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Volume XLI

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CM 262194 to CM 264081

(1944)

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

SPJGN
CM 262194

6 SEP 1944

U N I T E D S T A T E S	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	
Second Lieutenant CARROLL A. EVANS (0-365638), Air Corps.	)	Trial by G.C.M., convened at Keesler Field, Mississippi, 24 July 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, SYKES 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 64th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that 2nd Lieutenant Carroll A. Evans, Section "S" (Basic Student Section), 3704th Army Air Forces Base Unit, being indebted to Miss Neva Price, Biloxi, Mississippi, in the sum of Twenty Dollars ($20.00), by reason of a loan, which amount became due and payable on or about 28 January 1944, did, at Biloxi, Mississippi, from about 28 January 1944 to about 23 June 1944, dishonorably fail and neglect to pay said debt.

Specification 2: In that 2nd Lieutenant Carroll A. Evans, Section "S" (Basic Student Section), 3704th Army Air Forces Base Unit, being indebted to Miss Neva Price, Biloxi, Mississippi, in the sum of Fifty Dollars ($50.00), by reason of a loan, which amount became due and payable on or about 15 February 1944, did, at Biloxi, Mississippi, from about 15 February 1944 to about 8 July 1944, dishonorably fail and neglect to pay said debt.

Specification 3: In that 2nd Lieutenant Carroll A. Evans, Section "S" (Basic Student Section), 3704th Army Air Forces Base Unit, being indebted to Miss Selba Breland, Biloxi, Mississippi, in the sum of Ten Dollars ($10.00), for money given in return for a check subsequently dishonored, which amount became due and payable on or about 22 May 1944, did, at Biloxi, Mississippi, from about 22 May 1944 to about 8 July 1944, dishonorably fail and neglect to pay said debt.

Specification 4: In that 2nd Lieutenant Carroll A. Evans, Section "S" (Basic Student Section), 3704th Army Air Forces Base Unit, being indebted to Hotel Buena Vista, Biloxi, Mississippi, in the sum of Twenty Dollars ($20.00), for money given in return for a check subsequently dishonored, which amount became due and payable on or about 22 May 1944, did, at Biloxi, Mississippi, from about 22 May 1944 to about 8 July 1944, dishonorably fail and neglect to pay said debt.

Specification 5: In that 2nd Lieutenant Carroll A. Evans, Section "S" (Basic Student Section), 3704th Army Air Forces Base Unit, being indebted to Mr. Herbert Armistead, Biloxi, Mississippi, in the sum of Ten Dollars ($10.00), by reason of a loan, which amount became due and payable on or about 4 June 1944, did, at Biloxi, Mississippi, from about 4 June 1944 to about 8 July 1944, dishonorably fail and neglect to pay said debt.

Specification 6: In that 2nd Lieutenant Carroll A. Evans, Section "S" (Basic Student Section), 3704th Army Air Forces Base Unit, being indebted to the Officers Club, Keesler Field, Mississippi, in the sum of Ten Dollars ($10.00), for money given in return for a check subsequently dishonored; which amount became due and payable on or about 13 May 1944, did, at Keesler Field, Mississippi, from about 13 May 1944 to about 8 July 1944, dishonorably fail and neglect to pay said debt.

Specification 7: In that 2nd Lieutenant Carroll A. Evans, Section "S" (Basic Student Section), 3704th Army Air Forces Base Unit, being indebted to the Officers Club Fund, Keesler Field, Mississippi, in the sum of Twelve Dollars ($12.00), for Club dues and Bachelor Officers Quarters fees, which amount became due and payable as follows: Six Dollars ($6.00) on 1 April 1944, Three Dollars ($3.00) on 1 May 1944, and Three Dollars ($3.00) on 1 June 1944, did, at Keesler Field, Mississippi, from the respective due dates of each amounts to about 8 July 1944, dishonorably fail and neglect to pay said debt.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification, guilty of Charge II and all Specifications thereunder, and 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, who had been known to Miss Neva Price for approximately one year, frequently patronized Miss Price's sandwich shop in Biloxi, Mississippi (R. 14, 15, 23). On or about 21 January 1944, the accused gave Miss Price two undated checks, each in the amount of $10, drawn on the State Bank of Kenmore, Kenmore, New York, in exchange for $20 in cash (R. 15, 16; Pros. Exs. 2, 3). At this time, he told her "not to turn the checks in, to hold them three or four days" when "he'd receive a check from home and * * * return the money" (R. 15, 16, 19, 20, 21, 25). Approximately a week later, Miss Price was informed by the accused that he needed some money to return to his home because of the death of his mother (R. 16, 17). After "he kept insisting that (she) give him the money", she gave him a personal check for $50 which was subsequently paid by the drawee bank in exchange for the accused's promise that he would repay the loan "as soon as he returned from home on leave" (R. 17, 22, 23, 25; Pros. Ex. 4). He never thereafter returned to her "place" (R. 23). She next saw the accused several weeks later on Howard Avenue, again at King's Lounge, and thereafter about three times and "called him up about seven or eight times", and "each time he promised to pay the seventy dollars within a few days" (R. 17, 18). She finally called "Major Smith" (R. 18). Major James W. Smith, Adjutant, Section "C", 3704th Army Air Forces Base Unit, on "three, maybe four, occasions" between "the middle of March and the middle of April", discussed with the accused the "money transactions between Lieutenant Evans (the accused) and Miss Neva Price" (R. 26, 27, 29). The accused, who admitted the existence of the indebtedness, told Major Smith that he had telegraphed home for money and would

pay his debt within two or three days (R. 27, 28). In the early part of June, the accused after having been located "on the field" by Miss Price and her friend, Lieutenant Stanley D. Malino, agreed to pay her "twenty dollars a week" to discharge his obligation (R. 24, 25). On or about 24 June, she "received a twenty-dollar money order", and at another time a soldier was sent to her by the accused with $10 for the "two ten dollar checks" (R. 18, 19, 24). Miss Price had held these two checks until 15 May 1944 at which time she dated and "deposited" them (R. 19, 20, 21). The checks "came back" to her (R. 19).

Miss Selba Breland testified that on or about 22 May 1944 at her sandwich shop "near Gate 2", she cashed a $10 check for the accused who had come there pretty often (R. 30, 32, 33). The check was drawn on the State Bank of Kenmore, Kenmore, New York, and signed by the accused (Pros. Ex. 5). She deposited the check, received a note that "it wasn't any good" and "had to pay it off" (R. 31, 32). After an unsuccessful attempt to locate the accused, she called the "Provost Marshal" (R. 31). Thereafter, she neither saw nor talked with the accused but "someone (a captain) called (her) and said the check would be paid the first of July" (R. 31).

At the Buena Vista Hotel, Biloxi, Mississippi, on 22 May 1944, the accused obtained $20 from the hotel clerk for the accused's check in such amount drawn on the State Bank of Kenmore (R. 34, 35, 37; Pros. Ex. 6). The check was deposited in the regular course of business and returned unpaid (R. 35, 38). The manager of the Buena Vista Hotel endeavored to get in touch with the accused but did not succeed (R. 39). He finally called the Provost Marshal on 18 June (R. 39, 42, 44). Thereafter, the accused telephoned the manager that he "would be in that night" (R. 40, 41). He failed to carry out such promise (R. 40). In fact, the accused never thereafter came to the hotel or paid the check (R. 40, 41). On about 20 June, Lieutenant Colonel Calvin C. Crowder, Section B, 3704th Army Air Forces Base Unit, was informed by the accused that he, the accused, "didn't understand why the check would be returned" and that he would straighten it out immediately (R. 45).

On or about 3 June 1944, Mr. Herbert Armistead, proprietor of the Try Me Saloon, Biloxi, Mississippi, "cashed" a $10 check signed by the accused, at which time the accused promised that "he would be in the next day and take it up", and asked Mr. Armistead to "hold it" (R. 49, 50, 51, 54; Pros. Ex. 7). The accused did not tell Mr. Armistead that "the check wasn't any good" (R. 49). Mr. Armistead testified that the "check may be good" and that he "never did turn it in" (R. 49, 50). For about a month prior to this time, the accused had visited this saloon "quite

often" but thereafter he never came back (R. 50, 54). During early July, Mr. Armistead wrote the accused (R. 50, 51). Mr. Armistead has never received payment of the sum advanced the accused (R. 50).

On the night of 13 May 1944, the accused cashed at the Officers' Club, Keesler Field, a personal check for $10 drawn on the Kenmore State Bank (R. 55, 56; Pros. Ex. 8). The check was returned from the bank (R. 57). The amount of the check has never been paid to the Officers' Club (R. 57).

The prosecution and defense stipulated that "the sums set out in Specification '7'" were due and payable to the Officers' Club on the dates set forth, and that the same "have not since been paid" (R. 60). Official letters were sent to the accused on 14 April 1944 and 15 May 1944 respectively, requesting that his delinquent accounts with the Officers' Club "be liquidated with the least practical delay" (R. 60, 61; Pros. Exs. 9, 10). A similar letter was forwarded to the accused on 9 June 1944 with respect to the $10 check given to the Officers' Club which directed a "reply by indorsement hereon the date which you made this check good" (R. 61; Pros. Ex. 11).

4. The evidence for the defense consisted solely of the sworn testimony of the accused adduced after he had been advised concerning his rights as a witness (R. 62, 63).

The accused testified that he had worked for sixteen years in the State Bank of Kenmore, Kenmore, New York, in which he and his wife have a joint "special interest account" (R. 63, 64). Checks against an account of this kind will be paid only if the "passbook" is made available to the bank (R. 64). The accused had written checks on this account which had been paid without difficulty (R. 64). He testified that his wife "about the first of May" had taken the "passbook" from the bank without his knowledge (R. 64, 65) because of marital difficulties during the latter part of April or early May (R. 65). All of his Army pay was sent each month directly to the State Bank of Kenmore (R. 65). The accused's wife who sent him $25 each week (R. 65, 72) kept track of the balance of the account (R. 66).

The accused admitted that Miss Price had cashed the two ten dollar checks for him and that he had "asked her to hold them" (R. 67, 74). In connection with the $50 loan of Miss Price, he stated that she had "offered to give (him) the money to 'go home on'," and that he did not "insist" upon it (R. 67, 74). He claimed that he had been in that "place" since the loan was made and had arranged with Miss Price to "make her three payments of twenty dollars apiece and one of ten" (R. 68). He actually made a $20 payment, also sent a soldier with a "ten dollar" payment which was "refused"

(R. 68, 73). He has never denied his "obligation" (R. 68).

With reference to the "Breland" transaction, he said that he had "gone into Miss Breland's place at Gate Number '2'" and "just asked her if she would cash a check" (R. 69). He made the check for $10 "on (his) own bank, and she cashed it for (him)" (R. 69). The accused has had no other conversation with Miss Breland "in regard to the check" and has never "denied this obligation" (R. 69).

The accused also testified that after dinner one night at the Buena Vista Hotel he cashed a $20 check, that he did not recall the exact date when he received notice that the check had been "returned" to the hotel, and that he has "never denied it (the obligation)" (R. 69).

While in Mr. Armistead's "place * * * one time" in early June, the accused asked for a "loan of ten dollars" and at Mr. Armistead's suggestion "wrote out the check on (his, the accused's) bank and * * * told him he could hold it and (that he, the accused, would) pick it up on the next day, which (he) expected to do in all good faith" (R. 70). The accused asked for a "loan" instead of cashing a check because he had learned that his "passbook" was not at the bank (R. 70).

His "explanation" of the $10 check which he gave to the Officers' Club was that he "was in there on Saturday night and short of money, and cashed a check at the bar for ten dollars" (R. 70). This was during the time when he was having "domestic difficulties", and he did not know that the "passbook had been taken from the bank" (R. 71).

In regard to the non-payment of dues to the Officers' Club, the accused admitted that he owed the dues and stated that he had not talked with anyone about the dues and that he had never "made any promise" to pay them (R. 71).

In reply to the question why he had not paid all "these sums", the accused testified that he has not "had the difficulty that (he) did have at home. (He) tried to do the best (he) could. (He) tried to spread it all over" and not let his wife know (R. 73). He has confidence that if he now informs his wife, she will send him the money for settling the debts (R. 73).

5. Specification 1 of Charge II alleges that the accused "being indebted to Miss Neva Price", in the sum of $20, "by reason of a loan" which became payable 28 January 1944, did, from 28 January 1944 to 23 June 1944 "dishonorably fail and neglect to pay said debt". Specification 2 of Charge II similarly alleges the dishonorable neglect to pay from 15 February 1944 to 8 July 1944 a $50 debt to Miss Price which became payable 15

February 1944. Both Specifications are laid under Article of War 95, an instance of the violation of which is the "dishonorable neglect to pay debts" (MCM, 1928, par. 151).

The creation of the indebtedness to Miss Price, aggregating $70, is established by the prosecution's evidence and is admitted by the accused. The original indebtedness of $20 which was incurred on 21 January 1944 was secured by collateral consisting of two undated checks of the accused, which were not to be "turned in", but were to be "held" for three or four days when the accused promised to "return the money". The $50 loan was made to the accused by Miss Price approximately one week later to enable him to return to his home because of his mother's death. The accused promised to repay this loan "as soon as he returned from home". Prior to incurring this indebtedness, the accused had been a regular patron at Miss Price's sandwich shop, but after obtaining the $50 loan he never returned to it or communicated with Miss Price. After several weeks had passed, Miss Price saw the accused five times and "called him up" seven or eight times and "each time he promised to pay the seventy dollars within a few days". Finally, in early June, Miss Price, who in the meantime had notified the Provost Marshal about the accused's actions and the non-payment by the drawee bank of the aforesaid two checks which she had dated 15 May 1944 and deposited for payment, and the accused entered into an agreement under which the accused was to discharge the indebtedness in installments. Miss Price received the first installment of $20 on about 24 June 1944. The accused failed to give a satisfactory explanation of his long neglect of this indebtedness and his avoidance of the creditor until after the Adjutant repeatedly spoke to him about it. He promised the Adjutant that he would pay his debt within two or three days, but this promise was not fulfilled. During this time, he was receiving his pay as an officer. No proof was made by the accused of the existence of any unusual expense or emergency. In fact, there was money in a joint account in the Kenmore bank, which could have been used to discharge the obligation, but the accused chose to ignore the debt rather than inform his wife about it. Such facts clearly indicate a dishonorable neglect to pay valid indebtedness and justify the court's findings of guilty of Charge II and Specifications 1 and 2 thereunder.

6. Specifications 3 and 4 of Charge II respectively allege that the accused did "dishonorably fail and neglect to pay" from 22 May 1944 to 8 July 1944, a $10 debt to Miss Selba Breland and a $20 debt to Hotel Buena Vista, which debts arose out of "money given in return" for checks "subsequestly dishonored". Each of these Specifications alleges an offense which is violative of Article of War 95 (MCM 1928, par. 151).

The evidence shows that on 22 May 1944 Miss Breland and the Buena Vista Hotel cashed for the accused two of his checks in the respective amounts of $10 and $20 and that neither check was paid by the drawee bank. Miss Breland neither saw nor talked with the accused thereafter, although he had prior to such time often visited her shop. After unsuccessfully trying to get in touch with the accused about the check, she telephoned the Provost Marshal. The only response to this message was a call by an unknown "Captain" stating that payment would be made about the first of July. Similarly, the manager of the Buena Vista Hotel endeavored to talk with the accused but did not succeed until after he had

called the Provost Marshal. Finally, the accused telephoned that he would see the manager that night. He did not do so, and never did pay the check.

These facts, coupled with the other acts of the accused, including his studied avoidance of creditors, during this period of time in connection with obligations of a similar nature, indicate a deliberate and consistent course of action by the accused to refrain from discharging these debts until at least such indefinite time in the future as might suit his convenience. Apparently his wish to keep information of his debts from his wife was stronger than his desire to pay them and accounted to some extent at least for his evasive conduct. The evidence shows beyond a reasonable doubt the commission of the alleged offenses by the accused and supports the court's findings of guilty of Charge II and of Specifications 3 and 4 thereunder.

7. Specification 5 of Charge II alleges that the accused, being indebted to Mr. Herbert Armistead "by reason of a loan", did from 4 June 1944 to about 8 July 1944 "dishonorably fail and neglect to pay said debt". This was set forth as a violation of Article of War 95.

The accused had frequently patronized Mr. Armistead's Saloon for about a month prior to 3 June 1944 but, after borrowing $10.00 that day on the security of a check, he never again visited the establishment. This circumstance, when viewed in conjunction with his other financial entanglements, leads logically to the inference that he intended to evade payment of his debt. Specification 5 has been proved beyond a reasonable doubt.

8. Specification 6 of Charge II alleges the dishonorable failure and neglect by the accused from 13 May 1944 to 8 July 1944 to pay a $10 debt to the Officers' Club, Keesler Field, which debt arose because of "a check subsequently dishonored" after being cashed. Specification 7 of Charge II alleges similar dishonorable neglect to pay from due date to 8 July 1944 a $12 debt to the Officers' Club for certain dues and fees which became payable $6 on 1 April, $3 on 1 May and $3 on 1 June. These Specifications similar to the foregoing Specifications are laid under Article of War 95.

The incurring of the indebtedness, the amount and due date thereof and failure to pay the same, as alleged in these two Specifications, are clearly established and admitted by the accused. Letters were sent to the accused requesting that he pay the indebtedness which letters were ignored. Accused's only excuse was that the check was written when he was having domestic difficulties and that he had promised no one to pay the debts. These facts, when considered in the light of his other misconduct during this period of time regarding other debts, establishes beyond a reasonable doubt the commission of the offenses, and justify the findings of guilty of Specifications 6 and 7 of Charge II and Charge II.

9. The accused is 36 years of age. The records of the Office of

The Adjutant General show that he was commissioned as a second lieutenant, Cavalry-Reserve, on 2 April 1938 and was ordered to extended active duty on 8 July 1942. The accused graduated from a high school in Buffalo, New York, in 1928, and was employed in the Kenmore State Bank, Kenmore, New York, from that time until his being called to active duty.

10. 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 all the findings of guilty made by the court, and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(10)

SPJGN
CM 262194

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Carroll A. Evans (0-365638), 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. Consideration has been given to two letters from the wife of the accused, one addressed to the President and the other forwarded to this office by Honorable W. G. Andrews, Member of Congress, in which clemency is requested in behalf of accused.

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

Myron C. Cramer

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

5 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. fr. wife of accused.
Incl 5 - Ltr. fr. Hon. W. G. Andrews forwarding ltr. fr. wife of accused.

(Sentence confirmed. G.C.M.O. 613, 9 Nov 1944)

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

SPJGK
CM 262204

13 SEP 1944

UNITED STATES v. Private First Class PAUL F. LOCONTO (31005534), Company B, 182nd Infantry.	NEW CALEDONIA ISLAND COMMAND Trial by G.C.M., convened at Headquarters Americal Division, APO 716, c/o Postmaster, San Francisco, California, 20 May 1944. Dishonorable discharge (suspended) and confinement for five (5) years. Stockade, VI Island Command, APO 717.

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 soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and the 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Paul F. Loconto, Company B, 182nd Infantry, did, at APO 716, on or about 11 March 1944, misbehave himself before the enemy, by failing to advance with his command, which had then been ordered forward by First Lieutenant Benjamin H. Moody, Commanding Officer, Company B, 182nd Infantry, to engage with the enemy, which forces, the said command was then opposing on Hill 260.

He pleaded not guilty to and was found guilty of the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and by an amended order designated the Stockade, VI Island Command, APO 717, as the place of confinement. The sentence was published in General Court-Martial Orders No. 6, Headquarters Americal Division, 19 June 1944.

3. It will be noted that the accused was tried by a general court-martial duly convened within the jurisdiction of the South Pacific Area.

The sentence was adjudged 20 May 1944. The action of the reviewing authority is dated 19 June 1944. The record of trial was then forwarded to the Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia, for review in accordance with Article of War 50½. The Branch Office having found the record of trial legally insufficient to support the findings and sentence the record was thereupon in accordance with paragraph 5, Article of War 50½, transmitted to the Board of Review in the Branch Office. The opinion of the Board of Review of the Branch Office, which also holds the record of trial legally insufficient to support the findings and sentence, is dated 15 August 1944. On 1 August 1944 the Southern Pacific Area was abolished and the territory theretofore embraced by it was brought within the jurisdiction of the newly created Southern Pacific Base Command. This latter command is not now and never has been within the limited jurisdiction of the Australian Branch Office of The Judge Advocate General. Upon the theory that the authority of the Branch Office of The Judge Advocate General to pass upon the legal sufficiency of the record had terminated prior to the opinion of the Board of Review in that office dated 15 August 1944, Brigadier General E. H. Burt, Assistant Judge Advocate General, Branch Office, Melbourne, Victoria, Australia, forwarded the record of trial to this office for action under Article of War 50½.

4. Summary of the evidence.

The competent evidence for the prosecution shows that on 11 March, 1944, Company B, 182d Infantry, was engaged with the Japanese forces in the vicinity of Hill 260. As a part of the defense a platoon of Company D had been detailed for duty with this unit and accused had been attached to this platoon as a rifleman (R. 12,12a,13,15) to assist the machine gun crew (R. 12,12a), which was located about fifty yards in advance of the company toward Hill 260 (R. 17). About 1:30 P.M. an order was received from the Battalion Commander directing that B Company leave the perimeter and move to Hill 260 for combat there. All men of the company present for duty at that time were ordered to the hill (R. 7), but the attached platoon of D Company was told "that they would remain in the company area, and not accompany us" (R. 12). First Lieutenant John S. Myers, Jr., of Company B, testified that he was ordered by the Company Commander to move the company up the "East West Trail gate as soon as possible". The Company Commander "had already given the platoon leaders the warning order by phone". He (Lt. Myers), in turn, "contacted" them by sound phone, "that is our company net" (R. 12). He sent word that all men of Company B who were attached to the platoon of Company D would "accompany us to Hill 260" and that of his personal knowledge he knew of no one in the company who might have "excused the accused" (R. 12a).

Technical Sergeant William J. Deyermond, of accused's unit, testified that the platoon guide notified him of the order to move to Hill 260. This

order was passed on "From hole to hole" (R. 14). At that time there were five men from Company B attached to the platoon of Company D and all of them except accused accompanied them to Hill 260. He sent the platoon guide to look for accused but he could not find him (R. 14). At no time did he notify the accused that the company was going to move (R. 16).

Staff Sergeant Gerard J. Rocheleau, of Company D, 182d Infantry (R. 18), was in charge of a section of heavy machine guns to which accused had been detailed as a rifleman. On the day in question he spoke to accused asking him "why he wasn't going out with his outfit". Accused told him that "he had a medical slip to stay behind" (R. 19). No one at any time told him (Sgt. Rocheleau) that B Company was to move and at no time did he order accused to go to Hill 260. One other man assigned to this platoon went with B Company but he (Sgt. Rocheleau) did not know where he was going but "learned later on". Accused stayed in this "pit" about four days after B Company left for Hill 260 (R. 21).

Private First Class Raymond W. Ducharme, of Company D, 182d Infantry, testified that he was in charge of a machine gun pit of a platoon of Company D, and that accused had been assigned to the platoon as "assistant gunner or rifleman in the protection of the flank". At no time on the morning in question did he hear anyone "inform the accused that he was to move with his company to Hill 260" (R. 22), "but word was passed down by word of mouth" (R. 23). He knew that Company B was to move to Hill 260 approximately one hour in advance, stating "We had rumors, but were not quite sure". He questioned accused as to "why he did not go with his company" and "if he had permission to stay back, and he said he did" stating that he "had medical authority". This witness instructed accused to "go see the Lieutenant" and his "platoon leader" but did not know if accused saw them. Accused remained in the machine gun hole until "he moved out on the morning of the 15th". He performed his turn of guard "satisfactorily" (R. 23,24).

There was no evidence from the battalion sick book that accused had reported during the time in question (Pros. Ex. "I"; R. 25,26), but it was "possible" for a "medical aid man" to inform anyone who was ill "to take it easy or rest" without reporting it to the battalion medical officer (R. 27).

For the defense.

The accused elected to remain silent but called as a witness for the defense Sergeant Ian Douglas Weir, who testified that he was the squad leader of the squad of which accused was a member in Company B, 182d Infantry (R. 38). Two days prior to the time Company B was ordered to go to Hill 260, accused reported to him that "he wasn't feeling good".

This was told to accused's platoon sergeant who directed that accused be sent to the "medical aid man". Accused went to the medical aid man as directed. Some time thereafter he (Sgt. Weir) was directed to send accused to the machine gun squad in Company D. He stated:

> "There was another man in our squad at that time in the 'D' Company machine gun hole, and we needed a man that was not sick to do some work around the area. As private Loconto was sick, Sergeant Deyermond told me to send him down to take the other man's place and bring the other man back to our area." R. 39).

He further testified that prior to the event in question accused was on duty "at the kitchen area" and that there had been a bombing and "one particular friend of his was killed right beside him" (R. 39), and that before the bombing accused was an "A-1 soldier" but thereafter he was "very nervous and jumpy" (R. 40). This witness did not notify accused that he was to go with the company to Hill 260 at the time in question nor did he have anyone else so notify him. He testified:

> "It is possible that the company could move out without his knowing about it. We moved out so fast that there was no mention of him going with us. When he took this other boy's place in 'D' Company, I assumed that he was going to stay there.
>
> "Q. Had you ever had your men detailed out to machine gun positions, and had to make them move?
>
> "A. Only one other time when our company moved out to assist 'I' Company.
>
> "Q. Did you pull your men away from the machine gun pits at that time?
>
> "A. I couldn't say." (R. 41-42).
>
> * * *
>
> "I understood from sergeant Deyermond that he was on light duty, and that is all I know of it." (R. 42).

Accused subsequently joined his squad at Hill 260 and "did his job" (R. 41).

Private First Class Ernest L. Defee of B Company, 182d Infantry, testified that he had known accused for seventeen months. That after accused's "buddy" was killed in an air raid "His actions were a little changed * * *. He would speak of it at times, but would break down and couldn't talk about it any more" (R. 44). Private First Class Arthur Mills, of accused's unit, testified in substance as did the preceding witness, adding that two days prior to the incident in question accused told him that he was "ill, and went to the medics". When he returned he was taking atabrine three times a day. The normal amount issued to each individual was one a day (R. 47).

Sergeant Deyermond, recalled, testified that two or three days prior to the time in question he told accused to report to sick call and that subsequently the "aid man" told him (Sgt. Deyermond) that accused "had a slight fever" and that he "had prescribed three atabrine a day, and asked to put him on light duty". He reiterated that he never informed accused that the company was to move nor did he know of anyone else who had done so. He stated, "At the time the word came I was on top of the hill and not with the platoon. The platoon guide told me we were pulling out, and that he had notified the men" (R. 49).

5. The evidence is uncontradicted that at the time of the alleged offense accused was assigned, or attached, to a platoon of Company D, 182d Infantry, as a rifleman or assistant machine gunner. This platoon was approximately fifty yards from the perimeter of Company B guarding the flank. There is no evidence in the record that accused was ever relieved of this assignment until 15 March 1944, but the record shows that for approximately four days after the alleged offense accused continued to perform his duties with this platoon. There is no direct evidence in the record that he ever received an order to leave his assigned duties and advance with his company and no witness appeared for the prosecution who testified that the order for B Company to advance was ever heard or received by the accused. His statements, when questioned, as to why he had not joined B Company when it went forward were that he had a medical slip exempting him but this, in itself, is far from an admission of the receipt of an order relieving him of an assigned duty and directing him to perform another. No one was sent to relieve him of his duties as an assistant machine gunner or rifleman in a machine gun emplacement fifty yards forward from the perimeter from which his unit was to begin its advance, nor is there any testimony that the order to advance which was communicated to the members of B Company "from hole to hole" by word of mouth ever reached accused. The noncommissioned officers in the platoon in which accused was serving testified that none of them heard any such order. The Board of Review is of the opinion that the statement of Captain Kelly that accused told him that he had been "ordered to Hill 260 and went there three days later" is not conclusive of the accused's guilt of the offense charged. Assuming that this was an admission against interest and that therefore no previous warning as to his rights was necessary to render the statement admissible, the fact remains that the statement is susceptible of other interpretations which are wholly consistent with accused's innocence. It is equally reasonable to infer from the other evidence in the record that three days after the company moved accused was then ordered to Hill 260, and that he went pursuant to this order. The actual conversation between Captain Kelly and accused is no where set forth for us to analyze the true meaning of whatever words accused chose to use. We are reluctant to conclude a man's guilt upon evidence which though technically admissible is nevertheless most ambiguous in its meaning. The accused having been attached to

a platoon of Company D, 182d Infantry, as a rifleman or assistant machine gunner, for him to be convicted of the Charge and Specification it was incumbent upon the prosecution to prove beyond a reasonable doubt that the accused knew he was ordered by competent authority to quit his assigned duties and join his company in an advance against the enemy at the place and time alleged (par. 141, M.C.M., 1928). Such testimony as was offered by the prosecution is insufficient to support a finding of guilty.

6. The record of trial contains a great deal of testimony on the part of the defense relating to the mental responsibility of accused at the time of the alleged offense. Two medical officers (one the division neuropsychiatrist) testified that in their opinion the accused at the time of his alleged offense was able to distinguish right from wrong, but that he was suffering from an acute minor mental ailment, which they termed psychoneurosis, and that because of this condition there was some question in their judgment as to his ability to adhere to the right. The testimony of the psychiatrists was not contradicted by medical evidence. In view of our holding that the evidence upon the general issue is legally insufficient to support the findings of guilty, no discussion of the question of mental responsibility of the accused is deemed necessary.

7. The Charge Sheet shows that accused is 24 years 6 months of age, and that he was inducted into the military service 4 March 1941.

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

Amy E. Zoe, Judge Advocate.

Norman Maise, Judge Advocate.

Samuel Sonnenfeld, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 SEP 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 First Class Paul F. Loconto (31005534), Company B, 182nd Infantry.

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 the 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 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. 538, 27 Sep 1944)

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

SPJGQ
CM 262206

7 SEP 1944

UNITED STATES	NEW YORK PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Camp Kilmer, New Jersey, 17 August 1944. Dismissal, total forfeitures and confinement for one (1) year.
First Lieutenant HAROLD A. PECK (O-1173738), Field Artillery.	

OPINION of the BOARD OF REVIEW,
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that 1st Lieutenant Harold A. Peck, FA, 9192-Y, Camp Kilmer, New Jersey, did, at Durham, North Carolina, on or about 14 January 1944, wrongfully and unlawfully contract a bigamous marriage with one Charlotte Stricklen of Charleston, West Virginia, while he was legally married to Dorothy I. Peck, who presently resides at Chambersburg, Pennsylvania, and from whom he had obtained neither a divorce nor an annulment at the time he contracted the said bigamous marriage.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous conviction 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 two years. The reviewing authority approved the sentence, remitted one year of the confinement, and forwarded the record of trial for action under Article of War 48.

3. The prosecution showed by stipulation entered into between the accused, his defense counsel and the prosecution that, if Dorothy I. Peck were present and sworn as a witness, she would testify she did, on 22 March 1940, marry the accused at Chambersburg, Pennsylvania, and that said marriage still continues as it has never been annulled or set aside by any court (R. 7). There was introduced in evidence, without objection, a certified copy of the marriage certificate pertaining to this marriage (Pros. Ex. 1). It was further similarly stipulated that, if Charlotte Stricklen were present and sworn as a witness, she would testify that on 14 January 1944 at Durham, North Carolina, she went through a regular marriage ceremony with the accused in the presence of a Baptist Minister (R. 8). In corroboration thereof a certified copy of the marriage certificate of the marriage described was introduced in evidence without objection (Pros. Ex. 2).

4. The accused, having been advised of his rights, elected to be sworn as a witness. He testified that he was in the military service of the United States, having first entered therein on 9 November 1936 through the Pennsylvania National Guard. He served as an enlisted man until 19 November 1942 when he was commissioned a second lieutenant. He was promoted to first lieutenant on 13 April 1943.

On 22 March 1940 he married Dorothy I. Peck, nee Metz, when he was a corporal. They lived happily together until December 1940, separated for four days, were reunited again until 13 January 1941 when he was transferred to Mississippi and his wife refused to join him there. He obtained a furlough and finally persuaded her to join him. They lived together, but not happily, until March of 1942, when they again separated, this time because of military duties. He did not see her again until January of 1943, when she lived with him for two weeks at Camp Meade, Maryland (R. 12). Subsequently they lived together again for short periods at various camps. When stationed at Pittsburg, Kansas, he met Charlotte Stricklen and became very fond of her and wrote and asked his wife to divorce him. He received no reply. She subsequently joined him again and they tried to live happily together, but, after a short time, failed (R. 13). Upon his request his wife finally consented to get a divorce and they separated finally at her home in Pennsylvania on 2 January 1944 (R. 14). On 10 January 1944 Charlotte joined him at Durham, North Carolina, and on the 14th he went through a marriage ceremony with her (R. 16). At present she is pregnant and expects to give birth to a child in November 1944. He has allotted $75 per month out of his pay to take care of Dorothy and is

supporting Charlotte to the best of his financial ability. He desires to remain in the service in any capacity and perform the duties for which he has been fully trained. He is ready to suffer such punishment as may be imposed upon him but desires that it be postponed until after he has performed his duties overseas (R. 17). There are no children by the first marriage (R. 17).

5. The evidence produced by the prosecution and the admission under oath of the accused establish, without doubt, that accused did, as he was charged, enter into a bigamous marriage with one Charlotte Stricklen at Durham, North Carolina, on 14 January 1944 while he was legally married to another woman who was still alive. At the time of the occurrence he was in the military service. Such an act constitutes bigamy in violation of the laws of the State of North Carolina and in turn, because the commission of a criminal offense of this nature brings discredit upon the military service, violates the 96th Article of War (CM 240832, Harrison, 26 B.R. 149).

6. Attached to the record of trial is a recommendation signed by four members of the court-martial that tried the accused that clemency be extended to him and that that part of the sentence providing for confinement at hard labor be remitted.

7. War Department records show the accused to be 28 years of age, having been born in Syracuse, New York, on 17 January 1916. He graduated from Chambersburg High School in 1934. His permanent address is Chambersburg, Pennsylvania. He served in the Pennsylvania National Guard as an enlisted man from 9 November 1936 until 13 January 1941 when that organization was inducted into the service of the United States. He continued in enlisted service until 19 November 1942 when he was commissioned a second lieutenant, Field Artillery. He was promoted to first lieutenant on 13 April 1943.

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

William H. Gambrell, Judge Advocate.
Herbert B. Dredemen, Judge Advocate.
John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 21 SEP 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 Harold A. Peck (0-1173738), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and 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, and that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

3. Attached to the record of trial is a recommendation, executed by four of the six members of the court, that that portion of the sentence adjudging confinement at hard labor for two years be remitted. The reviewing authority remitted one year of the confinement.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to 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-Rec. of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 576, 21 Oct 1944)

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

SPJGV
CM 262293

12 SEP 1944

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Davis-Monthan Field, Tucson, Arizona, 14 August 1944. Dismissal and total forfeitures.
Second Lieutenant MILTON D. HARRINGTON (0-748181), Air Corps.	)	

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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 Charges and Specifications:

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

Specification: In that Second Lieutenant Milton D. Harrington, 233rd AAF Base Unit, HBC Personnel Pool, did, without proper leave, absent himself from his organization at Davis-Monthan Field, Tucson, Arizona, from about 27 June 1944 to about 18 July 1944.

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

Specifications 1-5 inclusive: (Withdrawn prior to trial by direction of the appointing authority.)

Specification 6: In that Second Lieutenant Milton D. Harrington 233rd AAF Base Unit, HBC Personnel Pool, with intent to defraud Linclon Army Air Field Post Exchange, did at Army Air Field, Lincoln, Nebraska, on or about 8 May 1944, unlawfully pretend and represent to said Lincoln Army Air Field Post Exchange, Army Air Base, Lincoln, Nebraska, that he had sufficient funds on deposit with the National Bank of Fort Sam Houston, San Antonio,

Texas, to pay his certain check dated 8 May 1944, in the amount of Sixty Dollars ($60.00), which was then and there uttered to said Lincoln Army Air Base Field Exchange, well knowing that said pretense and representation was false, and by means thereof did fraudulently obtain from said Lincoln Army Air Field Post Exchange cash in the sum of Sixty Dollars ($60.00).

Specification 7: Same allegations as Specification 6 except check in the amount of $70 and dated 15 May 1944.

Specification 8: Same allegations as Specification 6 except check in the amount of $20, dated 25 May 1944, and uttered to Valley National Bank, Tucson, Arizona, to whom false representations were made.

Specification 9: Same allegations as Specification 6 except check in the amount of $20, dated 4 June 1944, and uttered to Santa Rita Hotel, Tucson, Arizona, to whom false representations were made.

Specification 10: Same allegations as Specification 9 except check in the amount of $10 and dated 28 May 1944.

Specification 11: Same allegations as Specification 6 except check in the amount of $10, dated 5 June 1944, and uttered to Pioneer Hotel, Tucson, Arizona, to whom false representations were made.

Specification 12: Same allegations as Specification 11 except check dated 14 June 1944.

Specification 13: Same allegations as Specification 11 except check dated 25 June 1944.

Specification 14: Same allegations as Specification 11 except check dated 28 June 1944.

Specification 15: Same allegations as Specification 6 except check in the amount of $10, dated 26 June 1944, and uttered to Catalina Drug Store, Tucson, Arizona, to whom false representations were made.

Specification 16: Same allegations as Specification 6 except check in the amount of $10, dated 20 June 1944, and uttered to Beaudry Motor Company, Tucson, Arizona, to whom false representations were made.

Specification 17: Same allegations as Specification 16 except check in the amount of $20 and dated 19 June 1944.

Specification 18: Same allegations as Specification 16 except check in the amount of $5 and dated 21 June 1944.

Specification 19: Same allegations as Specification 16 except check in the amount of $35 and dated 27 June 1944.

Specification 20: Same allegations as Specification 16 except check dated 28 June 1944.

Specification 21: Same allegations as Specification 6 except check in the amount of $20, dated 3 July 1944, and uttered to Bank of Arizona, Flagstaff, Arizona, to whom false representations were made.

Specification 22: Same allegations as Specification 21 except check dated 5 July 1944.

Specification 23: Same allegations as Specification 21 except check dated 6 July 1944.

Specification 24: Same allegations as Specification 6 except check in the amount of $5, dated 6 July 1944, and uttered to Commercial Hotel, Flagstaff, Arizona, to whom false representations were made.

Specification 25: Same allegations as Specification 24 except check in the amount of $10.

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

3. In support of Charge I and its Specification the prosecution introduced evidence demonstrating that on 27 June 1944 accused absented himself without leave from his organization (R. 9; Pros. Ex. A). It was stipulated by the prosecution, defense counsel and the accused that he returned to military control on 18 July 1944 (R. 9; Pros. Ex. B).

All of the evidence introduced by the prosecution in support of Charge II and Specifications 6-25, inclusive, thereof was stipulated by the prosecution, defense counsel and the accused and may be summarized as follows. On various dates accused made and cashed twenty checks for various amounts all drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, and all returned unpaid by the drawee bank because of insufficient funds. These checks are more particularly identified and described as follows, viz (R. 9; Pros. Ex. B):

Specification Covering Check	Amount of Check	Date of Check	Cashed For Accused By
Spec. 6	$60	8 May 1944	Lincoln Army Air Field, Lincoln, Nebraska.
Spec. 7	$70	15 May 1944	" "
Spec. 8	$20	25 May 1944	Davis-Monthan Field Branch of Valley National Bank, Tucson, Arizona.
Spec. 9	$20	4 June 1944	Santa Rita Hotel, Tucson, Arizona.
Spec. 10	$10	28 May 1944	" " "
Spec. 11	$10	5 June 1944	Pioneer Hotel, Tucson, Arizona.
Spec. 12	$10	14 June 1944	" " "
Spec. 13	$10	25 June 1944	" " "
Spec. 14	$10	28 June 1944	" " "
Spec. 15	$10	26 June 1944	Catalina Drug Co., Tucson, Arizona.
Spec. 16	$10	20 June 1944	Beaudry Motor Company, Tucson, Arizona.
Spec. 17	$20	19 June 1944	" " "
Spec. 18	$5	21 June 1944	" " "
Spec. 19	$35	27 June 1944	" " "
Spec. 20	$10	28 June 1944	" " "
Spec. 21	$20	3 July 1944	Bank of Arizona, Flagstaff, Arizona.
Spec. 22	$20	5 July 1944	" " "
Spec. 23	$20	6 July 1944	" " "
Spec. 24	$5	6 July 1944	Commercial Hotel, Flagstaff, Arizona.
Spec. 25	$10	6 July 1944	" " "

None of these dishonored checks had been redeemed by accused at least as late as 14 August 1944.

On 15 March 1944, accused borrowed the sum of $500 from the First National Bank of Fort Sam Houston and agreed to allot to the bank $100 of his pay each month of which $50 was to be applied in reduction of the loan and $50 to be placed to accused's credit in a checking account. From 22 April 1944 accused had no balance in his checking account at this institution until his allotment check for $100 was deposited on 9 May 1944. Withdrawals made that same day reduced his bank balance to $50 on 9 May 1944, and thereafter it was reduced to $30 on 10 May 1944, $20 on 12 May 1944 and zero on 16 May 1944. Although accused's allotment checks for $100 were deposited during June and July, withdrawals against the account made the same day as these deposits so depleted the account that from 16 May 1944 to 24 July 1944 accused's checking account never had a balance of more than $4 in it at the close of business on any day (R. 9; Pros. Exs. C, D).

4. The accused elected to take the stand and made an unsworn statement after his rights as a witness had been fully explained to him. He stated that he entered military service as an enlisted man approximately four years ago and that he remained an enlisted man for eighteen months. Thereafter he trained for ten months as an air cadet and eventually received his commission as second lieutenant on 22 June 1943. At the time of this trial divorce proceedings initiated by accused's wife were pending against him in Texas. With respect to the offenses of which he was charged accused stated (R. 10, 11):

> "There isn't much I can say, I guess. There isn't much excuse for this, I don't suppose, but due to trouble with my wife and other things I started drinking too much, and went off the deep end."

5. Competent evidence establishes that accused absented himself from his organization without leave from 27 June 1944 to 18 July 1944. The evidence sustains the findings of guilty of Charge I and its Specification.

The accused is also charged with obtaining under false pretenses various sums of money, aggregating $385, by cashing various checks upon the false representation that he had sufficient funds on deposit in his bank account to honor them. It is elementary law that when the maker of a check utters it, he impliedly warrants or represents that there are sufficient funds on deposit in the drawee bank to pay the obligation. If the representations were false on the date accused issued these checks and accused was aware of their falsity, his guilt of the offenses alleged is established. The evidence conclusively demonstrates that accused's bank balance was continuously negligible in amount over the period of time these checks were issued and that it was never sufficient to pay any one of the checks when issued or presented for payment in the ordinary course of business. It is quite apparent that accused's

pleas of guilty to all Charges and Specifications were not improvidently entered. The record of trial sustains the findings of guilty of all Charges and Specifications.

6. The accused is about 25 years of age. He enlisted in the regular Army 13 March 1941 to serve for three years. On 12 September 1942 he was appointed an aviation cadet and on 22 June 1943 he was commissioned a second lieutenant. Immediately prior to his entry into military service accused worked as a service station attendant and prior thereto had been employed by a construction company to operate tractors and bulldozers.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, 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 61 or Article of War 96.

Thomas H. Taffey, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trenerry, Judge Advocate.

SPJGV
CM 262293

1st Ind.

War Department, J.A.G.O., 30 SEP 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 D. Harrington (0-748181), Air Corps.

2. The accused pleaded guilty to all Charges and Specifications. 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 accused was found guilty of absenting himself without leave from his organization from 27 June 1944 to 18 July 1944, in violation of Article of War 61, and guilty of obtaining, under false pretenses, a total of $385 by issuing twenty worthless checks without having sufficient funds on deposit either to pay them when issued or when presented for payment to the drawee bank, in violation of Article of War 96. As approved by the reviewing authority accused was sentenced to dismissal and total forfeitures. I recommend that the sentence as approved by the reviewing authority, although inadequate, be confirmed and carried into execution.

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

Myron C. Cramer,
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. 603, 3 Nov 1944)

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

SPJGK
CM 262294

12 SEP 1944

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Army Air Base, Alamogordo, New Mexico, 12 August 1944. Dismissal and total forfeitures.
Second Lieutenant DAVID E. FISHER (0-734881), Air Corps.	)	

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant David E. Fisher, 231st Army Air Forces Base Unit, Combat Crew Pool, did, without proper leave, absent himself from his organization at Army Air Base, Alamogordo, New Mexico, from about 0800 23 June 1944 to about 0800 26 June 1944.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence of two previous convictions, one for absence from duty for five days in violation of Article of War 61, and for remaining in Juarez, Mexico, after curfew hour, in violation of Article of War 96, and the other for absence from duty for eight days in violation of Article of War 61, 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. Summary of evidence.

An extract copy of the morning report of accused's organization, the 231st Army Air Force Base Unit, Combat Crew Pool, was introduced and showed

that accused was absent without leave, as charged (Pros. Ex. 1).

For the defense.

Accused was designated as "Assistant Tac Officer in the B.O.Q. Area", but had had no particular duties to perform for approximately two months, except such as might be assigned to him by the "B.O.Q. Tac Officer" (R. 9, 10,14). Accused was supposed to report twice a day to the North Area Tactical Room (R. 11,12). On the morning of Friday, 23 June, sometime between 0800 and 1200, accused was seen in the "Combat Crew Tac Office" by Corporal Antonio Contreras, Clerk in that office who received a call for accused later that day and additional calls on the two succeeding days (R. 15 and 16). Efforts on the part of the Personnel Officer to locate accused between 0800 and 0830 on 23 June in order to have him report to "Colonel Springer" at 0930 were unsuccessful and that officer was instructed to "drop him [accused] as AWOL" (R. 9). On the morning of 28 June 1944 accused was admitted to the Station Hospital at Alamogordo, suffering from a mild type of jaundice and had not yet been released (R. 19,20).

After an explanation of his rights, accused testified in his own behalf. Accused had reported to the "Tac Room" fairly early on the morning of 23 June 1944 by reading the bulletin board located there. On that occasion accused "said hello" to the Corporal in the office but did not pick up his mail (R. 22,23,24). His instructions required him to report only once a day, and it was not until 26 June that he was told to report twice daily (R. 21,22). Having no duties to perform, accused proceeded to Alamogordo and later that day got a ride to El Paso, where he met his wife the following day, Saturday, and where he remained with her until Sunday. Accused "got considerably sicker during the afternoon (Saturday)", but returned to the Base some time Sunday, spending the night at the Guest House. Accused made no effort to communicate with any one at the Base during the two days he was in El Paso. Accused's absence on Sunday was not a matter of concern to him, as that "was our day off" (R. 22,23,24). On Monday morning 26 June, accused "had the message that Colonel Springer wanted to see me, so I went to see him" (R. 23).

4. Accused offered no objection to the introduction of the Extract from the Morning Report of his organization, which established a prima facie case of absence without leave on the designated dates. The effect of this offering was weakened by subsequent testimony, adduced by the defense, which indicated that the entries on the report were based on hearsay. Accused's own testimony, however, supplied any deficiency in the proof, and renders the record legally sufficient to support the findings and the sentence. Assuming that accused may have had the right to go to Alamogordo on Friday, the record is clear that accused had no authority to remain absent from his organization. It is equally clear that accused's

unauthorized absence having existed prior to Sunday, accused may not successfully contend that his absence on that day was excused, even if that was a "day off" (Manual for Courts-Martial, 1928, par. 130a). In addition to the fact that illness does not excuse absence without leave (Manual for Courts-Martial, 1928, par. 132), there is nothing in the record even to indicate that accused was too ill to return to his organization or to contact officers at the Base.

5. War Department records show that accused is 28-11/12 years of age. He was graduated from Sacramento Senior High School in 1933, and attended Sacramento Junior College for two years, without graduating therefrom. He served in the California National Guard from March 1930 to August 1932, attaining the rank of sergeant, and had four months' service as sergeant in the California State Guard. He enlisted as a cadet on 27 January 1942 and upon completion of the prescribed course of instruction as a bombardier cadet on 1 January 1943 was discharged for the convenience of the Government. He was appointed a second lieutenant, Air Corps Reserve, Army of the United States, on 2 January 1943.

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

Irving G. Ross, Judge Advocate.

Herman Hoyt, Judge Advocate.

Samuel Sommerfeld, Judge Advocate.

1st Ind.

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

26 SEP 1944

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 E. Fisher (0-734881), 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. This is accused's third conviction by a general court-martial within a period of less than eight months. On 29 January 1944 he was found guilty of unauthorized absence from duty for five days, in violation of Article of War 61, and of remaining in Juarez, Mexico, after curfew hours contrary to the provisions of his pass, in violation of Article of War 96, and was sentenced to forfeit fifty dollars of his pay per month for six months. On 13 March 1944 he was found guilty of unauthorized absence from duty for eight days, in violation of Article of War 61. As approved by the reviewing authority, a sentence of forfeiture of $50 of his pay per month for eight months was imposed. It is apparent that the accused is lacking in a proper appreciation of the duties and responsibilities of a commissioned officer, and I recommend that the sentence be confirmed, that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 595, 28 Oct 1944)

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

SPJGN
CM 262295

5 SEP 1944

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Lincoln Army Air Base, Lincoln, Nebraska, 9 August 1944. Dismissal.
Second Lieutenant EARLE K. EASTON (O-748604), Air Corps.	)	

OPINION of 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 officer named above and submits this, its opinion, to The Judge Advocate General.

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

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

Specification 1: In that Second Lieutenant Earle K. Easton, Air Corps, 2nd Air Force Classification and Routing Pool, then Classification Routing Section "K", Classification Routing Pool, did, without proper leave absent himself from his station at Army Air Base, Salt Lake City, Utah from about 21 March 1944 to about 23 March 1944.

Specification 2: In that Second Lieutenant Earle K. Easton, Air Corps, 2nd Air Force Classification and Routing Pool, did, without proper leave absent himself from his station at Lincoln Army Air Field, Lincoln, Nebraska, from about 2 June 1944 to about 25 June 1944.

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

Specification 1: In that Second Lieutenant Earle K. Easton, Air Corps, 2nd Air Force Classification and Routing Pool, then Classification Routing Section "K", Classification Routing Pool, was at Portland, Oregon, on or about 23 March 1944 drunk and disorderly in uniform in a public place, to wit, Greeley Street.

Specification 2: In that Second Lieutenant Earle K. Easton, Air Corps, 2nd Air Force Classification and Routing Pool, then Classification Routing Section "K", Classification Routing Pool, did at Portland, Oregon on Southwest 5th Avenue on or about 16 March 1944 operate a motor vehicle while intoxicated.

Specification 3: In that Second Lieutenant Earle K. Easton, Air Corps, 2nd Air Force Classification and Routing Pool, then Army Air Forces Flexible Gunnery School, did, on or about 18 January 1944, wrongfully fail to maintain a sufficient bank balance in Valley National Bank, Phoenix, Arizona, to meet a certain check issued by him at Las Vegas, Nevada, to El Cortez Hotel, Las Vegas, Nevada, on 18 January 1944 in the amount of Ten Dollars ($10.00) drawn on the said Valley National Bank, Phoenix, Arizona, for which the said Second Lieutenant Earle K. Easton received full value.

Specifications 4 through 14 inclusive allege in identical terms as in Specification 3 above that the accused wrongfully failed to maintain an adequate bank account for the payment of the following described checks:

Specification	Date	Amount	Payee
Specification 4	18 January 1944	$15.00	El Cortez Hotel, Las Vegas, Nevada.
Specification 5	6 February 1944	$15.00	Biltmore Hotel, Las Vegas, Nevada.
Specification 6	11 February 1944	$10.00	El Cortez Hotel, Las Vegas, Nevada.
Specification 7	11 February 1944	$10.00	El Cortex Hotel, Las Vegas, Nevada.
Specification 8	11 February 1944	$10.00	Biltmore Hotel, Las Vegas, Nevada.

Specification	Date	Amount	Payee
Specification 9	11 February 1944	$10.00	Biltmore Hotel, Las Vegas, Nevada.
Specification 10	17 February 1944	$10.00	El Cortez Hotel, Las Vegas, Nevada.
Specification 11	20 February 1944	$10.00	El Cortez Hotel, Las Vegas, Nevada.
Specification 12	23 February 1944	$10.00	El Cortez Hotel, Las Vegas, Nevada.
Specification 13	24 February 1944	$10.00	Officers' Club, Las Vegas Army Air Field.
Specification 14	26 February 1944	$10.00	Pioneer Club, Las Vegas, Nevada.

He pleaded guilty to Charge I and its two Specifications, guilty to Charge II and the first Specification thereunder except the word "disorderly", to which he pleaded not guilty, and not guilty to the remaining Specifications of Charge II. He was found guilty of all Charges and Specifications and was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of the words "and disorderly" in Specification 1, Charge II, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution consisted entirely of documentary evidence, depositions and stipulations which were admitted into evidence without objection. Appropriate extract copies of the accused's organization's morning reports showed his absence without leave as alleged in Specifications 1 and 2, Charge I (R. 9-10, Exs.1, 3). His return to military control on 23 March 1944 was shown by a similar document of the Police and Prison Officer of the Portland Army Air Base, where he was temporarily confined immediately after apprehension (Ex. 2). A similar document of his own organization showed his return to military control on 25 June 1944 (Ex. 3).

On the night of 16 March 1944 at about 10:30 o'clock, the accused, while on leave, was operating one of his friends' automobiles which was involved in an accident upon a public street of Portland, Oregon, with the automobile of a retired officer. According to the latter, the arresting officer and military police, the accused immediately after the collision was intoxicated because "his gait was staggering; his eyes glassy and bloodshot; his speech incoherent and his breath alcoholic" (R. 10-12, 15-18; Ex. 4, 6).

At about 4:00 o'clock a.m. on 23 March 1944, the accused, while

absent without leave, was apprehended on the streets of Portland, Oregon, by the military police who characterized his condition as "drunken" and disheveled, but not disorderly, and who testified that the accused "passed out" in a "stupor" upon arrival at the police station (R. 12-14; Ex. 5).

It was stipulated that the accused issued the checks described in Specification 3-14, inclusive, Charge II, to the designated payees therein named and received full value therefor, and that photostatic copies thereof would be admitted into evidence, as was done (R. 22-23, 23-27; Exs. 9-19). It was likewise stipulated that such checks were presented to the drawee bank on the respective dates alleged in the Specifications for payment, which was refused because of insufficient funds (R. 27). By deposition, the assistant head bookkeeper of the drawee bank testified that the accused since 12 August 1943 had maintained a small account at the bank which he continued by the monthly deposit of a $100 government allotment, and that on all the dates alleged in the applicable Specifications the accused's account was overdrawn except on 18 January 1944 and 11 February 1944 when it showed balances of $2.22 and $15.02 respectively (R. 20-21; Ex. 7).

4. The accused, after explanation of his rights as a witness, testified that he was absent without leave on the two occasions as alleged and attributed the first to over-staying his leave because of "partying" and the second merely to restlessness (R. 28-29). On the night of 16 March 1944, he had been taking some intoxicated friends home in their automobile, but although he had imbibed several beers and two highballs he had not been "really drunk" (R. 30). On the morning of 23 March 1944, he had been "pretty drunk" but had not been disorderly (R. 29). Concerning the issuance of the checks, he had maintained the account as shown by the prosecution's witness, but had failed to keep his check stubs and had attempted to keep his checking transactions in his head (R. 32, 36). He had not intended to defraud anyone, and because of change of stations he had not been aware of the outstanding unpaid checks which he was willing to pay as he had ample funds to do so (R. 33). He had enlisted in December, 1940, had served at the attack on Pearl Harbor and had been appointed an aviation cadet in September, 1942 (R. 33). He had never before been court-martialed (R. 34). Upon cross-examination, he admitted that he had been careless about his bank account (R. 34-40).

5. Specifications 1 and 2, Charge I, allege that the accused without proper leave absented himself from his named stations from about 21 March 1944 to about 23 March 1944 and from about 2 June 1944 to about 25 June 1944 respectively. The elements of the offense of absence without leave, which is violative of Article of War 61, and the proof required for con-

viction thereof, according to applicable authority, are as follows:

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

The competent documentary evidence adduced by the prosecution conclusively establishes the two periods of unauthorized absences as alleged, and abundantly supplements the accused's pleas of guilty. The accused's own testimony, furthermore, admits his commission of the two offenses which were actuated by reasons so trivial that they are unworthy of consideration even in extenuation. All of the evidence and the accused's plea of guilty, therefore, beyond a reasonable doubt supports the court's findings of guilty of Charge I and its two Specifications.

6. Specifications 1 and 2, Charge II, respectively allege that the accused at a designated time on a named public street in the city of Portland, Oregon, was drunk and disorderly, and that at another designated time on other streets in the same city he operated a motor vehicle while intoxicated. "Drunkenness" is a disorder that is prejudicial to good order and military discipline and consequently is violative of Article of War 96 (MCM, 1928, par. 152a). The operation of a motor vehicle upon the streets of a city by an intoxicated member of the armed forces is likewise violative of Article of War 96 as conduct of a nature to bring discredit upon the military service (Id. par. 152b).

The prosecution's evidence conclusively shows that the accused on each of the specified occasions was drunk upon the streets of a large city, that on 23 March 1944 he was not disorderly and that on 16 March 1944 he was operating a motor vehicle which collided with another automobile. To the first Specification he pleaded guilty excepting the word "disorderly", to which he pleaded not guilty, and in his own testimony he admitted that on the alleged date he was "pretty drunk". The reviewing authority properly disapproved the court's findings of guilty of the words "and disorderly" in such Specification. While he pleaded not guilty to the second Specification, his own testimony admits that he had partaken of intoxicants before operating the vehicle, and feebly asserts that on such occasion he was not "really drunk". The evidence, therefore, beyond a reasonable doubt establishes the accused's commission of the offenses alleged as approved by the reviewing authority and fully warrants the court's findings of guilty thereof as approved.

7. Specifications 3 to 14 inclusive, Charge II, allege that the accused on or about various specified dates wrongfully failed to maintain a sufficient bank balance in a bank upon which he drew some 12 checks, ag-

gregating the total sum of $130, payable to four different payees, to pay them after he had received full value therefor. Wrongfully failing to maintain a sufficient bank balance to meet checks drawn thereon is violative of Article of War 96 (CM 202027 (1934), Dig. Op. JAG, 1912-40, Sec. 453 (22)).

The prosecution's evidence shows that the accused issued and received value for the checks as alleged and that on the dates thereof his account in the drawee bank was either overdrawn or was hopelessly inadequate for their payment. The checks were issued over a six week period, during which the accused by his own admission gave little, if any, attention to the adequacy of his bank account for the payment of checks issued by him against it. Such reckless disregard of financial responsibilities as is clearly evidenced by his profligate issuance of the checks over a protracted period of time during which he either knew or should have known that his bank account was insufficient to pay them, evinces a wanton abandon which transcends the ordinary dictates of financial decency and is clearly conduct of a nature to bring discredit upon the military service. The evidence, therefore, beyond a reasonable doubt establishes the accused's guilt of wrongfully failing to maintain a sufficient balance in his account to pay the 12 checks drawn against it, and amply warrants the court's findings of guilty of Charge II and Specifications 3 to 14 inclusive thereunder.

8. The accused is about 22 years old. The War Department records show that he has had enlisted service from 9 December 1940 to 22 June 1943 when he was commissioned a second lieutenant upon completion of Officers' Candidate School and that he has had active duty as an officer since the latter date. On 10 September 1943 he was punished under Article of War 104 by a fine of $75 for the offense of absence without leave. He attended high school for three years and is unmarried. There is no record of employment prior to entrance into the service. On 12 May 1937 he was confined in the Iowa Training School for Boys, Eldora, Iowa, upon a charge of "delinquent and incorrigible".

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 all Charges and Specifications, as approved by the court, and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

Abner E. Lipscomb, Judge Advocate.

Charles S. Sykes, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 262295

1st Ind.

War Department, J.A.G.O., 21 SEP 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 Earle K. Easton (0-748604), Air Corps.

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

(Sentence confirmed. G.C.M.O. 567, 16 Oct 1944)

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

SPJGV
CM 262347

13 SEP 1944

UNITED STATES	87TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Jackson, South Carolina, 15 August 1944. Dishonorable discharge and confinement for fifteen (15) years. Disciplinary Barracks.
Private GEORGE L. MOORE (34102856), Company A, 347th Infantry.	

HOLDING by the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, 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 George L. Moore, Company "A", 347th Infantry, did, at Fort Jackson, South Carolina, on or about 12 July 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Jackson, South Carolina, on or about 22 July 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions by summary court-martial for (a) absence without leave from 28 December 1943 to 30 December 1943 in violation of Article of War 61, and (b) breach of off limits order, 30 April 1944, in violation of Article of War 96, was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen 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 pursuant to the provisions of Article of War 50½.

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

Accused was a member of Company A, 347th Infantry, stationed at Fort Jackson, South Carolina. On 10 July 1941 an order was issued by 87th Infantry Division Headquarters, Fort Jackson, South Carolina, transferring accused to Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, and directing him to proceed to Fort Meade on or about 12 July 1944. On or about 11 July 1944 the first sergeant of Company A, 347th Infantry, called accused into the company orderly room and showed him a copy of the transfer orders (R. 8; Ex. 2) and told accused he would depart the next day at a time to be announced later. The transfer orders contained accused's new post office address and the sergeant called his attention to it suggesting that he notify his correspondents accordingly. The first sergeant ordered accused to remain in the area and be available for this transfer, advising him that he was alerted, headed for overseas duty, and that his absence without leave at such a time would be a most serious offense (R. 7-9).

Following this conversation with his first sergeant accused absented himself without leave on 12 July 1944 and remained absent until 22 July 1944, when he voluntarily returned to his old organization at Fort Jackson, South Carolina (R. 6; Ex. 1).

4. For the defense:

No evidence was presented for the defense but accused made an unsworn statement following an explanation of his rights. He admitted his unauthorized absence as charged, but denied that the first sergeant had said anything to him about going overseas. He said the sergeant had granted him permission to go to town on the night of 11 July 1944 to attend to some business and that upon his arrival in town he had a few drinks, "got lit up on liquor", and absented himself (R. 10-11).

5. The Specification follows with exactness the form recommended and appearing on page 238 of the Manual for Courts-Martial, 1928. This is the form customarily used in alleging desertion. Under the general allegations of the Specification the prosecution could have proven its case by showing either that the unauthorized absence was (a) with intent not to return, (b) to avoid hazardous duty or (c) to shirk important service (3 Bull. JAG 142; CM 245568, Clancy). It is apparent from the record that, in proving the desertion alleged, the prosecution proceeded upon the theory that accused absented himself from his organization, without leave, with intent to avoid hazardous duty or to shirk important service. Neither of these intents was proven. There is nothing in

the Special Orders (Ex. 2) effecting accused's transfer indicating that he was being sent to a port of embarkation or that he was alerted and destined for overseas service. The only evidence tending to show that accused knew he was being transferred to a port of embarkation or staging area for overseas shipment is the testimony of First Sergeant John W. Davis. However, it is not apparent that Sergeant Davis possessed this factual information. Indeed it appears that his knowledge, or more likely his belief, was premised upon the significance of the place to which accused was being sent and nothing more. In this connection the following questions were asked and answers elicited from Sergeant Davis:

> "Q. Now, as first sergeant, and as a member of the military personnel, does the fact that a person is transferred to Fort George G. Meade or Fort Ord have any particular significance to you?
> "A. Well, yes sir.
> "Q. What significance does it have?
> "A. They would be going over, sir, overseas replacement from the port of embarkation" (R. 9).

No weight can be given to such testimony as it was purely opinion evidence. Not all the military personnel transferred to or stationed at Camp Meade is destined for overseas duty, or for hazardous duty or important service within the meaning of the words as used in the applicable Article of War.

In a previous opinion of this office the purport of the term "important service" and the types of service included within its context were discussed as follows, viz:

> "* * * Within the meaning of that article [AW 28] 'important service' includes all actual service designed to protect or promote, in a manner direct and immediate, the national or public interest or welfare; but does not include what may be termed 'preparatory service,' that is, service which constitutes merely a part of a series of acts or course of prescribed conduct, designed, by way of preparation and training, to perfect the personnel of the Army in its duties to the end that it may be fitted when called upon in time of national stress or public emergency to render efficiently that actual, direct, immediate service to the national or public interest or welfare which is the ultimate object of maintaining an army. * * * C.M. 151672 (1922)." (1 Bull. JAG 271).

In a recent opinion of this office it was held that, under the foregoing

standards as applied in times of war

> "* * * transfers or movements for the organization or expansion of new units, or for training purposes of routine character, not directly related to the maintenance of internal order, embarkation for foreign duty, possible contact with the enemy, or other special functions of the Army, may not be classified as important service" (underlining added) (1 Bull. JAG 272, CM 224805 (1942); 14 BR 191).

Although the first sergeant advised accused he was destined for overseas service, it is quite apparent from the record that his opinion was not based upon facts, but merely upon an assumption drawn from the fact that accused was being transferred to a staging area. There is not a scintilla of evidence in the record to establish the fact that accused's transfer was "directly related" to embarkation for foreign duty or to any other important service. Because of the failure of the evidence to establish as a fact the type of service to which accused was being transferred, the evidence does not sustain the finding of guilty of absenting himself with intent to shirk important service.

To sustain a conviction of desertion based upon absenting himself with intent to avoid hazardous duty the record must contain evidence to establish that accused knew or had reason to know that his embarkation for overseas duty was imminent and that his absence would avoid embarkation (2 Bull. JAG 139, CM 231163 (1943); 18 BR 153). There is no evidence in the record that his embarkation was imminent and that his absence avoided such embarkation. It cannot be inferred that accused knew certain facts when the existence of the facts have not been established. Thus the evidence does not sustain a finding of guilty of absenting himself with intent to avoid hazardous duty.

The evidence likewise fails to establish beyond a reasonable doubt that accused absented himself with the intent not to return. An unexplained absence without leave of ten days terminated by voluntary surrender does not constitute desertion in the absence of other circumstances indicating an intent to remain away permanently (1 Bull. JAG 325, CM 226261 (1942); 15 BR 55). The findings of guilty of desertion on this ground cannot be sustained. The record is legally sufficient to support only so much of the findings of guilty as involves the lesser included offense of absence without leave at the time and place and for the period alleged, in violation of the 61st Article of War.

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of

guilty of the Charge and its Specification as involves findings that the accused, at the time and place alleged, absented himself without leave from his organization and remained absent without leave until his voluntary return at the time and place alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

Thomas H. Taffy, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevellen, Judge Advocate.

SPJGV
CM 262347

1st Ind.

War Department, J.A.G.O., SEP 16 1944 - To the Commanding General, 87th Infantry Division, Fort Jackson, South Carolina.

1. In the case of Private George L. Moore (34102856), Company A, 347th Infantry, I concur in the foregoing holding by the Board of Review and, for the reasons therein stated, recommend that only so much of the findings of guilty of the Charge and its Specification as involves findings that the accused, at the time and place alleged, absented himself without leave from his organization and remained absent without leave until his voluntary return at the time and place alleged, in violation of Article of War 61 be approved. Thereupon you will have authority to order the execution of the sentence.

2. In view of the policy announced in the letter dated 5 March 1943 (AG 250.4 (2-12-43)), from The Adjutant General to all officers exercising general court-martial jurisdiction within the continental limits of the United States, Subject: "Uniformity of sentences adjudged by general courts-martial", it is recommended that the confinement be reduced to a term not in excess of five 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 262347).

Myron C. Cramer

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

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

SPJGQ
CM 262360

SEP 18 1944

UNITED STATES v. Captain FRED B. CAMPBELL (0-450711), Medical Administrative Corps.	SEVENTH SERVICE COMMAND Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 16 August 1944. Dismissal and confinement for one (1) year.

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OPINION of the BOARD OF REVIEW
CAMPBELL, FREDERICK and ANDERSON, 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: Finding of not guilty.

Specification 2: In that Captain Fred B. Campbell, MAC, did at Fort Leonard Wood, Missouri, on or about 15 July 1944, with intent to deceive Major L. H. Prather, officially state to the said Major Prather, concerning the charging of items of merchandise personally purchased from Waynesville Lumber Company, Waynesville, Missouri, to "Medical Supply Officer, Station Hospital", that "I have no explanation of why the Waynesville Lumber Company charged these items to the Medical Supply Officer at the Station Hospital other than that they knew I was the Medical Supply Officer", which statement was known by the said Captain Fred B. Campbell to be untrue, in that he, the said Captain Campbell had demanded of said Waynesville Lumber Company that such billing be made.

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

Specification 1: In that Captain Fred B. Campbell, Medical Administrative Corps, did, at Fort Leonard Wood, Missouri, on or about 1 February 1944, wrongfully, unlawfully and fraudulently sell 100 bed sheets of the value of about $90.00 and 50 pillow cases of the value of about $18.50, total value $108.50, property of the United States, furnished and intended for the military service thereof.

Specification 2: Same as Specification 1 above, except that it alleges sale, on or about 28 February 1944, of 200 bed sheets, of the total value of $180.00.

Specification 3: Same as Specification 1 above, except that it alleges sale, on or about 15 May 1944, of 100 bed sheets and 72 pillow cases, of the total value of $116.64.

Specification 4: Same as Specification 1 above, except that it alleges sale, on or about 26 June 1944, of 144 bed sheets of the total value of $129.60.

Specification 5: Same as Specification 1 above, except that it alleges sale, on or about 5 April 1944, of 60 bed sheets of the total value of $90.00.

Specification 6: Same as Specification 1 above, except that it alleges sale, on or about 5 May 1944, of 156 bed sheets of the total value of $234.00.

Specification 7: Same as Specification 1 above, except that it alleges sale, on or about 4 January 1944, of 150 bed sheets and 75 pillow cases, of the total value of $162.75.

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

Specification 1: In that Captain Fred B. Campbell, Medical Administrative Corps, did, at Fort Leonard Wood, Missouri, on or about 23, 25, and 28 February 1944, wrongfully and unlawfully procure the issuance of Enlisted Men's Passes to Waynesville, Missouri, for Private First Class Shigenobu Sakahara, 39081611.

Specification 2: In that Captain Fred B. Campbell, Medical Administrative Corps, did, at Fort Leonard Wood, Missouri, on or about 23, 25, and 28 February 1944, wrongfully and unlawfully direct Private First Class Shigenobu Sakahara, 39081611, to proceed to Waynesville, Missouri, and there perform carpenter work and labor upon private property.

Specification 3: In that Captain Fred B. Campbell, Medical Administrative Corps, did, at Fort Leonard Wood, Missouri, on or about 24 and 29 February 1944 and 2, 7, 8, 9, and 14 March 1944, being seven different days, wrongfully and unlawfully procure the issuance of Enlisted Men's Passes to Waynesville, Missouri, for Private First Class Carl. C. Juvenal.

Specification 4: In that Captain Fred B. Campbell, Medical Administrative Corps, did, at Fort Leonard Wood, Missouri, on or about 24 and 29 February 1944, and 2, 7, 8, 9, and 14 March 1944, being seven different days, wrongfully, and unlawfully direct Private First Class Carl C. Juvenal, to proceed to Waynesville, Missouri, and there perform painting work and labor upon private property.

The accused pleaded not guilty to Charge I and its Specifications, guilty to all of the remaining Charges and Specifications, and was found not guilty of Specification 1 of Charge I, but guilty of all Charges and the remaining Specifications. No evidence of any previous conviction was introduced at the trial. The accused 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 three years. The reviewing authority approved the sentence but remitted the forfeitures and two years of the confinement, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

Specification 2 of Charge I (False official statement): Between 1 January 1944 and 26 June 1944, various purchases of building materials and allied items of merchandise were made on account from the Waynesville Lumber Company by or on behalf of the accused, who was Medical Supply Officer, Station Hospital, Fort Leonard Wood, Missouri, at the time such purchases were made (R. 12, 15). All building materials and items of merchandise so purchased were charged to "Medical Supply Officer, Station Hospital, Fort Leonard Wood, Missouri", but not all of them were delivered to Fort Leonard Wood (R. 12, 16). Some of them were delivered to the privately-owned dwelling in which the accused lived in Waynesville, Missouri (R. 12, 16), and which he was personally having repaired and improved pursuant to his rental contract with the owner thereof (R. 16, 60-61). Paint purchased from the lumber company by Pfc. Carl C. Juvenal (R. 59), and cabinet hinges, door knobs and other items purchased from it by Pfc. Shigenobu Sakahara (R. 57) were shown to have been actually used in the work which they did for the accused on this private dwelling. When these two enlisted men made the purchases referred to and gave instructions that the items purchased be charged to the account of Captain Campbell, the charge slips were made out to the account of Medical Supply Officer, Station Hospital, Fort Leonard Wood, Missouri (R. 58, 60). The manager of the lumber company, Arden W. Haubein, testified that the accused informed him that he was going to remodel a house in Waynesville

and gave specific instructions that when he made purchases in person of materials to be sent to this house, or when he sent or telephoned for them, they were to be charged to the Medical Supply Officer, Station Hospital, Fort Leonard Wood (R. 15, 16-17). All payments made to the lumber company on the account thus carried by it were made with some form of "Army" check (R. 17-20). Mrs. Eva Wood, bookkeeper for Waynesville Lumber Company, testified that it was well known among the employees of the company that the accused was Medical Supply Officer (R. 10).

On or about 25 July 1944, during "an official investigation which was directed by the Post Commander", Major Lawrence H. Prather questioned the accused with reference to some of his transactions (R. 8), and testified at the trial, as a prosecution witness, with regard to a statement made to him by the accused during the course of that investigation which is alleged in Specification 2 of Charge II to have been false. Upon original, direct examination, in response to a question "Were there any statements made concerning a firm or firms?", Major Prather testified as follows: "Captain Campbell stated that he did not know why the Waynesville Lumber Company charged these items to the Medical Supply Officer of the Station Hospital. At that time, they knew he was Medical Supply Officer" (R. 9). Having been recalled as a witness by the prosecution later during the trial, Major Prather was more particularly examined by the President of the court with regard to the alleged false official statement under discussion, the conditions under which it was made, the question or questions, if any, in response to which it was made, and the exact language used by the accused. Major Prather thereupon testified as follows: "I asked Captain Campbell if he had any statement that he wished to make at the conclusion of this interview and in that statement which he desired to make he made the statement that he had no explanation of why the Waynesville Lumber Company charged these items to the Medical Supply Officer, other than that they might have known that he was the Medical Supply Officer" (R. 49).

CHARGE II and its Specification (AW 94 - Sale of property of the United States, furnished and intended for the military use thereof):

Nothwithstanding the accused pleaded guilty to Charge II and each of its seven Specifications, the prosecution adduced evidence for the purpose of proving the commission by the accused of each offense alleged. To attempt to summarize under each separate Specification all of the evidence which may tend to establish the accused's guilt of the offense therein alleged would only serve to unduly lengthen this opinion, because some of the evidence is general in its nature and applicable to all seven Specifications alike. An effort will be made, however, to indicate the Specifications to which portions of the evidence have particular application.

It was stipulated that if Second Lieutenant Joseph A. Kirschner, MAC, were present and sworn as a witness, he would testify that, in his capacity as custodian of the Hospital Billeting and Mess Fund, Station Hospital, Fort Leonard Wood, Missouri, he talked with the accused on or about 5 January, 1 February, and 28 February, 1944, respectively, "about

securing bed sheets to be resold by the Billeting and Mess Fund as an accommodation to the nurses and officers who were required to own their own personal bed linens; that as a result Captain Campbell (accused) agreed to and did deliver to the housekeeper at Nurses Quarters number 117 for such resale, three (3) lots as follows: 5 January 1944, 150 bed sheets, 75 pillow cases, total $269.25; 1 February 1944, 100 bed sheets, 75 pillow cases, total $179.50; 28 February 1944, 200 bed sheets, total $300.00; that it was definitely represented by Captain Campbell that these sheets were being procured by him through Waynesville Lumber Company, Waynesville, Missouri, and in each case, he, the witness, made checks payable to the Waynesville Lumber Company in the three (3) amounts as stated above, (and) that he had no intimation whatever that Captain Campbell was handling the matter in any other manner than straight legitimate deals" (R. 30, Ex. 8). (Specifications 1, 2, 7).

Photographic copies of three checks drawn by Lieutenant Kirschner as custodian of the Hospital Billeting and Mess Fund, Station Hospital, Fort Leonard Wood, Missouri, dated 5 January 1944, 2 February 1944, and 25 February 1944, respectively, and for the amounts of $269.25, $179.50, and $300.00, respectively, one of which was payable to the order of "Waynesville Hardware & Lumber Co." and the other two of which were payable to "Waynesville Lumber Company," identified by the stipulated testimony of Lieutenant Kirschner as copies of the three checks referred to above in his stipulated evidence contained in Exhibit 8 (R. 30, Ex. 9), were introduced in evidence without objection (R. 27, Ex. 7; R. 26, Ex. 5; R. 25, Ex. 3). Mr. Haubein, manager of Waynesville Lumber Company, testified that each of these three checks was delivered to the Company by the accused (R. 27, 26, 23), and was credited to the latter's account (Medical Supply Officer account - R. 22), with the possible exception of the $179.50 check, upon which the accused may have been paid cash (R. 22, 28). All of the checks were indorsed by the lumber company and paid by the bank upon which they were drawn (Exs. 3, 5, 7). As a part of the transaction in connection with these checks, Mr. Haubein marked "paid" and delivered to the accused as receipts three bills or statements of account on Waynesville Lumber Company stationery which were ostensibly for sheets or sheets and pillow cases sold by the lumber company to the Station Hospital or the Billeting Fund thereof, the amounts of the respective statements corresponding to the amounts of the respective checks (R. 26-27, Ex. 6; R. 25-26, Ex. 4; R. 23, 25, Ex. 2). These receipted bills were in turn delivered by the accused to Lieutenant Kirschner. Photographic copies of each, identified by the stipulated testimony of Lieutenant Kirschner as copies of the receipts received by him from accused (R. 30, Ex. 9), were introduced in evidence without objection (R. 27, Ex. 6; R. 26, Ex. 4; R. 25, Ex. 2). One of these statements, dated 4 January 1944, was for 150 sheets @ $1.52 ($228.00) and 75 pillow cases @ 55 cents each ($41.25), total $269.25 (Ex. 6); one, dated 1 February 1944, was for 100 sheets @ $1.52 ($152.00) and 50 pillow cases @ 55 cents ($27.50), total $179.50 (Ex. 4); and one, dated 28 February 1944, was for 200 sheets @ $1.50, total $300 (Ex. 2). Waynesville Lumber Company never sold any sheets or pillow cases to the accused or to anyone else (R. 23), and these bills and statements were made out at the direction of the accused and according to his instructions, or else he presented them already prepared (R. 25, 26, 28). (Specifications 1, 2, 7).

