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GENERAL
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VOL. 54

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v. 54

Judge Advocate General's Department

BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 54

including

CM 280909 - CM 282649

(1945)

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

(1)

SPJGV-CM 280909

1 JUN 1945

UNITED STATES)

v.)

Second Lieutenant FRED P.
PITTERA (O-721200), Air
Corps.)

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened
at Fort Worth Army Air
Field, Fort Worth, Texas.
Dismissal and total for-
feitures.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, 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 Fred P. Pittera, Air Corps, having been restricted to the limits of Fort Worth Army Air Field, Fort Worth, Texas, did, at Fort Worth Army Air Field, Fort Worth, Texas, on or about 1 April 1945 break said restriction by going to the city of Fort Worth, Texas.

Specification 2: In that Second Lieutenant Fred P. Pittera, Air Corps, having been restricted to the limits of Fort Worth Army Air Field, Fort Worth, Texas, did, at Fort Worth Army Air Field, Fort Worth, Texas, on or about 9 May 1945 break said restriction by going to the city of Fort Worth, Texas.

He pleaded not guilty to and was found guilty of both Specifications and of the Charge. Evidence of one previous conviction was considered by the court. Accused was sentenced to dismissal and forfeiture of all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

(2)

3. The evidence offered on behalf of the prosecution may be summarized as follows:

On 15 February 1945, a general court-martial sentenced accused to be restricted to the limits of his post for three months and to forfeit \$75 of his pay per month for nine months. The sentence was approved by the reviewing authority and ordered to be executed (G.C.M.O. No. 65, Hq. AAF Central Flying Training Command, 6 March 1945, R. 5; Pros. Ex. 1). Accused's post was Fort Worth Army Air Field (R. 5). First Lieutenant Patrick A. Toomey saw accused on 1 April 1945 in the room of Miss Betty Miles in the Pennsylvania Hospital in Fort Worth. About 1745 on 9 May 1945, First Lieutenant Edward C. Yatkones, the provost marshal at the field, found a note on his desk (R. 5). After reading it, he went with First Lieutenant Malcolm M. Heber, to 1407 Harrington Street, Fort Worth, where accused's car was found to be parked in front of the home of Miss Betty Miles. The two officers waited in the street, a short distance away. About 1925, accused came out of Miss Miles' home (R. 6, 9). It was still daylight (R. 6). The officers called to accused. At Lieutenant Yatkones' direction, accused drove his car to the air field. There accused was placed in arrest. Lieutenant Heber asked accused what he was doing off the post (R. 10). Accused said nothing about permission to be off the post.

Accused was advised of his rights as a witness and elected to remain silent (R. 11). No evidence was offered on behalf of accused.

4. Upon the trial, defense counsel moved, by what he called a plea in abatement, to quash the Specifications on the ground that allegations specifically averring that accused's absence was without permission were wanting, and that for this reason the Specifications failed to charge an offense. The point is not well taken for two reasons. In the first place the language of each Specification is:

*** did *** break said restriction by going to the city of Fort Worth, Texas."

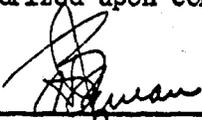
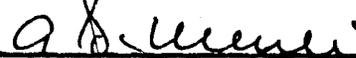
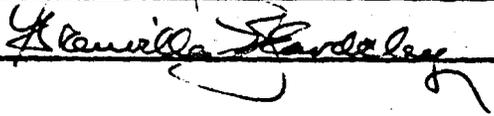
The use of the word "break" necessarily implies the absence of permission, because by going to Fort Worth with the permission of his commanding officer, accused would not "break" the restriction. In that case the restriction would be lifted for the time, but would not be broken. In the second place, the fact of permission to go to Fort Worth, had it been granted by proper authority, would be a circumstance in excuse or justification. The fact that a killing was in self-defense is a circumstance

which justifies and excuses a homicide, but it has never been held that in an indictment for murder it is either necessary or even proper to charge that the slaying was not in self-defense. The existence of facts which excuse or justify that which otherwise would be an offense is never presumed. The burden of offering evidence to establish such facts is always on the accused. Such a defense is affirmative in nature. It need not be anticipated and negated in the Specification, since the more stringent rules relating to indictments do not so require (42 C.J.S. 996; Olmstead v. U.S., 29 Fed. 2d 239; Pyle v. Johnston, 137 Fed. 2d 867; People v. Prystalski, 358 Ill. 198, 192 N.E. 908). Accused's motion was properly overruled.

5. Defense counsel throughout the trial took the position that in the absence of evidence to the contrary the presumption was that accused went to Fort Worth with permission from proper authority. Such is not the law. When by competent evidence it was established (1) that a restriction to the limits of the post was in effect, and (2) that during the period thereof accused twice was found in Fort Worth, a prima facie case was made out. If accused in fact had permission from proper authority, it would have been a simple matter for him to have offered evidence to establish that such permission was granted. The burden of establishing an affirmative defense rests upon the accused (16 C.J. 531; Agnew v. U.S., 165 U.S. 36, 17 S. Ct. 235; U.S. v. Heike, 175 Fed. 832; State v. Schweitzer, 57 Conn. 532, 6 LRA 125; Williams v. People, 121 In. 84, 11 N.E. 881; Com. v. Webster, 5 Cush. 295, 52 Am. D. 711; Com. v. Zelt, 138 Pa. 615, 11 LRA 602).

6. Accused will be 24 years old on 3 June 1945. He was born in Massachusetts. He is a high school graduate and attended Columbia University for six months. He entered the military service as an aviation cadet on 26 October 1942, and on 15 April 1944 was commissioned as a second lieutenant. He is classified as a four engine pilot. He is married and has one child.

7. The court was legally constituted and had jurisdiction of the person of the accused, and of the subject matter. No errors injuriously affecting the substantial rights of the accused were committed upon 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 to dismissal and total forfeitures is authorized upon conviction of a violation of the 96th Article of War.


 _____, Judge Advocate

 _____, Judge Advocate

 _____, Judge Advocate

(4)

SPJGV-CM 280909

1st Ind

Hq ASF, JAGO, Washington 25, D.C.

107122 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Fred P. Pittera (O-721200), Air Corps.

2. A general court-martial found this officer guilty of twice breaking his restriction to the limits of Fort Worth Army Air Field, in violation of Article of War 96, and sentenced him 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.

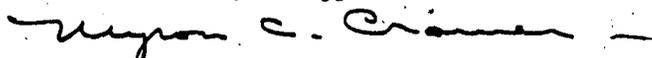
3. The evidence is summarized in the foregoing opinion of the Board of Review, which holds the record of trial to be legally sufficient to support the findings and sentence, and to warrant confirmation of the sentence. In that opinion I concur.

On 15 February 1945 the accused was sentenced by a general court-martial to be restricted to the limits of his post for three months. That sentence was approved and promulgated by the reviewing authority on 6 March 1945. On 1 April 1945 accused visited a young woman at her room in a hospital in the City of Fort Worth, and on 9 May 1945 he visited the same person at her home in that city.

Evidence was offered of one previous conviction for wrongfully carrying Miss Betty Miles on three occasions, and two other unauthorized persons on another occasion, as passengers in an Army airplane, in violation of Article of War 96. For these previous offenses accused had been sentenced to be restricted to the limits of his post for three months and to forfeit \$75 of his pay per month for nine months.

I recommend that the sentence be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



- 2 Incls
- 1 Rec of Trial
- 2 Form of Action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 272, 3 July 1945).

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

(5)

SPJGQ
CM 280941

19 JUN 1945

UNITED STATES

v.

First Lieutenant WILLIAM F.
HUMPHREY (O-690095), Air
Corps.

ARMY AIR FORCES WESTERN
FLYING TRAINING COMMAND

Trial by G.C.M., convened at
Victorville Army Air Field,
Victorville, California, 15
May 1945. Dismissal and total
forfeitures.

OPINION of the BOARD OF REVIEW
ANDREWS, FREDERICK and BIERER, 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: (Finding of not guilty.)

Specification 2: In that 1st Lieutenant William F. Humphrey, Squadron B, 3035th AAF Base Unit, having been suspended from flying status, did, at Victorville Army Air Field, Victorville, California, on or about 17 January 1945, wrongfully co-pilot a certain B-24L type Army aircraft, Air Corps Number 44-49091.

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

Specification 5: Identical in form with Specification 2, except that date is "24 February 1945" and Air Corps Number is "44-49636".

Specification 6: Identical in form with Specification 2, except that date is "23 March 1945"; duty, "pilot"; and Air Corps Number "44-49089".

Accused pleaded guilty to the Charge and Specifications 2, 5 and 6, and not guilty to Specifications 1, 3 and 4. He was found guilty of the Charge and Specifications 2, 5, and 6 and not guilty of Specifications 1, 3 and 4. Evidence of one previous conviction by general court-martial was introduced, further details of which appear in paragraph 4 of this opinion. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved only so much of the sentence "as provides for dismissal, forfeitures of pay and allowances due and to become due", and forwarded the record of trial for action under Article of War 48.

3. In view of the pleas of guilty to Specifications 2, 5 and 6, and the findings of not guilty of the other Specifications, no extended discussion of the evidence is necessary.

The evidence shows that the accused was stationed at Victorville Army Air Field, Victorville, California (R. 18). At the time he made the flights alleged in Specifications 2, 5, and 6, he had been suspended from flying status because of physical disqualification (R. 9, 10, 13). Originally, his suspension was confirmed by the Commanding General, Army Air Forces on 12 September 1944 (Pros. Ex. 1). Confirmation of a removal from suspension may be made only by the Commanding General, Army Air Forces (R. 6). On 1 November 1944, the Commanding Officer, Victorville Army Air Field, revoked the suspension and on 30 November requested confirmation of the revocation from the Commanding General, Army Air Forces (Def. Ex. A). From 30 November 1944 until 8 January 1945, pending confirmation of the revocation, accused was permitted by the authorities at Victorville to fly (R. 11).

On 8 January 1945, the Commanding General, Army Air Forces, wired the Commanding Officer, Victorville Army Air Field that the removal of the accused's suspension from flying status was "not favorably considered." The telegram was received at the Victorville Headquarters on 9 January (R. 8-10). A substantial part of the record is concerned with the time when this telegram was brought to the attention of the accused, but this testimony admittedly refers only to the offense alleged in Specification 1, of which accused was found not guilty, and the defense in open court and by the pleas of guilty admitted that accused was aware of the telegram before the flights alleged in the Specifications of which he was found guilty (R. 12). Furthermore, on 11 January 1945, accused, by letter, requested reinstatement to flying status and referred to the telegram of 8 January (Pros. Ex. 3).

The evidence clearly proves that accused made the flights alleged in Specifications 2, 5, and 6 (R. 24-26; Pros. Exs. 5, 8, 9). Since at the time of each flight, his flying status had been suspended, which he knew, the flights were wrongful. The pleas of guilty and the evidence support the findings of guilty.

4. War Department records show that accused is 26 years of age. He is married but has no children. Accused graduated from high school and attended Fern College, Cleveland, Ohio, for one year. From April 1938 to October 1940 he was employed as a rate clerk for the Aluminum Company of America, Cleveland, Ohio. He enlisted on 12 October 1940 and served as an enlisted man and aviation cadet until commissioned a second lieutenant, Air Corps, Army of the United States, on 30 August 1943, upon graduation from the Army Air Forces Pilot School (Adv.-2 Eng), Ellington Field, Texas. He was promoted to first lieutenant, Air Corps, on 13 May 1944 and was awarded the Air Medal while serving in the European Theater of Operations. On 20 February 1945 the accused was tried and convicted by general court-martial of four specifications of wrongfully wearing service ribbons and decorations, and one specification of making a false statement under oath concerning the wearing thereof, in violation of Article of War 96. He was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the sentence as provided for the forfeiture of eighty dollars per month for ten months.

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

Fletcher R. Andrews Judge Advocate.

Norbert B. Fredericks Judge Advocate.

Abraham J. [Signature] Judge Advocate.

(8)

SPJGQ - CM 280941

1st Ind

Hq ASF, JAGO, Washington 25, D.C. JUN 29 1945

TO The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant William F. Humphrey (O-690095), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of three specifications (Specifications 2, 5, and 6) alleging the flying of aircraft while suspended from flying status, in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion.

While suspended from flying status by reason of physical disqualification, the accused wrongfully participated in two flights as co-pilot and one flight as pilot of a B-24L Army aircraft at Victorville Army Air Field, California, on 17 January, 24 February, and 23 March 1945, respectively.

Accused was commissioned 30 August 1943 as a rated pilot. He served overseas for seven months and completed eight combat missions. He is now classified as an administrative officer. He is entitled to wear the Air Medal and European Theater Ribbon with two battle stars, the Good Conduct Ribbon, and the American Defense Service Ribbon. He was tried and convicted on 20 February 1945 on four specifications of wrongfully wearing service ribbons and decorations and one specification of making a false statement concerning the wearing thereof, all in violation of Article of War 96, and was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the sentence as provided for the forfeiture of eighty dollars per month for ten months.

Considering all the circumstances, it is my opinion that the conduct of the accused does not justify his separation from the

(9)

service. Accordingly, I recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures be remitted and the execution of the dismissal be suspended during good behavior.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls

- 1 Rec of Trial
- 2 Form of Action

MYRON C. CRAMER

Major General

The Judge Advocate General

(Sentence as approved by the reviewing authority, confirmed, forfeitures remitted, and dismissal suspended. GCMO 324,9 July 1945).



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

SPJGH-CM 280978

15 JUN 1945

UNITED STATES)

v.)

First Lieutenant HARVIE J.
BELSER (O-2046629), Air
Corps.)

I ARMY AIR FORCES BASE UNIT

Trial by G.C.M., convened at
Bolling Field, D. C., 23 May
1945. Dismissal and total
forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL 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 Specification:

CHARGE: Violation of the 96th Article of War

Specification: In that First Lieutenant Harvie J. Belser, Headquarters, 42d Bombardment Wing, currently attached on temporary duty to Headquarters, 1st Army Air Forces Base Unit, Bolling Field, District of Columbia, did, on or about 3 January 1945, in the County of Franklin, State of Ohio, wrongfully and unlawfully marry Ruth M. Brial, he, the said First Lieutenant Harvie J. Belser, being then lawfully married to Edna Mae Belser, she being then living.

He pleaded guilty to and was found guilty of the Charge and 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. The case was submitted to the court on documentary evidence alone. All documents offered by the prosecution were admitted in

evidence without objection by the defense. The first of these was a photostatic copy of a letter addressed to "Members of Local Draft Board # 17, 100 15th N.E., Washington, D. C.", dated 9 September 1941, and signed "Harvie J. Belser", in which a deferment until June 1942 was requested on several grounds (Pros. Ex. 1). Only the following portion of the letter was admitted in evidence, the rest of the letter being irrelevant (R. 6):

"In addition to this I have a Common Law wife and also a baby of two weeks old. I expect to get married within the next two weeks. I don't know how they would exist if I were drafted."

A photostatic copy of a second letter to the same draft board, dated 19 September 1941, and signed "Harvie J. Belser", was introduced in evidence (Pros. Ex. 2). This letter requested a hearing and referred to an earlier letter written "some days past" in which the writer had asked to be "reclassified from I-A to another classification." The third exhibit was a photostatic copy of a pay and allowance account submitted by Harvie J. Belser, 1st Lt., AC, certified as true and correct on 31 March 1945 over the signature of "Harvie J. Belser", and certified to be a true copy of the original by C. G. Gealta, Lieutenant Colonel, Finance Department, the Finance Officer of the 1st Army Air Forces Base Unit, Bolling Field, D. C. (Pros. Ex. 3). In this voucher "Edna Mae Belser, Box 253 Glen Rock, Wyoming" was listed as the officer's lawful wife, and a claim was made for subsistence allowance from 1 March 1945 to 31 March 1945 of \$43.40 and rental allowance for the same period of \$75.

A copy of the Marriage Record of Harvie J. Belser and Ruth M. Brial, certified as a true and correct copy of the original by C. P. McClelland, Judge and Ex-Officio Clerk of the Probate Court, Franklin County, Ohio, was introduced in evidence (Pros. Ex. 4). It appears from this exhibit that Harvie J. Belser and Ruth M. Brial were married by John C. Hanchett, a clergyman of Columbus, Ohio, on 3 January 1945. The affidavit of Ruth M. Brial, dated 14 May 1945, was introduced in evidence, with an oral stipulation by and between the prosecution, the accused and defense counsel, that Ruth M. Brial would have so testified if present in the courtroom and sworn as a witness (R. 7-8; Pros. Ex. 5). The affiant stated that she was married to Harvie J. Belser, 1st Lieutenant, Air Corps, on 3 January 1945 by John C. Hanchett, a clergyman, and that she obtained a divorce from Harvie J. Belser on 7 April 1945 in the Court of Common Pleas, Franklin County, Ohio.

4. Having been fully advised of his rights as a witness, the accused elected to remain silent.

A photostatic copy of the Honorable Discharge from the Army of the United States of Technical Sergeant Harvie J. Belser, dated

29 May 1943 at Sedrata, Algeria, was introduced in evidence (Def. Ex. 1). The discharge certificate indicates that the soldier participated in the North African and Middle Eastern campaigns, that he was awarded the American Theater Campaign Medal, European-African-Middle Eastern Campaign Medal and Good Conduct Medal, that his character was excellent, and that he was discharged to accept a commission. A photostatic copy of the accused's W.D.A.G.O. Form No. 66-1 was introduced in evidence (Def. Ex. 2). This exhibit shows that the accused was commissioned a second lieutenant, AUS, effective 30 May 1943, that he was promoted to first lieutenant, AUS-AC, 8 March 1944, and to first lieutenant, AUS, 7 May 1944, that he has performed his duties as a commissioned officer in a superior manner from 7 June 1943 to 24 November 1944, the date of his last efficiency rating, that he is authorized to wear battle participation stars for the Tunisian, Sicilian, Italian, Rome-Arno and French campaigns, that his organization received a Presidential citation, and that he was awarded the Croix de Guerre with Palm by the Provisional Government of France. The last exhibit introduced in evidence by the defense was a copy of a decree of divorce in case No. 37,664, Ruth B. Belser, Plaintiff vs. Harvie J. Belser, Defendant, in the Court of Common Pleas, Franklin County, Ohio, Division of Domestic Relations, certified on 7 April 1945 by the clerk of the court to be a true copy of the original record (Def. Ex. 3). It was stipulated by the defense and the prosecution that the expenses incurred in obtaining the divorce were borne by the accused (R. 9-10).

5. The truth of the Charge and Specification was admitted by the pleas of guilty, to which the accused adhered after the meaning and effect of the pleas had been fully explained to him by the court (R. 5). The marriage of the accused and Ruth M. Brial on 3 January 1945 was proved by the certified copy of the marriage record (Pros. Ex. 4) and the affidavit of Ruth M. Brial (Pros. Ex. 5), which was admitted in evidence as stipulated testimony (R. 7-8). No evidence of the marriage of the accused and Edna Mae Belser was introduced, except for his statement in the letter to the draft board, dated 9 September 1941 (Pros. Ex. 1), that he had a common law wife, and his statement in the pay voucher, signed 31 March 1945 (Pros. Ex. 3), that Edna Mae Belser was his lawful wife. Since the accused pleaded guilty to the Charge and Specification, further evidence of his marriage to Edna Mae Belser, to corroborate his own admissions, was not required. It is clear from the pleas and the evidence in the record that the accused knew he was already married to Edna Mae Belser at the time of his second marriage to Ruth M. Brial, and he was therefore guilty of bigamy, a military offense under Articles of War 95 and 96 (CM 245278, Yagel, 29 B.R. 153; CM 256886, Wilber, 36 B.R. 373; CM 264826, Ratliff). The result is the same whether the accused's marriage to Edna Mae Belser was statutory or common law (CM 264826, Ratliff). The findings of guilty of the Charge and Specification are sustained by the record.

6. The accused is about 28 years of age. The record indicates that he is married and the father of one child. He completed high school, two years of college, one year of business college, and two and a half years of law school. He was employed as secretary to the Postmaster, U. S. Senate, and he worked in the office of Senator Charles O. Andrews of Florida. He enlisted 23 December 1941, and was discharged 29 May 1943 to accept a commission as second lieutenant, AUS, 30 May 1943. On 8 March 1944 he was promoted to first lieutenant, AUS-AC, and to first lieutenant, AUS, on 7 May 1944.

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

Thomas N. Jaffy, Judge Advocate

William H. Hamrell, Judge Advocate

Robert E. Newthau, Judge Advocate

SPJGH-CM 280978

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 27 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Harvie J. Belser (O-2046629), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of bigamy in violation of Article of War 96. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

The accused pleaded guilty to the Charge and Specification. In a letter to his draft board, dated 9 September 1941, the accused stated that he had a common law wife, and in a pay voucher, which he signed 31 March 1945, the accused stated that Edna Mae Belser was his lawful wife. On 3 January 1945 the accused contracted a bigamous marriage with Ruth M. Brial, which was terminated by divorce 7 April 1945. The cost of the divorce was borne by the accused.

The accused has an excellent military record. He enlisted 23 December 1941, he was discharged as a technical sergeant 29 May 1943 to accept a direct commission as second lieutenant, AUS, and he performed his duties as a commissioned officer in a superior manner from 7 June 1943 to 24 November 1944, the date of his last efficiency rating. He was promoted to first lieutenant 8 March 1944. He is authorized to wear battle participation stars for the Tunisian, Sicilian, Italian, Rome-Arno, and French campaigns, his unit received a Presidential citation, and he was awarded the Croix de Guerre with Palm by the Provisional Government of France. It is stated in the Staff Judge Advocate's review and in his memorandum of 14 April 1945 to the Commanding Officer, 1st Army Air Forces Base Unit, Bolling Field, D. C., that the accused's organization, located overseas, has inquired concerning the date of the accused's availability and desires his early return. The Staff Judge Advocate expressed the opinion in his review

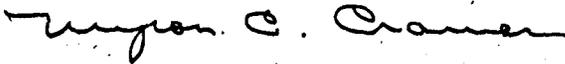
(16)

that the accused should not be separated from the service, but that a substantial forfeiture be imposed, and the reviewing authority, concurring in this opinion, recommended that the sentence be commuted.

In view of the accused's outstanding performance of duty and the service which he is capable of rendering as a commissioned officer, his honesty in admitting the offense charged, his efforts to make amends by assisting Ruth M. Brial to secure a divorce, and the recommendation of the reviewing authority, I recommend that the sentence 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 commuted be carried into execution.

4. Consideration has been given to the inclosed letter from the accused dated 1 June 1945 addressed to the Under Secretary of War.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should such recommendation meet with your approval.



- 3 Incls
1. Record of trial
2. Ltr fr accused,
1 June 45
3. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to reprimand and forfeiture of pay , \$50. per month for six months. GCMO 416, 28 Aug 1945).

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

SPJGN --CM 280986

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

SAN ANTONIO AIR TECHNICAL SERVICE COMMAND

v.)

Second Lieutenant COLONEL H.
 ADAMS (O-878064), Air Corps.)

Trial by G.C.M., convened
 at Kelly Field, Texas, 15
 May 1945. Dismissal and
 total forfeitures.

OPINION of the BOARD OF REVIEW
 LIPSCOMB, O'CONNOR and MORGAN, 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 Colonel H. Adams, Air Corps, Squadron "G", 4530th AAF Base Unit, did, at the Saint Anthony Hotel in San Antonio, Texas, on or about 25 April 1945, with intent to do her bodily harm, commit an assault upon Mrs. Elizabeth T. Oakman, by striking her on the head with a dangerous instrument, to wit, a blackjack.

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

Specification: In that Second Lieutenant Colonel H. Adams, * * *, did, at the Saint Anthony Hotel in San Antonio, Texas, on or about 25 April 1945, with intent to do her bodily harm, commit an assault upon Mrs. Elizabeth T. Oakman, by striking her on the head with a dangerous instrument, to wit, a blackjack.

The accused pleaded not guilty to, and was found guilty of, both Charges and the Specifications thereunder. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority 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 23 April 1945, toward the close of a short leave, departed from Oakland, California, in a B-17 airplane enroute to his station at Kelly Field, Texas. The ship arrived at El Paso, Texas, its destination, on the same

day; and, since no other Army transportation was available until the following morning, he was compelled to spend the night there. During this enforced stay he visited a pawn shop and purchased two cigarette lighters and a blackjack. His reason for this last acquisition was the "prospect of going overseas since it is more or less an established custom of soldiers going overseas to take along emergency defenses." Since his B-4 bag was already at the field from which he was scheduled to leave, he carried the weapon on his person. The next day he flew to Houston, Texas, in a C-47 transport, and, after another night's stop-over, he, on the morning of 25 April 1945, commenced the last leg of his journey by train. On the way, according to his pre-trial statement, he "indulged in rather heavy drinking", and, when he arrived in San Antonio, Texas, that afternoon, he was definitely "under the influence of alcohol." Deciding that it would be better not to go to his home for the moment because of his condition, he took a cab to the St. Anthony Hotel. Entering the lobby, he seated himself in one of the chairs, placed his B-4 bag alongside, and relaxed for about half an hour. Becoming dizzy and nauseated, he "got up to walk around" and, noticing an elevator nearby, entered it. Not having unpacked his bag since his departure from El Paso, he still had the blackjack on his person (R. 55, 81, 92, 113-114; Pros. Ex. 5).

Mrs. Elizabeth P. Oakman, a librarian, who was living at the hotel with her husband, had preceded him in the elevator (R. 9, 16-18, 24, 34-36, 59-60). After having spent the afternoon in Brackinridge Park, she was returning to her room (R. 9-10, 21). At the fourth floor she stepped out, proceeded to her left down the corridor on which the elevator opened, turned left again, and walked down to the end of a long hallway. Although she had paid no particular attention, she had noticed that another person had also gotten out of the elevator at the fourth floor. As she moved along, she realized that she was being followed by the accused, who was a total stranger to her (R. 9-11, 20, 22-23, 35, 47, 50). Inserting her key into the lock of room 403, she opened the door. As she did so, she "could see out of the corner of her/eye that the accused was/standing at the door opposite" hers. Taking two or three steps into her room, she tossed her pocketbook on the bed and "aboutfaced" to close her own door. Directly in front of her at the threshold was the accused (R. 10, 12, 16, 23-24, 37, 43-46, 51, 58).

Before she could move toward the door he rushed into the room. Something about "his general manner" filled her with a premonition that he intended to strike her and caused her to scream (R. 10, 28, 36). Her fear was well founded. Without uttering a word, he pushed her, apparently in the direction of the bed, and hit her a hard blow with the blackjack. She fell backward onto the floor and wedged herself between the bed and a heavy chair which she had overturned in her rapid descent. As she struggled to extricate herself and to rise to her feet, he leaned over her and again struck her on the head with the blackjack. One of his hands came near her face and somehow she succeeded in sinking her teeth into a finger. In that instant he exclaimed, "Oh my God", tore himself loose, and darted from the room (R. 10, 17, 24-26, 28-34, 37, 41-42, 44-46, 48-50, 59; Pros. Ex. 5).

Despite the severity of the blows sustained by her, Mrs. Oakman never lost consciousness. As soon as her assailant was gone, she locked the door with the catch bolt, went into the bathroom, applied some Kleenex to her head to stop the bleeding, and then "called the desk" for help. Mr. Jim Coulter, the assistant manager, and a baggage porter immediately responded. While they were on their way, Mrs. Oakman found the accused's blackjack, cap, and identification tags in the room. When Mr. Coulter arrived, Mrs. Oakman was holding the tags, the blackjack was on the floor, and the cap was on a writing desk. Since she was bleeding profusely, "and her clothes were saturated with blood down to the waist on both the front and back part of her dress," a maid was summoned to assist her in changing her clothes. Shortly thereafter the local Provost Marshal made his appearance and was handed all three of the articles left behind by the accused in his flight. While the Provost Marshal was present, she found in the bathroom "a small button cap that fitted over the end of the blackjack" and had been torn loose by the impact of the blows delivered (R. 12-18, 28, 36, 38-41, 56, 60-69, 114-115).

The first of these had inflicted a wound some two inches long "just off to the right of the crown and back towards the back part of her head" (R. 66-67). Five stitches had to be taken by the doctor who treated her. The second blow was not of a serious nature and "didn't break the skin" (R. 17-18).

In the meantime the accused had fled the hotel. After purchasing another cap, he went to a drug store and ordered "a coke in order to sit down and collect his wits a bit." Reaching into his pocket for some money, he discovered that his identification tags were missing and realized that he must have dropped them in Mrs. Oakman's room. Upon calling the St. Anthony Hotel, his suspicion was confirmed and he knew that his apprehension was only a matter of time. After making several unsuccessful attempts to contact a "Lt. Havorth", who was investigating the assault, he spent the night in San Pedro Park (Pros. Ex. 5). At about 6:10 am the following morning he again went to room 403 "for the purpose of seeing the lady and talking with her and offering what apologies I could." When he knocked on the door, he heard Mr. Oakman inquire, "Who is there?" The accused hastily excused himself, representing that he had the "wrong room", and made his departure (R. 17; Pros. Ex. 5).

After again trying to get in touch with "Lt. Havorth", he, at 8:30 or 9:00 am, walked to police headquarters, entered the office of Major Harry W. Roberson, the Provost Marshal of San Antonio, and said to him, "I am Lieutenant Adams, I am the lieutenant who hit the woman in the St. Anthony Hotel yesterday morning." To a question by Major Roberson as to what caused him "to do such a thing", the accused replied, "I don't know". The accused's principal concern seemed to be to keep knowledge of his plight from his wife (R. 52-58; Pros. Ex. 5). Later in the day, after being warned of his rights under Article of War 24, he was interrogated by Mr. C. A. Risien, a civilian investigator for the War Department. After the questioning was completed, the accused signed a statement which was dictated in his presence by Mr. Risien (R. 69-100, 113-114; Pros. Ex. 5). According to Mr. Risien,

"***** after I talk with a person that is under questioning a considerable time, and sometimes it is thirty minutes and sometimes it may be three hours, and I have gotten what I consider to be a recital; I call in a stenographer and then I dictate the statement that is taken down by the stenographer sentence by sentence. At the end of each sentence I make it a practice to ask the person that is going to sign the statement 'Is that right?' If he says yes the statement is carried on. If he says no then we clarify it. Now, that is exactly the procedure that I follow." (R. 82-83).

* * * * *

I dictated that statement to the stenographer in the lieutenant's presence and at the end of each sentence I asked him 'Now, is that right?' and the answer being in the affirmative, the narrative was carried on . . . So when the statement was concluded his mind was perfectly clear as to what was in there and so was mine."

4. After being apprised of his rights relative to testifying or remaining silent, the accused elected to take the stand on his own behalf. Several other witnesses were presented by the defense, one on the context and nature of his statement and the others on his character, intelligence, previous history, and social background.

Miss Peggy Klett, a stenographer employed in the Provost Marshal's office, had taken Mr. Risien's dictation of the statement which the accused subsequently executed. She noticed that the accused's "eyes were extremely bloodshot and the lids were quite heavy. His clothes were rather mussed up and he had at least a day's growth of beard." He "appeared sleepy, drunk or a mental case" (R. 101-102, 107, 110). Mr. Risien phrased the statement entirely in his own words and in two instances inserted sentences based upon his own conclusions rather than upon admissions of the accused. Since both sentences were eliminated from the statement by the court with the consent of the Trial Judge Advocate, they need not be considered (R. 102-105, 108-109, 112-113).

The combined effect of the remaining voluminous evidence presented on behalf of the accused was to depict him as an individual whose antecedents, breeding, character, previous conduct, morals, and intellect were absolutely incongruous with the offense committed by him. In brief, the record indicates that he came of "a very good family"; that he was an outstanding student; that his behavior as a civilian, an enlisted man, and officer was always honorable and beyond reproach; that his reputation was excellent; that subsequent to his enlistment in November of 1941 he was investigated on five different occasions by the Federal Bureau of Investigation because of the secret nature of his duties and was each time "certified to hold a position of trust"; that both as an enlisted man and as an officer his work in the fields of radar, and communications, whether as a student, instructor, or in practical application, was distinctly

superior; that on one occasion, after numerous other radar operators had failed, he succeeded in locating the position of a plane which had been downed near Cuba; that in November of 1944 he was offered a position as the Secretary of War's personal radar operator and mechanic but he chose to take cadet training instead; and that, although the cadet course at Yale was "pretty rough", with a "washout" rate of about three per cent a week, and although he had extra duties as a supply sergeant, he completed his studies without a single academic mishap (R. 118-132).

In his own testimony he elaborated somewhat upon his previous history, adding, among other things, that he had completed his college course with a bachelor of science degree in three years and at the age of seventeen (R. 134). Since September of 1944 he had been engaged in secret work which he could not describe for reasons of military security. For this assignment he had been selected from among some two thousand cadets (R. 136).

He explained his possession of the blackjack as follows:

"I had expected to be going overseas shortly and had thought of a personal weapon that I might like to take along, as is the usual custom, and discarded the idea of taking along a knife or small gun, as some people do, because I didn't particularly like the idea. And it had been in the back of my mind for quite a while, and I happened to be walking down the street in El Paso, Texas, and I saw two lighters in the window that are quite hard to get, and so I went in and bought them. While I was in there I saw this array of blackjacks that the man had in his showcase, and the idea struck me that I might as well get one now as anytime, so I bought it." (R. 137).

On the train to San Antonio he became acquainted with a "congenial" group of service people and "started drinking with them." Before the trip was over he had consumed about "a pint of straight liquor." After entering the lobby of the St. Anthony Hotel and seating himself, he "began to get quite dizzy and feel quite sick . . . and, not wanting to throw up in front of all the people there and on the rugs and so forth, he got up to walk around and . . . walked into the elevator."

At the fourth floor which was the first stop he "had to get off" (R. 139, 141). The events which then occurred were narrated by him as follows:

"***** there was a girl that got off the elevator at the same time and I just wandered down the hall more or less aimlessly, conscious of the fact that there was somebody else walking down the hall too, and as I got to the end of the hall, why, I stopped and didn't know just exactly where I wanted to go. I turned around and there was an open door there and I stepped into the doorway. I don't know why I stepped into the open doorway, but I did, and there was a girl there and she screamed, and the first thing I knew I just hit her. I guess I was panic, panicky, or something. I hit her and she grabbed hold of my left hand with

her hands and bit my finger and I just became panic stricken, I wanted to get out, and I hit her again, not even realizing that I had the blackjack in my hand. It was the only hand I had free to try to get away with, and I ran out the door and ran down the hall and I saw a sign that said exit on it." (R. 139-140).

He never intended to "pick up" Mrs. Oakman or to have "sexual intercourse with an unconscious woman" (R. 141, 143-144). In his own words,

"My wife was only a few blocks from there, and there are lots of women in San Antonio if a man wanted to pick one up" (R.141).

He had been married about fourteen months, and his wife had been with him at every post at which he was stationed during that period (R. 146).

5. The Specification of Charge I alleges that accused did, "on or about 25 April 1945, with intent to do her bodily harm, commit an assault upon Mrs. Elizabeth T. Oakman, by striking her on the head with a dangerous instrument, to wit, a blackjack." This offense was set forth as a violation of Article of War 93. The Specification of Charge I¹ is in exactly the same words but is laid under Article of War 95.

Apparently without reason and without provocation the accused followed a strange woman to her room, burst in upon her, and, without exchanging a word with her, twice struck her over the head with a blackjack. The first blow was of such severity as to inflict a two inch gash requiring five stitches. Although the accused had perhaps been drinking heavily, he was not so intoxicated as not to understand or appreciate the nature and quality of this act; for, shortly after fleeing from the room he, according to his own accounts, realized that he would be apprehended and accordingly attempted to contact the military police for the purpose of surrendering himself. As was said in II Bull JAG, August 1943, p. 310, sec. 451 (9),

"An intent to do bodily harm may be inferred from the nature of the weapon or the manner in which the weapon or other thing is used or from the seriousness of the resulting injury."

All of these criteria are present in this case. The blackjack obviously was a dangerous instrument per se, and the manner in which it was used and the severe injury which it inflicted both emphasized its dangerous character as a weapon. Since this senseless and brutal assault was a felony and consequently involved moral turpitude, it was violative not only of Article of War 93 but of Article of War 95. To quote from a discussion of an analogous problem in III Bull, JAG, September 1944, pp. 381-382, sec. 453,

"Accused was found guilty of larceny in violation of A.W. 95. . . . Held: While the offense is ordinarily charged as violative of A.W. 93 (punishable as court sees fit), it is also violative of A.W. 95 (punishable by dismissal only), since it is a crime involving moral turpitude and as such inherently amounts to conduct unbecoming an officer and a gentleman (MCM, 1928, Par. 151). CM 258108 (1944)."

The Specifications of Charge I and Charge II have been sustained beyond a reasonable doubt.

6. The accused, who is married and about 21 years of age, was graduated from the University of Wisconsin in 1941 with a Bachelor of Science degree. He entered the Army in November of that year and served as an enlisted man until 14 December 1944 when he was commissioned as a second lieutenant. Since this last date he has been on active duty as an officer.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 93.

Abner E. Spicomb Judge Advocate.

Robert J. Cannon Judge Advocate.

Samuel Morgan Judge Advocate.

(24)

SPJGN-CM 280986

1st Ind

Hq ASF, JAGO, Washington, D. C. 10 JUL 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Colonel H. Adams (O-878064), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of committing an assault with intent to do bodily harm in violation of both Articles of War 93 and 95. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

Without any provocation or reason the accused, while apparently somewhat under the influence of liquor, followed a young matron, who was a complete stranger to him, to her hotel room, rushed in after her, and struck her twice over the head with a blackjack. One of the blows inflicted a wound some two inches long, which ultimately required five stitches. After this completely senseless and brutal act, the accused fled from the hotel building, spent the night in a public park, and the following morning surrendered himself to the local Provost Marshal. Subsequently he was examined by the Chief of the Neuropsychiatric Section, Station Hospital, Kelly Field, Texas, over a period of four days and found to be altogether sane. Although the accused has an outstanding record as a student in college and an excellent reputation both in civilian life and in the military service, his savage assault upon a strange woman indicates that he is lacking in the emotional stability and character expected of an officer in the Army. I accordingly recommend that the sentence be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

2 Incls

1 Rec of Trial

2 Form of Action

MYRON C. CRAMER

Major General

The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 340, 21 July 1945).

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

SPJGK-CM 280997

8 JUN 1945

UNITED STATES)

ARMY AIR FORCES WESTERN FLYING
TRAINING COMMAND

v.)

Second Lieutenant RICHARD
M. NEWMAN (O-1049283), Air
Corps.)

Trial by G.C.M., convened
at Las Vegas Army Air
Field, Las Vegas, Nevada,
15 May 1945. Dismissal,
total forfeitures and
confinement for five (5)
years.)

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 61st Article of War.

Specification: In that Richard M. Newman, 2nd Lt., Air Corps, Squadron B, Las Vegas Army Air Field, Las Vegas, Nevada, did, without proper leave, absent himself from his station at Las Vegas Army Air Field, Las Vegas, Nevada, from about 17 January 1945 to about 7 February 1945.

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

Specification 1: In that Richard M. Newman, 2nd Lt., * * *, did, at Beverly Hills, California, on or about 5 January 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Bank of America, Beverly Hills Branch, Beverly Hills, California, a certain check in words and figures, and providing as follows, to wit:

Jan 5-1945

1st National Bank
Fort Myers, Florida

Pay To The Order of R. M. Newman
Two Hundred & Fifty Four & 45/100

\$254.45/100
Dollars

Richard M. Newman
Beverly House, 140 S. Lasky

and by means thereof did fraudulently obtain from the Bank of America, Beverly Hills Branch, Beverly Hills, California, credit to his account of two hundred fifty-four dollars and forty-five cents (\$254.45), he, the said Richard M. Newman, then well knowing that he did not have and not intending that he should have sufficient funds in the 1st National Bank, Fort Myers, Florida, for the payment of said check.

Note: Specifications 2 to 8 incl. are identical in form with Specification 1 except as to date, amount, person or organization defrauded, and as to what he obtained, which variations are as follows:

<u>Spec.</u>	<u>Date</u>	<u>Amount</u>	<u>Person Defrauded</u>	<u>Obtained</u>
2	10 Jan 1945	\$456.00	Beverly Hills Branch Bank of America Beverly Hills, California	Credit
3	12 Jan 1945	225.00	" " "	Credit
4	15 Jan 1945	350.00	" " "	Credit
5	26 Dec 1944	75.00	Hollywood Knickerbocker Hotel Hollywood, California	Cash
6	28 Dec 1944	75.00	" "	Cash
7	30 Dec 1944	75.00	Lester Allen	Cash
8	5 Jan 1945	100.00	" "	Cash

He pleaded not guilty to and was found guilty of both Charges and all 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 for five (5) years. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. Evidence for the prosecution.

CHARGE I and Specification:

Duly authenticated extract copies of the morning reports of Squadron B, 3021st Army Air Forces Base Unit, Las Vegas, Nevada, for 25 January 1945 and 22 February 1945 were introduced in evidence without objection by the defense. These extracts submitted at 3021st Army Air Forces Base Unit, Las Vegas Army Air Field, Las Vegas, Nevada, show entries regarding accused as follows:

"25 January 45

Newman Richard M AC 01 049 283 2Lt

(TD)

TD Culver City Calif to AWOL as of
the 17th 0001

22 February 1945

Newman Richard M AC 01 049 283 2Lt

(Abs Conf)

Abs Conf Hands of Mil Auth Mitchel
Fld NY to Arrest in Cqs this Sta as
of 2300

(Pros. Ex. 1, 2).

It was stipulated and agreed as a fact by and between accused, defense counsel and trial judge advocate that accused was apprehended by the military police in New York City on 7 February 1945 (Pros. Ex. 3).

CHARGE II and Specifications 1, 2, 3, 4:

On 2 January 1945 in the usual routine manner, accused opened a checking account at the Beverly Hills Main Office, Bank of America, N.T. & S.A., Beverly Hills, California, (hereinafter referred to as the Bank of America) and made a cash deposit on that date with that bank in the sum of \$225.00 (R. 10; Pros. Ex. 14). Thereafter on each of the following days and in the stated amounts:

5 January 1945	\$254.45
10 January 1945	456.00
11 January 1945	225.00
15 January 1945	350.00

accused made and signed checks drawn on the First National Bank, Fort Meyers, Florida, (hereinafter referred to as the First National Bank) and deposited each check in the account he had opened at the Bank of America. (Pros. Exs. 8, 9, 10, 11, 12, 14). In addition to these deposits the accused also between 2 January and 15 January 1945 deposited in this account \$63.55 in cash and a United States Government check payable to his order in the sum of \$50.75 (Pros. Ex. 14, 16).

The Bank of America treated all deposits as cash and between 3 January 1945 and 18 January 1945 honored and paid 23 checks drawn by the accused on his account amounting to \$1,519.00, so that there appeared to be a credit balance in favor of the accused on 18 January 1945 of \$105.25 (Pros. Ex. 14, 16). The records of the Bank of America show that subsequently each of the 4 checks drawn on the First National Bank and deposited in the Bank of America by the accused were returned by the First National Bank unpaid because of insufficient funds for their payment and were charged back by the Bank of America as a debit to accused's account, resulting in an overdraft of the account on 31 January 1945 in the sum of \$1,184.30 (Pros. Ex. 14, 16).

The statement of accused's account with the Bank of America shows a deposit on 23 February 1945 in the sum of \$1,270.00 resulting in a credit balance of \$84.56 (Pros. Ex. 16).

CHARGE II, Specifications 5, 6, 7 and 8:

On 26 December 1944 and again on 28 December 1944 the accused made and signed a check drawn on the First National Bank payable to the Hollywood Knickerbocker Hotel, Hollywood, California. Each of the two checks was in the sum of \$75.00 and were both delivered to Lester Allen (a life-long acquaintance of the accused) who upon endorsing them, handed them to the payee and delivered the cash received to the accused (R. 9, 23; Pros. Exs. 4, 5, 12, 13).

On 30 December 1944 and 5 January 1945 Lester Allen cashed two additional checks for the accused -- one payable to the order of cash in the amount of \$75.00, and one payable to the order of Lester Allen in the amount of \$100.00 -- by delivering on each occasion the entire sum in cash to the accused (Pros. Ex. 6, 7, 12). These two checks were both returned unpaid by the First National Bank (R. 10; Pros. Ex. 13).

A statement showing the activity of accused's account with the First National Bank, between the period 18 February 1944 and 20 January 1945 was introduced by the prosecution into evidence by stipulation (Pros. Ex. 15, 17). The statement shows accused's account from 1 December 1944 until the account was closed 20 January 1945, at no time had a credit balance of more than \$4.41 (Pros. Ex. 17).

On 8 March 1945 the accused voluntarily signed a typewritten statement for the investigating officer (R. 12). This statement was admitted in evidence without objection (R. 13). In it the accused stated in substance as follows:

On 3 January 1943, despite his parents' objecting on religious grounds, he was married to Miss Joan Kelly. Family relations became more bitter and finally resulted in separation and divorce. His

separation "was paying a heavy toll on his mind" and he turned to heavy gambling as an outlet. While at Las Vegas Army Air Field, Las Vegas, Nevada he lost all his savings amounting to about \$11,000.00 his automobile, and his bonds and found himself "a lot deeper than I was able to pay for." In June 1944 he went to New York on leave and made good all his debts. Later owing to his troubles he had to have treatments for chronic headaches and was advised he had to take his mind off his troubles or he would "crack up." He continued gambling in Las Vegas and getting deeper in debt.

In November 1944 he was sent to Culver City, California and while there opened an account with the Bank of America. When ordered to return to Las Vegas, he realized that he would have to face charges for writing checks which had been returned for insufficient funds. He attempted to obtain a delay en route in order to see his ex-wife and procure funds from his family to settle his debts. The funds that he intended to obtain consisted of money held in trust for him by his family and additional money that his family would loan him.

On Sunday 14 January 1945, having been refused the requested delay en route, he purchased ticket number 1826 and made a reservation on the 6:35 p.m. train for Las Vegas. On Sunday night, not being able to sleep and realizing the necessity of obtaining funds he decided he would visit his ex-wife in Portsmouth, Ohio and then proceed to New York to see his family. He left Los Angeles, California, Monday night, visited his wife and then proceeded to New York where he arranged for settlement of all his financial matters. He had completed all his business and planned to turn himself in on 9 February 1945 but was apprehended by the military police on 8 February 1945.

His ratings as an officer had been from excellent to superior and he has received commendations (Pros. Ex. 18).

On 8 March 1945 the accused voluntarily answered questions propounded by the investigating officer which were introduced in evidence. The accused in his answers admitted the making and explained the circumstances surrounding the cashing of a number of the checks in question. He also stated that on 5 January 1945 he did not know the status of his account at the First National Bank because although he had written them requesting a statement, he never received one. On 10 and 15 January 1945 when he drew a check on the First National Bank he knew he did not have sufficient funds on account to cover it. He was trying to get sufficient funds to go home on. In reply to a question in which he admitted he knew the checks would "bounce" when he wrote them, accused replied, "at no time did I feel that I wanted to stick anybody for the money given me (Pros. Ex. 19).

For the Defense

By a deposition admitted in evidence, Mr. Moe Newman, accused's father testified that when accused entered the Army on 21 May 1942 he (accused)

left about \$6,000.00 in trust with him. About \$5,000.00 was added by commissions from a former employer. On birthdays and other occasions he bought accused bonds and different gifts. He did not approve of the marriage of accused and there was a strained relationship which caused him to see little of his son and wife. He received information from his daughter, Mrs. Clair Newman Buzzell, prior to January 1945, that accused had incurred heavy gambling losses. Mrs. Buzzell approached him in December 1944 and requested him to deposit all of the money that he held in trust for the accused in the First National Bank. He refused to do so because he thought the money was for gambling. Had he known the funds were to be deposited to cover legitimate bills he would have immediately deposited the sums. He had about \$2,800.00 in trust for accused during the period between 26 December 1944 and 15 January 1945. After discovering the checks drawn by the accused were legitimate he sent checks covering all legitimate debts from funds held in trust for accused (Def. Ex. A).

By a deposition admitted in evidence Mr. Hazel Newman, mother of the accused testified in substance that she saw accused 2 or 3 times in New York between 17 January and 9 February 1945. She found him to be nervous, depressed, complaining of severe headaches and a chain smoker. She was afraid he would take his own life by taking an overdose of pills so on 9 February 1945 she called the military police and requested them to take him into custody (Def. Ex. B).

By a deposition admitted in evidence Mrs. Claire Newman Buzzell, sister of the accused, testified in substance that on 26 December 1944 accused requested her by letter to contact their father for the purpose of getting him to deposit funds to his credit in the First National Bank. She immediately notified her father but he refused to do so because he did not want to pay any gambling debts out of such funds. Accused wrote to her because he was not on friendly terms with his father. She saw accused in New York 2 or 3 times between 17 January 1945 and 9 February 1945 at which times he appeared nervous, low in spirits, unhappy and was a chain smoker (Def. Ex. C).

By a deposition admitted in evidence Miss Joanne Kelly, former wife of the accused, testified that on 10 October 1944 she was granted a final divorce from accused which had resulted from "family troubles". The accused's family had opposed their marriage and there was a feeling of bitterness which led to quarrels. While in Las Vegas accused incurred heavy gambling losses. She saw him in Portsmouth, Ohio, between 17 January 1945 and 9 February 1945 at which time he appeared nervous. She and accused reached an "understanding" in January 1945 that they would remarry (Def. Ex. D).

Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 16). His testimony was substantially as follows:

He was ordered to Las Vegas, Nevada on 14 May 1944 and while stationed there gambled and lost about \$11,000.00 (R. 17). When he entered the Army he had about \$6,000.00 in a trust fund and during the next two years about \$200.00 monthly was added by way of commissions from a former employer and further additions were made by his father in the nature of \$1,000.00 gifts on his birthdays and at Christmas (R. 17, 18, 26). The trust was not in written form but was just an agreement with his father whereby his father was to handle his money and was to put it where accused wanted it (R. 23).

When he was writing the checks made the basis of the charges, he thought his father would honor them as he had never before refused to deposit sufficient funds to cover the checks (R. 18). His father had made deposits to his account in the First National Bank on other occasions. His father deposited \$700.00 on 9 May 1944, \$500.00 on 20 July 1944, and \$1,300.00 on 22 July 1944 (R. 20). When his father put this money to his account he said he would not put up anymore money for gambling (R. 18).

About the middle of December 1944 he wrote his sister to ask her to have his father deposit money in the First National Bank (R. 18). At the time he went to Culver City, California he thought he had about \$3,000.00 in trust. The first time he had "personal knowledge" that his father would not deposit sufficient money was about 13 or 14 January 1945 when he received a letter from his sister to the effect his father had not deposited the money (R. 18, 19, 28). He found it out on the same day he wrote a letter to the Adjutant General (R. 23). When he said in the affidavit to the investigating officer that he thought the checks would "bounce" because of insufficient funds he meant unless his father made a deposit as he had always done (R. 22).

On the 15th or 16th of January 1944 when accused left Culver City he did so without authority (R. 29). He stayed with his wife about seven days and then went to New York City (R. 29). He had been highly nervous and when he was denied the request for a delay en route he purchased a ticket to Las Vegas and explained his change of plans in not going to Las Vegas as follows:

"Well, sir, it was a Sunday. I was trying to get to sleep, and my mind was pretty much in an uproar. I knew if I didn't get to New York, I wouldn't be able to get the money. My father is a pretty stubborn person, and if I couldn't explain to him, a lot of people would be left holding the bag on some money, which I didn't want to have happen. I knew if I could see my wife and explain to her exactly my feelings and everything, that we could reconcile, so I was just tossing and turning, and I knew I had to go back, and still this other thing was preying on my mind terribly. So, I woke up Monday morning, after falling off into some kind of sleep, and I called up the airline, and asked them if I could get a plane to Ohio that night, and they said yes. I didn't have a priority, but they said yes, and I took it" (R. 19, 20).

Restitution has been made on all checks (R. 40). His father caused sufficient money to be deposited with the Bank of America (\$1,270.00) so as to more than cover his overdraft with the Bank of America (R. 22, 23, 30). Although the actual payment was shown on the records of the Bank of America after his apprehension, it was actually started "way before that" (R. 40).

On cross-examination accused admitted that in November 1944 when he went to Culver City that checks given to the Frontier Club in Las Vegas, drawn on the First National Bank totaling \$1,400.00, had been returned for insufficient funds. He claimed, however, that he made these good by depositing further funds in his account. The prosecution introduced in evidence during cross-examination a letter written by accused addressed to the Adjutant General dated 10 January 1945 in which accused stated he was hopelessly in debt and unable to make good checks given out by him (Pros. Ex. 20), and also a letter written by accused to a Mr. Claiborne dated 2 January in which accused stated he was enclosing three checks in exchange for the three checks which were returned for insufficient funds in the First National Bank (Pros. Ex. 21).

In reply to the question by the court, "You made no attempt to keep an account in a small memo book, something of that sort, to know what balance you had?" he replied "No, sir" (R. 41).

4. With reference to Charge I and its Specification (AWOL) the record clearly establishes that the accused did, without proper leave, absent himself from his station from 17 January to 7 February 1945. The morning report entries (Pros. Ex. 1) of the accused's organization located at Las Vegas, Nevada, showed the accused to be absent without leave from his temporary station in Culver City, California. This entry was therefore based upon hearsay and should not have been admitted in evidence nor given any probative value in support of this charge. Nevertheless, the accused in his own testimony admitted that, when he was ordered to return to Las Vegas and his request for a leave had been refused, he deliberately left his station in Culver City and went to Ohio and to New York without authority. He described his activities during the period of time covering his unauthorized absence. These activities were purely personal and did not involve any military duties. The depositions of his mother, his sister and his wife offered by the defense and admitted in evidence also show that he was in Ohio and New York during this period of time. It was stipulated that he was apprehended by military authorities on 7 February 1945. The evidence aliunde the morning report was therefore overwhelmingly convincing that he was, as alleged in the Specification, absent from his station during the period averred.

With reference to Charge II and its Specification, the accused stands convicted of having made and uttered, with intent to defraud, eight checks totaling in amount \$1,610.45 and by means thereof of

having fraudulently obtained a like amount of cash or credit from various individuals or organizations, which checks, with the knowledge of the accused, were drawn on a checking account in which accused did not have and did not intend to have sufficient funds for their payment. It was clearly established by the evidence and admitted by the accused that he did issue the eight checks made the basis of this Charge at the times, in the amounts, and to the persons alleged in the Specifications; that he procured the cash or credit from those persons; that the checks when presented to the bank upon which they were drawn were returned unpaid because of insufficient funds of the accused on deposit with that bank for their payment; and that the status of the accused's checking account was such that there were not sufficient funds in it for the payment of these checks.

All of the facts alleged in these Specifications were therefore admitted except the important allegation that the accused knew at the times he issued the checks that he did not have and did not intend to have sufficient funds in the First National Bank for the payment of the checks. This, the accused denied. The presence or absence of the intent to defraud usually depends upon the determination of that issue.

In our opinion the evidence was clear and convincing that accused did know that the checks under discussion issued in California and drawn on a bank in Florida would not be honored because of insufficient funds on deposit for their payment. In spite of the accused's testimony on direct examination to the contrary, it was shown by cross-examination that the accused knew in November 1944 that his Florida bank had refused to pay his checks because of insufficient funds. Furthermore, the accused admitted in writing on 2 January and again on 10 January 1945 that his checks previously issued had been returned for the lack of funds on deposit (Pros. Exs. 20, 21). His account on 2 December 1944 showed a balance in his favor of \$4.41. He made no subsequent deposit. The conclusion is inescapable that he knew he did not have and that he did not intend to have sufficient funds on deposit with the First National Bank for the payment of any of the eight checks. The difference between his actual balance (\$4.41) and the total amount of the eight checks that he drew (\$1610.45) makes any other conclusion unreasonable and incredible.

Under oath as a witness the accused stated that he did not know that his checks were being dishonored until 10 January 1945 when he wrote his letter tendering his resignation as an officer. He claimed that this knowledge was based upon his sister's information that his father would not deposit any further sums in the accused's account with the First National Bank. These statements were shown by his own letters to be untrue. Under the circumstances the court was justified in not believing his testimony regarding his reliance upon his father to deposit sufficient money in his account to meet the checks. The evidence is convincing that the accused as a result of his gambling activities got

into financial difficulties and in an effort to extricate himself deliberately cashed the four checks with and through Lester Allen and then obtained other funds by fraudulently establishing a credit with the Bank of America by depositing with that bank four worthless checks of considerable amounts well knowing that the checks were worthless but taking the chance that because of the time it would take the checks to be presented and returned he might be able to recoup his gambling losses or in any event have his father pay his way out. Apparently he was not able to recoup, so in desperation he took off without authority to procure his father's help. As a result his father has made good all of the checks. Of course this does not condone the offenses committed. The court was also justified in concluding that the accused at the time intended to defraud Lester Allen and the Bank of America in the manner alleged. Assuming that the money that was finally used to reimburse those defrauded belonged to the accused and assuming that he realized when he obtained the money from Mr. Allen and the Bank of America in the manner that he did that he would eventually be required to make it good out of his funds held by his father, and so intended, nevertheless, he committed a fraud on Mr. Allen and the Bank of America and the intent to repay when compelled by circumstances to do so is no defense.

5. War Department records disclose this officer is 31 years of age. The record of trial indicates he was married 3 January 1943 and divorced 10 October 1944. He graduated from high school and attended New York University Business School for 2 years. From December 1933 until June 1942, he was employed as a warehouse manager and sales representative for various wholesale liquor, jewelry and ladies' handbag concerns. He enlisted in the Army 21 May 1942 and attained the rank of sergeant. In October 1942 he entered the Officer Candidate Division of the Antiaircraft Artillery School, Camp Davis, North Carolina and on 31 December 1942 was commissioned a temporary second lieutenant, Army of the United States.

6. The court was legally constituted and had jurisdiction over the accused and of 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 conviction of a violation of either Article of War 61 or Article of War 96.

On Leave

_____, Judge Advocate.

Earle Stebbins, Judge Advocate.

William M. Maye, Judge Advocate.

SPJGK - CM 280997

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Richard M. Newman (O-1049283), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his station for a period of 22 days in violation of Article of War 61 (Charge I and its Specification), and of issuing eight worthless checks in exchange for cash or credit totaling \$1610.45 with intent to defraud in violation of Article of War 96 (Charge II and its eight specifications). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof.

The accused absented himself without authority for a period of twenty-two days. Prior to going AWOL he drew four worthless checks totaling \$325.00 on a bank in Florida. The checks were returned unpaid. The accused's balance in this Florida bank during the period in question did not exceed \$5.00 and accused knew this. At approximately the same time accused opened an account with a bank in California, making a cash deposit of \$225.00. Soon thereafter, he made a deposit of \$63.65 in cash and a U. S. Government check totaling \$50.75. In order to augment the amount deposited in the California bank, he then drew four worthless checks totaling \$1285.45 on his bank account in Florida (the balance in the Florida bank at the time the checks were drawn did not exceed \$5.00 and accused knew this), and deposited them in the California bank where they were honored and their total amount credited to his account. He then drew 23 checks on the California bank amounting to \$1,519.00. When the records were finally settled between the Florida and California banks, it was disclosed that accused had overdrawn his California bank account in the sum of \$1,184.30. Three months before the trial all checks were paid by the father of the accused out of trust funds in his hands belonging to the accused.

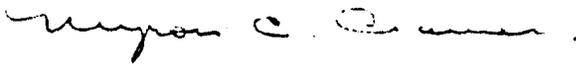
It is apparent that this officer is unworthy of his commission. He deserves substantial punishment in addition to dismissal. I recommend

(36)

that the sentence be confirmed, but, in view of his previous good character and military record and since he has made good all the checks here involved, I further recommend that the forfeitures imposed be remitted, that the period of confinement be reduced to two years, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a letter of Honorable Sol Bloom, Member of Congress, to the Under Secretary of War, to letters from the father, mother and sister of the accused, all requesting clemency, and to a letter from Mr. Herbert J. DeVarco, attorney for the accused. These letters, or copies thereof, are attached to the record of trial.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

7 Incls

1. Record of trial
2. Form of action
3. Ltr fr Hon Sol Bloom
w/incl (copy)
4. Ltr fr father of
accused
5. Ltr fr mother of
accused
6. Ltr fr sister of
accused
7. Ltr fr Mr. DeVarco,
atty for accused

(Sentence confirmed, forfeitures remitted and confinement reduced to two years. GCMO 271, 3 July 1945).

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

5 JUN 1945

SPJGV-CM 281037

UNITED STATES)

INFANTRY REPLACEMENT TRAINING CENTER
CAMP FANNIN, TEXAS

v.)

First Lieutenant HAROLD
C. GIBSON (O-396578),
Infantry.)

Trial by G.C.M., convened
at Camp Fannin, Texas, 15
May 1945. Dismissal.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Harold C. Gibson, Company "B", Sixty-sixth Training Battalion, Fourteenth Training Regiment, did, at Camp Fannin, Texas on or about 17 April 1945, wrongfully strike Private Nelman Ray Fuselier, a trainee under his command, on the body with his hand.

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

3. Evidence.

a. For the prosecution.

On the 17th day of April 1945, the accused was the company commander of Company B, 66th Battalion, 11th Regiment at Camp Fannin, Texas. Private Fuselier was also a member of that company on that date (R. 11). It appears that this trainee had been absent without leave (R. 39-40). At about 2100 hours on that date, Private Fuselier was told that Lieutenant Gibson wanted to see him. Private Fuselier thereupon reported to the orderly room and waited. He fell asleep and when he awakened he asked

Sergeant Wyble for permission to go to bed. He was told that he could do so, and that "he would come and wake me up when Lieutenant Gibson did come to see me" (R. 18). Then Private Fuselier went to his barracks and bunk, undressed and went straight to bed. At about 2300 hours, this soldier was awakened by the Charge of Quarters and told that Lieutenant Gibson, the accused, wanted to see him (R. 12-14). Private Fuselier got up and got dressed at once. Before he finished dressing, however, the accused came to the barracks or hut where the trainee was and asked him what was the matter. Before Private Fuselier could answer, the accused slapped him on the left side of the face (R. 12, 14) with the right hand. Private Fuselier said "Get your goddamn hands off my face" (R. 19) and he closed his fist to strike the lieutenant. At this moment the accused ordered him to open his fist and stand at attention. This the trainee did (R. 15). Then the accused ordered him "outside" (R. 12) and both accused and Private Fuselier went out of the barracks. When outdoors, the accused removed his tie and started to hit the trainee again (R. 15). Before he could do so, however, Private Fuselier hit the accused twice. The accused then ordered Sergeants Moore, Maupin and Campbell, who were standing by, to "cut in on him" (R. 12-15). Upon being so ordered, they entered the fray. Private Fuselier was beaten and knocked down by one or several of these sergeants and then was ordered to bed by the accused (R. 12). He obeyed the order. Later, Lieutenant Gibson, accompanied by at least two noncommissioned officers came back to the barracks of Private Fuselier and ordered him out of bed. Fuselier got up and stood at attention (R. 13). The accused then began to berate the trainee, calling him a "Louisiana French Son-of-a-Bitch" and a "no good son-of-a-bitch" (R. 13) and again struck Private Fuselier. The accused again left, and the trainee went back to bed. Again the accused returned and dragged Private Fuselier out of bed. Private Fuselier fell on the floor. The accused kicked him in the ribs while he was on the floor, kicked him again when he got back to bed, this time the blow landing on the head and otherwise beat him (R. 13-16). The accused left and came back several times, each time beating the trainee (R. 16). At one time he asked for a monkey wrench to "kill the son-of-a-bitch" (R. 25). This kind of punishment went on until some private intervened and told the accused that he had given him enough (R. 26) and the accused desisted. When he finally left, he stationed two armed guards in the barracks to watch Private Fuselier (R. 16). This was the story told by Private Fuselier himself. It is corroborated in large measure by Private Ellis, who was in a nearby bunk at the time (R. 21-22), by Private Fagan, Private Ehinger (R. 29-30) and Private Freel (R. 33), all members of the same company as accused. Private Fagan said that the accused was in "a storm of temper" at the time over Fuselier's going absent without leave.

As a result of the beating he received, Private Fuselier suffered bruises and contusions of the ear, head and leg (R. 16). He had practically passed out at the time of the occurrence (R. 25). Two days later he was examined at the station hospital and found to have sustained a perforated left ear drum (R. 41) as well as minor bruises and contusions. At the time of trial he still complained of pain.

There was also medical testimony that the accused was of sane mind, could distinguish right from wrong and adhere to the right.

b. For the defense.

Sergeant Roy E. Moore, of accused's company, testified in substance that about 2300 on that night he went with the accused into barracks 2 where the latter told Private Fuselier "he would like for him to come outside because he would like to talk with him", and they went out (R. 43) and accused asked the trainee if he "had not given him a dirty deal". Private Fuselier, who was bigger than the lieutenant, began cursing and "took a swing and hit the lieutenant". Sergeant Maupin was also present and they took the trainee back and put him in bed (R. 44).

Captain K. R. Eissler, M.C., whose qualifications as a doctor were admitted (R. 48), testified that he examined the accused for his mental and emotional condition at the request of the defense counsel on 9 May 1945 (R. 48); that accused, at the time of the offense and of the trial, knew right from wrong; had the capacity to "keep from doing wrong"; and had the mental ability to understand the nature of the proceedings against him; that from examination he determined the accused to be a psychoneurotic case (R. 50).

The accused himself elected to remain silent.

4. While there is some conflict of evidence, the testimony, viewed as a whole, is so compelling that the court could not but come to the conclusion that the accused was guilty of the Charge and Specification thereunder.

The 95th Article of War has no counterpart in the civil law. It contemplates conduct by an officer which, taking all the circumstances into consideration, shows moral unfitness of the accused to be an officer. In the words of Winthrop (1920 Reprint Winthrop's Military Law and Precedents, p. 712):

"The quality, indeed, of the conduct intended to be stigmatized by this provision of the code is, in general terms, indicated by the fact that a conviction of the same must

necessarily entail the penalty of dismissal. The Article in the fewest words declares that a member of the army who misconducts himself as described is unworthy to abide in the military service of the United States. The fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behavior complained of, or rather his worthiness, morally, to remain in it after and in view of such behavior, is perhaps the most reliable test of his amenability to trial and punishment under this Article."

The violation of this Article of War contemplates conduct not only unbecoming an officer, but conduct unbecoming a "gentleman" as well. That much maligned word "gentleman" is not used in the Article to designate a person of education, refinement, goodbreeding and manners; but to indicate a man of honor, a man with a high sense of justice, of an elevated standard of morals, manners and deportment (Winthrop); or in short, such a person as an officer of the Army is expected to be. Conduct unbecoming an officer and a gentleman need not necessarily amount to a crime; for if it offends against law, morality or decorum, and at the same time bring disrepute upon the military profession, that is sufficient.

The striking of an enlisted man by an officer has always been considered a serious offense. It has been held that an officer has no right to punish, by assault, any offense or dereliction of duty on the part of an enlisted man (250.4 Sept. 3, 1918). Indeed, the accused did not even raise such a defense in this case; nor was there any other legal justification or excuse for the batteries he committed. His striking of a trainee is unquestionably reprehensible conduct and of a kind unbecoming an officer and a gentleman within the meaning of Article of War 95. Happily, there are very few cases on record of officers committing assault and battery on enlisted men. The case of CM 239481 (Wickham) is very similar to this case. The Board of Review there held that the conduct of the officer in striking an enlisted man was unquestionably a violation of Article of War 95.

We note that the proof goes beyond the Specification, in showing that accused kicked as well as struck the trainee. Considering the record as a whole, we are satisfied that accused's substantial rights were not prejudiced.

5. Several errors in the record of trial need comment. The court, on motion of the defense, excused a member because he was inferior in rank to the accused. While Article of War 4 provides that all officers are eligible to sit on court-martial Article of War 16 provides that:

" . . . in no case, shall an officer, when it can be avoided, be tried by officers inferior to him in rank."

This Article of War has been held to be directory only on the appointing authority (Swain v. U.S., 165 U.S. 553). It is the appointing authority, then, who decides whether or not such a situation is "avoidable". The fact that the particular member is sitting is presumptive under the particular circumstances, that the appointing authority has decided it to be unavoidable. The defense cannot successfully attack the court by raising this question. In any event, no harm was done the accused in this case, since the request of the defense to excuse the particular officer from serving as a member of the court was granted.

6. The accused pleaded punishment under Article of War 104 as a plea in bar of trial. Colonel Ware, Commanding Officer of the accused and the officer who administered the punishment indicated, testified clearly and unequivocally that he did punish the accused under Article of War 104. He further testified that the punishment inflicted was not for the offense for which he was being tried by the court before which he (Colonel Ware) was testifying. This is obvious from the following evidence (R. 10):

"A. The reason I preferred charges is not to cover this offense for which I awarded punishment, but it is to cover the offense I did not know or could not prove conclusively in my mind when I awarded the punishment under the 104th Article of War. It came to light from other sources at a subsequent investigation."

The clearest statement by Colonel Ware on this point is on page 9 of the record of trial:

"Q. Then your restriction and reprimand was for engaging in a fight, allegedly engaging in a fight, between the accused and Private Fuselier in which the Private claims to have been struck on the body?

"A. The evidence which I had from the investigation failed to convince me beyond any question of doubt that there was a fist fight in which Lieutenant Gibson struck the enlisted man. There was sufficient evidence, however, to show Lieutenant Gibson's conduct was such that it was to the prejudice of good order and military discipline, and I awarded the punishment under the 104th Article of War for that and not for striking the man because the evidence did not prove conclusively that he had struck the enlisted man."

The punishment inflicted upon the accused under Article of War 104 was for an offense separate from, and in addition to, the offense charged herein. This being true, the question of such punishment being a bar to this trial does not arise. The court properly overruled the plea.

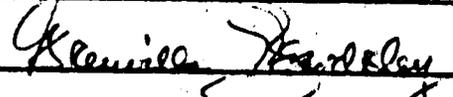
7. The court failed to permit the defense to present evidence of the condition of the accused at the time the offense took place. The evidence defense wished to offer was with regard to the emotional upset, and the basis therefor, of the accused (R. 50). Since there was evidence in the record of trial that the accused was sane, could distinguish right from wrong, and could adhere to the right, such evidence could only go toward mitigation or extenuation, and not toward the question of guilt. We believe this type of evidence should usually be admitted in court-martial cases. In this particular case, since the sentence is mandatory, the court's failure to consider mitigating or extenuating circumstances did not prejudice the substantial rights of the accused.

It would have been better, however, to allow such evidence into the record for the consideration of higher authority on the ground of clemency.

8. The accused is 26 years of age and a graduate of an agricultural college. He was appointed a second lieutenant, Infantry, Officers' Reserve Corps to date from 18 July 1940. He was ordered to active duty on 13 March 1941 and has been on active duty since that date. He has had a period of overseas duty, the length of which does not appear. His promotion to first lieutenant, AUS, was confirmed by the War Department on 26 February 1943. He has been hospitalized several times during his service - both overseas and in the United States for malaria and for psychosis, unclassified. On the 5th of October 1944 he was discharged from the Moore General Hospital as completely cured. There is no record of any manifestations of any illness, mental or physical since that date.

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


_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

SPJGV-CM 281037

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 29 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Harold C. Gibson (O-396578), Infantry.

2. Upon trial by general court-martial this officer was found guilty of striking an enlisted man in violation of Article of War 95. 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. A private who was AWOL returned to Camp Fannin and the accused, his superior officer and company commander, went to his barracks and struck this private with his open hand, and kicked him when he was lying prone, after having dragged him out of bed. A more detailed summary of the evidence may be found in the accompanying opinion of the Board of Review.

4. Accused was examined by a board of medical officers prior to trial, and subsequent to the trial, at the request of this office, he was again examined by another board of medical officers at Harmon General Hospital, Longview, Texas, on 9 July 1945. This board reported:

"A review of the past history of 1st Lt Gibson reveals normal behavior and excellent adjustment both in civilian life and in the Army until he was subjected to severe stress in the course of twenty-eight months overseas, from 21 April 1942 to 14 August 1944, where he served continuously for sixty days in active front line combat duty, during which time he was bombed, shelled and strafed. He developed a state of nervous tension that was aggravated by the physical and mental complications incident upon repeated attacks of malaria which required nine hospitalizations. He was sent back from overseas because of irritability and emotional disturbances which he revealed at a rest camp in Rockhamptom, Australia. Psychiatric examinations at that time led to a diagnosis of 'Psychoneurosis' in May 1944, with the result that the patient was returned to this country in August 1944. After two months of hospitalization at Moore General Hospital in North Carolina, he was sent back to full duty, although irritability and tension symptoms continued.

"Psychiatric examinations at Harmon General Hospital show evidence of a tense, nervous condition and other symptoms such as recent severe, recurrent headaches, nailbiting, and

(4b)

disturbances in sleep, which would justify the diagnosis of 'Anxiety State, moderately severe, following severe stress due to sixty days in combat duty and nine attacks of malaria overseas.' There was no evidence of delusions, hallucinations, or other symptoms of a malignant mental process."

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. I concur in that opinion.

I recommend that the sentence be confirmed, but in view of this officer's past history as above set forth, I further recommend that the sentence be commuted to a reprimand and forfeiture of \$50 pay per month for six months and that the sentence as thus modified be ordered executed.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls
1 Rec of Trial
2 Form of Action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to a reprimand and forfeitures.
CCMO 392, 10 Aug 1945).

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

(45)

SPJGQ-CM 281135

3 JUL 1945

UNITED STATES)

FIRST AIR FORCE

v.)

) Trial by G.C.M. convened at
) Lake Charles Army Air Field,
) Louisiana, 18-20 April 1945.
) To be shot to death with musketry

) Private CLARENCE D. GIBSON
) (18023334), attached Squadron
) C, 332d Army Air Forces Base
) Unit, Combat Crew Training
) Section, Lake Charles Army Air
) Field, Lake Charles, Louisiana,
) formerly of Company G, 25th
) Infantry, 93rd Division, Fort
) Huachuca, Arizona)

OPINION of the BOARD OF REVIEW
ANDREWS, BIERER and HICKMAN, Judge Advocates

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

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

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

Specification 1: In that Private Clarence D. Gibson, attached Squadron C, 332d Army Air Forces Base Unit, Combat Crew Training Station, Lake Charles Army Air Field, Lake Charles, Louisiana, then Company G, 25th Infantry, 93rd Division, Fort Huachuca, Arizona, did, at Fort Huachuca, Arizona, on or about 12 October 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at New Iberia, Louisiana, on or about 11 April 1943.

Specification 2: In that Private Clarence D. Gibson, attached Squadron C, 332d Army Air Forces Base Unit, Combat Crew Training Station, Lake Charles Army Air Field, Lake Charles, Louisiana, then Company G, 25th Infantry, 93rd Division, Fort Huachuca, Arizona, did, at Lake Charles Army Air Field, Lake Charles, Louisiana, on or about 25 April 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself at San Francisco, California, on or about 8 January 1945.

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

Specification: In that Private Clarence D. Gibson, attached Squadron C, 332d Army Air Forces Base Unit, Combat Crew Training Station, Lake Charles Army Air Field, Lake Charles, Louisiana, then Company G, 25th Infantry, 93rd Division, Fort Huachuca, Arizona, having been duly placed in confinement in the Base Guard House, Lake Charles Army Air Field, Lake Charles, Louisiana, on or about 11 April 1943, did, at Lake Charles Army Air Field, or about 25 April 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE III. Violation of the 92nd Article of War.

Specification: In that Private Clarence D. Gibson, attached Squadron C, 332d Army Air Forces Base, Unit, Combat Crew Training Station, Lake Charles Army Air Field, Lake Charles, Louisiana, then Company G, 25th Infantry, 93rd Division, Fort Huachuca, Arizona, did, at Lake Charles Army Air Field, Lake Charles, Louisiana, on or about 25 April 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Ralph S. Heimbach, 961st Guard Squadron, Lake Charles Army Air Field, Lake Charles, Louisiana, a human being, by striking the said Private Heimbach on the head with a blunt instrument, to wit, an iron pipe.

He pleaded guilty, with appropriate exceptions and substitutions, to the lesser offenses of absence without leave included in Specifications 1 and 2, as a violation of Article of War 61 and guilty to Charge II and the specification thereof. He further pleaded in bar of trial as to Specification 1 of Charge I for the reason that the statute of limitations had run as to the offense of absence without leave admitted by his plea of guilty. He pleaded not guilty to Charge I and to Charge III and the Specification thereof. He was found not guilty of Specification 1, Charge I but, all of the members of the court present at the time the vote was taken concurring, he was found guilty of all other Specifications and of all Charges. No evidence of previous conviction was introduced. All of the members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry at such time and place as the reviewing authority may direct. 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 in support of the Charges and the Specifications of which the accused was found guilty, briefly summarized, is as follows:

On 24 April 1943 the accused and one Morley Rideau were prisoners in confinement at Lake Charles Army Air Forces Guard House, Lake Charles, Louisiana (R. 8, 108; Pros, Ex. 3). On the same date and on the succeeding day, Private Ralph S. Heimbach, 961st General Squadron, was a prisoner guard and had acted as such on prior occasions. In this capacity he had escorted the accused and Rideau from the guard house to the mess hall on a number of occasions and he did so on 24 and 25 April 1943 (R. 11-13, 16, 19, 23, 33, 109, 110).

According to Rideau, Heimbach took the accused and himself to mess on the evening of 24 April 1943 (R. 109). Rideau had met the accused on 18 April 1943 but had not come to know him very well because he (Rideau) had spent most of the following week in the hospital and did not see the accused again until 24 April 1943 (R. 108). They had conversed a little "but not too much" and Rideau denied that they ever discussed or planned an escape (R. 108, 109, 116). Upon being returned to the guard house after mess on the night of 24 April 1943 the two prisoners went to bed at about 8:30 p.m. (R. 109).

On the morning of 25 April 1943 (Easter Sunday) at about 6 a.m. Private Heimbach again escorted the accused and Rideau to mess. From the guard house to the mess hall they travelled in a jeep, the guard driving, Rideau beside him and the accused on the back seat. After leaving the jeep they proceeded on a cement sidewalk leading to the mess hall door, Rideau walking ahead; the accused following and the guard behind the accused (R. 12, 110, 121). The kitchen detail had prepared breakfast and were waiting for reveille to be sounded (R. 23, 32).

There were two doors to the entrance of the mess hall, the main door and a screen door, both opening outward (R. 34, 41, 110). The main door, when open, was customarily propped with a piece of pipe approximately 18 inches long and $1\frac{1}{2}$ to $2\frac{1}{2}$ inches in diameter (R. 25, 34, 41, 42).

Rideau had not yet reached the screen door, which was closed although the main door was open, when he heard a "hard lick", (R. 111, 133) turned around and found the guard lying on the ground while the accused stood facing Rideau pointing a gun which he had taken from the guard. A piece of pipe was on the ground. The accused said "Come on, let's go". Rideau at first refused to move but at the point of the gun he did finally run away, with the accused following him (R. 111, 121, 122, 123, 134). At the time of this incident there was no other person in the vicinity outside the mess hall except the accused, Rideau and the guard (R. 132, 135).

Meanwhile members of the kitchen staff became aware of the disturbance on the walk outside of the mess hall door. It was then about 6:15 a.m. (R. 23, 32). Private First Class John Eppinger heard a groaning at the door but kept on with his work for the moment (R. 23). Private Rufus Robinson, on kitchen police, also heard the groaning but thought

it might be someone who had been to town and "had a few drinks too many" (R. 32). Someone by the name of Keith went to the door to investigate, however, and when he stood there dumbfounded, "just pointing to something and not speaking a word", the others left their work and went to the door (R. 32, 39). Eppinger saw the guard sitting on the sidewalk "with his head in his hands". He saw blood coming from the guard's head (R. 23, 24, 28, 29). Robinson, after looking at the body on the sidewalk, went immediately to barracks for the First Sergeant who called the guard house and the hospital. Robinson returned to the mess hall and stood by the guard until an ambulance came and took him away (R. 32, 36, 39). By this time the guard was lying on the pavement with his feet toward the mess hall and where his head rested on the sidewalk there were spots of blood (R. 24, 28, 29, 32, 46, 47). He tried to raise himself but was too weak and he spoke no word but only groaned (R. 36, 39). Private Nathaniel Holmes saw a piece of pipe about 1½ feet long lying near the prostrate guard (R. 46, 47, 48).

When the First Sergeant arrived the guard was trembling and breathing heavily (R. 41). Both he and Robinson noticed that the pistol was missing from the guard's holster (R. 33, 41). An ambulance arrived at some time between 6:30 and 7 a.m. and took the guard away (R. 32, 36).

Both Eppinger and Robinson identified the guard as one they had previously seen on frequent occasions bringing prisoners to mess (R. 23, 33), among whom was the accused (R. 33), and both recognized a picture of the guard (R. 24, 26, 33) which had been previously identified as a photograph of Private Ralph A. Heimbach (R. 13, 15, 17, 18; Pris. Ex. 6).

It was stipulated and agreed that Private Ralph S. Heimbach was detailed as a "prison-chaser" on 25 April 1943 and assigned the duty of taking colored prisoners, Private Morley D. Rideau and Private Clarence D. Gibson to the colored mess hall for their meals; that he used a jeep as the means of conveyance; that he received injuries in the vicinity of the mess hall; and that he died as a result of said injuries (R. 19; Pros. Ex. 7).

From the mess hall Private Heimbach was taken to the hospital (R. 50). By written stipulation it was agreed that Captain Siegfried H. Brauer, Medical Corps, if present, would testify, under oath that he was the medical officer on duty at the Lake Charles Army Air Field Station Hospital on 25 April 1943 when Private Ralph S. Heimbach, a guard, was brought there for treatment at 6:30 a.m. The guard was in a moribund state, and in a coma as the result of a fractured skull. He died at 11:08 a.m. and in Captain Brauer's opinion the death was the result of the skull fracture and the resultant intercranial hemorrhage. From the appearance of the wound on the skull he was further of the opinion that the wound and fracture were caused by a blow from a blunt instrument (R. 48; Pros. Ex. 9). Captain Robert W. Worden, Medical Corps, one of the officers who performed the autopsy, testified that no man could recover

from the results of the injuries received by the deceased because the disjuncture of the vital centers and the great pressure caused by the amount of hemorrhage under the deceased's brain made it impossible for life to continue. In the opinion of all three officers who made the examination, the injuries had been caused by a fairly heavy blow of a blunt instrument (R. 53).

A certificate of death showing that Private Heimbach died in the Station Hospital, Army Air Base, Lake Charles, Louisiana, at 11:08 a.m. on 25 April 1943 and a certificate of post mortem examination of his body made at Hixon's Funeral Home, Lake Charles, Louisiana at 3:15 p.m. on the same date were admitted in evidence without objection (R. 51, 52; Pros. Exs. 10 and 11). The cause of death set forth in the death certificate is: "Basal skull fracture with intracranial hemorrhage." The post mortem report related findings of a 2½ inch laceration of the scalp running posterior and downward, located 3 inches above and 1 inch posterior to the ear. The original wound had ragged edges as though made by a blunt instrument. There was a fracture of the parietal, temporal and sphenoid bones on the left side. The dura was traumatically ruptured, some of the temporal lobe of the brain was exuding and the entire subdural space was filled with blood.

After fleeing the scene, as above related, the accused and Rideau continued to run for some time in the direction of Lake Charles, passing through a railroad yard (R. 111). Two railroad employees, though unable to identify the accused at the trial, saw two colored men, corresponding in size with Rideau and the accused, in the railroad yards at the time in question (R. 60-63, 64-68). One of the witnesses testified that the smaller one of the two men carried a gun (R. 60) but the other witness, although he saw the larger one carrying an object, could not say it was a gun (R. 64, 65).

Rideau maintained that his actions in accompanying the accused in the escape were involuntary because the accused had possession of the gun and Rideau was afraid of him (R. 112, 123, 124, 125); furthermore, he had told the accused that he (Rideau) was to be released from the guard house on 25 April 1943 and sent back to his post (R. 114).

Arriving at the yard of a high school the escaped prisoners then changed clothes. The accused had put on two suits of civilian clothing that morning and he now took off a brown shirt and a two-tone jacket which he made Rideau put on in place of some of the clothes he was wearing. The accused then had on a white shirt and a brown hat (R. 112, 125, 131).

