OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 61

1946

K
16
B63
v. 61

Judge Advocate General's Department

BOARD OF REVIEW

Holdings Opinions and Reviews

Volume 61

including

CM 307207 - CM 312092

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

Office of The Judge Advocate General

Washington : 1946

06067

CONTENTS FOR VOLUME 61

CM No	Accused	Date	Page
307207	Colton	17 May 1946	1
307217	Odom, Gregory	26 June 1946	11
307221	Tripp	8 Mar 1946	15
307222	Jones	25 Mar 1946	19
307250	Camper, Boehm, Roth, Kremer, Smith	21 Mar 1946	25
307252	Lane	27 Mar 1946	33
307253	Hall	23 May 1946	37
307254	Galmon	19 Mar 1946	41
307257	Purvis	9 Oct 1946	45
307305	Green	9 Jul 1946	53
307322	Pechman	1 May 1946	61
307361	Hensley	9 May 1946	65
307365	Rowley	27 Mar 1946	69
307367	Watson	25 Mar 1946	77
307372	Manly	13 Jul 1946	79
307378	Tennis, Walker, Keller, Taylor.	4 Apr 1946	87
307385	Wood	28 Mar 1946	103
307416	Jones	23 Jul 1946	111
307420	Nelson	24 Jun 1946	117
307465	Danker	5 Apr 1946	119
307477	Haynes, Young.	30 Apr 1946	129
307491	Haire	7 Aug 1946	133
307776	Washington, Davis, Brunson, Mosely.	28 Mar 1946	149
308215	Pentimall	18 Jun 1946	165
310015	Kilbey	16 Oct 1946	167
310028	Burdette	16 Apr 1946	171
310072	Campbell	21 Oct 1946	175
310076	Peterson	23 May 1946	177
310082	Tapp	26 Jun 1946	183
310086	Gregory	20 Aug 1946	185
310091	Stiers	3 May 1946	193
310149	Santiago	19 Apr 1946	197
310155	Guareschi	10 Jan 1946	203
310156	Thurston	26 Apr 1946	207
310179	Mertes	6 Jun 1946	211
310193	West	12 Sep 1946	223
310246	Simpson	26 Apr 1946	225
310278	Daughtry	3 May 1946	229
310327	Leonhard	27 Jun 1946	233
310329	Kadin	26 Apr 1946	255
310352	Brunke	23 Sep 1946	263
310354	Newsom	16 Dec 1946	271
310362	Boswell, Gratton.	3 May 1946	273

CONTENTS FOR VOLUME 61
Continued

CM No	Accused	Date	Page
310403	Hoover	18 Sep 1946	279
310421	Smith, Toll.	6 May 1946	287
310446	Ruppel	8 Jul 1946	291
310473	Hines	2 May 1946	315
312008	Armstrong	6 Jun 1946	319
312022	Kavchak	19 Apr 1946	329
312023	Schirmer	3 May 1946	333
312079	Smith, Clay.	19 Jun 1946	339
312080	Russo	17 Dec 1946	343
312092	Currey, Padgett, Jackson, Jimmerson, Vasaturo, Williams.	25 Apr 1946	363

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

SPJGK - CM 307207

17 MAY 1946

UNITED STATES	)	FIRST AIR FORCE
v.	)	Trial by G.C.M., convened at Seymour Johnson Field, North Carolina, 23 January and 4 February 1946. "Dishonorable discharge," total forfeitures and confinement for one (1) year.
First Lieutenant BRUCE M. COLTON (O-875275), Air Corps.	)	

OPINION of the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, 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 First Lieutenant Bruce M. Colton, Air Corps, 66th Army Air Forces Base Unit (Redeployment & Tng Unit), Seymour Johnson Field, North Carolina, did, at the Officers' Club, Seymour Johnson Field, North Carolina, on or about 24 December 1945, feloniously take, steal, and carry away about sixty dollars ($60.00), lawful money of the United States, property of Miss Catherine Liddell.

Specification 2: In that First Lieutenant Bruce M. Colton, ***, did, at the Officers' Club, Seymour Johnson Field, North Carolina, on or about 24 December 1945, feloniously take, steal, and carry away about fifteen dollars ($15.00), lawful money of the United States, property of Miss Eloise Walker.

Specification 3: (Finding of guilty disapproved by the reviewing authority).

He pleaded not guilty to and was found guilty of all Specifications and the Charge. No evidence of any previous conviction was introduced. He was sentenced "to be dishonorably discharged the service," to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority disapproved the finding of guilty of

Specification 3 of the Charge, approved the sentence but remitted one year of the confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

On the night of 24 December 1945 the accused was present at a dance at the Officers' Club, Seymour Johnson Field, North Carolina (R. 8,11,15). He was alone and during the course of the evening he visited several groups of officers and their guests. While thus visiting he spent some time at the table of a party which included Miss Catherine Liddell and Miss Eloise Walker and was twice there alone (R. 8,16,17,18,21), while members of this party were dancing or were at the bar. The following day Miss Liddell discovered that $60 "made up of three twenty dollar bills" was "missing" from her purse. She had, according to her deposition, "left purse on table during several dances. Latter part of evening, purse was placed on near adjoining couch" (Exs. 1,3). On the afternoon of 25 December Miss Walker discovered that $15 "in bills" was "missing" from her purse. While she was dancing the preceding evening she had seen accused at her table. It was stipulated between the prosecution and defense, and the accused, that if she were present she would testify that,

> "There was no indication that [accused] was drunk at that time. He was sitting erect and appeared to be normal. By the time I was through dancing and returned to the table this officer had left our table ***. That evening I had my purse with me at the table where we were sitting" (Ex. 2).

About 1700 hours 25 December, First Lieutenant George F. Deckert, Jr., the brother-in-law of Miss Liddell, together with Major Harold N. Elliot, the Provost Marshal, and Second Lieutenant William H. Moffett went to the accused's quarters, where they found him sitting on a chair. Major Elliot testified that he

> "*** explained that some property was missing from some individuals at the Club the night before. I asked if [accused] knew anything about it, and he said, 'No.' I asked him if he had been around this particular table, and he said, 'Yes.' I then asked him who else had been there, and he said that another officer had. I asked him what type person this officer was, and he told me that he didn't believe he would take any property that didn't belong to him. During the conversation I noticed that Lieutenant Colton [accused] was quite nervous and decided that I had better tell him that he didn't have to make any remarks that would incriminate him, that I was merely trying to find out who the party was" (R. 31,32).

According to Lieutenant Deckert's testimony, Major Elliot "was very lenient in his questioning" (R. 23) and "made no threats" (R. 25) or promises (R. 33). Major Elliot and Lieutenant Deckert left the room and Lieutenant Moffett remained alone with the accused. Lieutenant Moffett's wife had lost a pistol

at the dance, and Lieutenant Moffett told the accused "what I was after and why I wanted it." He also told the accused that he would not prefer charges if the pistol were returned and the accused asked him if he thought that the accused had it. Lieutenant Moffett replied that he thought so and the accused immediately gave the pistol to Lieutenant Moffett; that officer handed it to Major Elliot (R. 27,28), who testified that he "went back in and asked Lieutenant Colton if he knew anything about the money that had been removed the night before, and he said he did not, that he did not know any money was missing" (R. 32). Lieutenant Deckert then interviewed the accused alone and questioned him about the money which was missing from the two purses, saying that he had seen the accused at Miss Liddell's table and was suspicious of him. He made no promises nor threats to the accused (R. 22). The accused then admitted having taken the money and produced five $20 bills from under the soap in a wooden shaving bowl; changing one of the bills he gave Lieutenant Deckert $75 which Lieutenant Deckert gave to Major Elliot. When asked why he had taken the money the accused replied, "It looked so easy to get to." He also told Major Elliot he was "very sorry" and did not know why he had "done it" (R. 9,22,25). At 1330 hours 26 December at Major Elliot's office the accused, after having been warned by Major Elliot of his rights under the 24th Article of War (R. 32,36), signed a sworn statement in which he admitted that while sitting at a table at the dance he had noticed some women's pocket books on a couch behind him:

> "***. I picked up one and held it under the table, from which I took a large amount of money. I looked at the money and could not decide whether they were two-dollar bills or twenty-dollar bills. I then put it back on the couch and picked up the other pocketbook, which I also held under the table and took out a small amount of money. My motions at this time, due to my condition, were, it seemed to me, obvious as I was very clumsy. I placed the bills in my side trousers pocket. ***" (Ex.7)

He had had several drinks of whiskey and was "getting quite intoxicated" before he took the money; "my head seemed to be reeling at that time." When he returned to his quarters before going to bed he "played with" a pistol which he had taken from another pocket book at the dance, and then placed it under the covers of a bed in his room:

> "*** I put all of the money, some of which was my own, under the soap in a wooden shaving bowl. I did not count it then. I know there were about five twenty-dollar bills. *** When I got up, around 9 o'clock in the morning, I remembered having the money and the gun, but did not look at them. I was very miserable all day long, and everything seemed like a terrible nightmare. I should not have allowed myself to get in such a state of intoxication. All day I stayed around very close to my quarters as I felt certain someone would be around to see me. I was not surprised when Major Elliot, together with Lt. Moffett and Lt. Deckert, came to my quarters around 1700. Major Elliot stated that some items were missing from the dance

the night before, and at that time I became so scared and nervous that I could not give the right answers to questions that were asked me either about the gun or the money that had disappeared the night before. After talking with all three Officers for some time, I fully realized the situation I was in. I then talked with Lt. Moffett alone and gave him the gun, following which I talked with Lt. Deckert alone and gave him $75.00 which he said was missing, although I thought, as well as I could recall, the amount was only $70.00. I then witnessed both the gun and the money turned over to Major Elliot. Major Elliot then advised me to stay around my quarters, and to see him the next day at 1:30 at his office.

"I have been completely miserable since I have realized what I have done and to have allowed myself to become in such a state of inebriation, and to have lost all control of my senses as to right and wrong. I am certain this would not have happened had I not become so thoroughly intoxicated as to lose my senses, as I have never done anything like this in my life before. This is the first time I have ever become involved in a matter of this sort." (Ex. 7)

4. Evidence for the defense.

The bartender at the Club testified that he "remembered serving /accused/ many drinks" at the Club during the evening of 24 December (R. 45). The Club steward testified that accused at the Club on the evening in question "was intoxicated ***. He was not steady. I didn't see him fall, but he was not steady on his feet" (R. 46). Two other witnesses testified that accused was drinking during the evening (R. 47,49). An unsworn statement by accused was offered by the defense and admitted in evidence without objection as Exhibit A, which reads in part as follows:

"I feel that this incident which I became involved in has completely ruined my life and ambitions as I had, previous to this incident, great hopes of remaining in the Army with the idea in view of a regular army commission.

"This has caused me excessive mental suffering and I shall repent and continue to pray to God to forgive me of this terrible thing that I have done the rest of my life." (Ex. A)

It was stipulated between the prosecution, defense counsel and the accused that witnesses concerned would, if present, testify to facts contained in certain documents as follows: (1) A telegram dated 21 January 1946 to accused from the First National Bank and Trust Company of Tulsa reading "Balance in your savings account $558.79" (Ex. D); (2) a certificate by Captain Widerman, Chief of Medical Service, Army Air Forces Station Hospital, Seymour Johnson Field, declaring that he had examined accused 21 January and, from his history as recited by accused while under the influence of hypnotic drugs, concluded that -

"*** This officer has been trained strictly in virtuous ways. The impressions were so deep seated as to bar any natural desires. He fears to have sex intercourse - a form of compulsion neurosis. He therefore represents a picture of failure of complete emotional development. He is immature, thus not been able to break the 'apron strings' by which he is tied. Under the influence of liquor and especially away from his home, barriers are down and instinctive behavior appears. On the 24th December this 'out of the line' type of behavior took the form of stealing, but no intent existed.

"The officer is sane and responsible for acts committed. He knows the difference between right and wrong. Under the influence of alcohol as with many other persons with strong repressions, the ideas of right and wrong are pushed aside to permit the person to do something different than is his custom." (Ex. F)

(3) a certificate by Chaplain (Major) Henry M. Bartlett dated 19 January 1945 stating that he had known accused

"*** for two months, and during this period of acquaintance I have been impressed by his good character.

"He has been a regular attendant at services held in my Chapel and is obviously a young man with religious background and training.

"In all my contacts with him I have noted his courteous behavior and his sincerity in thought, speech and action.

"In my judgement he would be incapable of deliberately and willfully committing any reprehensible act." (Ex. G)

(4) a statement from Mr. A. N. Murray, Head, Department of Geology, the University of Tulsa, Tulsa, Oklahoma, dated 14 January, which declared that Mr. Murray has known accused since September 1940 when accused

"*** became a member of the student body of the College of Petroleum Sciences and Engineering. He elected to major in geology and worked as assistant in this department. Since I served as his faculty advisor and had him in several of the classes that I teach, I feel qualified to pass judgement on his character and personal characteristics.

"Lt. Colton is a willing worker and, because of his stick-to-itiveness, can be depended upon to execute any task assigned to him to the best of his ability. He is loyal, discreet and self-controlled. Under adverse conditions he conducts himself well. His moral character is excellent.

"If it had been possible for Lt. Colton to continue his work in the College of Petroleum Sciences and Engineering, he would have graduated with the degree of Bachelor of Geology. In all of his courses he established a very good scholastic record. This good record was due to his excellent attitude, coupled with ambition and a good mind. ***" (Ex. H)

5. The evidence establishes the larcenies alleged. In his oral and written confessions accused stated that he took "a large amount of money," either "two-dollar bills or twenty-dollar bills" from a woman's "pocket book" on a couch at the dance, and that he took a "small amount" of money from another "pocket book" on the same couch, while under the influence of intoxicating liquor, because the money "looked so easy to get to." He thought "the amount was only $70.00" and concealed the money together with some of his own under the soap in a wooden shaving bowl in his room before retiring. When he got up the next morning he remembered "having the money" but did not "look at it," made no attempt to return it to the lawful owners, and "all day I stayed around very close to my quarters as I felt certain someone would be around to see me." When the expected visitors arrived accused "became so scared and nervous that he could not give the right answers," "finally realized the situation I was in" and delivered up the money.

The confessions were supported by adequate proof of the corpora delictorum. Sixty dollars in "bills" was "missing" from Miss Liddell's purse and $15.00 in "bills" was "missing" from Miss Walker's purse. The Manual for Courts-Martial provides that -

> "*** evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. *** In a case of alleged larceny *** evidence that the property in question was missing under circumstances indicating *** that it was probably stolen *** would be a compliance with the rule" (MCM, 1928, par. 114a, p. 115).

There was no evidence that any of the other contents of the purses were missing and it may, therefore, be concluded that the money was missing under circumstances indicating that it was probably stolen.

> "*** The term 'corpus delicti' seems in its orthodox sense to signify merely *** the fact of specific loss *** (as *** in larceny property missing)" (Wigmore, 2d Ed., Sec. 2072).

This evidence adduced clearly "touched" the corpus delicti:

> "The general rule *** is that the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of the evidence or at all, but that some evidence corroborative of the confession must be produced, and such evidence must touch the corpus delicti." (CM 202213, Mallon, 6 BR 9).

There was also evidence corroborative of the confession that it was the accused who took the money. He joined the party which included Miss Liddell and Miss Walker, and was seen alone at their table. Bills in the denomination

of $20.00 were missing from Miss Liddell's purse which she had left "on or near adjoining couch by the table." Accused took either "two-dollar bills or twenty-dollar bills" from a purse on a couch. The second purse accused rifled was near the first purse and could reasonably have belonged to a person who was in the same party as the owner of the first purse. Miss Walker was a member of Miss Liddell's party. A total of $75.00 was missing from the two purses and accused thought he had taken $70.00. Felonious intent is shown by accused's confession that he concealed the purses beneath the table while he was extracting the money from them, hid the money in the shaving bowl, and failed to report the incident the next day, although he remembered it when he woke up that morning. This confession of intent is corroborated by evidence that accused at first denied knowledge of the theft when questioned concerning the missing money and falsely attempted to shift suspicion to a fictitious officer, and later produced the money from a shaving bowl. The evidence of deliberate theft disproves accused's contention that he was too intoxicated to form the intent to commit a trespass or to deprive the owners permanently of their property, and establishes beyond a reasonable doubt the commission by accused of the larcenies alleged in violation of the 93rd Article of War.

The two larcenies alleged were substantially one transaction, even though the money was taken from two purses, and should have been alleged in but one specification (MCM, 1928, par. 149g, p. 171). Thus, where an accused took several articles "during a period of twenty minutes from three lockers of three enlisted men located in the same room" it was held that "the larceny of the several articles was substantially one transaction" (CM 200912, Archer, 5 BR 7). Since, however, conviction of the offense alleged in either specification supports the sentence in its entirety, and in view of the failure of accused to object to the defective pleading, it cannot be said that any substantial right of accused was prejudiced thereby (CM 260828, Parker, 40 BR 31,35; CM 193971, Reed, 2 BR 109, 120).

6. War Department records show that the accused is nearly 24 years of age and is single. He is a high school graduate and completed 2-1/2 years of a college course at the University of Tulsa, majoring in geology. He entered military service 8 March 1943, and upon completion of a course in metereology with the 31st Army Air Forces Technical Training Detachment at the University of Chicago was commissioned a temporary second lieutenant, Army of the United States, 28 February 1944, and ordered to active duty on the same date. He was promoted to first lieutenant 12 September 1945. He served outside the United States with the European Division, Air Transport Command, from 2 August 1944 to 25 August 1945, and has had no combat service.

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 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.

William P. Kuder, Judge Advocate

Wilbert J. Ashcroft, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307207 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 27 1946

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 Bruce M. Colton (O-875275), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of the larceny at the Officers' Club, Seymour Johnson Field, North Carolina, of $60.00 (Spec. 1), $15.00 (Spec. 2), and a pistol (Spec. 3), in violation of Article of War 93. 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 two years. The reviewing authority disapproved the finding of guilty of Specification 3 of the Charge, approved the sentence but remitted one year of 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 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 of guilty and the sentence and to warrant confirmation of the sentence.

On 24 December 1945, at a dance at the Officers' Club, Seymour Johnson Field, North Carolina, the accused, who was intoxicated, picked up a woman's purse from a couch, held the purse under a table and took $60.00 from the purse; he then picked up another purse which was lying nearby on the same couch, held that purse under the table and took $15.00 from the purse. Upon returning to his quarters he concealed this money together with money of his own under the soap in a wooden shaving bowl. At 1330 hours the next day, when interviewed at his quarters by the officers from whose party the money had been stolen, he at first denied and later admitted the theft and returned the money. He had approximately $500 in his bank account. There was no evidence that he had been gambling or had incurred debts in any other manner. There appears, therefore, to have been no motive for the theft other than accused's explanation that he was drunk and that the money "looked so easy to get to."

According to an Army psychiatrist whose statement was introduced into evidence, the accused is immature and by reason of a strict upbringing suffers from strong repressions; under the influence of alcohol his "ideas of right and wrong *** are pushed aside to permit the person to do something different than is his custom." A letter from the defense counsel to the reviewing authority attached to the record of trial states that the accused planned "to return to the ETO and eventually enter the Regular Army ***.

He evidently comes from a prominent family, his grandfather being Colonel George Radcliffe Colton, Governor of Porto-Rico from 7 November 1909 to 15 November 1913." There were also introduced into evidence written statements by an Army Chaplain and by the accused's faculty advisor at college, which show that in the opinion of these individuals the accused is a "young man with religious background and training" whose "moral character is excellent."

The accused is nearly 24 years of age, has completed 2-1/2 years of college, and is single. He entered the service 8 March 1943, was commissioned a temporary second lieutenant, Army of the United States, 28 February 1944 and promoted to first lieutenant 12 September 1945. He served overseas for one year with the Air Transport Command, but has no combat service.

In spite of his intoxication, the accused deliberately and cunningly stole the money, later concealed it and made no attempt to restore it on his own initiative. I therefore recommend that the sentence as approved by the reviewing authority be confirmedand carried into execution, and that a United States disciplinary barracks be designated as the place of confinement.

4. Consideration has been given to the attached letter from Major Harold J. Bilton, defense counsel, addressed to The Judge Advocate General discussing the evidence and stating with reference to the accused that "the penitent attitude and the character of the officer is such that any mercy shown will not injure the service. The officer prays that he will not be dismissed from the service."

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Ltr fr Maj Bilton to TJAG

(G.C.M.O. 196, 21 June 1946).

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

JAGH - CM 307217

26 JUN 1946

UNITED STATES v. Private First Class RICHARD ODOM (38601789), and Private EVERING L. GREGORY (33891696), both of 1696th Engineer Combat Battalion	)	SPECIAL TROOPS, SECOND ARMY Trial by G.C.M., convened at Camp Gruber, Oklahoma, 19 February 1946. Gregory: Confinement at hard labor for 3 months Camp Stockade, Camp Gruber, Oklahoma and forfeiture of $33 per month for 3 months

OPINION of the BOARD OF REVIEW
TAPPY, HOTTENSTEIN and STERN, Judge Advocates

1. The record of trial in the case of the two soldiers named above, which has been examined in the Office of The Judge Advocate General and there found legally sufficient to support the findings and sentence as to accused Private First Class Odom, but legally insufficient to support the findings and sentence as to Private Evering L. Gregory, has been examined by the Board of Review as to Private Gregory pursuant to paragraph 5 of Article of War 50½ and the Board submits, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Evering Gregory, Company C, 1696th Engineer Combat Battalion, did, at Muskogee, Oklahoma, on or about 2 February 1946 with intent to resist a lawful arrest by Private First Class Edward Durald, Military Police Detachment, 1881st Unit, then in the execution of his official military duties, commit an assault upon the said Private First Class Edward Durald by knocking him to the ground.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Charge and guilty of the Specification, except the words

"with intent to", substituting therefor the word "wrongfully", and except the words "commit an assault upon the said Private First Class Edward Durald by knocking him to the ground". Evidence was introduced of one previous conviction on 2 March 1945, by special court-martial, for absence without leave from 10 February 1945 to 14 February 1945 in violation of Article of War 61, for which accused was sentenced to confinement at hard labor for five (5) months and a forfeiture of $33.00 of his pay per month for a like period. For the instant offense he was sentenced to confinement at hard labor for five (5) months and a forfeiture of $33.00 of his pay per month for a like period. The reviewing authority approved only so much of the sentence as provides for confinement at hard labor for three (3) months and a forfeiture of $33.00 of his pay per month for three (3) months; ordered the sentence executed and designated the Camp Stockade, Camp Gruber, Oklahoma, as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 3, 25th Headquarters and Headquarters Detachment, Special Troops, Second Army, Camp Gruber, Oklahoma, dated 25 February 1946.

3. The pertinent evidence offered by the prosecution in support of the Specification of the Charge is substantially as follows:

On the evening of 2 February 1946 at about 1830 hours, Private First Class Edward Durald of the Military Police Corps, in company with another Military Policeman, each of whom were then on duty, made an authorized inspection of the People's Chicken Shack in Muskogee, Oklahoma. The People's Chicken Shack apparently was a public eating place and the inspection was made to ascertain if military personnel, who might be patronizing this establishment, were in proper uniform. There they found accused with his blouse unbottoned. Pursuant to their duty to enforce uniform regulation, the accused was ordered to button his blouse, which he did and departed. About twenty minutes later Private First Class Durald again saw accused and several companions in the vicinity of Mac's Bar in Muskogee and observed that his blouse was again unbuttoned. Private First Class Durald thereupon obtained accused's pass and moved to the lighted window of Mac's Bar to "write him up" for being in improper uniform. The accused followed and snatched the pass from Durald's hand, whereupon Durald said "Lets go to the station", and took accused by the arm. A struggle ensued, in the course of which accused knocked Durald to the ground. The accused and his companions then fled and were not apprehended until the following day, when Durald and several other Military Policemen again found accused at the "Chicken Shack" and took him into custody.

4. The Specification alleges that accused, with intent to resist arrest by Private First Class Durald while in the execution of his military duties, assaulted Durald by knocking him to the ground. By exceptions and substitutions the court found accused guilty of resisting a lawful arrest by Durald while in the execution of his military duties. Thus, the question for consideration here is whether <u>wrongfully resisting arrest</u> is a lesser included offense of the offense of <u>assault with intent to resist arrest</u>. A lesser included offense is one that is always lesser than and necessarily included in the offense charged, i.e., an offense the elements of which necessarily are proved in proving the offense charged (CM 254312, <u>Buchanan</u>, 35 BR 205).

The essential elements to establish an assault with intent to resist arrest are: (1) that accused assaulted a certain person, as alleged, and (2) that he entertained the specific intent to resist arrest at the time he committed the assault. The essential elements to establish resisting arrest are: (1) that accused was in arrest, (2) that the arrest was lawful and (3) that accused resisted (CM 235563, Baker, 22 BR 135).

Comparing the elements found in these respective offenses, it may be observed that the offense of assault with intent to resist arrest may be committed prior to an actual arrest. For example, an accused having knowledge that an officer of the law is about to place him in arrest, might assault said officer with the specific intention of rendering him incapable of carrying out the arrest. Hence, the accused could commit that offense without being in arrest. It follows therefrom that the offense of resisting arrest is not an offense the elements of which necessarily are proved in proving the offense of assault with intent to resist arrest and therefore that the former is not a lesser included offense of the latter. Accordingly the findings of guilty cannot be sustained.

5. The Board of Review is therefore, of the opinion that the record of trial is not legally sufficient to support the findings of guilty and not legally sufficient to support the sentence as to Private Evering L. Gregory.

On Leave, Judge Advocate

R. Hartenstein, Judge Advocate

Joseph J. Stern, Judge Advocate

(14)

JAGH - CM 307217 1st Ind

WD, JAGO, Washington 25, D. C. JUL 12 1946

TO: Secretary of War

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private Evering L. Gregory (33891696), 1696th Engineer Combat Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence and recommend that the findings of guilty and the sentence be vacated and that all rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 246, 31 July 1946. AS to accused GREGORY.)

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

SPJGN-CM 307221

UNITED STATES v. Private First Class HORACE E. TRIPP (44040602), Company I, 242nd Infantry.	)	42ND INFANTRY DIVISION Trial by G.C.M., convened at Salzburg, Austria, 28 December 1945. Dishonorable discharge (suspended), total forfeitures, and confinement for five (5) years. Eastern Branch, Disciplinary Barracks, Greenhaven, New York.

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

---

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

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

Specification: In that Private First Class Horace E. Tripp, Company I, 242nd Infantry, did, at Tenneck, Austria, on or about 11 October 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Karl Vleck (civilian), seventeen thousand (17,000) Reichsmarks, property in the custody of Karl Vleck (civilian), value about one thousand seven-hundred dollars ($1,700.00). (as amended)

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

Specification: In that * * * having been duly placed in confinement in 42nd Infantry Division Stockade, Salzburg, Austria, on or about 19 October 1945, did at Salzburg, Austria, on or about 28 October 1945, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * did without proper leave, absent himself from his organization from about 28 October 1945 to about 28 November 1945.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 5, Headquarters 42nd Infantry Division, APO 411, U. S. Army, 15 January 1946.

2. The record of trial of the soldier named above, was examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings in part. The record of trial was then examined by the Board of Review in the Branch Office of The Judge Advocate General with the European Theater and on 13 February 1946 was held to be legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of the remaining Charges and Specifications, and legally sufficient to support the sentence.

3. The Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater concurred in the opinion of the Board of Review, recommended that the findings of guilty of Charge I and its Specification be vacated, and forwarded the record of trial to The Judge Advocate General for action by the Secretary of War.

4. On 19 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces, European Theater of Operations, under the provisions of Articles of War 48, 49, 50, and 50½ were terminated.

5. The Board of Review in the office of The Judge Advocate General has also examined the record of trial in the case of the soldier named above and concurs in the opinion of the Board of Review in the Branch Office of The Judge Advocate General with the European Theater

and for the reasons set forth therein is also of the opinion that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of the remaining Charges and Specifications and the sentence.

Earle Stephens, Judge Advocate.

Robert J. Glennon, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

SPJGN-CM 307221 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War MAR 27 1948

1. Herewith transmitted for your action under Article of War 50½, as amended by the Act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private First Class Horace E. Tripp (44040602), Company I, 242nd Infantry.

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

3. In view of the legal insufficiency of the record of trial to support the findings of guilty of the offense of robbery, it is recommended that the period of confinement be reduced to one year.

4. Inclosed is a form of action designed to carry into effect these recommendations, should such action meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 171, 12 June 1946).

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

SPJGH - CM 307222

25 MAR 1946

UNITED STATES v. First Lieutenant WILLIAM H. JONES, Jr. (0-1004484), Adjutant General's Department, Headquarters, 4th Port (formerly of 208th Army Postal Unit).	THEATER SERVICE FORCES CHANOR BASE SECTION EUROPEAN THEATER Trial by G.C.M., convened at Cherbourg, Manche, France, 1 August 1945. Sentence: Dismissal and total forfeitures.

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

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

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

Specification: (Finding of not guilty).

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

Specification: In that First Lieutenant William H. Jones, Jr., Headquarters, 4th Port, then of the 208th Army Postal Unit, did, at or near Cherbourg, France, on or about 22 June 1945, during an official audit of the stamp stocks and funds on hand at the 208th Army Postal Unit, wrongfully and knowingly attempt to conceal a shortage in postal funds under his control, by borrowing about 250 25-franc denomination Expeditionary Force Message stamps and attempting to mingle such borrowed stamps with the stamp stock for which he was responsible at the 208th Army Postal Unit, without disclosing to the said auditing officers the circumstances surrounding the borrowing of such stamps.

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

Specification 1: In that * * * did, at or near Cherbourg, France, on or about 15 May 1945, wrongfully borrow about 1,000 francs, lawful money of France, of an exchange value of about $20, from Technician Fourth Grade Francis E. Ulrey, a member of his command.

Specification 2: In that * * * did, at nor near Rennes, France, on or about 14 June 1945, wrongfully borrow about 200 francs, lawful money of France, of an exchange value of about $4, from Technician Fourth Grade Francis E. Ulrey, a member of his command.

Specification 3: In that * * * did, at or near Rennes, France, on or about 12 June 1945, wrongfully borrow about 325 francs, lawful money of France, of an exchange value of about $6.50, from Technician Fourth Grade Louis E. Willett, a member of his command.

Specification 4: (Finding of not guilty).

Specification 5: In that * * * did, at or near Deauville, France, on or about 23 May 1945, wrongfully borrow about 500 francs, lawful money of France, of an exchange value of about $10, from Technician Sergeant Freeman Fitch, a member of his command.

He pleaded guilty to Specifications 1, 2, 3 and 5 of Charge III and Charge III, and not guilty to the remaining Charges and Specifications. He was found not guilty of the Specification of Charge I and Charge I, and of Specification 4 of Charge III, and guilty of the remaining Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, Chanor Base Section, Theater Service Forces, European Theater, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

2. The Board of Review in the Branch Office of The Judge Advocate General with the European Theater, examined the record of trial and in a formal holding attached to the record expressed the opinion that the record of trial was legally sufficient to support the findings of guilty and the sentence.

3. The Acting Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater, on 28 December 1945, approved the holding of the Board of Review in that office and advised the Commanding General, United States Army Forces in the European Theater, that he then had authority to order the execution of the sentence.

4. On 19 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of Articles of War 48,49,50 and 50½ were terminated.

The Assistant Judge Advocate General in charge of the above-mentioned Branch Office thereupon forwarded the record of trial to The Judge Advocate General, Washington, D. C.

5. The Board of Review in the Office of The Judge Advocate General, Washington, D. C., has examined the record of trial and concurs in the opinion of the Board of Review in the Branch Office and for the reasons therein stated is also of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

Thomas N. Jaffy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trevethan, Judge Advocate.

HEADQUARTERS, ARMY SERVICE FORCES
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

SPJGF CM 307222 MAY 13 1946

MEMORANDUM FOR THE UNDER SECRETARY OF WAR

SUBJECT: Record of trial in the case of First Lieutenant William H. Jones, Jr., 01004484, Headquarters, 4th Port.

1. There has been received in this office the record of trial in the European Theater of the officer named above. He was found guilty of knowingly attempting to conceal a shortage of postal funds in violation of Article of War 95 and of wrongfully borrowing money from enlisted men of his command (four specifications) in violation of Article of War 96. He was sentenced on 1 August 1945 to be dismissed the service and to forfeit all pay and allowances due or to become due. On 7 December 1945 the confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence. Thereafter on 28 December 1945, the Board of Review in the Branch Office of The Judge Advocate General with the European Theater, with the concurrence of the Acting Assistant Judge Advocate General in charge of said Branch Office, held the record of trial legally sufficient to support the findings of guilty and the sentence.

2. The proceedings were published in General Court-Martial Orders No. 7, Headquarters, U. S. Forces, European Theater, 12 January 1946. On 19 January 1946 the powers of confirmation conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of the Articles of War were suspended. The Assistant Judge Advocate General in charge of said Branch Office thereupon forwarded the record of trial to this office. A general court-martial order staying the unexecuted portion of the sentence was published by Headquarters, U. S. Forces, European Theater, on 23 February 1946.

3. The evidence shows that accused was in charge of a postal unit in France. At the time of the regular monthly audit for June 1945 his funds were short approximately 6000 francs. Accused made efforts to conceal the shortage through replacing it either by loans from his clerks or by transferring money from their accounts to his. When he was unsuccessful, accused left the office and went to a nearby Army Postal Unit where he borrowed 250 Expeditionary Force Message Stamps, valued at about $126, for which he gave a receipt in his own name. The officer in charge of this Postal Unit considered it a loan made on Army Postal Unit credit and not upon personal credit, since it was a practice among such units to borrow stamps in cases of necessity. Accused then returned to his office, placed the borrowed stamps in his "stamp stock", and succeeded temporarily in conceal-

ing his shortage. Accused deliberately misrepresented the status of his accounts and admitted that he knew his funds were short. Accused's actions in manipulating and not disclosing the true status of his accounts amounted to a fraud on the Government. Accused pleaded guilty to borrowing money from enlisted men.

4. Accused had been a postal officer since 3 November 1943, and, as a civilian, had six years experience as a clerk and carrier in a post office. His actions in attempting to conceal from officers conducting an official audit the true status of his funds and in borrowing money from enlisted men of his command have demonstrated his moral unfitness to remain an officer. I believe that the sentence to dismissal and total forfeitures should be carried into effect.

5. I recommend that the general court-martial order staying the unexecuted portion of the sentence be vacated by a War Department general court-martial order, and that the sentence be ordered executed. Submitted herewith is a draft of War Department general court-martial order carrying this recommendation into effect.

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Draft of GCMO

OK Ku

~~GCMO~~
(GCMO 159, 6 June 1946).

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

SPJGN-CM 307250

U N I T E D S T A T E S v. First Lieutenant RAYMOND E. CAMPER (0-571178), Corporal JACOB F. BOEHM (33588926), and Privates HENRY ROTH (36365453), HENRY KREMER (32448346), and FRED SMITH (36774907), all of Headquarters Squadron, 1st Air Disarmament Wing (Provisional).	IX AIR FORCE SERVICE COMMAND Trial by G.C.M., convened at Headquarters, 10th Air Depot Group, APO 149, U.S. Army, 1, 2 and 3 August 1945. Camper: Dismissal, total forfeitures and confinement for one (1) year. Disciplinary Barracks, Greenhaven, New York. Boehm, Kremer, and Smith: Dishonorable discharge (suspended), total forfeitures and confinement for one (1) year, Delta Disciplinary Training Center. Roth: Confinement for six (6) months and forfeiture of $19.00 per month for a like period, Oise Intermediate Base Section Guardhouse.

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

---

1. Accused were tried jointly upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant RAYMOND CAMPER, Corporal JACOB F. BOEHM, Private HENRY KREMER, Private HENRY ROTH, and Private FRED SMITH, all of Headquarters Squadron, 1st Air Disarmament Wing, (prov) U. S. Army, acting jointly and in pursuance of a common intent, did, at Oberstedten, Hessen, Germany, on or about 9 June 1945, by force and violence and by putting them in fear, feloniously

take, steal and carry away from the presence of Herr Willi Henrich, and Frau Elise Franz,

8 Radios
1 pr man's shoes
2 bottles champagne
1 pr Field glasses
1 Brief case (with stamp collection)
1 Pearl inset brooch
1 gold bracelet
1 tie pin with 4 diamonds and one (1) pearl
1 pin flower shape with 3 diamonds
1 bottle perfume
1 box powder
1 man's wrist watch
1 man's pocket watch
1 Topaz lavalier
1 necklace
1 powder compact
1 ladie's ring with 6 diamonds and 3 rubies
1 pr binoculars
1 iron
2 bars soap
1 box powder
6 handkerchiefs
1 pr ladies shoes
1 pr leather gloves
1 bottle Italian cherry Esperato
1 lock and key
1 string of beads
1 flashlight
3 alarm clocks
1 pocket knife
1 pr opera glasses
1 large sapphire brooch
1 pr gold earings
1 brief case
1 gold watch with chimes
1 gold watch with chain

property of the said Herr Willi Henrich and Frau Elise Franz, of a value of more than fifty ($50.00) dollars.

Each accused pleaded not guilty to, and was found guilty of, the Charge and Specification excepting the words "8 radios, 1 pair of men's shoes, one gold bracelet, one tie pin with one [sic] diamond and one pearl, one pin flower shaped [sic] with three diamonds, 1 topaz lavalier, 1 powder compact,

1 pair binoculars, two bars of soap, six handkerchiefs, 1 pair lady's shoes, 1 bottle Italian cherry esperato, 1 lock and key, 1 string of beads, 1 flashlight, 1 pocket knife, 1 large sapphire brooch", and substituting therefor the words "6 radios." No evidence of previous conviction was introduced as to any of accused except Smith who had one conviction by special court-martial for absence without leave for six days in violation of the 61st Article of War. Accused Camper was sentenced to be dismissed the service, and accused Boehm, Kremer, and Smith to be dishonorably discharged the service, and, in addition, all of the aforementioned accused were sentenced 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. Accused Roth was sentenced to be confined at hard labor, at such place as the reviewing authority might direct, for six months and to forfeit $19.00 of his pay per month for a like period. The reviewing authority, the Commanding General, IX Air Force Service Command, in the case of Camper approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 48; in the case of each of Boehm, Kremer and Smith, he approved the sentence, ordered it executed, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated "the Delta Base Section Disciplinary Training Center, Les Mills, near Marseille, France," as the place of confinement; and in the case of Roth he approved the sentence, ordered it executed, and designated the Oise Intermediate Base Section Guardhouse, Metz, France, as the place of confinement. The confirming authority, the Commanding General, United States Forces, European Theater, in the case of Camper approved only so much of the findings of guilty of the Specification of the Charge as involved a finding that accused and the other persons named therein, acting jointly and in pursuance of a common intent, did, in the place and at the time alleged, by force and violence and by putting them in fear, feloniously take, steal, and carry away, from the presence of Herr Willi Henrich and Frau Elise Franz, 6 radios, 1 pearl inset brooch, 1 man's wristwatch, 1 man's pocket watch, 1 necklace, 1 lady's ring with six diamonds and three rubies, three alarm clocks, 1 pair of opera glasses, 1 brief case, 1 gold watch with chimes, 1 gold watch with chain, property of the said Herr Willi Henrich and Frau Elise Franz, of some value. He confirmed the sentence, designated the United States Disciplinary Barracks, Greenhaven, New York, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

The proceedings as to Boehm, Roth, Kremer and Smith were published in General Court-Martial Orders Nos. 141, 143, 142, and 144 (respectively), Headquarters IX Air Force Service Command, APO 149, U.S. Army, 29 August 1945.

2. The Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and in a formal holding attached to the record was of the opinion that the record of trial as to each accused is legally sufficient to support only so much of the findings of guilty as involves a finding that accused, acting jointly and in pursuance of a common intent, did, at the time and place alleged, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Herr Willi Henrich and Frau Elise Franz one gold watch with chime, one gold watch with chain, one man's pocket watch, one necklace, one man's wrist watch, one lady's ring with six diamonds and three rubies, one pearl inset brooch, three alarm clocks, one pair of opera glasses, and two radios, of ownership as alleged, and of some value, and legally sufficient to support the sentence.

3. The Acting Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater on 18 January 1946 approved the holding of the Board of Review in that office and advised the Commanding General, United States Army Forces in the European Theater that he now had authority to order execution of the sentence (CM ETO 18898).

4. On 19 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces European Theater, under the provisions of Articles of War 48, 49, 50, and 50½ were terminated.

5. The Assistant Judge Advocate General in charge of the above mentioned Branch Office thereupon forwarded the record of trial in the case of First Lieutenant Raymond E. Camper to The Judge Advocate General, Washington, D. C.

6. The Board of Review with The Judge Advocate General, Washington, D. C. has examined the record of trial insofar as it pertains to First Lieutenant Raymond E. Camper, and concurs in the holding of the Board of Review with the Branch Office, a copy of which is hereto attached, and is of the opinion that the record of trial with reference to the accused named is legally sufficient to support only so much of the findings of guilty as involves a finding that accused, acting jointly and in pursuance of a common intent, did, at the time and place alleged, by force and violence and by putting them in fear, feloniously take, steal, and carry away from the presence of Herr Willi Henrich and Frau Elise Franz one gold watch with chime, one gold watch with chain, one man's pocket watch, one necklace, one man's wrist watch, one lady's ring with six diamonds and three rubies,

one pearl inset brooch, three alarm clocks, one pair of opera glasses, and two radios, of ownership as alleged, and of some value, and legally sufficient to support the sentence, and to warrant confirmation thereof.

Charles Stephens, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

Robert J. Clamor, Judge Advocate.

Incl
Holding by B/R
CM 18898

SPJGN-CM 307250 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War 1 1946

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 Raymond E. Camper (0-571178), Headquarters Squadron, 1st Air Disarmament Wing (Provisional).

2. Upon trial by general court-martial this officer was found guilty, along with four enlisted men, of robbing two German civilians of twenty-seven articles consisting principally of radios, jewelry and wearing apparel, 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 might direct, for one year. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 48.

3. The confirming authority, the Commanding General, United States Forces European Theater, approved only so much of the findings of guilty of the Specification and the Charge as involved a finding that the accused and the other persons named therein, acting jointly and in pursuance of a common intent, did, in the place and at the time alleged, by force and violence and by putting them in fear, feloniously take, steal and carry away, from the presence of two German civilians about 18 of the articles described in the Specification, property of the German civilians, of some value. He confirmed the sentence but withheld the order directing execution thereof pursuant to Article of War 50½.

4. The Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record and, in a formal holding attached thereto and containing a summary of the evidence, held the record of trial as to each accused legally sufficient to support only so much of the findings of guilty as involves a finding that the accused, acting jointly as set forth above, did, at the time and place alleged, by force and violence, and by putting them in fear, feloniously take, steal and carry away from the presence of two German civilians of the articles named in the Specification the following articles:

6 radios
1 pearl inset brooch
1 man's wristwatch
1 man's pocket watch

1 necklace
1 lady's ring with six diamonds and three rubies
3 alarm clocks
1 pair of opera glasses
1 brief case
1 gold watch with chimes
1 gold watch with chain

of the ownership as alleged and of some value. The Acting Assistant Judge Advocate General in charge of the Branch Office described approved the holding of the Board of Review, but before the sentence was executed the powers conferred by direction of the President upon the Commanding General, United States Forces European Theater, under the provisions of Articles of War 48, 49, 50, and 50½ were suspended and the record of trial was forwarded to The Judge Advocate General, Washington, D. C. for appropriate action.