It was stipulated that photographic copies of checks and receipts having application to the Specifications of Charge II could be introduced in evidence by the prosecution without objection by the defense and with like effect as the originals (R. 22, Ex. 1).

During the "last part of February 1944," First Lieutenant Martin E. Nitschke became billeting officer for the officers and nurses at the Station Hospital, Fort Leonard Wood (R. 35). Having been advised by his predecessor in that position to contact the accused for aid in purchasing "certain articles," and being in need of sheets, he contacted the accused in May and again in June 1944 with reference to purchasing sheets and pillow cases (R. 37). In each instance, after some delay, the accused advised Lieutenant Nitschke that he had made arrangements for the sheets or sheets and pillow cases at quoted prices, and in due course the items contracted for were delivered to the housekeeper as directed (R. 37-38). In payment of the bill or statement sent to him by accused for the sheets and pillow cases purchased in May, Lieutenant Nitschke delivered to accused a Hospital Billeting and Mess Fund check in the amount of $186.00, dated 15 May 1944, and payable to the order of Claude Davis (R. 36, Ex. 11), and in payment of the bill for the sheets delivered in June, he delivered to accused a similar check in the amount of $288, dated 26 June 1944, and payable to the order of W. E. Rhodes (R. 37, Ex. 13). Photographic copies of these checks, showing payment by the drawee bank, together with like copies of receipts for the respective amounts, ostensibly signed by Claude Davis and W. E. Rhodes, were introduced in evidence without objection (R. 36, 37, Exs. 10, 11, 12, 13). The Davis receipt evidenced payment for 100 sheets @ $1.50 ($150.00) and 6 dozen pillow cases @ $6.00 per dozen (Ex. 10), while the Rhodes receipt evidenced payment for 144 sheets @ $2.00 each (Ex. 12). (Specifications 2, 3).

Claude Davis testified that he, in company with the accused, carried the $186 check which was payable to him to the bank, cashed it, and delivered the money to accused (R. 31-32). T/4 Charles G. Miller, upon being ordered by the accused to do so, carried the Rhodes $288 check to the bank, cashed it, and delivered the money to accused (R. 34). It was stipulated that W. E. Rhodes was a fictitious name; that the endorsement "W. E. Rhodes" on the back of the check was fictitious; that accused presented the bill to Lieutenant Nitschke in the name of W. E. Rhodes and received the full face value of the check issued in payment thereof (R. 34, Ex. 14). (Specifications 2, 3).

Mabel Williamson, matron, Station Hospital, Fort Leonard Wood, Missouri, testified that sheets and pillow cases, for sale to nurses and officers, were delivered to her during 1944 at the direction of Lieutenants Kirschner and Nitschke, as follows: On 6 January, 150 sheets and 75 cases; on 1 February, 100 sheets and 25 cases; on 5 February, 200 sheets; on 11 February, 50 pillow cases; on 15 May, 100 sheets and 72 cases; and on 26 June 144 sheets (R. 46). All of these were sold except 125 sheets which were delivered to Major Prather, who, as hereinabove set out, conducted an official investigation of accused's activities (R. 46). The witness did not know who delivered the sheets to her (R. 45).

Cody D. Gholson, storekeeper, Medical Supply, Fort Leonard Wood, made delivery of sheets to building 116 at Fort Leonard Wood on 26 June 1944 (R. 44, 45). He procured these sheets from the government warehouse and made the delivery at the direction of Mr. Vandergriff, warehouseman (R. 45). The sheets were not wrapped but were bundled and tied with tape (R. 45). Oliver W. Vandergriff, storekeeper, Fort Leonard Wood, worked under the supervision of the accused while the latter was Medical Supply Officer (R. 41). His duties included checking stock, filling requisitions, and making deliveries (R. 41). On or about 26 June 1944 he was instructed (by whom is not specifically shown of record) to deliver some sheets to building 116 (R. 41-42). The delivery was made, but not by Mr. Vandergriff in person (R. 43). The sheets were taken from government-owned stock in the medical supply warehouse (R. 42, 43). He had no requisition for these sheets and never received one (R. 42). The sheets were not wrapped but were bundled and tied with a cord (R. 42).

On 22 May and 20 June 1944, respectively, the accused sold and personally delivered to Neal D. Williams, a merchant in Waynesville, Missouri, (R. 38) two lots of bed sheets, one lot of five dozen and one of thirteen dozen (R. 39, 40). He represented to Williams that he had purchased a stock of merchandise which included a quantity of pre-war sheets (R. 39). Williams delivered such of these sheets as he still had on hand to Major Prather (R. 39, 40). (Specifications 5, 6).

Two sheets from the lot which he recovered from Williams and two from the lot which had been purchased by the Billeting and Mess Fund and which he recovered from the Station Hospital, Fort Leonard Wood, under the guidance of Miss Williamson were identified by Major Prather (R. 47, 48), and introduced in evidence without objection (R. 50, Exs. 15, 15-A, 16, 16-A). First Lieutenant Forrest W. Larkin, MAC, Medical Supply Officer, Fort Leonard Wood, produced in court an unopened package of sheets taken from the government warehouse (R. 51). The wrapper removed from these sheets and two cords with which they were tied were admitted in evidence over objection by defense counsel (R. 51, 52, 54). Two sheets from this package proven to be government property were introduced in evidence (R. 52, 53, 54, Exs. 19, 20). According to information set out on the wrapper that had been around these sheets and the testimony of Lieutenant Larkin, the sheets were supposed to be 72" x 108" before being hemmed (R. 52, Ex. 17). Each of these two sheets (Exs. 19, 20) actually measured six feet one and three-fourths inches (73-3/4") by eight feet seven and three-fourth inches (103-3/4") (R. 52, 53). One of the sheets accused sold Williams (Ex. 15) and one which was sold to the Billeting and Mess Fund (Ex. 16) were likewise measured and they measured exactly the same as the two proven government-owned sheets (R. 53). One of the proven government owned sheets had a pencil marking "96-L" on it (Ex. 19) as did also one of the sheets recovered from the Billeting and Mess Fund (Ex. 16, R. 52, 53). The witness

testified that all of the sheets introduced in evidence were similar and in his opinion were government sheets (R. 53). He did not know whether similar sheets could be bought on the open market (R. 55). The catalog price of the government sheets was ninety (90) cents each (R. 55).

Pertinent portions of three written and signed pretrial statements voluntarily made by the accused after he had been first duly warned of his rights (R. 61, Ex. 21) were introduced in evidence without objection (R. 63, Exs. 22, 23, 24). In these statements the accused confessed making all of the sales of sheets and pillow cases hereinabove described and to receiving the proceeds of such sales as above set out. He made no inventory of property on hand before or at the time of assuming the duties of Medical Supply Officer and when he did check up he discovered that there were approximately 1000 sheets in the warehouse which were not charged to him and for which he was not accountable on the books. He retained these sheets as an unauthorized surplus and first began to make use of them to accommodate ward officers in making up shortages for which they were unable to account. He then began to make sales to the Billeting and Mess Fund. The four lots of sheets and pillow cases which he sold to Lieutenants Kirschner and Nitschke were delivered to the housekeeper at building 116 by ordinary delivery (Ex. 22). He personally delivered the two lots of sheets to Mr. Williams (Ex. 23). The accused either received cash on the various checks or credit at Waynesville Lumber Company "on the account which I had been running there under the name of Medical Supply Officer, but which was my personal account" (Ex. 22, p. 2). There were some government items included in that account but he paid most of those out of his own pocket because he knew he was improperly receiving money from the sale of sheets and it helped to soothe his conscience (Ex. 23, p.2).

CHARGE III and its Specifications (AW 96 - wrongfully procuring passes for enlisted men and having enlisted men work on private property):

First Lieutenant Maurice K. Palmquist, MAC, Commanding Officer, Medical Detachment, Station Hospital, Fort Leonard Wood, testified that he issued passes for Pfc. Shigenobu Sakahara and Pfc. Carl C. Juvenal, authorizing them to go to Waynesville, Missouri, during duty hours upon three or four occasions during February and March 1944 (R. 56). These passes were issued upon the request of accused (R. 56). It had been the policy of the detachment for the preceding three and one-half years to issue passes when they were requested by the head of a department (R.57).

Pfc. Sakahara, an enlisted man, cabinet maker at the Station Hospital, testified that he got passes on the 23d, 25th and 28th days of February 1944 at the request of accused and went to Waynesville, Missouri, where he made a kitchen cabinet and fixed the inside of the house in which accused lived (R. 57). On those three days he worked during duty hours (R. 58). Most of the work, however, was done on Sundays and after duty hours (R. 58). Accused was his immediate commanding officer (R. 58). Pfc. Sakahara raised no objection to doing this work, explaining that "orders are orders, so I just obeyed the orders" (R. 58).

Pfc. Juvenal was also an enlisted man in the Medical Detachment, Station Hospital, Fort Leonard Wood, Missouri, under the immediate command of the accused, during February and March 1944 (R. 58, 59). While unable to recall specific dates, he obtained passes during those months for the purpose of going to Waynesville, Missouri, and painting the house in which accused lived (R. 59). He did some of this painting during duty hours and some of it on Sundays (R. 59). The accused asked him if he would do the painting for him and he replied that he would. He took the inquiry as a command and did not know what else to do (R. 59, 60). He received pay for the work he did (R. 60).

4. For the Defense:

It was stipulated that on 8 August 1944 the accused voluntarily paid $1564.75 to the Finance Officer through Colonel L. C. Tarleton, MC, commanding officer, Regional Station Hospital, Fort Leonard Wood, Missouri, for the purpose of making full and complete restitution for the illegal sale by accused of property belonging to the United States (R. 64, Def. Ex. C). This money was to be distributed by the Finance Officer according to the order of higher authority. A copy of the receipt given for this money by Colonel Tarleton, showing the purpose for which it was received, together with an attached certificate made by accused, listing the illegal sales made by him and the respective amounts of money derived from each, was also introduced in evidence (R. 64, Def. Exs. A, B). The $1564.75 represented total receipts by accused from sales of sheets and pillow cases. Persons who had purchased this property were to be reimbursed for losses sustained as a result of the government's repossessing portions of it and the balance of the $1564.75 remaining was to be paid into the United States Treasury.

The accused offered no other evidence and, having had his rights as a witness explained, elected to remain silent.

5. Specification 2, Charge I (False official statement): The statement which is alleged in the Specification to have been falsely made by the accused concerning the charging of items of merchandise personally purchased from Waynesville Lumber Company to "Medical Supply Officer, Station Hospital" is as follows: "I have no explanation of why Waynesville Lumber Company charged these items to the Medical Supply Officer at the Station Hospital other than that they knew I was the Medical Supply Officer." The inference may be fairly drawn from the record that this alleged false statement is copied verbatim from a recorded statement made by the accused to Major Prather. The testimony of the latter makes clear that it was not made in response to any specific question touching the matters with reference to which it was made. It was made after Major Prather had concluded his interrogation of the accused, when he extended to the latter an opportunity to make any statement he saw fit. Under these circumstances, the statement is as susceptible of the construction that accused chose to make no other explanation of the matter than that given as it is of the

construction that he knew of no reason why the charges were so made other than that the employees of the lumber company knew he was the Medical Supply Officer. So considered, the statement does not constitute a false statement and constitutes no offense. The accused was under no obligation to make full disclosure of his dealings with Waynesville Lumber Company. Nor was he obliged to make any disclosure which might tend to incriminate him (A.W. 24). The fact that his selection of language might be deemed cagy does not alone justify branding his statement as a false statement made with intent to deceive. Before a conviction of the offense alleged can be sustained there must be evidence which is legally sufficient to prove, beyond reasonable doubt, that the statement is both false and made with intent to deceive. The evidence in the instant case does not measure up to this standard. In view of the allegations of the Specification and the testimony given by Major Prather when particularly questioned by the President of the Court in regard to the statement made by accused and the circumstances under which it was made, Major Prather's testimony given earlier on original direct examination, that the accused "stated that he did not know why Waynesville Lumber Company charged these items to the Medical Supply Officer" loses its force and effect. When he testified on original direct examination Major Prather apparently testified from memory while when questioned by the President of the Court he apparently had recourse to a transcription of the statement actually made by the accused at the time in question.

Charge II and its Specifications (A.W. 94 - sale of military property):

Taken in conjunction with accused's pleas of guilty, which constitute judicial confessions, sufficient within themselves to support the findings of guilty, the evidence of record is legally sufficient to support the findings of guilty of Charge II and each respective Specification thereof. The fact that accused made restitution of all money received by him from these illegal sales can only be considered in mitigation and does not constitute a defense.

Charge III and its Specifications:

It is alleged in Specifications 1 and 3 of this Charge that accused "did * * * wrongfully and unlawfully procure the issuance of Enlisted Men's Passes * * *" for named enlisted men, and in Specifications 2 and 4 that he wrongfully and unlawfully directed named enlisted men to perform labor on private property. The accused pleaded guilty to each of these Specifications and the Charge and thereby admitted the facts alleged. The evidence adduced, taken in conjunction with accused's pleas of guilty, is sufficient to establish that on the dates alleged the accused did procure passes for Pfc. Sakahara and Pfc. Juvenal from the commanding officer of the Medical Detachment, Station Hospital, Fort Leonard Wood. The inference is clear that these enlisted men were not themselves entitled to these passes as a matter of their own right. The accused, who, by virtue of his office, was in a position to obtain passes for them at will, abused

the privilege thus accorded him by obtaining the passes for the sole purpose of serving his own private and selfish purposes. By doing so under the circumstances shown, he was guilty of conduct to the prejudice of good order and military discipline and violated Article of War 96.

While the evidence does not show that either Pfc. Sakahara or Pfc. Juvenal was ordered or commanded by accused to work on his house, both testified that they construed whatever the accused said to them in this respect as an order and neither felt that he was a free, moral agent to refuse to do the work which accused desired done. Furthermore, a considerable amount of the work was done when these enlisted men were supposed to be on duty with their organization. This wrongful appropriation by accused of the services of the enlisted men during their official duty hours was conduct of a nature to bring discredit upon the military service and his conduct in directing or requesting enlisted men under his command to perform labor on private property constitutes a disorder to the prejudice of good order and military discipline, and hence was violative of Article of War 96. C.M. 257469-Mackay.

6. War Department records disclose that this officer is 31 years of age and is married. He is a high school graduate and attended Boston University for two years. In civil life he operated his own collection agency for two years immediately before entering the service. He enlisted in the regular Army on 28 October 1938 and attained the grade of staff sergeant before being admitted to Officers Candidate School. Upon graduating from Officers Candidate School he was commissioned a temporary second lieutenant in the Army of the United States on 27 September 1941. He was promoted to the grade of first lieutenant on 7 July 1942 and to that of captain on 3 May 1943.

7. 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 insufficient to support the finding of guilty of Charge I and Specification 2 thereof but legally sufficient to support all remaining findings and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of either Article of War 94 or Article of War 96.

William H. Bamberger, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 2 - 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 Fred B. Campbell (0-450711), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and Specification 2 thereof (false official statement) but legally sufficient to support all remaining findings and the sentence and to warrant confirmation of the sentence. I recommend that the findings of guilty of Charge I and Specification 2 thereof be disapproved and that the sentence as approved by the reviewing authority 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 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 of guilty of Charge I and Specification 2 thereof disapproved. Sentence as approved by reviewing authority confirmed. G.C.M.O. 651, 16 Dec 1944)

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

SPJGQ
CM 262416

7 SEP 1944

UNITED STATES v. Private ALEXANDER MOREL (36574705), Company G, 424th Infantry.	106TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Atterbury, Indiana, 3 August 1944. Dishonorable discharge, confinement for ten (10) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, 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 58th Article of War.

Specification: In that Private Alexander Morel, Company G, 424th Infantry, did at Camp Atterbury, Indiana on or about 23 April 1944, desert the service of the United States by absenting himself from his organization with intent to shirk important service, to wit: transfer to an undisclosed destination, and did remain absent in desertion until he was apprehended at Detroit, Michigan on or about 2 July 1944.

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for thirty years. The reviewing authority approved the sentence, but reduced the period of confinement to ten years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, was designated as the place of confinement and the record of trial was forwarded for action under Article of War 50½.

3. Pertinent evidence for the prosecution consisted of the following proof:

On 22 April 1944 the accused was transferred from the organization of which he was then a member to the Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, under the provisions of the following order:

22 April 1944

"SPECIAL ORDERS)
: E-X-T-R-A-C-T
NO. 96)

* * * *

6. Following EM trfd in gr from units indicated to AGF Repl Depot #1 Ft Geo G Meade Md so as to arrive on or before 26 Apr 44:

TN MAIN # 18901
GROUP IV (TWX GNACR 6001 Hq 2d A 17 Apr 44)
424th Inf

NAME	ASN	GRADE	AGCT GROUP	MOS	MCO	COMPANY
(Inf-Rifle Trained)		*	*			*
454. Morel, Alexander	36574705	Pvt	IV	745	590	G

By command of Major General JONES:

WILLIAM C BAKER JR
Col GSC
CofS

OFFICIAL:

/s/ Vollie McCollum
/t/ VOLLIE McCOLLUM
CWO USA
Asst Adj Gen"

On 23 April 1944 the accused absented himself from his organization and his initial absence without leave was shown by a duly authenticated extract copy of the morning report of the accused's company (R. 5, Pros. Ex. 1). His return to military control on 2 July 1944 was proved by a duly authenticated extract copy of the morning report of 1627th Service Unit, Detroit, Michigan (R. 5, Pros. Ex. 2). By stipulation it was agreed that if Patrolman Arnold Kuhn were present in court and sworn as a witness he would testify that he apprehended the accused at about 8:30 p.m. on 2 July 1944 at the Arcadia Roller Rink in Detroit, Michigan (R. 5, Pros. Ex. 3).

Staff Sergeant Arnold W. Calton, Company G, 424th Infantry, testified that on 22 April 1944 he was "sitting around talking to

(the accused) and kidding him about getting married and having to go P.O.E. and at that time he made the statement 'Hell, I'll never go P.O.E.'. . . . or words to that effect." At the time the accused, on orders of the first sergeant, was taking off corporal chevrons he had been wearing. After the first sergeant left he put on staff sergeant chevrons. When Calton asked him why he was doing so, the accused replied "Most privates and privates first class were on P.O.E. and he was going into town to see his wife and the MP's wouldn't stop him if he had staff sergeant's stripes on" (R. 9).

On 25 April 1944 Private First Class George C. Long, a member of the accused's company, saw the accused in Indianapolis, Indiana, dressed in OD's and wearing staff sergeant chevrons. He talked with the accused with reference to the chevrons, and the accused explained "that he was wearing those stripes because most privates and privates first class were on the P.O.E. list and the MP's wouldn't bother him" (R. 7, 8). In a sworn written statement, made after proper warning, the accused said, "I have one statement to make, I did know I was on shipping orders, but didn't know that I was to be shipped because of my physical defects" (R. 6; Ex. 5).

4. The accused, having been informed of his rights, testified as follows:

He denied making the statement that he "wouldn't go P.O.E.," but admitted saying he "wouldn't go P.O.E. because of (his) physical defects." He had been on a P.O.E. list before but was rejected. He had been operated upon for hernia and also had flat feet and these things had caused his rejection, although he is not "afraid of going P.O.E."

He said he left his organization on 23 April 1944 "because I had a furlough, got married and asked for an extension. I didn't get it so came back in time. My wife was in Indianapolis with me. She had no money. She was sick, pregnant. I was worried about it". The fact that he was on a P.O.E. list had nothing to do with his leaving his station (R. 11), nor did it have anything to do with his staying away. During his absence he never denied being a member of the United States Army, always wore his uniform except once when he was having it cleaned, and never intended not to return to duty. He admitted wearing staff sergeant chevrons because he "didn't think (he) would be picked up as quick" and he had on civilian clothes when he was apprehended (R. 12-14).

5. It is upon such tenuous evidence that the court made the findings from which it is apparent that they deemed it sufficient to show the specific intent with which the accused is charged.

The record of trial affords no explanation of the meaning of such phrases as "going P.O.E." and "on the P.O.E. list" but it is reasonably certain that the letters P.O.E. in the context mean "Port of Embarkation" and were so intended by those who used them.

There is nothing whatever in the order transferring the accused to the Replacement Depot at Fort Meade, Maryland, or in any of the other evidence adduced by the prosecution by which it is shown, or from which it could reasonably be inferred, that he believed that he was about to be subjected to any important service within the meaning of the 28th Article of War. Insofar as the record shows, his service at Camp Meade, Maryland, was to be no more important than his services had been at Camp Atterbury, Indiana. There is no showing that the accused was destined to embark on overseas service, nor is there evidence that he was upon a shipping list at a port of embarkation, nor is there any proof that the accused was to perform any more important service at Camp Meade than that performed daily by most soldiers within the continental limits of the United States. The record is wholly lacking in the requisites of proof to sustain the finding of desertion with intent to shirk important service (See 1 Bul. JAG 103, 269 and 323).

Where desertion with the intent to shirk important service is alleged, the accused cannot legally be convicted of desertion with intent not to return (1 Bul. JAG 323; CM 245568, Clancy).

The evidence does, however, clearly justify a finding of guilty of absence without leave.

6. The charge sheet discloses that the accused is 20 years of age and that he was inducted at Detroit, Michigan on 22 February 1943. He has had no prior service.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves findings that the accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent until he was apprehended at Detroit, Michigan, on or about 2 July 1944, in violation of Article of War 61, and legally sufficient to support the sentence.

William A. Hamlett, Judge Advocate.

Herbert B. Fredrick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 23 SEP 1944 To the Commanding General, 106th Infantry Division, Camp Atterbury, Indiana.

1. In the case of Private Alexander Morel (36574705), Company G, 424th Infantry, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the findings of guilty of the Specification and the Charge be approved as involves a finding of guilty of absence without leave, in violation of Article of War 61. Upon compliance with the foregoing recommendation, and under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

2. In view of the policy announced in letter dated 5 March 1943 (AG 250.4 (2-12-43)), from The Adjutant General to all officers exercising general court-martial jurisdiction within the continental limits of the United States, "Subject: Uniformity of sentences adjudged by general courts-martial", it is recommended that the confinement be reduced to a period not in excess of five 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 262416).

Myron C. Cramer

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
Washington, D. C.

SPJGV
CM 262430

16 SEP 1944

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Will Rogers Field, Oklahoma, 16 August 1944. Dismissal.
First Lieutenant DONALD L. MORRIS (0-688115), Air Corps.	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Donald L. Morris, Squadron A, 348th Army Air Forces Base Unit, Will Rogers Field, Oklahoma, having been restricted to the limits of the post at which he might be serving for three months pursuant to sentence adjudged by a General Court-Martial at Will Rogers Field, Oklahoma on 17 March 1944, which sentence was approved and ordered executed by order of the Commanding General, Third Air Force, per General Court-Martial Orders Number 271, Headquarters Third Air Force, dated 14 April 1944, did, while serving at Will Rogers Field, Oklahoma, on or about 18 May 1944, break said restriction by going to Oklahoma City, Oklahoma.

He pleaded not guilty to the Charge, but guilty of violation of the 96th Article of War, and guilty to the Specification. He was found guilty of the Charge and its Specification. Evidence of one prior conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution was substantially as follows:

General Court-Martial Order No. 271, Headquarters Third Air Force, Tampa, Florida, dated 14 April 1944, approving and ordering execution of a sentence of restriction of accused to the limits of his post for three months, forfeiture of $83.30 per month for a like period and a reprimand, imposed on accused by a General Court-Martial held at Will Rogers Field, Oklahoma, 17 March 1944, was offered in evidence, the trial judge advocate stating that the order was not to be considered by the court in the "light of a previous conviction, nor should they give any consideration at this stage to the nature of the offense, the appropriateness of the punishment, or any of the other contents of this order," except to show the imposition of the sentence of restriction for three months, and its approval by the Commanding General, Third Air Force, on 14 April 1944. Defense stated that subject to these qualifications no objection was interposed. The order was thereupon received in evidence (R. 5, Ex. 1).

Prior to 1 May 1944 a copy of the General Court-Martial Order No. 271, approving the sentence imposed and ordering its execution, was served on accused by the Assistant Legal and Boards and Claims Officer, Will Rogers Field, Oklahoma (R. 6).

It was stipulated that on 18 May 1944, the accused drove his automobile to an address in Oklahoma City, about ten miles outside the limits of Will Rogers Field, Oklahoma, and that he remained there for a period of time in excess of 15 minutes (R. 6).

4. For the Defense.

Captain Richard M. Hoff, Assistant Base Operations Officer, testified that AAF Form 5 is the record of flights performed by rated pilots, and as pertained to accused, showed that he had a total of 694 hours as a pilot, approximately 400 hours of which was as a B-24 pilot. Most of his flying time was acquired as a first pilot. The better pilots are the ones selected first pilots to fly the B-29 bomber, and they are mostly returnees from overseas. If a man who had not been overseas were selected to fly a B-29, he would say that such man was above average as a pilot. Accused is shown to be 100% qualified for overseas duty (R. 8).

First Lieutenant Dru A. Tighe testified he had known accused approximately two and a half years. In 1943 accused was Engineering Officer, and he the Operations Officer of the 18th Combat Mapping Squadron. Accused did a very efficient job of keeping the ships in perfect condition. Accused worked late at night, asking favors from no one and taking personal responsibility in seeing that the ships were ready. He and accused also went through cadet training together. At the time they were to go to 4-engine transition school, a colonel from Washington offered them a chance to go to Peterson Field, with the promise they would be overseas in six weeks. It would have taken them three or four months to go

through Bombardment, and thinking they could get overseas sooner by going to Peterson Field they did so. There they worked hard and were very conscientious, but had many disappointments, and were at Peterson Field almost a year (R. 9, 10).

The accused after having his rights as a witness explained elected to testify under oath. He said he had spent two and a half years trying to get overseas, and after cadet training went to Peterson Field on the promise that he would be sent overseas in six weeks time. In January he submitted through channels an application to transfer for training to fly the B-29 bomber. This application was approved, but was set aside because of his previous court-martial (R. 11). Accused was permitted to testify at length and in detail concerning his previous court-martial, wherein he was found guilty of altering without proper authority his WD AGO Forms 66-1 and 66-2 by changing his indicated manner of performance, and performance rating, from Satisfactory to Superior. He expressed the belief that inasmuch as the present offense for which he was being tried was analogous to breach of a standing order, and his acts did not brand him as dishonest or a thief, he did not think he was guilty of a violation of Article of War 95.

Attached to the record is a letter from the defense counsel, setting forth that inasmuch as the offense for which accused was tried in this case was reported to and considered in regard to clemency in connection with another case against accused then being considered by the reviewing authority, such action constituted punishment for this offense. The Board of Review is of the opinion that this contention is without merit.

5. Competent evidence shows that accused was restricted to the limits of his base for a period of three months by sentence of a general court-martial approved 14 April 1944. Prior to 1 May 1944 a copy of the general court-martial orders, approving the sentence and ordering its execution, was served on accused. On 18 May 1944 accused breached this restriction by driving his automobile to an address in Oklahoma City, Oklahoma, more than ten miles outside the limits of Will Rogers' Field, Oklahoma, accused's base, where he remained for a period of time in excess of fifteen minutes.

6. The charge and specification are laid under the 95th Article of War. It is therefore necessary to consider whether the conduct of the accused was such that in dishonoring or disgracing him personally as a gentleman, it seriously compromised his position as an officer and exhibited him as morally unworthy to remain a member of the honorable profession of arms (MCM, 1928, par. 151). The Board of Review is of the opinion that accused's misconduct in breaching the restriction imposed on him by the sentence of a general court-martial by driving his automobile from Will Rogers' Field, Oklahoma into Oklahoma City, Oklahoma, more than ten miles outside the limits of Will Rogers Field, where he remained for a period of time in excess of fifteen minutes, was not of a nature suffi-

ciently serious to warrant a finding of guilty under the 95th Article of War. The Board of Review is therefore of the opinion that the record is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves a finding of guilty of the Specification in violation of Article of War 96.

7. War Department records show that accused is 24 years of age. He attended Louisiana State University for two and one half years where he studied engineering. He worked at Barksdale Field, Louisiana, as junior airplane mechanic from 15 February 1942 to about 26 March 1942. He entered military service as an aviation cadet 26 March 1942 and after graduating from Army Air Forces Advanced Flying School, Kelly Field, Texas, was appointed second lieutenant, Air-Reserve, 13 December 1942 and ordered to active duty the same date. He was promoted to First lieutenant, Army of the United States, 24 July 1943. He attended the School of Medicine, Randolph Field, Texas, 2 August to 7 August 1943 and graduated as a Unit Oxygen Officer with a rating of very satisfactory.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty as involves a finding of guilty of the Specification in violation of the 96th Article of War, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 96.

Thomas N. Tappy, Judge Advocate.

Sick in Hospital, Judge Advocate.

Robert C. Trimble, Judge Advocate.

SPJGV
CM 262430

1st Ind.

War Department, J.A.G.O., 19 SEP 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 Donald L. Morris (0-688115), Air Corps.

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 563, 14 Oct 1944)

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

SPJGK
CM 262534

11 OCT 1944

UNITED STATES	)	ROME AIR SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Rome Army Air Field, Rome, New York, 2-7 August 1944. Dismissal.
	)	
Second Lieutenant OTHA MORGAN (0-575688), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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

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

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

Specifications 1 and 2: (Findings of not guilty).

Specification 3: In that Second Lieutenant Otha Morgan, Air Corps, 4104 A Army Air Forces Base Unit, then of the 436th Aviation Squadron, did, on or about the 1st of July 1944 on Train No. 37, New York Central Railroad, between Rome, New York and Cleveland, Ohio, conduct himself in a manner unbecoming an Officer and a gentleman by attempting to crawl into the Pullman berth of one Irene Davis, a female, not his wife.

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

Specification: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Otha Morgan, Air Corps, 4104 A Army Air Forces Base Unit, then of the 436th Aviation Squadron, did fail to insure that appropriate security precautions were taken in the handling of confidential documents in his possession, to wit: by permitting unauthorized persons

to handle the envelope containing the same and by failing to retain the confidential documents in his possession at all times, but permitting them to be left in his berth and seat while absent therefrom, contrary to Army Regulations and to the discredit of the military service and against good order and military discipline.

Specifications 3 and 4: (Findings of not guilty).

Specification 5: Identical with Specification 3 of Charge I.

He pleaded not guilty to all of the Charges and the Specifications. He was found not guilty of Specifications 1 and 2 of Charge I, Charge II and its Specification, Specifications 1, 3 and 4 of Charge III; guilty of Specification 2 of Charge III, and guilty of Specification 3 of Charge I and Specification 5 of Charge III excepting from each the words "crawled into" and substituting therefor the words "enter into" and guilty of Charges I and III. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved the sentence "though grossly inadequate" and forwarded the record of trial for action under the provisions of Article of War 48.

3. The evidence for the prosecution with reference to the Charges and Specifications of which the accused was found guilty may be summarized as follows:

During the occurrences hereinafter related the accused was in the military service of the United States in the grade of a second lieutenant, Air Corps, a member of the 436th Aviation Squadron, stationed at Rome Army Air Field, Rome, New York (R. 9). About 10:30 a.m. of 30 June 1944 he was appointed the advance representative of his organization to precede it to a port of embarkation. He was to take with him numerous documents including the lists of supplies, shipping tickets and packing lists of the organization, and to arrange upon his arrival for the messing and recreational facilities for the personnel of the organization (R. 10). The nature and the importance of the documents were explained to him. That evening at 7 o'clock Major M. D. Brown the Executive officer of the field accompanied the accused to the railroad station and turned the above documents over to the accused in two red envelopes. Also inclosed in the envelopes were the confidential and restricted orders of the accused showing his destination. Accused was again instructed upon his duties and cautioned not to disclose his destination or the purpose of his journey. The importance of timely arrival at his destination was likewise impressed upon him (R. 11). He was specifically told that the papers were classified and to keep them with him at all times (R. 12, 15). Accused boarded the train about 8 o'clock, for Chicago. He was assigned Upper berth No. 3 on Pullman car 379. Lower berth No. 3,

directly underneath, was assigned to a Miss Irene Davis (white), age 21, of Oak Park, Illinois (R. 16, 17, 37). Miss Davis also boarded the train at Rome and the two met at the section which was then in the form of seats. A conversation on the scenery, uniforms, her personal appearance, Chicago and other cities, and other general topics followed (R. 18). Accused remarked that she (Miss Davis) "had the makings of a good wife" and made some remark about being in her bedroom which she did not understand (R. 19). In the course of the conversation Miss Davis told accused that she was from Missouri and that she had graduated from the Missouri School of Mines (R. 19-20). At a time not definitely fixed accused excused himself to go to the club car. The porter made up the berths in 379 and Miss Davis retired about 10 o'clock and went to sleep. When the accused left for the club car he also left on the seat two "brownish red envelopes". After the berths were made up these envelopes were visible in the upper berth (R. 20).

Miss Davis testified that some time after midnight she was awakened by the noise the accused made in getting into the upper berth. Shortly thereafter she heard the rustling of paper and then heard accused calling "Missouri, Hey, Missouri". "Then he started rapping on the berth". She made no response. The noise stopped and she lay on her berth with her back to the car window when "all of a sudden he appeared * * * at the side of the berth; where he came from I don't know" (R. 22). He had one knee on the edge of the berth and both hands on the sides in a kneeling position facing her (R. 23). She was terrified and screamed. He told her to be quiet and disappeared. She continued to scream and continually pressed the porter's bell. People gathered at her berth. She could not tell how accused was dressed nor whether the curtains of her berth were open at the time the accused appeared (R. 23, 34). She had buttoned the curtains upon retiring (R. 25, 224). Miss Davis stated that she did not at any time expressly or impliedly invite the accused to enter her berth. She is unmarried, does not smoke or drink, and did not "dream" the facts concerning the accused's attempt to get into her berth (R. 24, 28, 224).

Later when someone told the accused to come out of his berth she heard him say that he had not been out of it and that he was being framed and insulted (R. 24).

Ross Simms, Specialist Third Class, Shore Patrolman, USN, was occupying upper berth No. 1 of the same car adjacent to that occupied by the accused. He retired about 1 a.m. (R. 50), removed his trousers and shoes and lay down. He then started to button his curtain. He had difficulty with the bottom button so he just pulled it to and lay down facing the curtain. He noticed that the bottom of his curtain was open so he pulled it together and again tried without success to fasten it. Again the curtain

pulled open. Simms stated that he looked to see who might be "messing" with it. At this time he saw the form of someone inside the curtains of Upper 3 go down to Lower 3. When the form got to the floor the bulge in the curtains disappeared and then he heard a lady scream. "Help. Get out of my berth" and heard the porter's bell ring continuously. Simms stated that he "hit the Deck" and, at the same time, he saw a form dressed in shorts and undershirt "back out" of Lower 3 into the aisle and jump into Upper 3 (R. 40-41, 49-50). Simms identified the accused as that person (R. 44, 45).

At the other end of the car in berth 12 was a military policeman. Simms went to his berth and asked for his automatic. The military policeman got out of his berth and followed Simms to No. 3. There they were joined by the steward and several passengers. The porter was also there (R. 53). The accused refused to come down out of his berth until a captain of military police was found on the train and ordered him to do so (R. 41, 62, 75). The accused emphatically denied having been out of his berth (R. 46). When Simms came from his berth the curtains of Upper 3 were open and those of Lower 3 were partially open (R. 52). The accused was then taken to the men's wash room and detained there until the train arrived at Cleveland where he was taken off by railroad police. He was not permitted to return to his berth, but his baggage and the two envelopes were handed to him on the station platform at Cleveland (R. 42, 55, 64, 76-77, 91, 92).

The dining car steward, Mr. William Jeffrey, was in car 379 and upon hearing the screams looked out through the curtains of his berth (apparently Upper 2) and saw someone in shorts climbing into Upper 3. He also saw Simms'head "sticking out" of the adjoining berth (R. 62). All that Mr. Jeffrey could see of the figure climbing into the berth was from the waist down (R. 70).

4. For the defense Edward E. Davis, the colored pullman car porter of car 379 testified that he assisted the accused as he boarded the train at Rome to Upper 3. A young lady occupied Lower 3. Shortly after the train left Rome he started to make up the berths of that car and completed this task before 9:30 (R. 106-108). Before doing so he told the accused about the presence of a club car attached to the train and saw accused leave for the club car. He did not see him again until 1:30 a.m. when accused returned and entered the smoking room of car 379 to get his pajamas from his bag which was located there. Witness stated that he then procured the ladder for the accused and that he saw accused get into his berth and pull the curtains together (R. 109). Thereafter shoreman patrol Simms came into the smoking room and, after washing up left for his berth. In a few minutes the bell rang and he (witness) heard a scream. As the bell indicator showed that the call was from No. 3, the porter went to that part of the car as fast as he could (R. 110). When he arrived there the young

lady in Lower 3 was crying and she said that a man was trying to get into her berth. Her curtains were unbuttoned all of the way down. The accused's curtains gaped "a little". The shore patrolman and the steward were standing in the aisle yelling, "I saw him, he was trying to get into the lady's berth". The porter said, "you saw who?" One said, "I saw the man in that upper". The steward said, "Let's drag him out". Considerable discussion followed during which the accused refused to come down out of the berth until another officer was found who ordered him to do so whereupon accused came down and went into the smoking room (R. 111-112). The porter estimated that the shore patrolman went to his berth about ten minutes after the accused had gone to his (R. 113). Both the shore patrolman and the steward were in the aisle of the car when the porter answered the bell (R. 113).

The porter went into a lengthy explanation of the mechanics of fastening and hanging curtains in front of the berths and gave a demonstration. In his opinion it would be impossible for one in an upper berth to enter the berth below if the curtains are buttoned and one cannot from an upper unfasten the buttons of the curtains of the lower (R. 114-116, 123, 140).

At the time the porter made up Upper 3 he saw no envelopes or folders lying on the seat. He did not see what the accused did with the envelopes he had with him when he boarded the train (R. 117-118). When the accused was being taken off of the train witness saw the envelopes in accused's berth and delivered them to the accused on the station platform with his other belongings (R. 118).

Mrs. Gladys Reese, occupant of Lower 4, testified by deposition that on the occasion in question she observed a girl and a negro second lieutenant occupying Section 3 directly opposite her berth. Mrs. Reese stated that she retired as soon as her berth was made up which was about 8:30. At that time the accused was seated across the aisle. About 2:00 a.m. she arose and went to the ladies wash room and when she returned about ten minutes later she saw the accused standing in the aisle of the car dressed in his underwear. He appeared to be looking at his berth or the lower one. He stood there for three or four minutes and then pulled himself into the upper berth and drew the curtains. Mrs. Reese went to her berth and sat upon the edge of it preparatory to getting in when she heard the girl scream. She saw no one at the time. Soon thereafter every one was in the aisle. Mrs. Reese leaned over and pulled aside the curtains of Lower 3 and asked the girl what was the matter. She replied that someone had tried to enter her berth. While she was talking to the girl the shore patrolman got down from his berth and pulled the curtains apart of Upper 3 and said he had seen the accused "down there". Everybody had something to say and one threatened to shoot the accused. The accused "acted dumb" and asked what was the matter. Prior to the scream she did not hear any knocking or tapping on the berth nor did she hear any talking. She did not see the accused enter or attempt to enter the young lady's berth. The witness was positive that the girl did not scream until after the

accused had gotten into his own berth.

The accused having been advised of his rights testified under oath, substantially as follows: He had been a member of the 436th Aviation Squadron since 11 April 1944. On 30 June 1944 he received his instructions regarding his duties as advance representative of his organization at an undisclosed port of embarkation and the two envelopes containing various documents. He was told of the importance of his mission, of arriving on time, of carrying out the instructions, and that he "would have to be careful with the papers" (R. 129). At the station the envelopes were delivered to him by the base executive officer who showed the accused his Special Orders and placed them in one of the envelopes. At that time it was again impressed upon him to be careful with the papers. "They suggested that whenever I had to move about the car to be careful with the papers. I suggested that I would do more than that, that I would keep them in my possession at all times" (R. 131). He was again cautioned that the papers were confidential.

After he had boarded the train he went to his berth section and found there a young lady who had been assigned the lower berth of that section. A conversation ensued regarding difficulties of shopping, her hat, Chicago, and the scenery, in which she was the aggressor. He denied that he said that she was "cute" or made any remark about being in her bedroom (R. 132-134). After a while he went to the car's smoking room and then to the club car leaving the envelopes containing all of the papers in the corner of the seat with his suit bag extending down over them (R. 134). He remained in the club car until after midnight during which time he had two drinks. Upon returning to his own car he went into the smoking room where he saw the porter and the steward. He could not definitely state how long in point of time he was gone from his seat but he left it between 8 and 10 o'clock and returned after midnight. He got his pajamas out of his bag, which was in the smoking room and climbed into his berth - No. 3 Upper - by means of the ladder which was held by the porter. He then pulled the curtains to without buttoning them and removed all of his clothing but his underwear consisting of a white shirt and white shorts (R. 136-138, 149). He saw that his envelopes were in the berth. Because of the heat he did not put the pajamas on but got under the covers clad in his underwear and fell asleep (R. 138).

Later he was awakened by someone pushing him on the shoulder and someone saying "Okay wake up". He was a bit "foggy" and asked what it was all about. He was told that he would soon find out. There were several people outside of his berth including the shore patrolman. He denied that he called "hey, Missouri" or "Missouri", or that he tapped in any way, or that he at any time attempted to enter Lower 3, or that he ever got out of his berth after he first climbed into it (R. 139, 145). He admitted that he refused to get out of the berth when told to do so until he was satisfied of the authority of the person giving the order. Upon the order of the captain

of military police he dressed and accompanied him to the smoking room. As he started for the smoking room he asked if he could go to his berth and get something. He was not permitted to do so. He was kept in the smoking room and not permitted again to return to his berth. At Cleveland he was taken off the train by police against his protest until he could procure his belongings. As a result, when he was on the station platform his belongings were brought to him, including the envelopes (R. 141-142).

Upon cross-examination he stated that he did not hear any scream or any noise before he was awakened by someone shaking his shoulder, nor was he out of his berth at any time after he had retired until after he was awakened. He denied that he had been in any part of the car in his underwear except in his berth. No one else got into his berth (R. 145, 147).

5. In rebuttal the prosecution called as a witness Mr. Theodore R. Ruth who had been in the "railroad business" for twenty-six years. Mr. Ruth testified that he was familiar with pullman cars and that he had located the same pullman car, the "McAlada", that was occupied by the accused on the night of the incident now under consideration. Witness stated that he had just ridden in that car from Syracuse to Utica, New York with an Army officer, Lieutenant W. J. Banyon and a sergeant. For the purpose of making certain observations, he had had upper and lower 3 made up and all of the curtains fully buttoned with Lieutenant Banyon inside of the upper. Within five minutes (R. 170) the lieutenant was able to unbutton part of the curtains and get down from the upper into the lower berth. From the outside one could not see the lieutenant but could only see the outline of a form going down from one berth to the other. This was visible to one occupying Upper 1 (R. 161-162). He explained the manner in which this feat was accomplished to the court by the use of photographs and diagrams (R. 163-170). Mr. Ruth was corroborated by Lieutenant W. J. Banyon and Sergeant R. Wisner (R. 183-184, 193-199). Photographs were taken while the lieutenant was climbing down through the curtains and admitted in evidence (Pros. Exs. 2 to 13).

6. The accused has been found guilty of (1) conduct unbecoming an officer and a gentleman and of disorderly conduct to the discredit of the service by "attempting to enter into the Pullman berth" of a female not his wife, in violation respectively of Articles of War 95 and 96, and (2) failing to insure that appropriate security precautions were taken in the handling of confidential documents in his possession by permitting unauthorized persons to handle them and failing to retain them in his possession at all times, contrary to Army Regulations and in violation of Article of War 96.

With reference to (1) the evidence for the prosecution and that for the defense present a clear issue of fact whether the accused did attempt to get into the lower berth of Miss Davis, or not. In support of the court's

finding of guilt Miss Davis positively identified the accused as the one who called out to her, rapped on the berth, and then appeared with one knee on the edge of her berth and with both hands on the sides in a kneeling position facing her. The shore patrolman, noticing the disturbance of the curtains, actually saw the form of a person go from Upper 3 to Lower 3 through the curtains, heard the scream "Help, get out of my berth" and then saw the accused back out of Lower 3 dressed in his shorts and jump back into Upper 3. The steward looked out of his berth in time to see the lower portion of a man disappearing into Upper 3 shortly after hearing the screams. The porter heard the screams, and answered the bell from No. 3. Upon arriving at No. 3, Miss Davis was crying and said that a man was trying to get into her berth. Mrs. Reese saw the accused in the aisle dressed only in his underwear. Evidence was introduced tending to show that a person could get from Upper 3 to Lower 3 by crawling through the curtains even though the curtains of the lower berth were buttoned. It was testified that this could be accomplished by reaching down from the upper and unbuttoning some of the buttons. On the part of the defense the accused flatly and unequivocally denied any guilt or participation in the alleged misconduct. He denied calling "Hey, Missouri" or "Missouri", or that he "tapped" in any way on the berth or that he at any time attempted to enter Lower 3, or that he emerged from his berth after he first climbed into it, until after the alleged occurrence when he was ordered to do so by the captain of military police. In all material respects the testimony of the accused is uncorroborated except for the negative testimony of Mrs. Reese and the porter, whereas the testimony of Miss Davis is substantially corroborated by the affirmative testimony of several witnesses who appear to be entirely disinterested. The accused appears to have had a fair and impartial trial. The court heard the testimony of the witnesses and observed their demeanor on the witness stand. In the opinion of the Board of Review the evidence fully warranted the court in finding accused guilty beyond a reasonable doubt of attempting to enter Miss Davis' berth, as alleged in violation of Articles of War 95 and 96. Certainly the conduct of accused was violative of both Articles of War. A conviction under both Article of War 95 and 96 is not illegal as placing accused twice in jeopardy for the same offense (JAG Bull. Mar. 1943, p. 96, par. (44)).

With reference to (2) there was no dispute as to the facts. The accused frankly admitted that, notwithstanding his instructions regarding the care to be taken of the papers entrusted to his care and his promise to keep them with him at all times, he left them on the seat of a public train for at least two hours. He must have known that the seat was to be converted into berths which would necessitate the removal of the papers by someone unauthorized to handle them. He was fortunate to find them in his berth upon his return. Whether anyone had examined or looked at them during this period of time no one knows. It was easily possible. The character of the papers was shown and admitted to be "confidential". The negligent manner in which they were left by the accused clearly violated Army Regulations 380-5, 27 (4) which provides that "It is the responsibility

of the commanding officer or equivalent official having custody of confidential documents to insure that appropriate security precautions are taken at all times". The findings of the court are therefore amply and legally supported by the evidence introduced at the trial.

7. War Department records show the accused to be 31 years of age and born in Chicago, Illinois, 25 January 1913. He is married and without children. He was graduated from high school and in 1938 received a degree of Bachelor of Arts from Fisk University. For three years he was employed as an investigator for the Chicago Relief Administration, for six months by the Chicago Community Forum, and for one year by the United States Employment Service as an interviewer. He was inducted into the service 25 May 1942 and after attending the Air Corps Administration Officer Candidate School at Miami Beach, Florida, he was commissioned second lieutenant, Air Corps, 3 March 1943. He was ordered before the Reclassification Board, Air Service Command on the recommendation of the Commanding Officer, Anti-aircraft Base, Alpena AAB, Alpena, Michigan, where he was then stationed as the result of a series of minor derelictions of duty. On 31 March 1944 the Board concluded that he possessed value to the service and recommended that he be reassigned in grade. On 6 April 1944 he was reprimanded and a forfeiture of $75.00 was imposed upon him for the eight minor military offenses made the basis of the reclassification proceedings.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGK
CM 262534

1st Ind.

War Department, J.A.G.O., 16 OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Otha Morgan (O-575688), Air Corps.

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

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 637, 25 Nov 1944)

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

(83)

SPJGN
CM 262542

11 SEP 1944

UNITED STATES	89TH INFANTRY DIVISION
v.	Trial by G. C. M., convened at Camp Butner, North Carolina, 21 August 1944. Dismissal.
Captain WAYNE A. MYERS (0-1291504), 355th Infantry.	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain Wayne A. Myers, 355th Infantry, was at Durham, North Carolina, on or about 29 July 1944, in a public place, to wit, the Southern Tavern, drunk and disorderly while in uniform.

Specification 2: In that Captain Wayne A. Myers, 355th Infantry, did, at the Southern Tavern, Durham, North Carolina, on or about 29 July 1944, wrongfully strike Mrs. Catheryne Curl under the chin with his fist.

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

3. The evidence for the prosecution shows that the Southern Tavern, sometimes known as the Carolina Inn, is located on the Raleigh Highway about 4 miles from Durham, North Carolina. It is an ordinary tavern that is frequented by both civilians and military personnel,

officer and enlisted, for entertainment such as food, wine and beer, and dancing (R. 7-10, 11, 23). On 29 July 1944 at about 2200 o'clock there were about 150 people at the tavern (R. 25). Seated at a table in the rear of the tavern were Mrs. Catheryne Curl, her escort who was a civilian named Clyde Tilley, her brother who was an enlisted man named Lummie Williams, Graham Baugh who was also a civilian, Virginia Day, and Opal Teeman (R. 14, 28-29, 34, 46-48, 52-56). The accused, who had previously patronized the tavern, was also present and was attired in proper uniform with his insignia of rank appearing upon his collar (R. 12, 21, 26, 30).

During the evening the accused, who was uninvited by and unknown to the members of the party, approached Mrs. Curl's table in the absence of her escort and brother and engaged in an argument of an undisclosed nature with Graham Baugh (R. 28-29, 38-39, 40, 45, 48-50, 65). The argument was reported to Tilley and Williams upon their return to the table, and they determined to see the accused outside where in the meantime he, protesting and belligerent, had been escorted by tavern employees at the suggestion of the tavern owner, who advised him to leave in a taxicab before he got into trouble, as he, the tavern owner, intended to call the military police (R. 11, 13-21, 50, 66).

According to the testimony of several eye-witnesses, the accused was either drunk or highly intoxicated (R. 12-15, 18, 40, 44, 46, 70, 71, 82). When Tilley and Williams approached the accused outside, he had just completed "scuffling" with another soldier of undisclosed identity (R. 25, 32, 43, 46, 68). Tilley spoke to the accused about the occurrence at Mrs. Curl's table, and the accused spoke about her profanely, whereupon Tilley knocked the accused to the ground (R. 51, 57-59). The accused, upon regaining his feet, took several steps toward Mrs. Curl, who had not seen the first blow as she approached her brother and escort for the purpose of requesting them to return to their table, and suddenly, silently, and without reason, struck her with his fist under the chin (R. 14, 16-17, 20, 22-25, 32-34, 40-47, 68, 77, 82-85). The blow was a wild overhand swing, which momentarily stunned her and from which she would have fallen if a soldier standing nearby had not caught her (R. 26, 28, 33-34, 61, 70, 78-79). Tilley thereupon knocked the accused down several times without being struck by the accused who was attempting to strike back (R. 50-55). The fight lasted about five minutes and was witnessed by a large crowd milling around in great confusion (R. 25, 36, 67-69, 78). According to Mrs. Curl's testimony, the accused apologized for striking her and asked Tilley not to hit him again (R. 44, 51, 62). Tilley and Williams had also been drinking (R. 62, 73).

Two enlisted men, one of whom had prevented Williams from taking a "poke" at the accused and had caught Mrs. Curl after she had been hit, failed to hear any profane words of the accused and were unable to state who started the fight, but were agreed that Mrs. Curl had been struck by the accused (R. 67-75, 81-85). Two members of the military police who were making a routine patrol stopped, upon observing the crowd outside of the tavern, and were advised that the accused had struck a girl who was still crying (R. 86-87). They found the accused unsteady on his feet, obviously intoxicated but not drunk, and recalcitrant in leaving with them, as they had to drag him to the car (R. 88). On the way into town, the accused voluntarily stated that he had struck the girl because she had said that his outfit was "chicken-shit" which remark he didn't take from anyone (R. 88). The Officer of the Day at the Military Police Station, where the accused was delivered, found his speech so incoherent that it could not be understood, his clothes disheveled and his gait staggering. The accused fell asleep at the office and was awakened with difficulty when he was assisted by a sergeant in staggering out (R. 90).

4. The evidence for the defense shows that the accused on 22 May 1943 had been commended for his service at Camp Swift, Texas (R. 91-92, Def. Ex. A). The accused's regimental adjutant testified to the accused's previous good character, his temperate use of intoxicants, his value to the service, and his prior record of freedom from disciplinary action. (R. 93-94).

The accused, after explanation of his rights as a witness, elected to remain silent (R. 95).

5. Specifications 1 and 2 respectively allege that on or about 29 July 1944, the accused was drunk and disorderly while in uniform in a public place, to wit, the Southern Tavern, Durham, North Carolina, and that on the same occasion he wrongfully struck Mrs. Catheryne Curl under the chin with his fist. "Being grossly drunk and conspicuously disorderly in a public place" is definitive of an offense that is violative of Article of War 95 (MCM, 1928, par. 15).

The evidence beyond a reasonable doubt establishes that on the occasion alleged the accused was grossly drunk and conspicuously disorderly at the Southern Tavern, a public place frequented by large numbers of civilians and military personnel. Numerous witnesses testified to his heavy intoxication, his argumentative conduct, and his ultimate expulsion from the tavern. Outside, he engaged in a "scuffle" with an unidentified soldier and before a large crowd became a participant in a drunken brawl, during which he struck a woman bystander under the chin with his fist and was himself knocked down several times by her escort before he was removed

from the scene by the military police and carried to the military police station, where he promptly lapsed into a drunken stupor. During the entire episode, he was in uniform and wearing the insignia of his rank. Such disgraceful conduct is clearly unbecoming an officer and a gentleman. His previous good conduct and reputation do not afford any defense and can be considered only in mitigation. The evidence, therefore, establishes his guilt of the offenses as alleged beyond a reasonable doubt and amply supports the findings of guilty of the Charge and its two Specifications.

6. The accused is about 36 years old. The War Department records show that he has had prior enlisted service from 2 January 1932 to 8 January 1935, 16 January 1935 to 15 January 1938 and 16 January 1938 to 15 January 1941 from each of which terms of enlistment he was honorably discharged without loss of time under Article of War 107 and with a character rating of excellent, that on 16 January 1941, he re-enlisted, serving as an enlisted man until 26 August 1942, when he was commissioned a second lieutenant upon completion of Officers Candidate School, that he has had active duty as an officer since the latter date, that he was promoted to first lieutenant on 16 December 1942 and that he was promoted to captain on 22 July 1943. He holds the Yangtze Service Medal for service in China in 1932. He attended high school for 2 years, is married and has two small children. His allotment for their support is $100 per month which has caused complaint by his wife. He received the commendation hereinabove mentioned.

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 mandatory upon conviction of a violation of Article of War 95.

Abra E. Lipscomb, Judge Advocate

Glenn S. Sykes, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGK
CM 262542

1st Ind.

War Department, J.A.G.O., 26 SEP 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 Wayne A. Myers (0-1291504), 355th 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 thereof. I recommend that the sentence be confirmed but suspended during good behavior.

3. Consideration has been given to a letter dated 15 September 1944, from the accused, requesting clemency.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action 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. ltr. for sig. S/W.
Incl 3 - Form of action.
Incl 4 - Ltr. fr. accused dated 15 September 1944.

(Sentence confirmed but execution suspended. G.C.M.O. 590, 25 Oct 1944)

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

SPJGV
CM 262592

13 SEP 1944

UNITED STATES v. Private JOHN C. SWEAT (34967268), Company A, 1st Battalion, Special Training Unit, Service Command Unit 3403.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Shelby, Mississippi, 21 August 1944. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
TAPPY, HARWOOD and TREVETHAN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John C. Sweat, Company A, First Battalion, Special Training Unit, Service Command Unit 3403, Camp Shelby, Mississippi, did, at Camp Shelby, Mississippi, on or about 1 August 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Iva Lee Childers.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the

sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Competent evidence offered by the prosecution shows that on 1 August 1944 and for some nine months prior thereto Mrs. Iva Lee Childers had been employed as a clerk in Post Exchange No. 3, Camp Shelby, Mississippi. She was familiarly known as "Mom" in the Post Exchange where she worked at the cigarette counter. She was a widow 39 years of age and the mother of six children. Her oldest son, age 21, was serving in the Army and three minor children, aged 4, 8 and 15 years, were living with her. She had known accused by sight for about two months prior to 1 August 1944 having seen him visit the Post Exchange on occasions but she had never been with him socially (R. 14, 18, 19). Accused visited the Post Exchange sometime between 8:30 and 9 p.m. on 1 August 1944. At 10:10 p.m. that same evening accused dressed in khaki loitered in front of the Post Exchange chatting with two other soldiers (R. 9, 10, 12, 13, 20, 21, 67). Mrs. Childers left the building about that time having finished her work for the day and as she crossed the street in front of the Post Exchange on her way to the bus station about a half mile away accused overtook her, grasped her arm and said, "I'm going to walk to the bus station with you, Mom" (R. 14, 21, 43). Mrs. Childers told accused to unhand her and indicated at first that she did not wish him to accompany her. Accused insisted there was no harm in escorting her and she apparently relented stating that he could do so if he behaved himself (R. 21, 22, 38).

The usual route from Post Exchange No. 3 to the bus station passed Camp Headquarters, crossed the railroad tracks somewhere in the vicinity of Military Police Headquarters and continued down a highway to the station. As accused and Mrs. Childers trod this route, accused conversed about his home in South Carolina and Mrs. Childers talked about her children particularly her son in the Army (R. 15, 21, 22). They walked for about ten minutes, crossing the tracks and continuing down the highway toward a large traffic road sign. Just off the shoulders of this portion of the highway there was a gulley or slope leading down to lower ground. As they passed the road sign accused seated himself by the roadside and invited Mrs. Childers to join him but she refused to do so and continued on toward the bus terminal. Accused then jumped up, caught her arm and grasped her hair. Mrs. Childers struggled and tried to wrench herself free (R. 22, 23; Pros. Ex. B). As she tussled with accused she attempted to extract a nail file from her purse but could only lay hands on a pencil which accused broke in two as she tried to jab him with it. She screamed and accused struck her a stunning blow over the left ear. As she screamed the second time accused dealt her a blow over the left eye causing it to become bloodshot and bruised. She struck accused with her left hand disjointing the middle finger of her hand. Accused then placed his hand

over her mouth, pushed her into the gulley where she fell to her hands and knees and, grasping her by the hair and the collar of her dress, he began to drag her across the ground. She screamed twice and received two more blows from accused which knocked two teeth from her jaw and caused blood to flow from her nose and mouth. Accused told her if she screamed again he would kill her and then he dragged her to the shadow of a small pine tree (R. 24, 26, 27, 42). There accused ripped one leg of her underdrawers, laid on top of her, pressed his hand against her throat and mouth making it difficult for her to breathe, inserted his penis in her vagina and experienced an emission within three or four minutes thereafter (R. 24, 25, 27-29, 39).

During the act of intercourse, Mrs. Childers was partially stunned from the blows she had received (R. 26). Although she begged accused to desist, she did not resist during the intercourse itself as she stated, "he threatened my life. He told me if I screamed or hollered again he would kill me and whenever you tussle you give out sometimes. He is a much younger man than I am a woman" (R. 25, 40). During intercourse accused said to Mrs. Childers that if she "did that at first he wouldn't have had to bash my face in". After completing the act accused said, "I guess you will tell this" to which Mrs. Childers replied, "You're mighty right I'm going to tell it". Accused stated he didn't "give a good god damn because he was shipping out the next day" (R. 28, 30). He then hurried off in the direction of Camp Headquarters.

Mrs. Childers arose from the ground, searched for and found her purse, clambered up the bank and started toward the bus station (R. 30, 41). She had proceeded but a short distance when she met Private Harold L. Blair. He had been waiting for a bus at the bus station and had thought he heard a woman cry for help. A few minutes later he heard the cry again and proceeded down the road to investigate. He came upon Mrs. Childers walking down the gravel road which led from the highway into the bus station (R. 30, 45). Private Blair asked what had happened and Mrs. Childers replied that a soldier had struck her in the mouth. He observed that her chin was bleeding and that she was dabbing it with a handkerchief soaked with blood. He escorted her to Private First Class Albert Aiello, a member of the military police on duty at the bus station. It was then about 10:30 p.m. (R. 31, 44, 48). Private Aiello had heard a scream about ten minutes before but assumed it was some girls walking to the bus station from the Post Exchange and "having fun in their own way" so he made no investigation at the time. Mrs. Childers told Private

Aiello that a soldier walking with her had struck her and knocked her to the ground. He observed that her clothes were dirty and wrinkled, her legs were dirty and she was bleeding from the mouth and above her eyes (R. 48-50). Beatrice Ladner, a clerk at Post Exchange No. 3, saw Mrs. Childers enter the bus station and noticed that her mouth was bleeding and that there was dirt on her clothes and grass in her hair. She wiped Mrs. Childers' face and brushed the dirt from her clothing (R. 31, 32, 68, 69).

Private Aiello made a telephone call and soon Sergeant Alfred T. Mahan, another member of the military police, arrived at the bus station and transported Mrs. Childers to Military Police Headquarters (R. 31, 51, 52). He observed that she was in an excited condition, that she was bleeding about the mouth and had a welt over one eye, that her legs and clothing were dirty, that she had "marks and red impressions" on her neck, and that two teeth had recently been knocked from her jaw (R. 32, 53). About 1:30 a.m. the next morning Sergeant Mahan examined the scene of the assault and discovered that the dirt and grass on the down slope of the gulley had been scuffed and dug up in various places (R. 56).

Mrs. Childers was taken to the station hospital where she arrived about 11:45 p.m. and was examined by Major Shelby N. Lever, Medical Corps, who found her calm and collected at that time (R. 32, 52, 58, 64). He observed bloodstains on the bosom of her dress, a tear in the right leg of her underdrawers the crotch of which was saturated with a colorless fluid he believed to be seminal fluid from a male genital organ. He found no abrasions on her external genitalia but there was about 1 cc of a grayish fluid present just inside the hymeneal ring of her vagina and laboratory analysis disclosed it to be male spermatozoa which had been deposited there within the preceding two or three hours (R. 59, 60, 64). An examination of the rest of her body revealed that two teeth had been forcibly removed from her lower jaw within the past two hours. She had lumps over her left eye, over one ear, on the scalp and in the temporal region near the scalp. The knuckle of the middle finger of one hand which he believed to be the right hand was swollen and tender. There were dirt and scratches on both thighs, both elbows and both knees. He found nothing to indicate she had been consuming intoxicants. Considering Mrs. Childers' physical attributes it was Major Lever's opinion that she possessed sufficient strength to resist an attack upon her only for a minute or two before she would tire (R. 61-63). As a matter of fact Mrs. Childers suffered from low blood pressure which caused her to experience fainting spells and periods of weakness (R. 33).

4. The defense introduced evidence to show that on three different occasions while on military police duty at the bus station Private Aiello

had seen Mrs. Childers in the company of soldiers. Twice she had been in the company of two soldiers and once he had observed her with a single soldier. However, she had not misconducted herself on any of these occasions (R. 89). Although Private Roy Huskey had never had a date with Mrs. Childers he had heard it said that "she would go out with a man" (R. 88).

The defense also introduced testimony to demonstrate that Mrs. Childers had previously been intimate with two soldiers. Private Henry S. Davidson who had been friendly with accused for some two weeks prior to this trial while they were both confined in the stockade and who had absented himself without leave on two or three occasions testified that about 10:30 p.m. on a Tuesday night approximately a month and a half prior to the time of trial he had met Mrs. Childers at Post Exchange No. 3 and walked to a bus station with her (R. 70, 71, 77). The station was located on Second Avenue, a main thoroughfare in Camp Shelby, across the street from the post office and from Company A, First Battalion (R. 74). It was a three sided building, each side about eight feet long, with a bench running around the three walls. The open front of the building faced the avenue and was about six feet from the sidewalk (R. 74-76). Davidson testified he and Mrs. Childers had sexual relations, with her consent, on the bench in the station about 10:30 p.m. They spent approximately twenty minutes so engaged with Mrs. Childers stretched prone on the bench and Davidson on top of her (R. 71, 72, 75, 76). After completion of the act Mrs. Childers inquired how much money Davidson had and he gave her 50 cents (R. 72).

Davidson never told accused he had such relations with Mrs. Childers but did tell Private Joe Powers who was also an inmate of the stockade at the time of this trial (R. 78, 80). Powers who had been friendly with accused both in the stockade and prior thereto also testified to having relations with Mrs. Childers with her consent (R. 80, 81, 85). He stated that between 7:30 and 8 p.m. on 3 or 4 January 1944, just before the Post Exchange closed for the day, he met Mrs. Childers at Post Exchange No. 2 and for an hour they walked a distance of some three miles to Theater No. 2 (R. 80, 83, 86). On the way he offered her a pint of whiskey if she would engage in sexual relations with him and she agreed to the bargain (R. 79, 84). He stated he had intercourse with her for about five minutes on the ground close to the chimney located in the rear of Theater No. 2 and gave her a half pint of whiskey after completion of the act (R. 79, 82). This theater was near the area of Company A, there was "some light" where the intercourse took place and the lights of automobiles entering the camp through Gate 4 would flash on the back of the theater building (R. 79, 85). Powers had told accused in the stockade of these events in the presence of Davidson but the latter did not at the time reveal to accused his similar experience (R. 81).

After his rights as a witness had been fully explained to him accused elected to take the stand and testify under oath. He testified that earlier on the evening of 1 August 1944 he visited the Post Exchange to obtain some articles for the company cooks and while there Mrs. Childers called to him, asked him to accompany her to the bus station that night and he agreed (R. 91, 93). He forgot his appointment but Mrs. Childers later passed by the mess hall of Company A, called to him and he joined her (R. 91, 92). On the way to the bus station he asked her to engage in sexual intercourse with him but she laughed without replying. When he asked her the second time she consented (R. 93). Thereafter they had relations just off the highway somewhere between the railroad tracks and the bus station. She did not remove her underdrawers but pulled one leg of them aside. She refused to let accused use a "rubber", made no outcry and offered no resistance (R. 92, 95, 96). When accused had finished she asked him for $2 and when he told her that she would have to wait until payday, the following Wednesday, she began to curse him. Accused then struck her once or twice but not on the mouth and returned to his company area (R. 92, 94). Accused denied he had ever signed a statement concerning his actions on this evening or that he had ever told the investigating officer that he had not raped Mrs. Childers because he had been in bed at the time (R. 97, 98).

5. In rebuttal of the testimony presented by the defense, the prosecution introduced evidence to demonstrate that Mrs. Childers had visited Camp Shelby in June 1943 to see her brother who was in the station hospital and that she had not returned to the camp again until 17 February 1944 when she obtained employment at Post Exchange No. 3. She had never worked in Post Exchange No. 2 or any other except Post Exchange No. 3 She had never seen Powers or Davidson before and had never been in their company (R. 100, 101).

Major James W. Keith, the investigating officer, testified he visited accused at the camp stockade, read Article of War 24 to him, explained his rights thereunder and made no promises or threats. Thereafter accused voluntarily made a sworn statement (R. 102, 103). The statement was admitted in evidence over objection of the defense. In it accused stated that he went to Post Exchange No. 3 about 7 p.m. on the night in question, left in about five minutes and returned to the orderly room of Company A which he then scrubbed and mopped. Thereafter he drilled in the company street and "killed time" with some soldiers for about an hour and a half, then bathed and retired without ever returning to the Post Exchange (R. 103; Pros. Ex. C). Major Keith asked accused if he had been with Mrs. Childers on this night and

accused stated he had not (R. 104).

6. The defense objected to the introduction of accused's statement on the ground it was not competent evidence as to the facts stated in it under paragraph 117, Manual for Courts-Martial, 1928, inasmuch as it was merely a statement accompanying the investigating officer's report and therefore hearsay. However, that paragraph of the Manual clearly indicates that this rule does not prohibit the use of statements obtained by an investigating officer to impeach any witness including an accused (MCM, 1928, par. 117). Proper foundation for impeachment of accused was laid by the prosecution when on cross-examination accused was asked if he had previously made a statement and if he had denied he raped Mrs. Childers as alleged because he was in bed at the time (R. 97, 98; par. 5 hereof). The statement given by accused to the investigating officer was inconsistent with the testimony he gave in reply to these questions and was properly admitted to impeach him as a witness (MCM, 1928, par. 124b).

The prosecution's evidence fully establishes that to the best of her ability Mrs. Childers resisted accused's efforts to assault her, receiving brutal blows from accused for her efforts one of which knocked two teeth from her jaw. Her screams were heard by other persons and her appearance immediately after the assault corroborated fully her story concerning the vicious treatment she had received from accused. No consent by her to the intercourse can be inferred from the fact that her resistance failed to continue during commission of the act itself. She was then exhausted from her tussle with accused, he held her forcibly under his control and indicated he would kill her if she continued to resist. His previous brutal conduct had been sufficient to convince any reasonable person that he was capable of executing this threat.

The evidence offered by the defense is unimpressive. Accused's testimony was completely at variance with the statement he had previously given the investigating officer. His testimony that Mrs. Childers called for him at the mess hall is disputed by the testimony of disinterested witnesses who saw him accost her as she left the Post Exchange. His testimony that he did not strike her in the mouth is hardly credible in view of her loss of two teeth from a blow. The testimony of two defense witnesses, Davidson and Powers, was incredible, but even if true other evidence in the record demonstrates beyond a reasonable doubt that Mrs. Childers did not consent to sexual relations with accused at the time and place alleged. The evidence fully sustains the findings of guilty of the Charge and its Specification.

7. The accused is about 20 years of age. He was inducted into the military service on 31 March 1944 for the duration of the war plus six months.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 22-2801, District of Columbia Code.

Thomas H. Tally, Judge Advocate.

Robert B. Harwood, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

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

SPJGQ
CM 262642

13 SEP 1944

UNITED STATES	13TH AIRBORNE DIVISION
v.	Trial by G.C.M., convened at Camp Mackall, North Carolina, 16 August 1944. Dismissal, total forfeitures and confinement for twenty (20) years.
Second Lieutenant JACK A. KENNA (01303350), Company "C", 515th Parachute Infantry.	

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant Jack A. Kenna, Company "C", 515th Parachute Infantry, did, without proper leave, absent himself from his organization and station at Camp Mackall, North Carolina, from about 13 April 1944 to about 20 April 1944.

Specification 2: In that Second Lieutenant Jack A. Kenna, Company "C", 515th Parachute Infantry, did, without proper leave, absent himself from his organization and station at Camp Mackall, North Carolina, from about 13 May 1944 to about 22 June 1944.

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

Specification: In that Second Lieutenant Jack A. Kenna, Company "C", 515th Parachute Infantry, having received a lawful order from Colonel Julian B. Lindsey, 515th Parachute Infantry, to remain in his company area for the purpose of maintaining quiet and order, the said Colonel Julian B Lindsey being in the execution of his office, did, at Camp Mackall, North Carolina, on or about 26 April 1944 fail to obey the same.

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

Specification 1: In that 2d Lt Jack A. Kenna, Company C., 515th Parachute Infantry, did, at Chanute Field, Illinois, on or about 20 June 1944 with intent to defraud, wrongfully and unlawfully make and utter to the Chanute Field Exchange, Chanute Field, Illinois, a certain check in words and figures as follows, to wit:

CUSTOMER'S DRAFT
Chanute Field, Ill., June 20 1944

Pay to the order of Chanute Field Exchange $50 00

——— Fifty and no/00 ——————————— DOLLARS
with current rate of exchange
Value received and charge to the account of

To Bank of Pinehurst
Pinehurst N. C.

Jack A. Kenna
2d Lt Inf 0-1303350
Camp Mackall, N. C.

Endorsement on back of check: Pay to the order of First National Bank 70-754 Rantoul, Illinois 70-754 For deposit only Chanute Field Exchange.

and by means thereof did fraudulently obtain from the Chanute Field Exchange cash in the amount of Fifty dollars lawful money of the United States, the said 2d Lt Jack A. Kenna then well knowing that he did not have sufficient funds in the said Bank of Pinehurst for the payment of said check.

Specification 2: In that 2d Lt Jack A. Kenna, Company C., 515th Parachute Infantry, did, at Chanute Field, Illinois, on or about 20 June 1944 with intent to defraud, wrongfully and unlawfully make and utter to the Chanute Field Exchange, Chanute Field Illinois, a certain check in words and figures as follows, to wit:

CUSTOMER'S DRAFT
Chanute Field, Ill., 20 June 1944

Pay to the order of Chanute Field Exchange $50 00

Fifty and no/00 ——————————— DOLLARS
with current rate of exchange
Value received and charge to the account of

To Bank of Pinehurst

Pinehurst N. C.
5M--2-44

Jack A. Kenna
2d Lt Inf O-1303350
515th Prcht Inf Camp Mackall, N.C.

Endorsed on back of check: Pay to the order of First National Bank 70-754 Rantoul, Illinois 70-754 For deposit only Chanute Field Exchange

and by means thereof did fraudulently obtain from the Chanute Field Exchange cash in the amount of Fifty Dollars, lawful money of the United States, the said 2d Lt Jack A. Kenna then well knowing that he did not have sufficient funds in the said Bank of Pinehurst for the payment of said check.

ADDITIONAL CHARGE II: Nolle prosequi by direction of appointing authority.

Specification: Nolle prosequi by direction of appointing authority.

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

Specification: In that Second Lieutenant Jack A. Kenna, Company "C", 515th Parachute Infantry, having been duly placed in confinement in the Post Stockade, Camp Mackall, North Carolina, on or about 29 June 1944, did, at Camp Mackall, North Carolina, on or about 4 August 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Second Lieutenant Jack A. Kenna, Company "C", 515th Parachute Infantry, did, at Camp Mackall, North Carolina, on or about 4 August 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private First Class Bradfield Collins, United States currency of the value of about $15.00, the property of said Private First Class Bradfield Collins.

Specification 2: In that Second Lieutenant Jack A. Kenna, Company "C", 515th Parachute Infantry, did, at Camp Mackall, North Carolina, on or about 4 August 1944, with intent to do him bodily harm, commit an assault upon one Private First Class Bradfield Collins, by wilfully and feloniously beating him on the body with a dangerous weapon, to wit, a bludgeon.

Specification 3: In that Second Lieutenant Jack A. Kenna, Company "C", 515th Parachute Infantry, did, at Camp Mackall, North Carolina, on or about 4 August 1944, with intent to do him bodily harm, commit an assault upon Private Joseph F. Murphy by shooting at him with a dangerous weapon, to wit, a U. S. Rifle - M-1 Garand.

He pleaded not guilty to and was found guilty of all of the Charges and Specifications. No evidence was introduced of any previous conviction. 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 30 years. The reviewing authority approved of only so much of the findings of guilty of the Specification of Additional Charge III and of Additional Charge III as involves a finding that the accused did at the time and place alleged attempt to escape from confinement in violation of Article of War 96, approved the sentence, reduced the period of confinement to 20 years, and forwarded the record of trial for action under Article of War 48.

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

The accused during the occurrences complained of was in the military service of the United States, being a second lieutenant on duty with the 515th Parachute Infantry stationed at Camp Mackall, North Carolina (R. 14, 20; Ex. 4).

a. Charge I and its Specifications. Absence without leave.

On 10 April 1944 accused having been transferred from Fort Benning, Georgia, to Camp Mackall, North Carolina, and directed to depart on 12 April 1944 (Ex. 4) telegraphed the Commanding Officer at Camp Mackall and requested a five-day delay enroute to accompany his pregnant wife to her home (Ex. 3). This request was refused and accused was directed to report immediately (R. 15). Accused without authority failed to report until 21 April 1944 (R. 16).

On 13 May 1944 accused absented himself without leave from his organization and station (R. 21, 23, 26; Ex. 7). His absence was not officially reported in the Morning Report until 16 May 1944 through an oversight (R. 22, 25; Ex. 7), but searches were made for him on 13 May 1944, and he was not found (R. 22, 25, 26). His absence continued until he was apprehended by the military police in Champaign, Illinois, on 22 June 1944 (R. 29-31; Ex. 9, 10).

b. Charge II and its Specification. Failure to obey.

On 26 April 1944 a Regimental Memorandum was issued to all officers of the regiment, of which accused was one, ordering all officers of the regiment to remain in their respective company areas between 1800 and

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NAVY DEPARTMENT

2400 that evening for the purpose of maintaining order and quiet among the troops (R. 18; Ex. 6). This order was transmitted personally to the accused by his company commander (R.21). About 1900 accused was summoned to see the Regimental Adjutant and upon completion of the interview was told to return to his company area (R. 18). From that time until 2400 he could not be found in the company area (R. 21, 23). He voluntarily admitted in writing that during the restricted period he left the company area on two occasions without authority (R. 28; Ex. 8).

c. Additional Charge I and its Specifications. Worthless checks.