Shortly thereafter Rideau managed to elude the accused by slipping away between two buildings (R. 112, 124). Subsequently the accused appeared alone at the home of his uncle and aunt, Charlie and Elvira Hickmon, in Lake Charles, Louisiana, in the evening of 25 April 1943. Only the uncle was there when the accused arrived at about 9 p.m. (R. 69). Hickmon, who had heard of the murder at Lake Charles Army Air Field

(R. 77) entered into conversation with the accused during which he asked him whether he was one of the boys who was sought for the murder to which the accused answered "Yes". When asked why he had done it, he replied "I was mistreated so I knocked him down". The uncle reproved him for having done wrong and said he could do nothing for him (R. 69, 72). At that time the accused was dressed in brown trousers, a blue shirt and a blue jumper (R. 72, 75) and had a pistol stuck in his belt which he said he had taken from the man he knocked down (R. 73). Some time later the aunt, who had been to church and heard about the murder, arrived and said: "Lawd, Clarence, the soldiers were all gathered around the church looking for two escaped prisoners" and the accused admitted "I'm one of the boys". She then told him she couldn't help him and said he would have to get out of the house, whereupon the accused left (R. 78).

At about 10 or 11 a.m. on the morning of 26 April 1943 the accused came to the home of Rev. James J. Davis in Lake Charles, wearing a pair of brown trousers and a bluish shirt and carrying a bulging object which "looked like a revolver" in his belt. He requested Rev. Davis to take him, by automobile, to Leesville, Louisiana, so he could catch a bus there to Weirgate, Texas, because "the MPs were after him". This, Rev. Davis declined to do, telling the accused to "get away from there" and slamming the door. After the accused disappeared, Rev. Davis informed a policeman of the circumstances (R. 81, 82).

On 8 January 1945 the accused was placed in confinement in the Post Prison at the Presidio of San Francisco, California (R. 9; Pros. Ex. 4).

On 14 February 1945 Second Lieutenant Hugh M. Neisler, Jr., Base Claims and Assistant Legal Officer at Lake Charles Army Air Field, Louisiana, who was the investigating officer, obtained a statement from the accused. Before doing so he read and explained to the accused the 24th and the 70th Articles of War and paragraph 35a of the Manual for Courts-Martial. He went into detail in his explanation, point by point, of the accused's rights, using a check list and going over some matters several times for a period of about thirty to forty-five minutes. He particularly advised him that any statement he might make could be used against him. After the accused expressed a desire to make a statement Lieutenant Neisler again read Article of War 24 to him and the accused then admitted that he understood his rights and had no further questions on the matter (R. 83-85, 100). Private Frances M. Hardesty, the stenographer who was present during this interview and who took down the accused's statement, was present in the courtroom (R. 90, 93).

The accused elected to testify regarding the circumstances surrounding the making of his statement. He stated that he had been in solitary confinement in a cell in the guard house for a period of two or three weeks before he was interviewed. On the first day he was confined, Sergeant Daidone had knocked him around pretty badly and he was chained down when Lieutenant Neisler came to see him. He admitted that the lieutenant read "the Article of War" to him but did it so

rapidly that he did not "completely" understand him but failed to tell him so. The officer told him his statement "would be for or against (him), too" and that it would be "to his advantage". He did not say that it could be used against him in court. Accordingly, the accused thought that making a statement would help him. He further admitted, however, that on 27 February 1945 when Lieutenant Neisler visited him a second time, he signed another statement in which he acknowledged that he had read the statement made on 14 February 1945 in its entirety, that it was absolutely true and correct and that when asked whether there was anything further which he wished to add he had answered "No, that's all". He stated that he had gone through the 9th grade in school and spent most of his time in writing love stories of which he had sold two for publication during the past two years (R. 93-99).

Upon cross-examination Lieutenant Neisler testified that the cell in which the accused was confined would accommodate approximately 15 or 20 men in double bunks and that accused was chained with a 1 inch chain 6 feet long attached to his ankle (R. 88). He denied having told the accused that a statement would be to his advantage or that it would make things easier for him (R. 89).

Sergeant John F. Daidone, prison Sergeant of the Lake Charles Army Air Field Guard House, testified that the accused was confined therein on 9 February 1945; that he had never been in solitary confinement while there and that no one ever mistreated him during his confinement. The reason the accused was chained was because the guard house personnel were taking all necessary precautions (R. 104, 105).

The statement made by the accused on 14 February 1945 was admitted in evidence over objection by the defense (R. 84, 91, 101, 102; Pros. Ex. 13). The accused's supplementary statement made on 27 February 1945 was admitted in evidence without objection (R. 142; Pros. Ex. 14).

The substance of the accused's first statement as it relates to the offenses of which he was found guilty, is as follows (references being to pages of the statement):

On or about 11 April 1943 he was confined in the guard house at Lake Charles Army Air Field, Louisiana (p. 2). While there he met another prisoner by the name of Morley Rideau on 24 April 1943 (p. 4). Rideau complained about mistreatment by the military police and stated he was going to escape. He suggested to the accused that, when they were being escorted by the guard, he would lie down and make believe he was sick at which time the accused should hit the guard and take his pistol as he was leaning down to see what was the matter with Rideau (p. 5, 11). The accused demurred and said it might turn out bad because "the guard might die or something"; but Rideau kept "talking him into it". On the preceding night Rideau had pointed out an iron pipe to the accused when they went to mess and told him he could hit the guard with it. The pipe was about 8 inches long, $1\frac{1}{2}$ inches around, and it was

near the door to the mess hall (p. 10). Rideau further assured the accused that his father had some money which Rideau would get and they would go to New York where he knew a lot of people (p. 6).

On the next morning (25 April 1943) the guard came to take them to mess. The accused was clad in brown pants with a blue coat and a brown civilian hat and brown civilian shoes (p. 7) but he had on an extra pair of pants and an extra shirt (p. 14). Rideau wore O.D. pants and a fatigue coat and hat with civilian shoes (p. 7). They rode to mess in a jeep, Rideau riding up front with the guard and the accused in back (p. 8). When they left the jeep they proceeded to the mess hall Rideau going first, then the accused followed by the guard (pp. 8, 9). As they reached the door to the mess hall the accused saw the iron pipe just where it had been on the night when Rideau pointed it out to him (p. 10). It was only about 6 inches from the walk where it joined the mess hall door so that he could easily reach down and pick it up.

Just as Rideau was nearing the door he fell down grabbing his stomach and groaned. The guard moved forward, stooped over and asked him what was the matter. The accused also stooped down to see what was wrong. Rideau, however, kept looking up and making motions to hit the guard. Then, in the accused's own words:

"...I must have picked up the pipe but I didn't pick it up sudden. Rideau stopped his groaning and made motions for me to hit the guard, but I studied over it. I didn't know what to do...I just couldn't feel what was going on. It was like a fainting spell. I couldn't catch myself to act like Rideau told me to. I still can't remember it yet...I remember picking up the pipe. I was standing looking down at Rideau and this guard and that's where I was studying, and he kept making me signs to hit him....When I was holding the pipe I was trying to think, I can't just remember raising up my hand to hit the guard....But I can't remember hitting the guard. The last thing I remember I had the pipe in my hand..." (pp. 12, 13).

"...I reached for the pipe. I had it in my hand...In my left hand...I picked the pipe up. I did not hold it to strike with, just held it in my hand and that is when I was thinking and went through a fainting spell...When I had the pipe in my hand that's all I can remember. Then when I remember again I was running..." (p. 19).

He admitted that Rideau could not have reached up and hit the guard on the back of his head because he was on his side (p. 13) and he did not see the guard lying on the ground (p. 19).

Suddenly he found himself running. Rideau had grabbed the guard's gun and was coming behind him. They ran across a field. When Rideau got tired of carrying the gun he handed it to the accused. After a

while the accused became faint and said he was going to give himself up but Rideau chided him and he continued running (p. 13). They then entered railroad yards beyond the field, where Rideau climbed under a box car on a siding when he saw military policemen coming down the street. After leaving the railroad yard the accused returned the gun to Rideau and they later climbed a fence into a high school yard where they changed clothes. He took off one of his extra outfits which Rideau then put on, throwing his uniform away in a bush. The gun was then lying on the ground (p. 14). Neither one even threatened the other with the gun.

At this point they parted, Rideau going one way and the accused another, taking the gun. The accused then proceeded to the house of Dan Franklin in Lake Charles and later to the house of his aunt, Mrs. Elvira Hickson (sic) where he saw his uncle, who asked what he was doing with the gun which was stuck in his belt, and accused told him a boy gave it to him. The uncle had heard something about "the break" and kept telling the accused that he (the accused) was involved. The accused, however, "didn't give him no stories on that ". Later his aunt arrived but he did not tell his uncle or his aunt that he had hit the guard. He then left and went down the street to a church where he spent the night (R. 15, 16). The next morning he asked "the preacher" to drive him to Leesville but was told that the car was broken down. The accused still had the gun stuck in his belt under his shirt. He then went to the home of some woman where he stayed until he saw some military police coming, when he ran out of the yard after hiding the gun underneath some plants in the woman's yard. After going to a pool room for awhile he soon after caught a bus for Leesville (p. 17).

From Leesville, Louisiana, over a period of three months, he went to Chicago, Illinois, St. Louis, and Kansas City, Missouri, Denver, Colorado, Ogden, Utah and Sacramento, Oakland, and Hollywood, California, wearing civilian clothes and engaging in civilian employment in several places (pp. 2, 3, 4, 18). He had learned of the death of the guard by reading a newspaper on his way from Leesville to Chicago (p. 18).

On 5 January 1945 he "turned himself in" to the military police in Oakland, California (p. 18).

Sergeant Daidone, in addition to other testimony hereinbefore set forth, stated that he assisted in a search for the escaped prisoners shortly after the homicide. After questioning some people in Lake Charles he was informed by a colored woman that there was a gun in her garden. The gun, which was a Colt 45 revolver, was found in the place indicated and taken to the guard-house (R. 106, 107).

Upon cross-examination, Morley Rideau denied that he had ever agreed with the accused to simulate illness while being escorted by the guard in order that the accused would be enabled to hit the guard with a pipe or that he did, on 25 April 1943, fall down to the ground

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and complain of pains (R. 127) or that he had told his father or his brother-in-law that he had cramps on that date (R. 128, 130). He did, however, admit that he saw his brother-in-law on Tuesday and his father on Wednesday, following the crime, and that in a former trial both the father and brother-in-law had testified that he (Rideau) had told them that he had had cramps on the morning of 25 April 1943 (R. 129, 130).

A certified extract copy of the morning report of Post Prison Casual Detachment, Presidio of San Francisco, California for 8 January 1945 was submitted in evidence. Thereon it is shown that the accused was confined to said prison on said date (R. 9; Pros. Ex. 4).

Photographs of the cement sidewalk at the mess hall where the homicide occurred, purporting to show blood spots thereon, which photographs were taken on 25 April 1943, were admitted in evidence (R. 19-22; Pros. Ex. 8).

For the purpose of saving time, expense and the trouble of formal proof the following facts were stipulated as true and susceptible of proof by competent evidence:

On 29 April 1943 the Provost Marshal of Lake Charles Army Air Field delivered an iron pipe alleged to have been the assault weapon to a chemist employed by the Bureau of Identification, Department of State Police, State of Louisiana. Said pipe measured approximately 18 1/8 inches in length and 1 7/8 inches in diameter. By the use of Benzedrine, Teichmann's and Precipitins tests, human blood was found in quantity upon said pipe (R. 59; Pros. Ex. 12).

4. Evidence for the defense, briefly summarized, is as follows:

General Court-Martial Order No. 488, Headquarters Third Air Force, Tampa, Florida, 9 September 1943 was admitted in evidence (R. 143; Def. Ex. A.). Herein it appears that Private Morley Rideau was charged with desertion on 8 April 1943 and escape from confinement, murder and desertion on 25 April 1943. He pleaded not guilty to all Charges and Specifications, was found guilty of absence without leave, escape from confinement, desertion and murder and was sentenced to be dishonorably discharged, to forfeit all pay and allowances and to be confined for life. The reviewing authority disapproved the findings of guilty as to murder, suspended the dishonorable discharge and approved only a period of 10 years confinement at hard labor.

It was stipulated and agreed that if Private Charles D. Hull was present in court he would testify that he was on duty as Charge of Quarters on the night of 24-25 April 1943. At 6:15 a.m. on the morning of 25 April 1943 it was his duty to waken the 913th Quartermaster Platoon. At that time he heard a noise on the cement pavement outside. As he looked out of the window he saw two men running "in open ranks", by which he meant "one to the far left and one to the far right". As he went

outside, between the mess hall and the barracks, he heard someone yell "Get the guard, the ambulance and the Officer of the Day; this man is dying". Thereupon he turned about, called up the Officer of the Day, the Corporal of the Guard and sent for an ambulance (R. 144, 145).

A certificate of birth registration, Mississippi State Board of Health, Jackson, Mississippi, showing that the accused was born on 7 August 1924, was admitted in evidence (R. 145; Def. Ex. B).

The accused, having been informed of his rights, elected to make an unsworn statement through his Counsel as follows:

"...The accused contends throughout that the escape was planned and suggested by Rideau, who, the accused states, was rather a cool character and the leader type of man who had audaciously planned it and got him in on the execution of it. He then proceeded to Lake Charles, Louisiana, right after the escape. He denies completely forcing Rideau to go with him and contends that Rideau had the gun nearly all of the time from the time they left, but that they were together. He went to Lake Charles, from there he traveled to Chicago, Saint Louis, San Francisco — he wandered about the country from April the 26th until he turned himself in on 5 January 1945 in San Francisco. He turned himself in because he realized he was implicated and wanted by the government. He desired to straighten himself out with the law and settle it. He is willing to take whatever punishment is meted out to him. He feels he is not to blame. He was lead into it by Private Rideau. While he was absent from military control, during the twenty months subsequent to the 25th of April 1943, the accused was in no trouble whatsoever. He worked at various jobs and received good pay for them. He was well liked and had many friends. He was active in church and social affairs. He had no trouble with the police. At the time of the alleged offense, the accused states that he was eighteen years and approximately seven or eight months old, his birth day being August the 7th 1924. He was confined after being apprehended in San Francisco and questioned by the Bureau of Identification on what he calls the 'hot seat'. He did not read the statement he made then. He says he made one statement there and another one later in Oakland, California, and he was not particularly aware of any difference in that type of statement and the one he made to Lieutenant Neisler. He denies he was completely aware of his rights when Lieutenant Neisler explained them to him. The accused states that there were several irregularities in the statement after it was written up, but that he did not understand it when he signed it, nor did not read it completely when he signed it. He was not completely aware of his rights...." (R. 146).

5. The accused is charged with murder in that he did, at Lake Charles Army Air Field, Lake Charles, Louisiana, on or about 25 April 1943, with malice aforethought willfully, deliberately, feloniously and unlawfully, and with premeditation, kill Private Ralph S. Heimbach,

a member of the 961st Guard Squadron.

Murder is the unlawful killing of a human being with malice aforethought and "unlawful", within the terms of this definition, means without legal justification or excuse. A homicide done in the proper performance of a legal duty is justifiable and one which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense or a sudden affray, is excusable; and no homicide committed in such manner is deemed to be unlawful (par. 148a, MCM 1928). As will be seen, no element of legal justification or excuse arises upon an examination of the record of trial in this case and no consideration need be given to these principles of defense in the discussion of the evidence.

Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word "aforethought" does not mean that the malice must exist for any particular time before the commission of the act or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. Moreover, malice aforethought may exist when the act is unpremeditated. It may mean anyone or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: (1) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); (2) Knowledge that the act which causes death, will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; and (3) Intent to commit any felony (Idem).

Furthermore, it is settled law that if death is caused by a willful act, the natural tendency of which is to cause death or great bodily harm, the homicide is murder unless justifiable or excusable, or reduced to manslaughter by extenuating circumstances. In such case an intent to kill or inflict great bodily harm will be implied as a matter of law, and without inquiry into the actual intent, on the principle that a man is to be presumed to have intended the natural and probable consequences of his voluntary acts. In accordance with this principle, the willful use of a deadly weapon upon another without justification, excuse or extenuating circumstances is universally recognized as showing malice (Clark and Marshal, Law of Crimes, 4th Edition, par. 241 a and b). Thus, if a man strikes another with a deadly weapon, or inflicts grievous bodily injury upon him, or does any act which is likely to cause death, and death results, he is presumed to have intended to kill him (Miller, Criminal Law, par. 88, b).

The evidence in this case leaves no doubt as to the propriety of the findings. The accused and one Morley Rideau were prisoners in the

stockade at Lake Charles Army Air Field, Louisiana, on Saturday, 24 April 1943. By the accused's own admissions it is evident that they had planned to escape by overcoming the guard while they were being escorted to their meals. This Rideau denied but the unique circumstances under which the homicide was perpetrated leaves no question of the truth of most of the story related by the accused.

Private Ralph S. Heimbach was the guard who took them to and from mess on the evening of 24 April 1943 and, according to the accused, both he and Rideau noticed a piece of iron pipe, approximately 18 inches long and $1\frac{1}{2}$ inches in diameter, in the vicinity of the door to the mess hall. The evidence shows that this pipe was customarily used to prop the door when it was open. Upon their return from mess on Saturday evening Rideau suggested a plan whereby he would feign illness just as they would reach the mess hall door and, while he fell to the ground in apparent pain and the guard stooped over to give him aid, the accused should seize the pipe and strike the guard with it and take his pistol, whereupon they would escape.

On the following day, which was Easter, Private Heimbach took both the accused and Rideau to the mess hall, and the ensuing tragedy was enacted exactly as planned. As soon as the trio reached the door, Rideau fell to the pavement groaning, the guard stooped over him, the accused picked up the pipe and felled the guard with a blow on the head. Thereupon the accused seized the guard's pistol and both he and Rideau escaped. The guard was mortally wounded and died within about five hours because of a fractured skull and resultant brain hemorrhage. According to expert medical opinion no man could continue to live with such injuries as the guard had suffered.

The extra-judicial statement of the accused would alone be amply sufficient to support the findings. Its admission in evidence was strenuously opposed by defense counsel on the ground that it was not a voluntary statement. A careful examination of all the evidence relating to the circumstances under which it was made leads to the conclusion that its admission was proper.

The stenographer who was present at the time the statement was made was present at the trial and available to the defense to impeach the testimony of the investigating officer but was not called as a witness.

However, disregarding the statement, there is abundant independent evidence of the guilt of the accused. As soon as they had fled the scene, the conspirators ran through a railroad yard where two railroad employees observed two colored men, one carrying a gun, at about the time when it was shown the two prisoners had escaped. Some time thereafter the accused and Rideau parted and the accused went to the home of an uncle and aunt. He admitted to his uncle, who had heard of the murder, that he was one of the men who was sought by the military police for the murder and that he had knocked the guard down and taken his pistol because he had been mistreated. To his aunt he admitted that he was one of the escaped

men being sought by the military police. He was then armed with a pistol. The next morning he was seen, still carrying what appeared to be a pistol, by Rev. Davis to whom he admitted that he was being sought by the police and who refused to transport him to Leesville by automobile. Thereafter the accused went to the home of some woman in Lake Charles until he was in danger of apprehension, when he hid the gun in the yard, where it was later found, and then fled. From this point he travelled west until he reached California. Nothing more was heard of him until he came under military control at the Presidio of San Francisco on 8 January 1945.

Meanwhile Rideau had surrendered and was tried and convicted of escape, absence without leave, desertion and the murder of the guard, although the findings of guilt as to the murder were disapproved, and he was sentenced to confinement at hard labor for ten years on 9 September 1943.

The corroborations evident in a comparison of the testimony of the accused and Rideau, who testified at the trial of the accused, and an examination of the evidence given by the uncle, the aunt, the minister and a sergeant who found the gun in the yard where the accused said he hid it, together with the facts and circumstances surrounding the homicide established by other witnesses, leaves no reasonable doubt whatever of the guilt of the accused on the charges of escape, murder and the ensuing desertion.

Any extended discussion of the facts and the law applicable thereto is unnecessary. It is abundantly evident that the assault on the guard was willfully, deliberately and maliciously planned by both prisoners and was brutally executed by the accused under circumstances which clearly demonstrated a wicked and depraved heart and mind and fully supplied every element of the crime of murder. Proof of the escape and of the intent to desert is too obvious to require comment.

6. In Specification 1 of Charge I the accused was charged with desertion at Fort Huachuca, Arizona, from 12 October 1942 until his apprehension at New Iberia, Louisiana on 11 April 1943. The evidence adduced in support of these allegations was amply sufficient to have justified an inference of the intent of the accused to remain absent permanently and thus would have supported a finding of guilty as to this Specification. It is apparent from the finding that the court must have resolved the matter in favor of the accused when he was found guilty of absence without leave for this period. Since the accused had pleaded guilty to absence without leave during the period alleged, in violation of Article of War 61 and then pleaded in bar because of the statute of limitations the court should have sustained the plea in bar rather than acquit the accused by a finding of not guilty.

7. It is noted that, although there was no issue as to the sanity of the accused raised either prior to or at the trial, a report of a board of officers who were directed to examine the accused, accompanies the record of trial. It discloses that, after examination of the accused continuously from 10 to 14 March 1945, it is the opinion of the board that the accused was at the time of the alleged offenses so far free from

mental defect, disease or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong and adhere to the right; that at the time of the examination he had the mental capacity to understand the nature of the court-martial proceedings and intelligently to conduct or to cooperate in his defense; and, not being then insane, that no hospitalization is necessary.

8. The charge sheet discloses that the accused is 24 years of age but a birth certificate introduced at the trial shows that he was born on 7 August 1924. He enlisted at Fort Huachuca, Arizona, on 13 February 1941 and has had no prior service. He has no dependents.

9. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation of the sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92, and a sentence of death is authorized for violation of Article of War 58 in time of war.

Fletcher R. Andrews, Judge Advocate

[Signature], Judge Advocate

On Leave, Judge Advocate

SPJGQ - CM 281135

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

JUL 9 1945

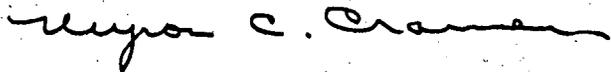
TO: The Secretary of War

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 Clarence D. Gibson (18023334), attached Squadron C, 332d Army Air Forces Base Unit, Combat Crew Training Section, Lake Charles Army Air Field, Lake Charles, Louisiana.

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 murderous assault upon the guard was deliberately planned and coldly executed. The likelihood that it would result in the guard's death was fully realized by the accused. The violence employed was such as to render death of the victim inevitable. I recommend that the sentence to be shot to death with musketry be confirmed and carried into execution.

3. Consideration has been given to the following letters, attached hereto, which have been referred to The Judge Advocate General; letters from Mr. and Mrs. Willie W. Gibson, parents of the accused, addressed to the President of the United States, to Honorable Sheridan Downey, United States Senate, and to Honorable Hiram Johnson, United States Senate, each dated 3 May 1945; letters from Miss A. B. Williams, New Orleans, Louisiana, former school teacher of the accused, addressed to the President of the United States and to Honorable Allen J. Ellender, United States Senate, each dated 11 May 1945.

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.



8 Incls

- 1 - Record of trial
- 2 - Dft ltr for sig S/W
- 3 - Form of action
- 4 - Ltr fr Mr. & Mrs. Gibson to the President, 3 May 45
- 5 - Ltr fr Mr. & Mrs. Gibson to Sen. Downey, 3 May 45
- 6 - Ltr fr Mr. & Mrs. Gibson to Sen. Johnson, 3 May 45
- 7 - Ltr fr Miss A. B. Williams to the President, 11 May 45
- 8 - Ltr fr Miss A. B. Williams to Sen. Ellender, 11 May 45

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence ordered excuted. GCMO 408,
21 Aug 1945).

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

SPJGH-CM 281164

29 JUN 1945

UNITED STATES

v.

First Lieutenant LUTHER S.
GARTRELL, JR. (O-501672),
Medical Corps.

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Camp Polk, Louisiana, 1 and
11 May 1945. Dismissal and
total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL 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 63rd Article of War.

Specification 1: In that First Lieutenant Luther S. Gartrell, Jr., MC, Detachment of Patients, 1880th Service Command Unit, Regional Hospital, Camp Polk, Louisiana, did, at Regional Hospital, Camp Polk, Louisiana, on or about 3 April 1945, behave himself with disrespect toward Major John S. Tracy, MC, his superior officer, by saying to him: "Why in the hell aren't you overseas? I don't give a damn what they do to me. I guess you must be a Jew brown-noser, otherwise you would not be in the front office with the Colonel," or words to that effect.

Specification 2: (Finding of not guilty).

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

Specification: In that First Lieutenant Luther S. Gartrell, Jr., * * *, did, at Regional Hospital, Camp Polk, Louisiana, on or about 3 April 1945, offer violence against Major John S. Tracy, MC, his superior officer, who was then in the execution of his office, in that he, the said First Lieutenant Luther S. Gartrell, Jr., did grab the said Major Tracy on the neck with his hands.

CHARGE III: Violation of the 69th Article of War.
(Withdrawn by direction of appointing authority).

Specification: (Withdrawn by direction of appointing authority).

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

Specification 1: In that First Lieutenant Luther S. Gartrell, Jr.,
* * *, was, at Regional Hospital, Camp Polk, Louisiana, on
or about 3 April 1945, disorderly in quarters.

Specification 2: (Defense's motion for finding of not guilty
granted by court, R. 89).

Specification 3: In that First Lieutenant Luther S. Gartrell, Jr.,
* * *, was, at Leesville, Louisiana, on or about 30 March
1945, in a public place, to-wit, National Coffee Shop,
disorderly while in uniform.

He pleaded not guilty to all Charges and Specifications, was found not guilty of Specification 2, Charge I and, upon motion of defense counsel, not guilty of Specification 2, Charge IV, and was found guilty of all other Charges and Specifications upon which he was tried. Evidence was introduced of one previous conviction for being disorderly in camp and for striking a sentinel in the execution of his duty for which accused was sentenced to forfeit \$50 of his pay per month for three months. In the present case 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. The evidence introduced by the prosecution is hereinafter summarized in chronological order under appropriate headings indicating the Charges and Specifications to which particular evidence is pertinent.

a. Charge IV, Specification 3:

On 30 March 1945, accused, dressed in proper uniform and accompanied by a young lady, apparently his wife, visited the National Coffee Shop, Leesville, Louisiana. The coffee shop was well filled with customers at the time, most of them being servicemen and their wives. Accused's companion objected when an inexperienced waitress served her a portion of eggs which had not been prepared as ordered and accused commenced to curse the waitress. Another waitress approached accused, asked him to refrain from swearing in the presence of the other patrons and informed him that she would have the order correctly filled. As the waitress walked from accused's table, he cursed her in a loud voice saying in effect, "God damn you, you get the order right. You're here making all kinds of money and we're in the service." Customers at two or three of the nearby

tables thereupon arose and left the coffee shop (R. 8-14, 16). During his meal accused continued audibly to express his sentiments about the restaurant's service. Finally, when the manager of the coffee shop heard two soldiers deliberating whether or not to "start something" with accused, he phoned for the military police and eventually two members thereof arrived accompanied by a city policeman (R. 14-17).

As the police entered the establishment, one of the military policemen heard accused, who was seated some fifteen yards away, "God damn this and God damn that" (R. 29, 30). They approached accused who arose from his seat. As accused made motion as if to strike a blow at the city policeman one of the military police grasped his arm (R. 30). Accused then in a loud voice made a remark to the effect that a "God damn son-of-a-bitch Greek from New York came down here and made all the money." Thereafter accused left the coffee shop accompanied by the military police (R. 20, 21, 23, 26, 30).

b. Charge I, Specification 1; Charge II, Specification; and Charge IV, Specification 1:

About 2030 hours on 3 April 1945, several hours after the evening meal had been concluded, Major John S. Tracy, who was the Administrative Officer of the Day at the Regional Hospital, Camp Polk, Louisiana, visited Ward 27 of the hospital and there saw accused who requested a serving of eggs (R. 22). When told he could have none accused protested that if lieutenant colonels could obtain them he saw no reason he shouldn't have them. Major Tracy then told accused to leave Ward 27 which contained sick patients and to proceed to Ward 31 where he belonged. As accused departed he asked Major Tracy, "Why the hell aren't you overseas" and, after remarking that "We have apparently a little Jew-loving southern Colonel up in the front office too", he next stated to the major "You must be a Jew brown-noser or you wouldn't be up there with him" (R. 34). Shortly after 2200 hours when lights were supposed to be extinguished, Major Tracy found accused in Ward 31 with the lights on and the radio "going full blast." When asked by the major to turn off both the lights and the radio accused refused so to do and informed the major that the latter "wasn't big enough to turn them off." Major Tracy then called for the military police and informed accused he was to be moved to Ward 38 which was generally used as a detention ward for mental cases (R. 35, 68).

Accused at first refused to be transferred and stretched himself upon his bed but when about a half dozen military policemen entered the ward he arose stating "Well you've got me" and proceeded to Ward 38 (R. 35). En route he remarked to one of the military policemen that he would go with an enlisted man but not with "that God damn Major" (R. 74). As they reached Ward 38 accused called Major Tracy "Colonel Dennison's stooge" or

"old Dennison's stooge." Major Tracy was executive officer at the hospital and served directly under Colonel Dennison (R. 57, 61, 65). Accused also made a threatening gesture toward the major but was prevented by the military police from doing more than strike the major lightly on the neck. As he entered Ward 38 accused continued to abuse the major stating, "Well, Tracy, there will be a day" (R. 35, 57, 65, 66, 70, 76, 80, 83, 85). Accused had the odor of alcohol on his breath, his speech was slightly slurred and although intoxicated he was able to walk straight and recognize people (R. 37, 38, 60, 61, 68, 70).

After accused had been placed in Ward 38 he commenced shouting for water and cigarettes and when told he could have neither he blamed "that God damn Tracy" for so ordering. He then began to belabor the door with his feet and thereafter intentionally ignited the mattress with his cigarette lighter causing the military police to bring a fire extinguisher into play (R. 58, 71). Major Tracy was summoned and as he entered Ward 38 he observed that the blanket on accused's bed was burned, the mattress cover torn and the bedding and the room soaked with water. Accused was then given a sedative by Major Tracy (R. 36).

On cross-examination Major Tracy denied that he ever told accused's wife he was going to make an example of her husband but admitted that he did say that accused was as mean an individual as ever he had encountered (R. 43).

4. The defense introduced evidence to show that accused commenced drinking in the hospital during the late afternoon of 3 April 1945 and that during the period from 2030 to 2230 hours he was in a highly intoxicated condition (R. 90, 95, 96, 100; Def. Exs. D-1, D-2). After accused had been removed from Ward 31 to Ward 38, the ward boy discovered a quart bottle about one third full of rum near the bed accused had occupied in Ward 31 (R. 92). Second Lieutenant Mae Dotson, Army Nurse Corps, was in Ward 38 about 2200 hours on the night in question. She saw the military police intercept accused as he sought to strike Major Tracy and heard accused curse the major calling him a "Jew son-of-a-bitch" or words to that effect (R. 97, 98). While accused was being conducted from Ward 31 to Ward 38 he passed Major Lee E. Waters whom he had known for about a month and although accused was looking at Major Waters as the latter spoke to him, accused made no reply (R. 99).

Accused's wife testified that on 4 April 1945 she visited Major Tracy who informed her that the accused was the meanest man he had ever met and that an example was to be made of him and charges preferred which could result in a prison sentence as well as loss of his medical license.

After accused's rights had been explained to him he elected to testify under oath and he gave the following sworn testimony. He stated that he was 31 years of age, married and a medical doctor and

that after completing his studies at the University of Arkansas he served his internship at the United States Naval Hospital, Washington, D. C. (R. 104). He entered military service on 12 November 1942 and served in England for approximately five months.

With reference to the episode in the National Coffee Shop, accused testified that after consuming a couple of drinks, he and his wife ordered a meal and that his wife objected to improperly prepared eggs which were served to her. The waitress appeared reluctant to correct the situation so accused told his wife she might as well eat the "damn eggs", stating that such service could be expected from a "damn place like this -- because they're making the money and we're getting a very small salary in the army." He denied attempting to strike any of the police who were eventually called to the shop (R. 105, 106).

As to events transpiring on 3 April 1945, accused testified he commenced drinking a rum mixture about 1630 hours that day and missed supper. He remembered that he became hungry later in the evening but did not remember that any officer sought to quiet him or that he used any disrespectful language toward or sought to strike any superior officer. He had only a vague recollection of struggling with someone and awoke the next morning to find himself "under bars" (R. 106, 107).

On cross-examination he admitted that at the National Coffee Shop he probably used the language "God damned eggs" and "God damn Greeks" (R. 108). He denied any recollection of having seen Major Tracy or the military police on the evening of 3 April 1945 and when confronted with a contrary statement he made to the investigating officer he explained that he prepared the statement from what others told him and not from his own knowledge (R. 108, 109).

5. The evidence clearly demonstrates that accused was disorderly in uniform on 30 March 1945 while in a public restaurant as alleged in Charge IV, Specification 3. He loudly cursed and abused a waitress and the establishment in general to such an extent that several patrons seated near his table left the restaurant while two enlisted men debated whether or not to use physical force upon him. His vulgar language and belligerent behavior in the presence of the police climaxed his course of censurable conduct. The evidence sustains the findings of guilty of that Charge and Specification.

The evidence also shows that on 3 April 1945 accused behaved most disrespectfully toward Major Tracy who was officer of the day in the station hospital where accused was located, using vulgar and contemptuous language to indicate his disdain of his superior officer. The record sustains the findings of guilty of Charge I and its Specification 1.

Not only did accused malign Major Tracy but he also offered violence against him by attempting to strike him and was only prevented

from doing worse than lightly tap the major's neck or shoulder because his blow was intercepted by an enlisted military policeman. It appears that Major Tracy was placed in a status of confinement at the time the violence was offered. Even if the proposed confinement were beyond the power of Major Tracy to order, that fact constitutes no excuse or defense for the violence accused offered his superior officer (MCM, 1928, par. 139a). The evidence fully supports the findings of guilty of Charge II and its Specification.

In addition to the use of disrespectful language and violence toward Major Tracy, accused also was disorderly in his quarters in the hospital when he refused to extinguish the lights and turn off the radio as requested and when he tore his bedding apart and set fire to it after battering the door with his feet. Evidence of such conduct fully sustains the findings of guilty of Charge IV, Specification 1.

Accused's defense for his conduct in the hospital on 2 April 1945 was that he was so drunk he knew not what he was doing. Although he had been drinking, there is a conflict in the evidence as to whether he was as drunk as he claimed. It was for the court as a fact finding body to resolve that conflict and we believe it reached the correct conclusion. The prosecution's evidence revealed that accused knew where he was, that he recognized Major Tracy whom he addressed by name and that he also was well aware of the presence of the military police as they conducted him from one ward to another. Any person so conversant with his surroundings and the identity of those about him was not so drunk as to have no knowledge of what he was doing.

6. On 13 June 1945, a representative for United States Senator J. William Fulbright appeared before the Board of Review and urged that the resignation for the good of the service submitted by accused be accepted. Consideration has also been given to a letter dated 11 June 1945 from A. G. Meehan, attorney at law, Stuttgart, Arkansas, a copy of which was forwarded to this office by United States Senator John L. McClellan and in which Mr. Meehan also urged that accused's resignation be accepted.

7. Accused is married and is 31 years of age. War Department records show that he attended college at the University of Arkansas for 2½ years and thereafter attended the School of Medicine at that university for 4 years graduating with an MD degree. From July 1940 to July 1941 he interned at the Arkansas State Hospital, Little Rock, Arkansas, and from July 1941 to July 1942 he served as acting assistant surgeon at the United States Naval Hospital, Bethesda, Maryland. On 23 October 1942 he was appointed a first lieutenant in the Medical Corps, Army of the United States. On 5 January 1944, while stationed in England accused was tried by general court-martial and found guilty of being disorderly in camp and of striking a sentinel in the execution

of his duty, both in violation of Article of War 96, and was sentenced to forfeit \$50 of his pay per month for 3 months, the sentence being approved by the reviewing authority on 11 February 1944. He was subsequently examined by an Officer Disposition Board at Walter Reed General Hospital and on 17 March 1944 the Board convened, reported its findings and recommended that accused be "returned to duty with a view to reclassification procedure." The Surgeon General concurred in this recommendation. After psychiatric examination of accused it was reported on 7 April 1945 that "his misbehavior and maladjustment are the evidences of an underlying psychoneurotic disturbance" and his condition was diagnosed as "Psychoneurosis, mixed type, severe." On 21 May 1945, subsequent to his present trial, accused submitted his resignation for the good of the service. No final action has been taken thereon.

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 authorized upon conviction of a violation of Article of War 63, 64 or 96.

Thomas N. Tally, Judge Advocate

William H. Lambell, Judge Advocate

Robert C. Crevelan, Judge Advocate

SPJGH-CM 281164

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 6 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Luther S. Gartrell, Jr. (O-501672), Medical Corps.

2. Upon trial by general court-martial this officer was found guilty of behaving himself with disrespect toward his superior officer, in violation of Article of War 63 (Chg. I, Spec. 1), of offering violence against his superior officer, in violation of Article of War 64 (Chg. II, Spec.); of being disorderly in his quarters in a station hospital, and of being disorderly while in uniform in a public restaurant, both in violation of Article of War 96 (Chg. IV, Specs. 1, 3). 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion. About 8:30 p.m. on the evening of 3 April 1945, accused, a medical officer, who had been engaged in drinking alcoholic liquor and had missed the evening meal as a consequence asked Major John S. Tracy, executive officer of the Regional Hospital, for a serving of eggs and was told he could have none. Thereafter he asked the major "Why the hell aren't you overseas" and then, after remarking that the commanding officer of the hospital was "a little Jew-loving southern Colonel" next stated to Major Tracy "You must be a Jew brown-noser or you wouldn't be up there with him" (Chg. I, Spec. 1). Later, accused refused to extinguish his light and silence his radio when properly requested so to do by Major Tracy who then ordered accused's transfer to another ward. While en route to the ward accused attempted to strike Major Tracy but his blow was deflected when military police interfered (Chg. II, Spec.). Accused had originally refused to accompany Major Tracy to the other ward after the radio and light incident and only the arrival of the military police persuaded him to change his mind. After he arrived at his new quarters he evidenced his dislike for them by battering on the door and by tearing his bedding apart and intentionally igniting it causing the military police to bring a fire extinguisher into play (Chg. IV, Spec. 1). Several days earlier, on 30 March 1945, accused had loudly cursed a waitress and the service

he was receiving in a public restaurant to such an extent that other patrons left the establishment and two enlisted men deliberated whether or not physically to assail him. He continued his loud vulgarity until conducted from the restaurant by military police having in the meanwhile threatened to strike a city policeman (Chg. IV, Spec. 3).

In January 1944 while serving with the Medical Corps in England, accused was convicted by general court-martial for being disorderly in camp and for striking a sentinel in the execution of his duty, in violation of Article of War 96, and was sentenced to forfeit \$50 of his pay per month for three months. He was thereafter returned to the United States and two months later, in March 1944, was examined by a Board of Officers convened at Walter Reed General Hospital which found no psychotic or neurotic disorder and recommended that he be returned to duty "with a view to reclassification" because his "personal and previous work record" was such that the Board opined "he would be unable to go for any extended period of time without being involved in some sort of scraps." Accused was later subjected to psychiatric examination at the Regional Hospital, Camp Polk, Louisiana, in April 1945 and the examining officers reported that his aggressive, rebellious nature indicated a psychoneurotic disturbance. When accused applied for his commission in 1942 he did not complain of any nervous disorder nor was any such condition found to exist by the examining officers.

4. On 13 June 1945 a representative for United States Senator J. William Fulbright appeared before the Board of Review and on 20 June 1945 conferred with me, on both occasions urging that the resignation for the good of the service submitted by accused be accepted. Consideration has been given to the inclosed letter dated 11 June 1945 from A. G. Meehan, attorney at law, Stuttgart, Arkansas, a copy of which was forwarded to this office by United States Senator John L. McClellan and in which it was urged that accused's resignation for the good of the service be accepted. Consideration has also been given to the inclosed letter from the accused dated 8 June 1945, to the letter from Congressman W. F. Norrell, dated 15 June 1945, to the letter of Senator J. William Fulbright, dated 21 June 1945 and inclosures forwarded therewith, to the letter of Congressman Wilbur D. Mills, dated 22 June 1945, to the letter of Senator Albert B. Chandler, dated 25 June 1945 and to the letter of Congressman Oren Harris, dated 25 June 1945.

I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

(70)

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

Myron C. Cramer

- | | |
|---|----------------------------|
| 9 Incls | MYRON C. CRAMER |
| 1. Record of trial | Major General |
| 2. Ltr fr Sen McClellan | The Judge Advocate General |
| 11 Jun 45 w/incl | |
| 3. Ltr fr accused 8 Jun 45 | |
| 4. Ltr fr Cong Norrell 15 Jun 45 | |
| 5. Ltr fr Sen Fulbright 21 Jun 45 w/incls | |
| 6. Ltr fr Cong Mills 22 Jun 45 | |
| 7. Ltr fr Sen Chandler 25 Jun 45 | |
| 8. Ltr fr Cong Harris 25 Jun 45 | |
| 9. Form of action | |

(Sentence confirmed but forfeitures remitted. GCMO 346, 21 July 1945).

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

SPJGK - CM 281171

7 JUN 1945

UNITED STATES)

v.)

Second Lieutenant ARNOLD
S. CASE (O-693624), Air
Corps.)

ARMY AIR FORCES
CENTRAL FLYING TRAINING COMMAND

Trial by G.C.M., convened at
San Marcos Army Air Field, San
Marcos, Texas, 18 May 1945.
Dismissal.

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 61st Article of War.

Specifications: In that Second Lieutenant Arnold S. Case, Air Corps, did, without proper leave, absent himself from his station at San Marcos Army Air Field, San Marcos, Texas, from about 20 March 1945 to about 2 April 1945.

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

Specification 1: In that Second Lieutenant Arnold S. Case, Air Corps, did, at San Antonio, Texas, on or about 13 March 1945, with intent to defraud, wrongfully and unlawfully make and utter to the South Texas National Bank, San Antonio, Texas, a certain check, in words and figures as follows, to wit:

"San Marcos, Texas, 3-3 1945 No. 15

STATE BANK & TRUST CO.
88-234
11-S.A.

Pay to the
Order of The South Texas National Bank \$15.00
Fifteen Dollars - - - - - and 00/100 DOLLARS
For _____

ARNOLD S. CASE
2nd Lt. O-693624

and by means thereof, did fraudulently obtain from the South

Texas National Bank, San Antonio, Texas, Fifteen Dollars (\$15.00) lawful money of the United States, he, the said Lieutenant Arnold S. Case, then well knowing that he did not have, and not intending that he should have, sufficient funds in the State Bank and Trust Company, San Marcos, Texas, for the payment of said check.

NOTE: Specifications 2 to 10 inclusive are identical in form with Specification 1 except as to date, amount, person or organization defrauded, and as to what he obtained, which variations are as follows:

<u>Spec.</u>	<u>Date</u>	<u>Amount</u>	<u>Person Defrauded</u>	<u>Obtained</u>
2	20 March 1945	\$10.00	S.A.A.C.C. Officers' Mess, San Antonio, Texas	Cash
3	21 March 1945	20.00	Nat'l Bank of Commerce of San Antonio, Texas	Cash
4	21 March 1945	37.25	Alamo Driverless Car Co., San Antonio, Texas	Rental of auto
5	23 March 1945	35.00	Alamo Driverless Car Co., San Antonio, Texas	Part rental of auto and cash
6	23 March 1945	20.00	Nat'l Bank of Commerce of San Antonio, Texas	Cash
7	31 March 1945	10.00	Officers' Mess Fund, Fort Worth, Texas	Cash
8	31 March 1945	15.00	Meacham's, Fort Worth, Texas	Cash
9	31 March 1945	20.00	Worth Hotel, Fort Worth, Texas	Cash
10	2 April 1945	44.40	Gans Company, Fort Worth, Texas	Merchandise

He pleaded not guilty to and was found guilty of both Charges and all Specifications. No evidence was introduced of any previous conviction. 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.

It was stipulated that from 4 June 1942 until 18 May 1945 the accused

was continuously a member of the armed forces of the United States and as such is subject to military law (Pros. Ex. 1).

Charge I and its Specification. There was introduced in evidence without objection an extract copy of the morning report of the accused's military organization, which showed the accused "Dy to AWOL 0800 20 Mar 45" (Pros. Ex. 2). It was stipulated that the accused was apprehended by military authorities in uniform at Fort Worth, Texas, on 2 April 1945, and on that date returned to military control (R.11).

CHARGE II and its Specifications. It was stipulated that if certain named witnesses were present in court they would testify that the accused did on the dates hereinafter set forth procure either cash or merchandise, or the rental of an automobile, in exchange for ten checks drawn by the accused upon State Bank and Trust Company of San Marcos, Texas, in the amounts and for the sum appearing in each of the checks as set forth, as follows:

Specification 1: on 3 March 1945, \$15.00, from the South Texas National Bank at San Antonio, Texas (Pros. Exs. 3,4,5).

Specification 2: on 20 March 1945, \$10.00, from the Officers' Mess, San Antonio Aviation Cadet Center, San Antonio, Texas (Pros. Exs. 6,7,8).

Specification 3: on 21 March 1945, \$20.00, from the National Bank of Commerce, San Antonio, Texas (Pros. Exs. 9,10).

Specification 4: on 21 March 1945, \$37.25, in payment of rental of an automobile to the Alamo Driverless Car Company, San Antonio, Texas (Pros. Exs. 11,12).

Specification 5: on 23 March 1945, \$35.00, for the rental of an automobile in the sum of \$18.50 and cash in the amount of \$16.50 to the Alamo Driverless Car Company (Pros. Exs. 11,13,14).

Specification 6: on 23 March 1945, \$20.00, from the National Bank of Commerce, San Antonio, Texas (Pros. Exs. 15,16).

Specification 7: on 31 March 1945, \$10.00, from the Officers' Club, Fort Worth Army Air Field (Pros. Exs. 17,18).

Specification 8: on 31 March 1945, \$15.00, in payment of merchandise in the amount of \$15.00 to Meacham's, Fort Worth, Texas (Pros. Exs. 19 and 20).

Specification 9: on 31 March 1945, \$30.00, from the Worth Hotel, Fort Worth, Texas (Pros. Exs. 21 and 22).

Specification 10: on 2 April 1945, \$44.40, in payment of merchandise procured from the Gans Company, Fort Worth, Texas (Pros. Exs. 23 and 24).

All of the above checks were deposited by the recipients and in due course presented for payment to State Bank and Trust Company of San Marcos, Texas. Payment was refused by the latter bank and the checks returned stamped, "Not sufficient funds to credit of drawer at time this check was presented for payment" (Pros. Exs. 3-24).

The assistant cashier of State Bank and Trust Company, San Marcos, Texas, testified that accused had an account with that bank during March and April of 1945, and that the balance therein in favor of the accused on the various dates of the ten checks set forth above was 13 cents, and that the ten checks were all presented to the bank for payment and payment was refused because of insufficient funds in the account for payment (R. 18,19; Pros. Ex. 25).

The accused, having been warned of his legal rights, voluntarily on 6 April 1945 signed a typewritten statement (Pros. Ex. 26) in which he admitted that on the various dates alleged he gave his check either for cash, merchandise, or in payment of automobile rental in the sums alleged, drawn on State Bank and Trust Company, San Marcos, Texas, at which time he did not have sufficient funds on deposit in that bank for the payment of any of the checks. He admitted further that he knew that he did not have such funds in the bank and that he has not since made restitution or payment of any of the checks.

4. The accused, having been fully advised of his rights, elected to remain silent.

5. With reference to Charge I and its Specification, it was established without contradiction by the morning report of the accused's organization that the accused absented himself from his organization without proper leave on 20 March 1945. It was stipulated that he was returned to military control on 2 April 1945. The evidence was therefore legally sufficient to support the findings that he was absent without leave between those dates as alleged in the Specification in violation of Article of War 61.

With reference to Charge II and its Specification the evidence for the prosecution consisting of the testimony by stipulation of numerous witnesses, the checks of the accused in the amounts alleged indicating by their indorsements that they had been presented for payment on the bank upon which they had been drawn and that payment was refused because of insufficient funds on deposit belonging to the accused, the status of the accused's account showing a balance in his favor of 13 cents at the time he issued the various checks, and the complete written confession of the accused, all conclusively show that the accused did on the dates, at the places, and in the amounts, give ten of his worthless checks in exchange for cash, merchandise or services, drawn on a bank in which he had insufficient funds on deposit for the payment of any of them, knowing that he did not have and not intending to have sufficient funds for the purpose. It was a fair and reasonable inference for the

court to find from these circumstances that the accused intended to defraud the persons or organizations from whom he obtained the cash, merchandise, or service. All of the elements of each offense as alleged in each Specification was therefore proved beyond any reasonable doubt. The issuing of worthless checks under such circumstances constitutes a violation of Article of War 96 (CM 276755, Morris; CM 262189, Amidee; CM 249006, Vergara, 32 B.R. 5).

6. War Department records show the accused to be 28 years of age, married, and the father of two children. He graduated from high school and was subsequently employed for a period of one year as a Civil Service carpenter. On 2 June 1942 he enlisted as an aviation cadet and was called to active duty on 7 December 1942, and upon completion of his training on 30 September 1943 was commissioned a second lieutenant, Air Corps, AUS.

7. The court was legally constituted and had jurisdiction over the accused and of 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 conviction of a violation of Article of War 61 or Article of War 96.

On Leave		, Judge Advocate.
	<i>Paul Stephens</i>	, Judge Advocate.
	<i>Wm. W. [unclear]</i>	, Judge Advocate.

(76)

SPJGK-CM 281171

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUN 26 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Arnold S. Case (O-693624), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave for a period of 13 days from his station, in violation of Article of War 61, and of making and uttering ten worthless checks in violation of Article of War 96. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The accused officer absented himself without proper leave from his station from 20 March to 2 April 1945 (Charge I and Specification). Over a period of about two weeks he fraudulently issued ten worthless checks totaling \$226.65 in amount in exchange for cash, merchandise or services (Charge II and its Specifications). The record does not disclose that he ever made restitution. Such dishonest and irresponsible conduct is inconsistent with the qualifications of an officer of the Army of the United States and warrants dismissal. I recommend that the sentence be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls

1. Record of trial
2. Form of action

(Sentence confirmed. GCMO:293, 7 July 1945).

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

SPJGN-CM 281188

22 JUN 1945

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

TANK DESTROYER CENTER

v.

Trial by G.C.M., convened at
Camp Hood, Texas, 22 May 1945.
Dismissal and total forfeitures.

Second Lieutenant CHARLES
B. GREENE (O-1329940),
Infantry.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 Charles B. Greene, Company B, One Hundred Seventy-eighth Infantry Replacement Training Battalion, Ninety-sixth Infantry Replacement Training Regiment, Infantry Replacement Training Center, Camp Hood, Texas, being a married man, did, at Belton, Texas, from on or about 5 February 1945 to on or about 30 March 1945, wrongfully and unlawfully live and cohabit with a woman not his wife.

Specification 2: In that Second Lieutenant Charles B. Greene, Company B, One Hundred Seventy-eighth Infantry Replacement Training Battalion, Ninety-sixth Infantry Replacement Training Regiment, Infantry Replacement Training Center, did, at Camp Hood, Texas, on or about 22 February 1945, with intent to deceive the Transportation Advisory

Committee, Camp Hood, Texas, make and deliver to said Transportation Advisory Committee a certificate and application for supplemental and occupational mileage ration, wherein he officially stated that Mabel C. Greene was his wife and that she lived at Belton, Texas, which statements were known by the said Second Lieutenant Charles B. Greene to be untrue, in that Mabel C. Greene was not his wife and in that his wife did not live in Belton, Texas.

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

3. The evidence for the prosecution shows that the accused was married, on 8 June 1940, at Stratford, Connecticut, to Marion Martha Swierz. The marriage was still in effect at the time of the alleged offenses, but his wife had remained in Connecticut, and had never visited the state of Texas (R. 6, 7; Pros. Exs. 1, 2). While stationed at Camp Hood, Texas, the accused, "on an average of three times a week" during February and March of 1945, called on Miss Mabel Connors who resided at the home of Mrs. Mealy L. Cox, 319 South Pearl Street, Belton, Texas (R. 10, 25). Miss Connors, in the name of Mabel Greene, had rented an apartment from Mrs. Cox in late January, 1945, and, at the time, introduced him as her husband. While living at the residence of Mrs. Cox over a period of about ten weeks, Miss Connors prepared meals for him, "did part of his laundry," and, throughout, was regarded as his wife (R. 8-10). Mrs. Cox described his deportment and that of Miss Connors as "conduct of a quiet decent married couple" (R. 12). The Officers' "VOCO" Register of his regiment showed that on eight occasions, from 5 February to 28 March 1945, in signing out, he gave Belton as his destination and the telephone at Mrs. Cox's residence as the number at which he could be reached (R. 22; Pros. Exs. 9-12, 14). On at least one occasion he presented Miss Connors as his wife to a fellow officer (R. 13).

The records of the Transportation Advisory Committee at Camp Hood revealed an "Application For Supplemental And Occupational Mileage Ration", requesting gasoline for use in an automobile owned by "Mabel C. Greene" and signed in the name of the accused, as applicant (Pros. Ex. 15). Attached to this application was a supplemental letter or certificate, also signed in the name of accused, addressed to the Transportation Advisory Committee, Camp Hood, Texas, and purporting to supply additional information. The two documents, which were attached and stapled together and constituted a single instrument, stated the residence of the applicant as 319 South Pearl Street, Belton, and referred to his "wife, Mabel C. Greene" (Pros. Ex. 16).

4. Evidence for the defense: Colonel John L. McElroy, Commanding Officer of the accused's regiment, appeared as a witness for the defense and described the accused's manner of performance of duty, as well as his character as an officer and individual, as "excellent" (R. 34, 35). Major William P. Jones, Commanding Officer of the accused's battalion, testified that the accused, whose conduct had been above reproach, had been "attentive to duty" and had proved himself to be a valuable officer (R. 36).

The accused, after he had been advised of his rights with respect to testifying or remaining silent, took the stand in his own behalf and testified only as to Specification 1 of the Charge. He stated that he was married on 8 June 1940, that one child was born to the union, and that he and his wife had not lived together since September 1942. With the help of a lawyer he attempted to effect a reconciliation but failed (R. 38, 39). His wife now resides in Stratford, Connecticut (R. 37).

For a few months prior to enlisting in the Army on 7 February 1943 the accused lived with Mabel A. Connors, whom he had known for several years (R. 39). During his basic training at Camp Lee, Virginia, and while he attended Officer Candidate School at Fort Benning, Georgia, Miss Connors lived and found employment in nearby towns. She rendered financial assistance to the accused who, while an enlisted man, had allotted a portion of his earnings for the support of his wife and child and for the payment of insurance premiums. By using money which Miss Connors had saved, the accused, upon completing his course at Fort Benning, was able to visit his child in Stratford.

Accompanying the accused when he was transferred to Camp Hood, Miss Connors rented an apartment in nearby Belton. He introduced her as Mrs. Greene and visited her "as often as possible, the same as any other man would go down to see his wife" (R. 42). Over a period of two and one half years he and Miss Connors had lived together as man and wife, and he loved and respected her more "as a wife than the one I have on hand" (R. 41). He had been unable to procure a divorce because of the provision in Connecticut law requiring separation for three years. His mother, who knew of his relationship with Miss Connors, had arranged for legal counsel to represent him in a divorce action in his home state. It was expected that the decree would "go into effect" in September 1945, when he and Miss Connors planned to be married (R. 41).

5. Specification 1 of the Charge alleges that the accused, "being a married man, did, at Belton, Texas, from on or about 5 February 1945 to on or about 30 March 1945, wrongfully and unlawfully live and cohabit with a woman, not his wife". This is set forth as violative of Article of War 96.

The alleged offense is established by compelling and conclusive evidence which, indeed, the accused made no effort to refute. In "throwing himself on the mercy of the court and telling his story", he made a

forthright statement and volunteered that the illicit relationship had existed for two and a half years. There can be no doubt that this course of conduct amounted to "cohabitation" in the strictest sense of that word.

In 12 BR 119 (at page 129) the Board of Review quoted with approval the following definitions of cohabitation:

"* * * to cohabit is to live together". Bishop, Marriage and Divorce, 6th ed., vol. 1, sec. 777.

"The act or state of a man and woman, not married, who dwell together in the same house, behaving themselves as man and wife.

"In statutes forbidding unlawful cohabitation that term involves the idea of habitual sexual intercourse, or living together in such a way as to hold out the appearance of being husband and wife, and it is the scandal resulting therefrom which constitutes the mischief against which the statutes are directed; * * * and proof of occasional acts of intercourse is not sufficient; * * *". Bouvier, Law Dictionary, Rawles 3rd revision, vol. 2, p. 1868.

"* * * The offence of cohabitation, in the sense of this statute is committed if there is a living or dwelling together as husband and wife. It is, inherently, a continuous offence, having duration; and not an offence consisting of a single act". In re Snow, 120 U.S. 274, 281.

The accused, with complete candor, admitted that he and Miss Connors lived together as man and wife, that they were each introduced as the spouse of the other, and were generally regarded as a married couple. Their conduct over a ten week period at Belton, Texas, was but an incident of an extra-marital affair which had begun over two years before at Stratford, Connecticut, prior to accused's entry in the Army, and had continued wherever he was stationed as a member of the Armed Forces. That his estranged wife may have been unreasonable and obstinate in refusing his overtures for reconciliation, that he found in Miss Connors a devoted and helpful companion, that they were able to live as a "quiet decent married couple" and planned, as soon as time permitted, to be legally married in no way justified a course of adulterous conduct, which, as a flagrant violation of the moral and legal code, manifestly constituted conduct by the accused of a nature to bring discredit and disrepute upon the military service. 31 BR 326, CM 248506, Bloom; 35 BR 355, CM 254722, Grimstad. The guilt of the accused of Specification 1 is established beyond any reasonable doubt.

6. Specification 2 of the Charge alleges that the accused did, "on or about 22 February 1945, with intent to deceive the Transportation Advisory Committee, Camp Hood, Texas, make and deliver to said * * *

Committee a certificate and application for supplemental and occupational mileage ration, wherein he officially stated that Mabel C. Greene was his wife and that she lived at Belton, Texas, which statements were known by the said Second Lieutenant Charles B. Greene to be untrue, in that Mabel C. Greene was not his wife and in that his wife did not live in Belton, Texas". This is set forth as a violation of Article of War 96.

While no witness was produced to attest the actual execution of the application and certificate by accused, the court had before it an admitted specimen of his handwriting and, by comparison, was justified in determining that both documents bore his distinctive signature. Par 116b, MCM, 1928. When it is further considered that both the application and certificate referred to Mabel C. Greene and gave her place of residence in Belton, that these facts were particularly within the knowledge of accused, and that the application was presented to, and acted upon by, the Transportation Advisory Committee, it seems clear that both the execution and delivery of the documents by accused were established, as alleged. Since the information thus given was intended to guide the members of the Committee in the performance of a military duty, the statements made were patently official in character and false in substance. The evidence is legally sufficient to support the findings of guilty of Specification 2 of the Charge.

7. The accused is about 27 years of age and is married. After attending public school for eleven years, he worked with a civilian contractor and, just prior to his entry into the Army was employed by Remington Arms Co., Inc. He enlisted on 3 February 1943 and served as an Aviation Cadet from 18 November 1943, to 17 April 1944. He attended Officer Candidate School at Fort Benning, Georgia, and was commissioned a Second Lieutenant, Army of the United States, on 3 January 1945.

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

Walter E. Lipscomb, Judge Advocate.

Robert J. Clum, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 281188

1st Ind

Hq ASF, JAGO, Washington, D. C.

JUL 4 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles B. Greene (O-1329940), Infantry.

2. Upon trial by general court-martial this officer was found guilty of wrongfully and unlawfully, while being married, living and cohabiting at Belton, Texas, with a woman not his wife (Spec. 1), and of falsely stating in official documents that the woman with whom he was living was his wife and that she lived in Belton, Texas (Spec. 2), both in violation of Article of War 96. 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.

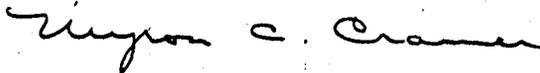
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation thereof.

The accused was married on 8 June 1940 and one child was born to the union. He and his wife separated in September, 1942, and about that time he began living with one Mabel A. Connors. After his entry in the army on 7 February 1943, Miss Connors followed him and lived and worked in towns near posts where he was stationed. After receiving his commission at Fort Benning, Georgia, the accused was transferred to Camp Hood, Texas. Miss Connors, holding herself out as his wife, rented an apartment in nearby Belton, and the accused spent several nights each week with her during the period from 5 February 1945 to 30 March 1945. He candidly admitted that they had lived together as man and wife for over two years and stated that they planned to be married as soon as he could be divorced from his wife.

The accused applied to the Transportation Advisory Committee at Camp Hood, for a supplemental gasoline allowance to enable him to travel by car to Belton. In his application and accompanying certificate, he stated that "Mabel C. Greene" was his wife and that she lived in Belton, Texas. This statement was false. Six of the seven members of the court recommend clemency in behalf of the accused.

The conduct of the accused in openly cohabiting with a woman not his wife for a prolonged period of time, was a flagrant violation of our moral and legal code which cannot be condoned. However, in view of all the circumstances in this case, I recommend that the sentence be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be suspended during good behavior.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



- 2 Incls
- 1 Rec of trial
- 2 Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. As thus modified suspended during good behavior. GCMO 347, 21 July 1945.



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

SPJGQ - CM 281223

16 JUL 1945

UNITED STATES)

FOURTH AIR FORCE

v.)

Trial by G.C.M., convened at
Santa Rosa Army Air Field,
Santa Rosa, California, 19,
20 April 1945. Each: Dis-
missal.

Second Lieutenant JAN W.
BARMORE (O-780829), Air
Corps, and Second Lieutenant
DAVID C. BRIGHAM (O-780851),
Air Corps.)

OPINION of the BOARD OF REVIEW
ANDREWS, BIERER and HICKMAN, Judge Advocates

1. The record of trial in the case of the officers 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 were tried at common trial, by their consent, upon separate Charges and Specifications as follows:

As to Second Lieutenant Barmore:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Jan W. Barmore, Squadron T, 434th Army Air Forces Base Unit, did, at or near Sebastopol, California, on or about 29 March 1945, wrongfully violate paragraph 1a, Army Air Forces Regulation No. 60-16D, dated 20 September 1944, by operating an aircraft in a reckless manner so as to endanger friendly aircraft in the air.

Specification 2: In that Second Lieutenant Jan W. Barmore, Squadron T, 434th Army Air Forces Base Unit, did, at or near Sebastopol, California, on or about 29 March 1945, wrongfully violate paragraph 1b, Army Air Forces Regulation No. 60-16D, dated 20 September 1944, by flying an aircraft closer than 500 feet to other aircraft in flight.

As to Second Lieutenant Brigham:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant David C. Brigham, Squadron T, 434th Army Air Forces Base Unit, did, at or near Sebastopol, California, on or about 29 March 1945, wrongfully violate paragraph 1a, Army Air Forces Regulation No. 60-16D, dated 20 September 1944, by operating an aircraft in a reckless manner so as to endanger friendly aircraft in the air.

Specification 2: In that Second Lieutenant David C. Brigham, Squadron T, 434th Army Air Forces Base Unit, did, at or near Sebastopol, California, on or about 29 March 1945, wrongfully violate paragraph 1b, Army Air Forces Regulation No. 60-16D, dated 20 September 1944, by flying an aircraft closer than 500 feet to other aircraft in flight.

Each accused pleaded not guilty to and each was found guilty of the Charge and Specifications applicable to him. No evidence of previous convictions was introduced. Each was sentenced to be dismissed the service and to pay to the United States a fine of \$500. The reviewing authority approved only so much of each sentence as provides for dismissal, and forwarded the record of trial for action under Article of War 48.

3. The case for the prosecution, established by competent evidence plus facts for judicial notice, was as follows:

Both accused were members of Squadron T, 434th Army Air Forces Base Unit, Santa Rosa Army Air Field, Santa Rosa, California (R. 21). It was orally stipulated that both accused took off from Santa Rosa Army Air Field in P-38 type aircraft on an authorized high altitude gunnery and "individual combat" mission at approximately 1600 and landed at approximately 1800 on 29 March 1945 (R. 19, 20; Pros. Exs. 2, 3). There were four planes on the flight under Flight Leader Lieutenant Freestone, of the "red section" (R. 21, 22). The planes were silver with red spinners (R. 22). Number 723 was painted on Lieutenant Barmore's plane and 705 on Lieutenant Brigham's (R. 22, 23). After completing the high altitude gunnery, the two accused "started individual combat" and the flight leader lost sight of them about 1740 (R. 23, 24). Three or four minutes later Lieutenant Freestone saw two P-38s near a formation of Navy planes and assumed that they were the planes of the two accused (R. 27, 28). At this time they were six or seven miles away. Another flight of four P-38s was in the same vicinity but several miles away (R. 30). There was a Navy plane between the two P-38s and they were breaking away in the opposite direction (R. 29). There were twenty-four planes in the Navy formation in a Duffberry circle (R. 64), trying to maintain a distance of one hundred feet between planes (R. 68). Just as the circle started to break, a P-38 circled and made a high wide run near the last plane in the formation (R. 64).

The two P-38s were first observed from the Navy formation about 1730, which was four or five minutes before they came near the formation (R. 44). The two P-38s made passes or runs along the line of the Navy planes (R. 45, 46). They broke through the formation between the number four and number five planes at a sixty degree angle, passing within 150 feet of the number five plane which was being piloted by Lieutenant Gartland (R. 58, 59, 60). On another pass the P-38s were within three or four hundred feet of the formation but did not break into it (R. 61). On one of the runs Lieutenant Crichter pulled wide on a turn to get the number of the P-38s. When he was about five or six hundred feet away he saw what appeared to him to be "123" on one plane (R. 45, 47). Ensign Rigg, who was flying tail position in the formation, saw two P-38s at approximately the center of the formation. At this time one was making a vertical roll (R. 52). Later he saw them pass between two planes in the forward part of the formation (R. 53). One plane passed about two hundred feet above the formation, but they were not within five hundred feet of Ensign Rigg's plane (R. 55). Lieutenant Commander Smith identified the P-38s as having red noses (R. 65). He pulled out of the formation to try to get the number of the P-38s (R. 66). While he was chasing one plane it turned back and "scissored" several times with his plane, the planes passing within 50 feet of each other (R. 66). Lieutenant Commander Smith then observed a plane with the number 705 flying not over two hundred feet from his column (R. 66).

Lieutenant Freestone testified that the two P-38s rejoined his formation from the same direction as the Navy formation (R. 31). In estimating the distance between planes the Navy pilots used their gun sights. Ensign Rigg said the ships had a forty-three foot wing span and were "flying on a one hundred mil", which was "four hundred and thirty feet" (R. 55, 56). Lieutenant Gartland testified that they "had a forty-two foot wing span and a hundred mils", which would be "about a hundred feet" (R. 59). Commander Smith testified that the wing span was forty-one feet and that one hundred mils on the gunsight was somewhere around one hundred and fifty feet (R. 68).

Lieutenant Crichter testified that the closest the P-38s came to the Navy formation was about five hundred feet (R. 47, 49, 51).

Colonel Weltman, the Commanding Officer of the 434th Army Air Forces Base Unit, Santa Rosa Army Air Field, testified that the only P-38 on the field which had a number "23" on the end was number 723 (R. 35). Both of the accused admitted to Colonel Weltman that they found themselves in the midst of the Navy formation while doing "individual combat", but denied making intentional passes at the formation (R. 34).

While being questioned by Lieutenant Colonel McGinn, the investigating officer appointed pursuant to Article of War 70,

Lieutenant Brigham stated that he did the vertical roll and Lieutenant Barmore stated that his plane was involved with a Navy plane while he was attempting to get away (R. 73). The two accused stated that they did not think they had come within 500 feet except when Lieutenant Barmore was trying to get out of the Navy plane's way (R. 73). These statements by the two accused were not made under oath.

4. Both accused, after being advised of their rights, elected to remain silent. Staff Sergeant Shane testified as to the number of P-38s dispatched out of Santa Rosa Army Air Field on local flights between 1600 and 1800 on 29 March 1945 and the records showed 13 P-38s from the "red" section dispatched between these hours (R. 76; Def. Ex. B). He also testified that planes in the "red" section have red spinners (R. 77).

5. The evidence shows that both of the accused were piloting P-38s on 29 March 1945. They took off from Santa Rosa Army Air Field at approximately 1600 and landed at approximately 1800 with two other P-38s. Their mission was high altitude gunnery and individual combat training. Both planes were silver with red spinners. Number 723 was painted on Lieutenant Barmore's plane and number 705 on Lieutenant Brigham's plane. After the two accused took off for individual combat the flight leader lost sight of them but three or four minutes later he saw two P-38s near a formation of Navy planes and assumed that they were the planes of the accused. The formation of twenty-four Navy planes was in a luftberry circle and just as the circle started to break, a P-38 made a high wide run near the last plane in the formation. Two P-38s made passes or runs along the line of Navy planes and broke through the formation between the number four and five planes at a sixty degree angle, passing within one hundred and fifty feet of the number five plane. The two P-38s were observed near the center of the formation, one of them making a vertical roll. One plane passed about two hundred feet above the formation, the other flew through it. Lieutenant Commander Smith, the leader of the Navy formation, left the formation to get the numbers of the P-38s. While he was chasing one plane it turned back and "scissored" several times with his plane, passing within fifty feet. The other plane, number 705, then passed within two hundred feet of his formation. Lieutenant Crichter observed what appeared to him to be the number "123" on one of the P-38s. Both P-38s had "red noses". The only P-38 on the field with a number ending in "23" was 723. The planes of the accused rejoined their formation from the direction of the Navy formation. The Navy pilots estimated distance between planes with relation to the distance between the planes in their own formation. They agreed that they were flying at a distance of one hundred miles on their gunsight. They disagreed as to the wing span of their own planes and as to the distance covered by one hundred miles on their gunsights. These distances were estimated from one hundred feet to four hundred and thirty feet. With full allowance for this disagreement, it is

clear that the Navy planes were less than five hundred feet apart and that the accused flew between planes in the formation. Both of the accused admitted to their commanding officer that while doing individual combat training, they found themselves in the midst of a Navy formation. Lieutenant Brigham admitted to the investigating officer that he did a vertical roll and Lieutenant Barmore that he became involved with a Navy plane while trying to get away.

The undisputed evidence supports the Specifications and the Charges against each accused. It shows that the P-38s, sufficiently identified as those piloted by the two accused, "made passes" at a formation of Navy planes and flew closer than five hundred feet to planes in the Navy formation. These actions constituted violations of paragraphs 1a and 1b, Army Air Forces Regulations No. 60-16D, dated 20 September 1944, which provide:

1a. "No aircraft will be operated in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons, or property on the ground."

1b. "No aircraft will be flown closer than 500 feet to any other aircraft in flight, except when two or more aircraft are flown in duly authorized formation ***."

6. Both accused desired Major Douglas M. Moore, Hamilton Field, to represent them as counsel (R. 3, 4). On 14 April 1945, the day after the service of the charges upon them, both accused sent a joint letter to Major General Parker, Commanding General, Fourth Air Force, requesting that Major Moore be detailed as defense counsel in place of the regularly appointed defense counsel. By second indorsement dated 17 April 1945 a reply was received from Major General Parker, stating, "Major Douglas M. Moore is not available for this duty" (R. 3; Def. Ex. A). This notice was received by the accused on 18 April 1945, the day before the trial (R. 6). Both accused expressed at the trial their wish to appeal from the determination that Major Moore was unavailable (R. 8). The president of the court notified Major General Parker of the appeal and received a telegraphic response from him stating that,

"COMMANDING OFFICER HAMILTON FIELD INFORMERLY (sic) STATED TO THIS HQS THAT MAJOR MOORE WAS NOT AVAILABLE FOR THIS DUTY BECAUSE OF AMOUNT OF WORK AT HAMILTON FIELD AND OTHER DUTIES *** CG 4TH AF CONCURRED IN THIS DECISION AS SET OUT IN 2ND IND REFERRED TO ABOVE ***." (R. 9; Court's Ex. A)

Both accused then agreed to proceed with the regularly appointed defense counsel and assistant defense counsel (R. 9).

Article of War 17 provides, inter alia;

"The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11."

The Manual for Courts-Martial, 1928, paragraph 45a, provides:

"Application, through the usual channels, for the detail of a person selected by the accused as military counsel may be made by the accused or anyone on his behalf. When the application reaches an officer who is authorized to make the detail and order any necessary travel, he will act thereon. His decision is subject to revision by his immediate superior on appeal by or on behalf of the accused."

In CM 207588, Lizotte, 8 ER 351, 358, it is stated:

"Article of War 17 and paragraph 45a of the Manual for Courts-Martial provide for military counsel selected by an accused only if such counsel be reasonably available. The administrative determination by the War Department that the military counsel selected by accused were not available for that duty was conclusive as to availability."

The Lizotte case, supra, represents the present opinion of The Judge Advocate General as expressed in correspondence with The Adjutant General (SPJGJ/1945 Corres., 13 April 1945).

The accused made application through the usual channels for the detail of Major Moore as defense counsel. When the application reached Major General Parker, he notified the Commanding Officer of Hamilton Field of the request. This latter officer determined that Major Moore was unavailable and the accused were so notified by the second indorsement. The Commanding Officer of Hamilton Field was the officer "authorized to make the detail and order any necessary travel." Major General Parker, as Commanding General of the Fourth Air Force, in referring the request from the accused to the commanding officer at Major Moore's station was merely acting as the conduit through which the application passed in accordance with established channels for military correspondence. When Major General Parker, as the immediate superior of the Commanding Officer of Hamilton Field, concurred in the decision that Major Moore was unavailable as evidenced by the telegram to that effect, explaining the second indorsement to the application, the appeal was properly disposed of in accordance with paragraph 45a, Manual for Courts-Martial, 1928. The appeal to which the accused were entitled was from the Commanding Officer of Hamilton Field to the Commanding General of the Fourth Air Force, who had jurisdiction

in the matter. After the action of Major General Parker on the appeal, both accused stated that they were satisfied to proceed with the regularly appointed defense counsel and assistant defense counsel, who represented them competently throughout the trial.

An objection was made by a member of the court to the ruling of the law member "that the trial cannot be delayed because of the unavailability of Major Moore, he having been determined by proper authority not to be available" (R. 5). The court was closed but upon being reopened the action of the court was not announced. The rights of the accused were not affected by this irregularity because it was after the court reopened that they appealed the question of Major Moore's availability.

7. Consideration has been given to a brief filed on behalf of the accused by Lieutenant Colonel Frank A. Flynn, Inactive, and to an affidavit submitted by Lieutenant Commander Joseph G. Smith, United States Navy, which documents are attached to the record of trial.

8. War Department records show that the accused, Second Lieutenant Jan W. Barmore, is 20 years of age and is single. He is a native of California and a resident of Ceres, California. He is a high school graduate and attended Modesto Junior College for three quarters of a year. He worked from 1933 to 1943 on his father's farm in Ceres, California. He served in enlisted status from 14 May 1943 to 26 June 1944, during which time he received pilot training as an aviation cadet. He was commissioned a second lieutenant in the Army of the United States on 27 June 1944.

War Department records show that the accused, Second Lieutenant David C. Brigham, is 20 years of age and is single. He is a native of Michigan and a resident of Rockford, Illinois. He is a graduate of high school. He worked from July 1942 to April 1943 as a bench worker for a manufacturer of aircraft and Diesel governors. He served in enlisted status from 3 October 1943 to 26 June 1944, during which time he received pilot training as an aviation cadet. He was commissioned a second lieutenant in the Army of the United States on 27 June 1944. On 16 October 1944 he was reprimanded under Article of War 104 for absenting himself without leave from about 1700, 13 October 1944 until sometime after 0800, 14 October 1944, in violation of Article of War 61, and for failing to sign out in the Officers' Register when leaving the post and negligently failing to complete clearance and processing from his station as directed by his superior officers, in violation of Article of War 96.

9. The court was legally constituted and had jurisdiction of the persons 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, as to each accused, 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 by an officer of Article of War 96.

Fletcher R. Andrews, Judge Advocate

[Signature], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 281223

1st Ind

Hq ASF, JAGO, Washington 25, D. C. 26 JUL 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Jan W. Barmore (O-780829), Air Corps, and Second Lieutenant David C. Brigham (O-780851), Air Corps.

2. Upon trial by general court-martial these officers were found guilty of wrongfully violating Army Air Forces Regulations by operating aircraft in a reckless manner and by flying aircraft closer than five hundred feet to other aircraft in flight, in violation of Article of War 96. Each was sentenced to be dismissed the service and to pay to the United States a fine of five hundred dollars. The reviewing authority approved only so much of each sentence as provided for dismissal, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion 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 concur in that opinion.

On 29 March 1945 both of the accused "took off" from Santa Rosa Army Air Field, Santa Rosa, California, piloting P-38s on a high altitude gunnery and individual combat training mission. They "took off" at approximately 1600 and landed at approximately 1800 with two other P-38s. Both planes were silver with red spinners and number 723 was painted on Lieutenant Barmore's plane and number 705 on Lieutenant Brigham's plane. The flight leader lost sight of the planes of both of the accused after they commenced individual combat but three or four minutes later he saw two P-38s near a formation of twenty-four Navy planes and assumed that they were the planes piloted by the two accused. The Navy planes were in a Luftberry circle and just as the circle started to break, a P-38 made a high wide run near the last plane in the formation. Then two P-38s made passes or runs along the line of Navy planes and broke through the formation between the number four and five planes at a sixty degree angle, passing within one hundred and fifty feet of the number five plane. The two P-38s were then observed near the center of the formation, one of them making a vertical roll. One plane passed about two hundred feet above the formation and the other flew through it. Lieutenant Commander Smith, the leader of the Navy formation, left his formation to get the number of the P-38s. While he was chasing one of the P-38s, it turned back

(94)

and "scissored", passing within fifty feet of his plane. He observed the number 705 on one plane and Lieutenant Crichter observed what appeared to be "123" on the other P-38. Both P-38s had red noses. The only P-38 on Santa Rosa Army Air Field having a number ending in "23" was "723". The planes of the accused subsequently joined their formation from the direction of the Navy planes. It is clear from the evidence that planes in the Navy formation were flying less than five hundred feet apart when the accused flew between the planes in the formation. Although the accused did not testify, they admitted to their commanding officer that they found themselves in the midst of the Navy formation while doing individual combat training. Lieutenant Brigham admitted to the investigating officer that he did a vertical roll and Lieutenant Barmore that he became involved with a Navy plane while trying to get away. Paragraphs 1a and 1b, Army Air Force Regulations No. 60-16D, 20 September 1944, prohibit the operation of aircraft "in a reckless or careless manner, or so as to endanger friendly aircraft in the air" and flying "closer than 500 feet to any other aircraft in flight". The evidence shows beyond a reasonable doubt that the two officers violated these regulations.

Transmitted with the record of trial is a memorandum for The Judge Advocate General, dated 26 June 1945, from the Commanding General, Army Air Forces, signed by Lieutenant General Ira C. Eaker, Deputy Commander, Army Air Forces. It is recommended therein that in the case of each accused the sentence of dismissal be commuted to a forfeiture of pay in the amount of \$60.00 per month for six months. The following observations concerning the conduct of the accused are also expressed in the memorandum:

"I do not consider the circumstances of their offenses sufficiently aggravated to require the elimination of subject officers from the service."

I concur with the opinion expressed by the Commanding General, Army Air Forces, except that I believe the sentence should include a reprimand. I recommend that in the case of each accused the sentence as approved by the reviewing authority be confirmed but commuted to a reprimand and a forfeiture of \$60 pay per month for six months, and that the sentences as thus commuted be ordered executed.

4. Consideration has been given to the attached letter from Congressman N. M. Mason, dated 16 July 1945, and to the memorandum from Colonel William F. Pearson, with three inclosures, dated 16 July 1945.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

4 Incls

- 1 - Record of trial
- 2 - Form of action
- 3 - Ltr fr Cong. Mason, 16 July 45
- 4 - Memo fr Col. Pearson, 16 July 45
with 3 incls

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed as to each accused, but commuted to a reprimand and forfeitures. OCMO 388, 10 Aug 1945).

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

20 JUN 1945

SPJGV-CM 281234

UNITED STATES)

SECOND AIR FORCE

v.)

Trial by G.C.M., convened at
Albuquerque, New Mexico, 19
May 1945. Dismissal and total
forfeitures.

First Lieutenant LELAND
G. BOND (O-685431), Air
Corps.)

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates

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

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

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

Specification 1: In that First Lieutenant Leland G. Bond, Air Corps, Squadron E, 237th Army Air Forces Base Unit, did, at Fairmont Army Air Field, Geneva, Nebraska, on or about 31 October 1943, present or cause to be presented for approval and payment a claim against the United States by presenting or causing to be presented to Second Lieutenant Joseph Strauss, Finance Department, Finance Officer at Fairmont Army Air Field, Geneva, Nebraska, Class "B" Agent for Captain Don M. Hattan, Finance Department, an officer of the United States duly authorized to approve and pay such claims, in the amount of \$240.20 for services alleged to have been rendered to the United States by said First Lieutenant Leland G. Bond, Air Corps, which claim was false and fraudulent, in that said claim failed to include any deduction for a class "E" allotment in the amount of \$50.00 and was then known by the said First Lieutenant Leland G. Bond, Air Corps, to be false and fraudulent.

Specifications 2 to 14, both numbers inclusive, are in substantially the same language as Specification 1, except for the following:

	Date of Offense	Amount Claimed on Pay Voucher	Finance Officer	Amount of Allot- ment not deducted
Spec. 2	30 Nov 43	\$89.50	1st Lt T.B. Wellwood, FD	\$50.00
3	31 Dec 43	240.20	1st Lt T.B. Wellwood, FD	50.00
4	31 Jan 44	240.20	Maj C.J. Barnes, FD	50.00
5	(Finding of not guilty)			
6	(Finding of not guilty)			
7	(Finding of not guilty)			
8	(Finding of not guilty)			
9	(Finding of not guilty)			
10	31 July 44	165.20	Maj C.J. Barnes, FD	100.00
11	31 Aug 44	240.20	Maj C.J. Barnes, FD	100.00
12	30 Sept 44	239.50	Maj C.J. Barnes, FD	100.00
13	31 Oct 44	240.20	Maj C.J. Barnes, FD	100.00
14	30 Nov 44	276.17	Maj C.J. Barnes, FD	100.00

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

Specification 1: In that First Lieutenant Leland G. Bond, Air Corps, Squadron E, 237th Army Air Forces Base Unit, did, at Kirtland Field, Albuquerque, New Mexico, on or about 30 April 1945, with intent to deceive Colonel Frank Kurtz, Air Corps, officially state to the said Colonel Frank Kurtz that he did on 29 April 1945 send to the Hotel Henning, Casper, Wyoming, United States Money Orders for \$483.11 constituting full payment of all checks theretofore issued by said First Lieutenant Leland G. Bond, Air Corps, to Hotel Henning, then well knowing that the said statement was untrue.

Specification 2: In that First Lieutenant Leland G. Bond, Air Corps, Squadron E, 237th Army Air Forces Base Unit, did, at Casper, Wyoming, on or about 17 February 1945, with intent to deceive and injure, wrongfully and unlawfully make and utter to the Henning Hotel a certain check in the amount of \$20.00 drawn on the First National Bank of Kingsport, Tennessee, and by means thereof did fraudulently obtain from the said Henning Hotel the sum of \$20.00 in cash, he the said First Lieutenant Leland G. Bond then well knowing that he did not have and not intending that he should have any account with the First National Bank of Kingsport, Tennessee, for the payment of said check.

Specifications 3, 4, 5, 6, 7 and 9 are in substantially the same language as Specification 2, except for the following:

	<u>Date</u>	<u>Amount</u>	<u>Drawee</u>
Spec. 3	21 Feb 45	\$40.00	1st National Bank, Kingsport, Tenn.
4	22 Feb 45	10.00	1st National Bank, Kingsport, Tenn.
5	22 Feb 45	15.00	1st National Bank, Kingsport, Tenn.
6	24 Feb 45	15.00	1st National Bank, Kingsport, Tenn.
7	4 Mar 45	326.11	1st National Bank, Kingsport, Tenn.
9	3 Mar 45	40.00	Riggs National Bank, Washington, D.C.