5. The Board of Review in my office is of the opinion that the record of trial is legally sufficient to support the findings as sustained by the Board of Review in the Branch Office described and legally sufficient to support the sentence and to warrant confirmation thereof. I concur in that opinion.

Accused was in command of a small detachment of enlisted men in Germany performing the duty of searching the homes of German civilians for arms or other material useful to the American forces then in occupation. The detachment entered the home of a German suspected of being a Nazi and a member of the "SS". The detachment awaited for a reasonable length of time the return of the German to his home and, upon his failure to appear, searched the house and removed several radios. The German arrived shortly after the departure of the detachment and searched for and found the Americans at a neighbor's home. In a dictatorial manner he accused the Americans of looting his home and stealing his wine. Accused became irritated by this display of arrogance and he placed the German under arrest and returned him to his own home. The German was subjected to some rough treatment and there was a display of firearms. At the German's home the detachment ransacked the house and in the presence of the German and his housekeeper removed the articles listed above. All of the articles were recovered shortly thereafter from the various members of the detachment. The only article the accused had in his possession was one of the radios, which he returned.

The Assistant Judge Advocate General in charge of the Branch Office, European Theater, advises that accused is 41 years of age. He served as an enlisted man from 10 June 1942 until he was commissioned on 20 January 1943. He had no previous convictions and the character of his service prior to this offense was rated as excellent. Without condoning the gravity of his offense the appropriation of radios held by German civilians was not thought to be improper as it was believed most radios

were the property of the German Army. Little actual violence was employed by the accused and his detachment against the victims of the robbery. Six of the eight members of the court recommended that the entire sentence be suspended. The Board of Review in the Branch Office recommended that the sentence to confinement be remitted and the dismissal be suspended. In view of the above circumstances and recommendations, I recommend that the sentence be confirmed but that all forfeitures in excess of $50.00 pay per month for three months, and the confinement, be remitted; that the sentence as thus modified be ordered executed, but that execution of that portion adjudging dismissal be suspended during good behavior.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 85, 1 May 1946.) As to accused Camper) .

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

SPJGH - CM 307252

27 MAR 1946

UNITED STATES v. Private First Class WILLIE C. LANE (34750115), 791st Engineer Dump Truck Company.	EUROPEAN THEATER OF OPERATIONS CONTINENTAL ADVANCE SECTION COMMUNICATIONS ZONE Trial by G.C.M., convened at Mannheim, Germany, 5 June 1945. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
TAPPY, STERN and TREWETHAN, Judge Advocates.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Willie C. Lane, 791st Engineer Dump Truck Company, did, at Leonberg, Germany, on or about 14 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private First Class Willie L. Dumas, 791st Engineer Dump Truck Company, a human being by shooting him in the neck and leg with an automatic pistol.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial, one for absence without leave of 10 days, in violation of Article of War 61; and one for careless discharge of a service carbine in Barracks, in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Continental Advance Section, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence and withheld the order directing execution of the sentence pursuant to Article of War 50½.

2. On 13 October 1945 the Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and held it legally sufficient to support the findings of guilty and the sentence. The Board of Review's holding, containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning

and conclusions of the Board, is attached to the record. The Assistant Judge Advocate General with the European Theater approved the holding of the Board of Review and on 13 October 1945 forwarded the record of trial to the Commanding General, United States Forces, European Theater, for execution of the sentence.

3. On 19 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of Articles of War 48,49,50 and 50½ were terminated.

4. On 14 February 1946 the record of trial, opinion of the Board of Review and First Indorsement were forwarded to The Judge Advocate General, Washington, D. C., for such further action as was deemed appropriate.

5. The Board of Review in the Office of The Judge Advocate General, Washington, D. C., has examined the record of trial, concurs in the opinion of the Board of Review in the Branch Office and for the reasons therein stated 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. The penalty for murder, in violation of Article of War 92, is death or imprisonment for life, as a court-martial may direct.

Thomas N. Tappy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trueblau, Judge Advocate.

SPJGH - CM 307252 1st Ind

Hq ASF, JAGO, Washington 25, D. C. APR 19 1948

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 First Class Willie C. Lane (34750115), 791st Engineer Dump Truck 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. The murder of Private First Class Willie L. Dumas was committed by accused within a very few minutes after an altercation during which both struck blows and both picked up carbines. Thus, it is apparent that this was not a cool, calculated killing but rather the immediate result of the barracks brawl between accused and deceased. Clearly the accused is guilty of murder but, in my opinion, this is not the type of case where the death penalty should be exacted. The accused is about twenty-four years of age, is married and is reported to have one child. He was inducted into the service in May 1943 and has a record of two previous convictions by special court-martial, one for a short period of absence without leave and the other for careless discharge of a service carbine in barracks. He denies conviction for any offenses in civil life. In view of the foregoing, 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 thirty (30) years, and that the sentence as thus commuted be carried into execution. I further recommend that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 138, 24 May 1946).

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

SPJGK - CM 307253

23 MAY 1946

UNITED STATES v. Private First Class ARCHIE HALL, JR. (34900858), 3135th Quartermaster Service Company	CHANOR BASE SECTION Trial by G.C.M., convened at Le Mans, Sarthe, France, 14 June 1945. To be hanged by the neck until dead.

OPINION of the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates.

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Archie Hall, Jr., 3135th Quartermaster Service Company, did, at Senonches, France, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Sidney B. Fountain, a human being, by shooting him with a rifle on or about 30 May 1945, thereby inflicting a mortal wound as a result of which the said Private Sidney B. Fountain died, at or near Chartres, France, on or about 3 June 1945.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of any previous conviction was introduced. He was sentenced to be hanged by the neck until dead, all the members present concurring in the vote on the sentence. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. That officer confirmed the sentence but withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and held it legally sufficient to support the findings and the sentence. The holding was approved by the Acting Assistant Judge Advocate General with the European Theater who advised the Commanding General, United States Forces, European Theater, that he had authority to order the execution of the sentence, and recommended commutation of the sentence to life imprisonment.

Before action was taken by that officer his powers, statutory or otherwise insofar as they pertain to courts-martial, were suspended and in accordance with instructions the record of trial was forwarded to The Judge Advocate General for action by the President.

4. The Board of Review in the Office of The Judge Advocate General has examined the record of trial, concurs in the opinion of the Board of Review in the Branch Office (a copy of which is hereto attached), and 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. A sentence of either death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92.

William R. Kuder, Judge Advocate
Gilbert S. Ackroyd, Judge Advocate
Earl W. Wingo, Judge Advocate

SPJGK - CM 307253 1st Ind

Hq ASF, JAGO, Washington, D. C. JUN 7 1946

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 First Class Archie Hall, Jr. (34900858), 3135th Quartermaster Service 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 commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty-five years, and that the U. S. Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Rec trial w/Bd Rev Op and Op Br O B/R
2. Drft ltr sig S/W
3. Form of Ex action

(GCMO 214, 8 July 1946).

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

SPJGN-CM 307254

U N I T E D S T A T E S v. Private BEN GALMON (34079809), 4007th Quartermaster Truck Company.	)))))))	FIFTEENTH UNITED STATES ARMY Trial by G.C.M., convened at Bad Neuenahr, Germany, 4, 5, and 9 June 1945. To be shot to death with musketry.

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

---

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

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

Specification 1: In that Private Ben Galmon, 4007 Quartermaster Truck Company, did, at or near Niederesch, Rheinprovinz, Germany, on or about 25 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Maria Wilbert, a human being, by shooting her with a rifle.

Specification 2: In that Private Ben Galmon, 4007 Quartermaster Truck Company, did, at or near Marienthal, Rheinprovinz, Germany, on or about 23 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Helena Sikorska.

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

Specification 1: In that Private Ben Galmon, 4007 Quartermaster Truck Company, did, at or near

Marienthal, Rheinprovinz, Germany, on or about 23 April 1945, with intent to do him bodily harm, commit an assault upon Joseph Sikorska, by striking him on the head with a dangerous instrument, to wit: - a hammer.

Specification 2: In that Private Ben Galmon, 4007 Quartermaster Truck Company, did, at or near Marienthal, Rheinprovinz, Germany, on or about 23 April 1945, commit the crime of sodomy by feloniously and against the order of nature, having carnal connection per anus with Helena Sikorska, a human being.

He pleaded not guilty to and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both Charges and their Specifications. Evidence was introduced of two previous convictions, one by special court-martial for breaking arrest in quarters and being found drunk on duty as a sentinel, in violation of Articles of War 69 and 85, and one by summary court for violation of a traffic regulation by speeding, in violation of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Fifteenth United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

2. On 27 October 1945 the Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and held it legally sufficient to support the findings of guilty and the sentence. The Board of Review's holding, containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning and conclusions of the Board, is attached to the record. The Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater approved the holding of the Board of Review and on 3 November 1945 forwarded the record of trial to the Commanding General, United States Forces, European Theater, for execution of the sentence (CM ETO 17275).

3. It appears that in the meantime the accused escaped from confinement and was not apprehended until 23 January 1946. On 19 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of Articles of War 48, 49, 50, and 50½ were terminated.

4. On 14 February 1946 the record of trial, the opinion of the Board of Review and first indorsement thereto were forwarded to The Judge Advocate General, Washington, D. C. for such further action as is deemed appropriate.

5. The Board of Review with The Judge Advocate General, Washington, D. C. has examined the record of trial and concurs in the opinion of the Board of Review in the Branch Office described above and is also of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The penalty for murder and for rape, in violation of Article of War 92, is death or imprisonment for life as a court-martial may direct.

Charles S. Lehlum, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

Roland J. Hanna, Judge Advocate.

Incl
Holding by B/R
CM ETO 17275
Vol 33 ETO

SPJGN-CM 307254 1st Ind
Hq ASF, JAGO, Washington, D. C. 1946
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 Ben Galmon (34079809), 4007th Quartermaster Truck 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 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 life, that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement, and that the sentence as thus modified be ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 155, 3 June 1946).

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

JAGH-CM 307257 9 OCT 1946

UNITED STATES	)	CHANOR BASE SECTION
v.	)	Trial by G.C.M., convened at Charleroi, Belgium, 19 September 1945. Dishonorable discharge and confinement for life. United States Penitentiary.
Private WILLIAM M. PURVIS (34964167), 956th Quartermaster Service Company.	)	

REVIEW by the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SCHWAGER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private William M. Purvis, 956th Quartermaster Service Company, did, at or near Ghlin, Belgium, on or about 22 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade Michael Gallivan, a human being by shooting him with a pistol.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. All members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Headquarters Chanor Base Section, European Theater, APO 562, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case commuted it to dishonorable discharge, total forfeitures and confinement at hard labor for life, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that on the evening of 22 July 1945 accused, a private in the 956th Quartermaster Service Company, was present in a cafe at Ghlin, Belgium (R 7, 13). This cafe had a bar and another room with a small floor where, at the time in question, 12 to 15 couples were dancing. Present, among those dancing, besides accused, were a number of negro and white soldiers, the latter including Private First Class Ozzie G. Worley and Technician Fifth Grade Michael Gallivan, the deceased, both members of the 552d Military Police Escort Guard Company (R 7, 14, 21, 22). Also present were Privates T. J. Silas and Clarence Durrah, both members of accused's organization (R 13, 21). The deceased, Worley and a "Private First Class Carl Groth" had gone to this cafe together and while they were dancing, Groth "accidentally bumped into a colored fellow-soldier." According to Worley "nothing resulted from that occurrence"; he had gone over to the "colored fellow" and explained that they "were all in the same Army and that there was no sense in having any trouble" (R 8). With that Worley danced away and by the time he reached the bar he heard "about four or five shots in succession" and when he came out from the place where he had "dived for cover," he saw Technician Fifth Grade Gallivan, the deceased, lying on his back (R 8). The shooting occurred at about nine or nine-thirty in the evening. Worley helped take the deceased to the post hospital, "located in the PWE" and saw him there for the last time at about ten o'clock (R 8). Captain George Schwartz, Medical Corps, examined Michael Gallivan at ten o'clock that evening at the Continental Central Enclosure Number 26, Mons, Belgium. He pronounced Gallivan "Dead on Arrival." As a result of his examination, Captain Schwartz testified, he found that Gallivan had "died a few moments before entering the hospital, and the cause of death was multiple gunshots of the body." At least four bullets had entered the body; there was a bullet wound on the right shoulder, one on the "leftside of the mid-line," and one below the navel (R 9, 10).

Private Durrah, a member of accused's organization, testified that before the shooting, T. J. Silas and a white technician fifth grade, had an argument in the middle of the dance floor. He heard someone say "It doesn't make any difference" About five minutes later he heard some shooting (R 13-15). He further testified:

> "when they started shooting I just looked over and seen that T. J. and the T/5 locked up in each others arms, closely arguing, and then I saw T. J. draw back to hit the T/5, and at that time the soldier started firing on the T/5" (R 15).

The soldier who started the firing was William Purvis (the accused) and, according to Durrah, "he raised his cap, grit his teeth and put his hand in his pocket and took out a pistol -- and started firing ---" (R 15). At no time did Durrah see Gallivan threaten accused with any weapon or strike accused (R 15). Durrah was "at the time -- looking at all of them" and at no time did he see a gun in Gallivan's hand, nor did he see him "reach for his pocket" (R 33).

In a voluntary extra-judicial written statement made eight days after the shooting, which was properly admitted in evidence (R 17-20), accused stated that on the night in question he had been drinking and was "pretty drunk." He went into the cafe and started dancing. There were two or three other colored soldiers present from his company, including T. J. Silas, and also two or three white soldiers dancing, one of whom "a T/5 looked like he was pretty drunk." Accused further stated that at about 2030 the "T/5" stepped on his foot and, upon being told by accused to get off his foot, remarked "I'll do more than that, I am going to turn out the place," meaning that "he was going to cause trouble." Accused then described the fatal incident:

> "At about 2130 hours I heard a scuffle in the center of the dance floor. I looked around and I saw the white T/5 hit T. J. Silas on the shoulder with his right fist. When I saw that I reached into my left front pocket and pulled out a small automatic pistol I had there. The T/5 was about ten feet away from me then. I fired at the T/5 and he put his arms across his stomach and crouched down. As he was falling I fired four more times. Every one started running out of the dance then. I saw the T/5 laying still on the floor, so I too ran out of the cafe and back to my company. On my way to the company area I passed under a treatle crossing and I threw the automatic into a ditch there" (Pros Ex 1).

In concluding this statement, accused said:

> "When I fired into the white soldier, the T/5, it was for no other reason that he told me he was going to cause trouble. If the T/5 did reach for a gun I did not see him" (Pros Ex 1).

4. Fully advised of his rights as a witness on his own behalf (R 34), accused elected to make the following unsworn statement through his counsel:

> "If the court please, the accused does not wish to take the stand. He wishes, through his counsel, to state that he is unable to detail what happen on the night of 22 July, and wishes to state that he knows that he drank about two bottles of cognac, that he remembers standing on his feet, but as to how or why the offense was committed he cannot relate" (R 34).

Private T. J. Silas, testifying on behalf of the accused, stated that he had an argument with one of the white soldiers who kept pushing him with his elbows while he was dancing. Another white soldier asked him not to pay any attention to the first soldier because he was just about drunk. Silas replied: "Okay, but tell him to stop bothering and pushing me around." Subsequently the deceased came over to Silas and renewed the argument by asking Silas what he was going to do about being pushed (R 21-22). Silas continued:

"So, I told him that I was talking to these two guys and he said, 'So what if he was drunk, what are you going to do about it.' I said, 'I'm not talking to you, and get out of my face.' At that time this same soldier then turns and makes a swing. Just as I seen him do that I raised my left hand to go back at him. So, this guy makes a pass at me and hits me on my left hand and I pushed him away and staggers around. I had turned myself like that (indicating); as soon as I goes like that, he backs up and he goes to his pocket and comes out with a gun; and then I heard a shot go off and the first one hit me here (indicating), and so I went down" (R 22).

Silas testified that he saw the deceased reach and take a pistol from his right hip pocket and saw a pistol in deceased's right hand (R 23). He further testified that on the night in question the accused was not drunk and that he was not a trouble maker in his outfit (R 22-23).

On cross-examination, Silas was confronted with a written statement, dated 26 July, which he admitted having signed (R 25). Silas said that he remembered being interviewed, while in the hospital for the wound which he received at the cafe, but that he did not remember making a particular statement contained therein to which the trial judge advocate directed his attention (R 25, 27). Silas' explanation for his failure to remember was that while being questioned in connection with that statement he was "intoxicated" and under the influence of "a couple of shots" given to make him sleep, one before and one after the operation (R 27, 30). His signature on the statement appeared because: "they held my left hand up. I was just about asleep and I could not steady myself, so they held up my hand to the paper and I signed it" (R 26). The statement, admitted in evidence as Prosecution Exhibit number 2, was contradictory to Silas' testimony at the trial with respect to the conduct of the deceased immediately prior to the shooting. It read in part:

"I don't know what he had in his pocket. Before the T/5, the white soldier, could pull anything out of his pocket, William Purvis shot at him four or five times" (R 26; Pros Ex 2).

Private Durrah testified that the accused was not a trouble maker in his company. On cross-examination he stated that at no time did the deceased have a gun in his hand (R 32).

5. The competent evidence established without doubt that at the time and place in question, accused shot and killed, with a pistol, Michael Gallivan, the human being named in the Specification; and that this shooting was intentional, without provocation and not in self defense. The testimony of Durrah, a member of accused's organization, was that the deceased did not reach for his pocket, did not produce a gun, and did not

threaten accused. He testified that the deceased and Silas were "closely arguing" and that Silas drew back to hit the latter when accused started firing. On this evidence the accused was the aggressor and his shooting of the deceased was without any possible provocation. Accused in his pre-trial statement said that if the deceased reached for a gun he did not see him. Silas was the only witness who testified that he saw accused reach for a gun and have a gun in his hand. The statement given by Silas in the hospital which partially impeached his testimony on this point was properly received in evidence. It was not necessary for the hospital statement of Silas to have been voluntarily made to render it admissible in evidence, since Silas was not the accused nor was his statement a confession made by an accused (CM ETO 2625, Pridgen). It was for the court to decide what weight should be given Silas' testimony on direct examination, after hearing his inconsistent pre-trial statement and his explanation and testimony as to his mental and physical condition at the time he made it, and after listening to all the other witnesses (MCM, 1928, par 124b, p 134).

6. The elements of proof in this case essential to the findings of guilty of murder, as charged, were:

(a) that accused unlawfully killed Gallivan by shooting him with a pistol as alleged and

(b) that such killing was with malice aforethought (MCM, 1928, par 148a, p 162).

That the accused killed Gallivan was not disputed. The court was fully justified in finding that the shooting was intentional and without provocation and not in self defense, in finding that the shooting was without legal justification or excuse and therefore unlawful (MCM, 1928, 148a, pp 162-163).

> "* * * Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not * * * 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" (MCM, 1928, par 148a, pp 162-164). (Underscoring supplied.)

The following principles of law are particularly applicable in the instant case:

"Mere use of a deadly weapon does not of itself raise a presumption of malice on the part of the accused: but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act" (1 Wharton's Criminal Law, 12th Ed, Sec 426, pp 654-655). (Underscoring supplied.)

"An intention to kill * * * may be inferred from the acts of the accused, or may be founded on a manifest or reckless disregard for the safety of human life. Thus an intention to kill may be inferred from the wilfull use of a deadly weapon" (40 CJS, Sec 44, p 905).

"Reckless disregard of human life may be equivalent of specific intent to kill." Looney v. State, 153 S.E. 372, 41 Ga. App 495; Chambliss v. State, 139 S.E. 80, 37 Ga. App 124 (Ibid, CJS, fn. 67, p 944).

The deliberate shooting of Gallivan with a deadly weapon resulting in his death, was, under the circumstances, sufficient to justify the court in inferring malice aforethought (MCM, 1928, pars 112a, 148a, pp 110, 163; CM ETO 1941 Battles; CM ETO 7815 Gutierrez).

In an unsworn statement made through his counsel, the accused apparently relied upon the defense that he was too drunk at the time of the shooting to entertain the specific intent. Being unsworn this statement was not evidence and was entitled to only such consideration as the court deemed warranted (MCM, 1928, par 76, p 61). In direct conflict with this evidence, defense witness Silas testified that the accused was not drunk. On this evidence and in view of the foregoing principles and their obvious application to the acts of the accused, the Board of Review is of the opinion that the court was justified in deciding that the accused, if intoxicated at all, was not so drunk as to be incapable of forming the intent to commit the act which resulted in the death of Gallivan (CM ETO 6229 Cruch; CM ETO 6265 Thurman).

The crime of murder was fully proved by competent evidence.

7. The charge sheet shows that accused is 22 years and 11 months of age. He was inducted 20 March 1944 at Fort Bragg, North Carolina. No prior service is shown.

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

9. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir 229, WD, 8 June 1944, Sec II, pars 1b(4), 3b).

H. Lowenstein, Judge Advocate

Waldemar A. Lee, Judge Advocate

On Leave, Judge Advocate

(G.C.M.O. 317, 22 Oct 1946).

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

JAGH - CM 307305 9 JUL 1946

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Alamogordo Army Air Field, Alamogordo, New Mexico, 1 February 1946. Dismissal and total forfeitures
Second Lieutenant ROBERT W. GREEN (0-2084512), Air Corps	)	

OPINION of the BOARD OF REVIEW
TAPPY, HOTTENSTEIN and STERN, 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 Robert W. Green, Air Corps, Squadron A, 231st Army Air Forces Base Unit, did, without proper leave, absent himself from his organization and station at Alamogordo Army Air Field, Alamogordo, New Mexico, from about 28 October 1945 to about 12 November 1945.

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

Specification 1: In that Second Lieutenant Robert W. Green, *** , did, at Atlanta Army Air Base, Atlanta, Georgia, on or about 31 October 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Officers Club, Atlanta Army Air Base, a certain check in words and figures as follows:

October 31st 1945 No. _____

OTERO COUNTY STATE BANK
Alamogordo, N. Mex.

Pay to the Order of Officers Club $20 #/100--------

Twenty- #/100 DOLLARS

I hereby claim that I have the above amount in this bank at this time, and will leave same on deposit there subject to this check upon presentation.

Robert W. Green
2d Lt. 0-2084512

Numerous Endorsement and clearing house stamps.

Officers Mess and Club Fund Atlanta Army Air Base

and by means thereof, did fraudulently obtain from said Officers Club Twenty Dollars ($20.00), he the said Second Lieutenant Green then well knowing that he did not have and not intending that he should have sufficient funds in the Otero County State Bank for the payment of said check.

Specification 2 through 12, inclusive, except Specification 9 which was withdrawn by direction of the appointing authority, are identical in form with Specification 1 except as to dates, places, amounts and persons or organizations defrauded. The variations are as follows:

Spec.	Date	Amount	Place	Organization or Person Defrauded
2	27 Nov 45	$25.00	Alamogordo Army Air Field, New Mexico	Officers' Mess
3	22 Nov 45	25.00	Alamogordo Army Air Field, New Mexico	Lt. Arthur G. Mehl
4	2 Oct 45	20.00	Atlanta Army Air Base, Atlanta, Georgia	Officers' Mess
5	24 Nov 45	25.00	El Paso, Texas	El Paso Officers' Club, Inc.
6	25 Nov 45	25.00	El Paso, Texas	El Paso Officers' Club, Inc.
7	26 Nov 45	25.00	El Paso, Texas	El Paso Officers' Club, Inc.
8	2 Nov 45	100.00	Atlanta, Georgia	J. S. Pinkston
10	10 Nov 45	10.00	Pyote, Texas	Officers' Club, Pyote Army Air Field
11	5 Nov 45	25.00	Maxwell Field, Alabama	Officers' Club
12	2 Nov 45	100.00	Atlanta Army Air Base, Atlanta, Georgia	J. S. Pinkston

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. With respect to Specification 4 of Charge II, the court by exception and substitution found the date of the offense to be 2 November 1945 instead of 2 October 1945 as alleged. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances and to be confined at hard labor for eight (8) months. The reviewing authority approved only so much of the sentence as provided for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. The prosecution introduced evidence to show that accused absented himself without leave from his organization, Squadron A, 231st Army Air Forces Base Unit, Alamogordo, New Mexico, on 28 October 1945 and remained in that status until he returned to duty on 12 November 1945 (R 13; Pros Exs 1, 2).

In support of the check offenses alleged in the Specifications of Charge II, it was shown that accused had an account with the Otero County State Bank of Alamogordo, New Mexico, from 19 October 1945 to 26 December 1945 and from 15 January 1946 to 31 January 1946 (R 15). Nine checks drawn on said bank and purporting to bear the signature of accused as maker were received in evidence without objection. These checks are more particularly identified and described as follows:

Spec.	Date	Amount	Payee	Pros. Ex. No.
1	31 Oct 45	$20.00	Officers' Club, Atlanta Army Air Base	3
2	27 Nov 45	25.00	Officers' Mess	4
3	22 Nov 45	25.00	Cash	5
4	2 Oct 45	20.00	Officers' Mess, Atlanta Army Air Base	6
5	Undated	25.00	El Paso Officers' Club	7
6	25 Nov 45	25.00	El Paso Officers' Club	8
7	26 Nov 45	25.00	El Paso Officers' Club	9
10	10 Nov 45	10.00	Officers' Club, Pyote, Texas	11
11	5 Nov 45	25.00	Officers' Club, Maxwell Field	12

A photostatic copy of the tenth and eleventh checks, each dated 2 November 1945, payable to "Cash", in the amount of $100, also drawn on the Otero County State Bank, Alamogordo, New Mexico, and purporting to be drawn by accused were received in evidence over objection by defense counsel (R 33, 34; Pros Exs 10,13). On 8 November 1945, the drawee bank made a charge against accused's account for returning two checks because of insufficient funds. Each of the said checks was dated 2 November 1945, was payable to "Cash" and was in the amount of $100 (R 18, 19). It was stipulated between the prosecution, the defense, and the accused that accused received from the first indorsers the full amounts specified on the face of Prosecution's Exhibits 3 through 9, inclusive, and 11 through 12, inclusive, and further that he received all or part of the amounts shown on the face of the checks

identified as Prosecution's Exhibits 10 and 13 (R 34; Pros Ex 15).

The accused made the following voluntary pre-trial statement to the investigating officer on 21 December 1945 (R 36; Pros Ex 14):

"In reference to two checks for $100.00 each written by me to Major Pinkston at Atlanta, Georgia, I entered them into a poker game and was given the balance on the table. In reference to two checks in the amount of $20.00 each, dated 31 October and 2 October, they were cashed by me at the Officers' Club at the Atlanta Municipal Airport, and I received actual cash for them. I believe that the checks dated 2 October, above-mentioned, should have been dated 2 November 1945. * * *.

On 5 November 1945, I was at Maxwell Field, Alabama and cashed a check there in the amount of $25.00. That check was not given in a gambling game. I presented that check to the Cashier at the Officers' Club and she gave me United States currency in exchange. At that time I did know that I did not have sufficient funds in the Otero County Bank to cover the checks at Atlanta as well as this one.

When I was in Pyote on approximately 10 November, I wrote two checks for $10.00 each. I wasn't in Pyote on the 20th of November and I don't have any idea whether I dated a check on the 20th. At the time I wrote these two checks I knew that I didn't have sufficient funds to cover them. I was pretty sober when I wrote all of the checks, I knew what I was doing.

On 23 November 1945 I was on the Post. I wrote several checks around that time and I might have written one for $25.00. I didn't know that I didn't have sufficient funds to cover them. I don't remember a check payable to Cash and indorsed by Arthur G. Mell. I don't know this person Mell. I don't remember whether I cashed two checks for $25.00 at the window of the Officer's Club on the Post.

Three checks in the amount of $75.00 cashed during the month of November at the El Paso Officers' Club were not in payment of gambling debts. I was not drunk at the time I cashed those checks. I did know that I didn't have sufficient funds to cover them.

I did not go to the bank to check to see if I had sufficient funds to cover these checks. I have nothing to say in regard to this matter and have no explanation to offer."

Accused's bank balance with the Otero County State Bank, Alamogordo, New Mexico, was insufficient to pay any of the eleven checks when they were presented for payment between 31 October 1945 and 1 December 1945 and all of said checks were returned unpaid by the drawee bank (R 16-18). From 24 October 1945 to 23 November 1945 accused's balance with said bank was never greater than $5.00. . On the latter date accused deposited $45.00, but two withdrawals on the same date reduced the balance to $16.95. From then until 26 December 1945 when the account was closed, the balance was never greater than the latter amount (R 16). The president of the aforementioned bank testified that he had been engaged in the banking business for about 29 years, much of which time had been spent as a teller. In fact he had started at the bottom and his experience involved all phases of banking including the examination of questionable signatures on documents received by the bank. His association with this bank dated back to 1917. Over objection of the defense counsel, he was permitted to testify that he had compared the writing appearing on accused's signature card at the bank with the signatures appearing on the checks in question and that in his opinion all were written by the same person (R 15, 19, 20).

4. After his rights as a witness were fully explained, accused elected to be sworn and testified that he entered the military service on 10 October 1939 as an enlisted man in the Regular Army and was discharged on 10 February 1945 to accept a commission as a second lieutenant after successful completion of training as an aviation cadet. He had overseas service from December 1939 to August 1943. He is a single man and his legal residence is Evansville, Indiana, the home of his grandmother whom he has been supporting since 1940. He was greatly attached to an aunt from whom he had received a letter about 28 October 1945 in which she stated her intention of committing suicide. He testified that the news depressed him to such an extent that while it was "not enough that I couldn't distinguish the difference (between right and wrong) but enough that the idea of the wrongness was not as strong as it would have been before I got into this confused state". This condition persisted until 27 November 1945, when after talking to the chaplain, he found a way to help his aunt. Since then the cause of his "agitation" has been removed and he has redeemed all of the checks (R 38-42). The total amount of the checks which he issued and which were returned for insufficient funds was $410. He lost the greater part of the proceeds of the first two checks in a poker game. The balance he spent for living expenses and recreation while returning to his station. He made restitution of the amounts involved in the insufficient funds checks out of his pay checks for December 1945 and January 1946. He did this voluntarily because he knew he had done wrong and in this regard he testified:

> "The only thing I can say in regard to that period is that the amount of wrongness was lessened by my mental condition and after I had a chance to think it over it was just naturally something I would do under those circumstances - go out and try to make up the checks, try to do what I could" (R 42, 44, 45).

5. The evidence clearly establishes the unauthorized absence of accused as alleged, in violation of Article of War 61 and is legally sufficient to support Charge I and its Specification. Further, the uncontradicted evidence amply demonstrates that the checks described in Specification 1 through 7 inclusive, 10 and 11 of Charge II were made and uttered by accused as alleged, that he received the proceeds thereof and that said checks were dishonored when presented for payment to the drawee bank because of insufficient funds in accused's account. On 31 October 1945, the date on which the first check was negotiated, accused's balance with the bank was only $5.00 and at no time thereafter were sufficient funds on hand to permit payment of any one of them. While on 23 November 1945, accused deposited $45.00 in his account, on the same day two withdrawals reduced the balance to $16.95. This was the only deposit throughout the period involving the transactions here under consideration. From these facts and circumstances, the court was fully warranted in inferring that the accused intended to defraud the payees of these several checks and accordingly the evidence is legally sufficient to sustain Charge II and Specifications 1 through 7 inclusive, 10 and 11 thereof.

There remains for consideration the findings of guilty with respect to Specifications 8 and 12 of Charge II. Over objection of defense counsel, photostatic copies of the two checks which were the subject of these Specifications were received in evidence. It was urged that the documents were secondary evidence and therefore inadmissible, but the objection was overruled when the trial judge advocate stated that the original checks were held by Major J. S. Pinkston at the Atlanta Municipal Airport, Atlanta, Georgia, and were not available. Assuming without deciding that said photostatic copies were inadmissible because it had not been shown that the originals were unproducible, there is other clear and convincing evidence in the record that accused negotiated the checks in question, that they were deposited for collection and that they were returned by the drawee bank unpaid because accused's balance was insufficient. There was proof that accused was in Atlanta, Georgia, on the date in question and that he had received all or part of the value shown on the face of the checks. Further, in his voluntary pre-trial statement he admitted that he wrote two checks each for $100 to Major Pinkston at Atlanta, Georgia, that he entered them in a poker game and was given the balance "on the table". He made reference to the Otero County State Bank, stating that on 5 November 1945 when he cashed a check at Maxwell Field, Alabama (Chg II, Spec 11), he knew he did not have sufficient funds in said bank to cover the checks issued in Atlanta. It was shown that a return charge was made against accused's account at the Otero County State Bank for two checks dated 2 November 1945 payable to cash, each in the amount of $100 received at said bank on 8 November 1945 and returned unpaid because of insufficient funds. Further, at all times during November 1945, his balance with the bank was minimal and never sufficient to permit payment of any one of the checks. At the trial accused testified that during the period 28 October 1945 to 27 November 1945, the checks written by him which were returned for insufficient funds totalled $410. He referred to the "first poker game when the first two checks were written", stating that he had lost the

greater part of it. The checks involved in the several Specifications had an aggregate value of $400 and one for $10 was the subject of Specification 9, against which a nolle prosequi was entered. Accused testified that all the checks had been redeemed by him. He did this voluntarily because, as he said, "Well, I knew I had done wrong". His explanation was that he was laboring under a strain during the period and "after I had a chance to think it over, it was just naturally something I would do under those circumstances - go out and try to make up the checks, try to do what I could". From the foregoing, it is clear that the evidence pertaining to the cashing of these two checks and their dishonor upon presentation for payment could relate only to the checks which are the subjects of Specifications 8 and 12 of Charge II and to no others. From the wholly inadequate state of the account, both when the checks were made and subsequently presented to the drawee bank, from the fact that during the month of November he cashed nine other "insufficient funds" checks, none of which were redeemed until after Charges had been preferred, the wrongful and fraudulent character of his conduct becomes apparent. The evidence is legally sufficient to support the findings of guilty of these two Specifications.

6. The accused is 25 years of age and single. He graduated from high school in Evansville, Indiana, in June 1939 and enlisted in the military service in October of that year. He had overseas service from December 1939 to August 1943, attaining the rank of staff sergeant. Thereafter he was appointed an aviation cadet and was commissioned a second lieutenant in the Air Corps, Army of the United States, on 10 February 1945. The review of the Staff Judge Advocate states that the accused has been awarded the Silver Star. He has an AGCT score of 142.

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

On Leave
_____, Judge Advocate

R. Lottenstein, Judge Advocate

Joseph J. Stern, Judge Advocate

JAGH - CM 307305 1st Ind

WD, JAGO, Washington 25, D. C. JUL 26 1946

TO: The Secretary of War

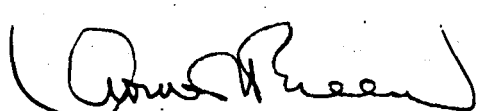
1. Pursuant to Executive Order No. 9556, dated 26 May 1945, there are transmitted herewith for your action the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert W. Green (0-2084512), Air Corps.

2. Upon trial by general court-martial this officer pleaded not guilty to, and was found guilty of, absence without leave for fifteen days, in violation of Article of War 61 (Charge I, Specification), and of the fraudulent making and uttering of eleven insufficient funds checks totalling $400. No evidence was introduced of any previous convictions. He was sentenced to dismissal, total forfeitures and confinement at hard labor for eight (8) months. The reviewing authority approved only so much of the sentence as provided for dismissal and total forfeitures 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 as approved by the reviewing authority and to warrant confirmation of the sentence. I concur in that opinion. The accused was absent without leave from his organization and station at Alamogordo Army Air Field, Alamogordo, New Mexico, from 28 October 1945 to 12 November 1945. Between 31 October 1945 and 27 November 1945 he made and passed to various officers' clubs and to an officer eleven checks aggregating $400, all drawn on the Otero County State Bank of Alamogordo, New Mexico. All of the checks were dishonored by the drawee bank when presented to it because the balance in accused's bank account was insufficient to pay them. Accused testified at the trial and stated that he had voluntarily redeemed all the checks from his pay for the months of December 1945 and January 1946. His explanation was that his actions were induced by mental strain over the illness of a close relative.

Accused's behavior in absenting himself without leave for a period of fifteen days coupled with the bad check offenses demonstrate that he is unworthy of his commission. I recommend that the sentence as approved by the reviewing authority be confirmed but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 248, 2 Aug 1946).

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

SPJGH - CM 307322

1 MAY 1946

UNITED STATES v. Private CLIFFORD A. PECHMAN (16094875), Squadron C, 3028 Army Air Forces Base Unit.	ARMY AIR FORCES FLYING TRAINING COMMAND Trial by G. C. M., convened at Luke Field, Arizona, 3 January 1946. Dishonorable discharge and confinement at hard labor for five (5) years. Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, 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 93d Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty).

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

Specification 1: In that Private Clifford A. Pechman, Squadron C. 3028th Army Air Forces Base Unit, Luke Field, Phoenix, Arizona, did, at Luke Field, Phoenix, Arizona, on or about 2 December 1945, commit an aggravated assault and battery by wrongfully striking Marilyn King, a female child of about three years, on the face and body with his fists and hands.

Specification 2: (Disapproved by the reviewing authority).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification and guilty of Charge II and Specifications 1 and 2 thereof. Evidence was introduced of one previous conviction by summary court-martial on 5 October 1945 for being drunk and disorderly in uniform in a public place in violation of Article of War 96, for which accused was sentenced to be reduced to the grade of private, to be restricted to the limits of his station for 90 days and to forfeit $14 of his pay. For the instant offenses he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due

and to be confined at hard labor for five (5) years. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge II, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record reveals that the most incriminating matter produced by the prosecution to establish the commission of the offenses of which accused was convicted was the unsworn testimony of two young boys, one five and the other six years of age. Not only were these two witnesses not sworn but, indeed, one of them stated on the stand that he would not testify truthfully. In addition to their unsworn testimony, there was admitted in evidence a stipulation as to what one of these witnesses would testify to if present in court.

Since these two witnesses were not sworn, their testimony was wholly incompetent and can be accorded no weight whatsoever. Furthermore, since they were each present in court, the stipulation (Pros. Ex. D) as to what one of them, John Edward King, would testify to if present, should not have been admitted in evidence. The prejudice to accused resulting from the introduction of this stipulation (Pros. Ex. D), in view of the incompetent testimony given by these two witnesses at the trial, is obvious. Were we to hold this stipulation to be competent evidence, the net result would be to hold that incompetent evidence from the mouth of John Edward King while on the witness stand becomes competent when presented as a written statement with denial to accused of any opportunity for cross-examination. Clearly such a result may not be countenanced.

A statement purporting to have been made by accused was admitted in evidence (Pros. Ex. G), and although it contained no incriminating matter with respect to the offenses charged, it is felt that some comment should be made of the method of its introduction. To establish its voluntary nature when offering it in evidence, the Trial Judge Advocate turned to accused, who had not submitted himself as a witness, and elicited from him information tending to establish its voluntary character. Such procedure was so violative of accused's rights as would have constituted prejudicial error had the statement been tantamount to a confession.

4. Such competent evidence as was introduced is woefully inadequate to establish the commission of the offenses charged beyond a reasonable doubt.

5. For the foregoing reasons the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Thomas N. Tappy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trevithan, Judge Advocate.

SPJGH - CM 307322 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 20 1946

TO: Commanding General, Army Air Forces Flying Training Command, Randolph Field, Texas.

1. In the case of Private Clifford A. Pechman (16094875), Squadron C, 3028 Army Air Forces Base Unit, attention is invited to the foregoing holding of 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. I concur in the holding of the Board of Review and, for the reasons therein stated, recommend that the findings and sentence be vacated.

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

(CM 307322).

1 Incl

THOMAS H. GREEN
Major General
The Judge Advocate General

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

9 MAY 1946

SPJGH - CM 307361

UNITED STATES	)	CHANOR BASE SECTION
	)	
v.	)	Trial by G.C.M., convened at Le Havre, France, 22 January 1946. Dismissal, total forfeitures, fine of $250.00, and confinement at hard labor for one (1) year.
	)	
First Lieutenant LOUIS J. HENSLEY, JR. (0-1592270), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, STERN 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 61st Article of War.

Specification: In that 1st Lieutenant Louis J. Hensley, Jr, 340th Quartermaster Depot Supply Company, formerly 990th Quartermaster Service Company, did without proper leave absent himself from his command at Le Havre, France from about 20 October 1945 to about 6 December 1945.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures, confinement at hard labor for one (1) years, and to pay a fine of $250 to the United States. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. On 17 October 1945, while stationed at Le Havre, France, accused was ordered by proper authority to proceed to Paris, France, and obtain the liquor ration for the officers then billeted with him and was furnished Government transportation for the trip. Accused was chosen primarily for this assignment because he wished to effect the transfer of a sum of money from his father in the United States for the purpose of paying certain debts accused had incurred. He left Le Havre on 17 October 1945 and was to be gone three days according to the terms of his orders. On 19 October 1945 transportation was dispatched to Paris for the purpose of transporting accused and the officers' liquor back to Le Havre, but accused did not return with the driver. Transportation was again dispatched to Paris on 20 October 1945, but accused did not meet the driver and consequently did not return to Le Havre. Thereafter,

on 8 November 1945, the transportation officer of accused's organization received a telegram from accused stating that he would arrive at Le Havre Railroad Station that date. Accordingly, transportation was dispatched to the station to pick him up, but accused did not arrive. He finally surrendered to the provost marshal in Paris, France, 6 December 1945 without having received any extension of his temporary duty. At the time accused was sent to Paris on the above-mentioned mission, he was awaiting redeployment to the United States and was performing no specifically assigned military duties.

4. After being fully advised of his rights as a witness in his own behalf, accused elected to be sworn and testified that he left Le Havre, France, for Paris on 17 October 1945 on three days' temporary duty, His official mission was to obtain the liquor ration for the officers of his organization but he was heavily in debt at the time and was chosen for the assignment so that he might effect the transfer of a sum of money to his credit from the United States through the J. P. Morgan Bank in Paris. After arriving in Paris he encountered difficulties and did not receive the money until about 8 November at which time he telegraphed an officer of his organization that he would return three days later. Accordingly, on 11 November 1945 he went to the railroad station to obtain a train reservation to Le Havre, and while in the act of completing this transaction his Val-pak containing his money and clothes was stolen. On the same day he was invited to have dinner in Paris with a lady friend, Countess Madeleine de Rebourseaux. While at her home he was stricken with influenza and remained in bed until 6 December 1945 except the day of 21 November. On that day he went to the finance office in Paris and drew a partial pay with the view to returning by train to his station but upon returning to the home of his lady friend, he again became ill, was sick to his stomach and ran a fever. On the morning of 6 December 1945 accused went to the Provost Marshal Headquarters in Paris and endeavored to telephone his commanding officer. He was prevented from doing so and thereupon taken into custody upon an apprehension warrant which that office possessed.

Defense introduced in evidence a true copy of a letter addressed to accused by Morgan & Cie, Incorporated, showing that on 8 November 1945, upon authorization of a cable transfer order from J. P. Morgan & Company of New York, N. Y., the sum of 44,354 French francs were paid to accused. Defense also introduced a true copy of a train reservation from Paris to Le Havre for accused's use on 11 November 1945.