During his period of absence without leave on 20 June 1944, accused visited the Post Exchange at Chanute Field, Illinois. At different times during that day, he presented two checks, each for $50.00 drawn on the Bank of Pinehurst, North Carolina, payable to the Exchange and signed by the accused as maker, and requested and received cash in exchange for them the total amount of $100. The checks were dishonored upon presentation for payment at the bank upon which they were drawn (R. 11, 12, 13; Ex. 1 and 2). The accused never had an account or money on deposit with that bank (R. 13).

d. Additional Charges III and IV and their Specifications. Escape, Robbery and Assault.

Accused was returned to Camp Mackall, North Carolina, on 29 June 1944, and was confined in the Post Stockade (R. 32; Ex. 10). In the afternoon of 4 August, while he and two other prisoners, named Ayers and Long, respectively, were being escorted under guard back to the Stockade, accused turned around, threw pepper in the guard's face, partly blinding him (R. 32-33). Accused disarmed the guard, handed his rifle to the prisoner, Ayers, and while Ayers covered the guard with the rifle (R. 74), accused struck the guard several times about the head with a blackjack, knocking him to the ground (R. 34, 36, 39). He searched the guard, taking a wallet containing $15 from his pocket (R. 34-36, 40, 41) and compelled him to remove his clothing (R. 35, 41). Accused and the prisoner, Ayers, then marched the guard and the other prisoner behind a building and commenced to change into the guard's uniform (R. 40).

This disturbance had not escaped notice (R. 45) and in a short time pursuit was organized. Accused and the prisoner, Ayers, fled, each running in a different direction (R. 50), accused carrying the rifle he had taken from the guard. The chase led through the area of the 467th Field Artillery Battalion. When the pursuers were only a few feet behind him, accused stopped, raised the rifle and said, "Don't take one more step or I'll shoot" (R. 50, 59). Private J. F. Murphy, one of the pursuers, was unable to check himself immediately in running after the accused and was within six to twelve feet of the accused when the accused fired the rifle from his shoulder (R. 51, 52, 60, 62, 63). His pursuers "froze"

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and accused lowered the rifle to his hip and said "Now I mean it," or words to that effect (R. 53, 60, 63). Murphy received scattered powder burns on his arm from the shot that was fired (R. 53, 56, 60). No one knew where the bullet went. Accused continued to run again after he saw that his pursuers had stopped as a result of his threat and firing of the gun. Accused was discovered hiding in a clothes locker in an officers' hutment (R. 46, 65), and upon being apprehended, he was searched and marched back to the stockade (R. 46, 47, 64). The guard's billfold was found on accused (R. 47). From the time pursuit was begun until apprehended, accused was not out of the sight of one or the other of his pursuers.

4. For the Defense.

The accused, having had his rights explained to him by the Law Member, elected to take the stand as a witness and to testify in his own defense. He testified in substance that he had been advised by doctors that, because of her pregnancy, it would be inadvisable for his wife to travel alone. When his request for a delay en route was denied, he decided he could take his wife to Indianapolis, Indiana, and be but a day late in reporting. However, inability to obtain train reservations and weather conditions which grounded the plane on which he was returning delayed him until 20 April (R. 69-70).

Accused denied that he took the guard's wallet. After disarming the guard and knocking him down, accused testified he patted his pockets to see if he had any more ammunition but took nothing therefrom (R. 70, 74). The prisoner, Ayers, who aided accused in the attempted escape, also testified that he watched accused closely and did not see him take anything from the guard's pockets (R. 67, 68).

Accused further testified that when he fired the rifle he had no intention of hitting anyone, or even of shooting. According to him, when the pursuers were 15 or 20 yards behind him, he stopped and "told them not to come any farther" (R. 70-71, 74). He denied any threat (R. 74). He testified that he was holding the rifle in one hand and as he started to turn about he stumbled and accidentally discharged the rifle (R. 71, 74-75). Accused stated he was and has been for three years an expert rifleman (R. 71). He admitted that the bludgeon he used on the guard consisted of four or five .45 calibre slugs laid out flat and wrapped around with tape (R. 73). He hit the guard on the head so as to give himself more time to get away (R. 74).

He also testified that he had contacted members of his family to get them to repay the worthless checks (R. 72).

He further testified that he was not absent on the 13th of May as alleged, and that he did not absent himself until about midnight on the 14th or the early hours of the 15th of May (R. 75, 76); that he was intoxicated at the time and remained intoxicated, "off and on", all the time he was gone (R. 77).

5. Accused was tried for and found guilty of the following offenses: (a) absence without leave from 13 April to 20 April 1944 (Ch I, Sp. 1); (b) failure to obey an order on 26 April 1944 (Ch. II, Sp. 2); (c) absence without leave from 13 May to 22 June 1944 (Ch. I, Sp. 2); (d) obtaining money by worthless checks in violation of A.W. 96 (Addit. Ch. I); (e) escape from confinement (Addit. Ch. III); (f) robbery (Addit. Ch. IV, Sp. 1); (g) assault with a dangerous weapon with intent to do bodily harm to Pfc. Collins, the guard (Addit. Chg. IV, Sp. 2); (h) assault with a dangerous weapon with intent to do bodily harm to Pvt. Murphy (Addit. Ch. IV, Sp. 3). The legal sufficiency of the record with respect to the offenses will be considered seriatim.

(a) The record is legally sufficient to sustain the finding of the Court that the accused was guilty of the offense alleged in Charge I and the Specification thereof. The proof shows that accused was ordered to report to the 515th Parachute Infantry, his request for a delay enroute was denied, and that accused did not arrive at Camp Mackall until the night of 20 April 1944. Under his orders he should have reported not later than 13 April 1944. Accused admitted the absence without leave and offered an explanation which the court was entitled to give such weight as it deemed proper.

(b) Charge II, under which accused is alleged to have failed to obey an order to remain in his company area, is proved by testimony that he was not seen in that area during the hours of restriction, and a sworn statement signed by accused admitting that he left the area twice during the evening. It sufficiently appeared that this statement was voluntarily made (R. 27-28) and therefore it was properly received in evidence (MCM, 1928, p. 116). The acts not being the flagrant type of disobedience contemplated by A.W. 64, this offense was properly charged under the 96th Article of War (Dig. Op. JAG, 1912-40, p. 285-286) (CM 124276, 1919).

(c) The record is legally sufficient to support the finding of the court that the accused was absent without leave from 13 May to 22 June 1944. It was contended by the defense that this absence did not commence until 15 May 1944. The evidence shows that searches were made for accused on the 13th and that he could not be found, but even if accused's version be accepted the variance between the Specification and the proof is immaterial.

(d) In Additional Charge I, accused is alleged to have fraudulently obtained money by means of two checks drawn upon a bank in which he knew he did not have sufficient funds. It was proved that he drew the checks upon the Bank of Pinehurst, that he never had an account in that bank, and that the checks were not honored. No satisfactory explanation was offered. Therefore, the record is sufficient to sustain the court's finding of guilty with respect to this charge.

(e) In Additional Charge III, accused is charged with a violation of the 69th Article of War by escaping from confinement. In the Manual for Courts-Martial, 1928, p. 154, it is stated,

> "Any completed casting off of the restraint of confinement before being set at liberty by proper authority is an escape from confinement . . . An escape is not complete until the prisoner has, momentarily, at least, freed himself from the restraint of his confinement; so, if the movement towards escape is opposed, or before it is completed an immediate pursuit ensues, there will be no escape until opposition is overcome or pursuit is shaken off."

The evidence shows that the assault upon the guard was observed by an officer who immediately ran to a nearby orderly room to summon aid (R. 45). There was a moment before chase was given when accused was neither observed nor actually pursued, but during this interval accused or the prisoner Ayers was engaged in changing into the uniform taken from the guard, rather than in moving toward making good their escape. Furthermore, the record indicates that the chase was so promptly commenced that it is believed the escape was never completed nor the restraint completely cast off. Accordingly, the evidence shows an attempt to escape but it does not show that the offense of escape was actually accomplished. Dig. Op. JAG, 1912-1940, p. 291 (CM 147506 (1921)). Hence the record is sufficient to sustain only so much of the finding of guilty of Additional Charge III as involves a finding of guilty of a violation of the 96th Article of War.

The reviewing authority has therefore with reference to this charge properly approved only so much of the findings of guilty as involves a finding that the accused at the time and place alleged did attempt to escape from confinement in violation of Article of War 96.

(f) The record is also sufficient to sustain the finding of the court that accused was guilty of robbery as alleged in Specification 1, Additional Charge IV. According to two witnesses, after accused had knocked the guard to the ground he searched his pockets and removed a wallet containing $15 from his pocket. The billfold was subsequently found in accused's clothing (R. 36). From these circumstances, an intent to steal may be presumed.

Robbery is the taking, with intent to steal, of the personal property of another from his person against his will by violence or intimidation (MCM par. 149, p. 170). The evidence convincingly showed that the accused took the guard's money from the guard's person by the use of violence and intimidation.

(g) In Specification 2, Additional Charge IV, accused is alleged to have assaulted Private First Class Bradfield Collins, the guard, with a dangerous weapon and with intent to do him bodily harm. The elements necessary for proof of this offense sufficiently appear in the record. After the guard had been disarmed and while he was being covered with his own rifle, accused struck him about the head five or six times with such violence that he was knocked to the ground. This brutal attack upon the helpless guard indicates a deliberate purpose of rendering him unable to give the alarm. The instrument used was a blackjack or bludgeon made of five or six .45 calibre cartridges laid side by side and covered with tape. The accused admitted that he struck the guard with the "bludgeon" with the intent to injure him sufficiently to prevent him from pursuing him. His intent to do bodily harm was clearly shown and admitted. The bludgeon or weapon used was made a dangerous weapon by the manner in which it was used.

(h) Specification 3 of Additional Charge IV alleges that the accused committed an assault upon Private Murphy with a dangerous weapon and with intent to do him bodily harm by shooting at him with a rifle. It was clearly shown that the accused, standing at bay with his pursuers intent upon capturing him, raised the loaded rifle in his hands and fired it at one of his pursuers. So close was his fire that the powder from the rifle shell burned Murphy on the arm. This act constituted an assault upon Murphy with a dangerous weapon—a loaded rifle being such per se. His intent to do bodily harm may be inferred from the act and the circumstances surrounding his attempt to escape and shake off his pursuers. The mere fact that one witness stated that accused, after he fired, said "Boy, I mean it" is not sufficient to raise a reasonable doubt as to his intent to shoot Murphy after having declared that he would shoot if anyone took a step nearer to him, and it was Murphy who took that step, and the bullet was so close that the powder struck him on the arm.

6. The War Department records show the accused to be 24 years of age, having been born 20 January 1920, in Indianapolis, Indiana. He is married, and his permanent residence is Indianapolis, Indiana. He graduated from high school in 1936, and subsequently attended the University of Florida two years. He was employed in various unskilled capacities for 3½ years until he was inducted 15 March 1941. He served as an enlisted man until 10 December 1942 when upon graduation from OCS he was commissioned a second lieutenant, Infantry. He volunteered for paratroop duty and served in various paratroop training regiments.

7. On 3 July 1944 he was given a psychiatric examination by his division neuropsychiatrist, whose diagnosis was "Psycopathic Personality, Emotional Instability, Inadequate Personality."

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. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon a conviction of a violation of Article of War 61, or Article of War 96 or Article of War 93.

William H. Lambrecht, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

SPJGA
CM 262642

1st Ind.

War Department, J.A.G.O., 29 SEP 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 Jack A. Kenna (0-1303350), Company "C", 515th Parachute Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings 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, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry the above recommendation into effect, 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. G.C.M.O. 659, 16 Dec 1944)

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

(109)

8 SEP 1944

SPJGH
CM 262693

UNITED STATES v. Private MARVIN H. SIKES (14032394), Company C, 742nd Amphibian Tank Battalion.	1st HEADQUARTERS AND HEADQUARTERS DETACHMENT SPECIAL TROOPS, ARMY GROUND FORCES Trial by G.C.M., convened at Fort Ord, California, 22 August 1944. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

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

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

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

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

Specification 1: In that Private Marvin H. Sikes, Company C, 742nd Light Tank Battalion, did without proper leave absent himself from his station at Camp Polk, Louisiana from about 12 January 1944 to about 22 February 1944.

Specification 2: In that Private Marvin H. Sikes, Company C, 742nd Light Tank Battalion, did without proper leave absent himself from his station at Fort Jay, New York from about 28 February 1944 to about 3 March 1944.

Specification 3: In that Private Marvin H. Sikes, Company C, 742nd Light Tank Battalion, did without proper leave absent himself from his station at Florence Army Air Field, South Carolina from about 8 March 1944 to about 19 June 1944.

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

Specification: In that Private Marvin H. Sikes, Company C, 742nd Light Tank Battalion, having been duly placed in confinement in the Base Guardhouse on or about 3 March 1944, did, at Florence Army Air Field, South Carolina on or about 8 March 1944 escape from said confinement before he was set at liberty by proper authority.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction of absence without leave for about two months, in violation of Article of War 61 was introduced. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for 10 years. The reviewing authority approved the sentence but reduced the period of confinement to 5 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of Charge I, of Specifications 2 and 3 thereunder, of Charge II and of the Specification thereunder and legally sufficient to support the sentence. The only question requiring consideration is whether the evidence is legally sufficient to support the finding of guilty of Specification 1, Charge I.

4. The evidence for the prosecution in pertinent part shows that on 12 January 1944 accused, a member of Company C, 742nd Light Tank Battalion, at Camp Polk, Louisiana, was sent on detached service for an indefinite period (R. 7). Captain Ernest A. Johnstead, executive officer and subsequently commanding officer of the company, did not see accused from that date until "the first day of August" when the organization came to Fort Ord (R. 8).

It was duly stipulated that if Private Donald B. Spotts were present in court he would testify that on 12 January 1944 he and accused were on a detached service detail which was proceeding toward a Quartermaster Provisional Railhead near Leesville, Louisiana, and were about six miles from that place, when accused jumped off of the truck in which they were riding and started down "a road in the opposite direction". That was the last time Spotts saw accused until the former's arrival at Fort Ord, California (R.8; Ex. 1).

An extract copy of a morning report of Post Guard House, Fort Jay, New York, which was received in evidence, shows "John D. Carl" (a name which accused admitted he had used) in confinement on 23 February 1944 (Exs. 3 and 4).

5. Accused was sworn and testified in his own behalf but gave no testimony which had any material bearing on Specification 1, Charge I. The defense offered no other evidence.

✓6. The evidence shows that on 12 January 1944 accused was placed on detached service with a Quartermaster Provisional Railhead near Leesville, Louisiana, and started for his station in a truck with another soldier, Private Spotts, who was on the same detached service. When the truck reached a point about six miles from Leesville accused "jumped off" and started down the road in the opposite direction. Spotts did not again see accused until he (Spotts) arrived at Fort Ord. However, the record does not disclose where Spotts spent the intervening period and there is no evidence either direct or circumstantial that accused absented himself without leave and

failed to report to his detached service station as directed. The entry on the morning report that accused was in confinement at Fort Jay, New York, on 23 February 1944 would be sufficient evidence of the termination of an existing prior absence without leave but it is not sufficient to supply evidence of the initiation of such absence. In the opinion of the Board of Review the evidence is legally insufficient to sustain the finding of guilty of the Specification under consideration.

7. For the foregoing reasons the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 1, Charge I, legally sufficient to support all other Specifications and Charges and legally sufficient to support the sentence.

Samuel M. Driver, Judge Advocate.

Robert [illegible], Judge Advocate.

F. J. Lottichios, Judge Advocate.

1st Ind.
SEP 13 1944

War Department, J.A.G.O., - To the Commanding General, 1st Headquarters and Headquarters Detachment Special Troops, Army Ground Forces, Fort Ord, California.

1. In the case of Private Marvin H. Sikes (14032394), Company C, 742nd Amphibian Tank Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge I, legally sufficient to support all other Specifications and Charges and legally sufficient to support the sentence, which holding is hereby approved. For the reasons therein stated it is recommended that the finding of guilty of Specification 1, Charge I be disapproved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

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

(CM 262693).

Myron C. Cramer

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

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

SPJGV
CM 262735

18 SEP 1944

UNITED STATES v. Second Lieutenant ROBERT G. KASLOW (0-815714), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Craig Field, Selma, Alabama, 26 and 27 June 1944. Dismissal, total forfeitures and confinement for life.

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 93rd Article of War.

Specification 1: In that Second Lieutenant Robert G. Kaslow, Air Corps, Army of the United States, Army Air Forces Pilot School (Advanced-Single Engine), Craig Field, Selma, Alabama, did, at Army Air Forces Pilot School (Advanced-Single Engine), Craig Field, Selma, Alabama, on or about 1 March 1944, feloniously take, steal and carry away one hundred and seventy dollars ($170.00), lawful money of the United States, the property of First Lieutenant John H. Flaherty, Jr., Air Corps; one hundred and thirty dollars ($130.00), lawful money of the United States, the property of Second Lieutenant William C. Giles, Jr., Air Corps; One hundred and

twenty-five dollars ($125.00), lawful money of the United States, the property of Second Lieutenant Francis P. Terranova, Air Corps; three hundred and nineteen dollars ($319.00), lawful money of the United States, the property of Second Lieutenant Earl Taylor, Air Corps; one hundred and twenty dollars ($120.00), lawful money of the United States, the property of Second Lieutenant Richard C. Loizeaux, Air Corps; twenty-five dollars ($25.00), lawful money of the United States, the property of Second Lieutenant Edward F. Barker, Air Corps; twenty-four dollars ($24.00), lawful money of the United States, the property of Second Lieutenant Edward J. Fitzgerald, Air Corps; one hundred and twenty-nine dollars ($129.00), lawful money of the United States, the property of Second Lieutenant Trevor F. Treece, Air Corps; sixteen dollars ($16.00), lawful money of the United States, the property of Second Lieutenant John P. Starke, Air Corps; one hundred dollars ($100.00), lawful money of the United States, the property of Second Lieutenant Joseph E. Simanonok, Air Corps; six dollars ($6.00), lawful money of the United States, the property of Second Lieutenant Warren P. Helsley, Air Corps; and eighty dollars ($80.00), lawful money of the United States, the property of Second Lieutenant Paul R. Meier, Air Corps, all of Army Air Forces Pilot School (Advanced-Single Engine), Craig Field, Selma, Alabama.

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

Specification 1: In that Robert G. Kaslow, 2nd Lt., AC, did at the Hilton Hotel, Long Beach, California, on or about 1 April 1944, feloniously take, steal and carry away one (1) pistol, cal. .45 Model US Army M1911A1 #847719; one (1) leather shoulder holster for cal. .45 automatic pistol; two (2) clips, cartridge cal. .45; twenty (20) rounds of cal. .45; one (1) wrist watch, DOM; one (1) wrist watch, Bulova, Type A-11, Spec No. 94-27834, serial #AF42-5360; Par No. 10 AKCSH, ORD #W535AC-31412, Bulova Watch Co; one (1) set of Captain's bars; one (1) electric shaver, Remington (Foursome) W/case and cord, of a total value of more than Fifty ($50.00), the property of Captain Truman W. Cummings.

Specification 2: In that Robert G. Kaslow, 2nd Lt., AC, did at 15233 De Pauw Avenue, Pacific Palisades, California, on or about 1 April 1944, with intent to commit a felony, viz, murder, commit an assault upon Harry Campbell by willfully and feloniously striking him, the said Harry Campbell, on the head with a .45 calibre automatic pistol.

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

Specification 1: In that Second Lieutenant Robert G. Kaslow, * * *, did, at Army Air Forces Pilot School (Advanced-Single Engine), Craig Field, Selma, Alabama, on or about 12 March 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Santa Monica, California, on or about 1 April 1944.

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

Specification 1: In that Second Lieutenant Robert G. Kaslow, * * *, having been duly placed in arrest of quarters on or about 9 March 1944, did, at Army Air Forces Pilot School (Advanced-Single Engine), Craig Field, Selma, Alabama, on or about 12 March 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that Second Lieutenant Robert G. Kaslow, * * *, did, at Army Air Forces Pilot School (Advanced-Single Engine), Craig Field, Selma, Alabama, on or about 12 March 1944, feloniously take, steal, and carry away one (1) wallet of some value and its contents, viz: Sixty-one dollars ($61.00), lawful money of the United States, the property of Second Lieutenant Barthau B. Shelley, Air Corps.

Specification 2: In that Second Lieutenant Robert G. Kaslow, * * *, did, at Army Air Forces Pilot School (Advanced-Single Engine), Craig Field, Selma, Alabama, on or about 12 March 1944, feloniously take, steal, and carry away one (1) 1940 Club Convertible Mercury automobile, license number 104-688, New Hampshire, motor number 99A-146151, value about fourteen-hundred dollars ($1,400.00), and its contents, viz: Eight (8) United States Savings Bonds, value about eighteen dollars and seventy-five cents ($18.75) each; one (1) .32 automatic Colt pistol, number 514409, value about sixty dollars ($60.00); and one (1) 616 Kodak camera, value about fifty dollars ($50.00), the property of Second Lieutenant Ollie J. Szatkowski, Air Corps.

Specification 3: In that Second Lieutenant Robert G. Kaslow, * * *, did, at New Orleans, Louisiana, on or about 16 March 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit: "THE PEOPLES BANK & TRUST CO., SELMA, ALA. MARCH 16 1944, NO. 15, PAY TO THE ORDER OF CASH 50\underline{00}$, FIFTY AND NO/100 DOLLARS", signed "Barthau B. Shelley", which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 4: In that Second Lieutenant Robert G. Kaslow, * * *, did, at New Orleans, Louisiana, on or about 17 March 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit: "THE PEOPLES BANK & TRUST CO., SELMA, ALA. MARCH 17 1944, NO. 15, PAY TO THE ORDER OF CASH 10\underline{00}$, TEN AND NO/100 DOLLARS", signed "Barthau B. Shelley", which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 5: In that Second Lieutenant Robert G. Kaslow, * * *, did, at New Orleans, Louisiana, on or about 17 March 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit: "THE PEOPLES BANK & TRUST CO., SELMA, ALA. MARCH 17 1944, NO. 16, PAY TO THE ORDER OF CASH 10\underline{00}$, TEN AND NO/100 DOLLARS", signed "Barthau B. Shelley", which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 6: In that Second Lieutenant Robert G. Kaslow, * * *, did, at Chicago, Illinois, on or about 19 March 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit: "THE PEOPLES BANK & TRUST CO., SELMA, ALA. MARCH 19 1944, NO. 17, PAY TO THE ORDER OF CASH 50\underline{00}$, FIFTY AND NO/100 DOLLARS", signed "Barthau B. Shelley", which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 7: In that Second Lieutenant Robert G. Kaslow, * * *, did, at Chicago, Illinois, on or about 20 March 1944, with intent to defraud, falsely make in its entirety a

certain check in the following words and figures, to wit: "THE PEOPLES BANK & TRUST CO., SELMA, ALA. MARCH 20 1944, NO. 18, PAY TO THE ORDER OF CASH $60.00, SIXTY AND NO/100 DOLLARS", signed "Barthau B. Shelley", which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 8: In that Second Lieutenant Robert G. Kaslow, * * *, did, at San Francisco, California, on or about 23 March 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit: "THE PEOPLES BANK & TRUST CO., SELMA, ALA. MARCH 23 1944, NO. 21, PAY TO THE ORDER OF CASH $50.00, FIFTY AND NO/100 DOLLARS", signed "Barthau B. Shelley", which said check was a writing of a private nature, which might operate to the prejudice of another.

He pleaded "Not Guilty and Not Guilty by reason of insanity" to the Additional Charge and Specification 2 thereof and to Additional Charge I and its Specification, and "Not Guilty by reason of insanity" to all other Charges and Specifications. He was found guilty of all Charges and Specifications except Specification 2 of Additional Charge III under Additional Charges dated 28 May 1944, of which he was found guilty, except the words "and its contents, viz: Eight (8) United States Savings Bonds, value about eighteen dollars and seventy-five cents ($18.75) each; one (1) .32 automatic Colt pistol, number 514409, value about sixty dollars ($60.00); and one (1) 616 Kodak camera, value about fifty dollars ($50.00)", of the excepted words not guilty. No evidence of prior 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 the term of his natural life. 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, Charge I.

On the morning of 2 March 1944 the following officers living in temporary barracks numbers 198, 377 and 399, Bachelor Officers' Quarters, Craig Field, Selma, Alabama, discovered that the following sums of money were missing from their wallets which were in their respective

rooms when they had retired the preceding night, viz (R. 12-22):

Officer	Sum Missing
1st Lt. John H. Flaherty, Jr.	$170
2nd Lt. William C. Giles, Jr.	$130
2nd Lt. Edward J. Fitzgerald	$ 24
2nd Lt. Trevor F. Treece	$129
2nd Lt. Warren P. Helsley	$6
2nd Lt. Edward F. Barker	$25
2nd Lt. F. P. Terranova	$129
2nd Lt. John P. Starke	$16
2nd Lt. Joseph E. Simanonok	$100
2nd Lt. Earl Taylor	$319
2nd Lt. Paul R. Meier	$80
2nd Lt. Richard C. Loizeaux	$120

These officers reported their losses to Major Charles R. Byrn, Provost Marshal, who had Mr. George B. Porter, fingerprint expert for the Police Department of Selma, Alabama, check their quarters for fingerprints on the morning of 2 March (R. 23). Mr. Porter found a fingerprint on the knob of a door between two rooms in one of the barracks. This print was compared with some 25 or 30 prints of Craig Field personnel furnished by the field, and found to be the print of the accused (R. 39). These matters were reported by Major Byrn to Colonel Jasper K. McDuffie, commanding officer of Craig Field.

On 7 March 1944 accused was brought to Colonel McDuffie's office, and after being advised of his rights under the Articles of War he was questioned by Colonel McDuffie and Major Byrn concerning the reported thefts of money. His answers were evasive until confronted with certain information then in the hands of Colonel McDuffie, after which his answers were "quite open and above-board" (R. 29, 32). Accused at first denied knowing anything of the theft, and denied that he had any money other than $66 in his billfold. After the interview in Colonel McDuffie's office the accused, Colonel McDuffie, Major Byrn, Lieutenant Colonel Harold B. Donaldson, Master Sergeant Jess W. Pearson and another enlisted man proceeded to accused's quarters where a search was made. When the upper right-hand dresser drawer was removed a roll of currency was found which had been secreted between the drawer and the back of the dresser (R. 25, 29, 34). This money was removed from the dresser and found to total $960 (R. 25, 30). A ring set consisting of two rings and a piece of costume jewelry was also found in accused's room (R. 35). Accused stated he had purchased the rings and piece of

costume jewelry from Klein and Son, Montgomery, Alabama, and paid $485 for the rings and $12 or $15 for the costume jewelry (R. 27, 35). The accused stated there was no need of further search as that was all the money in the room, and that the money found was money he had saved (R. 30, 34). The group then returned to Colonel McDuffie's office where he was again warned of his rights, and Articles of War 64, 58 and 59 were read to him (R. 26, 35). Accused then admitted he had taken the money from the rooms of various officers in the Bachelor Officers' Quarters and he was thereafter confined to his quarters under guard (R. 30).

Mrs. Sara E. Tippett, stenographer in the Legal Office, Craig Field, Alabama, testified that on 8 March 1944 she was the reporter at an official investigation of charges against accused conducted by Major Lemos L. Fulmer, investigating officer. At the beginning of the proceedings accused was informed of his right to remain silent or make a sworn or unsworn statement, and Article of War 24 was read to him. Thereafter accused in her presence made a statement, which she recorded in shorthand and later transcribed. She saw accused sign this statement, which she identified at the trial. The statement was thereupon received in evidence without objection (R. 46; Ex. 7). Accused stated therein that on the night of 1 March 1944 he and a young lady had dinner in Selma, Alabama, with another couple. At first they drank whiskey they had brought with them, then went to two other establishments where they had mixed drinks. He drank a lot, but still knew what he was doing the whole time. He returned to Craig Field by cab, arriving about 1:30 a.m. He went to his room, then to barracks 399 at the Bachelor Officers' Quarters. Finding the door to the barracks unlocked he entered, went from room to room, searched for and found the billfolds of the various occupants, and extracted the money contained therein. He then went to another barracks, either 377 or 397, and extracted money from the billfolds of the occupants thereof. He does not know the amount he obtained in each individual room, but he would estimate the total to be between $1300 and $1400. He returned to his room and put the money behind a drawer in his dresser where it was found during the search made of his room. Prior to the search he had gone to Montgomery and bought for $485 the two rings found in his room, payment being made partly with his own funds and partly with some of the money he had stolen.

b. Additional Charges I, II and III and Specifications thereof.

After admitting to Colonel McDuffie on 7 March 1944 that he had stolen money from the barracks, accused was placed in confinement under

guard in his room. On 9 March the guard was removed and accused was informed by Colonel McDuffie that he was in arrest of quarters, that he might leave his quarters to go to the barber shop, post office, and for exercise, but in no case was he to leave the limits of Craig Field, and that he was to remain in arrest until disposition was made of the charges against him (R. 30, 31). On 12 March 1944 it was discovered that accused was absent from Craig Field (R. 31, 48).

Between 0300 and 0700, 12 March 1944, someone stole automobile keys belonging to Second Lieutenant Ollie J. Szatkowski from the pocket of his trousers while he was asleep in his quarters. On the morning of 12 March, Lieutenant Szatkowski discovered his automobile had been taken without his permission. The automobile was a 1940 Mercury bearing New Hampshire license plate No. 104-688. He reported the incident to Major Byrn. About 28 March the New Orleans Police Department telegraphed Major Byrn that it had possession of the automobile, and Lieutenant Szatkowski proceeded to New Orleans and recovered it (R. 51, 52).

Subsequently Lieutenant Szatkowski, accompanied by "Lieutenant Rabalais" went to California for the purpose of returning accused to Craig Field. On the second day of the return trip, and after Lieutanant Szatkowski had instructed accused of his right to remain silent, the accused said to him, "Gee, Lt. Szatkowski, I am sorry I stole your automobile", to which the lieutenant replied, "The thing's all done, forget about it" (R. 54). Thereafter accused stated to the investigating officer that he never saw any War Savings Bonds in the automobile but that a pistol and camera had been stolen from the auto while it was in a parking lot in New Orleans (R. 72).

Second Lieutenant Barthau B. Shelley testified that he had spent the night in Lieutenant Szatkowski's room the night Lieutenant Szatkowski's automobile keys had been stolen. The next morning he discovered his wallet, which he had left in his trousers pocket, had also been taken. The wallet contained $61, a $30 check, Lieutenant Shelley's P.F.R. card, pay data card, hospital record, and his W.D., A.G.O. officers' identification card (R. 56, 57). On being shown W.D.,A.G.O. Form 65-1, Officers' Identification Card #472652 Shelley identified it as being his card which was stolen on 12 March, except that the picture thereon was that of accused (R. 56). Shelley's picture was on the card when it was stolen (R. 57).

The two checks described in Specifications 3 and 4, and photostats of the four checks described in Specifications 5, 6, 7 and 8 of the Additional Charges dated 28 May 1944 were shown to Lieutenant Shelley who said the checks were signed with his name, but were not in his writing and he had not signed them (R. 58). He had not authorized anyone other than his wife to sign his name to checks, and the signatures on these checks were not in his wife's handwriting with which he was familiar (R. 58, 59). These two checks and the photostats of the four checks above-mentioned were received in evidence without objection (R. 58; Exs. 10-15).

Charles C. Ward, cashier of the Peoples Bank and Trust Company, Selma, Alabama, testified that Exhibits 10-15 inclusive (the checks and photostats mentioned above) were presented to his bank for payment but were not paid because Barthau B. Shelley whose name was signed on them as maker did not have an account in the drawee bank (R. 61, 62).

Major George F. Jenkins, the investigating officer appointed to investigate these charges, testified that he fully informed accused as to his testimonial rights and warned him that anything he might say could be used against him. He read the Charges and Specifications to accused including Specifications 3 to 8 of Additional Charge III which described the checks (Exs. 10-15 incl.) signed with the name Barthau B. Shelley. The accused admitted he had written all of these checks (R. 65). In addition to accused's admission, the court had accused's authentic signature before it on the affidavit dated 8 March 1944 (Ex. 7), and on the unsworn statement introduced by the defense (Ex. A).

c. Additional Charge and Specifications.

It was stipulated that if Captain Truman W. Cummings were present he would testify that at about 2 a.m. on 1 April 1944 the hotel clerk at the Hilton Hotel, Long Beach, California, introduced him to a "Lt. Shelley" who was seeking a room for the night and he invited Shelley to share his room. They retired after a brief conversation. Captain Cummings dressed about 6:45 a.m. the next morning, and as his companion was not yet ready to leave the room, he told him to lock the door and leave the key at the desk. Shelley replied, "Okay, thanks for the room". Captain Cummings returned to his room about 9:30 that morning and noticed his dresser in disarray. Further search revealed that one pistol, caliber .45, U.S. Model M1911A1, No. 847719, one leather shoulder holster, two clips of .45 cartridges, twenty rounds of .45 cartridges, one DOM wrist watch, one Bulova wrist watch, one set of captains' bars, and one

Remington electric razor with case and cord, all the property of Captain Cummings, were missing from the room. He immediately reported the matter to the police and later was informed by the Long Beach police that the above property had been recovered. On 3 April 1944 he recovered this property from the provost marshal's office in Los Angeles, California (R. 66, 67). The value of a U.S. Army .45 caliber pistol, Model M1911A1, was $26.97 according to the Army Standard Nomenclature List (R. 67).

It was stipulated that if Harry Campbell and Allen Swenson, Detective Bureau, Santa Monica, California Police Department, were present they would testify that on 1 April 1944 they received a teletype notice to be on the lookout for one Second Lieutenant Shelley wanted on a charge of theft, and stating that he might be at a certain address in Pacific Palisades, California. They went to this address and remained in the vicinity. About 7:15 p.m. they saw a man answering Shelley's description drive up to this address in a LaSalle coupe accompanied by a woman companion. They asked this man for his identification card and he showed them a W.D.,A.G.O. Form 61-5 card bearing the name of Lieutenant Barthau B. Shelley, the serial number O-582401, and a picture of himself. The picture was that of the accused (Pros. Ex. 8). At the time the man showed them the card he stated that his name in fact was Kaslow, but that he was going under the name of Shelley. They followed accused into the house and Campbell went to a bedroom upstairs with him. There accused stooped as if to pick up a bag, whirled around with a .45 caliber Army pistol in his hand which he pointed at Campbell as he said, "Put up your hands, I am not going with you, you son-of-a-bitch". Campbell immediately grappled with accused and caught the pistol by the barrel, but was unable to hold it. Accused beat him over the head with the pistol, cutting several gashes in his head. Campbell was finally able to grasp the barrel again and held it until Swenson arrived although meanwhile accused kicked him several times in the chest and ribs. Swenson ordered accused to face the wall and Campbell attempted to place handcuffs on him. As Campbell turned to hand accused's pistol to Swenson, accused whirled around and attempted to grab it. When he failed to heed Swenson's orders to stop Swenson shot him in the right shoulder. Accused was then handcuffed. They brought a bag belonging to accused to the Santa Monica police headquarters where they found it contained the property reported by Captain Cummings to have been stolen from his hotel room. Accused was taken to the Sawtelle Hospital and Campbell went to the Santa Monica hospital for treatment. Seven stitches were required to close his head wounds, and his ribs were taped because of bruised and torn cartilage (R. 68-71).

4. For the defense:

Anthony G. Kaslow, father of the accused, testified that his wife, the accused's mother, had been confined in mental institutions for intermittent but substantial periods of time from shortly after accused's birth until her death in 1938. They separated in 1932 and he took accused, then about eleven or twelve years of age, to live with him. He worked during the day and he and accused kept house for themselves. The first job he obtained for accused was as a gasoline station attendant. Accused worked about three weeks and then left to attend a YMCA camp (R. 76). Accused next worked for a grocery store for two or three weeks, then carried papers for awhile. About this time he ran away from home, stealing some money and jewelry from his father and embezzling some of the money he collected for the newspaper before his departure. The father testified to numerous other jobs held by his son, none of which lasted more than four weeks. Accused started stealing in 1927 when he was about five years old. He stole money from his father on numerous occasions and stole a bicycle when he was fourteen years of age. He was then put in a semi-reform school but soon stole an auto and ran away. Later he stole a car in Wyoming. He was taken to California by his father where he stole another automobile and was sent to the Whittier State School in California. He was discharged by this school and obtained work in an iron works. However here he stole payroll checks and bought an automobile with the proceeds. He was apprehended and placed in Preston School, a reform school, where he remained for eighteen months. He then returned east and apparently lived in his sister's home for awhile. However he stole a pistol and jewelry from his brother-in-law, and went to New Jersey where he stole another car which he drove to Philadelphia, there surrendering to the police. He pleaded guilty to this offense, but through the intercession of his brother-in-law was permitted to enlist in the CCC. He completed his CCC enlistment and obtained a job during the Christmas holidays delivering C.O.D. packages. He stole the money collected, but was inducted into the Army before being prosecuted. However he stole $350 and some jewelry from his father just before departing for the Army (R. 79-82). From the time accused was ten years of age "he just kind of raised himself" (R. 84). In the opinion of this witness his son is of unsound mind.

The testimony of Mrs. Alice E. Moulton, accused's sister, was received in evidence by stipulation. She corroborated Mr. Kaslow's testimony concerning several of the offenses committed by accused during his boyhood and youth. She said that accused and his father had never gotten along together, and accused had practically no home training. In her opinion accused "is insane, and does not have the mental capacity to choose the right and has not sufficient mental capacity to distinguish right from wrong for any short period of time" (R. 95, 96).

5. Rebuttal testimony:

Second Lieutenant Edward J. Fitzgerald, who had known accused since September or October 1943, Second Lieutenant Hardy D. Roundtree, who had known accused for four months, and Second Lieutenant Gustav C. Bonow, who had known accused for three months, all testified that they had seen accused almost daily, that no incident ever occurred that would make them doubt accused's sanity, and in the opinion of each witness accused was sane during the time they observed him (R. 97, 98, 99).

6. Although not a part of the record of trial, it should be noted that there is included in the documents accompanying the record of trial a report of a Board of Officers appointed by the reviewing authority which examined accused on 16 August 1944 to determine his mental condition. The board found the accused "free from any mental defect, disease or derangement as would impair his mental ability, considering the particular acts charged, both to distinguish right from wrong and to adhere to the right, and therefore is considered sane and responsible for all of his actions."

7. The only pleas to the general issue recognized by military law are guilty, not guilty, and guilty with exceptions with or without substitutions. There is no recognized plea of "not guilty by reason of insanity". It is apparent that the defense entered this plea to direct the court's attention to the fact that the accused's sanity was doubted. However, a plea of not guilty would have protected the accused's rights on that score. After entry of such a plea, the defense could have requested the court to inquire first into the sanity of the accused before hearing evidence on the merits of the case, or, after the prosecution had completed its case, the defense could then have introduced evidence of insanity to rebut the general presumption of sanity (MCM, 1928, par. 63). Inasmuch as the trial was conducted as if the accused had entered general issue pleas of not guilty this record will be reviewed as if such pleas had in fact been entered.

At the inception of the trial the prosecution stated that it was within the discretion of the court to determine whether or not, before hearing evidence on the merits, it should recommend to the appointing authority that he convene a board of officers to examine into accused's mental condition. The defense countered with the suggestion that the court proceed with the trial, hear all the evidence both on the merits and on the question of insanity and thereafter determine whether or not such a recommendation should be made. The court decided, without objection, to follow the suggestion made by defense counsel (R. 11). Although it is

not apparent from the record that the court ever recommended the appointment of such a board, nevertheless, one was appointed after conclusion of the trial and it found the accused sane and able to adhere to the right (see par. 6 hereof). The court had reached a similar conclusion in its deliberations on the findings for it is implicit in its findings of guilty that it determined the accused to be sane and responsible for his acts. The evidence is sufficient to sustain this conclusion of the court.

Competent evidence establishes that on the night of 1 March or early morning of 2 March accused visited the rooms of various officers located in the Bachelor Officers' Quarters at Craig Field, Selma, Alabama, and stole various sums of money, totaling $1244, from the wallets of twelve officers. Shortly thereafter he was found in possession of $960 secreted in the dresser of his quarters and in possession of recently purchased jewelry costing approximately $500, the purchase price having been paid partly from accused's funds and partly from the stolen money. Accused confessed to these thefts and estimated he stole between $1300 and $1400.

Competent evidence further establishes that while accused was in arrest in quarters on or about 12 March he stole the wallet of Second Lieutenant Barthau B. Shelley which contained $61 and the lieutenant's AGO identification card, stole the keys to a 1940 Mercury automobile owned by Second Lieutenant Ollie J. Szatkowski, stole the automobile and departed from Craig Field, thereby breaching his arrest. Thereafter during his peregrinations accused forged the name of Lieutenant Shelley to six checks aggregating $230 in amount drawn on The Peoples Bank & Trust Co., Selma, Alabama. By 1 April 1944 accused had reached Long Beach, California, where he occupied the same hotel room with Captain Truman W. Cummings from whom he stole a .45 caliber, U.S. pistol worth $26.97, a shoulder holster, cartridges, two wrist watches, an electric razor and a set of captains' insignia. He was apprehended that same day by two detectives of the police department of Santa Monica, California, but only after he resisted arrest and sought to escape from the detectives by beating one of them severely about the head with the butt of a pistol, being finally subdued only after one of them shot him in the shoulder.

The court was amply warranted in inferring that accused intended permanently to remain away from his organization when he (a) broke arrest while under serious charges, (b) absented himself from his station after stealing money and an auto to aid his flight, (c) thereafter committed forgery six times and stole additional property and (d) violently resisted apprehension when finally cornered.

There was no testimony as to the value of the 1940 Mercury automobile stolen by accused. However it was in running order and, considering the type and model, the evidence is clearly sufficient to establish that its value was in excess of $50. Of the various articles stolen from Captain Cummings, testimony was offered only as to the value of the pistol which was $26.97 but considering the character of the other articles stolen, the court was warranted in concluding that they were of some value not in excess of $20.

As to the charge of assault with intent to murder Detective Campbell, it is indisputable that, as a matter of law, if accused's victim had perished as a result of the attack, the intent to murder would have been established by proof of accused's intent to use force against an officer of the law in order to resist lawful arrest (MCM, 1928, par. 148a). Similarly, the intent to murder which is a necessary element of the aggravated assault here charged is established by proof of the intent of accused to use force to resist lawful arrest and by the fact that he used a deadly weapon in a deadly way to execute his design.

The evidence sustains only so much of the findings of guilty of Specification 1 of the Additional Charge as involves the theft of the property alleged of a value in excess of $20 but not in excess of $50, only so much of the findings of guilty of Specification 2 of Additional Charge III as involves the theft of a 1940 Mercury automobile of a value in excess of $50, and the findings of guilty of all other Specifications and of the Charges.

8. The accused is about 22 years of age. For the month preceding his induction into the service he was employed as a mail carrier. Prior to that he had little regular employment. He entered military service 8 February 1943 as an air cadet and on 3 November 1943, after completing the prescribed Flying Training Command Course, Army Air Forces Pilot School at Craig Field, Selma, Alabama, he was commissioned a second lieutenant, Army of the United States and ordered to active duty with the Air Corps the same date.

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of the Additional

Charge as involves the theft of the property alleged of a value in excess of $20 but not in excess of $50, only so much of the finding of guilty of Specification 2 of Additional Charge III as involves the theft of a 1940 Mercury automobile of a value in excess of $50, and the findings of guilty of all other Specifications and of the Charges. The Board of Review is of the further opinion that the record of trial is legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 58th, 69th or 93rd Article of War.

Thomas N. Jaffey, Judge Advocate.

Sick in Hospital, Judge Advocate.

Robert E. Trueblood, Judge Advocate.

(128)

SPJGV
CM 262735 1st Ind.

War Department, J.A.G.O., 5 - OCT 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 Robert G. Kaslow (0-815714), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of the Additional Charge as involves the theft of the property alleged of a value in excess of $20 but not in excess of $50, only so much of the finding of guilty of Specification 2 of Additional Charge III as involves the theft of the property alleged of some value in excess of $50 and the findings of guilty of all other Specifications and of the Charges, legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused was found guilty of stealing a total of $1244 in cash from the quarters of twelve officers (Spec. 1, Ch. I), of stealing a pistol, holster, cartridges, two wrist watches, an electric razor and a set of captains' insignia from one officer (Spec. 1, Add. Ch.), of stealing a wallet and $61 from a second officer (Spec. 1, Add. Ch. III), of stealing an automobile from a third officer (Spec. 2, Add. Ch. III), of making and uttering six forged checks and obtaining thereby a total of $230 (Specs. 3-8 incl., Add. Ch. III), of committing an assault with intent to murder (Spec. 2, Add. Ch.), all in violation of Article of War 93; of breaking arrest (Spec. 1, Add. Ch. II) in violation of Article of War 69 and of desertion (Spec. 1, Add. Ch. I) in violation of Article of War 58. I recommend that the sentence be confirmed but that the period of confinement be reduced to thirty years and as thus modified that the sentence be carried into execution, and that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. Inclosed are a draft of a letter for your signature, transmitting the record of trial 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

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement reduced to thirty years. G.C.M.O. 596, 28 Oct 1944)

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

SPJGK
CM 262739

28 SEP 1944

UNITED STATES v. First Lieutenant DALE C. JENSEN (0-727346), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Deming Army Air Field, Deming, New Mexico, 22 August 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Dale C. Jensen, Air Corps, did, at Army Air Forces Bombardier School, Deming Army Air Field, Deming, New Mexico, on or about June 23, 1944, with intent to defraud, wrongfully and unlawfully make and utter to Deming Officers' Mess, a certain check, in words and figures as follows, to wit:

San Antonio, Texas, June 23 1944 No. _____
30-65
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

PAY TO THE
ORDER OF Cash $10.00

Ten and no/100 ---------- DOLLARS
0-727346
3013th AAFBU
Ext 384 Dale C. Jensen 1st Lt. AC.

and by means thereof, did fraudulently obtain from Deming Officers' Mess $10.00, he the said First Lieutenant Dale C. Jensen, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of said check.

Specifications 2 to 13 inclusive are identical in form with Specification 1, but allege checks of different dates and amounts issued to various persons whereby the accused did fraudulently obtain cash of an amount equal to the face of the check:

Spec.	Amount	Date	Person defrauded.
2	$10.00	24 June 1944	2nd Lt. Bernhard J. Specht
3	10.00	27 June 1944	Deming Officers' Mess
4	10.00	27 June 1944	2nd Lt. Sam S. Pruitt
5	25.00	28 June 1944	2nd Lt. Bernhard J. Specht
6	10.00	28 June 1944	2nd Lt. Wayne E. King
7	10.00	28 June 1944	Deming Officers' Mess
8	10.00	28 June 1944	2nd Lt. Bernhard J. Specht
9	40.00	28 June 1944	2nd Lt. Wayne E. King
10	20.00	28 June 1944	2nd Lt. Sam S. Pruitt
11	20.00	29 June 1944	2nd Lt. Sam S. Pruitt
12	10.00	29 June 1944	Deming Officers' Mess
13	25.00	15 July 1944	2nd Lt. John J. Rotar

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

3. The meaning and effect of his plea of guilty were explained to the accused. The accused then conferred with his counsel, after which he stated to the court that he would let his plea stand.

The prosecution did not introduce any evidence but rested its case upon the pleas of guilty.

4. Evidence for the accused.

Having been advised of his rights as a witness the accused elected to take the stand and make a sworn statement. He testified that he was a first lieutenant, Air Corps, stationed at Deming Army Air Field, New Mexico. He admitted that he cashed all of the checks described in the Specifications. All of the money that he received from the checks was lost by gambling. He got "over his head" and thought that he could win enough to cover them (R. 12).

The President of the court then asked the accused if he was under the impression that he had money in the bank when the checks were written, to which the accused replied, "Most of them, yes, sir: the last few I wasn't sure". The law member thereupon intervened and stated,

"That statement is inconsistent with your plea of guilty. I think the Prosecution had better cross examine the witness and determine if that is what he actually means." (R. 12).

On cross-examination the accused stated that he had an allotment to the bank of $100.00 per month, of which $50.00 was applied on indebtedness due the bank, the other $50.00 being subject to check. During the month in which the checks were drawn, accused stated that he wrote checks totaling more than $185.00, knowing when he wrote them that there was not enough money to cover them. Accused further testified that his statement to the President of the court that he thought he had money in the bank was not true (R. 13).

5. By his plea of guilty, accused admitted the facts alleged in the Specifications. It was therefore not incumbent upon the prosecution to present any evidence before resting its case, even though it might very properly have proceeded to prove a prima facie case notwithstanding such plea. Under ordinary circumstances a plea of guilty is sufficient in the absence of any evidence by the prosecution to justify a finding of guilty (CM 134185, par. 378 (3) Dig. Op. JAG, 1912-40, p. 190).

Accused's statement while on the stand, to the effect that when he wrote the checks he had the impression that there were sufficient funds to cover them, was inconsistent with his plea of guilty and, were it not for the action that followed, would have required the prosecution to produce evidence to establish its case. Whenever an accused, after a plea of guilty, makes a statement to the court in his testimony or otherwise inconsistent with the plea, the president or the law member, if so directed by the president, will make such explanation and statement to the accused as the occasion requires. If after such explanation and statement the accused does not voluntarily withdraw his inconsistent statement, the court will proceed to trial and judgment as if he had pleaded not guilty (par. 70, MCM, 1928, p. 54). Although it does not appear that an explanation was given accused, the law member stated that the prosecution should cross-examine the accused to determine if he actually meant what he said in his inconsistent statement. Thereafter the accused, without compulsion, stated in reply to questioning that his statement was not true and that he knew when he wrote the checks described in the specifications that there were not sufficient funds to cover them. This, in effect, not only constituted a withdrawal of the inconsistent statement, but was an admission as to an essential element of the offense. That such admission was made on cross-examination was not prejudicial since accused by becoming a witness had subjected himself to cross-examination. Under the circumstance the Board of Review is of the opinion that the court was justified in concluding that the accused's plea was not entered improvidently or through lack of understanding, and in proceeding with the trial on the plea and the evidence before it.

6. War Department records show accused to be 23-1/2 years of age, born 2 March 1921 in Long Beach, California, and single. He graduated from high school, attended a state teachers college for one year, and the College of Pharmacy of the University of Nebraska for two years. He was accepted as an aviation cadet on 17 December 1941, and upon completion of his training as a bombardier was commissioned a second lieutenant, Air Corps, 25 July 1942. On 12 July 1943 he was promoted to first lieutenant. On 27 May 1944 he was reprimanded and a forfeiture of $80.00 was imposed upon him under the provisions of Article of War 104 for an offense not disclosed by his A.G.O. 201 file.

7. The court was legally constituted and had jurisdiction over 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 the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

Guy G. Gore, Judge Advocate.

Earle Deptin, Judge Advocate.

Thurman Mayne, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 2 - 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 First Lieutenant Dale C. Jensen (0-727346), 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. War Department records disclose that on 27 May 1944 accused was reprimanded and a forfeiture of $80 of his pay was imposed upon him under the provisions of Article of War 104 for an offense not disclosed by his A.G.O. 201 file. 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. 604, 3 Nov 1944)

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

SPJGN
CM 262776

27 SEP 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,
First Lieutenant JAMES R.	)	27 July 1944. Dismissal,
GREER (0-568402), Air Corps.	)	total forfeitures, confinement
	)	at hard labor for three (3)
	)	years.

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OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates.

- - - - - - - - - - -

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

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

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

Specification 1: In that First Lieutenant JAMES R. GREER, Air Corps, 29th Bombardment Squadron (Heavy), did, at Howard Field, Fort Kobbe, Canal Zone, on or about and between 19 April 1944 and 17 June 1944, feloniously embezzle by fraudulently converting to his own use United States currency of the value of Six Hundred Seventy-five Dollars and Ten Cents ($675.10), property of the Squadron Fund, 29th Bombardment Squadron (Heavy), entrusted to him by the Commanding Officer, 29th Bombardment Squadron (Heavy).

Specification 2: Finding of guilty disapproved by the reviewing authority.

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

Specification: In that First Lieutenant JAMES R. GREER, Air Corps, 29th Bombardment Squadron (Heavy), did, at Howard Field, Fort Kobbe, Canal Zone, from on or about 15 May 1944 to on or about 17 June 1944, wilfully, wrongfully and dishonorably neglect his duties as an officer and custodian of the Coca Cola Fund of the 29th Bombardment Squadron (Heavy), and the 23d Tow Target Squadron, by failing to maintain an adequate accounting system for this fund.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for five years. The reviewing authority approved only so much of the findings as finds the accused guilty of Specification 1 of Charge I and Charge I and the Specification of Charge II and Charge II, remitted two years of the confinement imposed, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused was the custodian of the squadron fund and adjutant of the 29th Bombardment Squadron (Heavy), stationed at Howard Field, Fort Kobbe, Canal Zone (R. 63, 68). Lieutenant Colonel Harvey Hogan, his Commanding Officer, directed him on 17 April 1944 to "open and run" two coca-cola stands, one of which was located in a hangar and the other in a "sub-day-room" (R. 63-64). Their stock was to be purchased from the Post Exchange, and their sales were to be at cost (R. 64, 67, 69). No specific instructions as to the method of operation were issued to the accused, but Lieutenant Colonel Hogan was under the impression that the project was to be "more or less a branch PX" for which the squadron fund was not to be charged (R. 64, 69-70). Apparently, however, Lieutenant Colonel Hogan was aware that credit could not be established for the stands at the Post Exchange "unless it came through the squadron fund or in the name of the squadron fund" (R. 72).

The accused delegated the supervision of the stands to Private First Class Denton S. MacCarty and executed and delivered to him the following letter addressed to the Post Exchange Officer:

"1. Authority is herewith granted to Pfc. DENTON S. MACCARTY, 11084949, this organization, to make purchases at the Post Exchange and charge against the Squadron Fund, 29th Bombardment Squadron (H) Fund. His signature appears below" (R. 6-8, 52; Pros. Ex. 1).

No limitation other than need was placed upon the amount of merchandise to be ordered. The only arrangement as to the sales proceeds was that they were to be turned over to the accused as they accumulated. In pursuance to this understanding, he received approximately $130.00 in cash from MacCarty between 17 April and 15 May 1944 (R. 8, 19-20, 27). No memorandum or receipt was given by the accused for this sum (R. 23).

On the last date the operation of the stand in the hangar was discontinued, and the accused as the representative of the 29th Bombardment Squadron, and First Lieutenant Donald M. Fuller, as the representative of the 23rd Tow Target Squadron, entered into a written contract for the joint operation of a coca-cola stand in another hangar (R. 9-10, 31-33; Pros. Ex. 3). Among other things, the 23rd Tow Target Squadron agreed that certain assets shown on a physical inventory dated 12 May 1944 were to "be considered" its "investment" in the venture. The 29th Bombardment Squadron was to contribute nothing, either in cash or stock. Upon dissolution of the "partnership the sum of $290.87 or the equivalent thereto in stock" was to be returned to the 23rd Tow Target Squadron. If the assets then were less than $290.87, they were all to be paid to the 23rd Tow Target Squadron. If they exceeded that sum, the surplus was to be divided equally between the parties. The stand was to be operated by two men, one from each organization, and they were each to be paid $12.50 per month "from the fund. Any additional wages [were to] be paid by the respective squadrons". The accused agreed to keep complete records, which were always to be available for inspection. All transactions were to be entered in a Council Book which was to be signed by the Commanding Officer of each organization "or their representatives" (Pros. Ex. 3). Aside from the contract itself, there was a verbal understanding "that the $12.50 a month paid to each man working in the stand would gradually reduce the investment; in time it would amortize itself" (R. 35). Losses "due to breakage" were also contemplated as proper charges against the fund (R. 21, 36). No agreement was made with reference to deficits resulting from theft (R. 36).

The assets were actually inventoried on 15 May 1944. They consisted of $10.96 in merchandise, $195.65 in cases and bottles, and $84.26 in cash, or a total of $290.87 (R. 10-11, 30, 40). MacCarty, on behalf of the 29th Bombardment Squadron, and Private Earl J. Bobier, on behalf of the 23rd Tow Target Squadron, were designated to operate the stand in the hangar (R. 10-11, 46-47). One payment of $15.00 was made to MacCarty for his services (R. 22-23, 37). Neither Bobier nor Private First Class Walter M. Schmidt, who operated the dayroom stand, ever received any compensation (R. 46, 48).

No instructions as to the maintenance of records, other than a general direction to MacCarty to continue those already "in effect", were given by the accused with respect to either the hangar or the dayroom stand (R. 18-20, 44). MacCarty nevertheless kept daily tally sheets until he "ran out of the blanks on 5 or 6 June 1944" (R. 17, 19, 21). Schmidt had no records of any kind (R. 44). The Council Book of the 29th Bombardment Squadron contained no entries reflecting the operations of either stand (R. 69). Lieutenant Colonel Hogan was aware of this fact but attached no significance to it because he "thought that it was really a branch PX deal and was operated for the PX" (R. 69-70).

Between 15 May and 15 June 1944 the accused collected $652.12 in cash from MacCarty and another $402.50 in cash from Schmidt (R. 12, 16, 24, 42, 44). The receipt of the money was acknowledged by notations of

the dates and amounts on informal memoranda (R. 13-15, 42-44). As has been pointed out above, the accused had received about $130 in cash from the proceeds of the hangar stand prior to 15 May 1944. Of the total of $1184.62 thus coming into his hands, $169.40 was turned over by him on 9 May 1944 to the Post Exchange in partial satisfaction of the obligations for merchandise which he had incurred (R. 58). This was the only payment ever made by him. On 15 June 1944 the operation of the stands was suspended, and First Lieutenant Elmer M. Lojan was directed to inventory their assets (R. 12, 17, 45, 71, 74). He found that MacCarty had $396.40 in merchandise and $60.01 in cash, and Schmidt had $380.90 in merchandise and $59.60 in cash (R. 18, 45, 74, 75). Another $195.12 in cash was discovered in the accused's safe (R. 75). The merchandise aggregating $777.30 and the cash amounting to $314.73 were paid to the Post Exchange by Lieutenant Lojan on 17 June 1944 and credited against the account of the 29th Bombardment Squadron, which had been charged with all of the coca-cola delivered to the stands (R. 75-78).

The purchases by the accused from 15 April to 15 June 1944 totaled $3749.75. All of the merchandise returned up to and including 17 June 1944 produced a credit of $2568.95. The cash payments made by the accused on 9 May 1944 and by Lojan on 17 June 1944 amounted to $484.13. After deducting these two credits from the aggregate purchase price, an unpaid balance of $696.67 remained as of 17 June 1944 (R. 58-59; Pros. Ex. 5).

Spoilage of merchandise for both stands between 15 May and 15 June 1944 did not exceed $9.00 of which $4.00 was restored by Schmidt out of his own pocket (R. 21-22, 28, 44, 49). Another $15.65 was wrongfully "borrowed" by Bobier and never repaid by him (R. 16, 20, 23, 25, 36, 48-49).

The import of the figures set forth above may be gathered at a glance from the following recapitulation.

Cash proceeds paid to accused by MacCarty and Schmidt			$1184.62
Cash paid by accused to Post Exchange or found in his safe:			
9 May 1944	$169.40		
17 June 1944	$195.12		
		$364.52	
Credits to accused:			
Salary to MacCarty		$ 15.00	
Total Credits			379.52
Net Shortage			$ 805.10

Lieutenant Colonel Hogan asked the accused what "he did with the money". The reply was "that he would not tell . . ., that he didn't have the money . . ., and that if he had it to do over again he would do the same thing" (R. 65-66). This admission was made voluntarily (R. 67). Subsequently on 4 July 1944 a cash payment of $500.00 was made by someone in partial satisfaction of the shortage (R. 58-59). None of the original investment of $290.87 has ever been repaid to the 23rd Tow Target Squadron (R. 35).

4. The accused, after his rights as a witness had been fully explained to him, elected to remain silent. No evidence was adduced on his behalf.

5. Specification 1 of Charge I alleges that the accused did "on or about and between 19 April and 17 June 1944, feloniously embezzle by fraudulently converting to his own use United States currency of the value of . . . ($675.10), property of the Squadron Fund, 29th Bombardment Squadron (Heavy), entrusted to him by the Commanding Officer" of that squadron. This offense was laid under Article of War 93.

The accused was entrusted with the responsibility of managing and supervising two coca-cola stands. Between 17 April and 15 June 1944, $1184.62 of the cash proceeds accruing from their operation came into his hands, but, prior to the preferment of charges against him on 28 June 1944, only $379.52 was applied by him to the payment of the expenses and obligations properly chargeable against the Squadron Fund of the 29th Bombardment Squadron (Heavy). When demand was made upon him for the difference, he defiantly proclaimed that he would not "tell what he did with it" and that "if he had it to do over again, he would do the same thing". Restitution to the extent of $500 was eventually made by him or on his behalf on 4 July 1944, but the charges were then a week old.

Dig. Op. JAG, 1912-40, Sec. 451 (17), states that:

> "An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting. The return of the amount of the fund post litem motam is of no probative value, except as an admission that he was responsible for it. It does not tend either to negative or to excuse the offense charged. C.M. 123492 (1918)."

The presumption of embezzlement becomes conclusive, when, as here, the accused offers no explanation whatsoever and even adopts an insolent attitude. Having used a position of confidence to convert trust funds to his own use, the accused is guilty beyond a reasonable doubt of the offense alleged in Specification 1 of Charge I. While the amount proved to have been embezzled was larger than that alleged in the Specification, the discrepancy is in his favor.

6. The Specification of Charge II alleges that the accused did "from on or about 15 May 1944 to on or about 17 June 1944, willfully, wrongfully, and dishonorably neglect his duties as an officer and custodian of the Coca-Cola Fund of the 29th Bombardment Squadron (Heavy), and the 23rd Tow Target Squadron, by failing to maintain an adequate accounting system for this fund". This was set forth as a violation of Article of War 95.

Other than the "tally sheets" filled in each day by MacCarty until 5 or 6 June 1944 and the informal memoranda receipts given to him and to Schmidt for monies which they turned over, no books or accounts of any kind were prepared to reflect the operations of the stands. The accused cannot plead ignorance of his duty to maintain an adequate accounting system because in the written agreement dated 15 May 1944 he specifically and expressly undertook to keep complete records. His failure to do so was deliberate and, in the light of his defalcation, must be viewed as part and parcel of a calculated scheme to embezzle and to defraud. It was an act of "dishonesty or unfair dealing" unbecoming an officer and a gentleman within the meaning of paragraph 151 of the Manual for Courts-Martial 1928. The Specification of Charge II is clearly sustained by the evidence.

7. The accused is about 21 years old. The records of the War Department show that he attended the University of Arkansas for one and a half years; that he had R.O.T.C. training from 12 September 1938 to 4 June 1939 and from 12 September 1939 to 20 November 1940; that he had enlisted service in the Army from 4 February 1941 to 8 December 1942; that he was commissioned a second lieutenant on 9 December 1942; that he was promoted to first lieutenant on 27 October 1943; and that since 9 December 1942 he has been on active duty as an officer.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence 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 93.

(On Leave), Judge Advocate.

Robert E. Cannon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 262776

1st Ind.

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

6 - OCT 1944

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 James R. Greer (0-568402), 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 as approved by the reviewing authority be confirmed and ordered executed and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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

Myron C. Cramer.

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

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

(Sentence as approved by reviewing authority confirmed, but confinement remitted. G.C.M.O. 64, 27 Jan 1945)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington 25, D.C.

SPJGQ
CM 262800

UNITED STATES

v.

Second Lieutenant ALVIN JAMES LUONGO, (0-697566) Air Corps

18 SEP 1944

HEADQUARTERS SECOND AIR FORCE

Trial by G. C. M. convened at Colorado Springs, Colorado, 12 August 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Alvin J. Luongo, 262nd Army Air Forces Base Unit, did, on or about 15 July 1944, wrongfully violate paragraph 16a (1) (a), Army Air Forces Regulation 60-16, by flying a military aircraft of which he was pilot over the City of Beatrice, Nebraska, at an altitude of less than one thousand (1000) feet above the buildings of said city while not in take-off or landing.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution showed that on 15 July 1944 accused was in the military service serving as a second lieutenant and flight instructor in the 262nd Fighter Pilot Training School at Bruning, Nebraska (R. 7). About 10:30 o'clock that day accused and two student pilots in three P-47 Army planes took off from Bruning Field to practice formation flying and dive bombing (R. 10, 11-12, 17, 22, Pros. Ex. 2). After completing their dive bombing practice on the range, the three planes in formation with accused in command and acting as leader flew over the central part of the business section of the town or city of Beatrice, Nebraska, about eight to fifteen times (R. 12, 14, 22, 36, 49, 51) at a low altitude estimated by one of the accompanying pilots at 400 or 450 feet (R. 23), by the other at 500 feet (R. 14), by civilians in the town at 80 feet (R. 37), at 100 feet (R. 43), and at 200 feet (R. 52). Beatrice was located about 40 miles from the Bruning Airfield (R. 24). It is a town that has a population of 11,000 (R. 35). Immediately after the planes had returned to and landed at the field at twelve noon, the three pilots, including the accused, were ordered to report to the Commanding Officer, who told them that they would be court-martialed for low flying. Accused assumed all responsibility and said that he had ordered the other pilots to follow him (R. 17, 24, 62). The accused admitted to the Commanding Officer that he had been flying over Beatrice (R. 16, 62).

The weather was bad that morning. Flying had been discontinued in the morning until 10:15. One witness testified that there was a ceiling of about 700 feet over Beatrice and its vicinity (R. 17, 25). The civilian witnesses said the weather was clear and there were no clouds (R. 46).

Neither of the two fliers accompanying accused knew that the town over which they made the numerous "passes" was named "Beatrice" (R. 12, 31).

4. For the defense, Captain R. H. Sauve testified that the accused was an exceptionally fine instructor and that his work has always been above average (R. 56). Accused had been an instructor at that field for four months (R. 61). Between the hours of 10 and 12 o'clock 15 July 1944 there were twelve to fifteen P-47 planes in the air from Bruning Field (R. 58). The weather was bad. The ceiling varied. At some places, it was down on the ground, at other places it was two or three thousand feet, and at others seven hundred feet. At Beatrice it was 500 to 700 feet (R. 64). There are no signs painted on anything in Beatrice to identify the town as Beatrice (R. 64). Its appearance was similar to other towns in that locality and in order to identify it a flyer might have to fly as low as 300 feet and make three or four passes (R. 65).

Defense counsel offered in evidence "certified true copies" of the flight clearance sheet to show the number of planes in the air at that time from Bruning Field and their identifying numbers. The Law Member refused to admit them upon objection made by the prosecution (R. 66-67). It was stipulated that there were 15 to 20 planes in the air (R. 67).

The accused, having been advised of his rights, elected to make an unsworn statement which, in substance, was that he took off at about 10:30

when the ceiling was not over 1000 feet. After completing dive bombing practice, he observed that the weather was lightest toward the southeast, so he led off in that direction and practiced cloud formations for fifteen minutes and then looked for a place to identify his position. He observed a town and flew over it in a vertical bank two or three times and made at least four passes in order to identify it. He finally recognized it as Beatrice and started a "rat-race with the boys around the edge of the town, sort of a loop-the-loop around the town * * * came across the town again and followed the road that leads from Beatrice back to the field." When he came over the last time he was at about 1000 feet (R. 69).

5. In rebuttal, the prosecution introduced in evidence aerial photographs of "Beatrice" showing the courthouse, the post office, the school, the Methodist church and other buildings of Beatrice outstanding in the photograph (R. 70-72, Ex. 3, 4, 5).

6. The accused is charged with violating paragraph 16a (1) (a) of AAF Regulation 60-16 by flying a military aircraft over the City of Beatrice, Nebraska, at an altitude of less than 1000 feet above the buildings of that city.

Paragraph 16a (1)(a),AAF Regulation 60-16 provides as follows:

> "16. Minimum Altitudes of Flight.
>
> a. Except during take-off and landing, aircraft will not be operated
> (1) below the following altitudes:
> (a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight."

It was clearly established by the testimony of the five witnesses for the prosecution and by implication in the failure of the accused to deny it in his unsworn statement that he did fly his plane over the City of Beatrice at the time and place averred in the Specification at an altitude of less than 1000 feet which clearly violates the provisions of Par. 16a (1) (a) of AAF Regulation 60-16. The accused, in defense of this clear breach of the Regulation, claimed by his unsworn statement that the restriction imposed by the Regulation did not apply because he was compelled to fly low over the town due to "unavoidable causes," namely, he was lost and flew low in order to ascertain the name of the town. Such a defense was untenable under the circumstances, and the court was justified in disbelieving and rejecting it. Several disinterested witnesses related a story of three planes making from 8 to 15 "passes" at the town at a very low altitude with excellent visibility prevailing with the lead plane (accused's) flying, what one witness termed, upside down, but what the accused said was a vertical bank.

The photographs of the town show how easy it is to recognize the town by its many distinguishing features. The accused admitted he was well acquainted with the town and had visited it many times. The evidence is convincing that accused's wrongful conduct was not prompted by being lost but by a reckless desire to show off. The accused also claimed that he was forced to fly low because of the low ceiling of 700 feet in that locality. This also is unbelievable under the circumstances. Visibility was not affected by the alleged low ceiling. If there was such a low ceiling over Beatrice, accused should have avoided it and flown over the open country where he knew he was permitted to fly at 500 feet without violating regulations. The record abundantly supports the findings of guilty.

7. War Department records show the accused to be 21 years of age, having been born 27 November 1923, in New York City. He is a high school graduate and attended college for one year, specializing in art. He entered the service 19 October 1942 and served as an aviation cadet through OCS, until he was commissioned Second Lieutenant 3 November 1943. His manner of performance as a fighter pilot and instructor was rated "excellent" and on 23 August 1944 he was promoted to first lieutenant. He is unmarried.

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

William H. Barnes, Judge Advocate

Herbert B. Fredericks, Judge Advocate

John R. Anderson, Judge Advocate

1st Ind.

War Department, J.A.G.O., 19 OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Alvin James Luongo (0-697566), 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 but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the attached memorandum from General H. H. Arnold, Commanding General of the United States Army Air Forces, dated 2 October 1944. He recommends that the sentence of dismissal and total forfeitures be confirmed and ordered executed.

4. Consideration has also been given to the attached letter to the President from the accused's mother, dated 29 August 1944, to the letter from Mrs. Florence Korn, addressed to the President, dated 28 August 1944, to the letter from the accused's father addressed to The Judge Advocate General, dated 18 September 1944, and to the letter from Hon. Wm. B. Barry, House of Representatives, addressed to The Adjutant General, dated 22 September 1944, with which he incloses copy of a letter from Col. C. D. McAllister to the accused's father.

5. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry the above recommendation into effect, should such action meet with approval. In such form of Executive action the accused is described as a First Lieutenant since it appears from his 201 file that he was promoted to that grade on 23 August 1944.

Myron C. Cramer

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

8 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. S/W.
Incl 3 - Form of Executive action.
Incl 4 - Memo fr. Gen. Arnold.
Incl 5 - Ltr. fr. accused's mother.
Incl 6 - Ltr. fr. Mrs. Korn.
Incl 7 - Ltr. fr. accused's father.
Incl 8 - Letter fr. Hon. Wm. B. Barry.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 661, 16 Dec 1944)

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

SPJGH
CM 262830

18 OCT 1944

UNITED STATES	)	UNITED STATES ARMY FORCES IN THE MIDDLE EAST
v.	)	
Major WILLIAM H. LAKE (0-447869), Corps of Military Police.	)	Trial by G.C.M., convened at Cairo, Egypt, 11 and 12 August 1944. Dismissal and total forfeitures.

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OPINION of the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

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

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

Specification 1: (Finding of not guilty).

Specification 2: In that Major William H. Lake, Headquarters, MESC, Camp Russell B. Huckstep, Egypt, was guilty of conduct unbecoming an officer and a gentleman, in that he did at Cairo, Egypt, on or about 15 July 1944, in a public place; to wit, outside and near the James Bar, No. 1 Sharia Eloui, insult Mr. N. Christmas, a British subject, by calling him a "bloody Greek" and spitting at or on him, to the prejudice of good order and military discipline.

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

Specification 1: In that Major William H. Lake, Headquarters, MESC, Camp Russell B. Huckstep, Egypt was at Cairo, Egypt on or about 15 July 1944 drunk and disorderly in uniform in a public place, to wit, the James Bar, 1 Sharia Eloui, to the prejudice of good order and military discipline.

Specification 2: In that Major William H. Lake, Headquarters, MESC, Camp Russell B. Huckstep, Egypt, was at the James Bar, 1 Sharia Eloui, a public place in Cairo, Egypt, on or about 15 July 1944, engaged in drinking intoxicating beverages with Tec 5 John Annette, Hq., MESC, Private Albert Goyette, Co. "B", 802nd Military Police Battalion and Staff Sergeant William F. Beddow, Co. "C", 802nd Military Police Battalion, enlisted personnel of the U. S. Army, to the prejudice of good order and military discipline.

Specification 3: In that Major William H. Lake, Headquarters, MESC, Camp Russell B. Huckstep, Egypt, did on or about 15 July 1944 in Cairo, Egypt, violate existing instructions covering the use of Army vehicles by permitting a military vehicle; namely; a Ford Jeep No. 20159768 for which he was responsible, to be left unattended on Sharia El Madabigh near Fouad El Awal, to the prejudice of good order and military discipline.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1 of Charge I, guilty of Specification 1 of Charge II, by substitutions and exceptions, only of disorderly conduct at the time and place alleged, and guilty of all other Specifications and Charges. Evidence of one previous conviction on 15 May 1944 for being drunk and disorderly in uniform in a public place was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In support of Specifications 1 and 2 of Charge II, the prosecution introduced evidence to prove that around 5 p.m. on Saturday, 15 July 1944, accused, Staff Sergeant William F. Beddow, Technician Fifth Grade John W. Annette and Private Albert A. Goyette rode in a Government vehicle, commonly called a jeep, from Camp Russell B. Huckstep in Egypt to the nearby city of Cairo. The purpose of the trip was to obtain some of accused's luggage from his quarters in Cairo and transport it to the camp (R. 5, 43). During the trip Sergeant Beddow revealed that his home was in New York City and that during civilian life he had worked as a deputy collector for the Bureau of Internal Revenue. He and accused discovered during their conversation they had mutual friends in New York City (R. 11, 12). They arrived at Cairo about 6 p.m., were invited by accused to have a drink in his quarters and passed about a half hour there during which accused, Sergeant Beddow and Corporal Annette each imbibed two drinks of rye and soda (R. 5, 6, 31). Private Goyette remained in charge of the parked jeep during this visit until Corporal Annette came out to relieve him. Then Goyette entered accused's quarters and enjoyed one drink (R. 32, 44).

Sometime between 6:30 and 7 p.m., at accused's suggestion they all left his quarters and proceeded to the Churchill Bar, located on a street called Cherif Pasha. The jeep was parked in a nearby alley,

Goyette remained in charge of it and accused, Sergeant Beddow and Corporal Annette entered the establishment. They drank at the bar until Sergeant Beddow left to relieve Goyette so that he might join the group. Soon thereafter, Sergeant Beddow re-entered the bar, found the group was then occupying a table and instructed Goyette to return to the jeep. At the Churchill Bar accused had at least one brandy drink, Sergeant Beddow consumed one or two gin drinks, Corporal Annette had three brandy drinks and Goyette had one drink for all of which accused paid (R. 6, 7, 32, 33, 44). Goyette separated from his companions about 7:15 p.m. and did not see them again that evening. He believed accused to be sober at that time (R. 7, 34, 44, 45).

Between 7:15 and 7:30 p.m. accused, Sergeant Beddow and Corporal Annette departed from the Churchill Bar and proceeded in the jeep to the Bar Eugene located in the same neighborhood. Accused and Corporal Annette entered the bar but Sergeant Beddow left to attend to a personal errand, eventually joining them in about ten minutes (R. 7, 32). They sat at a table where Corporal Annette and accused consumed about three drinks of brandy and Sergeant Beddow had two drinks. Around 8:30 they left this bar and proceeded by jeep to the James Bar which was located "downstairs" in the same building in which accused had his quarters (R. 8, 33). They arrived there about 8:45 p.m. (R. 13).

When accused's party entered the James Bar they found it occupied by approximately a dozen individuals. They seated themselves at a table to the left of the entrance and adjoining a table occupied by about five men and three women, all civilians, who were playing cards (R. 8, 34). Mr. Neil Christmas, an employee of the Admiralty, British Navy, his wife, and Mrs. Steffen and Mr. Edmond Gentil, a Swiss watchmaker living in Cairo, also were seated at a table in this bar (R. 19, 20, 25, 26). Accused ordered a drink of brandy and his two companions ordered similar drinks (R. 9, 34; Pros. Ex. C). According to Corporal Annette they had each consumed about eight drinks before arriving at the James Bar and they each had four more of them at that bar (R. 36).

While at the James Bar, according to Sergeant Beddow, accused wished to speak to a civilian seated at a nearby table. The sergeant arose, walked to the civilian, spoke to him and apparently the man then left the establishment (R. 9). According to Corporal Annette's version of this incident, accused and Sergeant Beddow arose from their seats, rolled up their sleeves and accused pointing to a civilian seated at a table stated, "That man is fucking with my wife" (R. 34). Sergeant Beddow walked to this individual, talked to him and the man then left the bar (R. 35). Mr. Christmas heard someone at accused's table remark in a loud voice that civilians should be in uniform (R. 24). Mr. Gentil heard accused state that women in the bar were of bad character and he also saw accused commence to roll up his sleeves (R. 26). Mr. Jo Steffen, the proprietor of the bar, thereafter called the military police "to come over to James Bar and explain to them /accused's party/ where the Bar was" (Pros. Ex. C). When three members of the military police arrived the accused approached them, stated nothing was wrong and verified that his bar bill had been paid. Accused, Sergeant Beddow and Corporal Annette then followed the military police

from the establishment (R. 9, 26, 35). The military police found no disturbance in the bar although a civilian complained to them that accused had insulted his wife (R. 50, 53, 54). Mr. Steffen was of the opinion that accused was not drunk (Pros. Ex. C). Likewise, it was the opinion of one of the military policemen that, although accused had been drinking, he was not drunk (R. 51).