Specification 8: In that First Lieutenant Leland G. Bond, Air Corps, Squadron E, 237th Army Air Forces Base Unit, did, at Casper, Wyoming, on or about 28 February 1945, wrongfully fail to maintain a sufficient balance in his account in the First National Bank, Odessa, Texas, to cover a check which was made and issued to the order of the Henning Hotel, in the amount of \$25.00, drawn on the said First National Bank, Odessa, Texas.

Accused pleaded guilty to Charge I, to Specifications 1, 2, 3 and 4 of Charge I, to Charge II, and to Specification 1 of Charge II, and not guilty to all of the other Specifications. The court found accused guilty of Charge I, of Specifications 1, 2, 3 and 4, not guilty of Specifications 5, 6, 7, 8 and 9, and, by exceptions and substitution, guilty in the amount of \$50 only under Specifications 10, 11, 12, 13 and 14 of Charge I, and guilty of Charge II and of all the Specifications thereof. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for one year.

The reviewing authority approved the sentence, but remitted the confinement, and forwarded the record of trial for action under the 48th Article of War.

3. Evidence.

a. For the Prosecution.

By stipulation (R. 11-20) photostatic copies of accused's pay vouchers for the months in question were admitted (Pros. Exs. 2, 4, 6, 8, 20, 22, 24, 26, 28). It was further stipulated that the copies were correct, that the vouchers were presented by accused on the dates charged, that the finance officer to whom each voucher was presented was authorized to pay and did pay to the accused the amounts respectively alleged in Specifications 1, 2, 3, 4, 10, 11, 12, 13 and 14 of Charge I (Pros. Exs. 1, 3, 5, 7, 19, 21, 23, 25, 27).

It was stipulated (R. 20, 21; Pros. Ex. 29) that photostatic copies of two authorizations for allotments signed by accused (Pros. Ex. 30, 32)

might be admitted in evidence. The first allotment authorized payment of \$50 per month of accused's pay for 6 months, beginning 1 August 1943 and expiring 31 January 1944, to the First National Bank of Odessa, Texas, to be placed to the credit of accused. The second allotment (Pros. Ex. 32) authorized payment of \$50 per month out of accused's pay to Ezra L. Bond of Kingsport, Tennessee. These payments were to begin with the month of July 1944, and were to continue for an indefinite period. Under the stipulation, there were also admitted in evidence a list of 14 monthly payments by check made under the first allotment (Pros. Ex. 31), giving the dates and check numbers and a list of five monthly payments by check made under the second allotment (Pros. Ex. 33) giving the dates and check numbers. The payments were made by the finance officer, Office of Dependency Benefits, Newark, New Jersey. By stipulation (R. 22; Pros. Ex. 34) photostatic copies of the cancelled checks (Pros. Exs. 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53), by which such 19 monthly payments of \$50 were made, were received in evidence.

It was also stipulated (R. 28; Pros. Ex. 54) that Esther Mackey, auditor of Hotel Henning, Casper, Wyoming, if she were present, would testify that, between 17 February and 3 March 1945, accused presented eight checks to the Henning Hotel and obtained from the hotel on each occasion money in the amount of each check, that the checks were returned unpaid by the drawees, First National Bank of Kingsport, Tennessee (with the notation "account closed"), First National Bank of Odessa, Texas (with the notation, "Insufficient Funds"), and Riggs National Bank, Washington, D.C. (with the notation, "no such account"), that telegrams were sent to accused advising that the checks had been returned and requesting that he repay the amount thereof, that a telegram was received from accused stating that he was sending the money, but that he has never repaid the amount of these checks, or any part thereof to the Henning Hotel. It was further stipulated that photostatic copies of the checks might be received in evidence (R. 28). These checks are in the amounts and bear the dates following: \$20, 17 February 1945 (Pros. Ex. 55), \$30, 21 February 1945 (Pros. Ex. 56), \$10, 22 February 1945 (Pros. Ex. 57), \$15, 22 February 1945 (Pros. Ex. 58), \$15, 24 February 1945 (Pros. Ex. 59), \$326.11, 4 March 1945 (Pros. Ex. 60), \$25, 28 February 1945 (Pros. Ex. 61), and \$40, 3 February 1945 (Pros. Ex. 62). It was further stipulated (R. 32; Pros. Ex. 63) that a certified copy of the statement of accused's account with First National Bank of Odessa, Texas (Pros. Ex. 64) might be received in evidence. From this transcript it appears that between 8 February and 8 March 1945 accused's balance did not at any time exceed \$9.94. It was stipulated

(R. 33; Pros. Ex. 65) that the account of accused was closed on 11 October 1944, and that a copy of the ledger account (Pros. Ex. 66) might be received in evidence. It was further stipulated (R. 33; Pros. Ex. 67) accused did not have and never had an account with the Riggs National Bank, Washington, D. C.

It was further stipulated (R. 34; Pros. Ex. 68) that, if Colonel Frank Kurtz, Air Corps, were present, he would testify that he was Commanding Officer, Kirtland Field, New Mexico, and on 3 May 1945, it was brought to his attention that the statements contained in a letter addressed by accused to him on 30 April 1945 were false, in that accused on that date had not made any payments to Hotel Henning, as stated in the letter. This letter (Pros. Ex. 69) was admitted in evidence. Accused stated therein that on 29 April 1945 he had sent to Hotel Henning, Casper, Wyoming, United States money orders amounting to \$483.11, in full payment.

By agreement (R. 35), a letter (Pros. Ex. 70), addressed on 23 April 1945 to Colonel Kurtz by C. C. Hamlett, cashier of the First National Bank of Kingsport, Tennessee, was admitted in evidence. The writer states therein that accused opened a checking account on 10 August 1944, which was closed on 11 October 1944. No other person drew against this account. For several months, accused was authorized by his father, Ezra L. Bond to draw checks against the latter's account. This authority was cancelled on 5 May 1944 (Pros. Ex. 70).

b. For the defense.

Accused was last paid to include 31 December 1944 (R. 37). At the time of the trial, he had not been paid for January, February, March and April 1945. The total money so due accused was sufficient to reimburse the United States for all but \$337.94 of accused's indebtedness (R. 38), after applying thereon the sum of \$150, which the finance officer had received from accused (R. 41). At the time of the trial the sum of \$337.94 stood in the name of defense counsel (R. 42) at the Western Union Telegraph Company in Albuquerque, New Mexico. It had been telegraphed by Ezra Bond of Kingsport, Tennessee.

After hearing an explanation by the law member of his rights as a witness, accused made an unsworn statement (R. 45), to the effect that the checks on the First National Bank of Kingsport, which he presented to the Henning Hotel to be cashed, were drawn on his father's account, that he had never received notice either from his father or from the bank that authorization to draw on his father's account had been withdrawn, that his father and he had an agreement and accused had every reason to

expect the checks to go through, that he never had any blank checks of the Kingsport Bank and always used the checks of another bank, and changed the name of the bank. Defense Exhibits A, B, C and D for identification are checks of other banks so modified, and drawn by accused against the account of his father. He never intended that the check drawn on the Riggs National Bank should be presented to it (R.46). When he wrote the check on the Odessa Bank on 28 February 1945, he believed in good faith that the funds on deposit in his account were sufficient. Several times he had requested a statement of his account, but failed to receive it (R. 47). It was accused's intention at all times to apply the money due to him from the Government, to the payment of his debt, and that, when in December Major Barnes called accused to his office and advised him of the amount which he owed to the Government, accused agreed with him that all his monthly pay checks might be withheld, and that he should not be paid until "the money owed the Government was paid".

4. This record of trial does not appear to raise any difficult questions of law. Although accused is to be commended for entering into the numerous stipulations which saved the prosecution trouble and expense, these stipulations and the documentary evidence admitted in accordance therewith tend very strongly to establish the guilt of accused, as found by the court.

We regard it as significant that although the accused made an unsworn statement, no attempt was made therein, or otherwise, to explain his presentation for approval and payment of nine pay vouchers, on which no deductions were made on account of the allotments. The presentation of each such pay voucher was clearly an offense, within the meaning and intent of the 94th Article of War. The fact that, at the time of the trial accused was prepared to make reimbursement to the Government, may not be regarded as excusing or justifying the frauds which he had committed, but at most might be considered in extenuation or mitigation. We feel that the evidence warrants the findings of guilty of Charge I and of Specifications 1, 2, 3, 4, 10, 11, 12, 13 and 14 thereunder.

The accused likewise offered no reasonable explanation of the fact that he reported in writing to his commanding officer that inter alia he had paid the amount due the Hotel Henning, when in truth and in fact at that time he had not made restitution of the amount obtained from the hotel by means of checks, which had not been honored by the banks on which drawn. The finding of guilty of Specification 1 of Charge II and of Charge II would therefore appear to be supported by the evidence. The offenses charged in the other Specifications of Charge II, involve the wrongful obtaining of money by means of worthless checks. As to

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

(101)

Specifications 2, 3, 4, 5, 6 and 7, accused's defense was that he intended that the checks should be charged to his father's account, that he was authorized to write checks against that account and was never advised that the authorization had been withdrawn. As to the check referred to in Specification 8, accused believed his balance was sufficient. He had asked for statements, but never received a statement of the account. As to the check described in Specification 9, accused's explanation was that, through an oversight, he failed to change the name of the drawee bank, as he had intended to do. Whether he intended to draw the check on the bank in Kingsport, Tennessee, or in Odessa, Texas, was not stated. The result would have been the same in either case, since one bank was refusing to charge accused's checks against his father's account, while accused's balance in the other bank was smaller than the amount of the check. The defense interposed to each of these eight Specifications was without merit, and was properly rejected by the court in each instance. Accused had no right to issue the first six checks unless he knew that, absolutely and at all events, the bank would charge them against his father's account. He drew these checks at his own peril. To obtain money on checks like these was culpably negligent, and in gross disregard of the inconvenience which might be suffered by the payee. Accused had the burden of showing that his conduct was the result of an honest mistake not caused by his own carelessness or neglect. That burden he failed to meet (CM 249232, Norren, 32 B.R. 95, 103). A mere wrongful failure to maintain a sufficient balance for the payment of the check was sufficient to constitute the offense charged under each Specification. The evidence of accused's guilt of Specifications 2, 3, 4, 5, 6, 7 and 8 of Charge II is of compelling effect.

Good intentions cannot excuse accused (CM 228420, Smith, 16 BR 184; CM 232592, Law, 19 BR 117; CM 240885, Holley, 26 BR 157; CM 228793, Patterson, 16 BR 313). These decisions are grounded on the vital principle that an Army officer is chargeable with knowledge of the condition of his bank account, and that he is culpable in drawing against it unless he knows that his balance is sufficient for the payment of the check. What has been said as to knowledge of the condition of a bank account might with equal logic be said as to the degree of care required to insure that a check be not inadvertently drawn on a bank in which the drawer has no account. The evidence therefore warranted the court in finding accused guilty of Specification 9, Charge II.

5. Accused was born in Virginia. On 6 November 1944 he was 22 years of age. He is a high school graduate. He entered the military service as an aviation cadet on 8 January 1943, and was commissioned a second lieutenant on 15 July 1943, upon graduation from the Army Air

Forces Bombardier School, Midland, Texas. On 17 October 1944 he was promoted to the grade of first lieutenant.

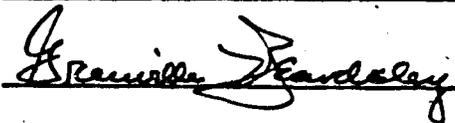
6. The court was legally constituted and had jurisdiction of the subject matter and of the person of accused. No legal errors injuriously affecting the substantial rights of accused were committed upon the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of violations of the 94th and 96th Articles of War.



_____, Judge Advocate

On Leave

_____, Judge Advocate



_____, Judge Advocate

SPJGV-CM 281234

1st Ind.

Hq ASF, JAGO, Washington 25, D.C. JUN 29 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Leland G. Bond (O-685431), Air Corps.

2. This officer was found guilty by a general court-martial of presenting to a Finance Officer for payment nine pay vouchers, on which no deductions were entered on account of a monthly allotment of \$50, and thereby obtaining in each instance monthly pay in an amount larger by \$50 than he was entitled to receive (Specifications 1, 2, 3, 4, 10, 11, 12, 13, 14), in violation of Article of War 94 (Charge I); of making a false official statement with intent to deceive his commanding officer (Specification 1), and of wrongfully obtaining money (Specifications 2, 3, 4, 5, 6, 7, 8, 9) by wrongfully procuring the cashing of checks signed by him, which were not honored by the banks on which drawn, in violation of Article of War 96 (Charge II). He was sentenced to dismissal, total forfeitures, and confinement at hard labor for one year. The reviewing authority approved the sentence, remitted the confinement, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the foregoing opinion of the Board of Review.

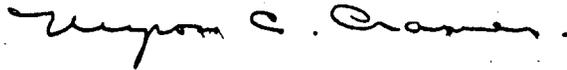
During the months of October, November and December 1943 and January 1944, pursuant to written authorization by accused, an allotment of \$50 per month of his pay was in force. For each of those months that amount was paid through the Office of Dependency Benefits to the First National Bank of Odessa, Texas, for deposit to the credit of the accused. During the months of July, August, September, October and November 1944, pursuant to written authorization by accused, an allotment of \$50 per month of his pay was in effect, and for each of those months that amount was paid through the Office of Dependency Benefits to Ezra L. Bond of Kingsport, Tennessee. In certifying his pay vouchers for all these months, it was the duty of accused to note or cause to be noted the amount of the allotment as a deduction. This he did not do, and in consequence thereof was paid \$50 more upon each of those vouchers than he was entitled to receive. At the time of the trial the Western Union Telegraph Company held, in the name of accused's counsel, the sum of \$337.94, which together with \$150 paid by accused to the Finance Officer, plus his pay for the months of January, February, March and April 1945, which he had not drawn,

was sufficient to reimburse the United States for this and other indebtedness owed the Government. Between 17 February and 3 March 1945 accused presented to the Henning Hotel, Casper, Wyoming, and obtained cash upon eight checks in the amounts respectively of \$20, \$40, \$10, \$15, \$15, \$25, \$326.11, and \$40. Payment of all of these checks was refused by the bank. Accused falsely stated in writing to his Commanding Officer that he had paid the amount of the checks to the Henning Hotel. When accused so stated, restitution had not in fact been made.

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

I recommend that the sentence as approved and modified by the reviewing authority, although inadequate, be confirmed but that the forfeitures be remitted, and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into effect the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Form of action

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. GCMO 290, 7 July 1945)

WAR DEPARTMENT
Army Service Forces (105)
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH-CM 281243

22 JUN 1945

UNITED STATES	)	ARMY AIR FORCES
	)	EASTERN TECHNICAL TRAINING COMMAND
v.)	
Second Lieutenant MALCOLM	)	Trial by G.C.M., convened at
G. HENWOOD (O-762773),	)	Langley Field, Virginia, 21
Air Corps.	)	May 1945. Dismissal, total
	)	forfeitures and confinement
	)	for two (2) years.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL 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 95th Article of War

Specification: In that, Second Lieutenant Malcolm G. Henwood, Air Corps, Squadron H, 3539th Army Air Forces Base Unit (Technical School), did, at Langley Field, Virginia, on or about 19 April 1945, knowingly, wrongfully and without authority wear the following ribbons, to wit, American Theater of Operations, European-African-Middle Eastern Theater of Operations, Asiatic-Pacific Theater of Operations, The Presidential Unit Citation with two bronze oak leaf clusters, the Air Medal with one silver oak leaf cluster, the Distinguished Flying Cross with two oak leaf clusters, and the silver star, conduct unbecoming an officer and gentleman.

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

Specification 1: In that Second Lieutenant Malcolm G. Henwood, Air Corps, Squadron H. 3539th Army Air Forces Base Unit (Technical School), did, at Langley Field, Virginia, on or about 1 December 1944, wrongfully, knowingly and unlawfully accept and retain the sum of \$150.00 as aviation pay for the months of October and November 1944, without being legally entitled thereto, in that said Second Lieutenant Malcolm G. Henwood had not performed sufficient aerial flights in October or November 1944, to comply with the requirements of Executive Order No. 9195, 7 July 1942. (AR 35-1480)

Specification 2: In that Second Lieutenant Malcolm G. Henwood, Air Corps, Squadron H, 3539th Army Air Forces Base Unit (Technical School), did, at Langley Field, Virginia, on or about 1 February 1945, wrongfully, knowingly and unlawfully accept and retain the sum of \$75.00 as aviation pay for the month of December 1944, without being legally entitled thereto, in that said Second Lieutenant Malcolm G. Henwood had not performed sufficient aerial flights in December 1944, to comply with the requirements of Executive Order No. 9195, 7 July 1942. (AR 35-1480)

Specification 3: In that Second Lieutenant Malcolm G. Henwood, Air Corps, Squadron H, 3539th Army Air Forces Base Unit (Technical School), did, at Langley Field, Virginia, on or about 1 March 1945, wrongfully, knowingly and unlawfully accept and retain the sum of \$75.00 as aviation pay for the month of February 1945, without being legally entitled thereto, in that said Second Lieutenant Malcolm G. Henwood had not performed sufficient aerial flights in February 1945, to comply with the requirements of Executive Order No. 9195, 7 July 1942. (AR 35-1480)

He pleaded guilty to the Specification of Charge I, not guilty to Charge I but guilty of a violation of the 96th Article of War and not guilty to Charge II and each of the Specifications thereunder. Evidence was introduced of a previous conviction of accused by a general court-martial on 11 April 1945 for AWOL from 21 March 1945 to 29 March 1945, for which he was sentenced to forfeit \$75 of his pay per month for a period of six (6) months. In the present case he was sentenced to dismissal, total forfeitures and confinement for five (5) years. The reviewing authority approved the sentence but reduced the period of confinement to two (2) years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution:

Specification of Charge I:

In support of accused's plea of guilty to this Specification in violation of Article of War 96, the prosecution introduced evidence to show that on 19 April 1945 accused was observed to be present in the Orderly Room of Squadron B, Langley Field, Virginia, wearing "the Presidential Citation with two oak leaf clusters; the Air Medal with a silver cluster; the DFC with two oak leaf clusters; the silver star; also the Asiatic ribbon, the European Theater ribbon and the American Theater ribbon" (R. 12, 15; Pros. Ex. 2). In a pre-trial, voluntary

statement accused stated with respect to his unauthorized wearing of service ribbons "I feel ashamed of myself; I haven't been overseas. I have been in the army for three years and never have been given a chance to do anything. I have spent all of my time in this country and the last eight months at Langley Field, and haven't been given a chance to go overseas. I just feel that I haven't been doing what I should." In the same statement he stated that the ribbons had been given to him by "a girl" (R. 10; Pros. Ex. 1). Accused's Form 66-2 does not contain any notation that he is authorized to wear any of the ribbons set out in the Specification (R. 16; Pros. Ex. 3).

Specifications 1, 2 and 3 of Charge II:

The prosecution introduced, without objection, duplicate copies of accused's pay and allowance vouchers for the months of November 1944, January 1945 and February 1945 (R. 22; Pros. Exs. 5, 6, 7). Attached to or stamped upon the back of each voucher was a certificate signed by the accused certifying that he holds an aeronautical rating as a bombardier, that during the period for which aviation pay is claimed on the particular voucher he was, by orders of competent authority, required to participate regularly and frequently in aerial flights and that, in consequence of such orders, he did participate in regular and frequent flights, while in a duty status, sufficient to meet the requirements of Executive Order No. 9195, 7 July 1942 (AR 35-1480) (R. 23). In the November voucher he claimed aviation pay for the months of October and November 1944 in the total amount of \$150; in the January voucher he claimed aviation pay for the months of December 1944 and January 1945 in the amount of \$150; and in the February voucher he claimed aviation pay for the month of February 1945 in the amount of \$75. It was stipulated that on the dates hereinafter set out, the Base Finance Officer of Langley Field paid to accused, on the basis of such vouchers and certificates, aviation pay as follows (Pros. Ex. 8):

On 30 November 1944	\$150	for October and November 1944
On 31 January 1945	\$75	for December 1944
On 28 February 1945	\$75	for February 1945

The monthly flying time of each flying officer is kept on his Form 5. That record is compiled from information contained on separate flight records (Form 1). A Form 1 is prepared by the pilot upon the completion of each required flight; and at a later time the information thereon with respect to each officer who participated in the flight is entered on such officer's Form 5 (R. 24, 25). These are the only official records kept of officers' flying time (R. 29). Accused's Form 5 for the months of October, November and December 1944 and January, February, March and April 1945, respectively were

introduced without objection (Pros. Exs. 9, 10, 11, 12, 13, 14, 15). They showed accused's flying time as follows:

October, 1944	-	20 minutes
November, 1944	-	none
December, 1944	-	none
January, 1945	-	7 hours, 15 minutes
February, 1945	-	none
March, 1945	-	4 hours, 10 minutes
April, 1945	-	4 hours, 30 minutes

On or about 25 April 1945 accused made a voluntary oral statement to an investigating officer (First Lieutenant John E. Grady), the substance of which was as follows (R. 30, 31):

"I have no proof that I have the time, and my word would not be any good. In November or December, I flew one night celestial flight of a few minutes more than eight hours with Lieutenant Frank Keyser, but I am sure he has shipped. When I need flying time, I sit next to a pilot during briefing, ask him if I can fly with him and then go and fly. I don't know the pilots' names. I don't always put my name on the Form 1, but I did last month. I know I didn't fly with anyone else - that is, anybody else I knew. I can't think of anyone who knows I flew. I feel that Captain Redfern and Lieutenant Colonel Jackson are morally prejudiced by preferring charges together."

Subsequently, on 5 May 1945, accused made and signed the following voluntary written statement (R. 32; Pros. Ex. 17):

"To the best of my knowledge, at the time that I signed vouchers Nos. 7391-79, 7407-95 and 8427-84 I fully believe that I was entitled to flying pay for the periods covered therein. Further, since I did believe that I was entitled to pay for flying during the periods specified, I made the statements contained in the vouchers in good faith and with no intent to defraud the government.

"To the best of my recollection I did meet the flight requirements for flying pay for the periods covered by the above mentioned vouchers.

"I cannot recollect the personnel with whom I flew nor the specific dates upon which any particular flight was flown.

"It is a matter of common knowledge within the Squadron that Form 1s have been known to be lost and, despite the fact

that I have been unable to find a Form 1 bearing my name for the periods specified in the charges, I nevertheless fully believe that I met the flight requirements for those periods."

4. Evidence for the defense:

No witnesses were called by the defense.

After his rights as a witness were explained to him by the law member the accused elected to remain silent (R. 33).

5. The commission of the wrongful acts alleged in the Specification of Charge I is admitted by accused by his plea of guilty of the Specification in violation of Article of War 96. The only question requiring consideration here is whether such acts - the unauthorized wearing of a large number of service ribbons - constituted a violation of Article of War 95, as alleged. In the opinion of the Board that question must be answered in the affirmative. Such conduct on the part of accused was not only disgraceful but seriously compromised his character as an officer and gentleman (CM 261810, Kitchel, 3 Bull, JAG 422; CM 275842, Hart).

6. With respect to Specifications 1, 2 and 3 of Charge II, the court took judicial notice of the provisions of AR 35-1480 and Executive Order No. 9195. Under those provisions the right to aviation pay is contingent upon the performance of aerial flights as defined in the Executive Order. Such order requires the performance of aerial flights totaling at least four hours during one calendar month, or eight hours during two consecutive calendar months, or twelve hours during three consecutive calendar months. The evidence conclusively shows that accused did not meet these requirements for any of the four months in question (October, November and December 1944 and February 1945) either by taking such months separately or by taking them in any authorized combinations. Accused's statements to the investigating officers respecting the flying time completed by him were vague and unconvincing. Moreover such statements, being extrajudicial, were of no probative value and amounted to nothing more than self-serving declarations.

The Form 5s received in evidence proving that accused had not performed the required flying time; were records required by the provisions of AAF Regulations 15-5, 1 July 1943, and as such were admissible in evidence as records kept in the regular course of business (3 Bull. JAG 468).

The Board of Review is of the opinion, therefore, that the convictions of all three Specifications of Charge II are amply supported by the record of trial.

7. The records of the War Department show that accused is 20 7/12 years old and single. He is a high school graduate and entered the Army in February 1943 as an air cadet. Upon graduation from Officer Candidate School at Victorville Army Air Field on 23 December 1943 he was commissioned a second lieutenant, Air Corps, Army of the United States.

On 11 April 1945 he was convicted by a general court-martial of AWOL from 21 March 1945 to 29 March 1945 and sentenced to forfeit \$75 of his pay per month for a period of six (6) months.

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

Thomas N. Jaffy, Judge Advocate
William H. Bamber, Judge Advocate
Robert E. Crowther, Judge Advocate

SPJGH-CM 281243

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 5 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Malcolm G. Henwood (O-762773), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the unauthorized wearing of seven service ribbons, in violation of Article of War 95 (Spec. of Ch. I); and guilty of knowingly and unlawfully accepting and retaining \$300 as aviation pay for the months of October, November and December 1944 and February 1945 without performing the required flying to entitle him to such pay, in violation of Article of War 96 (Specifications 1, 2 and 3 of Charge II). He was sentenced to dismissal, total forfeitures and confinement at hard labor for five (5) years. The reviewing authority approved the sentence but reduced the period of confinement to two (2) years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I concur in that opinion. The uncontradicted evidence, supporting accused's plea of guilty to the Specification of Charge I, shows that on 19 April 1945 he was observed to be present in the Orderly Room of Squadron B, 3539th Army Air Forces Base Unit, Langley Field, Virginia, wearing the following service ribbons: Presidential Citation with two oak leaf clusters; Air Medal with a silver cluster; Distinguished Flying Cross with two oak leaf clusters; Silver Star; Asiatic Theater of Operations; European Theater of Operations and American Theater of Operations. He was not authorized to wear any of these ribbons. The uncontradicted evidence further shows that in his pay and allowance vouchers for the months of November 1944 and January and February 1945 the accused wrongfully claimed aviation pay for the months of October, November and December 1944 and February 1945, attaching false certificates as to his flying time in support thereof. On the basis of such vouchers and false certificates accused was paid the sum of \$300 to which he was not legally entitled. In view of the youth of the accused I recommend that the sentence as approved by the reviewing authority be confirmed but that the period of confinement be reduced to one year and that the sentence as thus modified be carried into execution, and that the Mid-western Branch, United States Disciplinary Barracks, Fort Benjamin Harrison, Indiana, be designated as the place of confinement.

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4. This officer was convicted by a general court-martial on 11 April 1945 of eight days AWOL for which he was sentenced to forfeit \$75 of his pay per month for a period of six months.

5. Consideration has been given to a letter dated 3 June 1945 from accused's mother, Mrs. Edythe Henwood Smith, to the Commanding Officer, Eastern Technical Training Command, St. Louis, Missouri, attached to the record of trial and also to the letter dated 5 July 1945 from Senator Styles Bridges to Brigadier General Thomas H. Green, and to the inclosures forwarded therewith.

6. Inclosed is a form of action designed to carry the above recommendation into effect should such recommendation meet with your approval.

Myron C. Cramer

4 Incls

1. Record of trial
2. Ltr fr accused's mother, 3 Jun 45
3. Ltr fr Sen Bridges, 5 Jul 45, w/incls
4. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but confinement reduced to one year. GCMO 349, 21 July 1945).

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

(113)

SPJGK - CM 281257

8 JUN 1945

UNITED STATES)

FERRYING DIVISION
AIR TRANSPORT COMMAND

v.)

Second Lieutenant JAMES L.
MUGLER (O-546227), Air
Corps.)

Trial by G.C.M., convened at
Reno Army Air Base, Reno,
Nevada, 21 May 1945. Dismissal,
total forfeitures and confine-
ment for two (2) years.

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 93rd Article of War.

Specifications: In that Second Lieutenant James L. Mugler, 565th Army Air Forces Base Unit, did, at Reno Army Air Base, Reno, Nevada, on or about 27 April 1945, feloniously take, steal, and carry away about \$108.50, lawful money of the United States, property of Flight Officer Charles E. Wise.

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, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence, reduced the period of confinement to two years, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution shows that at about 1730 hours of 27 April 1945 Flight Officer Charles E. Wise was in his quarters in Room 21, Bachelor Officers' Quarters 5404, at the Reno Army Air Base, Reno, Nevada, writing a letter. He placed on the table that he was using six silver dollars and six silver quarters and a billfold containing five \$20 bills and a dollar bill, all money of the United States. After finishing the letter he went into the next room and held a conversation for two or three minutes with some other officers and upon his return discovered the billfold and all of the money had disappeared from the table. He immediately reported the loss to the Provost Marshal (R. 7). Among the six

silver dollars were two silver dollars which the accused had carried with him as pocket pieces for five or six years. They had thereby become worn so that the date was worn off of one and "1927" was barely discernible on the other. He reported this description of the coins to the Provost Marshal (R. 8). About two hours later the accused was requested by Major William E. Luck, CMP, the Provost Marshal, in the presence of Flight Officer Wise and others to empty the contents of his pockets on a table in a room of another Bachelor Officers' Quarters. The accused removed from his pockets and placed on the table six silver dollars, six quarters, a dime, two nickels, and a billfold containing five \$20 bills and one \$1 bill. The accused immediately identified the two silver dollar pocket pieces from among the coins placed on the table by the accused (R. 8, 10, 15). All of the bills and coins were introduced in evidence (R. 11-14).

Lieutenant Colonel Melvin R. Hagain was designated to investigate the charge that was preferred against the accused and during his investigation on 5 May 1945, after having been advised of his rights, the accused verbally and voluntarily admitted that he had taken "a purse containing in the neighborhood of \$108.50 from F/O Wise in his BOQ" (R. 17).

4. The accused elected to remain silent (R. 19). Two officers who were acquainted with him socially and had worked with him in military service testified that in their opinion the accused's character was excellent and that the performance of his work had been satisfactory (R. 18, 19).

5. The Manual for Courts-Martial, 1928, paragraph 149g, page 171, provides:

"Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark.)

"Once a larceny is committed, a return of the property or payment for it is no defense to a charge of larceny. Personal property only is the subject of larceny."

"Recent, unexplained and personal possession of stolen property is legally sufficient evidence to support a finding that the possessor stole the property" (Wharton's Criminal Evidence, sec. 191, CM 226734, 15 B.R. 145).

The evidence for the prosecution clearly shows that Flight Officer Wise was the owner of personal property consisting of \$108.50 in notes and coins of the United States; that this property was taken and carried away; that it was of the value of \$108.50 as alleged; and that within two hours notes and coins of the same number and denomination were found in the personal

possession of the accused, who offered no explanation. He subsequently admitted taking the money. The circumstances thus shown excluded every reasonable hypothesis except the one of the accused's guilt. We have no difficulty in reaching the conclusion that the record of trial is legally sufficient to support the conviction.

6. War Department records show the accused to be 23 years of age and married. He graduated from high school and for 3-1/2 years attended the University of Alabama, majoring in Engineering. For two years he received cadet training in the R.O.T.C. and on 8 June 1943 entered active military service as an enlisted man in the Corps of Engineers. On 5 January 1944 he entered Officers Candidate School and upon completion of his training on 27 May 1944 he was commissioned a second lieutenant, AUS.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

(On Leave)

, Judge Advocate.

Earle Hepburn

, Judge Advocate.

Norman Mays

, Judge Advocate.

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SPJGK - CM 281257

1st Ind.

Hq ASF, JAGO, Washington 25, D. C. JUN 25 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James L. Mugler (O-546227), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of stealing \$108.50 belonging to a fellow officer in violation of Article of War 93. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence, reduced the period of confinement to two years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board 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.

The accused took \$108.50 in cash left exposed on a table in the room of a fellow officer. It was recovered within a few hours and the accused admitted taking the money. Dismissal is warranted. I recommend that the sentence as modified by the reviewing authority be confirmed but that the forfeitures be remitted, that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to letters from the wife and mother of the accused and from The Reverend Willard P. Soper, Mr. B. L. Leeds, and Mr. Clyde Howes, all requesting clemency in behalf of the accused. These letters accompany the record of trial.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

7 Incls

1. Record of trial
2. Form of action
3. Ltr fr wife of accused
4. Ltr fr mother of accused
5. Ltr from Rev Willard P. Soper
6. Ltr fr Mr. B.L. Leeds
7. Ltr from Mr. Clyde Howes

(Sentence as modified by reviewing authority confirmed but forfeitures remitted. GCMO 307, 7 July 1945.)

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

SPJGN-CM 281338

UNITED STATES)

v.)

First Lieutenant OLIVER V.
ALLEN (O-1301410), Air Corps.)

1 JUL 1945
SACRAMENTO AIR TECHNICAL
SERVICE COMMAND

Trial by G.C.M., convened at
McClellan Field, California,
16 May 1945. Dismissal and
confinement for one (1) year.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 93rd Article of War.

Specification 1: In that First Lieutenant Oliver V. Allen, 4127th Army Air Forces Base Unit (Area Comd.) Section A, then Police and Prison Officer, did, at McClellan Field, California, on or about 29 March 1945, feloniously embezzle by fraudulently converting to his own use about \$670, lawful money of the United States, property of the Prisoners Fund, McClellan Field, California, which fund was entrusted to said First Lieutenant Oliver V. Allen as custodian thereof.

Specification 2: In that First Lieutenant Oliver V. Allen, 4127th Army Air Forces Base Unit (Area Comd.) Squadron A, then Police and Prison Officer, did, at McClellan Field, California, between 16 April 1945 and 23 April 1945, feloniously embezzle by fraudulently converting to his

own use about \$250, lawful money of the United States, property of Sergeant Rayburn K. Webb, entrusted to him by the said Sergeant Rayburn K. Webb.

ADDITIONAL CHARGE: Violation of the 93rd Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

The accused pleaded guilty to both Charges and the Specifications thereunder but was thereafter permitted to withdraw his plea of guilty to the Additional Charge and its Specification and to plead not guilty thereto. He was found guilty of the Charge and its Specifications and not guilty of the Additional Charge and the Specification thereunder. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that at all times relevant to the offenses alleged the accused was police and prison officer at McClellan Field, California (R. 21; Pros. Ex. 31). In his official capacity he was responsible for the safekeeping of funds intrusted to him by the prisoners under his charge (R. 9). For each deposit made with him he maintained an individual account sheet which listed the date on which the prisoner was confined, the amount of money deposited, the amount of money withdrawn, the prisoner's signature, and the accused's signature. These account sheets were kept in a loose-leaf notebook binder in the accused's office (R. 11).

On 21 April 1945, during the absence of the accused from McClellan Field, a prisoner, who was being released, asked for a refund of his money. The assistant police and prison officer contacted the accused by telephone and obtained the key to the prison office safe by messenger. When the safe was opened by the assistant prison officer, he discovered that there was only approximately \$40 in it. This fact having been reported to the local intelligence officer, an audit was made of the accused's account on 23 April 1945 and a discrepancy of \$261.22 was revealed between the cash on hand and that which was payable to the prisoners (R. 12). Thereafter five account sheets covering deposits totalling \$420.82 were found to be missing. These five accounts, and a further additional item of \$120 which was outstanding, when added to the previously discovered deficit of \$261.22, made a total deficit of \$807.04 (R. 13). On 24 April the accused refunded \$683.53 of this amount and an additional sum of \$125 on the day of trial (R. 10-13).

On 17 April 1945 Sergeant Rayburn K. Webb deposited with the accused \$316 for safekeeping. He thereafter procured a refund of \$66 and

received a receipt for \$250 which was to be put in the "Soldier's Savings". After the shortage in the guardhouse funds had been discovered, Sergeant Webb went to the accused and received a refund of the entire amount (R. 19-27).

The accused, in a pre-trial statement introduced by the prosecution, explained that on 28 March 1945 he had removed approximately \$675 from the safe in which the prisoners' fund was kept. He asserted that he had taken this money in order to make a loan of \$600 to a brother officer who was in trouble. In addition to the \$600 which he had taken from the prisoners' fund he had appropriated \$250 which had been deposited with him by Sergeant Webb (R. 21; Pros. Ex. 31).

4. The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to testify under oath. He reaffirmed his pre-trial statement in its entirety, explaining that an officer, who was his best friend, had been in trouble and had asked him for a loan of \$700. In order to accommodate his friend the accused had taken \$600 from the prisoners' fund and added thereto \$100 of his own money. The \$250 deposited by Sergeant Webb was used by the accused to make refunds to prisoners. All of the other money appropriated by the accused with the exception of \$5.33 had also been refunded (R. 32-34). This small sum was not brought to his attention until ten "minutes before the court convened" (R. 34). On cross-examination he refused to reveal the name of the officer to whom he had assertedly lent \$700. He testified that he knew of no deficiency in the prisoners' funds during February 1945. At that time, about two days before an audit, he had not been advised that there was a shortage in the account of some \$150 to \$200 (R. 35-40, 55).

He placed in evidence a document indicating that he had served as an enlisted man from 28 March 1942 to 25 November 1942; that he had attended Infantry Officer Candidate School, Fort Benning, Georgia, and had been commissioned as a second lieutenant upon graduation there; that he had served in various capacities including that of platoon leader, technical supply officer, base range officer, officer's intelligence corps, security section, and police and prison officer; and that he had been promoted to the rank of first lieutenant on 22 January 1944 (Def. Ex. 1).

5. In rebuttal the prosecution showed that on 21 February 1945 Private First Class Thomas L. Norman, who had been employed in the accused's office, received information that an audit of the books of that office was to be made. He and Staff Sergeant Jimmy A. Katsilometes checked the account books and, upon finding that there was a shortage of between \$150 and \$200, reported that fact to the accused. Five ledger sheets were thereafter withdrawn from the books and given by Private Norman to the accused who placed them in his desk (R. 42-44). The testimony concerning this act was corroborated by Sergeant Katsilometes who stated to Staff Sergeant Max Hubbs that "I took the slips out, put them in accused's desk drawer and told him I had done so and that the cash book balanced" (R. 52).

6. Specification 1 of the Charge alleges that the accused, while serving as police and prison officer at McClellan Field, did, on or about 29 March 1945 "feloniously embezzle by fraudulently converting to his own use about \$670", the property of the prisoners' fund of that station, intrusted to him as custodian. Specification 2 of the Charge alleges that the accused feloniously embezzled \$250, which had been intrusted to him by Sergeant Rayburn K. Webb.

The Manual for Courts-Martial defines embezzlement as,

"* * * the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come." MCM, 1928, par. 149h.

The evidence clearly sustains the accused's plea of guilty to both offenses and proves beyond a reasonable doubt that, on or about 28 March 1945, he wrongfully converted to his own use \$675 intrusted to him by the prisoners under his charge. Likewise the evidence establishes that he wrongfully converted \$250 which had been deposited with him for safekeeping by Sergeant Webb. Although his conduct in refunding the monies so embezzled is commendable, it does not change the criminal nature of his acts. The evidence showing that he had concealed a shortage in his accounts in February reveals a course of conduct and a frame of mind from which it may logically be inferred that his subsequent appropriations, forming the gist of Specifications 1 and 2, were fraudulently planned and executed.

7. The records of the War Department show that the accused is 27 years of age. He graduated from high school in 1934 and was thereafter employed as a shipping clerk, parts manager of an automobile company, field manager for a motor service, shipping clerk of a paper mill and an automobile parts distributing company. He enlisted in the service on 20 March 1942 and was commissioned a second lieutenant, Army of the United States on 25 November 1942. He was promoted to the rank of first lieutenant on 22 January 1944.

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

Abner E. Lifecomb, Judge Advocate.
Robert J. Plummer, Judge Advocate.
Samuel Morgan, Judge Advocate.

SPJGN-CM 281338

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

JUL 13 1945

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Oliver V. Allen (O-1301410), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, feloniously embezzling \$670, the property of the prisoners' fund of McClellan Field, California, and of fraudulently embezzling \$250, the property of Staff Sergeant Rayburn K. Webb, in violation of Article of War 93. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

The evidence clearly corroborates the accused's plea of guilty. While he was serving as police and prison officer at McClellan Field, California, he feloniously converted to his own use \$670 of the prisoners' fund intrusted to him for safekeeping. In addition he converted to his own use \$250 which had been intrusted to him for safekeeping by Sergeant Webb. Although his conduct in refunding the monies so embezzled is commendable, it does not change the criminal nature of his acts. I recommend that the sentence, although inadequate, be confirmed, but that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that a United States Disciplinary Barracks be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls

Incl 1 - Record of trial

Incl 2 - Form of action

MYRON C. CRAMER

Major General

The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 341, 21 July 1945).

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

SPJGN-CM 281398

11 JUL 1945

UNITED STATES)

ARMY AIR FORCES WESTERN
FLYING TRAINING COMMAND

v.)

Private JACKSON HART
(38521647), Squadron F,
3020th Army Air Forces
Base Unit.)

Trial by G.C.M., convened at
La Junta Army Air Field, La Junta,
Colorado, 14, 15, and 16 May 1945.
To be shot to death with musketry.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Jackson Hart, Squadron F, 3020th Army Air Forces Base Unit, La Junta Army Air Field, La Junta, Colorado, did, at Rocky Ford, Colorado, on or about 18 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Louis Box, a human being, by cutting him with a knife on and about the neck.

The accused pleaded not guilty to, and was found guilty of, both the Charge and the Specification. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on the night of

18 April 1945 Miss Opal Johnson, a fifteen-year old high school sophomore, was attending a movie at the Grand Theatre in Rocky Ford, Colorado, with "Velma Jean Moore and her mother". Because of the lateness of the hour and the necessity of arising early the following morning, Miss Johnson, at about "five minutes of eleven" and before the completion of the performance, separated from her friends and set out for her home (R. 53-54). Proceeding north on Main Street, she observed the accused walking south toward her and recognized him as one of the few colored soldiers stationed in Rocky Ford. As they passed one another, he whistled at her (R. 54-56, 85-88, 93, 104; Pros. Ex. 9). She ignored him and continued on her way without pausing. Some distance beyond, at the railroad tracks which crossed Main Street, she stopped to speak to Louis Box, a civilian policeman (R. 33, 57, 116; Pros. Exs. 4, 10).

In the course of their conversation, which covered some four or five minutes, she mentioned that a "Negro soldier" had whistled at her. As she was talking, she glanced back in the direction from which she had just come and saw the accused standing on the other side of the railroad tracks on the corner of Main and Front Streets (R. 58-60, 88, 90; Pros. Ex. 10). She pointed him out to Mr. Box who immediately informed her that the accused "lived above the Rex Theatre" and had been arrested the previous Saturday night (R. 61, 96-98, 104). When she was about to resume the walk to her home, Mr. Box assured her that if the accused "followed her he would follow him" (R. 60).

Continuing north on Main Street for a short distance, she turned left at Elm Avenue and proceeded west on the south side of the street (R. 62-64; Pros. Exs. 12, 13). The first block was bisected by an alley which led northward to Swink Avenue and from there to the entrance of the accused's lodging over the Rex Theatre (R. 50-51, 66-67, 104; Pros. Exs. 4, 6, 12, 15). Immediately west of this thoroughfare and on the south side of Elm Avenue was the Mrs. Jennie Gobin-Cameron Millinery Shop and beyond that was the entrance to the Gobin Hotel. Just as Miss Johnson passed the entrance to the hotel, she heard footsteps behind her. Turning around, she saw the accused a few yards away at the millinery shop, well past the alley leading to his home. She promptly addressed him, charged that he was pursuing her, and said, "I wish you would quit following me". He replied that "he wasn't following her, that he was going home". She then stated that she "didn't think he would be going home that way". To this comment he countered by inquiring how she "knew where his home was it" (R. 64-67, 89, 92; Pros. Exs. 13, 14, 37).

She did not answer, but continued on her way. At the intersection of Elm Avenue and Ninth Street she crossed over to the northwest corner and he to the northeast corner (R. 67). Although she was "frightened", she did not permit the conversation to flag. Despite the fact that they were separated by the width of the street, she declared that "if he came any closer she would slap him". Crossing over to her corner, "he said there wasn't anything she had that he wanted". With this final remark they

parted, she proceeding west on Elm Avenue and he north on Ninth Street (R. 67-74, 76, 92, 94-95; Pros. Ex. 37).

When she reached an alley between Ninth and Eighth Streets, she heard Mr. Box calling her. She turned and asked, "What do you want?" When he replied, "Come back", she returned to the northwest corner of Elm Avenue and Ninth Street where he joined her. His first words were, "What did the soldier say to you?" After she had recounted her experience, Mr. Box "told her to go on home and that he would go get the soldier and he might have her sign a statement". (R. 74-76, 95-97, 102). While Mr. Box headed north on Ninth Street, Miss Johnson, in compliance with his directions, again started for her home. She walked west on Elm Avenue, turned right on Eighth Street, proceeded north to Swink Avenue, crossed over to the other side of the street, and continued north for another half block. About midway between Swink and Chestnut Avenues she heard the sound of loud voices drifting across a large vacant lot separating Eighth and Ninth Streets. Although most of the words exchanged were distorted by the distance, she clearly heard Mr. Box say, "You are coming with me". After listening to some more indistinguishable conversation, she "heard a shot and * * * saw a flash" burst diagonally across Ninth Street in a northeasterly direction. A few seconds later she observed a figure running across Ninth Street in the same direction. Without attempting to ascertain the meaning and consequences of what she had witnessed, she completed the walk to her home and went to bed (R. 76, 84, 99-103).

Mrs. Ethel Merrifield, who lived in a house on Ninth Street between Chestnut and Swink Avenues, also heard the shot. Concluding that "there might be someone out in the alley bothering the cars" in her garage, she went to the back porch to listen and watch. After only a "short while", the sound of "footsteps running up the alley" came to her ears. This was followed by the noise of a door closing, "and then everything was quiet" (R. 39-48). Diagonally across the alley from Mrs. Merrifield's garage was the entrance to the accused's lodging over the Rex Theatre (R. 40, 43, 48, 50-51; Pros. Exs. 6, 7, 8).

Around 11:30 p.m. Miss Marguerite Fair was returning in her automobile from a house on North Ninth Street to which she had conveyed a friend. Near the intersection of Ninth and Chestnut Streets and only a few feet north of Mrs. Merrifield's house she saw lying in the gutter an object which she at first mistook to be "some clothing" but which upon closer approach she identified as the body of a man (R. 112-113; Pros. Ex. 7). Miss Fair promptly drove to the city hall to report her discovery but, finding no one present, went on to the depot. There she met Mr. John Kipper, a city policeman, and acquainted him with the facts. He proceeded in his car to North Ninth Street near Chestnut Avenue, and she followed in her automobile (R. 114, 116-117). The body was that of Louis Box. He was lying "face down", his left arm at his side, and his right arm partly extended. In his right hand a service

revolver was grasped and under his right shoulder there was a "20 gauge" gas gun with one discharged cartridge. After the arrival of other police officers, a "U.S." insignia "fastner" was found nearby. A vast quantity of blood had poured from the deceased's body to form a pool near his left side and to leave a trail which in its various meandering covered a course of approximately one hundred-seventy-five feet (R. 115, 119-122, 134-136, 140, 146, 160-167, 174-175; Pros. Exs. 7, 26, 33, 34, 35, 36). On the right side of his neck was a gash,

"about eight inches long extending from about two inches behind and below the ear to a point almost at the midline anteriorly just a little bit to the right of the larynx. This wound was about an inch deep in front and more or less scaled off to the other end. The platysma muscle was severed, the sternocleidomastoid muscle was almost entirely severed, the jugular vein was severed, and the common carotid artery was almost severed" (R. 25, 140, 171, 173-174).

These horrible injuries could have been inflicted with a pocket knife (R. 29; Pros. Ex. 3).

The next morning, upon learning of Mr. Box's death, Miss Johnson went to the police station and gave an account of the events of the previous evening. Apparently as the result of the information supplied by her, the accused was arrested at his place of duty. A simultaneous careful search of his person disclosed a jackknife which was marked for identification and forwarded to the Federal Bureau of Investigation. Upon analysis by Special Agent B. J. White of that Bureau a trace of human blood was found in the nail groove of the largest of the three blades (R. 87, 156-159, 186, 198; Pros. Exs. 3, 40). Following the arrest the accused was placed in the local jail. Later in the day he was "lined up" with four other colored soldiers and Miss Johnson was brought in to attempt an identification. After scrutinizing them all, she pointed out the accused (R. 85-86, 159, 171-173; Pros. Ex. 20).

A search of his lodgings revealed several other items which proved to be of importance. A whetstone and three pairs of dice were found, among other articles, in a drinking glass (R. 199, 201-209; Pros. Ex. 39). In the accused's barracks bag was a blouse to the right lapel of which there was pinned the upper or face half of a "U.S." insignia. The "clasp" or "fastner" usually worn underneath was missing (R. 149-150, 175-177; Pros. Ex. 31). The number on the "clasp" under the "U.S." insignia on the left lapel and that on the "clasp" found near the deceased were identical. This latter coincidence had no "special significance" (R. 176-177, 196-197; Pros. Ex. 26).

After being fully warned of his rights the accused on 19 April 1945 gave two statements, one in narrative form and another following shortly thereafter in question and answer form. The first was dictated

in the presence of the accused by Second Lieutenant Herbert I. Ross and was signed the following day. The second was taken by Assistant District Attorney A. T. Stewart and was witnessed by Sheriff John H. Armstrong, W. L. McDonald, G. D. Roberts, George Friedenberger, Frank Fuller, Captain Lawrence Cavanaugh, Sergeant Charles Ham, and Private Cassius B. Haig (R. 178-181, 183-185, 192-193; Pros. Exs. 37, 38). On the afternoon of 20 April 1945 the accused was interviewed by a Mr. "Tyler" and another gentleman from the "Association for the Advancement of Colored People". Having again been warned of his rights, the accused related exactly the same story as that contained in his narrative statement (R. 182-183). In this document, after recounting that he had gone to the Park View Hotel to meet his wife and that he had consumed "liquor" and beer with certain friends there, he continued as follows:

"I left the Park View Hotel and went to get my dice from a man who had them. This man is a Mexican but I do not know his name. I know him only by sight. This Mexican fellow lives on Chestnut Street west of the High School between 5th and 6th Streets. When I left the Park View Hotel I walked north on Main Street across the railroad tracks and just east of the station I saw Mr. Box, the night patrolman, standing talking to a woman. I turned left at the City Drug Store on Elm Avenue. I did not see any young lady walking in front of me until I crossed the street on 9th when I saw her. She said something to me but I paid no attention to it and made no reply. I walked north on 9th Street towards the High School and shortly after I had passed the Post Office I heard someone call 'Halt.' I stopped and turned around and saw that the person who had called me was Mr. Box a city patrolman. He asked me what I had said to the young lady. I said I had said nothing. He said, 'You will come with me', and when I refused to go with him he pointed something at me and shot it off. After he shot at me I struck him with my knife which I was carrying in my left hand. I did not pull the knife out of my pocket. I had been picking my teeth with the end of the knife and was carrying it in my left hand. I am left handed and I used my left hand when I struck Mr. Box. When I struck at Mr. Box I felt the knife go into his body and the knife later had blood on it. The reason I struck Mr. Box was because I thought he had shot me. I smelled some gas after he had fired off this weapon and my eyes teared but I did not recognize it at the time as a gas gun. I thought it was a pistol or a gun and I thought I was shot. I did not stay around to see what happened to Mr. Box or what he did. I ran northeast across the street, turned right on Chestnut, going as far as Main Street, There I turned around and came west on Chestnut as far as the alley on Main and 9th. There I turned to my left and went south through the alley as far as the back entrance of the room where I live. I went up the steps into my room. My knife was in my pocket at this time and I made no attempt to wipe the blood off it. I saw that my wife was not in the room and left almost immediately. I

went to the Park View Hotel. I left my room the same way I had entered it on the steps which lead to the alley behind Main Street. I went directly to the Park View Hotel to Room Number 17. I stayed there only long enough for my wife to put her coat on and then we left and went on home. When we got back to the room, I took my knife out of my pocket and started to sharpen it on a knife sharpening stone which I had wetted so the blood came off easily. I was wearing O.D. trousers and O.D. shirt, my blouse and my overcoat when all the events which I have described above occurred" (Pros. Ex. 37).

In the later statement the accused admitted that he knew Box to be a police officer and gave the following answers:

- "Q. Before going to bed the first thing when you got in the room what did you do? A. I sharpened my knife.
 Q. On what? A. A knife rock. Q. You always kept it sharp?
 A. Yes.
 Q. Was there blood on the knife? A. No sir, I wiped it off.
 Q. What did you wipe it off on? A. A little piece of rag.
 Q. What did you do with the rag? A. I put it in the garage can.
 Q. Did you wash the knife off? A. No I put water on the rock and it cleaned the knife off.
 Q. That is the same knife you cut Officer Box with? A. Yes sir.
 Q. Is the stone I have in my hand the one you used? A. It is the same one I sharpened my knife with.
 Q. The knife didn't need sharpening as much as it needed cleaning, did it? A. No sir, it needed cleaning" (Pros. Ex. 38).

4. After being apprized of his rights relative to testifying or remaining silent, the accused took the stand on his own behalf. His testimony substantially reaffirmed all of his narrative statement. He expressly denied that he had whistled at Miss Johnson (R. 212). When she spoke to him on Elm Avenue, he was "going over across town, which would be over on Chestnut Street, to where we were supposed to be having a dice game" (R. 210-211, 213). It was his intention not only to participate in the game but also "to get some dice". Although he had two pairs of dice at home, "he had never gambled with them", and these dice that this guy had, well, he had been asking me to pick up these dice from a fellow he had let have" (R. 237, 239). The accused did not then recognize her as the same "lady" whom he had previously observed in conversation with Mr. Box. In the accused's own words, "I didn't pay that much attention to her" (R. 222). He had never intended to kill Mr. Box. The accused had used his knife only after he "thought he was shot" (R. 213, 240). He described his encounter with Mr. Box as follows:

"Just before I get to the corner here Officer Box holler at me. Just about that corner block I stopped. He was coming from the south the same way I was going. I stopped and turned around

facing him. He walks up to me and asked me, 'What did you said to the lady?' I said 'Nothing, sir. What lady?' He said, 'The lady that cross the street ahead of you.' I said, 'Nothing, sir.' He said, 'Well, come on go with me to the city hall.' I said, 'What for, sir? I haven't done nothing.' He said, 'That doesn't matter, come on and go anyway,' and then he pulled out the gun and shot and I struck with the knife." (R. 214, 217)

After the weapon was fired, the accused noted some powder on his blouse (R. 248, 258).

He denied that in his statement to Mr. Stewart he had replied, "No, sir, it needed cleaning" to the inquiry, "The knife didn't need sharpening as much as it needed cleaning, did it?" (R. 228). The knife was always kept sharp because the accused used it to cut his fingernails and toenails and to "trim matches for toothpicks" (R. 229). After it had been used in the fatal assault upon Mr. Box, there was a "little flash of a little blood" on the weapon (R. 253). No force had been employed to obtain a statement from him, but, in his own words,

"Mr. Frank F. Fuller and a lawyer, I don't know who was the lawyer, I couldn't suggest who he was now, I don't know the lawyer's name but I would know him if I seen him, told me that they had my wife in here and they was going to give my wife fifteen to twenty-five years if I did not tell the truth" (R. 241-243).

5. Captain Lawrence D. Cavanaugh, Mr. Frank Fuller, Mr. William L. McDonald, and Mr. A. T. Stewart were recalled by the prosecution as witnesses on rebuttal. Captain Cavanaugh testified that a projectile from a gas gun striking an individual at "arms length range" would burn his clothing. "There was absolutely no burns and no smell of gas or powder on the accused's blouse. (R. 260).

None of the witnesses for the prosecution had ever heard or made any threats "to give" his wife fifteen to twenty-five years (R. 261, 263, 266, 268). To Mr. Fuller the accused frankly stated that, "I killed that man". The accused explained that:

"Mr. Box grabbed me by the right arm here and jerked me around by the tree and * * * we had some words and * * * he shot me * * * I heard a report and I thought I was shot, and * * * if he shot me I was going to take him along with me * * * I struck him with my knife and aimed to strike him in the right shoulder and I don't know where I hit him but I knew I cut him deep from the way the knife pulled * * *" (R. 263).

To Mr. A. T. Stewart the accused also stated that Mr. Box had seized him by the wrist and that, "I thought Officer Box killed me" (R. 269).

According to Mr. Stewart, no powder was brushed off of the accused's blouse (R. 269-270).

6. The Specification of the Charge alleges that the accused did, "on or about 18 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Louis Box, a human being, by cutting him with a knife on and about the neck".

Paragraph 148 of the Manual for Courts-Martial, 1928, provides that:

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse".

Perhaps the best analysis of malice aforethought is to be found in Chief Justice Shaw's famous opinion in Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711. It was there said that:

"* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * *

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

The substance of these comments in considerably condensed form are contained in the Manual. MCM, 1928, par. 148.

The words "deliberately" and "with premeditation" have been defined as "an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act" (Wharton, Criminal Law, sec. 420). In Bostic v.

facing him. He walks up to me and asked me, 'What did you said to the lady?' I said 'Nothing, sir. What lady?' He said, 'The lady that cross the street ahead of you.' I said, 'Nothing, sir.' He said, 'Well, come on go with me to the city hall.' I said, 'What for, sir? I haven't done nothing.' He said, 'That doesn't matter, come on and go anyway,' and then he pulled out the gun and shot and I struck with the knife." (R. 214, 217)

After the weapon was fired, the accused noted some powder on his blouse (R. 248, 258).

He denied that in his statement to Mr. Stewart he had replied, "No, sir, it needed cleaning" to the inquiry, "The knife didn't need sharpening as much as it needed cleaning, did it?" (R. 228). The knife was always kept sharp because the accused used it to cut his fingernails and toenails and to "trim matches for toothpicks" (R. 229). After it had been used in the fatal assault upon Mr. Box, there was a "little flash of a little blood" on the weapon (R. 253). No force had been employed to obtain a statement from him, but, in his own words,

"Mr. Frank F. Fuller and a lawyer, I don't know who was the lawyer, I couldn't suggest who he was now, I don't know the lawyer's name but I would know him if I seen him, told me that they had my wife in here and they was going to give my wife fifteen to twenty-five years if I did not tell the truth" (R. 241-243).

5. Captain Lawrence D. Cavanaugh, Mr. Frank Fuller, Mr. William L. McDonald, and Mr. A. T. Stewart were recalled by the prosecution as witnesses on rebuttal. Captain Cavanaugh testified that a projectile from a gas gun striking an individual at "arms length range" would burn his clothing. "There was absolutely no burns and no smell of gas or powder on" the accused's blouse (R. 260).

None of the witnesses for the prosecution had ever heard or made any threats "to give" his wife fifteen to twenty-five years (R. 261, 263, 266, 268). To Mr. Fuller the accused frankly stated that, "I killed that man". The accused explained that:

"Mr. Box grabbed me by the right arm here and jerked me around by the tree and * * * we had some words and * * * he shot me * * * I heard a report and I thought I was shot, and * * * if he shot me I was going to take him along with me * * * I struck him with my knife and aimed to strike him in the right shoulder and I don't know where I hit him but I knew I cut him deep from the way the knife pulled * * *" (R. 263).

To Mr. A. T. Stewart the accused also stated that Mr. Box had seized him by the wrist and that, "I thought Officer Box killed me" (R. 269).

According to Mr. Stewart, no powder was brushed off of the accused's blouse (R. 269-270).

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* * * * *
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The words "deliberately" and "with premeditation" have been defined as "an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act" (Wharton, Criminal Law, sec. 420). In Bostic v.

"A policeman or other officer appointed by the municipal authority for the preservation of order and the prevention of crime is entitled to the same protection which we have just stated to belong to the constable". Wharton, Criminal Law, sec's. 541, 543.

When struck down by the hand of the accused, the deceased was wearing the uniform and badge of his office, was in the lawful performance of his duties, and was attempting to make an arrest for disorderly conduct committed in his presence and consisting of improper and unwelcome advances to a teen-aged girl. Since he had ample notice both of the authority and the purpose of the arresting officer, the accused, in wielding his deadly weapon, must be presumed as a matter of law to have acted with malice aforethought.

The questions of deliberation and premeditation being ordinarily for the jury, the trial court, in performing its function of fact-finder, was justified in inferring from the same facts that the accused's conduct was deliberate and premeditated. But it is unnecessary to rely upon inference alone in this case, for the accused has explained the workings of his own mind at the time of the slaying by freely admitting that, "I thought I was shot, and * * * if he shot me I was going to take him along with me". Since these words must be construed as indicating a desire for revenge and since he was engaged at the time of the killing in resisting a lawful arrest, the Board of Review is impelled to the conclusion that the stabbing was deliberate and premeditated.

7. The record shows that the accused is about 26 years of age; that he was inducted on 4 October 1943 at Shreveport, Louisiana, for the duration plus six months; and that he had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Abner E. Lipscomb, Judge Advocate.

Robert J. Connor, Judge Advocate.

Samuel Morgan, Judge Advocate.

(134)

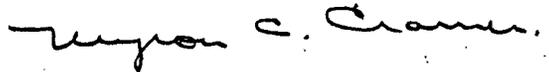
SPJGN-CM 281398 1st Ind
Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

19 JUL 1945

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 Jackson Hart (38521647), Squadron F, 3020th Army Air Forces Base Unit.

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 dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, that the sentence as thus commuted be ordered executed, and that the United States Penitentiary, 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.



3 Incls

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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life. GCMO 407, 21 Aug 1945).

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

(135)

10 JUN 1945

SPJGV-CM 281413

UNITED STATES	)	FAIRFIELD AIR TECHNICAL SERVICE COMMAND
v.)	
First Lieutenant REUBEN R. KATZ (O-583313), Air Corps.	)	Trial by G.C.M., convened at Wright Field, Dayton, Ohio, 14 May 1945. Dismissal.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, 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 First Lieutenant Reuben R. Katz, Air Corps, 4020th Army Air Forces Base Unit, did, at and near Dayton, Ohio, on or about 22 March 1945, wrongfully take and use, without the consent of the owner, a certain automobile, to wit: A Willys Overland 1/4 ton 4 by 4 truck, United States registration number W-2084634, of a value of more than \$50.00, property of the United States.

Specification 2: In that First Lieutenant Reuben R. Katz, Air Corps, * * *, did, at or near Dayton, Ohio, on or about 22 March 1945, drink intoxicating liquor with an enlisted member of the Woman's Army Corps, one Private Virginia M. Johnson.

Specification 3: In that First Lieutenant Reuben R. Katz, Air Corps, * * *, did, at Wright Field, Dayton, Ohio, on or about 22 March 1945, knowingly and willfully execute a false certificate concerning official duty absence of Private Virginia M. Johnson in words and figures as follows:

ENLISTED MAN'S
OFFICIAL DUTY CERTIFICATE
WRIGHT FIELD, DAYTON OHIO

This certifies that:

Virginia Johnson	Pvt.	502391
(Name)	(Rank)	(ASN)

is authorized to be absent from his post due to OFFICIAL BUSINESS. This certificate is valid only on the day dated hereon, between the hours of

1400 to 1700

TO VISIT Dayton, Ohio

DATE 3/22/45 APPROVED R. R. Katz, 1st Lt., AC
(Personnel Officer)

AAFMC-728-WF-12-29-43-5M

which said certificate he, the said First Lieutenant Reuben R. Katz, knew to be false and fraudulent in that the absence of the said Private Virginia M. Johnson was for the purpose of accompanying the said First Lieutenant Reuben R. Katz to Dayton and vicinity on a personal mission not connected with official business.

Specification 4: In that First Lieutenant Reuben R. Katz, Air Corps, * * *, did, at Wright Field, Dayton, Ohio, on or about 23 March 1945, wrongfully and willfully instruct Sergeant Howard Adamson, an enlisted man, to copy onto a blank War Department Ordnance Office Form No. 7361, Daily Dispatching Record of Motor Vehicles, two handwritten entries appearing on an official record, to wit: A War Department Ordnance Office Form No. 7361, Daily Dispatching Record of Motor Vehicles, which said official record contained entries relating to the use of motor vehicles, property of the United States, by personnel of the Armament Laboratory, Wright Field, Dayton, Ohio, on 22 March 1945, and did then and there further instruct the said Sergeant Howard Adamson to omit from the aforesaid copy a certain handwritten entry which pertained to the dispatch on 22 March 1945 of a Government vehicle to Dayton, Ohio, for the use of the said First Lieutenant Reuben R. Katz, and did then and there further instruct the said Sergeant Howard Adamson to destroy the afore described official record.

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

Specification: In that First Lieutenant Reuben R. Katz, Air Corps, * * *, did, at Wright Field, Dayton, Ohio, on or about 23 March 1945, with intent to deceive Captain James J. A. Daly, officially state to the said Captain James J. A. Daly, under oath, in substance that on 22 March 1945 Private Virginia M. Johnson drove a Government owned motor vehicle in which he, the said First Lieutenant Reuben R. Katz, was a passenger, in an easterly direction on Third Street and the extension thereof in Dayton, Ohio, direct from the State of Ohio Liquor Store No. 68 at the corner of Third

Street and State Route No. 4, Dayton, Ohio, to the entrance gate on Wright Field, at the junction of said Third Street extension and Skyline Drive without deviating from the route afore described until the said Private Virginia M. Johnson drove said motor vehicle through the aforesaid entrance gate onto Wright Field and that on 22 March 1945 he, the said First Lieutenant Reuben R. Katz, returned immediately to Wright Field with the said Private Virginia M. Johnson from the afore described State of Ohio Liquor Store without stopping, which statement was known by the said First Lieutenant Reuben R. Katz to be untrue in that the Government owned motor vehicle in which he and Private Virginia M. Johnson were riding turned off on a side lane or a street between the afore described State of Ohio Liquor Store and Wright Field for a short distance where the afore said motor vehicle was stopped.

He pleaded not guilty to both Charges and their Specifications and was found guilty of Charge I and its Specifications; guilty of the Specification, Charge II, and guilty of Charge II as a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused was in the supply room and in charge of the duties of one Private Johnson (WAC) at the Armament Laboratory at Wright Field, Ohio, on 22 March 1945 (R. 8-9). On that day the accused suggested to Private Johnson that she take him into the nearby town of Dayton for a quart of whiskey to which the WAC assented. The accused and Private Johnson started at 2 p.m. Both were on duty at that time. Accused signed an official duty certificate for Private Johnson authorizing her absence from Wright Field "due to official business" (R. 13, 14; Pros. Ex. 2). They went from Wright Field in Army jeep No. 2084634 (R. 10). This jeep was the property of the United States and furnished and intended for official use of the Army (R. 11). Accused directed Private Johnson to drive the Army jeep to take him to Dayton, Ohio, to purchase the whiskey (R. 10, 13, 23; Pros. Ex. 1). Accused and Private Johnson left Wright Field at approximately 1400 on 22 March 1945 in the Army jeep and proceeded to a state liquor store. Accused went into the liquor store and came out with a quart of whiskey (R. 15). Accused requested Private Johnson to drive around as there was still a couple of hours of working time (R. 15).

Accused then instructed Private Johnson to take them to the place where he was quartered, which she did. She then parked and waited in the jeep while accused went into the house to get his shaving kit. He was only gone ten minutes when he returned and they proceeded in the jeep to a black top road away from town (R. 15-16). They rode on several side roads - gravel roads (R. 16), and finally parked. Accused gave Private Johnson 8 or 10 drinks from the bottle of whiskey. He had the same number of drinks. They drank and smoked cigarettes for about an hour (R. 16, 17). Private Johnson became so drunk she became ill, lost consciousness and did not remember anything until she regained consciousness in the Patterson Field Hospital at approximately 2300 (R. 17, 26, 27). She remained in the hospital for five days (R. 17).

At no time did the accused molest Private Johnson, or make any improper advances to her whatever (R. 18)

Accused directed an enlisted man, Sergeant Adamson, to recopy all of the motor dispatch sheet of 22 March 1945, omitting the Dayton trip and to get rid of the old dispatch sheet (R. 27, 28, 29, 30, 35, 36 and Pros. Ex. 1). Sergeant Adamson recopied the dispatch sheet as directed by the accused but did not destroy the old one (R. 27, 28, 31, 32).

Colonel Frank W. Wright, Commanding Officer of Wright Field, ordered Captain James J. A. Daly, JAGD, to make an investigation of the actions of the accused (R. 40). Captain Daly duly informed the accused of his rights, and that he was making an official investigation (R. 40, 41, 44, 51, 52). This investigation was made on 23 March 1945 (R. 40). Accused at that time stated under oath to Captain Daly, in substance, that on 22 March 1945 Private Virginia M. Johnson drove a Government-owned vehicle in which the accused was a passenger to Dayton Ohio; that the vehicle was driven directly from the state liquor store in Dayton, Ohio, to Wright Field, Ohio, without deviating from the route from Dayton, Ohio, to Wright Field; that the accused returned directly to Wright Field with the said Private Johnson from the state liquor store without stopping and that they did not turn off on any side lanes or streets between Dayton, Ohio, and Wright Field (R. 42-49).

While Captain Healy, the investigating officer, was under cross-examination, individual counsel for accused insisted on reading the accused's testimony taken before him (Captain Healy). Actually the question asked was: (R. 60)

"Now Captain, I am going to ask you to refer to the record and then have you tell me after I read at length whether this is an exact statement of the proceedings that took place before you."

Whereupon defense read from what purported to be the testimony given at the investigation, for more than 80 pages. No answer to the question appears. At the close of the reading of the statement the law member "admitted in evidence" the statement of the accused taken before the investigating officer (R. 123). The statement was not attached to the record of trial as an exhibit. In this statement, made under oath to the investigating officer, the accused admitted that he directed Private Johnson to take the Government vehicle as alleged and to drive him into Dayton, Ohio, which occurred on 22 March 1945 (R. 114). The accused admitted that he did have a number of drinks with Private Johnson on 22 March 1945 (R. 115). He admitted that he did execute the official off duty pass for Private Johnson (R. 116). He admitted that he directed Sergeant Adamson to destroy the official motor vehicle record and to prepare a new record sheet omitting the entry of this trip to Dayton, Ohio (R. 119). He admitted that he made untruthful statements to Captain James J. A. Daly on 23 March 1945 (R. 121, et seq.).

The defense offered no witnesses or other evidence and the accused elected to remain silent.

4. The defense moved to strike out all the testimony of the chief witness for the prosecution, Private Johnson, on the ground that, since she and the accused went to town to purchase the quart of liquor together, and since they jointly took the jeep and drove off the field, they were engaged in a common enterprise; that the acts and statements of such persons made after the commission and accomplishment of that common design are not admissible against the others. What defense counsel overlooked was the fact that the testimony of Private Johnson was not as to what was said and done after the commission of the offenses herein charged were completed, but during and in furtherance of those offenses. Once the common design is shown, the acts and declarations of one co-actor in pursuance of the common act or design are admissible against any other co-actor on trial for the crime (Wharton's Crim. Ev., P. 1184 - Zarate v. U.S., 41F. (2d) 598; Frischia v. U.S., 289 U.S. 762; CM CBI 114 Ranzinger; CM CBI 157, Williams). The act of one co-conspirator during the furtherance of the common design is the act of all (Comm. v. Giradot, 107 Pa. Super. Ct. 274) and proof thereof is competent by one against the other.

Further, it has been held that the acts and declaration of a co-conspirator are admissible against an accomplice on trial if they form or are part of the res gestae of the offense or offenses with which the accused is charged (Shea v. U.S., 251F. 440). The merest perusal of the testimony of Private Johnson shows that that part of her testimony which does not fall within the res gestae rule, certainly recites acts and declarations in furtherance of the common design and hence admissible under the rule enunciated in the Giradot case (supra). This is true with regard to the offenses charged in Specifications 1, 2 and 3 under Charge I. The court properly overruled the motion to strike this witness' testimony.

The gravamen of the offense under the fourth Specification of Charge I (instructing Sergeant Adamson to change the Daily Dispatching record of motor vehicles) is the instruction by an officer to an enlisted man to falsify an official record. The fact that the record referred to was not falsified, or if falsified was never used officially, is a minor detail which is not material to the Charge.

Charge II alleges the accused made certain false official statements to Captain Daly. Every statement which it is alleged was falsely made to Captain Daly on 23 March 1945, was subsequently admitted to be false by the accused to Captain Healy, the investigating officer. Proof of the corpus delicti is found in the testimony of Private Johnson as well as that of Captain Daly. There remains the question as to whether the statements made were official. Defense contended that since the preliminary investigation made by Captain Daly was not the official investigation under Article of War 70, the statements made by accused to that officer were not official statements. The objection is without merit. The untrue statements made by accused were made during the course of an interrogation conducted as the result of an order by the commanding officer of the post. Both the

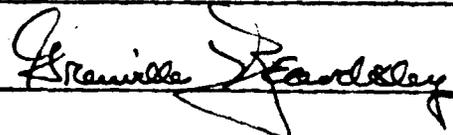
matter under investigation and the informal investigation itself was official business, since the informal investigation was being made for the purpose of determining whether charges should be preferred against accused and was ordered by a superior officer in the normal course of business.

The record of trial shows that the accused was mentally upset and that his mind was not clear when he made these untrue statements (R. 99). He was interrogated immediately upon the heels of the offenses charged, and within less than 24 hours. He apparently did not know that the untrue statements he was making could be used as the basis of charges against him (R. 99). He fully and freely admitted to the officer making the investigation under Article of "ar 70 not only the truth of the matters involved, but the fact also that he had been untruthful about them previously. These are facts in mitigation or extenuation. They do not affect the question of innocence or guilt.

The accused, in his statement before the investigating officer, Captain Healey, made sufficient admissions which, together with the other testimony in the case amply supports the Charges and Specifications.

5. War Department records show that the accused is 27 years of age and is married. He was one child. He was inducted into the Army on 3 October 1941 and rose to the grade of staff sergeant. He went to the Army Air Forces Officer Candidate School and upon graduation was commissioned a second lieutenant on 13 November 1943, entering on active duty on that date. He was promoted to first lieutenant on 6 October 1944. His commanding officer characterized his service as an "excellent record of past endeavor and a high efficiency of service". He has one brother who is a lieutenant with the AUS, serving in Belgium and a second brother who is also in the service.

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


 _____ Judge Advocate
 On Leave
 _____ Judge Advocate

 _____ Judge Advocate

SPJGV-CM 281413

1st Ind

Hq ASF, JAGO, Washington, 25, D.C. JUN 29 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Reuben R. Katz (O-583313), Air Corps.

2. Upon trial by general court-martial this officer was found guilty under five Specifications of misuse of a Government vehicle, drinking with an enlisted member of the Women's Army Corps, the wrongful issuing of a pass for a three-hour leave of absence, the attempt to procure an enlisted man to change a Daily Dispatch Record of Motor Vehicles; and with false official statements, all in violation of the 96th Article of War. 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.

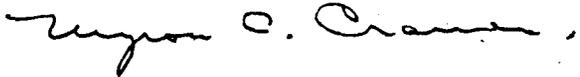
3. The accused was the superior officer of a WAC private. He wrongfully issued a pass for her so that she could accompany him to a liquor store to buy a quart of whiskey. They proceeded in a Government jeep which they had no authority to use. This was during the day and during normal working hours. Instead of returning to the field immediately, the car was driven to a side road where the accused and his companion each had about 10 drinks of whiskey. The WAC became unconscious and the officer drove her back to the field and tried unsuccessfully to revive her. She was then taken to a hospital and spent five days there. He also attempted to have the record of the trip obliterated by an enlisted man from the Safety Dispatch Record of Motor Vehicles. When questioned within 24 hours after this occurrence by an officer appointed by the commanding officer of Wright Field to investigate the case to determine whether or not court-martial charges should be preferred, the accused did not tell the truth concerning the occurrence. He later gave as his excuse for lying that he was extremely upset at the time. Nine days after the incident occurred after charges had been preferred and an investigating officer had been appointed under Article of War 70, accused told the entire truth to the investigating officer. A more complete summary of the evidence is found in the accompanying opinion of the Board of Review.

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

(112)

I recommend that the sentence be confirmed and ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1 Rec of Trial
2 Form of Action

(Sentence confirmed. GCMO 386, 3 Aug 1945).

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

SPJGH-CM 281449

30 JUN 1945

UNITED STATES)

FIRST AIR FORCE

v.)

Trial by G.C.M., convened
at Columbia Army Air Base,
Columbia, South Carolina,
18 May 1945. Dishonorable
discharge and total for-
feitures.

Second Lieutenant IRVING
LEVINE (O-2064382), Air
Corps.)

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL 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 96th Article of War

Specification: In that Second Lieutenant Irving Levine, Air Corps, Squadron F, 129th Army Air Forces Base Unit, did, at Columbia Army Air Base, Columbia, South Carolina, on or about 24 March 1945, wrongfully and unlawfully attempt to feloniously take, steal and carry away, gasoline of a value of less than \$20.00, property of the United States.

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

Specification: In that Second Lieutenant Irving Levine, Air Corps, Squadron F, 129th Army Air Forces Base Unit, did, at Columbia Army Air Base, Columbia, South Carolina, on or about 2 April 1945, with intent to impede the due administration of military justice, wrongfully and corruptly attempt to influence Sergeant Woodrow B. Swink, 129th Army Air Forces Base Unit, whom he then believed might be called as a witness before an officer detailed to investigate certain court-martial charges pending against the said Second Lieutenant Irving Levine, by offering to do favors for the said Sergeant Woodrow B. Swink if the said Sergeant Swink would make a false official statement to the said Investigating Officer to the effect that he

(144)

had overheard the said Second Lieutenant Irving Levine and another officer make a bet that they could not take gasoline from a Government truck without being caught, which statement would have been material to the issue involved in said pending court-martial charges and was known by the said Second Lieutenant Irving Levine to be false.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. He was sentenced to dishonorable discharge and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution's evidence in support of the Charge and Specification alleging a violation of Article of War 96 showed that on 24 March 1945 at about 1830 hours, a patrolman at Columbia Army Air Base, Columbia, South Carolina, noticed a blue 1941 Plymouth coupe approach a Government tanker used in refueling planes, which was parked about 40 feet east of the Base Operations Building. Upon closer investigation, he found the automobile parked 8 or 10 feet from the rear of the tanker, the hose from the tanker unreeled, and the nozzle placed in the tank of the automobile (R. 6-11). The tanker had a capacity of 4000 gallons, and although it was not full, it contained enough 73 octane gasoline to service planes (R. 11, 12, 14, 15). In order to obtain gasoline from the tanker it was necessary to start the pumps, and with the pumps in operation all the gasoline in the tanker could be pumped out through either of two hoses, because all valves in the partition separating the tanker into two cells were kept open (R. 12, 13, 14). The accused, who was standing behind the automobile (R. 9, 10), asked a soldier if the soldier "could start the engine that would pump the gas" (R. 10), and accused admitted to the patrolman that "he was getting a little gas" (R. 7). When asked by an officer "if he was trying to get gas out of the gas truck", the accused replied "Sure, I don't have any." When told by an officer that "he was crazy; that he was not supposed to have any of that gas", the accused replied "OK, I won't get any." The rules of the Base prohibited the taking of gasoline from a tanker for private use (R. 10-11).

Prosecution's evidence in support of the Additional Charge and Specification, alleging a violation of Article of War 95, showed that on 2 April 1945 at Columbia Army Air Base, while charges were pending against him for an attempted larceny of gasoline, the accused introduced himself to Sergeant Swink, saying that he was about to be court-martialed and that Sergeant Swink would be a witness. Sergeant Swink, who did not know anything about the court-martial was told by the accused that overseas it was possible to get any amount of gasoline from a plane or truck at any time, that "he was the party that was picked to go out and try" after making a bet with a friend that the same thing could not be done in this country, and that the bet was

made in the course of a loud conversation which Sergeant Swink was in a position to overhear. Sergeant Swink testified that the accused asked him to try and recall this conversation and "to go down to the Investigating Officer and tell him that I had seen him in my presence that day and had heard him make such a bet", but that he refused to make such a statement because he had neither seen the accused at the time in question nor heard the bet made and "there was not anything for me to recall." Having told the accused that he had no recollection of the conversation, Sergeant Swink testified that the accused again asked him to try to remember, said that he did not want to miss an overseas shipment because of a court-martial, and "that if I would go down and tell the Investigating Officer this story and help him get out of the court-martial that it would mean an awful lot to him, and, he, therefore, would do anything he could for me. He said he would go so far as to break his back to help me accomplish anything that I wished." The witness further testified that the accused said to him "just try to remember and if you will just go down there and tell them that you heard it, it will mean an awful lot to me." Sergeant Swink again refused to make such a statement, not knowing anything about the case (R. 22-25).

4. After his rights as a witness had been explained to him by the court, the accused elected to remain silent (R. 27-28). No evidence was offered by the defense.

5. The Charge and Specification allege an attempted larceny of gasoline belonging to the United States in violation of Article of War 96. The elements of the offense are: (1) an intent to commit larceny, (2) an overt act which would result in larceny "if not interrupted by circumstances independent of the doer's will", and (3) an "apparent possibility" of committing larceny "in the manner indicated" (MCM, 1928, p. 190).

The evidence proves that on 24 March 1945 at Columbia Army Air Base, Columbia, South Carolina, about 1830 hours, a blue Plymouth coupe approached a Government tanker containing 73 octane gasoline used in refueling planes. The automobile was parked at the rear of the tanker, the hose used in feeding gasoline from the tanker was unreeled and the nozzle was inserted in the tank of the automobile. The accused, standing behind the automobile, asked a soldier if he could start the pump on the tanker, and admitted that he was trying to get some gasoline. There is no evidence that the accused actually succeeded, and it appears that he ceased trying when told by another officer that it was contrary to the rules of the Base to draw gasoline from a tanker for private use. The fact that the accused appears to have abandoned the attempt at that point does not constitute a defense, because the attempt was not voluntarily and freely abandoned but only as a result of detection when the larceny was about to be consummated (Wharton's Criminal Law, 12th ed., sec. 226). No evidence was introduced to

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prove the value of the gasoline which the accused attempted to take, but such proof was unnecessary, since the members of the court could infer from their own experience that it had some substantial value (CM 254498, Miller, 35 B.R. 269). The evidence is sufficient to sustain the findings of guilty of the original Charge and Specification.

On cross-examination by the defense, Mr. Jason Hiller was asked, with reference to the gasoline level in the tanker when he inspected it 24 March 1945: "And you base your estimate of that particular day on the fact that each time you do check it, it is usually about 18 inches?" The prosecution's objection to this question was sustained (R. 15-16). The question should have been allowed since it was proper cross-examination bearing upon the credibility of the witness (MCM, 1928, par. 121b). However, the rights of the accused were not injuriously affected because the question was substantially answered in other parts of the cross-examination (R. 14-16). Furthermore, even if the proof had shown that the tanker in fact was empty, the evidence in the record is sufficient to sustain a finding of guilty of an attempted larceny of gasoline, since "the apparent possibility of committing the offense in the manner indicated" (MCM, 1928, p. 190) was adequately proved by showing that the tanker was used in refueling planes and that it normally contained gasoline belonging to the Government (R. 11, 14, 15; Wharton's Criminal Law, 12th ed., sec. 225; 36 C.J. 808).

The Additional Charge and Specification allege an attempt to induce a noncommissioned officer to make a false official statement for the benefit of the accused in violation of Article of War 95. The evidence proves that on 2 April 1945, while court-martial charges were pending against him for an attempted larceny of gasoline, the accused sought out Sergeant Swink, who knew nothing about the charges, and, referring to a conversation which Sergeant Swink was supposed to have overheard, asked him to make a statement to the investigating officer, in substance that the accused's attempt to take gasoline from a Government tanker was made pursuant to a bet with another officer that it could not be done as easily in this country as overseas. When Sergeant Swink told the accused that he did not remember the conversation and had no knowledge that the bet was made, the accused nevertheless repeated his request, urging him to state that he had overheard the conversation and promising him favors in return if he would help the accused in the manner requested to escape court-martial. Whether a bet was made or not, no evidence to prove it was offered by the defense, Sergeant Swink had no knowledge of it; and in attempting to persuade him to testify to the contrary it is clear from the record that the accused did not intend to refresh his recollection but to induce him to make a false official statement. Such conduct is unbecoming an officer and gentleman. A motion by the defense for a finding of not guilty on the theory that the evidence proved no more than an effort

by the accused to enable Sergeant Swink to testify from personal knowledge by refreshing his recollection was properly denied (R. 25-27). The evidence is sufficient to sustain the findings of guilty of the Additional Charge and Specification.