It was stipulated that if Countess de Rebourseaux were present in court she would testify that on 11 November 1945 she received a call from accused, whom she had known a few months, who told her he had lost his bag (Val-pak), and she invited him to her home for dinner. During his visit he became ill and despite her care, accused was obliged to remain abed for ten days. By 21 November his health had improved and he went to the finance office to obtain a partial pay and his railroad ticket for the return trip to his station. On his return to her home, following this errand, his illness became worse and he was forced to go back to bed and remain there until 6 December 1945.

Lieutenant Colonel Jack Fleischaker, stationed at Le Havre, France, testified that he attended college with accused at the University of Missouri and had personal knowledge of his reputation both at school and in Kansas City where he resided. Accused's reputation for truth and veracity was unimpeachable.

5. The evidence demonstrates that accused was ordered by competent authority to proceed on 17 October 1945 from Le Havre, France, to Paris, France, on three days' temporary duty and upon completion thereof was to return to his proper station. Government transportation was furnished to accomplish the trip to Paris and was dispatched to Paris on October 19 and 20 for his return trip, but accused did not return. He remained absent without leave from 20 October 1945 to 6 December 1945, at which time he surrendered to military police authorities in Paris. Accused contends, and to some extent his contention is corroborated, that he became ill on 11 November 1945 and was confined to bed at the home of his lady friend in Paris until 6 December 1945. Accepting his contention as true, it constituted no defense and could be considered only in extenuation. It will be noted, however, that no satisfactory explanation was given of accused's failure to return between 20 October 1945 and 11 November 1945 except the delay occasioned in effecting the transfer of a sum of money to him from the United States which was a purely personal business transaction. The record of trial is legally sufficient to sustain the findings of guilty of the Charge and Specification.

6. Accused is approximately 31 years of age , married and the father of a 4½ year old boy. He graduated from Shattuck Military Academy and attended the University of Missouri 3½ years. Prior to entering the military service he was employed by the Goodyear Aircraft Corporation, Litchfield Park, Arizona, at a salary of $300 per month. He was inducted 19 November 1942 and upon graduating from The Quartermaster School, Camp Lee, Virginia, was appointed a second lieutenant, Quartermaster Corps, Army of the United States, on 28 May 1943. He was promoted to first lieutenant on 16 July 1945.

Four of the five members of the court, the trial judge advocate and defense counsel recommended clemency predicated upon (a) accused's previous excellent character and military service, (b) because the offense committed is of a purely military nature involving no moral turpitude, and (c) because accused was awaiting transfer to a carrier unit for redeployment to the United States and was performing no military duty in his organization at the time the offense was committed.

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 61.

Thomas N. Jaffe, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert C. Trueblood, Judge Advocate

(68)

SPJGH - CM 307361 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 22 1946

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 Louis J. Hensley, Jr. (0-1592270), Quartermaster Corps.

2. Upon trial by general court-martial this officer was found guilty of absenting himself without leave from his command at Le Havre, France, from 20 October 1945 to 6 December 1945. He was sentenced to dismissal, total forfeitures, a fine of $250, and confinement for one (1) 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. 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 October 1945, while at Le Havre, France, awaiting transfer to the United States, accused was ordered to Paris, France, on three days' temporary duty with instructions to return to his station upon completion of such duty but not later than 20 October 1945. Accused did not return until 6 December 1945 and, accordingly, was absent without leave during the period of 20 October 1945 and 6 December 1945. The reason given by accused for his unauthorized absence was twofold, (a) that he was delayed until 11 November 1945 in effectuating the transfer of a sum of money to him from the United States, and (b) that on the last mentioned date he contracted influenze which required him to remain abed until 6 December 1945.

Four of the five members of the court, the trial judge advocate and defense counsel have recommended that the confinement imposed be remitted and the dismissal be suspended. On 15 September 1943 accused was convicted by general court-martial for absence without leave from 12 August 1943 to 26 August 1943 and sentenced to be restricted to his post for sixty (60) days and to forfeit $250 of his pay per month for four (4) months. I recommend that the sentence be confirmed but that the fine be remitted and that the sentence as thus modified be carried into execution 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 such recommendation meet with your approval.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 197, 21 June 1946).

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

SPJGN-CM 307365

UNITED STATES	)	OKINAWA BASE COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	APO #331, 29 January 1946.
Technician Fifth Grade	)	Dishonorable discharge, total
EDWARD ROWLEY (34943293),	)	forfeitures, and confinement
3070th Engineer Dump	)	for life. Penitentiary,
Truck Company.	)	McNeil Island, Washington.

REVIEW by the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Edward Rowley, 3070th Engineer Dump Truck Company did, at APO 180, on or about 6 January 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Isaac Bell, 3070th Engineer Dump Truck Company, a human being by shooting him with a pistol.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence was introduced of two previous convictions; each for an absence without leave of four days duration. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the

United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. The evidence as summarized by the Staff Judge Advocate of the Okinawa Base Command shows:

a. For the prosecution: Private (then Sergeant) Oscar Martin, Technician Fifth Grade Arthur B. Soarrey, and Corporal Johnson were standing in the company street, 3070th Engineer Dump Truck Company, APO 180, Okinawa, at about 2000, 6 January 1946 (R. 6, 13, 14, 20). Accused came out of a squad tent and asked Soarrey to return a .45 caliber pistol that accused had loaned him about fifteen minutes earlier (R. 14, 17; Pros. Ex. 2). Soarrey returned the weapon. Accused put it in the "bosom" (R. 6) of his coveralls (R. 27) and invited the others into the tent for a drink (R. 7, 14). The weapon was a United States Army Pistol, serial number 31076, and had plastic handles with pictures under them (R. 7, 14; Pros. Ex. 2). Martin and Soarrey accompanied accused into the latter's tent (R. 6, 14, 21). It was a squad tent and there were twelve cots therein. Accused's bed was the first on the left hand side, the bed of Private Isaac Bell (deceased) was situated on the right directly across the aisle from that of the accused, and the second bed on the left side, adjacent to that of the accused, belonged to Private Ellison J. Eady (R. 24-25). Eady was lying on his bunk at the time and Bell was lying on his (R. 7, 21, 25). Also present were the following: Flippen, Henry Johnson, Roland Herring, and Driver (R. 22).

When Martin, Soarrey, and accused entered the tent, they sat on accused's bed. Accused opened his locker and took out a fifth of whiskey and another pistol, handing the latter to Soarrey (R. 14, 21). There was a cartridge lodged in the chamber but since Soarrey did not know how to unload it he returned the pistol to accused and he unloaded it and laid it on the bed beside the whiskey. Soarrey stepped outside to urinate (R. 14, 21). Accused worked the mechanism of the gun with the plastic handles and checked the magazine (R. 7, 8). He pointed it in the direction of Eady, who said, "Don't point the gun towards me" (R. 7, 21). Accused "turned on his bed and was pointed towards Private Bell" (R. 7). The latter, who was lying on his cot, also objected (R. 7, 8. 21). Accused replied, "This is my gun, I will point it to where I want" (R. 8). They commenced to argue and swear (R. 8, 21). Accused put the pistol with the plastic handles back inside his coveralls (R. 8). The argument continued in an angry tone. Bell raised up on his elbow, but did not have any gun or weapon visible (R. 9). Finally, accused said "You black son of a bitch, I will kill you" (R. 29, 31, 32), and reached "back up there." Martin thereupon turned to leave but before he could get to the door, a series of four or five shots rang out (R. 8).

Easley raised up as soon as he heard the pistol fire. As he looked up he saw accused standing, with the pistol in his right hand, pointed at Bell, and with his right foot forward, not over three feet from the foot of Bell's bed. He saw accused take one step forward and fire the pistol three or four times more as he advanced with the pistol pointed at Bell (R. 21-22, 25). Some cotton flew up from the head of Bell's bed, and it looked like Bell "was jumping as the pistol shot" (R. 22, 24). Bell was lying down, covered and only his head was visible (R. 9, 18, 24). When the firing stopped, Bell said "Lord have mercy, somebody help me," and groaned once or twice (R. 22). Accused was standing in the middle of the aisle (R. 25). He appeared "pretty cool" and looked over at Easley and said, "You better move out and get him a truck and help take him to the Hospital" (R. 24).

Soarrey heard the shots and re-entered. He saw accused standing beside his bed with the .45 caliber pistol with the glass handles in his hand. He heard Bell moan. Accused told Soarrey to take a drink, which the latter did (R. 15, 17). Soarrey asked accused if the latter had shot Bell, and the accused replied, "yes" (R. 15). Accused did not appear excited (R. 18).

Technician Fifth Grade Horace E. Ridley heard the shots and entered accused's tent. As he came in, he saw accused and Soarrey standing by accused's bed. Accused had a .45 caliber pistol in his hand and was reloading it. Ridley asked accused if he had shot Bell but accused did not reply. Soarrey asked accused for a drink of whiskey and took it. After that Ridley again asked accused if he shot Bell. Accused thereupon replied, "Yes, I shot him, he is lying over there dead. That son of a bitch is lying over there dead, I done killed him" (R. 26). Bell was lying on his bed and Ridley went over and pulled the covers back. Bell was bleeding from the mouth and kind of groaning. More soldiers entered and accused pulled out his pistol, asked them what they wanted, and told them to get out before he killed somebody else. After the others went out, accused put the pistol into his coveralls (R. 26, 29).

Captain Francis W. Murray was summoned and entered the accused's tent a few minutes later. Accused was standing, waving his arms around, cursing, and "raving." Bell lay on his bunk, clad only in his underwear, with his blanket partly over the lower part of his body and his head on the pillow. Blood was "gushing" from his mouth and nose (R. 32-34). He was carried out of the tent on his cot, placed on a truck and taken to the hospital. At that time Bell was silent and was not moving in any way (R. 19, 24, 34).

At 1500 on the following day, 7 January 1946, Colonel John H. Schaefer, Medical Corps, 9th Station Hospital, performed an autopsy upon the body of a young negro man, identified to him by First Lieutenant

John W. McCarty as the body of Private Isaac Bell (R. 10, 11). The cause of death was a gunshot wound of the chest, with laceration of aorta and internal hemorrhage. The bullet was a .45 caliber pistol bullet and was found lodged in the body. It was removed and marked "H". It had entered Bell's body in the left posterior axillary line just below the tenth rib and passed upwards, toward the right and anteriorly through both lobes of the left lung, through the ascending aorta and had come to rest "just to the right of the inner and of the right clavicle which it had fractured" (R. 12; Pros. Exs. 1, 3).

A microscopical examination and comparison by First Lieutenant Amadio M. Cabe, Inf., P.A., of the Criminal Investigation Laboratory, Provost Marshal's Office, Manila, indicated that the bullet marked "H" had been fired from a .45 caliber Colt pistol, serial number 31076 (R. 28), the pistol with the plastic handles (R. 7, 14; Pros. Ex. 2).

b. For the defense: After being advised by the Law Member in open court of his rights as a witness, accused elected to testify as follows: He had had three fifths of whiskey on 6 January and had personally consumed at least a fifth thereof, starting at about 1400, right after lunch. In addition he had consumed an unknown quantity of beer. He was highly intoxicated that evening (R. 36).

By cross-examination of prosecution witnesses, the following testimony, pertaining to the state of sobriety of accused on the afternoon and evening of 6 January, was elicited by the defense: Accused, Soarrey, and several others had been drinking that afternoon. They had consumed two fifths of whiskey (R. 15, 19, 22). Accused was "intoxicated," but not "drunk" (R. 16, 18, 19, 27, 30, 33) or "senseless" (R. 19). As used by the witnesses, a man is only "drunk" when he falls down (R. 16), is "helpless" (R. 15) or asleep (R. 27). Accused staggered, talked loud (R. 16, 19, 27, 29), and appeared to have been drinking "pretty heavy" (R. 27, 29, 33) but did not stagger when he entered the tent just before the incident (R. 23). Immediately after the shooting he was standing steady on his feet (R. 19) and seemed to be "pretty cool" (R. 24), but a few minutes later, accused was waving his arms around, cursing, and raving (R. 34). In Captain Murray's opinion, accused was excited and acting unusual but did not appear to be intoxicated or drunk at that time. His breath smelled of whiskey, but he did not stagger or talk incoherently and, when he calmed down, he was "perfectly rational" (R. 35).

4. The accused has been found guilty of the murder of Private Isaac Bell. Murder is defined as the killing of a human being with malice aforethought without legal excuse or justification (MCM, 1928, par. 148a, p. 162). It was established by the evidence beyond any reasonable doubt that the accused killed Isaac Bell at the time and

place alleged in the Specification and that he had no legal excuse or justification for the act. The only element of the crime in issue was that of malice. Several witnesses heard the accused in anger shout epithets at Bell and then immediately before firing the fatal shots say "I will kill you."

> "Malice or malice aforethought is an essential ingredient of assault with intent to murder. As in the case of murder * * * malice may be either express or implied. It includes not only anger, hatred, and revenge, but every unlawful and unjustifiable motive. It is not confined to ill will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive, done with a wicked mind under such circumstances as evince a plain indication of a heart reckless of social duty and fatally bent on mischief. It is implied from any deliberate or cruel act against another which shows an abandoned and malignant heart. It is the opposite of an act performed under uncontrollable action which prevents all deliberation or cool reflection in forming a purpose.
>
> * * *
>
> * * * The existence of malice as an element of assault with intent to murder may be inferred or presumed from the surrounding circumstances, such as the use of a deadly weapon, the character of the assault, the unexplained attempt to take life, or where the assault is unlawful and is done without reasonable provocation or circumstance of palliation, or is committed deliberately and is likely to result fatally, or from the reckless disregard of human life" (40 CJS, sec. 78, pp. 940-942; CM ETO 2899, Reeves; CM ETO 15862, McDaniel).

> "In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption" (Winthrop's Military Law and Precedents, 2nd Ed., Reprint 1920, p. 673).

In the light of these authorities it is clear that there was ample substantial evidence of record from which the court could properly and legally presume malice.

Notwithstanding his acts resulting in the death of the decedent, the accused contends that as a matter of law he was not guilty of murder because, due to his drunkenness, he was not mentally able to entertain malice aforethought. Concerning the defense of drunkenness the Manual for Courts-Martial provides:

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

Such evidence should be carefully scrutinized as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act.

In courts-martial however, evidence of drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, whether it may be considered as properly affecting the issue to be tried, or only the measure of punishment to be awarded in the event of conviction, is generally admitted in evidence" (MCM, 1928, par. 126b, p. 136).

The evidence concerning his intoxication and its extent was properly admitted and it must be presumed that it was considered by the court in reaching its findings. By its findings of guilty the court has in effect found as a fact that the accused was not drunk to the extent that his mental capacity to entertain malice aforethought was affected. Although admittedly intoxicated the accused was able to and did walk, talk coherently, stand still and point and fire his pistol. He fully realized that he had killed his victim when he said "yes, I shot him, he is lying over there dead" and told those present to call an ambulance. None of the witnesses would say that accused was drunk. The record clearly shows that accused's intoxicated condition was not of such an extreme degree as to negative his ability to entertain malice aforethought. In any event the issue of fact thus raised has been resolved by the court against the accused. Such an issue was within the exclusive province of the court for determination, and, inasmuch as its findings are supported by competent substantial evidence they will not be disturbed by the Board of Review upon appellate review (CM ETO 15862, McDaniel, and the cases cited therein.)

5. The Charge Sheet shows accused to be 27 years of age. Without prior service he was inducted on 23 May 1944 at Fort Benning, Georgia.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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. The penalty for murder is death or life imprisonment

as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454, 567). The designation of the United States Penitentiary, McNeil Island, Washington, as the place of confinement, is proper (Cir. 229, WD, 8 June 1944, Sec. II, par. 1b (4), 3b).

Earle Stephens, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

Robert J. Clauson, Judge Advocate.

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

SPJGH - CM 307367

UNITED STATES v. Private JIMMIE WATSON (36463444), Company A, 47th Infantry, 9th Infantry Division.	)	9TH INFANTRY DIVISION Trial by G.C.M., convened at Ingolstadt, Germany, 27 August 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Jimmie Watson, Company "A", 47th Infantry, did, between Hohenwart and Hohenried, Germany, on or about 3 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Amalie Shauer, a human being by shooting her with a Thompson Sub Machine Gun.

Specification 2: In that *** did, between Hohenwart and Hohenried, Germany, on or about 3 July 1945, forcibly and feloniously, against her will, have carnal knowledge of Amalie Shauer, a female child below the age of sixteen years.

He pleaded not guilty to and, two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and both Specifications. Evidence was introduced of two previous convictions, one by special court-martial for disobeying an order of a non-commissioned officer in the execution of his office, in violation of Article of War 65, and one by summary court-martial for wrongfully entering off-limits premises, in violation of standing orders and of Article of War 96. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances in the case, he commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances

due or to become due and confinement at hard labor for life, designating the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

2. On 18 January 1946 the Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and held it legally sufficient to support the findings of guilty and the sentence as commuted. The Board of Review's holding which contains a summary of the evidence, a discussion of the law pertinent thereto and the reasoning and conclusions of the Board is attached to the record. The Acting Assistant Judge Advocate General with the European Theater approved the holding of the Board of Review and on 18 January 1946 forwarded the record of trial to the Commanding General, United States Forces, European Theater, for execution of the sentence.

3. On 19 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of Articles of War 48,49,50 and 50½ were terminated. On 25 February 1946 the record of trial, the holding of the Board of Review and First Indorsement of the Acting Assistant Judge Advocate General with the European Theater were forwarded to The Judge Advocate General, Washington, D. C., for such further action as was deemed appropriate.

4. The Board of Review in the Office of The Judge Advocate General, Washington, D. C., has examined the record of trial, concurs in the holding of the Board of Review in the Branch Office and for the reasons therein stated is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted and to warrant confirmation of the sentence. The penalty for either murder or rape in violation of Article of War 92 is death or imprisonment for life, as a court-martial may direct.

Thomas N. Tarbey, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trevethan, Judge Advocate.

(GCMO 168, 11 June 1946).

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

JAGK - CM 307372

13 JUL 1946

UNITED STATES	84TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Weinheim, Germany, 13 and 19 September 1945. Dismissal and total forfeitures. Confinement for eighteen (18) months.
First Lieutenant ROBERT D. MANLY (O-432906), Infantry	

OPINION of the BOARD OF REVIEW
KUDER, McAFEE and ACKROYD, 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 96th Article of War.

Specification 1: In that First Lieutenant Robert D. Manly, Company C, 159th Infantry, was, at Malsch, Germany, on or about 15 August 1945, drunk and disorderly in a civilian home, while in uniform.

Specification 2: In that First Lieutenant Robert D. Manly, ***, did, at Malsch, Germany, on or about 15 August 1945, wrongfully, willfully, and in violation of standing orders, fraternize with German civilians by entering the home of Wilhelm Kamuf.

Specification 3: In that First Lieutenant Robert D. Manly, ***, did, at Malsch, Germany, on or about 16 August 1945, wrongfully and unlawfully enter the dwelling of Wilhelm Kamuf.

CHARGE II: Violation of the 93d Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specifications and not guilty of Charge II and its Specification. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for eight years. The reviewing authority

approved the sentence but reduced the period of confinement to eighteen months and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. On 7 January 1946, that officer confirmed the sentence as approved and modified but remitted the eighteen months confinement and forwarded the record of trial to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater pursuant to Article of War 50½. On 19 January 1946, before action was taken by the Board of Review in the said Branch Office, the powers, statutory or otherwise, in so far as they pertain to courts-martial, of the Commanding General, United States Forces, European Theater, were suspended and, in accordance with instructions, the record of trial was forwarded to The Judge Advocate General for necessary action.

3. Evidence for the Prosecution.

Elizabeth Kamuf, a cigar worker from Malsch, Germany, testified that at about 9:30 on the evening of the 18th or 19th of August 1945, the accused came to the house where she and her parents lived at Malsch, Germany. Accused had visited this house twice before (R. 9) and on this occasion had come to see witness' sister on a purely social visit (R. 18). She was alone with accused in the kitchen for about five minutes until her sister Maria and her sister's friend joined them (R. 7). Accused was drinking Cognac and talked to no one, for "he was fully drunk" and "could not stand anymore" (R. 8). Later that evening an American lieutenant described by the witness as the "control" officer came to her home and asked her when the accused had arrived. The accused thereupon moved towards the "control" officer and "grabbed him in front by the necktie" and then left the house (R. 8). At this time the accused said something to the "control" officer but the witness did not understand it. Later, about two or three o'clock the next morning, accused knocked on the door and window of witness' home. Both window and door were closed and no one opened the door for him. Accused opened the shutter and climbed in through the window on the first floor. Witness had not opened the door for him because she was afraid of him as a result of what had happened earlier (R. 8,9). She did not see accused again at any time after this occurrence. Accused fell asleep after he climbed in the window and left the house at about seven o'clock in the morning (R. 10). Both witness and her father, Wilhelm Kamuf, are of German nationality (R. 9).

Helene Antrett, a waitress from Malsch, Germany, testified that she is the sister of Elizabeth Kamuf and lives in the house of Wilhelm Kamuf, her father. Witness, her father, and sister are of German nationality. Sometime during the night of 15 August 1945 she saw the accused knock on the door and window of the house and heard him call out her name and that of her sister. She was upstairs at the time and did not come down because she was afraid. She saw the accused tear the shutter open and climb in through the window. The following morning she looked out of a window on the top floor and saw him leave in an automobile. The door and window had been locked before accused entered and the latch which fastened the shutter had been torn off during the entry (R. 11,12).

First Lieutenant Thomas A. McLaren, Company A, 335th Infantry, testified that on the evening of 15 August 1945 he was acting as a patrol officer and stopped to check a civilian house in Malsch, Germany. He entered the living room of the house and asked two German girls he found there if there were any American soldiers in the house. About that time the accused "grabbed" him and turned him around saying, "What the hell are you doing here, what the God damned hell are you doing here. Come outside I want to talk to you" (R. 20). Accused was drunk and dressed in the uniform of a first lieutenant in the Army of the United States (R. 20). Witness said to the accused, "Just a minute Lieutenant, I will take care of you in a minute" and, turning his back to the accused, asked the girls if there were any more soldiers in the house. When the witness turned back to speak to accused, accused was gone (R. 19,20,21). Witness then left the house and searched for accused and heard someone running off in some bushes up the road from the house. Witness had a jeep turned around so that its headlights flashed up the road towards the bushes and, seeing a movement in the bushes about twenty-five yards from the jeep said, "You had better come out or I'll shoot." Since nothing happened, witness fired one round up in the air. He then walked up the road toward where he had seen the movement in the bushes and about twenty yards further on noticed accused lying in a ditch trying to hide under the bushes. Witness brought accused to the Command Post of Company C, 335th Infantry, and left him there with the Charge of Quarters. Witness entered the house in the first place on a routine check, for the two German girls that lived there had been treated for venereal disease and soldiers had been known to be "hanging around it" (R. 22,23).

The court, at the request of the prosecution and without objection by the defense, took judicial notice of the non-fraternization policy which existed as part of the standing orders of the European Theater (R.16).

4. After his rights as a witness were explained to him, the accused elected to remain silent, and no evidence was introduced in his behalf (R. 17,25).

5. <u>As to Specification 1.</u>

There can be no doubt that the accused was grossly drunk and disorderly while in uniform. He was "fully drunk," he "could not stand anymore," and, taken in connection with his unprovoked and abusive assault on Lieutenant McLaren, his return to the Kamuf residence in the early morning hours and his subsequent actions thereat, the evidence clearly shows that his conduct was such as to bring discredit upon the military service and was highly prejudicial to good order and military discipline. Although the drunkenness and disorderly conduct of the accused charged under Specification 1 did not occur at a public place but at a private, civilian German home, members of the occupation forces of the United States who so far forget their responsibilities as to act as did this accused in the presence of enemy civilians do a great disservice to their country and cause and cannot be

permitted to go unpunished.

As to Specification 2.

The court took judicial notice of the standing orders of the European Theater forbidding members of the occupation forces to fraternize with the enemy. The Acting Theater Judge Advocate in his review, referring to this non-fraternization policy, quoted Appendix "A" to letter dated 12 September 1944, Supreme Headquarters Allied Expeditionary Forces, as follows:

> Paragraph 4: "Non-fraternization is the avoidance of mingling with Germans upon terms of friendliness, familiarity or intimacy, whether individually or in groups, in official or unofficial dealings. However, non-fraternization does not demand rough, undignified or aggressive conduct, nor the insolent overbearance which has characterized Nazi leadership."
>
> Paragraph 5a: "There will be no fraternization between Allied personnel and the German officials or population."

Both the Acting Theater Judge Advocate and the Staff Judge Advocate, in their respective reviews, stated that this directive had received wide publicity. The court, then, from its own experience could infer in the absence of evidence to the contrary that the accused had knowledge of the non-fraternization policy. The defense did not complain of lack of notice of this policy or of the above quoted directive at the trial. Therefore, this case is easily distinguishable from CM P-595, Lattimer (4 Bull JAG 488), in which the record of trial was held legally insufficient because of lack of evidence showing that the accused had or should have had knowledge of an order relating to fraternization with natives in the Pacific Theater. The evidence is uncontradicted that the accused did in fact mingle with German civilians in violation of a standing order of the theater to which he was assigned.

As to Specification 3.

There is ample testimony that the accused did break and enter the dwelling of Wilhelm Kamuf without the consent of any of the occupants thereof. The Specification alleges that accused did "wrongfully and unlawfully enter the dwelling of Wilhelm Kamuf." The Specification sets out an offense cognizable under the 96th Article of War, and the evidence is clearly sufficient to establish the accused's guilt thereof (CM 220805, Peavy, 13 B.R. 73). Voluntary drunkenness is no defense to such an offense (CM 272624, Waters, 46 B.R. 327).

It is apparent from the evidence as a whole that the testimony of Elizabeth Kamuf as to the date of commission of the offenses charged was

in error or, in any case, that the events she relates as having happened on the 18th or 19th of August 1945 were the same as those occurring on the 15th and 16th of August 1945, concerning which the other witnesses in the case testified.

6. War Department records show that the accused is 29-1/2 years of age, is married and has one child. He is a high school graduate and completed four years of college at Kansas State College, majoring in General Science. He did not graduate from the latter institution. He was a student in the ROTC while in college and had two years experience as a student instructor of basic ROTC students. On 24 January 1942 he was appointed and commissioned a second lieutenant of Infantry in the Officers Reserve Corps and entered on extended active duty on 10 February 1942. He was promoted to the temporary grade of first lieutenant in the Army of the United States on 5 October 1942. According to the Staff Judge Advocate's review, accused arrived overseas on 20 March 1945 and has not been in combat.

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 of guilty and the sentence as approved by the reviewing authority and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of a violation of Article of War 96.

William B Kuder, Judge Advocate

C. E. McAfee, Judge Advocate

Gilbert B. Johnson, Judge Advocate

JAGK - CM 307372 1st Ind 16 August 1946

WD, JAGO, Washington 25, D. C.

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 Robert D. Manly (0-432906), Infantry.

2. Upon trial by general court-martial the accused was found guilty of being drunk and disorderly while in uniform in a civilian home at Malsch, Germany, of wrongfully, willfully and in violation of standing orders, fraternizing with German civilians, and of wrongfully and unlawfully entering the dwelling of one Wilhelm Kamuf, all in violation of Article of War 96. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for eight years. The reviewing authority approved the sentence but reduced the period of confinement to eighteen months and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. That officer confirmed the sentence as approved and modified but remitted the eighteen months' confinement and forwarded the record of trial to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater for action pursuant to Article of War 50½. On 19 January 1946, before action was taken in the said Branch Office, the powers, statutory or otherwise, insofar as they pertain to courts-martial, of the Commanding General, United States Forces, European Theater, were suspended and, in accordance with instructions, the record of trial was forwarded to The Judge Advocate General for necessary action.

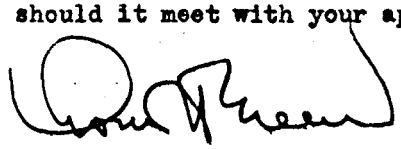
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and the sentence as approved and confirmed, and to warrant confirmation of the sentence.

The accused, on the evening of 15 August 1945, went to the home of Wilhelm Kamuf in Malsch, Germany, to pay a social visit with a daughter of the household. He had visited this home twice before. The occupants of the house were of German nationality and at that time the widely publicized non-fraternization policy of the European Theater was in effect. One of the daughters described the accused as "fully drunk" and as being intoxicated to the extent that he "could not stand any more." Later that evening Lieutenant McLaren, making a routine check of the house in pursuance of his duties as patrol officer, asked the two German girls he found there if there were any American soldiers present. Accused then

"grabbed" him and turned him around saying, "What the hell are you doing here, what the God damned hell are you doing here. Come outside I want to talk to you." Accused was drunk and dressed in the uniform of a first lieutenant in the Army of the United States. Lieutenant McLaren then told the accused he would take care of him in a minute and continued his questioning of the girls. Accused then left the house. Lieutenant McLaren completed his interrogation and went outside to search for the accused. He heard a rustling in some bushes some distance up the road from the house and, after warning whoever was in the bushes to come out, he fired one round up in the air. Since nothing happened as a result of this warning, he proceeded to investigate the area where he had heard the rustling and found the accused hiding in a ditch. He took the accused to a nearby command post and left him with the Charge of Quarters. About two or three o'clock the next morning accused returned to the Kamuf home, knocked on the door and window and called out the names of two of the daughters of the house. The door and window were shut and locked for the night and the daughters would not let him in because they were afraid of him as a result of his earlier conduct. Accused thereupon tore open the shutter and climbed in through the window. Accused fell asleep after he climbed in the window and left the house at about seven o'clock in the morning.

4. The accused is 29-1/2 years of age, is married and has one child. He is a high school graduate and attended Kansas State College for four years but did not graduate therefrom. He was a student in the ROTC while in college and had two years' experience as a student instructor of basic ROTC students. On 24 January 1942, he was commissioned a second lieutenant of Infantry in the Officers' Reserve Corps and entered on extended active duty on 10 February 1942. He was promoted to the temporary grade of first lieutenant in the Army of the United States on 5 October 1942. He arrived overseas on 20 March 1945. He had no combat experience. While there is nothing in the record to justify the acts of the accused, due to his long service, the subsequent relaxation of the ban on fraternization and the fact that the offenses of which the accused stands convicted are not of a serious criminal nature, I recommend that the sentence be confirmed 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.



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 262, 21 Aug 1946).

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

SPJGH - CM 307378

4 APR 1946

UNITED STATES v. Privates BERNARD W. TENNIS (33227644), Company I, 501st Parachute Infantry; FRANCIS A. WALKER (12201365), Headquarters Company, 3d Battalion, 501st Parachute Infantry; RALPH H. KELLER (11072354) and CARL H. TAYLOR (32945509), both of Service Company, 506th Parachute Infantry.	OISE INTERMEDIATE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by G.C.M., convened at Reims, France, 31 May and 1 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

REVIEW of the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

1. The accused were tried upon the following Charges and Specifications, respectively:

TENNIS

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

Specification 1: (Nolle prosequi).

Specification 2: In that Private Bernard W. Tennis, Company I, 501st Parachute Infantry, alias Corporal Charles S. Darby, Parachute Infantry, alias Corporal Charles T. Knight, Parachute Infantry, did, at Denford Manor, near Hungerford, England, on or about 19 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Richmond, Virginia, on or about 4 February 1945.

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

Specification: In that * * * having been duly placed in confinement in the Regimental Guardhouse, 506th Parachute Infantry, on or about 26 September 1944, did, at Denford Manor, near Hungerford, England, on or about 19 November 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that * * * did, in conjunction with Private Ralph H. Keller, Service Company, 506th Parachute Infantry, and Private Carl H. Taylor, Service Company, 506th Parachute Infantry, at Richmond, Virginia, on or about 8 January 1945, with intent to deceive military and civil authorities, falsely make and forge for his own use a certificate of honorable discharge from the Army of the United States in the name of Corporal Charles Terence Knight, Parachute Infantry.

KELLER

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

Specification: In that Private Ralph H. Keller, Service Company, 506th Parachute Infantry, alias Staff Sergeant Richard C. Barker, Parachute Infantry, did, at Denford Manor, near Hungerford, England, on or about 19 November 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at New York, New York, on or about 25 January 1945.

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

Specification: In that * * * having been duly placed in confinement in the Regimental Guardhouse, 506th Parachute Infantry, on or about 7 October 1944, did, at Denford Manor, near Hungerford, England, on or about 19 November 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that * * * did, in conjunction with Private Carl H. Taylor, Service Company, 506th Parachute Infantry, and Private Bernard W. Tennis, Company I, 501st Parachute Infantry, at Richmond, Virginia, on or about 8 January 1945, with intent to deceive military and civil authorities, falsely make and forge for the use of the said Private Carl H. Taylor a certificate of honorable discharge from the Army of the United States in the name of Staff Sergeant William C. Taylor, Parachute Infantry.

Specification 3: In that * * * did, in conjunction with Private Carl H. Taylor, Service Company, 506th Parachute Infantry, and Private Bernard W. Tennis, Company I, 501st

Parachute Infantry, at Richmond, Virginia, on or about 8 January 1945, with intent to deceive military and civil authorities, falsely make and forge for the use of the said Private Bernard W. Tennis a certificate of honorable discharge from the Army of the United States in the name of Corporal Charles Terence Knight, Parachute Infantry.

WALKER

CHARGE I: Violation of the 58thArticle of War.

Specification: In that Private Francis A. Walker, Headquarters Company, Third Battalion, 501st Parachute Infantry, alias Private Merle A. Broadhead, Parachute Infantry, did, at or near Hermitage, Berkshire, England, on or about 2 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Buffalo, New York, on or about 5 February 1945.

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

Specification: In that * * * having been duly placed in confinement in the Regimental Guardhouse, 506th Parachute Infantry, on or about 24 October 1944, did, at or near Hermitage, Berkshire, England, on or about 2 November 1944, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 96th Article of War. (Disapproved by the reviewing authority).

Specification: (Disapproved by the reviewing authority).

TAYLOR

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

Specification: In that Private Carl H. Taylor, Service Company, 506th Parachute Infantry, alias Staff Sergeant William C. Taylor, Parachute Infantry, alias Billy Taylor, did, at Upper Denford, near Hungerford, England, on or about 13 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Richmond, Virginia, on or about 4 February 1945.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that * * * did, in conjunction with Private Ralph H. Keller, Service Company, 506th Parachute Infantry, and Private Bernard W. Tennis, Company I, 501st Parachute Infantry, at Richmond, Virginia, on or about 8 January 1945, with intent to deceive military and civil authorities, falsely make and forge for his own use a certificate of honorable discharge from the Army of the United States in the name of Staff Sergeant William C. Taylor, Parachute Infantry.

Each accused pleaded not guilty to and, either all or three-fourths of the members of the court present at the time the votes were taken concurring, was found guilty of the Charges and Specifications against him. Evidence was introduced of one previous conviction of Tennis by special court-martial for absence without leave for ten days in violation of Article of War 61; of two previous convictions of Keller by summary court, one for being drunk in uniform in a public place in violation of Article of War 96 and one for absence without leave for four days in violation of Article of War 61; of three previous convictions of Walker, two by summary court for absence without leave for two days and for improper wearing of the uniform in violation of Articles of War 61 and 96, respectively, and one by special court-martial for absence without leave for 38 days in violation of Article of War 61; and of one previous conviction of Taylor by special court-martial for absence without leave for six days and for appearing in public in civilian clothes, in violation of Articles of War 61 and 96, respectively. All of the members of the court present at the time the vote was taken concurring, each accused was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Oise Intermediate Section, Communications Zone, United States Forces, European Theater, disapproved the findings of guilty of Specification 1 of each Charge III pertaining to accused Tennis and Keller; disapproved the findings of guilty of Charge III and its Specification as to accused Walker; disapproved the finding of guilty of Specification 1 of Charge II as to accused Taylor; approved each of the sentences and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentences but, owing to special circumstances in the case, commuted each to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50½.

2. On 11 January 1946 the Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and held it legally sufficient to support the findings of guilty as approved and the sentences as commuted. The Board of Review's holding which contains a summary of the evidence, a discussion of the law pertinent thereto and the reasoning and conclusions of the Board is attached to the record. The Acting Assistant Judge Advocate General with the European

Theater approved the holding of the Board of Review and on 11 January 1946 forwarded the record of trial to the Commanding General, United States Forces, European Theater, for execution of the sentences as commuted.

3. On 19 January 1946 the powers conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of Articles of War 48, 49, 50 and 50½ were terminated. On 12 February 1946 the record of trial, the holding of the Board of Review and First Indorsement of The Acting Assistant Judge Advocate General with the European Theater were forwarded to The Judge Advocate General, Washington, D. C., for such further action as was deemed appropriate.

4. The Board of Review in the Office of The Judge Advocate General, Washington, D. C., has examined the record of trial, concurs in the holding of the Board of Review in the Branch Office, a copy of which is attached hereto, and for the reasons therein stated is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentences as commuted and to warrant confirmation of the sentences. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (Article of War 58).

Thomas H. Tappy, Judge Advocate.
Joseph J. Alera, Judge Advocate.
Robert C. Trueblood, Judge Advocate.

(As to accused Tennis, GCMO 129,22 May 1946).
(As to accused Taylor, GCMO 130, 22 May 1946).
(. As to accused Keller, GCMO 133,24 May 1946).
((As to accused Walker, GCMO 134, 24 May 1946).

(92)

Classification cancelled
DEC 4 1946

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 4

11 JAN 1946

CM ETO 18749

UNITED STATES v. Privates BERNARD W. TENNIS (33227644), Company I, 501st Parachute Infantry, FRANCIS A. WALKER (12201365), Headquarters Company, 3rd Battalion, 501st Parachute Infantry, and RALPH H. KELLER (11072354) and CARL H. TAYLOR (32945509), both of Service Company, 506th Parachute Infantry.	OISE INTERMEDIATE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Reims, France, 31 May and 1 June 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING BY BOARD OF REVIEW NO. 4
DANIELSON, ANDERSON AND BURNS, Judge Advocates

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

2. Accused were tried upon the following charges and specifications:

TENNIS

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

Specification 1: (Nolle prosequi).

Specification 2: In that Private Bernard W. Tennis, Company I, 501st Parachute Infantry, alias Corporal Charles S. Darby, Parachute Infantry, alias Corporal Charles T. Knight, Parachute Infantry, did, at Denford Manor, near Hungerford, England, on or about 19 November 1944, desert the service of the United States and

did remain absent in desertion until he was apprehended at Richmond, Virginia, on or about 4 February 1945.

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

Specification: In that * * * having been duly placed in confinement in the Regimental Guardhouse, 506th Parachute Infantry, on or about 26 September 1944, did, at Denford Manor, near Hungerford, England, on or about 19 November 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: (Disapproved by the reviewing authority)

Specification 2: In that * * * did, in conjunction with Private Ralph H. Keller, Service Company, 506th Parachute Infantry, and Private Carl H. Taylor, Service Company, 506th Parachute Infantry, at Richmond, Virginia, on or about 8 January 1945, with intent to deceive military and civil authorities, falsely make and forge for his own use a certificate of honorable discharge from the Army of the United States in the name of Corporal Charles Terence Knight, Parachute Infantry.

KELLER

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

Specification: In that Private Ralph H. Keller, Service Company, 506th Parachute Infantry, alias Staff Sergeant Richard C. Barker, Parachute Infantry, did, at Denford Manor, near Hungerford, England, on or about 19 November 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at New York, New York, on or about 25 January 1945.

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

Specification: In that * * * having been duly placed in confinement in the Regimental Guardhouse, 506th Parachute Infantry, on or about 7 October 1944, did, at Denford Manor, near Hungerford, England, on or about 19 November 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: (Disapproved by the reviewing authority).

(94)

Specification 2: In that * * did, in conjunction with Private Carl H. Taylor, Service Company, 506th Parachute Infantry, and Private Bernard W. Tennis, Company I, 501st Parachute Infantry, at Richmond, Virginia, on or about 8 January 1945, with intent to deceive military and civil authorities, falsely make and forge for the use of the said Private Carl H. Taylor a certificate of honorable discharge from the Army of the United States in the name of Staff Sergeant William C. Taylor, Parachute, Infantry.

Specification 3: In that * * * did, in conjunction with Private Carl H. Taylor, Service Company, 506th Parachute Infantry, and Private Bernard W. Tennis, Company I, 501st Parachute Infantry, at Richmond, Virginia, on or about 8 January 1945, with intent to deceive military and civil authorities, falsely make and forge for the use of the said Private Bernard W. Tennis a certificate of honorable discharge from the Army of the United States in the name of Corporal Charles Terence Knight, Parachute Infantry.

WALKER

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

Specification: In that Private Francis A. Walker, Headquarters Company, Third Battalion, 501st Parachute Infantry, alias Private Merle A Broadhead, Parachute Infantry, did, at or near Hermitage, Berkshire, England, on or about 2 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Buffalo, New York, on or about 5 February 1945.

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

Specification: In that * * * having been duly placed in confinement in the Regimental Guardhouse, 506th Parachute Infantry, on or about 24 October 1944, did, at or near Hermitage, Berkshire, England, on or about 2 November 1944, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 96th Article of War. (Disapproved by the reviewing authority).

Specification: (Disapproved by the reviewing authority).

TAYLOR

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

Specification: In that Private Carl H. Taylor, Service Company, 506th Parachute Infantry, alias Staff Sergeant William C. Taylor, Parachute Infantry, alias Billy Taylor, did, at Upper Denford, near Hungerford, England, on or about 13 November 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Richmond, Virginia, on or about 4 February 1945.

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

Specification 1: (Disapproved by the reviewing authority).

Specification 2: In that * * * did, in conjunction with Private Ralph H. Keller, Service Company, 506th Parachute Infantry, and Private Bernard W. Tennis, Company I, 501st Parachute Infantry, at Richmond, Virginia, on or about 8 January 1945, with intent to deceive military and civil authorities, falsely make and forge for his own use a certificate of honorable discharge from the Army of the United States in the name of Staff Sergeant William C. Taylor, Parachute Infantry.

Each accused pleaded not guilty and, either all or three-fourths of the members of the court present at the time the votes were taken concurring, was found guilty of the charges and specifications against him. Evidence was introduced of one previous conviction of Tennis by special court-martial for absence without leave for 10 days in violation of Article of War 61. Evidence was introduced of two previous convictions of Keller by summary court, one for appearing drunk in uniform in a public place in violation of Article of War 96, and one for absence without leave for four days in violation of Article of War 61. Evidence was introduced of three previous convictions of Walker, two by summary court for absence without leave for two days and for improper wearing of the uniform in violation of Articles of War 61 and 96 respectively, and one by special court-martial for absence without leave for 38 days in violation of Article of War 61. Evidence was introduced of one previous conviction of Taylor by special court-martial for absence without leave for six days and for appearing in public in civilian clothes, in violation of Articles of War 61 and 96 respectively. All of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, Oise Intermediate Section, Communications Zone, United States Forces, European Theater, disapproved the findings of guilty of Specification 1 of Charge III as to each Tennis and Keller, disapproved the findings of guilty of Charge III and its Specification as to Walker, disapproved the finding of guilty of Specification 1 of Charge II as to Taylor, approved each of the sentences, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentences but, owing to special circumstances in the case, commuted each to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentences pursuant to Article of War 50½.

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

a. Proof of Initial Absences. On 24 October 1944, accused Walker was confined in the guardhouse of his organization near Hungerford, England (R23,36-37). On 2 November 1944, he asked to go on sick call, and while at the hospital at Hermitage, he escaped from his guard, and was not seen again (R37-39,41).