In support of Specification 2 of Charge I the prosecution introduced evidence to prove that about 10:30 p.m. on this same evening, 15 July 1944, Mr. Neil Christmas and his party left the James Bar and proceeded to their auto parked in front. Apparently accused and his party had walked from the bar with the military police but a short time prior and had not left the vicinity. Mr. Gentil stepped into the automobile and as Mr. Christmas assisted his wife and Mrs. Steffen to enter it, accused accompanied by Sergeant Beddow accosted him. Mr. Christmas testified that without any provocation whatsoever accused called him a "bloody Greek" and spat on him. Mr. Gentil testified that as Mrs. Christmas urged her husband to the automobile, accused spat in Mr. Christmas' face and called him a bloody Greek (R. 20-23, 27, 28). Sergeant Beddow testified that he did not recall that accused spoke to anyone but him after they left the James Bar (R. 13). After leaving this bar with accused and Sergeant Beddow, Corporal Annette walked to the other side of the street and did not see or hear the incident testified to by Mr. Christmas and Mr. Gentil (R. 90, 91). Mr. Christmas did not believe that accused was drunk at the time (R. 22). He did not know accused nor had he ever spoken to him (R. 21). Just prior to commission of this disgusting act accused had delivered a kick at the iron rolling door of the bar which had been closed for the night (R. 27).

In support of Specification 3 of Charge II the prosecution introduced evidence to show that, according to paragraph three of a Memorandum concerning the operation of Cairo Motor Pool, dated 21 May 1944 and issued by Headquarters Cairo Military District to all commanding officers, it was provided as follows (Pros. Ex. A):

> "Vehicles will be attended by the driver or passenger at all times unless parked in a military establishment or other secure location. In this connection, public garages and parking lots are not considered secure. So-called 'car watchers' will not be utilized at any time. Vehicles left unattended will be impounded in the Motor Pool. Impounded vehicles will be released only when authorized by the Commanding Officer, Cairo Military District, upon written request by Commanding Officer of unit to which vehicle pertains or Chief of Section to which vehicle is assigned."

After Goyette had left accused's party around 7:15, accused, Sergeant Beddow and Corporal Annette proceeded by jeep to the Bar Eugene. Sergeant Beddow attended to some personal errand and then joined them in about ten minutes. They remained there consuming brandy until about 8:30 p.m. (R. 7, 8, 32, 33). About 8:05 p.m. a jeep bearing No. 20159768 was found unattended at Shari el Madabigh Street near Fouad el Awal in Cairo and was removed by the military police to the Cairo Motor Pool (R. 48; Pros. Ex. B). About 8:45 p.m. Sergeant Jack Ward Downes, desk

sergeant on duty in military police office in Cairo received a telephone call from Sergeant Beddow concerning a jeep and told him it was at the motor pool and could only be released on order of a Colonel Herndon (R. 46). Corporal Annette testified that within fifteen minutes after they arrived at the James Bar, following the visit to the Bar Eugene, Sergeant Beddow remarked that their jeep had disappeared. Although they had proceeded to the James Bar in a jeep, it apparently was not the same one in which they had originally driven to town. The corporal made a phone call and was told the jeep was at Cairo Motor Pool, which he promptly told accused and the sergeant (R. 38). Sergeant Beddow, who had been sick and had vomited, was vague in his testimony concerning the jeep. When accused's party left the James Bar a little later, Sergeant Beddow saw a jeep parked around the corner, didn't know whether or not it was his but entered it and started back to camp. It was then around 10 p.m. (R. 9, 10). En route he was taken ill and he stepped from the jeep into an alley to relieve himself. When he returned the jeep was gone. He then telephoned accused (R. 10). Accused thereafter telephoned the Cairo Motor Pool about 11:30 p.m. and assisted Sergeant Beddow in obtaining the jeep from the pool (R. 11, 14, 16, 46). Sergeant Beddow then obtained from accused a black convas bag, commonly called a val-pac, and returned to camp with it in the jeep (R. 16, 17).

4. After his rights as a witness had been explained to him, the accused elected to testify under oath in his own behalf. He formerly had been Chief of the Investigation Division, United States Army Forces in the Middle East, and in civilian life had been a detective in New York City (R. 59, 60). He had spent a total of eight and one half years in military service and was a commissioned officer for two and one half years of this time (R. 76). Since 27 June 1944, he had been in charge of garbage removal and policing of the camp (R. 59). About 4 p.m. on 15 July 1944, in response to accused's questions, Sergeant Beddow said he had a jeep available and would pick up accused's luggage in Cairo (R. 60). About 5 p.m., Sergeant Beddow accompanied by Corporal Annette and Private Goyette called for accused and they drove to Cairo in a jeep. Conversing on the way, accused discovered he and Sergeant Beddow had mutual acquaintances. He invited the men to his quarters for a drink and imbibed one himself as he changed his clothing. They left accused's quarters in about a half hour and went to the Churchill Bar where accused attempted to locate a friend. They spent half an hour there, during which accused had a drink and purchased drinks for his enlisted companions. Accused's party then adjourned to the Eugene Bar where accused continued the search for his friend and had two drinks. His enlisted companions also ordered drinks and he believed that Corporal Annette had two or three of them. Following this visit they repaired to the James Bar (R. 61-63, 71, 72). Accused and Corporal Annette entered the bar immediately and were joined by Sergeant Beddow within ten or fifteen minutes. At this bar accused consumed two or three drinks (R. 64). His purpose in going to this bar was to talk to Mr. Steffen on a personal matter (R. 67).

Accused denied that he was drunk and disorderly at the James Bar and further denied that he pointed out a man stating that he was having improper relations with his (accused's) wife (R. 70, 73). He stated he talked to no one but the members of his party although he did ask Sergeant Beddow to summon Mr. Steffen to his table (R. 65, 66). He denied that he "rolled"

up his sleeves but merely turned back the cuffs because of the heat (R. 66). Sergeant Beddow similarly adjusted the cuffs of his sleeves (R. 80). When the military police arrived accused inquired of them if anything was wrong, questioned the bartender about his bill which the latter admitted was paid, and thereafter followed the military police from the bar (R. 67, 68). He denied that he called Mr. Christmas a "bloody Greek" or expectorated upon him (R. 68, 69).

Accused further testified that he had been at Camp Huckstep but a short time and, although he knew Government vehicles were not to be used for transportation to bars, he did not know all of the regulations concerning use of such vehicles. He admitted, however, that while at the Churchill Bar he made certain that the parked jeep was occupied at all times (R. 71). Although the jeep in which accused had come to Cairo that evening had been left unattended and had been picked up by military police about 8:05 p.m. while accused's party was at the Eugene Bar, accused and his companions had driven by jeep from the Eugene Bar to the James Bar and accused did not know whether the jeep so used was the original one used that evening or another one (R. 78). At the James Bar Sergeant Beddow remarked that their jeep had been picked up and removed from the street (R. 69). Although he felt no responsibility for the vehicle he did wish to see that the enlisted men obtained it for transportation back to camp so he called Colonel Herndon and procured its release (R. 69, 77). After leaving the James Bar accused placed his luggage in the recovered jeep and Sergeant Beddow returned to camp with it while accused repaired to his billet in town (R. 69, 70).

It was stipulated that if Lola, the Director of Churchill's Bar were called as a witness and sworn she would testify that accused visited that bar for about twenty minutes on the night in question and had a round of drinks "with his three boys" one of whom remained with the jeep while the other two were in the establishment (Def. Ex. 2). It was also stipulated that if Pierre Cabri, proprietor of Eugene Bar, were called and sworn as a witness he would testify that accused, accompanied by a sergeant and another enlisted man, had "a couple of drinks" in his establishment on the night in question but was not drunk and created no disturbance (Def. Ex. 1). It was further stipulated that if the dispatcher at the motor pool, Camp Huckstep, were called as a witness he would testify that Government motor vehicle No. 20159768 was dispatched from the central motor pool at 1020 hours on 15 July 1944 and was returned there about 2400 hours the same day without its trip ticket (Def. Ex. 3).

According to accused's W.D., A.G.O. Form No. 66-1 from 27 April 1942 to 24 February 1944, the manner of performance of his work had been three times rated "Superior" and for four other periods had been rated "Excellent" (Def. Ex. 4).

5. After conclusion of the defense's case, Sergeant Beddow and Corporal Annette were recalled by the court for further examination. Sergeant Beddow believed he used two different jeeps on the night in question both of which were taken while he was absent from them. He had the original jeep until the visit to the Eugene Bar was made. He used another jeep he

found on the street unattended to transport the group from that bar to the James Bar. He left his group at the latter bar to drive to the New Hotel on a personal matter. En route he stopped and walked into an alley to relieve himself and when he returned to the street the second jeep was missing (R. 82, 83, 85). During this evening Sergeant Beddow was "heady", sick to his stomach and left the party at the James Bar on one occasion to vomit (R. 84, 87). He didn't hear accused charge any person with having improper relations with his wife nor did he see accused accost any civilian outside the James Bar. Accused did ask him to summon a civilian to their table at the James Bar but, after he carried the message, the civilian walked from the establishment (R. 84, 86). Sergeant Beddow admitted he had previously told the trial judge advocate that the events of the evening were confused in his mind (R. 87).

Corporal Annette testified that the original jeep used that evening had no top on it but that there was a top on the jeep used for transportation from the Eugene Bar to the James Bar and admitted he could not say they were the same vehicles. At the James Bar he learned the jeep was missing (R. 89, 90). He described accused's act of rolling up his sleeves as merely the turning back of the cuffs thereof (R. 89). However, he testified that he spoke truthfully when he previously told the trial judge advocate in his office that the accused and Sergeant Beddow arose from their table at the James Bar and rolled up their sleeves as accused pointed to a civilian and said in a loud, belligerent tone which shocked the corporal, "That man has been fucking my wife" (R. 91, 92). He saw a black sedan in front of the James Bar after accused's party had emerged therefrom on the heels of the military police (R. 90, 91).

6. Under Specification 2 of Charge I, the evidence clearly demonstrates that accused, after consuming a substantial amount of liquor, accosted Mr. Neil Christmas, a British subject, outside a public bar about 10:30 p.m. on 15 July 1944 and in the presence of other civilians accused him of being a "bloody Greek" and spat in his face. Such conduct is reprehensible, disgraceful and extremely unbecoming an officer of the United States Army. The record of trial sustains the findings of guilty of this Charge and Specification.

Under Specification 1 of Charge II, the evidence demonstrates that while at the James Bar and just prior to the commission of his insulting act upon Mr. Christmas accused arose from a table at which he was drinking, rolled up the cuffs of his sleeves, pointed to a civilian and charged him with having intimate relations with accused's wife. He also stated that the women present in the bar were of bad character. Although testimony was reluctantly given by some of the witnesses, it is apparent that accused's unseemly behavior at this bar attracted the attention of other persons present at the time and resulted in the summoning of military police. Accused's conduct was plainly and clearly disorderly, and the record of trial fully sustains the findings of guilty of disorderly conduct under this Specification.

Under Specification 2 of Charge II the proof is clear that accused drank intoxicating liquor at the James Bar, a public bar in Cairo, in the company of two enlisted men who were also similarly engaged. Such conduct by accused constitutes a violation of Article of War 96 (2 Bull. JAG 342, CM 234558). The record of trial sustains the findings of guilty of Specification 2, Charge II.

Under Specification 3 of Charge II, an examination of the evidence reveals that the Government jeep used by accused and his enlisted companions for transportation to Cairo, to the Churchill Bar and to the Eugene Bar was left unattended while accused, Sergeant Beddow and Corporal Annette drank at the latter establishment. They had left the Churchill Bar about 7:30 p.m. and had driven to the Eugene Bar located in the same neighborhood. They departed from the Eugene Bar about 8:30 p.m. Meanwhile, about 8:05 p.m., their jeep was removed from the street by the military police. To leave this vehicle unattended on the streets of Cairo violated established regulations of the Cairo Military District.

There is no merit to accused's contention that Sergeant Beddow and not he was responsible for the jeep. The vehicle was being driven under accused's directions and he, the only commissioned officer present, was obligated to insure adherence to all regulations in the operation of it. Even if accused had no knowledge of the regulations prohibiting the parking of unattended vehicles, such lack of knowledge would have afforded no defense. It was his duty, before assuming to control the operation of a Government vehicle in a particular area, to determine the applicable regulations and, accordingly, he is charged with knowledge thereof. Ignorance of the regulations is no excuse. The record of trial sustains the findings of guilty of this Specification.

7. The accused is 43 years of age and married. He left public school at the age of 16 to join the Army. He served in the United States Army as an enlisted man from January 1918 to January 1923. On 5 April 1942 he was commissioned a captain, Army of the United States, and entered on active duty 21 April 1942. On 4 June 1943 he was promoted to major. In civilian life he conducted the W. H. Lake Detective Bureau in New York City.

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. Dismissal is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 96.

Thomas N. Tarpley, Judge Advocate.

_____, Judge Advocate.

William H. Gambrell, Judge Advocate.

SPJGH
CM 262830

1st Ind.

War Department, J.A.G.O., 23 OCT 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 Major William H. Lake (0-447869), 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 of guilty and the sentence and to warrant confirmation of the sentence. The accused was found guilty of being disorderly in a public place in Cairo, Egypt, of publicly drinking intoxicating liquor with enlisted men, of leaving a military vehicle unattended on the streets of Cairo contrary to military regulations, and of conduct unbecoming an officer and a gentleman in that publicly in Cairo he called a British subject a "bloody Greek" and spat in his face. All of these offenses were committed on 15 July 1944. Two months earlier, on 15 May 1944, accused had been convicted by general court-martial of being drunk and disorderly in a public place. As approved by the reviewing authority and published in General Court-Martial Orders No. 25, Headquarters United States Army Forces in the Middle East, 17 June 1944, accused was sentenced to be reprimanded and to be fined $500 for that offense. I recommend that the sentence in the instant case 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. 672, 22 Dec 1944)

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

SPJGK
CM 262836

8 OCT 1944

UNITED STATES v. Second Lieutenant ROBERT L. PARMELEE (O-1173413), Field Artillery.	ARMY GROUND FORCES REPLACEMENT DEPOT NO. 1 Trial by G.C.M., convened at Fort George G. Meade, Maryland, 29 August 1944. Dismissal, total forfeitures and five (5) years' confinement. Eastern Branch, Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Robert L. Parmelee, Company A, 5th Replacement Battalion, 2nd Replacement Regiment (Inf), Army Ground Forces Replacement Depot No 1, did, at Fort George G. Meade, Maryland, on or about 21 July 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: transfer to a port of embarkation for overseas shipment, and did remain absent in desertion until he surrendered himself at Camp Gruber, Oklahoma, on or about 1 August 1944.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of any previous conviction was introduced at the trial. The accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of five (5) years. The reviewing authority approved the sentence, designated the Eastern Branch Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, briefly summarized, is as follows:

The accused reported to Company A, 5th Battalion, 2nd Replacement Regiment, AGF Replacement Depot No. 1, Fort George G. Meade, Maryland, as a replacement officer, attached unassigned, on 16 July 1944 (R. 6). During

the course of an orientation lecture given by him to all officers reporting on that date, Captain Thomas J. Robinson, commanding officer of the above mentioned organization, informed them that they were there for processing for overseas shipment. He also informed them that they would be shipped on a definite date and at a fixed hour, neither of which was known to him at the time, and that they would be restricted for a period of 24 hours immediately preceding shipment (R. 6).

On 18 July 1944 Captain Robinson received from Headquarters, AGF Replacement Depot No. 1, Fort George G. Meade, Maryland, Special Orders No. 202, dated 20 July 1944, which relieved all officers and enlisted men named in lists attached to and made a part of the Special Orders from attached unassigned the organizations indicated, transferred them in grade from that station, assigned them to Shipment No. GJ - 900 (a) - A, and directed that they proceed on or about 22 July 1944 (R. 7). The accused was one of the officers named in the "outgoing transport" lists attached to and made a part of the foregoing special orders. A duly authenticated extract copy of these Special Orders, together with a copy of the page from the lists of personnel thereby affected upon which accused's name appeared, was introduced in evidence without objection (R. 7; Exs. A, B). In addition to the provisions above set out, the special orders directed that affected personnel use APO 15491, c/o Postmaster, New York, New York as their mailing address until arrival at final destination, appointed "escort personnel" and directed that they take charge of and conduct the movement to the Port of Embarkation and continue with it through the port area "to overseas destination" (Ex. A).

Upon receipt of the above mentioned special orders and lists, Captain Robinson called a formation of all officers in the company and assembled them in the company area bleachers (R. 7). A roll of the officers, including the name of accused, was first called and there was a response when accused's name was called (R. 8, 13). Captain Robinson then read to the assembled group an instrument designated as "Certificate of Notice of Transfer to Port of Embarkation", the original of which was introduced in evidence without objection and a copy substituted in the record (R. 8-9; Ex. C). It bore the heading "Company A, 5 Battalion, 2 Replacement Regiment, Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, Outgoing Transfer List No. GJ 900a A, Shipment No. GJ 900a A" and date of 18 July 1944, was designed and had additional sheets attached for signatures, was drawn in the first person, and was a certificate by each person signing it that he acknowledged he had received notice that he was on orders for transfer to a Port of Embarkation for shipment overseas; that he realized that the instrument was an alert notice and that any unauthorized absence was likely to cause him to miss his shipment, even though he should return before the shipment was scheduled to leave; that he realized that subsequent unauthorized absence on his part would appear to be desertion for the purpose of avoiding hazardous duty and to shirk important service overseas and that as a result he would be tried by court-martial for desertion; that he understood the meaning of Article of War 28 (quoted in the certificate) and that he was familiar with the penalties attaching to desertion set out in the certificate.

After reading the foregoing instrument to the assembled group, Captain Robinson called the roll by platoons and sent the officers to nearby tables where they were given copies of their orders and required to sign the "Certificate of Notice of Transfer to Port of Embarkation" which had been read to them (R. 8, 9, 14). The name of accused was signed on line 91, page 6, of the signature sheets attached to the certificate (R. 8). Corporal Charles J. Shutler was processing clerk at the formation, heard the certificate read to the group of officers by Captain Robinson, gave accused a copy of the orders, and saw him sign his name to the certificate (R. 14). Captain Robinson saw and talked to accused as the group was dispersing. The accused had a copy of the orders in his hand at the time and talked to him about the shipment (R. 12-13).

In addition to the matters above detailed, Captain Robinson informed the assembled officers that they were alerted, that the shipment was going to leave, and that the time of departure, as given to him, would be the 21st or 22nd of July 1944 (R. 9).

It was stipulated, and also testified by Captain Robinson, that Shipment No. GJ - 900a-A, including the Excess Officer Company (organization to which accused was assigned), departed from Fort George G. Meade, Maryland, on 22 July 1944 at 4:30 a.m. pursuant to the special orders hereinabove mentioned (Special Orders No. 202, Headquarters AGF Replacement Depot No. 1, Fort George G. Meade, Maryland) (R. 9, 15; Ex. E). The accused, however, was not present at the time of departure and did not accompany the shipment (R. 9). It had been discovered at roll call on the morning of 21 July 1944 that he was absent (R. 10). A search of his barracks and the company area was made at that time but he was not found (R. 10). The roll was again called and further search made for him on the morning of 22 July 1944 just before the shipment departed but he still could not be found (R.11). Another officer was substituted in the shipment to fill the vacancy thus created by the absence of accused (R. 12, 13).

Captain Robinson did not grant the accused permission to be absent from his organization at any time after 20 July 1944 (R. 11). Duly authenticated extract copies of the morning report of accused's organization (Co. A, 5th Bn., 2nd Replacement Regiment AGF Replacement Depot No. 1) for 21 July and 8 August 1944, were introduced in evidence without objection (R. 11; Ex. D). Accused was carried as from duty to absent without leave at 7:30 a.m. on 21 July 1944 and is shown to have returned to his station on 8 August 1944. The "shipping orders" (Special Orders 202) provided that their effective date, insofar as making changes on morning reports to reflect the transfers and changes in assignment therein provided, should be the date of departure (Ex. C).

By stipulation, an extract copy of the morning report of Headquarters, 1881st Service Unit, Camp Gruber, Oklahoma, was identified and

admitted to be duly authenticated (R. 15; Ex. F). This extract copy of morning report was introduced in evidence without objection as a part of Exhibit F and shows that accused reported to that station and was returned to military control on 1 August 1944 (R. 15; Ex. F).

4. Evidence for the defense:

In his opening statement to the court, defense counsel stated that the defense did not expect to show, and had no evidence to show that accused was not absent without leave from 21 July to 1 August 1944 (R. 15). Defense only sought to contest the intent which it is alleged in the Specification attended such absence.

A written statement made by Mrs. Edna Parmelee, mother of the accused, was introduced in evidence by stipulated agreement (R. 19; Def. Ex. 1). The statement is substantially as follows: The accused is 25 years of age. When he was a baby there was an abnormality about his scrotum. One testicle was enlarged and the condition became worse as accused grew older. Accused has suffered a broken jaw and nose and had his arm broken twice during his career. When examined in August 1941 to determine his fitness for service in the Army, he was discovered to have a slight hernia in his side and varicose veins. He had been examined in 1939 by Dr. J. W. Moore, of Oklahoma City, Oklahoma, and the latter advised that he be sent West. During May, 1941, accused attempted to commit suicide by taking poison. During the same month he was discovered to have an active streptococcic affliction in his lungs when examined by Dr. Henry H. Harris, of Oklahoma City, Oklahoma. The accused has always been of a highly nervous temperament and a "very light sleeper". He "gets the blues". When at home on leave during August, 1943, accused complained all of the time of headache, and fainted twice for no known reason. He still complains of headache and "just fairly eats aspirin". He "is not well and hasn't been for a long time".

Having had his rights as a witness explained to him, the accused elected to testify in his own behalf as a sworn witness (R. 19). He enlisted in the Army on 10 December 1941 (R.20). He had been previously deferred from draft because of physical defects (R. 31-32). After undergoing basic training with the Field Artillery at Camp Roberts, California, he entered Officer Candidate School, Fort Sill, Oklahoma. Having been commissioned a second lieutenant on 12 November 1942, for duty with the Field Artillery, he was transferred to Camp Gruber, Oklahoma. While at this latter station he was operated on for a hernia (R. 20). The operation was performed on or about 10 January 1943. As a result, accused was in the hospital for 46 days and was partially incapacitated for duty for a period of approximately six months (R. 21).

He entered the Parachute Jump School at Fort Benning, Georgia, on or about 10 May 1944 and completed the six jumps required to qualify him in that branch of the service by approximately 10 June 1944. When his parachute opened during his first jump he experienced severe pain and his left leg was rendered numb. When he reached the ground his left leg was "partially paralyzed" and approximately five minutes elapsed before he was able to walk on it (R. 21). Upon examination, he discovered a "large swelling in the left testicle and a very large blood blister, what we call a strap burn, on my lower left groin". Subsequent jumps aggravated the injuries (R. 25).

Upon reporting back to his home station, Camp McCall, North Carolina, after completion of his training at Fort Benning, the accused reported to his battalion surgeon, who had examined him before he (accused) left for Fort Benning, and "showed him the change that had taken place and how my left testicle had swollen" (R. 22). Accused went to the hospital and was given heat treatments and kept under observation, the while wearing a heavy truss (R. 22). Because of his physical condition he was not allowed to make two maneuver jumps made by his organization within the two weeks after he returned to Camp McCall (R. 22).

He was given a PCR physical examination (Form 63 physical) at Camp McCall and certified as physically fit for combat duty before being sent to Fort George G.Meade, Maryland, but he did not inform the persons making that examination of his condition (R. 26) because he wanted to qualify on the examination in order that he could get a leave of absence (R. 27). He knew all along that he was not physically qualified (R. 27). He was to report back to Camp McCall after his leave and go before a Reclassification Board for determination of whether he should be transferred out of the paratroops or be sent to the hospital. (The record is not clear as to whether accused had gained this impression from some source or whether it was just a part of his own private plans) (R. 22). He did not arrive back at Camp McCall, however, until the afternoon of 15 July 1944, and was shipped to Fort George G. Meade on 16 July 1944, which was a Sunday (R. 22). He was unable to see the Reclassification Board or the "medical doctor" before he was shipped, so went forward as a "qualified jumper" (R. 22). He did see his battalion surgeon at Camp McCall but only about two hours before departing that station. The latter, who had just returned from a weekend leave, "wanted to pull" accused "off the shipment" and told him he had no business going (R. 28). Accused replied that he was aware of that, but that he could no doubt get the same medical attention and go before a Reclassification Board at Fort George G. Meade (R. 28). This was his expectation (R. 30). Accused stated that he was still bothered "terribly" by his physical condition when he reached Fort George G. Meade (R. 22) and reported the matter to his regimental surgeon (R. 22-23). The latter examined him and on 19 July 1944 reported his findings. The report was not satisfactory to accused, so he requested another examination (R. 23). He was thereupon examined by the ACF Depot

Surgeon (R. 23). The latter's report, which was made known to accused on 20 July 1944, stated that accused had "varicocele, moderate" and varicose veins but left him qualified for shipment overseas (R.23).

Upon learning the contents of the Depot Surgeon's report, while not deciding that he was not going on the overseas shipment, accused decided to go to Camp Gruber, Oklahoma (camp at which he was operated upon), and obtain his medical record from there (R. 30). He desired this in order to convince the medical authorities at the AGF Depot, Fort George G. Meade, that he was operated on for hernia after entering the Army and that his trouble did not arise from causes which had existed all along (R. 24, 30). He had been receiving no cooperation from the Depot Surgeon and did not assume that he could himself get his record from Camp Gruber by merely sending a telegraphic request for it (R. 31). So, notwithstanding he had heard Captain Robinson read the "Certificate of Notice of Transfer to Port of Embarkation" (R. 28) and knew he was under orders for overseas shipment (R. 22, 23), all as hereinabove set out, accused, nevertheless left his company area about 5:00 o'clock p.m. on 20 July 1944 and proceeded by bus and train to Muskogee, Oklahoma, which is about 20 miles from Camp Gruber (R. 23). While there he stayed with relatives of his wife (R. 24). He went to Camp Gruber on 24 July 1944 (R. 24) and again between then and 1 August 1944 (R. 25) in an effort to get his medical record. He accomplished nothing in this respect, however (R. 25), because the surgeon who operated upon him had been transferred (R. 24) and the only person connected with the records whom he got to see on either trip was an enlisted file clerk (R. 24, 25).

Accused called the Provost Marshal at Camp Gruber, Oklahoma, on 29 July 1944, received instructions from him with reference to surrendering himself, and actually reported to him on 1 August 1944 (R. 29). He had no intention of deserting the military service when he left his organization (R. 29-30). He merely intended to get his medical record from Camp Gruber, hoping that it would aid him in being relieved from the painful ordeal of jumping. Accused is able to do other types of service in the Field Artillery and is willing to go overseas and perform such types (R. 30).

Accused testified that the stipulated testimony of his mother, including both statements of fact and her conclusions, is true (R. 33). His attempted suicide in May, 1941 resulted from the fact that he had been divorced from his first wife in April, 1941 and was "torn up and nervous" (R. 32). He further testified that he has taken a lot of sedatives and nerve medicine (R. 32).

Lieutenant Colonel Alan P. Parker, MC, Regional Hospital, Fort George G. Meade, Maryland, having been called by the defense as a witness testified that he, in his professional capacity, examined accused on

25 August 1944 (R. 16). He found that accused has a "moderate varicocele on the left and varicose veins on the left lower extremity, to a moderate degree" (R. 15) and a normal left inguinal hernia scar but no evidence of a present hernia on either the left or right (R. 18). Based on his objective examination, he was of the opinion that accused was qualified for general duty under the provisions of MR-19 (R. 19). Accused gave a history of his case which was in substantial accord with his testimony as hereinabove set out (R. 16, 18). Varicocele can cause pain, and there is "no way to determine that his statements (accused's claims of pain) are not correct from a subjective standpoint" (R. 17).

5. The Specification, laid under Article of War 58, alleges that, on or about 21 July 1944, the accused deserted the service of the United States "by absenting himself without proper leave from his organization with intent to shirk important service, to wit: transfer to a port of embarkation for overseas shipment". The gravamen of the offense charged is absence without leave "with intent to shirk important service" (AW 28). Embarkation for foreign duty or duty beyond the continental limits of the United States, or transfers or movements directly related to immediate embarkation for foreign duty have been consistently recognized in the opinions of the Board of Review as constituting "important service" within the purview of Article of War 28, CM 151672, Lytle (Dig. Ops. JAG, 1912-40, sec. 385), CM 224805, Conlon (Bull. JAG, October 1942, p. 272). The legal sufficiency of the Specification was not questioned at the trial, nor does it appear that a valid legal objection could have been urged to it. The facts averred were sufficient to put the accused upon notice that the "important service" which he was charged with intending to shirk was embarkation for foreign duty or at least a transfer and movement directly related to embarkation for foreign duty, which is all that is required.

That accused was absent from his organization without proper leave from 21 July to 1 August 1944, is conclusively established by the uncontroverted evidence of record and was admitted by both himself and his counsel at the trial. The only question requiring discussion, therefore, is whether at or during the time he so absented himself, the accused entertained the specific intent and was actuated by the motive alleged in the Specification. As to this, the evidence of record is of a nature to preclude any reasonable doubt that he did entertain such intent and was actuated by such motive.

The accused made no contention that he was not under orders for immediate shipment overseas or that he was unaware of that fact or of the probable date of departure at the time he absented himself from his organization without leave. Nor was he in a position to make either of these contentions with any hope of success. He was sent to AGF Depot No. 1, Fort George G. Meade, Maryland, as an overseas replacement officer.

Immediately upon arrival there he was advised by the commanding officer of the organization to which he was attached unassigned that he was there for processing for overseas shipment and that the shipment was really going to be made. Two days later, on 18 July 1944, he was aporised of the fact that orders had been issued assigning him to a definite shipment, that he was alerted, and that the date fixed for shipment was the 21st or 22nd of July 1944. He heard read and was required to sign a certificate acknowledging notice of his shipping orders and his alerted status. This certificate quoted the pertinent portions of Article of War 28 and gave full warning of the probable consequences of thereafter going absent without leave. Accused also received a copy of the special orders transferring him to the overseas shipment. These orders directed him to proceed on or about 22 July 1944. He could not have been under any misapprehension as to his final destination because, beside the information given him by his commanding officer and the certificate of notice which was read to him, the orders themselves expressly directed escort personnel therein appointed to continue with the shipment through the Port of Embarkation Area to its "overseas destination". That accused desired to avoid going overseas with the shipment to which he was assigned and which he knew was about to depart is fully evidenced by his insistence at Fort George G. Meade that he was physically disqualified and the persistence with which he endeavored to obtain medical support for his contention. When his Regimental Surgeon failed to certify him as disqualified for shipment, he immediately requested and was given another examination by the Depot Surgeon. When the latter likewise failed to certify him as disqualified and accused could no longer hope to be relieved from shipment by virtue of his physical condition, he immediately absented himself without leave. Accused testified that upon learning the nature of the Depot Surgeon's report on 20 July 1944, he resolved to go to Camp Gruber, Oklahoma, for the purpose of securing his medical record from there, and that he actually departed Fort Meade at about 5:00 o'clock p.m. of that day. The Board of Review is at liberty to take judicial notice of the distance from Fort George G. Meade, Maryland, to Camp Gruber, Oklahoma, and it is such that accused could not have reasonably expected to make the trip by the mode of travel employed and return before 22 July 1944, which was the date upon which the shipment was scheduled to and did actually depart Fort Meade. Nor does accused contend that he had any such expectation or intention at the time he left Fort Meade. He went to Muskogee, Oklahoma, and there remained with his wife's relatives for several days after another officer had been substituted in his stead in the shipment and the shipment had departed according to schedule before surrendering himself to military authority. The only reasonable inference to be drawn from the evidence of record is that accused both anticipated that the shipment would and intended that it should depart without him during his unauthorized absence. Notwithstanding he testified as a witness in his own behalf, he did not deny that this was his true state of mind. Nor did he, either by his own testimony or by other evidence adduced, bring forward any fact or matter which would operate as a legal defense to the offense charged.

Even had it been true that he was not physically qualified for field duty, such fact would not be a legal defense for his misconduct as reflected by the record. The evidence is legally sufficient to support the findings.

6. War Department records disclose that this officer is 25 years of age. He is a high school graduate and attended a Junior College for one year. He was a bookkeeper in private life. He enlisted in the service on 10 December 1941 and was assigned for training with the Field Artillery. On 5 January 1942 he made application for transfer to the Medical Corps, representing that, as a believer of the Seventh Day Adventist faith, he was a conscientious objector to combatant service and had enlisted upon the understanding that he would be assigned to the Medical Corps. This application for transfer was approved by the Secretary of War, effective upon completion by accused of basic training, but before the transfer had been effected, accused, under date of 28 February 1942, made a written request, signed and sworn to by him and forwarded through channels, that the application be considered as withdrawn and that all remarks in his service or other military records with reference to being a conscientious objector be expunged. Thereafter upon his application he was admitted to a Field Artillery Officer Candidate School. He was graduated from this school and commissioned a second lieutenant, Army of the United States, on 13 November 1942. He entered upon active duty the same date. He was convicted by general court-martial on 11 January 1943 for two offenses committed on 4 December 1942, one, of being drunk in public while in uniform, the other, of using abusive and defamatory language in addressing a noncommissioned officer of the military police. The record of trial in the instant case reflects that accused is married.

7. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 58.

Lucy E. Gore, Judge Advocate.

Earle Stephens, Judge Advocate.

Hermann Mayer, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 - OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert L. Parmelee (O-1173413), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution, and that the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, be designated as the place of confinement.

3. Careful consideration has been given to the letter of the Honorable Mike Monroney, Member of Congress, Oklahoma, as well as to the letters of Mrs. Edna Parmelee, mother of the accused, addressed to Mr. Monroney and to the Commanding General, Army Ground Forces Depot No. 1, Fort George G. Meade, Maryland, respectively. Consideration has also been given to letter from the mother of the accused addressed to The Judge Advocate General inclosing a statement from H. W. Harris, M.D. These letters are forwarded with 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 above recommendation 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-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr. fr. Hon.Mike Monroney w/incl.
Incl.5-Ltr. fr. Staff JA,AGF Repl. Depot No. 1, w/incls.
Incl.6-Ltr. fr. Mrs. Parmelee, w/incls.

(Sentence confirmed. G.C.M.O. 638, 27 Nov 1944)

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

SPJGK
CM 262919

-8 SEP 1944

UNITED STATES	ESPIRITU SANTO ISLAND COMMAND
v.	Trial by G.C.M., convened at Headquarters Espiritu Santo Island Command, c/o Postmaster, San Francisco, California, 22 August 1944. Dishonorable discharge and confinement for thirty (30) years. Disciplinary Barracks.
Private OTTO WRIGHT (36300208), 3385th Quartermaster Truck Company, 57th Quartermaster Battalion (M).	

REVIEW by the BOARD OF REVIEW
LYON, 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Otto Wright, (Then Technician 5th Grade), 3385th Quartermaster Truck Company, 57th Quartermaster Battalion, Mobile, did, at APO 708, on or about August 4, 1944, strike Second Lieutenant Rudolph P. Temple, 3386th Quartermaster Truck Company, 57th Quartermaster Battalion, Mobile, his superior officer, who was then in the execution of his office, on the hand with a piece of coral.

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

Specification: In that Private Otto Wright, * * * did, at APO 708, on or about August 4, 1944, behave himself with disrespect toward Second Lieutenant Rudolph P. Temple, 3386th Quartermaster Truck Company, 57th Quartermaster Battalion, Mobile, his superior officer, by saying to him "Don't you fuck with me," or words to that effect.

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

Specification: In that Private Otto Wright, * * * having received a lawful order from Second Lieutenant Rudolph P. Temple, 3386th Quartermaster Truck Company, 57th Quartermaster Battalion, Mobile to give his name and identify himself, the said Second Lieutenant Temple being in the execution of his office, did, at APO 708, on

or about August 4, 1944, fail to obey the same.

He pleaded not guilty to and was found guilty of all charges and specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for thirty (30) 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 Board of Review, after a careful consideration of the record of trial, adopts in substance as a part of this review the summary of the evidence and discussion in the review of the record of trial by the Staff Judge Advocate, which is substantially as follows:

For the Prosecution.

Second Lieutenant Rudolph P. Temple, 3386th Quartermaster Truck Company, 57th Quartermaster Truck Battalion, was on duty in charge of trucks on Pier #4, Alhena Landing, on the evening and morning 3 and 4 August, 1944, respectively (R. 6,7,10). His tour of duty continued until six in the morning (R. 9). He "secured" his trucks at about 23:45 hours, 3 August 1944, and was proceeding through the Navy Warehouse Area between Piers 4 and 5 when he noticed a truck coming behind him. A little later on the truck passed him in the "15 mile zone" at an excessive rate of speed, with its lights turned off. The lieutenant overtook the truck, stopped it and questioned the driver about his speed and running without lights. The driver and the passengers in the truck got out. Privates Clarence Martin, John L. Middleton, and the accused, Wright, were amongst the passengers (R. 6). At Pallikula Dock, while the lieutenant was investigating the speeding incident and the three soldier passengers, someone smashed the spot light, slashed the seat and deflated the tires on the lieutenant's jeep (R. 6). The lieutenant asked one of the soldiers what accused's name was, whereupon accused came up to within two inches of the lieutenant and said, "My name is Wright. What are you going to do about it?". The lieutenant ordered the accused to follow him, to which accused replied, "I am not going to follow anybody." (R.8). There was a flood light at the entrance of the dock and three main lights at the entrance of the warehouse. There was sufficient light for accused to observe that the lieutenant was an officer (R. 8). Accused did not follow the lieutenant but started off down the dock. The accused was under the influence of liquor at the time (R. 6). The incidents here referred to occurred about 2400 hours, 3 August 1944 (R. 6,10). The lieutenant left Pallikula Dock in a command car to get a repair truck for his jeep and as he was passing the Surrunda Bay Warehouse he noticed a group of men, two of which he recognized as Privates Middleton and Martin. He stopped his car, got out and proceeded toward the group. As he advanced toward the group he saw accused sitting down at the

entrance of the warehouse. The accused had a green aviator's cap on and when he saw the lieutenant coming he crouched by the rocks and pulled the cap down. The lieutenant was in regulation uniform including his rank and organization insignia. He walked up to accused and said, "What is your name?". Accused did not answer (R. 7,13). The lieutenant then said, "Stand up when you talk to an officer", and "What is your name, soldier?" (R.7). The accused did not answer (R. 7,13). Accused thereupon got up, "got a rock" (R. 7) about one foot in diameter (R. 8,12), "lifted it over his head and threw it". The lieutenant put one hand in front of his (the lieutenant's) face and was struck by the coral rock. The accused then bent over to procure another rock (R. 7). The second rock obtained by accused was smaller than the first one, being some four inches in diameter (R. 13). While accused was procuring the second rock the lieutenant ordered Private Middleton to get the Sergeant of the Guard, but as the private did not respond to the order the lieutenant left to get the guard (R. 8). Accused did not hit the lieutenant with the second rock (R. 13). The accused at the time of throwing the first rock or immediately thereafter said to the lieutenant, "Don't fuck with me" or words to that effect (R. 10,13). At the time accused threw the rock which hit the lieutenant they were approximately an arm's length apart from each other (R. 8,12). The accused, in the opinion of Lieutenant Temple, was drunk (R. 9). The accused and the lieutenant are members of the same battalion (R. 8). Private Middleton who was with accused since 1730 hours in the afternoon of 3 August 1944 and was present at the time of the alleged assault, was of the opinion that although accused had been drinking he was not drunk (R. 13,14).

4. For the Defense.

Accused, after having his rights as a witness explained to him, elected to make an unsworn statement through his defense counsel which was in substance as follows:

On the night of August 3-4, 1944, when the incidents relating to these charges and specifications were alleged to have taken place, the accused was in his company's day room. He got off duty at six o'clock - 1800 - and after chow he was in the company day room drinking. He drank beer and he also drank gin and brandy. He had most of two quarts of the hard liquor. Some time before 2300 the Officer of the Day closed the day room and the accused went to bed. Accused did not remember ever being at Pallikula landing or near the ration warehouses during that evening and he knows nothing of the charges preferred against him.

Captain William John Matheus, Quartermaster Corps, 3385th Quartermaster Truck Company, 57th Quartermaster Truck Battalion, was sworn as a witness and testified that Private Middleton's reputation for truth and veracity was not good and that he would not believe him under oath (R. 18).

5. As to the Specification, Charge I.

The accused is charged with striking his superior officer, who was then in the execution of his office, on the hand with a rock. The three basic elements of the offense are: (a) that the accused struck a certain officer as alleged, (b) that such officer was the accused's superior officer, (c) that such superior officer was in the execution of his duty.

The evidence clearly shows that the accused struck Second Lieutenant Rudolph P. Temple, with a piece of coral rock some twelve inches in diameter. It is true that the evidence does not clearly establish just where the rock struck the officer as the lieutenant states, "That he got up and got a rock and lifted it over his head and threw it". "I put my hand in front of my face and got hit by the coral".(R.7) According to the testimony of Private Middleton, the accused hit the lieutenant with the first rock on the foot (R. 11). It is immaterial as to where the officer was struck. The evidence is clear that the lieutenant was struck with a rock which was thrown by accused (R. 7,12). The element of the offense consisting of the striking is established without question. The words "on the hand" are merely descriptive of the striking and the particular portion of the body struck in consummation of the assault adds nothing to the gravamen of the offense charged. It cannot be said that the accused was misled in his defense by the descriptive words, "on the hand". The court was justified in its conclusion that the officer was hit on the hand.

The fact that the lieutenant is accused's superior officer is clearly established by the evidence.

That the lieutenant was then in the execution of his office is established by the evidence. The lieutenant was on duty as officer in charge of trucks on Pier #4, Alhena Landing, on the evening and morning of 3 and 4 August, respectively, and continued on duty until six in the morning (R. 6,7,9,10). While proceeding through the Navy warehouse area he observed a truck coming behind him which later overtook and passed him at an excessive rate of speed. It was his duty to stop the vehicle if possible and obtain the name of the driver. There were three soldier passengers in the truck, two of which, at least, had been drinking. While investigating the speed and the passenger members of the truck at Pallikula Dock, the accused did not give the lieutenant an opportunity to make full inquiry as to his presence in the truck, etc., but left the dock in a defiant manner. The lieutenant on the way to get a repair truck observed some of the same members of the group in front of Surrunda Bay Warehouse and stopped to further investigate the incidents before referred to. The offenses charged were then committed by the accused. In asking accused his name he was in the performance of his duty as an officer. It was his duty to obtain such information as might be immediately obtainable as to the incidents which had so recently taken place.

There appears to be no doubt that the accused knew that the lieutenant was his superior officer. The officer was at all times during which he had close contact with the accused in regulation uniform on which he was wearing his rank and organization insignia. The accused had come in contact with the officer twice before in the evening, first when he stopped the speeding vehicle, and second at Pallikula Dock, where the lieutenant was investigating the speeding incident and the vandalism to his car. In the latter incident the accused walked up to within two inches of the officer and directed certain remarks to him. Further, the accused, upon seeing the officer approaching him at the Surrunda Bay Warehouse, crouched and pulled his cap down, obviously to avoid detection by the officer. If there could have been any doubt in accused's mind as to whether the lieutenant was his superior officer it should have been erased when the lieutenant said to him, "Stand up when you talk to an officer" (R. 7). It also appears that the lieutenant and the accused are members of the same battalion (R. 8).

That the striking was intentional and not accidental is very evident from the manner and method of the assault. The obscene words of the accused spoken at the time of the assault or immediately thereafter are clearly indicative of the accused's attitude and intent.

The evidence as to accused's condition in regard to sobriety is not in harmony, which may be due in part to different interpretations by the witnesses as to the meaning of the word drunk. The lieutenant states that accused was drunk (R. 9). Private Middleton, who had been with the accused since 1730 hours in the afternoon said accused was not drunk at the time (R. 13,14). There is little doubt from the evidence taken as a whole that accused was sufficiently in control of his faculties to know, and did know, that the lieutenant was his superior officer and in sufficient control of his faculties to carry into execution his intent to assault the officer (CM NATO 774 (1943)). Although a specific intent is not an element of the offense charged, the act must be intentional and not accidental (Winthrop's Military Law & Precedents, Reprint 1920, p. 569). The evidence clearly shows that the act of striking the lieutenant was intentional and not accidental.

As to the Specification, Charge II.

The evidence fully supports the specification and the charge. The language used is, in itself, disrespectful. The circumstances under which it was used clearly indicate that same was intended to be disrespectful.

As to the Specification, Charge III.

The evidence shows that the lieutenant ordered the accused to state his name and the accused did not respond. The lieutenant again ordered the

accused to state his name by saying, "What is your name, soldier?" (R. 7). The accused did not answer (R. 7,13), but responded by procuring a coral rock with which he struck the lieutenant.

It is true that the order was given in question form, but nevertheless it was personally directed to the accused, its meaning clear, the compliance required immediate, and its nature mandatory. The form is immaterial provided the substance amounts to a mandate (Winthrop's Military Law & Precedents, 1920 Reprint, p. 574) (MCM, 1928, par. 134(b), p. 149).

The accused, by way of unsworn statement through his counsel states that he got off duty at 1800 hours on the night of 3 August and after chow time he was in the company day room drinking. He drank "most of two quarts of hard liquor" and some time before 2300 the Officer of the Day closed the day room and he went to bed. He cannot remember being at Pallikula landing or near the ration warehouse during the evening and stated that he knows nothing of the charges.

The court was entitled to give such weight to the unsworn statement as it saw fit.

6. The Charge Sheet shows that the accused is 27-6/12 years of age. He was inducted in the military service 20 October 1941.

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

Irving C. Sam, Judge Advocate.
Norman Mayo, Judge Advocate.
Samuel Gompers, Judge Advocate.

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

SPJGH
CM 263054

15 SEP 1944

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Langley Field, Virginia, 17 August 1944. Dishonorable discharge and confinement for three (3) years. Eastern Branch, Disciplinary Barracks.
Corporal MORRIS GLAZER (32303128), Section D, 111th Army Air Forces Base Unit, Army Air Base, Langley Field, Virginia.	)	

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

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

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

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

Specification 1: In that Corporal Morris Glazer, Section D, 111th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 10 January 1944, feloniously take, steal, and carry away one Royce Incabloc wrist watch, value about $59.50, the property of Private First Class Alvin J. Richard.

Specification 2: In that Corporal Morris Glazer, Section D, 111th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 3 May 1944, feloniously take, steal and carry away one Wyler Incaflex wrist watch, value about $59.50, the property of Corporal Carl H. Daye.

Specification 3: In that Corporal Morris Glazer, Section D, 111th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 14 July 1944, feloniously take, steal and carry away $7.50, lawful money of the United States, property of E.C. Kraft.

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

Specification: In that Corporal Morris Glazer, Section D, 111th Army Air Forces Base Unit, did, at Langley Field, Virginia, on or about 14 July 1944, while acting as organization mail clerk,

wrongfully and unlawfully take from the mail and open a letter addressed to Private Eugene F. Gettler, Jr., Section D, Building 11A, Langley Field, Virginia, and a letter addressed to Private George J. Harris, Section D, Building 11A, Langley Field, Virginia.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved only so much of the findings of guilty of Specifications 1 and 2, Charge I, as involved findings of guilty of the Specifications excepting therefrom the figures "$59.50" and substituting therefor the figures "$35.00", approved the sentence but reduced the period of confinement to 3 years, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of Charge I and of Specification 3 thereunder and of Charge II and of the Specification thereunder and legally sufficient to support the sentence. The only question requiring consideration is the sufficiency of the evidence to sustain the findings of guilty of Specifications 1 and 2, Charge I.

4. The evidence for the prosecution in pertinent part shows that on 14 July 1944 the accused was a mail orderly in Section D, 111th Army Air Forces Base Unit, Langley Field, Virginia (R. 7, 17); that on that day during the course of an investigation into a series of losses in the mail, as a result of which the accused was found to be in possession of marked money placed in "test" letters by a post office inspector, the wall locker of the accused was opened and two watches were found therein (R. 9), one (Pros. Ex. 5) inclosed in an envelope (Pros. Ex. 5) addressed to "Corp. Carl H. Daye" and the other (Pros. Ex. 4) with the name of Alvin Richard and his serial number and organization written on the strap (R. 35-36). The envelope (Pros. Ex. 5) had typed on it, on one side, the following: "Corp. Carl H. Daye, Section 'G', 111th AAF. Base Unit, Langley Field, Va. G. W. Wuler, C.O.D., 6.50" and on the other: "Rogers & Co., 5 N. Illinois St., Indianapolis, Ind., No. 4134, Name - Daye. Please return in this envelope". Prosecution Exhibit 4 was not inclosed in anything (R. 13). The wall locker in which the watches were found was unlocked by the accused at the direction of his commanding officer and the search was made in his presence (R. 8, 34). The watches were taken to the office of Major Harry L. Barton, post provost marshal, where they were subsequently identified by Daye and Richard (R. 36).

Private First Class Alvin J. Richard testified that he was a member of Section G, Army Air Forces Base Unit, Langley Field, Virginia (R. 38); that the watch (Pros. Ex. 4) bearing his name, serial number and organization on the band was his; that the last time he saw it was 28 December when he left it with a jeweler in New Orleans to be repaired;

that the watch was to be mailed to him at Langley Field but he never got it back; and that he did not see it again until it was shown to him by the provost marshal "approximately a month ago" (R. 39).

Corporal Carl H. Daye testified that he was a member of Section E, 111th Army Air Forces Base Unit, Langley Field, Virginia, had been stationed at Langley Field since 4 April and before that had been at Boca Raton, Florida; that the watch marked in evidence as Prosecution's Exhibit 5 was his watch; that in the first part of March he sent the watch from Boca Raton to Rogers & Co., Indianapolis, Indiana, to be repaired; that when he was transferred to Langley Field, about 10 April, he wrote to Rogers & Co. and gave them his new address; and that he did not get his watch back and never saw it again until it was shown to him in Major Barton's office (R. 42-43).

5. The accused having been advised by the court as to his rights as a witness elected to make an unsworn statement in which he stated in substance that he had from time to time bought a number of watches; that he never stole the watches and "never questioned the thought that they were stolen"; that if they were stolen he would not have kept them in his wall locker for a number of months knowing that any week or month there might be a show-down inspection (R. 60-61).

6. The competent evidence establishes that on 14 July 1944 two wrist watches were found in the locked wall-locker of the accused, a mail orderly in Section D, 111th Army Air Forces Base Unit, Langley Field, Virginia; that one of the watches was the property of Corporal Carl H. Daye, Section E, 111th Army Air Forces Base Unit, and the other the property of Private First Class Alvin Richard, of Section G. Private Richard had left his watch for repair with a jeweler in New Orleans on 28 December 1943 and had not seen it thereafter until after it was found in accused's locker on 14 July 1944. Corporal Daye had mailed his watch from Boca Raton, Florida, in the first part of March to Rogers & Co., Indianapolis, Indiana, for repair and had not seen it thereafter until after it was found in accused's locker. The question presented for determination is whether the mere possession of the missing property under the above recited circumstances raises an inference that the accused stole it. The Manual for Courts-Martial states that:

> "Proof that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it" (MCM, 1928, par. 112a)

The difficulty which stands in the way of the application of this general principle to the instant case is, first, that there is no proof that the watches were stolen and, second, that the watches are unaccounted for, in one instance, for a period of about six months and, in the other, for a period of about four months. While possession of recently stolen property may be sufficient to raise an inference that it was stolen by the possessor, it

does not dispense with the necessity for proof that the property was in fact stolen. Proof of possession by an accused of property alleged to have been stolen, without evidence that such property was in fact stolen, is not sufficient to support a conviction of larceny (Dig.Op. JAG 1912-40, sec. 451 (37); CM 149546 (1921)). There is no competent evidence in this case that either of the watches was stolen. This is a fatal deficiency in proof (Underhill, Criminal Evidence, sec. 468).

Another objection to the application of the above stated presumption to this case, is the lapse of time between the presumed loss or theft of the articles and their discovery, which in one instance may have been as much as six months and in the other possibly four months. The possession upon which the "inference" or "presumption" is predicated must be recent. While the term is incapable of exact definition and depends on the circumstances of each particular case, it is clear that under the circumstances of this case it cannot be said that the possession by the accused of the missing property was sufficiently close to the time of its loss to support an inference that the possessor was also the person who misappropriated it in the first instance.

> "In determining this question the particular period of time involved is an important element to be considered but it is not the only one. The circumstances and character of the goods, their salability, and whether they are cumbersome or easily portable, are also among the factors to be considered. Ordinarily, however, the weight of such evidence will be stronger or weaker in proportion to the period intervening between the taking and the finding in the possession of the defendant, and while such evidence is a circumstance tending to criminate the accused, even though considerable time has elapsed, it may be rendered of no weight whatever by the lapse of sufficient time as to make it not improbable that the goods may have been stolen by another and passed to the accused". 32 Am. Jr. 1054.

It is, therefore, the opinion of the Board of Review that the evidence presented is legally insufficient to support the findings of guilty of Specifications 1 and 2, Charge I.

7. For the reasons above stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 1 and 2, Charge I; legally sufficient to support the findings of guilty of all other Specifications and Charges and legally sufficient to support the sentence.

Samuel M. Driver, Judge Advocate.

J J Fottenhoe, Judge Advocate.

Robert C Clamor, Judge Advocate.

1st Ind.

16 SEP 1944

War Department, J.A.G.O., - To the Commanding General, First Air Force, Mitchel Field, New York.

1. In the case of Corporal Morris Glazer (32303128), Section D, 111th Army Air Forces Base Unit, Army Air Base, Langley Field, Virginia, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 2, Charge I, legally sufficient to support the findings of guilty of all other Specifications and the Charges and legally sufficient to support the sentence, which holding is hereby approved. For the reasons therein stated it is recommended that the findings of guilty of Specifications 1 and 2, Charge I, be disapproved. Thereupon, under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

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

(CM 263054).

Myron C. Cramer

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
Washington, D. C.

SPJGN CM 263080 UNITED STATES v. Second Lieutenant THEODORE P. WARREN (O-1309454), Corps of Military Police.	3 NOV 1944 SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G. C. M., convened at Fort Custer, Michigan, 21-23 July 1944. Dismissal, total forfeitures, and confinement for ten (10) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

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

Specification: In that, Second Lieutenant Theodore P. Warren, Corps of Military Police, Provost Marshal General's Replacement Pool, Fort Custer, Michigan, did, at Fort Custer, Michigan, on or about 2 July 1944, with intent to commit a felony, viz, rape, commit an assault upon Genevieve Verdayne, by willfully and feloniously dragging the said Genevieve Verdayne from an automobile, striking her on the face and body with his fists, forcibly throwing her upon the ground, and forcibly tearing her clothing from her person.

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

Specification 1: In that Second Lieutenant Theodore P. Warren, Corps of Military Police, Provost Marshal General's Replacement Pool, Fort Custer, Michigan, was, at Fort Custer, Michigan, on or about 2 July 1944, drunk and disorderly in camp.

Specification 2: In that Second Lieutenant Theodore P. Warren, Corps of Military Police, Provost Marshal General's Replacement Pool, Fort Custer, Michigan, did, at Fort Custer, Michigan, on or about 2 July 1944, behave in a disrespectful manner toward Private First Class Walter Oleshko, 1621st Military Police Detachment, a Military Policeman, in the execution of his duty, by refusing to state his name, rank, and serial number, by refusing to exhibit his Officer's Identification Card, and by refusing to accompany said Private First Class Walter Oleshko to the Orderly Room of the Military Police Detachment.

Specification 3: In that Second Lieutenant Theodore P. Warren, Corps of Military Police, Provost Marshal General's Replacement Pool, Fort Custer, Michigan, did, at Fort Custer, Michigan, on or about 2 July 1944, behave in a disrespectful manner toward Sergeant James L. Vanhoose, 1621st Military Police Detachment, a Military Policeman, in the execution of his duty, by refusing to state his name and by contemptuously refusing to accompany the said Sergeant James L. Vanhoose to the Post Military Police Headquarters.

Specification 4: In that Second Lieutenant Theodore P. Warren, Corps of Military Police, Provost Marshal General's Replacement Pool, Fort Custer, Michigan, having received a lawful order from Major Paul H. Smith, Corps of Military Police, Post Provost Marshal, Fort Custer, Michigan, to remain in the Orderly Room of the Military Police Detachment, Fort Custer, Michigan, the said Major Paul H. Smith being in the execution of his office, did, at Fort Custer, Michigan, on or about 2 July 1944, fail to obey the same.

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

Specification: In that Second Lieutenant Theodore P. Warren, Corps of Military Police, Provost Marshal General's Replacement Pool, Fort Custer, Michigan, did, at Fort Custer, Michigan, on or about 2 July 1944, behave himself with disrespect toward Major Paul H. Smith, Corps of Military Police, Post Provost Marshal, Fort Custer, Michigan, his superior officer, by arguing disrespectfully with him, while he, the said Major Paul H. Smith, was conducting an official investigation, and by then and there saying to him in a disrespectful and insolent manner, "I do not give a damn what you are," and "Military Policemen are a lot of sons-of-bitches," or words to that effect.

CHARGE IV: Violation of the 64th 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 the Specification of Charge IV and Charge IV, not guilty of Charge II "but guilty of violations of the 96th Article of War", guilty of the Specification of Charge I "except the words 'and body,'" guilty of the Specification of Charge III "except the words 'I do not give a damn who you are,' and 'Military Policemen are a lot of '", and guilty of all other 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 ten 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 the accused met Miss Genevieve Verdayne, a young woman of tarnished reputation and tawdry background, at the Officers' Club, Fort Custer, Michigan, on Saturday night, 24 June 1944 (R. 13, 87, 92-102). Although only twenty-two years of age she had already had frequent encounters with the law in its criminal aspects. In Long Beach, California, in November of 1939, she had been "arrested for vagrancy and sentenced to 180 days of which 150 were suspended" (R. 100). During December of 1942, while clad only in a robe and nightgown, she had been apprehended in the company of a "flyer" in her hotel room in Battle Creek, Michigan (R. 98). She was tried on a charge of disorderly conduct and given the alternative of paying a fine of $500.00 or spending "forty-five days in jail" (R. 97). On 7 January 1943 she was sentenced at Chicago, Illinois, to confinement for sixty days for "uttering and passing checks" (R. 99). Several months later on 24 September 1943 she was placed on probation for one year upon conviction of a violation of the National Stolen Property Act (R. 101). When she became acquainted with the accused, she was still on probation (R. 102).

Although her residence at the time was in Battle Creek, Michigan, where her "people [had] lived . . . about seventeen, nineteen years", she worked in Grand Rapids, Michigan, for the Jewel Tea Company (R. 12, 92). Part of her duties consisted of driving a panel truck which she described as a "semi-carrying sedan". It was colored cream, maroon, and black and bore the name of her employer (R. 18-19, 124, 145, 165-166, 181, 205, 224). It had only one true seat but in addition it had a "built-up platform" which could serve the purpose of an extra seat (R. 19).

Miss Verdayne went to the Officers' Club on 24 June 1944 accompanied only by a "girl friend". She had been a frequent visitor in the past and had dated "three or four" officers. According to her, "We went steady together until they left the post" (R. 92). In the course of the evening the accused danced with her, unsuccessfully tried to kiss her, and arranged to go swimming with her the following day (R. 87-88). The engagement was broken because she unexpectedly "had company from Chicago" (R. 88). He telephoned again on Monday, 26 June 1944, and she agreed to meet him Tuesday or Wednesday at a gas filling station in Battle Creek at which her car was being serviced (R. 88).

The appointment was kept, but not as originally made, for instead of going to the place which she had designated she "came out to the post" (R. 103). After spending the early evening drinking beer at a "girl friend's" house, Miss Verdayne drove the accused in the Jewel Tea Company truck to his barracks (R. 89-90, 102). They did not part immediately, but talked for a while. When she finally left him, it was 1:00 or 1:30 a.m. (R. 90, 104). The following Thursday they "had a date to go swimming" (R. 90). She "picked him up" at the gas station and drove to Eagle Lake, where they remained until the beach closed at 9:00 p.m. (R. 90-91, 102-103). Upon dressing they proceeded to the camp, parked near the Officers' Club, obtained six bottles of beer, and drank them in the car (R. 91). Between midnight and 1:00 a.m. she again "took him to his barracks" and went home herself (R. 91, 107). She did not have intercourse with him on either this or their first "date" (R. 87).

They arranged to see one another for the third time at the Officers' Club on Saturday night, 1 July 1944 (R. 13, 63). She arrived in the Jewel Tea Company truck at about 9:00 p.m. (R. 13, 63). She was late but she had earlier called the accused and informed him that she would be delayed. His comment had been, "You better hurry up because you have to catch up with me" (R. 26). After having had him paged, she finally located him in one of the telephone booths (R. 63-64). They went into the back room of the officers' lounge, joined two other lieutenants and their wives at a table, and commenced drinking (R. 14, 17, 64). The other two lieutenants had a bottle of whiskey before them, and the accused brought a fifth of his own which he opened after seating himself (R. 16-17). He prepared a mixed drink for himself in a large beer glass. One quarter of the contents, equivalent to two ordinary shots, consisted of whiskey (R. 15). This potent libation and at least one and perhaps two more like it were consumed by him during the next two hours (R. 16). Miss Verdayne also had some whiskey and in addition some beer (R. 14).

At about 11:00 or 11:30 p.m. she and the accused left the Officers' Club (R. 18, 64). She wanted "to go home early", and the accused accompanied her because "it was the right thing for him to do" and because

he wanted a ride to his barracks (R. 18, 64-65). When they entered the car, she took the wheel and he seated himself on the "built-up platform" beside her (R. 19, 65). Sometime after she commenced driving, he expressed a desire "to see a friend" at the station hospital located "at the end of Harmonia Road" (R. 21-22, 66). Since she was willing to convey him there, they halted at his barracks shortly before midnight only long enough for him to assume her place behind the wheel and for her to move over to the "built-up platform" (R. 20-21, 66). This exchange was made "at her request because she feared that at that hour of the night" she might "be stopped for driving a civilian car on the post" (R. 66-67).

Although the station hospital was "straight down" Harmonia Road, the accused followed that highway only as far as an intersection at which a sign had been placed reading "Vehicles prohibited with the exception of Army vehicles" (R. 22-23). At this point he turned left on a gravel road, drove in the new direction for one hundred to three hundred yards, again turned, this time to the right, and proceeded for about two hundred yards down an "improvised trail" and "into a little hollow" (R. 23, 26-28, 68). As he veered to the left, she inquired "why he was going there" (R. 23, 28, 68). His reply was she had been "looking at another man in the club" and he "was going to teach her a lesson" (R. 24, 28-29, 68; Pros. Ex. 11). In her opinion he was then "under the influence of liquor". The sole basis for this belief at the moment was his temper (R. 24-25).

The car was brought to a stop by him under a tree (R. 27). It was after midnight and very dark; all around the terrain was "rough" (R. 27, 50, 72, 75). Moving in front of her, he opened the door to her right and descended to the ground (R. 69). Once outside, he grasped her clothing at the bottom of the "V formed by the neck of her dress, over her breast" and began pulling her out of the car (R. 29, 69). She resisted, and the weight of her body coupled with several vigorous tugs by him resulted in all of her clothes being torn down to the waist. Seizing her skirt, he "ripped several times" more until she was completely nude, except for her stockings and shoes and her blouse which remained partly on her (R. 29-30, 32-41, 69-70, 72, 112; Pros. Exs. 1-10). Even her stockings did not remain undamaged, for they were torn from her garter belt (R. 30, 40). All of the articles rent from her body lay strewn in the car and on the running board (R. 70).

Having pulled her out of the car, he struck her with his fist or open hand on the right side of the jaw and knocked her to the ground (R. 31-32, 43, 71, 74, 111). Dropping down on top of her, he "forced his attentions" on her (R. 42, 72). She "struggled and thrashed" around and pushed against his chest in an attempt "to keep him away" and to prevent him from his "inserting himself" (R. 46, 73-74). This was the sum total of her resistance. She did not bite, kick, or use her fists. Only "half a scream" was uttered by her, and she "knew it wouldn't do . . . any good" (R. 45-46, 73). Such opposition as she did offer was ineffectual. He inserted his penis and had sexual intercourse with her (R. 41, 45).

Upon completion of the act he rose to his feet. When she tried to follow suit and "got to one knee," he struck her to the ground again (R. 43, 46-47, 74). He "started" to kick her or to step on her stomach but she "rolled free." For the second time she attempted to stand, and for the second time she was forced down. By this time she was feeling weak (R. 43, 74). Every time thereafter that she sought to regain her feet she was pushed back to the earth (R. 47, 75). He cursed her and told her that she had "better stay there" (R. 47).

After half an hour had passed he again got on top of her and had sexual intercourse with her (R. 47-48, 75). She struggled only "a small bit", for she was "worn out and tired" and "too weak after the first one" (R. 76). This time, when he was done, he permitted her to put on her skirt and jacket (R. 48, 77, 79). She was very cold, for the temperature was low (R. 48). Meanwhile he had begun drinking out of the fifth of whiskey which he had brought with him from the Officers' Club (R. 49, 77-78). He "rambled" in his talk, "staggered around in the sand," and was obviously drunk (R. 49). Being still "too weak to . . . run or walk," she made no effort to evade or elude him (R. 78). She had entered the car to dress, and he soon joined her (R. 49, 51, 78-79). He resumed his drinking and his cursing, but she did not pay much attention to what he said. Her thoughts were exclusively on how "to get out of there and a way to get out of there" (R. 51, 77, 79). She had one "shot" herself, hoping that "it would give [her] strength" (R. 51, 78). A few times she evidenced a desire to leave the car for some purpose, but he stopped her by twisting her arm (R. 51). Throughout the period that they were seated together she "kept pounding in his brain" that they "had to get out before anybody saw" them (R. 49-50).

Her words made no impression upon him. After the lapse of only a few minutes, he attempted a third act of sexual intercourse on the "built-up platform". Although she did not resist, he "couldn't force connection" because of his intoxication (R. 52, 78-81). She explained her failure to offer any opposition as follows:

> "I kept pounding at him that we better go back, it would be embarrassing for anybody to see me in that condition. I knew that was my only salvation, the way of getting out of there in one piece. If he knew I was going to turn him in he probably would have killed me, or broken my jaw, or worse" (R. 52-53).

Realizing that he was temporarily incapable of sexual intercourse, he at last desisted. She continued urging him to leave "before it was daylight so no one would see [her] clothes in that condition" (R. 81). At dawn he took the wheel in response to her pleading and began to retrace the route along which they had come (R. 53, 81). They had driven only a short distance along the gravel road toward the Harmonia highway when they were halted by Private First Class Oleshko and Private Julius A. Smolinski of the Military Police, who happened to be returning in a reconnaisance car from the Station Hospital (R. 53, 82, 122, 124-125, 141).

Oleshko asked the accused "why he was parked there..and told him that there was a post order that he was not allowed to be parked on a road like that at 4:00 in the morning" (R. 53, 125, 146). The accused replied that he "didn't see where there was anything wrong with it" (R. 125). To a query as to who the owner of the car was he made no answer (R. 126). He was ordered to move along but he did nothing to comply (R. 126, 146). Upon being asked for his name, rank, and serial number, he said "I won't give it to you" (R. 53, 82, 126). His AGO identification card was then demanded, and he refused to produce it (R. 126, 146, 158).

Miss Verdayne had remained silent during most of this interrogation, for the accused had ordered her not to "open your mouth," and she "did not want another sock in the jaw" (R. 83). Now, exasperated by his obstinacy, she exlaimed, "Haven't you caused me enough trouble?" (R. 53-54, 83, 127, 147). Oleshko inquired as to her identity. To this question the accused answered that she was his wife (R. 54, 82, 127).

Upon being asked to follow Oleshko to the orderly room, he stated that he "wouldn't come" (R. 126). Oleshko decided that "the only thing [he] could do" was to obtain the license number of the Jewel Tea Company truck. As he walked to the rear of the vehicle with that purpose in mind and began writing on a pad, the accused suddenly "pulled away" (R. 55, 83, 127-128, 146). The two military policemen immediately followed in their reconnaisance car all the way to the accused's barracks (R. 55, 83, 128, 136, 148). The Jewel Tea Company truck throughout the short journey was "weaving from side to side" (R. 129, 148). After a pause of about a minute Oleshko and Smolinski continued to the orderly room to "get the Officer of the Day" (R. 55, 84, 130, 150). During their absence the accused told Miss Verdayne to "get off the post" and helped himself to another drink. Becoming violently ill, he opened the door of the car, "lurched out, staggered to the rear, and vomited" (R. 55, 84).

The Desk Sergeant at the orderly room, upon receiving the report of the incident, sent Smolinski and Sergeant James L. Vanhoose back to the barracks (R. 151, 154, 165). The accused was still beside the Jewel Tea Company truck when the military police car arrived (R. 84). Vanhoose saluted him and inquired whether he was the officer who "refused to give the MP his name or to follow him to the orderly room" (R. 166). The accused said that he was, again declined to identify himself or show his AGO card, and later added in a sarcastic tone of voice that he would not follow Vanhoose either (R. 55-56, 85, 151-152, 166, 174). Sergeant Vanhoose thereupon declared that he would have to detain the accused until the Officer of the Day arrived (R. 153, 166). To this assertion the accused replied that he would not be detained, that he was going to his barracks, and that, if he was wanted, he would be in Room 27. Having delivered these words, he went inside the building (R. 56, 86, 167).

Upon his withdrawal from the scene Miss Verdayne complained to the military policemen that she had been raped (R. 56, 86, 169-170). As she narrated the events of the morning, her hair was "all mussed up," her badly torn dress was above her knees, a jacket and "what appeared to be a part of her dress" were around her breasts and over her shoulders, her stockings were rolled down, and she was bare from the middle of her chest to her abdomen (R. 151, 168, 184, 208, 216). One of the military policemen immediately "radioed back" to the Provost Marshal's office (R. 86). The accused in the meantime was making several trips in and out of the barracks. On each occasion he directed Miss Verdayne "to go" (R. 56, 87). "Once he called [her] a damn fool for not leaving" (R. 87).

About 4:30 a.m. Major Paul H. Smith, the Post Provost Marshal, and First Lieutenant Levin M. Price, the Officer of the Day, arrived at the barracks (R. 56, 130, 153, 170, 180, 205). The accused, upon being asked for his AGO card by Major Smith, reluctantly surrendered it (R. 57, 182). When interrogated concerning the presence of a woman on the post at that hour, the accused explained that "My girl is driving me home." One of the military police approached Major Smith and informed him that, "This girl said she was raped." Miss Verdayne personally confirmed this report (R. 169-170, 182). When the accused heard it, he "gave a short laugh" (R. 183). Major Smith promptly directed that they all proceed to the military police orderly room where he proposed to conduct an investigation (R. 170, 183, 218). This order was complied with by all who were present. The accused made the trip in the Officer of the Day's staff car and Miss Verdayne, accompanied by a military policeman, drove the distance in the Jewel Tea Company's truck (R. 57, 183, 220).

Upon entering the orderly room Major Smith told the accused to "sit down" and advised him that "I have to investigate this preliminary investigation. Have a chair, and I will be with you as soon as I get this woman's statement" (R. 184, 185, 193). After supplying himself with a pencil and a pad of paper, the Major went outside to summon Miss Verdayne who was still in the truck. When he observed that her "clothes were in rags" and that she was "very much disheveled," he decided that it would be desirable to have her stay in the vehicle (R. 184, 194). He accordingly handed her the pencil and pad and instructed her to prepare a statement describing "just what happened that evening" (R. 194).

Shortly after she had begun to write the accused emerged from the orderly room and inquired "What is going on?" and "What is it all about?" (R. 186, 195). Major Smith replied that as soon as he "found out" he "would let him know" but repeated that an investigation was being made (R. 186, 194). Since Miss Verdayne strenuously objected to the presence of the accused, contending that she could not write while he was about, the Major ordered him to "Go back into the orderly room and I will come to you when I finish with this witness". Rather reluctantly, the accused turned, walked a short distance toward the orderly room and then retraced his steps (R. 186, 195). Again he asked "What is it all about?" Major Smith repeated his order and finally obtained obedience (R. 186, 195).

The accused emerged a second time from the barracks. Since Miss Verdayne was still writing her statement, he was ordered to return to the orderly room and two military policemen were instructed to escort him. "One got on each side of him" and led him in (R. 136, 155, 187, 196-197). Before long, but after the completion of the statement, he came out for the third time. Major Smith responded by giving him a "direct order" to go back to the orderly room and to remain there or, in the alternative, to be placed in arrest. After insisting that only the Post Commander could arrest him, the accused complied but soon started out a fourth time and failed to reach the outside only because of the intervention of the men assigned to guard him (R. 171-172, 187, 188, 196).

When the statement was finished and Major Smith had taken the pad from Miss Verdayne, the accused, while looking in the direction of Major Smith and one of the military police, was heard to exclaim "Sons-of-bitches" (R. 188, 225). Lieutenant Price was then ordered to remove the accused to his barracks under arrest (R. 211, 221). After undertaking this mission and while en route, Lieutenant Price received a radio call instructing him to convey the accused to the Station Hospital instead for a blood test (R. 212-213). This message was heard by the accused (R. 212). He apparently offered no objection to being driven to the Hospital, but once there he refused to submit to an examination (R. 213, 228, 243). His "manner was very argumentative and belligerent" (R. 243).

Miss Verdayne, who had also been conveyed to the Hospital, permitted an examination of her entire body to be made. The findings were in pertinent part as follows:

> "Small bruises on the front portion of the right shoulder, and bruises on the left knee. These were fresh bruises. There were several old bruises on the side of the left thigh. The color of these bruises was different, and that is my reason for stating that they were of different ages. The upper legs and buttocks were rather dirty, and there was acne, mild acne irritation over those parts.
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> * * * * * *
>
> "It was difficult to say whether it was fresh or old [dirt] but recently, as if she had been on the ground, and some particles of ground were on those spots. They were fairly well ground into the skin; they were not loose.
>
> * * * * * *

"[The] hymen was perforate. The amount of vaginal secretion . . . was very small, perhaps even less than normal, and from two portions of the vagina material [was taken] which [was] placed on a microscopic slide and sent to the laboratory. Those two portions were just inside the opening, and then the second smear from the cervex, the opening of the womb at the upper portion of the vagina.

* * * *

"These were examined for the presence of spermatozoa, and for the presence of gonococci, neither of which were found. There were no other bacteria nor epithelia cells or leukecites than would be normally present in any vaginal secretion" (R. 244-245, 276).

No bruises were discovered on Miss Verdayne's jaw, nor did she complain of any soreness there (R. 247, 249). A sample of her blood contained.93 milligrams of alcohol per mill (R. 268, 274). This indicated that she had been drinking but was not intoxicated (R. 275).

With respect to the absence of any evidence of injury to her jaw Captain Robert A. Frisch of the Medical Corps testified that "occasionally a mark will not be very evident until several other hours, until there has been time for the blood to leave the skin and discolor." Since the examination occurred at about 5:30 a.m. and the first blow had been struck shortly after midnight, a bruise should in "all probability" but "not necessarily" have been present (R. 248).

All of the clothing worn by Miss Verdayne to the Hospital were turned over to First Lieutenant William Dienstein of the Military Police for investigation. A slip which had been found between 5:00 and 6:00 a.m. at the scene of the assault, along with parts of a brassier, a shoe buckle, a lady's hairpin, and a lieutenant's hat, was also delivered to him (R. 230-241). Application of the "benzedine test" showed the presence of blood on the blouse, skirt, and slip (R. 259). Under the ultra-violet light "suspicious stains" were revealed, but their nature could not be determined (R. 260, 266). Upon, however, being subjected to the "Florence Test" by Major Joseph M. Looney of the Medical Corps those on the skirt were analyzed as semen (R. 271).

From the moment of his initial contact with Oleshko and Smolinski and throughout the ensuing events the accused was "arrogant," "sneery", "disrespectful," "heated," "talkative," "argumentative," and "belligerent". (R. 188-189, 201, 210, 243). Captain Frisch of the Medical Corps considered him to be "under the influence of liquor, but not really drunk." This view was based on the following diagnosis:

"He was well coordinated; his movements were not purposeless. His speech also was coordinated. He knew where he was. He knew what was going on about him. But his manner was very argumentative and belligerent, more than one would normally expect at that time, and his manner to enlisted men and the other officers there was not what one would expect if he were not under the influence of alcohol" (R. 243-244).

Sergeant Vanhoose was of the same opinion as Captain Frisch (R. 173-174). Major Smith believed that the accused "had been drinking, but [did not] believe he had so much liquor that he did not know what he was doing" (R. 188-189). Sergeant Charles H. Thomas of the Military Police thought that the accused "had been drinking. There was an odor of alcohol on his breath, his speech was slow" (R. 227). Oleshko and Smolinski were convinced that the accused was drunk (R. 24-26, 49, 129-130, 149).