The accused was sentenced "to be dishonorably discharged the service and to forfeit all pay and allowances due or to become due" (R. 30). The sentence is inappropriate in so far as it provides for dishonorable discharge in the case of an officer rather than dismissal, but since dishonor is implicit in a sentence to dismissal, the rights of the accused have not been prejudiced by the use of inappropriate language. The sentence is legal and will be construed as though the proper phraseology were used (CM 249921, Maurer, 32 B. R. 235; CM 251162, Diehl, 33 B.R. 156).

6. War Department records show that the accused is 24 years of age. He is single and has no dependents. He completed high school, college, and one year of postgraduate work at Lowell Textile Institute. He has been employed as editor of college publications, and a writer of advertising copy. He enlisted 6 June 1942, and was discharged 30 June 1944 to accept a commission as second lieutenant, AUS, effective 1 July 1944, with aero-nautical rating as aircraft observer (Bombardier).

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 96.

Thomas M. Daffy, Judge Advocate.

On Leave, Judge Advocate.

Robert C. Trevethan, Judge Advocate.

SPJGH-CM 281449

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

JUL 16 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Irving Levine (O-2064382), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of an attempt to commit larceny, in violation of Article of War 96, and of an attempt to induce a noncommissioned officer to make a false official statement, in violation of Article of War 95. He was sentenced to dishonorable discharge, which the Board of Review in its opinion construed as a sentence to dismissal, and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

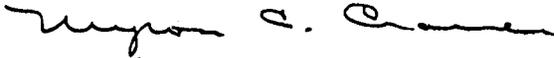
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I concur in that opinion.

On 24 March 1945, a patrolman at Columbia Army Air Base, Columbia, South Carolina, noticed a privately owned automobile approach a Government tanker containing 73 octane gasoline used in refueling planes. Upon closer investigation, the patrolman found the nozzle of the hose from the tanker inserted in the tank of this private car, which was parked in the rear of the tanker. The accused who was standing behind the private car, asked a soldier if he could start the pumps on the tanker and admitted to the patrolman and an officer nearby that he was trying to get some gasoline. On 2 April 1945, when charges were pending against him for the attempted larceny of gasoline, the accused asked a Sergeant Swink whom he expected to be a witness in his pending court-martial trial to make a statement to the investigating officer, in substance that the accused's attempt to take gasoline from a Government tanker was made pursuant to a bet with another officer that it could not be done as easily in this country as overseas. This bet was supposed to have been made during a conversation that Sergeant Swink was in a position to overhear. When Sergeant Swink told the accused that he did not remember the conversation and had no knowledge that the bet was made, the accused nevertheless repeated his request, urging him to state that he had overheard the conversation, and promising him favors in return if he would help the accused in the manner requested to escape court-martial.

Since his attempted larceny was committed entirely in the open with no apparent effort to escape detection, it is possible the accused did not realize the seriousness of the original offense. However, any doubt as to the appropriateness of the sentence is resolved by the evidence introduced in support of the Additional Charge and Specification, which proves an attempt thereafter to induce a noncommissioned officer to make a false official statement pertaining to court-martial charges against the accused for the attempted larceny.

I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified, be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should such recommendation meet with your approval.



2 Incls

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted. GCMO 370, 25 July 1945).



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

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SPJGK - CM 281486

14 JUN 1945

UNITED STATES)

ANTILLES DEPARTMENT

v.)

Trial by G.C.M., convened at
APO 851, c/o Postmaster, Miami,
Florida, 11 May 1945. Dismissal.

Captain JOSEPH B. LALLY)
(O-1576267), Quartermaster)
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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specifications: In that Captain Joseph B. Lally, QMC, attached unassigned to Casual Center, did, at APO 846, c/o PM, Miami, Florida, from on or about 1 April 1943 to on or about 1 September 1944, unlawfully and wrongfully defraud the Government of the United States of the sum of \$2800.00 by receiving, accepting and retaining monthly during said period of time the full amount of his pay, well knowing that he was receiving and using for his own benefit a monthly allotment which he had authorized to be deducted from his pay each month in the sum of \$175.00, which sum was, during said period and with the knowledge of said Captain Joseph B. Lally, being deposited each month by the Government of the United States to his account in the Montclair Trust Company, Montclair, New Jersey.

He pleaded not guilty to and was found guilty of the Charge and its Specification except the words and figure "April," "September" and "2800.00," substituting therefor the words and figure "June," "June" and "2275.00," respectively, of the excepted words and figure not guilty, and of the substituted words and figure, guilty. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The evidence for the prosecution consists almost entirely of photostatic copies of records admitted in evidence pursuant to a written stipulation entered into between the prosecution, the defense and the accused. These records establish that on 30 October 1942, the accused, a second lieutenant, Quartermaster Corps, arrived in the Antilles Department, APO 851, c/o Postmaster, New York, New York, and was assigned to duty with the Quartermaster Section. On 4 December 1942, the accused executed an authorization for a Class E allotment of his pay in the amount of \$175.00 per month for an indefinite period commencing 1 January 1943 to the Montclair Trust Company, Montclair, New Jersey (Pros. Ex. 3). This allotment was discontinued by the accused by a notification of discontinuance of allotment executed by the accused on 9 August 1944, effective 31 August 1944 (Pros. Ex. 4). The allotment of \$175.00 was paid by the Office of Dependency Benefits by forwarding a check in the sum of \$175.00 each month commencing February 1943 up to and including September 1944. These payments were made to the Montclair Trust Company, Montclair, New Jersey, and totaled \$3500.00 (Pros. Ex. 5). The accused's checking account in the Montclair Trust Company was established by the accused on 7 July 1942 and the accused was the only person authorized to draw on the checking account. Twenty checks for the aforesaid allotment were thus received by the Montclair Trust Company and credited to the account of the accused starting with 2 February 1943 through 5 September 1944. During this period of time the Montclair Trust Company mailed monthly statements to the accused. Through the month of October 1942 bank statements were mailed to him at Fort Lee, Virginia, and starting with the month of November 1942 they were forwarded to the accused at QM Depot, Supply Office, APO 846, c/o PM, New York, New York, up to and including December 1943. Bank statements from January 1944 through February 1945 were forwarded to APO 846, c/o PM, Miami, Florida. (Deposition of Arthur C. Haight, Pros. Ex. 6, 3rd cross-interrogatory.) The bank statements, admitted in evidence, show that the accused made use of all the funds in his account at various times, including the monthly item of \$175.00 forwarded to his account by virtue of his Class E allotment. A list of the numerous checks issued by the accused during this period, exhausting the funds on deposit with the Montclair Trust Company, appears as part of Prosecution's Exhibit 7.

Major Gerald F. True testified by deposition that he was the Finance Officer at APO 846 from 25 September 1941 to 11 December 1943. Army Regulations (AR 35-1360) make it the responsibility of the officer who makes an allotment of his pay to show the allotment as a deduction from his pay voucher. The Finance Office at APO 846 actually typed the pay vouchers for the officers, including those of the accused, as a courtesy and accommodation on the basis of information submitted by the officers. The prepared voucher was then submitted to each officer and if he was satisfied with its correctness he signed the voucher and certified as to its

correctness.

The accused told the witness that he made an allotment of his pay of considerable size and for several months complained that it was not being paid and frequently inquired when he might expect the allotment to go into effect. It was customary not to enter an allotment in the pay vouchers until it was determined that the request for the allotment was approved, and for that reason the deduction might not have been made in the accused's pay vouchers. After several months of "fussing around" about the allotment accused told the witness to "drop the whole matter." Neither the witness nor those in his office knew that the allotment was in effect. They were concerned with getting the money to the allottee as many officers were having difficulties of that nature (Pros. Ex. 8).

The accused's base and longevity pay from 1 January 1943 until 19 May 1943 (when he was promoted to Captain) was \$175.00. Thereafter it was \$210.00.

During eighteen months of the period that these allotment checks were being forwarded to the accused's banking account at the Montclair Trust Company, Montclair, New Jersey, that is, starting with the check for the month of January 1943 and continuing up to and including the one for June 1944, the accused signed each month a pay voucher for his pay. On none of these eighteen vouchers did he show as a proper deduction the \$175.00 allotment which he was receiving at the Montclair Trust Company, and throughout that period of time the accused received his monthly pay without any proper deduction being made for such allotment (Pros. Ex. 9 and 10). It was the officer's duty and obligation to insure that all of his allotments were shown as proper deductions on his monthly pay vouchers. (Section IV, Circular 315, WD 1943; Memorandum #51, Hq Antilles Department, o/o PM, New York City, dated 28 December 1943 (Pros. Ex. 11); Daily Orders #303, Hq. General Depot, APO 846, o/o PM, New York City, New York, dated 21 December 1943 (Pros. Ex. 12)).

When the overpayment was discovered and the matter called to the attention of the accused, he replied by a third indorsement to the Finance Office, APO 851, U. S. Army, dated 9 August 1944, stating that he had been unaware of these monthly deposits due to the fact that prior to his departure from the states he had instructed the bank not to forward any bank statements to him; that he had placed the account at the disposal of his dependent mother; and that his mother had expended a considerable portion of this allotment check per month. The accused further offered to reimburse the overpayment at the rate of \$100.00 per month until such time as the amount due was liquidated (Pros. Ex. 15). On 20 November 1944 and on 9 February 1945, the accused made two sworn statements, in both of which he repeated his previous assertions that he had not had any knowledge concerning the deposits which were being made to his account; his non-receipt of bank statements; his previous assertion that his account had been placed at the disposal of his mother; and that "at no time did I ever knowingly

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or unknowingly use any monies of the United States Government other than my salary for which I had signed a pay voucher" (Pros. Exs. 13 and 14).

The \$3,150.00 representing overpayments of pay made to the accused were refunded by the accused as follows: \$150.00 on 28 November 1944; \$1,400.00 on 23 January 1945, and \$1,600.00 on 15 February 1945. All overpayments were refunded after general court-martial charges had already been preferred, but before they had been sent to trial (R. 11).

b. For the defense.

The defense offered in evidence a written statement of Colonel J. V. McDowell, Quartermaster Corps, certifying to the good character of the accused (Def. Ex. A). A stipulation as to the testimony of Major Hugo Storer and Major August Roth was also entered into the record, to the effect that accused has an excellent reputation for honesty and integrity (R. 14).

The accused testified in his own behalf. His testimony may be briefly summarized as follows: Accused stated that he did not have any intent to defraud the Government of any amount; that he enlisted at Kelly Field, Texas, in September 1938 (R. 16); that in 1940 he volunteered to go to Puerto Rico and arrived there on 30 October 1940; that he graduated from Officers' Candidate School in September 1942 and his return to Puerto Rico was requested by his former commanding officer and he returned to Puerto Rico on 20 October 1942. In April 1943, upon a recommendation, he took over the Civilian Personnel Branch, APO 846, until August 1944, at which time he was placed in charge of military personnel. In October 1944, he was declared surplus and assigned to the Casual Center. The accused has seriously considered making the Army his career (R. 16).

In January 1942, accused received notice from his Insurance Companies advising him that his policies had lapsed, due to non-payment of premiums. He had previously arranged for the payment of these premiums by executing appropriate allotments. The Insurance Company further notified him that the lapsed policy would be renewed but that a war clause would be included. In April 1942, accused made an allotment in the sum of \$45 payable to the Montclair Trust Company and in July 1942 he discontinued this allotment. In November 1942 he received a letter from the Montclair Trust Company stating that they had received a letter from the Office of Dependency Benefits claiming an overpayment of \$45.00 a month. The bank also requested an authorization from the accused for the repayment of said sum of \$45.00 to the Office of Dependency Benefits; whereupon, the accused granted such authorization (R. 17). The copies of these letters of authorization were offered in evidence as Defense Exhibits B and C. On 4 December 1942 the accused effected two corrected allotments to straighten out the insurance premiums which were being excessively charged and at the same time also executed an allotment of \$175.00 per month (R. 18). In March or April 1943 the accused received a

letter from the General Life Insurance Company informing him that unless he paid some premiums his policies would lapse. He thereupon sent a check to the insurance company for the premiums. In August 1943 he received a letter from the Insurance Company advising him of the fact that they had received a check for six months premiums from the Office of Dependency Benefits and that he was entitled to a refund of the money he had sent them. A copy of this letter was received in evidence as Defense Exhibit G (R. 19). When the accused executed the \$175.00 allotment he visited the Personnel Officer and signed some forms. It was his impression that a copy of these forms was sent to the Finance Officer who made the necessary notations on his pay cards (R. 20). In January 1943, when the amount of the \$175.00 allotment was not shown as a deduction on his pay voucher, the accused spoke to Major True and told him about the allotment and that it had not been shown on the pay voucher. In January, February and March accused again spoke to Major True about the fact that he had made an allotment and that it was not shown on his pay voucher. Major True advised the accused to send a money order or a cashier's check to the Montclair Trust Company. Major True advised the accused that the allotment was not deducted from the voucher because "it probably had not been completed properly and in all probability it would not be honored. But the conversation, as I say, was general, although I notice in his deposition that he bore me out." During the time of these discussions, the accused did not know whether the \$175.00 was being received monthly by the Montclair Trust Company, and he first learned of the allotment payments during the month of May 1943. Previously thereto, however, he had requested Major True to drop the whole matter. In May or June 1943, the accused received five or six bank statements from the Montclair Trust Company, at which time he discovered that the \$175.00 allotment and the \$45.00 allotment were still being forwarded to his bank account (R. 21). Accused did not take any action when he learned about the payments of these allotments because he had just received the lapsed notice from his insurance companies and was thoroughly disgusted "insofar as apparently the discontinuance of the allotment by the Office of Dependency Benefits made no difference when the matter was brought to their attention on one item" and accused "took it for granted that the whole thing would be cleared up at the same time" (R. 22). Accused always had sufficient funds with which to repay the full amount of the overpayments in the form of bank deposits and bonds and also had a third interest in a piece of property in Long Island valued at about \$40,000.00. Accused also had between \$2,000.00 and \$3,000.00 in cash in his wife's name at the Banco Popular, Puerto Rico, and about \$2,200.00 in bonds in the names of his wife and himself jointly (R. 23).

On cross-examination the accused testified that he was 23 years of age and prior to his entry in the service he was employed by the Internal Revenue Department "handling income tax audits." In May 1943 he received his bank statements and learned then that the monthly allotment of \$175 was being deposited in his account with the Montclair Trust Company (R.27). He "surmized" that the deposits were from the allotment but because he had not been notified of that fact he was telling the truth in his statements

that "at no time did I receive any notification that the allotment had been effective" (R. 28). He also admitted that he alone drew checks on this account and during this time drew \$1400 for the support of his mother. While he had stated in his statement of 20 November 1944 that his mother "had access" to his account his mother never used the account (R. 29).

Major Victor J. Montilla, Lieutenant Colonel Herbert L. Schofield and Captain Joseph V. Doyles testified that the accused enjoyed an excellent standing and reputation in the community for honesty and integrity (R. 34,37,38).

4. The evidence for the prosecution clearly establishes that the accused, an officer of the Army of the United States, authorized an allotment of his pay to the Montclair Trust Company, Montclair, New Jersey, in the sum of \$175.00 per month. The allotment in that sum was paid regularly each month commencing 1 February 1943 for twenty months ending with the payment made 1 September 1944. The money thus received was credited by the bank to the checking account of the accused and was subject to withdrawal only by his check or other authorization. The accused used the account continuously and by checks exhausted the fund from time to time. During eighteen of the twenty months of this period of time the accused regularly signed and submitted his pay voucher each month which did not contain any credit or deduction of the \$175.00 allotment. He debited the allotment in his pay vouchers for the last two months of this period. In this manner he collected from the Government \$3,150.00 to which he was not entitled. He contended that he was not aware of the fact that the allotment was being paid to the bank because he had never been notified of that fact. He admitted on cross-examination that he learned in May 1943 that his account had been enriched each month by a deposit of \$175.00 monthly. He learned this when he received his delayed bank statements. He also knew that the deposits continued monthly thereafter until at his instance they were discontinued after the last payment in September 1944. This occurred after his conduct had been discovered by the military authorities. Thus, for over a year the accused knowingly received his full pay from the Government by means of his pay vouchers and at the same time received in his checking account and used \$175.00 each month - an amount equal to his full base pay. To contend that he was not aware of this enrichment and that when he did become aware of it he did not know its source is unbelievable. The conclusion is inescapable that from May 1943 until August 1944 he knew the allotment of \$175.00 which he had initiated was being paid into his checking account and that therefore beyond any doubt thirteen of the pay vouchers that he presented monthly during this period as a claim for his pay were fraudulent. The record therefore clearly shows that the accused did, as found by the court, defraud the Government of the sum of \$2,275.00 by receiving, accepting and retaining monthly during that period his full pay,

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SPJGK-CM 281486

1st Ind

Hq ASF, JAGO, Washington 25, D.C. JUN 27 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Joseph B. Lally (O-1576267), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty, in violation of Article of War 95, of defrauding the Government of \$2275, which was paid to him by the Government as a result of his failure to enter on his pay vouchers for 13 consecutive months that he had made and was receiving the benefits of an allotment of \$175.00 per month, which was being deposited at his direction in a checking account with a bank. 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.

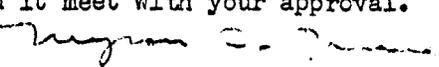
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence.

4. The accused was stationed in Puerto Rico and made an allotment of \$175 per month of his pay to a bank in New Jersey to be credited to his checking account. For five months he was unable to ascertain whether the allotment was being paid and therefore did not enter it as a debit on his monthly pay vouchers. At the end of that period he definitely learned that the allotment had been and was being deposited to his credit in the account. For thirteen months thereafter he presented his monthly pay voucher and collected his full pay without mentioning or debiting the allotment, thereby defrauding the Government of \$2275.00. During the entire period that the allotment was paid he alone drew on the checking account and continually used the allotted funds deposited in his account in the manner described. When his fraud was discovered he made full restitution. For some reason he was charged only with a violation of the 95th Article of War, upon the conviction of which dismissal is mandatory but no further punishment is permissible. His dishonest and fraudulent conduct warrants dismissal. I recommend that the sentence be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

2 Incls

1 Rec of Trial
2 Form of Action


MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. GCMO 353, 21 July 1945).

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Howze, Texas, on 6 March 1945, the question arises as to whether his status of absence without leave was ended by his apprehension or whether it continued until his return to his station. This important question, which does not appear to have been answered in any previous opinion by the Board of Review, has been considered from time to time in the Office of The Judge Advocate General. A summary of the views of this Office was recently presented in SPJGA, 1944/13317, as follows:

"Although this office once held that the status of absence without leave continued until the soldier arrived at his proper duty station, or until the consent of competent authority to the absence was given (JAG 220.712, 23 Jun 1920; Dig. Op. JAG 1912-40, p. 995), under current regulations the status of absence without leave terminates when the soldier has been returned to military control (JAG 220.46, 22 Jun 1937, Dig. Op. JAG 1912-40, p. 995; SPJGA 1942/4028, 2 Sep 42, 1 Bull. JAG 251; SPJGA 1943/19359, 31 Dec 1943, 3 Bull. JAG 9."

The Manual for Courts-Martial in discussing the continuation and termination of a status of absence without leave states:

"The condition of absence without leave with respect to an enlistment having once been shown to exist may be presumed to have continued, in the absence of evidence to the contrary, until the accused's return to military control under such enlistment". MCM, 1928, par. 130a.

In accord with the authority of the above rule paragraph 14, Army Regulations 615-300, 25 March 1944, provides,

"The effective date of return to military control is the date of surrender or delivery to or apprehension by the military authorities."

Although not determinative of the issue, it should be noted that for pay purposes the same rule has been recognized in sub-paragraph 6b, Army Regulations 35-1420, 15 December 1939, as follows:

"An enlisted man in desertion, or absent without leave, who surrenders or is apprehended before the expiration of his enlistment period, is entitled to pay and allowances from the date of his return to military control,
* * *".

No distinction can be made between the case of the soldier who is apprehended and the case of the soldier who voluntarily surrenders. It is not

the act of the soldier which changes his status of absence without leave but the act of competent military authority in exercising control over him. //

4. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification of the Charge as involves the finding that the accused absented himself without leave from his station from 16 January 1945 to 22 February 1945; and is legally sufficient to support the sentence.

Abner E. Prescott, Judge Advocate.

Robert H. Connor, Judge Advocate.

Samuel L. Morgan, Judge Advocate.

(162)

SPJGN-CM 281498

1st Ind

JUN 20 1945

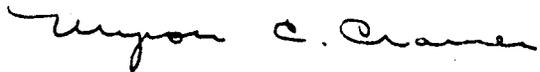
Hq ASF, JAGO, Washington, D. C.

TO: The Commanding General, Infantry Replacement Training Center,
Camp Howze, Texas.

1. In the foregoing case of Private Homer R. Arthur (39178906), Company C, 43rd Infantry Training Battalion, I concur in the opinion of the Board of Review and for the reasons therein stated recommend that only so much of the finding of guilty of the Specification be approved as involves a finding that the accused absented himself without leave from his station from 16 January 1945 to 22 February 1945. Under the provisions of Article of War 50 $\frac{1}{2}$ you now 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 281498).



1 Incl
Record of trial

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.

SPJGN-CM 281508

UNITED STATES	)	INFANTRY REPLACEMENT TRAINING CENTER
)	
v.	)	Trial by G.C.M., convened at Camp
	)	Blanding, Florida, 23 May 1945.
Second Lieutenant FRANK B.	)	Dismissal.
HILTON (O-1333467), Infantry.)	

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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: In that Second Lieutenant Frank Hilton, Company "B", 210th Infantry Training Battalion, 65th Infantry Training Regiment, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 2330, 26 April 1945, wrongfully take and carry away one purse of some value, one wallet containing five dollars and seventy cents (\$5.70) lawful money of the United States and one Girard men's wrist watch of some value, the property of Delores Erma Sheffield, 11 Anderson Street, St. Augustine, Florida.

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

Specification 3: In that Second Lieutenant Frank B. Hilton, Company "B", 210th Infantry Training Battalion, 65th Infantry Training Regiment, Camp Blanding, Florida, was, at Jacksonville Beach, Florida, on or about 2100, 15 April 1945, in a public place, to wit, Jacksonville Beach, Florida, drunk and disorderly while in uniform.

Specification 4: (Finding of not guilty)

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Specification 5: In that Second Lieutenant Frank B. Hilton, Company "B", 210th Infantry Training Battalion, 65th Infantry Training Regiment, Camp Blanding, Florida, did, at Camp Blanding, Florida, on or about 2330, 26 April 1945, while on the beach of Kingsley Lake, willfully and wrongfully expose in an indecent manner to public view his entire body.

Specification 6: In that Second Lieutenant Frank B. Hilton, Company "B", 210th Infantry Training Battalion, 65th Infantry Training Regiment, Camp Blanding, Florida, was, at Camp Blanding, Florida, on or about 2330, 26 April 1945, disorderly on the beach of Kingsley Lake, Camp Blanding, Florida.

CHARGE II: (Finding of guilty disapproved by reviewing authority).

Specification 1: (Motion for finding of not guilty sustained, R. 47).

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

The accused pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 4, Charge I, and of Specification 1, Charge II, but guilty of all other specifications and the Charges. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specification 2, Charge I, of Specification 2, Charge II, and of Charge II; approved only so much of the findings of guilty of Specification 3, Charge I, "as finds the accused guilty of being drunk in uniform at the time and place alleged"; approved the sentence; and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: On Sunday evening, 15 April 1945, a military policeman found accused sprawled out in an unconscious condition on a bench in the amusement park at Jacksonville Beach, Jacksonville, Florida. Accused was in proper uniform but his tie was out, his fly was open, and "some sort of sauce and liquor" was spilled over his clothes. Two officer companions under the influence of liquor were with him. The military policeman worked over accused, slapped his face, and finally got him on his feet. Accused aroused sufficiently to request that he be taken to the latrine. In the military policeman's opinion accused was drunk (R. 41-42). Several hundred spectators, civilian and military, were in the park at the time (R. 45).

About 11:20 p.m., on 26 May 1945, Private Joseph D. Russo, Jr., and his girl friend, Delores Sheffield, were on the beach at Kingsley Lake, Camp Blanding, Florida (R. 7-8, 26-27). After Miss Sheffield had placed her purse against the side of a bath house, they had walked down to the

water's edge (R. 18, 27, 29). In the purse was a wallet containing \$5.70, the property of Miss Sheffield, and a wrist watch which Private Russo had borrowed from a soldier friend and had delivered to her for safekeeping (R. 15, 17, 29-30; Pros. Exs. A, B). While Miss Sheffield and Private Russo were standing on the shore, they heard voices at the bath house and in the moonlight saw two nude figures, one short and the other tall. The tall individual picked up the purse and disappeared with his companion around the far side of the bath house (R. 8-10, 18-19, 27, 35).

Private Russo and Miss Sheffield returned to the bath house but the naked strangers were out of sight. After circling the bath house and walking along the hedge between the bath house and the beach, Private Russo came across the accused, completely nude, digging in the sand. Upon seeing Private Russo, the latter jumped to his feet and dashed into the water (R. 10, 16, 29-30, 36). Private Russo followed him to the shore line and called to him to come out and surrender the purse but received no reply. Finally, accused came out of the water and a brief exchange of fisticuffs ensued which ended with his being temporarily rendered unconscious. When he had sufficiently recovered, he was taken by the arm by Private Russo and led toward the bath house. Private Russo asked accused about the purse but he denied any knowledge of it and, suddenly breaking away, again fled into the water and out of sight (R. 10-11, 16, 21).

The military police, who had in the interim been summoned by Miss Sheffield, scoured the beach for the accused (R. 27-28). Accused's nude companion, also an officer, was discovered lying behind a hedge near the bath house, and a few minutes later accused was apprehended (R. 12-13, 38). Private Russo and Miss Sheffield returned to the place where they had seen accused digging and there, half buried in the sand, was the purse, but the wallet and wrist watch were missing (R. 13-14). Upon, however, going down to the shore where accused had first gone into the water, Private Russo found the wallet with the money intact nearby (R. 14-15). The wrist watch was never recovered (R. 17).

Regulations of the Infantry Replacement Training Center at Camp Blanding required the wearing of bathing suits on the beach and while bathing (R. 46; Pros. Exs. C, D).

4. Evidence for the defense: Accused, cognizant of his rights, elected to remain silent (R. 47). It was stipulated that Alma Shulman, Jacksonville, Florida, would testify that on Sunday evening, 15 April 1945, she saw accused "lying on the floor and Lieutenant Barnes and Lieutenant Plombo poured sauce on his face and walked away. In a minute they turned around and opened a bottle of whiskey and poured most of it on his face as the officers could see when they arrived. Then after that they pulled him by one arm and threw him in the booth as if he was a dog" (R. 48).

5. a. Specification 3, Charge I, as approved by the reviewing authority, alleges that, on 15 April 1945, accused was drunk in uniform at Jacksonville Beach, Florida, in violation of Article of War 95.

The evidence shows that accused was in an unconscious condition on a bench in a public amusement park where hundreds of people gathered. His uniform was in disarray and covered with liquor and some sort of sauce, and two drunken officers were with him. After a military policeman had repeatedly slapped his face and otherwise worked on him, he finally aroused sufficiently to ask to go to the latrine. Although there is no direct evidence in the record as to the cause of his condition, the surrounding circumstances leave little doubt that he had overindulged in intoxicating liquors. It is, of course, within the realm of possibility that his stuporous condition resulted from illness, drugs, or extreme fatigue but there is no evidence to support such conjecture. On the contrary, the record clearly supports the conclusion voiced by the arresting policeman that accused was drunk.

The spectacle of a uniformed officer "passed out" in a public park, under the eyes of numerous civilians as well as military personnel, with his clothes in a filthy condition, is revolting. Accused clearly was "grossly drunk" within the meaning of the words used by the Manual for Courts-Martial in describing a violation of Article of War 95. (MCM, par. 151).

b. Specification 1, Charge I, alleges that at Camp Blanding, Florida, 26 April 1945, accused stole a purse, a wallet containing \$5.70, and a wrist watch, which were the property of Delores Sheffield. Specifications 5 and 6, Charge I, allege that at the same time and place accused wrongfully exposed his entire body in an indecent manner to public view and was disorderly. All these offenses are alleged to be violations of Article of War 95.

It is shown that accused, on the night of 26 April 1945, was on the beach of Kingsley Lake, Camp Blanding, Florida, completely in the nude. While Miss Delores Sheffield and her companion, Private Joseph D. Russo, Jr., walked along the shore, they observed accused make off with Miss Sheffield's purse which she had left near the bath house. In the purse was her wallet containing \$5.70 and a wrist watch, which Private Russo had borrowed from another soldier. When Private Russo gave chase, accused ran out into the water, but eventually returned to engage in a fist fight with his pursuer. Private Russo attempted to detain accused while Miss Sheffield called the military police, but the accused broke away and disappeared momentarily in the water. A little later the military police arrived and apprehended him.

All the elements of larceny are established beyond any reasonable doubt. Although Miss Sheffield and Private Russo were some distance

away from the bath house when the purse was taken and could only identify the thief as a tall, nude, individual, immediately afterwards accused was found attempting to cache the purse in the sand and the wallet was subsequently found at the point where he fled into the water. Consequently, his identity as the thief cannot be seriously questioned. His attempted concealment of the purse, his carrying away of the wallet, and his denial of any knowledge of the matter, establish his larcenous intent in taking the purse. The ownership of all the items taken was laid in Miss Sheffield although the wrist watch belonged to a soldier. Since the watch was in her possession, the allegation was permissible. MCM, par. 149g. According to the Manual for Courts Martial, "committing or attempting to commit a crime involving moral turpitude" is a violation of Article of War 95. MCM, par. 151. Larceny is, therefore, a violation of Article of War 95. 12 B.R. 401.

Accused was found to have been "disorderly" on the night in question. "Disorderly conduct", to which the offense found is tantamount, has been defined by Black's Law Dictionary (quoted in 22 B.R. 241) as follows:

"A term of loose and indefinite meaning—but signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality."

Accused's actions clearly constituted "disorderly conduct" within this definition. His commission of larceny, his attempted flight when discovered, and his fist fight with his pursuer were a breach of the public peace and decorum. It was, moreover, "behavior***dishonoring or disgracing the individual personally as a gentleman" and, therefore, violative of Article of War 95. MCM, par. 151.

The final offense of which accused was found guilty, namely, wrongfully exposing his entire body to public view in an indecent manner, is sustained by the evidence. It is undisputed that accused appeared in a public beach in the nude contrary to the bathing rules promulgated by the military authorities. His performance violated accepted standards of modesty and was, therefore, indecent. But the gravity of the offense is lessened by the fact that his improper conduct occurred late at night, and that, insofar as the record shows, Private Russo and Miss Sheffield were the only persons in the immediate vicinity besides accused and his officer companion. The Board is of the opinion that accused has not been proved guilty of conduct "which, taking all the circumstances into consideration, satisfactorily shows ***moral unfitness" to be considered an officer and a gentleman within the meaning of Article of War 95. MCM, par. 151. It was, however, conduct of a nature to bring discredit upon the military service and violated Article of War 96.

6. The accused is about 22 years and 9 months of age, having been born 9 October 1922. He is a native of Georgia, a high school graduate, and unmarried. His statement of military service shows R.O.T.C. and C.M.T.C. training between 1939 and 1941. He had enlisted service in the Army from January 1943 to 28 March 1945 when he was commissioned a temporary second lieutenant in the Army of the United States following completion of the Officer Candidates Course at the Infantry School, Fort Benning, Georgia. He entered upon active duty on the date of his commission.

7. The court was legally constituted. The Board of Review is of the opinion that this record of trial is legally sufficient to support only so much of the finding of guilty of Specification 6, Charge I, as involves a finding of guilty of the Specification in violation of Article of War 96; legally sufficient to support the findings of guilty of all other Specifications and Charge I; and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate

Robert J. Connor, Judge Advocate

Samuel Morgan, Judge Advocate

SPJGN-CM 281508 1st Ind
 Hq ASF, JAGO, Washington 25, D. C.
 TO: The Secretary of War

JUL 1 8 1945

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Frank B. Hilton (O-1333467), Infantry.

2. Upon trial by general court-martial this officer was found guilty of being drunk in uniform on 14 April 1945, in violation of Article of War 95 (Spec. 2, Chg. I); of being drunk and disorderly in uniform in a public place on 15 April 1945, in violation of Article of War 95 (Spec. 3, Chg. I); of wrongfully swimming without a bathing suit on 26 April 1945, in violation of Article of War 96 (Spec. 2, Chg. II); of wrongfully exposing his entire body in an indecent manner to public view, of being disorderly (Spec. 6, Chg. I), and of larceny, all on 26 April 1945, in violation of Article of War 95. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specification 2, Charge I, of Specification 2, Charge II, and of Charge II; approved only so much of the findings of guilty of Specification 3, Charge I, as finds the accused guilty of being drunk in uniform at the time and place alleged; approved the sentence and forwarded the record of trial for action under Article of War 48.

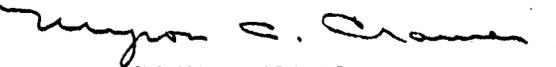
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 6, Charge I, as involves a finding of guilty of the Specification in violation of Article of War 96; legally sufficient to support the findings of guilty of all other Specifications and Charge I; and legally sufficient to support the sentence and to warrant confirmation thereof.

The accused, with his uniform dirty and in disarray, was found by the military police "passed out" on a bench in a public park at Jacksonville Beach, Florida, on the night of 15 April 1945. Later in the month, on the night of 26 April 1945, he appeared on the beach of Kingsley Lake, Camp Blanding, Florida, in the nude. Here he stole a purse containing a wallet, a small amount of money, and a wrist watch, which had been left by the side of a bathhouse. When he attempted to flee, there ensued a fist fight with a pursuer. Military police eventually apprehended the accused after another attempt to flee from the scene.

The nature of the offenses, committed by accused within a few weeks after he received his commission, demonstrates his unworthiness to remain in the military service as an officer. I recommend that the sentence be confirmed and ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

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


 MYRON C. CRAMER
 Major General
 The Judge Advocate General

Findings disapproved in part. Sentence confirmed ordered executed. GCMO 367, 25 July 1945)

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

SPJGQ-CM 281567

C JPL 1945

U N I T E D S T A T E S	)	ARMY AIR FORCES
	)	WESTERN TECHNICAL TRAINING COMMAND
v.)	
Second Lieutenant ANDREW JAMES	)	Trial by G.C.M., convened at
ADAMS, Jr. (O-830799), Air	)	Keesler Field, Mississippi, 12,
Corps.	)	28 May 1945. Dismissal.

OPINION of the BOARD OF REVIEW
ANDREWS, BIERER, and HICKMAN, Judge Advocates

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

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

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

Specification: In that, Second Lieutenant Andrew James Adams, Jr., Squadron "Y" (Student Officer), 3704th Army Air Forces Base Unit, was, at Biloxi, Mississippi, on or about 19 April 1945, drunk and disorderly in a public place, to-wit, Buena Vista Hotel, while in uniform.

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

Specification: In that Second Lieutenant Andrew James Adams, Jr., Squadron "Y" (Student Officer), 3704th Army Air Forces Base Unit, did, at Keesler Field, Mississippi, on or about 19 April 1945, strike Major Earl W. Brown, his superior officer, on the face with his hands.

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

Specification: In that Second Lieutenant Andrew James Adams, Jr., Squadron "Y" (Student Officer), 3704th Army Air Forces Base Unit, did, at Keesler Field, Mississippi, on or about 19 April 1945,

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behave himself with disrespect toward Major Earl W. Brown, his superior officer, by saying to him, "Fuck you Major", or words to that effect.

He pleaded, to the Specification of Charge I, guilty with the exception of the words "and disorderly" and to the excepted words, not guilty; to Charge I, not guilty but guilty of a violation of the 96th Article of War; to Charges II and III and their Specifications, not guilty. He was found guilty of all the Specifications and Charges. There was no evidence of previous conviction. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Charge I and the Specification.

On the night of 19 April 1945, the accused had been drinking with some other officers in the Marine Room of the Buena Vista Hotel, Biloxi, Mississippi (R. 9, 10). About 10:30 p.m. the other officers left the accused sitting at the table (R. 10). Floris Hertel, a waitress, was clearing glasses from the table when the accused leaned over and grabbed her arm saying, "I want to talk to you" (R. 10). The waitress attempted to pull away and asked him to talk without holding her arm (R. 10). The accused then jerked her across the table, holding her wrist (R. 10). A friend of the accused came in, talked to him, and finally got him out of the Marine Room (R. 10). The waitress was talking to the cashier, Mrs. Frentz, when a lieutenant came in asking "Where is my friend's hat?", meaning the cap of the accused (R. 10, 17). The waitress looked for the cap, (R. 11). She was in the cashier's booth when the accused came up behind her and grabbed her arm again (R. 11, 18). Mrs. Frentz jumped between them but the accused reached over, made a grab for the waitress and scratched her neck (R. 11, 18). Mr. Lyons, the bartender, came up and put his arm around the accused (R. 22). The accused grabbed Lyons around the throat and pushed him against the wall (R. 11, 12, 18, 24) saying, "I am going to claw you", but did not choke him (R. 27). A sergeant came in and told the accused to take his hands off Lyons and he did so, saying "I haven't got my hands on him" (R. 12, 18, 19, 25). The accused was then escorted from the Marine Room by some of his friends and the sergeant (R. 12, 19, 27). When he was taken outside, the accused got in a cab, but jumped out of the cab and ran down the beach when Mr. Sturm, the manager, told the driver not to drive away because he had called the Military Police (R. 12, 15). It was estimated that twenty to forty or fifty people were present in the Marine Room, mostly military personnel (R. 12, 28) but most of them could not see into the cashier's booth (R. 29). The accused appeared to be drunk (R. 27) and pleaded guilty being drunk.

Charges II and III and Specifications.

Some time after 11:30 on the night of 19 April 1945, Major Brown, Provost Marshal of Keesler Field, Captain Scott and Captain Stoffer went

to the accused's quarters but he was not there (R. 32). Major Brown was acting in his capacity as Provost Marshal (R. 60). They came back about fifteen minutes later and found the accused lying in bed (R. 33). According to Major Brown the accused was not asleep (R. 36). Major Brown told the accused that he was Major Brown, the Provost Marshal, and wanted to speak to him because he was in serious trouble (R. 33). Captain Scott shook the accused (R. 62). The accused kept talking unintelligibly (R. 33, 62). The accused said to Major Brown, "Fuck you, Major" (R. 33) "Fuck you, Major Brown, you son of a bitch" (R. 62). The accused jumped up and pulled Major Brown's tie, choking him. When the accused refused to let go of the tie, Major Brown hit the accused on the chin with the heel of his hand. The accused then flexed his hand and made a slight pass at Major Brown's hat (R. 34). The blow, according to Major Brown, was "just a little lick" (R. 34) across the side of his face which knocked off his hat (R. 36). "I believe it was just a sort of glancing blow he gave me" (R. 36). This was corroborated by Captain Scott (R. 62). Fifteen minutes later the accused did not remember what had taken place (R. 35). Major Brown concluded that the accused was drunk (R. 34, 37).

4. The accused did not testify as to any offense. He made an unsworn statement through defense counsel that he was in the top five per cent of his class at flying school, was sent to the central instructors' school at Randolph Field and upon graduation became a twin engine flying instructor in an advanced flying school (R. 59). The accused's squadron commander (R. 53) and a former instructor, (R. 54) testified to his capabilities and previous good record. He had been under tension in finishing his examinations and working hard (R. 56, 57). Captain Stoffer testified for the accused that the accused was asleep when Major Brown, Captain Scott and Captain Stoffer went to his quarters (R. 43, 47). Captain Scott pulled the accused out of bed and threw him on the floor (R. 44). The accused acted dazed when he got up from the floor (R. 45). He went back to bed muttering unintelligible curses (R. 45). Major Brown ordered accused to get out of bed (R. 45). Accused got out of bed and grabbed Major Brown's tie (R. 48). Everyone started swinging and the accused was thrown to the bed (R. 49). Major Brown told accused a second time that he was the Provost Marshal (R. 50). Captain Stoffer did not hear accused say "Fuck you, Major" (R. 47) and did not see accused strike Major Brown, but saw accused make "an initial grab for him." (R. 49).

5. The accused, with fellow officers, bibulously over-celebrated the completion of a training course and the examinations which concluded the course. Remaining at a table in the Marine Room of the Buena Vista Hotel, at Biloxi, Mississippi, after his drinking companions had departed, about 2230 hours on 19 April 1945, he became obstreperous with a waitress, seized her by the arm and pulled her across the table. Returning for his hat after being escorted outside by friends, he resumed his advances toward the waitress in the cashier's booth, over the opposition of the cashier, and engaged in some physical altercation with a bartender who intervened. Forty or fifty persons were in the room, though the affair

in the cashier's booth occurred out of sight of most of them. Again escorted outside and seated in a taxicab, he broke away and ran down the beach upon hearing that the restaurant manager had called the military police. Later aroused from his bed in his quarters by the Provost Marshal and two other officers, he engaged in a scuffle with the Provost Marshal wherein he struck that officer a light glancing blow in the face, knocking off his cap, and addressed him disrespectfully, saying "Fuck you, Major Brown".

The accused pleaded guilty to being drunk only. The evidence amply justifies the findings by the court that he was also disorderly in uniform in the public place specified and that he struck and was otherwise disrespectful to his superior officer.

However, the case established fails in certain particulars to reach the gravity of that charged. He was drunk, but not to a gross, maudlin or riotous degree. He is not shown to have been loud, profane or obscene. His conduct, while thoroughly reprehensible, was not such as to stigmatize him as morally unfit to be an officer or to be considered a gentleman (CM 253202, McClure, 34 BR 290). Accordingly, the evidence is legally sufficient to support only so much of the findings of guilty of the Specification of Charge I as involves findings of guilty of the Specification in violation of Article of War 96. The Specification of Charge II does not charge a violation of Article of War 64. A necessary element of the offense of striking a superior officer in violation of Article of War 64 is that the superior officer was "in the execution of his office". (MCM 1928 par. 134a). The Specification does not allege that Major Brown was "in the execution of his office". The evidence shows that Major Brown was in the execution of his office as Provost Marshal when he was struck by the accused. Since the Specification does not state the offense prohibited by Article of War 64, the record is legally sufficient to support only so much of the findings of guilty with respect to the Specification of Charge II as involves a finding of guilty of the Specification in violation of Article of War 96.

The evidence is legally sufficient to support the findings of guilty of the Specification of Charge III in violation of Article of War 63.

6. The record discloses that three-fourths of the members of the court present concurred in the sentence of dismissal, whereas Article of War 43 requires only the concurrence of two-thirds of the members present. This is an unwarranted disclosure of how the court voted in closed session, but it does not injuriously affect any substantial right of the accused.

7. War Department records show that accused is 21 years of age and is single. He graduated from high school but did not attend college. He worked as an electrician mechanic for Ford, Bacon, Davis Company at Charleston, West Virginia from January to February 1943 and for E. B. Badger and Sons Company, Point Pleasant, West Virginia, from September 1942 to January 1943. He served in enlisted status from 24 February 1943 to 22 May 1944, during which period he received pilot training as an

aviation cadet. He was commissioned a second lieutenant in the Army of the United States on 23 May 1944 upon graduation from Army Air Forces Pilot School (Advanced-2 Engine), Stuttgart Army Air Field, Stuttgart, Arkansas. On 21 August 1944, the accused received a reprimand and forfeiture of \$75.00 of his pay as disciplinary punishment under Article of War 104 for failing to make a visual check of the wheels of his airplane before landing, in violation of a Training Bulletin.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Charges I and II and the Specifications thereof as involves findings of guilty of those Specifications in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge III and the Specification thereof, and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation, by an officer, of Articles of War 63 and 96:

Fletcher R. Andrews, Judge Advocate

[Signature], Judge Advocate

On Leave, Judge Advocate

(176)

SPJGQ - CM 281567

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 13 1945

TO: The Secretary of War

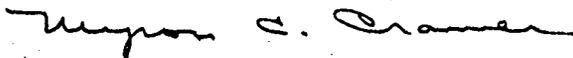
1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Andrew James Adams, Jr. (O-830799), Air Corps.
2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in a public place in violation of Article of War 95 (Specification, Charge I) to which he had pleaded guilty, except the words "and disorderly", in violation of Article of War 96. He was also found guilty of striking his superior officer in violation of Article of War 64 (Specification, Charge II), and of using disrespectful language toward his superior officer in violation of Article of War 63 (Specification, Charge III). He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charges I and II and the Specifications thereof as involves findings of guilty of those Specifications in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge III and the Specification thereof, and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

On the evening of 19 April 1945, the accused became drunk in the Marine Room of the Buena Vista Hotel, at Biloxi, Mississippi, while celebrating the completion of a training course, and, at about 10:30 p.m., seized a waitress by the arm and pulled her across the table. Returning for his hat after being escorted outside by friends, he resumed his advances toward the waitress in the cashier's booth, over the opposition of the cashier, and engaged in a minor physical altercation with a bartender who intervened. Forty or fifty persons were in the room, though the affair in the cashier's booth occurred out of sight of most of them. Again escorted outside and seated in a taxicab, he broke away and ran down the beach upon hearing that the restaurant manager had called the military police. Later aroused from his bed in his quarters by the Provost Marshal and two other officers, he engaged in a scuffle with the Provost Marshal wherein he struck that officer a light glancing blow in the face, knocking off his cap, and addressed him disrespectfully, saying "Fuck you, Major Brown".

Although the conduct of the accused was reprehensible, I do not believe that it justifies dismissal from the service. I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of fifty dollars pay per month for six months, and that as thus commuted the sentence be carried into execution.

4. Consideration has been given to letters from the Honorable E. H. Hedrick, House of Representatives, dated 19 June 1945, Colonel T. S. Voss, Air Corps, Commanding Officer of Keesler Field, Mississippi, the accused's commanding officer, and Captain John G. Taussig, Air Corps, Defense Counsel, in which the accused joined, recommending clemency in behalf of the accused.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



5 Incls

- 1 - Record of trial
- 2 - Form of action
- 3 - Ltr fr Hon E H Hedrick, 19 June 45
- 4 - Ltr fr Col T S Voss, CO of Keesler Field
- 5 - Ltr fr Capt John J Taussig, Defense Counsel

MYRON C. CRAMER
Major General
The Judge Advocate General

(Findings disapproved in part. Sentence is confirmed but commuted to a reprimand and forfeitures. GCMO 339, 21 July 1945).

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

26 JUN 1945.

SPJGV-CM 281592

UNITED STATES)

PERSIAN GULF COMMAND

v.)

Trial by G.C.M., convened at
Khorramshahr, Iran, 10-11 May,
at Ahwaz, Iran, 14 May and at
Khorramshahr, Iran, 15 May
1945. To be shot to death with
musketry.

Sergeant HENRY S. TRACEY
(33545002), 134th Port
Company.)

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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 1: (Finding of not guilty).

Specification 2: In that Sergeant Henry S. Tracey, 134th Port Company, did at American Pumping Station on Karun River, Ahwaz, Iran, on or about 21 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Hassan, son of Yoosif, a human being, by shooting him with a carbine.

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

Specification: In that Sergeant Henry S. Tracey, 134th Port Company, did, at American Pumping Station on Karun River, Ahwaz, Iran, on or about 21 March 1945, with intent to commit a felony, viz, sodomy, commit an assault upon Hassan, son of Yoosif, a human being, by willfully and feloniously grasping and forcibly holding the said Hassan, son of Yoosif on and about the arms, head and body.

The accused pleaded not guilty to all the Charges and Specifications, and was found guilty of all the Charges and Specifications, except Specification 1, Charge I, as to which he was found not guilty. No evidence of previous

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convictions was offered. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence relating to the Specifications of which accused was found guilty may be summarized as follows:

a. For the prosecution.

The accused and Private First Class Eddie L. Hopkins were on guard duty (R. 14) at the American Pumping Station on the Karun River, near Ahwaz, Iran, commonly known as Persia. The pumping station is on the river bank. Except on the side by the river, the area is inclosed by a barbed wire fence. The inclosure is about 75 yards in length and 50 yards in breadth. Within the fence are the pumping station, several tanks, living quarters, ice box, latrine and water heater. About 200 feet distant from the area is a trail or road, which leads to the City of Ahwaz. A native village is in sight of the pumping station (R. 11). About 6 p.m. o'clock on the day in question, accused observed a native boy, as he walked north along the trail, away from Ahwaz. Accused called to the boy, and he came toward the inclosure (R. 14). Private First Class Eddie L. Hopkins, upon whose testimony the prosecution strongly relied, was lying down in the quarters. He got up and went outside when he heard voices. Hopkins and accused were the only soldiers on duty at the pumping station at this time. Accused was leaning against the ice box. The boy was by the fence (R. 14). Accused said to Hopkins, "Let's make the native suck us off". Hopkins answered, "not me", and went back into the billet. When he again came out accused and the boy were in the latrine. Accused was seated. The native was leaning over his shoulder, and was "yelling and trying to get away from him". Hopkins again went into the quarters, and again came outside. The boy had gotten away from accused and was running toward the trail to Ahwaz. He then was about 30 yards away from the billet (R. 15). Accused emerged from the latrine, and walked toward the quarters. As he passed Hopkins, accused said that he was "going to shoot the son of a bitch". He got his carbine, and fired two shots. The first shot was not aimed (R. 16). The boy ducked his head (R. 16) and kept on running. For the second shot accused took careful aim at the boy. He then was about 150 yards away from accused. The boy fell, when accused fired, and lay still. Accused suggested that he was not dead. He went to the boy, carried him toward the inclosure, and laid him down in high grass about 50 yards away from the fence. While accused was so engaged, Hopkins called the military police on the telephone. Accused soon returned to the billet, and started

to call the military police. Hopkins told accused that he had already called them. Accused wanted to know why, and told Hopkins to tell the military police that the boy had climbed the ladder against the gas tank (R. 16), in an attempt to get something (R. 17), and that he had reached the third step from the top (R. 16). Accused again went to the boy, carried him within the inclosure, and laid him on the ground about three yards from the gate. Accused then told Hopkins to say that the boy was shot at that point. Hopkins went to talk with the boy, but the latter was foaming at the mouth and was unable to speak (R. 18). Between the first and second shots, Hopkins observed another native on the road (R. 23). When accused fired the shots, he said nothing. Immediately after the shooting accused "was kinda laughing * * * just sort of smiling like * * *. He wasn't laughing right out" (R. 18).

During cross-examination (R. 19-24) by defense counsel, Hopkins asserted (R. 21) that he told the company commander and first sergeant the "true story", as it actually happened, when they came (R. 21). He admitted that, when he was questioned that night by the military police, he did not tell the "true story", but that he then had said that the victim was on the ladder and ran to the gate. He admitted that, at the hospital he had been questioned by Lieutenant McLeod and then had signed a typewritten statement, which recited that the native was shot 200 yards from the gate (R. 23).

Several officers and soldiers went with an ambulance from Ahwaz to the pumping station, in response to the two calls. Corporal Anthony E. Thal, who drove the ambulance, was the first to arrive (R. 7). He saw an Arab boy, about 16 years of age, who was lying on his right side on the ground about six paces inside the fence. He was dressed in flimsy pyjama-like clothing, with a rope belt. There was a hole in his left hip. Thal looked at the wounded boy and asked, "Who shot him?" Accused said:

"I did . . . He was up that ladder and I was standing over by the door of the hut. I hollered 'halt'; the boy came down the ladder and started running. I hollered 'halt' three more times, then I shot him. I fired one shot; he fell and didn't move" (R. 7).

Accused stated that the boy then was lying where he had fallen when shot (R. 8). Thal asked the boy to give his name, and he answered "Hassam" (R. 10). Later he learned that the full name was "Hassan, son of Yoosif" (R. 14). Hassan was 15 or 16 years of age, was about five feet in height and weighed 70 pounds (R. 9). Thal took Hassan to the

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hospital in Ahwaz. At the hospital, a woman waited on the boy, and gave him water. There, another hole was discovered below the navel and to the left (R. 7).

Mohamid Ali Rawabakhshan is a graduate of the Iran Medical College at Teheran, and Chief of Jond Shapour Hospital, Ahwaz (R. 34). He examined the dead body of Hassan s/o Yoosif about 8 o'clock in the morning of second Farvardin 1324, Iranian calendar. Death had occurred about 12 hours earlier (R. 35). The boy had been brought to the hospital about 7 o'clock on the evening before. Death was due "to two holes in the body, one in the right hip and * * * one in the front of the stomach". The hole in the back was less than 1 centimeter, while the hole in the front was more than 2 centimeters, in diameter.

Ahid s/o Zayer Hossein, a shepherd of Oweimer Village, saw an unusual incident at the American Pumping Station "on that day", which was as long ago as "from the Persian New Year to the present" (R. 37). He was about "fifty times the length of his outstretched arms" distant from the pumping station, which distance the parties agreed was the equivalent of 80 yards (R. 37). A boy was in the desert near the path. An American soldier, who had a package in his hands, was at the door of the pumping station. He called to the boy, to come to him. The boy went to the soldier, who grabbed him (R. 38). The boy escaped and ran outside the fence (R. 39). When he was about 80 feet from the soldier, a shot was heard. The boy kept on running. A second shot was fired by the soldier. The boy fell. The soldier went to him, and carried the boy inside the fence. When the boy went to the door of the bungalow where the soldier was, he remained with him as long as it takes to smoke two cigarettes. The soldier held him by his hand (R. 40). After the boy was shot, the witness saw two soldiers there (R. 41). The soldier got the rifle from the same building to which he took the boy (R. 42).

Zomaid s/o Salman F/N Hardam is a farmer in Sheikh Feiris Village, Haddam Amery. On the Iranian New Year's Day, 21 March 1945, he went near the pumping station (R. 48), on the way to Ahwaz. He passed a boy. A black American called to the boy, and then took him into the bungalow. Then he heard a shot and saw the boy running along the trail. A second shot was fired and the boy fell. The American called another American. One of them picked the boy up, carried him, and then put him down. Then he lifted him again and took him in "behind the wire" (R. 50). The witness sat down. In a little while, a large car and a small car came. He saw many people there. Among them was a shepherd. The boy was shot when about 50 outstretched arms length or 250 feet away from the soldier. He admitted that he had once estimated the distance at 20 or 30 meters from the fence. He was 50 steps from the pumping station, when he stopped to watch (R. 52).

Ali Mashaf Hamad Samadi, an employee of the Army at Ahwaz (R. 42), on 21 March 1942 went with Sergeant Sullivan and met an ambulance. They got in the vehicle. There Ali acted as interpreter for Sullivan, who questioned Hassan s/o Yoosif. Hassan said that he could not talk, because "I am sick" or "I am going to die" (R. 43).

Roghiyeh d/o Mohammad, a nurse at the hospital, saw Hassan s/o Yoosif when he was brought there in an American "hospital car" (R. 44) about 7:30 p.m. on 21 March 1945, the Iranian New Year's Day. At midnight he died. She stripped and examined his body, and found a wound which pierced his right buttock and passed through the abdomen. As it was New Year's Eve, no doctor was available (R. 45). About 9 o'clock the boy said to her, "Oh Mother, I am dying". He then stated that as he passed the place where machinery was installed, close by the river, two black Americans called him. He paid no attention and they called again. Hassan then said:

"* * * They took me inside and opened my pants in the billet that they used to commit bad thing with me * * * then I ran away * * * I was a few steps away from them then they fired at me" (R. 47).

He was shot, when walking, about $2\frac{1}{2}$ to 3 meters away from them.

b. For the accused.

First Lieutenant Fred T. Hardy met accused at Indiantown Gap in June 1944. Until February, he commanded the platoon in which accused served. Accused was a very good soldier and had never been made the subject of disciplinary action (R. 36).

Sergeant Joseph W. Sullivan, 788th MP Battalion went with Ali, the interpreter, and met the ambulance, which was carrying Hassan to Ahwaz. Ali did not then interpret the boy's statement as "I am going to die", but as "I am too sick to talk" (R. 53). This witness questioned accused at the pumping station. There he examined accused's carbine. There were 14 rounds in the clip, which holds 15 rounds when full (R. 54). He also questioned Hopkins, who stated that he was taking a shower when he heard accused say, "halt"; then he heard a shot and ran outside where he saw accused standing about a yard inside the fence and looking down at a native on the ground. About 9 o'clock that night Sullivan again questioned Hopkins, who again said nothing about any suggestion by accused of sodomy with the boy. His account then was substantially that which he previously had given. Two days later, Sullivan again questioned Hopkins,

who on this occasion stated that the boy was shot at a point about 200 yards from the main gate of the pumping station. He pointed out the spot. Sullivan also took two natives to a point, which they indicated as that where the native was shot. This point was 200 yards south of the pumping station (R. 55). On cross-examination, Sullivan stated that a carbine, with a cartridge in the chamber and a full clip of 15 rounds, could be fired 16 times, without reloading (R. 55). Sullivan questioned Hopkins three times. The first and second examinations were in the presence of accused. The third interrogation was conducted outside accused's presence. The account then given by Hopkins was entirely different from that contained in the first two statements. The two statements, which were made in accused's presence, were substantially alike (R. 56).

The depositions of First Lieutenant Bernard A. Mollen (Acc. Ex. B), First Lieutenant Hunter W. Tyler (Acc. Ex. C), Second Lieutenant Graydon S. Seaton (Acc. Ex. D), and First Sergeant Kermit S. Allen (Acc. Ex. E), were taken at the instance of accused, and were offered in evidence in his behalf (R. 56).

Lieutenant Mollen was Executive officer of the 134th Port Company, in which accused as a recruit first came under deponent's observation on 5 June 1944. Accused was one of the best soldiers in the outfit and worked his way up to sergeant. He had never been the subject of disciplinary action, and his general reputation among the members of the company was that of being truthful (Acc. Ex. B). Deponent was officer of the day and arrived at the pumping station about 6:30 p.m. Lying about 10 or 15 feet inside the fence, and about 20 or 30 feet away from the ladder and water tank, was a Persian, who had been shot in the rump. Hopkins stated that he was not present when accused shot this Persian. Accused said that he came out of the building and saw a coolie on the ladder by the tanks. The coolie started to run. Accused yelled "halt" three times. When the native failed to halt, accused fired. The only natives observed by deponent in the vicinity of the pumping station were a considerable distance away.

According to Lieutenant Tyler (Acc. Ex. C), the instructions given to accused and other guards required that unauthorized persons found within the confines of the installation were to be halted three times. In the event of the failure of such a person to halt, the sentry was to shoot. It was also suggested that a small native might be evicted manually, and that in the guard's discretion shooting might be avoided.

First Sergeant Kermit S. Allen arrived at the pumping station between 6:15 and 6:45 p.m. (Acc. Ex. D). He did not recall that he saw any natives in the vicinity, other than the wounded boy. In the opinion of this witness, accused was an excellent soldier.

According to Lieutenant Seaton (Acc. Ex. E), accused was a very efficient soldier, although nervous and exacting. This officer accompanied Lieutenant Mollen to the pumping station, where he saw the wounded boy. There were no other natives in the immediate vicinity. Accused then made an oral report to the effect that, from the doorway of the hut, he observed the native on the ladder. He ran out and told him to get down and leave the area. The man did not leave. Accused went into the hut for his carbine. When he came out, the native was running toward the gate. Accused yelled "halt" three times, and then fired once. He said that the native was lying where he had fallen.

After being duly warned (R. 57) by the law member as to his rights in the premises, accused was sworn as a witness and testified in his own behalf. About 6 o'clock in the evening, while eating supper, he observed a native on the ladder, which was nailed to the tower (R. 67), of the gasoline tank. At that time, Hopkins, the other guard, was taking a bath (R. 60). The native was on the second rung of the ladder, about 25 feet (R. 65) from the gate. The door of the billet was 8 feet from the gate (R. 67). Accused reached for his carbine, and hollered "halt". The native jumped from the ladder and ran toward the gate and the railroad. After calling "halt" three times, and when the native was about five feet from the ladder, he fired one shot, which was aimed at the native's legs. The native fell where he was shot (R. 68) at a point about five feet inside the fence (R. 59). Accused walked over to question the man, but the native was unable to speak. Hopkins came from the direction of the shower. He asked where the native was. Accused told him. Accused directed Hopkins to call the MP's and to request an ambulance. Accused did not go outside the inclosure (R. 69). There were no other natives in the vicinity (R. 61). Accused had never before seen the natives who testified against him (R. 62). He had never been able to get along with Hopkins, and had had trouble with him, which began in June 1944. Hopkins would not obey his orders and "cussed" witness. Accused "turned him in" to the first sergeant and company punishment was awarded. At the time of the shooting, he and Hopkins had been alone at the pumping station for six days. Accused told the first sergeant that "he wouldn't like to be there with Hopkins", and asked for another man. He did not get him (R. 63).

4. If the shooting occurred in the manner and under the circumstances related by Hopkins, it would seem to be clear that accused is guilty of a brutal and wanton murder, maliciously committed when Hassan fled, after resisting physical force applied by accused in an attempt to make him the active participant in bucal coitus. If Hopkins' version be correct, the deceased was never even technically a trespasser, but was enticed into the inclosure by accused.

Were we to conclude, as we cannot do for the reasons hereinafter stated, that accused's account of the homicide was correct, nevertheless it would appear that gun fire was somewhat recklessly resorted to, and that the circumstances were not such as to make the shooting apparently necessary. Accused's explanation clearly indicates that his conduct, though apparently within the letter of the instructions of his superiors, nevertheless violated the spirit of the orders, which required the use of discretion. Calling three times upon a 16 year old boy to halt, and then shooting him when he failed to comply, under the circumstances related by accused, would seem to imply a lack of appreciation for the sanctity of human life, and a spirit of reckless heedlessness. The mere fact that a soldier is on guard duty does not authorize him to shoot indiscriminately (C^M CBI 249, Simons).

It might have been difficult for the trial court to determine whether accused or Hopkins told the truth, had their testimony stood alone. Accused's interest in the outcome of the trial was very great. On the other hand, Hopkins' veracity was impeached by his two statements, made shortly after the shooting, which are consistent with the facts as testified to by accused. These statements tend to indicate that accused was guilty at most of no more than manslaughter and perhaps was not guilty of homicide in any degree. However, Hopkins' testimony does not stand alone. The court had before it the dying declaration of the deceased as well as the testimony of two native eye-witnesses, however ignorant and unlettered the farmer and the shepherd may have been.

It seems somewhat unlikely that even an unruly soldier, who had been awarded company punishment for disobeying the accused, would so intensely thirst for vengeance, as to commit perjury, in a spiteful effort to send accused to his doom. Such great hatred would not probably be aroused by such a grievance.

The court was in a much better position than we are to judge of the credibility of the witnesses. It saw and heard them, and observed their manner, conduct and demeanor on the witness stand. Before us is only a typewritten record, which reproduces the words of the witnesses, but not the sound of their voices or their appearance while answering the questions of counsel.

Had deceased been shot where Hopkins swore he fell, it would seem that blood would have stained the ground at that spot, and perhaps along the route said to have been traveled by accused as he carried the boy's body within the inclosure. It does not appear whether any effort was made in the course of the investigation to ascertain the existence of such

physical circumstances, which, if they had existed, would have tended strongly to establish the truth of Hopkins' account of the slaying.

Upon the first two occasions when Hopkins was questioned, accused was present. On both occasions, he stated in substance that the shooting occurred about as accused had said that it occurred. In neither statement was there any suggestion that accused had solicited deceased to gratify any sexual perversion of the former. Only when questioned a third time, and outside the presence of accused, was it that Hopkins made a statement consistent with his testimony at the trial.

As these earlier statements were inconsistent with Hopkins' testimony, the court might well have concluded that this witness had testified falsely in material particulars. The court then might have rejected the testimony of this witness, except insofar as it was corroborated by other and credible testimony and facts and circumstances in evidence. Were Hopkins' testimony thus rejected, as perhaps it was, nevertheless the dying declaration of Hassan, taken together with the testimony of Ahid s/o Zayer Hossein (R. 39-41) and that of Zomaid s/o Salman F/N Hardam (R. 49-50), would be sufficient to warrant a finding that accused was guilty of murder.

An hour or more before he made the statement, Hassan had said that he was very sick and could not talk (R. 43). He told the nurse at the hospital that he was dying, that he was called inside the fence, that his pants were opened to commit a bad thing, that he ran, and that he was shot (R. 47). In CM CBI 240, Harvey, it was said:

"The contemplation of impending death is regarded as a sufficient guaranty of the reliability of a statement made by one who has lost all hope of recovery, as in the presence of impending death a person is without any motive to make a false statement. Earthly considerations have lost all significance to one about to die."

The evidence establishes the elements said in that opinion to be necessary prerequisites to the validity of a dying declaration. Although Hassan does not name his assailant, the accused admits that he fired the fatal shot. The dying declaration and the testimony of the two native eye-witnesses warranted the court in concluding that the guilt of accused was established beyond a reasonable doubt.

5. We observe that accused has been sentenced to be shot rather than to be hanged, as is usual in cases such as this. One of the punishments which Article of War 92 prescribes for murder is death.

The Articles of War are silent as to the mode and manner of inflicting this penalty. Winthrop states:

"* * * It would therefore be strictly legal for a court-martial to sentence simply that the offender be punished 'with death,' the authority empowered to approve the sentence thereupon directing as to the mode - shooting or hanging - which the usage of the service, in the absence of statutory requirement, has designated as appropriate to the particular offence. In practice, however, the court invariably specifies the form of the penalty, adjudging in general that the accused be shot where convicted of desertion, mutiny, or other purely military offence, and that he be hung where convicted of a crime other than military, as murder or rape, or of the crime of the spy." (Winthrop, Military Law and Precedents, 418).

Manual for Courts-Martial, 1928, paragraph 103a, provides in part (page 93):

"A court-martial in imposing the sentence of death will prescribe the method, whether by hanging or shooting. Hanging is considered more ignominious than shooting and is the usual method, for example, in the case of a person sentenced to death for spying, for murder in connection with mutiny, or for a violation of A.W. 92. Shooting is the usual method in the case of a person sentenced to death for a purely military offense, as sleeping on post."

The foregoing language seems to us to be permissive and not mandatory. It states the "usual" but not the only method, which a court is authorized to prescribe in a death sentence, imposed for a violation of Article of War 92.

The sentence imposed by the court (R. 71) "to be shot to death with musketry", is unusual and exceptional. Although in providing for death by shooting rather than by hanging by the neck, it departs from custom and precedent, nevertheless the sentence is not contrary to any statute. It does not appear to be in violation of the language of Manual for Courts-Martial, 1928, paragraph 103a. The sentence may therefore be regarded as neither illegal or inappropriate.

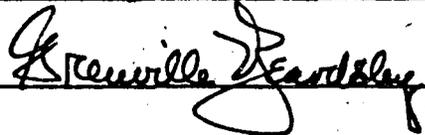
6. The accused is 26 years of age. He was inducted at Camp Lee, Virginia, on 9 December 1943. He had not previously served in the armed

forces. There is no record of any previous convictions. He is now in confinement at the Post Stockade, Khorramshahr, Iran.

7. The court was legally constituted and had jurisdiction of the subject matter and of the person of the accused. No legal errors injuriously affecting the substantial rights of the accused were committed upon 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 to death is authorized upon conviction of a violation of Article of War 92.


_____, Judge Advocate


_____, Judge Advocate


_____, Judge Advocate

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SPJGV-CM 281592

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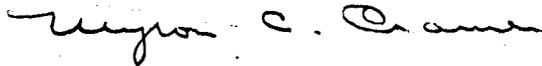
TO: The Secretary of War

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 Sergeant Henry S. Tracey (33545002), 134th Port Company.

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

I recommend that the sentence be confirmed, but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

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



MYRON C. CRAMER
Major General
The Judge Advocate General

3 Incls

- 1 Record of Trial
- 2 Drft of ltr for sig S/W
- 3 Form of Action

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for life). GCMO 409, 21 Aug 1945).

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

(191)

18 JUN 1945

SPJGV-CM 281612

UNITED STATES)

v.)

Captain ELWOOD R. BONEY)
(O-1693027), Medical)
Corps.)

SIXTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at
Fort Sheridan, Illinois, 21
May 1945. Dismissal.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

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

Specification: In that Captain Elwood R. BONEY, Station Medical Activities, 1612 Service Command Unit, Fort Sheridan, Illinois, was, at Highland Park, Illinois, on or about 5 May 1945, on a public street, to wit, South Green Bay Road, drunk and disorderly while in uniform.

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

Specification: In that Captain Elwood R. BONEY, Station Medical Activities, 1612 Service Command Unit, Fort Sheridan, Illinois, did, on or about 5 May 1945, wrongfully and unlawfully, while drunk, operate a motor vehicle on a public highway, to wit, South Green Bay Road in the City of Highland Park, Illinois.

Accused pleaded not guilty to, and was found guilty of, both Charges and their Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of Charge I and the Specification thereof as involves a finding of guilty of the Specification in violation of Article of War 96, and the sentence, and forwarded the record of trial for action under

the 48th Article of War.

3. Evidence.

On the 5th day of May 1945, at about 0730 the accused was awakened in his Bachelor Officers' Quarters at Fort Sheridan by an orderly (R.31). A few minutes later the orderly heard accused say to someone on the phone "Colonel, I broke my pledge and I won't be to work this morning" (R. 33, 34). The accused remained in the building most of the morning. He appeared not to be able to walk a straight line, looked rather tired and shaky and his speech was not too good. There was the odor of alcohol on his breath (R. 34-35). Accused called Major Hiatt, M.C., Assistant Commanding Officer of Station Hospital activities at Fort Sheridan about 0900 (R. 115) and accused:

"* * * stated that he was very sorry that he had broken his promise, or previous statements to me, and that he was not able to come to duty that morning. That he had previously called the Chief of the Medical Service and had reported and he had told him to stay in quarters" (R. 116).

Major Hiatt again talked to accused about 1115 hours and asked him to remain where he was and that he, Major Hiatt would come and get him to take him to the hospital. When the Major arrived, the accused had gone (R. 117-118).

At about 1150 hours the accused was driving a 1941 Cadillac on South Green Bay Road in the City of Highland Park, which is about 5 miles from Fort Sheridan. It was a clear day and the pavements were dry (R. 22). The accused's car struck one of two trucks parked along the curb, hurling a mechanic (who was standing on the curb reaching into one of the trucks for some tools) some 20 feet by the impact (R. 13, 19). The accused caused some damage to the parked trucks (R. 17, 39) as well as considerable damage to the car he was driving (R. 14, 26, 39).

After the accident accused started to get out of the car. He looked dazed, with blurred eyes and open mouth (R. 14, 27) and was not steady on his feet (R. 14, 29) and had to lean against the car to balance himself. The accused was in uniform with the front of his trousers open, his belt loose, his feet bare of socks with shoes unlaced, his blouse open and shirt hanging outside his trousers (R. 15, 27, 41, 58). In the opinion of the mechanic accused was drunk (R. 16). A group of people gathered at the scene (R. 29, 57).

When the Highland Park police arrived and asked accused to get out of the car he refused and the policeman reached in and pulled the accused out, standing him on his feet (R. 40). The officers then took accused to the police car. In walking over he staggered and his speech was heavy and thick and the policemen could not distinguish his words (R. 41, 56). They smelled liquor on accused's breath while taking him to the police station (R. 41-42). Upon arrival there he was uncooperative, smelled of liquor and was unsteady in his walk (R. 66-67). The Chief of Police arrived about 1230 hours to question accused. He got only incoherent answers (R. 68-69, 71). In the opinion of this police officer, accused was drunk (R. 74). The desk sergeant was of the same opinion (R. 68) as were the two officers who arrested accused (R. 51, 57, 60, 61) and that of a physician called to examine him while at the police station (R. 81-82). The accused had no liquor in his possession while in the police station, nor was he given any while there (R. 68, 71).

Lieutenant Bull, M.P., called at the police station to take accused back to Fort Sheridan. The accused was unstable on his feet, lurched from side to side, almost fell going down the step. He reeked of alcohol and cried (R. 87-89). In the opinion of Lieutenant Bull, the accused was "very drunk" (R. 90). About 1430 hours a blood alcohol analysis was made which, in the opinion of Captain Pilot, Chief of the laboratory at Fort Sheridan, showed the accused to be intoxicated or drunk (R. 105-106). This was corroborated by Lieutenant Colonel Bayless, Director of the Sixth Service Command Laboratories (R. 110-111).

The accused elected to make an unsworn statement (R. 127) in which he said that he had been practicing medicine for 10 years, specializing for five of them in internal medicine. He was one of a group of directors who owned and operated the Memorial General Hospital in Kinston, North Carolina. He served in the last war. He was commissioned on 30 May 1942 and has been on active duty since 1 July 1942. On 8 July 1943 he fractured three lumbar vertebrae which hospitalized him for seven months. Although he could have had a medical discharge he preferred to remain on duty. His request for overseas duty was several times considered but he was finally put on limited service within the continental limits of the United States. He was assigned to his present station at Fort Sheridan on 1 June 1945.

The accused further detailed serious marital difficulties which he has had continuously since he entered the service. His wife left him and closed their home in North Carolina, separating the children among various relatives after the accident to accused's back. He started legal proceedings to straighten out this tangle, but his marital

troubles still continue and are of a more or less serious nature. The accused further stated that on the night before the occurrences which form the basis for charges in this case he did not sleep all night and felt miserable and unable to go on duty the next morning. He had a few drinks and then decided to get some air and some food and return to the hospital.

As to the accident he stated that when he first saw the truck he did not realize it was parked until it was too late. He swerved his car to minimize the impact. His head struck the top of the car and he remembered no more until he was standing on the road. He was dazed and confused and unable to get himself together when he was taken to the station.

He stated that he realized that his actions were reprehensible and wished to make amends, for he felt keenly his duty to his country. For almost three years he had given his best professional services and desired to continue, expressing the hope that when his country no longer needed him he might return to civilian life and endeavor to reestablish his family and professional practice.

4. The defense moved that Charge I and its Specification be stricken on the ground that the Specification did not allege that the accused was "grossly drunk and conspicuously disorderly in a public place"; that alleging merely drunk and disorderly on a public street while in uniform was insufficient pleading under Article of War 95. That article states that:

"Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

It is true that it has been held that drunkenness must be gross and disorderliness must be conspicuous to meet the requirements of Article of War 95. But these things are matters of proof rather than pleading.

There is nothing in Article of War 95 which mentions "gross" conduct or "conspicuous conduct". Whether proof is sufficient to sustain a finding under this Article depends on the circumstances of each case. So long as the Specification clearly alleges enough to "fairly apprise the accused of the offense intended to be charged" it is sufficient (MCM, 1928, par. 71c). In any event the reviewing authority reduced the finding of guilty under Article of War 95 to the lesser included offense under Article of War 96. That being drunk and disorderly in uniform on a public street is, for an Army officer, an offense under Article of War 96 there can be no

doubt (Brandt, CM 253339 - Patriguin, CM 246607 - Brown, CM 248096). The fact that a Specification is laid under the wrong Article of War is immaterial (Dig. Ops. JAG 1912-40, par. 394(2)). In CM 241045, Cleaver, the accused was charged under Article of War 93. The court found him guilty under Article of War 95. The Board of Review in that case nevertheless held the record of trial legally sufficient to support only a violation of Article of War 96.

Defense counsel in support of the motion to strike strongly contended that merely because the Specification was in the very language of model Specification No. 115, Appendix 4, Manual for Courts-Martial, 1928, was of no significance. He argued that the appendices to the Manual for Courts-Martial form no part thereof, and that a form may appear therein and nevertheless not be sufficient in law for the purpose intended.

Article of War 38 confers upon the president the power to prescribe the procedure and modes of proof in cases before courts-martial and certain other military tribunals. In the exercise of the power so delegated, the President by Executive Order No. 4773, prescribed the Manual for Courts-Martial and directed that it be published for the government of all concerned, effective 1 April 1928. Following the main body of the Manual are published 11 appendices. Numerous references to these appendices appear on many pages of the body of the Manual. The language on these pages in some instances would lack meaning, without the appendix to which reference is made. Whenever a change has been made in the Manual for Courts-Martial, it has been accomplished by an Executive Order signed by the President. If the appendices were not part of the Manual, and were only accompanying material and not binding upon the service, as all will concede the main body of the Manual to be, then it would seem unnecessary to invoke the President's authority to make changes in the appendices. However, when on 31 March 1943, Appendices 4 and 10 were modified, the change was accomplished by Executive Order No. 9324, signed by the President. It would appear to follow that the appendices are to be regarded as integral parts of the Manual for Courts-Martial, and are as binding upon the service as though incorporated in the main body thereof instead of being subjoined thereto for convenience in arrangement.

As to the charge of operating a motor vehicle while drunk the evidence is ample and not denied. A mechanic, three policemen, a police chief, a civilian physician and the commanding officer of a Military Police Company all testified that they had observed accused at some time within several minutes to several hours after the accident, and in the opinion of all these witnesses the accused was drunk. There is also testimony that from the time of the accident until the accused's return to military control he had nothing to drink. Two medical officers, from a

sample of blood taken from accused and a blood alcohol analysis made from the specimen, together with the clinical picture given them, gave it as their opinion that the accused was intoxicated at the time he was driving his car on a public highway, i.e., at 1100 hours on the date in question. The accused himself stated that he had been drinking immediately prior to his taking his car out on a public highway.

The sentence is supported by the finding of guilty as to this Specification alone.

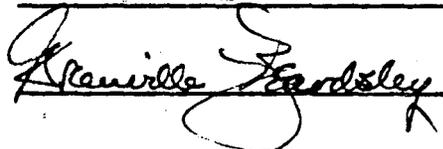
There can be little doubt from the unfortunate story told by the accused in his unsworn statement, that for several years he has been having considerable marital trouble and that perhaps he has literally been "driven to drink". While these facts might be in the nature of mitigation or extenuation, they do not affect the question of accused's guilt.

5. The accused is nearly 47 years old. He is married and has 5 children. He is a graduate of Davidson College where he took an A.B. degree, and a graduate of the University of Pennsylvania Medical School where he obtained an M.D. degree. He was commissioned a captain, Medical Corps, AUS on 31 May 1942 and entered active duty on 1 July 1942.

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


_____, Judge Advocate

On Leave _____, Judge Advocate


_____, Judge Advocate

SPJGV-CM 281612

1st Ind

Hq ASF, JAGO, Washington 25, D. C. 30 JUN 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Elwood R. Boney (O-1693027), Medical Corps.

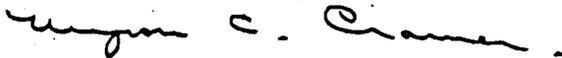
2. Upon trial by general court-martial this officer was found guilty of being drunk and disorderly in uniform in a public place in violation of Article of War 95 and driving while drunk in violation of Article of War 96. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of Charge I and the Specification thereof as involves a finding of guilty of the 96th Article of War, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused had been worrying all night over marital troubles and on arising on the morning of 5 May 1945, took some drinks and drove his car on to a public highway in Highland Park, Illinois, not far from his station at Fort Sheridan. He ran into a parked truck. When the local police arrived on the scene, the accused appeared with his clothes badly disarranged and, in their opinion, very drunk. His intoxication was testified to by a military police lieutenant, the local chief of police and others.

A more complete summary of the evidence may be found in the opinion of the Board of Review, which is of the opinion 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 concur in that opinion.

Under all the circumstances of the case, I believe the best interests of justice would be served if the sentence be confirmed but the execution thereof suspended during good behavior. I therefore so recommend.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls
1 Rec of Trial
2 Form of Action

(Sentence confirmed but execution suspended. GCMO 366, 25 July 1945).

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

SPJGH-CM 281669

13 JUL 1945

UNITED STATES)

v.)

Second Lieutenant DAN C.
MIDGETT, JR. (O-785857),
Air Corps.)

ARMY AIR FORCES
WESTERN TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened at
Lowry Field, Denver, Colorado,
1 June 1945. Dismissal and
total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL 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 95th Article of War.

Specification: In that Second Lieutenant Dan C. Midgett, Jr., Air Corps, Air Corps Unassigned, attached Squadron T, 3705th Army Air Forces Base Unit (Technical School), having been duly placed in arrest at Lowry Field, Denver, Colorado on or about 19 May 1945, did, at Lowry Field, Denver, Colorado on or about 22 May 1945 break his said arrest before he was set at liberty by proper authority.

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

Specification: (Finding of not guilty).

He pleaded guilty to the Specification of Charge I except the words "placed in arrest at" and "arrest" substituting therefor, respectively, the words "restricted to the limits of" and "restriction", not guilty

to the excepted words, but guilty to the substituted words. He pleaded not guilty to Charge I but guilty of a violation of the 96th Article of War. He pleaded not guilty to Charge II and its Specification. He was found guilty of the Specification of Charge I except the words "placed in arrest at" and "arrest", substituting therefor, respectively, the words "restricted to the limits of" and "restriction", and guilty of the substituted words. He was found not guilty of the excepted words and of Charge I but guilty of a violation of the 96th Article of War, and not guilty of Charge II and its Specification. Evidence was introduced of a previous conviction by a general court-martial on 19 May 1945 of violations of Article of War 96 for being "Disorderly in a taxi-cab on 22 April 1945" and for being "Drunk and Disorderly at 1464 Marion St. Denver, Colorado on 11 May 1945" for which offenses he was sentenced to a reprimand, one month restriction to his post, and a forfeiture of his pay of \$50 per month for 12 months which sentence was approved 23 May 1945. 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 and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution in support of the findings of guilty may be summarized as follows:

On 19 May 1945 Major Joseph R. Johnston, the Post Judge Advocate at Lowry Field, Denver, Colorado, in accordance with instructions given him by Colonel Patrick, the Commanding Officer, verbally told the accused at Major Johnston's office that he, the accused, was still under arrest but that the terms of his arrest were changed to a restriction to the post. He warned the accused of the consequences of breaching the restriction and handed to him a letter confirming the change which was admitted in evidence without objection and read, in fact, as follows (R. 12-13; Pros. Ex. A):

"1. You have heretofore been placed in arrest pending the hearing of court martial charges against you. You have been tried, convicted, sentenced to one (1) month restriction, together with other punishment given you. You are hereby advised that your arrest status is changed so that you are restricted to the limits of Lowry Field.

"2. You will acknowledge receipt of this communication by first indorsement.

BY ORDER OF COLONEL PATRICK:

/s/ Donald W. Runquist
DONALD W. RUNQUIST
Captain, Air Corps,
Adjutant."

The accused acknowledged receipt of the letter by indorsement thereto

(R. 13; Pros. Ex. A). Major Johnston explained to the accused that he was still under arrest although the sentence imposed that day by a court-martial of one month's restriction was not in effect at that time as it had not as yet been approved by the reviewing authority (R. 14).

On 22 May 1945 about 10 p.m. the accused left Lowry Field and went to "town" with another officer where they remained for at least several hours (R. 15-16).

4. The accused having been advised concerning his rights elected to testify under oath. With reference to the charge of which he was found guilty he testified that he was "tried" on 19 May 1945 and sentenced to be reprimanded, restricted to the limits of the post for one month, and to forfeit \$50 of his pay for twelve months. Previous to the trial he had been in arrest in quarters. After his sentence was announced he requested that he be permitted to "start my restriction right then." As a result he went to Major Johnston's office and waited for a letter to be written changing the restrictions of his arrest (R. 18). The letter was written and handed to him without explanation. He thought that it meant that he was restricted to the limits of the post starting at that time (R. 19-20). He left the post on 22 May 1945 to see his "girl" because he thought that she was pregnant and he intended to make arrangements to marry her. He thought this was a sufficiently important reason for breaking the restriction. When he arrived at her house about 10 o'clock that evening she "found out she wasn't pregnant and we decided to" postpone plans for the marriage until after his restriction had expired (R. 20).

5. The accused's plea of guilty to the Specification of Charge I admits all of the elements of the offense charged. Notwithstanding the plea the evidence introduced by the prosecution and the testimony of the accused clearly established that the accused was in arrest in quarters pending a trial by court-martial which took place on 19 May 1945 and resulted in a conviction and there was imposed upon the accused a sentence which included a restriction to the post of one month. The accused, believing that his sentence of restriction could not be executed until it was approved by the reviewing authority and desiring to commence the serving of that part of his sentence immediately requested that the restriction be imposed upon him forthwith. As a result of his request the commanding officer of the post on 19 May 1945 issued an order, prepared under the direction of the Post Judge Advocate, restricting the accused to the limits of the post. The order was delivered to the accused. He acknowledged receipt of the order and understood that he was thereby officially restricted to the post for one month commencing that day in compliance with the order of the court.