About 13 November 1944, accused Taylor failed to appear for scheduled duty as a waiter for officers of his organization near Hungerford, England, whereupon his commanding officer caused a search to be made and personnally participated in the search. Taylor could not be found in camp. He had no authority to be absent and was not seen again by his commanding officer (R35-36).

On 26 September 1944, accused Tennis was confined in a guardhouse used by both the 501st and 506th Parachute Infantry Regiments, and on 7 October 1944, accused Keller was confined in the same guardhouse, a large "nissen hut" surrounded by barbed wire, with a guard stationed at each end (R23-25,27; Pros. Exs. A,B). Both men were present at roll call at 1800 hours on 18 November 1944, but at 0545 hours on 19 November 1944, both were absent. Their release had not been authorized (R28-29,32).

b. Proof of Termination of Absences. On 25 January 1945, Keller surrendered himself to an agent of the Federal Bureau of Investigation in New York City (R50; Pros. Ex. E).

On 4 February 1945, Tennis and Taylor were apprehended and arrested by an army agent while they were in bed in a house in Richmond, Virginia (R45). Tennis identified himself as Charles Terence Knight and produced a certificate of honorable discharge from the Army of the United States in that name (R46-47; Pros. Ex. D). Taylor identified himself as William C. Taylor and produced a certificate of honorable discharge from the Army of the United States in that name (R45-46; Pros. Ex. C). They dressed themselves in civilian clothing and had ration books, a discharge button, and some articles of "GI" clothing in their possession (R47). It was shown by testimony of an officer that the certificates of discharge did not have the appearance of genuine documents (R59-60).

On 5 February 1945, Walker was apprehended and arrested by an army agent in a hotel in Buffalo, New York. He at first stated that his name was McCauley. He dressed himself in civilian clothing (R50-51,58).

c. Pre-trial Statements. On 1 February 1945, Keller signed a voluntary written statement, which was admitted in evidence without objection and limited as evidence against him only (R56-57; Pros. Ex. I). He admitted escaping from the guardhouse by crawling under barbed wire with some companions. They procured forged "travel orders" and Keller drew a partial payment from a finance officer. They later attempted, without success, to obtain transportation by plane at Prestwick, Scotland, later went to Glasgow, and then returned to London. After presenting a copy of their orders, they finally embarked on a ship from Southampton, and arrived in the United States on 12 December 1944. In a hotel in New York City, they prepared new orders and were held by the military police for one day because of failure to pay their hotel bill, until one of the group could obtain a partial payment from a finance officer. After a futile trip to Ohio in search of "Army discharges",Keller went to the supply room at the "War College" in Washington, and by false representations, secured and filled out requisitions which he

took to the Pentagon Building and procured "50 discharges" and other forms. After staying in Richmond for about three weeks he went to New York and surrendered himself to the "FBI" (Pros. Ex. I).

On or about 15 February 1945, Tennis, Walker and Taylor each signed voluntary written statements, each of which was admitted in evidence without objection and limited as evidence against only the accused who made it (R52-56; Pros. Exs. F,G,H). Each admitted leaving his organization, and the description of each as to the manner in which he returned to the United States is substantially like that given by Keller. Walker admitted leaving the other three accused in New York City, after which he lived with various women in different cities, had false orders made, bought civilian clothing, carried a draft card belonging to a person named McCauley, and used the name Broadhead before he was finally apprehended in Buffalo. Taylor and Tennis each admitted being present with Keller in a Richmond hotel at the time the certificates of discharge were typed, after Keller's return from Washington. Taylor admitted that they used the discharges for identification, and that they bought civilian clothing after completing the discharges (Pros. Exs. F,G,H).

4. After the rights of each accused were explained to him, each elected to testify (R63-64,74-76,86-87,106-107).

Keller testified that he enlisted in 1942, attended officers' candidate school, became a "platoon officer" and received an "honorable discharge" as a result of findings of a reclassification board. After reinduction in 1944, he joined the "paratroopers" and came overseas in September of that year (R64,66,72). After being in the guardhouse in England for six weeks, he left with Tennis and another prisoner, intending to return to the army, but not to the stockade (R65,67). He later met Walker and Taylor in London, where he prepared a stencil and mimeographed orders for the transfer of all four accused to the United States (R67-68; Pros. Ex. J). He travelled under the name Barker, Walker under the name Broadhead, and Tennis under the name Darby (R68-69). Witness later made out false honorable discharges in the names of William C. Taylor and Charles Terence Knight, and signed each without authority with the fictitious name "Charles A. McArdle, Colonel, Infantry" (R69-70,75; Pros. Exs. C,D). His pre-trial statement was a true account of his activities (R71-72).

Tennis testified that he lived in Virginia and had never seen his mother. He had intended to become a concert violinist. In order to overcome nervousness, he had volunteered for the paratroops, and jumped in the invasion of Normandy on 6 June 1944 (R77). He later stayed in the guardhouse in England under "AWOL" charges for about two months, before finally leaving with Keller and two other prisoners (R78-79). He returned to the states by means of false special orders under the name Charles S. Darby (R80; Pros. Ex. J). He signed the name Charles T. Knight on the reverse side of the discharge typed in his presence by Keller, which he used to obtain a whiskey ration book (R80-81). He had bleached his hair since the fall of 1944 (R79). He put on civilian clothes but kept a complete army uniform, and refused an offer of employment (R78,81,82,84). He always intended to return to the army, but wanted to rest his nerves and "take some time off and drink as much as I could as it helps" (R78,84).

Taylor testified that he had always been a performer, had lived with "show people", and had not seen his parents since he came out of an orphanage at the age of 11 years (R88). He received injuries in a parachute jump at Fort Benning, was refused medical aid and assigned to duty before being cured, whereupon he absented himself without leave and received medical treatment daily for about 15 days. He was convicted by court-martial and volunteered to go overseas after being promised a furlough and his freedom, neither of which he received (R89-91). He absented himself without leave in England by failing to return to duty as officers' orderly from a pass (R91-92). He met Keller and returned to the United States by means of the false orders which bore his correct name but a false grade and serial number (R91,94-95; Pros. Ex. J). He signed the honorable discharge, which he saw partially prepared by Keller, with the fictitous name William C. Taylor, and used the discharge as a means of identification (R94). He was not satisfied with the treatment he received in the army, but intended to return to it (R91-93). He applied for and received, about 1 February 1945, a special soldiers' membership in the National Showmen's Association, Inc. in his theatrical name of Billy Taylor (R95-99; Pros. Ex. K,L; Def. Ex. 3). He had not paid any dues in a guild or union, of which he was a member, since May 1943, and it would have been impossible for him to obtain a job in the "show world" without paying them (R99-100,102). His pre-trial statement was true (R95).

Walker testified that he enlisted in the paratroops, landed in Normandy on 6 June 1944 with them, was wounded in action at Carentan, and received the Purple Heart and a unit citation (R107-108). He was later in a guardhouse in England for about six months, and about 2 November 1944, left a hospital without authority after being taken there under guard (R108-109). He came to the United States with the other accused by means of the false orders, under the name of Merle A. Broadhead (R110-111). He gave the name Robert McCauley to the agent who arrested him in Buffalo, at which time he had been wearing civilian clothing for about four or five days. His pre-trial statement was true (R111).

On behalf of Taylor, a soldier who knew him at Fort Benning in July or August 1944 testified that Taylor received injuries in a parachute jump (R105). It was stipulated that a witness, if present, would testify that on 3 February 1945 he informed both Tennis and Taylor that the "F.B.I. were coming to investigate" their whereabouts; that they were apprehended the next morning at the same address at which they had been living; and that Tennis had refused offers of a job and a recommendation for another job (R76,87-88; Def. Exs. 1,2). Stipulated testimony of two female witnesses showed that on the evening of 4 February 1945, Walker's father advised him that army agents were looking for him, whereupon Walker stated that he would surrender himself the next afternoon if the agents did not appear the following morning (R106; Def. Ex. 5).

5. a. Escapes from confinement. The evidence for the prosecution and testimony of Tennis, Keller and Walker clearly show that they were confined at the times and places alleged, and that

Tennis and Keller left the guardhouse, and Walker left his guard while on sick call, at the times and places alleged, without being set at liberty by proper authority. Walker's act in eluding his guard under the circumstances shown constitutes an escape from confinement within the meaning of Article of War 69 (CM ETO 3153, Van Breemen; CM ETO 12128, Bailey). The confinement of each of such three accused is presumed to have been legal, and all of the elements of the offenses charged were adequately proved (MCM, 1928, par. 139b, p. 154).

b. Desertions. Initial absences without leave of Tennis, Keller and Walker were clearly shown by their escapes from confinement. Taylor's initial absence was established by his own testimony and that of his commanding officer. Other evidence for both prosecution and defense clearly establishes their continued absences without leave during the periods alleged. The fact that they absented themselves without leave from their organizations in an active theater of operations for periods of time ranging from 67 to 95 days would, in itself, constitute an adequate legal basis to support the court's finding of an intent to desert on the part of each accused (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll; CM ETO 5406, Aldinger). In addition, the court had before it other circumstances from which it might have inferred such intent. It appears without dispute that each accused except Taylor escaped from confinement, and each willfully used false orders to secure passage on a ship from England to the United States. They wrongfully drew money from a finance officer on at least two occasions, and Keller wrongfully requisitioned forms for honorable discharges. For the obvious purpose of avoiding detection, each accused assumed a fictitious name or names at various times during his absence. Tennis bleached his hair. Two accused used false honorable discharges as a means of identification, and all except Keller admitted wearing civilian clothing. They were dissatisfied with the army, and each accused, except Keller, initially denied his identity at the time he was apprehended. Such circumstances constituted abundant proof from which the court could properly infer an intent on the part of each accused not to return to the service (CM ETO 952, Mosser, 3 BR (ETO) 177; CM ETO 2216, Gallagher; CM ETO 2901, Childrey et al; CM ETO 11201, Livingston; MCM, 1928, par. 130a, pp. 143-144).

c. Falsely making and forging certificates of discharge. The prosecution established that at the time of their apprehension, Tennis and Taylor each exhibited a false certificate of honorable discharge from the Army of the United States in the fictitious names of Charles Terence Knight and William C. Taylor respectively, as alleged. Keller admitted in his testimony that he made and signed the certificates with a fictitious name, and this judicial confession is alone sufficient to establish his guilt of the specifications against him. In their pre-trial statements, and in their testimony at the trial, both Tennis and Taylor admitted that they were present with Keller at the time he typed the discharges, and that each signed his discharge with the fictitious name used by him, and subsequently used his discharge as a means of identification. Under the circumstances disclosed by the record of trial the reception in evidence of photostatic or photographic copies of the certificates of honorable discharge was

clearly proper (CM ETO 1631, Pepper, 5 BR (ETO) 125,152; CM ETO 17473, Clark; United States v. Manton, 107 F(2d) 834,845, cert. denied 309 U.S. 664, 84 L.Ed. 1012). The evidence warrants the inference that Tennis and Taylor, in conjunction with each other and with Keller, aided and abetted in the making or forging of the certificates so as to make each liable as a principal with Keller (see CM ETO 1453, Fowler; CM ETO 3740, Sanders et al; CM ETO 3859, Watson et al). The forging of a certificate of honorable discharge from the army, as here alleged, is made expressly a Federal offense by Title 18, section 136, United States Code (1940 Ed.), (18 USCA 136), and the offense was properly charged as a violation of Article of War 96 (MCM, 1928, par. 152c, pp. 188-189; see CM 261047, DeAngelo, 40 BR 105 (1944), III Bull JAG 420).

After the prosecution had rested its case, the defense made a motion for a finding of not guilty of specifications 2 and 3 of Charge III as to Keller because there was no competent evidence of his guilt of the offenses charged. The law member denied the motion, subject to objection of any member of the court (R61-63). While this motion may have been well taken at the time it was made, Keller thereafter voluntarily testified under oath and admitted his guilt of the offenses charged in such specifications. Moreover, the defense waived the question of the correctness of denial of the motion by failing to renew such motion at the close of its own testimony (CM ETO 564, Neville, 2 BR (ETO) 135; CM ETO 1249, Marchetti, 4 BR (ETO) 143; CM ETO 4165, Fecica; III Bull. JAG 185-186).

6. Following arraignment, and before their pleas were entered, defense counsel moved to sever the case of each accused upon the stated grounds that Walker would be prejudiced by the trial of the other three accused for falsely making and forging the certificates of discharge, and that the evidence as to each of the accused would prejudice each of the other accused, each of whom had a defense distinct and separate from the other (R13-14). Nothing appears in the record of trial to indicate that the accused in fact had antagonistic defenses or that any accused was prejudiced in any manner by a common trial. Upon all of the evidence it is clear that the court did not abuse its sound judicial discretion in denying the motion (CM ETO 6148, Dear et al; CM ETO 15274, Spencer et al).

7. The charge sheets show that Tennis is 24 years seven months of age and was inducted 14 October 1942. Walker is 20 years five months of age and enlisted 4 December 1942. Keller is 22 years eight months of age, had prior service from 25 June 1942 to 2 December 1942 and from 3 December 1942 to 18 December 1943, and was inducted 10 April 1944. Taylor is 26 years of age and was inducted 1 October 1943. Neither Tennis, Walker nor Taylor had prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. 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 as approved and the sentences as commuted.

LAW LIBRARY
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

Lester A. Hamlin, Judge Advocate

John R. Anderson, Judge Advocate

John A. Burns, Judge Advocate

06067

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 11 JAN 1946 TO: Commanding General, United States Forces, European Theater (Main), APO 757, U.S. Army.

1. In the case of Privates BERNARD W. TENNIS (33227644), Company I, 501st Parachute Infantry, FRANCIS A. WALKER (12201365), Headquarters Company, 3rd Battalion, 501st Parachute Infantry, and RALPH H. KELLER (11072354) and CARL H. TAYLOR (32945509), both of Service Company, 506th Parachute Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentences as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 18749. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 18749).

B. FRANKLIN RITER
Colonel, JAGD,
Acting Assistant Judge Advocate General.

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

SPJGN-CM 307385

UNITED STATES	)	THIRD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Munich, Germany, 4 May 1945.
First Lieutenant EDWARD S.	)	Dismissal, total forfeitures,
WOOD (0-385846), Infantry.	)	and confinement for ten (10)
	)	years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, 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 75th Article of War.

Specification 1: In that First Lieutenant Edward S. Wood, Company "A", 15th Infantry, being present with his platoon while it was engaged with the enemy, did near Ormersviller, France, on or about 15 March 1945, shamefully abandon the said platoon and seek safety in the rear.

Specification 2: (Disapproved by reviewing authority).

He pleaded not guilty to, and was found guilty of, the Charge and the Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for forty years. The reviewing authority disapproved the finding of guilty of Specification 2 of the Charge, approved the sentence but

reduced the period of confinement to twenty years, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces European Theater, on 7 January 1946, confirmed the sentence but reduced the period of confinement to ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and, pursuant to Article of War 50½, withheld the order directing execution of the sentence. The powers conferred by direction of the President upon the Commanding General, United States Forces European Theater, under the provisions of Articles of War 48, 49, 50, and 50½, having been terminated on 19 January 1946, the record of trial was forwarded to The Judge Advocate General for appropriate action.

3. Evidence for the prosecution: Accused was the platoon leader of the second platoon of Company A, 15th Infantry, on 15 March 1945 (R. 9). On that date the First Battalion, to which Company A belonged, was moving up to a forward assembly area, in preparation for an attack in the vicinity of Ormersviller, France (R. 10, 22). Heavy enemy artillery fire developed as the battalion approached the assembly area and Company B, which was leading the movement, suffered casualties. The remainder of the battalion, including Company A, dispersed and took cover. Captain John S. Harvey, Commanding Officer of Company A, and Major Kenneth B. Potter, Commanding Officer of the Battalion, made a reconnaissance to find a suitable position for Company A. When Captain Harvey returned to his Company, accused approached him and said "he couldn't take it any more and would like to go to the rear" (R. 10, 21). Captain Harvey replied that he did not think Major Potter would evacuate the accused and "suggested" that he remain with his platoon and move up with the company. Following this conversation accused rejoined his organization (R. 10-11).

Company A, including accused and his platoon, moved to the forward assembly area and waited until dark when the attack began (R. 11). Some artillery fire was encountered as the company moved up to the line of departure (R. 11-12). The company moved across this line with the first and third platoons leading and with accused's platoon in support. Some small arms fire as well as artillery fire was received. When the company was about 300 yards from Ormersviller, an enemy tank was sighted and accused's platoon was ordered to move 200 yards to the rear while the situation was reconnoitered. A patrol having reported that there "wasn't much" in the town, word was sent back to accused's platoon to move up. The first and third platoons occupied the town but accused's platoon failed to join them. A guide was sent back and he returned with the platoon but the accused was not with it (R. 12-13). Captain Harvey had not given accused permission to be absent at any time (R. 13).

According to Private First Class Samuel Erickson, radio operator

with the second platoon, accused and the platoon had moved forward that night under fire (R. 32-33). While advancing Private Erickson looked back and saw accused on the ground. He was not hit but he told Private Erickson that he was "awfully nervous" (R. 33). Private Erickson thought accused was "kind of shocked" and doubted that he could have gone on any farther (R. 34). Every time a shell landed nearby he shook (R. 36). He told Private Erickson to take the radio "on up" and after appointing another to take charge of the platoon, went back to the Battalion Command Post (R. 22, 33, 35). The Command Post was located in a house two or three hundred yards to the rear and was a position of relative safety (R. 26).

Accused reported to Major Potter that "he just couldn't take it any more" and asked "to be sent back to the medics." Major Potter responded that accused was no different than any of the rest and could "take it" as well as anyone. He told accused that he could stay at the Command Post that night and rejoin his company in the morning (R. 22). At the time of the conversation accused appeared to be lucid and was "as calm as the circumstances warranted" (R. 28). Accused returned to Company A the following morning (R. 13).

On 2 April 1945, accused, after having been warned of his rights under Article of War 24, gave a statement to the investigating officer (R. 38, 39, 40; Pros. Ex. A). In his statement accused said:

> "On 15 March 1945, at night, Company 'A', 15th Infantry, advanced towards Ormersviller, France. My platoon was the support platoon, following the first and third platoons. Our own artillery was shelling to our right front. A machine gun opened up on our right flank. I don't know whether it was friendly or not. Everybody hit the ground and the company stopped for about five minutes. I was very nervous. Lying on the ground, I felt I could not get up and go any farther. The company then moved forward. One of my squads, under the leadership of S/Sgt Aubrey Moore, passed me as I was sitting up. I told S/Sgt Moore to tell S/Sgt Voca to take charge of the platoon as I could not go on any farther. Then my platoon passed by me. (* * * I was not present with the platoon when Captain Harvey gave orders for the platoon to withdraw 200 yards). I sat there for awhile. Then I got up and went back to the medics. I was told that I had to see Major Potter, the battalion commander. I did that. I told Major Potter that I reached a state where I could go no farther. He said he would take me up with him when he went and that I was to go back to my company. We went forward and it was about 0400 hours when he told me to go into the Company 'A' CP as we passed

it. I went in and reported to Captain Harvey, my Company Commander" (Pros. Ex. A).

4. Evidence for the defense: Accused took the witness stand in his own behalf (R. 60). He testified that he joined the 15th Infantry in October 1944. Except for two periods of ten days each when he was in the hospital, he had been in combat continuously since that time (R. 68). In the attack on Ormersviller on 15 March his platoon was supporting the first and third platoons. There was considerable mortar fire from their own lines and, as they moved up, suddenly there was firing on the right flank. Everybody "hit" the ground and accused "went to pieces." When the firing abated and the company resumed their forward movement he "just couldn't seem to get up." He talked to a radio operator and to a noncommissioned officer about getting someone to take charge of the platoon (R. 61). He felt at the time that he was in no condition, mentally or physically, to lead the platoon in combat and that his sergeant "could do a better job" (R. 61, 65). The platoon went on and about five minutes later accused got up and went back to the battalion aid station and from there he went to see Major Potter (R. 61). The battalion command post was 700 yards to the rear and accused was "pretty well recovered" by the time he got there (R. 68, 69). He felt he had to talk to someone "to prevent /his/ leading the platoon into some situation where it would be /his/ fault if /he/ did" (R. 61). Shelling affected him worse than it did others because others were not "built" the same as he (R. 62). He insisted that in going back to the battalion command post he thought he was doing right (R. 64). He was aware that he was leaving the scene of combat (R. 67).

Private First Class Francis L. Vesey observed accused during the attack on the night of 15 March. Accused was "jittery" and was looking for some of his men that he said were lost. Five minutes later he approached a sentry and "didn't know the pass word and was standing there like in a fog." Private Vesey had to vouch for accused. He appeared "dumbfounded" and "didn't know anything." Private Vesey advised accused to follow him to the aid station and accused walked after him without a word (R. 52-53). Private First Class Herbert Tetterton saw accused on the morning of 16 March and noted that he was "very shaken and tired" (R. 55).

As an "unsworn statement" accused offered statements by Staff Sergeant Aubrey T. Moore and Sergeant Fred Vocca (R. 58, 59). Sergeant Moore saw accused the night of the attack at the time he turned over the platoon to a noncommissioned officer. Accused did not seem to be able to move and sounded very broken or shaken. He was at the battalion command post later and appeared physically exhausted (R. 68). Sergeant Vocca saw accused at the time he failed to give the password. "He did not seem to recognize us at first and

was talking rather strangely and did not seem to be like his usual self." He appeared to be "mentally exhausted." Sergeant Vocca felt accused was in no condition to go on with the company (R. 59-60).

Major Potter, who was introduced as a character witness for accused, testified, "I have never found him to lie to me and tell an untruth to me" (R. 43-44).

5. Rebuttal evidence for prosecution: Major J. Robert Campbell, Division Psychiatrist, examined accused on the 28th day of March 1945 (R. 72-73, 85-87). In his opinion accused was able to distinguish right from wrong and adhere to the right on 15 March 1945 (R. 79). Major Campbell was of the further opinion that accused was "fully competent and able physically and mentally to carry on with his assigned military duties at that time." At no time had accused suffered "such impairment of his mental capacity that he was a fit subject for medical evacuation" (R. 88).

6. It is alleged that accused, being present with his platoon while it was engaged with the enemy near Ormersviller, France, on 15 March 1945, did shamefully abandon the platoon and seek safety in the rear. The offense is charged as a violation of Article of War 75.

The undisputed evidence in this case discloses that on the night of 15 March 1945 accused's platoon was supporting two other platoons in an attack on the enemy at Ormersviller, France. The company came under enemy fire and took cover. When the advance was resumed accused asked a noncommissioned officer to take charge of the platoon and then proceeded toward the rear. He had no permission to be absent.

Going to the rear or leaving the command when engaged with the enemy constitutes misbehavior before the enemy. Winthrop's Military Law and Precedents, 2nd Ed. 1920, p. 623. Such behavior constitutes a violation of Article of War 75. CM ETO 1249, Marchetti, 4 BR (ETO) 147; CM ETO 3196, Puleio, 9 BR (ETO) 37.

Accused testified that he "went to pieces" during the shelling and "just couldn't seem to get up." He felt mentally and physically unable to continue. Other witnesses described accused as "jittery," "dumbfounded," "in a fog" and "mentally exhausted." On the other hand the battalion commander, who saw accused but a short time later described accused as lucid in speech and as calm as the circumstances warranted. The division psychiatrist, testifying upon the basis of a psychiatric examination of accused two weeks later, was of the opinion that accused was physically and mentally able to carry on with his duties on 15 March and that at no time was his mental capacity impaired so that his medical evacuation was required.

If it were established that accused was "suffering under a

genuine and extreme illness or other disability at the time of the alleged misbehavior" it would constitute a defense to the charge. Winthrop's Military Law and Precedents, 2nd Ed. 1920, p. 624. Thus in CM ETO 15661, Satmary, it was held by the Board of Review (European Theater) that uncontradicted proof of combat exhaustion rendering the accused incapable of performing his duties was a legal defense to the charge of misbehavior before the enemy, notwithstanding the admitted sanity of the accused. Where, however, the evidence is conflicting as to the existence of the disability a question of fact is created for the court to determine and its finding should not be disturbed without good reason.

In the case under discussion such an issue of fact was raised by the evidence of record and the court by its findings has resolved the issue against accused. Since no sound reason appears for interfering with the findings in the present case, the Specification is, accordingly, sustained. CM ETO 1404, Stack, 4 BR (ETO) 279; CM ETO 4095, Delre, 11 BR (ETO) 355.

7. The accused is about 28 years of age having been born 14 August 1918. He is a native of Connecticut and had his preparatory school training at the New York Military Academy from which he was graduated in 1938. By virtue of his R.O.T.C. training he was commissioned a second lieutenant in the Infantry Reserve on 1 December 1939. He entered upon active duty on 16 July 1941 and on 1 July 1943 was promoted to the grade of first lieutenant.

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 of the sentence. Dismissal is authorized upon conviction of a violation of the 75th Article of War.

Charles Stephen, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

Robert J. Clarner, Judge Advocate.

SPJGN-CM 307385 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War APR 1 8 1946

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 Edward S. Wood (0-385846), Infantry.

2. Upon trial by general court-martial this officer was found guilty of shamefully abandoning his platoon while it was engaged with the enemy, and seeking safety in the rear, near Ormersviller, France, on 15 March 1945; and of similar misbehavior, near Mauschbach, Germany, on 19 March 1945; in violation of Article of War 75. 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 forty years. The reviewing authority disapproved the finding of guilty of misbehavior near Mauschbach, Germany, on 19 March 1945, approved the sentence but reduced the period of confinement to twenty years, and forwarded the record of trial for action under Article of War 48. The Commanding General, United States Forces European Theater, confirmed the sentence on 7 January 1946, but reduced the period of confinement to ten years; designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement; and, pursuant to Article of War 50½, withheld the order directing execution of the sentence. The power conferred by direction of the President upon the Commanding General, United States Forces European Theater, under the provisions of Articles of War 48, 49, 50 and 50½, having been terminated on 19 January 1946, the record of trial was forwarded to The Judge Advocate General for appropriate action.

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 approved findings and sentence and to warrant confirmation thereof.

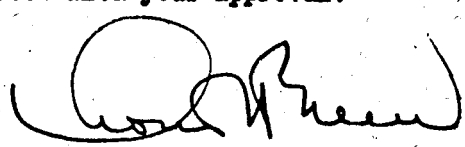
Accused's platoon was supporting two other platoons of Company A, 15th Infantry, in an attack on the enemy near Ormersviller, France, on the night of 15 March 1945. The company came under enemy fire and took cover. When the advance was resumed, accused, although he had not been hit, remained on the ground and said he could not continue. He asked a noncommissioned officer to take charge of the platoon and in a few minutes proceeded 200 to 300 yards to the rear to the Battalion Command Post and reported to the Battalion Commander that he "couldn't take it any more." The latter had him remain there that night and rejoin his company in the morning. The accused contended that he "went to pieces" under the shelling and was unable to go on. Other witnesses described him as "jittery," "kind of shocked," "dumbfounded," "in a fog" and "mentally exhausted." Accused's battalion commander, however, thought accused was as calm as the circumstances warranted and the division psychiatrist was of the

opinion that accused was physically and mentally able to carry on with his duties.

The record of trial and attached papers clearly show that accused is constitutionally a person of weak psychological makeup. Although in combat for some fifty days prior to 15 March, he had never adjusted himself to battle conditions and exhibited an increasing sensitivity to such conditions, culminating in the offense charged. It should be noted that in abandoning his platoon he did not flee precipitantly and leave his unit in confusion but instead placed a noncommissioned officer in charge before seeking medical assistance at the rear. Undoubtedly because of this action on accused's part no adverse effect resulted from his leaving the scene. Accused has now been under restraint, pending trial and action on his case, for about a year. In view of all the circumstances I recommend that the sentence be confirmed but that the confinement be reduced to five years, and that the sentence as thus modified be ordered executed.

4. United States Senator Brien McMahon called the Board requesting clemency for accused. Mr. Edward F. Wood of New York City, father of accused, appeared before the Board, in his behalf. The Board has also given consideration to letters from Lieutenant Colonel Tom B. Blocker, F.A., to the Commanding General, United States Forces European Theater; from the father of accused to Colonel Albert W. Johnson of this office; from Mrs. Barbara T. Wood, wife of accused, to the Under Secretary of War; from the father of accused to the Under Secretary of War; from Mr. Fred S. Sly, New York City, to the Under Secretary of War; and from the accused to his father.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

8 Incls
1 - Record of trial
2 - Form of action
3 - Ltr. fr. Lt.Col. Blocker w/incl
4 - Ltr. fr. Mr. E.F. Wood to Col. Johnson
5 - Ltr. fr. Mrs. Barbara T. Wood
6 - Ltr. fr. Mr. E. F. Wood to USW
7 - Ltr. fr. Mr. Fred S. Sly
8 - Ltr. fr. accused to his father

(GCMO 116, 10 May 1946).

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

JAGK - CM 307416

23 JUL 1946

UNITED STATES	)	82ND AIRBORNE DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 19 February 1946. Dismissal.
First Lieutenant RALPH T. JONES (O-1319285), Infantry	)	

HOLDING by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

---

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Ralph T. Jones, Company I, 326th Glider Infantry, did at Fort Bragg, North Carolina, on or about 29 January 1946, wrongfully and dishonorably fail to pay the Fort Bragg Post Exchange the sum of Two-hundred and Fifty Dollars ($250.00), which sum represented worthless checks cashed by the Fort Bragg Post Exchange for Lieutenant Jones.

Specification 2: In that First Lieutenant Ralph T. Jones, ***, being indebted to the Finance Office, 13th Airborne Division as Class A Agent Finance Officer in the sum of Six-hundred and sixty dollars and sixty-eight cents ($660.68) did, on or about 31 January 1946 at Fort Bragg, North Carolina, wrongfully and dishonorably fail to pay the aforesaid indebtedness.

He pleaded not guilty to and was found guilty of the Charge and both Specifications. Evidence of one previous conviction by general court-martial for absence without leave was considered by the court. The accused was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution.

Specification 1.

On 11 January 1946 the accused opened an account with the First

Citizens Bank and Trust Company at Fort Bragg, North Carolina, by depositing a check in the amount of $500, drawn by "Mr. Milligan," on the Commercial State Bank of Hamlet, North Carolina. On 15 January 1946 this check was returned to the First Citizens Bank and Trust Company with the notation that the payment had been stopped. The bank thereupon charged this check to the account of the accused and returned the check to him by mail on 16 January 1946 (R. 11-12). Between the 16th and 19th of January 1946 the accused cashed at the Post Exchange, Fort Bragg, five checks, drawn on the First Citizens Bank and Trust Company. Each check was for $50.00. These checks were returned to the Post Exchange by the bank in the following order: two on 21 January 1946, one on 22 January 1946, and two on 23 January 1946. A few days after 21 January 1946 (exact date not shown) the cashier of the Post Exchange talked to accused by telephone concerning these checks and from her testimony it appears that the accused was expecting to get some money to take care of the checks (R. 13-15). The cashier of the bank testified that in his opinion the accused waited a reasonable length of time for the check to clear before writing checks on the account and as far as he knew the checks were issued by the accused at a time he believed that he had $500 in the bank (R. 13). The prosecution also offered in evidence the sworn statement of the accused made 1 February 1946 wherein he states that when the $500 check was returned he applied for leave to go to Washington to raise money, that three days leave was granted over a week end and he was unable to raise any money because his business connections were closed on Saturday afternoon and Sunday, and that if he had been granted a fourth day of leave he could have raised not only enough money to cover the checks but also the pay roll shortage and if necessary he would sell his automobile (Pros. Ex. 1).

Specification 2.

The accused drew the December 1945 pay roll for Company I, 326th Glider Infantry, amounting to $14235.37 and started paying the men of the company on 3 January 1946 (Pros. Ex. 2). By 4 January 1946, the majority of the company was paid but a few members of the company were absent and would not be available for a few days (R. 19). On 10 January 1946 the accused went to the finance officer and told him that he was short about $128.00 in the pay roll account, and that he was making arrangements to secure funds to settle the account (R. 22). On 19 January 1946 the accused told Lieutenant Le Breu that he had misplaced the pay roll and the money to be turned in was lost (R. 19). On 23 January 1946 Major Cox and Lieutenant Le Breu made a computation on the pay roll held by accused and found it to be short in the sum of $660.68. At this time the accused stated he intended to replace the money and turn in the pay roll on 28 January 1946 (R. 20,21; Pros. Ex. 2). The money was not available on the 28th of January, so on the 29th of January Major Cox returned the pay roll to the finance office, at which time the accused signed a receipt acknowledging the shortage and stated that he hoped to have the money by 31 January 1946 (R. 22-23). The pay roll was not required to be returned to the finance office on any particular day (R. 23).

For the Defense.

The accused offered in evidence orders granting him three days leave effective 24 January 1946.

4. Dishonorable neglect to pay a debt, by an officer, is an offense under Article of War 95. The non-payment must amount to dishonorable conduct characterized by deceit, fraud, evasion and in some instances specific promises to pay, which promises were not kept. The mere failure to pay a debt is not in itself sufficient (CM 121207 and CM 123090 (1918) Dig Op JAG 1912-1940, sec 453 (14-15)). The failure to pay must also bring discredit upon the military service (Winthrop's Mil Law and Prec (2d Ed), 1920, p. 715). The mere failure by an officer to keep his promise to pay a debt is not a dishonorable act in violation of Article of War 95 unless the promise to pay is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment (CM 220760 (1942), I Bull JAG, p 23).

In the instant case in reference to Specification 1 the following facts appear in reference to the accused:

(a) Opened a checking account in a bank on 11 January 1946 by depositing a check for $500.00.

(b) Waited until 16 January 1946 before writing checks on this account, and then cashed five checks, at the Post Exchange at Fort Bragg, in the total amount of $250.00.

(c) On 16 January 1946 the check deposited by the accused was returned with the notation payment stopped.

(d) On 16 January 1946 the bank charged the accused's account with this check and returned it to him by mail.

(e) The five checks written by accused to the Post Exchange were returned to the Post Exchange by the bank on 21, 22 and 23 January 1946.

(f) Some few days after 21 January 1946 the cashier of the Post Exchange contacted the accused, notified him of the returned checks at which time the accused stated that he was expecting some money.

(g) The checks were not redeemed by the accused and charges were preferred alleging wrongful failure to pay on 29 January 1946.

Nowhere in the record does it appear that the accused practiced any deceit, fraud or evasion in reference to these checks. Neither does there appear to

be any discredit brought upon the military service. At the time the checks were written the accused had every reason to believe that the checks would be paid by the bank. In fact the cashier of the bank testified that in his opinion the accused waited a reasonable time for the check deposited on 11 January 1946 to clear before starting to check on this account on 16 January 1946. The failure to redeem these checks within eight days, in view of the circumstances under which they were issued, is not such delay as to be wrongful and dishonorable.

With respect to Specification 2 it appears from the record that the accused knew that his accounts were short on 10 January 1946. He promptly informed the finance officer who had issued him the pay roll. On 23 January 1946 an investigating officer found the accused to be short in his accounts in the sum of $660.68, at which time the accused stated that he would have the money by the 28th of January 1946. The accused was given three days leave in order to make arrangements to secure the money. This leave was over the weekend. On 29 January 1946 the pay roll was returned to the finance office and the accused signed an acknowledgment of the shortage and accepted liability therefor, at which time he stated that he hoped to have the money by 31 January 1946.

It therefore appears that this is a debt due the United States. There is nothing in the record to show what happened to the money except the statement of the accused to Lieutenant Le Bleu. It does not appear that the accused ever attempted to evade responsibility for the shortage. In fact the accused was the first person to make known that a shortage existed. The transaction is one wholly within the military service. The failure to pay a debt due the United States Government within two days after liability was acknowledged is not in itself such a neglect as to be wrongful or dishonorable. This is particularly true in view of the provisions of the United States Code which provide:

> "No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the treasury all sums for which he may be liable."
> (5 U.S.C. 82; AR 35-1800, 9 Jan 1946.)

5. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the finding of guilty and the sentence.

Charles E. Silvers, Judge Advocate

C. E. McAfee, Judge Advocate

(On Leave), Judge Advocate

JAGK - CM 307416 1st Ind

WD, JAGO, Washington 25, D. C.

TO: Commanding General, 82nd Airborne Division, Fort Bragg, North Carolina

1. In the case of First Lieutenant Ralph T. Jones (O-1319285), Infantry, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated recommend that the findings of guilty and the sentence be vacated.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, 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 307416).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 307420

24 JUN 1946

UNITED STATES v. Technician Fourth Grade Willie Nelson (38548994), 440th Quartermaster Laundry Detachment (M).	UNITED STATES ARMY SERVICE COMMAND C Trial by G.C.M., convened at APO 404, c/o Postmaster, San Francisco, California, 26, 27 & 28 December 1945. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates

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

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

CHARGE: Violation of the 92d Article of War

Specification: In that Technician Fourth Grade Willie Nelson, 38548994, 440th Quartermaster Laundry Detachment (M), did, at APO 503 on or about 2300 hours on 21 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Technician Fifth Grade Elam Page Sr, 440th Quartermaster Laundry Detachment (M), a human being by shooting him with a U.S. Carbine M-1.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct "for the rest of his natural life". The reviewing authority approved the sentence, designated the "United States" Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. 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. 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. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452, 454).

William A. Kuder, Judge Advocate

Gilbert G. Ashcroft, Judge Advocate

Earl W. Wingo, Judge Advocate

(GCMO 229, 18 July 1946).

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

SPJGH - CM 307465

5 APR 1946

UNITED STATES v. Lieutenant Colonel GEORGE DANKER (0-162803), Military Intelligence Service.	SEINE SECTION COMMUNICATIONS ZONE EUROPEAN THEATER Trial by G.C.M., convened at Paris, France, 29 May 1945. Dismissal, total forfeitures and fine of $1,000.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Lieutenant Colonel George Danker, Military Intelligence Service Headquarters, European Theater of Operations, United States Army, did, at London, England and Paris, France, between 1 August 1944 and 1 April 1945, wrongfully conspire and agree with Master Sergeant Allen Silver, Second Lieutenant Edgar L. Phillips, Private James A. Gourgouras, and other persons unknown, to wrongfully, knowingly, and without proper authority import, hold and transfer British paper currency in the liberated territory of France, and wrongfully participate in transactions involving the purchase and sale of francs, French currency, against British currency through other than official channels.

Specification 2: (Disapproved by the reviewing authority).

Specification 3: In that Lieutenant Colonel George Danker, * * *, did, at or near London, England, and Paris, France, between 1 December 1944 and 31 December 1944, wrongfully, knowingly, and without proper authority participate with Master Sergeant Allen Silver and persons unknown, in a transaction involving the sale of about 60,000 francs, French currency, in return for about 300 pounds, British currency, through other than official channels, and involving the wrongful importation and sale of said British currency in the liberated territory of France.

Specification 4: (Disapproved by the reviewing authority).

He pleaded not guilty of Specifications 1, 2 and 3 and the Charge and at the direction of the court a plea of not guilty of Specification 4 was entered upon accused's failure to plead thereto. He was found guilty of all Specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and fined $1000. The reviewing authority, the Commanding General, Seine Section, Communications Zone, United States Forces, European Theater, disapproved the findings of guilty of Specifications 2 and 4; approved the sentence, noting that it was grossly inadequate, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, approved only so much of the finding of Specification 1 of the Charge as finds that the accused did, at the places alleged, between 1 November 1944 and 31 January 1945, wrongfully conspire and agree with Master Sergeant Allen Silver to do the wrongful acts alleged; confirmed the sentence and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. On 23 November 1945 the Board of Review in the Branch Office of The Judge Advocate General with the United Army Forces in the European Theater examined the record of trial and held it to be legally sufficient to support the findings of guilty as approved and the sentence. The holding of the Board of Review, which contains a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning and conclusions of the Board, is attached to the record. The Assistant Judge Advocate General in charge of the Branch Office approved the holding of the Board of Review and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for execution of the sentence. Before execution of the sentence was carried into effect by the Commanding General, United States Forces, European Theater, the authority so to do was terminated by the President. Accordingly, the record of trial was forwarded to the Office of The Judge Advocate General, Washington, D. C., for examination therein and for subsequent action by you.

4. The Board of Review in the Office of The Judge Advocate General, Washington, D. C., has examined the record of trial, concurs in and adopts the holding of the Board of Review in the Branch Office, a copy of which is hereto attached, and for the reasons set forth therein is of the opinion that the record of trial is legally sufficient to support the approved findings of guilty and the sentence as confirmed by the Commanding General, United States Forces, European Theater, and to warrant confirmation of the sentence by the Secretary of War. Dismissal is authorized upon conviction of a violation of Article of War 96.

Thomas N. Tappy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert E. Trevethan, Judge Advocate.

1 Incl
Copy holding Bd.Rev.
~~in ETO~~

(GCMO 148, 28 May 1946).

SPJGF CM 307465

18 May 1946

MEMORANDUM FOR THE SECRETARY OF WAR

SUBJECT: Record of trial in the case of Lieutenant Colonel George Danker, 0162803, Headquarters, Military Intelligence Service, European Theater of Operations

1. There has been received in this office the record of trial in the European Theater of the officer named above. He was found guilty of conspiring to deal in foreign money and of exchanging French and British currencies through other than official channels, both in violation of Article of War 96. He was sentenced to be dismissed, to forfeit all pay and allowances due or to become due, and to pay a fine of $1,000 to the United States. On 16 October 1945 the confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence. Thereafter, on 23 November 1945, the Board of Review in the Branch Office of the Judge Advocate General with the European Theater, with the concurrence of the Assistant Judge Advocate General in charge of said Branch Office, held the record of trial legally sufficient to support the findings of guilty, as approved, and the sentence.

2. On 19 January 1946 the powers of confirmation conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of the Articles of War were suspended. The Assistant Judge Advocate General in charge of said Branch Office thereupon forwarded the record of trial to this office. No general court-martial order promulgating the proceedings has been published.

3. The evidence shows that accused arrived in the European Theater in July 1943 and was transferred to Military Intelligence in May 1944. At that time he caused an enlisted man whom he had known since 1943 to be assigned to his office. In September 1944 accused was assigned to Military Intelligence Headquarters in France. Between November 1944 and January 1945 the enlisted man in the Headquarters in England received "through" accused approximately 100,000 francs, which he converted into pounds. He then sent about 300 English pounds to accused in France by messenger. Accused gave 100 pounds to his chauffeur to convert into francs and received from him about 40,000 francs as the proceeds. He also gave 75 pounds to a lieutenant for conversion into francs. The lieutenant returned 35 of the pounds and about 16,000 francs.

4. The nature of accused's offenses, his rank, and his assignment in Military Intelligence are such as to render his conduct inexcusable. Junior officers in this command found guilty of similar offenses should not be more severely punished than accused. However, I believe that the fine adjudged should be remitted, and that, as so modified, the unexecuted portion of the sentence should be executed.

5. It is recommended that a War Department general court-martial order be published remitting the fine and carrying the unexecuted portion of the sentence as modified into execution. A draft of order is inclosed.

1 Incl
Draft of GCMO

/s/ Thomas H. Green
THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 148, 28 May 1946)

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2 23 NOV 1945

CM ETO 18098

UNITED STATES v. Lieutenant Colonel GEORGE DANKER (0-162803), Headquarters, Military Intelligence Service, European Theater of Operations	SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by GCM, convened at Paris, France, 29 May 1945. Sentence: Dismissal, total forfeitures and fine of $1000.00.