4. The accused, after being apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. He related the history of his relationship with Miss Verdayne in minute detail and, while confirming her chronology and her account of such events as lacked legal significance, differed radically from her version of vital facts directly affecting the gravamen of the charges against him. At their initial meeting at the Officers' Club on 24 June 1944 he had in the course of the evening kissed her "a few times" with no resistance on her part (R. 289, 343-344). On their first date the following Monday, after visiting her "girl friend's" house and stopping briefly at the Officers' Club and finding it closed, they had parked in front of his barracks (R. 292-293, 338). According to him,

"we were making love. I was kissing her, playing with her breasts, playing with her thighs, and just generally, what we call pitching woo. And after some time I suggested that I was getting warm, and also suggested that we go some place where we could do something about it. She said, 'Where will we go?' I said, 'I don't know. We will find some place. Just drive out Harmonia Road. We will turn off some side road.'" (R. 294).

This suggestion being favorably received by Miss Verdayne, they drove to the spot which she had described while on the stand for the prosecution as the scene of the assault on 2 July 1944 (R. 294-295). She "took the cushions out of the car, the cushions I was sitting on, and laid them side by side [on the platform] beside the driver's seat" (R. 295). Having thus improvised a couch she "laid down" upon it, after removing "her pants" and had sexual intercourse with him. When they were done, she requested him to hand her a box of Kleenex and, upon his turning it over to her, she "disappeared from view" for a few minutes. After she had returned and they had talked for a while, she conveyed him to his barracks (R. 297).

When they left Eagle Lake on the following Wednesday night, she of her own accord drove to their former rendezvous and some distance beyond (R. 299-301, 346). They indulged in their second act of intercourse and at its conclusion she again used some Kleenex "to wipe herself out" (R. 302-303). They proceeded to the Officers' Club, purchased some beer, and "made some love" (R. 33). Shortly after Miss Verdayne expressed a desire to "whack" him again (R. 304). They made their second trip of the evening to their trysting place and fulfilled their purpose. As before she cleansed herself with Kleenex (R. 305). A long conversation followed, a part of which was summarized by the accused as follows:

> "She also told me that her mother was planning on going to Florida in the very near future, and that she was going to ask her mother if she would let her have the house so that we would have some place to go. She exacted a promise from me that I would not have sexual intercourse with anybody else during the time I was going with her. She said that she was not promiscuous, and while she liked her loving she wanted to feel safe that I was not chippying out on her. She did not want a chance to get anything. She did not want to take the risk, take a chance of getting anything" (R. 306).

Before meeting him on Saturday night, 1 July 1944, she called him on the telephone and, among other things, said to him: "I got to see you tonight. I have something very important to tell you." (R. 309). Later at the Officers' Club she reminded him that "I got something important to tell you" and urged that they "go some place where we can be alone" (R. 313). In compliance with her wishes they made their fourth excursion to their rendezvous. After the truck had come to a stop, he "finally asked her what was all this big news." She placed her head down on her hands which were resting on the wheel and said, "Oh, you are going to hate me when I tell you this." After pressing her unsuccessfully for an explanation, he remarked, "What are you trying to do? Are you trying to tell me you got a dose of clap?" Her answer was "Yes. I was examined by my doctor today. He tells me I got gonorrhea" (R. 317, 355, 378).

He lost his temper and called her a "dirty chippy". Reaching over, he "grabbed the front of her dress and gave her a yank towards" himself (R. 318-356). He "felt her clothes tear." With his open hand he "sort of half hit and half shoved her against the side of the car." She remonstrated with him, saying, "I wouldn't have done it if I had known," and after a while, realizing that he had been "unreasonable," he began to "cool down." He apologized and placing his head against hers said, "Let's forget it." This was his prologue to some more love making, for he felt that "the harm had been done" (R. 318-319). After the usual kissing and "necking," they lay down on the grass and had sexual intercourse (R. 319-320, 358). They chose the ground because she "had complained previously that" her position on the improvised couch "was awkward and hurt her back" (R. 376). Once again she used the Kleenex (R. 321). They did not engage in further sexual intercourse that morning, but they would have done so had he "been able to get an erection" (R. 320-321, 359-360).

On their return trip he stopped at the intersection of Longman Road and Harmonia Road because he noticed that he had forgotten his hat. At that moment he observed the tail light of the car in which Oleshko and Smolinski were riding (R. 322). Oleshko, upon approaching the Jewel Tea Company truck, did not identify himself as a military policeman, nor did he ever tell the accused to move on (R. 323-324). Despite the requests of Oleshko and later those of Sergeant Vanhoose, the accused refused to give his name or serial number, show his AGO card, or drive to the military police orderly room (R. 324-325). His reason was that "I know of nothing that authorizes military policemen to order an officer to accompany them, order an officer to go any place, or to demand their identification" (R. 367).

When Miss Verdayne was writing her statement, he "could not stand" the "suspense of waiting" (R. 329, 379-380). He had been told to remain in the orderly room three times, but he had been curious and "thought [he] was entitled to know" what was occuring. He had believed that "they were putting Miss Verdayne on the spot" (R. 371). At the hospital he had refused to have a blood test made because "after the treatment [he] had received [he] wasn't in a mood to cooperate . . ." (R. 333, 376-377). On Sunday, 2 July 1944, he had been examined for gonorrhea (R. 335). Neither then nor at the trial did he have the disease (R. 377). He was not familiar with the post regulations and, since the highway crossed Camp Custer, he did not "find it unusual for a commercial vehicle to be on the reservation at 4:00 a.m."(R. 350-355). Miss Verdayne's clothes had been pulled by him only once. Her garter belt had not been touched, and she wore no step-ins or panties. While he had torn her other clothes, they were not reduced to the tattered condition in which they were offered in evidence (R. 320, 356, 372, 382). He had slapped her only once (R. 356). At no time had he ever threatened her (R. 372). He had never stated that she was his wife (R. 381). Although he had been drinking on the night of 1-2 July 1944, he was not drunk (R. 365, 369-370).

Major Leo W. Smith was recalled as a witness for the defense. He stated that he had visited the area in which the accused and Miss Verdayne had had sexual relations and had found four or five pieces of Kleenex (R. 391). A motion to exclude his testimony was sustained.

5. Miss Verdayne called on rebuttal as a witness for the prosecution denied that she had kissed the accused on the night of 24 June 1944, that she had ever had sexual intercourse with him prior to 2 July 1944, or that she was on 1 July 1944 infected with gonorrhea (R. 394). She had never willingly had sexual relations with him (R. 397).

6. The Specification of Charge I alleges that the accused did, "on or about 2 July 1944, with intent to commit a felony, viz, rape, commit an assault upon Genevieve Verdayne, by willfully and feloniously dragging [her] from an automobile, striking her on the face...with his fists, forcibly throwing her upon the ground, and forcibly tearing her clothing from her person." This was set forth as a violation of Article of War 93.

"An assault with intent to rape includes every element of the crime of rape except penetration": People v. Cieslak, 319 Ill. 221, 149 N.E. 815 (1925); Newman v. People, 223 Ill. 324, 79 N. E. 80 (1906). Paragraph 149b of the Manual for Courts Martial, 1928, quotes the familiar axiom that "Rape is a most detestable crime..but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent." A corollary to this proposition, pertinent to the facts here under consideration, is that men "take liberties with fallen women without intending a rape, while they would not with chaste ladies": Shields v. State, 32 Tex. Crim. Rep. 498, 23 S.W. 893, (1893).

At least three of the four offenses of which the prosecutrix had been convicted involved moral turpitude and by their very nature tended to impeach her credibility as a witness: MCM 1928, par. 124b. She had an excellent and overpowering reason for denying that she voluntarily joined in sexual intercourse with him and for posing as the innocent victim of his violent lust. The year of her probation had not yet expired and proof that she had breached it might have resulted in her having to serve the suspended sentence for violating the National Stolen Property Act. The predominant thought in her mind after the assault upon her appears to have been to leave the post without being detected in her disheveled condition by anyone in authority. When she was frustrated in this purpose and held for questioning by the Military Police, her natural reaction was to give an account of her experiences which would completely exonerate her and cast the blame upon the accused.

He has testified that he had sexual intercourse with her on two occasions prior to 2 July 1944, and that she willingly and even eagerly participated. His account bears the earmarks of truth. It is inconceivable that a woman of her history and background should have suddenly become a reticent and virtuous lady. Nor can one readily believe that an officer of experience in his middle thirties with presumably some knowledge of the world could have associated with one of her kind unless encouraged by her to expect fornication. By her own admission she gave merely "half a scream" and resisted only mildly, allegedly because any other course was useless. A virtuous woman does not weigh the possible effectiveness or futility of opposition; she fights for her honor until her strength completely fails her. When she and the accused were first stopped by the military police she made no outcry or complaint. Only after she reached his barracks and perceived that her probation was at stake did she make a charge of rape. Under the circumstances it is logical to assume that the "rape" first materialized on the flight from the intersection after she realized the inevitability of an investigation which would involve her as well as the accused.

He undoubtedly did strike her and reduce her clothing to tatters but, having had sexual relations with her on two previous occasions with her full consent and cooperation, he could hardly have intended to use ultimate force to induce her to submit to intercourse with him. The more reasonable

construction to be placed upon the facts presented was that his violence was the product of drunken rage. Whether his anger was incited by a false representation on her part that she had contracted gonorrhea or was aroused by some other cause not revealed is immaterial. What does matter is that in the light of his past experiences with her he had every reason to believe that she would again willingly have sexual relations with him. Accordingly he could not possibly have intended to satisfy his desires against her will and in spite of her resistance. The record is legally sufficient to sustain only so much of the finding of guilty of the Specification of Charge I as involves a finding of guilty of the lesser included offense of assault in violation of Article of War 96.

7. Specification 1 of Charge II alleges that the accused was, "on or about 2 July 1944, drunk and disorderly in camp." The accused was found guilty of this act in violation of Article of War 96.

After consuming a large quantity of liquor on the night of 1-2 July 1944, he committed an assault upon Miss Verdayne, drove her car in a wavering and unsteady manner, was extremely belligerent and talkative, and behaved disrespectfully and insolently toward several military policemen and to the Post Provost Marshal. While some of the witnesses did not believe the accused to be drunk, they all were convinced that he had been drinking and they all described phases of his conduct which could reasonably be attributed only to over-indulgence in liquor. Drunkenness, according to Paragraphs 126a and 145 of the Manual for Courts-Martial, 1928, is "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties." The behavior of the accused falls within the scope of this definition. Specification 1 of Charge II has been sustained beyond a reasonable doubt.

8. Specification 2 of Charge II alleges that the accused did, "on or about 2 July 1944, behave in a disrespectful manner toward Private First Class Walter Oleshko..., a military policeman, in the execution of his duty..." Specification 3 of Charge II alleges that the accused did on the same day "behave in a disrespectful manner toward Sergeant James L. Vanhoose, ...a military policeman, in the execution of his duty." Specification 4 of Charge II alleges that the accused, "having received a lawful order from Major Paul H. Smith..., Post Provost Marshal..., the said Major Paul H. Smith being in the execution of office, did," on the same day "fail to obey the same." The accused was found guilty of these various acts in violation of Article of War 96. The Specification of Charge III alleges that the accused did on the same day "behave himself with disrespect toward Major Paul H. Smith.., Post Provost Marshal..., his superior officer.., while he, the said Major Paul H. Smith, was conducting an official investigation..." This offense was laid under Article of War 63.

(196)

All military police in Camp Custer had been instructed "to investigate and see why" any civilian car was on the post "during the hours of darkness" and if there "were anything suspicious concerning" the vehicle to "bring it to the Military Police orderly room" (R. 178). Both Oleshko and Vanhoose were attempting to carry these directions into effect. Although they were acting in good faith and comported themselves in a polite and dignified manner, the accused arrogantly rebuffed them and refused to give them his name or serial number, to display his AGO identification card, or to accompany either of them to the military police orderly room. His demeanor was unbearably contemptuous and disrespectful.

Major Smith, his superior officer, thrice ordered him to remain in the orderly room. Although he fully understood what was required of him, the accused twice walked out of the room and thereafter again attempted to leave it being prevented from doing so only by the intervention of guards who had been assigned to detain him. His curiosity as to what Miss Verdayne was at the moment saying or doing does not excuse his failure to obey.

"The disrespectful behavior contemplated by" Article of War 63 "is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed": MCM, 1928, par. 133. The accused's audible reference to Major Smith and others present as "Sons-of-bitches", his disobedience of orders, his bickering with the Major over who had the authority to place him in arrest, and his loud, belligerent, and offensive mode of address all clearly fall within the pattern of unlawful behavior contemplated by the Article. The record sustains beyond a reasonable doubt the findings of guilty of Specifications 2, 3, and 4 of Charge II and of the Specification of Charge III.

8. The accused is about 35 years old. The records of the War Department show that he attended high school for two years; that from 1934 to 1941 he was successively employed as a golf club manager and instructor, as a policeman, and as a book salesman; that he had enlisted service from 7 January 1929 to 14 February 1931 and from 2 May 1942 to 26 January 1943; that on 27 January 1943 he was commissioned a second lieutenant; and that since this last date he has been on active duty as an officer.

9. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of Charge I as involve a finding of guilty of assault in violation of Article of War 96 and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 63 or 96.

Abner E. Lipscomb, Judge Advocate

Robert J. Clamon, Judge Advocate

Gabriel H. Golden, Judge Advocate

SPJGN
CM 263080

1st Ind.

War Department, J.A.G.O., Nov 16 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 Theodore P. Warren (O-1309454), 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 only so much of the findings of guilty of the Specification, Charge I, alleging an assault with intent to commit rape, as involves a finding of guilty of assault in violation of Article of War 96, and legally sufficient to support all the other 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 the attached letter with inclosure from Honorable Mon C. Walgren, 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 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. ltr. for sig. S/W.
Incl 3 - Ltr. fr. Hon. M. C. Walgren.
Incl 4 - Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 69, 27 Jan 1945)

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

SPJGQ
CM 263130

15 SEP 1944

UNITED STATES	FOURTH AIR FORCE
v.	Trial by G.C.M., convened at Muroc Army Air Field, Muroc, California, 23 August 1944. Dismissal and total forfeitures.
Second Lieutenant HARMON R. SWETT (0-863205), Air Corps.	

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, 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 Harmon R. Swett, Squadron A, 421st AAF Base Unit, did without proper leave absent himself from his station and duties at Muroc Army Air Field, Muroc, California, from about 2 July 1944, to about 28 July 1944.

He pleaded guilty to, and was found guilty of, the Charge and the Specification. Evidence was introduced of a previous conviction of the accused by a general court-martial on 8 March 1944, for absence without leave from 11 February 1944, until 21 February 1944. In that case he was sentenced to forfeit $75 per month for a period of twelve months. In the present case 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 three (3) years. The reviewing authority approved the sentence, remitted the confinement and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

Supplementing the accused's plea of guilty, the prosecution introduced in evidence a certified extract copy of the Morning Report of the accused's organization (Squadron A, 421st AAF Base Unit, Muroc Army Air Field, Muroc, California), showing accused "Dy to AWOL" on 2 July 1944 (R. 6; Pros. Ex. 1). He was apprehended by the military

police in Los Angeles, California, and returned to military control on 28 July 1944 (R. 8). At the time of his apprehension, the accused was working on an automobile at a "grease rack" in a garage and "was dressed in ordinary shoes with khaki trousers and nothing on from the belt up" (R. 8).

4. Evidence for the Defense:

The accused, upon being advised by the court respecting his rights as a witness, elected to remain silent (R. 11, 12). No witnesses were called for the defense.

5. The accused's plea of guilty amounted to a judicial confession of guilt sufficient, in and of itself, to support the court's finding of guilty. The prosecution, nevertheless, introduced legal and competent evidence which, being uncontroverted, compelled the conclusion that, beyond a reasonable doubt, the accused was guilty of the offense alleged. The Board of Review is of the opinion, therefore, that the accused's guilt of absence without leave in violation of the 61st Article of War, as alleged, was conclusively established.

6. The records of the War Department show that the accused is 23 years of age. He was born in Michigan, is married and his permanent residence address is Harrisville, Michigan. He attended high school but did not graduate. In civilian life he was a press operator and die setter for Yellow Truck and Coach Co. for one year. He was inducted into the Army 25 August 1942, and was commissioned a second lieutenant, Air Corps, upon graduation from Officer Candidate School in June 1943. He was reprimanded and fined $75 under Article of War 104, in December 1943 for failure to keep his headquarters advised of his whereabouts during an official leave.

7. 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. Dismissal is authorized upon a conviction of a violation of Article of War 61.

William H. Gaunbrell, Judge Advocate.

Herbert B. Fredricks, Judge Advocate.

John R. Anderson, Judge Advocate.

SPJGQ
CM 263130

1st Ind.

War Department, J.A.G.O., 21 SEP 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 Harmon R. Swett (O-863205), 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. This is the second time within six months that this officer has been convicted by a general court-martial of being absent without leave, the sentence adjudged against him upon the first conviction being a forfeiture of $75 per month for a period of 12 months. Also, in December 1943, he was reprimanded and fined $75, under Article of War 104, for failing to keep his headquarters advised of his whereabouts during an official leave. There appear to be no mitigating or extenuating circumstances. 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 for his action, and a form of Executive action designed to carry the above recommendation into effect, 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 let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 571, 16 Oct 1944)

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

SPJGV
CM 263139

18 SEP 1944

UNITED STATES v. Second Lieutenant EUGENE J. BULLER (O-710557), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Ellington Field, Texas, 24 August 1944. Dismissal, total forfeitures and confinement for one (1) year and six (6) months.

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 Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Eugene J. Buller, Air Corps, did, at Ellington Field, Texas, on or about 7 June 1944, with intent to defraud, falsely sign a certain charge sales ticket known as a "mess chit" in the following words and figures, to-wit:

DATE 6-7-44 "

NAME W. E. Weigman RANK 2nd Lt.

BREAKFAST		SNACK	
DINNER		AMOUNT	
SUPPER			25

"

by forging the name of W. E. Weigman thereto, which said "mess chit" was a writing of a private nature which might operate to the prejudice of another.

Specification 2: Same allegations as Specification 1 except mess chit dated 21 June 1944.

Specification 3: Same allegations as Specification 1 except mess chit dated "6-25" and covered supper charge of $0.45.

Specification 4: Same allegations as Specification 1 except mess chit dated "7-25" and covered supper charge of $0.45.

Specification 5: Same allegations as Specification 1 except mess chit dated "7-7" and covered dinner charge of $0.45.

Specification 6: Same allegations as Specification 1 except mess chit dated "7-7-44" and no amount stated.

Specification 7: Same allegations as Specification 1 except mess chit dated "6-18" and name "D. E. Weigman" is signed thereon.

Specification 8: Same allegations as Specification 7 except mess chit dated "6-22".

Specification 9: Same allegations as Specification 7 except mess chit dated "6-24" and covered dinner charge of $0.45.

Specification 10: Same allegations as Specification 7 except mess chit dated "6-25".

Specification 11: Same allegations as Specification 7 except mess chit dated "6-27" and covered supper charge of $0.45.

Specification 12: Same allegations as Specification 7 except mess chit dated "6-24" and covered breakfast charge of $0.35.

The 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, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year and six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to prove that under the mess system established at Ellington Field, Texas, unmarried officers were expected to eat all meals at the Bachelor Officers' Mess and an arbitrary assessment of $1.25 per day for meals was charged against each officer whether or not he attended that mess. Each officer signed a mess chit for every meal eaten at the mess. Thus a record was kept of the actual number of meals consumed by the officers and the basis for drawing rations was thereby established. After the supply of chits had become exhausted a roster book was substituted, the book being signed by all officers to record the meals actually consumed by them (R. 16). On 12 June 1944 accused was released from the daily mess assessment of $1.25 and thereafter was only charged for one meal a day, i.e. dinner (R. 18; Pros. Ex. 34).

From 7 June 1944 to 7 July 1944, inclusive, twelve chits were presented to the Bachelor Officers' Mess which bore the signature either of "W. E. Weigman" or "D. E. Weigman" and various meals were obtained thereby on credit. The details relative to these chits and the meals furnished thereunder are as follows, viz (R. 15; Pros. Exs. 1-12 incl.):

Specification Covering Chit	Name Signed To Chit	Date Of Chit	Amount Of Chit	Food Obtained
1	W. E. Weigman	"6-7-44"	$0.25	Snack
2	W. E. Weigman	"June 21, 1944"	$0.25	Snack
3	W. E. Weigman	"6-25"	$0.45	Supper
4	W. E. Weigman	"7-5"	$0.45	Supper
5	W. E. Weigman	"7-7"	$0.45	Dinner
6	W. E. Weigman	"7-7-44"	none stated	Snack
7	D. E. Weigman	"6-18"	$0.25	Snack
8	D. E. Weigman	"6-22"	$0.25	Snack
9	D. E. Weigman	"6-24"	$0.45	Dinner
10	D. E. Weigman	"6-25"	$0.25	Snack
11	D. E. Weigman	"6-27"	$0.45	Supper
12	D. E. Weigman	"6-24"	$0.35	Breakfast

During the months of June, July and August 1944, there was no member of the Bachelor Officers' Mess named "W. E. Weigman" or "D. E. Weigman" (R. 15). Furthermore, the official Army record of officers stationed at Ellington Field did not list any officer bearing either of such names and if there had been any such officer stationed at the field his name would have appeared on the official record (R. 14).

Sometime in July 1944, Captain James C. McCoy, Provost Marshal at Ellington Field, acting upon certain information he had obtained, interviewed accused in his office and had him write the names "W. E. Weigman"

and "D. E. Weigman". He then exhibited to accused numerous chits signed with these names and also entries on the roster book similarly signed. He asked accused if he had signed these names and accused admitted he had (R. 7, 9-11). Warrant Officer Junior Grade W. S. Redd was then summoned and he warned accused that he was not required to make a statement but that if he did it could be used against him (R. 7). Accused thereafter gave two voluntary statements in which he admitted that he signed the fictitious names "W. E. Weigman" and "D. E. Weigman" to the various mess chits covered by Specifications 1 to 12, inclusive, of the Charge, aggregating $3.85 in amount as well as to ten other mess chits aggregating $3.90 in amount. He also admitted that he had signed the roster book of the Bachelor Officers' Mess nine times with the name "D. E. Weigman" and that he thereby obtained meals worth a total of $3.05. He commenced this practice because the burden of his indebtedness had made it increasingly difficult for him to meet his mess bills (R. 10-13; Pros. Exs. 1-12, 13-22, 23, 24, 25-33).

4. The accused elected to give sworn testimony after he had been duly advised of his rights as an accused. He testified that prior to his entry into military service he had farmed with his father and had purchased certain farm machinery with borrowed money on which he still owed a principal balance of $1200 (R. 19, 21). Accused's father was unable to pay the interest that accrued against accused on this indebtedness and, so long as accused lived off post with several other officers, he managed from time to time to send his father various sums aggregating $170 which were applied to pay current interest thereon. However, after he had been ordered to live on post and attend the Bachelor Officers' Mess his financial condition became difficult. He also owed a balance of $200 on an automobile that he had purchased and, in addition, was quite concerned over an aircraft accident in which he had been involved (R. 20, 21). He admitted he signed the fictitious names "W. E. Weigman" and "D. E. Weigman" to the various mess chits covered by Specifications 1 to 12 inclusive, to save money and avoid being charged for the meals furnished him. He did not intend to defraud but intended to pay the amounts due on the chits after he had discharged his "outside debts" (R. 20, 21).

5. The evidence offered by the prosecution and accused's sworn testimony given at the trial fully sustain the findings of guilty of all Specifications and clearly demonstrate that accused's pleas of guilty to the Charge and all Specifications thereunder were not improvidently entered. The fact that the mess chit covered by Specification 6 has no amount entered on the face thereof is not fatal. The chit was signed by accused to acknowledge receipt of certain food or refreshments commonly referred to as a "snack". Other evidence in the record satisfactorily

establishes that the charge for a snack was $0.25. Accordingly, the court was warranted in concluding that the charge for the snack mentioned in Specification 6 was in that amount.

The prosecution introduced evidence demonstrating that, in addition to the twelve offenses charged, accused forged the fictitious name "D. E. Weigman" or "W. E. Weigman" to ten other mess chits and on the mess roster book on nine occasions and thereby obtained meals worth a total of $6.95. The law member admitted this evidence of other offenses solely as proof of the intent of accused in committing the offenses charged.

Where criminal intent is an element of an offense charged, evidence of other acts of accused not too remote in time which manifest that intent are admissible even though they may tend to establish the commission of other offenses (MCM, 1928, par. 112b). Since the criminal intent of accused was conclusively established by his pleas of guilty and by the evidence introduced by the prosecution relative to the offenses charged, it does not appear that the evidence relative to the other offenses with which accused was not charged was necessary to establish that intent. However, the admission of this evidence did not prejudice any substantial rights of the accused in so far as the findings of the court are concerned. If it received improper consideration from the court in determining the sentence to be imposed the error is without injury to the accused inasmuch as the confirming authority is empowered to remit, mitigate or commute the sentence so that the eventual punishment imposed may be consistent with the gravity of the offenses of which accused was found guilty. Thus, any error committed by the admission of this evidence was not fatal since machinery exists whereby it may be corrected (CM 232160, McCloudy, 18 BR 389). The record of trial sustains the findings of guilty of the Charge and its Specifications.

6. The accused is 24 years of age. He attended a junior college of music for four years and thereafter engaged in farming with his father in Nebraska until he entered military service 1 September 1942. He served as an enlisted man until 2 February 1943 and thereafter as an aviation cadet until 7 February 1944. He was commissioned a second lieutenant 8 February 1944 and entered upon extended active duty the same 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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

[illegible], Judge Advocate.

Sick in Hospital, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 28 SEP 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 Eugene J. Buller (0-710557), Air Corps.

2. The accused pleaded guilty to the Charge and all Specifications. 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 forging fictitious names to twelve mess chits at the Bachelor Officers' Mess, Ellington Field, Texas, between 7 June 1944 and 7 July 1944, whereby he fraudulently obtained meals and refreshments worth $3.85 without being charged therefor. He also similarly obtained other meals worth a total of $6.95 although he was not tried for these offenses. I recommend that the sentence be confirmed but, in view of the monetary value involved in accused's unlawful acts, his youth, and previous good record, I further recommend that the forfeitures and confinement adjudged be remitted and that the sentence as thus modified be carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 600, 3 Nov 1944)

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

SPJGK
CM 263231

23 SEP 1944

UNITED STATES	)	13TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Bowie, Texas, 18 August 1944. Dismissal.
Second Lieutenant WILLIAM B. BAKER (0-1018860), Infantry.	)	

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, 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 96th Article of War.

Specification 1: In that 2d Lt William B. Baker, Inf, Company "C", 46th Tank Battalion, having been detailed as Duty Officer of Company "C" on 22 July 1944, did, at Camp Bowie, Texas, on 22 July 1944, abandon his place of duty by going to Brownwood, Texas.

Specification 2: In that 2d Lt William B. Baker, Inf, Company "C", 46th Tank Battalion, did, in the City of Brownwood, Texas, at night-time, on 22 July 1944, wrongfully, to the prejudice of good order and military discipline and to the discredit of the military service, act and conduct himself obscenely and indecently by peeping and peering through a window at the residence of Mrs. Juanita Leach, residing at 1803 8th Street, Brownwood, Texas, who was then removing her clothes.

He pleaded not guilty to and was found guilty of the Charge and the Specifications except the words "who was then removing her clothes" in Specification 2. No evidence was introduced of any previous conviction. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of Specification 2 of the Charge as involves a finding that the accused did at the time and place alleged wrongfully, to the prejudice of good order and military discipline and to the discredit of the military service, act and conduct himself indecently by peeping and peering through a window at the residence of Mrs. Juanita Leach, residing at 1803 8th Street, Brownwood, Texas, and 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 during the occurrences hereinafter related was in the military service of the United States, being a second lieutenant in Company "C", 46th Tank Battalion, stationed at Camp Bowie, Texas (R. 6). On 22 July 1944 First Lieutenant George D. Jackson, the accused's company commander, with the approval of the battalion commander, appointed the accused to be Company Duty Officer, in the place of a previously designated officer, from 1500 that day until the following Monday, 24 July 1944 at noon (R. 7). It was one of the duties of Company Duty Officer not to leave the post under any circumstances. The accused had been assigned to duty with this organization only a few weeks previously but the commanding officer informed him at the time that he was not to leave the post. The accused was thoroughly informed as to his duties. These duties also appear on the bulletin board of the battalion (R. 8-9).

Mrs. Juanita Leach lives in a private house at 1803 Eighth Street, Brownwood, Texas (R. 15). The house faces north and is flanked both sides by driveways; the west driveway leads to Mrs. Leach's garage, the east driveway to that of a neighbor. A fence surrounds the property (R. 15, 21, 37). Shortly before 9:30 p.m., 22 July 1944, Mrs. Leach was in her home and had just finished bathing her son. It was dark outside. The only light turned on in the house was in the rear bedroom which had five windows. All of the shades of these windows were pulled down but it was possible to peer under one of the shades which lacked being pulled down all the way by one inch. Through the space one could see possibly one half of the room (R. 17-18). She had occasion to go to the front porch and noticed a man in uniform walk past the house and turn around and walk up into the driveway along the east side of her house. Her neighbors were away so she called the police (R. 15). She waited in the front room for the police to arrive which occurred within 15 minutes. She did not see the accused look in any window (R. 16, 18, 21). She was fully clothed at the time (R. 18).

About 10 or 15 minutes after Mrs. Leach's telephone call two local policemen arrived at the house and apprehended the accused as he was emerging from the west driveway (R. 22, 24). One of the officers found foot prints on the east side of the house. The length of the print corresponded with the shoe of the accused when both were measured by a string. He asked the accused what he was doing in the yard at the time. The accused said that he was "window-peeping" and "trying to watch the lady undress" (R. 24, 27, 30, 31). The toe of the foot print that he measured, which was 6 or 7 inches from "the window", pointed away from the house (R. 26). The window itself was three feet above ground but he could not remember whether there was a light on in that window or which window of the house it was (R. 29). The shade in that particular window was up 5 or 6 inches (R. 33). The officer did not at any time warn the accused that anything he might say might be used against him.

The local policemen then took the accused to Military Police Headquarters in Brownwood (R. 34). There the accused voluntarily, after having

been explained his rights under the 24th Article of War, made substantially the following statements to Captain C. A. Dienst, Assistant Security and Intelligence Officer, Captain Husband, and Lieutenant J. J. Richmond, Military Police (R. 34-36, 42-44): Accused had obtained a case of beer at camp that day and took it to his house which was located near the Leach home. As he was passing the Leach home on his return to camp he observed the lights in the front part of the house go out and the light in the bedroom go on. A day or two earlier he had seen a girl playing ball in the front yard dressed in shorts, so he went into the driveway alongside of the house to look into the bedroom window. "He went to the window to watch". The police arrived as he walked out of the driveway. When it was proposed that the accused be turned over to his battalion duty officer accused stated that he was Company Duty Officer (R. 36, 44).

4. The accused having been advised of his rights with respect to testifying elected to remain silent (R. 50). The defense called as a witness Lieutenant Harry Lindsey who testified that he was an officer in the same organization as the accused. On 22 July 1944 accused was appointed Company Duty Officer by the acting company commander. He did not hear him instruct the accused as to his duties although he was present at the time and it is customary for the company commander to do so. There is no notice posted on either the company or battalion bulletin board that sets forth the duties of a Company Duty Officer. The accused had been with the organization about three weeks (R. 47, 49).

5. Lieutenant George D. Jackson was recalled as a witness by the court and testified that accused's residence was in Brownwood and that he did not leave any address or tell anyone in the company that he was leaving the post the evening of 22 July 1944 (R. 50-51).

6. The evidence introduced by the prosecution clearly shows that the accused did, as averred in Specification 1 and at the time and place set forth therein, abandon his place of duty by leaving his military post at Camp Bowie, Texas, and going to Brownwood, Texas, contrary to the specific verbal orders given him by his superior officer when he described to the accused his duties as Company Duty Officer. His disregard of his duty to remain on the post while acting in that capacity was clearly prejudicial to good order and military discipline and therefore a violation of the 96th Article of War.

It was further clearly shown that the accused on the night of 22 July 1944 trespassed upon Mrs. Leach's property when he walked back along the side of her house attracted by a light in the rear bedroom window. He remained in that fenced-in vicinity for a period of 10 to 15 minutes. His footprints showed that he stood under and close to one of the windows of the house. When called upon to explain his reason for his presence there he frankly admitted to the two policemen who apprehended him and to three

Army officers who questioned him that he went there to look into the windows to see if he could see the young girl whom he had seen a few days previously playing ball on the front lawn. To the police he also stated that he was "trying to watch the lady undress". In common parlance he admitted he was a "Peeping Tom". Such conduct is contrary to ordinary standards of decency. It is not only unbecoming an officer but is also disgraceful and brings discredit upon the service. It therefore violates the 96th Article of War (CM 167521; CM 198202, 3 BR 175).

7. War Department records show the accused to be 26 years of age having been born 8 December 1918 in Baltimore, Maryland. He is married and the father of one child. He attended high school for 3 years but did not graduate. His hobby was photography and art. He enlisted in the service 16 September 1941, and served as an enlisted man until 24 July 1943 when he was commissioned second lieutenant, Infantry, AUS.

8. The court was legally constituted and had jurisdiction over the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the course of the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Charge and of the Specifications thereunder as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Irving G. Gore, Judge Advocate.

Earle Stephens, Judge Advocate.

Hermann Moyer, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 26 SEP 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 B. Baker (0-1018860), 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 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-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence confirmed. G.C.M.O. 578, 25 Oct 1944)

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

SPJGQ
CM 263257

SEP 1944

UNITED STATES v. Second Lieutenant FRANCIS R. CONNELLY (0-674664), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Ellington Field, Texas, 26 August 1944. Dismissal, total forfeitures and confinement for two and one-half ($2\frac{1}{2}$) years.

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OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, 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 96th Article of War.

Specification 1: In that Second Lieutenant Francis R. Connelly, Air Corps, did, at Ellington Field, Texas, on or about 17 August 1944, wrongfully strike Private First Class James A. Burwell on the head with his arm.

Specification 2: In that Second Lieutenant Francis R. Connelly, Air Corps, was at Ellington Field, Texas on or about 17 August 1944 drunk and disorderly in uniform.

Specification 3: In that Second Lieutenant Francis R. Connelly, Air Corps, having received a lawful order from First Lieutenant Fred D. Devilleneuve to leave the Officers Club, or words to that effect, the said First Lieutenant Fred D. Devilleneuve being in the execution of his office, did, at Ellington Field, Texas, on or about 17 August 1944, fail to obey the same.

He declined to plead and the court entered for him a plea of not guilty to the Charge and all Specifications. He was found guilty of the Charge and all Specifications. No evidence of any previous conviction 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 two years and six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

First Lieutenant Fred deVilleneuve, Air Corps, was Officer of the Day at Ellington Field, Texas, from noon on 17 August 1944 until noon on 18 August 1944 (R. 6). At approximately 10:55 p.m. on 17 August 1944 he entered the Officers Club on an inspection tour. His standing orders, as Officer of the Day, required him to close the Club at 11 p.m. Accordingly, at two minutes before eleven he announced over the loud speaker system of the Club that the Club would close at eleven o'clock and he asked those present "to finish their drinks and leave immediately" (R. 6-7). Everyone in the Club complied with this request except the accused. The OD, noticing that the accused had not left, "then asked /him/ again to leave" but instead of leaving the accused ordered some more beer (R. 7). The OD then "asked him to go ahead and hurry and drink his beer and leave immediately". The accused at this point adopted a defiant attitude, telling the OD that "he would take his time" drinking his beer and that the OD "wasn't big enough to put him out of the Club" (R. 7). The OD thereupon told the accused that he would give the accused 30 seconds to finish up and get out "because it was after eleven" (R. 6-7). The accused did not leave within the 30 seconds allotted to him, and the OD went to a telephone and called the Main Gate for an MP. There being no jeeps available at the Main Gate, the OD then drove his own car to the Main Gate and returned with an MP. He then "asked the Lieutenant again to leave the Club in a quiet way and he said he was waiting for me to put him out" (R. 7-8). The OD thereupon reminded the accused that the latter had ordered some more beer after the OD had first ordered him to leave the Club. The accused at this point called the OD a "damned liar" (R. 8). The OD then placed the accused under arrest and ordered the MP to escort the accused from the Club (R. 8).

The accused left the Club with the MP and without requiring the employment of any physical force (R. 8). Present at the Club at the time of the altercation between the OD and the accused were the Night Adjutant (Second Lieutenant S. J. Milford), and the Officer of the Guard (Second Lieutenant Stanley C. Gregg). Both of them testified for the prosecution and they corroborated in all substantial respects the testimony of the Officer of the Day above related (R. 14-16, 17-19). In addition, they testified that when the OD went to telephone for an MP the accused used a considerable amount of abusive and obscene language in referring to the OD, calling him a "son-of-a-bitch" and other names (R. 15, 18).

At the time of the encounter between the OD and the accused at the Club, the OD was wearing regular OD insignia. The accused recognized him as the OD and referred to him in conversation as the OD (R. 9, 13). The OD gave the accused altogether "four orders" to leave the Club before he went to the Main Gate for the MP (R. 9). The accused was in uniform (R. 9).

In the opinion of the OD the accused "was drunk". He was "very loud, disorderly and swearing in a very high voice" and talked with a "thick tongue". Also, he "was drunk enough to where his actions and his talk were affected, and his manner of walking was affected" (R. 11). The Night Adjutant testified that the accused was "definitely under the influence of alcohol" (R. 16).

When the accused finally left the Club after the arrival of the MP, he was taken by the OD to the TOQ where he was told that he was not to leave his quarters except to go to the latrine, and the MP was stationed as a guard over him (R. 8, 22). Approximately one hour later, at about 12:30 a.m. on 18 August 1944, the Officer of the Guard was summoned to the TOQ because of a disturbance the accused was creating there (R. 19). The accused, having previously undressed, had dressed again and he told the Officer of the Guard that he (the accused) was going out to get something to eat. This privilege was denied him and the accused thereupon said he wanted to be taken to the Guard House (R. 19). This request was acceded to by the Officer of the Guard, and they walked out to the jeep to drive to the Guard House. Upon reaching the jeep, however, the accused changed his mind and stated that he would not go. The Officer of the Guard then instructed the two enlisted men who were with him to put the accused in the jeep, which they did (R. 19). The accused claimed to be in an uncomfortable position in the jeep and asked to be permitted to get out and get back in "on his own power" (R. 22). When he got out, however, he started walking away (R. 19). At this point one of the two enlisted men, Private First Class James A. Burwell, a military policeman, caught hold of the accused to restrain him and the accused "made a swing" at Burwell, striking him on the side of his head with his (the accused's) arm (R. 19, 22). Both the Officer of the Guard and Burwell testified as to the making of this assault and battery (R. 19, 22). The accused was thereupon again forcibly placed in the jeep, and was driven to the Guard House (R. 22).

4. Evidence for the Defense:

After having his rights as a witness explained to him, the accused elected to make an unsworn statement, which was as follows:

"In this statement I am trying to explain why I was found in such a condition.

"On the evening before this offence took place I telephoned the girl I expected to marry. She informed me that her parents did not consent to the idea that we would get married as the disgrace of an officer being dismissed from service was to much to be lived down. My father had previously informed me that for being 'kicked out of the army', as he put it I could not consider myself as a son of his.

"The reason explained in the above paragraph, waiting for my dismissal to come thru, and the objectional treatment I received as an officer when I first reported to this station caused me to lose control of myself.

"To explain my dismissal from the service, I was tried under the ninety-six (96th) article of war for writing thirty-five ($35.00) dollars worth of bad checks. For this offence I was sentenced to be dismissed from the service and forfeit all pay and allowances due or to become due.

"I am not trying to condone my actions but am trying to explain the reason I was found in the condition to break the rules and regulations I have been charged with breaking."

No witnesses were called for the defense.

5. Each of the three Specifications on which the accused was tried is laid under the 96th Article of War. They will be considered in the order set out in the Charge Sheet.

Specification 1. Assault and battery.

The uncontroverted evidence is that the accused, without provocation, struck Private First Class James A. Burwell on the side of his head with his arm. This was a sufficient blow to constitute an assault and battery. Although "some impact is essential, a mere touching of the body of the party assailed will satisfy the legal definition" (Winthrop's Military Law and Precedents, Reprint page 687). It is no defense that the accused was drunk, as no specific intent was alleged. Nor did the accused assert any defense. The evidence conclusively establishes the accused's guilt of the offense alleged.

Specification 2. Drunk and disorderly in uniform.

The evidence that the accused was drunk and disorderly, in uniform, at the Officers Club on the evening of 17 August 1944 is overwhelming and uncontroverted. Such conduct was prejudicial to good order and military discipline, in violation of Article of War 96 (Lowry, CM 207887, 8 Board of Review 377; MCM, 1928, par. 152).

Specification 3. Failure to obey order.

The evidence is clear that First Lieutenant Fred deVilleneuve, being in the execution of his office as Officer of the Day, gave the accused a lawful order to leave the Officers Club at or about 11 p.m. on 17 August 1944, and that, although the order was repeated several times and was well understood by the accused, he failed to obey it. Such conduct was prejudicial to good order and military discipline and of a nature to bring discredit upon the military service, in violation of Article of War 96 (JAG Bull. Aug. 1942, Section 442 (5)). A failure of a subordinate to obey an order when in a state of drunkenness is properly chargeable under Article of War 96 (Winthrop's Military Law and Precedents, Reprint page 573).

6. The records of the War Department show that the accused was born and reared in Boston, Massachusetts.. He is 22 years old and is a high school graduate. In civilian life he worked from September, 1939, until January, 1942, for Armour & Co. as a refrigerator repair man. He was inducted into the Army on 16 March 1942, subsequently attended the Army Air Forces Bombardier School, and upon graduation in March, 1943, was commissioned a second lieutenant.

7. 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 is authorized upon a conviction of a violation of Article of War 96.

William H. Gramberell, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 - OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Francis R. Connelly (0-674664), 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. While, in my opinion, the sentence is legal, it is my belief that it is unnecessarily severe. I recommend, therefore, that the sentence be confirmed but that the confinement and forfeitures adjudged be remitted, and that the sentence as thus modified be carried into execution.

3. The sentence in the instant case (C.M. 263257) was adjudged on 26 August 1944. Seven weeks prior to this trial the accused was tried (7 July 1944) by a general court-martial, found guilty of making and uttering four worthless checks, in violation of Article of War 96, and sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The record of trial in that case (C.M. 259880) has been examined by the Board of Review and the Board has rendered its opinion that the record is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I concur in that opinion. Action by the President upon both records of trial appears to be unnecessary. If the sentence in the instant case is confirmed and carried into execution, I shall, unless otherwise directed, cause the record of the other trial (C.M. 259880) to be filed in my office without further action. A copy of the opinion of the Board of Review in the other case is attached hereto for your information.

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 the above recommendation into effect, 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 action
4 - Cy of Op. Bd. of Rev. in C.M. 259880

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 614, 10 Nov 1944)

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

SPJGN
CM 263258

22 SEP 1944

UNITED STATES	)	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Maxwell Field, Alabama, 15 August 1944. Dismissal.
Captain THEODORE H. R. KEITH (0-1699531), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

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

Specification 1: In that Captain Theodore H. R. Keith, Air Corps, Hendricks Field, Sebring, Florida, for the purpose of obtaining the payment of a claim against the United States, by presenting to the Finance Officer at Hendricks Field, Sebring, Florida, an officer of the United States duly authorized to approve, pay, and allow such claims, did, at Hendricks Field, Sebring, Florida, on or about 15 October 1942, make and use a certain writing, to wit: War Department Form 336, Revised, Pay and Allowance Account, for the month of October, 1942, which said writing, as he, the said Captain Keith, then knew, contained a statement that the sum of Three hundred Ninety-one Dollars and six Cents ($391.06) was due him, which statement was false and fraudulent, in that said statement omitted as a debit a Class "E" Allotment in the sum of One hundred Eighty-five ($185.00) Dollars, payable to the said Captain Keith's account at the Madison-Southern Bank and Trust Company, Richmond, Kentucky, and was then known by the said Captain Keith to be false and fraudulent.

Specifications 2 to 15 allege in identical language the repetition of the offense stated in Specification 1 for the months of November and December, 1942 and January through December, 1943.

He pleaded not guilty to and was found guilty of the Charge and all its Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 17 August 1942 the accused at Hendricks Field, Florida, executed A.G.O. Form No. 29, "Authorization For Allotment of Pay" whereby he as a "Class E" allotment allotted to Madison-Southern National Bank, Richmond, Kentucky, the sum of $185 per month of his pay commencing with the month of September, 1942, and continuing for an indefinite time with instructions that such allotment was to be deposited to his account (Pros. Exs. 1, 2). He had theretofore executed another "Class E" allotment in the monthly sum of $35.34 to another bank and also a "Class N" allotment in the monthly sum of $7 for insurance (Pros. Ex. 19). Thereafter, the accused from September, 1942, until December, 1943, inclusive, executed his monthly pay vouchers, upon the customary forms and with the usual certifications, which did not show the $185 allotment (Pros. Exs. 1, 3-18). No authorization for the $185 allotment was on file at the Finance Office at Hendricks Field where he presented and was paid upon his pay vouchers (R. 21-24; Pros. Ex. 19). The $185 allotment for the months indicated was paid by the Finance Office, Washington, D. C. (R. 21-22).

By letter of 14 January 1944 from the Fiscal Director the accused was advised that he had been overpaid and demand was made for repayment (Pros. Ex. 24, R. 25-26). The accused replied that he understood that the payment of $185 per month was in the nature of subsistence allowance for dependents which was in addition to pay and allowances normally received (R. 31; Pros. Id). Sometime after 8 September 1942 the accused completed a questionnaire at Hendricks Field in which he affirmatively answered the following question: "Have you made Class 'E' Allotment covering allotments to bank for credit of dependents or direct to dependents?" (R. 43, 90; Pros. Ex. 21).

Each of the aforementioned vouchers certified that the amount shown to be due was true and correct, that payment therefor had not been received and that the accused's dependent wife was not being furnished subsistence or quarters by the government or being paid an allowance in lieu thereof (Pros. Exs. 3-18).

4. The evidence for the defense shows by stipulation that an employee of the "Treasury Office of Dependent's Allowances Assigned to Pay of the Royal Canadian Air Force" would testify substantially as follows:

"a. That in accordance with the financial rules and instructions of the Royal Canadian Air Force, Dependent's Allowance and Subsistence Allowance is not deducted from an officer's pay, but is a separate and distinct allowance made payable to the wife of said officer depending upon the number of children said officer has and the rank that he holds in the Royal Canadian Air Force.

"b. That when Captain Theodore H. R. Keith was in the Royal Canadian Air Force as a Flight Lieutenant, his Dependency Allowance for Mrs. Theodore H. R. Keith and his two children was $74.00 per month, and that during Captain Keith's period of service in Canada all payments of Dependent's Allowance were made from the office of the 'Treasury Office of Dependent's Allowance and Assigned Pay' direct to Mrs. Theodore H. R. Keith by check" (Def. Ex.A).

The full text of the accused's reply to the Fiscal Director's letter of 14 January 1944 is as follows:

"1. Payment of allotment referred to in 1st Indorsement was understood by the undersigned to constitute a subsistence allowance for dependents. When transferring from the Royal Canadian Air Force, the undersigned was told by a Major on the Canadian-American Military Board train that allotments for dependents would be 'more than doubled'. At this time, dependent's allotment totaled $74.00, paid directly to Mrs. Keith, and was not deducted from my pay, but was paid in excess of my pay. My orders from the above mentioned C.A.M.B. were signed by J. H. Lowell, Major A.G.D., Adjutant. Although this may or may not have been the Major who informed me of the pay, he might be able to furnish the correct name.

"2. On each pay voucher, my allotment to the Bank of America for $35.34 was checked and also my allotment for $7.00 for insurance was checked. The allotment of $185.00 was not entered, as it was thought that my pay voucher was not affected by this allotment to my dependents.

"3. The undersigned is working to ascertain what amount of a cash payment can be made on the overpayment, and requests that the balance of overpayment be made by deductions of $185.00 per month until the balance is liquidated.

"4. The Undersigned, at no time meant to deceive or defraud in signing any of the pay vouchers as correct. According to information at hand and my understanding of the dependence allotment, the pay voucher was correct and was certified as such" (Def. Ex. B).

The accused, after explanation of his rights as a witness, testified substantially in accordance with the foregoing. After serving in the Royal Canadian Air Force as a Flight Lieutenant, the equivalent in rank to that of Captain in the United States Army Air Corps, for about 21 months, he appeared before a joint board to receive a transfer to the United States Army Air Corps on 29 May 1942 and was told that his dependency benefits would be over twice that received from the Canadian Government which was $74 per month (R, 48-49). He had reported to Hendricks Field on 1 August 1942 and thereafter had on 9 August 1942 executed numerous forms including the questionnaire (Pros. Ex. 21) in which he stated he had made a "Class E" allotment for dependents (R. 50). This answer had been made because he had made an allotment to the Bank of America in the monthly amount of $35.34 on 19 June 1942 as he had not made the $185 allotment until 17 August 1942 (R. 50). The account in the Richmond, Kentucky, bank was a joint account used by himself and his wife and he did not know the $185 allotment was to come out of his pay (R. 50, 51). The $185 allotment had been calculated by a civilian employee and he, the accused, had signed and delivered the several forms for it as directed (R. 52-53). He had signed in good faith the monthly pay vouchers, which had been prepared by the finance office, without reading them but after checking the $35.34 and the $7 allotments and had no intent to defraud the government (R. 52-54). He had refunded $1785 of the overpayment and stood ready to repay the balance (R. 54).

Upon cross-examination he testified that he had attended college for about seven years (R. 54-57), that he was fully conversant with the items of pay he received from the Canadian Government and also the items of pay he was to receive in the United States Army Air Corps (R. 58-62), that he had been in debt when he left Canada to the extent of $350, that he thought he would receive about $200 per month more in the United States Air Corps than in the Royal Canadian Air Force (R. 62), that he had borrowed $300 to buy an automobile and had made the $35.34 monthly allotment to repay that loan, that when he signed the vouchers he had not read them but thought they were correct (R. 67,68), that he had signed vouchers for uniform allowance and also for additional back pay for prior service in the National Guard (R. 69-72), and that he had become indebted for furniture in the sum of about $500 (R. 79-81). He had transferred to the United States Army Air Corps about 1 June 1942 (R. 61).

Upon examination by the court he stated that he knew the $185 monthly allotment had been paid into his account and both he and his wife had issued checks against such deposits. He had never discussed with other officers of his same rank what pay and allowances they were receiving (R. 83-88).

5. Specifications 1 through 15 respectively allege that the accused on or about the fifteenth day of each of the months of October, 1942, through December, 1943, inclusive, made and used for each of said months

War Department Form No. 336, Revised Pay and Allowance Account, which he knew contained a false and fraudulent statement about the amount due him in that there was omitted from each of the statements a monthly Class "E" allotment in the sum of $185 payable to his own account at the Madison-Southern Bank and Trust Company, Richmond, Kentucky. All of the Specifications are alleged in contravention of Article of War 94 of which they are clearly violative. The offenses charged are those of making and presenting fifteen false and fraudulent claims and knowledge of such character thereof is chargeable to one making and using them when such character of the instruments would have been known to an ordinarily prudent man under the circumstances shown (M.C.M., 1928, pars. 150a, b). Applicable provisions of Army Regulations provide as follows:

"(1) Authorizations for allotments will be prepared in duplicate on W.D. A.G.O. Form No. 29 only. The duplicate will be retained by the allotter (when he prepares and certifies his own voucher) or by the commanding officer or personnel officer (in all other cases). The original should be forwarded in time to reach the Finance Officer, U.S. Army, Washington, D. C., by the 10th of the month in which the allotment is to become effective.

* * * *

"(3) The allotter (when he prepares and certifies his own voucher) or the commanding officer or personnel officer (in all other cases) is responsible that the allotment is immediately entered on all pertinent records as a charge against the pay of the allotter, and further that such charge has been entered on the pay voucher or pay roll as a deduction for the month in which the allotment was authorized. This action will be taken without waiting for word from the Finance Officer, U.S. Army, Washington, D.C., that the allotment has been received and accepted" (A.R. No. 35-5520, 4 March 1941, 6a (1), (3)).

The evidence for the prosecution conclusively shows that the accused on 17 August 1942 executed an allotment of $185 per month payable to his bank account for an indefinite period commencing with the month of September, 1942 and that he thereafter executed and used pay vouchers which did not show the deduction of such allotment for the specified months. In such manner he secured an overpayment of $2960. The accused admits these facts but contends that he had no actual knowledge that such pay vouchers contained false statements and that he, consequently, did not fraudulently make and use such vouchers. Such contentions can not prevail. By Army Regulations with which he is charged in law with constructive knowledge he was under the duty of forwarding the allotment to the Finance Officer, U.S. Army, Washington, D. C., and also of having it entered on all pertinent records as a charge against his pay. The allotment itself plainly states that it is an "allotment of pay". The vouchers each stated plainly and

unequivocally that the amount shown thereon was due to the accused and that his wife was not receiving subsistence or quarters from the government or being paid an allowance in lieu thereof. The accused is bound to know the natural and probable consequences of his acts. By his own testimony he is fully conversant with the items of both pay and allowances to which he is entitled and was entitled while in the Royal Canadian Air Force. All of the testimony including his own belies his lack of knowledge of the falsity of the pertinent statements in the vouchers and the circumstances shown impel the conclusion that he as an ordinarily prudent man must have known thereof. Since he had both actual and constructive knowledge of the falsity of the statements in the pay vouchers his disavowal of a fraudulent intent is unworthy of belief. This is so for the further reason that if he had been bona fide in his asserted belief that he was entitled to the $185 per month in addition to the amounts certified upon the vouchers, he would have most certainly made claim for such additional amount of $185 per month for the months of June, July and August, 1942, which immediately succeeded his transfer to the United States Army Air Corps. Restitution in whole or in part, actual or promised, does not obliterate the offenses. The evidence therefore, beyond a reasonable doubt establishes the accused's guilt as alleged and amply supports the court's findings of guilty of the Charge and all its Specifications.

6. Attached to the record is a brief submitted by the accused in which he urges (1) that the court erred in refusing his motion for findings of not guilty at the conclusion of the prosecution's case and (2) that the reviewing authority should "declare" the accused not guilty because of newly discovered evidence tending to show that the accused executed the prosecution's exhibit No. 21 on or about 9 August 1942 as contended by him and not after 8 September 1942 as shown by the prosecution. The first reason fails because the prosecution's evidence established a prima facie case and the second because the "newly discovered" evidence is merely cumulative of the accused's own testimony and as hereinabove shown could not have been controlling in any event. It is also considered not inappropriate to state that the instant trial was the third in which the same specifications, among others, were involved.

7. The accused is about 30 years old. The War Department records show that the accused served in the Kentucky National Guard from 1929 to 1932, that he was appointed a second lieutenant in the AUS, "Air-Res" from which he was honorably discharged on 9 December 1940, that he was an officer in the Royal Canadian Air Force from about October 1940 until about 1 June 1942 when he was transferred as a captain to the United States Army Air Corps and that since the latter date he has had active duty in such capacity. He graduated from high school, attended Eastern Teachers College, Richmond, Kentucky, where his father is Professor of History, and Dean of Men, for 3½ years without graduating, and graduated from Dallas Aviation

School after one year's attendance. He is married and has three children one of which was adopted and as a civilian he was employed by several commercial airlines for different periods of time as a co-pilot.

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 all of its Specifications and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94.

Abner E. Lipscomb, Judge Advocate.

Robert Bonner, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(228)
SPJGN
CM 263258

1st Ind.

War Department, J.A.G.O., 4 - 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 Theodore H. R. Keith (0-1699531), 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. In March and again in June of this year, accused was tried by general court-martial and found guilty of the identical Charge and Specifications of which he here stands convicted. In both cases, the reviewing authority disapproved the sentence and ordered a rehearing. The instant case is the second rehearing.

4. Consideration has been given to two letters from the accused's parents, dated 31 August 1944 and 9 September 1944, and two letters from Senator Albert B. Chandler, dated 25 August 1944 and 21 September 1944, relative to the last trial of the accused. Consideration has also been given to three letters from the accused's father addressed to the President, The Judge Advocate General and the Director of the Federal Bureau of Investigation; respectively, dated 11 July 1944, 3 August 1944 and 10 July 1944, concerning previous trials of the accused.

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

Myron C. Cramer

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

10 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. for sig. S/W.
Incl 3 - Form of Executive action.
Incl 4 - Ltr. dated 31 Aug 44.
Incl 5 - Ltr. dated 9 Sept 44.
Incl 6 - Ltr. dated 25 Aug 44.
Incl 7 - Ltr. dated 21 Sept 44.
Incl 8 - Ltr. dated 11 July 44.
Incl 9 - Ltr. dated 3 Aug 44.
Incl 10 - Ltr. dated 10 July 44.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 658, 16 Dec 1944)

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

SPJGV
CM 263267

18 SEP 1944

UNITED STATES v. Second Lieutenant WILLIAM F. JOHNS (0-752125), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Mather Field, Sacramento, California, 3 and 4 August 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: Violation of the 61st Article of War.

Specification: In that 2d Lt. William F. Johns, 3031st AAF Base Unit, Section B, Mather Field, California, did, without proper leave, absent himself from his organization at Mather Field, California, from about 23 May 1944 to about 2 June 1944.

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

Specification 1: In that 2nd Lt. William F. Johns, * * *, Sacramento, California, did, at San Francisco, California, on or about 26 April 1944, with intent to defraud, wrongfully and unlawfully make and utter to Hotel Carlton, a certain check in words and figures as follows, to wit:

April 26 1944 No.___

VALLEY NATIONAL BANK
Mesa, Arizona

Pay to the order of Hotel Carlton $20.00

Twenty dollars and no/100 DOLLARS

William F. Johns, 2nd Lt.
0-752125, Mather Fld, Calif.

and by means thereof, did fraudulently obtain from Hotel Carlton $20.00 in cash, he the said 2nd Lt. William F. Johns, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank for the payment of said check.

Specification 2: Same allegations as Specification 1 except check in the amount of $25, dated 6 May 1944, and made and uttered to Mather Field Exchange, Sacramento, California.

Specification 3: Same allegations as Specification 1 except check in the amount of $15, dated 9 May 1944, and made and uttered to Nicolo L. Basso, Perkins, California.

Specification 4: Same allegations as Specification 1 except check in the amount of $10, dated 10 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 5: Same allegations as Specification 1 except check in the amount of $10, dated 10 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 6: Same allegations as Specification 1 except check in the amount of $10, dated 10 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 7: Same allegations as Specification 1 except check in the amount of $10, dated 11 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 8: Same allegations as Specification 1 except check in the amount of $15, dated 12 May 1944, and made and uttered to Nicolo L. Basso, Perkins, California.

Specification 9: Same allegations as Specification 1 except check in the amount of $10, dated 12 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 10: Same allegations as Specification 1 except check in the amount of $10, dated 12 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 11: Same allegations as Specification 1 except check in the amount of $10, dated 12 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 12: Same allegations as Specification 1 except check dated 13 May 1944, and made and uttered to Mather Field Exchange, Sacramento, California.

Specification 13: Same allegations as Specification 1 except check in the amount of $10, dated 13 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 14: Same allegations as Specification 1 except check in the amount of $25, dated 14 May 1944, and made and uttered to Radich and Separovich, Sacramento, California.

Specification 15: Same allegations as Specification 1 except check in the amount of $10, dated 14 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 16: Same allegations as Specification 1 except check in the amount of $15, dated 14 May 1944, and made and uttered to Radich and Separovich, Sacramento, California.

Specification 17: Same allegations as Specification 1 except check in the amount of $10, dated 15 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 18: Same allegations as Specification 1 except check in the amount of $25, dated 18 May 1944, and made and uttered to Mather Field Exchange, Sacramento, California.

Specification 19: Same allegations as Specification 1 except check in the amount of $15, dated 16 May 1944, and made and uttered to Radich and Separovich, Sacramento, California.

Specification 20: Same allegations as Specification 1 except check in the amount of $10, dated 16 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 21: Same allegations as Specification 1 except check in the amount of $15, dated 16 May 1944, and made and uttered to Radich and Separovich, Sacramento, California.

Specification 22: Same allegations as Specification 1 except check in the amount of $10, dated 17 May 1944, and made and uttered to Hotel Senator, Sacramento, California.

Specification 23: Same allegations as Specification 1 except check in the amount of $15, dated 17 May 1944, and made and uttered to Radich and Separovich, Sacramento, California.

Specification 24: Same allegations as Specification 1 except check dated 17 May 1944, and made and uttered to Radich and Separovich, Sacramento, California.

Specification 25: Same allegations as Specification 1 except check dated 20 May 1944, and made and uttered to Radich and Separovich, Sacramento, California.

Specification 26: Same allegations as Specification 1 except check dated 20 May 1944, and made and uttered to Radich and Separovich, Sacramento, California.

Specification 27: Same allegations as Specification 1 except check dated 21 May 1944, and made and uttered to Radich and Separovich, Sacramento, California.

Specification 28: Same allegations as Specification 1 except check dated 22 May 1944, and made and uttered to Mather Field Exchange, Sacramento, California.

Specification 29: Same allegations as Specification 1 except check dated 24 May 1944, and made and uttered to Matteoni's Restaurant, Stockton, California.

Specification 30: Same allegations as Specification 1 except check in the amount of $30, dated 27 May 1944, and made and uttered to Bank of America, Santa Cruz, California.

Specification 31: Same allegations as Specification 1 except check in the amount of $30, dated 29 May 1944, and made and uttered to Bank of America, Santa Cruz, California.

Specification 32: Same allegations as Specification 1 except check in the amount of $25, dated 31 May 1944, and made and uttered to Bank of America, Santa Cruz, California.

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

Specification: In that 2d Lt. William F. Johns,* * *, having been duly placed in arrest at Mather Field, California, on or about 3 June 1944, did, at Mather Field, Sacramento, California, on or about 17 July 1944 break his said arrest before he was set at liberty by proper authority.

He pleaded guilty to all Charges and Specifications except the Additional Charge to which he pleaded not guilty, but guilty of a violation of the 96th Article of War. He was found guilty of all Charges and Specifications. No evidence of prior convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of the Additional Charge and its Specifications as involves findings of guilty thereof 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 prosecution at first presented no evidence in support of the Charges and Specifications, informing the court that it would rest its case solely upon the accused's pleas of guilty (R. 43). After the defense had concluded the presentation of its case, the law member requested the prosecution to introduce some evidence to establish commission of the offenses alleged in the Charge and its Specification, and in the Second Additional Charge and its Specification (R. 63). Evidence was then introduced in support of the Charge and its Specification to show that accused absented himself from his organization without leave from 25 May 1944 to 2 June 1944 (R. 64; Pros. Ex. A). In support of the Second Additional Charge and its Specification it was verbally stipulated by the prosecution and the defense that the accused had been placed in arrest in quarters on or about 3 June 1944, that he breached this arrest before being set at liberty by proper authority, and that thereafter he was apprehended in San Francisco, California, on 19 July 1944 (R. 63, 64).

4. The defense offered the testimony of accused's mother, father, sister, and his brother, the latter being an officer in the Air Corps. The substance of their testimony was that accused had always been a dutiful and loving son and brother. He had begun to work early in boyhood, first selling papers, then operating a small trucking business, and later employed as a sheet metal worker. He had always turned his entire earnings over

to his mother for the support of the family, his father's income always being small and frequently nonexistent because of ill health. Accused had been a good church worker, and had never been in trouble of any kind in civilian life. He was held in the highest esteem and affection by all persons with whom he had contact (R. 43, 48, 49, 53).

Captain George W. Mabee, who had known accused for about two years in the Army, testified that accused's reputation at the stations where he had served with him was good and the performance of his duties as a soldier was excellent (R. 65, 66). In addition, it was stipulated by the prosecution and the defense that accused was a capable flyer (R. 67).

Letters from various civilian employers and acquaintances of accused attesting to his good character were received in evidence without objection (R. 56-58; Exs. 1-7).

The accused after having his rights as a witness explained elected to testify under oath. He testified that he had repaid all of the obligations resulting from the issuance of his worthless checks. He further stated:

> "Well, sir, I try, myself, to arrive at some explanation; and as far as I can understand, I have really no logical explanation for committing such acts. I realize the seriousness of it, and I sincerely mean this: I am sincerely sorry that I put such a black mark on my name, my family, and the Army of the United States, toward the uniform I'm wearing. I wish to express myself this way; that, if I am dismissed from the service, that I be given the opportunity to erase this black mark by reenlisting. I assure the court that if I am given this consideration, that I will do everything in my power to back up that consideration. That is about all, sir." (R. 60).

5. Immediately after arraignment of the accused defense counsel informed the court that he was doubtful of the mental condition of the accused and requested permission to introduce evidence relative thereto prefatory to a motion urging the court to recommend to the appointing authority that a board of officers be appointed to examine into accused's mental condition. The court granted the request and the defense introduced evidence to show that one person who had known accused since February 1944 found nothing abnormal in his behavior except once when accused was highly intoxicated (R. 26-30). Another individual had noticed nothing unusual in accused's actions and demeanor during the previous eight months (R. 31). The accused appeared to be rational and sensible to the assistant defense counsel during his interviews before trial but had nothing to offer to assist in his defense (R. 34, 35). Captain Lyman C. Veazy, a qualified

psychiatrist, had interviewed the accused, found no evidence of insanity or abnormality and did not believe that three or four weeks of arrest in quarters or of confinement would adversely affect his mental condition (R. 38, 40, 41). Following the introduction of this evidence the law member denied the motion of defense counsel that the court recommend to the appointing authority that he convene a board of officers to examine into accused's mental condition (R. 42).

At the conclusion of the trial and after the president had announced the findings and sentence as voted upon by the court, the law member made the following statement in open court, viz:

> "As a result of the mention by the defense counsel of suspected insanity of the accused, two questions were propounded to the court during closed session. The first question, 'Is the accused in proper mental condition at this time to undergo trial?', to which question more than two-thirds of the members present, by secret written ballot, at the time the vote was taken concurring, answered in the affirmative, 'yes'. A second question was then propounded as to all specifications and charges, as follows: 'Was the accused, at the time of the commission of the alleged acts, so far free from mental defect, disease or derangement, to be (1) able to distinguish right from wrong, and (2) to adhere to the right, to which question two-thirds of the members present, voted by secret written ballot, in the affirmative; that is, that the accused was sane at the time of the commission of the acts." (R. 70, 71).

It is apparent from the evidence presented by the defense itself that the court's conclusions as to the sanity of the accused were fully warranted. Although it was irregular for the law member to reveal the details of the court's deliberations in determining the sanity of accused inasmuch as it is implicit in its findings of guilty that it determined the accused to be sane and legally responsible for his acts, nevertheless the irregularity was procedural only and did not prejudice any substantial rights of accused.

The evidence and accused's pleas of guilty fully sustain the findings, as approved by the reviewing authority, that accused absented himself without leave from 23 May 1944 to 2 June 1944; that between 26 April 1944 and 31 May 1944 he made and uttered 32 checks and thereby fraudulently obtained a total of $430 without having or intending to have sufficient funds on deposit in the drawee bank to pay those checks; that on 17 July 1944 accused breached an arrest imposed upon him on 3 June 1944.

6. The accused is about 23 years of age. In civilian life he was employed as a sheet metal worker. He entered military service 17 September 1942 and was appointed an air cadet 22 October 1942. On 28 July 1943 he was commissioned a second lieutenant and assigned to duty with the Air Corps.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61, 69 or 96.

Thomas N. Jaffy, Judge Advocate.

Sick in Hospital, Judge Advocate.

Robert C. Trueblood, Judge Advocate.

SPJGV
CM 263267

1st Ind.

War Department, J.A.G.O., 29 SEP 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William F. Johns (O-752125), 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 as approved by the reviewing authority, to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence, though inadequate, be confirmed and carried into execution.

3. Consideration has been given to the inclosed letter from the accused's parents addressed to the President of the United States, in which they request clemency.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Ltr fr Mr & Mrs W Johns, 14 Aug 44.
Incl 3 - Dft. ltr for sig S/W.
Incl 4 - Form of action.

(Sentence confirmed. G.C.M.O. 605, 3 Nov 1944)

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

(239)

16 SEP 1944

SPJGH
CM 263284

UNITED STATES v. Private ANDREW WHITE (39043372), 3696th Quartermaster Truck Company, Camp Livingston, Louisiana.	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Livingston, Louisiana, 28 August 1944. Dishonorable discharge and confinement for five (5) years. Federal Reformatory.

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

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

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

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

Specification 1: In that Private Andrew White, 3696th Quartermaster Truck Company, did, at Camp Livingston, Louisiana, on or about 22 July 1944, lift up a weapon, to-wit: a weed cutter, against Captain Harry W. Bennett, his superior officer, who was then in the execution of his office.

Specification 2: In that Private Andrew White, 3696th Quartermaster Truck Company, having received a lawful command from Captain Harry W. Bennett, his superior officer, to come out of his hut, did, at Camp Livingston, Louisiana, on or about 22 July 1944, willfully disobey the same.

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

Specification: In that Private Andrew White, 3696th Quartermaster Truck Company, did, at Camp Livingston, Louisiana, on or about 22 July 1944, with intent to do him bodily harm, commit an assault upon Private First Class Charles F. Green, by attempting to strike him on the body with a dangerous instrument, to-wit: a weed cutter.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence was presented of two previous convictions involving absence without

leave, in violation of Article of War 61, and failure to obey a lawful order, in violation of Article of War 96. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 5 years. The reviewing authority approved the findings and the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 22 July 1944, accused was a garrison prisoner in the stockade at Camp Livingston, Louisiana (R. 6). Captain Harry W. Bennett, the post and prison officer, ordered the prisoners to cut the grass in the area, and, following a report that accused had refused to work, sent Private First Class Charles F. Green to investigate (R. 6, 6-14). Accused was carrying a grass cutter described as a wooden handle about three feet long with a sharp, double-edged blade on the end approximately two inches wide and a foot long, the instrument weighing about three pounds (R. 6-3, 6-14). Private Green ordered accused to lay down the cutter, saying that he wished to speak to him, but accused refused and as Private Green approached, accused commenced swinging the cutter at him compelling Private Green to back away to avoid being struck. Private Green testified that accused was "kinda angry", and called him (Private Green) "a mother fucking son of a bitch" (R. 6-14, 6-15).

Accused then went into his hut and Captain Bennett was summoned. He went to the door of the hut and called out in a loud voice, "This is Captain Bennett, Police and Prison Officer, I want you to come out". Accused replied, "if I come out I will cut your head off" (R. 6-1, 6-15). Captain Bennett threatened to get a tear gas grenade but accused still refused to come out. A tear gas grenade was sent for and when it arrived Captain Bennett, after again ordering accused to come out, attempted to push open the screen door of the hut. Accused commenced striking the other side of the door with the grass cutter. Captain Bennett stood about two and a half feet from the door, as far away as he could and still reach it. He succeeded in opening the door a few inches but accused struck it and forced it shut. Captain Bennett testified that if the cutter had come through the screen it would have struck his hand. However, he was unable to say whether the cutter struck the screen or the wooden part of the door. Under Captain Bennett's orders the guards knocked the screen in, and the tear gas grenade was thrown into the hut (R. 6-2, 6-4, 6-7).

4. The evidence for the defense shows that when accused was ordered to cut grass he stated that he had been working all day and would not work unless the other prisoners did. Private Green told accused he would work or go "to the hole". Accused had a grass cutter in his hand and told Green to leave him alone, whereupon Green summoned a number of guards, who arrived

armed with ball bats. Accused ran to his hut and Captain Bennett was called. Captain Bennett ordered accused to come out of the hut but he did not announce his identity to accused. Accused said he "wasn't coming out to be beaten all up" but made no threats against Captain Bennett (R. 6-19, 6-22, 6-23).

The accused elected to remain silent (R. 6-28).

5. The evidence accordingly shows that accused, while a prisoner in the post stockade at Camp Livingston, Louisiana, refused to work and when Private First Class Charles F. Green was sent to investigate, and approached accused, he (accused) cursed Green and swung a grass cutter at him, forcing him to retreat to avoid being struck. The grass cutter consisted of a sharp, double-edged blade, 2 inches by 12 inches, on a handle three feet long. An assault with intent to do bodily harm with a dangerous instrument (Spec., Chg. II) is proven.

The evidence further shows that after assaulting Private Green accused ran to his hut and refused to come out; that Captain Harry W. Bennett, the post and prison officer, was summoned, told accused who he was and ordered him to come out of the hut; but that accused disobeyed the order (Spec. 2, Chg. I).

Captain Bennett secured a tear gas grenade and attempted to push the screen door of the hut open in order to throw in the grenade. Accused struck the other side of the screen door with the grass cutter several times and forced the door shut. Although the grass cutter had a sharp blade which undoubtedly could have penetrated the screen, and in such case might have struck Captain Bennett's hand as he pushed on the door, the evidence considered in its entirety does not warrant the inference that the weapon was wielded with that purpose in view. Rather the intention of accused appears to have been to use the grass cutter to force the door shut and not as a means of committing an assault directly or indirectly upon Captain Bennett. It is charged that accused did "lift up a weapon" against Captain Bennett, which according to the Manual for Courts-Martial (par. 134a), "covers any simple assault committed in the manner stated". An assault is "an attempt or offer with unlawful force or violence to do a corporal hurt to another" (MCM, par. 149l). The Board is of the opinion that accused did not use the weapon with the intent of harming Captain Bennett. Although under Article of War 50½ the Board of Review does not weigh evidence or determine contraverted questions of fact, nevertheless, in determining whether there is evidence of record to support a finding of guilty, where any part of a finding of guilty rests on an inference of fact, it is the duty of the Board to determine whether there is in the evidence a reasonable basis for such inference (CM 223336; 1 Bull. JAG 159). The finding that accused lifted up a weapon against Captain Bennett (Spec. 1, Chg. I) is not sustained by the evidence.

4. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the finding of guilty of Specification 1, Charge I, legally sufficient to support the findings of guilty of all other Specifications and the Charges, and legally sufficient to support the sentence. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of assault with a dangerous weapon, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 22-502 of the District of Columbia Code.

Samuel M. Driver, Judge Advocate.

F. Fotterhos, Judge Advocate.

Filed [illegible], Judge Advocate.

1st Ind.

War Department, J.A.G.O., 19 SEP 1944 - To the Commanding General, Eighth Service Command, Army Service Forces, Dallas 2, Texas.

1. In the case of Private Andrew White (39043372), 3696th Quartermaster Truck Company, Camp Livingston, Louisiana, I concur in the holding of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 1, Charge I, legally sufficient to support the findings of guilty of all other Specifications and the Charges, and legally sufficient to support the sentence, which holding is hereby approved. I therefore recommend that the finding of guilty of Specification 1, Charge I, be disapproved. Thereupon, under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

2. Although confinement in a reformatory is authorized in this case, in view of all the circumstances it is recommended that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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 263284).

Myron C. Cramer

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
Washington, D.C.

15 SEP 1944 (245)

SPJGH
CM 263301

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Bradley Field, Connecticut, 31 August 1944. Dishonorable discharge and confinement for ten (10) years. Reformatory.
Private ALBIN J. BIACHURA (32582081), Section I (Security), 121st Army Air Forces Base Unit (Fighter), Bradley Field, Connecticut.	)	

HOLDING by the BOARD OF REVIEW
DRIVER, LOTTERHOS and O'CONNOR, 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 69th Article of War.

Specification: In that Private Albin J. Blachura, Section I (Security), 121st Army Air Forces Base Unit (Fighter), having been duly placed in confinement at Bradley Field, Connecticut, 25 April 1944, did, at Bradley Field, Connecticut, on or about 5 May 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private Albin J. Blachura, Section I (Security), 121st Army Air Forces Base Unit (Fighter), did, at Bradley Field, Connecticut, on or about 5 May 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Buffalo, New York, on or about 22 July 1944.

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

Specification 1: In that Private Albin J. Blachura, Section I (Security), 121st Army Air Forces Base Unit (Fighter), did, at Buffalo, New York, on or about 17 July 1944, in the nighttime feloniously and burglariously break and enter the room of John Danahy in the Hotel Buffalo, with intent to commit a felony, viz. larceny, therein.

Specification 2: In that Private Albin J. Blachura, Section I (Security), 121st Army Air Forces Base Unit (Fighter), did, at Buffalo, New York, on or about 17 July 1944, feloniously take, steal, and carry away five hundred dollars ($500.00) lawful money of the United States, the property of John Danahy.

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

Specification: In that Private Albin J. Blachura, Section "I" (Security), 121st Army Air Forces Base Unit (Fighter), having been duly placed in confinement in the guardhouse at Bradley Field, Connecticut, on or about 28 July 1944, did, at said Bradley Field, Connecticut, on or about 16 August 1944 escape from said confinement before he was set at liberty by proper authority.

He pleaded guilty to Charge I, the Additional Charge and the Specifications thereunder; guilty to the Specification, Charge II, except the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without leave", and not guilty to Charge II but guilty of a violation of the 61st Article of War; and not guilty to Charge III and the Specifications thereunder. He was found guilty of the Specification, Charge II, with exceptions and substitutions as pleaded; not guilty of Charge II, but guilty of a violation of the 61st Article of War; and guilty of all other Specifications and Charges. Evidence of four previous convictions was introduced, three by summary court martial and one by special court martial, of absence without leave, in violation of the 61st Article of War, and of breach of restriction, in violation of the 96th Article of War. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of all Specifications and Charges except Specification 1, Charge III, and to support the sentence. The only question requiring consideration is whether the evidence is legally sufficient to support the finding of guilty of Specification 1, Charge III.

4. The evidence for the prosecution in pertinent part shows that on the afternoon of 17 July 1944 Mr. John J. Danahy became acquainted with accused in Murphy's Tavern, Buffalo, New York. They had a number of drinks of beer and whiskey together and Mr. Danahy "flashed" a roll of currency containing between $500 and $600. At about 3:30 p.m. Mr. Danahy left the tavern alone and returned to his room (number 637) at the Hotel Buffalo. Upon entering the room he closed the door, but could not remember

whether he locked it. He placed his money in a bureau drawer under a towel, removed his clothes and went to bed. He was alone when he entered the room and when he retired. About 4:00 p.m. (not later than 5:00 p.m.) he went to sleep. When he awakened he "checked" the bureau drawer and found his money missing (R. 8; Ex. 2).