It was shown that the order was issued by the commanding officer of Lowry Field, where the accused was stationed - the only person who

had the legal authority to place the accused in arrest (MCM, 1928, par. 20, p. 14). On 22 May 1945 while the restriction was still in full force and effect the accused deliberately broke the restriction by leaving the limits of his post. The excuse that he gave did not constitute a legal defense. The record therefore amply supports the finding of guilty of the Specification of Charge I. The court in its discretion could, as it did, find the accused not guilty of breach of arrest in violation of Article of War 95 but guilty of breach of restriction in violation of Article of War 96 since the latter offense is a lesser included offense of the one charged (GM 271594, Fritchard, 4 Bull. JAG 11). However, no greater punishment than that authorized by Article of War 95 may be legally imposed since an accused may not be found guilty, by exceptions and substitutions, of a more serious offense than the one charged nor may a greater punishment be imposed than the maximum authorized by the offense charged (GM 224286, Hightower, 1 Bull. JAG 215). Accordingly, only so much of the sentence here imposed as involves dismissal is legal.

6. War Department records show the accused to be 20½ years of age, single, and a high school graduate. He was inducted into the service on 20 May 1943 and upon completion of his training as a pilot on 8 September 1944 was commissioned a second lieutenant, Army of the United States. On 14 December 1944 he was restricted to his post for 7 days as punishment under Article of War 104 for being absent from class without authority and sleeping off the post in violation of the rules and regulations of the Pre-Flight Engineer School he was attending at Amarillo, Texas. On 19 May 1945 he pleaded guilty to and was found guilty of being disorderly in uniform in violation of Article of War 96 and sentenced to be reprimanded; to be restricted to his post for one month, and to forfeit \$50 of his pay per month for 12 months.

7. The court was legally constituted and had jurisdiction of 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 findings of guilty and only so much of the sentence as involves dismissal and legally sufficient to warrant confirmation of the sentence to dismissal. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas W. Jolly, Judge Advocate

On Leave, Judge Advocate

Robert C. Newell, Judge Advocate

SPJGH-CM 281669

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

JUL 20 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Dan C. Midgett, Jr. (O-785857), Air Corps.

2. Upon trial by general court-martial this officer, charged with breach of arrest in violation of Article of War 95, pleaded guilty to and was found guilty of the lesser included offense of breach of restriction in violation of Article of War 96. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty and only so much of the sentence as involves dismissal and legally sufficient to warrant confirmation of the sentence to dismissal. I concur in that opinion. On 19 May 1945, accused was convicted of being disorderly in uniform on 22 April 1945 and of being drunk and disorderly on 11 May 1945. He was sentenced to be reprimanded, to be restricted to the limits of his post, and to forfeit \$50 of his pay per month for 12 months. Prior to this general court-martial trial of 19 May 1945, accused had been in a status of arrest in quarters pending the trial. On the same day that he was convicted, and after the result had been announced, the commanding officer of the station where he was in arrest issued a written order to accused changing his former arrest in quarters status to one of restriction to the limits of the post. This new order was delivered to accused who acknowledged receipt of it. Nevertheless, three days later, while the post commander's restriction order was still in effect, accused deliberately breached his restriction by going to a nearby town where he became involved in an incident which resulted in the detection of his violation of the restriction order.

On 14 December 1944 accused was restricted to his post for seven days as punishment under Article of War 104 for being absent from class without authority and sleeping off the post in violation of the rules and regulations of the Pre-Flight Engineer School he was then attending at Amarillo, Texas. On 19 May 1945 he pleaded guilty to, and was found guilty of, being disorderly in uniform in violation of Article of War 96 and was sentenced to be reprimanded, to be restricted to his post for one month and to forfeit \$50 of his pay per month for 12 months.

In view of the foregoing I recommend that only so much of the sentence as involves dismissal be confirmed and carried into execution.

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



2 Incls

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Only so much of sentence as involves dismissal is confirmed.
GCMO 396, 10 Aug 1945).

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

SPJGH-CM 281684

27 JUN 1945

UNITED STATES)

FOURTH AIR FORCE

v.)

Private TOMMY L. DOWNS
(6939018), Squadron E,
463d Army Air Forces Base
Unit, Geiger Field,
Washington.)

Trial by G.C.M., convened at
Geiger Field, Washington,
12 May 1945. Dishonorable
discharge and confinement
for four (4) years. South-
western Branch, Disciplinary
Barracks.

HQ, 4th AIR FORCE

5 JUL 1945

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HOLDING by the BOARD OF REVIEW
TAPPY, GAMBRELL 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 61st Article of War.

Specification: In that Private Tommy L. Downs, Squadron E, 463rd Army Air Forces Base Unit, did, without proper leave, absent himself from his proper organization and station at Army Air Base, Geiger Field, Washington, from about 2 April 1945 to about 6 April 1945.

He pleaded not guilty to and was found guilty of the Charge and the Specification. Evidence was introduced of (a) three previous convictions by summary courts-martial for AWOL, (b) one previous conviction by a special court-martial for AWOL and (c) one previous conviction by a summary court-martial for breach of restriction. In the present case he was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for four (4) years. The reviewing authority approved the sentence, designated the Southwestern Branch, United States Disciplinary Barracks, Camp Haan, California, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record of trial shows that the court convened for the purpose of trying the accused at Geiger Field, Washington, on 12 May 1945.

At the opening of the trial the regularly appointed defense counsel stated to the court that the accused had requested him "immediately before this trial" to secure special counsel for the accused. He thereupon made a motion for a continuance "until such time as this specially requested counsel can be obtained for the accused." The entire portion of the record of trial dealing with this motion, including the ruling of the court denying the motion, is set out on page 3, as follows:

"DEFENSE: The accused requested the regularly appointed defense counsel immediately before this trial to secure special counsel for him, and the defense counsel moves that the court adjourn until such time as this specially requested counsel can be obtained for the accused.

PROSECUTION: A copy of the charges was served on the accused on 21 April 1945. It is the contention of the prosecution that the accused has been allowed sufficient time to request special defense counsel, if he so desired. The prosecution feels that the request just made by the defense counsel is unreasonable, and therefore we should proceed with the trial. Should the court desire some readings from legal authorities, I should be more than happy to give some.

PRESIDENT: Does the defense counsel desire any readings from legal authorities.

DEFENSE: Paragraph 45 of the Manual for Courts-Martial, 1928, deals with individual counsel for the accused, and it states that it is normally allowed to the accused. That is the basis for the motion which the defense counsel has just made.

PROSECUTION: The prosecution admits that it is normally allowed to the accused, however it is also normal practice for the accused, upon being served with the charges, to select his defense counsel then if the regularly appointed defense counsel is not desired, and the prosecution feels that since this accused has been served since 21 April 1945, he has had ample time to make such request.

PRESIDENT: The motion is denied on the ground that ample opportunity has been given the accused to prepare his defense and introduce special defense counsel, if he so desired. Consequently, the regularly appointed defense counsel and assistant defense counsel will serve."

4. Upon a trial by a general court-martial the accused has a statutory right to be represented by counsel of his own selection. Article of War 17 provides, in part, as follows:

"* * * The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11."

Further, the Manual for Courts-Martial, 1928, specifically provides that the regularly appointed defense counsel will inform the accused "of his rights as to counsel, and will render the accused any desired assistance in securing and in consulting counsel of his own selection" (par. 43b).

There is no showing in the instant case that the regularly appointed defense counsel ever informed the accused that the latter was entitled to be represented by counsel of his own selection. The length of time elapsing between the date charges are served upon an accused and the date of the trial - 21 days in the present case - is meaningless if the accused is unaware of his rights to special counsel. Dilatory conduct may not be attributed to an accused who has no knowledge of his rights. The case of CM 231539, Casarella, 18 B.R. 241, is not determinative of the questions here involved for in that case while in the guardhouse awaiting trial accused had been advised of his right to special counsel and free long distance telephone service had been offered to assist him in obtaining such counsel. No such facts appear in the record in the instant case.

In CM 245664, Schuman, 29 B.R. 225, 232, the Board of Review declared:

"The right to prepare for trial is fundamental. To deny this right is to deny a fair trial. Article of War. 70 provides 'In time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.' This does not mean that during war an accused may be deprived of the right to prepare his defense. It means rather that, during war, he may be tried as soon, after service of charges, as he has had a reasonable time to advise with counsel and prepare his defense. Such period will of course, vary with the facts and circumstances involved in each particular case."

To the same effect were the decisions of the Board of Review in CM 231119, Lockwood, 18 B.R. 139; and CM 236323, McClain, 22 B.R. 379.

The Supreme Court of the United States in Powell v. Alabama, 287 U.S. 45, 59, stated:

"* * * The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."

Again, in Avery v. Alabama, 308 U.S. 446, the United States Supreme Court said

"But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

Prima facie, a seasonable motion for a continuance, for the purpose of securing special counsel, must be granted. To justify a denial of such a motion there must be a showing of facts or circumstances tending to establish that the motion was not reasonably made. Here the only fact shown in opposition to the motion is the fact that the charges were served upon the accused 21 days before the date of the trial. That fact, standing alone, is not sufficient in the face of a total absence of any showing that accused was even aware, at any time prior to the date of the trial, that he had the right to select special counsel to represent him. It is to be noted, also, in this connection that the charge sheet reveals that accused was confined in the Base Guardhouse, at Geiger Field, on 6 April 1945. Presumably his confinement continued until the date of his trial. Such status would necessarily affect his ability to get in communication with and retain desired individual counsel, either in some nearby city or in his home or other distant community.

It may also be noted that there is nothing in the record to suggest that the accused or his organization was about to be transferred to any other place or station. Nor is any other fact or circumstance urged by the prosecution as a reason for shortening, in this case, what otherwise might be considered a reasonable allotment of time for the securing of special counsel and the preparation of the defense's case.

It is unnecessary to speculate upon what additional materials, pertaining either to the facts or to the law, may have been acquired for use in defending the accused had the requested continuance been granted. To so speculate would be to enter the field of conjecture. The Board of Review is of the opinion that, under the circumstances of this case, the

failure of the court to grant the requested continuance was an abuse of its discretion, which injuriously affected the substantial rights of the accused. As was said in CM 126651, Hager, "The question of a continuance is one for the sound discretion of the court. It is believed, however, that when it is apparent from the record that the court has abused its discretion, the conviction should be held illegal."

5. For the reasons indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Thomas M. Tapp, Judge Advocate

William H. Dumbrell, Judge Advocate

Robert C. Trevethan, Judge Advocate

(210)

SPJGH-CM 281684

1st Ind

JUN 27 1945

Hq ASF, JAGO, Washington 25, D. C.

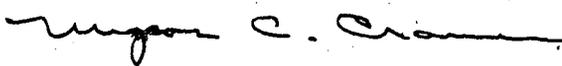
TO: Commanding General, Fourth Air Force, San Francisco, California.

1. In the case of Private Tommy L. Downs (6939018), Squadron E, 463d Army Air Forces Base Unit, Geiger Field, Washington, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient 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 50 $\frac{1}{2}$, 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, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 281684).



1 Incl
Record of trial

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.

(211)

JUN 30 1945

SPJGK - CM 281713

22 JUN 1945

UNITED STATES)

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Private ELMER SMITH (7086209),)
Company A, Second Training.)
Group, Army Service Forces)
Training Center (Ord), Miss-)
issippi Ordnance Plant, Flora,)
Mississippi.)

Trial by G.C.M., convened at
Camp Shelby, Mississippi, 28
and 29 May 1945. Dishonorable
discharge and confinement for
life. Penitentiary.

REVIEW by 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 soldier named above.

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Elmer Smith, Company A, Second Training Group, Army Service Forces Training Center (Ord), Mississippi Ordnance Plant, Flora, Mississippi, did at Mississippi Ordnance Plant, Flora, Mississippi, on or about 6 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Private Agnes A. Buresh.

Specification 2: In that Private Elmer Smith, * * *, did, at Mississippi Ordnance Plant, Flora, Mississippi, on or about 6 April 1945, wrongfully and feloniously aid and abet Private Joe Gonzales in forcibly and feloniously, against her will, having carnal knowledge of Private Agnes A. Buresh.

He pleaded not guilty to and was found guilty of the Charge and both of its Specifications. Evidence was introduced of one previous conviction by a special court-martial for absence without leave from 8 January to 8 February 1945, in violation of Article of War 61, for which he was sentenced to confinement for two months and forfeiture of \$18 of his pay per month for two months. In the instant case 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 50 $\frac{1}{2}$.

3. Summary of evidence.

a. For the prosecution.

At the time of the commission of the offenses with which accused is charged and at the time of trial he was a private in the United States Army (R. 8, Pros. Ex. J). On the evening of 6 April 1945, Private Agnes A. Buresh, Women's Army Corps, 31 years of age, was at the library of the Mississippi Ordnance Plant, Flora, Mississippi, where she was stationed (R. 8,9,10). The library was located in a room "inside of the Service Club" and when the library closed at 10:00 p.m. Private Buresh went across to the dance floor of the Service Club where she met the accused, Private Joe Gonzales, and Private Anthony J. Wincelowicz (R. 10, 11). Private Buresh had known the accused, Gonzales and Wincelowicz since about October, 1944, but did not have an appointment to meet any of them on this particular evening (R. 9,10). Wincelowicz told Private Buresh that they (Wincelowicz and accused) had some beer outside of the Service Club at their car, and asked Private Buresh to go out and have a drink (R. 10). At first Private Buresh refused, but upon insistence went outside and drank a bottle of beer with them (R. 10,11). All of the parties then returned to the Service Club where Private Buresh introduced accused to a friend of hers, Private Geraldine Devine (R. 11,77). Private Buresh danced with Gonzales (R. 11), and after the dance was over at 11:00 p.m. the accused, Gonzales and Wincelowicz offered to take Private Buresh to her barracks which was a distance of about five blocks from the Service Club (R. 12). She accepted the offer and got into the car with accused and the other two men, sitting in the front seat between accused, who was driving, and Wincelowicz. Gonzales occupied the rear seat (R. 12). After leaving the Service Club, the accused, instead of driving to Private Buresh's barracks, drove to the "NCO" Club, where one of the men got out and obtained some more beer (R. 12,13). Private Buresh drank part of a bottle of beer there and was telling the accused and the others "over and over" to take her home as she would be late for bed check (R. 13). Despite Private Buresh's entreaties to take her home, the accused drove the car to the motor pool, where it was found that some men were working, and then across a field to the edge of a wooded place (R. 14, 15). Accused and Wincelowicz then got out of the front seat, and Private Buresh jumped out of the car and "started running toward the WAC Detachment" (R. 16). Accused and Gonzales caught Private Buresh and accused stated to her, "If you know what's good for you, you had better get back in the car" (R. 16). Private Buresh was very "frightened," and the two men put her in the back seat of the car (R. 17). After she was back in the car, one of the men started the car and drove down a bank into some mud, where the automobile "got stuck" (R. 17). Gonzales left to walk back up to the motor pool to get

a wrecker (R. 17). Accused then "pulled over toward me and I jumped out of the car. Before I could start running they both grabbed me and forced me back into the car and laid me down with my head to the left side" (R. 18). Private Buresh started "screaming" and Wincelowicz hit her on the left jaw. Accused and Wincelowicz were holding her hands and feet (R. 18). Accused then cut her "panties" out from between her legs (R. 18). She continued to scream and each time she screamed Wincelowicz hit her in the face (R. 18). Wincelowicz then stuffed her mouth with rags and "gagged" her with a handkerchief (R. 18,19). While Wincelowicz continued to hold her accused "started putting his private part into my womb" (R. 19). About that time, Gonzales came back and said that somebody was coming (R. 19). "Both of the boys jumped out of the car and I quickly jumped up and got out and ran" (R. 19). While Private Buresh was running Gonzales caught her and pulled her over to some trees on the left side of the field. The other two boys were there and accused threw her to the ground and held her (R. 20). While she was being held on the ground by accused and Wincelowicz, Gonzales got on top of her but did not effect a penetration (R. 21). Private Buresh testified, "I was struggling and praying and every time I let out a scream, they hit me over the face and held their hands over my mouth, and had me pinned to the ground and held my arms and legs" (R. 21). As soon as Gonzales got off of her the accused got on top of her, Gonzales and Wincelowicz holding her at the time (R. 22). Accused effected a penetration (R. 22), and as soon as accused got off, Wincelowicz then got on top of her (R. 22). Wincelowicz did not penetrate her (R. 23). After Wincelowicz got off of her Gonzales got on her again. "The other two boys had gone," but Private Buresh testified, "I was terribly tired and weak" and could not get Gonzales off of her (R. 23). Gonzales at this time penetrated her and had intercourse with her (R. 23). Buresh then went back to her barracks (R. 24), and noted that her mouth and jaw were bruised and bloody; a man's handkerchief was tied around her neck; her skirt and blouse were muddy; her slip and panties were bloody, and the strap on her panties that went between her legs was cut clear across (R. 26,27). She was bleeding from her vagina at the time (R. 28). Pictures of Private Buresh taken the next day were introduced, showing the bruises and scratches (R. 70, Ex. E; R. 71, Exs. F, and G; R. 72, Exs. H and I). The clothes that she was wearing at the time of this offense were introduced as follows: Blouse (R. 99, Ex. B), skirt (R. 99, Ex. C), and slip (R. 99, Ex. D). The next morning Private Buresh told two of her friends about this occurrence (R. 33, 78,79) and the matter was reported to her commanding officer (R. 33,67,79). Private Buresh was physically examined by Captain John R. West, Chief of Surgical Service at Flora, Mississippi, on 7 April 1945, who found the following abnormalities:

"*** abrasions and contusions of her lower lip, right side of face and chin, left upper arm, right hip and right thigh. She also had scratch marks on both shoulders, both legs, knees and thighs. She had contusions and abrasions of the external

genitals, abrasions and lacerations, recent, of the hymenal ring." (R. 81,82).

Witness also testified, "I made note that the vaginal canal was virginal in type and the vaginal contents were negative for spermatozoa" (R. 82). Lieutenant Charles R. Ireland, Laboratory Officer at Flora, Mississippi, testified that there was blood on Private Buresh's slip (R. 94, Ex. D), and that there was spermatozoa on her skirt (R. 95, Ex. B). Accused made a statement to the investigating officer (R. 102, Ex. J), the substance of which is substantially the same as his testimony on the stand summarized below. A map was introduced showing the location of all of the buildings and terrain testified to by the witnesses (R. 6, Ex. A).

b. For the defense.

Sergeant Bernard J. Finklestein testified substantially as follows: On the evening of Friday, 6 April 1945, he was shop foreman of the night maintenance group at Mississippi Ordnance Plant (R. 175), and was on duty that night at the motor pool (R. 177). At approximately 12:30 a.m. Saturday he found an enlisted man starting a wrecker in the motor pool (R. 178). The witness would not let him have the wrecker because he did not have a trip ticket, but told the man that he (Sgt. Finklestein) would take the wrecker and go out and tow in the vehicle that was stuck (R. 178). While the sergeant was "warming up" the wrecker, the enlisted man left, going across the field (R. 178,179). The sergeant took the wrecker and drove around the roads surrounding the field, looking for the vehicle that was stuck. Not finding it, he drove out on the field as far as the bandstand and shined his spotlight around the field. He then returned to the motor pool (R. 179). Just as he returned to the motor pool, the accused was taking out the other wrecker (R. 179). Witness asked accused if he needed any help and accused said he did not (R. 188). The sergeant testified he spent about forty-five minutes looking for the other vehicle (R. 184), and it was about 1:30 a.m. when he returned to the motor pool (R. 185).

Accused elected to testify in his own behalf. His testimony under oath was substantially as follows: He is 23 years of age and works as a dispatcher at the motor pool, Mississippi Ordnance Plant (R. 112,113). On the night of 6 April 1945, after finishing his work, he took an Army staff car and drove up to the service club (R. 113,114). There he saw Private Buresh, whom he had known about eight months (R. 113,114). At the service club with him were Private Bolt, Private Gonzales and Private Wincelowicz (R. 114). He asked Private Buresh to have a beer with them and she accepted (R. 114). After drinking the beer he and Gonzales took Private Bolt home, leaving Private Buresh and Wincelowicz at the service club (R. 115). When he and Gonzales returned, Private Buresh and Wincelowicz were still outside the service club where he had left them (R. 115). The four of them then went into the service club where Gonzales danced with Private Buresh (R. 116). Accused was sitting on a couch watching a game of pool and Private Buresh

came over to him and said, "Let's go" (R. 117). He had not said anything to her about taking her home at the time. The four of them then walked out to the staff car and he suggested going to the "NCO" Club and getting some more beer (R. 117). At first Private Buresh refused, but they later drove over to the "NCO" Club where Wincelowicz gave him (accused) \$2.00 to go in and get some beer (R. 119). He and Gonzales went into the club and obtained the beer while Wincelowicz and Private Buresh remained outside in the car (R. 119). When they returned, all four of them drank some more beer (R. 119), and were talking about "sex" and "Buresh's brother's invention" (R. 120). During this time he (accused) kissed Private Buresh (R. 121), and Wincelowicz had his arm around her shoulders (R. 121). Then he drove the car down to the motor pool to drink the rest of the beer, but, observing the men working in the shop, they drove on out into the field next to the motor pool (R. 122) where the car got stuck in the mud (R. 124). All four of them got out of the car and looked at it and Gonzales left to get the wrecker (R. 126). He and Private Buresh and Wincelowicz then got into the back seat of the car (R. 127). Neither he nor Wincelowicz forced her to get into the car (R. 127). While they were all three sitting in the back seat he "put his finger in Buresh's vagina and moved it back and forth" (R. 127,128). He did not notice any blood on his finger (R. 128). He did not strike Private Buresh and did not see anyone else strike her (R. 129). Gonzales came back and said there was a car coming. He, Wincelowicz and Private Buresh got out of the car and Private Buresh fell. Gonzales was trying to hold her up, but lost his balance and fell on top of her (R. 130). All four of them then walked over to a large tree and stayed there until the car lights had passed (R. 130). He then left the other three and walked up to the motor pool to get a wrecker (R. 130). He was gone about twenty minutes and when he returned Wincelowicz and Gonzales were still there but Private Buresh had gone (R. 131). He did not have intercourse with Private Buresh and did not see Gonzales or Wincelowicz attempt any familiarity with her (R. 130,131). He did not cut her "panties," because he did not have a knife and she did not have on any "panties" (R. 132). He has served twenty-two months in the South Pacific and participated in the Guadalcanal campaign (R. 132,133).

4. The Manual for Courts-Martial, 1928, paragraph 148b, provides:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

"Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent ***."

*

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"Proof. - (a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent."

Applying these principles to the facts in the instant case, it clearly appears that the accused committed rape upon Private Buresh at the time and place averred in Specification 1 of the Charge. Private Buresh's statement of what occurred is convincing and is corroborated by her physical appearance after her harrowing experience, the condition of her genitalia, and the presence of blood on the slip and spermatozoa on the skirt she wore the night that she was criminally assaulted. Accused's preposterous statement that while he, another enlisted man, and Private Buresh were calmly sitting in the car and conversing on casual topics he inserted his finger into Private Buresh's vagina and detected no blood on his finger indicates to the satisfaction of the Board the slight degree of credence to which accused's testimony is entitled. With full realization that an accusation of rape is one "easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent" (MCM, 1928, p. 165), the Board is of the opinion that the record of trial compels the conclusion that accused forcibly and feloniously against her will had carnal knowledge of Private Buresh at the time and place described.

5. The Board of Review is of the opinion that the record of trial supports the finding that accused aided and abetted Private Joe Gonzales in the latter's commission of rape upon Private Buresh. Private Gonzales is shown to have been the first of the three enlisted men who attempted to have intercourse with Private Buresh against her will. Failing in his efforts, he was succeeded by accused, who, after accomplishing his purpose by force, with the assistance of Privates Gonzales and Wincelowiez, left her prostrate on the ground so that Private Wincelowiez might take his place. Private Wincelowiez lay on Private Buresh, but did not penetrate her. After a few minutes he got up, and immediately Private Gonzales got on her for the second time, and this time succeeded in having intercourse with her by force and against her will. She had reached a state of exhaustion and could not get her assailant off of her. The record, therefore, clearly justifies the conclusion that Private Gonzales actually raped Private Buresh. The second element of the offense which requires consideration is whether or not accused aided and abetted Gonzales in the perpetration of this nefarious crime. The testimony convincingly shows that for an hour or more accused and his two companions acted in concert in their reprehensible conduct towards Private Buresh. Accused stands out as the leader in the deliberate attempt to subject Private Buresh to the lustful desires of all three. It was he who drove the car at all times and it was he who refused to heed Private Buresh's importunities that she be taken to her barracks. When the car clogged down in the field it was accused who sent Private Gonzales to procure a wrecker. When Private Gonzales returned and

warned the group of the approach of a car, all sought to conceal themselves. Accused, although present, made no effort to interfere when Private Gonzales made his first attempt to rape Private Buresh, and followed up this brutal assault by himself having intercourse with her against her will, an act which was accomplished while the other two men held her down. While there is no proof that accused was actually at the immediate scene when Private Gonzales succeeded in accomplishing penetration of Private Buresh, the short period of time which elapsed between the commission of the rape by accused and of the rape by Private Gonzales justified the court in finding that the accused was nearby, ready to warn his fellow conspirators of the approach of any third person, and by his proximity encouraging the latter to commit the crime. It is clear that Private Buresh had been weakened by the repeated attacks on her, and that accused had contributed in no small degree to her condition. The Board, therefore, concludes that the record of trial fully supports the conclusion that accused aided and abetted Private Gonzales in committing rape upon Private Buresh, by conspiring with him and Private Wincelwicz to convey Private Buresh to a place where they might carry out their unlawful designs, by helping to render their victim incapable of resistance, and by remaining in sufficiently close proximity to be able to warn the perpetrator of the crime and thereby to encourage him in its commission.

"An aider or abettor is one who advises, counsels, procures or encourages another to commit a crime, whether personally present or not at the time and place of commission of the offense." (Flickinger v. United States, 150 Fed. 1,9.)

While accused could have been charged as a principal, he was not improperly charged and was properly found guilty as an aider and abettor (CM NATO 648).

6. The Charge Sheet shows that accused is 23 years of age. Without prior service he was inducted into the Army of the United States on 21 June 1940 at Jackson, Mississippi.

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 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by confinement for more than one year by Title 22, paragraph 2801, of the District of Columbia Code.

Wm. G. Jones, Judge Advocate.

Wm. Leavy, Judge Advocate.

Wm. M. Meyer Judge Advocate.



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

JUN 29 1945

22 JUN 1945

SPJGK-CM 281766

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

FOURTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Private JOE GONZALES)
(36697009), Company B,)
Fourth Training Group, Army)
Service Forces Training Center)
(Ordnance) Mississippi Ordnance)
Plant, Flora, Mississippi.)

Trial by G.C.M., convened at Camp
Shelby, Mississippi, 31 May and 1
June 1945. Dishonorable discharge
and confinement for life. Peni-
tentiary.

REVIEW by 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 soldier named above.

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that, Private Joe Gonzales, Company B, Fourth Training Group, Army Service Forces Training Center (Ord), Mississippi Ordnance Plant, Flora, Mississippi; did, at Mississippi Ordnance Plant, Flora, Mississippi, on or about 6 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Private Agnes A. Buresh.

Specification 2: In that Private Joe Gonzales, Company B, Fourth Training Group, Army Service Forces Training Center (Ordnance), Mississippi Ordnance Plant, Flora, Mississippi, did, at Mississippi Ordnance Plant, Flora, Mississippi, on or about 6 April 1945, wrongfully and feloniously aid and abet Private Elmer Smith in forcibly and feloniously, against her will, having carnal knowledge of Private Agnes A. Buresh.

He pleaded not guilty to and was found guilty of the Charge and both of its Specifications. Evidence was introduced of two previous convictions for absences without leave in violation of Article of War 61, one by a summary court for an unauthorized absence from 14 September to 17 September 1944, for which he was sentenced to restriction to his post for 30 days and forfeiture of \$30 of his pay for one month, and the other by a special court-martial for unauthorized absence from 11 December to 25 December 1944, for which he was sentenced to confinement for four months and forfeiture of \$18 of his pay per month for four months. In the instant case 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 50 $\frac{1}{2}$.

3. Summary of evidence.

a. For the prosecution.

At the time of the commission of the offenses with which accused is charged and at the time of trial he was a private in the United States Army (R. 7, 96, Pros. Exs. K and L). On the evening of 6 April 1945, Private Agnes A. Buresh, Women's Army Corps, 31 years of age, was at the library of the Mississippi Ordnance Plant, Flora, Mississippi, where she was stationed (R. 7, 9). The library was located in a room "inside of the Service Club", and when the library closed at 10:00 p.m., Private Buresh went across to the dance floor in the Service Club where she met Private Elmer Smith and Private Anthony J. Wincelowicz (R. 9, 10). She was invited out to the car of Smith and Wincelowicz to have some beer, and when Private Buresh went out to the car, the accused was there (R. 10). Private Buresh had known the accused, Smith and Wincelowicz for about eight months, but did not have an appointment to meet any of them on this particular evening (R. 8-10). After drinking "almost one bottle" of beer Private Buresh danced one dance with the accused (R. 10, 11). After the dance was over at 11:00 p.m., one of the men (accused, Smith or Wincelowicz), offered to take Private Buresh to her barracks (R. 11). Private Buresh accepted the ride and got in the front seat of the car with Smith (R. 11). Accused was sitting in the back seat (R. 12). Smith turned the car around and instead of going to the "WAC" detachment went in the opposite direction (R. 12). Private Buresh wanted to go to her barracks, but the three men just laughed it off and said they were going to the "NCO" Club to get more beer (R. 12). Accused went into the "NCO" Club for more beer (R. 12). While the car was parked at the "NCO" Club Private Buresh "was telling" the three men to take her to her barracks, "that [she] would be late for bed check" (R. 13). Despite Private Buresh's entreaties to take her home, Smith drove the car to the motor pool and parked there about 10 or 15 minutes (R. 14). Private Buresh continued to ask them to take her home, and accused said, "Boys, you had better take her home" (R. 14). Smith then drove the car from the motor pool across an adjoining field to a wooded place (R. 14, 15). When the car stopped Smith and Wincelowicz got out and some beer spilled on the front seat and Private Buresh "jumped out of the car and started running back to the barracks" (R. 16). Two of the men, whom she believed to be accused and Smith, caught her and stated, "if you know what is good for you, get back in the car" (R. 16). She "struggled to get away" but the two men forced her into the back seat of the car (R. 17). She testified, "just after I was seated in the car, one of the boys started the car and drove down a

bank into a puddle of mud" (R. 17). The car became "stuck" and accused was told to go to the motor pool and get the wrecker (R. 18). When accused came back Smith and Wincelowicz were "assaulting" her "in the worst way", and accused said that "somebody was coming" (R. 18, 19). Smith and Wincelowicz "jumped out of the car", and Private Buresh, "jumped out of the car and started running towards [her] barracks" (R. 18, 19). While she was running accused caught her around the waist and "pulled [her] to the left side of the field" where there were bushes and shrubbery (R. 19, 50). The other two boys were there and Smith caught her and threw her to the ground (R. 19). Private Buresh was held on the ground by Smith and Wincelowicz and "accused got on top of her". She "screamed as loud as [she] could. * * * Every time [she] continued to scream somebody hit [her] over the face" (R. 20). Accused did not effect a penetration at this time, but as soon as accused got off of her, Smith got on and he did effect a penetration (R. 21). Accused and Wincelowicz were holding her at this time (R. 21, 22). As soon as Smith got off Wincelowicz got on her but did not penetrate her (R. 22, 23). The accused then got back on Private Buresh and penetrated her (R. 24). Private Buresh testified that Smith and Wincelowicz were not holding her when accused actually penetrated her, but that she was terribly tired, and tried to get up but did not have the strength to do anything (R. 24). She hit accused on his "organ" but he did not stop (R. 24). Accused "pleaded with [her] not to turn him in," and she was so anxious to get away that she told him she would not (R. 25). Private Buresh then went back to her barracks, and noted that her mouth was bloody and swollen and there was dry blood all over her tongue (R. 26, 27). Her shoes, blouse and skirt were muddy; her slip and panties were bloody, and she was bleeding from her womb at the time (R. 26-28). Pictures of Private Buresh, taken the next day, were introduced, showing the bruises and scratches (R. 70, Exs. E and F; R. 71, Ex. G; R. 72, Ex. H). The clothes that she was wearing were introduced as follows: Blouse (R. 104, Ex. B); skirt (R. 104, Ex. C), and slip (R. 105, Ex. D). The next morning Private Buresh told two of her friends about this occurrence (R. 63-66), and the matter was reported to her commanding officer (R. 66, 67). She was physically examined by Captain John R. West on 7 April 1945, who found the following abnormalities: "abrasions and contusions of her lower lip, right side of face and chin, left upper arm, right hip and right thigh. There were scratch marks on both shoulders, both legs, both knees and both thighs. Examination of the genitalia was that there were contusions and abrasions of the external genitals, abrasions and lacerations, recent, of the hymenal ring. The vaginal canal was virginal in type and the examination made of the vaginal contents was negative for the presence of spermatozoa" (R. 83). Lieutenant Charles R. Ireland, Laboratory Officer at Flora, Mississippi, testified that there was blood on Buresh's "slip" (R. 92) and spermatozoa on her skirt (R. 94). Accused's pants, that he wore the night of the alleged offenses, were introduced (R. 79, 80, 99; R. 100, Ex. J), and Lieutenant Ireland testified that there was blood on these trousers (R. 93). Accused made two statements to the investigating officer, which statements were very similar to

Private Buresh's testimony, with the exception of his part in the offenses. In the statement he stated that Smith and Wincelowicz had intercourse with Private Buresh but that he did not "molest" her (R. 98, Ex. K; R. 102, Ex. L). A map was introduced showing the location of all of the buildings and terrain testified to by the witnesses (R. 6, Ex. A).

b. For the defense.

Accused elected to testify in his own behalf. His testimony as to what occurred prior to the arrival of the group in the "field" adjacent to the motor pool was substantially the same as that of Private Buresh. His account of what occurred thereafter differs materially from hers. He testified that when the car was driven out into the field it became "stuck" and all three of the boys (accused, Wincelowicz and Smith) got out. Private Buresh remained seated in the car and did not get out and run as she testified (R. 114, 115). He went for the wrecker and left Wincelowicz, Smith and Private Buresh at the car (R. 115, 116). When he got to the motor pool Sergeant Finklestein would not let him bring out a wrecker, but stated that he (Sgt. Finklestein) would bring the wrecker out (R. 116). Accused told Sergeant Finklestein where the car was and told him that he would wait there for him (R. 116). When accused got back to the car Private Buresh, Smith and Wincelowicz were in the back seat (R. 116). He told them there was a car coming and they all got out. Private Buresh fell and accused was trying to hold her up, but lost his balance and fell on top of her (R. 117). All of the parties then "walked" over to a big tree and sat down on the ground (R. 117). Smith got on top of Private Buresh and when he got through, said, "it is good" (R. 117). Wincelowicz then got on top of her. When Wincelowicz got up Private Buresh also got up and asked accused for her "book" (R. 118). All during this time Private Buresh did not say anything, except to tell Wincelowicz to "get off of her because he was too heavy" (R. 118). Buresh then asked accused to take her home, and he went over to tell Wincelowicz he was going to take her home. When he came back she was gone. At no time did he have intercourse with Private Buresh and did not hold her while Smith had intercourse with her (R. 119). Accused repudiated the statements contained in "Exhibits K and L", and denied that the pants, "Exhibit J", were his (R. 120-123). However, on cross-examination he admitted the pants were his (R. 134).

On the evening of 6 April 1945 Sergeant Bernard J. Finklestein was on duty as foreman of the night maintenance group at the motor pool at the Mississippi Ordnance Plant (R. 159). At approximately 12:30 o'clock in the morning he found an enlisted man starting a wrecker. This man told him that there was a vehicle stuck in the field and that Private Elmer Smith had sent him for a wrecker (R. 160). Sergeant Finklestein would not permit the man to take the wrecker because he did not have a trip ticket, but told him that he (Sgt. Finklestein) would go out with him and help bring in the vehicle (R. 160). The enlisted man pointed out in a general way where the car was stuck and then "took off across the field". Witness

never saw him again (R. 160, 161). Sergeant Finklestein took the wrecker and drove around the roads surrounding the field, looking for the vehicle that was stuck. Not finding it he drove out on the field as far as the bandstand and shined his spotlight around the field. He then returned to the pool (R. 161), and just as he arrived there he saw Private Elmer Smith taking out the other wrecker (R. 162). About an hour elapsed from the time Sergeant Finklestein first saw the first enlisted man in the wrecker to the time he returned to the pool (R. 162).

4. The Manual for Courts-Martial, 1928, paragraph 148b, provides:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

"Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Verbal protestations and a pretense of resistance are not sufficient to show want of consent **."

* * * *

"Proof. - (a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent."

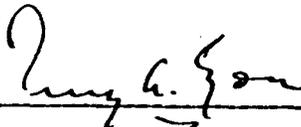
Applying these principles to the facts in the instant case, it clearly appears that the accused committed rape upon Private Buresh at the time and place averred in Specification 1 of the Charge. Private Buresh's statement of what occurred is convincing and is corroborated by her physical appearance after her harrowing experience, the condition of her genitalia, and the presence of blood on the pants worn by accused and of spermatozoa on the skirt and blood on the slip worn by Private Buresh on the night that she was criminally assaulted. With full realization that an accusation of rape is one "easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent" (MCM, 1928, p. 165), the Board is of the opinion that the record of trial compels the conclusion that accused forcibly and feloniously against her will had carnal knowledge of Private Buresh at the time and place described.

5. The record equally establishes that accused aided and abetted Private Elmer Smith in the latter's commission of rape upon Private Buresh. That Private Smith was guilty of forcibly and feloniously having carnal knowledge of Private Buresh against her will admits of no doubt. Her account of this brutal assault upon her by Private Smith is fully corroborated by accused's pre-trial statements and his testimony as a witness in his own behalf. The only substantial controverted point

between them in so far as the details of her rape by Private Smith is concerned is the part that accused played. Accused maintains that he was a silent and passive bystander. Private Buresh in unequivocal terms denounces him as an active aider and abettor, who, after his first unlawful attempt to have intercourse with her failed, helped to hold her down while Private Smith accomplished his nefarious purpose. The revolting story unfolded by the testimony discloses that for an hour or more accused, Private Smith and Private Wincelowicz had been constantly acting in concert in their efforts to force their improper attentions upon Private Buresh, and, in the opinion of the Board of Review, except for accused's denials, all details fully support the testimony given by her. Not only was the accused at the scene of the crime, but actually aided and abetted in its commission. While, therefore, he could have been charged as a principal, he was not improperly charged and was properly found guilty as an aider and abettor (CM NATO 643).

6. The Charge Sheets shows that accused is 22 years of age. Without prior service he was inducted into the Army of the United States on 6 October 1943 at Chicago, Illinois.

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 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by confinement for more than one year by Title 22, paragraph 2801, of the District of Columbia Code.


_____, Judge Advocate

On Leave
_____, Judge Advocate


_____, Judge Advocate

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

(225)

SPJGK - CM 281848

2 JUL 1945

UNITED STATES)

SECOND SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Captain BENHAM M. INGERSOLL)
(O-481603), Army of the)
United States.)

Trial by G.C.M., convened at Fort
Jay, New York, 23-24 May 1945.
Dismissal.

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 Specifications, as amended prior to arraignment:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Benham M. Ingersoll, AUS, attached unassigned 1201st SCSU, Station Complement, Fort Jay, New York, (formerly Instructor, United States Military Academy, West Point, New York) was, on or about 2 January 1945, drunk and disorderly in his quarters, Apartment 114-12, North Apartments, United States Military Academy, West Point, New York.

Specification 2: In that Captain Benham M. Ingersoll, AUS, * * *, did, on or about 2 January 1945, at Apartment 114-12, North Apartments, United States Military Academy, West Point, New York, wilfully, wrongfully and unlawfully damage and deface Government property, to wit, the ceiling, walls and floor of said apartment and a dresser of some value, property of the United States.

Specification 3: In that Captain Benham M. Ingersoll, AUS, * * *, did, on or about 2 January 1945 at United States Military Academy, West Point, New York, use the following threatening and insulting language toward his superior officer, Major W. A. Hunt, Jr., CMP, to wit, "Get your skulking strongarms of the law to hell out of here," and, "Anyone who wants me to wear those pajamas can stick them up his ass, and you can include that in your official report if you like, Major," or words to that effect.

He pleaded not guilty to and was found guilty of the Charge and all of its

Specifications, except in Specification 2 the words "of some value," substituting therefor the words "to the value of \$54.80," and except in Specification 3 the word "threatening," substituting therefor the word "disrespectful." 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 3 of the Charge as involved "a finding that accused, at the time and place alleged, used the following insulting language toward his superior officer, Major W. A. Hunt, Jr., C.M.P., to wit: 'Anyone who wants me to wear those pajamas can stick them up his ass, and you can include that in your official report, if you like, Major', or words to that effect"; approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48.

3. Summary of evidence.

a. For the prosecution.

At the time of the commission of the offenses with which accused is charged and at the time of the trial the accused was a captain in the Army of the United States (R. 42). On 2 January 1945 accused was serving as an instructor in mathematics at the United States Military Academy at West Point, New York, where he occupied Government quarters in a building designated as "North Apartments" (R. 15). His family, which consisted of his wife and two children, resided there with him. The older of the two children, a boy about two years of age, was the subject of a "good deal" of the frequent quarrels that took place between accused and his wife (R. 15,16,21,22). Major and Mrs. Harry L. Wilson, Jr., occupied the apartment directly over that of accused, and Captain and Mrs. Tellington that across from the Wilson apartment (R. 15). Between 2 and 3 p.m. on 2 January 1945 Major Wilson had heard sounds and evidences of a quarrel between accused and his wife in their apartment (R. 21). At about 9 o'clock that evening, while Major and Mrs. Wilson were visiting Captain and Mrs. Tellington in the latter's apartment, a loud crash was heard. Upon running to the top of the stairs, Major Wilson saw Mrs. Ingersoll, in a somewhat hysterical condition, ascending the stairs. She was yelling "help" or words to that effect (R. 15,41). At that time accused was standing in the doorway of his apartment (R. 16). Mrs. Ingersoll expressed fear for the safety of her children, and they were taken by Mrs. Wilson and Captain Tellington to the latter's apartment. Mrs. Ingersoll accompanied them. About twenty or thirty minutes later, loud noises, including the sound of breaking glass, were heard in accused's apartment (R. 18). As a result of a conference between the Wilsons and the Tellingtons, Major Drewry, a psychiatrist at the Station Hospital, was summoned and came to the Tellington apartment about ten minutes later. At the time that Mrs. Ingersoll first called for help, Major Wilson spoke with accused, who seemed to be sober and rational but resentful of the fact that his wife had called in their neighbors (R. 25,40). He did not appear to Major Wilson to be drunk when he left his apartment later that evening in the company of Major Hunt. Major Wilson was in accused's apartment twice that evening, first when the children were taken to Captain Tellington's apartment and later when he went for a crib for one of the

children around midnight. The appearance of the apartment had changed between the two visits. A part of the plaster on the ceiling in the hallway had been broken, there were black marks on the walls and ceilings, and the apartment was in the disorderly condition shown in the pictures offered as Prosecution's Exhibits 1 to 8 (R. 8-12,16,17,18).

At about 11 o'clock that evening Lieutenant Colonel Alexander M. Willing, Post Officer of the Day, received a call from the Military Police concerning a disturbance in accused's apartment (R. 42). He proceeded to the apartment building and found several enlisted members of the Military Police outside the building. Upon entering accused's apartment he found books and clothing strewn about, some panes of glass in the entrance door broken, and some of the furniture damaged (R. 42,43). The photographs, previously described, properly depicted the condition of the apartment (R. 43). Accused was standing but was "swaying on his feet" (R. 47). Colonel Willing advised accused that the disturbance would have to cease (R. 44) and would not permit accused to make any statement, as he considered that his sole mission was to stop the disturbance (R. 44). Accused appeared to be in a state of great mental excitement, and, based upon accused's insistence on talking about his personal affairs, Colonel Willing was of the opinion that he was not in full possession of his faculties (R. 45,48,49,52). While his diction was not clear and his voice was "rather thick," he spoke in a "rather low," respectful tone and was intelligible (R. 44,48,52). While he was unsteady on his feet he did not require anything to lean on for physical support (R. 44,53). According to Colonel Willing's opinion, although accused's "actions were not normal" "his mental excitement and his actions were not of the kind that one would ordinarily associate with a man who is drunk" (R. 48). Colonel Willing did not detect the odor of liquor on accused's breath and could not express an opinion as to whether he was drunk or sober (R. 44,45,48). Colonel Willing also spoke to Mrs. Ingersoll, and found her very much upset, excited and nervous (R. 49,55).

Major William A. Hunt, Jr., Provost Marshal, West Point, New York, proceeded to accused's apartment after receiving a radio call at about 2300, 2 January 1945, while driving in his car about ten miles from the apartment (R. 60,61,68). Upon entering the apartment he left an enlisted Military Police at the door. Accused was in the hallway of the apartment, in his shorts, on a trunk or overturned piece of furniture, attempting to get the operator on the telephone (R. 61,62,69). The photographs offered in evidence properly represent the condition of the apartment at the time (R. 62,63,76). When Major Hunt asked accused what the trouble was, accused replied that he had been "having a marvelous time throwing those things around here" and "indicated the whole floor full of debris that had been upset and thrown around" (R. 62,79). During the half hour that Major Hunt was in the apartment, accused at times continued to throw articles around (R. 79). Some but not all of the furniture in the apartment was Government property (R. 82). In Major Hunt's opinion accused was drunk at the time (R. 66).

Accused started to dress when Major Hunt requested him to do so in order that he might accompany Major Hunt to the hospital. Accused then protested that there was nothing wrong with him and no reason why he should go to the hospital, but finally completed dressing upon Major Hunt's insistence. While accused was dressing an enlisted military policeman entered the apartment, whereupon accused exclaimed to Major Hunt, "I wish you would get these damned minions of the law to hell out of here." Major Hunt, who had not called for the enlisted man, directed him to leave (R. 63,64). Major Hunt and accused, accompanied by Major Drewry, then left for the Station Hospital, accused taking with him a bottle of whiskey which he insisted he had to have and which he later surrendered without resistance to a medical officer at the hospital when requested to do so (R. 63,64,65,77). Accused objected to putting on the pajamas that were given to him by an interne at the hospital, and when, after the departure of the interne, Major Hunt insisted that he should put them on, declared in a tone like that of "a man completely indifferent or trying to be a big shot," that "If I or persons who wanted him to put on those pajamas didn't like it, we could damn well ram them up our fanny." Accused then turned to Major Hunt and added, "Furthermore, you can include ~~that~~ in your official report" (R. 64,65,74). During the fifteen or twenty minute conversation that accused and Major Hunt had at the apartment, accused spoke in a loud tone but did not shout. Among other statements that he made to Major Hunt was one to the effect "that he had been drinking too much" (R. 67). While at the hospital accused asked for permission to telephone his wife in order to advise her of his whereabouts and wanted to notify the head of the mathematics department that he would not be in for work the following morning (R. 75).

Major Patrick H. Drewry, psychiatrist at the Station Hospital, West Point, who was Out-Patient Officer of the Day on the evening of 2 January 1945, in response to a telephone call, proceeded first to the apartment of Captain Tellington and then to that of accused where he found Major Hunt and accused together (R. 84,85). With regard to accused's condition, Major Drewry testified:

"He was unsteady on his feet. In attempting to put his trousers on, he finally had to brace himself against the wall. His speech was thick. His eyes were bloodshot. His speech was sarcastic. That is, in summary, the way he appeared" (R. 86).

While no blood test was made or ordered, Major Drewry diagnosed accused's condition upon admission to the Station Hospital as that of "acute alcoholism" (R. 86). At that time accused's appearance and "behavior" were described by Major Drewry as follows:

"Bloodshot eyes, staggering gait, thick speech, insulting, sarcastic, and had a strong odor of alcohol on his breath. *** The note I have here is that he was a slender, well-developed man of 32. *** Upon admission he was unquestionably intoxicated" (R. 88).

In the last paragraph of a report to the Superintendent of the United States Military Academy on 3 January 1945, Major Drewry made the following diagnosis:

"The tentative diagnosis is acute alcoholism. There is a possibility that this officer may be suffering from a mental illness, and further psychiatric observation will be necessary before a final and complete diagnosis can be made" (R. 89).

Major Drewry's original view that accused might possibly be suffering from a mental illness was prompted primarily by his behavior on the night of 2 January 1945, and partly by statements made by accused's wife, who was hysterical that night and made statements to Major Drewry that were later learned to be not entirely correct (R. 90,91). A special wardman was kept at accused's door in the hospital because he was under observation as a psychiatric patient (R. 99). This procedure is not followed when a patient is admitted solely for drunkenness (R. 99). After observing accused for four days, Major Drewry concluded that accused was not a psychiatric case, and on 6 January made the following diagnosis:

"The diagnosis was first, the admission diagnosis which had not been changed, acute alcoholism. The second diagnosis was constitutional psychopathic state, with emotional instability and probably paranoiac personality" (R. 101).

According to Major Drewry's views, an individual with a constitutional psychopathic state is not normal but is not insane; can distinguish between right and wrong; and is considered legally responsible for his acts (R. 102, 103). On the night that Major Drewry saw accused at his apartment, accused spoke in a low tone and was rational but sarcastic (R. 91). Accused's sarcasm played no part in the conclusion reached by Major Drewry that accused was suffering from alcoholism (R. 91), and continued while accused was in hospital. Accused and Major Drewry "didn't get along very well" (R. 91,92).

Major John G. Ross was the Medical Officer of the Day at the Station Hospital, West Point, when accused was brought there at about 11:45 p.m. on 2 January 1945 by Majors Hunt and Drewry (R. 105). Major Ross examined the accused, whose eyes were bloodshot and who "had a staggering gait and a thick speech" (R. 105). Major Ross did not "believe" that accused was sober and did "think" that he was drunk (R. 105) and "under the influence of liquor" (R. 108). Accused had "a strong odor of alcohol on his breath and he had the typical appearance of being under the influence of liquor, incoordination of movements" (R. 109). His actions were not those of a man under the influence of drugs (R. 109). While he obeyed and seemed to understand Major Ross's instructions, his reaction was not that of a normal man and his voice was "rather antagonistic" (R. 108). Major Ross concurred in Major Drewry's diagnosis of "acute alcoholism" (R. 109).

The quarrel between accused and his wife on 2 January 1945, according to Major Wilson, was not the first occasion on which Mrs. Ingersoll had called in the Tellingtons and the Wilsons (R. 34). After a party on 25 December 1944, Major Wilson went to accused's apartment at Mrs. Ingersoll's request. At that time she appeared quite upset (R. 32). Accused, whom Major Wilson did not consider drunk but at the same time not sober, wanted to leave the apartment, but was prevailed upon by Major Wilson to remain. During the forty-five minutes that the conversation lasted on this occasion or on 2 January 1945 Major Wilson heard Mrs. Ingersoll refer to the paternity of the older child (R. 32,34).

b. Evidence for the defense.

W.D.A.G.O. Form 66-1 of accused was submitted in evidence and showed that accused received one rating of very satisfactory, three ratings of excellent, and one rating of superior as an instructor of mathematics at West Point, New York, from 6 July 1942 to 31 December 1944 (R. 122; Def. Ex. A). Disposition Board Proceedings conducted at Mason General Hospital 14 March 1945 on accused with diagnosis of accused as "Psychopathic personality, emotional instability", and with recommendation that accused be returned to his former station to face pending reclassification proceedings was admitted in evidence (R. 123; Def. Ex. B). The accompanying medical history of the case contained the following statements:

"It is the opinion of the board that the patient's (accused's) instability has been so severe as to bring about his difficulties in spite of his own efforts at restraining himself and he has performed his duties as adequately as possible. Although a psychopath must be considered responsible for his actions in the above sense, the patient's (accused's) difficulties have received a large involuntary contribution which constitutes a large mitigating circumstance."

A letter dated 10 January 1945 from Major General F. B. Wilby, Superintendent, United States Military Academy, to the Commanding General, Second Service Command, wherein General Wilby stated that he had decided that accused should be made the subject of reclassification proceedings was admitted in evidence (R. 126; Def. Ex. C).

Accused was assigned as an instructor in the Mathematics Department of the United States Military Academy, West Point, New York, from September 1942 to January 1945. He was promoted from first lieutenant to captain on 24 March 1943 (R. 127,128). Accused spent the summers of 1943 and 1944 at Brown University, Providence, Rhode Island, studying advanced mathematics (R. 126,127,129,130). Accused's name was placed on the promotion list for promotion to major in November 1944 (R. 128). According to Lieutenant Colonel Robinson, ranking mathematics instructor in the West Point Mathematics Department, accused had a very high standing as a mathematician (R. 132). Lieutenant Colonel Welsh, instructor of mathematics at

West Point, lived across the hall from accused from June 1942 to January 1944 and visited accused socially and never saw accused under the influence of liquor (R. 134). Lieutenant Colonel Taul, instructor of mathematics at West Point, lived in the same apartment with accused from June 1942 to March 1943, visited accused's apartment frequently, never saw the accused under the influence of liquor, and accused's conduct was always proper and correct (R. 127,128). Accused usually worked very late and, according to Lieutenant Colonel Taul, was probably the most conscientious officer at West Point from the standpoint of academic work (R. 139).

Accused's wife voluntarily elected to take the stand to testify on behalf of her husband and waived her privilege of refusing to divulge confidential communications between herself and accused (R. 141). She stated that accused studied very hard and worked very late hours at West Point and would spend as much as four and five hours a night, as much as twenty hours a week on his mathematical research, in addition to his regularly assigned duties as instructor (R. 142). Accused's wife stated that during 1944 she became quite excited, subject to crying spells, uncontrollable and unreasonable, and that she neglected herself and engaged in many quarrels with her husband which interfered with his work (R. 143). Accused's wife stated that she had consulted Dr. Franz Alexander, a noted psychologist (R. 143). Major Drewry, witness for the prosecution, admitted that Dr. Alexander was "a very well known psycho-analyst" (R. 102). This visit to Dr. Alexander took place after the events of 2 January 1945 (R. 143) and a reconciliation was effected in March 1945 (R. 143). Accused's son became ill, suffering from convulsions during 1944 and arguments developed between accused and his wife over the kind of treatment and hospitalization of the child, accused desiring that the child be sent to the Yale Clinic, his wife insisting on keeping the child at home (R. 145,146). On Christmas night, 1944, accused and his wife entertained six couples in their apartment. Liquor was served and while no one became intoxicated, many were feeling very good. The subject of the child arose again and accused's wife, under the influence of intoxicants, made a remark, "about the worst thing I could think of. I didn't want him to take the child to the hospital" (the remark was that accused was not the father of the child) (R. 147; see also R. 33,34). Accused's wife ran upstairs to the Wilson's apartment "crying and carrying on" because she did not want her husband to take the child away. The Wilsons went to the accused's apartment and succeeded in pacifying accused and his wife (R. 147,148). Accused left his wife the next morning for a few days, going to New York City (R. 148).

On 2 January 1945 after accused returned from New York City, another argument developed between accused and his wife over the child. Accused suggested to his wife that she see a psychiatrist and she "flew off the handle" and violently opposed it (R. 150). Accused's wife again repeated the remark made on 25 December 1944 (that accused was not the father of her child) in order to incite accused (R. 150,160). Accused then went to bed and accused's wife ran upstairs to the Wilsons and Tellingtons' apartments and persuaded Major Wilson and Captain Tellington

to go down to accused's apartment, telling them that accused had been drinking all day and had consumed a whole quart of liquor and asked for help to take the children out of the apartment (R. 152). The children were taken to the Tellington apartment, accused remaining in his apartment (R. 153). Accused did not threaten violence at all toward his wife or the children at any time during the evening (R. 154,162). Accused's wife admitted she had made a statement to this effect to induce the Wilsons and Tellingtons to go to her apartment (R. 154). Accused's wife stated that the cupboard shown in prosecution's Exhibit 2 was not in the condition shown in the photograph when she left the apartment and stated that her husband was the only person in the apartment when she left on the night of 2 January (R. 158). Accused had broken a bottle of rum during the course of the argument with his wife on the night in question (R. 163). Accused had informed his wife on many occasions that she was interfering with his professional duties (R. 166). Accused's wife stated: "I was anxious *** to make my husband out as the guilty party." "Dr. Alexander told me of this and demonstrated it to me" (R. 166). "I was mad. I was almost trying to get him to fight back so that I could fight for my child" (R. 170).

Mrs. Lois Fletcher, wife of Major Fletcher, testified that she lived in the same apartment building with accused and his wife from June 1942 to June 1944, and that she had heard loud conversations and crying in accused's apartment about two or three times a month; that accused's wife was hysterical and could not stop crying for one or two hours; that accused never raised his voice (R. 174,175). Accused's wife was quite upset over her little boy (R. 176).

Accused, conversant with his rights, took the stand, was sworn, and testified on his own behalf (R. 177).

Accused stated that after he was graduated from Columbia University he taught mathematics for eight months at Drew University, Madison, New Jersey, and at the United States Merchant Marine Academy for four months (R. 178). Accused entered the Army in July 1942 on a direct commission as a first lieutenant and was assigned to teach mathematics at the United States Military Academy, West Point, New York (R. 178). Accused was selected by Colonel H. Jones, Head of the Mathematics Department, to take special courses in advanced mathematics at Brown University, Providence, Rhode Island, in the summers of 1943 and 1944 (R. 178). Accused continued this research work at West Point and kept Colonel Jones informed of his progress (R. 179). Accused spent an average of twenty hours a week in research, often working until 0500 (R. 180). Accused was invited as a distinguished mathematician to deliver a talk at a colloquium held at Syracuse University in September 1944 (R. 181,182; Def. Ex. D). In April 1944 accused published a paper on Geometric Derivation for the National Mathematics Magazine (R. 182; Def. Ex.E). Accused also delivered talks at Columbia University and at Wellesley College before members of the American Mathematical Society, and these talks were published in the Bulletin of the American Mathematical Society (R. 183,184; Def. Ex. F,G, H).

The condition of accused's son caused him a great deal of worry in 1944 and led to many quarrels with his wife over the question of treatment and care of the child (R. 185,186). Accused stated he became irritated and weary during the latter part of 1944 over some intricate mathematical research work which he had to complete by a certain date in January 1945 (R. 187,188). As to the events which occurred on the night of 2 January 1945, accused stated that he did not drink at all during that afternoon as he had intended to work on the paper which he had promised to complete. After dinner he suggested to his wife that she should get in touch with a good psychiatrist in New York City to help clarify the situation. His wife objected and an argument ensued. Many unpleasant things were said on both sides. At about 2100 accused drank the remainder of a bottle of whiskey - which was the equivalent of two or three drinks but was not sufficient to make him intoxicated. The argument became more bitter and accused's wife then made an "extremely disturbing remark" (concerning the paternity of the child). He went to the cabinet to take another drink but found it locked, and when his wife refused to surrender the key this angered him and he forced the cabinet by kicking on the door. Accused then decided to end the argument and went into his bedroom at approximately 2200 or 2230 and went to bed. After lying there for about twenty minutes he called his wife but found that she had left the apartment. His wife and neighbors then came into the apartment and requested permission to take the children, which request accused granted. Accused felt humiliated since the neighbors had been called in and because his wife had gone to the upstairs apartment; so he began to throw books against the ceiling and wall and began to throw things around the apartment. "It was a matter of venting in a physical way the pent-up rage or resentment that had been accumulating for a long time." Accused admitted that he had told Major Wilson that he had a good time. He stated that he was not being sarcastic or facetious, because "it was a release of all this accumulated resentment in this physical way." Accused stated he remembers seeing Major Wilson and Captain Tellington in his apartment but does not recall any conversation with either of them. He also remembers that Lieutenant Colonel Willing came into his apartment and that he entirely complied with Colonel Willing's orders. Accused stated he remembers Major Drewry and Major Hunt coming in his apartment and ordering him to get dressed to go to the hospital. On arriving at the hospital he was given a pink capsule and then some difference arose as to whether or not he should wear pajamas. Accused stated he resented being taken to the hospital after he was told by Colonel Willing that he was to go to bed and get up the next morning and go to class as usual. Accused stated that he was not drunk nor intoxicated on the night of 2 January; that he remembers everything that happened and that there were no "blank spots" in his recollection; and that all that he had to drink that day was about an inch and a quarter of whiskey (R. 188-195). Accused stated that on the night of 25 December his wife had made a very disturbing remark in the presence of their guests and had run upstairs to the neighbors in a very excited state, returning with Major and Mrs. Wilson, who pacified accused and his wife and then left (R. 196,197). Accused went to New York City and on his return effected a reconciliation with his wife (R. 197). Accused was transferred

from the Station Hospital, West Point, New York, to the regional hospital, Fort Jay, New York, and then to Mason General Hospital, Brentwood, Long Island (R. 198).

Accused stated that he had paid for repairing the walls and ceilings of his apartment and for other damage in the amount of approximately fifty-eight dollars.

On cross-examination accused stated that he had had no drinks during the afternoon of 2 January 1945 and had his first drink about 2100 (R. 201). Accused stated that he did not know that his wife was in a hysterical state when she left the apartment on 2 January and that he did not hear her cry loudly for the neighbors (R. 202). Accused stated that he did not attempt to restrain his wife from taking the children out of the apartment (R. 203). Accused further stated that he had been working very hard for several weeks late in 1944 to reach a certain result in his research work, which resulted in much loss of sleep which made him very irritable (R. 207). Accused denied that he had finished a whole bottle of liquor on the night of 2 January 1945 (R. 210).

4. a. Drunkenness and disorderly conduct.

While there is some conflict in the testimony of the witnesses, the record of trial overwhelmingly sustains the finding that on the evening of 2 January 1945, accused, a mathematics instructor at the United States Military Academy at West Point, was drunk and disorderly in his quarters on the Academy grounds. There is no doubt that accused was mentally agitated and excited to a marked degree, a condition brought about in part by his quarrel with his wife. Over a considerable period of time the hospitalization of their older child, a boy of two years, had been the cause of serious disagreement between them, culminating on the evening of 25 December 1944 after a party at which both had drunk intoxicating liquors in a quarrel, in the course of which accused's wife, in an effort to gain her point, denied that accused was the father of the child. A threatened abandonment of his home by accused was prevented when his wife later explained that her statement was false and had been actuated solely by her desire to keep her child with her. When the topic of sending the child to the Yale Clinic came up again on 2 January 1945 accused's wife sought to accomplish her same purpose by once more reflecting on the legitimacy of the child. Accused had indulged in some drinking, and it was at this time that he began to give vent to his pent-up emotions. It is apparent that the agitation created by the bickering that had gone on contributed to this final outburst. Major Wilson, who first saw accused, did not consider him drunk and Colonel Willing would not express an opinion as to his sobriety. These facts, however, do not offset the positive testimony of Major Ross, Major Drewry and Major Hunt that accused was in fact drunk, a conclusion that is strongly fortified by accused's actions for several hours. It will be noted that Colonel Willing testified

that accused was unsteady on his feet and that his diction was not clear, a condition that could hardly be imputed to excitement. In the absence of proof that accused's mental condition was such as to cause a lapse of memory, accused's inability to recall many of the important details of what transpired that evening is likewise persuasive of the conclusion that he was in fact drunk. Much weight is to be given to the findings of a court-martial on questions of fact, and the Board of Review finds no basis for disagreeing with its conclusions as to accused's drunkenness. That accused was disorderly, regardless of the reasons for his misconduct, is not questioned. The Board, therefore, finds that the record of trial supports the findings of guilty of Specification 1 of the Charge, which sets forth an offense under Article of War 96 (MCM, 1928, par. 152a).

b. Damage to Government property (Specification 2).

That accused did damage Government property, as alleged in Specification 2 of the Charge, admits of no doubt. The testimony of the several witnesses, the photographs offered in evidence, accused's admissions, and the stipulation as to the amount paid by accused in settlement of the damage done to the apartment clearly show that accused in actuality damaged and defaced parts of the Government building which he occupied and some Government furniture located in his apartment. While the action of the court in substituting the words "to the value of \$54.80", for the words "of some value," in describing the damage done, may not be technically correct, accused's substantial rights were not affected thereby, since the substituted words in no way affect the seriousness of the charge or the severity of the punishment imposed.

In a special plea to strike out, filed before arraignment, and in a motion for a finding of not guilty at the close of the case for the prosecution, counsel for defense contended that it was improper to lay the specification under Article of War 96, in view of the fact that Article of War 89 specifically provides that any one subject to military law who "willfully destroys any property whatsoever" may be punished as a court-martial may direct. Premitting any other aspect of the question, it is necessary only to point out that accused is not charged with having destroyed, but merely with having damaged and defaced Government property, recognized as an offense chargeable under Article of War 96 (MCM, 1928, p. 254, Form 134). The court, therefore, properly overruled both the plea and the motion. Its finding of guilty of this specification is fully supported by the evidence.

c. Using insulting language toward superior officer (Specification 3).

The reviewing authority approved only so much of the finding of guilty of Specification 3 as involved the insulting language used by accused toward Major Hunt at the Station Hospital. The incident at accused's apartment, therefore, need not be considered. After accused's arrival at the

Station Hospital an interne brought him a pair of pajamas which he was requested but not ordered to put on. He refused to do so, stating that he never wore pajamas. After the interne left, Major Hunt, who, with Major Drewry, had taken accused to the hospital, insisted that accused should comply with the instructions which he had received. It was then that accused stated to Major Hunt "like a man completely indifferent or trying to be a big shot" that if Major Hunt "or any one who wanted him to put on those pajamas didn't like it [they] could damn well ram them up [their] fanny," adding in a direct statement to Major Hunt, "Furthermore, you can include that in your official report." Regardless of accused's disturbed mental condition and excitement, such language is properly classified as insulting, and its application by an officer to a superior officer is punishable under Article of War 96 as an act to the prejudice of good order and military discipline (Winthrop's Military Law and Precedents, 2d Ed., p. 714).

5. Consideration has been given to a "Memorandum of Behalf of Accused" filed by special counsel for accused, Mr. Henry S. Miller.

6. Four of the eight members of the court which tried accused recommended clemency to the reviewing authority.

7. War Department records show that accused is 33 years and 3 months of age, and is married. The record of trial shows that he has two children. After attending high school for 2-1/2 years, he attended for one year and graduated from Colby Academy, Brooklyn. Thereafter he pursued a four-year course at Columbia, graduating with the degree of A.B. in 1932, and took post-graduate work there for 2-1/2 years thereafter, specializing in mathematics. He is a member of the American Mathematical Society. He was employed as an English Instructor by the Amtorg Trading Corporation (Russian-American Trade Center) for two years, and for six months thereafter as a part-time mathematics instructor by Drew University, John Marshall College and Wagner College. He was an instructor in mathematics and science at the United States Coast Guard Merchant Marine Academy, Great Neck, Long Island, when his appointment as a first lieutenant, AUS, and assignment to the United States Military Academy as an instructor in mathematics was recommended by Major General F. B. Wilby, Superintendent of the latter institution. He was commissioned a first lieutenant on 1 July 1942 and called to active duty on 6 July 1942, being assigned to the United States Military Academy, where he remained as an instructor until about 10 January 1945. He was promoted to captain on 24 March 1943.

8. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of

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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 96.

James G. Stone, Judge Advocate
Earle Stephens, Judge Advocate
Wm. M. W. W. W., Judge Advocate

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SPJGK - CM 281848

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Hq ASF, JAGO, Washington 25, D. C. JUL 10 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Benham M. Ingersoll (O-481603), Army of the United States.

2. Upon trial by general court-martial this officer was found guilty, in violation of Article of War 96, of being drunk and disorderly (Specification 1), and of willfully, wrongfully and unlawfully damaging and defacing Government property (Specification 2) in his quarters, and of using insulting language toward his superior officer, Major William A. Hunt, Jr. (Specification 3), all of these offenses having been committed at the United States Military Academy, West Point, New York, on 2 January 1945. He was sentenced to be dismissed the service. Four of the eight members of the court-martial which tried him subsequently recommended clemency. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

On 1 July 1942, accused, a college professor, was commissioned first lieutenant and assigned to the United States Military Academy as an instructor in mathematics on the recommendation of the Superintendent of the Academy, and served with distinction as such until about 10 January 1945. In addition to his regular work as an instructor, he devoted much time in the evenings to additional study and research, and was engaged in the preparation of a special treatise at the time of the occurrences which gave rise to the charges in the present case. During this period of service he delivered lectures at three different colleges, attended advanced courses at Brown University during the summers of 1943 and 1944 at the request of the head of the Mathematics Department at the Academy, and prepared a technical paper which was published in an outstanding national magazine, devoted to mathematics. His wife and their two children resided with him in their quarters on the Academy grounds. The older of the children, a boy of two, who was subject to frequent spells of an epileptic nature, was the subject of many quarrels between accused and his wife, culminating after a party on Christmas, 1944, in a statement by accused's wife to him that he was not the father of the child. Subsequently his wife admitted that her statement was false and had been made only to deter him from carrying out his desire to have the child taken to a clinic for examination

and possible treatment. On 2 January 1945 in the course of a heated argument accused again suggested examination of the child at the Yale Clinic. In the bitter bickering which followed this suggestion, and after accused had partaken rather freely of straight whiskey, accused's wife reiterated her statement as to the legitimacy of the child. It was at this time that accused broke the first piece of furniture and accused's wife ran screaming to her neighbors. About thirty minutes later accused began throwing various articles around in the apartment and defaced and damaged Government property as charged. He later paid for this damage in full. Subsequently he was taken to the Station Hospital by Major Hunt, Provost Marshal at West Point, and a psychiatrist from the medical staff. He refused to put on the pajamas that were given to him in the hospital by the interne, and upon Major Hunt's insistence that he do so he used the insulting and offensive language described in the findings as approved. On 8 January 1945 the Superintendent of the Academy recommended that accused be reclassified. A Disposition Board at Mason General Hospital, to which institution accused had apparently been sent for observation, rendered a report on 10 March 1945 in which it made a diagnosis of "Psychopathic personality, emotional instability," recommended accused's return to his station to face reclassification proceedings, and expressed the following views:

"It is the opinion of the board that the patient's (accused's) instability has been so severe as to bring about his difficulties in spite of his own efforts at restraining himself and he has performed his duties as adequately as possible. Although a psychopath must be considered responsible for his actions in the above sense, the patient's (accused's) difficulties have received a large involuntary contribution which constitutes a large mitigating circumstance."

While accused's misconduct was clearly established, it is apparent that it was provoked by the unreasonable attitude assumed by his wife with regard to the medical care of their child and by her admittedly unfounded statement made to him by her, while she was in a hysterical and emotionally upset condition, that he was not the father of the child. In his wrought up state of mind, accused drank too heavily, became drunk, lost control of himself and committed the offenses described in the specifications. In view of the great provocation indicated by these circumstances and of his excellent record as an officer, as emphasized in the request for clemency, filed by four members of the trial court, I recommend that the sentence be confirmed but commuted to a reprimand and forfeiture of fifty dollars of his pay per month for six months, and that the sentence as thus modified be carried into execution.

4. Consideration has been given to a brief filed in behalf of accused by his special counsel, Mr. Henry S. Miller.

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5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

3 Incls

1. Record of trial
2. Form of action
3. Brief in behalf
of accused

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to a reprimand and forfeitures.
G.C.M.O. 404, 18 Aug 1945).

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

SPJGN-CM 281884

U N I T E D S T A T E S	)	ARMY AIR FORCES EASTERN
	)	FLYING TRAINING COMMAND
v.)	
Second Lieutenant EDWIN H.	)	Trial by G.C.M., convened at
MENGENS (O-840119), Air Corps.	)	Courtland Army Air Field, Courtland,
	)	Alabama, 30 May 1945. Dismissal
	)	and forfeiture of all pay due or
	)	to become due.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 Edwin H. Mengers, Squadron "H", 2115th AAF Base Unit, Army Air Forces Pilot School (Spec. 4-E), Courtland Army Air Field, Courtland, Alabama, did, on or about 28 December 1944, wrongfully, feloniously, and knowingly, transport, by train, one Sara Weaver, a woman, in interstate commerce, from Atlanta, Georgia, to Fort Myers, Florida, for the purpose of illicit sexual intercourse.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

The accused pleaded not guilty to the Charge and all Specifications thereunder and was found not guilty of Specifications 2 and 3 but guilty

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of the Charge and of Specification 1. 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 so much of the forfeitures imposed thereby as pertained to the accused's allowances, and forwarded the record of trial for action under Article of War 48.

3. The deposition of Miss Sara Weaver of Union City, Georgia, and two letters and a telegram dispatched by the accused comprise all of the evidence for the prosecution (R. 5; Pros. Ex. 1). These show that "about fourteen months" prior to the trial Miss Weaver met the accused in Montgomery, Alabama, and became his paramour. Shortly thereafter, in May of 1944, after his transfer from Maxwell Field, Alabama, she visited him at his new station in Bennettsville, South Carolina. Upon learning at the Cadet Club there that he was married she discontinued sexual relations with him. She agreed, however, to marry him "if he got a divorce".

Subsequently, in a letter written on 19 December 1944 from Turner Field, Georgia, he informed her that, after receiving his "wings and bars" on the following "Saturday" and after going to his home in Denver, Colorado, for a brief leave, he expected to spend a few days with her in Atlanta, Georgia, before "I move on to my next post and take you with me". Soon she would be, "All mine to have and hold close every night". On 30 December 1944 he wrote to her from Denver that he was to be stationed at Buckingham Field, Fort Myers, Florida, "so it looks as if we'll get to have a Florida winter after all, darling". At his new post he would be able to spend considerable time "in town" and asked, "what are you going to do with your man in your arms so much after such a long time?"

Following the plan expressed in his letters, he met Miss Weaver in Atlanta, Georgia, early in January, 1945. He assured her that within two weeks he would be divorced, urged her to accompany him to Florida, and purchased her ticket. She acceded, and while waiting with him for the train in the station at Atlanta, she encountered a casual acquaintance to whom she stated that she was going to Florida with her "husband, Lieutenant Mengers". After traveling with the accused from Atlanta, Georgia, to Fort Myers, Florida, she procured lodging first at the Morgan Hotel and later, from 9 January to 19 February 1945, at the Colonial Hotel. They lived together as man and wife during this period, and he introduced her as, and generally represented that she was, his wife. As a result of their sexual relations she contracted gonorrhoea for which she was successfully treated at the Lee Memorial Hospital. When the accused was transferred to Courtland, Alabama, on 19 February 1945, she left Fort Myers and followed him to his new assignment.

Upon joining him again she inquired, "what he intended to do about the money he had gotten from her". The sum in question aggregated some six hundred dollars and represented the proceeds of the sale, at his

behest, of her furniture and jewelry. No part of this money having been returned to her, she advised him that she would "forget about the rest of it" if he would give her his automobile. When he "just laughed" at her, she threatened to tell "someone at the legal office". Eventually he did offer her the car, but on 12 May 1945, she informed him by telephone that he could make full satisfaction only by restoring the money which he had taken. Her reason for making the statement upon which the present charges were based was as follows:

"I merely wanted to get back the money that I received from the furniture and jewelry that he encouraged me to sell, telling me I wouldn't need it anymore; that from now on my home was with him until he went overseas and then I would stay with his mother."

In answer to certain cross-interrogatories, she stated that she had been married at the age of sixteen. She denied living with a "Claude Anderson" but acknowledged her "friendship" with him, extending over a period of "two years, steady dating". At one time she had been "booked" as a material witness in a murder case, but, after being held only twelve hours, she was released from custody.

4. The accused, after his rights relative to testifying or remaining silent had been explained, elected to take the stand and make a sworn statement on his own behalf. He explained that he was acting as his own counsel because "certain things****should be said***which would not be brought out unless I conducted my own defense". (R. 6).

His wife, whom he had married seven years before, had become estranged from him and had left their three children in the care of her sister in Denver, Colorado (R. 10). Because of domestic difficulties he looked around for "feminine company" and, while stationed at Maxwell Field, Alabama, met and had several dates with Miss Weaver (R. 6). During the course of her subsequent visit to Bennettsville, they had sexual relations with one another (R. 7). After receiving his commission in December, 1944, he went on leave to his home in Denver, Colorado, and, while there, effected a reconciliation with his wife (R. 9). Although he persisted in his plan to have Miss Weaver accompany him to his new station at Fort Myers, Florida, after he reached Atlanta, he was told certain things by her about her past which "scared him off" and convinced him that "she was too much for him to handle" (R. 22). She had been married three times, had engaged in "bootlegging", and for two years had lived with a "Claude Anderson", a convict, who had committed a murder in her apartment (R. 7, 21). When the accused suggested that she should not go with him to Florida, she "just laughed it off" and, since she had quit her job and made all arrangements, she decided to go "any way" (R. 9, 22). In any event, she had recently undergone an operation and had planned to visit Florida for her health (R. 12). She and the accused indulged in sexual relations during his stay of two or three days duration in Atlanta (R. 13). Together they went to see her parents

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who knew that she was going to Florida. To keep them "from being suspicious" the accused traveled alone to Fort Myers and Miss Weaver followed a day and a half later (R. 8, 15).

After her arrival she resided at the Colonial Hotel where he called on her and had sexual intercourse with her "on several occasions" (R. 16, 18). Both contracted "V. D." but she had it first (R. 16, 17). He never gave her money for support but paid for her meals "occasionally" (R. 21). When he was assigned to Courtland Army Air Field, Courtland, Alabama, she proceeded there also. She attempted to "blackmail" him by threatening to create trouble unless he met her demands for money. At one time she requested his automobile and, about two weeks before the trial informed him that "the whole thing would be cleaned up if I would give her \$600.00" (R. 8, 23). The fact that she retained his letters indicated her plan to "incriminate" him (R. 8). When he refused to pay her, she instigated the instant proceedings "to get revenge" (R. 23). He described Miss Weaver as follows:

"She was a sharp dresser, and she danced well. She was pleasant company, and she was just out for a good time. All in all, she was quite a physically attractive girl, as well as plenty eager. She liked to get in the sack pretty often, too" (R. 20).

A letter from the Solicitor General of the Atlanta, Georgia, Judicial Circuit, revealed that "a Sara Weaver" was arrested in 1942 for being "Drunk and Disorderly" and, on 19 June 1942, for being "Plain Drunk" (R. 8; Def. Ex. 1).

5. Specification 1 of the Charge alleges that the accused "did, on or about 28 December 1944, wrongfully, feloniously, and knowingly, transport, by train, one Sara Weaver, a woman, in interstate commerce, from Atlanta, Georgia, to Fort Myers, Florida, for the purpose of illicit sexual intercourse". This offense was laid under Article of War 96.

Section 398, Title 18, United States Code, often described as section 2 of the White Slave Traffic Act or the Mann Act, provides that:

"Any person who shall knowingly transport....in interstate or foreign commerce,....any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose,..; or who shall knowingly procure or obtain....,any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce...., in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose...., whereby any such woman or girl shall be transported in interstate or foreign commerce...., shall be deemed guilty of a felony...."

That the accused violated this statute is established by the evidence

beyond the peradventure of a doubt. Having arranged by correspondence to take his paramour with him to his new station, he met her in Atlanta, Georgia; had intercourse with her; purchased a railroad ticket for her to Fort Myers, Florida; lived with her there as husband and wife in the Colonial Hotel; and had sexual relations with her on numerous occasions. The purchase of a railroad ticket, the transportation in interstate commerce, and the immoral purpose having all been conclusively shown, the findings of guilty are amply sustained. Miss Weaver's history, character, and tactics, while hardly admirable, do not mitigate or extenuate the conduct of the accused, for obviously the Mann Act was primarily directed against the interstate transportation of women of low morals. Since commercial gain is not an essential element of the offense defined by the statute, the fact that she received no remuneration from him is immaterial. (Johnson v. United States, 215 Fed. 679 (C. C. A. 7th, 1914); 29 BR 99, CM 245014, Cookerly).

6. The accused, who is married, is about 26 years old. After attending high school for three years, he was employed from June, 1938 to June, 1940, by the United States Bureau of Public Roads as a junior messenger and from June, 1940 to January, 1943, by General Motors as a parts clerk. From 6 June 1937 through 1942 he served in the Colorado National Guard. After enlisted service in the Army from 26 February 1943 to 22 December 1944, he was commissioned a second lieutenant on 23 December 1944. He has been on active duty as an officer since the last date.

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 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. Connor, Judge Advocate

Samuel Morgan, Judge Advocate

(246)

SPJGN-CM 281884

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

TO: The Secretary of War

JUL 16 1945

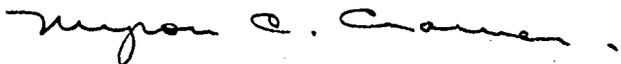
1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edwin H. Mengers (O-840119), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of wrongfully, feloniously, and knowingly transporting a woman in interstate commerce for the purpose of illicit sexual intercourse, in violation of Article of War 96. 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 so much of the forfeitures imposed thereby as pertain to the accused's allowances, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

Early in January 1945 the accused, a married man, purchased a railroad ticket for the transportation of Miss Sara Weaver, his paramour, from Atlanta, Georgia, to Fort Myers, Florida. After her arrival there he openly lived with her as husband and wife in the Colonial Hotel from 9 January 1945 to 19 February 1945 and had sexual relations with her on numerous occasions. This was a clear violation of Section 2 of the so-called Mann Act and clearly demonstrated him to be lacking in that degree of moral responsibility and good character required of an officer in the Army. I accordingly recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures imposed be remitted, and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls

Incl 1 - Record of trial

Incl 2 - Form of action

MYRON C. CRAMER

Major General

The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. GCMO 378, 25 July 1945).

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

SPJGQ - CM 281891

U N I T E D S T A T E S	)	ARMY AIR FORCES WESTERN
	)	FLYING TRAINING COMMAND
v.)	
Second Lieutenant HARRY J. SCHROEDER, JR. (O-862059), Air Corps.	)	Trial by G.C.M., convened at Army Air Forces Flexible Gunnery School, Las Vegas Army Air Field, Las Vegas, Nevada, 2 June 1945. Dismissal, total forfeitures and confinement for eighteen (18) months.

OPINION of the BOARD OF REVIEW
ANDREWS, BIERER and HICKMAN, 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 Second Lieutenant Harry J. Schroeder, Jr., Air Corps, 3021st Army Air Forces Base Unit, did, without proper leave, absent himself from his station at Las Vegas Army Air Field, Las Vegas, Nevada, from about 7 April 1945, to about 11 May 1945.

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

Specification 1: In that Second Lieutenant Harry J. Schroeder, Jr., Air Corps, 3021st Army Air Forces Base Unit, while legally married to Betty K. Schroeder, did, from about 25 April 1945 to about 27 April 1945, at Hermosa Beach, California, wrongfully and unlawfully live and cohabit with one Genevieve Scribner, a woman not his wife.

Specification 2: In that Second Lieutenant Harry J. Schroeder, Jr., Air Corps, 3021st Army Air Forces Base Unit, while legally married to Betty K. Schroeder, did, from about 27 April 1945 to about 4 May 1945, at Big Bear Lake, California, wrongfully and unlawfully live and cohabit with one Genevieve Scribner, a woman not his wife.

Specification 3: In that Second Lieutenant Harry J. Schroeder, Jr., Air Corps, 3021st Army Air Forces Base Unit, while legally married to Betty K. Schroeder, did, from about 4 May 1945 to about 6 May 1945, at Los Angeles, California, wrongfully and unlawfully live and cohabit with one Genevieve Scribner, a woman not his wife.

Specification 4: In that Second Lieutenant Harry J. Schroeder, Jr., Air Corps, 3021st Army Air Forces Base Unit, while legally married to Betty K. Schroeder, did, from about 6 May 1945 to about 10 May 1945, at Laguna Beach, California, wrongfully and unlawfully live and cohabit with one Genevieve Scribner, a woman not his wife.

Specification 5: In that Second Lieutenant Harry J. Schroeder, Jr., Air Corps, 3021st Army Air Forces Base Unit, while legally married to Betty K. Schroeder, did, from about 25 April 1945 to about 27 April 1945, at Hermosa Beach, California, wrongfully and falsely represent Genevieve Scribner to be his wife.