HOLDING BY BOARD OF REVIEW NO. 2
HEPBURN, HALL AND COLLINS, 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 holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Lieutenant Colonel George Danker, Military Intelligence Service, Headquarters, European Theater of Operations, United States Army, did, at London, England and Paris, France, between 1 August 1944 and 1 April 1945, wrongfully conspire and agree with Master Sergeant Allen Silver, Second Lieutenant Edgar L. Phillips, Private James A. Gourgouras, and other persons unknown, to wrongfully, knowingly, and without proper authority import, hold, and transfer British paper currency in the liberated territory of France, and wrongfully participate in transactions involving the purchase and sale of francs, French currency, against British currency through other than official channels.

Specification 2: (Disapproved by reviewing authority).

Specification 3: In that * * * did, at or near London, England, and Paris, France, between 1 December 1944 and 31 December 1944, wrongfully, knowingly, and without proper authority participate with Master Sergeant Allen Silver and persons unknown, in a transaction involving the sale of about 60,000 francs, French currency, in return for about 300 pounds, British currency, through other than official channels, and involving the wrongful importation and sale of said British currency in the liberated territory of France.

Specification 4: (Disapproved by reviewing authority).

He pleaded not guilty to Specifications 1, 2 and 3 and the Charge, and the court entered a plea of not guilty to Specification 4 upon his failure to plead to such Specification. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of all specifications and the Charge. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed from the service, to forfeit all pay and allowances due or to become due, and to pay to the United States a fine of $1,000.00. The reviewing authority, the Commanding General, Seine Section, Communications Zone, United States Forces European Theater, disapproved the findings of guilty of Specifications 2 and 4, approved the sentence, "though grossly inadequate", and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces European Theater, approved only so much of the finding of Specification 1 of the Charge as finds that the accused did at the places alleged, between 1 November 1944 and 31 January 1945, wrongfully conspire and agree with Master Sergeant Allen Silver to do the wrongful acts alleged, confirmed the sentence, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution relating to Specifications 1 and 3 as approved may be summarized as follows:

Captain William M. Work testified that in early December 1944, at accused's request, he took a sealed envelope containing an unknown number of 1000-franc notes from Paris to London and delivered it to Sergeant Silver at the Military Intelligence headquarters (R15-16).

Private Allen Silver, who had been associated with the accused for about 2½ years in military service, testified that while he was a master sergeant in the Military Intelligence headquarters in London (R17) he received "through" accused, who was then stationed in Paris, one hundred 1000-franc notes in an envelope. Accused had previously told witness that he was going to send francs for witness to change into pounds because he had a car that he might sell and would have a lot of francs (R21-22). Witness had the francs changed into pounds at the regular rate of exchange and sent about 100 pounds to accused in a sealed envelope, a non-official communication, by courier, and kept

some of the pounds himself as his share. He denied that there was any agreement between the two that he should retain any of the money but as he was doing something for the accused he "supposed" that he was to get a share of it. He did not know what accused intended to do with the money at that time.(R21-22,23-24). Witness exchanged francs for pounds for accused on two occasions and held the pounds until accused came to London to get them. About 27 January 1945 witness received a note from accused, which was received in evidence and which stated, among other things, "Phil will explain 420 or 440 most for 1 lb." and "How is my account with you Anything to come to me? If so send it" (R23, Pros. Ex. C).

In a voluntary pre-trial statement, accused admitted that between November 1944 and January 1945, during three trips which he made from Paris to London, he gave Sergeant Silver about 60,000 francs, and that Silver sent back English pounds in sealed envelopes by messengers, but that "a few times I picked up these pounds while I was in London." Accused received about 300 pounds for such francs and 100 of these pounds he gave to his chauffeur to convert into francs and received from him about 40,000 francs as the proceeds. 75 of these pounds he gave to a lieutenant to convert into francs. The lieutenant returned 35 of the pounds and about 16,000 francs.(R26-28, Pros. Ex. D).

The court took judicial notice of, and received in evidence, a directive letter from Headquarters European Theater of Operations (AG 121 OpGA), dated 23 September 1944, Subject: Prohibition Against Circulating, Importing, or Exporting United States and British Currencies in Liberated and Occupied Areas and Certain Transactions Involving French Currency Except Through Official Channels, which letter prohibits all personnel subject to the jurisdiction of such headquarters from importing, holding, transferring, exporting, or in any way dealing in British paper currency in liberated or occupied territory within the theater, and from participating in transactions involving the purchase or sale of francs against other currencies except through official channels (R6-7, Pros. Ex. A).

4. After his rights as a witness were explained to him, accused elected to remain silent (R35).

For the defense, the adjutant and the postal officer of accused's organization in London each testified that he had no recollection of seeing the directive letter of 23 September 1944 (R29,31).

The personnel officer of accused's organization in London, who was transferred to accused's organization in Paris on 1 March 1945, testified that he had never seen the directive prior to the trial (R33-34).

Lieutenant Colonel Herbert W. Aronson testified that he had served under accused for about 15 months and that accused's character was good (R35-36).

5. The approved findings of guilty as to Specification 1 allege a wrongful conspiracy or agreement of accused with Master Sergeant Allen Silver to do certain acts which are expressly prohibited by the terms of a general theater directive. Specification 3 alleges wrongful participation by accused in acts which are also expressly prohibited by the terms of such directive. Offenses in violation of Article of War 96 are thus clearly stated, although the violation of no specific order is alleged expressly (CM ETO 17871, Santoriello; CM ETO 17469, Allen).

The testimony of Captain Work and Private Silver establishes sufficiently that under an agreement with Silver, accused, from Paris, sent to Silver, in London, by private messenger 100,000 francs, which Silver then had exchanged into pounds, a part of which pounds he then sent by messenger to accused in France. The note written by accused to Silver, and Silver's testimony admitting the exchange of francs for accused on two occasions, tend to show the probability of an agreement between accused and Silver with respect to the acts charged. All of such evidence was sufficient to show that both the offenses alleged had "probably been committed" and to establish the corpus delicti of the offenses, so that accused's statement was properly received in evidence by the court (see CM ETO 8234, Young et al; MCM 1928, par. 114a, p. 115). Such statement in effect admits accused's guilt of Specification 3 and tends to support the approved finding of guilty as to Specification 1.

> "A conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end" (MCM 1928, par. 150c, p. 182).

One of the conspirators may perform a part of the unlawful act and the other may complete it, as the evidence here indicates. Moreover, the agreement need not be in writing or in any particular form, and may be inferred from the acts done in pursuance of the apparent criminal purpose by the alleged conspirators (2 Wharton's Criminal Law (12th Ed. 1932), sec. 1667, pp. 1938-1939). In the opinion of the Board of Review, the evidence adduced and the admissions in accused's statement clearly warranted the court in inferring the existence of a wrongful agreement between accused and Silver to import, hold and transfer without authority British paper currency in France, and to wrongfully participate in transactions involving the purchase and sale of francs against British currency through other than official channels, as alleged in Specification 1.

Evidence for the defense tended to show that certain officers in accused's organization who might normally have received the directive letter violated by accused actually had no knowledge of it. However, it appears that during the period covered by the specifications, each of such officers was in London, whereas accused's statement shows that he was in Paris (Pros. Ex. D). There is no evidence that accused lacked knowledge of the directive, and his statement contains no denial of such knowledge. The directive was addressed to various commands throughout the theater and specifies that its provisions will be brought to the

attention of all personnel. The general prohibitions contained in it were a matter of common knowledge and discussion within the theater. Aside from such common knowledge, which accused must have had, under the circumstances shown it will be presumed that the directive was released and distributed on or about the date it bears, and accused was charged with notice of the prohibitions contained in it (CM ETO 7553, Besdine; CM ETO 11216, Andrews).

6. The charge sheet shows that accused is 47 years eight months of age and entered active duty as a reserve officer on 6 September 1940 at Fort Dix, New Jersey.

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence.

8. Dismissal, total forfeitures and fine are authorized punishments for an officer found guilty of violation of Article of War 96.

Earle Stephens Judge Advocate

Clarence W. Hall Judge Advocate

John J. Collins, Jr. Judge Advocate

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

SPJGK - CM 307477

30 APR 1946

UNITED STATES v. Corporal WILLIAM J. HAYNES (32908153), 82nd Chemical Smoke Generator Company, and Private ROBERT YOUNG, JR. (34840316), 82nd Chemical Smoke Generator Company.	CONTINENTAL ADVANCE SECTION COMMUNICATIONS ZONE ETOUSA Trial by G.C.M., convened at Mannheim Germany, 28 May 1945. EACH: To be shot to death with musketry.

OPINION of the BOARD OF REVIEW
MOYSE, KUDER and WINGO, Judge Advocates.

---

1. The record of trial in the case of the soldiers 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 Haynes was tried upon the following Charge and Specifications:

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

Specification 1: In that Corporal William J. Haynes, 82nd Chemical Smoke Generator Company, CWS, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ludwig Emmert, a human being by shooting him with a carbine.

Specification 2: In that Corporal William J. Haynes, ***, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mrs. Magdalene Messberger, a human being, by shooting her with a carbine.

Specification 3: In that Corporal William J. Haynes, ***, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mrs. Anna Wippel, a human being, by shooting her with a carbine.

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

Specification: (Finding of not guilty).

The accused Young was tried upon the following Charge and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert Young, Jr., 82nd Chemical Smoke Generator Company, CWS, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Ludwig Emmert, a human being by shooting him with a carbine.

Specification 2: In that Private Robert Young, Jr., 82nd Chemical Smoke Generator Company, CWS, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Mrs. Magdalene Messberger, a human being, by shooting her with a carbine.

Specification 3: In that Private Robert Young, Jr., 82nd Chemical Generator Company, CWS, did, at Frankenthal, Germany, on or about 21 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mrs. Anna Wippel, a human being, by shooting her with a carbine.

The accused Haynes pleaded not guilty to the specifications of both charges and to both charges. He was found not guilty of the specification of Charge II and of Charge II and was found guilty of all specifications of Charge I and of Charge I. The accused Young pleaded not guilty to all specifications of the Charge and to the Charge and was found guilty of all specifications of the Charge and of the Charge. No evidence was introduced of previous convictions as to Haynes. Evidence was introduced of three previous convictions as to the accused Young by summary court-martial, one for being disorderly in a public place while in uniform, in violation of Article of War 96, one for absence without leave for one day, in violation of Article of War 61, and one for being drunk on duty and discharging a carbine in a bivouac area, in violation of Articles of War 85 and 96. Each of the accused was sentenced to be shot to death with musketry, all the members present at the time the vote was taken concurring in the vote on the sentence. The reviewing authority approved each of the sentences and forwarded the record of trial to the Commanding General, United States Forces, European Theater, for action under Article of War 48. The Commanding General, United States Forces, European Theater, confirmed each sentence but withheld the order directing the execution of each sentence, pursuant to Article of War 50½. The record of trial was then forwarded to the Branch Office of The Judge Advocate General with the European Theater.

3. The Board of Review in the Branch Office of The Judge Advocate General with the European Theater examined the record of trial and, in a formal holding attached to the record of trial, was of the opinion that the record of trial is legally sufficient to support the findings and each sentence.

4. The Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater approved the holding of the Board of Review in that office on 9 November 1945, and advised the Commanding General, United States Forces, European Theater, that he then had authority to order the execution of each sentence.

5. On 19 January 1946, the powers conferred by direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of Articles of War 48, 49, 50 and 50½, were terminated.

6. The Assistant Judge Advocate General in charge of the above-mentioned branch office thereupon forwarded the record of trial in this case to The Judge Advocate General, Washington, D. C. The Board of Review in the Office of The Judge Advocate General, Washington, D.C., has examined the record of trial, concurs in the opinion of the Board of Review of the Branch Office (a copy of which is hereto attached), and is also of the opinion that the record of trial is legally sufficient to support the findings of guilty and each sentence, and to warrant confirmation of each sentence. A sentence of either death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92.

7. A special hearing was held by the Board of Review in the Office of The Judge Advocate General 18 April 1946, at which arguments on behalf of the accused Haynes were presented by Mr. Franklin H. Williams, Assistant Special Counsel, N.A.A.C.P. Legal Defense and Educational Fund, Inc., who subsequently submitted a brief in support of his argument.

Norman Moyer, Judge Advocate

William B. Nudes, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 307477 1st Ind

Hq ASF, JAGO, Washington, D. C. MAY 8 1946

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 Corporal William J. Haynes (32908153) and Private Robert Young, Jr. (34840316), both of the 82nd Chemical Smoke Generator 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 as to each accused and each sentence and to warrant confirmation of each sentence. I recommend that each sentence be confirmed but commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the terms of the natural lives of accused, and that a U. S. Penitentiary be designated as the place of confinement.

3. Consideration has been given to the following communications urging clemency for the accused Haynes: a memorandum from Honorable Robert F. Wagner, United States Senator from New York, to The Adjutant General, transmitting a letter from the accused to the Senator; a letter from Honorable Adam Clayton Powell, Jr., Member of Congress, to the Under Secretary of War; a telegram from the mother of the accused to The Judge Advocate General; a letter from the mother of the accused to The Adjutant General; and a letter from Mr. and Mrs. Craig and others to the President. Consideration has also been given to a brief filed on behalf of the accused Haynes by Mr. Franklin H. Williams, Assistant Special Counsel, N.A.A.P.C. Legal Defense and Educational Fund, Inc., who presented arguments on behalf of Haynes at a special hearing held by the Board of Review 18 April 1946.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 191, 20 June 1946).

9 Incls
1. Rec of trial w/Bd Rev Op and Op Br Of B/R
2. Drft ltr sig S/W
3. Form of Ex action
4. Memo fr Sen Wagner
5. Ltr fr Hon A.C.Powell,Jr.
6. Telegram fr mother of acc'd to TJAG
7. Ltr fr mother of acc'd to TAG
8. Ltr fr Mr. and Mrs. Craig and others
9. Brief by Mr. Franklin H. Williams

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

JAGK - CM 307491

7 AUG 1946

UNITED STATES v. Second Lieutenant FREDERICK A. HAIRE (O-1545864), Medical Administrative Corps.	ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Keesler Field, Mississippi, 15 February 1946. Dismissal, total forfeitures and confinement for ten (10) years.

OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant Frederick A. Haire, Squadron "E" (Medical), 3704th Army Air Forces Base Unit, did, at Keesler Field, Mississippi, on or about 7 July 1945, make and utter to the Officers Club, Keesler Field, Mississippi, a certain check in words and figures as follows, to wit:

Denver, Colo., 7 July 194 5 No. 16

THE DENVER NATIONAL BANK 23-7
Depository and financial agent of the United States Treasury

Pay to the order of Officers Club $10 -00

Ten & no/100 DOLLARS

BUCKLEY FIELD Frederick A Haire
2nd Lt MAC O-1545864 Sqd E

and did wrongfully fail to maintain a sufficient bank balance to meet the payment of said check.

Note: Specifications 2 to 4 inclusive vary materially from Specification 1 only with respect to date of offense and date and amount of check as follows:

Spec.	Date of offense	Date of check	Amount of check
2	10 July 1945	10 July 1945	$10.00
3	17 July 1945	17 July 1945	$30.00
4	21 July 1945	21 July 1945	$10.00

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

Specification 1: In that Second Lieutenant Frederick A. Haire, ***, did, at Keesler Field, Mississippi, on or about 13 June 1945, with intent to deceive Colonel R. M. Allott, officially state to the said Colonel R. M. Allott, that "my allotment check for the month of April 1945 was not sent to the National Bank of Fort Sam Houston, San Antonio, Texas, as I had expected", or words to that effect, which statement was known by the said Second Lieutenant Frederick A. Haire to be untrue, in that he had no allotment to the National Bank of Fort Sam Houston, San Antonio, Texas, for April 1945.

Specification 2: In that Second Lieutenant Frederick A. Haire, ***, did, at Keesler Field, Mississippi, on or about 13 June 1945, with intent to deceive Colonel R. M. Allott, officially state to the said Colonel R. M. Allott, that "I sent a bank draft of $100 to the Denver National Bank, Buckley Field, Colorado, on 8 June 1945", or words to that effect, which statement was known by the said Second Lieutenant Frederick A. Haire to be untrue, in that he did not in fact send such draft.

Specification 3: (Finding of guilty disapproved by reviewing authority.)

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

Specification 1: In that Second Lieutenant Frederick A. Haire, ***, did, at Mobile, Alabama, on or about 25 August 1945, make and utter to the First National Bank of Mobile, Mobile, Alabama, a certain check in words and figures as follows, to wit:

No. 7 SAN ANTONIO, TEXAS, 25 Aug 194 5

30-65

NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO

Pay to the
Order of Cash $ 77-00

Seventy-seven & no/100 DOLLARS

Frederick A Haire
2nd Lt MAC 0-1545864
STATION HOSP BF Ala

and did wrongfully fail to maintain a sufficient bank balance to meet the payment of said check.

Note: Specification 2 varies materially from Specification 1 only with respect to date of offense and date and amount of check as follows:

Date of offense	Date of check	Amount of check
20 Aug 1945	20 Aug 1945	$ 50.00

SECOND ADDITIONAL CHARGES:

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

Specification: In that Second Lieutenant Frederick A. Haire, ***, did, at Keesler Field, Mississippi on or about 4 October 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Kelly Field, Texas on or about 3 December 1945.

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

Specification 1: In that Second Lieutenant Frederick A. Haire, ***, did, at Randolph Field, Texas, on or about 31 October 1945, present for approval and payment a claim against the United States by presenting to Lt. Col. Edw. Robinson Jr, F.D., finance officer at Randolph Field, Texas, an officer of the United States duly authorized to approve and pay such claims, in the amount of $205.03, for pay and subsistence allowance, which claim was false and fraudulent in that Second Lieutenant Frederick A. Haire was not entitled to

any pay and allowance, and was then known by the said Second Lieutenant Frederick A. Haire to be false and fraudulent.

Note: Specifications 2 to 6 inclusive vary materially from Specification 1 only with respect to place and date of offense, individual to whom the claim was presented, and amount of claim as follows:

Spec.	Offense Place	Date	Claim presented to	Amount
2	Ft Sam Houston, Texas	31 Oct 45	Col A O Walsh, FD	$205.03
3	"	30 Nov 45	"	$204.33
4	Kelly Fld, Texas	31 Oct 45	Lt Col J D Arthur, FD	$205.03
5	AAFPDC, San Antonio, Texas	31 Oct 45	Lt Col Hoke McWhorter	$244.00
6	"	26 Nov 45	"	$200.00

Note: The claims alleged in Specifications 5 and 6 were for "partial pay."

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

Specification 1: In that Second Lieutenant Frederick A. Haire, ***, did, at New Orleans, Louisiana, on or about 6 October 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Whitney National Bank of New Orleans, Louisiana, a certain check in words and figures as follows, to wit:

CUSTOMER'S DRAFT

_____ New Orleans, 10/6 19 45

Pay to the order of Cash $50.00

Fifty and 00/100 Dollars

Value received and charge to account of With exchange

To Denver National Bank
Denver, Colorado

/s/ Frederick A. Haire
2nd Lt. M.A.C. O-1545864
Keesler Field, Mississippi

and by means thereof did fraudulently obtain from the Whitney

National Bank of New Orleans the sum of $50.00, he the said Second Lieutenant Frederick A. Haire then well knowing that he did not have and not intending that he should have sufficient funds in the Denver National Bank for the payment of said check.

Specification 2: In that Second Lieutenant Frederick A. Haire, ***, did, at San Antonio, Texas, on or about 30 October 1945, with intent to defraud, wrongfully and unlawfully make and utter to the National Bank of Commerce, San Antonio, Texas, a certain check in words and figures as follows, to wit:

CUSTOMERS DRAFT
NATIONAL BANK OF COMMERCE
San Antonio, Texas

San Antonio, Texas 30 Oct. 19 45

Pay to the order of Cash $ 25.00

Twenty five and 00/100 Dollars

Value received, and charge to account of With exchange

To Denver National Bank
Denver
Colorado

/s/ Frederick A. Haire
1st Lt. M.A.C. O-1545864
Sq E

and by means thereof did fraudulently obtain from the National Bank of Commerce the sum of $25.00, he the said Second Lieutenant Frederick A. Haire then well knowing that he did not have and not intending that he should have sufficient funds in the Denver National Bank for the payment of said check.

Specification 3: In that Second Lieutenant Frederick A. Haire, ***, did, at Houston, Texas, on or about 23 October 1945, with intent to defraud, wrongfully and unlawfully make and utter to the Second National Bank of Houston, Texas, a certain check in words and figures as follows, to wit:

CUSTOMERS DRAFT
The Second National Bank
of Houston

Houston, Texas 23 Oct 19 45

Pay to the order of Cash $ 50.00

Fifty and no/100 Dollars

Value received and charge the same to account of With exchange

To

Denver National Bank
Denver, Colorado

Frederick A. Haire
2nd Lt. M.A.C. O-1545864
Keesler Field, Denver, Colorado

and by means thereof did fraudulently obtain from the Second National Bank of Houston the sum of $50.00, he the said Second Lieutenant Frederick A. Haire then well knowing that he did not have and not intending that he should have sufficient funds in the Denver National Bank for the payment of said check.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of any previous conviction was introduced. The reviewing authority disapproved "the finding of Specification 3 of Charge II original charges", and approved "only so much of the findings of guilty of the Specification of Charge I and Charge I, Second Additional Charges, as involves a fihding of guilty of absence without leave from 6 October 1945 to 3 December 1945 in violation of Article of War 61," and approved only so much of the sentence as provided for dismissal, total forfeitures and confinement at hard labor for ten years, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

The prosecution's evidence consisted entirely of stipulations by and between the accused, his individual defense counsel and the trial judge advocate and of exhibits.

Charge I and it's Specifications, the Additional Charge and its Specifications and Charge III of the Second Additional Charges.

It was stipulated,

"*** that the checks set forth in Specifications 1 to 4, inclusive, of Charge I, the original charge, and the checks set forth in Specifications 1 and 2 of the Additional Charge, and the checks set forth in Specifications 1, 2 and 3 of Charge III, of the Second Additional Charge, in other words, all the checks alleged in all the Specifications and Charges were given by the accused to the respective parties and on the dates and for the sums of money alleged that appear on each of the checks, and that each of these checks were returned unpaid by the paying bank, due to the fact that there were insufficient funds in the accused's

bank account to meet the payment thereof. ***" (R. 15-16).

These checks were offered in evidence and admitted without objection as Prosecution's Exhibits 1 to 9 inclusive (R. 16). The ledger sheets of accused's accounts with the Denver National Bank and with the National Bank of Fort Sam Houston were offered into evidence and admitted without objection as Prosecution's Exhibits 10 and 11 respectively (R. 16).

Original Charge II and its Specifications.

It was further stipulated,

"*** that if Mr. W. T. Roe were present he would testify under oath that he is the manager of the Buckley Field Office of the Denver National Bank, Colorado. That on 29 May 1945 he sent a letter dated 29 May 1945 and marked Prosecution's Exhibit '12' to the Commanding Officer of Keesler Field, Mississippi. ***" (R. 17).

The letter reads as follows:

"We recently had a Lt. Frederick A Haire stationed here at Buckley Field, Colorado, and we understand that he is now stationed on Keesler Field.

"On May 17th he gave this bank his check drawn on National Bank of Fort Sam Houston for $100.00 in payment of three short checks cashed prior to that time. He gave the excuse that his allotment check had been delayed and assured us that this check for $100.00 would be paid on presentation. Today the check has been returned to us for insufficient funds.

"We will greatly appreciate it if you will assist us in making collection from Lt. Haire. It is desired that he mail us either a Bank Draft or Postal Money." (Pros. Ex. 12)

It was further stipulated that if Colonel R. M. Allott were present he would testify that he was Commanding Officer of AAF Regional Hospital, Keesler Field, Mississippi, on 13 June 1945 and was accused's superior officer and "that,on or about that date,he forwarded to the accused for reply,the letter received from Mr. W. T. Roe,which is in evidence here as Prosecution's Exhibit 12, and that Lieutenant Haire [the accused] answered by First Indorsement" (R. 18). Accused's indorsement reads as follows:

"1. My allottment check for the month of April 1945 did not go to the National Bank of Fort Sam Houston as I had expected. I did not sign a voucher for the month of April 1945 and did not receive my pay until the 14 of May 1945. It is regretted by the undersigned that such did happen and

assure you that this instance will not reoccur.

"2. The undersigned has sent a bank draft in the amount of one hundred dollars ($100.00) to the Denver National Bank, Buckley Field, Colorado. This draft was sent on the 8 June 1945." (Pros. Ex. 15)

It was further stipulated that Mr. Roe received from Lieutenant G. E. Sunderman, the Assistant Adjutant of Keesler Field, a reply to his letter of 29 May (R. 17). Lieutenant Sunderman's reply reads as follows:

"15 June 1945

"The Denver National Bank
Denver, Colorado.

Gentlemen:

Attention is invited to 1st Indorsement to Letter Headquarters Keesler Field, Mississippi, dated 13 June 1945. Lt. Frederick A. Haire states that bank draft in the amount of $100.00 was forwarded 8 June 1945.

Very truly yours,

/s/ G. E. Sunderman
G. E. SUNDERMAN,
1st Lt., Air Corps,
Assistant Adjutant" (Pros. Ex. 13)

It was further stipulated that Mr. Roe sent a letter to Lieutenant Sunderman (R. 18), which reads as follows:

"June 18, 1945.

"G. E. Sunderman,
1st Lt., Air Corps,
Assistant Adjutant,
Keesler Field,
Keesler Field, Mississippi.

Dear Sir:

We are returning the attached correspondence relative to Lt. Haire for further attention. The bank draft referred to has not been received to date and we will appreciate it if you will follow this matter further for us.

Very truly yours

/s/ W. T. Roe
W. T. Roe, Manager
Buckley Field Office" (Pros. Ex. 14)

It was further stipulated that if Captain William Tucker were present he would testify under oath that he was the Assistant Finance Officer at Keesler Field and that the records of the Finance Office of that Field indicated "that Lieutenant Haire has no allotment and has had no allotment to the National Bank of Fort Sam Houston, Texas, and that his pay check has been paid direct to him and has not been sent to any other place, party, or bank" (R. 19).

It was further stipulated that pay and allowance vouchers, admitted in evidence as Prosecution's Exhibits 16 to 21 inclusive were "true copies of pay vouchers presented to the Finance Officers appearing on each of the exhibits respectively, on the dates appearing thereon respectively" and "that the accused received the respective sums of money appearing thereon in each instance" (R. 19, 20).

Charge I, Second Additional Charges.

A duly authenticated extract copy of the morning report of "Sq E 3704 AAF Base Unit Keesler Fld Miss" was offered and admitted in evidence without objection as Prosecution's Exhibit 22. This extract shows the following entry:

"5 October, 1945
Haire Frederick A MAC O-1545864 2nd Lt
Dy to AWOL 0800 4 Oct 45"

It was further stipulated that if Catherine Louise Berman were present she would testify under oath that she was an employee of the Finance Department of Kelly Field, Texas; that on 3 December 1945 about 0830 hours accused entered her office wearing the insignia of a first lieutenant and advised her that he was Lieutenant Frederick A. Haire. He

> "approached her with a copy of last October 1945's pay voucher from Kelly Field, which was paid by Kelly Field Finance Office, and requested a voucher for November. She recognized the officer as the office had received a teletype from Keesler Field, Mississippi, stating that officer was AWOL from 4 October 1945. She advised this officer to return in an hour. The officer asked if he could be paid earlier as he was in a hurry to get away. She then told him to come back in 45 minutes. She notified Mr. Burn, the Chief Clerk, and he notified the Military Police Office. This officer returned in about 45 minutes and was arrested by the Military Police. " ***" (R. 21).

It was further stipulated that if Corporal Harold B. Madeen were present he would testify under oath that he was a member of the Military Police, 4121st Army Air Forces Base Unit, Kelly Field, Texas, and that he arrested the accused on 3 December 1945 in the Finance Office on that Field and delivered the accused "to the Provost Marshal's Office" (R. 21).

4. Evidence for the defense.

The accused, after having been duly advised as to his testimonial rights, elected to be sworn as a witness in his own behalf. He stated that he is a member of Squadron "E", 3704th Army Air Forces Base Unit, Keesler Field, Mississippi, and in turn identified each of the checks mentioned in Specifications 1, 2, 3 and 4 of Charge I; Specifications 1 and 2 of the Additional Charge and Specifications 1, 2 and 3 of the Second Additional Charge III (Pros. Exs. 1 to 9, incl.) bearing his signature and as having been issued by him on the dates alleged (R. 24-26); that all of the checks were issued by him under the belief that he had sufficient funds in the bank on which they were drawn to cover payment thereof; that he actually had accounts in the Bank of Fort Sam Houston and the Denver National Bank, and that he had made deposits in each bank at various times and had caused allotments to be sent thereto (R. 24-28). The accused did not deny failing to maintain sufficient funds to meet the payment of said checks but denied that such a failure was wrongful or with knowledge on his part as set forth in the Specifications (R. 28).

With regard to the Specification, Charge I of Second Additional Charge, alleging desertion for the period 4 October 1945 to 3 December 1945, the accused frankly admitted that he was absent without leave for the period alleged but denied any intention of deserting the service (R. 36, 42). Upon leaving Keesler Field he went to Biloxi, Mississippi, started drinking and continued drinking until he found himself in New Orleans, Louisiana. He had intended to return to Keesler Field but got drunk in New Orleans, met a friend, and at some later date proceeded to San Antonio, Texas, where he remained in an intoxicated condition at a hotel (R. 39). During this period of his unauthorized absence the accused testified that he was in such an intoxicated condition that he did not remember cashing the three checks mentioned in Specifications 1, 2 and 3 of Charge II, Second Additional Charges, nor did he remember presenting to the finance officers the claims alleged to have been false in Specifications 1 to 6 inclusive, Charge II, of Second Additional Charges (R. 36-50). The accused denied making false official statements to Colonel R. M. Allott, as alleged in Specifications 1 and 2 of Charge II, but asserted that these statements were made under an honest belief that they were in fact true (R. 30-35).

On cross-examination this officer admitted that he received a statement in May 1945 from the Denver National Bank showing his balance to be $16.17, that he made no further deposits prior to 20 July 1945, yet he issued the four checks described in Specifications 1 to 4, Charge I, during the period 7 July to 21 July in the total sum of $60.00. In response to a question as to why he believed he had enough money on deposit to cover these checks the accused replied, "I just thought there was enough to cover it" (R. 52). He admitted that at the time he made the statements to Colonel R. M. Allott concerning an allotment to the National Bank of Fort Sam Houston that the finance office had entered a stoppage in the amount of $100 per month against his pay to cover a previous transaction and that he was receiving the balance of approximately $98 by check (R. 55). Although accused positively affirmed that the ledger sheet of his account with the Denver National Bank was correct (R. 52, Pros. Ex. 10), yet he could not explain why he had not been credited with the amount of $100 which he certified to Colonel Allott that he had forwarded to said bank on 8 June 1945 (R. 56, 57). The accused admitted that he cashed the checks mentioned in Specifications 1 and 2, Additional Charge, which were drawn on the National Bank of Fort Sam Houston in the amounts of $50.00 and $77.00, that he did not know how much he had deposited or how much he had drawn out; that he had received no statement from the bank and did not consider it necessary (R. 59-60); that he was intoxicated during all the period of his unauthorized absence and did not remember giving the checks described in Specifications 1, 2 and 3 of Second Additional Charges III. He could not remember where he obtained the special orders attached to the various vouchers showing him to be on leave and presumably signed by Hugh J. Whatley as Adjutant of Keesler Field and by order of Colonel Voss (R. 64); where he obtained the officers pay data card showing him to be a first lieutenant and which he admitted having in his possession on 3 December 1945 at the time he was arrested in the finance office at Kelly Field, Texas, nor could he explain his possession of a telegram stating, "Five days emergency leave granted, Special Orders 62, Paragraph 4, this Headquarters, signed Dietrich, dated 26 October 1945" (R. 64, 65).

No further testimony was presented by either the prosecution or defense.

5. Stated as briefly as is possible and in chronological order of events, the record shows that on 13 June 1945 by first indorsement to a letter from his commanding officer, Colonel R. M. Allott, the accused stated to such officer that "my allotment check for the month of April 1945 was not sent to the National Bank of Fort Sam Houston, San Antonio, Texas, as I expected" when in fact he had no such allotment to

such bank. That by paragraph 2 of such first indorsement accused also stated that on 8 June 1945 he had sent a bank draft in the sum of $100 to the Denver National Bank, while the record shows that the bank never received such a draft (Specs. 1 and 2, Charge II). That during the period 7 to 21 July 1945 the accused issued to the Officers' Club, Kessler Field, Mississippi, four checks in the total sum of $60.00, the same being drawn on the Denver National Bank, and two of said checks containing a certificate that the drawer had sufficient funds on deposit, free of any claims, to cover the amount of the checks, while the evidence shows that accused did not in fact have sufficient funds on deposit to cover these checks (Specs. 1, 2, 3, 4, Charge I; Pros. Ex. 10); that on 20 and 25 August 1945, at Mobile, Alabama, accused issued checks in the sum of $50.00 and $77.00, respectively, on the Bank of Fort Sam Houston, San Antonio, Texas, while the records show that he had no more than $5.55 on deposit in said bank during the months of August and September 1945 (Specs. 1 and 2, Add'l Charge; Pros. Ex. 11); that on 6 October 1945 at New Orleans, Louisiana, 23 October 1945 at Houston, Texas, and 30 October at San Antonio, Texas, the accused issued checks in the sum of $50.00, $50.00, and $25.00, respectively, on the Denver National Bank, and that he had no more than $5.54 on deposit at such bank during the months of August, September, October and November 1945 (Specs. 1, 2, 3, Charge II, Second Add'l Charges; Pros. Ex. 10); that on the dates mentioned accused presented false and fraudulent claims in the form of pay vouchers against the United States at the respective finance offices in the San Antonio, Texas, Area, and in the following amounts:

Date	Finance Office	Pay period claimed	Amount
31 Oct 45	Randolph Field, Texas	1 Oct to 31 Oct 45	$205.03
"	Ft Sam Houston, Texas	1 Oct to 31 Oct 45	$205.03
"	Kelly Field, Texas	1 Oct to 31 Oct 45	$205.03
"	AAF Distribution Command	Partial pay only	$244.00
26 Nov 45	"	"	$200.00
30 Nov 45	Ft Sam Houston, Texas	1 Nov to 30 Nov 45	$204.33,

securing payment on each of such false and fraudulent vouchers, and well knowing that he was not entitled to receive the amounts represented by such vouchers, if for no other reason that, as he admits under oath, "I was AWOL. No, sir, I wasn't entitled to it, but it was partial payment more or less" (R. 42).

6. As heretofore stated, the accused admitted his unauthorized absence for the period alleged, 4 October to 3 December 1945, and since the reviewing authority approved only so much of the findings of guilty

of the Specification of Charge I, and Charge I, Second Additional Charges, as involved a finding of guilty of absence without leave for the period alleged, no further comment is necessary.

7. Accused contends that the issuing of the nine checks in the total sum of $312, all of which were returned by reason of insufficient funds being on deposit to his credit, was not wrongful because he believed there was money on deposit covering the amounts thereof. If such testimony be accepted as fact it does not constitute a defense here for the reason as stated in CM 307125, Keller:

> "'*** in the absence of adequate explanation or countervailing proof, the inference of fact is fully justified, from common human experience, that the accused knew that his account was insufficient and did not intend that it should be sufficient. If there be evidence of extenuation or excuse the accused is the person to furnish it. This rule is well established, often stated in the language that the accused, under such circumstances, is "chargeable" with knowledge of the condition of his own account (CM 202601, Sperti, 6 BR 171, 214; CM 236070, Wanner, 22 BR 279; CM 257069, Bishop, 37 BR 7, 13; CM 257417, Sims, 37 BR 111, 117; CM 258314, Reeser, 37 BR 367, 378; CM 259005, Poteet, 38 BR 197, 206), and that the "burden" (of going forward with proof in his defense to dispel the ordinary inference from established facts) in such an evidentiary situation is on the accused (CM 249232, Norren, 32 BR 95, 103; CM 249993, Yates, 32 BR 255, 261; CM 250484, Hebb, 32 BR 397, 402)' (CM 280769, Hughes; accord, CM 280898, Dannelly)."

8. Accused admitted that his signature appeared on each voucher identified as Prosecution's Exhibits 16 to 21 inclusive, but stated that due to his prolonged intoxicated condition he did not remember such transactions. He did remember, however, that he was absent without leave and that he was not justly entitled to the money received on the false vouchers. The evidence shows with convincing effect that accused knew at all times mentioned in the specifications that he did not have sufficient funds on deposit in the banks to cover the amounts of the checks drawn thereon. The evidence further shows that he had sufficient mind and memory, even if addicted to alcohol, to deceive the personnel of four finance offices, collecting triple pay for the period of 1 October to 31 October 1945, pay for the period of 1 November to 30 November 1945, and in addition thereto, and by the use of fictitious papers to collect partial pay twice from the same finance office. That such fraudulent misconduct is denounced by Article of War 94 is beyond question and a citation of authorities is unnecessary.

9. War Department records show the accused to be 28 years of age and unmarried. He attended commercial college for one and one-half years prior to enlisting in the Army in 1936. On 29 January 1942, while a sergeant, Medical Department, 1326 Service Unit, Camp Lee, Virginia, he applied for a commission in the Officers' Reserve Corps, and on 31 March 1943, after completion of training at the Medical Administrative Corps Officer Candidate School, Camp Barkeley, Texas, he was commissioned a second lieutenant, Medical Administrative Corps, Army of the United States. He has no record of service in combat. Under the provisions of Article of War 104, this officer was on 25 August 1944 restricted to the limits of the post at Ellington Field, Texas, for the period of one week for the issuance of a check in the sum of $25.00 to the Officers' Mess, Ellington Field, Texas, said check having been returned unpaid by the bank and marked insufficient funds. Again on 1 September 1944 similar action was taken against accused and he was again restricted to his Post for one week for issuance of two checks to the Officers' Mess in the total sum of $35.00, which checks were returned unpaid because of insufficient funds.

10. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 61, 94 and 96 and is mandatory upon conviction of a violation of Article of War 95.

Chester E. Silvers, Judge Advocate

C. E. McAfee, Judge Advocate

Elbert E. Schaad, Judge Advocate

JAGK - CM 307491 1st Ind

WD, JAGO, Washington 25, D. C. AUG 27 1946

TO: Secretary of War

1. Pursuant to Executive Order No. 9556, dated May 25, 1945, there are transmitted herewith the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Frederick A. Haire (O-1545864), Medical Administrative Corps.

2. Upon trial by general court-martial this officer was found guilty of nine specifications alleging the making and uttering of nine checks in the total sum of $312 drawn on two different banks where he wrongfully failed to maintain sufficient funds to meet payment thereof in violation of the 96th Article of War; desertion for the period 4 October 1945 to 3 December 1945 in violation of Article of War 58; three specifications alleging the making of false official statements in violation of Article of War 95, and of six specifications alleging the presenting of false and fraudulent pay vouchers to various finance officers in the San Antonio, Texas, Area, whereby he defrauded the Government of a total sum of $1263.42 in violation of Article of War 94. He was sentenced to dismissal, total forfeitures and confinement at hard labor for fifteen years. The reviewing authority disapproved the finding of guilty of Specification 3, Charge II, alleging a false official statement and approved only so much of the findings of guilty of the Specification, Charge II, and Charge II (alleging desertion) as involved a finding of guilty of absence without leave for the period alleged in violation of Article of War 61. The reviewing authority approved only so much of the sentence as provided for dismissal, total forfeitures and confinement at hard labor for ten 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 sentence as approved by the reviewing authority.

The accused admitted that he absented himself without leave from his organization and station at Keesler Field, Mississippi, for the period 4 October 1945 to 3 December 1945, on which latter date he was arrested in the finance office at Kelly Field, Texas. Prior to his unauthorized absence he had given four checks in the total sum of $60 to the officers' club at Keesler Field, which were drawn on the Denver National Bank. Two of these checks contained the usual certificate that sufficient funds were on deposit at the designated bank, free of any claims, to meet payment thereof. On 13 June 1945 he had falsely stated in a letter to his commanding officer, Colonel R. M. Allott, Keesler Field, Mississippi, that his allotment to the National Bank of Fort Sam Houston, Texas, was not sent as he expected, when in fact he had no allotment to said bank, and he also falsely certified to the same officer that he had sent a draft to the Denver

National Bank to cover a prior shortage. During the period of accused's unauthorized absence he issued six other worthless checks, in complete disregard as to whether there were any funds on deposit to meet the same. These checks, in the total sum of $252.00, were all returned to the banks cashing same marked insufficient funds. While absent from his unit, accused traveled about Mississippi, Louisiana and Texas, finally securing lodging for himself and a friend in a San Antonio, Texas, hotel, where he testified he stayed drunk for about two weeks, and where it is shown that he went about executing and presenting six false and fraudulent pay vouchers to four different finance officers in the San Antonio Area, thereby defrauding the United States of $1263.42.

4. The record presents a picture of an officer who, by his fraudulent conduct has rendered himself unworthy of any trust and should be eliminated from the service. On two occasions prior to the offenses recited herein this officer has been punished under the provisions of Article of War 104 for the issuance of worthless checks.

5. I recommend that the sentence be confirmed but that the period of confinement be reduced to seven years and that a United Stated disciplinary barracks be designated as the place of confinement.

6. Consideration has been given to the following communications on behalf of the accused, which accompany the record of trial: Letter from Mr. Howard A. McDonnell, Civilian Defense Counsel, dated 8 March 1946, addressed to the Commanding General, Keesler Field, Mississippi; letter from Senator Harry Byrd addressed to The Judge Advocate General, dated 15 March 1946 inclosing letter to him from the accused; and letter from Mrs. R. B. Haire, mother of accused, dated June 10, 1946, addressed to the Secretary of War, with two inclosures.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

5 Incls
1. Record of trial
2. Form of action
3. Ltr fr Mr. McDonnell
4. Ltr fr Sen Byrd w/incl
5. Ltr fr mother of accused w/2 incls.

(G.C.M.O. 276, 12 Sept 1946)

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

SPJGN-CM 307776

P-48

UNITED STATES	)	EIGHTH ARMY AREA COMMAND
v.	)	Trial by G.C.M., convened at APO 310, 28 March 1945. As to Washington, Davis and Brunson: Death. As to Mosely: Dishonorable discharge, total forfeitures, and confinement for life. Penitentiary, McNeil Island, Washington.
Corporal JOHN WASHINGTON (16001618), Privates MONROE DAVIS (16039964), WILLIAM M. BRUNSON (33103891) and SAM MOSELY (34072701), all of 3521st Quartermaster Truck Company.	)	

OPINION of the BOARD OF REVIEW
HEPBURN, BAUGHN and O'CONNOR, Judge Advocates

---

1. The accused were tried in a joint trial upon the following Charge and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Sam Mosely, Private Monroe Davis, Private William M. Brunson and Corporal John Washington, all of the 3521 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Caggan, both of the 3521 Quartermaster Truck Company, at APO 72, on or about 25 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fourth Grade Isadore Ruditys, Company "B", 99th Signal Battalion, a human being by shooting him with a gun.

Specification 2: In that * * *, acting jointly and in pursuance of a common intent, did, in conjunction with

Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Caggan, both of the 3521 Quartermaster Truck Company, at APO 72, on or about 25 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Calextro Dingcong, a human being by shooting him with a gun.