On 21 July accused was apprehended by two city policemen of Buffalo (R. 6; Ex. 1). He admitted to them that he took about $500 from room 637 at Hotel Buffalo, and gave them $260, which was returned to Mr. Danahy (R. 8; Exs. 3 and 4). On 22 July he voluntarily (Ex. 1) made and signed a written statement in which he admitted that on "Monday evening July 17th 1944" he entered room 637 at the Hotel Buffalo and took $500 of the money of Mr. Danahy from the dresser drawer (R. 8; Ex. 5).

5. The accused made an unsworn statement to the effect that the hotel door was not locked, that he was "invited to go up" by Mr. Danahy, and that he used no force in entering the room (R. 14-15).

6. The evidence shows that at some time after 5:00 p.m. on 17 July 1944 accused entered the hotel room of Mr. John J. Danahy in a hotel at Buffalo, New York. At the time, the door was closed but not locked, and Mr. Danahy was asleep in bed. Accused stole about $500 of Mr. Danahy's money from a bureau drawer.

In the opinion of the Board of Review every element of the offense of burglary is proved except that it is not shown that accused entered the room in the nighttime. His entry may have been shortly after 5:00 p.m., which would be in the daytime. His admission that he entered the room "Monday evening" adds nothing to the proof as the term "evening" covers an indeterminate part of the day not limited to the hours of darkness. To constitute burglary the breaking and entry must be in the nighttime (MCM, 1928, par. 149d). Accordingly, the evidence supports only a finding of guilty of the lesser included offense of housebreaking.

7. The charge sheet shows that accused is 28 years of age and that he was inducted 13 November 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 Specification 1, Charge III, as involves a finding of guilty of housebreaking; legally sufficient to support the findings of guilty of all other Specifications and Charges; and legally sufficient to support the sentence. Confinement in a penitentiary (or Federal reformatory) is authorized by Article of War 42 for the offense of housebreaking, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 22-1801, District of Columbia Code.

Samuel M. Drive, Judge Advocate.

H. Lotthoss, Judge Advocate.

Robert J. Lamar, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 SEP 1944 - To the Commanding General, First Air Force, Mitchel Field, New York.

1. In the case of Private Albin J. Blachura (32582081), Section I (Security), 121st Army Air Forces Base Unit (Fighter), Bradley Field, Connecticut, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1, Charge III, as involves a finding of guilty of housebreaking; legally sufficient to support the findings of guilty of all other Specifications and Charges; and legally sufficient to support the sentence, which holding is hereby approved. For the reasons therein stated it is recommended that only so much of the finding of guilty of Specification 1, Charge III, be approved as involves a finding of guilty of housebreaking. Thereupon, under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

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

(CM 263301).

Myron C. Cramer

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
Washington, D.C.

SPJGK
CM 263303

21 OCT 1944

UNITED STATES v. Second Lieutenant JOHN P. VARNELL (0-768322), Air Corps.	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND Trial by G.C.M., convened at Ellington Field, Texas, 24 August 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, 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 96th Article of War.

Specification 1: In that Second Lieutenant John P. Varnell, Air Corps, did, on or about 4 June 1944, at Houston, Texas, wrongfully pilot a military aircraft at an altitude of approximately fifty (50) feet above the ground in violation of paragraph 16, AAF Regulation 60-16.

Specification 2: In that Second Lieutenant John P. Varnell, Air Corps, did, on or about 27 June 1944, at Houston, Texas, wrongfully pilot a military aircraft at an altitude of approximately fifty (50) feet above the ground in violation of paragraph 16, AAF Regulation 60-16.

Specification 3: In that Second Lieutenant John P. Varnell, Air Corps, did, at Houston, Texas, on or about 27 June 1944, wrongfully perform acrobatic maneuvers with a military aircraft over a congested area of said City of Houston in violation of paragraph 10, AAF Regulation 60-16.

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

3. The evidence for the prosecution showed by stipulation that the accused was in the military service. On 28 June 1944 the accused voluntarily signed a written statement admitted in evidence without objection (R. 6, Ex.1). In substance the statement avers that the home of the accused is located at 2304 Chestnut Street, Houston, Texas. From 28 May 1944 until the date of the statement he was stationed at Randolph Field, Texas. On 27 June 1944 he flew a plane over his home at 2000 feet, then "buzzed" the home at 50 to 100 feet. He arose again to 4700 feet and did two barrel rolls and again "buzzed" the home at 50 to 100 feet. He did this as a welcome to his brother in the service who had just returned home. On 4 June 1944 he flew over his home for "the benefit of" his mother and father at a height of 50 or 100 feet and then ascended to 5500 feet and engaged in stunting maneuvers doing one slow roll and one loop. On both occasions he was flying an AT-6 plane.

Five civilian witnesses were called by the prosecution to corroborate the low flying of the accused and his acrobatic maneuvers. They also showed that the area where this occurred was thickly congested and populated and was in the northern section of the City of Houston (R. 7,10,16,21,24).

4. Accused, after proper warning of his rights, elected to testify in his own behalf. He testified that he has served three and a half years in the Army, has 500 hours flying time to his credit, and has been a pilot a little over six months. During this time he has received two efficiency ratings of "Excellent" and one of "Very Satisfactory". He knew of the flying regulations prohibiting low flying and his sole reason for flying low on 4 June was to "show off" in the sight of his parents (R. 26-27).

5. Army Air Forces Regulation 60-16 provides in paragraphs 10 and 16 as follows:

> "10. Acrobatic Flight. No pilot will perform acrobatics:
>
> a. At any height whatsoever over a congested area of any city, town, or settlement, or over any open-air assembly of persons."
>
> "16. Minimum Altitudes of Flight:
>
> a. Except during take-off and landing, aircraft will not be operated:
>
> (1) Below the following altitudes:
>
> (a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight."

It was shown beyond any reasonable doubt and admitted by the accused that on the days and at the place averred in the specifications he piloted a military plane at an altitude of approximately 50 feet above the ground and did also

on the same occasions perform acrobatics with the plane over a congested area of the City of Houston, Texas. Such acts constituted violations of the Army Air Forces Regulation set forth above, and in turn violated the 96th Article of War as conduct prejudicial to good order and military discipline.

6. War Department records show the accused to be 22 years of age, born in Houston, Texas, 22 September 1922, single, and a high school graduate. He enlisted in the service 30 January 1941, served as an enlisted man to 30 March 1943, then as an aviation cadet until he was commissioned second lieutenant, Army of the United States, Air Corps, 8 February 1944.

7. The court was legally constituted and had jurisdiction over the accused 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 the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 24 OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John P. Varnell (O-768322), 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.

3. Consideration has been given to a petition for clemency addressed to the President of the United States, signed by numerous citizens of Houston, Texas, attesting to the fine character of the accused. Attached to the petition are letters addressed to Honorable Tom Connally, United States Senate, from Mr. Frank Paul, Assistant Chief Deputy Sheriff, and Mr. C. L. Albertson, Investigator in the Office of the Criminal District Attorney, both of Houston, Texas, who speak highly of accused's character. Consideration has also been given to the attached memorandum from Lieutenant General Barney M. Giles, Deputy Commander, Army Air Forces, dated 16 October 1944, stating that he is familiar with the facts in this case and recommending that the sentence to dismissal be confirmed but commuted to a forfeiture of $75.00 of accused's pay per month for a period of six months, in which recommendation I concur.

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

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Petition for clemency and ltrs. attached.
Incl.5-Memo. fr. Lt. Gen. Barney M. Giles, DC, AAF.

(Sentence confirmed but commuted to forfeiture of $75 per month for six months. G.C.M.O. 628, 17 Nov 1944)

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

SPJGN
CM 263304

4 OCT 1944

UNITED STATES	)	ARMY AIR FORCES CENTRAL FLYING TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Ellington Field, Texas, 29 August 1944. Dismissal and total forfeitures.
Second Lieutenant D. G. KIRKLAND (0-742485), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant D. G. Kirkland, Air Corps, did at or near Mart, Texas, on or about 15 July 1944, wrongfully violate paragraph 4b, Section I, General Orders No. 13, Headquarters, Ellington Field, Texas, 26 June 1944, by flying an Army aircraft of which he was the pilot outside a 50 mile radius of Ellington Field, without obtaining authority therefor from the Director of Flying at Ellington Field, Texas.

Specification 2: In that Second Lieutenant D. G. Kirkland, Air Corps, did at or near Mart, Texas, on or about 15 July 1944, wrongfully violate Paragraph 5, Section I, General Orders No. 13, Headquarters, Ellington Field, Texas, 26 June 1944, by landing an Army aircraft of which he was the pilot on the public highway between Mart, Texas and Groesbeck, Texas, without first obtaining proper clearance for such landing from Base Operations, Ellington Field, Texas.

Specification 3: In that Second Lieutenant D. G. Kirkland, Air Corps, did at or near Mart, Texas, on or about 15 July 1944, wrongfully violate paragraph 12, Section I, General Orders No. 13, Headquarters, Ellington Field, Texas, 26 June 1944, by failing to report immediately the landing of an Army aircraft of which he was the pilot on the public highway between Mart, Texas and Groesbeck, Texas.

The accused pleaded guilty to, and was found guilty of, the Charge and all 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 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 the Flight Test and Engineering Officer at the Navigation PLM Hangar, Ellington Field, Texas (Pros. Ex. 4). An AT-18 two-motored bomber designed for use in training was assigned to him on 15 July 1944 for testing (R. 13, 19-20, 27, 29; Pros. Ex. 4). Technical Sergeant Edgar E. Hutton and Sergeant Grady R. McCrary requested and were granted permission to accompany him as passengers (R. 6, 19). A "local clearance" form and an "airplane clearance record" were issued by the Base Operations Officer. The maximum flying radius authorized under a "local clearance" was fifty miles (R. 28-30, 32, 36-37; Pros. Exs. 2, 3). For greater distances a "Form 23" was required. No such instrument was filed by the accused, and no authority of any kind was obtained from the Director of Flying for a flight in excess of the fifty mile radius (R. 28-30).

The accused and his passengers began their "take off" around 9:00 a.m. but they were immediately compelled to return to the hangar when the plane "ground-looped" and swerved off the run-way. The damage inflicted, though not serious, necessitated the replacing of "a landing gear and tire" and the checking of the brakes. This work caused a delay of some thirty minutes. At the end of that period the accused again took-off with his passengers (R. 7, 20).

They flew for about an hour along the channel of a small river. The accused from time to time pointed out their position on a map to Hutton who, however, being ignorant of Army cartography, understood nothing of what was told him. McCrary, too, had no conception of where they were (R.8, 21). About five miles east of Mart, Texas, which is more than fifty miles from Ellington Field, they circled over a small white farm-house (R. 8, 40; Pros. Ex. 4). Without warning either sergeant of his intention, the accused proceeded to land the plane nearby on a hard-surfaced, asphalt highway about twenty-two feet wide (R. 8-9, 13, 21, 25-26; Pros. Ex. 4).

The house, which was located about two hundred feet south of the road, was the home of his parents (Pros. Ex. 4). Leaving both sergeants in the plane he "got out" and embraced his mother and kissed his child, both of whom had approached to greet him (R.10, 22; Pros. Ex. 4). His father soon joined them bringing a cocker spaniel with him. The dog was handed to the accused. Carrying it in his arms, he re-entered the plane and took off down the highway for the return trip to Ellington Field (R. 10, 14, 22-23, 27; Pros. Ex. 4).

He was "not out of the aircraft more than a minute and a half" (Pros. Ex. 4). During that brief period the motors were "left . . . running" (R. 14, 23; Pros. Ex. 4). The plane was "in the middle of the highway", but no traffic of any kind passed by or could be seen for at least two miles in either direction (R. 11-12, 23; Pros. Ex. 4). There were no trees or houses in the immediate vicinity; nor were there any civilians present other than the accused's father, mother, and child (R. 13, 15, 23; Pros. Ex. 4). Prior to landing on the highway the accused neither performed acrobatics or stunts or indulged in any buzzing (R. 12). No damage of any kind was done (R. 15).

During the return trip he said nothing to his passengers "about what he had done" (R. 13, 27). Upon arriving at Ellington Field he failed to report his landing on the highway to the Base Operations Office (R. 11, 36). He never did inform Major H. T. Weeks, the Operations Officer, of the occurrence (R. 36). At the pre-trial investigation the accused "cooperated . . . to the utmost" (R. 39). He voluntarily signed a "Certificate" in which he admitted the landing and all of the attendant circumstances as summarized above. In his concluding sentence he stated that:

> "This was a thoughtless act on my part, and I knew it was in violation of Flying Regulations."

4. After his rights as a witness had been fully explained to him the accused elected to remain silent. No testimony was offered on his behalf.

5. Specification 1 of the Charge alleges that the accused did "on or about 15 July 1944, wrongfully violate paragraph 4b, Section I, General Orders No. 13, Headquarters, Ellington Field, Texas, 26 June 1944, by flying an Army aircraft of which he was the pilot outside a 50 mile radius of Ellington Field, without obtaining authority therefor from the Director of Flying at Ellington Field, Texas". Specification 2 alleges that the accused did on the same day "wrongfully violate Paragraph 5, Section I" of the said General Orders . . . "by landing an Army Aircraft of which he was the pilot on a public highway . . . without first obtaining proper clearance for such landing . . .". Specification 3 alleges that the accused did on the same day "wrongfully violate paragraph 12, Section I" of the said General Orders "by failing to report immediately the landing of an Army aircraft of which he was the pilot on the public highway . . .". These acts were all set forth as violations of Article of

War 96.

The paragraphs cited read as follows:

"4. . . .

b. Other Base Flying. All flying other than student training outside a fifty (50) mile zone and not in excess of 1,000 mile radius of Ellington Field. Authority for flight - Directors of Flying; clearance - Base Operations.

* * * *

"5. CLEARANCE, WHEN REQUIRED. Clearance from Base Operations is required for all flights made from Base when landing is planned at other than auxilliary fields or when flight is made outside of local flying area . . .

* * * *

"12. ANY UNUSUAL OCCURRENCE INVOLVING AN AIRPLANE shall be immediately reported. . . An unusual occurrence means any of the following:

* * * *

c. Violation of these or other regulations.

d. Violation of the unwritten rules of good judgment or technique in flying.

e. Any carelessness or negligence of flying or ground personnel which might affect safety, maintenance, or flight operation."

The accused had been stationed at Ellington Field for two and a half months prior to 15 July 1944 and had apparently been informed of the local regulations. As Flight Test Officer he must have acquired sufficient familiarity with the surrounding country to know that his parents' home was more than fifty miles distant. Since the trip which he contemplated was outside the local base flying area and since a landing was planned at other than an auxiliary field, it was his duty to obtain clearance from the Base Operations Officer. His failure to request the required authorization can be reasonably attributed only to an intent to conceal the flight from his superiors because of its dangerous and irregular character. If the accused was ignorant of the distance to be covered when he took-off, his frequent consultation of a map throughout the journey must have corrected any erroneous impression he may have previously entertained.

In undertaking the flight without proper clearance the accused violated the General Orders of Ellington Field. His landing on a public highway was obviously a violation of "good judgment or technique in flying" and was an act of carelessness and negligence potentially dangerous to all users of the highway. The fact that no vehicles or civilians other than the accused's family were present on the morning of the incident was only a fortunate coincidence. For all these reasons the flight and the landing constituted an "unusual occurrence" within the meaning of paragraph 12 of the General Orders and should have been "immediately reported". The accused's omission to inform the Base Operations Officer is in this instance also explainable only by an intent to conceal a violation of the local regulations. Specification 3 of the Charge, as well as Specifications 1 and 2, have been proved beyond a reasonable doubt.

5. The accused, who is married and the father of one child, is about 23 years old. The records of the War Department show that he attended Texas A & M College for two years; that from November 1941 to August 1942 he was employed by the Robert E. McKee Construction Company at El Paso, Texas, as a carpenter foreman; that he entered the service as an enlisted man on 3 March 1942 but was granted a furlough to 3 August 1942; that from 4 August 1942 to 11 April 1943 he had active enlisted service; that he was commissioned a second lieutenant on 12 April 1943; and that since the last date he has been on active duty as an officer.

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

On leave, Judge Advocate.

Robert Connor, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(258)
SPJGN
CM 263304

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant D. G. Kirkland (O-742485), 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 but commuted to a forfeiture of pay of $75 per month for 12 months and that, as thus commuted, the sentence be ordered executed.

3. Consideration has been given to a letter from the Commanding General, Army Air Forces, dated 2 October 1944.

4. Consideration has also been given to the attached letters from the Honorable Luther A. Johnson, Member of Congress, and from the Honorable H. F. Kirby, Judge of the 77th Judicial District of Texas. The communications from Judge Kirby were referred to this office by the Honorable Tom Connally and the Honorable W. Lee O'Daniel, Members of the United States Senate. Mr. Johnson also personally appeared before the Board on behalf of the accused.

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

Myron C. Cramer

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

9 Incls.
Record of trial.
Dft. ltr. for sig. S/W.
2 Ltrs. fr. Hon. Luther A. Johnson.
Memorandum fr. Colonel Dinsmore.
Ltr. fr. Senator O'Daniel w/incl.
Ltr. fr. Senator Connally w/incl.
Ltr. fr. Commanding General, AAF.
Form of Executive action.

(Sentence confirmed but commuted to forfeiture of $75 per month for twelve months. G.C.M.O. 579, 25 Oct 1944)

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

SPJGQ
CM 263422

18 Sep 1944

UNITED STATES v. First Lieutenant WILLIAM T. MUSSER (0-1050006), Antiaircraft Artillery Automatic Weapons Battalion.	ANTIAIRCRAFT ARTILLERY TRAINING CENTER Trial by G.C.M., convened at Camp Haan, California, 5 September 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, Judge Advocates.

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

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

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

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

Specification: In that First Lieutenant William T. Musser, C.A.C., Battery D, 833rd Antiaircraft Artillery Automatic Weapons Battalion, did, without proper leave, absent himself from his command at Camp Haan, California, from about 1 August 1944 to about 20 August 1944.

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

Specification: In that First Lieutenant William T. Musser, C.A.C., Battery D, 833rd Antiaircraft Artillery Automatic Weapons Battalion, was, at Los Angeles, California, on or about 20 August 1944, drunk in uniform in a public place, to wit: the Savoy Hotel, 616 West 6th Street, Los Angeles, California.

He pleaded guilty to Charge II and its Specification but not guilty to all remaining Charges and Specifications. He was found not guilty of Charge I and its Specifications and guilty of all remaining Charges and Specifications. Evidence of one previous conviction for being drunk in uniform in a public place, in violation of Article of War 96, was introduced at the trial (R. 38, Ex. 8). In that case he was sentenced to be restricted to his post for two months and to forfeit $75 of his pay. In the instant case, the 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. The evidence for the prosecution, pertinent to the Specifications and Charges of which the accused was found guilty, is, briefly summarized, as follows:

It was stipulated that at all times pertinent to the issues involved, as well as at the time of trial, the accused was in the military service of the United States, as a member of the 833rd Antiaircraft Artillery Automatic Weapons Battalion, stationed at Camp Haan, California (R. 7).

Charge II and its Specification (AW 61 - AWOL): In support of accused's pleas of guilty to this Charge and its Specification, a duly authenticated extract copy of the morning report of his organization (Battery D, 833rd AAA Automatic Weapons Battalion) for 1 August 1944, carrying him as from "Dy to AWOL 0630" on that date, was introduced in evidence without objection (R. 13, Ex. 6). A duly authenticated Extract copy of the morning report of the Ninth Service Command Military Police Station Detachment, 1250 North Main Street, Los Angeles 12, California, showing that the accused was returned to military control and to confinement on 20 August 1944, was also introduced in evidence without objection (R. 14; Ex. 7).

Charge III and its Specification (AW 96 - drunk in public): About 12:30 a.m. on 20 August 1944, Robert J. Westwood, house detective for the Hotel Savoy, 601 West 6th Street, Los Angeles, California, was engaged in making a routine inspection tour of the hotel building. While going through the dining room, which was on the mezzanine floor of the hotel, and which had been closed earlier and was then dark except for such light as penetrated it from the outside, he stumbled over the accused who was lying on his back across the aisle between the tables (R. 15). Shaking did not arouse accused, who was obviously very drunk (R. 15). Westwood finally had to resort to slapping his face and, in all, worked with him fully 15 minutes before the accused was sufficiently arcused to sit up (R. 15). When told by Westwood that he would have to leave the hotel, accused objected because he had no cap. Westwood looked for accused's cap but was unable to find it, either in the dining room or in other portions of the hotel where he looked (R. 16). While still in the dining room accused made an

unsuccessful attempt to strike the detective (R. 16). Westwood finally succeeded in getting accused to follow him downstairs. Accused was able to walk at the time and entered the revolving door as if to leave the hotel but spun completely around with the door, re-entered the lobby of the hotel, and sat down in a chair near which some guests of the hotel were sitting (R. 17, 21). Westwood again spent several minutes in an unsuccessful effort to get accused to leave the hotel. The latter was not belligerent, boisterous, or noisy while in the hotel lobby, but declined to leave without a cap (R. 22-23). He finally proceeded to leave the hotel of his own volition while Westwood was talking to the night clerk but repeated his act of circling through the revolving door, and this time seated himself in a different chair in a corner of the hotel lobby. Shortly afterwards, the hotel guests having departed the lobby for their rooms, accused "left the chair and went over to a davenport in the far corner and fell down on it, stretched out on his left side and passed out completely" (R. 18). Being unable to arouse accused this time, Westwood notified military police (R. 18). Accused was not a guest of the hotel on the night in question (R. 23).

T/5 Dwight P. Thompson and Pfc. Donald M. Gable, Military Police, went to the Hotel Savoy following Westwood's communication, arriving there about 2:30 a.m. (R. 18, 30). They found accused on the davenport and, being unable to arouse him, picked him up and carried him out of the hotel to their patrol wagon (R. 18, 26, 27, 28, 30). Accused was drunk and unable to "move under his own power" at that time (R. 18, 28, 31). T/5 Thompson testified that accused was "very intoxicated", and Pfc. Gable that he was "drunk" when they found him in the lobby of the hotel (R. 27, 31). When they arrived at the booking station, some six blocks from the hotel, accused was "pretty well able to walk by himself" (R. 27, 28). At the time he was arrested the accused was dressed in a suntan, military uniform, without hat (R. 31), and was wearing the insignia of rank of a first lieutenant (R. 28, 29, 33), as well as the insignia of the Coast Artillery Corps (R. 29).

4. Having been first duly advised of his rights, the accused elected to make an unsworn statement (R. 35). It was, in pertinent part, as follows:

> "There has been a certain amount of family trouble and I have been more or less at odds with my wife for a spell and I left Camp Haan intending to meet her in Denver. When I got to Denver she had been there and gone. When I came back I wired the commanding officer that I was returning to Camp Haan, and I came back, and in Los Angeles I got plastered, and as you know now, or will know soon, that is not the first time. Last October I was plastered. Well, I think that things — in fact, I know that things are going to work out so far as my personal difficulties are concerned. Since last October, since I was court-martialed last October, I have put in one written request for overseas service and three written requests for the mechanized cavalry of the armored forces, which I did as an

enlisted man. I have had no TO jobs since last October and I do think that with one more opportunity we can make some use of that money the government has invested in me, and I would have some chance of restitution to the government for what they have invested in me." (R. 36)

5. Not only did the accused plead guilty to Charge II and its Specification, but the prosecution adduced competent evidence which is legally sufficient to prove that accused was absent without leave from 1 August 1944 to 20 August 1944 as alleged in the Specification. There is, therefore, no question as to the legal sufficiency of the record to support the findings of guilty of this Charge and Specification.

Nor is there any question as to the legal sufficiency of the record to support the findings of guilty of Charge III and its Specification. The offense alleged is that of being drunk in a public place while in uniform, in violation of Article of War 96. Each element of the offense is conclusively established by uncontroverted evidence. This evidence proves beyond any reasonable doubt that accused was grossly drunk in the lobby of the Hotel Savoy in Los Angeles, California, at the time alleged in the Specification; that he was at such time an officer in the Army of the United States, and was wearing his uniform and insignia of rank. He was not a guest of the hotel and its lobby was obviously a public place. Further discussion is deemed unnecessary, his conduct was clearly of a nature to bring discredit upon the military service.

6. War Department records disclose that this officer is 30 years of age and married. He is a high school graduate and attended the University of Iowa for three years. He was employed in a produce processing business before being inducted into the service on 19 March 1941. As an enlisted man, he attained the grade of staff sergeant. He was graduated from officer candidate school and commissioned a temporary second lieutenant, Army of the United States, on 14 January 1943. He entered upon active duty the same date and was promoted to the grade of first lieutenant on 14 June 1943. Under date of 6 August 1943, the Commanding General, Antiaircraft Artillery Center, Fort Bliss, Texas, proposed to demote him without reclassification proceedings from the grade of first to that of second lieutenant as a disciplinary measure. This proposal was based upon the fact that accused had been reported as staying in Mexico after 11:00 o'clock p.m. on 16 February 1943 and had been arrested in Mexico by Military Police on 6 February, 7 June and 24 July 1943, respectively, for being in an unconscious state of drunkenness. The Secretary of War declined the proposal and directed that recourse be had to other and different disciplinary measures.

7. 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 and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of either Article of War 61 or Article of War 96.

William H. Bamberger, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 29 SEP 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 William T. Musser (0-1050006), Antiaircraft Artillery Automatic Weapons Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Dismissal is justified under the circumstances but the forfeitures appear to be unnecessary. 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 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. 620, 15 Nov 1944)

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

SPJGV
CM 263480

6 OCT 1944

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Westover Field, Massachusetts, 29 August 1944. Dismissal.
Second Lieutenant ASHLEY M. GRIFFITH (0-1642923), Signal Corps.	)	

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OPINION of the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Ashley M. Griffith, Signal Corps, 144th Army Air Forces Base Unit (Administration), did, without proper leave, absent himself from his station and duties at Army Air Base, Bedford Army Air Field, Bedford, Massachusetts, from about 1200, 29 July to about 1930, 29 July 1944.

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

Specification: In that Second Lieutenant Ashley M. Griffith, Signal Corps, 144th Army Air Forces Base Unit (Administration), having received a lawful order from Major Charles L. Wright, Base Commander, to work Saturday afternoon 29 July 1944, the said Major Charles L. Wright being in the execution of his office, did, at Army Air Base, Bedford Army Air Field, Bedford, Massachusetts, on or about 1200 29 July 1944 fail to obey the same.

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

Specification: In that Second Lieutenant Ashley M. Griffith, Signal Corps, 144th Army Air Forces Base Unit (Administration), did, at Army Air Base, Bedford Army Air Field, Bedford, Massachusetts, on or about 29 July 1944, with intent to deceive Major Charles L. Wright, his commanding officer, cause an entry to be made in the official officers' departure register of Army Air Base, Bedford Army Air Field, Bedford, Massachusetts, to the effect that he had departed for the Massachusetts Institute of Technology, Cambridge, Massachusetts, which entry was known by the said Second Lieutenant Ashley M. Griffith to be untrue in that he had not departed for the Massachusetts Institute of Technology, Cambridge, Massachusetts.

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

Specification: In that Second Lieutenant Ashley M. Griffith, Signal Corps, 144th Army Air Forces Base Unit (Administration), having been restricted to the limits of Bedford Army Air Field, Bedford, Massachusetts, did, at Bedford Army Air Field, Bedford, Massachusetts, on or about 7 August 1944, break said restriction by going to Revere Beach, Revere, Massachusetts.

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

3. In support of Charges I, II and III and their respective Specifications, the prosecution introduced evidence to show that at Bedford Army Air Field, Bedford, Massachusetts, a "VOCO" from a commanding officer to an officer of his command is verbal permission from the former authorizing the latter to be absent from the field. On Friday, 28 July 1944, accused, base signal officer at the field, telephoned Major Charles L. Wright, commanding officer of the field, and requested a "VOCO" permitting him to be absent from the field on the afternoon of the next day, Saturday, 29 July 1944. Major Wright refused accused's request, informed him he would have to be on duty on Saturday afternoon, but, did give him permission to be absent from the field on the following day, Sunday (R. 7, 19).

Shortly before noon on Saturday, 29 July 1944, accused left his office at the field, informed one of his assistants, Staff Sergeant John F. Giblin, that he was going to dinner and requested the sergeant to sign him out on the officers' register for Massachusetts Institute of Technology, Cambridge, Massachusetts, if he failed to return by 1 p.m. (R. 20, 24). It was only necessary for officers to sign out on the officers' register if their destination was without the limits of the airfield (R. 17, 18). At 1:45 p.m. that day Sergeant Giblin entered accused's name on the register and his destination as "M.I.T." (R. 20, 31; Ex. 1).

Massachusetts Institute of Technology had an experimental station, commonly referred to as the Radiation Laboratory, located on this airfield. The accused, as base signal officer, was responsible for the installation and maintenance of the telephone system in the Laboratory (R. 9, 20). Major Wright did not know whether accused's work required him to make frequent visits to Boston although he did testify that the airfield had no business relations with Massachusetts Institute of Technology at Cambridge, but only with the Radiation Laboratory located on the field. Sergeant Giblin testified that the base signal officer did have direct contact with the university's main office whenever the matter of installing a telephone at the Laboratory arose. However, the sergeant did not know how often that business would necessitate a trip to Cambridge (R. 15, 18, 20).

Sergeant Giblin was on duty in accused's office at the field from 1 p.m. to 5 p.m. on Saturday, 29 July 1944, and did not see accused at any time during those hours (R. 24). Sometime during the early afternoon of that day Major Wright visited accused's office to see him on official business and was informed by Sergeant Giblin that he was not there (R. 7, 17). The major did not observe accused anywhere about the building which housed both his office and accused's. A short time later he made a second attempt to locate accused which also proved fruitless. Thereafter, about 2:30 or 3 p.m. he made a third search for accused and also called the Radiation Laboratory to see if he were there but accused could not be located. He did not call the main office of the university at Cambridge because the university had no business hours on Saturday afternoon. Major Wright instructed Sergeant Giblin to locate accused and then returned to his own office (R. 8, 12, 17). The sergeant telephoned the Radiation Laboratory and also Massachusetts Institute of Technology at Cambridge but could not contact accused. He then sent a telegram to accused addressed to Rockingham Race Track, Salem, New Hampshire (R. 21, 22). In the meantime Major Wright telephoned Second Lieutenant James A. McMahon, the field provost marshal, and instructed him to search the base for accused. Apparently accused could not be found on the field because Major Wright thereafter dispatched Lieutenant McMahon to Rockingham Park Race Track to continue his search (R. 8-10, 25).

Lieutenant McMahon reached Rockingham Park Race Track about 6 p.m. that day. He was unable to locate accused about the track and went to the telegraph office to inquire if he had been there (R. 25). A telegram addressed to the accused had been received at the track telegraph office that afternoon and accused's name had been posted on a bulletin board to advise him of that fact. The telegraphic message was to the effect that a major was looking for accused and that the writer of the telegram had stated that accused had gone to Massachusetts Institute of Technology. Within 30 or 40 minutes a man clothed in an Army uniform had called for the telegram. Employees of the telegraph office were unable to identify the man to whom the telegram was delivered (R. 31-35). Accused was not at the telegraph office when Lieutenant McMahon called there and within a short time thereafter, approximately 6:30 p.m., the lieutenant started back to the airfield.

Just outside the town of Billerica on the road from Rockingham Park to the airfield he came upon accused walking along the roadside. He took him into custody and returned him to camp (R. 25, 26). Rockingham Park is about 30 to 35 miles north or northwest of Bedford Air Field and the town of Billerica lies in the same direction about 10 or 15 miles from the airfield. The City of Cambridge is about 14 miles east or southeast of the airfield (R. 25, 26, 29, 30).

In support of the Additional Charge and its Specification the prosecution introduced evidence showing that on Sunday, 30 July 1944, the day following occurrence of the events summarized above, Major Wright placed accused in administrative restriction and informed him that he was to pursue his normal duties but was not to go without the limits of the airfield. On 7 August 1944 Major Wright attended the Wonderland Dog Races held at Revere Beach which was located a distance of some 30 to 35 miles from the airfield There he encountered accused who was also attending the races. Major Wright took him into custody and delivered him to the local police. That same evening accused was returned to the airfield (R. 10-12).

4. The defense introduced no evidence and the accused, after his rights as an accused on trial had been explained to him, elected to remain silent.

5. Although accused's commanding officer had denied him permission to be absent from duty at Bedford Army Air Field on the afternoon of Saturday, 29 July 1944, the accused was not in his office from 1 p.m. to 5 p.m. that afternoon and could not be located on the field by either his commanding officer or the field provost marshal. About 6:30 p.m. that day accused was found 10 or 15 miles north or northwest of the airfield walking along the highway between it and Rockingham Park. When there is considered, in conjunction with the foregoing, the fact that about noon that day accused instructed an enlisted man to enter him on the officers' register as leaving for the afternoon to visit Massachusetts Institute of Technology at Cambridge, which lay almost in the opposite direction from the place accused was found, it cannot be reasonably doubted that accused was not on the airfield during the time alleged on the afternoon in question.

Counsel for the defense contended in effect that, inasmuch as the prosecution had not established by direct evidence that accused was not at the university in Cambridge on official business during this afternoon, the evidence did not establish beyond a reasonable doubt that he was absent from his duties as base signal officer. However, the only official business accused had with the university was with respect to the installation and maintenance of telephonic equipment in the Radiation Laboratory at the airfield. Only infrequently, if at all, did his work require him personally to visit the main office of the university in Cambridge. His presence at a place north or northwest of the airfield at 6:30 p.m. when Cambridge lies south or southeast of it refutes any inference that accused was on official business at the university on this Saturday afternoon. Moreover, the university had no business hours on Saturday afternoon. The evidence sustains the findings of guilty of Charge I and its Specification.

Accused's commanding officer had denied him permission to be absent on this Saturday afternoon when accused requested such permission just the day before and had instructed him to remain on duty that afternoon. Accused's failure to obey that order clearly establishes commission of the offense alleged in Charge II and its Specification. To charge accused both with absence without leave and with failure to obey a lawful order under these circumstances did not constitue an unreasonable multiplication of offenses based upon the same transaction within the admonition contained in paragraph 27, Manual for Courts-Martial, 1928. The evidence sustains the finding of guilty of Charge II and its Specification.

Accused instructed Sergeant Giblin to enter him on the officers' register as visiting Massachusetts Institute of Technology in Cambridge when in fact that was not accused's destination. His only reason to cause such a false entry to be made must have been to conceal his unauthorized absence from his superior officer. It is a violation of Article of War 95 for an officer to abuse his authority over an enlisted man by ordering him to make a false statement on a matter concerning the officer (2 Bull. JAG 384, CM 237521). The evidence sustains the findings of guilty of Charge III and its Specification.

While accused was under administrative restriction to the limits of the field imposed by his commanding officer he departed from the field and attended dog races held at Revere Beach, Massachusetts. It was proper for accused's commanding officer to impose such restriction while the charges then pending against accused were being investigated. A breach of such restriction may properly be charged as a violation of Article of War 96 (2 Bull. JAG 426, SPJGJ 1943/15606). The evidence sustains the finding of guilty of the Additional Charge and its Specification.

6. The accused is 27 years of age. He was a citizen of Canada by birth but became a citizen of the United States by naturalization on 17 September 1942. He is a graduate of the University of Saskatchewan, Canada, and in civilian life he was employed as administrative secretary to an individual who concerned himself with administering his own personal investments and who was also a director of a dorporation. He entered military service on 14 March 1942 and was commissioned a second lieutenant on 3 February 1943 after graduation from the Signal Corps Officer Candidate School, Fort Monmouth, New Jersey.

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

Article of War 95 and is authorized upon conviction of a violation of Article of War 61 or of Article of War 96.

Thomas M. Taffy, Judge Advocate.

A. Auchincloss, Judge Advocate.

William K. Gambrell, Judge Advocate.

SPJGH
CM 263480

1st Ind.

War Department, J.A.G.O., 16 OCT 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 Ashley M. Griffith (0-1642923), Signal Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, to support the sentence, and to warrant confirmation of the sentence. The accused was found guilty of absenting himself from his organization and his duties from noon until about 7:30 p.m. on Saturday, 29 July 1944, in violation of Article of War 61, of failing to obey an order of his commanding officer directing him to remain on duty during that period of time, in violation of Article of War 96, of causing an enlisted man to make a false entry on the officers' register concerning his whereabouts on the afternoon in question, in violation of Article of War 95, and of breaking restriction to the limits of the post, in violation of Article of War 96. Accused's several willful and inexcusable violations of the most fundamental principles of military discipline clearly demonstrate his unfitness to remain 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 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 ltr for sig S/W.
Incl 3 - Form of action.

(Sentence confirmed. G.C.M.O. 634, 24 Nov 1944)

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

SPJGK
CM 263485

11 OCT 1944

UNITED STATES v. First Lieutenant HEWET S. HUNSDON (O-801792), Air Corps.	CENTRAL AFRICAN DIVISION AIR TRANSPORT COMMAND Trial by G.C.M., convened at Accra, Gold Coast, British West Africa, 21 August 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, Judge Advocates.

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

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

CHARGE I: Violation of the 93rd Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Hewet S. Hunsdon, Air Corps, 1202 Army Air Force Base Unit, Central African Division, Air Transport Command, (then Station Number Three, Central African Wing, Air Transport Command), was, at Station Number Twelve, Central African Wing, Air Transport Command, (now 1206 Army Air Force Base Unit, Central African Division, Air Transport Command), on or about 30 June 1944, drunk and disorderly on a porch of a barracks.

Specification 2: In that First Lieutenant Hewet S. Hunsdon, * * *, was, at Accra, Gold Coast, British West Africa, on or about 16 July 1944, in a public place, to wit, the Accra Club, drunk and disorderly while in uniform.

ADDITIONAL CHARGE: Violation of the 63rd Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifidations and was found not guilty of Charge I and the Additional Charge and their respective Specifications but guilty of Charge II and its Specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved so much of the finding of guilty of Specification 2 of Charge II as reads "while in uniform" and so much of the sentence as provided for forfeitures, approved the sentence as thus modified, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, pertinent to the Charge and Specifications of which the accused was found guilty, is, summarized, as follows:

Specification 1, Charge II (drunk and disorderly on the porch of a barracks): This Specification is predicated upon the alleged condition and conduct of accused on 30 June 1944 at "B" Barracks (Officers), Station #12 (later redesignated 1206 Army Air Force Base Unit), Central African Wing, Air Transport Command, which station was situated at Maiduguri, Nigera, Africa (R. 29). He was at Station #12 in a transient status on the date mentioned, his home base being Station #3 (later redesignated 1202 Army Air Force Unit), Central African Wing, Air Transport Command, which was situated at Accra, Gold Coast, British West Africa. He had been stationed at Station #12 previously, however, and quartered in "B" Barracks (R. 50). He was not officially billeted in this barracks at the time in question but was nevertheless staying there (R. 35,39-40,50). The barracks, a plat of which was introduced in evidence, was rectangular in shape and had a screened-in porch which completely surrounded the walled portion of the building (R. 10, Ex. A; R. 21-22). The long sides of the building faced north and south (R.30). Beds were spaced around the porch (R. 11). The beds were equipped with an arrangement of light poles for the support of mosquito netting (R. 11).

Donald Anerobi, a native of Nigeria, who worked at "B" Barracks as houseboy (R. 10-11), testified to seeing accused drinking both beer and wine shortly after noon on 30 June 1944 (R. 12). Later during the same afternoon Anerobi heard a noise, as of a stick being broken, and, upon investigating, discovered the accused pushing on one of the mosquito netting support poles in an effort to remove it from its place (R. 13,16). "He /accused/ was not breaking at that time, but later I saw him do it" (R. 17). At the time of his approach Anerobi observed that three similar poles were already broken (R. 13). He told accused that he was going to complain to the billeting officer, whereupon accused went to a room and returned with a pistol.

"* * * He said he would shoot me before I could go to the Billeting Office. When he said this, he came and held one of my arms. I was afraid. I said, 'Please, Sir, I will not go to

Billeting Office'. He said, 'All right, don't go to Billeting Office.' When he left my arm, I wanted to walk out. He drew me back and said, 'Where are you going?' I said, 'Going to another room.' He held the gun like this (demonstrates: holds both hands to his stomach) and I was standing by his side. I stood at one place. He said, 'Don't even move'. I told him, 'All right'. Then I walked to other end of barracks. He followed me to this side with the gun. I said I would not go any place. Then two masters came in, one captain and one lieutenant. * * * I don't know their names. When they came in, they were asking what was wrong. When these masters came in, Lt. Hunsdon [accused] held the gun like this with his two hands. (Indicates behind his back.) When the two masters were there, I went out and brought the shower boards in. They held the door for me, and the captain said, 'OK, everything is all right. No more palaver.'"(R.13-14.)

When the captain and lieutenant had departed, accused charged Anerobi with having called them (R. 14).

"He said it was too good killing me with the pistol; he would kill me with his hands. He hit me with his fist. Said, 'You called the masters.' * * * He grabbed my hand and hurt me. I went to the hospital for three days. * * * He said I was a black nigger, a bastard, and a cock-sucker. He was calling me a lot of names that I don't understand. I said he was abusing me. 'Bastard' I understood; I didn't like that" (R. 14-15).

Lieutenant Orly O. Davis, Air Corps, acting Provost Marshal at Station #12, having received notice of a disturbance at "B" Barracks, secured Captain Leonard L. Hutchison, Air Corps, Station Adjutant, and together they went to investigate (R. 30). As they approached the barracks from the south and while 30 to 50 feet away, they observed accused and the houseboy on the porch near the southwest corner of the building (R. 22,30). The accused had one hand on the houseboy's shoulder and in the other he held a gun. Captain Hutchison testified the gun was pointed at the stomach of the houseboy and that accused appeared excited and "heated" at the time (R. 22,26). Accused was talking in a loud tone of voice. Captain Hutchinson heard him exclaim, "I'll kill you", but Lieutenant Davis did not hear what accused was saying (R. 22,23). As Captain Hutchison and Lieutenant Davis entered the porch by way of the east door, accused walked around the west end of the walled portion of the building and was out of their sight for possibly ten seconds (R. 23,31). They found him near the refrigerator talking to Flight Officer Revels (R.24,31). As they approached, accused turned to face them and assumed the position of attention, except that he had his hands behind his back (R. 31). Captain Hutchison got a brief glimpse of the pistol which accused held (R. 24), and noticed that it was a United States Army pistol, Cal. 45, which had no cartridge clip inserted in it (R. 26). Captain Hutchison asked what the trouble

was, to which accused replied that there was no trouble, that the houseboy would not shine shoes and was no good (R. 24,32). Lieutenant Davis told accused that they knew he had been breaking the beds and threatening the houseboy and asked if he would put up the gun and behave. Accused agreed that he would and said he was sorry he had caused any trouble (R. 25,32). He was apologetic and appeared to take no offense at their intervention (R. 27). Captain Hutchison had heard quite a number of officers in exasperation threaten African boys without actually meaning what they said (R. 25).

Captain Hutchison expressed the opinion that accused had been drinking (R. 27), and Lieutenant Davis, that he was "under the influence of intoxicating liquor". Upon cross-examination the latter called attention to the fact that he had not stated the degree of intoxication (R. 33), but went on to say that he had based his opinion upon his observations that accused's eyes were not focusing, he was swaying noticeably, and his voice was heavy and blurred (R. 34). The witness admitted that accused had a naturally heavy voice.

Flight Officer Fred O. Revels, Jr., testified that on 30 June 1944 he, together with Lieutenants Douglas and Barren and the accused, was living in room 3 of "B" Barracks and that after lunch, "we got our week's ration of beer from the PX" and each drank four or five beers (R. 35). He saw accused break one of the mosquito nets. "He snapped it with his hand" (R. 37). It "was just a passing sweep" (R. 38). No great force was used. "You need only hit the stick and the mosquito net snaps (R. 37). He saw accused pass the door with a gun and knew that he had an argument with the houseboy, but did not know any of the particulars of what transpired between them (R. 35).

Captain Harry C. Goodel, Jr., Air Corps, was flight operations officer at Station #12, and quartered in "B" Barracks (R. 39). He noticed accused at the barracks on 29 June 1944 and, knowing that Accra pilots were not ordinarily billeted there, checked to see if accused had "registered in" (R. 39). He was informed that accused had not (R. 39). Captain Goodel went on a trip that afternoon (29 June) and returned to his barracks the following afternoon shortly after the trouble occurred between accused and the houseboy. Upon encountering accused still at "B" Barracks, he asked him what he was doing there. Accused replied that he had been billeted there. Captain Goodell expressed his disbelief of this and accused said there had been some mistake in the billeting office (R. 40). Captain Goodel then made inquiry about the trouble with the houseboy and while accused was giving his explanation, Sergeant Boetcher, billeting clerk, came looking for the houseboy. Captain Goodel thereupon told accused that he should not control the houseboys the way he did, to which accused replied, "Kiss my ass, Captain". When Captain Goodel told him to be careful, accused repeated the statement (R. 40). He appeared angry at the time (R. 41).

Accused was drinking beer, but, in the opinion of Captain Goodel, was not drunk (R. 41). Captain Goodel reported the incident to Captain Hutchison immediately (R. 41), because he was annoyed by the outburst and wanted to keep accused "on the ball" (R. 42). He and accused had been very friendly before and have been since. They sometimes had arguments but he had never considered accused's conduct an affront to his rank (R. 42).

Specification 2, Charge II (Drunk and disorderly in public): Upon being relieved from duty as assistant officer of the guard at 12:00 o'clock on the night of 16 July 1944, First Lieutenant Burdis Kelley, Military Police, repaired to the Accra club and joined a party at a table on the veranda (R. 43). About 1:30 a.m. (17 July) he first noticed a "party" at an adjoining table. "There were three officers, Captain Burgers, Lieutenant Hunsdon (accused) and Lieutenant Edmonds. They appeared pretty drunk. About 0200 [2 o'clock a.m.] they were getting drunker, so I decided to go over to their table and tell them that it was a good idea to go home. I had moved my chair across to Captain Burgers' and identified myself as a Military Police Officer" (R. 43). The witness testified that accused was six or seven feet away at the time and heard this conversation with Captain Burgers.

> "* * * They flared up and demanded why in hell they should go home or words to that effect. I told them they were too drunk to stay there. Captain Burgers said, 'We better get out of here before this MP gets us in trouble'. Captain Burgers and Lieutenant Hunsdon left. I thought they were going home. Lt. Edmonds said he wouldn't go home as he could take all the trouble the MP's could dish out" (R. 43).

Lieutenant Kelley requested Lieutenant Edmonds' AGO pass and then went to a telephone booth and was in the act of calling the Military Police Station when Captain Burgers and accused entered the booth (R. 44). Captain Burgers addressed an uncomplimentary remark to Lieutenant Kelley, whereupon the latter "tried to push them out".

> "* * * Burgers said, 'We are going to have you tried for laying hands on a superior officer.' Then Lt. Hunsdon [accused] made a dive for me in the booth. There wasn't much of a tussle in the booth because we struggled out of the booth and into the dining room. * * * We struggled there and Captain Burgers got a hold of me. About this time two officers, Captain Myer and Captain Campbell, separated us." (R. 44-45).

The dining room was inclosed by a lattice (R. 45).

Upon cross-examination, Lieutenant Kelly admitted that he had "had about one bottle of beer or so" (R. 45). He had not been notified of

any fines being imposed upon him under Article of War 104 for his conduct at the time in question. He was "before the colonel", but was not fined (R. 46).

4. Evidence for the defense:

Sergeant Maynard J. Boetcher, Army Transport Corps, who was on duty on 30 June 1944 at Station #12 with the Billeting Department, and was in charge of houseboys, was called as a witness by the defense. He went to "B" Barracks on the date mentioned and saw four broken mosquito netting poles, two on each of two separate beds (R. 49,50). The poles were each about an inch wide (R. 50). The poles were not always put on the beds securely (R. 49). Some were nailed and some were tied on (R. 50). It was not unusual for them to be broken on beds on the porches. Due to the small space they could easily be knocked down (R. 49). They could be knocked down by someone's just brushing against them (R. 50).

Sergeant Boetcher was present and heard Captain Goodel speak to accused about chasing the houseboy and also heard him tell accused that he was not supposed to be billeted in "B" Barracks. Accused walked up quite close t Captain Goodel and said something to him, but Boetcher did not hear what he said (R. 51).

The defense introduced in evidence without objection a duly authenticated copy of an official notice of intention to recommend the imposition of punishment under Article of War 104 for disorderly conduct at the Accra Club on or about 16 July 1944, addressed to Lieutenant Kelley by his commanding officer, Colonel A. B. McMullen under date of 25 July 1944. By first indorsement, Lieutenant Kelley waived his right to a trial by court-martial and expressed his desire that action be taken under Article of War 104. By second indorsement Colonel McMullen recommended administrative reprimand and a $25 fine as punishment for Lieutenant Kelley (R. 51; Def. Exs. B,C). Accused was given a similar notice, agreed to accept punishment under Article of War 104, and a reprimand and $90 fine was recommended as punishment for him (R. 51; Def. Ex. C). Also, accused was officially notified of Colonel McMullen's intention to impose punishment against him under Article of War 104 for being "drunk and disorderly in station" (Station #12, CAFW-ATC, B Barracks) on or about 30 June 1944 (R. 51, Def. Ex. D). Accused acknowledged receipt of the notice and expressed his willingness to accept punishment under Article of War 104. (Note: None of the proceedings initiated as above outlined appear to have been consummated.)

Having been advised of his right to testify under oath, make an unsworn statement, or remain silent, the accused elected to remain silent.

5. Specification 1, Charge II (drunk and disorderly on porch of barracks Article of War 95):

Notwithstanding it found the accused not guilty of Charge I and its Specification, wherein he was charged with committing an assault upon Donald Anerobi with a dangerous weapon with intent to do him serious bodily harm, the court undoubtedly very largely predicated its finding of guilty of the Specification now under discussion, particularly the portion thereof which alleged disorderly conduct, upon the altercation and difficulty which transpired between Anerobi and accused on the porch of "B" Barracks. There was no inconsistency in this. The court had the right to consider accused's remarks to Captain Goodel as bearing upon whether accused was drunk as alleged in Specification 1 of Charge II, notwithstanding the court found accused not guilty of the Additional Charge and its Specification, wherein he was charged with behaving himself with disrespect toward his superior officer by those very remarks. So, taking these matters into consideration, together with the other evidence of record, and considering the uncontroverted evidence that accused had been drinking beer and wine, and the testimony of Lieutenant Davis that accused was swaying noticeably while attempting to stand at attention, that his eyes did not focus and his speech was blurred, and that he was, in the opinion of the witness, under the influence of intoxicating liquor, together with the further circumstance that accused agreed to accept punishment under Article of War 104 for being "drunk and disorderly" upon the occasion in question, the evidence of record is legally sufficient to support the finding that accused was both drunk and disorderly at the time and place alleged in the Specification. It does not appear from the record, however, that accused was grossly drunk upon the occasion in question, and it is the opinion of the Board of Review that, under all of the circumstances, his conduct was not of a nature to constitute a violation of Article of War 95. The finding by the court that accused was not guilty of assaulting Anerobi with a dangerous weapon with intent to do him serious bodily harm greatly minimizes the seriousness of his disorderly conduct. His attitude toward, and treatment of, Anerobi, as well as his conduct in breaking the mosquito netting supports, if the latter was done willfully and maliciously (a question that may well be said to be debatable on the record as presented), were reprehensible but, taking into consideration the comparative youth of the accused (21 years of age) and the conditions under which he was living, the Board of Review is not disposed to say that his display of irritability and lack of self-restraint upon the occasion in question were such as either to dishonor or to disgrace him or to establish his moral unworthiness to remain a member of the honorable profession of arms (par. 151, M.C.M., 1928). Clearly, however, accused's conduct was of a nature to bring discredit upon the military service and constituted a violation of Article of War 96.

Specification 2, Charge II (Drunk and disorderly in a public place, Article of War 95):

The evidence of record is deemed insufficient to support the finding that accused was drunk at the time and place alleged in this Specification. Aside from the evidence which was adduced by the defense, that is,

the notice from Colonel McMullen of his intention to recommend disciplinary action against accused, for "Disorderly conduct in uniform in a public place (Accra Club, Accra, Gold Coast, British West Africa) on or about 16 July 1944", and the latter's indorsement thereon indicating his willingness to accept such disciplinary action, the only evidence tending to prove that accused was either drunk or disorderly upon the occasion in question is the unsupported testimony of Lieutenant Kelley. The disciplinary action notice makes no accusation or mention of drunkenness. Lieutenant Kelley did not testify specifically as to accused's state of sobriety. His testimony on this point dealt with a group of three, of which accused was one. The extent of it was his statements that "they appeared pretty drunk" and "they were getting drunker". He did not disclose any fact upon which he predicated these conclusions or opinions. There is no direct evidence of record that accused was or had been drinking. So far as the record discloses, Captain Burgers and Lieutenant Edmonds, rather than accused, were the ones who assumed a belligerent attitude when Lieutenant Kelley first accosted their group. Accused is not shown to have said anything or to have made any display of rowdyism at that time. Lieutenant Kelley had himself been drinking beer, and it was his officious conduct that precipitated the difficulty which he had with Captain Burgers and accused. His testimony on the point under discussion is, under the circumstances, too general and indefinite in nature to establish beyond reasonable doubt that accused was drunk. Nor is it considered to be greatly strengthened in this respect by the fact that accused entered into the tussle in the telephone booth. Full recognition may be given to the fact that intoxication quite often contributes to altercations and physical encounters between men without accepting the converse of the proposition, that is, that one who engages in an altercation or fight is, almost certainly, drunk.

The accused's participation in the encounter which began in the telephone booth and spilled over into the dining room did, however, constitute disorderly conduct. And, while the evidence on the point is meager, it is deemed sufficiently proved that this difficulty occurred in a public place. The Accra Club is so described in the disciplinary action notices introduced in evidence by the defense and it is apparent from the other evidence of record that it was a place where people could assemble and drink openly. But, while the evidence of record is legally sufficient to support the finding of guilty of disorderly conduct in a public place, it is legally insufficient to support it as a violation of Article of War 95.

As above stated, the difficulty was precipitated by Lieutenant Kelley's officious conduct and he was the first to resort to the use of physical force. He undertook to push accused and Captain Burgers out of the telephone booth and accused grappled with him. It does not appear that accused resorted to any dishonest, disgracing, unfair, or cruel practices in the struggle which ensued. Nor does it appear from the record of trial that there were any witnesses to the difficulty aside from the participants

and the two officers who separated them. The mere fact that he engaged or became embroiled in the struggle does not establish the moral unfitness contemplated by Article of War 95 and paragraph 151, Manual for Courts-Martial, 1928. Clearly, however, accused's conduct was to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service, hence a violation of Article of War 96.

6. War Department records disclose that this officer is 21 years of age and unmarried. He is a high school graduate and has attended junior college for two years. He does not appear to have been employed in any civilian occupation prior to entering the service. He entered the service on 20 March 1942 as an enlisted reserve in the Air Corps. Upon completion of training as an air cadet he was, on 29 April 1943, commissioned a second lieutenant, Air Branch, in the Officers' Reserve Corps of the Army of the United States. He entered upon active duty the same date and was promoted to the rank of first lieutenant on 29 December 1943.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as herein noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge II as involves a finding of guilty in violation of Article of War 96, legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge II, as modified by the reviewing authority, as involves a finding of guilty of disorderly conduct at the time and place alleged in violation of Article of War 96, and legally sufficient 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 96.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave)_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 18 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 First Lieutenant Hewet S. Hunsdon (0-801792), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 1 of Charge II as involves a finding of guilty in violation of Article of War 96, legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge II, as modified by the reviewing authority, as involves a finding of guilty of disorderly conduct at the time and place alleged in violation of Article of War 96, and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed but, in view of the youth of accused (21 years) and because of his potential value to the service as a pilot in the Air Transport Command, I further recommend that the sentence be commuted to a reprimand, forfeiture of fifty dollars ($50) of accused's pay per month for a period of six months, 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 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-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence as approved by reviewing authority confirmed but commuted to reprimand and forfeiture of $50 per month for six months. G.C.M.O. 619, 15 Nov 1944)

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

SPJGQ
CM 263529

18 SEP 1944

UNITED STATES v. Private MACIO GORDON DIXON (34908920), Company F, Replacement Training Group, Transportation Corps.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Gordon Johnston, Florida 8 September 1944. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, 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 96th Article of War.

Specification: In that Private Macio Gordon Dixon, Company "F", Replacement Training Group, Transportation Corps, Camp Gordon Johnston, Florida, then a member of 598th Port Company, Indiantown Gap, Pennsylvania, did, at or near Bainbridge, Georgia, on or about 8 May 1944, wrongfully and willfully maim himself in the right foot by shooting himself with a shotgun, thereby unfitting himself for the full performance of military service.

He pleaded not guilty to the Charge and the Specification. He was found guilty of the Specification, substituting the words "intending thereby to render himself unfit for the full performance of military service" for the words "thereby unfitting himself for full performance of military service", and guilty of the Charge. No evidence of any previous conviction was introduced at the trial. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five (5) years. The reviewing authority approve 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 only question requiring comment by the Board is that raised by the deletion and substitution made by the court in its findings, as set out above. The substitution of the phrase "intending thereby to render himself unfit for the full performance of military service" was illegal, no such "intent" having been alleged in the Specification. The substituted phrase may, however, be deleted by the reviewing authority and there is sufficient remaining of the original Specification to state an offense under Article of War 96, and the legal and competent evidence of record is adequate to support such a modified finding. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed at the trial.

4. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings, excepting the phrase "intending thereby to render himself unfit for the full performance of military service", contained in the finding of guilty of the Specification, and legally sufficient to support the sentence.

William H. Bamberger, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 19 SEP 1944 - To the Commanding General, Fourth Service Command, Army Service Forces, Atlanta, Georgia.

1. In the case of Private Macio Gordon Dixon (34908920), Company F, Replacement Training Group, Transportation Corps, I concur in the foregoing holding of the Board of Review and for the reasons stated therein recommend that the finding of guilty of the Specification of the Charge be approved excepting the phrase "intending thereby to render himself unfit for the full performance of military service". Upon compliance with this recommendation, and under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

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

(CM 263529).

Myron C. Cramer

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
Washington, D.C.

SPJGN
CM 263562

28 SEP 1944

UNITED STATES v. Second Lieutenant HARRY S. SCHULTZ (O-1016812), Infantry.	EIGHTH ARMORED DIVISION Trial by G.C.M., convened at Camp Polk, Louisiana, 22 August 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Harry S. Schultz, 58th Armored Infantry Battalion, Camp Polk, Louisiana, did, at Camp Polk, Louisiana, on or about 12 July 1944, he then having a lawful wife, wrongfully and unlawfully attempt to have illicit sexual intercourse with Jolean Smith, a woman not his wife.

Specification 2: In that Second Lieutenant Harry S. Schultz, 58th Armored Infantry Battalion, Camp Polk, Louisiana, did, at Camp Polk, Louisiana, on or about 12 July 1944, wrongfully threaten to "rape" Jolean Smith and did thereby put her in fear and cause her to jump from a moving automobile and become injured thereby.

The accused pleaded not guilty to, and was found guilty of, the Charge and both 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 the accused on 12 July 1944 was thirty-one years of age, married, and living with his wife in Leesville, Louisiana (R. 25; Ex. A). About 9:30 p.m. he left "Eddie's Beer Garden" in Leesville and entered his car. At that moment seventeen-year old Miss Jolean Smith was walking down the street on her way home from the ice cream parlor in which she was employed (R. 7, 13). Although she was a stranger

to him, he drove his car to "her side of the street ...., made himself acquainted", and asked her "if he might take [her] out" that night (R. 7; Ex. A). Upon her protesting that the hour was late and that she was not suitably dressed, he offered to convey her to her home. She accepted, and in the course of the ride she "formed a very nice opinion of him" and decided to go with him to a new highway and "try to drive his car". She stopped at her home only long enough to obtain permission from her "folks" and to change her clothes (R. 7-8, 12-13, 27).

When she reentered the car, she seated herself behind the wheel and "tried to drive" (R. 15). With the assistance of the accused she succeeded in guiding the vehicle all the way to Camp Polk where the traffic was so extremely heavy that he again took the wheel. He drove to the post exchange, but, finding it closed, continued on through the camp, turned off onto a gravel road, and parked (R. 8, 15, 27).

For a short while they talked (R. 8). In the course of the conversation he kissed her twice with her permission after she had made some show of resistance (R. 14-15). He left his place behind the wheel and assumed a place to her right (R. 8, 15).

Suddenly he "commenced to make love". As he himself said at a pretrial investigation, "When we stopped she made no complaint .... and naturally we started necking or whatever you call it that man and woman will do when you get together" (R. 27). He attempted to put his hand on her breast and "in other places" and to pull her out of the car (R. 9, 15, 17). She repelled his advances and, when he indicated that he was determined to use force, she "started hitting on him" (R. 9, 28). She finally "got him pretty well under control" but in the struggle her dress was torn (R. 9-10, 19-21, 23). To quote him again, "I was trying to have intercourse with her.... I rolled over and tried to get between her legs and she slapped me two or three times and also tore her dress" (R. 28). After requesting him to desist, she stated that she would "get out and walk" and asked for directions home. Although he made some further desultory attempts to induce her to have intercourse with him, he was apparently convinced of her sincerity and permitted her to leave (R. 9, 16, 27).

He followed her in his car, told her she was proceeding in the wrong direction, and offered to take her home. Relying upon his assurances, she again seated herself by his side, and they "headed for the gate" (R. 9-10). He began to speak of the "good times [they] would have", and, when she replied that it was their last date together, he commented that she "wasn't out of the car yet" (R. 11). Once more she requested that he allow her to leave. He refused and, as they approached the "Mp gate", said in "plain words" that he "was going to take her out and rape her" (R. 11, 16-17, 27). Since they were then near a bus station, she pleaded that he let her out, but he stated that he would not release her "until he was satisfied" (R. 11). Upon her threatening

to jump out, he said "go ahead and jump" (R. 11, 27). She kept her word and leaped to the pavement. She "was sure that it was the only way [she] would get out" (R. 11). Since the car was then traveling at a speed of not more than ten to fifteen miles an hour, she sustained only some superficial abrasions of her knees and elbows (R. 11, 22-24).

She immediately reported to the guard at the gate and "started crying" (R. 11, 19). When she complained "that some Lieutenant had got smart with her", she was taken to the provost marshal's office and from there to the hospital (R. 19-23). Upon being questioned by a nurse, she emphatically denied that she had been raped (R. 23).

At a pre-trial investigation the accused, after being fully advised of his rights under Article of War 24, frankly admitted that he had sought to have intercourse with her. He believed that she was willing because of "the way she was letting me play around" (R. 28). No force had been resorted to by him, and his remark about rape had been made "joking like" (R. 27-28).

4. The accused, after being advised of his rights relative to testifying or remaining silent, took the stand on his own behalf. He admitted kissing her, playing with her breasts, and making advances "in preparation for intercourse" (R. 31). When she objected, he stopped. He had not threatened to rape her, his exact words being, "Someone should take you out here and rape you". It had been his intention to take her to the bus station rather than to her home because he had "heard of a lot of cases where men have picked up women, taken them someplace, and they jumped out and started yelling" (R. 32). He had not gone in search of her after she had jumped out of the car for fear that he "would look as silly as hell chasing down through there after her" (R. 33).

The accused's character rating was "excellent" in the opinion of First Lieutenant Calvin H. Shaw and Captain Donald E. Draper, his present and former commanding officers, respectively (R. 29-30). Captain Draper believed an appropriate efficiency rating for the accused to be "Superior" (R. 30).

Captain Harold A. Ham, who had conducted the pre-trial investigation, admitted that he had warned the accused of his personal rights only under Article of War 24. Nothing had been said to the accused about his right to cross-examine witnesses (R. 30).

5. Specification 1 alleges that the accused did, "on or about 12 July 1944, he then having a lawful wife, wrongfully and unlawfully attempt to have illicit sexual intercourse with Jolean Smith, a woman not his wife". Specification 2 alleges that he did on the same day "wrongfully threaten to 'rape' Jolean Smith and did thereby put her in fear and cause her to jump from a moving automobile and become injured thereby". Both of these acts were laid

under Article of War 95.

The accused in Specification 1 is charged with an attempt to commit adultery. Counsel for the defense has argued that such misconduct was not indictable either at common law or under the statutory law of Louisiana. Whether his contention be correct or not is immaterial, for it overlooks the true nature of the offense alleged. The accused has been tried not for a violation of common law or the statutory law of Louisiana but for "conduct unbecoming an officer and a gentleman". The officer who attempts to commit adultery not only offends against his wife but infringes upon that code of honor by which gentlemen are expected to abide.

The accused caressed the breasts of his seventeen-year old "pick-up", sought to place his hands "in other places", and plainly manifested his intention to have intercourse with her. When subsequently he threatened to "rape" her, his words were susceptible of only one interpretation by any reasonable woman. He may have been "joking", but in view of his previous forceful, though unsuccessful, attempt to have sexual intercourse with her, the humor of the remark, if any were actually intended, was difficult to appreciate. Since she had ample grounds to fear a criminal attack upon her person, she chose the only honorable course open to her at the moment and jumped from the moving car. Both Specifications are amply supported by the evidence adduced.

5. The accused is about 31 years old. The records of the War Department show that he attended the University of Kentucky for two and a half years; that he was employed as a motion picture projectionist by the Majestic Theatre of Springfield, Kentucky, and as a factory manager by the R. J. Reynolds Tobacco Company at Winston-Salem, North Carolina; that he had enlisted service from 14 August 1942 to 19 March 1943; that he was commissioned a second lieutenant on 20 March 1943; that he has been on active duty as an officer since the last date.

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

(On Leave), Judge Advocate.

Robert W. Hanna, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

SPJGN
CM 263562

1st Ind.

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

4 - OCT 1944

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 Harry S. Schultz (0-1016812), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. 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. ltr. for sig. S/W.
Incl 3 - Form of Executive action.

(Sentence confirmed. G.C.M.O. 664, 16 Dec 1944)

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

SPJGQ
CM 263608

18 SEP 1944

UNITED STATES v. Captain WILLIAM M. ST. JOHN (0-1040298), 839th AAA Automatic Weapons Battalion, (Mobile).	XXIII CORPS Trial by G.C.M., convened at Camp Bowie, Texas, 30 August 1944. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
GAMBRELL, FREDERICK and ANDERSON, 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 Captain William M. St. John, 839th Antiaircraft Artillery Automatic Weapons Battalion Mobile, did, without proper leave absent himself from his organization and station at Santa Maria Army Air Field, Santa Maria, California, from about 23 June 1944 to about 9 July 1944.

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

Specification 1: In that Captain William M. St. John, 839th Antiaircraft Artillery Automatic Weapons Battalion, Mobile, having been placed in charge of property and personnel of the said battalion, at Santa Maria Army Air Field, Santa Maria, California, with orders to remain in charge thereof until relieved, did, on or about 23 June 1944 wrongfully, without authority, and in violation of orders, abandon and fail to perform his duty.

Specification 2: In that Captain William M. St. John, 839th Antiaircraft Artillery Automatic Weapons Battalion Mobile, having received a lawful order from the Commanding Officer of the said battalion, to pick up the battalion payroll for June, 1944 at Muroc Army Air Field on 30 June 1944, and bring the same to the

battalion headquarters, the said battalion commander being in the execution of his office, did, at or in the vicinity of Muroc Army Air Field, on or about 30 June 1944, fail to obey the same.

He pleaded guilty to Charge I and its Specification except as to the words "from about 23 June 1944 to about 9 July 1944" substituting therefor the words "from 6 July 1944 to 9 July 1944", and to Charge II and its Specification 2. He pleaded not guilty to Specification 1 of Charge II and the excepted words above of the Specification of Charge I. He was found guilty of all Charges and Specifications. No evidence of any previous conviction 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 only so much of the sentence as provides for dismissal from the service and forfeiture of all pay and allowances due or to become due and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution shows that the accused was, during the occurrences complained of, in the military service of the United States occupying the grade of captain in the 839th AAA Weapons Battalion, Mobile, on maneuvers at Estrella Army Air Base, California. Estrella is about 210 miles South of Muroc Air Field, California, which was the home station of the organization (R. 6, 7). On or about 21 June 1944 Lieutenant Colonel Charles A. Anderson, the battalion commander at Estrella, ordered accused, who was acting assistant executive officer of the battalion, to go to Santa Maria Army Air Field, California (about 75 miles southwest of Estrella) and take charge of the battalion property stored there and a detail of 5 or 6 enlisted men sent there to guard the property, see to it that the battalion area was policed, remain there until 30 June 1944 and then proceed to Muroc Army Air Base, and as Class A Agent pick up the battalion payroll and return to Estrella Army Air Base and pay the men (R. 7-8, 13, 17). Accused had no authority to leave Santa Maria Army Air Base at any time until 30 June when he was to go to Muroc (R. 10). Accused on the same day applied in writing for a three days leave of absence effective on or about 3 July 1944 which was approved by the commanding officer (R. 9, Pros. Ex. A).

The detail of four enlisted men including a Corporal John E. Wilson arrived at Santa Maria Army Air Base on the evening of 20 June 1944. The accused arrived there on Wednesday, 21 June 1944 (R. 18-19). The battalion property was stored in the mess hall. No formal guard duty was required. It was necessary to have one man on duty in the building all of the time so that proper receipts could be obtained from anyone drawing supplies (R. 23).

Accused was seen by the enlisted personnel assigned as guards of the battalion property on the 21st (R. 18), on the 22nd (R. 19, 25) and on the 23rd of June (R. 19) but not thereafter (R. 20, 25).

On Sunday 25 June 1944 Captain E. W. Junker of the same organization arrived at Santa Maria Army Air Field about 10 a.m. to check the battalion property and to transfer it from the accused to himself. He checked the property but did not see the accused in the area. He returned again on the following Tuesday, 27 June, with 20 trucks with which to load the property and then turn the convoy over to the accused to take to Muroc, but the accused was not in the area nor in his quarters on that day (R. 26-27). The battalion property was therefore removed by convoy in the absence of the accused and Corporal Wilson was detailed to remain at Santa Maria Army Air Base and await the accused's return. Corporal Wilson remained in the area from that time until 29 June, sleeping during the nights of 27th and 28th in the accused's quarters where the accused's belongings were located but did not see the accused (R. 22). On 29 June 1944, Lieutenant Louis A. Rudloff, another officer of accused's organization arrived at Santa Maria Army Air Base with instructions to look for the accused, and if unable to find him to pick up his belongings and turn in a jeep that the accused had borrowed (R. 32, 36). He was unable to find the accused so he picked up his belongings and returned them to Estrella (R. 37) and also brought Corporal Wilson back. The battalion adjutant upon learning of the foregoing on 29 June 1944 tried to locate the accused by telephoning to his home in San Jose, to San Maria Army Air Base, and to Muroc Army Air Base, but could not locate him (R. 33-34, 38).

Accused did not pick up the payroll at Muroc Army Air Base and did not return to Estrella Army Air Base on 30 June 1944 to pay the men (R. 9).

On 8 July accused telephoned from Los Angeles, California and talked to the Officer of the Day, Lieutenant H. M. Houk and told him that he was without funds with which to travel to Muroc. During the conversation accused said he had been gone for a while - "it seems to me he said about 2 weeks" (R. 40). Accused rejoined his organization on 9 July 1944 (R. 34, Ex. C).

4. The accused having been advised of his rights to either remain silent, make an unsworn statement, or testify under oath, elected to testify (R. 49). He stated that both Major O. A. Moomaw, the Executive Officer, and Lt. Col. Charles A. Anderson, the Commanding Officer of the Battalion, explained to him the nature of the duties expected of him at Santa Maria AAB (R. 50). Upon his arrival at that Base on 21 June 1944 he instructed Corporal Wilson, who was in charge of the guard, as to the manner of guarding the battalion property. He told him to be alert and to keep the area clean and "policed up". On 24 June he returned to Estrella AAB to get some of his personal belongings that he had forgotten on his initial trip and was driven back in the afternoon by a sergeant in a "jeep". During the nights of the 25th and 26th he remained in his quarters at Santa Maria AAB. During the nights of the 27th and 28th he slept in a room in a rooming house in the town of Santa Maria two miles away from the Base. On the 29th he registered at the BOQ of the Santa Maria AAB and slept there at night from that date until 3 July 1944. During the day from 25 June until 3 July he spent his time at the Officers Club reading, on the flight strip, and around the

Base in general. He did not go near the battalion area where the battalion property was stored except on the 29th when he walked by on his way to the QM store. During this time he did not communicate with any member of the guard nor do anything regarding the property (R. 51, 55-56). He did not know about Captain Junker's visit on the 25th or the 27th (R. 57). On the 30th he learned about Lt. Rudloff's visit of the 29th when, upon discovering that his own personal belongings had disappeared, he made some inquiry. He did not telephone his organization because he was told that there was no available telephone (R. 58). He admitted that he was ordered to go to Muroc AAB on the 30th to arrange about the battalion payroll but he did not go because when he discovered his belongings and the "jeep" which he expected to use in order to get to Muroc AAB were gone, he assumed that some one else would be sent. He did not communicate with his organization about this (R. 60).

On 3 July 1944 accused availed himself of his three day leave which had been authorized before he left Estrella AAB and went to Los Angeles (R. 59) and remained there until 8 July 1944 (R. 51). On that date he telephoned Muroc AAB and told the Officer of the Day, who was the only officer available, that he was absent without leave and had no funds with which to get to Muroc (R. 51). He also advised the military police of his situation and, on the following day reported to the Military Police and with their help was able to get to Muroc AAB and his organization (R. 52).

Major O. A. Moomaw testified that he explained to the accused on 21 June 1944 the details of what was expected of him if he was sent to Santa Maria AAB by the battalion commander (R. 47).

Sergeant L. S. Hale testified that on 24 June 1944 he drove the accused from Estrella AAB to Santa Maria AAB and left him there (R. 45). It was stipulated that the register at the Officers' Club, Santa Maria AAB showed that accused registered there on 29 June 1944 and was assigned Room 303 (R. 47); and that accused was seen in that room by an orderly on Sunday, 2 July 1944 at about 10:30 a.m. (R. 47).

Evidence was introduced that accused enjoyed a good reputation among both officers and enlisted men of his battalion. This evidence consisted of the testimony of one officer and one enlisted man and the testimony by stipulation of eleven of the other battalion officers and six noncommissioned officers of the battalion (R. 66, 68, 70).

Lieutenant J. E. Bradford testified that he was the battalion adjutant and that it was the practice of the battalion commander to issue 3 day "passes" and the officers would leave on the day which they requested and which had been approved by the commanding officer. No formal leaves in writing were used. He, however, had never before seen the form of request and approval used in the instant case (R. 69; Ex. A).

5. The Specification of Charge I avers that the accused, on or about 23 June 1944, absented himself without proper leave "from his organization and station at Santa Maria Army Air Field". The accused's regular organization was not stationed at that place, therefore the "organization" intended was the guard of enlisted personnel in his charge, and the "station" was the battalion area clearly described in the evidence as a few buildings and a small part of the Santa Maria Army Air Base. The rest of the Base was occupied by another organization which was not connected with the accused's organization. Therefore the test to apply in determining whether the accused was absent from his "organization and station" is whether he was absent from his detail and the battalion area.

It was clearly shown by the evidence for the prosecution and admitted by the accused that after he arrived at Santa Maria on 21 June 1944 and saw that the guard detail consisting of a corporal and three enlisted men were properly guarding the battalion property located in the mess hall of the area, he did not bother himself further about it. He was seen by the enlisted men at a distance for two days following, but not after 23 June 1944. Having been told to take charge of these enlisted men, to guard the property and to police the area, accused, after 23 June, devoted himself to his own devices and purposes. The fact that, as he claims, he was present on the Santa Maria Army Air Base during the period of 23 June to 3 July (when he admittedly left) is no defense to the charge of being absent without leave under the circumstances of this case. Article of War 61, for the violation of which he was convicted, 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" (M.C.M. 1928, par. 133, p. 145-6). The accused's required place was with the enlisted men placed in his charge and in the battalion area. Reading at the officers club, wandering around the flight strip of the Base, running back and forth for his personal belongings forgotten at Estrella, sleeping in town, and just walking by the building where the battalion property was stored because it happened to be near the path taken by the accused to accomplish his own personal desires is not being at the place or spot where he was required to be in order to properly perform his duties. If he had been 100 miles or more away, insofar as the government is concerned, his absence would not have been felt any more. The testimony was clear and convincing that he was not, during the time specified, in or at the place where his duties required him to be.

His contention that during three days of his absence he had leave is without merit, even if it be assumed that a three-day leave was regularly granted to him on 21 June 1944 to become effective on or about 3 July 1944 (as claimed by the accused). Leave contemplates going from a duty status to a leave status. It is elementary that to

effect such a change of status, the officer must not only obtain a leave from proper authority but must also comply with the requirements of his organization respecting the various things to be done by him before departing on leave. These customarily include, among other things, signing out, supplying information as to where the officer may be communicated with during the period of his absence and advising as to the day and hour of his departure. Usually an official leave is granted to commence "on or about" a named date. That was true of the leave in the instant case. If the time of the officer's departure on leave is not officially recorded, the period of his leave is left in an uncertain state. It is apparent that in the instant case there was no compliance by the accused with any of these requirements. The evidence clearly establishes that the accused was absent without leave from 23 June 1944 until 9 July 1944, and that his organization was without knowledge as to his whereabouts until he telephoned from Los Angeles on 8 July 1944 stating that he was without funds to return to his station.