Specification 6: In that Second Lieutenant Harry J. Schroeder, Jr., Air Corps, 3021st Army Air Forces Base Unit, while legally married to Betty K. Schroeder, did, from about 27 April 1945 to about 4 May 1945, at Big Bear Lake, California, wrongfully and falsely represent Genevieve Scribner to be his wife.

Specification 7: In that Second Lieutenant Harry J. Schroeder, Jr., Air Corps, 3021st Army Air Forces Base Unit, while legally married to Betty K. Schroeder, did, from about 4 May 1945 to about 6 May 1945, at Los Angeles, California, wrongfully and falsely represent Genevieve Scribner to be his wife.

Specification 8: In that Second Lieutenant Harry J. Schroeder, Jr., Air Corps, 3021st Army Air Forces Base Unit, while legally married to Betty K. Schroeder, did, from about 6 May 1945 to about 10 May 1945, at Laguna Beach, California, wrongfully and falsely represent Genevieve Scribner to be his wife.

He pleaded guilty to and was found guilty of all the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as

the reviewing authority may direct for eighteen (18) months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. No evidence was introduced by either the prosecution or the defense (R. 5, 6). The accused, after being informed of his rights as a witness, elected to remain silent (R. 5, 6).

4. Although no evidence was introduced, the pleas of guilty sustain the findings of guilty of absence without leave from about 7 April 1945 to about 11 May 1945, in violation of Article of War 61, and of the four Specifications of wrongfully and unlawfully living and cohabiting with a woman not his wife and the four Specifications of wrongfully and falsely representing a woman to be his wife who in fact was not his wife, all in violation of Article of War 96.

5. War Department records show that the accused is 27 years of age, married and has one minor child. He is a native of Iowa and a resident of Fort Madison, Iowa. He is a graduate of the University of Notre Dame, South Bend, Indiana, having received the degree of Bachelor of Science in 1939. He did post-graduate work in business administration at the Babson Institute, Babson Park, Massachusetts, and received a certificate of completion in 1940. In civilian life the accused was employed in 1941 by Phelan-Faust, St. Louis, Missouri, as a stock boy, and by E. I. Du Pont de Nemours Company, Chicago, Illinois, as a trainee. During 1942 he was employed by Day and Zimmerman, Burlington, Iowa, as a guard, and by Royal Markets, Fort Madison, Iowa, as production manager. He served in enlisted status in the Army from 16 October 1942 to 19 May 1943 as an aviation cadet. He was appointed a second lieutenant, Army of the United States, on 20 May 1943 upon graduation from the Armament Course, Air Force Technical School, Army Air Forces Technical Training Command, Yale University, New Haven, Connecticut, and was ordered to active duty in the Air Corps. War Department records disclose that the accused has been punished twice under Article of War 104, and the review of the Staff Judge Advocate reveals a third punishment thereunder. The offenses and punishments were as follows: (1) On 15 October 1943, a reprimand and forfeiture for being drunk in uniform in a public place; (2) On 18 January 1944, a reprimand for being drunk and fighting with a police officer in a public bar; (3) On 8 June 1944, a reprimand and forfeiture for absence without leave for two days.

6. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized for violation of Article of War 61 and 96.

Fletcher R. Andrews, Judge Advocate
W. H. Jones, Judge Advocate
Donald D. Hickman, Judge Advocate

SPJGQ - CM 281891

1st Ind.

Hq-ASF, JAGO, Washington 25, D. C. AUG 6 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Harry J. Schroeder, Jr. (O-862059), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absenting himself without leave from his station from about 7 April 1945 to about 11 May 1945 (34 days), in violation of Article of War 61 (Charge I and Specification); of four Specifications of wrongfully and unlawfully living and cohabiting with a woman not his wife, while legally married to another woman (Specifications 1 through 4, Charge II); and of four Specifications of wrongfully and falsely representing the aforementioned woman to be his wife (Specifications 5 through 8, Charge II), in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for eighteen months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. No evidence was introduced by either the prosecution or the defense. 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. I concur in that opinion.

The eight Specifications of Charge II all relate to the same woman. They cover the period from about 25 April 1945 to about 10 May 1945, during which period the accused, while legally married to another woman, wrongfully and unlawfully lived and cohabited with the woman named in the Specifications, who was not his wife, at four different places in California, at each of which he wrongfully and falsely represented her to be his wife.

Lieutenant Schroeder has been punished three times under Article of War 104, as follows: (1) 15 October 1943, drunk in uniform in a public place; (2) 18 January 1944, drunk and fighting with a police officer in a public bar; (3) 8 June 1944, absence without leave for two days.

I recommend that the sentence be confirmed but that the forfeitures and confinement be remitted, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to letters from the Honorable Thomas E. Martin, House of Representatives; Mrs. Harry J. Schroeder, Jr., wife of the accused, and Georgia D. Phillips, concerning clemency, which letters are attached to the record of trial.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

- 5 Incls
1 - Record of trial
2 - Form of action
3 - Ltr fr Hon. Thomas
E. Martin, 7 July 45
4 - Ltr fr Mrs. Harry J.
Schroeder, Jr., 16
July 45
5 - Ltr fr Georgia D.
Phillips, 24 July 45

(Sentence confirmed but forfeitures and confinement remitted. GCMO 426,
28 Aug 1945).

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

(253)

30 JUN 1945

SPJGV-CM 281906

UNITED STATES)

v.)

First Lieutenant ISADORE
SHEINBEIN (O-1593269),
Quartermaster Corps.)

SAN ANTONIO AIR TECHNICAL SERVICE COMMAND

Trial by G.C.M., convened
at Kelly Field, Texas, 25-26
May 1945. Dismissal, total
forfeitures and confinement
for five (5) years.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, 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 Isadore Sheinbein, Headquarters and Headquarters Squadron, 59th Air Depot Group, being at the time Assistant Quartermaster Supply Officer, did, at Kelly Field, Texas, on or about 6 April 1945, feloniously embezzle by fraudulently converting to his own use 155 shirts, cotton khaki, of the value of \$292.95, 613 trousers, cotton khaki, of the value of \$1471.20, 23 drawers, cotton shorts, of the value of \$9.89, 2 undershirts, cotton, of the value of \$.62, 16 pairs of socks, cotton tan, of the value of \$2.72, 40 pairs of socks, wool light, of the value of \$14.00, 4 neckties, cotton mohair, of the value of \$1.04, of a total value of \$1792.42, the property of the United States, furnished and intended for the military service thereof, intrusted to him, the said First Lieutenant Isadore Sheinbein, by Lieutenant Colonel Alfred O. Saenger, Chief Supply Division, Kelly Field, Texas.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused was assistant group quartermaster, 59th Air Depot Group, Kelly Field, Texas, on 6 April 1945 and for more than a month prior thereto. He was also the group supply officer. As such he was responsible for consolidating the requisitions from the various units of the group and drawing the necessary property from the base supply officer, Lieu-

tenant Colonel Saenger (R. 8). Upon receipt of this property, it would be distributed including individual supply and equipment (R. 10). Stocks were not supposed to be kept on hand, but were to be kept only long enough for "breaking down and issuing" (R. 14). The accused had a key to the building where the "breaking down and issuing" was done and was "responsible" for the building and all quartermaster clothing delivered to him for the 59th Air Depot Group (R. 14-15). He signed for all memorandum receipt property and was the only officer so signing "at that time" (R. 10). His position as to this quartermaster property was one of trust (R. 9), and he accepted responsibility for it when clothing or anything else was drawn for the units (R. 15).

On 5 April 1945 the accused was seen storing some boxes resembling Army foot lockers in his garage where he resided in San Antonio, Texas. He told his landlady that there were clothes in them (R. 49). The next day the accused and a soldier took 15 similar boxes from an Army truck and placed them in the garage (R. 49). Later accused asked this soldier driver not to tell that he was along when the boxes were delivered (R. 61). About 8 April 1945 the accused's landlady saw accused with 4 boxes on the porch of their common residence and accused's car standing by. A few minutes later the car, accused and boxes disappeared (R. 50). The landlady and her husband (a civilian guard at an Army installation) became suspicious. They thereupon opened three of the boxes and saw new Army clothing in them (R. 50). The landlady's husband reported the matter (R. 56). About 9 April 1945 accused told the landlady that he had gotten into trouble. He tried to explain this trouble to her. He then asked her not to say he was with the truck when it brought the boxes to the garage (R. 51).

Apparently as a result of the report by the landlady's husband, the matter was investigated. On 9 April 1945 the accused, together with a civilian investigator and a couple of officers went to the accused's garage and took the 15 Air Corps shipping boxes, which were found to be full of Army clothes (R. 63), to the 59th Air Depot Squadron Area. Upon examination they were found to contain 377 pairs of trousers and 132 shirts (R. 72). The following day the accused's residence was searched and there was found the following: 40 pairs socks, wool, O.D.; 4 khaki ties; 23 drawers, cotton O. D.; and 2 pairs of khaki trousers (R. 73-94).

On 14 April 1945, military police and a civilian investigator went to the American Railway Express Office in San Antonio. There they saw the accused, who had accompanied them, receive four shipping boxes and a duffel bag (R. 76).

These boxes were green Air Corps boxes and were marked (R. 76).

"Returned from Oklahoma City Union Station ***
Returned to Shipper from Oklahoma City Union Station"

and

"Lt. Isadore Sheinbein, 129 Cumberland Rd.
San Antonio, Tex"

These boxes contained 130 pairs of trousers, khaki and 23 shirts (R. 103) and the duffel bag and 48 pairs of trousers (R. 98).

Accused stated that he had wired his father-in-law, one Dave Davis, on 9 April 1945 to return these boxes to him after he had discovered that he had shipped the wrong merchandise (R. 77-78).

On 16 April the accused received 4 additional cardboard packages from the American Railway Express. These packages or boxes were marked:

"Shipped from Dave Davis, 901 NE 16th St., Okla City Okla to Lt. Isadore Sheinbein, San Antonio".

These packages were opened in the provost marshal's office and were found to contain Government clothing (R. 105). These packages contained, collectively, 38 pairs of trousers (R. 108), 2 undershirts and 16 pairs of cotton socks (R. 119). On 24 April 1945 accused received 4 more boxes (R. 87-88). These packages contained among other things 18 pairs trousers (R. 122). All of the articles of clothing mentioned in the boxes stored at the accused's garage at his home, and the boxes received from Dave Davis were Army quartermaster issue and of the type furnished and intended for military use (R. 25, 43, 73, 95, 108, 126).

On 19 April 1945 an inventory was made of the property for which the accused was responsible by Major Bowling, the Quartermaster of the 59th Air Depot Group (R. 19). It showed the following shortages: 216 shirts, cotton khaki; 664 trousers, cotton; 36 drawers, cotton short; 16 undershirts, cotton; 77 socks, cotton; 178 socks, wool; 19 neckties, cotton (R. 19). Clothing of similar type is on sale at Kelly Field to officers. However, there is some limit to the number which may be sold to an officer (R. 45). This limit varies. The court took judicial notice of AR 300-3000 dated October 16, 1944 which sets out the price of the articles involved.

The accused himself remained silent, but for the defense three majors, a captain and two civilian clerks testified the accused was a capable officer of excellent character and had conducted himself as an officer and a gentleman (R. 36, 113, 115, 118, 148, 149).

The defense further showed that some of the boxes contained items of property with which the accused has not been charged (R. 146) such as a Van Heusen shirt and a shaving kit, as well as other items. The total value of the items recovered amounts to \$1792.42.

4. The only question in this case that merits discussion is whether the offense the accused committed is one of larceny or embezzlement. The accused was charged with an offense under the 94th Article of War. Under that Article the offenses of embezzlement, larceny and misappropriation of government property may be alleged. The pertinent part of that Article of War reads:

"Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States furnished or intended for the military service thereof; ***"

In this case the allegation is embezzlement of government property intended for the military service which is a direct violation of that portion of Article of War 94 above quoted.

It has been held that embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268). The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship. In the case of CM 197396 Christopher it was held that where a soldier to whom a blanket was issued, converted it to his own use, the offense was embezzlement (See also MOORE v. U.S., 160 U.S. 268 and Grin v. Shine, 187, U.S. 181).

The instant case is easily distinguishable from cases such as CM 211810, Houston and CM 211900 Edwards. In neither of those cases was the property of the United States which was alleged had been wrongfully disposed of, entrusted to the possession of the accused. In the former case the soldier merely had access to the property stolen, and in the latter case the accused, a cook, also had access only to ice box where the property was stored. In those cases the accused was not the person who in law had possession of the property involved, but instead had only bare custody. In the instant case, the accused was the person, who signed memorandum receipts for the property, which he was charged with converting. He was responsible for obtaining this property for certain units and for keeping possession of such property until it was "broken down" and distributed to the various units. During the time that he had such possession, the offenses occurred. Clearly then, the case is one of embezzlement.

Further, it has been held that where an accused has been found in possession of stolen or embezzled goods, and the theft or conversion was comparatively recent, his possession, if not explained, is prima facie evidence of guilt. Such evidence is sufficient to support a finding of guilty (Dig. Ops. JAG 1912-40, Sec. 451, (37)). In the instant case, the accused was found in personal possession of some government property under such circumstances as to clearly indicate that he has converted it to his own use. He made no explanation. This, coupled with the fact that he himself is short of similar property in large amounts, amply is sufficient to make out a case of a violation of Article of War 94.

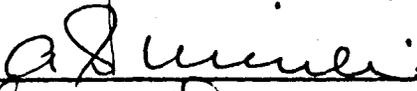
The value of the property embezzled may be determined by the court upon taking judicial notice of A. R. 30-3000 (16 October 1944) since that pamphlet, which fixes the price of the articles embezzled, is a War

Department Regulation. A War Department Regulation has the force and effect of law and courts-martial are authorized to take judicial notice of their contents (CM CBI-114, Ranzinger). The total value of the articles embezzled by the accused total \$1792.42. Although the shortages discovered were greater than those recovered, the accused was only charged with those items found either in his possession, or found to have been in his possession.

5. Accused was 28 years of age on 2 April 1945. He was inducted on 2 February 1942 and rose to the rank of a staff sergeant. He was commissioned a second lieutenant on 18 June 1943, entering active duty on that date, and promoted to first lieutenant on 29 July 1944. He is married. In civil life he was a livestock dealer. His efficiency ratings have been excellent.

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


 _____, Judge Advocate


 _____, Judge Advocate


 _____, Judge Advocate

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

SPJGH-CM 281923

29 JUN 1945

U N I T E D S T A T E S v. Captain JACK W. HOSFORD (O-295644), Infantry.) INFANTRY REPLACEMENT TRAINING CENTER) CAMP JOSEPH T. ROBINSON, ARKANSAS)) Trial by G.C.M., convened at Camp) Joseph T. Robinson, Arkansas,) 25 and 28 May 1945. Dismissal) and total forfeitures.
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OPINION of the BOARD OF REVIEW
 TAPPY, GAMBRELL 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 64th Article of War.

Specification: In that Captain Jack W. Hosford, Company C, 132nd Infantry Training Battalion, 82nd Infantry Training Regiment, Infantry Replacement Training Center, Camp Joseph T. Robinson, Arkansas, having received a lawful command from Major Weldon F. Williams, his superior officer, to go out to the training area and join his company, did, at Camp Joseph T. Robinson, Arkansas, on or about 1 March 1945, willfully disobey the same.

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

Specification: (Finding of not guilty).

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

Specification: (Finding of not guilty).

Accused pleaded not guilty to all Charges and Specifications and was found guilty of Charge I and its Specification and not guilty of all other Charges and Specifications. 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. The prosecution introduced evidence to show that on or about 24 February 1945 Major Weldon F. Williams assumed command of the 132d Battalion, accused being company commander of Company C of that battalion. On the morning of 1 March 1945 accused conferred with Major Williams and informed him that he was suffering from a physical ailment for which he had been hospitalized several times and which also had occasioned his appearance before a board of officers. He asserted that although the board recommended that he be retired because of his condition, the recommendation had not been followed by higher echelon in Washington, D. C. (R. 7, 10). Accused indicated to Major Williams that he was disgusted with the treatment he had received from the Army not only as it related to his physical condition but also with respect to his failure to receive a promotion for a long period of time. He requested the major to commence reclassification proceedings against him so that he might submit his resignation but the major declined so to do stating he had no knowledge of any lack of ability by accused which would warrant such action (R. 7, 9). Major Williams then "asked him if he would go out in the field and watch the training, not take any exercise, just observe" (R. 8, 10).

Accused however failed to appear in the training area with his organization that morning and, concluding that he could not have in his battalion a company commander who was not performing his duties, Major Williams decided to bring the matter to a head by issuing accused a direct order and thus afford grounds for punishing accused if he did not obey it. Informing First Lieutenant William J. Anderson of his decision and remarking "Well, we might as well go over and get it over with", Major Williams proceeded to the orderly room of accused's organization accompanied by Lieutenant Anderson and a Lieutenant Swager (R. 8, 11, 14). Finding accused in the orderly room, Major Williams ordered him to join his company in the training area. Accused replied that he did not wish to disobey an order but that he did not feel able to comply with it. Major Williams then asked accused if he refused to join his organization. Accused replied affirmatively, and did not thereafter join his organization in the training area (R. 8, 9).

4. The defense introduced evidence to show that many times accused has been seen professionally by Captain Morris Fishman, his regimental surgeon. In February 1945, after hearing accused's history of backaches and headaches and of medical and hospital treatment, he tentatively concluded that accused was suffering from myositis or

fibrositis of the back muscles and decided to refer him to the hospital for examination by a specialist in arthritic disorders. Thereafter the hospital reported that accused's condition had been diagnosed as a myositis-fibrositis of the back muscles, moderately severe. Myositis is a medical term designating an inflammation of muscles and ligaments, i.e. a rheumatic condition. The disorder is painful and causes a limitation of motion. It is intensified by cold, damp weather and the climate at accused's station was such as would aggravate rheumatic conditions. Captain Fishman was of the opinion that accused's condition would incapacitate him from performing full military duty. He had placed accused sick in quarters many times because of it (R. 15-19).

On 1 May 1945, accused was examined by Captain Roy W. Reed, Medical Corps, in the Regional Hospital at accused's station. The examination revealed accused suffered from a "moderately rigid neck with pain in the left deltoid muscle" and "tenderness over the medial trapezoid muscle." He diagnosed accused's condition as "fibrositis periosticular chronic" which affected his back and left shoulder and he recommended that accused be placed on limited service (R. 20, 21). This ailment would cause a stiffness in shoulder and back muscles in the early morning and although later in the morning the muscles would become limber and loose, by late afternoon they would be sore and tired. Accused could perform any duty which did not entail "too much use of his left hand or too much bending of his back or his neck." Although it would be a physical hardship for him to stand on his feet for eight hours a day he could do it (R. 22).

Accused had appeared before an Army Retiring Board, convened at the Army and Navy General Hospital, Hot Springs, Arkansas, several months prior to the instant trial and the board had recommended that accused be placed on limited service. The Adjutant General's Office subsequently directed the board to reconvene and reconsider its findings. One member of the board believed that after reconvening the board still found accused unfit for general service (R. 23). But a few days before the instant trial accused appeared before an Army Retiring Board at the Regional Hospital at his station and that board concluded that he should be retired and so recommended. That decision would not become final until approved by the Surgeon General and The Adjutant General (R. 23-25).

After accused had been informed of his rights he elected to give sworn testimony in his own behalf and he testified as follows. Since July 1943, he had suffered from a muscular stiffness and soreness which had gotten progressively worse (R. 28). Although he had been marked "for duty" on 1 March 1945, presumably after visiting the infirmary, his shoulders and back were stiff and sore that morning. He informed Major Williams of his condition that morning and also indicated that he was dissatisfied because he had remained a captain for over four

years (R. 31, 32). He stated that he was accustomed to put on slippers after arising each morning because the pain in his back prevented him from bending to tie shoelaces. Within two or three hours thereafter he would reach his maximum point of efficiency for the day and by the middle of the afternoon his back would again commence to pain (R. 33, 34).

Upon examination by the court with respect to his overseas service accused testified that he landed in Africa on 8 November 1942 with the 3d Division with which he was serving as a battalion S-3. In February 1943 he volunteered as a combat replacement with the 1st Division which was then engaging the enemy in Tunisia. His services were at first refused because of his rank until General Mark Clark intervened and ordered acceptance of them. Accused then became company commander of a heavy weapons company of the 1st Division. He also served for a brief time as escort for President Roosevelt when he visited North Africa. He returned to the United States on 7 July bringing to General Marshall the plans for the invasion of Sicily (R. 47).

5. In rebuttal the prosecution introduced evidence to show that on 1 March 1945, accused's organization was engaged in preliminary marksmanship training in a training area not more than four hundred yards distant from his orderly room (R. 35). Brigadier General Henry P. Perrine testified that on 15 March 1945 accused visited his office and had the appearance of one suffering from a stiff neck and back insomuch as he "carried his head tilted to one side and one hand appeared to be held in a constrained position" (R. 37). However, on a Sunday afternoon three days later General Perrine observed accused dancing at the Officers' Club and noted no constraint in his bearing or movement (R. 38).

Captain Allen L. Hayes, Medical Corps, examined accused on 10 January 1945 and was of the opinion he suffered from fibrositis. However, upon re-examination conducted the following month, he concluded that accused did not have fibrositis. At that time accused informed Captain Hayes that the fact he had not been promoted for a long time "could have perhaps made him feel worse" (R. 40, 41).

Major Marvin W. Ludington, Staff Judge Advocate at accused's station, interviewed accused the day after the instant charges were filed against him to discuss the situation. The major observed during the interview that accused carried his head at an angle and had his left hand drawn up to his side. Major Ludington urged accused to perform such moderate duty with his organization as he was able but after cogitating a few minutes accused stated that he would "let matters rest as they were" (R. 45, 46).

6. The evidence demonstrates that because of accused's failure to heed an earlier suggestion of his superior officer that he appear

in the training area with his organization, the superior officer decided to give accused a direct order so that, as he expressed it, the matter might be brought to a head and grounds furnished for punishing accused if he refused to obey it. If this order had been given "for the sole purpose of increasing the penalty for an offense" which it was expected the accused might commit the order would have been unlawful and the violation thereof not punishable under Article of War 64 (MCM, 1928, par. 134b; CM 219946, Tracz, et al, 12 B.R. 317, 1 Bull. JAG 18). Analyzing this proposition of law it seems clear that strictly construed it applies to a situation where superior authority expects the inferior authority to commit an offense and, in order solely to expose the latter to a punishment greater than that provided for the expected offense, the superior authority issues a direct order. For example, if superior authority had reason to believe that an inferior authority was about to commit a minor violation of Article of War 96 and, in order solely to increase the punishment for the act about to be committed, issued an order directing the inferior authority not to do the act, the order would be illegal. The rationale for this rule is clear. It is to prevent the issuance of orders which are solely to persecute military personnel. It is not to prevent the issuance of orders primarily aimed at obtaining performance of military duty or maintaining discipline.

The evidence here shows that shortly prior to issuance of the order in question, Major Williams had consulted with accused on a friendly basis, discussed his physical condition, urged him merely to put in an appearance in the training area that morning and indicated that he would expect accused so to do. No express, direct order was given accused during this informal discussion. Rather, Major Williams sought only by persuasion and tact to induce accused to perform duty. It might well be, however, that accused's subsequent failure to appear with his organization in the training area and observe its exercises constituted a failure to repair at a fixed time to a properly appointed place of duty in violation of Article of War 61. If that were so and if Major Williams realized it to be so and if he thereafter gave the express order solely to persecute accused by exposing him to greater punishment, the instant order might well have been illegal. However, the evidence does not indicate that to be the fact. It is not apparent that Major Williams believed accused had committed any offense prior to accused's disobedience of the direct order. Rather, Major Williams was of the opinion that he was compelled to issue a direct order to accused in order to obtain performance of duty by accused or his refusal so to do. The order was not issued "for the sole purpose" of exposing accused to greater punishment but was merely to expose him for the first time to punishment if he refused to perform duty properly expected of him. Were we to hold the instant order illegal we would be doing much to promote slothful and inefficient performance of military duties and careless regard, if not downright disrespect, for military discipline. Accordingly, in our opinion this order was legal and was a proper and necessary exercise of command function by Major Williams.

Although compliance with the moderate order given by Major Williams may have proven physically painful to accused, that fact would not as a matter of law excuse him from complying therewith. As a general rule nothing short of physical impossibility excuses noncompliance with a direct order (Winthrop, Military Law & Precedents, 2nd ed., p. 572). If medical authority had placed accused sick in quarters on the day in question and he had refused to obey the order because of that fact, it might well be that his conduct would not constitute such willful, defiant disobedience as is contemplated by the offense charged (CM 237479, Hill, 24 B.R. 5). However, accused had visited the infirmary that very morning and had been placed on duty status. Thus, there existed no legal excuse for his willful disobedience of the order. It is clear that accused had been suffering for some time from an arthritic or rheumatic condition which caused him substantial pain and for which he had sought treatment on numerous occasions. Because of his condition an Army Retiring Board had recommended his retirement but a few days prior to his trial. These facts merit weight in considering the appropriateness of the penalty imposed but do not constitute a legal defense to the offense charged. The evidence sustains the finding of guilty of the Specification of Charge I.

7. War Department records reveal that accused is 37 years of age, married and has three children. After graduation from high school he attended the University of Washington for two years. As a civilian he was employed from 1933 to 1941 by the Maryland Casualty Company where he was engaged in the selection and training of insurance agents. On 1 April 1932 he was commissioned a second lieutenant, Infantry, Officers Reserve Corps. He served on active duty from 12 August 1932 to 25 August 1932. On 18 May 1935 he was promoted to first lieutenant and served on active duty from 9 June 1935 to 22 June 1935. Thereafter he saw active duty from 1 August 1937 to 14 August 1937 and from 12 July 1938 to 25 July 1938. On 7 March 1940 he was promoted to captain and on 9 March 1941 he was called to extended active duty. In July 1943 he returned to this country from overseas duty presumably performed in North Africa but the duration of it is not disclosed by available records. In January 1943 he was commended by President Roosevelt for the "splendid manner" in which he performed "varied and arduous tasks during the ANFA Conference." In October 1944 an Army Retiring Board, convened at the Army and Navy General Hospital, Hot Springs, Arkansas, found accused suffering from fibrositis involving the neck, lower back and both shoulders and recommended that he be placed on limited service. The Surgeon General's Office returned the matter to the board for a reconsideration of its findings on the grounds accused suffered only from "a very mild and minor disability" and should not have been "found incapacitated for active service." After reconsideration the board adhered to its original findings and recommendation. The War Department thereafter disapproved the findings of the board and directed that accused be returned to general military service. Subsequent to commission of the instant offense accused submitted his resignation for the good of the service which was not accepted.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 64.

Thomas M. Jappy, Judge Advocate

William H. Samuell, Judge Advocate

Robert C. Trevelyan, Judge Advocate

(268)

SPJGH-CM 281923

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

JUL 16 1945

TO: The Secretary of War

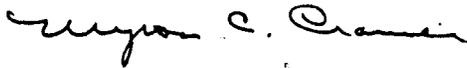
1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Jack W. Hosford (O-295644), Infantry.

2. Upon trial by general court-martial this officer was found guilty of willfully disobeying a lawful command of a superior officer, in violation of Article of War 64. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion. On 1 March 1945 accused, who was serving as a company commander, received a direct order from his battalion commander to go to the training area and observe his company which was engaging in training exercises. Accused asserted that he did not wish to disobey an order but that he was too ill to comply with it and refused so to do. Accused had been suffering from a painful fibrositis condition in his back and shoulders for some time. Many times he had been placed sick in quarters by medical authority but on the day in question, although he had visited the infirmary, he had been placed on duty. In October 1943 he had been recommended for limited service by an Army Retiring Board because of his condition but the findings had been disapproved by the War Department and accused had been placed on general service. Several days before the instant trial another Army Retiring Board had recommended, after examination of accused, that he be retired from the service because of his condition and it forwarded that recommendation to the Surgeon General for his action. Although accused's illness did not constitute a legal defense for his conduct, it is an extenuating circumstance that deserves consideration in determining the appropriate punishment to be assessed. In addition, accused served overseas in North Africa during 1943 and was especially commended by President Roosevelt for services performed during the ANFA Conference.

In view of the foregoing I recommend that the sentence 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 commuted be carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but commuted to a reprimand and forfeitures.
GCMO 368, 25 July 1945.).



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

SPJGK-CM 281929

2 JUL 1945

U N I T E D S T A T E S	)	FOURTH AIR FORCES
)	
v.	)	Trial by G.C.M. convened at
	)	Tonopah Army Air Field, Tonopah,
Second Lieutenant DELMAR	)	Nevada, 23 May 1945. Dismissal,
H. BINDER (O-682774), Air	)	total forfeitures, and confine-
Corps.	)	ment for three years.

OPINION OF THE BOARD OF REVIEW
 LYON, HEPBURN and MCYSE, 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 1: In that Second Lieutenant Delmar H. Binder, Squadron T-IV, 422nd Army Air Forces Base Unit, then of Squadron T-1, 461st Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Lemoore Army Air Field, Lemoore, California, from about 4 December 1944 to about 6 December 1944.

Specification 2: In that Second Lieutenant Delmar H. Binder, Squadron T-IV, 422nd Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Tonopah Army Air Field, Tonopah, Nevada, from about 29 December 1944 to about 31 December 1944.

Specification 3: In that Second Lieutenant Delmar H. Binder, Squadron T-IV, 422nd Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Tonopah Army Air Field, Tonopah, Nevada, from about 18 January 1945 to about 14 March 1945.

He pleaded guilty to Specifications 1 and 3 of the Charge and the Charge but not guilty to Specification 2. During the trial the court permitted the plea of guilty of Specification 1 (absence without leave from 4 December 1944 to 6 December 1944) to be changed to a plea of not guilty of absence without leave on 4 and 5 December 1944 but guilty to absence

without leave on 6 December 1944. He was found guilty of the Charge and all Specifications. Evidence was introduced of one previous conviction by general court-martial for two absences without leave, one of 9 days duration and the other of 6 days, for which the sentence as adjudged on 8 March 1944 and subsequently approved provided for a reprimand and forfeiture of \$75 per month for 6 months. In the instant 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 for 5 years. The reviewing authority approved the sentence but reduced the period of confinement to three years, and forwarded the record of trial for action under Article of War 48.

3. For the Prosecution:

Duly authenticated extract copies of morning reports were introduced and received in evidence without objection, showing accused as absent without leave for the period alleged in each Specification (R. 6, 7, Pros. Ex's. 1, 2, 3, 4).

4. Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 7).

With reference to his alleged absence without leave from 4 December 1944 to 6 December 1944 witness stated that upon arriving and being processed at Lemoore Army Air Field he was given the week end off by VOCC (R. 7). He took his wife and car home to Los Angeles, intending to return by train on Sunday (3 December 1944). He was unable to obtain transportation before Monday (4 December 1944) and "couldn't" get back until Tuesday (5 December 1944) morning (R. 8). On cross-examination he identified a written statement given to Lieutenant James A. Burns, investigating officer, on 27 December 1944 introduced as Prosecution's Exhibit 5 in which he stated

"My name is Delmar H. Binder, O-682774 2d Lt. AC, Sqdn T-4, co-pilot, crew #332, 3rd phase, age 24 years.

"I have read the 24th AW and fully understand my rights thereunder.

"On 4 December 1944 I was a Casual Officer at Lemoore Army Air Field. That day I was present on the field and attended all my required Schedules.

"On 5 December 1944 I missed Roll Call, orientation, and turning bedding because I left the field without authorization at about 1830 4 December 1944 to drive my wife to her home in Los Angeles Calif. I intended to catch the mid-night bus from Los Angeles to Lemoore but couldn't get on the bus as it was too crowded. I was able to

catch the train out of Los Angeles at 0800 5 December 1944 arriving at Lemoore Army Air Field about 2100 5 December 1944.

"On 6 December 1944 I was late for Roll Call at 0745 answering at Roll Call at about 0755. Then I turned in my bedding and reported to Capt. Miller my Sqdn CO at about 0925 6 December 1944.

"Therefore I was Awol from 1830 4 December 1944 until 2100 5 December 1944; also I did not sign out on the Sqdn departure book when I left on 4 December 1944; Further I was late for Roll Call on-6 December 1944."

Upon redirect examination by defense counsel he testified that if the 4th of December was on Saturday he left on the 4th and returned on Tuesday morning and that he could not recall the dates (R. 10). The total length of time he was absent from Lemoore Army Air Field was 3 days and he believed he had a VOCO for two days. (R. 10).

He testified that he made the statement introduced as Prosecution Exhibit 5 after being called into the office in regard to the "incident" (R. 11). He said that Lt. Burns questioned him about it and was explaining about the different distances "how I shouldn't have gone so far and how I was AWOL and I just told him what happened so he put it down". He signed the statement freely and voluntarily (R. 11). He did not feel the 50 mile radius pertained to him in view of the fact they were told to take their wives and cars home (R. 10).

With regard to Specification 2 witness stated that during the period 29 to 31 December 1944 he was living with his wife in Goldfield (R. 8). He went to the field each morning to check his mail and see if there were any orders (8). He would leave the field at 2 p.m. or 3 p.m. and return to Goldfield (R. 8). He presented himself at his station on 29, 30 and 31 December 1944 but the only witness who could substantiate it was the "fellow" he was riding with and he is now overseas (R. 8). He would state under oath that he was at the station on 29 and 31 December 1944 and that he performed to the best of his ability all the requirements expected of him (R. 8). On cross-examination witness testified he was co-pilot for Lt. Col. Hogan during the period of 29 to 31 December 1944 but did not recall what his hours were during those three days. He did report for sick call in the mornings as required but did not attend the roll call in the briefing room on those mornings and assumed that that was the reason he was "marked" AWOL.(R. 9).

With reference to the period of absence without leave from 18 January 1945 to about 14 March 1945 witness testified as follows:

"Well, I had my wife with me here and my wife and I weren't getting along too well. She decided she was going to leave. I got a three day pass to go home and straighten things out.

The leave was the 13th, 14th and 15th. I remained here the 16th and 17th. I got worried and left the morning of the 18th. When I got home, I found out my wife was going to have a child. Due to the circumstances I was worried. I tried to persuade her not to go through with it because of the operation, etc. She said she was going ahead and have the child. As I stated to Captain Middleton, I just blew my top and didn't care what happened." (R. 8)

He surrendered himself to the military police in Los Angeles (10).

5. The extract copies of the morning reports introduced into evidence by the prosecution without objection constituted competent prima facie evidence of the accused's guilt of each unauthorized absence for the period alleged in each Specification (par. 117 MCM 1928).

Upon arraignment accused pleaded guilty to Specifications 1 and 3 of the charge but was later properly permitted by the court to change his plea of guilty to the period alleged in Specification 1 to a plea of guilty of absence without leave on 6 December 1944 but not guilty of absence without leave on 4 and 5 December 1944. The court was warranted in finding the accused guilty of the unauthorized absence for the entire period alleged in Specification 1. The accused in a signed written statement admitted he was absent without leave on 4 and 5 December 1944 and although he claimed he returned to his station at 2100 on 5 December 1944 he said he was late for roll call on 6 December 1944 and did not report to his squadron commander until 0925 on that day.

The court was likewise justified in finding accused guilty of absence without leave on 29, 30 and 31 December 1944. Although accused maintained in his sworn testimony he was present at his station on these days and performed his duties as required he admitted he did not attend roll call in the briefing room. The court in considering the weight and credibility to be given accused's statement was clearly not acting improperly in refusing to accept his version and finding him guilty of the offense as alleged.

The accused's plea of guilty supplemented by the evidence offered by the prosecution clearly establishes his guilt of absence without leave from his station from 18 January 1945 to 14 March 1945 as alleged in Specification 3. His testimony frankly admits the offense and he offers nothing more than a flimsy excuse in extenuation. The prosecution has proved the averments contained in each of the Specifications beyond any reasonable doubt.

6. War Department records disclose that this officer is 25 years of age, married, and a high school graduate. He enlisted and served in the Wisconsin National Guard from 26 October 1939 to 15 October 1940 at which time he entered the service of the United States Army. He was in training as an aviation cadet from 22 September 1942 to 25 June 1943,

on which date he was honorably discharged as such and was co
a temporary second lieutenant in the Army of the United States
26 June 1943. He was tried and convicted by general court-m
March 1944 for two offenses of absence without leave (9 days
in violation of Article of War 61 and sentenced to forfeit \$
for 6 months and to be reprimanded.

7. The court was legally constituted and had jurisdiction
accused and the offenses. No errors injuriously affecting t
stantial rights of the accused were committed by the court c
trial. In the opinion of the Board of Review the record of
legally sufficient to support the findings and the sentence
confirmation of the sentence. Dismissal is authorized upon
a violation of Article of War 61.

Langston
Earle Stephen
Wm. M. Mays

(276)

SPJGK - CM 281929

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 12 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Delmar H. Binder (O-682774), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of three absences without leave for periods of two days, two days, and for four days less than two months, respectively, in violation of Article of War 61. Evidence was introduced of one previous conviction by general court-martial for two prior absences without leave for periods of nine days and six days, respectively, for which the sentence as adjudged on 8 March 1944 and subsequently approved, provided for a reprimand and forfeiture of \$75 per month for six months. In the instant 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 for five years. The reviewing authority approved the sentence but reduced the period of confinement to three years and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

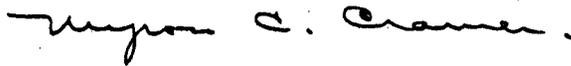
The accused officer absented himself without proper leave from his station from 4 December to 6 December 1944, from 29 December to 31 December 1944, and from 18 January to 14 March 1945. Absence without leave in time of war by an officer is a serious offense, and accused has clearly demonstrated that he is not worthy of his commission. From the accused's testimony the final unauthorized absence appears to have been the result of his loss of self-control and disregard of his military obligations when he discovered that his wife was to have a baby. Knowing her poor physical condition, as he expressed it, "I just blew my top and didn't care what happened." The psychiatric report contains the following:

"The most probable diagnosis is simple adult maladjustment, manifested by periods of A.W.O.L., indiscreet drinking and over-concern over domestic situations."

I recommend that the sentence be confirmed, but that the forfeitures be remitted, that a United States Disciplinary Barracks be designated as the place of confinement, and that the sentence as thus modified be ordered

executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation should it meet with your approval.



2 Incls

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. GCMO 344, 21 July 1945).

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

SPJGN-CM 281935

UNITED STATES

v.

Captain HOWARD N. KIRK
(O-432072), Air Corps.

ARMY AIR FORCES EASTERN
TECHNICAL TRAINING COMMAND

Trial by G.C.M., convened at
Chanute Field, Illinois, 2 June
1945. Dismissal, total forfeitures,
and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 Captain Howard N. Kirk, 328th AAF Base Unit, atchd Sq P, 3502d AAF BU, TS&HS, did at Chanute Field, Illinois, on or about 5 May 1945, feloniously take, steal and carry away one (1) fountain pen and one (1) pencil, (Parker set), value about \$12.00, the property of Captain D. B. O'Hara.

Specification 2: In that Captain Howard N. Kirk, * * * did at Chanute Field, Illinois, on or about 10 May 1945, feloniously take, steal and carry away one (1) ring, diamonds off-set, value about \$45.00, the property of Captain D. B. O'Hara.

Specification 3: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois, on or about 10 May 1945, feloniously take, steal and carry away one (1) Remington electric razor, value about \$15.00 the property of 1st Lt. William R. Ferris.

Specification 4: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois, on or about 11 May 1945, feloniously take, steal and carry away One Hundred Fifty Dollars (\$150.00), cash, lawful money of the United States, the property of 1st Lt. J. D. McClurkin.

Specification 5: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois, on or about 11 May 1945, feloniously take, steal and carry away One Hundred Sixty Dollars (\$160.00), cash, lawful money of the United States, the property of 1st Lt. Philip C. Stinson.

Specification 6: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois, on or about 10 May 1945, feloniously take, steal and carry away Two Hundred Dollars (\$200.00) cash, lawful money of the United States, the property of 2d Lt. Harlan E. Lyon.

Specification 7: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois, on or about 11 May 1945, feloniously take, steal and carry away Seventy-Four Dollars (\$74.00) cash, lawful money of the United States, the property of 1st Lt. William J. Ingram.

Specification 8: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois, on or about 11 May 1945, feloniously take, steal and carry away one (1) cigarette lighter, Thoren, value about \$15.00 the property of 1st Lt. Edward H. Frost.

Specification 9: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois, on or about 9 May 1945, feloniously take, steal and carry away Fifty-Three Dollars (\$53.00), cash, lawful money of the United States, the property of 1st Lt. Ernest L. Wildhagen.

Specification 10: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois, on or about 9 May 1945, feloniously take, steal and carry away Forty Dollars (\$40.00), cash, lawful money of the United States, the property of 2d Lt. Dale C. Whittaker.

Specification 11: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois, on or about 11 May 1945, feloniously take, steal and carry away Two (2) Twenty-Five Dollar United States War Bonds, value about Thirty-Seven Dollars and Fifty Cents (\$37.50); one (1) Ten Dollar United States War Bond, value about Seven Dollars and Fifty Cents (\$7.50); and Twenty-Five Dollars (\$25.00), cash, lawful money of the United States, the property of F/O Donald R. Bossard.

Specification 12: In that Captain Howard N. Kirk, * * * did, at Chanute Field, Illinois on or about 11 May 1945, feloniously take, steal and carry away one (1) Fifty Dollar (\$50.00) check payable to cash, dated 8 May 1945, drawn on the Fowler's State Bank, Rantoul, Illinois and signed by 2d Lt. Gerald Saperstein; and Seventy Dollars (\$70.00), cash, lawful money of the United States, the property of 1st Lt. William V. Williams.

The accused pleaded not guilty to, and was found guilty of, both the Charge and the Specifications thereunder. 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 twenty-five years. The reviewing authority approved only so much of the finding of guilty of Specification 2 as involved a finding of guilty of larceny of one ring, value about \$45, property of Captain D. B. O'Hara; approved the sentence but reduced the period of confinement to five years; and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that, between 8 May and 11 May 1945, a number of items of personal property and considerable sums of money disappeared from the possession of various officers at Chanute Field, Illinois. The pertinent data relative to these articles may be summarized as follows:

<u>Spec.</u>	<u>Name of Owner</u>	<u>Property, Value and Date of Disappearance</u>	
Spec. 1	Capt. D. B. O'Hara	1 Fountain Pen & Pencil, \$12.00, 10 May 1945.	(R. 19, 33)
Spec. 2	Capt. D. B. O'Hara	Diamond ring, \$45.00, date not shown.	(R. 19-20)
Spec. 3	1st Lt. William R. Ferris	Remington electric razor, \$15.00, 11 May 1945.	(Pros. Exs. 15, 35)
Spec. 4	1st Lt. J. D. McClurkin	3 \$50.00 bills, \$150.00, 11 May 1945.	(Pros. Ex. 16)
Spec. 5	1st Lt. Phillip C. Stinson	8 \$20.00 bills, \$160.00, 11 May 1945.	(Pros. Ex. 17)
Spec. 6	2nd Lt. Harlan E. Lyon	10 \$20.00 bills, \$200.00, 11 May 1945.	(R. 22-23)
Spec. 7	1st Lt. William J. Ingram	\$74.00 in bills, \$74.00, 11 May 1945.	(Pros. Ex. 18)

<u>Spec.</u>	<u>Name of Owner</u>	<u>Property, Value and Date of Disappearance</u>	
Spec. 8	1st Lt. Edward H. Frost	1 Cigarette lighter, owner's evaluation \$15.00, 11 May 1945.	(Pros. Ex. 19)
Spec. 9	1st Lt. Ernest L. Wildhagen	\$53.00, \$53.00, 10 May 1945	(Pros. Ex. 20)
Spec. 10	2nd Lt. Dale C. Whittaker	\$40.00, \$40.00, 10 May 1945.	(R. 23-24)
Spec. 11	F/O Donald R. Bossard	War Bonds and \$25.00 in cash, \$45.00 and \$25.00, 11 May 1945.	(Pros. Ex. 21)
Spec. 12	1st Lt. William V. Williams	\$70.00 in cash and \$50.00 check payable to cash signed by 2nd Lt. Gerald Saperstein, \$120.00, 11 May 1945.	(R. 25-26).

From 29 April to 11 May 1945 the accused was stationed temporarily at Chanute Field, Illinois; for a brief course of instruction (R. 11). On the last date, after he had completed his training and was about to complete the "clearance" process at headquarters prior to his return to his home station, he was identified as one suspected of the theft of some of the above articles (R. 8). Having been warned of his rights against self-incrimination, he admitted that he had taken a number of items which did not belong to him from the local officers' barracks. He permitted his bags to be opened and searched and surrendered \$233 from his wallet. This sum consisted of two \$20 bills, three \$1 bills, thirteen \$10 bills, and twelve \$5 bills, all of which he admitted removing from various officers' wallets. "Then he crossed his legs, took off his shoe", and disclosed therein five \$50 bills and fifteen \$20 bills (R. 12). This currency had admittedly also been appropriated from various officers' wallets (R. 12, 17). A Parker fountain pen and pencil and a ring which were found in his bag were identified by him as having been taken from the personal belongings of Captain O'Hara (R. 11, 12). He also identified, as property misappropriated by him, a Remington electric razor, a Thoren cigarette lighter, three \$25 United States War Bonds, one \$10 United States War Bond, and the check described in Specification 12 (R. 11-14). After these articles and money had been discovered in the accused's possession, he made a voluntary statement, as follows:

"I arrived at Chanute Field on 29 April 1945 to attend the Weights and Balance course. I was assigned to Barracks 189. I was here approximately one week when I took a Remington electric razor out of the barracks where I slept. I did not

know the owner of the razor but knew it was not mine. I intended to keep the razor and was not going to offer it for sale. From that time on I made visits to numerous barracks and took several wallets, removed the money from the wallets and threw the wallets in the furnace. I also removed gasoline coupons from the wallets and kept the coupons. I also found \$60 worth of bonds which I kept. The \$233 which was in my wallet was all money taken from other wallets. The three 2 dollar bills likewise did not belong to me and were taken from other wallets. The \$550 which I gave to Major GREEN which I took out of my shoe, was money which I took from wallets. The \$50 check marked 'Cash' signed by 2nd Lt. JERALD SAPERSTEIN was taken from a Lieutenant's wallet and was in my possession. I gave permission to Major GREEN to look at the rest of my luggage and in it were a diamond ring and a fountain pen and pencil set which belonged to Captain O'HARA which I had taken. The cigarette lighter I picked up in the barracks and was also found in my possession and did not belong to me" (Pros. Ex. 22).

4. After his rights relative to testifying or remaining silent had been explained to him, the accused elected to remain silent, and no evidence was presented by the defense. By stipulation, however, it was agreed that the accused's Form 66-2 contained entries, as follows:

"* * * Accused was commissioned 2d Lt. 12 December 1941. Was commissioned Captain 26 February 1943. That there is no evidence of any previous court martials. That from April 1943 to January 1944, he was a B-17 pilot. That he made regular combat missions in B-17s and was a group leader in 17 out of 25 missions. That he has the American Theater ribbon, European Theater ribbon with 2 battle stars, an Air Medal and a DFC with 1 oak leaf cluster" (R. 33).

5. Each of the twelve Specifications alleges that the accused did on the dates therein named "feloniously take, steal, and carry away" the property or money therein described.

The Manual for Courts-Martial defines larceny, as follows:

"Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein.

"Once a larceny is committed, a return of the property or payment for it is no defense to a charge of larceny. Personal property only is the subject of larceny." MCM, 1928, par. 149g.

The evidence, as presented by the various owners of the property

and money in question, shows that such money and property, after disappearing from their personal possession about the time alleged, was found in the possession of the accused under circumstances which clearly indicated that he had intended permanently to appropriate the various articles to his own use. Since the accused has voluntarily admitted his wrongful taking of each of the items, the record is, subject to the exception indicated below, legally sufficient beyond a reasonable doubt to sustain each of the findings of guilty. The only proof concerning the value of the cigarette lighter described in Specification 8 was the evaluation placed upon it by Lieutenant Frost. Since Lieutenant Frost was not shown to be an expert valuator of such articles and since he gave no basis for his evaluation, we must conclude that the value alleged was not satisfactorily established. The evidence is legally sufficient, therefore, to support only so much of the finding of guilty of Specification 8 as finds the accused guilty of the larceny of a Thoren cigarette lighter of some value. II Bull. JAG, Jan. 1943, pp. 12-13, sec. 427 (40).

6. According to the records of the War Department the accused is approximately 26 years of age. He completed three and one-fourth years of college work and was thereafter variously employed as a clerk in a grocery store, as a clerk in an aircraft factory, and as a sheet metal worker. He enlisted in the service on 1 May 1941 and was commissioned a second lieutenant, Air Corps, Army of the United States on 12 December 1941. On 22 September 1942 he was promoted to the rank of first lieutenant and on 26 February 1943 he was promoted to his present grade of captain. He has been awarded the Distinguished Flying Cross and the Air Medal with an additional Oak Leaf Cluster for each medal. On 16 March 1944 he was reprimanded under Article of War 104 for taking a woman not his wife to his hotel room.

7. 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 8 as finds the accused guilty of the larceny of one Thoren cigarette lighter of some value; and legally sufficient to support all the other findings and the sentence and to warrant confirmation thereof. A sentence of dismissal and confinement at hard labor for five years is warranted upon conviction of a violation of Article of War 93.

Abner E. Lifecomb Judge Advocate.

Robert J. Cannon Judge Advocate.

Samuel Morgan Judge Advocate.

SPJGN-CM 281935 1st Ind
Hq ASF, JAGO, Washington 25, D. C. JUL 16 1945
TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Captain Howard N. Kirk (O-432072), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of feloniously stealing a fountain pen and pencil set of the value of \$12, a diamond ring of the value of \$45, an electric razor of the value of \$15, \$150 in cash, \$160 in cash, \$200 in cash, \$74 in cash, a cigarette lighter of the value of \$15, \$53 in cash, \$40 in cash, three United States War Bonds of the value of \$45 and \$25 in cash, and one check in the sum of \$50 and \$70 in cash, all in violation of Article of War 93. 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 twenty-five years. The reviewing authority approved only so much of the finding of guilty of Specification 2 as involved a finding of guilty of larceny of one ring, value about \$45, property of Captain D. B. O'Hara, approved the sentence but reduced the period of confinement to five years, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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 8 as finds the accused guilty of the larceny of one Thoren cigarette lighter of some value, legally sufficient to support all the other findings and the sentence as approved by the reviewing authority and to warrant confirmation thereof.

The record shows that from 29 April to 11 May 1945 the accused was stationed temporarily at Chanute Field, Illinois, for a brief course of instruction. On several occasions during this time he removed from the clothing and personal possession of a number of officers the various items listed above, including property of a total value of \$939. After he had completed his training and was about to complete the "clearance" process at headquarters prior to his return to his home station, he was identified as one suspected of the above described thefts. After being warned of his rights against self-incrimination he admitted taking a number of items which did not belong to him and surrendered \$233 from his wallet and \$550 which was concealed in his shoe.

A psychiatric report attached to the record shows that the accused has a psychopathic personality, but that he shows no evidence of a psychosis and that he is able to distinguish right from wrong and to cooperate in his defense.

War Department records show that the accused has been awarded the Distinguished Flying Cross and the Air Medal with an additional Oak Leaf Cluster for each medal. On one occasion he was punished under Article of War 104 for taking a woman not his wife into a hotel room. The question of the accused's sanity was not raised at the trial.

The accused's deliberate acts of stealing from brother officers on several occasions is a serious offense which cannot be condoned. In view, however, of his extremely meritorious combat record some clemency is warranted. I accordingly recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures be remitted and the period of confinement be reduced to three years; that the sentence as thus modified be ordered executed; and that a United States Disciplinary Barracks be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted and confinement reduced to three years. GCMO 376, 25 July, 1945).

become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for seven years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and, pursuant to Article of War 50 $\frac{1}{2}$, withheld the order directing the execution of the sentence.

3. The record of trial is legally sufficient to sustain the findings of guilty of Specification 1 and the Charge. It is also legally sufficient to sustain the finding of guilty of Specification 2 except as to value of the property therein described. By a stipulation between the prosecution and the defense the total value of those articles was shown to be "not less than Fifty Dollars (\$50.00)" (Pros. Ex. A). The record of trial is legally sufficient, therefore, to sustain the finding of guilty of Specification 2, substituting therein for the alleged value "of not less than \$273.55", the proved value "of not less than \$50"; legally sufficient to sustain the other findings; and legally sufficient to sustain the sentence.

Abner E. Lipscomb, Judge Advocate.

Robert J. Cannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 281985

1st Ind JUL 9 1945

Hq ASF, JAGO, Washington, D. C.

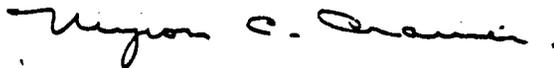
TO: The Commanding General, Second Service Command, Army
Service Forces, Governors Island, New York 4, New York.

1. In the foregoing case of Private George Kaelin (42209877), Un-assigned Company A, 1209th SCU STU, Pine Camp, New York, I concur in the holding of the Board of Review and for the reasons therein stated recommend that only so much of the finding of guilty of Specification 2 be approved as involves a finding of guilty of that Specification, substituting therein for the alleged value "of not less than \$273.55", the proved value "of not less than \$50". Under the provisions of Article of War 50½ you now have authority to order the execution of the sentence.

2. In view of the youth of the accused, his short period of service, and since the value of the property stolen by him was much less than that alleged, it is recommended that the period of confinement be reduced to five years and that the Federal Reformatory, Chillicothe, Ohio, 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 281985).



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.

(291)

JUN 30 1945

SPJGK - 282005

23 JUN 1945

UNITED STATES)

FOURTH SERVICE COMMAND
Army Service Forces

v.)

Private ANTHONY J.
WINCELOWICZ (32408569),
Company B, Fourth Training
Group, ASF Training Center
(Ord), Mississippi Ordnance
Plant, Flora, Mississippi)

Trial by G.C.M., convened at
Mississippi Ordnance Plant,
Flora, Mississippi, 5-6 June
1945. Dishonorable discharge
and confinement for life.
Penitentiary.

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

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

Specification 1: In that Private Anthony J. Wincelowicz, Company B, Fourth Training Group, Army Service Forces Training Center (Ordnance), Mississippi Ordnance Plant, Flora, Mississippi, did, at Mississippi Ordnance Plant, Flora, Mississippi, on or about 6 April 1945, wrongfully and feloniously aid and abet Private Joe Gonzales in forcibly and feloniously, against her will, having carnal knowledge of Private Agnes A. Buresh.

Specification 2: In that Private Anthony J. Wincelowicz, ***, did, at Mississippi Ordnance Plant, Flora, Mississippi, on or about 6 April 1945, wrongfully and feloniously aid and abet Private Elmer Smith in forcibly and feloniously, against her will, having carnal knowledge of Private Agnes A. Buresh.

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

Specifications: In that Private Anthony J. Wincelowicz, ***, did, at Mississippi Ordnance Plant, Flora, Mississippi, on or about 6 April 1945, with intent to commit a felony, viz rape, wrongfully commit an assault upon Private Agnes A. Buresh, by willfully and feloniously striking the said Private Agnes A. Buresh on the legs, arms, face and private parts of her body with his hands and fists.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence was introduced of two previous convictions in violation of Article of War 96, one by a summary court on 28 October 1944 for disrespect to a superior officer, for which he was sentenced to forfeiture of \$10 of his pay for one month and restriction to his post for two months, and the other by a special court-martial on 19 December 1944 for striking a woman and breach of restriction, for which he was sentenced to confinement at hard labor for six months and forfeiture of \$16 of his pay per month for a like period. In the instant case he was sentenced to be 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 at Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. Summary of evidence.

a. For the Prosecution.

At the time of the commission of the offenses with which accused is charged and at the time of the trial accused was a private in the United States Army (R. 9, Pros. Ex. J). On the evening of 6 April 1945, Private Agnes A. Buresh, Women's Army Corps, 31 years of age, was at the library of the Mississippi Ordnance Plant, Flora, Mississippi, where she was stationed (R. 8,10). The library was located in a room in the Service Club next to the dance floor, and when the library closed at 10:00 p.m., Private Buresh went to the dance floor to meet two girl friends. There she met the accused and Private Elmer Smith (R. 10). Accused and Smith invited Private Buresh out to their car to have some beer. At first Private Buresh refused but upon insistence went outside to their car and drank a bottle of beer (R. 11). Private Joe Gonzales was outside in the car when they went out (R. 11,32). Private Buresh had known the accused, Smith and Gonzales for about eight months, but did not have an appointment to meet any of them on this particular evening (R. 9,10). All of the parties then returned to the service club where Gonzales danced with Private Buresh once (R. 11). When the dance was over Gonzales and Smith asked Private Buresh to ride to her barracks with them (R. 12). Private Buresh, accused, Smith and Gonzales then got into the car. Smith was driving and instead of taking Private Buresh to her home, drove to the "NCO" Club, where one of the men got out and obtained some more beer (R. 12,13). Private Buresh kept telling these men, "time after time," to take her home as she would be late for bed check (R. 13). Despite Private Buresh's entreaties the three men drove the car down to the motor pool where they stopped again (R. 14). While parked at the motor pool, Private Buresh testified: "Accused took my hand and placed it on his private parts. I was frightened and continued telling them to take me home" (R. 14). Smith again started the car and drove across a field near the motor pool to the edge of some trees (R. 14,15). After the car stopped, accused and Smith, who had been in the front seat with Private

Buresh, got out (R. 15). Private Buresh then "jumped out and started running toward her barracks" (R. 16). Before she could run very far two of the men (the witness didn't recall which two) caught her and forced her into the back seat of the car (R. 16). The car was again started and driven down a "steep bank into some mud", where it became "stuck" (R. 16). Private Buresh then asked Smith "to explain the idea of bringing [her] down there," to which Smith replied that she "didn't know what [she was] missing" (R. 17). Smith moved over towards Private Buresh and she again jumped out of the car, but was caught by accused and Smith before she could get away (R. 17). Gonzales had gone for a wrecker at this time (R. 17). Accused and Smith forced Private Buresh down on the back seat of the car. She screamed and one of them hit her (R. 17). Accused hit her on the left jaw with his hand (R. 18). Accused and Smith were holding her hands and feet (R. 18). Smith cut Private Buresh's "panties" out from between her legs, and accused "stuffed" her mouth with rags or a handkerchief to stop her from screaming (R. 18). Smith then put his fingers in her private parts, and accused asked Smith, "Does she have a cherry?" to which Smith replied, "You can't tell me she is not that type of a girl" (R. 18). Accused then held Private Buresh's hands and Smith "commenced to have intercourse with her." Smith's private part penetrated her (R. 19). Accused tried to put his private part in Private Buresh's mouth but did not succeed (R. 18). Gonzales came back about this time and said that somebody was coming (R. 19). Accused and Smith got out of the car and Private Buresh started running towards her barracks (R. 19). Gonzales caught Private Buresh and pulled her to the side of the field where Smith grabbed her and threw her down (R. 19). All three of the men held her on the ground and one of them beat her over the face (R. 20). While she was being held Gonzales got on top of her but did not effect a penetration (R. 20). As soon as Gonzales got up Smith got on her and penetrated her (R. 21). Private Buresh's testimony at this point was: "All along I was being held. My legs were held, too. My face was pinned to the ground. Everytime I tried to say something or screamed I was knocked over the face" (R. 21). After Smith got off of her the accused got on her but did not effect a penetration. While accused was on top of her she was trying to "pray" and accused hit her (R. 21). Accused was on her two or three minutes and as soon as he got off of her Gonzales got back on top of her and penetrated her at this time (R. 22). Private Buresh did not at any time consent to any of the acts on the part of accused, Smith or Gonzales (R. 22,23). Private Buresh then went back to her barracks, and noted that her mouth and jaw were bruised and bloody; a man's handkerchief was tied around her neck; her blouse, skirt, shoes and hose were muddy; her slip and panties were bloody, and the strap on her panties that went between her legs was cut clear across (R. 23-26). Private Buresh noticed blood in the commode when she urinated (R. 27). The next morning Private Buresh told two of her friends about this occurrence (R. 26, 63,65) and the matter was reported to Private Buresh's commanding officer (R. 27,66,67). Private Buresh was physically examined at Flora, Mississippi, on 7 April 1945 by Captain John R. West, Chief of the Surgical Service, who found the following abnormalities:

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"*** abrasions and contusions of her lower lip, right side of face and chin, left upper arm, right hip and right thigh. There were scratch marks on both shoulders, both legs, both knees and both thighs. Examination of the genitalis was that there were contusions and abrasions of the external genitalis, abrasions and lacerations, recent, of the hymenal ring. The vaginal canal was virginal in type, and the examination made of the vaginal canal was negative for the presence of spermatozoa." (R. 76-78).

Lieutenant Charles R. Ireland, Laboratory Officer at Flora, Mississippi, testified that there was blood on Private Buresh's slip (R. 88,89, Ex. D), and spermatozoa on her skirt (R. 89,90, Ex. C). Private Buresh's clothes were properly identified and introduced as follows: Blouse (R. 96, Ex. B); skirt (R. 96, Ex. C) and slip (R. 96, Ex. D). Photographs of Private Buresh's face and knees which were shown to be a fair representation of her face and knees on 7 April 1945 were introduced (R. 69, Ex. E; R. 70, Exs. F,G,H; R. 71, Ex. 1). A map was introduced showing the location of all the buildings and objects testified to by the witnesses (R. 7, Ex. A).

Accused voluntarily made a sworn statement to Captain Ben A. O'Dorisio, the original investigating officer (R. 91,93,97, Ex. J), and subsequently stated to First Lieutenant James A. Cleveland, who later served in the same capacity, that he did not care to change or alter this statement, although accused was told by the latter that "he could do away with his previous statement" (R. 98,99,100). This statement was as follows:

"I, Private Anthony J. Wincelowiez, ASN 32409569, Company B, Fourth Training Group, Army Service Forces Training Center (Ord), Mississippi Ordnance Plant, Flora, Mississippi, make the following statement to Captain Ben A. O'Dorisio, Investigating Officer, who has identified himself to me. The 24th Article of War has been read to me and I understand same. This statement is being made of my own free will, with no promise of reward, and I have been warned that such statement may be used against me in court:

"On Friday night, 6 April 1945, Privates Gonzales, Smith, Bolt, and myself were drinking beer in Post Exchange No. 2 until about 2230. From there we went up to the Service Club. We were stopped by an MP who wanted to know who it was. It told him it was me, and he told us to go ahead. We parked by the Service Club, and Smith and I went inside and I started dancing. After the dance was over, Gonzales asked Private Buresh if we could take her home.

"We got in the car and drove up to the NCO Club. Private Smith was driving. We got some more beer, and from there we were going to take her home. Smith was going to drive back to the Motor Pool, and I got leery. Some men were working in the Motor Pool. I told Smith to let Private Buresh go, but he said, 'No, let's go', and took the car some place. It was so dark I couldn't see. He

got in a ditch and sunk the car in mud. We tried to get it out, but couldn't. Smith told Gonzales to go get the wrecker. Gonzales didn't want to go, but he went and came back in less than five minutes.

"Smith and I were both in the car with Private Buresh, and we couldn't succeed in any way, so I said to her, 'You win. Let's get the car out of here and go.' Smith was a little more persistent and said, 'We have gone so far, let's go on and finish with her.' Then I got out of the car and Smith was in there alone with her. At the time I got out, Gonzales happened to come back.

"In about ten or fifteen minutes, she jumped out of the car. Gonzales grabbed her, and Smith came out of the car. I said, 'I am going back to the barracks. Let's get this staff car out of here before we get ourselves in a mess.' Smith said, 'No, we have gone so far with her, let's just go on.' He also told me he had cut her panties with a knife. I still wanted to go back to the barracks, but I didn't go.

"I tried to get the staff car out, and Gonzales and Smith took her over to the side out in the woods some place, and I heard her scream. As she screamed, I walked over to see what was going on. I saw they had her on the ground. Gonzales was the first to try to have an intercourse with her. She was screaming, and I got scared and put my hat over her mouth, but I didn't strike her. I said, 'Let's get out of here.' Smith then tried to have an intercourse with her. I don't know whether he succeeded or not, but when he got up, he said, 'It was good. You try now.' Then I got on her, but she was screaming so at the moment that I got up. I didn't succeed in the intercourse, or even penetrate. Gonzales got on her again. She was screaming and pleading to get up and get out.

"Smith and I went over to get the staff car out. Smith went to get the wrecker, and I got in the staff car and tried to back it out, but saw it was useless. Then Smith came back with the wrecker, and I was still trying to get the wrecker out, and the woman was still screaming. Smith pulled the wrecker up by the staff car, I got out, and we tied a rope to the back bumper. After we got it hooked up, Gonzales came back. Smith asked him, 'What did you do with the girl? What happened to her?' He said she ran off.

"We got the staff car out and took it back to the Motor Pool and washed it as best we could. Directly from there, Gonzales and I went to our barracks."

b. For the defense.

After an explanation of his rights, accused elected to make an unsworn statement, which was substantially as follows:

Accused, Smith, Gonzales and a Private Bolt went to the service club on the evening of 6 April 1945 (R. 103). He and Smith went in the club while Gonzales and Bolt remained outside. Inside the service club they saw Private Buresh and asked her to have some beer with them. Private

Buresh accepted and the three of them walked out to the car where they each drank a bottle of beer. While they were outside Smith and Gonzales left in the car to drive Bolt to his barracks. While they were gone he put his arm around Private Buresh and "with the other hand felt her breast. She did not protest" (R. 103). When Smith and Gonzales came back they all went inside the service club where Gonzales danced with Private Buresh. At the close of the dance at 2300 he found Private Buresh, Smith and Gonzales saying "something about beer". They all got into the car and drove over to the NCO Club and Smith parked the car back of the "Post Engineers' Building" (R. 104,105). After parking all three of the men got out of the car and went behind the building to "relieve" themselves. Gonzales and Smith then went inside the "NCO" club to get the beer while he remained outside with Private Buresh (R. 105). While they were gone he put his arm around Private Buresh and "placed her hand on his penis" (R. 105). "She did not object at the time". When Smith and Gonzales came back all four of them drank another bottle of beer, and talked of Private Buresh's brother's invention. Smith asked Private Buresh "if she would like to see some new trucks", to which she replied, "alright" (R. 105). They then drove to the motor pool, and as they were going to the motor pool he had his hand on Private Buresh's "breast," and Gonzales had his hand on her "other breast" (R. 105). There were men working at the motor pool so they drove out into a field where the car became "stuck" (R. 106). Gonzales left and went back for the wrecker, and accused got out of the car to "relieve" himself (R. 106). When he came back to the car Gonzales was back and said that he could not get the wrecker (R. 106). Private Buresh then got out of the car and slipped and fell and Gonzales fell on top of her (R. 107). They walked over to some trees where Gonzales and Smith "kissed" Private Buresh (R. 107). Accused then kissed her and she "screamed" (R. 107). Accused then left and went back to the car and did not see Private Buresh any more that night (R. 107,108). Gonzales was alone with Private Buresh about 10 minutes while Smith was after the wrecker and he (accused) was trying to get the car out of the mud (R. 107,108). Accused denied trying to rape Private Buresh or holding her while Smith and Gonzales raped her and denied trying to put his penis in her mouth (R. 108). Accused denied, in effect, that he had made the statement to Captain O'Dorisio contained in Prosecution Exhibit "J" (R. 108-111). He stated that he signed this statement because the investigating officer told him that the investigating officer would help him, and that he told the investigating officer that the statement was not true at the time he signed it (R. 110).

The defense introduced a statement made by Private Buresh to the investigating officer on 11 April 1946, for the purpose of showing that Private Buresh did not tell the investigating officer that Smith had intercourse with her while she, accused, and Smith were in the car, during Gonzales' absence (R. 58, Def. Ex. 1).

4. The Manual for Courts-Martial, 1928, paragraph 148b, provides:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

"Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

"The offense may be committed on a female of any age.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent ***."

"Proof. - (a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent."

Applying these principles to the facts in the present case it clearly appears that accused was raped by both Privates Smith and Gonzales at the time and place alleged in Specifications 1 and 2 of Charge I. Private Buresh's statement of what occurred is convincing and is corroborated by her physical appearance after her harrowing experience, the condition of her genitals, the presence of blood on the slip and of spermatozoa on the skirt she wore the night that she was originally assaulted. Furthermore, as to this aspect of the Specifications, accused's voluntary pre-trial statement fully supports every important detail testified to by Private Buresh. In describing what occurred after the car had bogged down in the field, accused stated:

"I tried to get the staff car out, and Gonzales and Smith took her over to the side out in the woods some place, and I heard her scream. As she screamed, I walked over to see what was going on. I saw they had her on the ground. Gonzales was the first to try to have an intercourse with her. She was screaming, and I got scared and put my hat over her mouth, but I didn't strike her. I said, 'Let's get out of here.' Smith then tried to have an intercourse with her. I don't know whether he succeeded or not, but when he got up, he said 'It was good. You try now.' Then I got on her, but she was screaming so at the moment that I got up. I didn't succeed in the intercourse, or even penetrate. Gonzales got on her again. She was screaming and pleading to get up and get out."

Accused did not testify that he saw the actual penetration of Private Buresh by Privates Smith and Gonzales, but this deficiency is fully supplied by the definite testimony of Private Buresh. With full realization that an accusation of rape is one "easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent" (MCM, 1928, p. 165), the Board is of the opinion that the record of trial compels the conclusion that Privates Smith and Gonzales forcibly and feloniously against her will had carnal knowledge of Private Buresh at the time and place described.

That accused aided and abetted both of the assailants in the commission of rape upon Private Buresh is equally well established. For an hour or more accused and his two companions acted in concert in their reprehensible conduct toward Private Buresh. In his unsworn statement accused admitted that he took improper liberties with Private Buresh even before the car became stuck. When the car did get stuck, he described the situation in his pre-trial statement as follows:

"Smith and I were both in the car with Private Buresh, and we couldn't succeed in any way, so I said to her, 'You win. Let's get the car out of here and go.' Smith was a little more persistent and said, 'We have gone so far, let's go on and finish with her.' Then I got out of the car and Smith was in there alone with her. At the time I got out, Gonzales happened to come back.

"In about ten or fifteen minutes, she jumped out of the car. Gonzales grabbed her, and Smith came out of the car. I said, 'I am going back to the barracks. Let's get this staff car out of here before we get ourselves in a mess.' Smith said, 'No, we have gone so far with her, let's just go on.' He also told me he had cut her panties with a knife. I still wanted to go back to the barracks, but I didn't go."

His recital of what occurred thereafter has already been quoted. He admitted that he had placed his hat over Private Buresh's face to keep her from screaming while she was down on the ground, that he watched Gonzales when he first attempted to have intercourse with her, that he likewise watched Smith when he "tried to have an intercourse with or penetrate her," and that he saw Gonzales get "on her again." During all of this time he testified Private Buresh was "screaming and pleading to get up ***". Private Buresh testified positively to accused's presence at the time she was raped by Smith, and to the active assistance rendered by him to Smith in carrying out his nefarious purpose. She could not state positively that accused was present when she was raped by Gonzales, for she was completely exhausted by her harrowing experience, including the attack on her by accused. This deficiency was supplied by accused's own statement that after he got off Private Buresh his place was taken by Gonzales, and that Private Buresh was screaming and pleading to get up. The record of trial clearly supports the conclusion that accused was nearby when both crimes were committed, actively assisting at least in the first instance and in both instances standing by, ready to warn his fellow conspirators of the approach of any third person and by his presence encouraging them to rape their victim. While, therefore, accused could have been charged as a principal, he was not improperly charged and was properly found guilty as an aider and abettor (CM NATO 643).

That accused assaulted Private Buresh with intent to rape her, as alleged in the Specification of Charge II is fully established by Private Buresh's testimony and accused's pre-trial statement. In the analysis of this offense, the Manual for Courts-Martial, 1928, paragraph

1491, page 179, provides in pertinent part as follows:

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

"No actual touching is necessary. * * *

"The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. * * *

"Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted."

The facts in the present case show beyond any doubt that accused had sought unsuccessfully to obtain Private Buresh's consent to intercourse with him, and that later, after she had been assaulted by both Privates Smith and Gonzales he deliberately got on top of her while she lay prone on the ground and remained on her for about three minutes. His explanation of his failure to consummate his purpose is that "*** she was screaming so at the moment that I got up." The record shows conclusively that he did not penetrate Private Buresh, but there is only one inference that can be drawn from accused's actions, namely, that when he assaulted Private Buresh he intended to have intercourse with her forcibly; regardless of her resistance and objections. As pointed out in the Manual for Courts-Martial (supra) his abandonment of the attempt before penetration, even if he desisted voluntarily, did not alter the nature of the crime.

5. The Charge Sheet shows that accused is 24-8/12 years of age. Without prior service he was inducted into the Army of the United States on 20 July 1942 at Fort Jay, New York.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. 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 and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, and also for the offense of assault with intent to commit rape, both of which are recognized as offenses of a civil nature and so punishable by penitentiary confinement by paragraphs 2801 and 501, respectively, of Title 22 of the Code of the District of Columbia.

Wm. G. Gore, Judge Advocate

On Leave, Judge Advocate

Norman Mays Judge Advocate

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

SPJGN-CM 282049

29 JUN 1945

UNITED STATES)

SIXTH SERVICE COMMAND
ARMY SERVICE FORCES

v.)

Second Lieutenant OSCAR M.
MULLENIX, JR. (O-1639829),
Signal Corps.)

Trial by G.C.M., convened at
Camp Ellis, Illinois, 24 and
28 May 1945. Dismissal and
confinement for ten (10) years.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 Second Lieutenant Oscar M. Mullenix, Jr., Signal Corps, 1614 Service Command Unit, Headquarters, Station Complement, did, without proper leave, absent himself from his station at Camp Ellis, Illinois, from about 6 February 1945, until about 23 March 1945.

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

Specification 1: In that Second Lieutenant Oscar M. Mullenix, Jr., Signal Corps, 1614 Service Command Unit, Headquarters, Station Complement under the name of Rene Molyneaux, did, at Joplin, Missouri, on or about 1 March 1943, wrongfully, unlawfully and bigamously marry Dorothy Ash, having at the time of said marriage to Dorothy Ash, a lawful wife then living, to-wit: Dorsey Alexander Molyneaux, with whom he had contracted marriage under the name of Rene Molyneaux on 6 December 1942.

Specification 2: In that Second Lieutenant Oscar M. Mullenix, Jr., Signal Corps, 1614 Service Command Unit, Headquarters, Station Complement, did, at Smith Center, Kansas, on or about 9 February 1945, wrongfully, unlawfully and bigamously marry Marjorie A. Reeves, having at the time of said marriage to Marjorie A. Reeves, a lawful wife then living, to-wit: Dorsey Alexander Molyneaux, with whom he had contracted marriage under the name of Rene Molyneaux on 6 December 1942.

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

Specification 1: In that Second Lieutenant Oscar M. Mullenix, Jr., Signal Corps, 1614 Service Command Unit, Headquarters, Station Complement, did, at Smith Center, Kansas, on or about 9 February 1945, with intent to defraud, wrongfully and unlawfully make and utter to the First National Bank, Smith Center, Kansas, a certain check in words and figures as follows, to-wit:

"Van Alstyne Texas Feb 9 1945 19 No. _____

88-576 FIRST NATIONAL BANK 88-576

The First National Bank

Pay to FR-10 Smith Center, Kansas 83-340 or order \$ 25.00

Twenty five & no/100 _____ Dollars

Oscar M. Mullenix, Jr. 2nd Lt S. C.
0-1639829"

and by means thereof did fraudulently obtain from the said Smith Center Bank United States currency in the amount of \$25.00, he the said Lieutenant Oscar M. Mullenix, Jr., then well knowing that he did not have and not intending that he should have any account in the name of "Oscar M. Mullenix Jr. 2nd Lt. S.C. 0-1639829" with the drawee bank for the payment of said check.

Specification 2: In that Second Lieutenant Oscar M. Mullenix, Jr., Signal Corps, 1614 Service Command Unit, Headquarters, Station Complement, did, at Barstow, California, on or about 1 March 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Bank of America, Barstow Branch, Barstow, California, a certain false and bogus check in words and figures as follows, to wit:

"BANK OF AMERICA

National Trust and Association
Savings

March 1 19 45
Pay to the order of

Cash \$ 35.00

Thirty Five 00/100 Dollars

Value received and charge the same to account of

TO New York State Bank Oscar M. Mullenix Jr.
New York 8 New York 2nd. Lt. S.C. 01639829

FX-204 12-41*

and by means thereof did fraudulently obtain from the Bank of America, Barstow Branch, United States currency in the amount of \$35.00.

Specification 3: Same as Specification 2 but alleging check dated 5 March 1945, in amount of \$35, drawn on New York State Bank, New York, and made and uttered to the Bank of America, Soledad Branch, Soledad, California.

Specification 4: Same as Specification 2 but alleging check dated 12 March 1945, in amount of \$75, drawn on New York State Bank, Branch #616, New York, and made and uttered to the San Francisco Bank, Park-Presidio Branch, San Francisco, California.

He pleaded guilty to, and was found guilty of, all the Charges and the Specifications thereunder. 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 on 6 December 1942 the accused, under the name of Rene Molyneaux, married Dorsey Alexander (R. 9, 17; Pros. Exs. 2, 11). Thereafter, on 1 March 1943, while his first wife was alive and while he was undivorced from her, he married Dorothy Ash at Joplin, Missouri. This second marriage, like the first one, was contracted by him under the name of Rene Molyneaux. A daughter was born of the first union and a son of the second (R. 9, 17; Pros. Exs. 3, 11).

In January of 1945 the accused was assigned to duty at Camp Ellis, Illinois. According to his pre-trial statement, his "two wives were finding out" and, as a result of their discoveries, he absented himself without leave (Pros. Ex. 11). His unauthorized absence began

on 6 February 1945 and continued until he was arrested and returned to military control in proper uniform at San Francisco, California, on 23 March 1945 (R. 8; Pros. Ex. 1). During this period and while his first wife was still alive and undivorced from him, he married Marjorie A. Reeves, at Smith Center, Kansas, on 9 February 1945. On this occasion he used his true name (R. 9-10; Pros. Exs. 4, 11).

On 9 February 1945 a check in the sum of \$25, drawn on The First National Bank, Van Alstyne, Texas, was cashed by him at the First National Bank, Smith Center, Kansas. The check was dishonored upon presentation for payment, the records of the drawee Bank showing that at the time the accused had no account with it. Thereafter, however, on 19 March 1945, he did make a deposit in the sum of \$25. By stipulation it was shown that he has reimbursed the Bank in the amount of \$25 (R. 10-11; Pros. Exs. 5, 6).

On 1 March, 5 March, and 12 March 1945, the accused cashed checks at the Barstow Branch, Bank of America, National Trust and Savings Association, Barstow, California, the Soledad Branch, Bank of America, Soledad, California, and the San Francisco Bank, Park Presidio Branch, San Francisco, California, in the sums of \$35, \$35, and \$75, respectively. The first two checks were drawn on the New York State Bank, New York, N. Y., and the third on the New York State Bank, Branch #616, New York, N. Y. No such banks existed in the state of New York (R. 13-16; Pros. Exs. 7-9).

The accused admitted that he had no money in any bank at the time the four checks were written (R. 18-19). It was stipulated that he reimbursed the accommodation indorser whose name appeared on the check in the sum of \$75 (R. 16).

4. Captain Wilfrid P. Als, who had previously testified for the prosecution as investigating officer, testified for the defense that he had worked as a criminal investigator in Washington, D. C., for twenty-three years before entering the Army, that in that position he had investigated thousands of cases, and that in his opinion the accused was not a "criminal type" but "an overgrown kid" (R. 20-21).

The accused, after his rights relative to testifying or remaining silent had been explained to him, elected to remain silent (R. 21).

5a. The Specification, Charge I, alleges that the accused absented himself without leave from his station at Camp Ellis, Illinois, from about 6 February 1945 until about 23 March 1945. His plea of guilty to this offense is corroborated by substantial evidence showing that he absented himself without authority for the time alleged. The record is legally sufficient to sustain the findings of guilty of Charge I and the Specification thereunder.

b. Specification 1, Charge II, alleges that the accused, under the name of Rene Molyneaux, on 1 March 1943, did, at Joplin, Missouri, "wrongfully, unlawfully, and bigamously marry Dorothy Ash". Specification 2 of the same Charge similarly alleges that on 9 February 1945, at Smith Center, Kansas, he entered into an unlawful and bigamous marriage with Marjorie A. Reeves.

"Bigamy is defined as 'The criminal offense of willfully and knowingly contracting a second marriage (or going through the form of a second marriage) while the first marriage, to the knowledge of the offender, is still subsisting and undissolved' (Black's Law Dictionary, 3rd Ed., p. 215; CM 220518, Quigley)". Cited with approval in 24 BR 191.

The accused's pleas of guilty to the above two offenses are corroborated by evidence which clearly establishes that he was legally married to Dorsey Alexander on 6 December 1942, and that thereafter, while she was still living and his marriage had not been terminated by a divorce, he wrongfully and unlawfully contracted the two bigamous marriages alleged. Each constituted conduct of a nature to bring discredit upon the military service within the meaning of Article of War 96.

c. Specification 1, Charge III, alleges that the accused did, at Smith Center, Kansas, on or about 9 February 1945, with intent to defraud, wrongfully and unlawfully make and utter to the First National Bank, Smith Center, Kansas, a check in the sum of \$25, drawn upon the First National Bank of Van Alstyne, Texas, and as a result thereof fraudulently obtained the sum of \$25. Specifications 2, 3, and 4 of the same Charge, similarly allege the fraudulent making and uttering of checks to the Bank of America, Barstow Branch, Barstow, California, to the Bank of America, Soledad Branch, Soledad, California, and to the San Francisco Bank, Park Presidio Branch, San Francisco, California, on 1 March, 5 March, and 12 March, and in the sums of \$35, \$35, and \$75, respectively.

The accused's pleas of guilty to each of the above alleged offenses are supported by evidence clearly proving his guilt. At the time the first check on the First National Bank, Van Alstyne, Texas, was drawn and for some five weeks thereafter the accused did not have an account in that bank. The other three checks were shown to have been drawn upon a non-existent bank. Every element of the offenses alleged is clearly established. The accused's conduct in reimbursing the First National Bank, Smith Center, Kansas, in the sum of \$25 and the accommodation indorser in the sum of \$75 does not alleviate his criminal responsibility.

6. The records of the War Department show that the accused is approximately 25 years of age. He attended high school for three years and was graduated in 1938. On 15 July 1938 he enlisted in the service

serving continuously thereafter as an enlisted man until he was commissioned as a second lieutenant, Signal Corps, Army of the United States, on 23 November 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. The sentence of dismissal and confinement at hard labor for ten years is authorized upon conviction of a violation of Articles of War 61 or 96 and dismissal is mandatory upon conviction of a violation of Article of War 95.

Abner E. Lipscomb, Judge Advocate.

Robert J. Hannon, Judge Advocate.

Samuel Morgan, Judge Advocate.

SPJGN-CM 282049
 Hq, ASF, JAGO, Washington 25, D. C.
 TO: The Secretary of War

1st Ind

JUL 10 1945

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Oscar M. Mullenix, Jr. (O-1639829), Signal Corps.

2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, absenting himself without leave from his station for a period of 45 days, in violation of Article of War 61; of contracting a bigamous marriage on 1 March 1943 and of contracting a second bigamous marriage on 9 February 1945, in violation of Article of War 96; and of fraudulently making and uttering four worthless checks in the sums of \$25, \$35, \$35, and \$75, respectively, in violation of Article of War 95. 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 ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

The record shows that on 6 December 1942, the accused, under the name of Rene Molyneaux, married Dorsey Alexander. Thereafter, on 1 March 1943, while the first wife was alive and while he was undivorced from her, he contracted a second marriage. A daughter was born to the first lawful union and son to the second unlawful union. In January 1945, the accused absented himself without leave from his station for a period of 45 days. During this protracted absence he contracted a second bigamous marriage and fraudulently made and uttered four worthless checks in the sums of \$25, \$35, \$35, and \$75.