Specification 3: In that * * *, acting jointly and in pursuance of a common intent, did, in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Caggan, both of the 3521 Quartermaster Truck Company, at APO 72, on or about 25 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation mortally wound one Private Hobert B. Duke, Headquarters Company, X Corps, a human being by shooting him with a gun in consequence of which shooting and wounding, the said Private Hobert B. Duke died on or about 26 February 1945.

Each accused pleaded not guilty to, but, all members of the court concurring, was found guilty of, the Specifications and the Charge with the exception of the words "in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Caggan, both of the 3521 Quartermaster Truck Company," of which words each was found not guilty. Accused Washington, Davis and Brunson were sentenced to be hanged by the neck until dead and accused Mosely to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentences and in the case of Mosely designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The confirming authority confirmed the sentences of accused Washington, Davis and Brunson and forwarded the record of trial for action under Article of War 50½.

2. On 22 July 1945 the Board of Review in the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific, examined the record of trial and held it legally sufficient to support the findings and the sentences. The Board of Review's holding, containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning and conclusions of the Board, is attached to the record. The Assistant Judge Advocate General in charge of that Branch Office approved the holding of the Board of Review and on 29 July 1945 forwarded the record of trial of Washington, Davis and Brunson, to the Commander-in-Chief, United States Army Forces, Pacific, for execution of the sentences (CM P-48). The sentence as to Mosely was ordered executed on 6 August 1945 by General Court-Martial Orders #7, Headquarters Eighth Army Area Command.

3. The execution of the sentences of Washington, Davis and Brunson was stayed by the Commander-in-Chief, United States Army Forces, Pacific, following the request of Senators Scott W. Lucas and C. Wayland Brooks of Illinois, on 7 August 1945, to enable them to submit clemency petitions with respect to Washington. The last clemency petition was received on 21 January 1946. On 19 January 1946 the powers conferred by direction of the President upon the Commander-in-Chief, United States Army Forces, Pacific, under the provisions of Articles of War 48, 49, 50, and 50½ were terminated. The record of trial of Washington, Davis and Brunson was thereupon forwarded to The Judge Advocate General, Washington, D. C. for appropriate action on 5 February 1946.

4. The record of trial of Washington, Davis and Brunson has been examined by the Board of Review in the Office of The Judge Advocate General, Washington, D. C. and it adopts and concurs in the holding of the Board of Review with the Branch Office, a copy of which is hereto attached, and, for the reasons set forth therein, is of the opinion that the record of trial of Washington, Davis and Brunson is legally sufficient to support the findings and the sentences and to warrant confirmation thereof. A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92.

Carlos Stephens, Judge Advocate.

Wilmot T. Baughn, Judge Advocate.

Robert J. Clamer, Judge Advocate.

Incl
Holding by B/R
CM P-48

SPJGN-CM 307776 1st Ind
Hq ASF, JAGO, Washington, D. C.
TO: The Secretary of War APR 4 1946

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 Corporal John Washington (16001618), Privates Monroe Davis (16039964), and William M. Brunson (33103891), all of 3521st Quartermaster Truck Company.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentences and to warrant confirmation thereof. I recommend that the sentence as to each accused be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement, and that the sentences as thus modified be ordered executed.

3. Consideration has been given to requests for clemency with respect to Washington by Senators C. Wayland Brooks and Scott W. Lucas, and by Attorneys George S. Barr and Arthur Poorman; with respect to Davis, by Congressman Raymond S. Springer of Indiana; and with respect to Brunson, by Robert L. Carter, Attorney.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

9 Incls
1 - Record of trial
2 - Dft. ltr. for sig. Sec. of War
3 - Form of Executive action
4 - 2 Ltrs. fr. Hon. C. Wayland Brooks
5 - Memo fr. Hon. Scott W. Lucas w/incls.
6 - Ltr. fr. Mr. George S. Barr
7 - 2 Ltrs. fr. Mr. Arthur Poorman w/incls.
8 - 2 Ltrs. fr. Hon. Raymond Springer w/incl.
9 - Ltr. fr. Mr. Robert L. Carter

(GCMO 125, 14 May 1946).

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
with the United States Army Forces
in the Pacific

Board of Review
CM P-48
CM # 307776

22 July 1945.

UNITED STATES v. Corporal JOHN WASHINGTON (16001618), Privates MONROE DAVIS (16039964), WILLIAM M. BRUNSON (33103891) and SAM MOSELY (34072701), all of 3521st Quartermaster Truck Company.	Trial by G.C.M., convened at APO 310, 28 March 1945. As to Washington, Davis and Brunson: Death. As to Mosely: Dishonorable discharge, total forfeitures, confinement for life. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, MURPHY and CLEMENTS,
Judge Advocates.

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

2. The accused were tried in a joint trial upon the following charge and specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Sam Mosely, Private Monroe Davis, Private William M. Brunson and Corporal John Washington, all of the 3521 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Caggan, both of the 3521 Quartermaster Truck Company, at APO 72, on or about 25 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fourth Grade Isadore Ruditys, Company "B", 99th Signal Battalion, a human being by shooting him with a gun.

Specification 2: In that Private Sam Mosely, Private Monroe Davis, Private William M. Brunson and Corporal John Washington, all of the 3521 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Caggan, both of the 3521 Quartermaster Truck Company, at APO 72, on or about 25 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Calextro Dingcong, a human being by shooting him with a gun.

Specification 3: In that Private Sam Mosely, Private Monroe Davis, Private William M. Brunson and Corporal John Washington, all of the 3521 Quartermaster Truck Company, acting jointly and in pursuance of a common intent, did, in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Caggan, both of the 3521 Quartermaster Truck Company, at APO 72, on or about 25 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation mortally wound one Private Hobert B. Duke, Headquarters Company, X Corps, a human being by shooting him with a gun in consequence of which shooting and wounding, the said Private Hobert B. Duke died on or about 26 February 1945.

Each accused pleaded not guilty to, but, all members of the court concurring, was found guilty of, the specifications and the charge with the exception of the words "in conjunction with Technician Fifth Grade William O. Talley and Technician Fifth Grade Eugene Caggan, both of the 3521 Quartermaster Truck Company" of which words each was found not guilty. Accused Washington, Davis and Brunson were sentenced to be hanged by the neck until dead and accused Mosely to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentences and designated the United States Penitentiary, McNeil Island, Washington, as Mosely's place of confinement. The confirming authority confirmed the sentences of accused Washington, Davis and Brunson and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on the evening of 24 February 1945 a public dance (R. 19, 28), attended by about two hundred Filipino civilians and white American soldiers (R. 10), was held in a tent at a place called the "cockpit" (R. 23) northwest of and near the 216th Military Police area (R. 9, 10). That organization was located on the south side of a road that paralleled the beach and led to the town of Carigara, P.I.. On the other side of the road, that nearest the beach, and about five hundred or six hundred feet east of the "cockpit" was the western boundary of Headquarters Battery, X Corps Artillery. The 3521st Quartermaster Truck Company of which organization the four accused were members (R. 60) was located about a mile east of the Headquarters Battery area.

About 11:00 or 11:30 that evening five colored soldiers (R. 11, 17), one of whom at least had purchased a ticket of admission (R. 28), entered the dance tent. Accused Washington, Davis and Mosely were identified as three of the colored soldiers (R. 11, 23, 185, 214, 224). About thirty minutes after their arrival there was an intermission to permit the members of the orchestra to eat (R. 12, 225) and everyone went outside (R. 23, 205). There was the sound of a "short scuffle" (R. 12) and accused Davis, who was walking behind his companions and arguing with a Filipino, drew a pistol from his pocket, cocked it, pointed it at the Filipino and also aimed it in the general direction of the dance tent (R. 17, 27, 186, 214). The people standing about scattered (R. 24) and the colored soldiers ran away (R. 25).

Between 11:00 and 12:00 o'clock that night Corporal Roy L. Smith of accused's unit saw accused Washington and Davis, each carrying a Thompson submachine gun, walk past the orderly room of their company going in the direction of the Headquarters Battery area (R. 105). About 11:45 Technician Fourth Grade Leslie W. Hines, a guard who was walking a post along the eastern boundary of Headquarters Battery and who a short time earlier that evening had seen five colored soldiers walking in the other direction (R. 117) saw six colored soldiers walking three abreast down the road towards the Military Police area (R. 115). The three in front and the one in the second line nearest Hines were carrying Thompson submachine guns slung over their shoulders. The soldier in the center of the front line was wearing a white T-shirt and the others were dressed in khaki (R. 115, 116). The witness was not able to identify any of the men nor was he able to state whether the other two in the second line were armed (R. 116).

About fifteen, twenty, or twenty-five minutes after the colored soldiers had left the dance five were seen by witnesses in the dance area to return along the road (R. 20, 25, 187). One of them, accused Brunson, wearing a white T-shirt (R. 199) and carrying a gun in an "on guard" position, went toward the dance tent and the others remained grouped on the road (R.188). A fight started between about five

Filipinos, two white soldiers and Brunson (R. 186, 200). Brunson's gun was taken from him and he shouted "something" (R. 189, 192). A bolt was heard to click; someone shouted "The colored troops were back" (R. 12, 19, 25); everyone started to "scatter" and there was firing from the vicinity of the road and the beach (R. 12, 19, 28, 206, 216). The firing was variously described as submachine rapid fire (R. 28); two short bursts like Tommy-gun fire (R. 12); like half of a small 20-round clip (R. 20); two or three bursts of fire (R. 29); two bursts and a carbine shot (R. 47); a string of shots, a single shot, and then a long string of shots (R. 145); several bursts with a long burst at the end (R. 136); thirty or forty shots, single shots, then bursts (R. 110, 131) and three or four bursts (R. 142). The firing lasted between twelve (R. 131) and thirty seconds (R. 47).

After the firing had ceased the body of an American soldier, Private Isadore Ruditys, 99th Signal Battalion, was lying about 8 feet from the entrance to the dance tent (R. 13, 59) and the body of a Filipino was lying about five or six paces away (R. 13, 145). Both had been killed by the gun fire (R. 14, 34, 35). No firearms were seen near either of them (R. 15, 20).

The body of the Filipino was taken to the Municipal Building in Carigara where it was identified as Calextro Dingoong (R. 39, 40, 93). A .45 calibre bullet (R. 41; Ex. 14, R. 181) was removed from his body by a civilian doctor and given to the Military Police (R. 41, 82, 84, 161, 169, 209).

Accused Brunson had suffered a gunshot wound in the leg (R. 33) from which a .45 calibre bullet (Ex. 3, R. 33, 180) was extracted, and a Technician Fifth Grade Wilbert F. Ruff was wounded in the leg (R. 145, 197, 202).

A Private Hobert B. Duke, Headquarters Company, X Corps, received several gunshot wounds in the body (R. 31). A Filipino took the carbine that Duke was carrying and, assisted by Corporal Byron J. Eckard (R. 25, 43, 54, 99), helped him to walk to the orderly room in the Military Police area (R. 25, 221). There Private Duke was laid on the floor and his clothing removed. A .45 calibre bullet (Ex. 13; R. 181) which was protruding from his hip was extracted (R. 54, 165, 169). He was taken to the 58th Evacuation Hospital (R. 32, 51) and died the following day from the wounds that he had received (R. 57). The carbine which Private Duke had been carrying was examined and did not appear to have been recently fired (R. 50).

About midnight Technician Fifth Grade William E. Wilson, the guard patroling the ocean approaches to the beach and the western boundary of Headquarters Battery, that is, the boundary nearest the Military Police area (R. 121) saw through the field glasses that he was using on his tour of duty (R. 134) two or three colored soldiers walking along the road

toward the Military Police area. He noticed that they left the road and dropped behind an enbankment and "squatted there a moment" (R. 122). The guard looked away for two or three minutes (R. 133), looked back, and then saw four or five colored soldiers (R. 130, 132) behind the enbankment about 25 yards from the first hut of the Military Police area (R. 124). While he was watching them he saw "very small flashes" coming from their position and heard approximately thirty or forty shots from automatic weapons in ten or fifteen short bursts and at least one single shot (R.125, 131). The colored soldiers then turned and ran in his direction (R. 125). Three of them "broke away towards the road" and the other two continued towards the guard (R. 125). Captain Morton H. Robinson of Headquarters X Corps Artillery had heard the shooting and joined Technician Fifth Grade Wilson. He saw two colored soldiers "walking and running intermittently" along the beach towards him (R. 136). Within forty-five seconds to a minute after the firing had ceased (R. 139) he and Wilson stopped the two men, accused Washington and Davis (R. 125), and asked them if they had fired their weapons. They answered in the negative. The Captain felt the submachine gun that each was carrying and, finding that one was warm to the touch, disarmed the men and placed them in custody (R. 126, 137). Captain Robinson asked the soldier who had been carrying the hot gun what he had shot at and the latter replied,"'I fired my gun in the air . . they were shooting at us'". Asked what his name was the soldier answered "'John Washington'" (R. 137, 140, 143). One of the two colored soldiers said, "'White boys stuck guns in our belly * * * We wasn't shooting to kill anybody'" (R. 128, 135). The accused were taken to the supply room at Artillery Headquarters. First Lieutenant Michael Demkowski of the 216th Military Police Company asked Washington if the hot gun was his and the latter answered in the affirmative (R. 150). He asked Davis if the cold gun was his and he said it was (R. 150). The guns were kept separate, taken to the MP supply room and tagged (R. 140, 146, 148, 151, 155, 171). The butt plate (magazine release) of Davis' gun, number 177894, (Ex. 10; R. 175) was hanging out but the gun could have been made to fire in two or three seconds (R. 141, 144, 211). A full clip was found in Davis' pocket (R. 164). Washington's gun, number 159694 (Ex. 11; R. 175) contained ten or twelve live rounds in a 20-round clip.

About eight minutes after the shooting Technician Fourth Grade Hines saw three colored soldiers, at least two of whom were carrying submachine guns, going in an easterly direction along the road towards the Quartermaster area. In some manner, not disclosed by the record, they "identified themselves" to him and were not detained (R. 117). The guard could not recognize any of the accused as among those whom he had previously seen nor did he hear any conversation at the time (R. 120).

A short time after the shooting first Washington and then Davis retraced with First Lieutenant Walter G. Troy, 216th Military Police Company

307776

and Captain Del Guerico, the Provost Marshal, X Corps, their route to the place where they had been apprehended (R. 156). Washington told the officers that he had walked down the road and that when he jumped into a ditch his gun was discharged. He told them that he then went further up the road where he met Davis. They then crossed a barbed wire fence, walked along the beach and were taken into custody (R. 157, 159). In daylight the Lieutenant went over the same ground again and found nothing to indicate that that had been the path which the accused had taken. No expended cartridges were found in the vicinity of the ditch into which Washington claimed he had jumped (R. 157) but, fifteen or twenty feet away and four or five feet from the road the Lieutenant found ten expended .45 cartridges (R. 158, 163). The expended shells (Exs. 16-A-1 - 16-A-10; R. 235) were placed in an envelope and marked (R. 159).

Lieutenant Troy also examined the dance area and found five .45 bullets (Exs. 15-A-1 - 15-A-5; R. 235) in trees and a tree shrub about eighteen or twenty feet from the dance "cockpit" (R. 159). By noting where the trees and bushes had been marked the Lieutenant determined that the bullets he found had been fired from the place where he had discovered the empty cartridges (R. 160).

Within twenty minutes after the shooting, a little after 12:00 o'clock (R. 101), a Thompson submachine gun Number AO 23837 (Ex. 7; R. 111, 171), without a stock or sling, was found about twenty feet from the northeast corner of the dance area (R. 100). It contained a full clip and one round in the chamber (R. 101, 110) and did not appear to have been recently fired.

About an hour later Sergeant Alfred O. Culver inspected the area where the dance had been held. About fifteen feet south of the road and about sixty feet northwest of the "cockpit" (R. 88) he found twenty expended .45 cartridges which smelled of freshly burned powder (R. 91) (Exs. 17-B-1 - 17-B-20; R. 85, 172, 236) lying on the ground "in a sort of a column" as though they had been discharged from a weapon (R. 88, 89). Between the place where he had found the shells and the dance tent there was one tree and no shrubbery. The place was "out in the open" (R. 92).

About 0400 hours that day Sergeant of the Guard Clarence Sutton found a Thompson submachine gun and clip between a kitchen and an incinerator about forty yards from the gun tent in accused's area (R. 78). The gun had not been fired (R. 80). By stipulation it was agreed that the gun bore Number 193849 and was introduced as Exhibit Number 6 (R. 78).

On 12 March 1945 two Filipino boys, Marcus Cantivesos and Eladio Insigne, found a Thompson submachine gun near the Sebang River about two or three hundred yards from the Quartermaster area. The next day they found a loaded magazine at the same place (R. 94-97). The gun and magazine were turned over to the Military Police. The gun bore serial number 174140 and was introduced in evidence as prosecution's Exhibit Number 8 (R. 174, 184).

The record further reveals that the 3521st Quartermaster Truck Company of which accused were members possessed nine Thompson submachine guns (R. 60). They were kept in a box in the supply room but on the morning of 24 February, the day of the fatal shooting, the guns were moved to the gun tent, next to the supply tent and three or four feet from it (R. 61, 66, 72) and laid out for inspection (R.62). Accused Davis was the assistant supply sergeant of the company and occupied the tent opposite the supply tent (R. 64). Early on the morning after the shooting the company was lined up and a search was made for the machine guns (R. 66). Six Thompson submachine guns bearing serial numbers 196428, 174140, 177894, 193849, 023837, and 159694 and two or three clips of ammunition for that type of gun were found to be missing (R. 59, 67). It would have been possible for someone to go into the tent and get the guns without anyone knowing it (R.72, 75). The four accused were not authorized to carry submachine guns (R. 69) and none had been issued in the company (R. 71).

The several guns, the bullets which had been taken from Dingcong's and Duke's bodies and Brunson's leg, and the empty cartridges and the bullets which had been found by Lieutenant Troy and Sergeant Culver were, all as marked, turned over to Second Lieutenant Robert W. Kent, acting Assistant Inspector General, Americal Division (R. 84, 152, 159, 161, 165, 169-175, 177-182, 235). Gun number 196428, Exhibit Number 9 (R. 174, 237) was also turned over to him. The record does not reveal, however, where or when that gun was found.

Lieutenant Kent took the several guns, cartridges and bullets to Brisbane, Australia, and turned them over to Detective Constable Thomas M. Baty, a qualified ballistics expert for examination (R. 238). Mr. Baty testified that from tests made by him and the comparison of photomicrographs (R. 240; Exs. 18, 19) in his opinion the bullet (Ex. 14) taken from Dingcong's body and that (Ex. 13) taken from Private Duke's body were fired from gun number 159694 (Ex. 11; accused Washington's gun)(R. 239, 241). Of the five bullets found by Lieutenant Troy (Ex. 15) two had been fired from that gun; one bore no rifling; one was fired from a colt .45 revolver; and the other was fired from a submachine gun not tested by the witness (R. 239, 241). Of the ten empty cartridges

(Ex. 16), four had been fired from gun number 196428 (Ex. 9) (otherwise unidentified); four had perhaps been fired from a pistol; one from gun number 159694 (accused Washington's; Ex. 11) and the last by a weapon not tested by him (R. 242, 244, 248). The twenty empty cartridges found by Sergeant Culver (Ex. 17) had all been fired from gun number 159694 (accused Washington's; Ex. 11) (R. 242, 244). The bullet which had struck accused Brunson in the leg (Ex. 3) had been fired from a submachine gun, but not from any of those tested by him (R. 241). Because of its condition Mr. Baty made no attempt to secure a sample bullet fired from gun number 174140 (that found by the Filipino boys) (Ex. 8; R. 245).

Lieutenant Kent, on or about 1 March 1945 (R. 227, 230) saw accused Mosely in the M.P. office at the stockade (R.228). After warning him of his rights he interrogated Mosely with reference to his activities on 24 February (R. 227). Mosely then said that he, Davis, and Caggan bought tickets and entered the dance tent on the night of the shooting (R. 232). Washington and Talley later joined them (R. 233). Washington asked a white soldier for a light and the latter refused to give it to him. Washington said to the soldier "'No hard feelings, shake my hand'" but he declined. The dance stopped and they left the tent. Mosely was the last to leave and as he went outside he noticed that there was "some sort of argument" and "the crowd was scattering". Someone said to him "Get, nigger, before you get a bolo in your back" (R. 233). He went toward his company area and on his way back met Washington, Caggan, Talley, Brunson and Davis who were armed (R. 233, 234). He asked where they were going and they answered "'Back to the dance'" (R. 233). He also stated to the Lieutenant "We was talking when we left about the guys snapping rifles. We was going back up prepared. If anything did start, we would have something to protect ourselves" (R. 232) and that when they reached a place about one hundred yards from the dance "people gets to running. Someway or another, we gets on by the dance. We heard a scuffle at the dance. They was whipping Brunson. After a while we heard a Tommy-gun" (R. 234).

The only witnesses called by the defense were First Lieutenant Melvin C. Koch, Field Artillery, Headquarters X Corps, and Technician Fifth Grade Felix Jamison of accused's organization. The Lieutenant testified that on either 4 or 11 February he passed through the area of the 3521st Quartermaster Truck Company (R. 249) and saw a typewritten paper posted prominently upon the bulletin board which, in effect, stated:

> "If some day you see a black bastard lying out in the middle of a field well policed for an area of about 75 yards square, you will know the poor son-of-a-bitch was a member of the 3521st." (R. 250).

Jamison, who had also seen the notice, said that it had appeared to him "as a threat" (R. 252). Prosecution's witness Sutton had also seen the notice on the bulletin board about twelve or thirteen days before the shooting (R.80).

Each of the accused elected to remain silent.

4. The four accused were found guilty of the murder of the several deceased. Murder is the unlawful killing of a human being with malice aforethought (MCM, 1928, par. 148a).

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

Every person is presumed to intend the natural and probable consequences of his act. The evidence clearly establishes that accused Washington discharged a submachine gun at short range into a group of soldiers and civilians and killed Dingcong, a Filipino, and Private Duke. A fatal injury to someone was the natural and probable consequence of his act. Such action "clearly tends to establish that, whether or not he had any special malevolence toward any particular individual, he was possessed of 'a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief,' which has been held to be embraced by the term 'malice aforethought'" (Liggins v. U.S., 297 F. 881; Allen v. U.S., 164 U.S. 492, 17 S. Ct. 154). It follows that there is substantial evidence in the record in support of the court's findings that accused Washington was guilty of murder. There then remains for consideration the question whether the findings with reference to the remaining three accused may be sustained.

"The mere presence of a person at the scene of the commission of an offense by another, in the absence of evidence of preconcert or evidence of intent to participate, if need be, is not sufficient basis for an inference of his participation as an accessory or principal therein" (CM 186947, Bopp & Aldrich; CM 206280, Taylor, et al, VIII B.R. 261; CM 218876, Wyrick, et al, XII B.R. 157, 162).

Such inference usually rests on circumstantial evidence (sec. 244, Wharton, Crim. Evid.) and may be drawn from conduct which discloses a common design on the part of accused to act together in pursuance of the common criminal purpose (sec. 1667, Wharton, Crim. Law); from all the attendant circumstances and from the conduct of accused subsequent to the criminal act (22 C.J.S. 155-156; CM 234118, Reis, XX B.R. 243, 248; Blaustein v. U.S., 44 F. 2d 163).

From the conduct of accused Davis, Brunson and Mosely and the attendant circumstances, their preconcert and association with accused Washington in his felonious acts may be inferred. They were all members of the same organization. Accused Davis, Mosely and Washington were identified as being present at the dance. Davis there drew, cocked, and pointed a revolver at a Filipino and others, and the several colored soldiers left and were seen walking toward their company area. Mosely admitted (which was not evidence against the other accused) "We was talking when we left about the guys snapping rifles. We was going back up prepared. If anything did start, we would have something to protect ourselves". A short time later Washington, Davis, Brunson, Mosely (the latter by his own admission) and two other colored soldiers were seen walking three abreast from the direction of their organization to the vicinity of the dance (those in the front line and one in the second line at least carrying submachine guns). The evidence establishes that Washington, Davis, and Brunson were carrying such weapons and, as six Thompson submachine guns were unlawfully taken from the gun tent in accuseds' area that evening, the court properly could infer that Mosely also was carrying one. Upon nearing the place where the dance was held, Brunson, carrying his gun in an "on guard" position, left the others standing on the road nearby and went toward the dance tent. He was disarmed and shouted something. Immediately thereafter Washington and others commenced the fatal firing. The shooting stopped and Washington and Davis, each carrying a submachine gun, ran towards a guard and were apprehended. Their two companions ran in another direction and were not then taken into custody. When apprehended the magazine release on Davis' gun was hanging down and it could not be fired but could have been repaired in two or three seconds. A full clip of ammunition for his gun was found in his pocket. Either Davis or Washington stated about a minute after the shooting, "'White boys stuck guns in our belly * * *We wasn't shooting to kill anybody'"

Tests made by a ballistics expert revealed that bullets from Washington's gun had killed Duke and Dingcong. Other bullets and expended cartridges were found which had been fired from other of the missing submachine guns and a revolver.

From all of such facts the court properly could infer that the several accused, pursuant to a joint plan and agreed course of action, unlawfully took submachine guns from their company's gun tent and returned to the dance area. Accused Brunson went to the vicinity of the tent. He shouted "something" and immediately thereafter at least one of the conspirators, Washington, fired into the crowd killing Dingcong and Private Duke. The evidence is susceptible to the further inference that the shooting was in accordance with accuseds' joint plan. One of their number, pursuant to such purpose, having committed murder, it follows that all are equally guilty with him as principals for such unlawful action (III Bull. JAG 284, July 1944). Although there was no evidence as to who fired the gun which caused Private Ruditys' death, it might properly be concluded that that homicide was also a result of the firing by one of the accused.

A sentence of death or of life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. With reference to accused Mosely it is noted that confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 455).

5. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings and the sentences.

Lathan J. Platt, Judge Advocate.
Colonel, J.A.G.D.

Le Roy B. Murphy, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson S. Clements, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, A.P.O. 75, 29 July 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, A.P.O. 500.

1. In the cases of Corporal John Washington (16001618), Private Monroe Davis (16039964) and Private William M. Brunson (33103891), all of 3521st Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentences.

2. When copies of the published orders in these cases 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 orders to the record in these cases, please place the file number of the record in brackets at the end of the published orders, as follows:

(CM P-48).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

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

JAGK CM 308215

18 JUN 1946

UNITED STATES	77TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at APO 77, c/o Postmaster, San Francisco, California, 18 and 19 December 1945. Dishonorable discharge and confinement for life. Penitentiary.
Private First Class CHARLES T. PENTIMALL (33779079), Company A, 154th Engineer Combat Battalion, APO 928, c/o Postmaster, San Francisco, California.	

REVIEW by the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Charles T. Pentimall, Company A, 154th Engineer Combat Battalion, APO 928, c/o Postmaster, San Francisco, California, did, at APO 928 c/o Postmaster, San Francisco, California, on or about 8 November 1945, forcibly and feloniously, against her will, have carnal knowledge of Toshiko Ota.

(Another Charge and Specification were withdrawn before trial by order of the appointing authority.)

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence was introduced of one previous conviction by summary court-martial for wrongfully entering "an off limits area" in violation of Article of War 96 for which he was sentenced to forfeit $10 of his pay. In the instant case he was sentenced "to be reduced to the grade of private, to be dishonorably discharged from the service, to forfeit all

pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life." The reviewing authority approved the sentence, designated the "United States" Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. 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. 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. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 22, paragraph 2801, of the District of Columbia Code.

William B. Kuder, Judge Advocate
Gilbert E. Schmidt, Judge Advocate
Earl W. Wingo, Judge Advocate

(GCMO 209, 2 July 1946).

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

JAGH-CM 310015

16 OCT 1946

UNITED STATES	CHANOR BASE SECTION
v.	Trial by G.C.M., convened at Antwerp, Belgium, 11 January 1946. Dishonorable discharge, total forfeitures and confinement for life.
Technician Fifth Grade GEORGE (NMI) KILBEY (33832541), 463d Quartermaster Laundry Company.	

REVIEW by the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SCHWAGER, 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: In that Technician Fifth Grade George Kilbey, 463rd Quartermaster Laundry Company, did, at or near Mortsel, Belgium, on or about 17 November 1945, forcibly and feloniously, against her will, have carnal knowledge of Maria Van den Hoek.

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

Specification: In that Technician Fifth Grade, George Kilbey, 463rd Quartermaster Laundry Company, did, at or near Mortsel, Belgium, on or about 17 November 1945, wrongfully take and use without proper authority a 2½ ton motor truck property of the United States.

He pleaded not guilty to, and was found guilty of, both charges and specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such places as the reviewing authority may direct, for the rest of his natural life. The reviewing authority approved the sentence,

designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct as the place of confinement, but withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on the evening of 16 November 1945 the accused and Technician Fifth Grade Ezra Hawkins attended a dance. Accused drove a 2½-ton 6 x 6 truck which was marked "The Kid" on the doors. After the dance was over, he and Hawkins took two girls home and at about 2345 the former left Hawkins and drove away in the truck (R 33). On 16 November 1945, at about 2345 hours, Maria Van den Hoek and Paula Van Looy were proceeding along a highway from a cinema to their home in Antwerp, Belgium. Two colored soldiers approached them and offered to take them home but they refused. Paula became frightened and waived for a passing vehicle to stop. The driver stopped and they observed that the driver was the accused, a colored soldier. They declined to ride in the vehicle and the accused said, "Oh, you don't want to ride with me because I am black man. You go with white soldiers maybe and they told you we are no damn good" (R 6, 25). The vehicle driven by the accused had the words "The Kid" printed on the door (R 7). The two girls then continued walking along the highway and the accused drove away in the vehicle. About ten minutes later the vehicle driven by the accused passed the girls. He then turned the vehicle around and stopped near them, saying, "Come here" and pointed a pistol toward Maria. Paula then ran away and left Maria. The accused, while still pointing the pistol toward Maria, ordered her three times to "come in". Maria finally entered the vehicle and the accused drove to an open field on the outskirts of Antwerp and stopped. The accused tried to kiss Maria but she refused. He kept the pistol pointed towards her and she finally permitted him to kiss her because she had "fears". The accused placed her on the seat of the vehicle, got on top of her and had sexual intercourse with her (R 6, 7, 24, 25). Maria testified that "when he threatened me with his pistol I had fears and I consented". She further testified that she consented because "I don't want him to kill me with his pistol" (R 9).

The accused then drove Maria to her home after a promise from her that she would meet him on the following day at 1900 hours. She arrived home at about 0200 hours (R 8), crying and nervous (R 25). Immediately she reported to Paula that she had been "raped" (R 26) and on the following day, reported the matter to the Civil Labor Office and the military police (R 10). Arrangements were made with the police, and Maria went to the place where she was to meet the accused at 1900 hours (R 11). The accused in company with Hawkins drove the same vehicle to the appointed place and was apprehended by the military police. The accused had in his possession two trip tickets executed by him as dispatcher and designating himself as the driver (R 43; Pros Ex 2 and 3). The standing operating procedure for the unit of the accused provided that no vehicle would be dispatched except in an emergency after 1800 hours by anyone other than the commanding officer. The accused was not authorized to use the vehicle at the time in question on 17 November 1945 (R 39).

Technician Fifth Grade Lenwood Gunn testified that at about 2000 hours, 16 November 1945, he loaned his gun, a Belgian 32 pistol (R 31), to the accused and that he recovered it the next morning from the accused's bed upon being advised of its location by the accused.

The accused, in a voluntarily pre-trial statement, admitted that he attended a dance on 16 November 1945 with Technician Fifth Grade Hawkins, that he took two girls home in a truck and returned directly to his quarters at 0015 hours. At about 1845 hours, 17 November 1945, Master Sergeant Smith informed him that he (Smith) thought water was in the gas tank of the truck assigned to the accused. He and Hawkins then got in the truck and he told the latter that he was going to "Turnhout" to see a girl and would return immediately. They proceeded in the vehicle to "Turnhout" and when the motor started to miss again he "pulled over to the side". He noticed a girl nearby but did not say anything to her and that he was then placed in arrest by the military police. He further stated that no one gave him a pistol on 16 November 1945 and that he did not have possession of a pistol at any time that night (R 44-45; Pros Ex 4).

4. The accused, having been advised of his rights as a witness, elected to remain silent (R 49). No witnesses were called in his behalf.

5. The victim, Maria Van den Hoek, testified that she got into the truck with the accused upon his insistance when he threatened her with a pistol, and that she submitted to the accused because of fear of her life. She reported the rape soon after the act and was crying and in a nervous condition. The accused, in a pre-trial statement, impliedly denied he was with Maria by stating that he went directly back to his quarters from a dance on the night of 16 November 1945 and also denied he had possession of a pistol on that night. Technician Fifth Grade Gunn, an impartial witness, testified that at about 2000 hours, 16 November 1945, he loaned his gun, a Belgian 32 pistol, to the accused and that he recovered it from the accused's bed the next morning when told of its location by the accused. Hawkins, another impartial witness, testified that he was with the accused on the night of 16 November until about 2345 hours when the accused left him, driving a 2½-ton truck containing the mark "The Kid" on the doors. Paula Van Looy, another witness, testified that she was with Maria on the night of 16 November, that the accused was driving a truck marked "The Kid" and that he drove the truck alongside of Maria and herself and said, "Come here" and when she saw he had a pistol she ran away. She further testified that at about 0200, on 17 November, Maria arrived at the house where they both lived and told her that she, Maria, had been raped and at that time she was crying and nervous. All of this evidence tended to corroborate the testimony of Maria Van den Hoek. Maria appeared to have offered little resistance to the advances of the accused but she claimed she submitted because of fear. The extent and character of the resistance required of a woman to establish her lack of consent depends upon the circumstances and the relative strength of the parties. Where the woman ceases resistance under fear of death or other

great harm the consummated act is rape (CM 236612, Tyree; CM 240674, Rimke). In the instant case failure of Maria to resist more strenuously was clearly due to her fear of being shot by the accused if she did so.

The accused was further charged with the wrongful use of a government vehicle on or about 17 November 1945. The accused was apprehended driving a 2½-ton United States Army truck at about 1900 hours, 17 November 1945. He did not have authority to use the vehicle. One witness indicated that the accused drove the vehicle in question for the purpose of giving it a mechanical check, however, another witness, Hawkins, testified that the accused was going to meet a girl. The accused in a pre-trial statement admitted he had told Hawkins that he (accused) was going to see a girl. There is ample proof of the unauthorized use of the vehicle as alleged in the specification.

6. The charge sheet shows the accused to be 27 years of age. He was inducted on 16 September 1943 at Allentown, Pennsylvania, and had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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. A sentence of death or imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92.

A. Hottenstein, Judge Advocate

William A. Self, Judge Advocate

Harry A. Schwarzes, Judge Advocate

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

SPJGN-CM 310028

U N I T E D S T A T E S	)	83RD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Linz, Austria, 24 January 1946. Dishonorable discharge and confinement for three (3) years. Federal Reformatory, Chillicothe, Ohio.
Private CLINTON BURDETTE (36909614), 644th Quartermaster Truck Company.	)	

HOLDING by the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, Judge Advocates

---

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Pvt Clinton Burdette, 644th Quartermaster Truck Company, APO 777, did at Wels Austria on or about 20 December 1945, willfully, feloniously and unlawfully kill Karl Schmieder by shooting him in the face with a carbine.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for three years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, or elsewhere as the Secretary of War may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Accused was convicted of voluntary manslaughter. The evidence

for the prosecution shows that on 20 December 1945 accused was on guard duty at Wels, Austria. About 0920 hours accused reported to a superior officer that he had shot a man. The officer went to a building on accused's post and found a German civilian, Karl Schmieder, shot through the lip (R. 7-9). Questioned further accused stated that he did not know the gun was loaded and that he had pointed it at deceased merely to scare him (R. 7). Accused told a straightforward story, did not attempt to hide any details, and reported the incident within three or four minutes after it occurred (R. 8).

In accused's organization each guard did not have his own carbine but two or three weapons, together with ammunition, were passed from guard to guard. The magazine always remained in the carbine when this was done but the guards were required to inspect the weapon when receiving it to ascertain whether there was a round in the chamber. Accused obtained his weapon from a man who since then has been redeployed (R. 11, 17).

In an extra-judicial statement, properly admitted in evidence, accused said that when he received the carbine from the guard who preceded him, the magazine was in it but that he did not check to see if it was loaded; that in walking his post he saw a civilian employee of the Army standing near a window; that for the purpose of frightening the man he pointed the carbine at him and pulled the trigger; and that when he realized he had shot the man he immediately reported it to his superior officer. Accused disclaimed any intention of shooting the man (R. 16).

The deceased, Karl Schmieder died as a result of a bullet wound through the brain (R. 13).

The neuropsychiatrist of the 83rd Division testified that although accused is legally sane, he is of subnormal intelligence on level of a moron (R. 19-21).

4. Accused, after an explanation of his rights, elected to remain silent.

5. Due to the presence of the word "willfully" in the Specification accused was tried and found guilty of voluntary manslaughter (CM 217590 Lamb, Jr., 11 BR 275). The only evidence as to how the killing occurred came from accused's extra-judicial admissions where he expressly said that the killing was not intentional. There was no showing that accused bore a grudge toward deceased or that there had been any altercation preceding the killing. There was no showing that accused was aware that the gun was loaded. He reported the incident promptly and, while this might have been the result of shrewdness, such a conclusion seems to attribute to accused a cunning

that is beyond his general level of intelligence. It is true that the court was not required to believe accused's self-serving declarations as to the accidental character of the shooting but, even assuming it did, its disbelief is not affirmative evidence that accused intended to kill deceased, affirmative evidence which the prosecution was bound to supply if a conviction for voluntary manslaughter is to stand. It follows, therefore, that accused should have been convicted of involuntary manslaughter only and that the word "willfully" should have been excepted by the court in its findings (CM 202359, Turner, 6 BR 87; Lamb, Jr., supra).

6. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of the Charge as involves a finding that accused did, at the time and place alleged, feloniously and unlawfully kill Karl Schmieder, as alleged, and legally sufficient to support the sentence.

Wilmot T. Baughn, Judge Advocate.

Robert J. Glennon, Judge Advocate.

Gerald J. O'Hara, Judge Advocate.

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

JAGH - CM 310072

21 OCT 1946

UNITED STATES	CHANOR BASE SECTION
v.	Trial by G.C.M., convened at Charleroi, Belgium, 18 January 1946. Dishonorable discharge and confinement for life. United States Penitentiary.
Technician Fifth Grade THOMAS CAMPBELL (32631959), Quartermaster Laundry Company	

REVIEW by the BOARD OF REVIEW
HOTTENSTEIN, SOLF and SCHWAGER, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Technician Fifth Grade Thomas Campbell, 465th Quartermaster Laundry Company, did, at or near Marchienne, Belgium, on or about 7 January 1946, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation, kill one Private Buford Ervin, a human being, by shooting him with a gun.

Specification 2: In that Technician Fifth Grade Thomas Campbell, 465th Quartermaster Laundry Company, did, at or near Marchienne, Belgium, on or about 7 January 1946, with malice aforethought wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Randolph Murry, a human being, by shooting him with a gun.

He pleaded not guilty to, and was found guilty of, the Charge and both Specifications. No evidence of any previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence,

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

3. The Board of Review adopts the statement of evidence and law contained in the Staff Judge Advocate's review.

4. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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. A sentence to death or life imprisonment is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC 452, 454).

A. Lotenstein, Judge Advocate

Wallenar A. Wolf, Judge Advocate

Henry A. Sleyster, Judge Advocate

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

(177)

SPJGH - CM 310076

23 MAY 1946

UNITED STATES	)	ARMY AIR FORCES TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Sheppard Field, Wichita Falls, Texas, 21 February 1946. Dismissal and confinement for two (2) years.
Second Lieutenant EARL R. PETERSON (0837194), Air Corps.	)	

OPINION of the BOARD OF REVIEW
TAPPY, STERN 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 93d Article of War.

Specification: In that Second Lieutenant Earl R. Peterson, Air Corps, Squadron Q, 3706th Army Air Forces Base Unit (Basic Training Center and Pilot Schools Helicopter and Liaison) did, at Wichita Falls, Texas on or about 1 February 1946, feloniously take, steal, and carry away a Camera, value of about Four Hundred Dollars ($400.00), the property of Private I. A. Tucci.

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, total forfeitures, and confinement for two (2) years. 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 about 12:00 p.m. on 1 February 1946, Corporal William L. Mayhew entered the Baxter Cleaners establishment in Wichita Falls, Texas, carrying a "Denchel-Zeiss" camera which had been loaned to him by Private Ivo A. Tucci (R.7,8,10,11). Mayhew went to the rear of the shop to change his shirt (R.7). While he was gone, the accused entered the premises and asked the attendant for his clothes. She went to the rear of the shop leaving accused in the front. When she returned with accused's clothes, he took them and left the premises. Shortly thereafter Mayhew came to the front of the store and found that the camera had disappeared. He had given no one permission to take it (R.7,8). Private Ivo A. Tucci

identified a camera as one which had been sent to him by his father and which he had loaned to Mayhew. Tucci had not given accused permission to take it. Mayhew also identified the camera as the one which Tucci had loaned him and which had disappeared in the dry cleaning establishment (R.8,10,11; Pros. Ex. 1). A witness, qualified as an expert in the appraisal of cameras, testified that the camera in question was worth about $235 (R.12,13).

4. After a full explanation of his rights as a witness, the accused elected to be sworn and testified that he is 21 years of age and resides in Detroit, Michigan; that his parents are living and that his father is employed at the Plymouth Motor Corporation. The accused completed high school and in civilian life was a cutter-grinder for about six months before enlisting in the Army. He had never been in trouble with civilian or military authority before (R.15,16).

On cross-examination, without objection, accused testified that he entered the Baxter Cleaners establishment shortly after noon on 1 February 1946 to pick up his cleaning. While there his attention was attracted to a camera case lying on the desk. When the young lady, whom he had asked for his cleaning, went to the rear of the shop, he picked up the case and examined the camera. Upon her return with his clothes, he paid the bill, took his clothes and the camera and departed. That evening about 7:00 p.m., he was called to the office of the provost marshal and there encountered an enlisted man who asked him if he had seen a camera that day. Accused replied affirmatively, stating that he had taken it and that it was then in his footlocker. He returned the camera to its owner (R.16-18).

The accused's commanding officer testified that accused had served under him since January 1946 and that accused's rating in the performance of duty was "high excellent" (R.14).

5. The prosecution's evidence together with accused's plea of guilty establishes that on 1 February 1946 accused, without permission, took Private I. A. Tucci's camera, then in the lawful possession of Corporal Mayhew, and carried it away with the intent permanently to deprive the owner of this property. Such an unauthorized taking was larceny (MCM, 1928, par. 152g). The evidence shows the value of the camera to be $235, while the court found its value to be $400 as alleged. Since the finding did not increase the grade of the offense or punishment which might be imposed, the variance was immaterial (CM 244666, Schallenberg, 28 BR 385).