With reference to Specifications 1 and 2 of Charge II it was clearly shown that the accused did, as alleged, "abandon and fail to perform" the duties of remaining in charge of property and personnel of the detachment to the supervision of which he had been assigned and failed, also, to obey the specific order to go to Muroc on 30 June for the purpose of obtaining funds with which to thereupon pay the enlisted men of his detachment.

6. Records of the War Department disclose that the accused was born in Syracuse, New York, is 28 years of age and unmarried. He attended high school for three years and was graduated from Cook Academy (Preparatory School) in 1937. He was inducted into the Army 10 February 1941 and entered upon active duty with the 209th Coast Artillery (AA) at Camp Stewart, Georgia. After the prescribed course of training at the Antiaircraft Artillery School at Camp Davis, North Carolina, he was commissioned a second lieutenant on 29 May 1942. On 10 February 1943 he was promoted to first lieutenant and on 19 August 1943 to captain.

7. 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. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61 or Article of War 96.

William H. Bamberger, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

John R. Anderson, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 27 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 William M. St. John (O-1040298), 839th AAA Automatic Weapons Battalion (Mobile).

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. I recommend that the sentence, as approved by the reviewing authority, be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the attached fifteen letters of recommendation from officers and enlisted men in the accused's battalion.

4. 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 the above recommendation into effect, 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. sig. of S/W.
3 - 15 letters of recom.
4 - Form of action.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 666, 16 Dec 1944)

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

SPJGH
CM 263656

27 OCT 1944

UNITED STATES v. Second Lieutenant JOHN D. MONJAY (O-578633), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Victorville, California, 21 and 22 August 1944. Dismissal, total forfeitures and confinement for two (2) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, 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 1: In that 2nd Lieutenant John D. Monjay, Air Corps, 3035th AAF Base Unit, did, at Hollywood, California, on or about 14 March 1944, with intent to defraud, wrongfully and unlawfully make and utter to the CHRISTIE HOTEL, a corporation, located at Hollywood, California, a certain check in the sum of Forty ($40.00) Dollars, drawn on the First National Bank of Colorado Springs, Colorado Springs, Colorado, and by means thereof did fraudulently obtain from the said Christie Hotel cash in the sum of Forty ($40.00) Dollars, he the said 2nd Lieutenant John D. Monjay then well knowing that he did not have and not intending that he should have sufficient funds in said First National Bank of Colorado Springs for the payment of said check.

Specification 2: In that 2nd Lieutenant John D. Monjay, * * *, did, at Hollywood, California, on or about 14 March 1944, with intent to defraud, wrongfully and unlawfully make and utter to the CHRISTIE HOTEL, a corporation located at Hollywood, California, a certain check in the sum of Fifteen ($15.00) Dollars, drawn on the First National Bank of Colorado Springs, Colorado Springs, Colorado, and by means thereof did fraudulently obtain from the said Christie Hotel cash in the sum of Fifteen ($15.00) Dollars, he the said 2nd Lieutenant John D. Monjay then well knowing that he did not have and not intending that he should have sufficient funds in said First National Bank of Colorado Springs for the payment of said check.

Specification 3: In that 2nd Lieutenant John D. Monjay, * * *, did, at Hollywood, California, on or about 15 March 1944, with intent to defraud, wrongfully and unlawfully make and utter to the Christie Hotel, a corporation located at Hollywood, California, a certain check in the sum of Fourteen Dollars and fourteen ($14.14) cents, drawn on the First National Bank of Colorado Springs, Colorado Springs, Colorado, and did by means thereof did fraudulently obtain from the said Christie Hotel merchandise and services of the value of about Fourteen Dollars and ($14.14) fourteen cents, he the said 2nd Lieutenant John D. Monjay then well knowing that he did not have and not intending that he should have sufficient funds in said First National Bank of Colorado Springs for the payment of said check.

Specification 4: (Finding of not guilty).

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

Specification: In that 2nd Lieutenant John D. Monjay, * * *, did, at Blythe, California, on or about 17 January 1944, feloniously embezzle by fraudulently converting to his own use, United States currency and coin in the sum of One Hundred Twenty Three ($123.00) Dollars, the property of Iris Rouner, entrusted to him for the said Iris Rouner by 2nd Lieutenant Walter H. Helmerich III, Aviation Cadet John W. Schroeder and Aviation Cadet Everett W. Terry.

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

Specification: In that 2nd Lieutenant John D. Monjay, * * *, did without proper leave, absent himself from his

organization and station at 3035th AAF Base Unit, Victorville Army Air Field, Victorville, California, from about 0800, 3 July 1944, to about 1500, 6 July 1944.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 4 of Charge I and guilty of all other Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for two years. The reviewing authority approved only so much of the findings of guilty of the Additional Charge and its Specification as involves a finding of guilty of absence without leave from 0800, 3 July 1944 to 1300, 4 July 1944, 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 48.

3. In support of Specifications 1-3 inclusive, of Charge I, the prosecution introduced evidence to show that on 14 March 1944 the Christie Hotel in Hollywood, California, received two checks from accused, one for $40 and the other for $15, both dated 14 March 1944 and drawn to the order of the hotel on the First National Bank of Colorado Springs, Colorado Springs, Colorado. On 15 March 1944 the hotel received accused's check for $14.14, dated on that day, payable to it and drawn on the same bank as the two previous checks. This check was tendered in payment of accused's hotel bill (R. 13, 22). These checks were deposited by the hotel for collection on 20 March 1944, but they were returned unpaid on 31 March 1944 (R. 16, 17). Shortly thereafter Mr. E. W. Silver, manager of the Christie Hotel, telephoned accused at his station, Morton's Air Academy, Blythe, California, was unable to contact him but did talk to First Lieutenant Charles B. Hinkle who was Commandant of Cadets at the Academy (R. 16, 27). Lieutenant Hinkle then wrote accused who was confined in a hospital at Palm Springs because of a back ailment, informed him that Mr. Silver had called concerning some checks and instructed accused to straighten out the situation (R. 79). Thereafter, between 1 April and 8 April 1944, accused telephoned Mr. Silver from Palm Springs (R. 18). During the conversation he admitted that he had made and issued these checks and received value therefor, expressed regret that they had not been paid by the drawee bank and informed Mr. Silver that if they were again put through for collection they would be honored (R. 13, 19, 23).

Accused's bank statement reveals that on the following dates he deposited the following amounts of money to his account in the First National Bank of Colorado Springs, viz (Pros. Ex. 1):

Date Deposited	Amount Deposited
3 December 1943	$245.30
4 January 1944	$268.70
4 January 1944	$200.00
2 February 1944	$254.20
2 March 1944	$251.40
3 April 1944	$254.20
2 May 1944	$252.80

A further examination of his bank statement reveals that on 15 January 1944 his balance had been reduced to approximately $12 and did not rise above that level again until the February deposit was made. Thereafter it was reduced to approximately $13 by 23 February 1944 and rose no higher until the March deposit was made. By 14 March 1944, withdrawals had reduced the balance to less than $5 and it remained below that level until the April deposit was made.

In support of Specification 1 of Charge II the prosecution offered evidence to show that on 13 January 1944, Aviation Cadets Floyd H. Rouner, Jr. and Richard D. Ronne, stationed at Morton's Air Academy, were killed in a mid-air collision. Second Lieutenant Walter H. Helmerich III and accused were appointed summary court officers for Cadets Ronne and Rouner, respectively (R. 43; Pros. Ex. 3). The classmates of the two deceased cadets contributed money to raise a fund to purchase flowers for the funerals but the fund reached such substantial proportions that the cadets decided to divide it equally between the widow of Cadet Rouner and the mother of Cadet Ronne. Lieutenant Helmerich divided the fund giving one half of it, approximately $123, to accused to deliver to Cadet Rouner's beneficiary (R. 43; Pros. Ex. 2). This money had been so given to accused by Saturday (15 January 1944) of the week in which the deaths of the two cadets had occurred (R. 30).

Mrs. Iris Rouner, widow of Cadet Floyd H. Rouner, Jr. was living at 270 East 15 Street, Pittsburg, California, at the time of her husband's death and continued to live there at least until sometime in May 1944, without being absent from her home for any appreciable length of time (R. 49, 57). On 15 January 1944 she received a letter from accused advising her that he had been appointed as summary court officer, that he had turned over her husband's automobile and personal effects to her brother and that cash of $10 belonging to her husband would be sent to her (R. 49). Thereafter she received a cashier's check for $10 drawn on the Citizens National Bank of Blythe, California, which was sent to her home address. About 17 or 18 January 1944 she received a letter of sympathy from accused which, likewise, was addressed to her at her home. On 19 January 1944 she received at her home a telegram from accused requesting her to sign a receipt for the property that had been delivered to her (R. 50, 51). She received no other money from accused by check, money order or otherwise until 15 May 1944 (R. 52).

On 9 May 1944, Major Dana R. Fuller, commanding officer of the base unit at Blythe, California, questioned accused and the latter stated that he had received the $123 collected by the cadets for Cadet Rouner's widow, that he had used it to pay personal bills and for personal needs and that thereafter he had sent Mrs. Rouner his personal check for $123. He admitted that Mrs. Rouner had not acknowledged receipt of this money and that he had never received the canceled check (R. 61). An examination of accused's bank statement shows that on 15 January 1944 his bank balance was approximately $12 and never rose above that level until his monthly pay check was deposited on 2 February 1944 (Pros. Ex. 1). Later in the day on 9 May 1944 accused stated to Major Fuller that he thought he should send Mrs. Rouner a check for $123 and clear up the matter (R. 63). On 10 May 1944 when Major Fuller had another interview with accused, the latter stated that he had sent $123 to Mrs. Rouner by registered mail (R. 62, 63).

On 15 May 1944, Mrs. Rouner received a letter from accused, addressed to her care of the Pittsburg Funeral Home, with which was inclosed a cashier's check for $123. The letter was dated 10 May 1944 and in it accused stated that he had previously sent a check for $123 "with the last letter I wrote you", and requested an acknowledgement of the present check (R. 52; Pros. Ex. 4).

In support of the Specification of the Additional Charge the prosecution introduced evidence to show that on 1 July 1944, accused was stationed at Victorville Army Air Field, Victorville, California, while an investigation of these charges was being conducted. On Saturday, 1 July 1944, accused was given permission by Major Sidney A. Milligan to be absent until 0800 on Monday, 3 July 1944, so that he could consult with his civilian counsel over the week end (R. 32). On Tuesday, 4 July 1944, Mr. Milan Medigovich, accused's civilian counsel, telephoned Captain Robert C. Davidson, accused's commanding officer, and requested that accused be sent to Los Angeles on Wednesday, 5 July 1944, so that he might consult with him. Mr. Medigovich stated that the conference would only necessitate accused's absence from camp until noon on Thursday, 6 July 1944. A search was made of the field so that this information could be relayed to accused but he could not be found (R. 71, 72). On Thursday, 6 July 1944, accused telephoned Major Sidney A. Milligan and requested permission to be absent for the balance of the day in order to obtain certain affidavits and accused was given permission to be absent until noon, Friday, 7 July 1944 (R. 32). According to the morning report of accused's organization, he was carried as absent without leave from 0800 on 3 July 1944 until 1500 on 6 July 1944 (Pros. Ex. 6).

4. After accused's rights as a witness had been explained to him, he elected to testify under oath in his own behalf. He testified that he

was 25 years of age and had completed his high school education. He enlisted in the Army on 3 August 1940, eventually became squadron sergeant major at March Field and thereafter worked in the legal department at base headquarters where he prepared a directive on the method of handling property shortages which was adopted and used. After graduation from Officer Candidate School he was commissioned a second lieutenant on 16 April 1943 and subsequently, on 9 December 1943, was assigned to Morton's Air Academy where he was assigned to duty as legal assistance officer, assistant intelligence officer, postal officer, fire marshal, ordnance officer, assistant chemical warfare officer and in addition handled a class of some 300 cadets. He had never been court-martialed or experienced any difficulties in his work until the present time (R. 90-94).

He admitted his appointment as summary court officer to distribute the effects of deceased Cadet Rouner and the receipt of the contribution of $123 for the cadet's beneficiary. He admitted making personal use of this fund but stated that on 15 or 16 January 1944 he sent Iris Rouner his personal check for $123 drawn on the First National Bank of Colorado Springs. Although his monthly pay checks were being deposited regularly to his account in that bank, he admitted that when he sent this check he did not know definitely whether he had sufficient funds on deposit to cover it although he believed his balance was adequate. He had no check book but used counter checks in drawing on his account, kept a record of checks issued in a small notebook and kept no record of the balance on deposit. He sent his January check for $123 to the home address of Iris Rouner in Pittsburg, California, and in an accompanying letter he indicated the source of the fund. Sometime thereafter he was confined to the hospital for treatment and upon his release went on leave (R. 94-99).

When he returned to duty on 9 May 1944, Major Fuller questioned accused about the contribution fund and he replied that he had sent his personal check to the beneficiary of Cadet Rouner. When informed the check had not been received, he wired his bank at Colorado Springs for funds which he used to purchase a cashier's check for $123 at a bank in Blythe. He sent this check and a letter by registered mail to Iris Rouner, c/o Pittsburg Funeral Home, Pittsburg, California, and also mailed a letter to his Colorado bank stopping payment on the original check for $123 he claimed he dispatched in January 1944 (R. 99-101; Def. Exs. A, D, E). He admitted he had made no inquiry at the post office in Blythe to locate his original letter and check (R. 102). Until interviewed by Major Fuller accused believed that Iris Rouner had received the original check for $123 sent in January (R. 113). He sent the second check to Mrs. Rouner c/o Pittsburg Funeral Home because he did not have her address (R. 123).

Accused further testified that about 4 March 1944 he registered at the Christie Hotel and that he cashed two checks at the hotel on 14 March 1944, one for $40 and the other for $15, receiving cash in exchange therefor. On 15 March 1944 he tendered the hotel a check for $14.14 which was accepted in payment of his hotel bill. He admitted that when he left the hotel the clerk followed him out, told him he would have to hold his luggage and did so although accused did not know the reason. He did not know what balance he then had in his account at the First National Bank of Colorado Springs but believed it was sufficient to cover these checks (R. 103, 104, 118). He knew that his pay check for March 1944 had been deposited in that account and that some withdrawals had been made from the account. Sometime shortly before the first of April Lieutenant Hinkle sent a letter to accused at Palm Springs where he was a patient and thereafter accused telephoned the Christie Hotel and informed it that if the checks mentioned above were then presented for payment they would be honored. The checks were presented and were paid (R. 105).

Accused denied that he had any intention of defrauding the Christie Hotel (R. 106). He had maintained an account with the bank at Colorado Springs since June 1943, and had overdrawn it from time to time because of his careless method of keeping account of his balance. He had not regularly received statements of his account from this bank. He did not know if he ever received bank statements for January and February 1944, and did not receive statements for March and April until he wrote for them apparently from Victorville Army Air Field to which he had been assigned on 24 May 1944 pending investigation of the Rouner matter (R. 108, 117).

Accused also testified that on Saturday, 1 July 1944,he had received permission from Major Milligan to be absent from Victorville Army Air Field until 0800 on 3 July 1944 when he was to report to Captain Davidson. The reason for the absence was to permit accused to consult with his civilian counsel, Mr. Milan Medigovich, relative to the pending charges (R. 109, 115). However, accused did not see his lawyer over the week end because he was interviewing character witnesses at March Field. Accused stated he wired Mr. Medigovich on Sunday night and asked him to obtain an extension on the permission granted to him to be absent and requested Mr. Medigovich to wire a reply if such permission were not obtained (R. 110). On Tuesday, 4 July 1944, accused was at his counsel's home when the latter telephoned Captain Davidson about 1 p.m. and obtained permission for accused to be absent until Thursday noon, 6 July 1944 (R. 111) Accused stated that when he received no reply from his telegram to Mr. Medigovich he assumed an extension of time had been obtained to permit him to be absent on 3 July 1944 (R. 116, 117).

According to accused's Form 66-2 card he had received efficiency ratings during the period 26 April 1943 to 23 May 1944 as follows: 1 Superior, 1 Excellent, 2 Very Satisfactory and 1 Satisfactory (R. 103). Lieutenant Hinkle testified that accused led a quiet life while in his command, that he performed his duties well and that nothing occurred to make him doubtful of accused's honesty (R. 135). Major James F. Clausen of Victorville Army Air Field, testified that accused had been in his organization about one month, that he rated his performance of duty as excellent and would be pleased to have him continue in his command (R. 136, 137).

5. At the time accused issued the three checks to the Christie Hotel for $40, $15 and $14.14 on 14 and 15 March 1944, his bank balance was less than the amount of any one of these checks and so remained until his monthly pay check for April in the amount of $254.20 was deposited on 3 April 1944. Accused never kept any record of the condition of his account other than a list of the checks he issued from time to time against it and did not concern himself with determining the amount of his balance at the time he issued these three checks. Inasmuch as his monthly pay checks were the only funds deposited in this account from December 1943 through May 1944 (except for a deposit of $200 made in January 1944 and withdrawn the same month) and there is no evidence that any person but accused had authority to draw on this account, it is quite apparent that a simple mathematical computation would have been sufficient to apprise accused of his approximate balance from time to time. In such a situation as this, accused is charged with knowledge of the condition of his bank account as a matter of law (See 2 Bull. JAG 384-385, 22 BR 279). In addition, accused was content to issue these checks with reckless indifference as to the sufficiency of his bank balance. When accused departed from the Christie Hotel after issuing these checks, the clerk followed him to the street, informed accused that the hotel would have to detain his luggage and accused left without it. It is quite apparent from this that accused's financial transactions with the hotel had not been concluded to the satisfaction of the hotel, and that accused was aware of it. From all of these circumstances the court was warranted in concluding that accused possessed the intent to defraud at the time he issued these worthless checks (See 3 Bull. JAG 14, 26 BR 33). Subsequent repayment may be matter in mitigation but is not a defense.

From the evidence introduced under the Specification of Charge II it is clear that the classmates of deceased Cadet Rouner contributed the sum of $123 which was delivered to accused in a fiduciary capacity for transmittal to the widow of Cadet Rouner. Accused was not authorized to use this money for his own purposes. However, he promptly made personal

use of it although he claimed that within a few days thereafter he sent his personal check for $123 to Iris Rouner. As custodian of this fund, accused was legally prohibited from borrowing it. By making personal and unauthorized use thereof, even though under the guise of borrowing it with the intent that his use thereof should only be temporary, accused committed the offense of embezzlement (3 Bull. JAG 99, 189, 344).

Furthermore, the court was amply warranted in disbelieving accused's testimony that this check had been dispatched to Mrs. Rouner in January 1944. At the time he claimed to have dispatched this check the balance in his bank account was woefully insufficient to cover it. The check had not been received by her or returned to accused although several other communications from accused to Mrs. Rouner mailed in January 1944 had been promptly received by her at her home. In January accused had requested a receipt from Mrs. Rouner as to personal effects he had then delivered to her, but there is no evidence that he asked her for a receipt for the $123 or otherwise sought to determine if she had received it. It is hardly credible that accused would request a receipt for personal effects delivered to Mrs. Rouner but request none for the check for $123 or seek to examine his canceled checks to determine whether it had been received. Clearly, the record sustains the court's conclusions that accused fraudulently embezzled these funds as alleged and, accordingly, sustains the finding of guilty of the Specification of Charge II.

It is apparent from all the evidence introduced under the Specification of the Additional Charge that, although accused received permission to be absent from his station from 1 July 1944 until 0800, 3 July 1944, and possibly from 1300 on 4 July 1944 until sometime on 7 July 1944, he had no authority to be absent for the period from 0800 on 3 July 1944 to 1300 on 4 July 1944. Specific intent is not an element of the offense of absence without leave and proof of the absence alone is sufficient to establish guilt (MCM, 1928, par. 126a). Even if, as accused contended, he had wired his civilian counsel to obtain permission for his absence over that intervening period and assumed such permission had been given when he received no communication advising him otherwise, those facts would not constitute a justifiable excuse for accused's absence. The record of trial sustains the finding of guilty of the Specification of the Additional Charge.

6. Accused is 25 years of age, married and has one child, a son aged 22 months. He was born in Portland, Oregon. After graduating from high school he was employed by Tidewater-Associated Oil Company as an

office boy and later as a posting clerk. Later he was employed by the American Can Company in production. He enlisted on 3 October 1940, attended Air Corps Administrative Officer Candidate School at Miami Beach, Florida, and was commissioned a second lieutenant on 16 April 1943 and assigned to Peterson Field as personnel and statistical officer and assistant squadron adjutant; on 9 December 1943 he was assigned to the 10th Army Air Forces Flying Training Detachment, Blythe, California, as an instructor in military art. His performance ratings have been "Excellent", "Superior", "Very Satisfactory" and "Satisfactory". There is no record of punishment by court-martial or under the 104th Article of War.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. The sentence imposed is authorized upon conviction of a violation of either the 61st, 93rd or 96th Article of War.

Thomas N. Tabby, Judge Advocate.

[illegible], Judge Advocate.

William H. Gambrell, Judge Advocate.

SPJGH
CM 263656

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John D. Monjay (0-578633), 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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. As approved by the reviewing authority, the accused was found guilty of fraudulently making and uttering three checks, for which he received cash or other value in the amount of $69.14, without having sufficient funds on deposit for payment thereof; of embezzling $123 which had been contributed by air cadets in his command and entrusted to him for transmittal to the widow of a deceased cadet, and of an absence without leave of approximately 29 hours. His reprehensible conduct in embezzling funds contributed to assist financially the widow of a deceased cadet clearly demonstrates his moral unfitness to remain an officer of the Army. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution and that the Federal Reformatory, Chillicothe, Ohio, be designated as the place of confinement.

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

Myron C. Cramer

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

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 37, 24 Jan 1945)

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

SPJGK
CM 263713

11 OCT 1944

UNITED STATES	SECOND AIR FORCE
v.	Trial by G.C.M., convened at Army Air Base, Pueblo, Colorado, 17 August 1944. Dismissal, total forfeitures, and confinement for five (5) years.
Second Lieutenant JACKIE D. FREDERICK (O-752746), Air Corps.	

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, 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 Jackie D. Frederick, 215th Army Air Forces Base Unit, Combat Crew Section, did, at Pueblo Army Air Base, Pueblo, Colorado, on or about 31 July 1944, feloniously take, steal and carry away about $271.00, lawful money of the United States, the property of Second Lieutenant William L. Hulen; about $200.00, lawful money of the United States, the property of Second Lieutenant Doyle R. Smith; about $153.00, lawful money of the United States, the property of Second Lieutenant George P. McKinley; about $40.00, lawful money of the United States, the property of Second Lieutenant Lawrence E. Burton; and about $15.00, lawful money of the United States, the property of Second Lieutenant Arnold J. Rosemeyer.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of any previous conviction 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 for a period of ten (10) years. The reviewing authority approved the sentence but reduced the period of confinement to five (5) years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

The officers occupying Bachelor Officers Quarters 615, Army Air Base, Pueblo, Colorado, were required to undergo physical training between five and six o'clock on the afternoon of 31 July 1944 (R. 7). Those taking this training departed the Bachelor Officers Quarters between 5:10 and 5:20 p.m. (R. 8). They had received their regular monthly pay that day and several of them left their money in their rooms when they went out for physical training. When they returned about six o'clock they found that their money was missing. In this category were Second Lieutenants William L. Hulen, Doyle R. Smith, George P. McKinley, Lawrence E. Burton, and Arnold J. Rosemeyer, who lost respectively, $271, $200, $153, $40, and $15, or a grand total of $679 (R. 14-18).

Lieutenant Donald J. Anderton, who was also quartered in Bachelor Officers Quarters 615, testified that he was excused from physical training and that he remained in his room while the other officers were absent. He stated that his room door was open and that about 5:25 p.m. he saw the accused enter a room across the hall. The accused remained in this room a short time and then went to the next room (R. 7,8,10). Accused was not quartered in Bachelor Officers Quarters 615 (R. 7). Witness stated that he followed accused and asked him what he was doing. Accused replied that he was inspecting the Bachelor Officers Quarters for untidy rooms (R. 8). Lieutenant Anderton thereupon returned to his own room. In a few minutes the accused entered the room of the witness, introduced himself, and stated that, in addition to inspecting the Bachelor Officers Quarters he was also watching for anyone who might be stealing money from the rooms, and requested that he be called in the event any money should be found missing (R. 8). Accused gave his telephone number and wrote it on the wall (R. 11). As soon as Lieutenant Hulen and the other officers named above returned and discovered their losses, Lieutenant Anderton related to them the facts concerning the accused as above stated. Witness had not seen any person in the Bachelor Officers Quarters except accused during the absence of these officers (R.8). Second Lieutenant James N. Racz, tactical officer for the Combat Crew Section, whose duty it was to inspect barracks (R. 30) was notified by Lieutenant Anderton of the situation and of the presence of the accused in the barracks as testified to by Lieutenant Anderton. Lieutenant Racz stated that accused had not been authorized to make inspections for him, and that inquiry disclosed that he had not been working for the Bachelor Officers Quarters, the Officer of the Day, or the Provost Marshal (R. 29-30). The Provost Marshal was immediately notified of the thefts and of accused's presence and peculiar conduct in the barracks at the time of the thefts. Lieutenant Smith informed the Provost Marshal of the denominations and serial numbers of the bills which had been stolen from him, consisting of one $100 bill and two $50 bills (R. 14,16,20).

Search was immediately begun for accused and it developed that he had gone to town (R. 20). The town patrol was notified and when Captain Samuel

E. Fine, Base Provost Marshal, arrived in town, accused had been apprehended and was being detained at Military Police Headquarters. When questioned by Captain Fine as to how much money he had upon his person, accused handed over his billfold containing $105 and said, "This is all I have" (R. 21). Accused was nevertheless directed to empty his pockets. While removing some papers from a shirt pocket accused turned partly away from Captain Fine in a manner to arouse the latter's suspicion and cause him to feel of the pocket, in which was found a sheaf of bills totaling $667 (R. 22,26,27,31). As he produced this money accused said, "This belongs to my uncle" (R. 22). Among the bills thus found upon the person of accused three of them were of denominations and serial numbers corresponding to those stolen from Lieutenant Smith (R.15; Ex. 1, R. 22). The accused was placed in arrest and returned to the Base under guard.

Before beginning his return to the Base, accused wrote a note on a piece of paper supplied by Lieutenant Racz, inserted it in an envelope, sealed the envelope and addressed it to Mr. Carl Connors, who resided in Pueblo, and requested Lieutenant Racz to deliver it (R. 31-32). Instead of delivering this letter to its addressee, Lieutenant Racz delivered it to the Base S-2 officer (R. 32). The letter and envelope were identified and introduced in evidence (R. 35,36; Exs. 2,3). In this letter accused informed Mr. Connors that he was in custody under suspicion of having stolen the money in question and requested that in the event Mr. Connors were questioned that he claim ownership of the money and state that he (Connors) had obtained it in a bar in exchange for a large bill (Ex. 2). On 8 August 1944 the accused asked First Lieutenant Jack W. W. Bennett, Air Corps to testify that between five and six o'clock p.m., 31 July 1944, he (Lt. Bennett) saw a colored corporal (R. 42,43) run out of Bachelor Officers Quarters 615 with the accused in pursuit and that he saw the corporal throw something into the air which proved to be money (R. 37). Lieutenant Bennett stated that he had not seen such an occurrence and informed accused that he would not comply with his request (R. 38,39,40,42).

Over the objection of defense there was introduced in evidence a letter dated 9 August 1944, addressed to Lieutenant Bennett, signed "Jack". The letter was found in the room of Lieutenant Bennett, 13 August 1944, by Lieutenant Floyd K. Rylander, roommate of Lieutenant Bennett. It was opened by Lieutenant Rylander (with the authority of Lt. Bennett) and then delivered to the Trial Judge Advocate (R. 44,45, Ex. 6). The letter reads as follows:

"Lt. Jackie Frederick
9 Aug. 44

"Hello Jack:

I couldn't locate you today.

If I don't see you today, please come over to the Hospital tomorrow. I will be in Nut Ward to throw T.J.A. off guard until trial. So please come on over so I can talk to you. Just say, when Lt. Christanes comes to see

you what we talked about yesterday (8th). Don't let him know we fixed it up. Just say you saw me chase guy out of barracks etc., you know. I am sure I'll have a chance if you will only testify for me.

Thanks Jack.

Please get in touch with me.

a friend - Jackie."

4. For the defense.

Having been advised of his right to be sworn as a witness, to make an unsworn statement, or to remain silent, the accused elected to testify under oath. He was graduated from high school at the age of fifteen, attended an agricultural college "for a time" and after the war began completed a bookkeeping course at Brown's Business College. He joined the Air Corps 8 July 1942 and entered active status 3 February 1943 (R. 56-57). He stated that at the time of receiving his commission 21 August 1943 he was given a special award for being the best bombardier in his class; that he became an instructor for a time, and was sent to Salt Lake City, Utah, preparatory to going to a combat area, but that instructors were needed at the Army Air Base where he is presently stationed, and that he was selected and sent there because of his "high records". He reported to his present station on or about 12 February 1944. He entered Fitzsimmons General Hospital on 3 March 1944 and remained there until 5 or 6 June (R. 56-57).

With reference to his alleged offense, he stated that around 5:15 or 5:20 p.m. on 31 July 1944 while standing by the rear of his car about half a block away, he saw a white enlisted man stop in front of Bachelor Officers Quarters 615, glance in all directions, turn quickly and enter the barracks. Knowing that the enlisted man had no business in the Bachelor Officers Quarters, suspecting his purpose and being accustomed to investigating such matters, accused hurried over to and entered the Bachelor Officers Quarters to see what he was doing there (R. 58). Accused stated that he looked in several rooms without seeing the enlisted man, and that while he was so engaged, Lieutenant Anderton approached and asked him what he was doing there. Accused stated that he "didn't know what to say at first", so he replied that he was inspecting the barracks (R. 59). After Lieutenant Anderton left accused looked in one more room and then he went to Lieutenant Anderton's room, introduced himself and inquired if the lieutenant had seen anyone in the Bachelor Officers Quarters who should not be there. According to his version Lieutenant Anderton stated that he had seen someone come in a few minutes earlier, in reply to which accused requested that if anything should be "missed" to notify him as he "might be able to identify the responsible person". Accused stated that he gave his correct barracks and telephone numbers to Lieutenant Anderton and continued his search, and that as he was about to leave the

building he saw the enlisted man preparing to go out the door of the barracks. The soldier "had his hands cupped up" and as he went out accused hollered to him, but instead of stopping he ran and "threw a lot of papers in the air". Accused started in pursuit but injured his knee and had to desist (R. 60). Upon returning to where he had seen the "papers" thrown into the air, accused found and picked up the $667 in question (R. 59,60). Accused stated that he went to the mess hall to call the Officer of the Day, but that some lieutenant, whom he did not remember, told him that he (accused) had a telephone call to come to town, so he got in his car and went to town. He knew that if he went by the Provost Marshal's office to report the incident he would be delayed two or three hours. Not knowing what else to do with the money, he put it in his pocket (R. 60). Upon arriving in town he learned that his telephone call was from "Mr. Connors", whom he had known since arriving in Pueblo. (R. 60). He drove Connors to a beer parlor where they discussed some business. As he was on his way back to camp where he intended telling the Officer of the Day "what had happened", he was stopped by a member of the Military Police and taken to the Provost Marshal's downtown office. He stated that when the $667 was found in his pocket he did not know what to say because he did not know whether he could prove where he got the money, so he said it was his uncle's money (R. 61-62). "I said that until I could clarify my story" (R. 62). He admitted that he gave Lieutenant Racz the note to Connors (Ex. 2), admitted that he had asked Lieutenant Bennett to testify for him as related by Lieutenant Bennett, adding that he thought perhaps Lieutenant Bennett had seen him chasing the corporal. He also admitted authorship of Exhibit 6, and stated that he wrote the letter because everyone thought he was guilty and that he was scared. Protesting his innocence, accused stated that his father was killed when he was eight years of age; that he has money from his father's insurance and that he has $2,000 in war bonds in a bank, and that he "has no use for any more money" (R. 73). Accused further testified that he cannot be still, that he is "Just nervous and wants to be on the move".

Arthur Barrett, a 17-year old civilian, testified that he began working as a waiter at the Officers Mess on 31 July 1944, that about 5:30 p.m. of that day he looked out of a window of the mess hall and saw a man run out of Bachelor Officers Quarters 615, throw something away, and run down the street. He stated that the man was chased by a lieutenant. The lieutenant appeared to wrench his leg and was limping as he returned after pursuing the man only a short distance. Witness stated that he "got a good look at" the lieutenant's face as he walked back (R. 77) and "stooped down and picked up the money". Barrett stated that after this incident he saw accused in the mess hall under guard and recognized him as the lieutenant whom he had seen chasing the other man. Witness stated that on 9 August 1944, during the temporary absence of the guard, he asked accused "who was the guy you were chasing the other day". Thereupon accused remarked that he could use him as a witness, and proceeded to tell him about the money and the chase. Barrett later talked to accused in the hospital, at which time accused loaned him five dollars which had not been repaid at the time of the trial (R. 78,79,81).

Captain Stephen E. Kramer, Medical Corps, Chief of the Neuro-psychiatric Section of the Base Hospital, testified that accused was under his observation from 3 February to 8 March 1944 and from 10 to 17 August 1944 (R. 46). During March he sent accused to Fitzsimmons General Hospital for frostbite. At that time accused was under investigation for improper conduct. Witness, with the concurrence of the medical staff of the hospital made the diagnosis: "Constitutional psychopathic state, emotional inadequacy, emotional instability, and psychopathic personality" (R. 47-49). In Captain Cramer's opinion, accused knows the difference between right and wrong and is sane (R.47-50,55).

6. The undisputed evidence shows that $679 was stolen from Bachelor Officers Quarters 615 at the time and place alleged. A short time after the money was left in the barracks and before the thefts were discovered, the accused who lived in other quarters was observed entering some of the rooms of No. 615, and upon being questioned as to why he was there falsely stated that he was inspecting the barracks. Within a few minutes after his departure from the barracks the thefts were discovered. These facts were reported to the Officer of the Day and the Provost Marshal. A few hours thereafter the accused was taken in custody off the post and when asked how much money he had he produced $105 and said, "this is all I have". He was made to empty his pockets in which was found a "sheaf of bills" amounting in all to $667. Three of the bills (one $100 bill and two $50 bills) were of denominations and serial numbers corresponding to those stolen from Lieutenant Smith. The accused denied that he had stolen the money. He admitted that he entered Barracks No. 615 on the afternoon of 31 July as testified by Lieutenant Anderton, but stated that he did so for the purpose of watching an enlisted man whom he had seen go into the quarters. He contended that he gave chase to the enlisted man as he emerged from the quarters and that while fleeing from him the enlisted man threw these bills to the ground. Accused stated that he recovered the bills and had them in his possession when he was searched by the Provost Marshal. The fantastic and grotesque explanation of the accused was not strengthened by the incredible testimony of the waiter, Barrett, by the letter from accused to Mr.Connors asking him to claim ownership of the money, or by the letter to Lieutenant Bennett asking him to testify falsely in his behalf. In the opinion of the Board of Review the evidence of accused's guilt is overwhelming.

7. The objection of the defense to the admission in evidence of Exhibit 6 should have been sustained. This was the letter signed "Jack" and found in the room of Lieutenant Bennett. The prosecution had not established any proper foundation for the introduction of this letter. There was no proof by anyone that the letter was in the handwriting of or signed by the accused, as required by Manual for Courts-Martial 1928, paragraph 116 b. It is clear, however, that the error committed was cured and became harmless by reason of the fact that when accused testified in his own behalf, he admitted the authorship of the letter.

8. War Department records disclose that this officer is 21 years of age and unmarried. He is a high school graduate, has attended college one year, and attended a business college for 3 months. He was a sales clerk in civil life when not attending school. He entered the Air Corps as a private on 8 July 1942, began training as an Air Cadet on 2 February 1943, graduated as a bombardier and was commissioned a second lieutenant, Army of the United States, on 21 August 1943.

9. 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 and sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 93.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave) _____, Judge Advocate.

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Jackie D. Frederick (0-752746), 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. I recommend that the sentence as approved by the reviewing authority be confirmed, that the forfeitures be remitted, that the sentence as thus modified be carried into execution, and that the Federal Reformatory, El Reno, Oklahoma, 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.
Incl.1-Record of trial.
Incl.2-Drft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 656, 16 Dec 1944)

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

SPJGN
CM 263742

20 OCT 1944

UNITED STATES	)	ARMY AIR FORCES WESTERN TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Lowry Field, Denver, Colorado, 22 August 1944. Dismissal.
Second Lieutenant RICHARD C. HERRING (0-686744), Air Corps.	)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR 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: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Richard C. Herring, Air Corps, 2513th Army Air Forces Base Unit, did, at or near La Porte, Colorado, on or about 14 May 1944, wrongfully disobey Section II, Paragraph 16a, Army Air Forces Regulations number 60-16, 6 March 1944, issued by the Commanding General, Army Air Forces, in the execution of his office, reading as follows:

"16. Minimum Altitudes of Flight:

a. Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.

(b) At an altitude above the congested sections of cities, towns, or settlements to permit an emergency landing outside of such sections in the event of complete power failure.

(c) 1,000 feet above any open air assembly of persons.

(d) 500 feet above the ground elsewhere than as specified above.

(2) Within 500 feet of any obstruction to flight."

by flying a military aircraft within 500 feet of an obstruction to flight, to wit, an electric power line.

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

Specification 1: In that Second Lieutenant Richard C. Herring, Air Corps, Assigned Aloe Field, Victoria, Texas, Attached Section B, 3705th Army Air Forces Base Unit (Technical School), did, at or near La Porte, Colorado, on or about 14 May 1944, wrongfully disobey Section II, Paragraph 16a, Army Air Forces Regulation Number 60-16, 6 March 1944, issued by the Commanding General, Army Air Forces, in the execution of his office, reading as follows:

"16. Minimum Altitudes of Flight:

a. Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.

(b) At an altitude above the congested

sections of cities, towns, or settlements to permit an emergency landing outside of such sections in the event of complete power failure.

(c) 1,000 feet above any open air assembly of persons.

(d) 500 feet above the ground elsewhere than as specified above.

(2) Within 500 feet of any obstruction to flight."

by flying a military aircraft less than 1,000 feet above the house of Edward I. Herring, and buildings in the vicinity thereof, not during a takeoff or a landing.

Specification 2: In that Second Lieutenant Richard C. Herring, Air Corps, Assigned Aloe Field, Victoria, Texas, Attached Section B, 3705th Army Air Forces Base Unit (Technical School), did, at or near La Porte, Colorado, on or about 14 May 1944, wrongfully and unlawfully violate his flight plan by flying seventy five miles more or less off of the course specified in said flight plan.

The accused pleaded not guilty to the Specification of the Charge and the Charge, not guilty to Specification 1 of the Additional Charge, and guilty to Specification 2 of the Additional Charge and the Additional Charge. He was found guilty of both Charges and all Specifications thereunder. After evidence had been introduced of one previous conviction by general court-martial for violation of the flying regulations, 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 and Second Lieutenant Raymond Joseph Hill took off from Lowry Field, Colorado, on 14 May 1944 in a BT-13A military airplane (R. 10, 12-13; Pros. Exs. A, B). As they passed over Denver, Colorado, en route to Garden City, Kansas, their assigned destination, the accused, who was the pilot of the ship, suggested over the interphone that they fly "by" his parents' home in La Porte, Colorado. Since Lieutenant Hill apparently did not offer any serious objection, a detour seventy miles "north and a little west of Denver" was made (R. 7; Pros. Ex. A).

When the accused reached the immediate vicinity of "Ted's Place", a

business and residential property located on U. S. highway 287 and owned by his father, he "circled around at an altitude of 500 feet" (R. 8-9; Pros. Ex. A). For a brief moment he "got around behind the buildings" out of the line of vision of several spectators on the ground. Upon reappearing he was seen flying at a height of only about 200 feet (R. 8-9, 11, 15; Pros. Ex. A). What then occurred has been summarized by Lieutenant Hill as follows:

> "[The accused] changed the propellor pitch, let down his flaps to approximately twenty degrees and then made a slow approach and passed over his parents' house at about 50 feet indicating. The plane lost airspeed and started to mush. There was a string of electric light wires directly ahead of us. [The accused] could not pull the plane over the wires so he turned inside the wires. [Immediately before this action Lieutenant Hill opened the rear canopy]. As [the accused] turnad the plane stalled and mushed into the ground. I got out and helped [the accused] out. [He] was unconscious at the time and was badly hurt" (Pros. Ex. A).

This statement was erroneous insofar as it referred to "50 feet indicating", meaning 50 feet above sea level. Lieutenant Hill probably intended to fix the altitude with reference to the earth's surface (R. 30).

The nearest the accused came to either the building or to the power line mentioned was approximately 50 yards. The power line was about "30 or 40 feet" above the ground (R. 10-11). The point at which the accused crashed was 100 yards from the building (R. 11, 14). Mr. J. Leo Cathey who observed the accident was of the opinion that it did not occur during a take-off or landing (R. 13).

4. The accused, after being apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. The ultimate destination of the flight commenced on 14 May 1944 was Wright Field to which he had been assigned as a test pilot (R. 27). He had deviated some seventy-five miles from his "specified course" because "I never have seen my home from the air and taking off from Denver you can see Fort Collins, it doesn't look very far" (R. 19, 27). Although he had previously made some remarks to his father about "flying over home", he "didn't intend to", and his decision to make the trip was not formed until he actually was in the air (R. 27-28). At the height and the speed at which they were travelling when they began to circle the building, the opening of the canopy would cause the plane to "stall". According to him, in "instructing cadets in teaching

them chandelles lots of times the instructor will open his canopy at the top of the chandelle so the cadet will stall out so he won't think he is too good. It is a little trick the instructors pull" (R. 21). The crash had necessitated his hospitalization for two months. He had lost four front teeth, suffered a severe brain concussion, and sustained some facial scars (R. 20). As a result of the blow to his head he had only a hazy recollection of the events immediately preceding the accident (R. 20, 22-23).

Major John H. Pribble of the Medical Corps had examined the accused shortly after the crash at Fort Collins. The accused was in a state of coma and "hadn't any memory at all". In Major Pribble's opinion the result of the severe cerebral concussion suffered by the accused would in many cases be "a loss of memory for events leading up to the accident and the accident itself. It corresponds quite a great deal with people that are growing old, they can remember things years back but what they had for breakfast they often forget" (R. 24).

Mr. Edward I. Herring, the father of the accused, had "kind of * * * expected" his son. So far as Mr. Herring knew, the accused had not flown directly over the house but only to the north and south of it. Aside from a reluctance to study the boy had never been a source of any serious trouble (R. 25). His good behavior and excellent character were attested to not only by his father but by a Mr. Malcolm M. McDougall and a Mr. Thorwald H. Sackett (R. 26-27).

5. The prosecution offered the testimony of Flight Officer Joseph F. Meinsohn on rebuttal. As an expert in aviation he believed that "the opening of the rear canopy would increase the drag and airflow around the fuselage, but /he/ couldn't say it would be great enough to produce a stall unless the airplane were practically in a stalling position anyway". He defined a "stall" as "a condition resulting from loss of flying speed in aircraft and it destroys the airflow in the wings. It isn't flying, it is just falling" (R. 28). At his basic school he had been taught to take off and land with one canopy open (R. 29).

6. The Specification of the Charge alleges that the accused did, "on or about 14 May 1944, wrongfully disobey Section II, Paragraph 16a, Army Air Forces Regulations number 60-16, 6 March 1944, * * * by flying a military aircraft within 500 feet of an obstruction to flight, to wit, an electric power line". Specification 1 of the Additional Charge alleges that he did on the same day wrongfully violate the same regulation "by flying a military aircraft less than 1,000 feet above the house of Edward I. Herring, and buildings in the vicinity thereof, not during a takeoff or a landing". Specification 2 of the Additional Charge alleges that the accused did on the same day "wrongfully and unlawfully violate

his flight plan by flying seventy five miles more or less off of the course specified in said flight plan". These various acts were set forth as violations of Article of War 96.

The record clearly establishes, and the accused by his plea of guilty has admitted, that he deviated from his prescribed course of flight as charged in Specification 2. The detour was entirely unnecessary and motivated solely by a desire to see his home and to impress his parents and friends before departing for a distant assignment. Whether the trip was prearranged or begun on the spur of the moment does not affect the gravamen of the offense. In either event the accused was wrongfully disregarding his flight plan for purely personal reasons.

Paragraph 16a, Section II, Army Air Forces Regulations 60-16, 6 March 1944, reads in part as follows:

"16. Minimum Altitudes of Flight:

a. Except during take-off and landing, aircraft will not be operated:

(1) Below the following altitudes:

(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.

* * * * * *

(2) Within 500 feet of any obstruction to flight".

That the accused "made a pass of about 200 feet over his home" and came within 50 yards of a power line not more than 40 feet above the ground is undisputed. At the time he was neither engaged in taking-off or landing. The Specification of the Charge and Specification 1 of the Additional Charge have been proved beyond a reasonable doubt.

6. The accused is unmarried and about 21 years old. The records of the War Department show that he attended Colorado State College for one year; that he had enlisted service from 6 May 1942 to 28 July 1943; that he was commissioned a second lieutenant on 29 July 1943; that on 8 November 1943 he was sentenced by general court-martial to restriction and to forfeitures for flying above a building at an altitude of only 400 feet in violation of the Army Air Forces Regulations; and that since 29 July 1943 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.

Robert H. Lamon, Judge Advocate.

Fabian H. Goldman, Judge Advocate.

SPJGN
CM 263742

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Richard C. Herring (0-686744), 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. Consideration has been given to the attached letters from the Honorable Lister Hill, the Honorable Edwin C. Johnson, and the Honorable Claude Pepper, members of the United States Senate.

4. Inclosed are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, 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 - Dft. of ltr. for sig. Sec. of War.
Incl 3 - Form of action.
Incl 4 - Ltr. from Hon. Lister Hill.
Incl 5 - Ltr. from Hon. Edwin C. Johnson.
Incl 6 - Ltr. from Hon. Claude Pepper.
Incl 7 - Memo. from Deputy Commander, Army Air Force.

(Sentence confirmed. G.C.M.O. 657, 16 Dec 1944)

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

SPJGH
CM 263787

10 OCT 1944

UNITED STATES	FIELD ARTILLERY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Fort Bragg, North Carolina, 7 September 1944. Dismissal.
First Lieutenant OKEY H. GUINN (O-1179421), Field Artillery.	

OPINION of the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, 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 First Lieutenant Okey H. Guinn, Third Field Artillery Training Regiment, Field Artillery Replacement Training Center, Fort Bragg, North Carolina, did, without proper leave, absent himself from his organization and station at Fort Bragg, North Carolina, from about 5 August 1944 to about 8 August 1944.

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

Specification: In that First Lieutenant Okey H. Guinn, * * *, did, at Fort Bragg, North Carolina, on or about 5 August 1944, knowingly and willfully misappropriate one (1) U. S. carbine, caliber .30, M 1, serial number 14129, of the value of about fifty-four dollars ($54.00), property of the United States furnished and intended for the military service thereof.

CHARGE III: Violation of the 95th 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 Charge III and its two Specifications but guilty of Charges I and II and their respective Specifications. No evidence of any previous conviction was introduced at the trial. He was sentenced "To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one (1) year". The reviewing authority approved "only so much of the sentence as provides for dismissal the service" and forwarded the record of trial for action under Article of War 48.

3. The material and relevant evidence for the prosecution pertaining to the offenses of which the accused was found guilty may be summarized as follows:

Specification, Charge I.

The commencement of the accused's absence without leave on 5 August 1944 was established by the introduction in evidence of a certified extract copy of the morning report of his organization (D-8-3, Field Artillery Replacement Training Center, Fort Bragg, North Carolina) (R. 6; Pros. Ex. 1). It was stipulated that the accused returned to military custody on 8 August 1944, when civil authorities at Newark, Ohio, delivered him to Second Lieutenant James A. Andrade of Fort Hayes, Columbus, Ohio (R. 6, 7).

Specification, Charge II.

On Saturday, 5 August 1944, at about 9:15 p.m., the accused approached Private Hector A. Dubay, a member of his battery who was working in front of the battery orderly room, and said to him, "Go get me your carbine" (R. 8.). Dubay went to the gun rack, returned with his carbine and held it at Port Arms "just like it was inspection" (R. 8, 10). The accused took the gun from Dubay's hands, whereupon Dubay said, "Sir, I need it Monday for my training". The accused replied, "I will bring it back Sunday". The carbine had a magazine in it at the time it was taken. The number on the stock of the carbine was 146. The gun was identified by Dubay (by the number on the stock and by a scratch on the weapon) and was introduced in evidence as Prosecution's Exhibit 2 (R. 9, 11). At the time the accused took the gun he appeared to Dubay to have been drinking. Dubay smelled liquor on his breath and noticed that "his talk was kind of slow" and that he was staggering a little (R. 10, 11).

Bert R. Slate, a police officer of Newark, Ohio, testified for the prosecution by deposition (Pros. Ex. 3). On the evening of 7 August 1944, he received a call to make an investigation for a prowler in or about 136 South 30th Street, Newark, Ohio. He proceeded to the building at that address and observed a 1936 Ford coupe, bearing North Carolina license No. 269-109, parked in front of the building. He heard a woman scream and he thereupon entered the building to investigate the source of the scream. His investigation took him to the apartment occupied by the accused's wife, and he found her standing in her kitchen in an excited and upset condition. He proceeded to hunt for a man and shortly thereafter observed the accused approaching the automobile, above-mentioned, carrying a .30 caliber carbine rifle. He arrested the accused and searched him and the automobile. He found on the accused a pocketbook, some money and an identification card. The automobile contained a part of a quart of whiskey, four empty beer bottles and a quantity of .30 caliber shells. The number painted on the stock of the carbine was 146. He locked the accused in the city jail and on the following day, 8 August 1944, delivered him into the custody of "Lt. Andrade".

Ralph Kerns, a police officer of Newark, Ohio, testified for the prosecution by deposition (Pros. Ex. 4). His testimony corroborated in all substantial respects the testimony of police officer Slate. The two of them went together to 136 South 30th Street on the evening of 7 August 1944, and both of them participated in the investigation made there and in the arrest of the accused.

Captain Justus N. Wells, Jr., a witness for the prosecution, testified that he was appointed investigating officer to investigate the charges in the instant case. He interviewed the accused with reference to the charges, informing him that he had the right to remain silent or to make a statement and that "anything he said could be used against him". No threats or promises were made (R. 13). The accused thereupon made and signed a written statement. Such statement was identified by the witness and was introduced in evidence, without objection, as Prosecution's Exhibit 6 (R. 14). It reads as follows:

> "Fri. eve 4 Aug I was in Sanford, N.C attending a party in a small hotel. I stayed all night, intending to get up early enough to return to camp in time for duty. However I did not awaken until 0930, too late to return to duty.
>
> "Sat. eve. I returned to my qtrs. in Ft. Bragg, changed clothes and picked up my mail. I went to the battery orderly room to see what was on the schedule for the coming week. As

I was leaving, I saw some soldiers working and asked one of them why he was working on Sat. night. He replied that his carbine had been dirty for inspection that day. I told him to go get it as I wanted to look it over. He went to his barracks, brought it to me and after inspecting it I threw it into my car for a joke. He protested but I promised him I would return it, then got in my car and drove off.

"I returned to Sanford and stayed all night. After checking out the next morning I decided to go for a ride and finally arrived in Bluefield W. Va.

"Arrived in Bluefield in the afternoon, went to a private club where I had a few drinks.

"Went on to Charleston, W.Va., stayed all night there. The next day I went on to Newark Ohio, intending to try to see my wife about the divorce case coming up. I did not succeed in seeing her that night, the city police arrested me as a prowler in front of her home before I could talk to her. However, she did call at the jail to see me the next day.

"The statements of the police that I was carrying a carbine on returning to the car are true. I had intended taking it into the house for safekeeping. The reason it was loaded was that while riding through the mountains I had taken a shot at a rabbit running across the road. It automatically loaded, so I put the safety on and put it up behind the seat.

"At no time during my absence was I drunk in public."

It was stipulated that the carbine rifle, offered in evidence as Prosecution's Exhibit 2, is the property of the United States furnished or intended for the military service thereof and that it has an approximate value of $54 (R. 14).

4. Evidence for the defense:

The accused, after having his rights as a witness explained to him by the court, elected to testify under oath in his own behalf (R. 17, 18). He did not deny either the absence without leave alleged in the Specification of Charge I or the misappropriation of the carbine alleged in the Specification of Charge II. With reference to the former, he testified that on the evening of 5 August 1944, he left his station at Fort Bragg in his car, driving to Sanford, North Carolina, where he spent the night; that the next morning he started on a long drive which took him across the State of North Carolina, through the State of West Virginia, and to Newark, Ohio, arriving at the latter city on the evening of 7 August 1944; and that he was arrested by police officers in Newark, Ohio, the

same evening he arrived there and was in their custody until 8 August 1944 (R. 23-26). He made no claim that he had any authority to be absent from his station. With reference to his taking of the carbine, he testified in part, as follows (R. 23):

> "* * * As I got out there, I had noticed a lot of activity around the orderly room, didn't pay any attention to it, but when I went outside several boys were working around there, several soldiers. Being Saturday night I wondered why they were working and asked them why they were working. Extra duty. I asked one of them, 'What are you working for?' 'Extra duty'. 'What did you do?' 'My carbine was dirty.' I pointed to this one boy, I didn't know his name, and I told him to go get his carbine, I wanted to inspect it, so he ran and got it and came back. I inspected it, and as I did so I started to step towards the light, I was outside the orderly room in the door, I stepped towards the light and he started to protest I couldn't take his carbine. Well, he kept protesting; it rubbed me the wrong way; I thought, I will take it; I will show you whether I can take it or not; so I walked over and put it in my car and told him I would bring it back Sunday.
>
> "Q. At that time, Lt. Guinn, had you been drinking?
>
> "A. I had, yes.
>
> "Q. Were you drunk?
>
> "A. No, I wasn't drunk."

By way of mitigation, but not as a defense to either of the offenses of which he was convicted, the accused testified at considerable length regarding his domestic troubles. He was married 1 December 1939. Up until the time he was inducted into the Army in July 1942 he experienced no marital difficulties (R. 18). In the spring of 1943, however, upon making a trip home he found that "things were not like they ought to be". He and his wife "had a frank discussion" and she said she did not want to live with him any more (R. 19). In July 1943 she wrote him that she had met another man and "was very much in love with him" (R. 19; Def. Ex. A). In August 1943 she wrote him that she had changed her mind, and he sent her money to pay her transportation to Fort Bragg. She came and stayed two days (R. 20). She then returned to her job in Newark, Ohio, and it was arranged that she would return to Fort Bragg later (R. 20). In September he went home on a leave and found that things "didn't turn out exactly as we had talked it over down here" and that "the situation was back just about where it was when she wrote this letter" (R. 21). Subsequently, in the spring of 1944, he went to visit his mother in Parkersburg, West Virginia, and, while there, ran across "an old girl friend". He started

corresponding with this girl, and, upon his invitation, she came to visit him at Fort Bragg in June. They agreed then to get married as soon as he could get a divorce. He consulted a lawyer in Fayetteville, North Carolina, who indicated that he could obtain a divorce by September. He thereupon made arrangements to obtain possession of a house for occupancy in September, expecting to be married at that time (R. 21-22). Then, on 4 August 1944, his lawyer advised him that he had received a letter from the lawyer representing the accused's wife in which it was stated that unless the accused paid certain bills incurred by his wife the divorce would be contested. Accused's lawyer further advised him that this development might delay the divorce case until another term of court (R. 22, 23). Accused became very upset and drank heavily on the evening of 4 August, and again on the evening of 5 August (R. 23). On his motor trip to Newark, Ohio, covering 6 August and 7 August he continued to drink heavily (R. 23, 24). Between Bluefield, West Virginia, and Charleston, West Virginia, on the afternoon of 6 August, he stopped at a roadside park to relieve himself. Upon returning to the car he looked behind the seat "for a bottle of beer and found this carbine". His testimony then continues (R. 24):

> "* * * That is the first I recall of the carbine since the night before. Well, I fished around further and found this amunition which I carried around in the car for some time. I loaded up and walked down the road a piece and sure enough I did see a rabbit running down the road. I took a shot at him but missed it. Well, the carbine loads itself automatically, and I locked it and put it back in the car and drove on."

When he reached Newark, Ohio, he parked in front of the apartment house in which his wife lived. The apartment was dark and the front door was locked. He assumed that his wife had not gotten home from work, and he decided to enter by the back door and wait for her. The back door was unlocked, and he pushed the door open and was feeling for the switch to turn on the light when "I heard this awful scream" (R. 24). When asked why he took the carbine in the building with him, he replied that his object was "safekeeping, for one thing" and then too that it "isn't any too good neighborhood" (R. 25). His purpose in making the trip was to talk to his wife further about a divorce and to pay the bills which she wanted paid (R. 26, 27). He stopped en route at Parkersburg, West Virginia, and cashed a check for $250, so as to provide himself with the necessary money to pay the bills. The canceled check was introduced in evidence as Defense's Exhibit B (R. 26). The proceeds of the check were more than sufficient to pay the bills, which, as it turned out, amounted to $68 (R. 27). The accused also testified that at the time he made this trip

he owned a .45 caliber Colt automatic pistol and that he had ammunition for it. The pistol was introduced in evidence as Defense's Exhibit C (R. 28). Defense counsel explained that the purpose of introducing the pistol in evidence was to rebut any possible inference that the accused took the rifle "with some intention of using it" (R. 28).

The accused's testimony regarding the advice given him by his lawyer (R. Glenn Cobb, Esq., of Fayetteville, North Carolina) was corroborated by the lawyer himself (R. 16-17).

First Lieutenant William J. Carey, a witness for the defense and a member of accused's battery, testified that the accused's reputation for character and integrity is the highest, that his industry "is tops" and that he is an "exemplary officer" and a model for other junior officers. He also testified that he had arranged to turn his house over to the accused in September (R. 31).

Captain A. Gordon Tunstall, a witness for the defense and the commander of accused's battery, testified with respect to the accused as follows (R. 32):

> "He is the most sincere officer that ever served with me or under my command at any time. Whenever I was taking a leave he was always my second in command. He did a superior job."

Major Roland E. Pomeroy, a witness for the defense and the executive officer of accused's battalion, testified with respect to the accused as follows (R. 33):

> "* * * I consider him one of the best officers in the battalion. * * * Lt. Guinn always impressed me as, well, you might say the workhorse of the battalion. You could depend on him for taking over any assignment."

Major Jack C. Land and Captain Virgil T. Sewell, witnesses for the defense, testified with respect to accused's character and efficiency in similar laudatory terms (R. 34-36).

5. The accused's guilt of the AWOL offense alleged in the Specification of Charge I is impliedly admitted in the accused's own testimony, and is conclusively established by the evidence introduced by the prosecution. That the accused was absent from his organization and station during the time alleged (from 5 August 1944 until 8 August 1944) is freely admitted by the accused.

6. Each element of the offense alleged in the Specification of Charge II is fully established by the evidence.

a. The taking and carrying away of the carbine by the accused, under circumstances showing that in so doing he was acting without authority, is disclosed in testimony of the accused himself.

b. That the carbine was property of the United States, furnished or intended for the military service thereof, is proved by stipulation (Pros. Ex. 2).

c. Similarly, the value of the carbine, in the amount alleged, is proved by stipulation (Pros. Ex. 2).

d. The fact the carbine was knowingly and willfully taken is fully evident from the story related on the stand by the accused.

Under the charge that the accused did "misappropriate" the carbine, it was unnecessary to show that the accused intended permanently to deprive the United States of the use of it. "Misappropriating means devoting to an unauthorized purpose" (3 Bull. JAG 236; CM 243287, 27 BR 321). In the case cited, the Board of Review further held that, to establish the offense of misappropriating Government property in violation of Article of War 94, it is unnecessary to show that the accused had any rightful supervision, control or custody over the property misappropriated.

7. The court sentenced the accused "to be dishonorably discharged the service" and to total forfeitures and confinement. The inartful words "dishonorably discharged", as applied to a commissioned officer, had the same legal effect as if the word "dismissed" had been used.

"* * * The sentence to 'dishonorable discharge' was inappropriate inasmuch as accused is a commissioned officer, but the sentence is not an illegal one and the substantial rights of accused have not been prejudiced. 'Dismissal' and 'dishonorable discharge' are legal equivalents insofar as they preclude receipt of benefits under acts which are limited in their operation to cases of separation from the service under honorable conditions" (3 Bull. JAG 281; CM 249921).

8. There is attached to the record of trial a clemency petition signed by eight of the twelve members of the court who tried the case.

In such petition it is recommended that "the sentence in this case be suspended and that punishment in the form of reprimand, restriction or forfeiture, or a combination of them, be substituted therefor". Another member of the court (the president) signed the petition with a limiting clause, as follows: "I concur in the sentence given except possibly part giving confinement."

9. The records of the War Department show that the accused is 37 years of age and married. He was born and reared in Parkersburg, West Virginia, and is a high school graduate. He enlisted in the Army in February 1934, serving in the 10th Infantry until 4 April 1936, and in the 3rd Engineers, in Hawaii, from 4 April 1936 until June 1938, when he received an honorable discharge. From September 1938 until June 1942 he was employed by the U. S. Army Engineers at Huntington, West Virginia, as an inspector. He was inducted into the Army in June 1942, was commissioned a second lieutenant upon graduation from the Field Artillery Officer Candidate School in March 1943, and was promoted to first lieutenant on 28 December 1943.

10. 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 as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon either a conviction of a violation of Article of War 61 or a conviction of a violation of Article of War 94.

Thomas N. Tapley, Judge Advocate.

[illegible], Judge Advocate.

William H. Gambrell, Judge Advocate.

SPJGH
CM 263787

1st Ind.

War Department, J.A.G.O., 18 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 First Lieutenant Okey H. Guinn (O-1179421), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. In view, however, of the excellent previous record of the accused, as testified to by several officers of his battalion (including the executive officer of the battalion and the commanding officer of accused's battery), and in view of the petition for clemency, attached to the record, signed by eight of the twelve members of the court who tried the case, I recommend that the sentence, as approved by the reviewing authority, be confirmed but commuted to a reprimand and a forfeiture of $50.00 per month for three months, and that the sentence, as thus commuted, be carried into execution.

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

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 but commuted to reprimand and forfeiture of $50 per month for three months. G.C.M.O. 625, 17 Nov 1944)

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

SPJGH
CM 263858

6 OCT 1944

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Smoky Hill Army Air Field, Salina, Kansas, 6 September 1944. Dismissal and total forfeitures.
First Lieutenant CHARLES W. CHARLES (0-857828), Air Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant Charles W. Charles, 62nd Bombardment Squadron, 39th Bombardment Group, did, at Smoky Hill Army Air Field, Salina, Kansas, from on or about 1 February 1944, to about 15 August 1944, knowingly and willfully apply to his own use and benefit 300 gallons of Grade #2-114A 72 Octane gasoline, more or less, of the value of about $20.39 property of the United States furnished and intended for the Military service thereof.

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

3. Evidence for the prosecution:

On 22 August 1944, the accused was called to his station headquarters and questioned, in the presence of three officers, about the taking

of Government gasoline. Before he was questioned the 24th Article of War was read to him and he was told that he did not have to make any statement. He was further told that no promise of leniency would be made (R. 7, 8). The accused thereupon confessed that in February 1944 he learned from an enlisted man that certain 72 octane gasoline, usable in automobiles, was stored in Government drums located behind Building No. 350 at his station, Smoky Hill Army Air Field, Salina, Kansas, and that upon acquiring such information he obtained from the oil shed of the 877th Squadron several five-gallon cans, which he kept in the trunk of his car. Using these cans he withdrew from these Government drums and placed in his own private automobile, over the period from February 1944 until 22 August 1944, "approximately 300 to 350 gallons of gasoline" for his own "personal use". On "four or five" occasions these illegal withdrawals of Government gasoline were made with the assistance of an enlisted man. The balance of the withdrawals was made by the accused alone (Pros. Ex. 1).

Following this confession accused led the three officers to his car, which was parked near headquarters. Upon searching the car the three officers found in the trunk of the car six five-gallon cans and a funnel. Three of the cans were full of gasoline, which the accused admitted had been illegally taken from the Government drums, and three were empty (R. 10, 11; Pros. Ex. 1). The six cans and the funnel were identified and introduced in evidence collectively as Prosecution's Exhibit 2. Permission was granted to withdraw this real evidence at the end of the trial upon substitution of a single photograph of the seven articles so withdrawn (R. 12).

The general supply officer at accused's station, Captain Glenn M. Wheeler, testified that his duties included the handling of contracts for the purchase of Government gasoline and that during the period from 1 February until 15 August 1944 the cost price of 300 gallons of 72 octane gasoline varied between $20.39 and $27 (R. 13, 14).

4. Evidence for the defense:

The accused, after being advised as to his rights as a witness, elected to remain silent. No witnesses were called for the defense.

5. The proof required for a conviction of the offense alleged is set out in the Manual for Courts-Martial, 1928, as follows:

> "(a) That the accused * * * applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or intended for

the military service thereof, as alleged; (c) the facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done; and (d) the value of the property, as specified." (par. 150i).

Supporting the accused's plea of guilty, the legal and competent evidence of record establishes, beyond a reasonable doubt, each element of the offense alleged.

The accused's written confession was properly admitted, it having been shown that the confession was voluntarily made and evidence touching upon the corpus delicti having been introduced (MCM, 1928, par. 114).

The gasoline, taken from the drums located in the rear of Building No. 350 at Smoky Hill Army Air Field, had an octane rating of that of Government gasoline purchased for use at this air base. The building was used by the 877th Bomb Squadron, of which accused was at the time engineering officer. Furthermore, accused admitted that the three five-gallon cans of gasoline found in his automobile had been taken from "Government supply" at Smoky Hill Army Air Field (Pros Ex. 1). Thus the court was fully justified in concluding that all of the gasoline taken was property of the United States furnished or intended for the military service thereof.

"Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended." (MCM, 1928, par. 150i).

That the gasoline was "willfully and knowingly" taken by the accused is fully established by the following statement in his confession (Pros. Ex. 1):

"I committed these acts of pilferage with the full knowledge that a penalty could be enforced, if apprehended."

The value of the stolen gasoline, in the amount alleged, is established by the testimony of the supply officer.

The court's findings of guilty are fully sustained by the record.

6. The records of the War Department show that the accused is about 26 years of age and unmarried. He was born and reared in Worcester,

Massachusetts, and graduated from the Worcester School of Technology in 1942 with a B.S. degree. He changed his name from Charles W. Osipowich to Charles W. Charles in 1942. His father and mother were born in Lithuania. The accused enlisted at Chanute Field, Illinois, 22 August 1942, as an engineering cadet. He was commissioned a second lieutenant 7 January 1943 and was promoted to first lieutenant 30 July 1943.

7. 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 is authorized upon a conviction of a violation of Article of War 94.

Thomas N. Tappy, Judge Advocate.

[illegible], Judge Advocate.

William H. Gaunbrell, Judge Advocate.

SPJGH
CM 263858

1st Ind.

War Department, J.A.G.C., 18 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 First Lieutenant Charles W. Charles (0-857828), 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. There appear to be no mitigating or extenuating circumstances. 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 for his action, and a form of Executive action designed to carry into effect the above recommendation, should such recommendation meet with approval.

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 653, 16 Dec 1944)

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

SPJGK
CM 263868

26 SEP 1944

UNITED STATES	)	UNITED STATES ARMY FORCES IN THE MIDDLE EAST
v.	)	
Private WALTER E. SAMPLE (7074321), Company C, 802nd Military Police Battalion.	)	Trial by G.C.M., convened at Camp Russell B. Huckstep, Egypt, 17 August 1944. Dishonorable discharge and confinement for two (2) years. Eastern Branch, Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, 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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Walter E. Sample, Company C, 802nd M. P. Bn, Camp Russell B. Huckstep, Egypt, did, at Cairo, Egypt, on or about 15 February 1944, wrongfully and knowingly sell to one Roufail Boutros, Metro Pharmacy, Cairo, Egypt, two (2) Eversharp fountain pens and three (3) Electrolite cigarette lighters in violation of a standing order contained in USAFIME Circular #55, Section II, Paragraph 5, dated 30th September 1943, to the prejudice of good order and military discipline.

Specification 2: This Specification is identical with Specification 1, except that the items sold are described as "twenty (20) Electrolite lighters" and the date of sale, "on or about 18 February 1944".

Specification 3: This Specification is identical with Specification 1, except that the items sold are described as "two (2) jackets and two (2) pair of sun glasses" and the date of sale "on or about 22 February 1944".

Specification 4: In that Private Walter E. Sample * * *, did at Cairo, Egypt, on or about 15 February 1944, wrongfully sell to

Roufail Boutros, Metro Pharmacy, Cairo, Egypt, two (2) Eversharp fountain pens and three (3) Electrolite cigarette lighters, which were imported from United States, thereby violating Egyptian Customs Regulations by evading the payment of the required import duty, said conduct being of such a nature as to bring discredit upon the military service.

Specification 5: This Specification is identical with Specification 4, except that the items sold are described as "twenty (20) Electrolite cigarette lighters" and the date of sale, "on or about 18 February 1944".

Specification 6: (Disapproved by the reviewing authority).

He pleaded not guilty to and was found guilty of the Charge and all of its Specifications. Evidence of three previous convictions by special court-martial, one for willful disobedience of a lawful command in violation of Article of War 64, another for absence without leave for 9-1/2 hours in violation of Article of War 61, and a third for stealing two officers' khaki shirts, in violation of Article of War 94 (sic), was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for two years. The reviewing authority disapproved the finding of guilty of Specification 6 of the Charge, approved the sentence, designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Summary of evidence.

a. Specifications 1, 2 and 3 of the Charge.

During February 1944 accused, a private in Company C, 802nd Military Police Battalion, Camp Russell B. Huckstep, Egypt (R. 6), sold to one Roufail Boutros, a pharmacist in Cairo, Egypt, twenty-three Electrolite (Lektrolite) cigarette lighters, two Eversharp fountain pens, two pairs of sun glasses and two jackets. The lighters were sold in two lots, one of three and the other of twenty, on separate days. While it is impossible to determine from the record the number of occasions on which sales were made by accused to the pharmacist, the latter's testimony is, in effect, that the sales of the pens, glasses and jackets were not commingled, the sale of each group being an independent transaction (R. 7-10). The lighters were contained in boxes marked "overseas Package". Such lighters were manufactured for sale to the Army, but were not issued. They were "made available through the QM for sale by the Post Exchanges", and were on sale in the post exchanges of the Middle East Theater prior to February 1944.

As these lighters arrived from the states they were placed on sale "on an honor system of one lighter per man" but they were not rationed and there was nothing, other than an individual's "honesty" to prevent his purchasing a larger quantity. Prior to February 1944, the exchanges likewise sold Eversharp fountain pens, Compton sun or eye glasses and leather jackets, similar to those sold by accused to the pharmacist. The jackets sold by the exchanges were procured "from QM through Project 19, a civilian project in Africa at that time". There was nothing on the jackets sold by accused to indicate that they were the "property of the QM or the US. Government" (R. 15-16; Pros. Ex.1).

Paragraph 5, Section I of Circular No. 55, Headquarters, United States Army Forces in the Middle East, Cairo, Egypt, 30 September 1943, provides as follows:

> "Items sold in Army Exchanges may not be resold or given away for purposes of resale. Violations of these instructions will be cause for disciplinary action and loss of future authorization to make purchases of Army Exchange items" (R. 6).

b. Specifications 4 and 5 of the Charge.

Over the protest of the defense that the law itself was the best evidence, Mohamed Wasif, Assistant Secretary of Customs at Cairo, Egypt, testified to the provisions of and interpreted the Egyptian customs laws, based on his experience in their administration for a period of eight years. There is a duty on electric lighters and fountain pens imported into Egypt. There is also an excise tax, in the "nature of a consumption tax", imposable on electric lighters imported into or manufactured in Egypt, but such a tax is not an import tax. There is a fine assessable if "smuggled" goods are resold. It is not an offense for one, not a merchant, to sell an imported fountain pen on which the duty has not been paid. The sale of two pens under similar conditions would present a question "to be considered by the customs" (R.17-19). In the examination of Major Lorenzo M. Hinshaw, Post Exchange Officer, MESC, the following testimony, relative to import duties as applied to post exchanges, was adduced:

> "Q. These articles that are sold by the Post Exchanges, how much custom do you pay the Egyptian Government?
> A. None whatsoever.
>
> Q. What are the customs paid by you when the goods are imported?
> A. None."

After an explanation of his rights, accused elected to remain silent and offered no testimony.

4. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence. It is well established that all elements of an offense may be proved by circumstantial evidence. It is equally well established that while absolute certainty is not essential, circumstantial evidence creating a mere conjecture or a mere probability of guilt is not sufficient. The guilt of an accused must be founded upon evidence, which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except that of a defendant's guilt. The circumstances must not only be consistent with guilt but inconsistent with innocence (16 C.J. 766, CM 233766, Nicholl, CM 238435, Rideau). There is no direct proof that accused acquired the articles which he disposed of from or through an Army Exchange nor that they were sold in or through an Army Exchange. Equally there is a lack of proof to establish that they could have been procured only through an Army Exchange. The pens and sun-glasses were of a standard make, the jackets were of a type that were manufactured in Africa, and the lighters, although of the type that were made available to the Army Exchanges through the Quartermaster Department, may have been acquired from any one of several sources. For example, it is a well known fact that many articles, manufactured for the Army, are disposed of to friendly nations through the Lend-Lease system, and that in turn some of them are offered for sale to American soldiers through the exchanges of these nations. In the Middle Eastern Theatre, where there is a large British contingent, it is most likely that American soldiers acquire from the British Exchanges some of the articles that were originally manufactured for the American Army. There is nothing to indicate that these lighters in "overseas packages" were sold exclusively to the Army. They may have been found in local shops or they may have been purchased by American soldiers elsewhere and through one of these sources they may have been acquired by accused. Lacking, as they do, any characteristics or markings peculiar to articles sold exclusively to the Government or in Army Exchanges, and being unidentified with any actual sales in an Army Exchange, it cannot legally be inferred that they were "sold in" such an exchange (CM 208895,Zerkel, 9 B.R. 59, Dig. Op. JAG 1912-40,sec. 452 (10).

The degree of certainty is equally missing in connection with the proof of the offenses charged in Specifications 4 and 5. An analysis of these specifications shows that accused is charged with bringing discredit upon the military service through the wrongful sale of 23 "electric" lighters and two fountain pens, which had been imported from the United States, thereby violating Egyptian customs regulations "by evading the payment of the required import duty". Assuming that these vague specifications, which were not objected to by accused, set forth offenses, the Board of Review is of the opinion that there is not sufficient evidence to establish the violation of any Egyptian customs regulations in the manner alleged. There is a penalty for the sale of "smuggled" goods, but based on the testimony of Mohamed Wasif this applies where there is a sale of goods improperly brought into Egypt without the payment of the import tax or duty. There is no direct testimony

by this witness, by whom alone the prosecution sought to establish the applicable regulations, that the resale of goods, properly admitted duty free, constitutes an offense, and, in the absence from the record of a copy of the regulations, neither the court nor this Board has the right to draw any inference as to their contents or meaning. While it may be inferred that the lighters were imported from the United States and even possibly the pens, since they bore a well-known American mark, there is absolutely no proof that they were illegally imported into Egypt or, if they were imported, that the customs duties were not paid. Lacking such proof as well as any proof from which an inference of guilt might properly be inferred, the court was not justified in concluding that these articles were smuggled into Egypt and that their sale by accused constituted a violation of Egyptian customs regulations "by evading the payment of the required import duty".

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

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., 4 - OCT 1944

TO: Commanding General,
United States Army Forces in the Middle East,
APO 616, c/o Postmaster,
New York, New York.

1. In the case of Private Walter E. Sample (7074321), Company C, 802nd Military Police Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, which holding is hereby approved. For the reasons stated in the holding by the Board of Review I recommend that the findings of guilty and the sentence be vacated.

2. Under the provisions of Article of War 50½, the record of trial is transmitted for vacation of the sentence in accordance with the foregoing holding and for a rehearing or such other action as you may deem proper.

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 263868).

Myron C. Cramer

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
Washington, D.C.

SPJGK
CM 263892

3 NOV 1944

UNITED STATES	ESPIRITU SANTO ISLAND COMMAND
v.	Trial by G.C.M., convened at APO 932, 3 and 4 August 1944. Dishonorable discharge and confinement for life. Penitentiary.
Private HENRY ASHLEY (34167671), 4077th Quartermaster Service Company.	