Although the accused's conduct is deserving of stern punishment, the sentence imposed is excessive. I recommend, therefore, that the sentence be confirmed but that the forfeitures be remitted, that the period of confinement be reduced to five years, that the Federal Reformatory, Chillicothe, Ohio, be designated as the place of confinement, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a letter from the accused transmitted to this office by Honorable Lee O'Daniel, United States Senator.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

Myron C. Cramer

3 Incls
 Incl 1 - Record of trial
 Incl 2 - Form of action
 Incl 3 - Ltr. fr. Hon. O'Daniel

MYRON C. CRAMER
 Major General
 The Judge Advocate General

(Sentence confirmed, forfeitures remitted, confinement reduced to five years.
 GCMO 355, 21 July 1945).



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

(309)

SPJGQ - CM 282058

- 1 233 1945

U N I T E D S T A T E S	)	INFANTRY REPLACEMENT TRAINING CENTER, CAMP FANNIN, TEXAS
v.	)	Trial by G.C.M., convened at Camp Fannin, Texas, 16, 18 May and 18 June 1945. Dismissal and total forfeitures.
Second Lieutenant JOHN P. OWENS (O-1328180), Infantry.)	

OPINION of the BOARD OF REVIEW
ANDREWS, BIERER and HICKMAN, 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 John P. Owens, Company "C", Sixty-first Training Battalion, Thirteenth Training Regiment, did, at Camp Fannin, Texas, on or about 12 March 1945, unlawfully enter the building of the Officers' Club, Thirteenth Training Regiment, with intent to commit a criminal offense, to-wit, larceny, therein.

Specification 2: In that Second Lieutenant John P. Owens, Company "C", Sixty-first Training Battalion, Thirteenth Training Regiment, did, at Camp Fannin, Texas, on or about 12 March 1945, feloniously take, steal, and carry away about one hundred and eight cigars, value about Twelve Dollars (\$12.00), and six merchandise coupon books, value about Thirty Dollars (\$30.00), of a total value of about Forty-two Dollars (\$42.00), the property of the Officers' Club, Thirteenth Training Regiment.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service 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 on Sunday evening, 11 March 1945, at about 2230, Private First Class Sasser, Steward of the 13th Regimental Officers' Club, Camp Fannin, Texas, placed six boxes of cigars on display back of the bar (R. 7, 8). They consisted of one box of Phillies, two boxes of R. G. Duns, one box of Websters, one box of La Flors and one box of Roi Tans (R. 8). Each box contained fifty cigars but eight cigars were missing from the box of Phillies (R. 8). No sales of cigars were made after the cigars were placed on display that night (R. 8). About 2330 Private First Class Sasser checked the back porch of the club, closed the windows and before leaving at 2400 locked up the money, turned out the light and locked the door (R. 8). He was not certain that two of the windows from the porch to the club proper were locked but the door was locked (R. 11). The accused and Private First Class Sasser were the last persons to leave the club that night (R. 8). After leaving the club they looked for Lieutenant Shine because Private First Class Sasser was to drive Lieutenant Shine's girl to town. They found him in a parked car (R. 8). At 0730 on Monday morning, 12 March 1945, Private First Class Sasser entered the club and proceeded to take the regular Monday inventory (R. 9). He found that 108 of the cigars were missing (R. 9). One full box of fifty was missing from the cabinet and the others were from the display (R. 9, 10). The missing cigars were fifty-eight Phillies, selling for ten cents each, six Websters, selling for twelve cents each, twenty R. G. Duns, selling for eleven cents each, twelve Roi Tans, selling two for fifteen cents, and twelve La Flors, selling for twenty cents each (R. 9). It was orally stipulated that the value of the cigars was twelve dollars (R. 52). He reported to Lieutenant McPherson, the mess officer, that the cigars were missing (R. 9). Two panes of glass had been missing for several days from two windows which were found locked (R. 12).

On Tuesday morning, 13 March Private First Class Hearl, co-steward of the Officers' Club, drew coupon books from the office of the club (R. 14). The coupon books are numbered consecutively and he found that six numbered books were missing (R. 14). He reported this discrepancy to Lieutenant McPherson (R. 14). The coupon books were sold to officers for five dollars each and were used instead of money in making purchases (R. 15). The supply of coupon books was kept by Lieutenant McPherson in a cabinet but about one hundred dollars worth were kept by the bookkeeper in the drawer of his desk (R. 16). The steward drew the books from the bookkeeper as needed (R. 16). The six books immediately following the last one previously issued to the steward were missing (R. 16).

When the matter was reported to Colonel Evans, the Commanding Officer of the 13th Training Regiment, he went to the accused's quarters, accompanied by Major Perry, his executive officer, and Lieutenant Mc-

Pherson and searched the accused's quarters when the accused was not present (R. 41, 50). They found a box of Phillies in a footlocker at the foot of his bed (R. 42, 50). Colonel Evans called in the accused, told him that he was making an investigation and warned him of his rights (R. 18, 36). The accused stated that he had cigars which had been sent to him by his mother (R. 18). The accused, Colonel Evans, Major Perry and Lieutenant McPherson went to the accused's quarters to examine the proof that the accused's mother had sent him cigars (R. 18, 37). The accused brought out two cigar boxes containing five or six brands of cigars (R. 18). Colonel Evans lined the cigars up in front of the boxes from which the cigars had been taken at the club (R. 20). They appeared to be the same brands and number of cigars that were taken from the club (R. 18, 37, 38, 46). Colonel Evans asked Lieutenant Clack, who had joined the group in the accused's quarters, to send a wire to the accused's mother to ascertain the kind and number of cigars she had sent to him within the past few weeks (R. 19, 25). The accused asked to speak to Colonel Evans alone and the others went outside (R. 20, 25, 38, 46). The accused then admitted to Colonel Evans that sometime after 0100 Monday morning, 12 March 1945, he had "entered the window on the northwest corner of the porch of the Officers' Club where a pane had been broken out and proceeded on into the Club and had taken the cigars from the counter." Accused then handed over the six coupon books (R. 21). Major Perry and Lieutenant McPherson then wrapped each brand of loose cigars and the coupon books in separate bags (R. 21, 38, 47). Colonel Evans and Lieutenant McPherson initialed the bags and the box of Phillies (R. 21, 38, 47, 49) and they remained in Lieutenant McPherson's custody until the trial (R. 38, 47, 48). Colonel Evans examined the side of the Officers' Club building under the window where the accused said he entered (R. 22). He found scuff marks under the window in the plaster board material (R. 22).

4. The accused elected to be sworn as a witness (R. 76). He testified that he was twenty-seven years of age and lived in New York (R. 76). Prior to being inducted into the Army on 5 February 1941 he worked as an accountant and never had any trouble in civilian life (R. 77). As an enlisted man he served in the United States and the Territory of Hawaii and had attained the grade of Technical Sergeant when he went to Officers' Candidate School at Fort Benning, Georgia (R. 78). He was commissioned as a second lieutenant on 29 November 1944 (R. 78).

On Saturday, 10 March 1945 before supper, his whole company went to the dispensary and received a sulfa drug because one man in the company had spinal meningitis (R. 78, 79, 88). The accused swallowed six or seven tablets together (R. 79). That evening the accused went to the 13th Regiment Officers' Club to a regimental party (R. 79). He and Lieutenant Ryan had "dates" and were together (R. 79). Accused was sitting at a table about eleven o'clock and Lieutenant Ryan said accused was asleep at the time (R. 80). Accused did not remember anything until the party broke up about three o'clock Sunday morning when

he was aroused by the noise at the next table (R. 80). By this time his girl was gone and he rode to town to call her and see if she had reached home, but came back to camp in a cab without doing so (R. 80). On Sunday, 11 March 1945, the accused went to church in town and arrived back at camp about one o'clock in the afternoon (R. 80). He did not eat breakfast or lunch (R. 80, 81). In the afternoon he took pictures with Lieutenants Verga and Small (R. 81). About three o'clock he went to the 13th Regimental Club with Lieutenants Polander and Shine (R. 81, 89). Each of them had a bottle of whiskey and they sat with their "dates" and drank (R. 81). Later they all went to the Main Club for a steak dinner but accused could not eat much (R. 81, 89). They then started drinking again (R. 82). They stayed until the club closed about ten forty-five or eleven o'clock (R. 89). After his "date" left him at his quarters he went to the 13th Regimental Officers' Club (R. 89), and after the club closed he went to his quarters and then to Lieutenant Shine's quarters (R. 90). It was after twelve o'clock when he went to bed (R. 82). The next morning he found a bunch of cigars on the table and the shelf of his footlocker and knew they were not his (R. 82). He could not figure how they got there and "couldn't think straight at all." He was "all mixed up" and "embarrassed" over the possibility of his having done something the night before which he could not explain the next day. He put the cigars in his footlocker (R. 83). Monday night he found a box of cigars in the footlocker at the foot of his bed (R. 83). Later Monday night he found the coupon books in a footlocker among his shirts (R. 84).

On Wednesday morning the accused was called in by Colonel Evans and told to account for his actions on Sunday (R. 84). Several times Colonel Evans said, "Don't lie to me." (R. 84). When Colonel Evans asked about cigars, the accused said that he had cigars and that he had letters from his mother to prove where they had come from (R. 85). In the accused's quarters he showed Colonel Evans the cigars and Colonel Evans placed them in front of the boxes from which they had been taken (R. 85). Colonel Evans then said, "Look at that. Look at that. No court-martial in the world would expect to believe otherwise you took them. Can't you see that? Can't you see that?" (R. 85). While accused was getting cigars out of his shirts, Colonel Evans took the box of cigars from accused's footlocker (R. 85). Colonel Evans then told Lieutenant Clack to send a telegram to accused's mother asking her about the cigars (R. 86). The accused then asked to speak to Colonel Evans alone (R. 86). The accused then said, "Well Colonel, I guess I must have taken the cigars." He said, "The door was locked. How did you get in?", and I said, "I don't know sir. I must have got in some way. I might have gone in through a window." (R. 86).

When Colonel Evans asked about the coupon books, the accused turned them over but could give no explanation for having them (R. 86). After the accused reached his quarters, Colonel Evans did not warn him again about making statements (R. 86). The accused was then placed under arrest (R. 86). His mother regularly sent him cigars and he had received a box of fifty on the previous Wednesday or Thursday, and on Sunday about half of the box was left (R. 87).

Testifying for the defense, Second Lieutenant Ryan stated that he was with the accused on Saturday night, 10 March 1945, and that both were drinking whiskey at the 13th Regiment Club (R. 53). At eleven-thirty the accused was sitting with his hands folded in front of his head and was bent over (R. 53). He was not sleeping, and the witness could not tell whether he was drunk or tired although he was one or the other (R. 53). The accused had remarked that "the pills he took during that day were making him sleepy, drowsy or tired." (R. 53, 54). On Sunday afternoon about three o'clock the accused was acting normally (R. 54).

Miss Browning, who was with accused on Sunday, 11 March, testified that accused had been drinking on that day from three-thirty to ten-thirty (R. 55, 56). He was drunk about midnight when she last saw him but "was not noisy or loud" (R. 56).

Second Lieutenant Verga, who shared quarters with the accused, saw him in his quarters shortly before midnight Sunday, at which time he appeared to have been drinking (R. 59, 60). Witness had seen the accused receive packages containing cigars from his family but did not know whether there were any cigars in the package received by the accused during the week prior to 10 March 1945 (R. 58).

First Lieutenant Shine was with the accused from three-fifteen Sunday afternoon until ten-thirty that evening and corroborated the accused's testimony concerning his drinking during this period of time (R. 70, 71, 72). About eleven-thirty he went with the accused to the accused's quarters and then to his own quarters where they drank for about an hour (R. 73). Lieutenant Shine said that when the accused left him, "He certainly wasn't a sober man. I don't mean to say he was dead drunk or reeling or he didn't know where he was going, but I certainly would not give him the keys to my car to drive" (R. 73). Lieutenant Shine stated further that "—several times both Sunday afternoon and that evening, he seemed rather dopey. He was not his usual self" (R. 75). "Here again I stress also that he was rather slow, sort of sluggish in his replies. I understood him all right. I had a conversation with him but he was just sluggish in his replies and a little bit dopey acting" (R. 75).

The testimony of Second Lieutenant Polander was stipulated in writing (R. 66; Def. Ex. 1). He had been with the accused Sunday afternoon and evening until 2300. There were three officers and three girls in the party and they consumed approximately three "fifths" bottles of whiskey. Most of the drinking was done by the men. Only one girl drank. Witness did not pay particular attention to the accused's behavior although witness "could not say he was drunk, he would not call him fully sober" (Def. Ex. 1).

Major Millard, the Regimental Surgeon, testified that sulfadiazine affects only a few people who are sensitive to it (R. 62) and that he did not know whether whiskey taken after sulfadiazine would increase

its effect (R. 63). On 10 March 1945 a prophylactic dose had been given to the members of the accused's company (R. 62). Ordinarily the drug has a toxic effect but the witness has seen cases where it has had a narcotic effect where a large initial dose has been given (R. 64, 66). The toxic effect and its duration depends upon the sensitiveness of the individual to the drug (R. 65). "A general statement would be that most people do not react to it but some people do" (R. 65). In a few cases the mental faculties of patients have been impaired (R. 66).

It was stipulated in writing that Sidney Lewis would testify that he was the owner of the Advanced Molding Corporation of New York City; that the accused worked for him for two and one-half years prior to his induction into the Army; that the accused's reputation for truth and veracity and as a law-abiding citizen was good; and that witness had never seen or heard of anything disparaging to the character of the accused (R. 67; Def. Ex. 2).

It was further stipulated in writing that Second Lieutenant Peter G. Di Rocco, Company D, 27th Infantry Training Battalion, Camp Croft, South Carolina, would testify that he was inducted into the Army of the United States with the accused on or about 5 February 1941; that he served with him for about three and one-half years as an enlisted man; that his reputation as a law-abiding citizen and soldier and for veracity was good; and that witness never heard anything disparaging to accused's character (R. 67; Def. Ex. 2).

It was also stipulated in writing that Waldo Johnson, E. J. Freund and George Norbit would testify that they have known the accused and his family for a number of years and were members of the same lodge as accused; that his reputation for truth and veracity and as a law-abiding citizen was good; and that they had never seen or heard anything disparaging to his character (R. 67; Def. Ex. 3).

5. In rebuttal the prosecution showed that the accused was given six sulfadiazine tablets, the equivalent of three grams, between four and six o'clock on the afternoon of 10 March 1945 (R. 97). Captain Turner, Medical Corps, a neuropsychiatrist, testified that the effect of sulfadiazine and alcoholic beverages would depend upon whether the individual was hypersensitive (R. 98, 99). Usually there would only be a small trace of the drug after twelve hours and it should be entirely excreted within thirty hours (R. 98). Persons who saw the accused in the Regimental Officers' Club somewhere between 2100 and midnight on Sunday, 11 March, noticed nothing unusual about his appearance or condition and some of them stated that he did not appear to be drunk (R. 103-109).

6. The evidence sustains the findings of guilty of both Specifications and the Charge. The accused was convicted of housebreaking by unlawful entry of the Regimental Officers' Club through a window late at night after the club had been closed and the door locked, and of larceny of 108 cigars, value about \$12; and six books of coupons exchangeable for merchandise at the club, having a trade value of \$30, property of the club. The cigars and the coupon books were found among his personal effects in his quarters and, after a previous denial, he admitted to his Regimental Commander that he had entered the club building through a window and had taken the stolen articles.

In his defense, the accused asserted a lapse of conscious volition on the night in question, due to extended alcoholic indulgence following sulfadiazine medication.

The testimony shows that the accused was given six sulfadiazine tablets, the equivalent of three grams, between four and six o'clock on the afternoon of 10 March 1945. That night he attended a Regimental party at the Regimental Officers' Club. Shortly before midnight he was observed by Lieutenant Ryan to be either drunk or tired. The accused had remarked to Lieutenant Ryan that the pills were making him "sleepy, drowsy or tired." The accused then remembered nothing until he was aroused by the breaking up of the party about three o'clock Sunday morning. On Sunday, 11 March 1945, the accused drank whiskey from about 1530 until after midnight at the Regimental Officers' Club, the Main Club and Lieutenant Shine's quarters. Several witnesses who were with the accused testified that he was drunk but officers who saw him at the Regimental Officers' Club shortly before it closed noticed nothing unusual about his appearance. The steward of the Regimental Officers' Club placed cigars on display about 2230 Sunday night. He and the accused were the last to leave the Club. On Monday morning the steward found that 108 cigars of a stipulated value of twelve dollars were missing and reported this fact to Lieutenant McPherson. On Tuesday the co-steward of the club found that six coupon books of the value of five dollars each were missing. When the accused awoke on Monday he found cigars on his table and the shelf of his footlocker. Monday night he found a box of Phillies cigars in his other footlocker and later that night he found the six coupon books among his shirts in his footlocker. Colonel Evans and two of his officers searched the accused's quarters, in the absence of the accused, and found the cigars. On Wednesday morning Colonel Evans, after warning the accused of his rights, questioned him about the cigars. The accused admitted having cigars in his quarters but said that his mother sent cigars to him. The accused went to his quarters with Colonel Evans, Major Perry and Lieutenant McPherson. The accused produced the loose cigars which were found to be the same brand and number which were missing. When Colonel Evans directed Lieutenant Clack, who had joined the group, to send a wire to the accused's mother to ascertain what cigars she had sent recently, the

accused asked to speak to Colonel Evans alone. He then told Colonel Evans that he had entered the Officers' Club through a window and had taken the cigars. He also gave the Colonel the six coupon books. The testimony showed that the taking of sulfadiazine followed by alcohol would affect only a small percentage of persons who were hypersensitive. At the end of twelve hours, only a trace of sulfadiazine would remain and it would all be excreted at the end of thirty hours. The evidence clearly showed that the cigars, of the value of twelve dollars, and the coupon books, of the value of thirty dollars, the property of the 13th Regiment Officers' Club, were missing and were found in the possession of the accused. The accused admitted taking and carrying them away and the surrounding circumstances show the accused's intent to deprive the 13th Regiment Officers' Club of its property. The Specification of house-breaking was proved by the accused's confession that he entered the 13th Regiment Officers' Club by the window, the finding of scuff marks under the window, and the circumstances of the disappearance of the cigars and coupon books. The proof that the offense of larceny was committed inside the building proved that the entry was made with intent to commit that criminal offense therein.

7. Objections were made to the admission of the accused's confession on the grounds that he was not "properly warned after a complete change of scene and new officers were present," and that any statements which he made were made under duress (R. 20, 21). Colonel Evans testified that he warned accused of his rights under Article of War 24 while in his office (R. 18, 36). The objection is that the accused was not again warned a short time later when he confessed to Colonel Evans in his quarters. The accused was in Colonel Evans' office for ten or fifteen minutes and then the accused, Colonel Evans and the other officers went to the accused's quarters about two hundred yards away. This was all part of the same investigation and questioning by Colonel Evans and so closely related in time and place to the giving of the warning that it was a continuous transaction. In CM 230070, Henry et al, 17 B. R. 291, II Bull JAG 95, the warning was given at the county jail in Phoenix, Arizona, and the confession made at San Bernardino, California. The Board of Review said, "The statements made by accused at Shidler's garage, confessing to the offense, were properly admitted in evidence since accused previously had been warned of their rights. That the warning was not given immediately prior to the confessions does not affect their admissibility." The objection was properly overruled.

The alleged duress in securing the confession related to Colonel Evans' order to Lieutenant Clack to send a wire to accused's mother to check on his statement of having received cigars from her (R. 25). There was no threat or promise connected with this order. It was merely a method of ascertaining the truth or falsity of the accused's story for the purpose of the investigation. It differs from the situation in CM 141221, Dig. Op. JAG 1912-40, Sec. 395 (10), where a confession was secured by a threat to write a letter to the accused's commanding officer

reporting a theft, writing the letter and permitting the accused to read it. The checking of the accused's story was merely another step in the investigation and not a threat. This objection was properly overruled.

Several objections were made to the admissibility of testimony based on information secured by a search of the accused's quarters in his absence (R. 24, 41, 42, 43, 50). These objections were properly overruled.

"Authority to make, or order, an inspection or search of a member of the military establishment, or of a public building in a place under military control, even though occupied as an office or living quarters by a member of the military establishment, always has been regarded as indispensable to the maintenance of good order and discipline in any military command—such a search is not unreasonable and therefore not unlawful." JAG 250.413 July 23, 1930 and Sec. 395 (27) Dig. Ops. JAG 1912-40." (Quoted from CM 248379, Wilson, 31 B. R. 231, 235).

A motion was made to dismiss both Specifications on the ground that the Charge should have been laid under Article of War 94 instead of Article of War 93 because the property of the Officers' Club of the 13th Regiment was Government-owned property. This motion was properly overruled. The evidence showed that the Officers' Mess and Club of the 13th Regiment were operated independently with a separate mess fund and not by the Army Exchange Officer (R. 44, 45). Such an officers' mess or club has property rights in the fund and property (SPJGC 1944/11289, 1 November 1944, III Bull JAG 503) and has an insurable interest in the Government-owned building which it occupies (SPJGC 1944/12740, 9 November 1944, III Bull JAG 503). Specification 2 was properly laid under Article of War 93 because the property which was the subject of the larceny was not Government-owned property. Specification 1 was also properly laid under Article of War 93 because housebreaking is a specific offense under this article. The offense of housebreaking is properly charged under Article of War 93 even if the criminal offense intended to be committed in the building was misappropriation of Government property (CM 229652, Brown, 17 B. R. 217).

A motion was made to strike out that portion of Specification 2 which alleged larceny of six coupon books of the value of thirty dollars because the evidence showed these coupon books to have no value. Lieutenant McPherson testified that the coupon books have a value of "Five dollars each if they are used at the Officers' Club of the 13th Regiment" (R. 49, 50). Under cross-examination he testified that after the loss or theft of coupon books they could be used if the person in charge of the club failed to notice the serial numbers (R. 51). This testimony sufficiently established the value of the coupon books and the motion to strike was properly overruled.

8. The accused officer is 27 years of age and is single. He is a native of New York and a resident of New York, New York. He graduated from high school. In civilian life he worked as an operator of

plastic molding machines for nineteen months and as assistant operator of a tintex machine, tender of grinding and coffee filling machines, and mail shipping clerk for brief periods. He served in the Citizen's Military Training Corps in summer encampments from 1935 to 1938, attaining the grade of cadet second lieutenant. He served in enlisted status from February 1941 until 29 November 1944, attaining the grade of technical sergeant. He was commissioned a second lieutenant in the Army of the United States on 29 November 1944 upon graduation from The Infantry School, Fort Benning, Georgia.

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

Fletcher R. Andrews Judge Advocate

[Signature] Judge Advocate

Ronald D. Kickman Judge Advocate

SPJGQ - CM 282058

1st Ind.

Hq ASF, JAGO, Washington 25, D. C. AUG 6 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John P. Owens (O-1328180), Infantry.

2. Upon trial by general court-martial this officer was found guilty of unlawfully entering the building of an Officers' Club with intent to commit larceny therein and of larceny of 108 cigars, of the value of \$12.00 and six merchandise coupon books of the value of \$30.00, a total value of \$42.00, in violation of Article of War 93. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion.

On Saturday afternoon, 10 March 1945, the accused was given six sulfadiazine tablets, the equivalent of three grams. That night at a regimental party he was observed shortly before midnight to be either drunk or tired. The accused remembered nothing from that time until 0300 Sunday morning when he was aroused by the breaking up of the party. On Sunday, 11 March 1945, he drank whiskey from about 1530 until after midnight. Witnesses for the defense testified that he was drunk, but witnesses for the prosecution, who saw him in the Regimental Officers' Club at various times between 2100 and midnight, noticed nothing unusual about his appearance. After the club closed, the accused drank for awhile in an officer's quarters. The latter officer described him as "sluggish" and "dopey" and not a sober man, although he was not "dead drunk or reeling".

About 2230 on Sunday night, 11 March, the steward of the Regimental Officers' Club placed several boxes of cigars on display. He and the accused were the last to leave the club. On Monday morning, 12 March, the steward discovered 108 cigars of the value of \$12.00 missing and on Tuesday the co-steward of the club found six coupon books, of the value of \$5.00 each, missing. The accused found cigars on his table and in his footlocker on Monday morning, and that night found a box of cigars and six coupon books in his footlocker. He

(320)

could not figure how they got there and "couldn't think straight at all". He was "all mixed up" and "embarrassed" over the possibility of his having done something the night before which he could not explain the next day.

The regimental commander and two of his officers searched the accused's quarters in his absence and found the cigars. When questioned by the regimental commander, the accused admitted having cigars but said that his mother sent them to him. There was testimony that the accused's mother often sent cigars to him. The accused produced loose cigars, which corresponded in brands and numbers with those missing from the club. According to the regimental commander, the accused admitted having entered the Officers' Club through a window and having taken the cigars. However, according to the accused, he said to the regimental commander, "I guess I must have taken the cigars. I must have got in some way. I might have gone through a window". Accused also handed over the coupon books.

There was medical testimony that the taking of sulfadiazine followed by alcohol would affect only a small percentage of persons who were hypersensitive. At the end of 12 hours only a trace of sulfadiazine would remain and it would all be excreted at the end of 30 hours.

This officer's civilian and military record appear to be above reproach except for the present offenses. His military service as an officer and enlisted man covers a period of over four years. Although his conduct should not be condoned, the peculiar circumstances and his apparent lack of motive suggest that excessive drinking caused the accused to become befuddled. He does not appear to be a criminal type. In consideration of his prior record and the circumstances of the case, I believe that accused should be retained in the service. Accordingly, I recommend that the sentence be confirmed but that the forfeitures be remitted, and that the execution of that portion of the sentence adjudging dismissal be suspended during good behavior.

4. Consideration has been given to letters from the Honorable Vito Marcantonio, House of Representatives, and from Mr. and Mrs. David A. Owens, parents of the accused, recommending clemency, and to letters from the accused to the Secretary of War, the Undersecretary of War, the Chief of Staff, the Commanding General, Army Ground Forces, The Adjutant General, and The Judge Advocate General, requesting clemency.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



- 5 Incls
1 - Record of trial
2 - Form of action
3 - Ltr fr Cong. Marcantonio
4 - Ltr fr Mr. & Mrs. Owens

MYRON C. CRAMER
Major General
The Judge Advocate General

{ Sentence confirmed, forfeitures remitted and sentence ^{of dismissal} suspended. GCMO 398,
10 Aug 1945).

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

SPJGN-CM 282112

UNITED STATES

17 JUL 1945
SECOND AIR FORCE

v.

Second Lieutenants ROBERT J. WEISS (O-788617), Air Corps; ALLEN P. GYVING (O-2056387), Air Corps; and First Lieutenant MITCHELL LEVY (O-744073), Air Corps.)

) Trial by G.C.M., convened at McCook, Nebraska, 23 May 1945.
) Each: Forfeiture of \$75 per month for three months.
)
)
)
)

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Robert Joseph Weiss, Air Corps, 357th Bombardment Squadron, 331st Bombardment Group, did, without proper leave, absent himself from his proper station at McCook Army Air Field, McCook, Nebraska, from about 9 April 1945 to about 12 April 1945.

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Allen P. Gyving, Air Corps, 357th Bombardment Squadron, 331st Bombardment Group, did without proper leave absent himself from his proper station at McCook Army Air Field, McCook, Nebraska, from about 9 April 1945 to about 12 April 1945.

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Mitchell Levy, Air Corps, 357th Bombardment Squadron, 331st Bombardment Group, did without proper leave, absent himself from his proper station at McCook Army Air Field, McCook, Nebraska, from about 9 April 1945 to about 12 April 1945.

Each accused pleaded not guilty to, and was found guilty of, the Charge and Specification under which he was tried. Each was sentenced to a forfeiture of \$75 per month for three months. The reviewing authority approved the sentences and ordered their execution. The result of the trial as to each accused was published on 9 June 1945, in General Court-Martial Orders 217, 218, and 219, Headquarters Second Air Force, Colorado Springs, Colorado.

3. For the purposes of this opinion it is sufficient to observe that the evidence for the prosecution, as to each accused, consisted of an extract copy of the morning report of his organization and the testimony of Major Gerald J. Crosson, their commanding officer. Each morning report contained identical entries, as follows:

"Fr Dy to AWOL 1900 eff 9 Apr 45

* * *

"Fr AWOL to Dy 0600 eff 12 Apr 45" (Pros. Exs. 1-3).

Major Crosson, who made the above entries, was not present with his organization on 9 April 1945 at the alleged inception of the unauthorized absence of each accused (R. 7-9). Although Major Crosson was present on 10 April 1945 and had personal knowledge of the absence of each accused on that day, there is no satisfactory evidence to show that they had not been given leaves on 9 April 1945 by the officer authorized to grant leave. (R. 8, 10).

Since the record shows that the officer responsible for the morning report had no personal knowledge of the possible leave status of the three accused from 9 April to 12 April, the above entries were legally insufficient to establish the alleged unauthorized absence. In discussing the rule requiring personal knowledge of the entries made in a morning report The Judge Advocate General has stated:

"The decisions of this office have interpreted the provisions of paragraph 117 of the Manual for Courts-Martial as requiring the officer responsible for the morning report to have personal knowledge of the entries made therein. This is the principal safeguard provided by law to assure the veracity and accuracy of such entries." IV Bull. JAG, March 1945, p. 87, 395 (18).

4. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as to each accused.

Abner E. Lipscomb, Judge Advocate.

Robert J. Clannan, Judge Advocate.

Samuel C. Morgan, Judge Advocate.

SPJGN-CM 282112

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

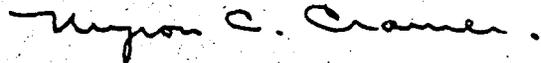
TO: The Secretary of War

26 JUL 1945

1. Herewith transmitted for your action under Article of War 50^{1/2}, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Second Lieutenants Robert J. Weiss (O-788617), Air Corps; Allen P. Gyving (O-2056387), Air Corps; and First Lieutenant Mitchell Levy (O-744073), Air Corps, together with the foregoing opinion of the Board of Review.

2. I concur in the said opinion of the Board of Review and recommend that the findings of guilty and the sentence as to each accused be vacated; and that all rights, privileges and property of which each accused has been deprived by virtue of the findings and sentence so vacated be restored.

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



2 Incls

Incl 1 - Record of trial

Incl 2 - Form of action

MYRON C. CRAMER

Major General

The Judge Advocate General

(Findings and sentence as to each accused vacated. GCMO 402, 11 Aug 1945).

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

(325)

8 JUL 1945

SPJGV-CM 282113

UNITED STATES)

v.)

First Lieutenant RONALD A.
KRAMER (O-690584), Air
Corps.)

FOURTH AIR FORCE

Trial by G.C.M., convened at
Riverside, California, 23
May 1945. Dismissal, total
forfeitures and confinement
for five (5) years. Disci-
plinary Barracks.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the above-named officer 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 69th Article of War.

Specification: In that First Lieutenant Ronald A. Kramer, Squadron T-4, 421st Army Air Forces Base Unit, having been duly placed in arrest at Muroc Army Air Field, Muroc, California, on or about 28 March 1945, did at Muroc Army Air Field, Muroc, California, on or about 8 April 1945, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that First Lieutenant Ronald A. Kramer, Squadron T-4, 421st Army Air Forces Base Unit, did, at Muroc Army Air Field, Muroc, California, on or about 14 December 1944, feloniously take, steal, and carry away about ten gallons of gasoline of the value of about \$ 0.90, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that First Lieutenant Ronald A. Kramer, Squadron T-4, 421st Army Air Forces Base Unit, did at Muroc Army Air Field, Muroc, California, on or about 18 December 1944, feloniously take, steal, and carry away about fifteen gallons of gasoline, of the value of about \$1.35, property of the United

States, furnished and intended for the military service thereof.

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

Specification 1: In that First Lieutenant Ronald A. Kramer, Squadron T-4, 421st Army Air Forces Base Unit, then and there being a married man, did, at Muroc Army Air Field, Muroc, California, on or about 30 December 1944, wrongfully have carnal knowledge of Private Eleanor J. Miller, Squadron W, 421st Army Air Forces Base Unit, a female person, the said Private Miller not then and there being the wife of the said First Lieutenant Ronald A. Kramer.

Specification 2: In that First Lieutenant Ronald A. Kramer, Squadron T-4, 421st Army Air Forces Base Unit, then and there being a married man, did, at Muroc Army Air Field, Muroc, California, on or about 30 December 1944, wrongfully have carnal knowledge of Private Shirley A. Voorhies, Squadron W, 421st Army Air Forces Base Unit, a female person, the said Private Voorhies not then and there being the wife of the said First Lieutenant Ronald A. Kramer.

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

Specifications: In that First Lieutenant Ronald A. Kramer, Squadron T-4, 421st Army Air Forces Base Unit, did, at Muroc Army Air Field, Muroc, California, on or about 12 December 1944, wrongfully gamble with Corporal Grover S. Pike, Private Edwin A. McKanna, and Sergeant Manley D. Monk.

Accused pleaded not guilty to, and was found guilty of all the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence, but reduced the period of confinement to five years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under the 48th Article of War.

3. The following is a brief recapitulation of the evidence, in the chronological order of the events, which gave rise to the Charges and Specifications.

a. For the prosecution.

Sergeant Nels M. Nelson, Corporal Grover S. Pike, an enlisted man identified only as "Isley" and accused were quartered together in a hut

(R. 24) at Muroc Army Air Field. On the night of 12 December 1944, a poker game took place, in which accused, Staff Sergeant Manley D. Monk, Corporal Grover S. Pike, Private Edwin A. McKanna and others took part (R. 25, 26). The stakes were limited to 25 cents. It was "just a friendly little game, to pass the time away" (R. 27). Once or twice during the game the betting limit was raised from 25 cents to one dollar (R. 25).

On 4 December 1944, accused became gasoline checking officer. About 18 December, Corporal David O. Thomas told accused (R. 28), in the presence of Staff Sergeant Nelson, Corporal Pike and Private First Class Manny that several members of the refueling section had been court-martialed for using Government gasoline in private vehicles. Accused remarked that they were stupid for getting caught, and that: "I am no angel. I have used the gasoline myself."

On 14 December 1944, accused and Private First Class Gerald W. Manny got a five-gallon can out of accused's car (R. 34). Manny filled the can twice with gasoline (R. 35), which he carried 25 feet and poured into the tank of accused's car (R. 36). Accused told witness to get the gasoline and put it in his car (R. 35). Accused then drove the car away. On 18 December 1944, in Corporal Thomas' presence (R. 29) accused told Manny to go down and fill up his car, and "we would go to Inyo-Kern" (R. 37). Witness put five gallons in the car. Accused asked if the tank was full, and told Manny to fill it up (R. 29). Manny then put an additional 10 gallons in the tank (R. 38). Accused drove the car to Inyo-Kern, with Manny and Corporal Pike as passengers. Thomas did not see them again that night (R. 29). Government gasoline was worth 9 cents per gallon.

About 30 December 1944, accused, Corporal Pike and Private McKanna were together in accused's office. It was about 1 o'clock a.m. Private Eleanor J. Miller, WAC (R. 52) entered the room (R. 45, 50). She had been drinking "pretty heavily", and her clothes were messy (R. 45). Accused, Pike, McKanna and the WAC went to the hutment, located about 10 feet from the office, which was used by the first two and Sergeant Nelson (R. 54) as sleeping quarters. Sergeant Nelson was in bed, apparently asleep. After a brief conversation, accused and McKanna went outside. A "gang-bang" was suggested. Pike returned to the office. Accused went back into the hut. After 10 or 15 minutes (R. 45) Pike and McKanna entered the hut (R. 46). Accused was naked, and was engaged in wiping his private parts with a towel (R. 46). The woman was beneath the covers in accused's bunk. Her right shoulder was bare. A WAC blouse and undergarments, of the feminine type, were on a chair. As "it was McKanna's turn", accused and Pike went to the office. There accused discussed his intercourse with

the WAC (R. 47). McKanna found the WAC to be dressed (R. 50). She undressed in order to have intercourse with him. After waiting in the office 20 minutes, accused suggested that Pike go over and get McKanna out, "so we could get rid of the WAC" (R. 46). Nelson had gone to bed about 10:30 p.m. (R. 54). He awakened, when accused and others, including a woman entered and turned on the light, but decided to feign sleep. The men soon went out. The woman sat down on accused's bed. She spoke to Nelson twice. He replied by grunting. Soon accused came back. He turned off the light, and sat down on the bed with the woman. A rustling sound was heard. Accused said that the bed clothing was not adequate, and the woman answered that it was good enough for her. Nelson heard her tell accused that she wanted a first lieutenant to back her up in trouble she was having with another first lieutenant. She was "tight" and felt high, but did not stagger (R. 56). Nelson could not see whether they undressed (R. 55). After McKanna went out, he heard the woman say that she couldn't find her stockings. She "wriggled", as if she were getting into a girdle (R. 55).

Private First Class Shirley A. Voorhies, WAC, had known accused since about 30 December 1944 (R. 10). At his insistent urging, she rode in his car with him and others to Los Angeles, where they had drinks (R. 11). After driving back to Muroc Army Air Field, she and accused indulged in sexual intercourse on the back seat of his car (R. 14).

On 28 March 1945, accused was notified in writing that he was placed by the commanding officer in arrest in quarters, pending investigation of serious charges, and that he would leave his quarters only for mess and latrine (Pros. Ex. 1). He acknowledged receipt by indorsement. On 8 April, he had not been released from arrest (R. 7). That evening the officer of the day checked accused's quarters several times. He was not there (R. 10; Pros. Ex. 2). His roommate did not see him in the quarters that night (R. 9). About 7 a.m. o'clock, 9 April, a sentry saw him drive into the field (R. 8, 9). In answer to questions of the officer of the day, accused stated that he spent the night in hut 33 (Pros. Ex. 2). Later, when this officer told accused that this statement was untrue, accused stated that he had spent the night in his car (Pros. Ex. 2), which was in the area parking lot.

About 27 March 1945, Captain Claude W. Rosenkrantz, an investigator, C.I.D., Office of the Provost Marshal, Southern District, 9th Service Command (R. 16), questioned accused (R. 16, 19), after reading Article of War 24 to him, and explaining his rights thereunder. Accused made, and swore to the truth of (R. 17, 19), a holographic (R. 18) statement (Pros. Ex. 3), wherein he acknowledged that he had engaged in sexual intercourse with three enlisted women, among whom was Shirley Voorhies and

another whose name he did not know, that he had knowingly misappropriated Government gasoline (Pros. Ex. 3), and that he had committed other offenses.

b. For the defense.

Lois Kramer, accused's wife, testified that Sergeant Manny told her on 19 April 1945 that accused "didn't know about the gasoline until the latter part of January" (R. 60). On 8 April, about 10 a.m. o'clock, when accused called her on the telephone, she told him that their baby, then aged 3½ months, was very sick. She broke down and started to cry. Lucinda Goodspeed (R. 62) completed the telephone conversation for her, (R. 60) saying to accused that the baby was not expected to live (R.63). The baby had pneumonia (R. 60). That night, accused came to the house in Glendale (R. 61). He departed therefrom at about 4 o'clock the following morning (R. 62).

Accused, after due warning (R. 63), testified that what he actually said to Manny on 14 December was that he would like to drive to Glendale, where both had their homes, but that he did not have enough gasoline. He asked whether Manny could get some with his coupons (R. 63). He gave the keys of the car to Manny. Manny would not have needed the keys, in order to take Government gasoline. On 19 April, he heard Manny tell Mrs. Kramer that accused knew nothing about the gasoline until January (R.64).

On the night of 30 December 1944, accused was awakened by Corporal Pike, who said there was a disturbance at the flotation office. Accused dressed and went to the office, where he found a drunken and disheveled female. She said that she was in trouble and needed help. "The boys" put her in the quarters (R. 65). After a telephone conversation, accused told them to get her out of the area. He went to the hut and told her to leave the area. She said that she was in trouble with another lieutenant and asked accused's help. He urged her to leave, so that there would be no reflection on his group. The lights were not turned on. He did not have intercourse with her. He admitted that he had broken arrest on 8 April, that he had indulged in coition with Private Voorhies, and that he had gambled with the enlisted men on 12 December 1944 (R. 65), but denied knowing that Government gasoline was put in his car in December 1944 (R. 66). The "unknown" WAC referred to in his statement (Pros. Ex. 3) was not Private Eleanor J. Miller (R. 66). The admissions of guilt in that statement as to misappropriation of gasoline were not true (R. 67). He was not lying (R. 67) then, but the statement was not voluntary, and was made at the urging of the investigators, after he had been arrested at his home at 4 o'clock in the morning on 26 March 1944.

He was taken to a cell in Los Angeles, and was not permitted to communicate with his wife (R. 20). After spending a night in a cell, he was questioned by agents Schmiedicke and Van Dusen, and was told that if he would make an admission of guilt he could be at home under arrest (R. 21). He signed the statement (R. 22), in the expectation that then he could go to his home.

It was stipulated (R. 59) that, if WAC Private Eleanor J. Miller were present, she would testify that she was not on the base at Muroc on the night of 30 December 1944, that she did not ever have a sexual relationship with accused, and that she had never seen him prior to the investigation of the charges.

4. As a witness in his own behalf, accused freely acknowledged guilt of Charge I and its Specification, of Charge III and Specification 2 thereof, and of Charge IV and its Specification. The sufficiency of the other testimony to support such findings of guilty is therefore not in question. It is necessary only for us to consider whether the findings of guilty of Charge II and of the two Specifications thereof and of Specification 1 of Charge III are proven beyond a reasonable doubt. We shall consider these findings of guilty in their numerical order.

Evidence is regarded by most courts of law as sufficient to support a judgment when the testimony on behalf of the prosecution, if taken to be true, is sufficient to prove guilt beyond a reasonable doubt. In thus weighing the evidence, all fair and rational inferences are to be drawn from the testimony, which tend to support the judgment. (Crumpton v. U.S., 138 U.S. 361).

As to Charge II and the Specifications thereof, it seems apparent that if the testimony of Corporal Thomas and Private First Class Manny be taken as true, accused was proven thereby to have been an accessory to the taking, stealing and carrying away of gasoline on two occasions. It is true that Thomas had gone to the Air Inspector's office about the gasoline situation, without first consulting his immediate superiors, and that Manny was impeached by proof of statements inconsistent with his testimony. However, these are matters, which merely go to the weight of their testimony. It is also true that accused denied knowledge of the theft of the gasoline. In weighing accused's testimony we do not disregard either his interest in the outcome of the case, or the fact that before the trial he had stated under oath that he was guilty of stealing gasoline. The conclusion of the court that the gasoline was stolen and that accused was particeps criminis is supported by the evidence. However, since the evidence is in conflict, the record must be free from prejudicial error, if the findings of guilty of Charge II and its

Specifications are to stand. The evidence cannot be said to be of such compelling force that all reasonable men would agree as to accused's guilt,

As to Specification 1 of Charge III, the application of the same test leads us to the same conclusion. No inhibitions seem to have restrained complete disclosure by accused of his activities as a Casanova. On the witness stand he admitted that he had committed adultery with Private Shirley Voorhies. Previously, he acknowledged under oath that he had copulated with two other members of the Woman's Army Corps. However, he insistently denies that he committed fornication with Private Eleanor J. Miller. On the other hand, the testimony of Nelson, Pike and McKanna, if taken to be true, strongly tends to prove that accused did have carnal knowledge of her at the time and place alleged. The stipulation entered into by the prosecution and defense that, if Private Miller had been present, she would have testified that she did not know accused in December 1944 and that she never had sexual intercourse with him, seems to us in the light of all the other evidence not to create a reasonable doubt as to accused's guilt under this Specification. The evidence under this Specification is sharply in conflict, and is not so compelling as to cause all reasonable men to agree that accused is guilty. This finding of guilty therefore can be permitted to stand, only if it can be said that the record is free from prejudicial error.

5. This record of trial is not free from error. On direct examination the testimony of accused was confined to the offenses charged in the Specifications of Charge II and Specification 1 of Charge III (R. 63-65). The cross-examination was not so limited (R. 65-68). The position of the trial judge advocate was that his cross-examination might deal with the subject matter of all the Specifications, unless at the time of taking the stand accused announced that his testimony was to be confined to certain Specifications. No such restriction was announced by accused. His counsel objected to the scope of the cross-examination, but subsequently he withdrew the objection. The theory of the trial judge advocate was erroneous. The objection of defense counsel clearly was well taken, since Manual for Courts-Martial, 1928, par. 121b states:

"* * * Where an accused is on trial for a number of offenses and on direct examination has testified about only a part of them, his cross-examination must be confined to questions of credibility and matters having a bearing upon the offense about which he has testified." (Underscoring supplied).

It is obvious that defense counsel withdrew the objection because of the trial judge advocate's stand, and not because he deemed it proper.

After careful consideration of the entire record, it is our opinion that the result of the trial, so far as Charge II and its Specifications and Specification 1, Charge III are concerned might not have been the same,

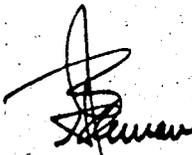
had not the cross-examination of accused exceeded its proper scope. Accused was clearly prejudiced thereby.

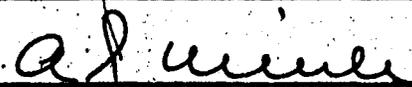
The holographic statement subscribed and sworn to by accused (Pros. Ex. 3) acknowledges guilt of several offenses, some of which were not charged in any of the Specifications upon which accused was arraigned and tried. Those portions of the statement, which had no bearing upon the subject matter of the trial, at best should have been deleted, and at least should have been made the subject of a warning by the law member that these other offenses should not be considered by the court. Only those portions of the statement, which related to the offenses for which accused was on trial, should have been considered by the court. Accused as a witness freely acknowledged his guilt of all the offenses charged, except the larceny of gasoline and carnal knowledge of Private Eleanor J. Miller. While the findings of guilty under the Specifications, as to which accused acknowledged guilt, could not have been influenced by the irrelevant portions of his statement, it would appear that accused's acknowledgment therein that he had engaged in sexual intercourse with an enlisted woman, whose name he did not know (Pros. Ex. 3) might easily have resulted (R. 66) in the conclusion that this unidentified woman was Private Eleanor J. Miller. As has been pointed out, the testimony to establish accused's guilt of Charge II and its Specifications was given by an accomplice, whose credibility was impeached by proof of prior statements inconsistent with his testimony as to declarations and circumstances indicative of accused's guilt, and by a soldier who appears to have entertained a grievance against accused, and who had complained to the Air Inspector. Accused denied that he was guilty of stealing gasoline. The findings of guilty of Charge II and its Specifications might have been influenced by these admissions of guilt of unrelated misappropriations, which should have been excluded from consideration by the court. It is also extremely likely that evidence of these other and unrelated offenses might have had some effect upon the court, in measuring the sentence to be adjudged. In our opinion, the prejudicial effect of these errors may be cured by disapproval of the findings of guilty of Charge II and its Specifications and of Specification 1, Charge III and by remission of a portion of the sentence.

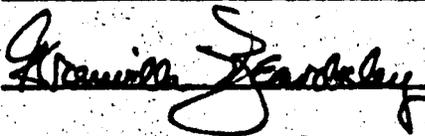
6. It appears from the records of the War Department that accused was 21 years of age on 17 October 1944. He entered the military service at Camp Upton, New York, on 17 August 1942. On 27 August 1942 he was appointed a technician fifth grade. From 19 January 1943 to 25 August 1943, he was an aviation cadet. On 26 August 1943, he was commissioned a second lieutenant, Air Corps, AUS, upon qualifying for the aeronautical rating of aircraft observer (bombardier) at the AAF Bombardier School,

Big Spring, Texas. On 24 August 1944, he was promoted to first lieutenant. His record as an officer appears to have been excellent, prior to his present difficulties.

7. The court was legally constituted and had jurisdiction of the subject matter and of the person of the accused. Except as noted above, no errors were committed upon the trial, which injuriously affected accused's substantial rights. In the opinion of the Board of Review, the record of trial is not legally sufficient to support the findings of guilty of Charge II and its Specifications and of Specification 1, Charge III, but is legally sufficient to support the findings of guilty of Charge II, and of the other Charges and Specifications and the sentence as modified and approved by the reviewing authority, and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of the 95th Article of War, and a sentence to dismissal, total forfeitures and confinement at hard labor for five years is authorized upon conviction of violations of the 69th and 96th Articles of War.


 _____, Judge Advocate


 _____, Judge Advocate


 _____, Judge Advocate

SPJGV-CM 282113

1st Ind

Hq ASF, JAGO, Washington 25, D.C. JUL 1 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Ronald A. Kramer (O-690584), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of breach of arrest (Specification, Charge I), in violation of Article of War 69; of larceny of gasoline of a total value of \$2.25 (Specifications 1 and 2, Charge II), in violation of Article of War 94; of wrongfully having carnal knowledge of enlisted women (Specifications 1 and 2, Charge III), in violation of Article of War 95, and of wrongfully gambling with enlisted men (Specification, Charge IV), in violation of Article of War 96. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence is summarized in the foregoing opinion of the Board of Review, which is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge II and its Specifications (larceny of gasoline) and of Specification 1, Charge III (carnal knowledge of an enlisted woman), but that it is legally sufficient to support the findings of guilty of Charge I and its Specification (breach of arrest), of Charge III and Specification 2 thereof (carnal knowledge of an enlisted woman), and of Charge IV and its Specification (gambling with enlisted men) and the sentence, as approved by the reviewing authority, and to warrant confirmation of the sentence.

The following facts and circumstances, relevant to the Charges and Specifications, which the record is legally sufficient to support, are shown by the evidence. On 28 March 1945, accused was given written notice that he was placed in arrest, pending investigation of charges, and was ordered not to leave the quarters, except to go to mess and to the latrine (Specification, Charge I). On 8 April, his wife told him over the telephone, from Glendale, California, that their three month old baby was very sick.

She began to weep and could not complete the conversation. Another woman stepped to the telephone and told accused that the infant, who was suffering from pneumonia, probably would not live until morning. Without permission, accused left the post, thereby breaking his arrest that night, and drove to Glendale. He returned to the post early the next morning.

About 30 December 1944, accused and Private Shirley A. Voorhees, WAC, indulged in sexual intercourse on the back seat of accused's car (Specification 2, Charge III), after he had induced her to accompany him on a trip in his car to Los Angeles, where they had several drinks together.

Accused was quartered with several enlisted men in a hut, near the office in which they performed their duties. On the night of 12 December 1944, accused played poker (Specification, Charge IV) in the hut with a group of enlisted men, some of whom were quartered there and others of whom were not. The stakes were limited to 25 cents, although once or twice during the evening the betting limit was raised to one dollar.

I concur in the opinion of the Board of Review, and for the reasons therein stated recommend that the findings of guilty of Charge II and its Specifications and of Specification 1 of Charge III be disapproved, that the sentence as modified and approved by the reviewing authority be confirmed, but that the forfeitures and confinement be remitted, and that the sentence as thus modified be ordered executed.

4. Consideration has been given to a letter from Mrs. Ronald A. Kramer, addressed to the Commanding General, Ninth Service Command Headquarters, Ogden, Utah, dated 23 June 1945; a letter from Senator Elbert D. Thomas, dated 29 June 1945, with a letter from Mrs. Ronald A. Kramer; and a memorandum from Senator Mead with a copy of a letter from Mrs. Ronald A. Kramer, dated 23 June 1945.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

5 Incls

- 1 Rec of Trial
- 2 Form of Action
- 3 Ltr fr Mrs Kramer, 6/23/45
- 4 Ltr fr Sen Thomas, w/ incl dated 6/29/45
- 5 Memo fr Sen Mead, w/copy of ltr fr Mrs Kramer

Myron C. Cramer
 MYRON C. CRAMER
 Major General
 The Judge Advocate General

(Findings disapproved in part. Sentence as modified and approved by reviewing authority, confirmed but forfeitures and confinement remitted, GCMO 381, 25 July 1945).

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

SPJGH-CM 282135

29 JUN 1945

UNITED STATES)
) v.)
First Lieutenant MATHEW J.)
FINKELSON (O-794113), Air)
Corps.)

FERRYING DIVISION
AIR TRANSPORT COMMAND

Trial by G.C.M., convened at
Romulus Army Air Field,
Romulus, Michigan, 8 May 1945.
Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
TAPPY, GAMBRELL 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 94th Article of War.

Specification: In that First Lieutenant Mathew J. Finkelson, 553d Army Air Forces Base Unit (3d Ferrying Group), did, at Romulus Army Air Field, Romulus, Michigan, on or about 15 September 1944, present for approval and payment a claim against the United States by presenting to Captain Nathaniel J. Sharlip, Finance Officer at the Romulus Army Air Field, Romulus, Michigan, an Officer of the United States, duly authorized to approve and pay such claims, in the amount of \$1114.65, for services alleged to have been rendered to the United States by the said First Lieutenant Mathew J. Finkelson from 1 July 1944 to 30 September 1944 and for subsistence and rental allowances allegedly due said First Lieutenant Mathew J. Finkelson, as an officer having a dependent, to wit, a lawful wife, from 1 July 1944 to 30 September 1944, less debits of \$819.50, which claim was false and fraudulent in the amount of \$289.40, in that the said First Lieutenant Mathew J. Finkelson did not have a lawful wife as a dependent during the period for which said subsistence and rental allowances were claimed by him, and was then known by the said First Lieutenant

Mathew J. Finkelson to be false and fraudulent.

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

Specification: In that 1st Lieutenant Mathew J. Finkelson, * * *, did, at Romulus Army Air Field, Romulus, Michigan, on or about 15 September 1944, with intent to deceive Captain Nathaniel J. Sharlip, 550th Army Air Forces Base Unit (Headquarters Ferrying Division, Air Transport Command), then accountable and disbursing officer at the 553d Army Air Forces Base Unit (3d Ferrying Group), officially state to the said Captain Nathaniel J. Sharlip, that he, the said 1st Lieutenant Mathew J. Finkelson then had a lawful wife, one Bernadine Roth Finkelson, which statement was known by the said 1st Lieutenant Mathew J. Finkelson, to be untrue in that he was not then and never had been married and his lawful wife was not said Bernadine Roth Finkelson.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty of all Charges and Specifications. No evidence of any previous conviction 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:

In support of accused's plea of guilty to the Specification of Charge I, the prosecution introduced evidence showing that at the time accused originally reported for duty at Romulus Army Air Field, Romulus, Michigan, on 24 July 1944 he reported to the Finance Office and was handed an information sheet for officers' pay but that he neglected to fill it out and file it, stating that he did not have sufficient copies of his orders to go along with the information sheet (R. 8). He did not report to the Finance Office again until on or about 15 September 1944 when he reported there in response to a call to come in (R. 9). At that time he completed his information sheet and handed it personally to the Finance Officer, Captain Nathaniel J. Sharlip, and filed a pay data card showing partial payments on account received by him in August 1944 from other offices of the Finance Department. He did not draw any pay at Romulus Field prior to 15 September 1944 (R. 9). On the basis of the information sheet thus completed by the accused, a pay and allowance voucher was then prepared for him by a clerk in the Finance Office covering the period 1 July 1944 to 30 September 1944. Such voucher listed as accused's lawful wife "Bernadine Roth Finkelson, 337 NE 28th St., Miami, Fla." and included a claim for subsistence allowance in the amount of \$128.80 and a claim

for rental allowance in the amount of \$225. The original voucher, bearing accused's signature, was admitted in evidence without objection (R. 7, 8; Pros. Ex. 1).

It was stipulated that if Mrs. Bernadine Roth Tucker were present in court she would testify that she has been acquainted with accused approximately five years but has never been married to him and that since 1 July 1944 she has been married to William Daniel Tucker, Jr. (R. 11; Pros. Ex. 2).

Accused's written confession dated 12 April 1945 was introduced without objection (R. 19; Pros. Ex. 4). In that instrument he stated in part:

"I do not hesitate to admit my guilt under the 94th Article of War in that I do admit that on 15 September 1944 I presented a claim against the United States for subsistence and allowances which would be due me as a married officer. I am not a married officer nor have I ever been married. I realized at the time I made this claim against the government that I was participating in an attempt to defraud the United States and that such action is punishable under the Articles of War."

4. Evidence for the defense:

Captain Nathaniel J. Sharlip, Finance Officer at Romulus Army Air Field, identified the original of a receipt signed by himself and covering repayment to the Government by accused of the overpayment of subsistence and rental allowances received by accused from 1 January 1943 to 31 May 1944 on account of his having falsely represented his status as that of a married man. Such receipt was admitted in evidence and permitted to be withdrawn (R. 19, 20).

The accused elected to testify under oath in his own behalf. In December 1942 accused, just before going overseas, told several of his friends, as a joke, that he had been married to Miss Bernadine Roth. Because it would prove embarrassing to him, he did not thereafter correct this misrepresentation and continued to make out and present pay and allowance vouchers as a married officer. This continued throughout his overseas service and included the voucher introduced as Prosecution's Exhibit 1. He wanted to correct this misrepresentation frequently but did not have the "guts" to do so. Upon being called into the base legal office on or about 20 September 1944 he confessed the entire transaction and submitted his resignation, which was not accepted (R. 22, 23). No payment was ever made on the voucher submitted by accused on 15 September 1944. The total amount illegally collected by accused from the Government

(340)

from 1 January 1943 to 31 May 1944 was approximately \$1500. He is 23 years of age (R. 24). He has consistently received efficiency ratings of "excellent" (Pros. Ex. 4).

5. The evidence introduced by the prosecution in support of accused's plea of guilty to the Specification of Charge I full establishes that the plea was not improvidently made. The record of trial required a finding of guilty of this Specification.

While accused pleaded not guilty to Charge II and its Specification, alleging the making of a false official statement to Captain Nathaniel J. Sharlip in violation of Article of War 95, he freely admitted his guilt of this offense not only in his written confession (Pros. Ex. 4) but also in his testimony at the trial. The court could not reasonably have made any other finding than that of guilty (CM 246219, Garrow, 30 B.R. 1, 6; CM 248867, Logan, 31 B.R. 363).

6. The records of the War Department show that accused is 24 years of age and single. He is a high school graduate and has had two years of college training. In civilian life he was manager of a chain store for two years. He entered the Army as an aviation cadet in May 1942 and was commissioned a second lieutenant, A.C., AUS, on 5 December 1942 upon graduation from the Army Air Forces Navigation School, Selman Field, Monroe, Louisiana, with a rating of Aerial Navigator. He was promoted to first lieutenant on 29 June 1943.

Accused was stationed at Accra, Africa, from approximately 1 January 1943 until June 1944. On 28 December 1944 accused tendered his resignation for the good of the service, which resignation was not accepted.

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 conviction of a violation of Article of War 94 and is mandatory upon conviction of a violation of Article of War 95.

Thomas M. Jaffy, Judge Advocate

William H. Lambell, Judge Advocate

Robert C. Brewthorn, Judge Advocate

SPJGH - CM 282135

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 13 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Mathew J. Finkelson (O-794113), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of presenting for approval and payment a false and fraudulent claim against the Government for subsistence and rental allowances in the amount of \$289.40, in violation of Article of War 94 (Specification of Charge I); and was found guilty of making a false official statement with intent to deceive a Finance Officer of the United States Army, in violation of Article of War 95 (Specification of Charge II). 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.

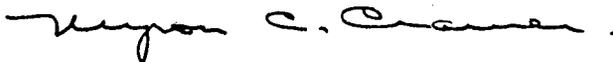
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I concur in that opinion. On or about 24 July 1944 accused, returning from 18 months' service overseas, reported for duty at the Romulus Army Air Field, Romulus, Michigan. He checked in at the Finance Office and was handed an information sheet for officers' pay. He neglected, however, to complete the information sheet and he did not return to the Finance Office until he was called there on or about 15 September 1944. At that time he completed an information sheet and handed it personally to the Post Finance Officer. On the basis of such information sheet a clerk prepared for accused a pay and allowance voucher covering the period 1 July 1944 to 30 September 1944, which accused signed and presented for payment. Such voucher listed as accused's lawful wife, one Bernadine Roth Finkelson, notwithstanding that accused has never been married. Accused claimed subsistence and rental allowances in such voucher as a married officer. His fraud was discovered a few days after the voucher was presented, however, and the false claim was not paid. While only the voucher mentioned above was involved in the present case, accused admitted, in his testimony, that he had signed and presented for payment pay and allowance vouchers covering the period 1 January 1943 to 31 May 1944 on all of which he had falsely represented himself as a married officer and had illegally collected approximately \$1500. His only explanation of his conduct was that just prior to going overseas in December 1942 he had, as a joke, told several of his fellow officers

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that he had married Miss Bernadine Roth. Because it would prove embarrassing to him, he did not thereafter correct this misrepresentation and continued, down to and including 15 September 1944, to make out and present pay and allowance vouchers as a married officer. He introduced into evidence a receipt of the Finance Officer at Romulus Field showing repayment by him to the Government of all overpayments made to him from 1 January 1943 to 31 May 1944.

4. The Staff Judge Advocate states that the accused completed 18 months duty overseas as a navigator at various stations of ATC in Africa and that he is authorized to wear the EAME Campaign, Asiatic-Pacific Theatre and American Theatre Ribbons. He further states that the record conclusively establishes that accused deliberately misrepresented himself as a married officer and on the basis thereof presented to the finance officer at his station a voucher making claim for the additional allowances to which he would be entitled as such married officer and that this was an admitted practice by the accused extending throughout his overseas service of 18 months. In view of these facts I do not think this is a case for clemency because of accused's war record. In fact the sentence is light for the offense committed. There appear to be no extenuating or mitigating circumstances. I recommend that it be confirmed and carried into execution.

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



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

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed and carried into execution. GCMO 351, 21 July 1945).

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

SPJGV-CM 282223

3 JUL 1945

UNITED STATES)

SECOND AIR FORCE

v.)

Second Lieutenant WILLIAM
R. RENNIE (O-778565),
Air Corps.)

Trial by G.C.M., convened at
Colorado Springs, Colorado, 4
June 1945. Dismissal, total
forfeitures and confinement
for one (1) year.

OPINION of the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

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

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

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

Specification 1: In that Second Lieutenant William R. Rennie, 208th Army Air Forces Base Unit (Special), did, without proper leave, absent himself from his proper organization and station, at Peterson Field, Colorado Springs, Colorado, from about 6 April 1945 to about 9 April 1945.

Specification 2: In that Second Lieutenant William R. Rennie, 208th Army Air Forces Base Unit (Special), did, without proper leave, absent himself from his proper organization and station, at Peterson Field, Colorado Springs, Colorado, from about 10 April 1945 to about 10 May 1945.

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

Specification 1: In that Second Lieutenant William R. Rennie, 208th Army Air Forces Base Unit (Special), did, at Colorado Springs, Colorado, on or about 6 April 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Antlers Hotel, Colorado Springs, Colorado, a certain check in words and figures as follows, to-wit:

(344)

R-512

No. 10

San Antonio, Texas, March 6 1945

30-65

NATIONAL BANK OF FORT SAM HOUSTON
at San Antonio

Pay to the
order of

Cash

\$20.00

Twenty Dollars and no/100

DOLLARS

AGO-1705734

William R. Rennie 2nd Lt.
Peterson (signed) 0-778565

and by means thereof did fraudulently obtain from the said Antlers Hotel, Colorado Springs, Colorado, \$20.00 lawful money of the United States, he, the said Second Lieutenant William R. Rennie, 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, for the payment of said check.

Specification 2: Similar to Specification 1, except that it alleges that the check was made and uttered on or about 8 April 1945, in the amount of \$35.

Specification 3: Similar to Specification 1, except that it alleges that the check was made and uttered to the First National Bank of Colorado Springs, Colorado Springs, Colorado, on or about 6 April 1945, in the amount of \$40.

Specification 4: Similar to Specification 1, except that it alleges that the check was made and uttered at Denver, Colorado, on or about 15 April 1945, to The Brown Palace Hotel, Denver, Colorado.

Specification 5: Similar to Specification 1, except that it alleges that the check was made and uttered at Denver, Colorado, on or about 16 April 1945, to The Brown Palace Hotel, Denver, Colorado.

Specification 6: Similar to Specification 1, except that it alleges that the check was made and uttered at Denver, Colorado, on or about 16 April 1945, to The Brown Palace Hotel, Denver, Colorado.

Specification 7: Similar to Specification 1, except that it alleges that the check was made and uttered at Denver, Colorado, on or about 17 April 1945, to The Brown Palace Hotel, Denver, Colorado.

Specification 8: Similar to Specification 1, except that it alleges that the check was made and uttered at Denver, Colorado, on or about 18 April 1945, to The Brown Palace Hotel, Denver, Colorado.

Specification 9: Similar to Specification 1, except that it alleges that the check was made and uttered at Denver, Colorado, on or about 19 April 1945, to The Brown Palace Hotel, Denver, Colorado.

Specification 10: Similar to Specification 1, except that it alleges that the check was made and uttered at Denver, Colorado, on or about 19 April 1945, to The Brown Palace Hotel, Denver, Colorado, in the amount of \$24.42.

Specification 11: In that Second Lieutenant William R. Rennie, Air Corps, 208th Army Air Forces Base Unit (Special), having been restricted to the limits of the barracks area of his organization and the Officers' Mess, did, at Peterson Field, Colorado Springs, Colorado, on or about 10 April 1945, break said restriction by going to Denver, Colorado.

He pleaded guilty to, and was found guilty of, all Charges and Specifications. Evidence of one previous conviction by general court-martial for absence without leave for eleven days, in violation of Article of War 61 and of making and cashing nine checks without sufficient funds in violation of Article of War 96 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 four years. The reviewing authority approved the sentence but reduced the period of confinement to one year and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that accused was placed under arrest at the Antlers Hotel, Colorado Springs, Colorado, on the ninth of April 1945 for being absent without leave. Major Quinn L. Oldaker, the commanding officer of accused who made the arrest testified that he had personal knowledge that accused was absent without leave from

6 April to 9 April 1945 and from 10 April to 10 May 1945. Accused was restricted by witness to the limits of the barracks area of his organization and left the location without authority on 10 April 1945 (R. 14-16). Extract copies of morning reports substantiating the two periods of absence without leave were introduced in evidence (Pros. Exs. 1 and 2).

A sworn statement made by accused to the investigating officer, after having been duly warned of his rights, admitting in substance all the Charges and Specifications was introduced in evidence (Pros. Ex. 3). Ten checks were also introduced in evidence by the prosecution and marked for identification as follows:

Pros. Ex. No.	In favor of	Date	Amount
11	Cash	March 6, 1945	\$20.00
12	"	March 8, 1945	35.00
13	The 1st Natl. Bk of Colo. Springs, Colo	April 6, 1945	40.00
14	Cash	April 15, 1945	20.00
15	"	April 16, 1945	20.00
16	The Brown Palace Hotel	April 16, 1945	20.00
17	Cash	April 17, 1945	20.00
18	"	April 18, 1945	20.00
19	"	April 19, 1945	20.00
20	"	April 19, 1945	24.42

It was stipulated between the prosecution, the defense and the accused that if Mrs. Virgilee Parton were present she would testify that she was a cashier at the Antlers Hotel, Colorado Springs, Colorado, and that she cashed two checks for accused, one for \$20 and the other for \$35 (Pros. Exs. 4, 11 and 12). James J. McCaffery would testify that he is an assistant cashier of the First National Bank of Colorado Springs, Colorado and that the bank cashed accused's check for \$40 (Pros. Exs. 6, 13).

F. S. Bingenheimer would testify that he is an assistant manager of The Brown Palace Hotel, Denver, Colorado, and he cashed for accused five checks of \$20 each (Pros. Exs. 7, 14, 15, 16, 17, 18) and received in payment of rental of room amounting to \$24.42 another check (Pros. Ex. 7 and 20). Joseph Paul would testify that he was an assistant manager of The Brown Palace Hotel, Denver, Colorado, and he cashed a check for accused on 20 April 1945 for \$20 (Pros. Exs. 8, 19).

W. L. Bailey would testify that he is an assistant cashier of the National Bank of Fort Sam Houston, San Antonio, Texas, and that in that

capacity he has access to all the records and accounts of customers; that he has examined the checking accounts of that bank under the name of William R. Rennie and examined every check listed in Specifications 1 to 10, inclusive, of Charge II (Pros. Exs. 11 to 20) and the dates on the face of the checks and on the reverse of each and that according to the bank's records there were not sufficient funds in the account of accused on the dates on which the checks were drawn and on the dates on which the checks were received by the bank for payment.

4. The accused after his rights as a witness were explained to him took the stand in his own behalf. He testified that he had been in the Army for about three years and received his commission on 23 March 1944. He was sent to Roswell, New Mexico for first pilot training on B-17 and while there he got friendly with a divorcee. When he graduated from the course he was ordered to Lincoln, Nebraska, and borrowed \$100 to take 10 days leave en route. Immediately upon his arrival at his new post he received a letter from the girl with whom he had been keeping company, stating that she was going to have a baby. He sent her about \$50. The girl tried to have an abortion which was unsuccessful and accused sent her another \$100 or \$150 for hospitalization (R. 31). When he was transferred to Clovis, New Mexico, accused had to support this girl who was sick and could not work and he still owed a balance to the investment company of \$60.00. He played poker and at times issued checks without sufficient funds. Before entering the Army he never had written a check as he did not have enough money to open a checking account. The first checking account that he opened was with the Roswell National Bank when he started playing poker. Accused had an interest in a cab for hire in California from which he received for two months \$150 a month as his share of the profits. However, he received news later that the cab had been demolished and all profits lost. Accused had at that time \$300 more of debts and about \$150 of outstanding bad checks. He tried unsuccessfully to borrow money in Roswell and Clovis and then he went to Amarillo, Texas, where he thought he could get a loan. It was Columbus Day and the banks were closed and he stayed the next day although he knew that he would be AWOL (R. 32). Next day he failed to get the loan and got drunk and stayed away from his organization for eleven days and issued additional bad checks. He was tried by a court-martial for this absence and for issuing checks without sufficient funds. Accused received his pay check for \$150 and got in a poker game winning about \$350 and so he was able to pay all the bad checks with which he was charged. He stated that he had other debts amounting to \$300 unknown at the time to his commanding officer. He gambled a lot to try to catch up but he only got more deeply in debt. In December he found out that he could borrow \$450 from the National Bank of Fort Sam Houston and he did so. As he owed about \$600, this sum was

not sufficient to liquidate his indebtedness. Complaints began to come in to his commanding officer (R. 33). He took up gambling again. After his three months of restriction were up, he went to town and threw a little spree and spent more money. At the same time the girl had the baby and it cost him about \$150 to \$200. He wired home to get all the cash he could and he received \$400. At that time he was confined to his barracks for a week and when the \$400 arrived he could not get off the post to pay any of his debts. The commanding officer heard about his new debts and decided to place him before the flying evaluation board. Accused was then transferred to Peterson Field. He started drinking on the train and when he arrived at Colorado Springs he checked in at the Antlers Hotel (R. 34). The next morning he reported to the Second Air Force and then returned downtown and kept on drinking for about two more days until he was arrested by Major Oldaker. Major Oldaker took him to the field and told him he was restricted. He knew that he was in trouble and so he took off for Denver and stayed drunk for about 30 days. He did not know what he was going to do. He considered committing suicide. He was picked up by the military police at Club Morocco and sent to jail. He stated that he liked the Army and flying and that he wanted to make restitution (R. 35). On cross-examination he stated he owed about \$1800 and that the majority of his debts were contracted in the one or two months prior to the trial (R. 36).

5. The evidence conclusively establishes the guilt of accused of all Charges and Specifications and supplements the accused's plea of guilty. The accused's testimony substantiates his commission of guilt of the offenses charged. An analysis of accused's testimony discloses he was afforded an opportunity by his superior to amend his ways. His own excesses, immoderate drinking, gambling and personal habits are solely to blame for his predicament. The psychiatric examination classifies accused as a "self-centered and conceited individual" who recognizes right from wrong but lacks the character to act upon the distinction. He lacks any sense of moral obligation.

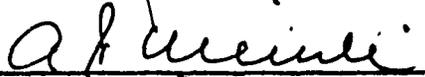
6. The records of the War Department disclose that he was born in Ogden, Utah, on 13 September 1918, and resides at Fairfax, California. He reached the tenth grade in school but did not graduate. He has worked as clerk in a candy store and restaurant and he has never been married. He enlisted in the Army on 25 March 1941 and was honorably discharged on 23 May 1944 to accept an appointment as a second lieutenant in the Army of the United States (A.C.).

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial

rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence, as modified and approved by the reviewing authority, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 and Article of War 96.



Judge Advocate



Judge Advocate



Judge Advocate

(350)

SPJGV-CM 282223

1st Ind

Hq ASF, JAGO, Washington 25, D.C. JUL 16 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556 dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William R. Rennie (O-778565), Air Corps.

2. Upon trial by general court-martial this officer pleaded guilty to and was found guilty of absence without leave for a total period of 33 days, in violation of Article of War 61, of breaking restriction and of issuing and cashing ten checks for a total of \$239.42 without sufficient funds in the bank, in violation of Article of War 96. Evidence of a previous conviction by court-martial for similar offenses 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 four years. The reviewing authority approved the sentence but reduced the period of confinement to one year and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority and to warrant confirmation of the sentence.

Accused was absent without leave from 6 April to 9 April. He was arrested at the Antlers Hotel, Colorado Springs, Colorado, and restricted to his barracks area. He broke restriction and again went AWOL for a period of 30 days. During this period accused issued and cashed ten checks without having sufficient funds in the bank. This officer has one previous conviction by general court-martial for being absent without leave for eleven days and for making and cashing nine checks without sufficient funds adjudged November 1944 for which he was sentenced to forfeiture of pay, suspended promotion, a reprimand and restriction. From the record it appears that every possible chance was given this officer to mend his ways. His complete indifference to duty and to his moral and financial obligations indicate a fundamental lack of character and renders undesirable his continuance in the service as an officer.

I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted, that the sentence as thus modified be ordered executed, and that a United States Disciplinary Barracks be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

- 2 Incls
 - 1 Record of Trial
 - 2 Form of Action
-

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted. GCMO 377, 25 July 1945).

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

(353)

4 JUL 1945

SPJGV-CM 282292

UNITED STATES)

v.)

Private FRANK AMODIO)
(32320704), Sergeant HARRY)
DAVIS (33189167), Corporal)
WILFORD W. GUY (36056562),)
Private First Class MICHAEL)
J. DOMBOL (32197771) and)
Private JOHN J. SCATTONE)
(13045545), all of 571st Air)
Service Squadron, 1264-1)
Operating Location, North)
African Division, Air Trans-)
port Command and Sergeant)
KENNETH L. MCKAY (39014413),)
95th Depot Repair Squadron,)
1264-1 Operating Location,)
North African Division, Air)
Transport Command.)

AFRICA-MIDDLE EAST THEATER

Trial by G.C.M., convened at
Cairo, Egypt, 29-31 May and 1
June 1945. Amodio, Davis,
Guy (Acquitted). Dombol and
Scattone: Dishonorable dis-
charge and confinement for
three and one-half (3½) years.
As to McKay: Dishonorable
discharge and confinement for
three (3) years. As to each:
Eastern Branch, Disciplinary
Barracks.

HOLDING by the BOARD OF REVIEW
SEMAN, MICELI and BEARDSLEY, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review, as to Dombol, Scattone and McKay.
2. The accused were tried upon the following Charges and Specifications:

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

Specification: In that Private Frank Amodio, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; Sergeant Harry Davis, Headquarters Detachment, Middle East Service Command, Camp Russell B. Huckstep, Egypt; Private First Class Michael J. Dombol, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; Corporal Wilford W. Guy, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; Private John J. Scattone, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; and Sergeant

Kenneth L. McKay, 95th Depot Repair Squadron, 1264-1 Operating Location, North African Division, Air Transport Command, did on or about 7 October 1944 acting jointly and in pursuance of a common intent, knowingly and willfully misappropriate one Ford one and one-half (1½) ton truck automobile of the value of about one thousand dollars (\$1,000), property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Private Frank Amodio, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; Sergeant Harry Davis, Headquarters Detachment, Middle East Service Command, Camp Russell B. Huckstep, Egypt; Private First Class Michael J. Dombol, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; Corporal Wilford W. Guy, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; Private John J. Scatton, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; and Sergeant Kenneth L. McKay, 95th Depot Repair Squadron, 1264-1 Operating Location, North African Division, Air Transport Command, acting jointly and in pursuance of a common intent, did, at or near Ismailia, Egypt, on or about 5 October 1944 conspire, wrongfully and unlawfully, to deal and traffic in a narcotic drug commonly known as hashish.

Specification 2: In that Private Frank Amodio, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; Sergeant Harry Davis, Headquarters Detachment, Middle East Service Command, Camp Russell B. Huckstep, Egypt; Private First Class Michael J. Dombol, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; Corporal Wilford W. Guy, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; Private John J. Scatton, 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command; and Sergeant Kenneth L. McKay, 95th Depot Repair Squadron, 1264-1 Operating Location, North African Division, Air Transport Command, acting jointly and in pursuance of a common intent did, at Cairo, Egypt, on or about 5 December 1944 wrongfully and unlawfully deal and traffic in a narcotic drug commonly known as hashish.

CHARGE III: Violation of the 93rd Article of War.
(Finding of Not Guilty).

Specification: (Finding of Not Guilty).

The accused Dombol, Scattone and McKay pleaded not guilty to all the Charges and Specifications. The accused Dombol and Scattone were found guilty with exceptions of the Specification of Charge I and Charge I, and guilty with exceptions of Specification 1, Charge II and Charge II. The accused McKay was found guilty with exceptions of Specifications 1 and 2, Charge II and Charge II. No evidence of previous convictions was introduced. The accused Dombol and Scattone were sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 3½ years. The accused McKay was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 3 years. The reviewing authority approved the sentences 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. Evidence.

Only that evidence pertinent to the issues herein discussed is summarized.

Private Charles, a general prisoner, testified that on 5 October 1944 he approached the accused Scattone and Dombol asking them to drive him to Palestine. He told them he would make it worth their while (R. 16, 17, 46), and that he would explain on the way why he wanted them to do this (R. 21). He explained to the court that he meant he would pay them for driving him up and back (R. 46). Actually, he never did pay them anything (R. 46). The reason he wanted them to drive him was because he couldn't drive himself (R. 47). The next morning Scattone and Dombol were with Charles when he went to the motor pool to pick up the truck (R. 17). They started about 6:30 a.m. (R. 31), in a Government truck, to Gaza in Palestine (R. 14) from Deversoir, Scattone and Dombol taking turns driving (R. 15, 32, 68). Charles found old trip tickets in the cab but made out a new trip ticket, for which he had no authority, on which appeared his own name, as well as that of Scattone and Dombol. On this they traveled (R. 48). There was an empty (R. 113) Allison engine box on the truck when they started. This box was placed on the truck by Charles, Scattone and Dombol (R. 112). The trip was not made for military purposes but for Charles own personal benefit (R. 21). At Ismailia an Egyptian, otherwise unidentified, was picked up by this trio (R. 115) and concealed in the box (R. 35). The arrangements to pick up this Egyptian were made by Charles alone (R. 116). This Egyptian apparently made the whole trip to

Gaza and back (R. 40). He was to be the person buying and paying for hashish for which the trip was undertaken by Charles (R. 121). The truck was checked out of the post at Deversoir by an MP (R. 51) who noticed Charles, Scattone and Dombol sitting in the cab. Along the road, four miles out of Ismailia, a vehicle was checked by a British MP. The car or truck was on the road headed toward Palestine (R. 54) and was identified as a 3-ton Ford occupied by three USA OR's (USA enlisted men) (R. 55). The trip ticket or movement order listed Private Charles as driver (R. 57). Further along at another checkpost, at Abu Aweigila another British MP checking vehicles checked an American vehicle at about 1025 hours on 7 October 1944 going towards Palestine. From his records this witness testified that the vehicle was a 3-ton Ford number USAT31453 and the driver was Sergeant Scattone; that Sergeant Charles was in charge and that the truck also carried one "other rank" (R. 60). This witness also testified that British MPs list a truck as "3 ton" if it is more or less over one ton (R. 60). At this same post of Abu Aweigila, another British MP at 1 a.m. on the morning of 8 October checked the same truck proceeding towards Egypt on the return journey (R. 63). The vehicle was again checked at 0410 on that date at a ferry point, pontoon bridge checkpost (Suez Canal) (R. 68).

When the truck in which Charles, Scattone and Dombol were riding arrived at Gaza (R. 35) on its outward journey, Charles left Scattone and Dombol in the truck which had been parked and "went someplace else for an hour" (R. 35). When he returned, he told them "the setup, what it was" (R. 37, 38, 115) to get some hashish (R. 39) and that it was to be taken back to Ismailia (a place in Egypt near the Suez Canal and on the road from Gaza to Cairo and Deversoir). The accused Scattone and Dombol did not like the idea. They were scared or peeved. They said they wanted no part of taking hashish back (R. 115). Charles did tell the accused McKay what they had gone for that day; but none of the other accused (R. 40). He discussed no other plans with McKay or any of the other accused (R. 40). The value of the truck taken was stipulated at \$1,000 (R. 69).

Before Christmas, in December of 1944 Charles testified he was at the Eden Cabaret in Cairo several times and that he had been there with the accused McKay (R. 27, 29). Charles knew the manager of the Cabaret (R. 29). He did not see McKay carrying anything, or "with" anything during that night (R. 29). He did not see McKay talk to the manager (R. 30). He talked to the manager himself many times (R. 30). On this particular night Charles asked the manager to buy some hashish (R. 30, 41). At that time he did not have the hashish with him (R. 46). McKay was nowhere near, when this conversation took place, although he was in another room

in the cafe (R. 30, 42). None of the other accused were present at that time (R. 30). Charles had no package with him that night (R. 42) nor saw one (R. 43). Charles offered to sell hashish to the manager of the Eden Cafe three times in a period of four or five days (R. 44). On one of these trips McKay was present in the cafe when Charles spoke to the manager but not in the same room when he (Charles) spoke about the hashish (R. 44) and couldn't possibly hear the discussion. Further, accused McKay never discussed the matter of hashish with the manager of the Eden Cabaret (R. 45). Accused McKay made a written statement to Captain Barrett in connection with a matter not herein charged in the nature of "an admission against interest" (R. 70-76) which was admitted in evidence (R. 77, Ex. P-5). In this statement McKay involves Scattone, Charles and Dombol in the transporting of hashish from Gaza to Ismailia. He also states that Davis (one of the accused) was involved with Guy and Charles in a holdup of an Egyptian. He relates further that he and Guy (an accused) got a three day pass for Palestine where Guy bought 2½ Okars of "dope"; that he and Charles tried to sell it in Cairo but were unsuccessful. This incident is not included in the offenses herein charged. He also relates other crimes which have no relation to the offenses here charged. Lieutenant Colonel Sewell, Deputy Surgeon, AMET, testified that hashish, also known as Cannabis indica, (R. 84) is a narcotic drug (R. 83) and that as far as the witness knew it was on the list of drugs in an amendment to the Harrison Narcotics Act (R. 86).

Mohamed Said, manager of the Eden Cabaret in Cairo (R. 92) testified that he saw Private Charles in the Cabaret the first week in December (R. 92) with Sergeant McKay and four sergeants (R. 93). At that time Private Charles spoke about the hashish, but not in the presence of McKay and McKay was not in the conversation (R. 93).

No one was with Charles when the problem of buying it was first discussed with the Egyptian (R. 123). This was a month before December 1944.

There is other evidence in the case, completely irrelevant and immaterial to the offenses for which accused were found guilty.

4. The evidence is abundant to prove that the accused Scattone and Dombol are guilty of a misappropriation of a Government truck as charged. Their taking of the truck and the trip they made with it was fully described by the witness, Charles. Various MPs at various posts checked the vehicle, with these accused in it, during the journey.

In support of Specification 1, Charge II, in which Dombol and Scattone and McKay were found guilty of conspiring to deal and traffic in

hashish, there is not the slightest evidence. Private Charles, on whom the prosecution relied chiefly to prove this accusation, testified that Dombol and Scattone never even knew why they embarked on the trip to Palestine until the truck in which they all were riding arrived at Gaza. He told them, when they started, that he would tell them the reason for the trip when they got there. It is true they knew the taking of the truck was wrong. But this is only evidence of a conspiracy to misappropriate, not a conspiracy to deal in hashish.