The accused as a witness in his own behalf on direct examination testified only to matters pertaining to his civilian background and his good record prior to the commission of the present offense. On cross-examination, he was interrogated with respect to the offense itself. While this was error, it being well-settled that an accused is subject to cross-examination, only as to an offense or offenses concerning which he has testified to on direct examination and as to facts relevant to his credibility as a witness (MCM, 1928, par. 121b), the error was not prejudicial to accused's substantial rights in view of his plea of guilty. Indeed, the evidence might be

said to have had some ameliorating effect in view of accused's testimony that upon being asked concerning the camera, he immediately disclosed that he had it and returned it to its owner. While the return of the property after the offense had been committed was no defense (MCM, 1928, par. 149g), accused's testimony in this regard clearly tended toward extenuation. The findings of guilty of the Charge and its Specification are fully sustained by the record.

5. War Department records show the accused to be twenty-two years of age and single. He completed the twelfth grade in high school but did not graduate. He was employed by the Hudson Motor Company of Detroit, Michigan, as a "cutter-grinder" from 1941 to 1942. The Charge Sheet shows that he enlisted in the Army on 10 December 1942. War Department records further show that he thereafter became an aviation cadet and on 8 September 1944, after completion of the prescribed course of instruction, was appointed a second lieutenant in the Army of the United States and assigned to the Air Corps.

6. The court was legally constituted and had jurisdiction of 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 of guilty of the Charge and its Specification and the sentence and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 93.

Thomas N. Jaffy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert E. Trevethan, Judge Advocate.

SPJGH - CM 310076 1st Ind

JUN 12 1946

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

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 Earl R. Peterson (O-837194), Air Corps.

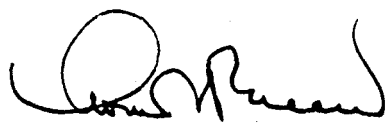
2. Upon trial by general court-martial this officer pleaded guilty to, and was found guilty of, the larceny of a camera, value $400, in violation of Article of War 93. No evidence of previous convictions was introduced. He was sentenced to dismissal, total forfeitures and confinement at hard labor for two (2) 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. 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 February 1946 the accused entered a dry cleaning establishment in Wichita Falls, Texas, and without permission took a camera which had been placed on a desk therein by another customer, a person to whom it had been loaned by the owner. It was shown that the camera had a value of about $235.00. The accused took the stand and, after admitting that he had taken the camera without permission, testified that later in the day when asked if he knew anything about a camera, readily admitted that he had taken it and immediately returned it to the owner. His commanding officer testified that his rating for performance of duty was excellent.

The civil offense of which this officer stands convicted is a felony and warrants severe punishment. However, it appears that his military and civilian record was unblemished until the instant offense was committed. The circumstances of the theft, lead me to believe that the taking of the property was the act of a foolish, impulsive and weak young man, unable to withstand temptation rather than the premeditated act of a confirmed thief. Of course, his actions demonstrate that he is unworthy of his commission and, accordingly, I recommend that the sentence be confirmed but that the period of confinement be reduced to one (1) year and that the sentence as thus modified 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.



THOMAS H. GREEN
Major General
The Judge Advocate General

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

(GCMO 203, 28 June 1946).

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

JAGK - CM 310082

26 JUN 1946

UNITED STATES v. Private First Class JAMES B. TAPP (35814572), 3719th Quartermaster Truck Company (Heavy).	UNITED STATES ARMY FORCES WESTERN PACIFIC Trial by G.C.M., convened at APO 358, c/o Postmaster, San Francisco, 28 December 1945. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates.

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class James B. Tapp, 3719th Quartermaster Truck Company (Heavy), did, at Santa Quiteria, Baesa, Caloocan, Greater Manila, Philippine Islands, on or about 9 August 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Natividad Supetron, a human being by shooting her with a carbine.

He pleaded not guilty to and was found guilty of the Specification and the Charge. Evidence was introduced of two previous convictions by summary court-martial, each for leaving a bivouac area without a pass and entering an off-limits area in violation of the 96th Article of War. 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 rest of your natural life." The reviewing authority approved the sentence, designated the "United States" Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support

the finding of guilty and the sentence. A sentence to death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452,454).

William B. Kreder, Judge Advocate

Gilbert Goldenzweig, Judge Advocate

Earl W. Wingo, Judge Advocate

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

JAGK - CM 310086

20 AUG 1946

UNITED STATES	)	HEADQUARTERS 83D INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Linz, Austria, 21 December 1945. Dismissal, total forfeitures and confinement at hard labor for five (5) years.
	)	
Second Lieutenant THOMAS J. GREGORY (O-1592735), 3977 Quartermaster Truck Company.	)	

OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

---

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

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

CHARGE I: (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: In that Second Lieutenant Thomas J. Gregory, 3977th Quartermaster Truck Company, did, at Flak Kaserne, Germany, on or about 18 October 1945, feloniously embezzle by fraudulently converting to his own use 5 cigarette lighters, of the value of about $5.00, 2 Parker fountain pens, of the value of about $12.12, and 10 cartons of cigarettes of the value of about $5.00, and of a total value of about $22.12, the property of the Army Exchange Service.

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

Specification 1: In that Second Lieutenant Thomas J. Gregory, ***, did, near Enns, Austria, on or about 18 October 1945, wrongfully, unlawfully and knowingly dispose of by sales 3 wool OD blankets, of the value of about $24.30, 3 pair of wool OD trousers, of the value of about $17.10, about 6 wool OD shirts, of the value of about $26.10, 4 wool OD sweaters, of the value of about $15.60, 6 wool undershirts, of the value of about $9.18, 6 wool drawers, of the value of about $9.00, 10 pair of wool socks, of the value of about $3.50,

all of a total value of about $104.78, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Second Lieutenant Thomas J. Gregory, ***, did, at Flak Kaserne, Germany, on or about 18 October 1945, knowingly and willfully apply to his own use a quarter ton 4x4 motor vehicle, of a value in excess of $50.00, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Second Lieutenant Thomas J. Gregory, ***, did, at Flak Kaserne, Germany, on or about 18 October 1945, wrongfully, fraudulently and unlawfully execute a "Driver's Trip Ticket and P.M. Service Record", War Department Form 48, for the purpose of making an unauthorized trip to Vienna, Austria.

Specification 2: In that Second Lieutenant Thomas J. Gregory, ***, did, at or near Enns, Austria, on or about 18 October 1945, wrongfully and unlawfully have in his possession forged and fraudulent travel orders, to wit:

HEADQUARTERS
862ND ENGINEER AVIATION BATTALION
APO 126, U.S. Army
16 October 1945

SUBJECT: Letter Orders
TO: All Concerned

Fol pers this orgn are placed on TDY for approx seven (7) days & WP on 17 October 1945 to Airstrip R-92, Vienna, Austria, rptd upon arrival to CO, Det A & upon compl of TDY will ret to proper sta. TDN by MT (EDCMR 17 Oct 1945)

2ND LT THOMAS J. GREGORY 01592735
Cpl Leon Cox 35241930

Travel dir is pursuant to the auth contained in ltr Hq. ETOUSA, 22 Nov 44, file 300.4 MPM.

BY ORDER OF MAJOR SELLERS:

O F F I C I A L: /s/ L. M. Sawtell
L. M. SAWTELL
CAPT
Adjutant

L. M. SAWTELL
Capt
Adjutant

Specification 3: In that Second Lieutenant Thomas J. Gregory, ***, did, in the vicinity of Enns, Austria, on or about 18 October 1945, wrongfully violate and fail to obey Paragraph 3, Letter Order, Subject: Troop Participation in Black Market Trade, Headquarters United States Forces, European Theater, dated 10 September 1945, providing as follows:

"All military personnel are, therefore, advised that they are forbidden: a. To sell, barter or exchange for services any and all material purchased in Army Exchange stores to Germans and civilians in the United States zone of occupation, and elsewhere. Violation of this prohibition is a military offense and will subject offenders to punishment under the Articles of War", by selling to various Russian soldiers, names and numbers unknown, 20 cartons of cigarettes and one wristwatch, all purchased from an Army Exchange store.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of the Specification and Charge I. He was found guilty of the Specification and Charge II, Specification 2 of Charge III, Specification 1 of Charge IV and guilty of Specification 1 of Charge III except the words "6 wool OD shirts, of the value of about $26.10," substituting therefor the words "3 wool undershirts, of the value about $15.05", and except the words "6 wool undershirts, of the value of about $9.18", substituting therefor the words "3 wool undershirts, of the value of about $4.59", and except the words "6 wool drawers, of the value of about $9.00", substituting therefor the words "3 wool drawers, of the value of about $4.50", and except the words "10 pair of wool socks, of the value of about $3.50", without substitution, and except the figure "$104.78", substituting therefor the figure"$79.14". Of the excepted words Not Guilty; of the substituted words Guilty; guilty of Specification 2 of Charge IV except the words "forged and"; guilty of Specification 3 of Charge IV except the words "20 cartons", substituting therefor the words "10 cartons", of the excepted words Not Guilty; of the substituted words, Guilty and guilty of Charges III and IV. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The Board of Review adopts the statement of evidence and law contained in the Staff Judge Advocate's review except insofar as it pertains to Specification 3 of Charge IV.

4. In view of the above holding, discussion will be limited to Specification 3 of Charge IV. This specification alleges that the accused did "*** wrongfully violate and fail to obey Paragraph 3, Letter Order, Subject: Troop Participation in Black Market Trade, Headquarters United States Forces, European Theater, dated 10 September 1945, providing as follows: 'All military personnel are, therefore, advised that they are forbidden: a. To sell, barter or exchange for services any and all material purchased in Army Exchange stores to Germans and civilians in the United States zone of occupation, and elsewhere. Violation of this prohibition is a military offense and will subject offenders to punishment under the Articles of War", by selling to various Russian soldiers, names and numbers unknown,

20 cartons of cigarettes and one wristwatch, all purchased from an Army Exchange store.'" It will be noticed that the letter order prohibits the selling, bartering or exchanging all material purchased in Army Exchange stores to "Germans and civilians in the United States zone of occupation, and elsewhere." (Underscoring supplied.) The specification alleges sales to "Russian soldiers." (Underscoring supplied.) The letter order, alleged in the specification, does not mention Russian soldiers. Russian soldiers are recognized as military personnel of an allied power and as such they are neither Germans nor civilians. The specification is fatally defective in that it fails to state an offense and is legally insufficient to support a conviction (Sec. 428 (10), Dig. Op. JAG 1912-40).

5. War Department records show that at the time of the commission of the offenses described in the specifications the accused was approximately 33 years and 3 months of age. He graduated from high school and attended Pennsylvania State College for one year. He studied Cultural and Business Administration while in college. From September 1931 to September 1935, he was employed as a laborer on odd jobs, earning approximately $20 per week. He left this work and attended college for one year. From December 1936 to January 1937, he worked as assistant manager for a theater, starting at $18 a week. His salary was finally increased to $35 per week. From January 1937 to October 1942, he owned and operated his own theater, earning approximately $50 per week. In September 1942, he entered the Army as an enlisted man and rose to the rank of corporal. He attended officers' candidate school and was appointed and commissioned a temporary second lieutenant in the Army of the United States on 14 July 1944. The War Department records do not show when he went overseas, however they do show that, between 1 January 1945 and 30 June 1945, he was a member of 3977 Quartermaster Truck Company and that this unit spent 82 days in Wales, 24 days in France, and 74 days in Germany. His efficiency report for this period is excellent with a numerical rating of 5.1.

6. On 2 April 1946, the firm of Brennan and Brennan, Attorneys at Law, Pittsburgh, Pennsylvania, submitted twenty-one affidavits attesting to the reputation of the accused in the community in which he lived prior to his entry into the military service, and, on 20 May 1946, Mr. T. Robert Brennan, of the above-mentioned firm, appeared before the Board of Review at a special hearing, and presented oral argument on behalf of the accused. The Board of Review has also received letters requesting clemency from:

(a) four of the accused's former Commanding Officers: Lt. Col. Thomas J. Trumbull, Corps of Engineers, Albuquerque, New Mexico; Captain R. R. Shelton, Jr., Quartermaster Corps Reserve, Royal Oak, Michigan; Major Leonard Evans, Quartermaster Corps; Lieutenant Irving J. Bilgor, Providence, Rhode Island; Lieutenant Bilgor was a witness for the prosecution at the trial of accused,

(b) Two officers who served overseas with the accused: First Lieutenant Henry R. Philbrick, Coast Artillery Corps; and First Lieutenant Robert E. Knapp, Corps of Engineers,

(c) Two members of the court-martial who sentenced the accused: Captain Harry E. Giff, Infantry, and Captain Waldron J. Winter, Infantry,

(d) The commanding officer of the Wurzburg Disciplinary Training Center, APO 227; Colonel M. E. Olmstead, Infantry. From this letter it appears that the accused was placed on parole and assigned to duty as Assistant Motor Officer of the training center and that later he was placed on detached service and detailed as Motor Officer for the Wurzburg Military Community.

Careful consideration has been given to the attached correspondence by the Board of Review.

7. The court was legally constituted and had jurisdiction over the accused and the offenses. Except as noted herein, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the finding of guilty of Specification and Charge II, Specifications 1 and 2 of Charge III and Charge III, Specifications 1 and 2 of Charge IV and Charge IV, but is legally insufficient to support a conviction of Specification 3 of Charge IV, and is legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93, Article of War 94 or Article of War 96.

Charles D. Gilbert, Judge Advocate

Carlos E. McCelvey, Judge Advocate

Gilbert E. Schmidt, Judge Advocate

JAGK - CM 310086 1st Ind

WD, JAGO, Washington 25, D. C. SEP 4 1946

TO: The Under 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 Thomas J. Gregory (O-1592735), Quartermaster Corps.

2. Upon trial by general court-martial the accused was found guilty of embezzlement by fraudulently converting to his own use 5 cigarette lighters, value $5.00; 2 Parker fountain pens, value $12.12; and 10 cartons of cigarettes, value $5.00, property of the Army Exchange Service, in violation of Article of War 93; and of wrongfully selling 3 wool OD shirts, value $15.05, 3 wool undershirts, value $4.59, 3 wool drawers, value $4.50, of a total value of $24.14, property of the United States and furnished for the military service thereof; and of knowingly and willfully applying to his own use a 1/4-ton motor vehicle, value in excess of $50.00, property of the United States and furnished for the military service, in violation of Article of War 94; and the fraudulent execution of a driver's trip ticket for the purpose of making an unauthorized trip to Vienna, Austria, the possession of fraudulent travel orders and a violation of a letter order prohibiting the resale of post exchange purchases to Germans or civilians, 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 may direct, for a period of five years. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. A summary of the evidence may be found in the Staff Judge Advocate's review, which is adopted by the Board of Review except as to Specification 3, Charge IV. I concur in the opinion of the Board that the record of trial is legally insufficient to support the finding of guilty of Specification 3 of Charge IV, and that the record of trial is legally sufficient to support the finding of guilty of all other specifications and charges and the sentence and to warrant confirmation thereof.

On 17 October 1945 the accused, as Post Exchange Officer, drew Post Exchange items for his company. These items included, among other things, a watch, 2 fountain pens, 5 cigarette lighters and cigarettes. After drawing these supplies, the accused directed Corporal Cox to prepare a motor vehicle for a trip to Vienna. At about 0300, 18 October 1945, he awakened Corporal Cox and told him it was time to make the trip to Vienna. A military jeep was parked in front of the company billets. At this time the accused prepared a trip ticket to Vienna. The accused and Corporal

Cox then drove to Vienna, using the trip ticket to cross the boundary. While returning from Vienna, they were stopped several times by Russian soldiers, at which time the accused sold to Russian soldiers a watch and cigarettes, which were Post Exchange items, and some military clothing and blankets, which had been furnished for the military service. From these sales the accused realized over $750 in Austrian currency. The accused was driving the jeep and as they approached Enns, Austria, the accused fell asleep and the jeep crashed into a bridge. The accused received a broken jaw and two broken ribs. The accused was taken to the hospital for treatment and while there it was discovered that he had in his possession the fountain pens and cigarette lighters, as well as fraudulent orders. He was questioned by Colonel Lloyd of the Inspector General's Department, at which time he admitted the unauthorized trip to Vienna and the sale of the articles alleged in the Specifications of Charges II and III. The accused was sworn as a witness and testified that he realized that he had made a mistake. He had married while in England and wanted some money to send to his wife, as she needed clothes and money. He had taken the fountain pens and cigarette lighters with the intent to sell them but realized that he had made a mistake and was returning them to the company.

4. The accused is 33 years of age and married. He graduated from high school and attended college for one year. He worked at odd jobs for four years and then obtained a position as assistant manager of a theater. He became the owner of a theater and was operating this theater when inducted into the Army in September 1942. He obtained the rating of corporal and was sent to Officers' Candidate School. He was appointed and commissioned a temporary second lieutenant in the Army of the United States on 14 July 1944. His records show overseas service from 1 January 1945 to the present time.

5. Consideration has been given to the 21 character affidavits submitted by Brennan and Brennan, Attorneys at Law, the oral argument presented by T. Robert Brennan to the Board of Review and the clemency requests from four of the accused's commanding officers: Lieutenant Colonel Thomas J. Trumbull, Corps of Engineers; Captain R. R. Shelton, Quartermaster Corps; Major Leonard Evans, Quartermaster Corps; Lieutenant Irving J. Bilgor, Quartermaster Corps; two officers who served overseas with accused: First Lieutenants Henry R. Philbrick, Coast Artillery Corps, and Robert E. Knapp, Corps of Engineers; two members of the court-martial: Captains Harry E. Webb, Infantry, and Waldron J. Winter, Infantry; the Commanding Officer of the Wurzburg Disciplinary Training Center, Colonel M. E. Olmstead, Infantry, and the clemency recommendation, submitted by Captain Frank A. Reynolds, Field Artillery, and First Lieutenant Edward H. Bart, Infantry, the regularly appointed defense counsel, and attached to the record of trial.

6. While there is nothing in the record to justify the acts of the accused, due to the many requests for clemency and particularly the recommendation of Colonel M. E. Olmstead, which shows a very efficient

performance of duty while awaiting action by the confirming authority, I believe that the sentence should be reduced. I, therefore, recommend that the sentence be confirmed but that the period of confinement be reduced to one year, and that the sentence as thus modified be carried into execution.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

9 Incls
1. Record of trial
2. Form of action
3. Ltr fr Brennan & Brennan w/ 21 affidavits
4. Pet for clemency fr Lt Col Thomas L. Trumbull
5. Pet for clemency fr Capt R. R. Shelton, Jr.
6. Ltr fr Irving J. Bilgor
7. Petition for clemency fr 1st Lt Henry R. Philbrick
8. Pet for clemency fr 1st Lt. Robert E. Knapp
9. Pet for clemency fr Capt Harry E. Gibb and Capt Waldron J. Winter

---

(G.C.M.O. 275, 12 Sep 1946).

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

SPJGQ - CM 310091

MAY 3 1946

UNITED STATES v. Private ROBERT H. STIERS (13060617), attached-unassigned 233rd Reinforcement Company, 72d Reinforcement Battalion, 3rd Reinforcement Depot.	SEVENTH UNITED STATES ARMY Trial by G.C.M., convened at Marburg, Germany, 28 January 1946. Dishonorable discharge (suspended) and confinement for seven (7) years. Wurzburg Disciplinary Training Center, Wurzburg, Germany.

HOLDING by the BOARD OF REVIEW
DANIELSON, BURNS and DAVIS, Judge Advocates

1. The record of trial of the above named soldier, having been examined in the Office of The Judge Advocate General and there found legally insufficient, 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 Rober H. Stiers, attached-unassigned, 233d Reinforcement Company, 72d Reinforcement Battalion, 3rd Reinforcement Depot, then 365th Reinforcement Company, Detachment 97, did, without proper leave absent himself from his command and station at Munster, Germany, from about 27 April 1945 to about 14 September 1945.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for twelve years. The reviewing authority approved the sentence, reduced the period of confinement to seven years and ordered the sentence as thus modified executed, but suspended the execution of the dishonorable discharge until the soldier's release from

confinement. The Wurzburg Disciplinary Training Center, Wurzburg, Germany, was designated as the place of confinement. The result of his trial was published in General Court-Martial Orders No. 51, Headquarters Seventh United States Army, 13 February 1946.

3. The evidence consists of an extract copy of the morning report of Detachment 97, Ground Force Reinforcement Command, for 6 May 1945, evidencing a change in accused's status on 27 April 1945 from duty to absent without leave (Pros. Ex. A, R 9), and a stipulation reciting that accused was on 27 April 1945 and 6 May 1945, attached-unassigned to Detachment 97, Ground Force Reinforcement Command, also known as the 97th Reinforcement Battalion, then located at Munster, Germany, and that he returned to military control on 14 September 1945 (Pros. Ex. B, R 9). In addition thereto, the following stipulation was received with reference to the preparation of the morning reports of Detachment 97, Ground Force Reinforcement Command (R 7):

"It is stipulated and agreed by and between the Trial Judge Advocate, the accused, and his counsel, that the following is the regular course of business and the standard operating procedure of Detachment 97, Ground Force Reinforcement Command, followed with respect to absentees without leave in that Detachment and that this procedure is followed from day to day in Detachment 97: The first step in accounting for the personnel is the holding of formations. At reveille each morning, a roll call is made of all the personnel in Detachment 97, broken down by companies. Any absentees from that reveille roll call are reported to the company commander. Normally, a search is made of the area, immediately following that report, in order to determine if someone has overslept, or is ill in quarters and hasn't shown up at reveille for that reason. At various intervals during the day in Detachment 97, AWOL checks are made--that is, a roster of these men who were missing from the morning reveille roll call is again called out to the various companies, and any man who was absent at reveille might make his presence known. Again at retreat, a company roll call of all personnel is made. At the conclusion of the day's business, the company clerk within the company makes up his morning report for that company, of all the attached unassigned personnel, on a worksheet, which is similar in form to a regular morning report form. All the personnel who entered into the company, or departed from the company during that day, are accounted for by remarks, indicating that they had arrived pursuant to a certain authority, or had shipped pursuant to a certain authority. Personnel dropped to the hospital are accounted for on that worksheet, and men who are AWOL are entered thereon. The company commander then signs the worksheet and it is sent to Battalion Headquarters. The worksheets of the four companies, are then consolidated by the Battalion morning report clerk. By consolidation is meant, the bringing together of the figures for the four companies. The individual remarks

remain the same, and appear in the same manner on the Detachment 97 morning report, as they do on the company worksheet. In the event the Battalion morning report clerk fails to enter on the consolidated report, on the proper day, the remark showing an absentee who was so reported absent, he makes an as of entry on a subsequent day when the error is discovered. Otherwise stated, if through clerical error, the Battalion morning report clerk over-looks including in his consolidated report, an AWOL as of a date, he subsequently makes an entry on the morning report as of the date when the absence reported actually occurred, after establishing the fact from the records in his possession. The Detachment 97 morning report is then signed by the Personnel Officer of Detachment 97 and submitted to Depot Headquarters: That this procedure was followed in Detachment 97 from the date of activation to date, and is known as the standard operating procedure in the Detachment."

It was further stipulated that if the officer who signed the morning report were called as a witness he would testify that he had no personal knowledge of the facts recited in the entry thereon (R 9).

4. The only question for determination raised by the record of trial is the competency of Prosecution's Exhibit A to establish the initial absence without leave. The evidence leaves no doubt that it was the record of an event made in the regular course of business, and it was therefore, admissible by reason of the Federal "shop-book" statute (Act of 20 June 1936, c. 640, § 1; 28 U.S.C., § 695; 49 Stat. 1561) (CM 312023, Schirmer).

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

Lester A. Danielson, Judge Advocate

John A. Burns, Judge Advocate

Walter H. Davis, Judge Advocate

SPJGQ - CM 310091 1st Ind

TO: The Judge Advocate General

For his information.

Lester A. Danielson

LESTER A. DANIELSON
Major, JAGD
Chairman, Board of Review No. 4

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

SPJGQ
CM 310149

APR 19 1946

UNITED STATES)	88th INFANTRY DIVISION
)	APO 88, U. S. Army
v.)	
)	Trial by G.C.M., convened at Gorizia,
Private CARMELO P. SANTIAGO)	Italy, 22-23 February 1946. Dishonor-
(33983545), Company M, 349th)	able discharge, total forfeitures, and
Infantry Regiment.)	confinement for life. United States
	Penitentiary, Lewisburg, Pennsylvania.

REVIEW by the BOARD OF REVIEW
DANIELSON, BURNS and DAVIS, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Carmelo P. Santiago, Company M, 349th Infantry, did, at Canale, Italy, on or about 31 January 1946, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Andrej Lascak, a human being, by shooting him with a pistol.

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

Specification: In that Private Carmelo P. Santiago, Company M, 349th Infantry, did, at Canale, Italy, on or about 31 January 1946, with intent to commit a felony, viz, murder, commit an assault upon Cvetko Paravan, by willfully and feloniously shooting the said Cvetko Paravan with a pistol.

He pleaded not guilty to all charges and specifications and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined, at such place as the reviewing authority may direct, for the term of his natural life. The

reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution established that on the night of 31 January 1946 accused was in a civilian bar in Canale, Italy, with another soldier, Private William Allen. Two civilians, later identified as Lascak and Paravan, the alleged victims, entered the bar and accused talked with them. He returned to his companion and borrowed an empty pistol, saying he wanted to scare them. He pointed the pistol at the younger of the two, Paravan, who put his hand in his pocket and started moving toward accused. Accused returned and demanded the clip, put a shell in the chamber, and continued arguing with Paravan who continued to move towards him. Accused fired, and his companion then left and heard about 5 more shots as he ran across the street. (R 14, 15, 16.) Another civilian in the bar was awakened by shots, saw accused shooting at Lascak and saw him fall (R 20, 22). The prosecution proved by competent testimony the death of Lascak due to three injuries sustained by penetrating missiles (R 55, 56), and injuries of Paravan in the nature of penetrating wounds. It was stipulated that Paravan died of tuberculosis on 11 February 1946. One bullet was taken from the body of the latter (R 56, 58). Seven cartridge cases and two slugs were found in the bar (R 49, 50). The pistol allegedly used by accused was found as a result of information given by him and contained one bullet in the chamber (R 45, 46, 51). The day after the shooting accused said, "I wish I had killed the cock-suckers" (R 52). Three days later accused told Allen he would have killed everyone if they hadn't run, and that then there would not have been any witnesses (R17).

4. After his rights as a witness were fully explained to him, accused elected to be sworn and to testify in his own behalf (R 69). He was the only witness for the defense. The accused's version of the shooting is as follows:

> "We were talking about fifteen minutes, then the two civilians came in bar. After two civilians came in bar. They took the left side. We were on right side. They were on left side by front door. I talked to Allen about fifteen twenty minutes. As two civilians were talking, I talked to Allen. I said, 'Let's go to other side to see what they talk about'. Then we were there. I talked to older, no younger man /Paravan/ with finger to come here. I was at corner of bar. The civilian came to me and I talked, 'Do you know how to speak Italian?' The civilian told me 'I can talk Italian but my friend don't talk Italian', the younger man told me. Then I went to other side with Allen and talked to him, 'Do you know how to speak Italian?' Then I looked at civilian and I laughed and when I laughed he told me 'No, he don't know how to talk Italian". Then I talk to him that he want to have drink. He told me he had one at table. I put a drink on his glass. After five minutes I talk to Allen to give me the pistol.

Then Allen told me 'No, Santiago, I don't give you no pistol'. Then, 'Allen, I don't want no bullet. I just want pistol' Allen gave me pistol and I pointed to man. Then the man looked at me and then I put my pistol in my pocket again. He was still looking at me and playing with glass in hand. I thought he was going to put drink in my face. He don't do anything - just look at me. For the second time I took off the pistol from the pocket. I talked, 'Why are you looking to me in that way?'. He no answer to me. Then I talk to Allen. Allen gave me the magazine. Then I put the magazine in the pistol. The man put hands in the pocket, then he started to walk to me. I told him to stop. He didn't stop. Then I pulled chamber back and put shell in chamber. The man didn't stop. Then I tried to shoot. I pulled the trigger and shoot a chair on his left side. Then after that I didn't pull the trigger no more. Then I walked back and I pulled the trigger again. Then I shoot him in the stomach. He fell down and I tried to take off. When I tried to take off I reached the door and then when I look back I saw the other man /Lascak/ coming to the door. He tried not to let me go out from the bar. He tried to take pistol from me. Then I didn't want to shoot that man. The other was laying on floor. I didn't want to shoot him. That took about three, four minutes. We are talking. He tried to take pistol - then I shoot him on the leg. When I shoot him on leg he try to take pistol. Then I shoot three, four more times. When I took off from bar I find bartender. The bartender was coming in my direction. He said, 'Don't shoot me'. I say, 'No, sir, I don't shoot you'. Then I took off to my company and hide the pistol."

The accused further testified he didn't want to shoot Lascak but that if Lascak got the gun Lascak would have shot him (R 73); and that he was afraid of Paravan because he felt he was armed (R 72). On cross-examination accused admitted he shot Paravan in the legs and intended to shoot him in the legs, and that he shot him in the stomach and intended to shoot him in the stomach (R 82). He also admitted he could have gone out either of the two doors before he shot the first man (R 84).

5. The evidence is clear and convincing that on the date and at the place alleged accused shot Lascak with a pistol and that this resulted in his death, and also that accused shot and wounded Paravan with a pistol. The only questions raised by the record of trial are whether the shooting of Lascak was done with "malice aforethought" and whether the shooting of Paravan was accompanied by the specific intent to murder him. There being substantial evidence in the record from which the court could have inferred the existence of these necessary elements, the case could be disposed of with little discussion except for certain actions of the trial judge advocate which were vigorously objected to by the defense counsel, and whose objections were, we believe, improperly overruled by the law member. During the presentation of the prosecution's case the law member properly ruled that an offered extrajudicial statement by the accused

(Prosecution's Exhibit 4 for identification) would not be received in evidence, the defense having shown that a prior similar statement was taken by improper means and the accused had not been told that the prior statement was inadmissible against him (R 42). During cross-examination of the accused, and over objection of the defense, the prosecution was allowed to impeach the testimony of accused by means of the second statement (Prosecution's Exhibit 4 for identification) (R 75-78, 82). The impropriety of proceeding in this manner is well-established. The rule is aptly stated in 3 Wharton's Criminal Evidence (11th ed.), sec. 1328, pp. 2206, 2207, as follows:

> "Furthermore, an involuntary confession cannot be used as a basis for, or admitted as part of, the cross-examination of the defendant, and he may not be cross-examined thereon, even for the purpose of impeachment."

(See also Harrold v. Territory of Oklahoma, 169 Fed. 47; CM ETO 2625, Pridgen, 7 B. R. (ETO) 225.)

This action on the part of the trial judge advocate, and the overruling of the defense's objections thereto, constituted error, and such error must result in the invalidity of the record unless there is other competent evidence in the record of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the findings of guilty. (CM 237711, Fleischer, 24 B. R. 98; CM ETO 11905, Howse; CM ETO 12210, Black.) We are of the opinion, however, that the actions of the accused, as shown by his own testimony, which is set out above, regardless of the other competent testimony in the record, is of such quality and quantity as to practically compel findings of guilty in the minds of reasonable and conscientious men. Accused by his own testimony demonstrated that he started an argument, became fearful of his own ability to terminate it satisfactorily, and resorted intentionally to the use of a dangerous weapon to vanquish his adversaries. Accordingly, we conclude that the erroneously received impeaching evidence was not prejudicial to the substantial rights of the accused.

6. The charge sheet shows accused is 19 years of age, and was inducted at Philadelphia, Pennsylvania, on 23 April 1945. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person 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 as approved by the reviewing authority and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder

recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 18, paragraph 163, of the United States Criminal Code.

Lester A. Damelson, Judge Advocate

John A. Burns, Judge Advocate

Walter W. Davis, Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

WITH THE

EUROPEAN THEATER

APO 887

BOARD OF REVIEW NO. 4
CM ETO 18709

10 January 1946

UNITED STATES V. Sergeant PARIDE GUARESCHI (81-I-69559) and Private LEONARDO POZZI (81- I-10631), both of the 7469th Quartermaster Service Company (Italian).	)	OISE INTERMEDIATE SECTION, THEATER SERVICE FORCES, EUROPEAN THEATER Trial by GCM convened at Nancy, France, 4 October 1945. Sentence as to each accused; Total forfeitures and confinement at hard labor for five years (suspended)

OPINION by BOARD OF REVIEW NO. 4
DANIELSON, ANDERSON AND BURNS, Judge Advocates

1. The record of trial in the case of the accused named above has been examined in the Branch Office Of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

2. Accused were tried jointly upon a Specification laid under Article of War 94 with jointly disposing unlawfully of twenty-five five-gallon cans of gasoline of the value of $79.10, property of the United States, furnished and intended for the military service thereof. They were found guilty as charged, and, as approved by the Reviewing Authority, were sentenced to forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The execution of the sentence was suspended. The proceedings were published in General Court-Martial Orders 563, Headquarters Oise Intermediate Section, Theater Service Forces, European Theater, dated 20 November 1945.

3.

3. The disposition we make of this casedoes not require us to consider the evidence offered in proof of the offense alleged. The record of trial discloses that accused are Italian prisoners of war assigned to an Italian service unit. They are triable by courts-martial, therefore, in the manner defined by the pertinent provisions of the Geneva Convention of 1929 (47 Stat.233; Department of State, Treaty Series No. 845;FM 27-10, sec.133) and par.6a Standard Operating Procedure No. 56, Headquarters, European Theater of Operations, 5 April 1945).

The applicable language of the Geneva Convention of 1929 provides as follows (FM 27-10, sec.133):

> "At the opening of a judicial proceeding directed against a prisoner of war, the detaining power shall advise the representatives of the protecting power thereof as soon as posible, and always before the date set for the opening of the trial.
>
> "This advice shall contain the following information:
>
> (a) Civil status and rank of prisoner;
>
> (b) Place of sojourn or imprisonment;
>
> (c) Statement of the charges and specifications, with notice of the legal provisions applicable.
>
> "If this is not possible to indicate in such notice the court which will pass upon the matter, the date of opening of the trial and the place where it will take place, this information must be furnished to the representative of the protecting power later, as soon as possible, and at all events at least 3 weeks before the opening of the trial."(Underscoring supplied)

Like provision for notice to the representative of the protecting power is made by par. 6c, Standard Operating Procedure No. 56. Supra, which reads as follows:

> "When charges in a judicial prosecution are filed against a prisoner of war, prompt notice (throughthisheadquarters) MUST be given the pepresentative of the protecting power, and trial MUST NOT take place until three weeks after the delivery of such notice to such representative. (Underscoring supplied)

The record of trial discloses that the quoted provision of the Geneva Convention of 1929 and Standard Operating Procedure No. 56 were not complied with in this case, and the questions presented for solution is whether noncompliance therewith renders the proceedings null and void.

The provisions of the Geneva Convention of 1929 derive from the consent of nations, and at this late day there can be no doubt that treaties of this character, made under the authority of the United States and being self-executing,are of like dignity and obligation with an Actof Congress (Art. 6, cl.2, Constitution of the United States; Whitney v. Robertson, 124 U.S. 190, 31 L, Ed. 386 (1888)and limitations on the powers of courts-martial.

Italy being a party signatory to the Convention, its provisions are, of course applicable to her combat forces. Moreover the War Department has expressly provided that its provisions will be observed and enforced by the Army of the United States with reference to all prisoners of war regardless of signature by a belligerant power (Cir. 136, WD, 7 May 1942).

A reasonable reading of the language of the Convention shows clearly that its provisions are mandatory and that compliance therewith is jurisdictional in the trial by courts-martial of prisoners of war. This conclusion is particularly inescapable when one observes that international treaties are usually, if not invariably prepared by men of learning and experience who are accustomed to select words carefully to express accurately the intention of high contracting parties in solemn affairs, and that they are to be construed in that broad and liberal spirit which is calculated to make for the existence of perpetual amity(Tucker v. Alexandroff, 183 U.S. 424, 46 L. Ed. 264 (1902)). Moreover the language of par. 6a, Standard Operating Procedure No. 56 abundantly indicates compliance is of a jurisdictional character, and this, being an executive interpretation of the Convention, and in sympathy with its obvious purpose is entitled to great, if not controlling weight, in determining its meaning (Castro v. DeGriarte (S.D.N.Y., 1883), 16 F 93, 98; Billings v. Truesdell, 321 U.S. 542, 83 L. Ed. 917, 923 (1944).)

We are persuaded therefore that compliance with the pertinent provisions of the Geneva Convention of 1929 was a jurisdictional alement in the trial by court-martial of the accused in this case, and, the record of trial disclosing noncompliance therewith, we conclude that it is legally insufficient to support the findings and the sentence of the court as approved and confirmed.

LESTER A. DANIELSON Judge Advocate

JOHN R. ANDERSON Judge Advocate

JOHN A. BURNS Judge Advocate

1st Ind,

10 Jan 1946

War department, Branch Office of The Judge Advocate General with the European Theater.
For Commanding General, United States Forces, European Theater (Main) APO 757, U.S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 Aug 1937 (50 Stat. 724, 10 USC 1522) and as further amended by the Act of 1 August 1942 (56 Stat. 732, 10 USC 1522), is the record of trial in the case of Sergeant PARIDE GUARESCHI (81-I- 69559) and Private LEONARDO POZZI (81-I-10631), both of the 7469th Quartermaster Service Company (Italian).

2. I concur in the opinion of the Board of Review and, for the reason stated therein, recommend that the findings of guilty and the semtence be vacated, and that all rights, privvileges and property of which they have been deprived by virtue of said findings and sentence so vacated be restored.

3. Inclosed is a form of action designated to carry into effect the recommendation herein before made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.

ETO 18709

B. FRANKLIN RITER
Colonel, JAGD,
Assistant Judge Advocate General.

3 Incls:
Incl 1 - record of trial
Incl 2 - Form of action
Incl 3 - Draft GCMO

(G.C.M.O., 271, 10 Sept 1946).

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

SPJGQ-CM 310156

APR 26 1946

UNITED STATES v. Private First Class MARVIN THURSTON, JR., (36794262), 4404th Quartermaster Service Company	70th INFANTRY DIVISION Trial by GCM convened at Weilburg, Germany, 15 August 1945. Sentence: Shot to death with musketry.

OPINION OF THE BOARD OF REVIEW

DANIELSON, BURNS, and DAVIS, Judge Advocates

---

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Marvin Thurston, Junior, 4404th Quartermaster Service Company, did at Urmitz, Germany on or about 11 June 1945, with malice aforethought, willfully, deliberately, feloniously and unlawfully kill one Sergeant Gurnie W. Lindsay, Company "C" 740th Railway Operation Battalion, a human being, by shooting him with a carbine.

He pleaded not guilty and, all the members of the court present at time the vote was taken concurring, was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. All the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 70th Infantry Division, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but withheld the order directing execution thereof pursuant to Article of War 50½.

2. On 4 January 1946 the Board of Review in the Branch Office of The Judge Advocate General with the European Theater, examined the record of trial and held it legally sufficient to support the findings

and the sentence. The Board of Review's holding, containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasoning and conclusions of the Board, is attached to the record. The Acting Assistant Judge Advocate General in charge of that Branch Office approved the holding of the Board of Review and on 4 January 1946 forwarded the record of trial to the Commanding General, United States Forces, European Theater, for execution of the sentence. The sentence was ordered executed on 19 January 1946 by General Court-Martial Orders No. 25, Headquarters, United States Forces, European Theater.

3. The execution of the sentence was stayed by the Commanding General, United States Forces, European Theater, pending further orders, by General Court-Martial Orders No. 32, Headquarters, United States Forces, European Theater, dated 23 January 1946, by reason of the termination on 19 January 1946 of the powers conferred by the President upon the Commanding General, United States Forces, European Theater, under the provisions of Article of War 48, 49, 50, and 50½. The record of trial was thereupon forwarded to The Judge Advocate General, Washington, D. C., for appropriate action on 19 February 1946.

4. The record of trial has now been examined by the Board of Review in the Office of The Judge Advocate General, Washington, D. C., and it adopts and concurs in the holding of the Board of Review with the Branch Office of The Judge Advocate General with the European Theater, a copy of which said holding is annexed to the record of trial, and, for the reasons set forth therein, is of the opinion that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92.

Lester A. Daniel[illegible], Judge Advocate

John A. Burns, Judge Advocate

Walter W. Davis, Judge Advocate

SPJGQ - CM 310156 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 7 1946

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 First Class Marvin Thurston, Jr. (36794262), 4404th Quartermaster Service 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 commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for life, that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement, and that the sentence as thus modified be ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(G.C.M.O. 212, 8 July 1946).

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

SPJGN-CM 310179

U N I T E D S T A T E S	)	7TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 7, Kyongsong, Korea, 29 December 1945. Death.
Private First Class CLINTON V. MERTES (39470590), Company M, 184th Infantry.	)	

HOLDING by the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, Judge Advocates

---

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

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

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

Specification: In that Private First Class Clinton V. Mertes, Company M, 184th Infantry, did, at Kyongsong, Korea, on or about 23 October 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Miss Sook Kyung, a human being by shooting her with a pistol.

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

Specification 1: In that Private First Class Clinton V. Mertes, Company M, 184th Infantry, did, at Kyongsong, Korea, on or about 23 October 1945, with intent to do bodily harm, commit an assault upon Pedro Garza, by shooting him with a dangerous weapon, to wit, a pistol.

INCL #1

Specification 2: In that Private First Class Clinton V. Mertes, Company M, 184th Infantry, did, at Kyongsong, Korea, on or about 23 October 1945, with intent to do bodily harm, commit an assault upon Bonnie Valdez, by shooting him with a dangerous weapon, to wit, a pistol.

Specification 3: In that Private First Class Clinton V. Mertes, Company M, 184th Infantry, did at Kyongsong, Korea, on or about 23 October 1945, with intent to do bodily harm, commit an assault upon Frank Costa, Jr., by shooting him with a dangerous weapon, to wit, a pistol.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be hanged by the neck until dead. All the members of the court present at the time of the voting concurred in the findings and the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution: Accused was a member of Company M, 184th Infantry, which was stationed at Kyongsong, Korea, on 23 October 1945 (R. 6-7, 34-35). At about 1630 on that day he went into a restaurant, labelled by accused "a joint," at 25 Tai Ta Chung Street in Kyongsong (R. 28, 56; Pros. Exs. 1, 9). There he met a fellow member of the same company, Private First Class Albert B. Fuerst, and three Korean girls, Sook Kyung, Kwen Kaeun and Kim Chung Sook (R. 7; Pros. Ex. 9). The girls told accused that they expected trouble from "some soldiers" and needed protection. When accused and Fuerst subsequently left the place they promised to return (Pros. Ex. 9). Accused had on his person a .45 caliber pistol which he had borrowed previously from Technical Sergeant Glen Benefield of his company to use while serving as Corporal of the Guard (R. 34-35; Pros. Ex. 9).

Accused and Fuerst returned to the restaurant about 1900, sat down at a table and ordered a drink (R. 7-8). Shortly thereafter Corporal Pedro E. Garza and "Bonnie Valdez," both drunk, came in and were joined at their table by the Korean girls (R. 8, 14, 39, 43, 51; Pros. Ex. B). A few minutes later Technician Fifth Grade Frank Gomes, Jr., and "Costa" entered, sat down at another table and ordered food (R. 14, 43-44). According to Fuerst, Garza and Valdez began "raising hell," "got to treating the girls pretty mean," and the girls tried to get away (R. 15). Kwen Kaeun and Kim Chung Sook, however, testified that Garza merely tried to dance with Sook Kyung, and as she was equally drunk, they fell to the floor (R. 39, 52). Gomes and Costa helped them to their feet and dusted off their clothes (R. 44, 52). Accused and Fuerst got up, came over to within three or four feet of where the group was standing, and accused said, "he didn't want any rough stuff" (R. 8, 15, 44).