REVIEW by the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, 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 Henry Ashley, 4077th Quartermaster Service Company, did, at APO 932, on or about 4 July 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Maceo C. Henderson, 4077th Quartermaster Service Company, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and the Specification. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that the accused was in the military service of the United States at the time he is alleged to have committed the offense with which he is charged (R. 5). On the evening of 4 July 1944, about 1845 hours, there was a poker game in progress in Hut No. 7, which is located in the 4077th Quartermaster Service Company area, APO 932. There were several soldiers present including Staff Sergeants Walter W. Ware and Robert G. Buffington and Privates Odell Burton, Herman W. Jones, Sullivan W. Walker, and deceased (R. 13,16,22,23,24,30,34). At

approximately 1900 hours the accused entered the back door of the hut carrying a 1903 rifle on his shoulder (R. 13,16,22,25,30,34,56). The accused at the time was "intoxicated" and staggered but, in the opinion of several soldiers present, he was not drunk. The varying descriptions of accused's actions and of his condition as to sobriety are substantially as follows:

"As he entered the door he staggered in a sort of intoxicated way * * *" (R. 13). "In my opinion the accused had been drinking" (R. 15). He talked in "a normal tone". His gestures were "jerky" (R. 16). "He was intoxicated. I would not say he was dead drunk" (R. 17). "He didn't seem to be necessarily drunk but he had quite a bit to drink". "His speech was kind of flat. He didn't speak clearly". "He weaves a little bit" (R.25). "He wasn't drunk". "He was loaded but not unconscious" (R. 26). "He had been drinking" (R. 32). "* * * I knew he had some". "* * * I could smell liquor on his breath", but he was not "staggering" (R. 36). The accused walked past the bed where the soldiers were playing poker (R. 22). One of the soldiers asked accused where he was going with the rifle and he replied, "I am going to blow the lights out". Sergeant Buffington told accused to go to bed. Accused started toward the door, turned around and said, "Who don't believe I will blow those lights out?" (R. 13). The deceased said to accused, "Why don't you put down the rifle? Don't you know that you are going to get yourself in a lot of trouble?" Immediately following the foregoing remark deceased got up and started toward accused (R. 22). Accused said to deceased, "Don't come on me, because I will shoot you". Deceased continued toward accused and accused began working the bolt of his rifle. In working the bolt a cartridge fell upon the floor. Deceased struggled with accused over the rifle and the cartridge (R. 13,18, 22,30,57). During the struggle accused picked up the cartridge and put it in his pocket (R. 22,25,57,63). However, there is testimony to the effect that deceased picked up the cartridge (R. 13,18,89). During the struggle the sun helmets that accused and deceased were wearing fell to the floor. The difference in the two hats was that one was slightly dirtier than the other and accused wore his with the strap under the chin. Deceased took the rifle away from the accused and returned to the bed. Deceased, in the exchange of hats after the struggle put accused's hat on his head. Accused looked at deceased's hat that he had obtained in the exchange, then went over to deceased and asked for his own hat which deceased gave him (R. 13, 16,19,30,32,57,88,89). At this point Sergeant Ware left the hut (R. 13). The accused asked deceased several times to give him his rifle which deceased refused to do, saying to accused, "No, I am not going to give you your rifle because this rifle is going to get you in a whole lot of trouble". At the suggestion of the other soldiers present, deceased took the bolt from the rifle and returned the rifle to accused. Accused then demanded the bolt, saying, "Henderson, give me my bolt". He continued his demand for the bolt but deceased refused to return it. Accused then said words to the effect, "that he could find another gun or there were other guns * * *", "You will give it to me because I am going back to get another one".

Accused then left the hut (R. 13,22,23,31,57,63,90). Sergeant Ware, who left during the discussion over the hats, returned after a lapse of 15 minutes and the poker game was still going on. About 15 minutes after Sergeant Ware returned, accused appeared at the front door of Hut No. 7 with a rifle. He opened the front door and pointed the rifle into the hut, "waving it in a sort of wild manner" (R. 13,14). Whether it was the same rifle that accused formerly had is not revealed. Accused demanded his bolt saying, "Henderson, give me my bolt" (R. 34). Deceased was sitting at the poker game with his back to the door (R. 19). Deceased refused to give accused the bolt and accused backed up. Deceased then got up and walked over toward the door and threw the bolt out the door (R. 24,27,34,58). The accused was "holding the rifle as you would a machine gun" (R. 23). As deceased approached the accused, accused "told Private Henderson don't come on him". Deceased replied, "You are not going to shoot me" (R. 14). Deceased said he was not afraid of the accused and was going to take the rifle from him (R. 58). At this point Sergeants Buffington and Ware and Private Burton left the hut by the rear door (R. 24). Deceased went out of the front door and accused continued to back up, walking backward toward the mess hall (R. 58,59). Deceased was not armed (R. 57,58,65). At this point, Private Lucas approached Hut No. 7 and saw the accused (R. 29). He saw that accused had a rifle in his hand and spoke to him. Accused replied by saying, "Is that you, Lucas?". Private Walker was at the front door (R. 28). Private Lucas and Private Walker then entered the front door of the hut and went right on through, coming out the back door, as they anticipated trouble. Lucas turned right and started up the path to Hut No. 6 (Pros. Ex. 1). Walker turned left (R. 28,58). Upon arriving at Hut No. 6, Lucas heard a shot fired (R. 28). Walker stopped at a point to the rear of Hut No. 7 (R. 59, Pros. Ex. 1). It was a bright moonlight night and the visibility was good (R. 59,60,70). Private Walker witnessed the following from the point at which he had stopped in the rear of Hut No. 7: Deceased was near the concrete block (R. 59, Pros. Ex. 1). Accused was walking backward going in a southwesterly direction toward a group of trees (Pros. Ex.1). He was holding his rifle "straight out from his body", and was facing deceased who was advancing upon him as he backed away. Accused said to deceased, "Don't come on me". Deceased continued walking toward accused (R. 59,60). Deceased was unarmed (R. 58,65). When deceased reached the "concrete block" accused "opened fire". Accused was at this point by the group of trees (Pros. Ex. 1) some 50 or 60 feet from deceased. Accused and deceased were facing each other when the shot was fired (R. 59,60). Immediately prior to firing the shot accused said, "Don't come on me, because if you do, I am going to shoot you" (R. 59). One shot was fired by the accused. Deceased "spinned" around twice to his left, fell to the ground and started calling for help. Walker started over to deceased after he fell and accused said to Walker, "Who is there?", to which Walker replied, "Kingfish". The accused then laid his rifle by the tree (R. 60, Pros. Ex.1). Accused went to where deceased was lying on the ground and kneeling down on his right knee "over" deceased said, "You see, you made me do it. I told you not to come on me" (R. 60). Accused then started off in a northeasterly direction toward the road shown at the foot of drawing (R. 60, Pros. Ex.1).

Several witnesses saw accused in the area immediately after the shooting (R. 26). In leaving the scene of the shooting, accused said, "The son of a bitch. I told him to go back" (R. 40,42). There is also testimony to the effect that accused leaned down by deceased after the shooting and called him by name, "Arkansas" (R. 40), and also that accused said, "I am sorry for what I done" (R. 35). Immediately after the shooting and while deceased was lying on the spot where he fell he made the following statements: "These people won't do anything for me. God Damn it, I am dying" (R. 31,33,35). "Henry Ashley done shot me. He done killed me. My wife and mother ain't got nothing to worry about me" (R. 39,43,51). Deceased was taken to Base Hospital Number 2 in an ambulance (R. 55,78). On the way to the hospital Henderson said to Sergeant Rayborn, "Sergeant Rayborn, I am dying" (R. 55).

At 2002 hours, 4 July 1944, deceased was brought to Base Hospital Number 2. Lieutenant Commander John H. Crandon, Medical Corps, United States Naval Reserve, ward medical officer, examined him and found him to be in a dying condition, unconscious, frothing at the mouth, pulse cold and restless, having a through and through bullet wound of the right forearm and abdomen, going through the left back. He died at 2020 hours, 4 July 1944. Cause of death in the opinion of the physician was hemorrhage and shock as a result of the bullet wound (R. 6,7). Commander N. H. Lufkin, Medical Corps, United States Naval Reserve, performed an autopsy upon the body of the deceased on 5 July 1944. His findings were that there were bullet wounds of the abdomen and the right forearm. There was a rupture of the liver and left kidney. There were multiple wounds involving the stomach and intestines and there were hemorrhage and shock, presumably as a result of a gunshot wound (R. 8). The wound was one that was entirely consistent with the high velocity bullet of thirty caliber (R. 9). The course of the bullet was on an angle in relation to an erect position of the victim. In order for a bullet to take the course it did, the victim would have had to be leaning forward (R. 10).

4. For the defense. Commander Emory Ewing Walter, Medical Corps, United States Navy, testified that he examined the accused.

> "The nature of the examination was a complete neuropsychiatric interview and mental examination, including, also, general physical and neurological examination and laboratory procedures. My conclusion as a result of the complete examination was that the accused evidences a high grade mental defect, classed as 'moron' with a mental age of approximately eleven years and that by historical evidence, he previously had a syphilitic infection for which he has received apparently adequate treatment and now shows no physical or sereological evidence of active infection. Further, that on physical examination, he shows some evidence of early hypertensive cardio-vascular venal disease." (R.73)

On cross-examination he testified that accused knows right from wrong and can adhere to the right; that he is not insane, and that he has the mental capacity and judgment to know the purpose and dangers of a lethal weapon (R. 73).

First Lieutenant Paul B. Williams, 133rd Military Police Platoon, testified that he saw accused at 2115 hours, 4 July 1944, and in his opinion accused was "out on his feet". He was unsteady and his speech was slurred. In the opinion of the witness accused was drunk (R. 74,75).

Captain Robert E. Carey, accused's Company Commander, testified that he saw accused at about 2330 hours, 4 July 1944. Accused spoke incoherently, his eyes were glassy and he was reeling slightly. In his opinion accused was drunk. Basing his opinion on the fact that no one had mentioned to him that accused was deceitful he would say that accused's reputation for truth and veracity was good. Accused had been recently awarded the good conduct medal and was well thought of by the men in the company. Private Sullivan Walker, witness for the prosecution, does not have a good reputation for truth and veracity.

Second Lieutenant Robert Bruns, 4077th Quartermaster Service Company, testified that he saw accused at 2130 hours, 4 July 1944, and at that time, in his opinion, accused was drunk. He was staggering, reeling, and incoherent as far as his reactions were concerned (R. 78).

Private John Robertson, 4077th Quartermaster Service Company, testified that he and the accused left the company area just after noon on 4 July 1944 and went to town. They went to a wine shop. The accused was drunk when he left him at 1600 hours (R. 79).

Corporal Rudolph Sheller, 33rd Military Police Platoon, testified that he saw accused at 2130 hours, 4 July 1944, and that he was "kind of staggering", his speech was "kind of slurred", "He motioned with his hands when he talked" and his gestures were "just a little exaggerated". In his opinion accused was drunk (R. 80).

First Lieutenant Hyman Stein, 4077th Quartermaster Service Company, testified that accused has a reputation of being a peaceful and non-aggressive soldier. His reputation for truth and veracity is good. Private Sullivan Walker's reputation for truth and veracity is "Poor". He saw accused at approximately 2130 hours, 4 July 1944. Accused staggered slightly, talked incoherently and in his opinion accused was drunk. Accused spoke irrationally of someone doing the shooting while he was backing away from deceased. Private Walker made some inconsistent statements to him about the shooting (R. 81,82,83).

Technician Fifth Grade Charles J. Nicolosi, Headquarters Service Company,

testified that when he took down a statement from Private Sullivan Walker prior to trial in regard to the shooting, Walker did not say that accused said, "I am sorry I did it", but merely said, "I'm sorry" (R. 85,86).

First Lieutenant Charles W. Kurie, Ordnance Officer, Service Command, testified that whether one can see the flash of a thirty caliber cartridge fired from a thirty caliber rifle on a moonlight night would depend on the background. One can see the flash in the day time (R. 92,93).

Accused, after having been advised of his rights as a witness, elected to make an unsworn statement which was in substance as follows: He was born in Pensacola, Florida, and is 36 years of age. At the age of 17 he left school while in the 7th grade. His mother is living but his father is dead. He worked as bootblack, cement finisher, and porter in civilian life. He is married. He did not kill Private Maceo C. Henderson on 4 July 1944 (R. 86,87,88,89).

5. Demonstration at scene of shooting. At the request of the defense, the court recessed to the scene of the shooting and a demonstration was held to show the relative positions of the accused, the deceased, and certain witnesses at the time of the shooting and immediately thereafter (R. 84,85).

6. That the deceased, Private Maceo C. Henderson, came to his death on 4 July 1944 as a result of a gunshot wound from a rifle in the hands of the accused is so clearly established by the evidence as to render unnecessary any discussion upon this question. The shooting occurred after a struggle between accused and deceased in which deceased was trying to take the rifle from the accused, presumably to keep the accused from getting into trouble. After removing the bolt from the rifle the deceased returned the rifle to accused. Accused then left the building saying that he would find another gun. About 30 minutes later accused returned to the building, opened the door, pointed the rifle into the building, "waving it in a sort of wild manner", and again demanded that accused return his bolt. Deceased then threw the bolt out the door. Accused was "holding the rifle as you would a machine gun" (R. 23). The deceased was unarmed but approached accused saying that he was not afraid, and that he was going to take the rifle from accused. Accused was walking backward holding his rifle "straight out from his body" and was facing deceased who was advancing. Accused said to deceased, "Do not come on me". Deceased continued to advance. When deceased reached the concrete block about 50 to 60 feet away from accused, accused "opened fire" (R. 59,60). After the shooting accused was heard to say to deceased, "You see, you made me do it. I told you not to come on me" (R. 60), and as accused was leaving the scene of the shooting several witnesses heard him say, "The son of a bitch. I told him to go back". Thus it clearly appears that the accused shot and killed the deceased without any legal provocation or justification. A homicide under such circumstances is murder in violation of Article of War 92, unless at the time of the shooting the accused was so drunk as to have been incapable of entertaining a specific intent, thus reducing the crime to manslaughter in

violation of Article of War 93. There appears to have been no motive for accused's extreme conduct. According to the evidence he and deceased were on friendly terms. Obviously, the accused had been drinking. His condition as to sobriety is described by the witnesses as follows: "As he entered the door he staggered in a sort of intoxicated way" (R. 13). "In my opinion the accused had been drinking" (R. 15). "He was intoxicated. I would not say he was dead drunk" (R. 17). "He didn't seem to be necessarily drunk, but he had quite a bit to drink". "He was loaded but not unconscious" (R. 26). "He wasn't drunk" (R. 26). The degree of accused's intoxication was a question of fact to be determined by the court. There is a general rule of law that drunkenness is not an excuse for crime committed while in that condition. As stated in paragraph 126, Manual for Courts-Martial 1928:

> "* * * it [drunkenness] may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense".

In the instant case the court upon all the evidence was fully warranted in rejecting the theory that accused at the time of the homicide was so drunk as to have been incapable of entertaining a specific intent (CM 234838, Blizzard, 21 B.R. 183; CM 238470, Ledbetter, 24 B.R. 257).

There is substantial evidence that accused knew what he was going. For example, he and deceased were wearing sun helmets. In their struggle for the rifle a short while before the shooting their hats dropped to the floor. Deceased picked up accused's hat and placed it on his head. Accused detected the error and called it to the attention of the deceased. He knew that deceased had taken the bolt from his rifle. In his determination to regain the bolt he returned to Hut No. 7 after a lapse of 30 minutes and again demanded the rifle bolt. He was not only aware of the purpose of his return but remembered that deceased was the soldier who had offended him. He was capable of walking backward several feet while keeping deceased covered with his rifle. He was able to shoot with such accuracy as on a moonlight night to hit his victim in a vital place at a distance of 50 to 60 feet away. He was conscious of what he had done, as shown by his remark - "The son of a bitch. I told him not to come on me", and further by his statement immediately after the shooting - "I am sorry I done it" (R. 35).

Viewing the record of trial in the light of all the evidence, direct and circumstantial, the Board of Review is of the opinion that the court was fully justified in finding accused guilty of murder in violation of Article of War 92. This conclusion is supported by a chain of events and circumstances involving every element of murder.

7. The charge sheet shows that the accused is 36 years of age, and that he was inducted into the military service of the United States 9

April 1942 at Fort McClellan, Alabama.

8. The court was legally constituted and had jurisdiction over the accused 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 finding of guilty and the sentence. A sentence either of death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452,454).

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGH
CM 263918

9 OCT 1944

UNITED STATES	AGF REPLACEMENT DEPOT NO 1
v.	Trial by G.C.M., convened at Fort George G. Meade, Maryland, 12 September 1944. Dismissal.
Second Lieutenant HARRY D. STANLEY (0-1293877), Infantry.	

OPINION of the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, 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: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Harry D. Stanley, Company D, 9th Replacement Battalion, 3rd Replacement Regiment (Inf), Army Ground Forces Replacement Depot No. 1, did, at Fort George G. Meade, Maryland, on or about 1200, 20 August 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: transfer to a port of embarkation for overseas shipment, and did remain absent in desertion until he surrendered himself at Fort George G. Meade, Maryland, on or about 0530, 22 August 1944.

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

Specification: In that 2nd Lieutenant Harry D. Stanley, * * *, having been duly placed in arrest at Company D, 9th Battalion, 3rd Replacement Regiment, AGFRD #1, Fort George

G. Meade, Maryland, on or about 22 August, 1944, did at Company D, 9th Battalion, 3rd Replacement Regiment, AGFRD #1, Fort George G. Meade, Maryland, on or about 25 August, 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that 2nd Lieutenant Harry D. Stanley, * * * did without proper leave, absent himself from his organization at Company D, 9th Battalion, 3rd Replacement Regiment, AGFRD #1, Fort George G. Meade, Maryland, from about 25 August 1944 to about 29 August 1944.

He pleaded not guilty to each of the Charges and Specifications and was found not guilty of the Charge and its Specification, but guilty by exceptions and substitutions of absenting himself without leave when he knew he was about to be transferred to a port of embarkation which transfer he thereby avoided, in violation of the 96th Article of War, and guilty of all other Charges and Specifications. Evidence of one prior conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution was substantially as follows:

On 18 August 1944 accused, who was stationed at Fort George G. Meade, Maryland, requested a VOCO from his commanding officer, Captain Harold I. Feinberg, to visit Washington, D. C. (R. 6). Accused was advised that orders for his shipment overseas were expected momentarily but that a 48 hour pass would be granted with the restriction that the accused was to call company headquarters by phone during the morning and afternoon of the 19th and again during the morning of the 20th (R. 7-13). The accused was advised that there was an urgent need for officers for overseas shipment (R. 7). The company "sign-out book" records the departure of accused at 11:55 o'clock, 18 August 1944, with his Washington address given as The Ambassador Hotel (R. 12, 14). During the morning of 19 August 1944 the accused called his company headquarters, as he had been instructed to do. He was then advised that his orders had been received and that he should remain in his hotel; that he would be called by phone before noon of that day (R. 15-16). Accused was ordered to depart for a port of embarkation by orders dated 18 August 1944 (Pros. Ex. A). Later, during the morning of 19 August 1944, the accused was called by Captain Feinberg at the Ambassador Hotel, but he could not be located. Captain Feinberg

was advised the accused had signed out. An effort made during the afternoon of 19 August 1944 to locate the accused at all the hotels in Washington was unavailing. A similar effort was made on 20 August 1944, to no avail. The accused was not present with his company on 21 August 1944. The shipment, of which accused was a member, departed on 21 August 1944 (R. 8; Pros. Ex. A).

At 0800, 22 August 1944, the company commander was informed the accused had returned to his station (R. 9). The accused was then taken before the regimental executive officer who, in the temporary absence of the regimental commander, placed him in arrest in quarters. The regimental commander confirmed this action upon his return (R. 10, 17).

On 25 August 1944, the accused breached his arrest and absented himself without authority, being subsequently apprehended in Washington, D. C., 29 August 1944 (R. 9-11; Pros. Ex. D).

The accused elected to give a sworn statement to the investigating officer. In this he stated that he had been granted a 48 hour VOCO with the understanding that he would call his company headquarters during the morning of 19 August 1944 to ascertain if he were on shipment; that he duly called and was advised he was on orders, but that another call would be made informing him more in detail. He understood he was to leave for a port of embarkation for overseas shipment but did not know when his shipment was to leave. He left Washington with his fiancee for his home in Hopewell, Virginia, 19 August 1944, intending to return to Washington that afternoon. He later changed his plans when he ascertained his fiancee could made train connections at Petersburg, Virginia, for her return trip to Chicago, Illinois. He returned to Washington on the afternoon of 20 August 1944 and had a few drinks in Washington which delayed his return to his post until 0530, 22 August 1944 (Pros. Ex. E).

4. For the defense.

The accused, having had his rights as a witness explained, elected to testify under oath. He stated that though he had learned from his telephone conversation that he was on orders, he did not believe the shipment would leave until the middle of the ensuing week. He thereupon departed from Washington with his fiancee for Hopewell, Virginia, and returned to Washington at approximately 1630 the following day (R. 21), Fully realizing he was on orders and that his VOCO had expired at noon, he nevertheless remained in Washington drinking, and did not return to the depot until 0530, 22 August 1944. He had no intention of missing the shipment (R. 21, 22, 23), and expressed a desire to again serve overseas (R. 22, 24). He offered no explanation of his breach of arrest followed by an unauthorized absence from 25 August to 29 August 1944.

By stipulation it was agreed that if First Lieutenant Ernest W. Lee were present and sworn he would testify that he was with the accused in Washington on 21 August 1944, and that on several occasions the accused expressed a desire to return overseas (R. 24).

5. Competent evidence discloses that on 18 August 1944 the accused was granted a VOCO for forty-eight hours to visit Washington, D. C.; that, having knowledge he had been ordered overseas, he failed to return to his post within the forty-eight hours and did not return until approximately two days after the expiration of his leave; that the shipment, of which the accused was a member, departed prior to his return; that the accused was duly placed in arrest of quarters upon his return to station, but broke arrest 25 August 1944 and absented himself without authority from that date until he was apprehended four days later in Washington, D. C. None of these facts was denied by the accused in his own testimony.

The violations of Article of War 69 and Article of War 61 alleged in the Specifications of Additional Charge I and Additional Charge II, respectively, are clearly established and require no discussion.

The Specification of the original Charge was laid under Article of War 58. The court found the accused not guilty of a violation of Article of War 58, but guilty of the Specification, with exceptions and substitutions, in violation of Article of War 96. Giving effect to the exceptions and substitutions made by the court, the Specification reads as follows:

> Specification: In that Second Lieutenant Harry D. Stanley, Company D, 9th Replacement Battalion, 3rd Replacement Regiment (Inf), Army Ground Forces Replacement Depot No. 1, then well knowing that he had been included on orders for transfer to a port of embarkation for shipment overseas, did, on or about 1200, 20th August, 1944, absent himself without leave from his station, and did remain absent until about 0530, 22 August, 1944, which absence caused his name to be deleted from said shipment.

The court was without authority to substitute the phrases "then well knowing that he had been included on orders for transfer to a port of embarkation for shipment overseas" and "which absence caused his name to be deleted from said shipment" because they state facts which were not embraced within the allegations of the original Specification. Deleting these illegal substitutions, the remainder of the modified Specification is not sufficient to state the offense of aggravated AWOL in violation of Article of War 96, but is sufficient to state the lesser included offense of AWOL in violation of

Article of War 61. Accordingly, the Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of aggravated AWOL in violation of Article of War 96, but legally sufficient to support the lesser included offense of AWOL in violation of Article of War 61.

6. War Department records show that accused is 29 years of age. He finished three and one half years in Hopewell, Virginia, high school. From 16 June 1936 to 16 September 1942 he served in the Army as an enlisted man. On 17 September 1942 he was appointed second lieutenant, Infantry, in the Army of the United States.

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 only so much of the findings of guilty of the Charge and its Specification as involves findings of guilty of absence without leave, for the period alleged, in violation of Article of War 61, legally sufficient to support the findings of guilty of all other Charges and Specifications, legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of either Article of War 61 or Article of War 69.

Thomas N. Jaffy, Judge Advocate.

_____, Judge Advocate.

William H. Bamberger, Judge Advocate.

SPJGH
CM 263918

1st Ind.

War Department, J.A.G.O., 23 OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harry D. Stanley (0-1293877), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves findings of guilty of absence without leave, for two days, in violation of Article of War 61, legally sufficient to support the findings of guilty of all other Charges and Specifications, legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 665, 16 Dec 1944)

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

SPJGK
CM 264077

(365)

29 SEP 1944

UNITED STATES v. Second Lieutenant HERBERT M. PATTERSON (0-680936), Air Corps.	ARMY AIR FORCES EASTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Laredo Army Air Field, Laredo, Texas, 29 August 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, HEPBURN and MOYSE, 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 95th Article of War.

Specification 1: In that Second Lieutenant Herbert M. Patterson, Air Corps, 2126th Army Air Force Base Unit, Section B, Laredo Army Air Field, Laredo, Texas, did, on or about 5 August 1944, fraternize socially with Private George E. Fagan, Jr., and Private First Class Wilbur J. Hinds, enlisted men, in a public place, to wit: the Community House and the "Cross S" Hotel, in Crystal City, Texas.

Specification 2: In that Second Lieutenant Herbert M. Patterson, * * * did, on or about 8 August 1944, fraternize socially with Private George E. Fagan, Jr., and Private Bernice H. Stubbs, enlisted men, in a public place, to wit: the Club Cafe and Officer's Country Club, in Laredo, Texas.

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

Specification: In that Second Lieutenant Herbert M. Patterson, * * *, did, without proper leave, absent himself from his station at Laredo Army Air Field, Laredo, Texas, from about 5 August 1944 to about 6 August 1944.

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

Specification 1: In that Second Lieutenant Herbert M. Patterson, * * *, did, at Laredo Army Air Field, Laredo, Texas, on or about

2 August 1944, while driving an automobile, wrongfully fail to stop the said vehicle and make his identity known after colliding with another vehicle.

Specification 2: In that Second Lieutenant Herbert M. Patterson, * * *, having been restricted to the limits of his post, did, at Laredo Army Air Field, Laredo, Texas, on or about 5 August 1944, break said restriction by going to Crystal City, Texas.

Specification 3: In that Second Lieutenant Herbert M. Patterson, * * *, having been restricted to the limits of his post, did, at Laredo Army Air Field, Laredo, Texas, on or about 8 August 1944, break said restriction by going to the city of Laredo, Texas.

He pleaded guilty to all of the Charges and the Specifications except Charge I to which he pleaded not guilty of a violation of Article of War 95, but guilty of a violation of Article of War 96. He was found guilty of all of the Charges and Specifications. Evidence was introduced of a previous conviction by a general court-martial of violating flying regulations by flying a plane closer than 500 feet to another plane in violation of the 96th Article of War, for which he was sentenced to be restricted to the limits of his post and to forfeit $75 of his pay per month for three months. In the instant case he was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence but remitted the forfeitures and forwarded the record of trial for action under the provisions of Article of War 48.

3. The evidence for the prosecution showed that about 5 A.M. of 5 August 1944 the accused, a second lieutenant of the Air Corps stationed at Laredo Army Air Field, in his automobile picked up Private George E. Fagan, Jr. and Private First Class W. J. Hinds at the motor pool of the field and drove them to Laredo, Texas (R. 7,17). There they picked up an automobile tire and a quart of rum and then drove to Crystal City, Texas (R. 7,8,17). Fagan registered for a room in the only hotel in that town and the three occupied that room, the two enlisted men sleeping in one of the double beds and the accused in the other. That evening the three attended a dance given at the Community House of the town. While at the dance they did not appear together. The following morning they returned to the Field (R. 8,9,13,15,18,20).

About 3:30 A.M. of 8 August 1944 the accused in his automobile picked up Private Fagan again and drove to the Club Cafe, a public restaurant located in Laredo, Texas (R. 10). There they were joined by two other enlisted men, Privates Bernice H. Stubbs and Charles W. Skelton, and by two girls who "wandered in" (R. 11,23). It was decided that they would go for a swim in the swimming pool at the Officers' Country Club (R. 11,23,28). Outside of the

Club Cafe the accused was heard to shout to the others to meet him at the Officers' Country Club (R. 34). The accused drove the two girls and one of the enlisted men, Private Stubbs, to the Officers' Country Club, where the accused, Fagan and one of the girls went in swimming in the pool using bathing suits provided by Fagan (R. 12,24,28). It was early morning and still dark. No one else was present (R. 14,24,26).

There was admitted in evidence without objection a copy of the General Court-Martial Order No. 234, Headquarters, Army Air Forces Eastern Flying Training Command, Maxwell Field, Alabama, dated 10 June 1944 showing that the accused, stationed at Laredo Army Air Field, had been sentenced to be restricted to the limits of his post for a period of three months. The sentence was adjudged 25 May 1944 (Pros. Ex. 1). Captain John D. Lawler testified that as Post Adjutant at Laredo Army Air Field no permission to breach this restriction had been brought to his attention (R.30).

On the morning of 2 August 1944 Staff Sergeant Adrian L. Thebeau while on duty as sergeant of the guard saw an automobile similar to accused's go by the guardhouse. The location was well lighted and he identified the car as that of accused. In about 10 or 15 seconds witness heard a crash, but the passing car "kept on going". Witness immediately proceeded to the place of the crash and there found Private Austin's car sitting in front of the barracks of Section A, about three blocks from the guardhouse, with a bent left fender. Private Austin stated that when he parked his car it was not damaged in any way, but on examination the next morning he noticed that the front and rear fenders and the lower part of the door had been damaged (R. 30-33). On the following day accused told the owner of the car that he "supposed" that he was the one who had struck the car and offered to pay and did pay for the damage (R. 33). The accused also told an officer investigating the collision that he had had some sort of a crash in that vicinity at that time but that he did not know that he had struck an automobile, nevertheless he would pay for the damage (R. 34).

5. It was clearly established by the evidence introduced by the prosecution and admitted by the plea of guilty of the accused that (1) he did on the dates and at the places averred in the specifications of Charge I fraternize socially with enlisted personnel by driving them to a distant town where they attended a dance together and spent the night in the same room of the local hotel, and driving them to a public restaurant, where he became one of a group that sat around a table drinking and conversing with women, and then leading the group to the swimming pool of the Officers' Country Club and making use of the pool; (2) that he had no authority to leave his post when he drove to Crystal City and remained away for over 24 hours as averred in the specification of Charge II; (3) that at the times he left his post at Laredo Army Air Field on the occasions described he was restricted to the limits of that post by a court-martial order and therefore breached that

restriction on both occasions; (4) and that on the early morning of 2 August 1944 while driving his automobile he struck a parked automobile causing damage thereto and then drove off without stopping and making his identity known.

It follows from the above resume that the findings of guilty of each and every specification were amply supported by the evidence. The conclusion of law that the acts or conduct of the accused constituted a violation of the respective Articles of War named in the charges requires discussion.

The accused pleaded guilty to all charges and specifications except as to Charge I to which he pleaded not guilty of a violation of Article of War 95, but guilty of a violation of Article of War 96. In other words he admits the misconduct described in the specification but contends that such misconduct constitutes a violation of Article of War 96 rather than Article of War 95. In this the Board is constrained to agree with the accused. Social fraternization between officers and enlisted personnel is prohibited by military custom and not by any specific provision of the Articles of War. The basis of the custom is military discipline. It is not a question of social equality. The conduct prohibited by and contemplated in the 95th Article of War is -

> "* * * action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms. (Winthrop.)" (M.C.M., 1928, par. 151, p. 186.)

The conduct of accused in the instant case was not of such a character as to disgrace or dishonor him within the meaning of the 95th Article of War. The finding of guilty of a violation of the 95th Article of War cannot be sustained.

The conclusion that the accused's absence without leave violated the 61st Article of War as found in Charge II and that his breach of restriction, which is in reality a failure to obey an order, is a violation of the 96th Article of War requires no comment.

The offense described in Specification 1 of Charge III of wrongfully failing to stop and make known his identity after colliding with another motor vehicle has been held to be a violation of the 96th Article of War in CM 221686, Hicks (13 B.R. 228):

> "Although the offense of leaving the scene of an automobile accident without attempting to locate the owner or to report the accident to proper authority is not specifically defined in the Manual for Courts-Martial, the 96th Article of War designates

as a military offense, 'all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service'. It seems quite clear that the conduct of an officer in leaving the scene of an accident in which his automobile has just damaged the automobile of another without attempting to locate the owner of the other car, or to report the accident to proper authority, would be a neglect to the '* * * Prejudice of good order * * *' and '* * * conduct of a nature to bring discredit upon the military service'."

6. War Department records show the accused to be 28 years of age, having been born in Fort Worth, Texas, on 14 December 1916. He is divorced. He attended high school for three years but did not graduate. As an enlisted man he served in the National Guard of Texas from 1 April 1934 to 17 June 1942. On 17 September 1942 he became an aviation cadet and upon completion of his training as a fighter pilot on 24 May 1943 he was commissioned Second Lieutenant, Air Corps.

7. The court was legally constituted and had jurisdiction over the accused 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 only so much of the finding of guilty of Charge I and the specifications thereunder as involves a finding of guilty thereof in violation of Article of War 96, legally sufficient to support the findings of guilty of the remaining charges and specifications and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61 or 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J. A.G.O., 6 - OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Herbert M. Patterson (0-680936), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and the specifications thereunder as involves a finding of guilty in violation of Article of War 96, legally sufficient to support the findings of guilty of the remaining charges and specifications and legally sufficient to support the sentence and to warrant confirmation of the sentence. The record of trial shows that accused was found guilty by general court-martial in May 1944 of violating flying regulations by which he was sentenced to forfeit $75 per month of his pay for three months and to be restricted to the limits of his post for a like period. Although the misconduct of accused constituted a serious breach of military discipline, in view of his training and skill as a pilot, I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the execution of the sentence, as thus modified, be suspended during good behavior.

3. Consideration has been given to a letter from accused to Honorable Robert P. Patterson, Under Secretary of War, dated 12 August 1944, which letter is attached to 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.

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. accused
to Under Sec. of War.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted and execution suspended. G.C.M.O. 615, 10 Nov 1944)

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

SPJGN
CM 264079

20 OCT 1944

UNITED STATES v. Second Lieutenant JAMES S. BATES (0-761542), Air Corps.	ARMY AIR FORCES WESTERN FLYING TRAINING COMMAND Trial by G.C.M., convened at Mather Field, Sacramento, California, 1, 2, 3 August 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lt. James S. Bates, AC, Section B, 3031st AAF Base Unit, Mather Field, Sacramento, California, did, at Sacramento, California, on or about 2 July 1944, wrongfully pilot a TB-25 type airplane at an altitude of about 500 feet above the terrain, in violation of paragraph 16, AAF Regulations 60-16.

Specification 2: In that 2nd Lt. James S. Bates, AC, Section B, 3031st AAF Base Unit, Mather Field, Sacramento, California, did, at Sacramento, California, on or about 3 July 1944, wrongfully pilot a TB-25 type airplane at an altitude of about 150 feet above the terrain, in violation of paragraph 16, AAF Regulations 60-16.

Specification 3: In that 2nd Lt. James S. Bates, AC, Section B, 3031st AAF Base Unit, Mather Field, Sacramento, California, did, at Sacramento, California, on or about 4 July 1944, wrongfully pilot a TB-25 type airplane at an altitude of about 150 feet above the terrain, in violation of paragraph 16, AAF Regulations 60-16.

Specification 4: (Finding of not guilty).

He pleaded guilty to Specification 1, not guilty to Specifications 2, 3 and 4, and guilty to the Charge. He was found guilty of Specifications 1, 2 and 3, not guilty of Specification 4, and guilty of the Charge. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that between 8:30 and 9:30 p.m. on 2 July 1944 a two-engined Mitchell plane was seen flying low over a residential section in the east part of Sacramento, California, near "H" and 46th Streets. Its height was estimated by a Mr. Creed H. Boucher, who lived in that vicinity, as 150 feet above ground (R. 94) and by his wife as about three telephone poles (R. 82). At about the same time on the following evening a plane of the same type flew over the same locality just clearing the telephone wires (R. 92) and rattling the upstairs windows of the Boucher house (R. 82). On this occasion the plane was also observed by a neighbor of the Bouchers' who estimated that its height was about that of three telephone poles (R. 63-64). On the third successive evening, 4 July 1944, at approximately the same hour, a plane appeared over the neighborhood at an altitude estimated by Mr. Boucher to be 200 feet (R. 93-94) and by his neighbor to be that of three or four telephone poles (R. 63-64). The telephone poles extended 43½ feet above ground (R. 96).

The evidence further discloses that the accused was an instructor at Mather Field, California, near Sacramento. On each of the dates in question at 2035 hours, he took off from Mather Field in a "TB 25" plane, on a cross-country instruction flight. The course of flight in each instance passed over the east part of Sacramento.

Two students were with the accused on the flight of 2 July 1944, one of whom stated that, a few minutes after taking off, the accused went into a shallow dive of five or six hundred feet over the eastern part of Sacramento (R. 39), while the other testified that the plane went down to 500 feet (R. 115-117). Two other students accompanying the accused on 3 July 1944 testified that the accused flew the plane over Sacramento at an altitude of 300 to 600 feet (R. 138, 199). On the flight of 4 July 1944, according to one of the officers in the plane, the accused, flying at an altitude of 500 to 550 feet over Sacramento dipped his plane some one to two hundred feet as it passed over a house with a green roof (R. 18-21).

The court took judicial notice of Paragraph 16, AAF Regulation 60-16, the pertinent provisions of which are:

> "1. Except during take-off and landing, aircraft will not be operated below the following minimum:
>
> (a) 1000 feet above any building, house, boat, vehicle or other obstruction."

4. The accused having been apprised of his rights as a witness elected to remain silent.

The evidence for the defense consisted chiefly of the testimony of three other residents in the neighborhood of "H" and 46th Streets, who had observed the aircraft on the evenings of 2, 3 and 4 July 1944. Each severally estimated the altitude as from 600 to 700 feet on 2 and 3 July 1944 (R. 224), over 500 feet or around 600 to 700 feet on 3 July and 4 July 1944 (R. 234, 237) and about 500 feet on 2 and 3 July 1944 (R. 250-251).

5. Specification 1 alleges that the accused did, at Sacramento, California, on or about 2 July 1944, wrongfully pilot a B-25 airplane at an altitude of about 500 feet above the terrain, in violation of Paragraph 16, AAF Regulations 60-16. Specifications 2 and 3 allege similar violations of the same Regulations on 3 and 4 July 1944. "Disobedience of standing orders" is violative of Article of War 96 (MCM, 1928, par. 152a).

The record clearly establishes that the accused operated a B-25 airplane over a residential section of Sacramento, California, on the dates alleged. The only conflict in the evidence is that which relates to the exact altitude under 1000 feet at which the plane was so operated, as all witnesses, both for the prosecution and for the defense, agreed that it was substantially less than 1000 feet. The operation of an airplane at <u>any</u> altitude under 1000 feet, except during take-off or landing,

under the circumstances disclosed by the record, was in violation of Paragraph 16, AAF Regulations 60-16, for it is obvious that an aircraft operated over a residential district of a populous city such as Sacramento, California, is likewise operated "above buildings and other obstructions to flight" within the intent of the regulation. The evidence, therefore, beyond a reasonable doubt supports the findings of guilty of the Charge and Specifications 1-3 thereunder.

6. The accused is 20 years of age. War Department records show that he has had enlisted service from 4 September 1942 until 5 December 1943, when he was commissioned a second lieutenant upon completion of Officers Candidate School and that he has had active duty as an officer since the latter date. He is a high school graduate and attended junior college for 1½ years. He is single and has no record of prior employment.

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 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

Robert J. Homer, Judge Advocate

Gabriel N. Golden, Judge Advocate

SPJGN
CM 264079

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James S. Bates (O-761542), 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 be confirmed but commuted to a forfeiture of pay of $75 per month for six months and that the sentence as thus modified be ordered executed.

3. Consideration has been given to a memorandum dated 25 August 1944 from Senator Tom Connally transmitting a letter from Mr. H. A. Hodges, to a letter dated 12 August 1944 from Congressman Chet Holifield transmitting a letter from Mr. C. M. Coffman, to a letter dated 18 September 1944 from the accused's mother, and to a letter dated 22 September 1944 from Congressman Milton W. West.

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

Myron C. Cramer

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

8 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. ltr. sig. Sec. of War.
Incl 3 - Form of Executive action.
Incl 4 - Memo. from Sen. Tom Connally transmitting letter from Mr. H.A. Hodges.
Incl 5 - Ltr. from Congressman Chet Holifield transmitting ltr. from Mr. C.M. Coffman.
Incl 6 - Ltr. from Mrs. Tom W. Bates, mother of accused.
Incl 7 - Ltr. from Congressman Milton W. West.
Incl 8 - Memo. from Deputy Commander, Army Air Forces.

(Sentence confirmed but commuted to forfeiture of $75 per month for six months. G.C.M.O. 623, 17 Nov 1944)

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

SPJGN
CM 264080

12 OCT 1944

UNITED STATES v. Second Lieutenant JERRY F. PEARCE (O-1018195), Adjutant General's Department.	PERSIAN GULF COMMAND Trial by G.C.M., convened at Camp Amirabad, Teheran, Iran, 29 August 1944. Dismissal.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and GOLDEN, Judge Advocates

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

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

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

Specification: In that Second Lieutenant Jerry F. Pearce, AGD, Headquarters, Persian Gulf Command, was, at Teheran, Iran, on or about 11 August 1944, found drunk while on duty as Courier Transfer Officer.

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

Specification 1: In that Second Lieutenant Jerry F. Pearce, AGD, Headquarters, Persian Gulf Command, was at Teheran, Iran, on or about 11 August 1944, in a public place, to wit, Shah Reza Avenue, Teheran, Iran, drunk and disorderly while in uniform.

Specification 2: In that Second Lieutenant Jerry F. Pearce, AGD, Headquarters, Persian Gulf Command, was, at Teheran, Iran, on or about 11 August 1944, in a public place, to wit, the Amirabad Grocery, Teheran, Iran, drunk while in uniform.

CHARGE III: (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 the Specification of Charge III and Charge III but guilty of the remaining Charges and Specifications. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that the accused on 11 August 1944 was the Courier Transfer Officer at Teheran, Iran (R. 6, 26, 29, 43-44). At about 4:00 p.m. he met Technician Fourth Grade Andrew H. Shawn, a bonded railway mail carrier, in the post office at Camp Amirabad (R. 7, 14). The accused remarked that he was about to drive in a jeep to the airport to meet a plane and "to pick up" some courier pouches. Not being on duty then, Shawn expressed a desire "to go with him" "for the ride" (R. 7, 15). The accused was agreeable, but before commencing the trip offered Shawn a drink from a bottle of vodka and had one himself (R. 8).

They reached the airport at about 5:15 p.m., fifteen minutes before the plane landed (R. 8, 14). While waiting, the accused indulged in another drink of vodka (R. 8). When the plane arrived, two courier pouches bearing numbers 43-1376 and 43-1206 were delivered to him and were at his request placed in the jeep by Shawn (R. 9, 14, 26, 29). Both contained classified material (R. 29-32, 34; Pros. Exs. 1, 2, 3).

After chatting for a moment with a man named Holly and after briefly visiting an office near the hangar, the accused reentered the car, seated himself behind the wheel, and began the return journey (R. 9-10). He soon began to show signs of "feeling sick" or "bad" (R. 10, 15). When Shawn perceived this development, he immediately requested permission to drive. The accused brought the vehicle to a halt near a railroad track and not only surrendered the wheel but also entrusted the mail and his .45 caliber, M-1 pistol to Shawn (R. 10-11). Responsibility for the two pouches was readily assumed by Shawn because he had "carried this type of mail for AACS which is really a transfer carrier officer's position" (R. 14). After exchanging seats, he and the accused recommenced the trip back to the camp (R. 10).

On the way Shawn remarked that he "had missed supper and was hungry". Since the accused also desired some food, it was agreed that they stop for "a couple of sandwiches" at the "Amirabad Grocery" (R. 17-18, 24). As they drove along Shah Reza Avenue, the accused slumped down in his seat (R. 11, 16, 17, 23). Near the Military Police station he pulled the pistol in Shawn's possession out of its holster (R. 11). Thrusting his arm "straight out" through the door, the accused waved the weapon "out the right side of the jeep" (R. 11, 17, 23, 26). Shawn immediately requested him "to hand it back". The accused complied, and the pistol was restored to its holster (R. 11).

His conduct and bearing were observed by Sergeant William Convery and Sergeant Joseph F. McGuire of the Military Police Corps (R. 17, 23). Sergeant Convery immediately notified a Sergeant Dahlstedt, who was "in charge of the town patrol" and he in turn called the guards at the main gate of the camp and instructed them to stop and hold "this particular jeep". The three sergeants then themselves proceeded to the gate. Learning that the accused had not been there as yet, they set out in search of him (R. 17).

Upon arriving at the Amirabad Grocery, Shawn parked the jeep near the door (R. 12, 17-18, 22, 24-25). The accused went inside alone and attempted to order some sandwiches and beer but he could not make himself understood. Shawn, who apparently had some knowledge of the Iranian language, stepped out of the car and explained what was wanted (R. 12, 16).

In the meantime the Military Police sergeants had traced the jeep to the Amirabad Grocery. They did not enter the establishment but, upon looking inside, they saw both the accused and Shawn. The accused was sitting, "leaning on the table and had a sandwich in his hand, in a slumped position" (R. 17-18, 20, 24-25). Shawn was standing nearby, also with a sandwich in his hand (R. 18, 20, 22).

Convery called Shawn outside and engaged him in conversation for about fifteen or twenty minutes (R. 18, 20-22, 24-25). Sometime during that period the accused fell to the floor (R. 20). He was then in uniform and wore the insignia of a second lieutenant (R. 19). Shawn and a British soldier brought him to his feet and helped him walk to the jeep (R. 13, 18). His gait was unsteady, his breath smelled strongly of alcohol, and he was in "no condition to walk by himself" (R. 19-20, 27). Immediately after being seated in the jeep, he was driven to the military police station. When seen there by First Lieutenant Olin S. Walrath, the Officer of the Day, he was "in a state of unconsciousness" (R. 27). In the opinion of Convery and Walrath he was drunk (R. 19, 27-28). Both courier pouches were turned over by Walrath to Major R. O. Estes, the Postal Officer (R. 28-29). Upon their removal a bottle of vodka "about one-sixth full" was found in the jeep (R. 28).

4. The accused, after being apprised of his rights relative to testifying or remaining silent, took the stand on his own behalf. Early in the afternoon of 11 August 1944 he had delivered a pouch to the Brazilian Embassy in Teheran. He had there been offered a drink, and he had accepted (R. 40). When later he received the two pouches at the airport, he believed himself to be sober (R. 39). After that first drink at the Brazilian Embassy, however, he had consumed almost five-sixths of the bottle of vodka (R. 40). At the Amirabad Grocery he was "under the influence of intoxicants" while in uniform (R. 41). He did not remember arriving, staying at that place of business, or leaving it; nor did he recall when he "passed out" (R. 41).

Sergeant Shawn, as a witness for the defense, stated that during the two months of their acquaintance he had not only never seen the accused drinking while on duty or drunk at any time but had found him to be "very efficient" and "very friendly and nice" with both officers and enlisted men. It was stipulated "by and between the accused, his counsel and the prosecution" that, among other things, the accused "at the time /he/ received these two sacks and receipted for them . . . did not appear to have been drinking or to have been in a condition which would have rendered him unable to perform his duties satisfactorily" (R. 37).

5. The Specification of Charge I alleges that the accused was, "on or about 11 August 1944, found drunk while on duty as Courier Transfer Officer". This offense was laid under Article of War 85. Specification 1 of Charge II alleges that the accused was on the same day, "in a public place, to wit, Shah Reza Avenue, Teheran, Iran, drunk and disorderly while in uniform". Specification 2 of Charge II alleges that the accused was on the same day, "in a public place, to wit, the Amirabad Grocery, Teheran, Iran, drunk while in uniform". These acts were set forth as violations of Article of War 95.

Between about 3:00 p.m. and 5:30 p.m. on 11 August 1944 the accused consumed one drink of an unknown nature at the Brazilian Embassy and almost five-sixths of a bottle of vodka of undisclosed size. The natural consequence was, by his own admission, a condition of intoxication. His waving of a pistol from the door of the jeep, his fall to the floor of the Amirabad Grocery, his inability to walk without assistance, and his strong alcoholic breath all bespeak complete and unmistakable drunkenness. Since he was then on duty as a courier transfer officer, he committed a clear violation of Article of War 85 as represented in the Specification of Charge I.

Shah Reza Avenue was a public thoroughfare and as such "a public place". The Amirabad Grocery, being open to all who could pay for its wares, also definitely fell within the purview of that phrase. Since the accused, while driving along the one and while eating in the other, wore the attire and insignia of an officer, he was manifestly guilty of being drunk while in uniform in a public place as alleged in the two Specifications under Charge II. Whether he was also disorderly during the ride along Shah Reza Avenue as set forth in Specification 1 of Charge II poses a more difficult problem.

Brandishing or firing a pistol in a threatening manner in a public place to the terror of the onlookers would of course constitute a breach of the peace. Several of these elements are absent in the instant case. True, the accused did wave a pistol outside the door of his jeep, but he did not pull the trigger and there is absolutely no evidence tending to indicate that anyone was in the line of potential fire or considered himself menaced in any way. When Sergeant Shawn requested that the weapon be returned, the accused forthwith surrendered it without argument or show of resistance.

Under the circumstances it must be concluded that the accused's conduct, though induced by drunkenness, was not disorderly. The record accordingly is legally sufficient to sustain only so much of the finding of guilty of Specification 1 of Charge II as involves a finding of being drunk in a public place while in uniform.

6. The accused is married and about 30 years old. The records of the War Department show that he attended Murray A & M for two years and Southeastern State College for one year but was not graduated; that from January of 1935 to November of 1942 he was employed as a post office clerk in Durant, Oklahoma; that after enlisting on 29 October 1942 as a volunteer officer candidate, he had enlisted service until 14 May 1943; that on 15 May 1943 he was commissioned a second lieutenant; and that since that date he has been on active duty as an officer.

6. The court was legally constituted. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge II as involves a finding of being drunk in a public place while in uniform, and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory in time of war upon conviction of a violation of Article of War 85 and is mandatory at all times upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Robert J. Clannon, Judge Advocate.

Gabriel H. Golden, Judge Advocate.

(382)

SPJGN
CM 264080

1st Ind.

War Department, J.A.G.O., 19 OCT 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Jerry F. Pearce (0-1018195), Adjutant General's Department.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge II alleging drunk and disorderly conduct as involves a finding of being drunk in a public place while in uniform, and legally sufficient to support all of the other findings and the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed but commuted to a reprimand and a forfeiture of pay of $50 per month for six months and that the sentence as thus modified be ordered executed.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but commuted to reprimand and forfeiture of $50 per month for six months. G.C.M.O. 626, 17 Nov 1944)

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

SPJGH
CM 264081

22 NOV 1944

UNITED STATES	)	XXXVI CORPS
	)	
v.	)	Trial by G.C.M., convened
	)	at Camp Phillips, Kansas,
Private ALFRED B. RICHIE	)	17, 18, 19 August 1944.
(34212940), Company L,	)	To be hanged by the neck
37th Infantry.	)	until dead.

OPINION of the BOARD OF REVIEW
TAPPY, MELNIKER and GAMBRELL, Judge Advocates

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

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

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

Specification: In that Private Alfred B. Richie, Company L, Thirty Seventh Infantry, did, at Camp Phillips, Kansas, on or about 27 June 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal Pete De Fusco, Company L, Thirty Seventh Infantry, a human being by striking the said Corporal Pete De Fusco on the head with an object, the exact nature of which is undetermined.

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

Specification: In that Private Alfred B. Richie, Company L, Thirty Seventh Infantry, did, at Camp Phillips, Kansas, or or about 27 June 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Corporal Pete De Fusco, Company L, Thirty Seventh Infantry, the property of the said Corporal Pete De Fusco, value about $1200.00.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction for absence without leave was introduced. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. In support of the Charges and their Specifications the prosecution introduced evidence to show that accused and the deceased, Corporal Pete De Fusco, were members of the same organization and were quartered in adjoining barracks at Camp Phillips, Kansas (R. 59, 107). On Saturday, 24 June 1944, between 12 noon and 1 p.m., the deceased drew the sum of $1100 from the Camp Phillips post branch of the Farmers National Bank, Salina, Kansas. He had originally made a single deposit of $1100 in that bank on 13 June 1944 (R. 55-57; Exs. I, I-1).

About 4 p.m., Saturday, 24 June 1944, the deceased changed a worn and soiled $100 bill for Staff Sergeant Richard B. Monday, giving him $10 bills in exchange therefor (R. 100, 101, 103). Sometime on Sunday, 25 June 1944, Technician Fourth Grade Floyd B. Kelley sought to obtain a loan of money from deceased but the latter refused him stating he only had $100 which he needed for his furlough commencing within a few days (R. 106). On Saturday or Sunday, 24 or 25 June 1944, the deceased refused to make a loan to Staff Sergeant Carlyle Jacobson, stating that he was going on furlough. Later deceased commented that he was not going to loan any money because the organization was "splitting up" and he did not know if he would see any of the men again (R. 63). Various enlisted men who had known deceased in the Army for periods of time ranging from one year to over two years had known deceased to loan as much as $30 to a man, one of them having heard deceased claim at one time that he loaned accused $100, but none of them had ever known him to loan as much as $1000 (R. 60-63, 80, 85, 106, 107, 109, 111, 113, 114). Sometime during the late afternoon or early evening of Sunday, 25 June 1944, several enlisted men observed deceased sitting on a bunk in accused's barracks counting a substantial pile of currency which was about an inch and a half thick and was composed of a $100 bill and a substantial number of $20 bills (R. 71, 81, 91, 92).

The following day, Monday, 26 June 1944, deceased ate supper at his organization's mess hall around 5:30 p.m. (R. 28, 30). The meal consisted of roast ham, potatoes, breaded tomatoes, bread, butter, stewed peaches, coffee and cole slaw. Cabbage, lettuce, tomato, cucumbers and celery were the ingredients of the cole slaw. Carrots were not served at this evening meal although they had been served for lunch (R. 28, 32). About a half hour after supper deceased was observed busying himself about his bunk having completed packing his belongings preparatory to going on furlough (R. 61, 62). Sometime between 8:30

and 9 p.m. that evening the deceased, accused and Private Louis I. Serandour visited the Post Exchange to obtain "cokes" and en route deceased exhibited a soiled $100 bill which he had in his wallet (R. 58, 59). Private Serandour saw no other currency in deceased's wallet than the $100 bill (R. 61). A short while later deceased was seated on the porch of his barracks where he was joined by Private First Class John Plowman. Accused strolled up and he and deceased walked down the boardwalk toward the street while Plowman went to the washroom and spent 20 or 25 minutes taking a shower. Thereafter he returned to his barracks and found that the lights had already been extinguished for the night (R. 62). Plowman thought it was around 9 p.m. when he left accused and deceased. Lights were extinguished in the barracks about 10 p.m. (R. 64).

Several of the enlisted men who were quartered in the same barracks as accused and who bunked in the immediate vicinity of accused's bunk were in the barracks that Monday night but could not remember whether or not accused was present. Private Houston Hughes who slept two bunks away from accused's bunk, was continuously in the barracks that night after 8 p.m. and lay awake for about a half hour after lights were extinguished while several men continued a discussion involving tobacco. He did not remember whether or not accused was in the barracks at any time after 8 p.m. (R. 97-99). Private First Class Andy G. Kender who bunked near accused was in the barracks from sometime between 8:15 and 8:45 p.m. for the rest of the night and did not remember if he saw accused during that time (R. 113). Private Thurman E. Rountree was continuously in the barracks that night after 9:30 p.m., heard the discussion involving tobacco which continued for some 30 minutes after lights had been extinguished but did not remember if accused was present (R. 92). Private First Class Wiley C. Steels retired about 9:45 p.m. and lay awake for some 30 minutes thereafter but did not remember seeing accused or hearing him come in the barracks during that interval (R. 72). Technician Fifth Grade William J. Stephenson retired about 10 p.m., lay awake for about a half hour thereafter and did not remember seeing accused in the barracks or hearing him enter into the discussion about tobacco (R. 82-84, 88). Private William H. Miller returned to the barracks from the Service Club shortly after 10 p.m. and lay awake for 15 or 20 minutes after he retired (R. 95, 96). None of these men heard anyone striking matches around accused's bunk and footlocker after the lights had been extinguished in the barracks (R. 72, 85, 93, 96, 99).

Private George W. Schwark, who also was quartered in the same barracks as accused, returned to the barracks from the movies sometime after lights had been extinguished on this Monday night, obtained a flashlight and then visited the latrine where he was informed it was about 10:20 p.m. Thereafter he proceeded to the boiler room and spent

less than five minutes coaling the fire (R. 65, 119, 120, 122). He remained in the boiler room and spent a half or three quarters of an hour writing a 3 or 4 page letter to his brother. Around 10:30 or 10:45 accused entered the boiler room with a writing tablet and envelopes in his hand and asked Schwark how long before he would be finished with the writing facilities of the boiler room (a small desk Schwark had constructed). Schwark said he had 6 or 8 more lines to write, accused departed but returned within 10 minutes and addressed an envelope for Schwark who was bothered with arthritis in his hands. Schwark then retired to the barracks as accused commenced to write a letter (R. 65-69, 122-124).

The following morning, Tuesday, 27 June 1944, deceased was not present at reveille (R. 11). About 7 or 7:30 a.m. that morning accused was observed seated on his bunk, staring off into space with a worried look on his face (R. 60). Between 1 and 3 p.m. that day, Technician Fourth Grade Hersee P. Harris and several other men were sunbathing alongside of the barracks and discussing the absence of deceased. About 3 p.m. Sergeant Harris decided to search for deceased in the maneuver field which lay several hundred yards east of accused's barracks. He searched the field and along the hedgerows subdividing it and within 40 minutes came upon the liefless body of deceased (R. 11-14, 16). The body was lying at a spot between 400 and 500 yards from Company L Orderly Room under the overhang of the hedgerow and all of the body except the feet and lower portions of the legs was covered with long dry yellow grass which had been pulled from the ground and scattered over it (R. 12, 15, 49). Deceased's shirt was bloodstained and was drawn up to his neck. No tie or cap were to be found. The face was covered with dried blood and was discolored a purple hue. No valuables were found on the body (R. 16, 17). A deep cut over the left eye exposed the frontal bone; pressure of the fingers upon the scalp indicated that the skull had been crushed (R. 16).

The following morning, Wednesday, 28 June 1944, an autopsy was performed upon deceased's body and revealed a comminuted compound fracture of all skull bones, a laceration and small hemorrhages of the brain, and superficial contusions and abrasions of the face. The cause of death was the fractured skull and laceration of the brain which resulted from a crushing blow or blows delivered by a blunt instrument (R. 19, 22-24). The stomach contained partially digested carrots, potatoes, onions, tomatoes and cabbage which had been eaten "within two hours of death and most probably not later than four hours". Deceased's digestive functions would have ceased within a matter of minutes after his skull had been crushed (R. 25).

An examination of the maneuver field where deceased's body was found revealed human bloodstains at various places throughout the field. A substantial bloodstain was found at the edge of a wagon road about 65 feet from where deceased's body was discovered (R. 37, 38, 40, 41, 52, 77; Exs. A-2, A-9). Deceased had lost about a pint of blood and

the quantity of blood that had caused the stain at the edge of the dirt road was estimated at a half pint (R. 42, 47). One medical witness was of the opinion that the deceased had died near the blood-stain along the road (R. 47).

On the afternoon of Tuesday, 27 June 1944, while the death of deceased was being discussed by men of his organization, Corporal Stephenson asked accused where he was on the previous night and accused replied that he was in the boiler room writing letters (R. 86). Between 7 and 8 p.m. that evening, during a discussion about deceased, accused stated that the last time he saw deceased was when Private Plowman saw accused and deceased together in the company area (R. 63).

On Wednesday, 28 June 1944, Mr. C. C. Browning, Jr., Special Agent of the Federal Bureau of Investigation, interviewed accused after fully advising him of his right to remain silent and of the effect of anything he might say. Accused stated that he, deceased and Serandour went to the Post Exchange for a "coke" about 8:45 p.m. on Monday evening, 26 June 1944. Thereafter accused and deceased visited the gymnasium for a few minutes, left about 9 p.m. and proceeded to accused's barracks where they chatted for a short while. They then separated and deceased proceeded to his own barracks. Accused stated he did not see deceased after that (R. 136, 139). On 29 June 1944, accused was again interviewed by Mr. Browning and stated that he was in his barracks from 9 to 10 p.m., Monday, 26 June 1944, and chatted with various men although he could not remember exactly whom they were. Thereafter, about 10 p.m., he went to the boiler room to write a letter to his girl, did so after first addressing a letter for Schwark and eventually retired about 11 p.m. Accused said he did not owe deceased any money nor did the latter owe him any nor had deceased loaned him any substantial sum of money after 24 June 1944. He asserted he had but $180 in his possession which he had been saving for his furlough since 1 May 1944. He denied knowing how much money deceased had in his possession at the time of his death. He expressed the opinion that deceased would not have gone walking in the field with "just anyone" (R. 137-140). After this interview accused left camp to accompany deceased's body to Uniontown, Pennsylvania. Accused was selected for this duty because he was reputed to be deceased's best friend. He was told by his company commander, First Lieutenant Noble Devall, that he was to deliver the body to deceased's family, remain for the funeral if they wished him to do so and thereafter he could commence his furlough (R. 115-116).

When accused arrived in Uniontown, on 1 July 1944, deceased's brother, Anthony De Fusco, asked him the cause of deceased's death and all that accused replied was that he didn't know, he had not been on the post when it happened. Accused refused to stay for the funeral stating that he had a plane reservation to fly to California to visit his wife. He spent about a half hour at deceased's home and a like amount of time at the funeral home (R. 141, 142). Anthony De Fusco knew that on two different occasions

his deceased brother had sent $300 home and another time had sent $700. At the time of his death deceased had $1000 of his own money at home. Anthony did not believe that his brother would give anybody $1000 (R. 143).

On 2 July 1944, two special agents of the Federal Bureau of Investigation and two members of the local military police visited accused in his room at the William Penn Hotel, Pittsburgh, Pennsylvania, and then escorted him to the local field office of the Bureau. After being fully advised of his rights accused voluntarily stated that he first met deceased in May 1942, at Camp Stewart, Georgia. Soon thereafter accused detected deceased cheating in a card game, confronted him and then accused and deceased struck an agreement according to which accused was to obtain marked cards and loaded dice through his brother in California to be used by deceased in conducting crooked gambling games. With the help of these cards and dice deceased was accustomed to win from $300 to $500 each pay period of which he would give accused $100 to $200. Accused stated that at Englewood, California, deceased gave him $200 on one occasion and $100 on two occasions and gave him $100 at Camp Haan, California. Deceased had won from $300 to $400 in a game at Camp Phillips of which accused received $140 as his share (R. 145, 146).

The Federal agents also examined accused's personal effects and found he possessed an airplane travel ticket from Pittsburgh to Los Angeles costing $141.75 and cash of $1065 made up of a $100 bill which had a dirty smear upon it, two $10 bills, a few $1 bills and the balance in $20 bills (R. 146, 147, 156). When asked where he obtained such a sum of money accused stated that the deceased had given him $1000 on the evening of 24 June 1944 but he didn't remember the exact time and place. He claimed that the $1000 was a gift and that he did not have to repay it. He stated that he was given the money to purchase marked cards and loaded dice for deceased and to finance a divorce from his (accused's) wife, Mrs. Inez W. Richie (R. 148, 149, 159, 160, 161). Accused explained that he proposed to marry Mrs. R. J. Lee of Hermosa Beach, California, the lady whom he was en route to visit and who was then married to a member of the Navy. He was not certain, however, that Mrs. Lee had any intention of divorcing her husband (R. 149, 150).

Accused stated that when he left on furlough he possessed $180, the $1000 deceased had given him, and $9 for expenses given to him at Camp Phillips for his trip to Uniontown, making a total of $1189. He itemized the various amounts of money he had spent since leaving for Uniontown which, when added to the balance of $1065 he then possessed, gave a total of $1239. Accused's explanation of the $50 cash overage was that deceased must have "miscounted" the money when he gave accused the $1000 (R. 150, 159, 160).

Accused also stated that he did not remain in Uniontown for deceased's funeral because he did not wish to answer questions as to how deceased's death occurred, did not wish to waste his furlough time and was impatient to visit Mrs. Lee in California. He admitted he did not view the body of deceased after it was discovered or attempt to acquaint himself with any of the circumstances surrounding the death of deceased. When asked why he did not tell Mr. Browning, during the interview on 28 and 29 June 1944, that deceased had given him $1000, accused replied that to reveal that information would have cast suspicion upon him as being the murderer of deceased (R. 152, 160).

Accused was questioned about his activities on the night of Monday, 26 June 1944, and replied that he returned from the gymnasium with deceased and left him in front of accused's barracks about 9:15 p.m. He then chatted with several soldiers in his barracks, including Burrill, Gardiner and Filardo, until 10 p.m. when he went to the boiler room and wrote a letter to Mrs. Lee until 11 or 11:30 (R. 151, 153, 160). Accused asserted that if deceased had gambled on the night of his death, he would have known of it (R. 151).

On 2 July 1944, accused's barracks bags were examined and in the hip pocket of a pair of trousers was found a handkerchief containing the stains of human blood (R. 164, 173; Ex. P).

On 7 July 1944, accused was again questioned by Mr. C. C. Browning of the Federal Bureau of Investigation after being fully warned of his rights (R. 164). He explained the presence of the blood on the handkerchief as resulting from his treatment of a facial pimple (R. 167). Accused was also questioned again about the gift of $1000 from deceased. He then stated that deceased gave him that money after the evening meal on Saturday, 24 June 1944, when accused asked deceased for "some money". Deceased just pulled a roll of bills from his pocket, peeled off a portion of it and handed it to accused without counting it. The portion given to accused contained a $100 bill, a few $10 bills and the remainder was $20 bills. No definite arrangement was made for repayment of this money and accused now was not clear as to whether it was a loan or a gift. Accused planned to use $200 to purchase marked cards and loaded dice. He had discussed divorce proceedings with a lawyer in California and accused knew that such proceedings would be expensive but he did not know what the actual expense would be (R. 165, 168). Accused was asked with whom he chatted in the barracks between 9 and 10 p.m., Monday, 26 June 1944, and replied that he had autographed a card for an enlisted man named Filardo during that time. Subsequent investigation revealed that Filardo had such an autographed card in his possession (R. 172).

4. The defense introduced evidence to show that deceased generally carried substantial sums of money on his person ranging from $100 to $500 (R. 185, 186). Deceased was accustomed to participate in dice and card games and, although he lost heavily on occasion, he won more often than

he lost (R. 178). While deceased's organization was en route from California to its present station at Camp Phillips, deceased played in a card game and won. During the game deceased asked accused for another deck of cards and it was furnished to him. Private Serandour examined the deck after the game was over and found an ace and a ten spot missing (R. 175, 176). Technician Fifth Grade William J. Stephenson had participated in dice and card games with deceased. During one card game accused furnished the deck of cards and deceased won. Corporal Stephenson thought deceased cheated at gambling games but never detected him doing so (R. 176, 177, 181).

Corporal James W. Maley testified that on one occasion while the organization was stationed in California he accompanied deceased to the home of accused's brother where deceased obtained two decks of cards from a box containing several decks of them and then paid accused's sister-in-law $57 (R. 185). At some indefinite time on the evening of 26 June 1944, "it couldn't have been any later than 9:00, but it might have been before 8:30", Corporal Maley borrowed a pair of shorts from accused (R. 184). Later that evening, about 10 minutes before lights were extinguished in the barracks, accused and several other men autographed cards for him. Accused was on or near his bunk at the time but was not asleep. Corporal Maley had been friendly with both accused and deceased for about 2½ years and, although he had never borrowed money from or loaned any to accused, he had borrowed money from deceased at various times (R. 187-189).

Technician Fifth Grade Tony J. Filardo who had known both accused and deceased for about two years testified that between 9 and 10 p.m. on 26 June 1944 he entered accused's barracks to have some 15 cards autographed by various of the men. About 20 minutes before 10 p.m., accused autographed a card for him. This witness had previously given a sworn statement on 18 July 1944 that accused autographed a card about 10 p.m. just as the lights were being extinguished. However, when testifying at the trial he stated that an enlisted man named Blaschak was the one who autographed a card about 10 p.m. (R. 189- 193).

Corporal Joseph G. Blaschak testified that he visited the latrine immediately after the lights were extinguished in the barracks at 10 p.m. on 26 June 1944, and found accused there. Corporal Blaschak asked accused to loan him some socks, accused consented and the two of them went to accused's footlocker in the barracks where Corporal Blaschak struck some matches to aid accused in obtaining the socks from the footlocker. The barracks was quiet and Corporal Blaschak heard no conversation among the men concerning tobacco (R. 200-203).

Staff Sergeant Carlyle Jacobson testified that he walked at a normal pace from the place deceased's body was found under the hedgerow to accused's barracks in six minutes and five seconds (R. 183).

After accused's rights as a witness had been explained to him he elected to remain silent (R. 207).

5. After the prosecution and defense had rested, the court recalled various witnesses for further examination. Two of the witnesses recited that the $100 bill they had seen in deceased's possession on Sunday, 25 June 1944, had a blue or black smear upon it (R. 209, 211). Sergeant Roy R. Joines and Staff Sergeant Carlyle Jacobson testified that, on Sunday, 25 June 1944, when the latter sought a loan from deceased, the latter refused stating that all he had was a $1 and $100 bill and Sergeant Jacobson saw those bills in deceased's possession (R. 208, 210, 211). Staff Sergeant Richard B. Monday, for whom deceased had changed a $100 bill on 24 June 1944, could not identify the $100 bill found in accused's possession on 2 July 1944 as the one deceased had changed for him (R. 209, 210).

Sergeant Hersee P. Harris testified that he had heard several men discuss the matter or searching the training area for deceased and that as a result he decided to search it himself with the eventual result that he discovered the body (R. 214, 215).

Anthony De Fusco repeated his previous testimony that accused stated on 1 July 1944 to deceased's family that he was not on the post when deceased died and didn't know what had caused his death (R. 215). Accused did not mention to the family that deceased had given him $1000 on 24 June 1944, nor did he mention any financial transactions which had occurred between accused and deceased (R. 215, 216).

After all the evidence had been presented and before final arguments were made, the court, at the request of the prosecution, repaired to the area of Company L and made a personal inspection of the barracks, latrine, boiler room, maneuver field and hedgerow, all referred to in the testimony (R. 216).

6. In view of the fact that the death penalty has been imposed, the President of the United States is the confirming authority in this case (AW 48). In a case in which the President is the confirming authority, it is the function of the Board of Review in passing upon the legal sufficiency of the record to weigh the evidence, judge of the credibility of witnesses and determine controverted questions of fact (MCM, 1928, note p. 216; CM 152729).

The conviction of accused is based solely upon circumstantial evidence, there being no direct evidence that he killed deceased. Circumstantial evidence means proof of facts from which, either alone or in connection with other facts, "a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact, which is in issue" (MCM, 1928, par. 112b). A conviction based on circumstantial evidence cannot be sustained if a reasonable doubt arises "from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the

circumstances themselves or to the strength of the inference from them" (MCM, 1928, par. 78a). A "reasonable doubt" as to accused's guilt cannot exist if the proof is sufficient to exclude "any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a moral certainty". Thus, we must decide if the evidence in the record is sufficient to exclude any fair and rational hypothesis except the conclusion that accused killed deceased.

The evidence in the record establishes the following facts that support the conclusion that accused killed deceased, viz:

a. Deceased's death, considering the condition of the contents of his stomach, occurred "most probably not later than four hours" after he ate his evening meal around 5:30 p.m. on 26 June 1944. He was seen alive around 9 or 9:15 p.m. so that his death occurred sometime thereafter but "most probably" not later than 9:30 or 9:45 p.m., 26 June 1944.

b. Between 9 and 9:30 p.m., accused and deceased were seen together strolling away from deceased's barracks although accused claimed that about that time he left deceased and entered his own barracks while deceased continued on to his quarters.

c. On Sunday evening, the day before deceased's death, deceased possessed a substantial amount of money having drawn $1100 from the bank the previous day. No money was found on deceased's body when it was discovered under the hedgerow.

d. Although accused claimed he was in his own barracks chatting with other men from shortly after 9 p.m. until he went to the latrine at 10 p.m., several men who bunked near accused and who were in the barracks between those hours did not remember seeing accused there. One witness testified he saw accused in the barracks about 9:40 p.m. but that witness had previously given a sworn statement that it was just about 10 p.m. when lights were being extinguished that he saw accused. The only other witness who claimed to have seen accused before 10 p.m. was one who testified he saw him about 9:50 p.m. in the barracks. At a normal gait one could walk from the barracks to the place deceased's body was found in about six minutes.

e. Accused who was a close friend of deceased admitted that, to his knowledge, deceased would not have gone walking in the maneuver area at that hour with "just anyone".

f. On 29 June 1944, accused told an agent of the Federal Bureau of Investigation that he owed deceased no money and

possessed but $180 he had been saving. However, when $1065 was found in his possession on 2 July 1944, he admitted he had lied previously and then stated that deceased had given him $1000 in the early evening of 24 June 1944 to purchase marked cards, loaded dice and to finance accused's proposed divorce.

g. Adding this $1000 to the other funds accused admitted he had when he left to escort deceased's body to Uniontown and balancing it against all of accused's expenditures and the cash of $1065 which he possessed on 2 July 1944, a discrepancy of $50 resulted which accused accounted for by stating that deceased must have miscounted the money when he gave him the $1000. However, when questioned again on 7 July 1944, accused stated that deceased did not count the money when he gave him $1000 but merely thumbed through a roll of bills and peeled off a portion of it which he handed accused when he asked deceased for "some money".

h. Deceased had never been known to loan as much as $1000 to anybody although he had made loans of various amounts of less than $100 to men in his organization.

i. Although accused was reputed to be deceased's best friend among members of his organization and was selected to accompany the body to Uniontown, Pennsylvania, accused refused to remain for the funeral and lied to deceased's family when he told them he was off the post when deceased died. His conduct was not that to be expected from a friend of the deceased.

If all or any part of the money that accused had on his person on 2 July 1944 included funds which deceased possessed on Sunday, 25 June 1944, the day before he was murdered, the inference that accused killed deceased with robbery as his motive is not only reasonable but also compelling. There was no direct evidence that any part of deceased's money was included in the $1065 accused possessed on 2 July 1944. Thus we come to the crucial question as to whether or not the evidence was sufficient to exclude every fair and rational hypothesis except the inference that the same currency comprised both funds. Examining accused's explanations as to how he obtained $1000 from deceased we find them so contradictory that ordinary common sense prevents us from giving them any credence whatsoever. In the first place, on 29 June 1944, accused claimed he possessed only $180. When he was found in possession of $1065 on 2 July 1944 he contradicted his first story and then stated that deceased gave him $1000 on 24 June 1944 to purchase marked cards, loaded dice and to finance accused's proposed divorce. When confronted with a discrepancy in his cash account accused explained it by saying deceased must have miscounted the money when he gave him the $1000. Deceased was never accustomed to make a loan of that amount of money much less a gift.

Although we find this explanation incredible, it becomes absolutely unbelievable when we consider the new twist accused gave to his story on 7 July 1944 when he stated that on 24 June 1944 he asked deceased for "some money" and deceased peeled off a sheaf of bills from his bank roll and handed them to accused without counting them. How could deceased have miscounted and overpaid accused $50 when he didn't count the money? Furthermore, it is incredible that deceased would have given away any money so carelessly and with such indifference to the amount of the gift when he refused to loan even $1 the next day because his outfit was "splitting up". These contradictory and extraordinary explanations of accused's possession of such a substantial sum of money brand all of them as complete falsehoods. Accused's statement that this money had been given to him by deceased is unworthy of belief.

Summarizing the state of affairs we find that on 24 June 1944 deceased had $1100 on his person, and on 25 June 1944 a large roll of bills composed almost entirely of $20 bills; on 26 June 1944 he was seen with accused walking away from the barracks between 9 and 9:15 p.m., was killed not later than 9:30 or 9:45 p.m. and his body was found at a place six minutes' walk from the barracks without any funds on it; although an impeached witness testified he saw accused in the barracks about 9:40 p.m. the earliest his presence there is established by unimpeached evidence is 9:50 p.m.; on 2 July 1944, accused had over $1000 cash on his person which included a smeared $100 bill similar to one deceased had on 25 June 1944, two $10 bills, a few $1 bills and the balance in $20 bills; and, finally, accused's statements that deceased had given him $1000 on 24 June 1944 are clearly false. These facts exclude any fair and rational hypothesis except the conclusion that accused killed deceased while perpetrating a robbery of a substantial sum of money from him. Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought does not mean hatred or ill will. A killing is committed with malice aforethought if done in the furtherance of, and during the commission of, a felony (MCM, 1928, par. 148a). Robbery is a felony (MCM, 1928, par. 149d). Thus, the killing of deceased by accused constituted murder. The evidence sustains the findings of the court on both Charges and their Specifications.

7. On 21 November 1944, at the request of the Honorable Cameron Morrison, Member of Congress from North Carolina, Mr. Richard H. Shuford and Mr. John C. Stroupe, of Hickory, North Carolina, appeared before the Board of Review as special counsel for the accused, and were accorded a full hearing on behalf of the accused.

8. The accused is 26 years of age. He was inducted into the military service on 26 February 1942.

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of a violation of Article of War 92.

Thomas N. Jaffey Judge Advocate.

[illegible] Judge Advocate.

William H. Campbell Jr. Judge Advocate.

SPJGH
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War Department, J.A.G.O., JAN 24 1945 - To the Secretary of War

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Alfred B. Richie (34212940), Company L, 37th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused was found guilty of murder in violation of Article of War 92 and of robbery in violation of Article of War 93, all members of the court present concurring. He was sentenced by the court, all members of the court present concurring, to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The evidence shows that the accused robbed the deceased, a member of accused's organization, of the sum of approximately $1200, and during the commission of the robbery murdered the deceased by inflicting blows upon his head with a blunt instrument, following which he concealed the body. No extenuating or mitigating circumstances are disclosed in the record of trial or elsewhere upon which to base a recommendation for clemency. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to certain letters requesting clemency, addressed to the President and forwarded to this office by the Honorable Joe W. Ervin, Member of Congress, from public officials and private individuals residing in North Carolina.

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 - Ltr fr Hon Joe W Ervin, MC, w/24 incls.
Incl 3 - Dft ltr for sig S/W.
Incl 4 - Form of action.

(Sentence confirmed. G.C.M.O. 167, 16 May 1945)

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TITLE

DATE	BORROWER'S NAME	EXT.