When told by Charles at Gaza the reason for the trip they "became peeved and sore." They drove back to Deversoir without a single overt act on their part to form a conspiracy or without in any way joining a conspiracy, if one was already formed. While it is true that the actors in a conspiracy each act for all (Cm CBI 114, Ranziger), an unlawful agreement must be proven, and the accused must be proven to have been parties thereto before any accused can be held responsible for the acts and declarations of others. The prosecution's case failed both as to proving these three accused part of a conspiracy to traffic in hashish, or even that a conspiracy existed. The fact that an Egyptian was being smuggled out of and back into Egypt, does not prove a conspiracy to traffic in hashish. Accused Dombol and Scattone did not know anything about trafficking in the drug until they arrived in Palestine. For all they knew when they embarked on the trip, taking the Egyptian along was for the purpose of smuggling him out of the country only. This, however, is not the conspiracy with which Dombol and Scattone were charged. The statement of McKay implicating these two accused is not evidence as to them, since it was not made in furtherance of any conspiracy, and after the overt acts had taken place. It was competent solely to prove admissions against interest of McKay only (R. 77). Taking the evidence against Scattone and Dombol altogether we find nothing that proves they were part of a conspiracy to deal in hashish as charged. This is not a question of reasonable doubt, or weight of the evidence; but a case of complete insufficiency of any evidence on the point whatever.

As to McKay, except for his confession or "admission against interest" as it was called, he was neither proven to be along on the trip to Palestine, nor connected with the alleged conspiracy in any manner whatever. It is true that McKay knew what the trip was about, for Charles told him. But the record is barren of any evidence to show what he said or did, if anything, as to result thereof. McKay was in the cabaret when Charles tried to make a deal to sell hashish. Yet Charles testified, as did the manager of the cabaret to whom the proposition was made, that McKay was not part of the conversation, or even nearby when it took place. Mere presence when a conspiracy is formed, or mere knowledge of a conspiracy, does not make the person present or knowing, a conspirator. There must be some evidence connecting him with the conspiracy (Wharton Criminal

Law, Vol. I, p. 327; Simon v. State, 149 Ark 609; Gower v. State, 166 Ga. 500). If the connection has been sufficiently shown that an accused is part of an existing conspiracy the doctrine may be applied that each party is an agent of the others and an act done or declaration made, so long as it was in furtherance of the common design, is an act of all (U.S. v. Gooding, 6 Law Ed. 693). There is, however, no such evidence in this case.

The only evidence in the record as to McKay, aside from the fact that he knew of the trip to Palestine, is his statement which was admitted in evidence. Whether it is a confession or an admission against interest, the statement is the only competent evidence connecting accused with the conspiracy. The mere fact that he knew of the conspiracy is no proof of the corpus delicti. An unsupported confession is insufficient upon which to base a finding of guilty. It is universally held that a crime cannot be proven by an extrajudicial confession standing alone, but must be proven independently of it. (Jinkemulder v. U.S., 64 F (2d) 535; 290 U.S. 666). There must be independent proof of the corpus delicti of the crime (Flower v. U.S., 116 F. 241). While such evidence may be circumstantial (vol. 1, p. 1071, Wharton's Criminal Evidence) in this case there is no evidence whatever connecting McKay with the crime charged. His mere knowledge of the conspiracy is insufficient to connect him with it.

5. McKay alone was found guilty (Spec. 2, Charge II) of dealing in hashish (as distinguished from the conspiracy to deal therein). What has been said in paragraph 4 hereof (as to Specification 1, Charge II) might well be said of this Specification. There is no direct evidence, aside from the accused McKay's confession, to show that he actually did deal or traffic in hashish. The circumstances established by evidence aliunde his statement are inconclusive, and insufficient to prove beyond a reasonable doubt either that the offense was committed or that McKay is guilty.

In this statement, admitted over his objection, accused McKay stated that he was guilty of other offenses, for which he was not on trial. The effect of these admissions of guilt of serious offenses could not have been otherwise than prejudicial. Those portions of the confession which related to offenses for which McKay was not on trial at best should have been deleted therefrom before it was received in evidence, or at least should have been made the subject of an admonition by the law member. The admission of this statement, without limiting it to the offenses charged, either by striking out the irrelevant portions, or by a cautionary admonition by the law member, in itself constituted prejudicial error as to McKay (CM 257634, 3 Bull JAG 417; CM 211829, Dig Ops JAG 1912-40, sec. 395(21)). Considering the

record as a whole, it seems to us that this finding of guilty may have been influenced thereby.

6. For the reasons above set forth we find the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification as to Dombol and Scattone; legally insufficient to support the findings of guilty of Specification 1, Charge II as to Dombol, Scattone and McKay, legally insufficient to support the findings of guilty as to Specification 2, Charge II as to McKay and legally insufficient to support the findings of guilty of Charge II as to Dombol, Scattone and McKay. The record of trial is legally sufficient to support the sentence as to Scattone and Dombol and legally insufficient to support the sentence as to McKay.

Judge Advocate

Judge Advocate

Judge Advocate

SPJGV-CM 282292

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

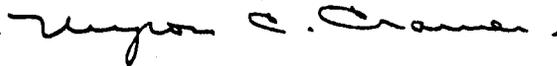
8 JUL 1945

TO: The Secretary of War

1. In the case of Private First Class Michael J. Dombol (32197771), and Private John J. Scattone (13045545), both of 571st Air Service Squadron, 1264-1 Operating Location, North African Division, Air Transport Command, and Sergeant Kenneth L. McKay (39014413), 95th Depot Repair Squadron, 1264-1 Operating Location, North African Division, Air Transport Command, I concur in the foregoing holding of the Board of Review and for the reasons therein stated, recommend that the findings of guilty of Specification 1, Charge II as to Dombol, Scattone and McKay, the findings of guilty of Specification 2, Charge II as to McKay, the findings of guilty of Charge II as to Dombol, Scattone and McKay, and the sentence as to McKay, be disapproved, and that the period of confinement be reduced to one year in the cases of Dombol and Scattone.

2. This case is submitted for the action of the Secretary of War in order to avoid the delay which would be involved in transmitting the approved holding overseas for the action of the reviewing authority.

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



MYRON C. CRAMER
Major General
The Judge Advocate General

- 2 Incls
- 1 Record of trial
- 2 Form of Action

(Findings of Specification 1, Charge II as to accused Dombol, Scattone and McKay, findings of guilty of Specification 2, Charge II as to McKay, the findings of guilty of Charge II as to Dombol, Scattone, and McKay, and the sentence as to McKay are disapproved. The sentence as to Dombol and Scattone are approved but confinement reduced to one year. GCMO 387, 8 Aug 1945).



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

SPJGH-CM 282335

10 JUL 1945

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

FOURTH AIR FORCE

v.)

Trial by G.C.M., convened at
Lemoore Army Air Field,
Lemoore, California, 5 and 6
June 1945. Dismissal.

First Lieutenant TIMOTHY
J. McARTHY (O-1035931);
Chemical Warfare Service.)

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

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

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

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

Specification 1: In that First Lieutenant Timothy J. McCarthy, 461st Army Air Forces Base Unit, did, at Lemoore Army Air Field, Lemoore, California, on or about 29 December 1944, with intent to defraud, wrongfully and unlawfully make and utter to Post Exchange, Lemoore Army Air Field, Lemoore, California, a certain check, dated 29 December 1944, drawn upon the Bank of America, National Trust and Savings Association, Day & Night Branch of San Francisco, California, payable to the order of cash in the sum of Twenty Dollars (\$20.00), and signed by Timothy J. McCarthy, 01035931, 1st Lieut U. S. Army, and by means thereof, did fraudulently obtain from the Post Exchange, Lemoore Army Air Field, Lemoore, California, \$20.00, lawful money of the United States, he the said First Lieutenant McCarthy, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of America, Day & Night Branch, San Francisco, California, for the payment of said check.

Specification 2: Same allegations as Specification 1 except check in amount of \$25.

Specification 3: Same allegations as Specification 1 except check made and uttered on 13 January 1945 in amount of \$25.

Specification 4: Same allegations as Specification 1 except check made and uttered on 18 January 1945 to Lemoore Army Air Field Officers' Mess in amount of \$15.

Specification 5: Same allegations as Specification 1 except check made and uttered on 26 January 1945 to Lemoore Army Air Field Officers' Mess in amount of \$25.

Specification 6: Same allegations as Specification 1 except check made and uttered on 28 January 1945 in amount of \$25.

Specification 7: Same allegations as Specification 1 except check made and uttered on 24 February 1945 to Lemoore Army Air Field Officers' Mess.

CHARGE II: Violation of the 94th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

Accused pleaded not guilty to all Charges and Specifications and was found not guilty of Charge II and its Specification and guilty of Charge I and of all Specifications thereunder except the words "with intent to defraud." There was introduced evidence of one previous conviction for wrongfully cashing three checks aggregating \$80 in amount without maintaining a sufficient bank balance to pay them, in violation of Article of War 96, for which accused was sentenced to forfeit \$50 of his pay per month for six months. In the present case accused was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that on the following dates accused made and uttered seven checks, all more fully described as follows, viz (R. 12-15, 17-20; Pros. Exs. 1, 2):

<u>Spec.</u>	<u>Date of Check</u>	<u>Amount</u>	<u>Uttered to</u>	<u>Consider- ation Given</u>	<u>Drawee Bank</u>
1	29 Dec 44	\$20	Lemoore AAF Post Exchange	Cash	Bank of America Day & Night Branch San Francisco, Calif

2	29 Dec 44	\$25	Lemoore AAF Post Exchange	Cash	Bank of America Day & Night Branch San Francisco, Calif
3	13 Jan 45	\$25	Lemoore AAF Post Exchange	Cash	Bank of America Day & Night Branch San Francisco, Calif
4	18 Jan 45	\$15	Lemoore AAF Officers' Mess	Cash	Bank of America Day & Night Branch San Francisco, Calif
5	26 Jan 45	\$25	Lemoore AAF Officers' Mess	Cash	Bank of America Day & Night Branch San Francisco, Calif
6	28 Jan 45	\$25	Lemoore AAF Post Exchange	Cash	Bank of America Day & Night Branch San Francisco, Calif
7	24 Feb 45	\$20	Lemoore AAF Officers' Mess	Cash	Bank of America Day & Night Branch San Francisco, Calif

Each of these checks was forwarded to the drawee bank for payment through ordinary banking channels and was returned unpaid. Accused was notified of the return of these checks and thereafter he redeemed all of them (R. 12-15, 18, 19, 21, 22).

The balance in accused's account in the drawee bank did not exceed \$5.77 from 23 December 1944 until 5 January 1945 when a deposit brought it to \$133.57. On 4 January 1945 when two checks, one for \$20 and one for \$25 (Specs. 1, 2), were presented for payment they were dishonored because of insufficient funds. Although accused's balance on 13 January 1945 was \$29.07, it was reduced by withdrawals to \$9.07 by 16 January 1945 and when accused's check for \$25 (Spec. 3) was presented for payment on 17 January 1945 it was dishonored because his balance was still but \$9.07. On 18 January 1945 accused's balance was \$8.07 and when his check for \$15 (Spec. 4) was presented for payment on 23 January 1945 his balance had fallen to \$7.57, consequently this check was dishonored. From 26 January until the afternoon of 2 February 1945, the balance in his account was \$7.07 and when accused's check for \$25 (Spec. 5) was presented for payment on 30 January 1945, it was also dishonored because of insufficient funds. Accused's check for \$25 (Spec. 6) was presented for payment on the morning of 2 February 1945 and was dishonored because his balance was then but \$7.07. Although a deposit of \$236.30 reached the bank on the afternoon of that same day

(2 February 1945) dishonor of the check had already been accomplished and the check dispatched to the depositor. From 20 February 1945 until the afternoon of 28 February 1945, accused had not more than \$17.51 on deposit in his account and accordingly when his \$20 check (Spec. 7) was presented for payment on the morning of 28 February 1945 it was dishonored. Although a deposit of \$20 was received on the afternoon of that same day (28 February 1945) accused's check had already been dishonored and dispatched to the depositor (R. 22, 23; Pros. Exs. 3, 4, 5).

On 22 March 1945, after having been advised of his rights, accused made a statement to First Lieutenant John W. Rutherford in which he admitted drawing on the Bank of America, Day and Night Branch, six of the above-mentioned seven checks and redeeming them after they had been dishonored by the bank but he asserted that the check for \$20 dated 24 February 1945 was mistakenly drawn on the Fresno Branch of that bank and was returned unpaid by it (R. 24, 25; Pros. Ex. 7). This last assertion was not correct inasmuch as the prosecution's documentary evidence demonstrated that the check dated 24 February 1945 was drawn on the Day and Night Branch (Pros. Ex. 2).

4. After his rights had been explained to him accused elected to give sworn testimony in his own behalf. He testified that he was 31 years of age, married and the father of a three year old son with another child expected (R. 30). He had received no statement of his account from the bank but he believed when he issued these checks that he had sufficient funds on deposit to pay each of them (R. 31, 33-37).

5. At the inception of the trial the defense entered a plea in bar on the grounds that accused had previously been punished for the offenses alleged under Article of War 104. By communication dated 6 April 1945, accused's commanding officer, Colonel Troy Keith, advised accused that he had knowledge of several worthless checks negotiated by accused and that in order "to rectify" accused's conduct he was placing him on probation for 60 days. He further stated, however, that:

"* * * In doing this, I do not condone or forgive your past conduct and the evidence which has been collected concerning your past delinquencies will be retained for use against you in the event that you commit any further acts of moral turpitude or financial irresponsibility during the probationary period."

Accused was also directed "to refrain from gambling in any manner or by any means for any stakes however small" and was ordered to acknowledge by indorsement that he had read this communication.

In our opinion the court properly denied the plea in bar. The course of conduct the communication directed accused to follow, including the probationary period, was not a form of punishment authorized under Article of War 104 nor did the commanding officer inform the accused it was intended as such punishment or offer the accused the opportunity to request trial by general court-martial in lieu thereof (MCM, 1928, pars. 105-107). The whole tenor of the communication indicates clearly that the commanding officer was withholding punitive action in order to give accused an opportunity to improve his conduct. The probationary period and the direction against gambling were solely to assist accused "to rectify" his conduct. Such measures were intended not as a penalty but as corrective measures and consequently did not constitute a bar to the present trial (MCM, 1928, par. 105). These measures were substantially similar to those set forth in CM 232968, McCormick, 19 B.R. 263, where among other things accused's commanding officer limited him to one drink a day and informed him that the evidence concerning his conduct would be officially presented if he again misconducted himself. Such measures were there held to be corrective only and not punitive under Article of War 104. In view of the foregoing it becomes unnecessary for us to consider whether accused's offenses were such "minor offenses" as might properly be punished under Article of War 104 (MCM, 1928, par. 105).

The court found accused guilty of each Specification except the words "with intent to defraud." Apparently the court intended to exonerate accused of any fraudulent intent and to find him guilty only of the lesser included offense of uttering checks without maintaining a sufficient bank balance to pay them. To have reported its findings in correct form it should at least also have excepted the word "fraudulently" from each Specification (See CM 249006, Vergara, 32 B.R. 5). Be that as it may, the intent of the court is sufficiently expressed in its findings (See CM 251451, Monaghan, 33 B.R. 243, 4 Bull. JAG 5).

The nonfraudulent offense of issuing a check without maintaining a sufficient bank balance to pay it is established by proof (a) that the check was issued when accused knew or ought to have known that his bank balance was or was likely to be insufficient to pay it and (b) that when the check was presented for payment the balance in his account was in fact insufficient to pay it (CM 252273, Clark, 34 B.R. 25; CM 249232, Norren, 32 B.R. 95). Proof that the check was issued as a result of an honest mistake made by accused with respect to the sufficiency of his bank balance constitutes a defense but proof that the check was carelessly and negligently issued affords accused no legal excuse for his act (CM 249232, Norren, 32 B.R. 95). Furthermore, where there is no adequate evidence to show that the condition of accused's account was occasioned by acts of persons other than himself, accused is chargeable as a matter of law with knowledge of the status of his bank balance (CM 202601, Sperti, 6 B.R. 171; CM 253783, Fleming, 35 B.R. 97).

The evidence does not reveal that any person other than accused had authority to draw on his account and, accordingly, being charged with knowledge of the condition of his account, accused knew or should have known the amount of his balance at the time he issued each of these seven checks. Six of the checks (Specs. 1, 2, 4-7 incl.) were issued at times when accused's bank balance was insufficient to pay them and all of them were dishonored for the same reason. Two of these checks (Specs. 6, 7) were dishonored during the mornings of two different days and during the afternoons of each of these days deposits were made in amounts sufficient to cover each check. Such facts, however, would constitute a defense only if upon all the evidence it is clear that dishonor of these two checks resulted from an honest mistake rather than accused's negligence (Norren case, supra). It does not appear from the evidence before us that at the time accused issued these two checks he intended promptly thereafter to replenish his account so that they would be honored and that he diligently took steps to accomplish that end. Rather, the evidence of accused's whole course of conduct indicates that he was content to issue checks without ever having any accurate knowledge of the condition of his account and that his deposits were made in an equally casual fashion. Under such circumstances the court was not compelled to believe that the receipt of these two deposits by the bank was the result of diligent efforts by accused to cover these two checks. Accordingly, we cannot say that upon all the evidence the defense has established that the issuance and dishonor of these two checks was the result of an honest mistake rather than accused's careless inattention to his banking transactions.

The last check to be considered (Spec. 3) was for \$25 and was issued on 13 January 1945 when accused's balance was \$29.07. It was dishonored when presented for payment on 17 January 1945 because accused's account then contained but \$9.07 to which figure it had been reduced by a withdrawal made on 16 January. The court was well justified in concluding that accused was responsible for the withdrawal of \$20 which depleted his account. Similarly he knew or should have known of the insufficiency of his balance of \$29.07 to pay checks totaling \$40 and, consequently, that at least one of these checks would not be honored. Such evidence is sufficient to establish commission of the offense of which he was found guilty (CM 258171, Lucas, 37 B.R. 327).

In view of the foregoing, it is our opinion that the evidence is sufficient to sustain the findings of guilty of these seven Specifications.

6. Accused is 31 years of age, married and the father of one child with another expected. War Department records show that accused attended Loyola and Wayne Universities for a total of four years but did not graduate. He worked as a department store salesman from

1937 to 1938, as a service engineer for a telephone company from 1938 to 1940 and as a salesman for a chemical company from 1940 to 1941. He was inducted into military service on 3 March 1941 and rose to the grade of master sergeant. On 28 November 1942, after graduation from Chemical Warfare Officer Candidate School, Edgewood Arsenal, Maryland, accused was commissioned a second lieutenant. He was promoted to first lieutenant on 22 June 1943. On 21 September 1944 he was found guilty by general court-martial of making and uttering three checks aggregating \$80 in amount without maintaining a sufficient bank balance to pay them, in violation of Article of War 96, and sentenced to forfeit \$50 of his pay per month for six months which sentence was approved by the reviewing authority.

7. The court was legally constituted and had jurisdiction of 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 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.

Thomas W. Jappy, Judge Advocate

On Leave, Judge Advocate

Robert E. Truethan, Judge Advocate

SPJGH-CM 282335

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 16 1945

TO: The Secretary of War

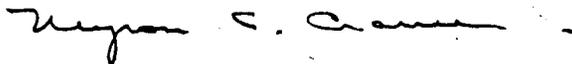
1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Timothy J. McCarthy (O-1035931), Chemical Warfare Service.

2. Upon trial by general court-martial this officer was found guilty of making and uttering seven worthless checks aggregating \$155 in amount without maintaining a sufficient bank balance to pay them, in violation of Article of War 96. He was sentenced to dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion. From 29 December 1944 to 24 February 1945, accused made and uttered seven checks whereby he obtained a total of \$155 in cash. All of these checks were dishonored by the drawee bank when presented for payment because of the insufficiency of accused's bank balance to pay them. Subsequent to their dishonor accused redeemed all of these worthless checks. Previously, on 21 September 1944, accused had been found guilty by general court-martial of making and uttering three other worthless checks whereby he obtained a total of \$80 without maintaining a sufficient bank balance to pay them, in violation of Article of War 96, and was sentenced to forfeit \$50 of his pay per month for six months which sentence was approved by the reviewing authority.

I recommend that the present sentence be confirmed and carried into execution.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls

1. Record of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed. GCMO 371, 25 July 1945).

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

(371)

SPJGK - CM 282391

10 JUL 1945

UNITED STATES)

v.)

Second Lieutenant CLYDE
C. HONER (O-762333), Air
Corps.)

ARMY AIR FORCES
WESTERN TECHNICAL TRAINING COMMAND

Trial by G. C.M., convened at
Amarillo Army Air Field, Amarillo,
Texas, 18 and 19 June 1945. Dis-
missal, total forfeitures, and con-
finement for two (2) years.

OPINION of the BOARD OF REVIEW
LYON, LUCKIE 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 Specifications:

CHARGE: Violation of the 61st Article of War.

Specifications: In that Second Lieutenant Clyde C. Honer, Air Corps Unassigned, attached Squadron "U", 3701st Army Air Forces Base Unit, did, without proper leave, absent himself from his station at Amarillo Army Air Field, Amarillo, Texas, from about 24 April 1945 to about 3 June 1945.

He pleaded guilty to the Charge and its Specification except as to the date "24 April 1945", substituting therefor the date "8 May 1945", to the excepted date, not guilty, to the substituted date, guilty. He was found guilty of the Charge and its Specification. Evidence was introduced of one previous conviction by general court-martial for absence without leave from 7 December 1944 to 12 January 1945 (36 days) in violation of the 61st Article of War, for which the sentence as approved on 30 January 1945 provided for a reprimand; three months restriction to the limits of his post and a forfeiture of \$50 per month for twelve months. In the instant 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 for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. For the prosecution.

Duly authenticated extract copies of morning reports of Squadron V and Squadron U, both of the 3701st AAF Base Unit, Amarillo Army Air Field, Amarillo, Texas, were introduced into evidence without objection showing accused as absent without leave from his organization from 24 April 1945 to 3 June 1945 (R. 16,17; Pros. Exs. A,C). Special orders were issued on 8 May 1945 transferring accused from Squadron V to Squadron U, both of the 3701st AAF Base Unit, Amarillo Army Air Field, Amarillo, Texas (Pros. Ex.B).

4. Accused, after being apprised of his rights as a witness, elected to take the stand and testify under oath (R. 18).

Witness stated that he personally talked to Lieutenant Colonel Paul M. Davis, his commanding officer, and made application to him for a leave of absence (R. 19). The request was for 15 days plus travel time and was to commence on 28 April 1945 (R. 21). Upon Lieutenant Colonel Davis approving his application he took it to Captain Dorothy A. Connaughton (WAC) at Post Headquarters and explained to her he was requesting leave (R. 19,23). She left the room for about 5 to 10 minutes and upon her return told him the orders would be out on 25 April 1945 (R. 19,23). That was "why" he left around the 24th or 25th of April 1945, his departure being "sometime" around midnight 24 April 1945 (R. 19,20). He spent the first part of the "leave" in the Big Bear Mountains, remaining there until 8 May 1945 (R. 20). His first knowledge that he was considered absent without leave was upon receipt of a telegram on 8 May from Lieutenant Colonel Davis stating in substance that "your leave was not granted. You are being carried AWOL. Advise return at once" (R. 20,21).

On cross-examination witness stated he left on 24 April 1945 "about eleven - between eleven and twelve, Sir" (R. 20). He believed that the telegram he received from Lieutenant Colonel Davis was dated 27 April 1945, but he did not receive it until 8 May 1945 (R. 21). On that day he dispatched a telegram to his commanding officer saying, "Received wire. Will return at once. Return by Friday or Saturday" (R. 22). He received no written orders authorizing his leave of absence while he was away from his station (R. 23).

In reply to questions by the court accused testified that he did not sign out when he left on 24 May 1945 (R. 22). He had made arrangements for some one to do this for him but "he didn't sign out for me because the orders didn't come through" (R. 22). The telegram received from Lieutenant Colonel Davis was addressed to 1905 Ocean Front, Venice, California, the address he gave in his application for leave (R. 23,24). He did not return by 12 May 1945 (R. 22).

It was stipulated by the prosecution, defense and the accused that if Lieutenant Colonel Paul M. Davis, Air Corps, were present in court he would testify under oath as follows:

"*** that 2nd Lieutenant Clyde C. Honer has many redeeming qualities which merit consideration. For three months he worked

faithfully long hours each day. His work in the Squadron mail room was of invaluable assistance and the results of his diligence were outstanding. He accomplished many tasks aside from his assigned duties. His deportment was of the highest character and he allowed nothing to interfere with the completion of his daily duties" (R. 24).

Captain Dorothy A. Connaughton (WAC) was offered as a witness in rebuttal by the prosecution (R. 25). She testified that her primary duty was that of officer in charge of the Officers' Section (R. 25). Approximately a week before 24 or 25 April 1945 she had a conversation with accused (R. 25,26). He had in his possession a request for a leave (R. 26). Accused had previously asked her if he could have a leave and "I checked and found no reason he shouldn't" (R. 26). She told him he could have a leave and that it would be approved, "subject to any conditions arising" (R. 27). She signed the application he made out, sent it to the Adjutant and upon its return with his (the adjutant's) signature she kept it (R. 26). In reply to a question as to whether a leave of absence was given to accused, she stated, "No, no orders were published" (R. 26). She had no further conversation with accused subsequent to that date (R. 27).

In reply to questions by the defense and members of the court, witness stated she believed Lieutenant Colonel Davis approved it "but the dates were incorrect even though it was approved, that's why it wasn't published" (R. 27). She did not know whether accused knew the dates were incorrect (R. 27).

She did not recall telling accused that orders would be cut on 25 April 1945 making his leave effective on 26 April 1945, nor did she recall telling him the orders would be cut on any specific date (R. 27). At that time she did not know whether the dates were correct or not. She checked on that later (R. 27).

8. The accused's plea of guilty of absence without leave from 8 May to 3 June 1945, coupled with the morning report entries, conclusively shows that he is guilty as alleged for this period. His plea of not guilty of absence without leave from 24 April to 8 May 1945 required the prosecution to show (a) that the accused absented himself from his station for the period alleged, and (b) that such absence was without competent authority. The introduction into evidence of the extract copies of the morning reports constitutes prima facie evidence of both elements of the offense (par. 117, MCM 1928). In addition the accused admitted his absence as alleged when he stated he departed from his station on 24 April and had not returned by 12 May 1945. The defense, however, is predicated upon the premises that the accused was absent with competent authority, not that he was present for duty with his organization. In support of this contention, accused presented uncontradicted testimony to the effect that he originated an application for

a fifteen day leave of absence to become effective on 26 April 1945; that the application was approved and signed by his commanding officer; and that he then took it to Post Headquarters, where it was signed by the officer in charge of the Officers' Section, Captain Connaughton, and the Adjutant. The evidence is also convincing that as a result of his conversation with Captain Connaughton he received some assurance that the leave would be granted. Accused's testimony is to the effect that Captain Connaughton told him that the orders would be "out" on 25 April 1945. Captain Connaughton's version is that she told accused that the leave would be approved "subject to any conditions arising" and that she did not recall any statement by her that the orders would be "out" on any specific date. According to her uncontradicted testimony, the conversation with accused took place "about a week before 24th or 25th of April" and she had no further conversation with accused after that date. Without awaiting the issuance of orders, accused, according to his testimony, relied on the information furnished him by Captain Connaughton, and left the post before midnight of 24 April 1945, at which time, even had the order been actually out on 25 April 1945, making his leave effective on 26 April 1945, he had no authority to leave the post. That he recognized this lack of authority is best evidenced by the fact that he did not "sign out" at Post Headquarters, but, according to his testimony, "made arrangements" with some one who "didn't sign out for him" because the orders did not come through." No order granting the leave was ever published by competent authority, as it was discovered that certain dates in accused's application were incorrect. On 27 April 1945, accused's commanding officer, who was not the authority competent to grant leaves, telegraphed accused that his leave had not been granted, that he was "AWOL", and that he was advised to return at once. Accused's statement is that he did not receive this telegram until 8 May and that he thereupon immediately replied that he would return at once. This he failed to do, remaining absent for an additional period of 26 days.

The record, therefore, shows that while accused's application for a leave, effective on 26 April 1945, was approved by his commanding officer, the Post Adjutant and the officer in charge of the Officers' Section at Post Headquarters, the leave in actuality was never granted as evidenced by the refusal of the proper authority to issue orders necessary to make the leave effective. Consequently, as found by the trial court, accused was not granted a leave of absence, and his departure from the post was without authority. While it is unnecessary, in view of this conclusion, to pass upon the effect of accused's premature departure, had the leave been subsequently granted, effective on 26 April 1945, it should be observed that accused, according to his own admissions, left the post before midnight on 24 April, at which time he had no authority to depart under a leave effective on 26 April 1945.

Accused apparently realized the importance of and the necessity for the publication of orders, for, according to his testimony, it was only

after he was assured that orders would be published that he left the station. Assuming, however, that he was acting in good faith in erroneously believing he had already been granted a leave, such belief would not constitute a defense. Specific intent is not an element of the offense of absence without leave, and "proof of the act alone is sufficient to establish guilt" (MCM, 1928, par. 126a). Such good faith or erroneous belief, however, should be considered in mitigation.

The Board of Review consequently holds that the record of trial is legally sufficient to support the finding of guilty of absence without leave for the entire period, as charged in the specification, and not merely for the period from 8 May to 3 June 1945, to which he pleaded guilty.

6. War Department records disclose that this officer is 27 years of age, married but separated from his wife, and is a high school graduate. He entered the service as an aviation cadet on 6 January 1943 and was commissioned a temporary second lieutenant in the Army of the United States on 5 December 1943. He was tried and convicted by general court-martial in January 1945 for absence without leave for 36 days in violation of Article of War 61 for which the sentence as approved provided for a reprimand, three months restriction and forfeiture of \$50 of his pay per month for 12 months.

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

Langley, Judge Advocate.
Charles A. Luckie, Judge Advocate.
Samuel Meyer, Judge Advocate.

(376)

SPJGK - CM 282391

1st Ind

Hq ASF, JAGO, Washington 25, D. C. JUL 16 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Clyde C. Honer (O-762333), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty of absence without leave from 24 April 1945 to 8 May 1945, but guilty of absence without leave from 8 May 1945 to 3 June 1945, and was found guilty of absence without leave for the entire period, 24 April - 8 June, forty days, in violation of Article of War 61. Evidence was introduced of one previous conviction by general court-martial for absence without leave for 36 days in violation of Article of War 61, for which the sentence as approved on 30 January 1945 provided for a reprimand, three months restriction to the limits of his post and forfeiture of \$50 of his pay per month for twelve months. In the instant 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 for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

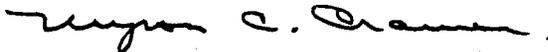
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

Accused, who had been sentenced to restriction for three months as a result of a previous conviction of absence without leave, applied for a fifteen day leave of absence, effective on 26 April 1945. After its approval by his commanding officer, the post adjutant and the officer in charge of the Officers' Section at Post Headquarters, but before any orders granting the leave had been issued, accused left his station prior to midnight on 24 April 1945 without signing out at Post Headquarters. The order was never issued because of the discovery of certain errors in the dates in the application. Accused was notified by his commanding officer on 27 April by telegraph that his leave had not been granted, that he was "AWOL," and that he should return at once. Accused claims that he did not receive the telegram until 8 May, but admits that he remained absent until 3 June, although he notified his commanding officer on 8 May in reply to the message that he would return at once. While admitting his unauthorized absence from 8 May to 3 June, he contends that his departure on 24 April 1945 was based upon the approval of his application for leave and on assurances given him by the officer in charge of the Officers' Section that

his orders for his leave, effective on 26 April 1945, would be "cut" on 25 April. He claimed that he was not aware until 8 May that the leave had not been granted. Even had the leave been granted, effective on 26 April 1945, accused's departure prior to midnight of 24 April 1945 was premature.

Absence without leave by an officer is a serious military offense. The accused was convicted of a similar offense involving an absence of 36 days in January 1945. His repeated misconduct clearly demonstrates that he is not worthy of his commission. I therefore recommend that the sentence be confirmed, but that the forfeitures be remitted, that a United States Disciplinary Barracks be designated as the place of confinement, and that the sentence as thus modified be ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls

1. Record of trial
2. Form of Action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted, GCMO 379, 25 July 1945).

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

SPJGN-CM 282469

UNITED STATES	)	ARMY AIR FORCES WESTERN
	)	FLYING TRAINING COMMAND
v.)	
Second Lieutenant KENNETH	)	Trial by G.C.M., convened at
R. McLAIN (O-837179), Air	)	Las Vegas Army Air Field, Las
Corps.	)	Vegas, Nevada, 14 June 1945.
	)	Dismissal, total forfeitures and
	)	confinement for one (1) year.

OPINION of the BOARD OF REVIEW
LIPSCOMB, O'CONNOR and MORGAN, 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 93rd Article of War.

Specification: In that Second Lieutenant Kenneth R. McLain, Air Corps, 3021st Army Air Forces Base Unit, did, at Las Vegas Army Air Field, Las Vegas, Nevada, on or about 3 June 1945, feloniously take, steal and carry away two hundred thirty-five dollars (\$235.00), lawful money of the United States, the property of Flight Officer William T. Fischer.

The accused pleaded guilty to, and was found guilty of, both the Charge and the Specification thereunder. 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 two years. The reviewing authority approved the sentence, but reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. The prosecution has adduced as its only evidence its stipulation

with the defense and the accused that, if Flight Officer William T. Fischer were present at the trial, he would testify as follows:

"I live in BOQ #5, Las Vegas Army Air Field, Las Vegas, Nevada, and on 3 June 1945, \$235.00 was stolen from me. I knew the exact amount stolen because I had just counted it, after cashing my pay check.

"At about 1230, 3 June 1945, I left my room, which is Room #15 at the top of the stairs, and went downstairs to take a shower. My money at that time was on my bed. When I came back upstairs, my money was gone, and I took the list I had of the serial numbers of the bills and reported the loss to the Provost Marshal's office. I had made this list of the serial numbers about three days before, and I still have it. The officers from the Provost Marshal's office started to search 2nd Lt. Kenneth R. McLain's room because he acted suspiciously. 2nd Lt. McLain took hold of my arm, and said, 'If you get your money back, will you forget about the whole thing?' I said, 'As far as I am concerned, I won't press any charges,' and he handed me the money, which he took from an athletic sock he had pulled out of his pocket. I counted the money when I got down to the Provost Marshal's office ten minutes later. I do not have all of it now. McLain also said, 'I have been losing heavily on the dice tables, and I had a moment of insanity,' and that in a moment of weakness he had picked the money up. He did not say that he intended to return the money before, or anything like that.

"When I counted the money at the Provost Marshal's office, I found that all of the \$235.00 was there" (R. 5; Pros. Ex. 1).

4. Having been apprized of his rights relative to testifying or remaining silent, the accused elected to take the stand on his own behalf. He readily admitted the appropriation of the sum in question but explained that he "took it without thinking" after having gambled away all of his pay. He immediately realized what he "had done" and "wanted to put the money back" but was unable to do so because of the presence of numerous other officers in Fischer's room. Finally, while his own room was apparently being searched, the accused took Fischer aside, returned the entire sum, and "asked him please not to prefer any charges". Fischer promised that "he wouldn't" and told two of the officers in his room "to forget about the whole thing". "But [the accused] was standing there and they naturally knew [hg] was the guilty person" (R. 8). He had never been charged with any offense before and he had not gambled at any of the posts at which he had been stationed prior to coming to Las Vegas Army Air Field (R. 7-8).

His previous good character was attested to by the personal testimony of Flight Officer Nobert M. Kaneski and Second Lieutenant Eugene C. Keeling and the stipulated testimony of the Reverend Carl W. Nau. According

to the latter, the accused came of a highly respected family, had two brothers in the service, and had always been "reliable and trustworthy and of fine influence with the other boys of the parish". Both Flight Officer Kaneski and Lieutenant Keeling were of the opinion that the accused's character was "excellent". Neither knew of any previous infraction of military discipline by the accused (R. 5, 9-11; Def. Ex. A).

5. The Specification of the Charge alleges that the accused did, "on or about 3 June 1945, feloniously take, steal and carry away two hundred thirty-five dollars (\$235.00), lawful money of the United States, the property of Flight Officer William T. Fischer". This offense was laid under Article of War 93.

The evidence adduced, coupled with the accused's plea of guilty, conclusively establishes his theft of a wallet containing \$235.00 from the room occupied by Flight Officer William T. Fischer. Although the accused promptly made full restitution, he could not thereby undo his criminal act or escape responsibility for it. The Specification has been proved beyond a reasonable doubt.

6. The accused, who is single and about 20 years of age, entered the Army after being graduated from high school. He was commissioned as a Second Lieutenant on 8 September 1944 and has been on active duty as an officer since that date.

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 93.

Abner E. Lifecomb Judge Advocate.

Robert J. Connor Judge Advocate.

Samuel Morgan Judge Advocate.

(382)

SPJGN-CM 282469

1st Ind

Hq ASF, JAGO, Washington 25, D. C.
TO: The Secretary of War

JUL 16 1945

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Kenneth R. McLain (O-837179), Air Corps.

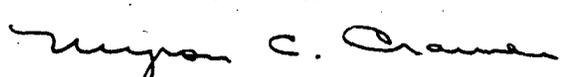
2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, the larceny of \$235 in cash, in violation of Article of War 93. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for two years. The reviewing authority approved the sentence, but reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48.

3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. 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.

Upon returning to his BOQ after having lost a month's pay at a gambling establishment in Las Vegas, Nevada, the accused noticed a wallet lying on the bed in the room occupied by Flight Officer William T. Fischer. The accused immediately appropriated the contents amounting to \$235 in cash. When, a short time later, the loss was reported and a search made of his room, he called Flight Officer Fischer aside and returned to him the entire amount which had been stolen. The accused is only 20 years old and his background and past record indicate that his theft was the result of a sudden impulse which is inconsistent with his true character. In view of these facts and his previous excellent record, I recommend that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures and confinement imposed be remitted, and that the sentence as thus modified be suspended during good behavior.

4. Consideration has been given to a letter from the Honorable Arthur Capper, member of the United States Senate, and to letters from Mr. & Mrs. S. A. McLain, the father and mother of the accused.

5. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



MYRON C. CRAMER
Major General
The Judge Advocate General

7 Incls

- Incl 1 - Record of trial
- Incl 2 - Form of action
- Incl 3 - Ltr. fr. Hon. Arthur Capper
- Incl 4 - Ltr. fr. Mrs. S. A. McLain
- Incl 5 - Ltr. fr. Mrs. S. A. McLain
- Incl 6 - Ltr. fr. Mrs. S. A. McLain
- Incl 7 - Ltr. fr. Mr. S. A. McLain

(Sentence as approved by reviewing
(authority confirmed but forfeitures
(and confinement remitted. As
(modified sentence suspended.
(GCMO 372, 25 July 1945).

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

(383)

SPJGQ - CM 282496

20 JUL 1945

UNITED STATES

v.

First Lieutenant MONTAGUE
DuBARRY (O-579908), Air
Corps.

ARMY AIR FORCES
PERSONNEL DISTRIBUTION COMMAND

Trial by G.C.M., convened at
Army Air Forces Overseas
Replacement Depot, Greensboro,
North Carolina, 2 June 1945.
Dismissal, total forfeitures
and confinement for five (5)
years.

OPINION of the BOARD OF REVIEW
ANDREWS, BIERER and HICKMAN, 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: In that First Lieutenant Montague Du Barry, Air Corps, Squadron B, 1060th AAF Base Unit (ORD), did, at Greensboro, North Carolina, on or about 31 March 1945, engage in conduct unbecoming an officer and gentlemen in that he did wrongfully and dishonorably accost and molest Ruth Irene Geiger, a female person who was then a minor, for immoral and lewd purposes.

Specification 2: (Motion for finding of not guilty sustained.)

Specification 3: Same form as Specification 1, but alleging the date as "1 April 1945" and the female person as "Virginia Lee Sink".

Specification 4: Same form as Specification 1, but alleging the date as "5 April 1945" and the female person as "Mary K. Hylton".

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

Specification 1: In that First Lieutenant Montague Du Barry, Air Corps, Squadron B, 1060th AAF Base Unit (ORD), did, at Greensboro, North Carolina, on or about 31 March 1945, wilfully, wrongfully and indecently expose his

private parts to Ruth Irene Geiger, a female person, who was then a minor.

Specification 2: In that First Lieutenant Montague DuBarry, Air Corps, Squadron B, 1060th AAF Base Unit (ORD), did, at Greensboro, North Carolina, on or about 31 March 1945, wilfully, wrongfully and indecently fondle and stroke his private parts in the presence of Doris Jean Vaughn, a female person, who was then a minor.

Specification 3: Same form as Specification 1, but alleging the date as "1 April 1945" and the female person as "Virginia Lee Sink".

Specification 4: (Finding of guilty disapproved by the reviewing authority.)

Specification 5: In that First Lieutenant Montague DuBarry, Air Corps, Squadron B, 1060th AAF Base Unit (ORD), did, at Greensboro, North Carolina, on or about 5 April 1945, wilfully and wrongfully, place his hands and his private parts upon and against the body of Mary K. Hylton, a female person, who was then a minor.

Specification 6: In that First Lieutenant Montague DuBarry, Air Corps, Squadron B, 1060th AAF Base Unit (ORD), did, in conjunction with Staff Sergeant Richard J. Murphy, on or about 6 April 1945, at or near Greensboro, North Carolina, engage in conduct of a nature to bring discredit upon the military service, in that the said First Lieutenant Montague DuBarry did, wrongfully and unlawfully, transport ten cases of Schenley whiskey into the State of North Carolina for resale.

He pleaded not guilty to all Charges and Specifications. A motion for a finding of not guilty as to Specification 2, Charge I, was granted (R. 51). Accused was found guilty of all other Specifications and of the 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 five (5) years. The reviewing authority disapproved the finding of guilty of Specification 4, Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Specification 1, Charge I and Specification 1, Charge II.

The evidence for the prosecution shows that Ruth Geiger was ten years old and in the fifth grade in grammar school (R. 21). A little after 1300 hours on the day before Easter Sunday (31 March 1945) she was walking at the corner of Wiley and Caldwell Streets with her seven year old sister when a car pulled up to the curb (R. 22, 24, 25). There was a soldier in the automobile (R. 22), who had

black hair and "sort of big" lips, and who was wearing dark sun glasses (R. 23). The soldier pulled to the curb, stopped and asked her if she "wanted to go for a ride" and she said no (R. 22, 25, 26). He asked her again if she wanted to go for a ride (R. 22, 26). Then he asked her the location of a street and when he said that he could not hear, she approached within a foot of the car (R. 22). The soldier "took out his privates and said 'do you know what this is' and I said No." (R. 22) His pants were unbuttoned and his privates were outside of his trousers (R. 22, 23, 25). The soldier had both of his hands at his stomach (R. 23) and then one hand on his private parts and the other hand on the seat of the car (R. 25, 26). The soldier did not threaten or touch her (R. 24). After three or four minutes the girl left and the soldier drove off (R. 26). The girl identified photographs of the accused's car as being the same type as the soldier's car (R. 24, Pros. Ex. 1, 2). She identified the accused when he was brought to her house several days later at which time he was wearing dark glasses, but could not identify him in court (R. 24, 27, 39-41). In his statement to Captain Walsh the accused said in reference to Ruth Geiger "I asked her if she wanted a ride" (R. 47; Pros. Ex. 5). He admitted to First Lieutenant Becker that he accosted Ruth Geiger but when asked if he had exhibited his private parts to her, he replied, "I am not sure" (R. 50; Pros. Ex. 6).

Specification 2, Charge II

About 1230 hours on 31 March 1945, "Saturday before Easter Sunday", Doris Vaughn, who was 12 years old and in the sixth grade in school, was on the corner of West Lee and South Aycock Streets in Greensboro, North Carolina (R. 17, 18, 19). She saw a soldier, who "had thick lips and his teeth were parted", and who was in a black convertible coupe with a canvas top (R. 17). The soldier asked her the location of a street and when he said that he could not hear her she went to the edge of the curb (R. 18, 19). She saw the soldier "moving his hand up and down on his private parts" (R. 18), but his trousers were not unbuttoned and she could not see his private parts (R. 20). His right hand was on the wheel and his left hand "was moving up and down over his private parts" (R. 21). She stood at the car for about three minutes but the soldier only asked for direction and did not ask her to come into the car (R. 20). About a week later this girl identified accused as the "soldier" in question, and she also identified him at the trial (R. 18, 19, 40, 41). In his statement to Captain Walsh the accused admitted accosting two different girls on 31 March 1945 (R. 47, Pros. Ex. 5). When questioned by First Lieutenant Becker concerning the accosting of Doris Vaughn on the corner of West Lee and Aycock Streets, the accused said "I did accost a young girl whose name I do not know". He further stated that he was not sure if he exhibited his private parts to this girl but stated, "it is quite possible that I did" (R. 50; Pros. Ex. 6).

Specification 3, Charge I and Specification 3, Charge II

Virginia Sink was eleven years old and in the fifth grade in school (R. 28). At about 1700 hours on Easter Sunday, 1 April 1945, she was on South Cedar Street in Greensboro, North Carolina, when a soldier in an automobile pulled up alongside of her and asked her "to show him where Oak Street was" (R. 29). She told him where it was and "He said he didn't exactly know and he said he would give me \$5.00 if I would get in the car and show him where it was" (R. 29). The girl refused to get in the car (R. 29). The soldier then asked her if she "wanted to get in the car and play with his cracker-jack" (R. 29, 32). She looked in the car and "he had his pants open and his private parts out" so she backed away (R. 29, 32). He again asked her to get in the car (R. 29). The soldier "had on a cap with a bill" and "his teeth were wide apart" (R. 30). Virginia Sink identified the accused's car from photographs (R. 29; Pros. Ex. 1, 2). She identified the accused three or four days after the incident when detectives brought him to her home (R. 30, 39-41). In the courtroom she pointed out the accused as being the soldier who was in the car (R. 31). In his statement to Captain Walsh the accused did not recall accosting a minor female on Easter Sunday but stated "it may be possible" (R. 47; Pros. Ex. 5). When questioned by First Lieutenant Becker concerning the same incident he said, "I did accost a young girl but I don't know her name". He admitted exhibiting his private parts to her but denied asking her if she wanted to play with his "cracker-jack" (R. 50; Pros. Ex. 6).

Specification 4, Charge I and Specification 5, Charge II

Mary Hylton was eight years old and in the third grade in school in Greensboro (R. 32, 33). She was on Spring Garden Street near Hudson's Store when a soldier in a maroon or grey car with a canvas top asked her to show him where Spring Street was (R. 33, 37, 38). In describing the soldier she said that "his teeth were sort of apart right in front" (R. 33) and that he was wearing sun glasses (R. 36). The soldier asked her to get in the car and show him where Spring Street was and she got in the car (R. 33). He drove to Spring Garden Street, stopped in the woods (R. 33, 37), and told Mary to take off her pants (R. 36), which she did (R. 37). She started to cry when he stuck his "doodoo" (private parts) in hers (R. 33, 35, 36, 39). He also touched her with his hands "a little bit" (R. 33) on the lower part of her stomach (R. 37). The soldier was sitting close to her and had one arm around her (R. 36). He told her not to cry (R. 34, 35), and he did not hurt her (R. 36). She put her pants on (R. 37) and he drove her back to Hudson's Store (R. 35). Several days later Mary identified accused as the "soldier" involved (R. 34, 38, 41, 42), but she could not identify him in court (R. 36). The accused admitted to Captain Walsh and First Lieutenant Becker that he had Mary in his car on 5 April 1945 and exposed his private parts to her (R. 47, 50; Pros. Ex. 5, 6). He did not touch her private parts or fondle her (Pros. Exs. 5, 6).

Specification 6, Charge II.

The evidence for the prosecution shows that Staff Sergeant Murphy first met the accused on 9 or 10 March 1945 (R. 7). On 6 April 1945 he made a trip to Washington, D.C., with the accused in the accused's automobile (R. 7, 8). It was orally stipulated that the accused owned a black Ford convertible coupe, bearing Louisiana license number 185292 (R. 7), which was identified in photographs by Staff Sergeant Murphy (R. 7, Pros. Ex. 1, 2). The purpose of the trip was to pick up some whiskey in McMahon's Liquor Store in Washington (R. 8) and to resell it in Greensboro, North Carolina (R. 9). At the McMahon's Liquor Store Staff Sergeant Murphy negotiated the purchase of the whiskey and they purchased ten cases of Schenley's black label whiskey for \$430 cash (R. 8, 12). Each put up half the purchase price (R. 8). The liquor was placed in the accused's car and they drove back to Greensboro, North Carolina (R. 8). Staff Sergeant Murphy unloaded the whiskey in the presence of the accused and stored it in his home (R. 10, 12). Five cases were sold (R. 10). The proceeds of sale were turned into money orders and each received \$182.00 as his share (R. 10). On 10 April 1945 Captain Walsh, the Provost Marshal, and Technical Sergeant Gilliam went to Staff Sergeant Murphy's home, told him that they had "information that he had some liquor in his house" (R. 14, 44), and that they had no search warrants (R. 14). Staff Sergeant Murphy took them to the closet where the liquor was stored, helped to remove it to Captain Walsh's staff car, and rode back to the Main Gate with them (R. 14, 15, 45). The liquor was placed in a locker in the Military Police substation and locked (R. 15, 45). One key to the lock was in the possession of Captain Walsh and the other in the possession of Technical Sergeant Gilliam (R. 14, 45). It was orally stipulated that only one case of whiskey be introduced into evidence (R. 6). The case of whiskey, Schenley Reserve with a black label, was identified by Staff Sergeant Murphy (R. 9, 10), by Technical Sergeant Gilliam (R. 14), and by Captain Walsh (R. 46). The accused, after being warned of his rights, made a statement to Captain Walsh on 9 April 1945 in which he admitted that he drove to Washington, D. C. on 6 April 1945. He further stated, "We went up there and purchased the whiskey. It was brought back here and was brought to Murphy's house. I don't know where it is now. I don't think it is there; * * * *. We came back the same night and I reported for duty at 0800 as usual on Saturday morning" (R. 47; Pros. Ex. 5). He also made a statement on 17 April 1945 to First Lieutenant Becker, the investigating officer appointed pursuant to Article of War 70, after his rights had been explained to him, that he drove to Washington, D. C. on 6 April 1945 in his automobile and was accompanied by Staff Sergeant Murphy; that both of them handled the transaction in McMahon's Liquor Store; that each put up \$215.00; that it was their intention to re-sell part of the whiskey; that half of the whiskey had been sold; and that he had received half of the proceeds of the sale (R. 50; Pros. Ex. 6).

It was stipulated that North Carolina statutes prohibit the importation or possession of intoxicating liquor except as licensed and authorized (R. 51).

4. The accused, after having his rights explained to him, elected to make an unsworn statement (R. 57). He admitted the indecent exposures but denied any intent to harm the girls in any way (R. 57). Although the doctors said that he was sane, he did not think his actions were normal (R. 57). He wants to stay in the service even if it is as an enlisted man (R. 57). His parents were divorced when he was a baby and he lived with his grandmother. He attended junior college and graduated from the University of California at Los Angeles and was working for a master's degree in physical education (R. 58). He taught high school for a year and did playground supervision (R. 58). He thinks his trouble was caused by masturbation and he fought against it and hoped that his contemplated marriage would help him (R. 58). He feels ashamed of himself and has not eaten in the mess hall since he was placed in arrest in quarters (R. 59).

Major Rosner, Chief of the Neuropsychiatric Section at the Station Hospital, Army Air Forces, Overseas Replacement Depot, Greensboro, North Carolina, was a witness for the accused (R. 53). He had examined the accused and believed that he was sane, capable of distinguishing between right and wrong and adhering to the right (R. 53, 56). The accused suffers from a recognized form of sexual perversion (R. 53). His control of his sexual desire is not the same as the average man's. However, a perverted sexual instinct can be controlled (R. 54). Accused might be deterred by a normal sexual outlet, by exposure or by punishment (R. 54, 55).

5. The accused officer was convicted, as approved by the reviewing authority, on three Specifications of accosting and molesting female children for immoral and lewd purposes, in violation of Article of War 95, and two Specifications of indecently exposing, and one Specification of indecently stroking and fondling, his private parts in the presence of the same children, one Specification of wrongfully placing his hands and private parts upon the person of one of the children, and one Specification of wrongfully and unlawfully, in conjunction with a staff sergeant, transporting ten cases of whiskey into the State of North Carolina for resale. The evidence is ample to sustain the findings of guilty.

The combination of his conversation and exposure of his privates in the case of Ruth Geiger and Virginia Sink, and his conduct with Mary Hylton, show the immoral and lewd purposes for which the accused accosted the children. Such conduct is unbecoming an officer and a gentleman and is a violation of Article of War 95. The accused's indecent exposure of his privates to Ruth Geiger and Virginia Sink,

the stroking of his unexposed privates in the presence of Doris Vaughn and the placing of his private parts against the body of Mary Hylton are all conduct of a nature to bring discredit upon the military service in violation of Article of War 96.

Concerning Specification 6, Charge II, the evidence shows that on 6 April 1945 the accused and Staff Sergeant Murphy drove from Greensboro, North Carolina to Washington, D. C., for the purpose of buying whiskey for resale. They bought ten cases of Schenley's black label whiskey in Washington for \$430.00, and transported it to Greensboro, North Carolina, where it was stored in Staff Sergeant Murphy's home. Later, five cases were sold and the remaining five cases were found by the Provost Marshal. Staff Sergeant Murphy and the accused contributed equally to the purchase price of the whiskey and divided the proceeds of sale equally. The accused admitted his part in the transaction. The transportation and sale of liquor in North Carolina by persons not authorized is a violation of the statutes of that State and a penal offense (Gen. St. North Carolina (1943) 18-2, 18-11, 18-29). The violation of a State penal statute by military personnel constitutes conduct of a nature to bring discredit upon the military service and is a violation of Article of War 96 (CM 245510, Carusone, 29 BR 199). Further, the association of an officer and an enlisted man in a joint venture in the whiskey bootlegging business for sale and profit is patently inappropriate and discreditable as a military matter, regardless of State law.

6. The record shows that the trial judge advocate was also the investigating officer appointed pursuant to Article of War 70 (R. 49), and in that connection testified as a witness for the prosecution (R. 48-50). After testifying, he "resumed his duties as a Trial Judge Advocate" (R. 50). "There is no statutory or other legal inhibition against an investigating officer serving as trial judge advocate or assistant trial judge advocate" (CM 234622, Panettiere, 21 BR 79, 89). The general rule as to prosecuting attorneys testifying as witnesses is stated in 28 R.C.L. 470:

"There seems to be no question but that the prosecuting attorney is a competent witness to prove all facts or statements coming to his knowledge except confidential statements. * * * However, some of the cases severely criticize the propriety of a prosecutor being a witness and an advocate in the same action on account of his liability to be prejudiced, and the difficulty of the jury in discriminating between the evidence given under oath and that stated in the argument."

The Manual for Courts-Martial, 1928, does not prohibit the trial judge advocate from being a witness. It merely states concerning the competency of witnesses, "Interest or bias does not disqualify" (MCM 1928, par. 120d). However, it does require that a member of the court should be excused from further duty in the case before qualifying as a witness for the prosecution (MCM 1928, par. 59). In CM 224549, Sykes, 14 BR 159, 169, the Board of Review held that it was not error to permit an assistant trial judge advocate to testify.

"The record does not show that the assistant trial judge advocate addressed the court after he had testified or in final argument. He was a competent witness (par. 120, MCM; Sec. 1159, Wharton's Criminal Evidence, 11th ed.) and there is nothing suggestive of unfairness to accused in the court's action in permitting him to testify."

In the present case it would have been better practice for the trial judge advocate to have been relieved from active presentation of the case since it was necessary for him to be a witness. Defense counsel made no objection to receiving in evidence the trial judge advocate's testimony to the statement made by the accused to him as investigating officer acting pursuant to Article of War 70. In accepting the practice of appointing the trial judge advocate as investigating officer, which has been found convenient in some commands by reason of limitations of appropriately qualified personnel and the logical interrelation of the functions of the two offices, it must be contemplated that the investigating officer will sometimes have to testify. The proprieties established before civil tribunals should be observed so far as practical in such cases, but may in particular cases have to yield to considerations of military expediency (Cf. Winthrop, Military Law and Precedents, Second Edition, 1920 Reprint, page 173-174).

7. War Department records show that the accused is 26 years of age and is unmarried. He is a native of California and a resident of Los Angeles, California. He is a graduate of Glendale Junior College and the University of California at Los Angeles, having received the degree of Bachelor of Education from the latter with a major in physical education. He did post graduate work for one month at the University of Southern California. In civilian life he was employed from October 1940 to June 1941 by the Los Angeles Board of Education, Los Angeles, California, as a playground director, and from June 1941 to November 1942 as a riveter by the Lockheed Aircraft Corporation, Burbank, California. He served in enlisted status from December 1942 to 28 May 1943. He was appointed a second lieutenant, Army of the United States, on 29 May 1943 upon graduation from the Army Air Forces Officer Candidate School, Miami Beach, Florida, and ordered to active duty in the Air Corps. He was promoted to the grade of first lieutenant on 25 January 1945. He has served in commissioned

status as Physical Training Officer with ratings of superior and excellent.

8. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and to support the sentence and warrant confirmation thereof. Dismissal is authorized for a violation of Article of War 96 and is mandatory for a violation of Article of War 95.

Robert R. Andrews, Judge Advocate

[Signature], Judge Advocate

Donald D. Hickman, Judge Advocate

SPJGQ - CM 282496

1st Ind

Hq ASF, JAGO, Washington 25 D. C.

30 JUL 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Montague DuBarry (O-579908), Air Corps.

2. Upon trial by general court-martial this officer was found guilty, as approved by the reviewing authority, of three offenses of wrongfully and dishonorably accosting and molesting female children for immoral and lewd purposes (Specifications 1, 3 and 4, Charge I), in violation of Article of War 95 (Charge I), and of five offenses of military misconduct, consisting of wrongfully and indecently exposing (Specifications 1 and 3, Charge II) and stroking and fondling (Specification 2, Charge II) his private parts in the presence of female children, willfully and wrongfully placing his hands and his private parts upon and against the body of a female child (Specification 5, Charge II), and wrongfully and unlawfully, in conjunction with a Staff Sergeant, transporting ten cases of whiskey into the State of North Carolina for resale, all in violation of Article of War 96 (Charge II). He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for five years. The reviewing authority disapproved the finding of guilty of Specification 4, Charge II, which involved another offense of misconduct with a female child, approved the sentence, and forwarded the record of trial for action under Article of War 48.

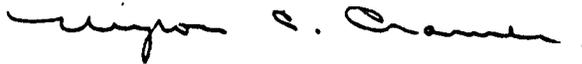
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board is of the opinion that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and to support the sentence and warrant confirmation thereof. I concur in that opinion.

At Greensboro, North Carolina, on four separate occasions from 31 March to 5 April 1945, the accused officer called to his parked automobile young girls from eight to twelve years of age, on the pretext of obtaining street information. Having the child close to his car, he then in each instance either exposed or fondled his private parts, calling the child's attention thereto. In three of the cases, he attempted to lure the child into his car, and in one instance was successful in doing so, whereupon he drove to the woods and, having had the girl, eight years old, remove her panties, felt her with his hands and rubbed his private parts against hers. In the whiskey incident, on 6 April 1945, the accused and a staff sergeant jointly bought and transported

ten cases of whiskey from the city of Washington, D. C. to Greensboro, North Carolina, for the purpose of resale at a profit to any available buyers, in violation of North Carolina law. They sold half of it and the Provost Marshal seized the rest. Medical testimony furnishes assurance that the accused, if morally degenerate, nevertheless is mentally responsible. The facts and circumstances of the case clearly call for dismissal and appropriate confinement. I believe, however, that a lesser period of confinement will meet the ends of justice.

I recommend that the sentence be confirmed, but that the forfeitures be remitted and that the period of confinement be reduced to two years, that the sentence as thus modified be ordered executed, and that a United States Disciplinary Barracks be designated as the place of confinement.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.



2 Incls

1. Rec of trial
2. Form of action

MYRON C. CRAMER
Major General
The Judge Advocate General

(Sentence confirmed but forfeitures remitted and confinement reduced. GCMO 390, 10 Aug 1945).

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

9 JUL 1945

SPJGV-CM 282587

UNITED STATES)

v.)

First Lieutenant HARVEY J.
 GARROW (O-1289234), In-
 fantry.)

INFANTRY REPLACEMENT TRAINING CENTER
 CAMP ROBERTS, CALIFORNIA

Trial by G.C.M., convened
 at Camp Roberts, California,
 14 June 1945. Dismissal.

OPINION of the BOARD OF REVIEW
 SEMAN, MICELI and BEARDSLEY, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specifications 1-6: (Motion for findings of not guilty sustained).

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

Specification 1: (Motion for finding of not guilty sustained)..

Specification 2: In that First Lieutenant Harvey J. Garrow, Infantry, Headquarters, 87th Infantry Training Battalion, Camp Roberts, California, did, at Santa Barbara, California, on or about 7 November 1944, wrongfully, unlawfully and bigamously marry, take and have for his wife, one Betty Allen, he, the said First Lieutenant Harvey J. Garrow, having at the time of said marriage to Betty Allen, a lawful wife then living, to-wit, Irene Koury.

He pleaded not guilty to all Specifications and Charges. A motion for findings of not guilty of Specifications 1, 2, 3, 4, 5 and 6 of the Charge and Specification 1 of the Additional Charge was sustained by the court (R. 51). He was found guilty of the remaining Specification 2 of the Additional Charge and of the Additional Charge. Evidence was introduced of one previous conviction by general court-martial for making false claims in violation of Article of War 95 and for cohabiting and living with

a woman not his wife in violation of Article of War 96. Accused was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that Irene Marion Koury was married to accused on 17 October 1936 at Whitesboro, New York (Pros. Ex. 10; R. 33). They lived together for a period of six months at 205 Blandina Street, Utica, New York, at which time they separated (R. 33). Irene M. Koury was never divorced from accused, but she was told by accused that he had obtained a divorce from her at Salem, Oregon about 7 October 1942 and she remarried on 23 May 1944 to Jack Vail. She never received any official copies of this alleged divorce and now resides at 205 Blandina Street, Utica, New York. A stipulation was entered into between accused, the defense and the prosecution that Harry John Rose, the name under which accused was known before entering the military service is the same person as Harvey John Garrow (R. 34; 38; Exs. 10, 11). A marriage certificate was introduced in evidence showing that accused was married a second time to Betty Allen on 7 November 1944 at Santa Barbara, State of California (Pros. Ex. 11; R. 34).

4. The accused after having been duly warned of his rights took the witness stand under oath. He testified that in October 1936 he had married Irene Koury in Whitesboro, New York. At that time he believed his name to be Harry Rose (R. 58) and he was married under that name. In December of that year he found his wife in bed with another man. Immediately he filed a divorce suit on the grounds of adultery. He was told that a period of ninety days was necessary before a final decree could be granted. At the end of that period neither Irene Koury nor the man she had been living with could be found (R. 59). Since then every bit of money that he has made since 1936 has been spent to trace her down so he could legally get rid of her (R. 59). In September 1942 while he was stationed at Camp Adair, Oregon, he went to Salem, Oregon and filed another suit for divorce through William McKinney, attorney at law (R. 59). On 29 September 1943 Mr. McKinney wrote to accused that it was possible then for accused to obtain a divorce (Def. Ex. B). Accused had paid this attorney a total of about \$150 (R. 62). In the spring and summer of 1944 accused received information from friends and relatives to the effect that his wife, Irene Koury, had been seen in several places in Utica, New York and had represented herself as being married to Jack Vail and appeared pregnant (R. 69).

At about the middle of August 1944 accused got sick leave and went back east to find out whether Irene Koury was legally married and to

determine whether she had obtained a legal decree of divorce (R. 72). He was not able to locate her except that she lived at a particular residence as Mrs. Irene Koury Vail and accused believed that she must have received some form of legal notice (R. 72). Accused did not enter knowingly into a bigamous marriage (R. 73).

On cross-examination accused stated that he had tried unsuccessfully to obtain a divorce from his wife, Irene Koury, in the State of New York a few months after their marriage (R. 73). He had tried to locate her from 1936 until the summer of 1944 when he heard from friends and relatives about her being seen in Utica, New York. In the summer of that year he went east trying to locate her, but could not find her. However, he admitted that members of his family and friends had seen her in streets, bowling alleys and other places (R. 74). In 1943 he had applied for a loan with the First National Bank of Monmouth, Monmouth, Oregon, for a loan necessitated by the serious illness of his wife. He believed he had obtained a final divorce in Oregon in 1942, and explained his quest to locate Irene Koury in the summer of 1944 in an effort to "ease my own conscience" (R. 74). The reason why he had believed that a final decree was granted in 1942 was a letter received from the attorney in Salem, Oregon, saying that "it will now be possible for you to get a divorce" (R. 75; Def. Ex. "B").

In April 1944 accused received a telegram from Mr. McKinney which he interpreted to mean that the divorce itself was absolutely in effect. He has not been able to trace the telegram (R. 75). When later he received definite information about the subsequent marriage of Irene Koury he wrote to Mr. McKinney again for an explanation of his marital status (R. 76). Accused was then asked, "in your own mind you must not have been convinced that your divorce action had been final, even on the strength of the telegram, is that correct", to which he answered: "In my own mind I was convinced but the facts are — well, it is really the way a man feels, the way my luck runs, something always seems to come up" (R. 76). When questioned by the court whether or not he could now obtain evidence from the court in Salem, Oregon, that he had been divorced, he stated that he now had evidence that he had not been divorced (R. 77).

A stipulation was entered into between prosecution, defense and accused that if Captain Russell A. Jones would be present in court he would testify that he had known and worked with accused for a period of about six weeks, and to the best of his knowledge accused had conducted himself as an officer and a gentleman and had diligently applied himself to his work (R. 77); also that Captain Victor Hungerford would testify that

accused performed his duties in a military manner and displayed unexcelled technical knowledge (R. 78). Lieutenant Colonel Gerald C. Line, accused's commanding officer would grade accused on his military proficiency as superior (R. 79). The adjutant and the executive officer of accused's organization testified that accused performed his military duties conscientiously and to the best of his ability (R. 52) and from a standpoint of military ability he would be graded superior (R. 54).

5. The evidence is clear that accused was married twice, the first time to Irene Marion Koury at Whitesboro, New York, in 1936 and the second time to Betty Allen in Santa Barbara, California, in 1944. The first wife is still living in Utica, New York, and the accused admits that he had not secured a divorce from her. He attempted twice to do so, the first time in the State of New York and then again in Salem, Oregon. His defense seems to hinge on the theory that at the time that the bigamy was committed he had reason to believe that his marriage to Irene Koury had been dissolved and he was free to remarry. We believe that this defense is untenable in law and in fact.

Bigamy has been defined as the crime committed by the act of marrying while the spouse of a former marriage, still in force, is alive (Ballentine's Law Dictionary).

The corpus delicti of bigamy is the unlawful marriage contract and the offense is committed at the place where this unlawful marriage is celebrated. Accused contracted the unlawful marriage in the State of California. The Penal Code of that state in Chapter V defines bigamy as follows:

Sec. 281. "Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy."

Sec. 282. "The last section does not extend--

"1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living; nor,

"2. To any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent court."

Section 22-601 of the Code of the District of Columbia recognized bigamy as an offense and provides a penalty therefor.

However, bigamy has been recognized as an offense under the 95th and 96th Articles of War, without reference to state laws (CM 128111, Barry; CM 217931, Jenkins; CM 245278, Yagel; 3 Bull JAG 150).

6. The prosecution has established its case by proving a valid first marriage and a second illegal marriage at a time when the lawful spouse of accused was living. Prosecution is not bound to go further and offer in evidence proof that the first marriage has not been dissolved (People v. Huntley, 269 P. 750; 93 Cal. 504). Such a knowledge is peculiarly within the cognizance of accused and "the burden of proving the divorce is on the defendant" (Wharton's Criminal Law, 12th Ed., Vol. 2, p. 2355). An honest but erroneous belief in a divorce is no defense (Wharton's Criminal Law, *supra*). It has been held that intent is not necessary to commit the crime of bigamy and:

"* * * Under this attitude the majority rule has developed that good faith of a defendant in contracting a second marriage, believing that a divorce was valid to dissolve a former marriage, or that separation had the effect of divorce, is no defense to a charge of bigamy.

"Similarly are the many holdings that belief in good faith of termination of a former union by divorce, when in fact no such decree had been granted, is likewise no defense. Opposed to these views is that of several courts which recognize as defense a mistaken belief in the existence of a divorce; or at least mitigate punishment of bigamy because of this." (Wharton's Criminal Law, 12th Ed., Vol. 2, p. 2388).

The California courts follow the majority rule and have held that a second marriage under an erroneous conception that the first marriage has been annulled or dissolved is not a defense to a charge of bigamy (People v. Kelly, 90 P. 2d 605, People v. Hartman, 62 P. 823; People v. Priestly, 118 P. 965, People v. Glab, 57 P. 2d 588). Although there is a conflict in the decisions in other jurisdictions the California cases are in line with the greater weight of authority (10 CJS Bigamy, p. 367, par. 7; State v. Hendrickson, 67 Utah 15, 245 P. 375; 57 ALR 792).

The question of good faith in the belief of the dissolution of a marriage in a charge of bigamy was discussed in a Federal case, Alexander v. United States, 136 F. 2d 783 (1943) decided by the United States Court of Appeals for the District of Columbia. The court however did not decide the case on the point whether a criminal intent was necessary to commit bigamy since in that case the accused had failed to prove a bona fide belief in the dissolution of the prior marriage. The United States

contended in that case that the crime was completed when the second marriage was contracted within the five-year period and while the first wife was alive and undivorced. The court said:

"The great weight of authority sustains the Government's position, though there is respectable authority that an honest and reasonable belief that the first marriage has been terminated is a defence. So far as we know, the question is new in the District of Columbia. In the light of the undisputed facts of this case it is not necessary that we answer it. The rule which denies the defence of good faith is a harsh one and in a proper case where the information is such that a reasonable person, after an honest and thorough investigation, would have been justified in remarrying in reliance on it, we should be slow to hold that such a remarriage constituted a felony.

"But even in those States taking the minority position it is necessary that the accused have made a bona fide and diligent effort to ascertain the true facts. In the present case appellant's evidence wholly fails to measure up to this standard. * * *"

7. So in this case accused has failed to prove either that his marriage to Irene Marion Koury had been dissolved, or that he was justified in the belief that the first marriage had been terminated by a decree of divorce. The only evidence relied upon by accused is his own testimony to the effect that in 1936 he tried unsuccessfully to obtain a divorce from his wife in the State of New York and that again in October 1942, he filed a suit for divorce at Salem in the State of Oregon. As to the status of this suit in September 1943, he received a letter from his attorney (Def. Ex. A) stating that it would then be possible for accused to get a divorce. In April 1944, accused testified that he received a telegram, not introduced in evidence, which he interpreted to mean that the divorce itself was in effect. No other communications or certificates were ever received to substantiate his alleged belief of having obtained a divorce. A few months later, he was informed that his wife had represented herself as being married to one Jack Vail and was pregnant when seen. In the month of August accused secured a leave of absence and went back to find out whether Irene Koury had obtained a legal decree of divorce. Why should accused incur this additional expense and trouble if he had already a valid legal divorce of his own? Nevertheless, he went to Utica, New York, the place of his former residence and of residence of his wife, and although Irene Koury had been seen there many times by his friends and relatives, he states that he failed to contact her. Accused testified under oath that he had not been able to locate his wife since

1936. However, on cross-examination he admitted to having applied for a loan in 1943 necessitated by the serious illness of his wife. Accused returned to California and on 7 November 1944 went through a matrimonial ceremony with Betty Allen. He failed to contact his former wife to ascertain whether their marriage had been dissolved and he did not take the trouble to get proof from his attorney or the court in the State of Oregon whether a divorce had been granted. In view of all the inconsistencies and the inadequacy of accused's explanation, we cannot give credence to his testimony that he believed that the first marriage had been dissolved. No reasonable man could have entertained any such belief, and we do not see how accused could have so believed.

Even if we disregard the majority rule that intent is not necessary to commit the crime of bigamy, under the evidence in this case we find that if accused did mistakenly believe that he had already obtained a divorce in Salem, Oregon, or that his wife had procured their marriage to be dissolved, his opinion resulted from lack of reasonable diligence and want of proper care to ascertain the truth, and was so reckless as to border on deliberate bad faith.

8. There remains an irregularity to be disposed of. The defense moved for a finding of not guilty of all Charges and Specifications and the court announced that the motion was granted as to Specifications 1, 2, 3, 4, 5 and 6 of the Charge, and it remained silent as to the motion for a finding of not guilty as to the Charge itself. Obviously that was an oversight by the court which is without any legal consequences. The Charge contained only six Specifications and the motion was granted as to all of them. A Charge without a Specification legally is an empty shell.

Winthrop in his discussion on Forms of Findings in Military Law and Precedents, Second Edition, Reprint 1920 on page 379, says:

"* * * But to find Not Guilty, (or Guilty without criminality) of the specification, or of all the specifications where there are several, and then Guilty of the charge, is an inconsistent and incongruous verdict, since the finding on the specification or specifications deprives the charge of support, - leaves it wholly without substance, - and a finding of Guilty upon it is a nullity in law. * * *"

9. Accused is 29 years of age. He was born in Ilion, New York, attended the grade schools and was graduated from high school. He also attended Carnegie Institute for two years. On 7 April 1939 he enlisted

in the Army and he was honorably discharged to accept a commission as a second lieutenant in the Army of the United States on 4 August 1942. On 22 January 1943 he was promoted to first lieutenant. On 8 December 1943 he was tried by a general court-martial (CM 246219) for making false official statements in violation of the 95th Article of War and for co-habiting and living in open relationship with a woman not his wife in violation of the 96th Article of War. He was found guilty of all Charges and Specifications and sentenced to dismissal and total forfeitures. The sentence was confirmed and commuted to a reprimand by the President (GCMO No. 128, 16 March 1944).

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

J. L. ...

_____, Judge Advocate

A. J. ...

_____, Judge Advocate

William ...

_____, Judge Advocate

SPJGV - CM 282587

1st Ind

Hq ASF, JAGO, Washington 25, D. C.

JUL 27 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Harvey J. Garrow (O-1289234), Infantry.

2. Upon trial by general court-martial this officer was found guilty of bigamy, in violation of the 96th Article of War, in that he married one Betty Allen at Santa Barbara, California, on 7 November 1944, having at the same time an undivorced living wife. Evidence was introduced of one previous conviction by general court-martial for making false claims in violation of the 95th Article of War and for cohabiting with one Betty Lou McGrath, a woman not his wife, in violation of the 96th Article of War (GCMO #128, 16 March 1944). 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence.

Accused on 17 October 1936 married Irene Marion Koury at Whitesboro, New York. They separated a few months after their marriage. He joined the Army on 7 April 1939 and on 4 August 1942 was commissioned a second lieutenant in the Army of the United States, Infantry. On 7 November 1944 in California he married Betty Allen, an Army nurse. No divorce was secured by accused prior to the second marriage. Accused testified to an unsuccessful attempt to obtain a divorce in the State of New York immediately after his separation and to the filing of a divorce suit in the State of Oregon in October 1942. He stated that he believed that his marriage had been dissolved by the court in Oregon. This contention is not supported by any evidence tending to warrant any such belief, on his part.

I recommend that the sentence be confirmed and ordered executed.

4. Inclosed is a form of action designed to carry into execution the foregoing recommendation, should it meet with your approval.

MYRON C. CRAMER
Major General
The Judge Advocate General

2 Incls

- 1. Rec of trial
- 2. Form of action

(Sentence confirmed. GCMO 391. 10 Aug 1945).

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

SPJGH-CM 282649

25 JUL 1945

UNITED STATES)

v.)

First Lieutenant KENNETH
 G. KEISEL (O-535811), Air
 Corps.)

FERRYING DIVISION
 AIR TRANSPORT COMMAND

Trial by G.C.M., convened at
 Greenwood Army Air Field,
 Greenwood, Mississippi,
 21 May 1945. Dismissal and
 total forfeitures.)

OPINION of the BOARD OF REVIEW
 TAPPY, GAMBRELL 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 Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Kenneth G. Keisel, 553rd Army Air Forces Base Unit (Third Ferrying Group), Ferrying Division, Air Transport Command, did, at or near Itta Bena, Mississippi, on or about 17 April 1945, wrongfully operate a government aircraft, to-wit: a P-51D type aircraft, at an altitude of less than 500 feet above the ground, in violation of paragraph 16 a (1) (d) of Army Air Forces Regulation Number 60-16, dated 6 March 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification thereunder. No evidence of any previous conviction was considered. 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. The prosecution introduced evidence showing that accused on 17 April 1945 flew a P-51D type Army airplane #44-73903 from Shreveport,

Louisiana, to Greenwood Army Air Field, Greenwood, Mississippi. He took off at about 0930 and landed at about 1035. Itta Bena, Mississippi, is located along the most direct flight route between Shreveport and Greenwood, and is about three minutes flying time, in a P-51D type airplane, west of Greenwood Army Air Field. At about 1030 on 17 April 1945 a silver colored single-engine airplane was seen by at least four eye-witnesses (R. 35-41, 43-50; Pros. Exs. 10, 11) to fly across a three wire power line at a point about six miles northwest of Itta Bena, severing all three wires. At the time of this incident the airplane was flying about twenty feet above the ground (R. 11-20, 35-47, 51; Pros. Exs. 10, 11). The lower wire of the power line was about twenty feet above the ground and the other two wires were some two or three feet above the lower one (R. 36).

Upon landing at Greenwood Army Air Field, accused reported damage to the airplane he had been piloting and pointed out the damage to military personnel. This damage consisted of a deep cut in the leading edge of the left wing from which several pieces of wire, of the same type as that comprising the severed power line, were removed; the pitot tube was broken and hanging loose from the cowling of the right wing; there was a scratch in the aluminum along the edge of the left wing; there were scratches across the right wing and on top of the engine's cowling and all four blades of the propeller had been nicked in the same place (R. 7-11, 24-25, 29, 30; Pros. Exs. 1-4). During an investigation of the damage to the plane, and after accused had been warned of his rights, he made a voluntary statement to the investigating officer that he had taken off from Shreveport Municipal Field, Shreveport, Louisiana, as pilot of a P-51D type airplane number 44-73903, at about 0930 Central War Time, on 17 April 1945, climbed to 3,000 feet and remained above that altitude until he entered the traffic pattern to land at Greenwood Army Air Field, Greenwood, Mississippi, at about 1035 Central War Time on the same date. He stated further that at about 20 minutes after taking off he observed that his air speed indicator was registering no speed, and at the same time observed that the left wing tip of his airplane had a cut in it, but denied knowing how the damage occurred (R. 6, 26, 27, 54; Pros. Exs. 7, 8).

4. The accused, having been fully informed of his rights as a witness, elected to remain silent. War Department, A.G.O. Form No. 66-2 relating to accused was received in evidence as Defense's Exhibit A and read to the court. It was stipulated between the prosecution and defense counsel that accused had to his credit 1224 hours flying time, of which approximately 700 hours were flown in combat on approximately 95 missions.

5. The evidence clearly demonstrates that an airplane of the type piloted by accused on 17 April 1945 flew into and severed a three

wire power line located a short distance west of Greenwood Army Air Field, Greenwood, Mississippi, and that accused was piloting his airplane in this same locality at the same time. The power line was about 20 or 25 feet above the ground and when accused landed at Greenwood Army Air Field his plane was found to be in a damaged condition. Several pieces of wire, of the same type as that comprising the severed power line, were removed from the leading edge of the left wing. To strike these wires the airplane was obviously being flown at an altitude less than 500 feet above the ground in violation of paragraph 16a (1) (d), Army Air Forces Regulations No. 60-16, dated 6 March 1944, which prohibit the operation of military aircraft below an altitude of 500 feet above the ground, except under certain specified conditions not present in this case. At least four persons saw an airplane, similar to the one piloted by accused, fly into the wires of a power line at the time when and the place where accused was then piloting his airplane. From such evidence the court was fully justified in finding accused guilty as charged.

Although Army Air Forces Regulations No. 60-16, paragraph 16a (1) (d), dated 6 March 1944, were not introduced in evidence, the court was expressly requested at the trial to take judicial notice of them and the court was authorized to take cognizance of the provisions of these regulations without their introduction in evidence (MCM, 1928, par. 125, CM 244946, Forbes, 29 B.R. 81).

6. Accused is single and 23 years of age. He is a high school graduate and enlisted in the Army Air Forces on 9 January 1942. Upon completion of the prescribed flight training courses he was appointed a flight officer 10 March 1943 and on 4 October 1943 was commissioned a second lieutenant, Army of the United States. On 1 November 1944 he was promoted to first lieutenant, MOS 1050-pilot, twin-engine. He has had ten and one half months overseas service with the India-China Division of the Air Transport Command. His performance ratings range from satisfactory to excellent. He has been authorized to wear the Asiatic-Pacific and American Theater ribbons and one overseas service bar. He has been awarded the Distinguished Flying Cross and the Air Medal with one Oak Leaf Cluster and is entitled to wear the Distinguished Unit Badge temporarily per citation of the India-China Wing, Air Transport Command.

7. The court was legally constituted and had jurisdiction of 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 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.

Thomas M. Zappu, Judge Advocate

William H. Samarell, Judge Advocate

Robert E. Nevelhan, Judge Advocate

SPJGH-CM 282649

1st Ind

Hq ASF, JAGO, Washington 25, D. C. 31 JUN 1945

TO: The Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 26, 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of First Lieutenant Kenneth G. Keisel (O-535811), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to, and was found guilty of, piloting a P-51D type Government airplane at an altitude of less than 500 feet above the ground contrary to the provisions of paragraph 16a (1) (d), Army Air Forces Regulations Number 60-16, dated 6 March 1944 (Charge and Specification) in violation of Article of War 96. 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. A summary of the evidence may be found in the accompanying opinion of the Board of Review. The Board 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. I concur in that opinion. On 17 April 1945 accused flew a P-51D type Government airplane from Shreveport, Louisiana, to Greenwood Army Air Base, Greenwood, Mississippi, and while en route flew into and severed a three-wire power line located a short distance west of Greenwood, Mississippi, which said line was constructed about 20 to 25 feet above the ground. The damage to the airplane accused was piloting consisted of a deep cut about 18 inches long in the leading edge of the left wing, the pitot tube was broken and hanging loose from the right wing, both wings were scratched, the top of the engine cowling was scratched and all four blades of the propeller were nicked relatively in the same place. Upon landing at Greenwood Army Air Base accused reported the damage, but denied any knowledge of how it had occurred, saying that he flew above 3,000 feet altitude at all times after taking off from Shreveport, Louisiana, until he entered the traffic pattern to land at Greenwood.

Transmitted with the record of trial is a memorandum for The Judge Advocate General, dated 18 July 1945, from the Commanding General, Army Air Forces, and signed by Lieutenant General Ira C. Eaker, Deputy Commander, Army Air Forces. He makes the following observations and recommendations:

"In flying so low that he struck and severed three wires of a power line suspended at an estimated altitude of only 21-28 feet, this officer plainly committed a serious and wilful violation of flying regulations. Serious injury to himself and substantial damage to the aircraft he was piloting were thereby rendered highly probable. Through extreme good fortune only minor damage to the plane resulted. The gravity of the offense was aggravated by the accused's apparent falsification in denying any knowledge of how the damage occurred when he was questioned immediately after the incident. At his trial, however, he did not persist in this denial, electing instead to remain silent rather than to testify in his own behalf. An inspection of this officer's previous military record discloses that it is unmarred. With only one exception, his manner of performance of duty has been classified as excellent by his commanding officers. He has served overseas for ten and one-half months, and has been awarded the Distinguished Flying Cross and the Air Medal and one Oak Leaf Cluster. He is authorized to wear the Distinguished Unit Badge. Considering all the circumstances of the violation, and giving full weight to the accused's commendable past record, I believe that the best interests of the service do not require the confirmation of his dismissal.

"I, therefore, recommend that his sentence be commuted to a forfeiture of pay in the amount of \$75 per month for 9 months."

I concur in the recommendation of the Commanding General, Army Air Forces, but I think it should also include a reprimand. I therefore recommend that the sentence be confirmed, but that it be commuted to a reprimand and a forfeiture of accused's pay of \$75 per month for nine months, and that the sentence as thus commuted be carried into execution.

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

Myron C. Cramer

3 Incls.

1. Record of trial
2. Form of action
3. Memo fr Hq AAF, 18 Jul 45

MYRON C. CRAMER

Major General

The Judge Advocate General

(Sentence confirmed but commuted to a reprimand and forfeitures. GCMO 401, 11 Aug 1945).