Both accused and Garza were angry and "the boys" crowded around urging them to go out in the street and fight (R. 16). Garza pulled out

what was described by Fuerst as "a regular United States Army knife" and by Gomez as a "pocket knife," with an open blade (R. 9, 19, 44, 49). Holding it in his fist with his arm down at his side Garza advanced on accused (R. 9, 19-20). Fuerst hollered "knife" and accused took the pistol out of his pocket (R. 9, 18). Garza paused momentarily and then approached within two feet of accused who ordered him to drop the knife (R. 9, 45). Accused backed up toward the door (R. 40, 52, 53). It was a "double swinging door, full length," the left side of which was latched, only the right being open (R. 31).

The sequence of the ensuing action was given by Gomes as follows:

"Q. Tell us how close they came to each other before he started firing.
A. He advanced twice towards him. He stopped once when the accused pulled out the .45, and the accused told him to put the knife back in his pocket.

Q. How far was the man with the knife away?
A. About half-way in between me and you, sir (approximately one or two feet).

Q. Then what happened?
A. He kept on coming.

Q. Alright, continue please.
A. It happened so quickly, the accused shot when he came up to him, but didn't hit him when he was inside the building.

Q. I want to know how close they came before the shooter started firing.
A. Within inches, sir.

Q. At that time, the shooter had his back to the door, is that correct?
A. Yes, sir.

Q. Then what happened after they got close to each other?
A. The accused shot.

Q. How many times?
A. Three times, I would say. (R. 45)

* * *

"Q. What did the shooter say to the man with the knife, was there any conversation between the two?
A. They were arguing back and forth. He told the accused to mind his own business.

Q. As closely as you can remember, I want you to recall the conversation between the two?
A. All I can say is that the accused kept telling him to put the knife away. We didn't think anything was going to happen, we just kept sitting at the table. (R. 46)

* * *

"Q. I want to go back and find out how far away the man with the knife was from the shooter when the shooter fired the first shot. I want you to tell the court, in your opinion, how far apart they were.
A. They just clinched together. The fellow with the knife was going to stick him, and he shot.

Q. How far was the shooter from the open door when he made contact with the man with the knife?
A. About three or four feet, sir.

Q. Did you see the shooter go out the door?
A. They both went out together." (R. 47)

Kwen Kaeun's version of the shooting is as follows:

"Q. What happened as the soldier with the knife kept coming toward the other soldier?
A. When the GI who has the daggar moving toward the man who has not daggar, he who has not daggar, step backward and, but there was a /moveable screen/, so he tried to get away from the door, but the /moveable screen/ is locked to him, so he cannot move. This man is cannot move, so one man who has the daggar, gets nearer and nearer to him.

Q. What happened then?
A. It seems to me he tried to get away from the door, but he is stuck by the /moveable screen/, so he drew the pistol.

Q. Then what happened?
A. He drawed out the pistol.

Q. What did he do with the pistol?
A. He drew out the pistol, the man in the front of the particular man, they say something, but I do not understand. Then I heard shots." (R. 40-41, 54-55)

Kim Chung Sook's account paralleled that given by Kwen Kaeun:

"Q. What did he do at this time?
A. When he pulled out the knife, who stands at the middle of the table, he frightens me.

Q. Did the man with the knife make any movements?
A. He moved to the man who has picked him up.

Q. What did the man do who was standing there? The man who was the object of the man holding the knife, what did he do?
A. I do not understand.

Q. There are two men, as I understand it. What did the other man do?
A. The man try to hold up the fighting.

Q. Did he move in any direction?
A. This man who picked this man up tried to back up, but there was a /moveable screen/ and stuck the door closed.

Q. What happened then?
A. Then this man tried to move back, and stuck by the /moveable screen/, and finally it fell down. There was too many men trying to stop this fighting, and I could not see.

Q. Did you hear any shots?
A. I heard two shots.

* * *

"Q. Where was the shooter with relation to the front door?
A. There was a /moveable screen/ by open door, and he closed the door back against it. It seems to me, he made effort to get away from door." (R. 52-54)

When the firing ceased, Sook Kyung was lying on the floor dead with a bullet wound in her head (R. 10, 12, 21-22, 43; Pros. Exs. 2, 3). Costa, who had fallen when the first shot was fired, also was on the floor with a bullet in his head (R. 10, 45, 49-50). Everyone else fled from the building (R. 17).

When the military police arrived on the scene, they found Garza and Valdez lying in the street, one about thirty feet and the other about fifty feet from the entrance to the restaurant (R. 23-24, 33; Pros. Exs. 4, 5). Trails of blood led from inside the restaurant to where the men were found (R. 32). One soldier had one bullet wound in him and the other three bullet wounds (R. 26). An inspection of the building and the street in front revealed one bullet slug and two shell cases just inside the door and one bullet slug and three shell cases just outside the door, all of .45 caliber (R. 29-30).

After the shooting Fuerst joined accused outside in the street and was handed the pistol which Fuerst took back to their barracks (R. 10). Accused went to the Officer of the Day and reported the shooting (R. 25). Later that evening he made a voluntary statement to investigators in which

he admitted the shooting. He could not say how many shots he fired but he thought that one shot was fired from just outside the door. He contended the shooting was done in self-defense (Pros. Ex. 9).

4. No testimony was offered by the defense. Accused, advised of his rights as a witness, elected to remain silent (R. 56).

5. The Specification of Charge I alleges that at Kyongsong, Korea, on 23 October 1945, accused, with malice aforethought, willfully , deliberately, feloniously, unlawfully, and with premeditation, killed Miss Sook Kyung by shooting her with a pistol, in violation of Article of War 92. Specifications 1 to 3 of Charge II allege that at the same time and place accused committed three separate assaults with intent to do bodily harm by shooting with a dangerous weapon, to wit, a pistol, Pedro Garza, Bonnie Valdez, and Frank Costa, Jr., respectively, all in violation of Article of War 93.

Accused is thus charged with the murder of Sook Kyung and with aggravated assaults on the other persons named. It is established that at the time and place alleged accused fired several shots from a pistol at Corporal Pedro E. Garza. The shots killed Miss Sook Kyung and seriously wounded Garza, Bonnie Valdez and Frank Costa, Jr.

Murder is defined as "the unlawful killing of a human being with malice aforethought." By "unlawful" is meant "without legal justification or excuse." MCM, 1928, par. 148a, p. 162.

Defining the phrase "without legal justification or excuse," the Manual for Courts-Martial further provides:

> "A homicide * * * which is done in self-defense on a sudden affray, is excusable. * * * To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor." MCM, 1928, par. 148a, p. 163.

Under the facts of this case, it must be concluded that in returning to the restaurant on the invitation of the Korean girls, although he was armed with a pistol in anticipation of possible trouble, accused did not forfeit his right of self-defense, nor thereby constitute himself the aggressor in the ensuing clash with Garza. As stated by the Board of Review in CM 235044, Winters, 21 BR 265, 271:

> "* * * It is true that by merely arming himself and going to a place where deceased was likely to be, he /accused/ did not sacrifice his right of self-defense in case of an unauthorized attack (Thompson v. U. S., 155 U. S. 271, Peo. v. Gonzales, 71 Cal. 569, 12 Pac. 783; Radford v. Comm., 5 S.W. 343 (Ky.); State v. Evans, 124 Mo. 397, 28 S.W. 8; 11 Harv. Law Rev. 58). As the court in the Evans case remarked:
>
> > 'The fact that defendant expected an attack did not abate by one jot or tittle his right to arm himself in his own proper defense, nor go where he would after thus arming, so long as he did no overt act, or make no hostile demonstration toward Fine (the deceased).'"

There is nothing in accused's actions in the restaurant which would make him the aggressor. His warning to Garza to stop the "rough stuff" was insufficient provocation for the violent assault by Garza. Under the evidence, it is apparent that the latter "intentionally provoked the difficulty" and was the aggressor throughout.

The right to take the life of an aggressor in self-defense is qualified by various conditions. The Winters case, supra, states:

> "But before one may take the life of his assailant, he must reasonably believe that his life is in danger or that he is in danger of suffering great bodily harm, and he must also reasonably believe that it is necessary to kill to avert the danger (Acers v. U. S., 164 U. S. 388; Davis v. Peo., 88 Ill. 350; State v. Thompson, 9 Iowa 188; Wesley v. State, 37 Miss. 327; Smith v. State, 25 Fla. 517, 6 So. 482). Furthermore, he must retreat if by so doing he may lessen the danger (16 Harv. Law Rev. 567; 12 Iowa Law Rev. 171; 18 A.L.R. 1279)."

Concerning the necessity to retreat, the Board of Review in CM 237641, Brackins, 24 BR 71, 78, observed:

> "This common law doctrine requires that a person when attacked by another by whatever means, except when in his own home, must give ground, or, as it is often stated 'retreat to the wall,' if practicable, before taking the life of an assailant. So long as a safe avenue is open to him he must retreat. The 'wall' is to be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to attack the pursuer, though /retreat/ need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death (Wharton's Criminal Law, 12th Edition, sec. 616)."

When tested by these rules, the conclusion is inescapable that any reasonable man in the position of accused would have believed, on reasonable grounds, that his life was jeopardized to such extent as to require the taking of life to save his own. It must have been clear to accused as he retreated before Garza's steady advance that he could expect no quarter from Garza in his drunken rage. Unless otherwise repelled, the knife which Garza clenched in his fist eventually must have found a resting place in accused's body. The testimony of all the witnesses discloses a bona fide attempt on accused's part to avoid shooting Garza. It is uncontradicted that accused backed up step by step almost to the door repeating his warning to Garza to drop the knife. Near the door he became entangled in a moveable screen rendering further flight difficult if not impossible. As graphically detailed by Kwen Kaeun, "This man is cannot move, so one man who has the dagger, gets nearer and nearer to him." At this moment of imminent peril, accused was compelled either to shoot Garza or to turn his back and locate the door, his path to which had been blocked by the screen. As far as retreat was concerned, he had reached "the wall." In refusing to turn his back to Garza and offer him an opportunity and an invitation to plunge his knife in accused's back, he acted in a manner eminently justified by the circumstances existing at that precise point. The alternative course of action might possibly have allowed accused to escape with his life. But as Justice Holmes said in Brown v. United States, 256 U. S. 335, 65 L. ed. 961, 41 S. Ct. Rep. 501, 18 A.L.R. 1276, a case involving the matter of defense with a pistol against a knife attack:

> "Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety, or to disable his assailant rather than to kill him. Rowe v. United States, 164 U. S. 546, 558, 41 L. ed. 547, 551, 17 Sup. Ct. Rep. 172."

Under a similar factual situation the Board of Review (NATO) held, "Inasmuch as the beliefs of imminent danger and the necessity of taking life to save his own life existed in the mind of accused and were reasonably grounded the homicide was excusable in self-defense and was not unlawful." CM NATO 550, Mitchell, 2 Bull. JAG 428. The evidence in the instant case requires the same conclusion.

The shots fired by accused in self-defense struck not only his assailant but also three bystanders, killing one of them and wounding the other two. The principles governing such accidental shooting are recapitulated in American Jurisprudence (Vol. 26, p. 179, sec. 35) as follows:

> "The fact that the homicidal act was directed against or intended to effect the death of one other than the person killed does not relieve the slayer of criminal responsibility * * * it is generally agreed that such a homicide partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been, had the blow fallen upon the intended victim instead of the bystander. Under this rule, the fact that the bystander was killed instead of the victim becomes immaterial, and the only question at issue is what would have been the degree of guilt if the result intended had been accomplished. The intent is transferred to the person whose death has been caused, or, as sometimes expressed, the malice or intent follows the bullet. The result is that the slayer must be held guilty of murder, manslaughter, or excusable or justifiable homicide, according to the attendant circumstances. * * * However, in cases where the killing of the person intended to be hit would have been excusable or justifiable, the rule may be somewhat modified by the care, or absence of care, with which one exercises his right of self-defense * * *. The law imposes upon all a duty of exercising a high degree of care in the use of deadly weapons, and must hold one to a strict account if he uses such weapons so carelessly that needless injury is done to a bystander, although the one using the weapon is not exceeding his rights in doing so." (See cases collected in 18 A.L.R., pp. 927-929.)

It is indisputable that the crowded condition of the small restaurant rendered the use of a firearm hazardous and perilous in the extreme to all present. But this fact alone could not deprive accused of his right of self-defense unless we are to reduce the right to pure legalistic theory. The circumstances called for some action on the part of the bystanders for their own self-protection. Instead the record indicates that they recklessly crowded around the disputants even urging them to fight. It is difficult to perceive in what manner accused could have exercised care in firing his pistol at such a time. There is nothing to suggest that he fired

otherwise than directly at Garza. It is vain to speculate whether Garza might have been stopped with fewer than the five shots which appear to have been fired. The fact that he followed accused into the street and collapsed some distance away is fairly indicative of the contrary. We are of the opinion that the evidence does not show that the firing was done wantonly or recklessly and that the accused's exercise of his right of self-defense did not exceed permissible limitations. The Board of Review concludes that the evidence is legally insufficient to support the findings and the sentence.

6. The record of trial shows that accused is about twenty-three years of age and that he was inducted at Spokane, Washington, 21 July 1944. The Acting Staff Judge Advocate in his review states that accused went overseas 10 January 1945, joined the 7th Infantry Division on 16 April 1945 and took part in the Okinawa campaign, in which he was twice wounded. He has the Combat Infantrymans Badge, the Good Conduct Medal, and the Purple Heart with one cluster.

7. The court was legally constituted. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Walmsley T. Baughn, Judge Advocate

Robert J. Lamson, Judge Advocate

James D. Adams, Judge Advocate

JUN 8 1945

SPJGN-CM 310179 1st Ind.
Hq, ASF, JAGO, Washington, D. C.
TO: Commanding General, Headquarters 7th Infantry Division, APO 7, c/o Postmaster, San Francisco, California.

1. In the case of Private First Class Clinton V. Mertes (39470590), Company M, 184th Infantry, I concur in the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing 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 310179).

1 Incl.
Record of trial.

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 310193

12 SEP 1946

UNITED STATES v. Private First Class GEORGE H. WEST (34991241), Squadron F, 2517th AAF Base Unit.	ARMY AIR FORCES FLYING TRAINING COMMAND Trial by G.C.M., convened at Ellington Field, Texas, 19 February 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

---

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class George H. West, Squadron F, 2517th Army Air Forces Base Unit, did, at Houston, Texas, on or about 22 December 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ethel West, a human being, by stabbing her with a knife.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of any previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the "United States Penitentiary, Leavenworth, Kansas, or elsewhere as the Secretary of War may direct" as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review adopts the statement of the evidence and law contained in the Staff Judge Advocate's review.

4. 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. 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. A sentence of death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 USC, 452,454).

Chester E. Silvers, Judge Advocat

Carlos E. McAfee, Judge Advocat

Gilbert E. Hoyd, Judge Advocate

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

SPJGH - CM 310246

26 APR 1946

UNITED STATES	INFANTRY REPLACEMENT TRAINING CENTER
v.	Trial by G.C.M., convened at Fort McClellan, Alabama, 1 March 1946.
Private CHARLES R. SIMPSON (13214855), Company B, 27th Training Battalion, 4th Training Regiment.	Dishonorable discharge and confinement at hard labor for two (2) years. Southeastern Branch, Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TAPPY, STERN and TREVETHAN, Judge Advocates.

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

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

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

Specification 1: In that Private Charles R. Simpson, Company B, Twenty-Seventh Training Battalion, Fourth Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, did, on or about 19 December 1945 at Anniston, Alabama, wrongfully attempt to take, steal, and carry away one automobile, 1941 Ford Tudor Sedan, the property of Mrs. Edna McCartney, value of over fifty dollars ($50.00).

Specification 2: In that * * *, did, at Fort McClellan, Alabama, on or about 4 February 1946 assault Private Paul G. Thiry, Company C, 10th Battalion, 4th Regiment, a sentinel in the execution of his duty, by wresting his carbine from him, by force and violence.

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

Specification 1: In that * * *, having been duly placed in confinement in the Fourth Regimental Guardhouse on or about 20 December 1945, did, at Fort McClellan, Alabama, on or about 23 December 1945, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that * * *, having been duly placed in confinement in the Post Stockade, Fort McClellan, Alabama, on or about 3 January 1946, did at Fort McClellan, Alabama, on or about 4 February 1946 escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that * * *, did, without proper leave, absent himself from his organization at Fort McClellan, Alabama from about 19 December 1945 until about 20 December 1945.

Specification 2: In that * * *, did, without proper leave, absent himself from his organization at Fort McClellan, Alabama from about 23 December 1945 until about 26 December 1945.

Accused pleaded not guilty to, and was found guilty of, all Specifications and Charges. No evidence of previous convictions was introduced. Accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement for two (2) years. The reviewing authority approved the sentence, designated the Southeastern Branch, United States Disciplinary Barracks, Camp Gordon, Georgia, or elsewhere as the Secretary of War might direct, as the place of confinement, and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The evidence is legally sufficient to warrant the findings of guilty of Charge I and its Specification 2 and Charge II and its Specification 2. For the reasons hereinafter shown, the findings of guilty of Specification 1 of Charge I, of Specification 1 of Charge II and of Charge III and both of its Specifications cannot be sustained.

4. At the inception of the trial, the defense moved for a dismissal of "Charge I, Specification 1, Charge II, Specification 1, Charge III, Specification 1, Specification 2" stating that accused had previously been tried by court-martial for these offenses.

The evidence stipulated by the prosecution, defense and the accused (Def.Ex.A) shows that on 26 January 1946, accused was tried by Special Court-Martial convened at Fort McClellan, Alabama, for the offenses alleged in Specification 1 of Charge I, Specification 1 of Charge II and Specifications 1 and 2 of Charge III and was found guilty thereof and sentenced to six months confinement and to forfeit thirty-three dollars ($33.00) of his pay per month for a like period. This sentence was ordered executed by the reviewing authority in Special Court-Martial Orders No. 35, Headquarters, 4th Training Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, 1 February 1946. Thereafter by communication dated 7 February 1946 from Headquarters, Infantry Replacement Training Center, the reviewing authority was advised that the Special Court-Martial had no jurisdiction to try accused since the signature of the accuser appeared on the Charge Sheet as follows: "Earl H. Jordan, Jr. By R. M. Leach 1st Lt," and was directed to promulgate a new Special Court-Martial Order vacating the findings and sentence. On 8 February 1946 the reviewing authority promulgated Special Court-Martial Orders No. 45 wherein it was recited that since the special court-martial proceedings were void, the findings and sentence were vacated and all rights, privileges and property of which accused had been deprived by virtue thereof were restored.

The question before us is whether or not those special court-martial proceedings were void because the charge sheet was signed for the accuser by a person purporting to act as his agent. Although Article of War 70 provides that Charges and Specifications must be signed under oath by a person subject to military law, nevertheless, it is established by opinions of The Judge Advocate General that the failure of the accuser to sign or swear to Charges is procedural only and does not affect the jurisdiction of the court or render the trial void, at least in the absence of timely objection raised by accused (CM 172002, Nickerson; CM 220625, Gentry; CM 288951, Burton). It does not appear from this record that the accused had objected to the trial by special court-martial upon Charges and Specifications not personally signed and sworn to by the accuser. Accordingly, that trial was a valid trial. Since the reviewing authority had taken final action on the valid trial by promulgating his special court-martial order thereon, accused had been placed in jeopardy and could not be tried a second time, without his consent, for these four offenses (MCM, 1928, par. 68). Thus, the findings of guilty of Specification 1 of Charge I, of Specification 1 of Charge II and of Charge III and its Specifications 1 and 2 cannot be sustained. The record of trial is, however, legally sufficient to support the findings of guilty of Charge I and its Specification 2 and of Charge II and its Specification 2 and legally sufficient to support the sentence.

Thomas H. Tappy, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert E. Trevellian, Judge Advocate.

COPY

SPJGH - CM 310246 1st Ind.

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

TO: Commanding General, Infantry Replacement Training Center, Fort McClellan, Alabama.

1. In the case of Private Charles R. Simpson (13214855), Company B, 27th Training Battalion, 4th Training Regiment, I concur in the holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty of Specification 1 of Charge I, of Specification 1 of Charge II and of Charge III and its Specifications be disapproved. Upon compliance with the foregoing recommendation you will, under the provisions of Article of War 50½, have authority to order execution of the sentence.

2. In view of the fact that the findings of guilty of four of the six Specifications involved are disapproved, it is suggested that consideration be given to reducing the period of confinement to one (1) year.

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 310246)

/s/ THOMAS H. GREEN
/t/ THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

310246

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

SPJGQ - CM 310278

MAY 3 1946

UNITED STATES v. Private THOMAS J. DAUGHTRY (33044265), attached-unassigned 233d Reinforcement Company, 72d Reinforcement Battalion, 3rd Reinforcement Depot.	SEVENTH UNITED STATES ARMY Trial by G.C.M., convened at Marburg, Germany, 28 January 1946. Dishonorable discharge (suspended) and confinement for five (5) years. Wurzburg Disciplinary Training Center, Wurzburg, Germany.

HOLDING by the BOARD OF REVIEW
DANIELSON, BURNS and DAVIS, Judge Advocates

1. The record of trial of the above named soldier, having been examined in the Office of The Judge Advocate General and there found legally insufficient, 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 Thomas J. Daughtry, attached-unassigned, 233rd Reinforcement Company, 72d Reinforcement Battalion, did without proper leave, absent himself from his organization at Marburg, Germany, from about 25 September 1945 to about 4 January 1946.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, ordered it executed, but suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Wurzburg Disciplinary Training Center, Wurzburg, Germany, as the place of confinement. The result of his trial was published in General Court-Martial Orders No. 53, Headquarters Seventh United States Army, 13 February 1946.

3. The pertinent evidence consists of an extract copy of the morning report of Detachment 72, Ground Force Reinforcement Command, for 28 September 1945, evidencing a change in accused's status on 25 September 1945 from duty to absent without leave (Pros. Ex. A, R 9), and a stipulation reciting that accused was on 25 September 1945 and 28 September 1945, attached-unassigned to the 233d Reinforcement Company, 72d Reinforcement Battalion, also known as Detachment 72, Ground Force Reinforcement Command, then located at Marburg, Germany, and that he returned to military control on 4 January 1946 (Pros. Ex. B, R 9). In addition thereto, the following stipulation was received with reference to the preparation of the morning reports of Detachment 72, Ground Force Reinforcement Command (R 7):

"It is stipulated and agreed by and between the Trial Judge Advocate, the Accused and his counsel, that the following is the regular course of business and the standard operating procedure of Detachment 72, Ground Force Reinforcement Command, followed with respect to absentees without leave in that Detachment and that this procedure is followed from day to day in Detachment 72: The first step in accounting for the personnel is the holding of formations. At reveille each morning, a roll call is made of all the personnel in the Detachment, broken down by companies. Any absentees from that reveille roll call are reported to the company commander. Normally, a search is made of the area, immediately following that report, in order to determine if someone has overslept, or is ill in quarters and hasn't shown up at reveille for that reason. At various intervals during the day in Detachment 72, AWOL checks are made--that is, a roster of these men who were missing from the morning reveille roll call is again called out to the various companies, and any man who was absent at reveille might make his presence known. Again at retreat, a company roll call of all personnel is made. At the conclusion of the day's business, the company clerk within the company makes up his morning report for that company, of all the attached unassigned personnel, on a worksheet, which is similar in form to a regular morning report form. All the personnel who entered into the company, or departed from the company during that day, are accounted for by remarks, indicating that they had arrived pursuant to a certain authority, or had shipped pursuant to a certain authority. Personnel dropped to the hospital are accounted for on that worksheet, and men who are AWOL are entered thereon. The company commander then signs the worksheet, and it is sent to Battalion Headquarters. The worksheets of the four companies, are then consolidated by the Battalion morning report clerk. By consolidated is meant, the bringing together of the figures for the four companies. The individual remarks remain the same, and appear in the same manner on the Detachment 72 morning report, as they do on the company worksheet.

In the event the Battalion morning report clerk fails to enter on the consolidated report, on the proper day, the remark showing an absentee who was so reported, he makes an as 'of entry' on a subsequent day when the error is discovered. Otherwise stated, if through clerical error, the Battalion morning report clerk overlooks including in his consolidated report, an AWOL as of a particular date, he subsequently makes an entry on the morning report as of the date when the absence reported actually occurred, after establishing the fact from the records in his possession. The Detachment 72 morning report is then signed by the Personnel Officer of Detachment 72 and is submitted to Depot Headquarters. That this procedure was followed in Detachment 72 from the date of activation to date, and is known as the standard operating procedure in the Detachment."

It was further stipulated that if the officer who signed the morning report were called as a witness he would testify that he had no personal knowledge of the facts recited in the entry thereon (R 8).

4. The only question for determination raised by the record of trial is the competency of Prosecution's Exhibit A to establish the initial absence without leave. The evidence leaves no doubt that it was the record of an event made in the regular course of business, and it was therefore, admissible by reason of the Federal "shop-book" statute (Act of 20 June 1936, c. 640, § 1; 28 U.S.C., § 695; 49 Stat. 1561) (CM 312023, Schirmer).

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

MAY 28 1946
DISPATCHER

Lester A Danielson, Judge Advocate
John C. Burns, Judge Advocate
Walter W. Davis, Judge Advocate

1st Ind

TO: The Judge Advocate General

For his information.

Concur

Lester A Danielson
LESTER A DANIELSON
Major, JAGD
Chairman, Board of Review No. 4

Edward W. Tempel
C.W.S.

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

JAGN-CM 310327

JUN 27 1946

UNITED STATES v. Private THEOPHIL J. LEONHARD (38034443), Company A, 1800th Engineer General Service Battalion, then the 620th Engineer General Service Company.	SEVENTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Leavenworth, Kansas, 9, 10, 11, 12, 14, and 15 January 1946. Dishonorable discharge and confinement at hard labor for the term of his natural life. Penitentiary.

HOLDING by the BOARD OF REVIEW
BAUGHN, O'CONNOR and O'HARA, Judge Advocates

---

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

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

CHARGE I: Violation of the 81st Article of War.

Specification 1: In that Private Theophil J. Leonhard, Company A, 1800th Engineer Service Battalion, then the 620th Engineer General Service Company, did, at Camp Hale, Colorado, on or about 1 February 1944, knowingly attempt to relieve the enemy with information by furnishing and delivering to one Private First Class Dale Maple, Company A, 1800th Engineer General Service Battalion, then the 620th Engineer General Service Company, a list of articles needed to travel in Mexico, information as to the most convenient place to purchase a revolver, and information as to the place in Mexico where contact with an alleged agent of the German Reich could be made, the said Leonhard then knowing that the said Maple planned and intended to use said information in wrongfully assisting German Prisoners of War,

members of the enemy's forces, viz, the Army of the German Reich, then at war with the United States of America, in a proposed flight from the custody and jurisdiction of the United States of America.

Specification 2: In that Private Theophil J. Leonhard, Company A, 1800th Engineer Service Battalion, then the 620th Engineer General Service Company, in conjunction with Private First Class Friedrich W. Siering, Company A, 1800th Engineer General Service Battalion, then the 620th Engineer General Service Company, did, enroute from Camp Hale, Colorado, to Eagle, Colorado, and at Eagle, Colorado, on or about 31 December 1943, to 2 January 1944, both dates inclusive, knowingly harbor and protect Unteroffizier Erhard Schwichtenberg, Side Camp No. 1, Prisoner of War Camp, Trinidad, Colorado, located at Camp Hale, Colorado, a person whom he, the said Private Theophil J. Leonhard, then knew to be an escaped Prisoner of War, and a member of the enemy forces, viz, the Army of the German Reich, then at war with the United States of America, by procuring and providing articles of American uniform, transportation, food, drink and lodging for the said Unteroffizier Erhard Schwichtenberg, all being of some value but of an undetermined and unknown value.

Specification 3: In that Private Theophil J. Leonhard, Company A, 1800th Engineer General Service Company, then the 620th Engineer General Service Company, did, at Camp Hale, Colorado, on or about 5 February 1944, knowingly hold correspondence with the enemy by writing and causing to be delivered a letter in the German language to one Unteroffizier Erhard Schwichtenberg, a German Prisoner of War, a member of the enemy forces, viz, the Army of the German Reich, then at war with the United States of America, then knowing that said Unteroffizier Erhard Schwichtenberg planned to escape from confinement and to proceed to Germany, a part of which said letter in English translation, was in words and figures as follows, to-wit:

"Coutless time you have put your life at stake for Germany. Believe me, when the hour comes I shall without doubt gladly give my life for Germany. I don't want to live without Germany--but Germany alone must live, must be free and powerful, so that someday our people will live and act in freedom in a larger, more powerful and united Reich. Every sacrifice, is worthy of that time.

That's why I remain, friends. I will further be leader of the boys, that are ready to stake all for Germany. And when you return to the native country (home) please dear friends, tell the authorities, especially the intelligence service about the things I mentioned-It's especially important in case I won't be able to communicate with Germany in the next weeks. If the German agents will get in contact with me, everything will be possible.

So please tell my story, also tell my plans to the authorities in Berlin and the Gestapo. They could find out who I am - E. Erhr von Spiegel, lately German consul in New Orleans, Louisiana, and Doctor Ernst Wendlerlast German Minister in La Paz, Bolivia, know me well. Also my name is known to the VDA-where I have corresponded with Veemekahl (?). Doctor Gerhard Wiens, lately Lt. Wiens, of the medium artillery and Saks of the ministry, Wiens in the Treasury Department, know me also well and so does a coworker of mine Doctor Neumann, who lived in Houston, Texas and has returned to Germany 1938. Remember these names or make a note of them. These people could--"

and which communication and the contents thereof, he, the said Leonhard, intended to reach the enemy.

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

Specification 1: In that Private Theophil J. Leonhard, Company A, 1800th Engineer Service Battalion, then the 620th Engineer General Service Company, did, at Camp Hale, Colorado, on or about 5 February 1944, knowingly attempt to give intelligence to the enemy by writing and causing to be delivered a letter in the German language to one Unteroffizier Erhard Schwichtenberg, a German Prisoner of War, a member of the enemy forces, viz, the Army of the German Reich, then at War with the United States of America, then knowing

that the said Unteroffizier Erhard Schwichtenberg planned to escape from confinement and to proceed to Germany, a part of which said letter in English translation, was in words and figures as follows, to-wit:

(Letter identical with that set out in Specification 3 of Charge I.)

and which communication and the contents thereof, he, the said Leonhard, intended to reach the enemy.

Specification 2: In that Private Theophil J. Leonhard, Company A, 1800th Engineer Service Battalion, then the 620th Engineer General Service Company, did, at Camp Hale, Colorado, on or about 5 February 1944, for the purpose of aiding the German Government to the detriment of the United States of America, wrongfully attempt to make contact with authorities of the German Reich, an enemy of, and then in, a state of war with the United States of America, by preparing in the German language and by causing to be delivered to one Unteroffizier Erhard Schwichtenberg, a German Prisoner of War, then in military confinement and in the custody and under the jurisdiction of the United States of America, and a member of the Army of the said German Reich, a letter, a part of which said letter in English translation was in words and figures as follows, to-wit:

(Letter identical with that set out in Specification 3 of Charge I.)

then knowing that the said Schwichtenberg intended to escape from confinement, flee from the custody and jurisdiction of the United States of America, and to proceed to Germany.

CHARGE III: Violation of the 59th Article of War.

Specification: In that Private Theophil J. Leonhard, Company A, 1800th Engineer General Service Battalion, then the 620th Engineer General Service Company, did, at Camp Hale, Colorado, on or about 1 February 1944, by knowingly furnishing one Private First Class Dale Maple, Company A, 1800th Engineer General Service Battalion, then the 620th Engineer General Service Company, information, viz, a list of articles needed to travel across northern Mexico, the most convenient place to purchase a revolver, and the place in Mexico

where contact with an alleged agent of the German Reich could be made, knowingly assist the said Maple to desert the service of the United States at Camp Hale, Colorado, on or about 15 February 1944.

After he pleaded the Statute of Limitations to Specification 2 of Charge I and the plea was overruled, he pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence was introduced of one previous conviction by a special court-martial for failure to obey the lawful order of a commanding officer, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

(This is one of the cases arising out of the activities of certain allegedly dissident, pro-German members of the Army at Camp Hale, Colorado, early in 1944. Cf. CM 257165, Maple, 37 BR 47; CM 260393, Kissman, CM 285509, Siering.)

3. Plea of Statute of Limitations: Specification 2 of Charge I alleged that accused knowingly harbored and protected an escaped German prisoner of war, Unteroffizier Erhard Schwichtenberg, by furnishing him with clothing, transportation, food, and drink from on or about 31 December 1943 to 2 January 1944. Accused was arraigned on this Specification on 9 January 1946 and seasonably interposed the defense of the Statute of Limitations (R. 8).

Article of War 39 provides that:

"Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: Provided, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: And provided further, That this article shall

not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law."

Since on the face of the record it is shown that the statutory period has run, and since accused pleaded the statute in bar of trial, it devolved upon the prosecution to prove that the case was excepted from the operation of the statute, either because accused was absent from the jurisdiction of the United States or because "some manifest impediment" existed which precluded the Government from arraigning him. CM 149051; CM 150340; CM 150341; CM 154086; Dig. Op. JAG, 1912-40, sec. 396 (3).

It is obvious from the record that accused was at all critical times physically present within the territorial limits of the United States and, therefore, the prosecution rightly did not attempt to bring the case within that proviso of the statute. CM 212634, Bergdoll, 10 BR 249. Rather, they maintained that certain proceedings which accused took in the Federal courts of the United States, seeking the issuance of a writ of habeas corpus, created a "manifest impediment" to his arraignment.

Although the prosecution introduced no evidence to sustain its contention, the following facts are either conceded or are contained in sources which it is within our power to examine. The charges, dated 25 April 1944, were referred to trial on 26 May 1944 by the Commanding General, Seventh Service Command, and were served on accused on 27 May 1944. On 10 June 1944, accused filed a petition in the District Court of the United States for the District of Kansas, for a writ of habeas corpus against William S. Eley, Colonel, Infantry Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas. In his petition, accused alleged that he was a German citizen and that as a enemy alien he was not a proper person to be retained in the United States Army. A motion to dismiss the application for a writ was sustained and, upon appeal by accused, the Circuit Court of Appeals, Tenth Circuit, on 16 October 1945, affirmed the decision of the trial court. Leonhard v. Eley, 151 F. 2d 409. The opinion of the appellate court recites that Leonhard is in the custody of the Colonel Eley.

The term "manifest impediment," as used in Article of War 39, has been defined by the Board of Review, the Attorney General and the courts. The Federal court has said that manifest impediments,

> "are such impediments only as operate to prevent the military court from exercising its jurisdiction over him; as, for instance, his being continuously a prisoner in the hands of the enemy, or his being imprisoned under sentence of a civil court for crime, and the like." In re Davison (4 F. 507).

The Attorney General has said that the impediment intended by the statute is an impediment "similar in kind to absence," one which "renders

it impossible for a prosecution to take place" (14 Op. Atty. Gen. 52) or one derived from a "physical inability" to bring the party charged to trial. 14 Op. Atty. Gen. 265, 267.

A similar interpretation has been placed on these words by the Board of Review. Thus, confinement in a United States Naval Prison is not a "manifest impediment" since, during the period of confinement, accused was under the control and jurisdiction of the United States. CM 177524, Dig. Op. JAG, 1912-40, sec. 396 (3). Similarly, isolation in a military hospital does not toll the statute. CM 197643, Smith, 3 BR 143.

There remains but to apply these principles to the question raised by this case. That question is whether the mere filing of a petition for a writ of habeas corpus by a soldier against whom charges are pending constitutes such a "manifest impediment" to his arraignment that the statute of limitations is thereby tolled. In this connection, it should be pointed out that there is no evidence that the court-martial proceedings were stayed by the Federal court. Indeed, it seems that accused, in his petition, did not specifically raise the issue of his confinement while awaiting trial. Doubtless the filing of the petition was to a large extent motivated by his impending trial, but so far as the record is concerned accused was concerned with larger issues which, to be sure, if they were resolved in his favor, would have protected him from court-martial, but issues which did not at all advise the court of his prospective trial.

We are of the opinion that the question must be answered in the negative, that is, that the mere filing of a petition for a writ of habeas corpus did not create a manifest impediment to accused's arraignment.

We assume, without deciding, that if the writ had issued, return made thereon, and the body of accused produced in court, he would then be in the custody of the court and his arraignment before a military tribunal impossible (Barth v. Clise, 12 Wall. 400; 20 L. ed. 393; Stallings v. Splain, 253 U.S. 339; 40 S. Ct. 537; 64 L. ed. 940), although even this assumption may possibly be questioned, since he would be under the control of the sovereignty which urges the impossibility of arraigning him. CM 177524, Dig. Op. JAG, 1912-40, sec. 396 (3).

However, that is not the invariable procedure followed in disposing of petitions for writs of habeas corpus.

> "The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto . . . ." 28 U.S.C.A., sec. 455.

The summary procedure of refusing to issue the writ because of a failure to state a cause of action is frequently followed (Ex parte Quirin, 317 US 1; 63 S. Ct. 1; 87 L. ed 3; Harrison v. King, 111 F. 2 420), particularly in the Federal District Court of Kansas — where accused filed his petition — because of the many petitions brought by the inmates of the Federal penitentiary located therein. Murdock v. Pollock, 229 F. 392.

It is clear from the report of this case in the Circuit Court of Appeals that this procedure was followed in disposing of accused's petition. It is there stated that the trial court sustained a motion to dismiss the application for the writ. The writ, accordingly, was never issued. The respondent was not required to produce accused and justify his detention. The court concluded merely from the face of the petition that accused was not entitled to the relief he sought and refused to proceed further. We thus have nothing more than an application for a writ of habeas corpus by accused with its subsequent summary denial and we fail to see how the filing and pendency of the application created a "manifest impediment" to accused's arraignment.

Nor was the situation altered by accused's appeal.

> "The appeals allowed by section 463 of this title shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty * * * as may be prescribed by the Supreme Court, or, in default thereof by the court or judge hearing the case." 28 U.S.C.A., sec. 464.

Rule 45 of the Supreme Court provides:

> "(1) Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed." 28 U.S.C.A. following sec. 354.

Since accused was in the custody of the military authorities when the application for the writ was denied, he remained in their custody during the pendency of his appeal. This is clear from the opening statement of the opinion of the Circuit Court:

> "Leonhard, hereinafter called the petitioner, is in custody of William S. Eley, Commandant of the United States Disciplinary Barracks, Fort Leavenworth, Kansas."

The trial judge advocate in his argument to the court relied on 6 Op. Atty. Gen. 506 as authority for the proposition that the running of

the statute had been tolled. In that case competent orders, dated 10 April 1840, directed that accused officer be tried for a charge growing out of an assault on, with the subsequent death of, an enlisted man. On 30 April 1840, accused pleaded in bar of trial the fact that he then faced trial in a Florida court on an indictment growing out of the same incident. The court overruled the plea but the reviewing authority suspended the proceedings to await the result of the civil trial. On 20 October 1841, accused was acquitted by the Florida court and on 2 March 1842 he was ordered tried by court-martial. On 10 May 1842, the court reconvened and accused interposed the plea of the Statute of Limitations. The plea was overruled and the Attorney General, in approving the court's action, said:

> "The suspension of the proceedings, because of the pending indictment before the court of Florida, and the respect so paid to the civil magistrate and civil proceedings, were in my opinion justified by the thirty-third article of the rules and articles for the government of the Army; as also by precedents, and a just principle that the military authority should respect and await on instituted proceedings of the civil authority in cases when they have concurrent jurisdiction . . . ."

To the extent that this decision is the result of the particular wording of the Statute of Limitations then in force, as applied to the peculiar facts of that case, we have no quarrel with it. To the extent that it seeks to introduce into the problem of considering whether the statute has run some vague principle of courtesy, it is sufficient to say that it is opposed to the whole current of opinion since, even in the Office of The Attorney General, and, accordingly, we must decline to follow it. That current of opinion is well summarized in CM 197643, Smith, 3 BR 143, where it was said:

> "We unite in the view that no manifest impediment to the arraignment of an accused can exist during a period in which the accused is under the actual physical jurisdiction and control of the Army."

The trial judge advocate also urged that the plea be overruled on the grounds that in December he agreed with the defense counsel to try the case after 1 January 1946. He then introduced into evidence a stipulation entered into by and between the prosecution, defense, and accused, on 7 January 1946, wherein it was agreed that "this case stipulated for trial on 7 January 1946 shall be continued, upon the request of the accused for additional time in which to perfect his defense, and shall come on for trial 9 January 1946" (R. 9; Pros. Ex. 1).

We need not consider what would be the effect of a request by accused, made while the statute had not run, to postpone trial until after it had, because there is no evidence that the postponement in December was not agreed upon for reasons of mutual convenience to both sides. There certainly is no suggestion in the record that it was requested by accused for the sole purpose of eventually avoiding trial on this Specification. In these circumstances we can only say that the Government must suffer the consequences of the delay, which in this case take the form of an inability to prosecute accused for the offense to which he has pleaded the statute as a bar.

For the foregoing reasons, then, we think the law member erred in overruling accused's plea in bar.

4. Evidence for the prosecution: Accused, Private Paul A. Kissman, Private First Class Friedrick W. Siering and Private First Class Dale Maple were members of the 620th Engineer General Service Company, which in December 1943 was transferred from Fort Meade, South Dakota to Camp Hale, Colorado (R. 34, 74, 75, 76, 98; Pros. Ex. 12). This company was composed of men whose loyalty to the United States was for one reason or another suspected and who were treated accordingly (R. 34, 35, 98; Pros. Ex. 12). This treatment in turn provoked resentment on the part of those who were subjected to it and was a general topic of conversation in the unit (R. 81). There was a German prisoner of war compound located at Camp Hale and members of the 620th were thrown into contact with the prisoners during the course of the day's work (R. 36). Accused became acquainted with a German prisoner, Unteroffizier Erhard Schwichtenberg and, together with Siering, made arrangements, at Schwichtenberg's request, to take him out of camp over New Year's Eve (R. 97; Pros. Ex. 9). Accordingly, on the evening of 31 December 1943, Siering picked up Schwichtenberg, who was waiting for him on a bridge outside the compound, accused and Siering's wife, and drove to Eagle, Colorado, where accused engaged a room for Schwichtenberg (R. 37, 38, 97; Pros. Ex. 9). Schwichtenberg stayed at a hotel alone that night, Siering, his wife, and accused returning to Camp Hale. The next day these three rejoined him and spent the night at the same hotel. All returned to Camp Hale on 2 January 1944 (R. 39-45). Accused furnished Schwichtenberg with a United States Army blouse and overcoat for the trip (R. 98; Pros. Ex. 12), and paid for his meals and room (R. 97; Pros. Ex. 9).

In the latter part of January or the first of February, Kissman had a conversation with Maple in the presence of accused, with reference to a proposed trip to Denver by Kissman (R. 77). Maple and accused were well known to each other, having shared an apartment when the 620th was stationed at Fort Meade, South Dakota (R. 84). Maple gave Kissman money and a list of articles to purchase. There was some conversation about the cost of the items and the place where they could be procured. Some of the articles mentioned were a compass, clothing, a "sextent" (sic), and a gun. Accused did not participate in the conversation (R. 77, 78). On the morning of 15 February

1944 accused, Kissman and Maple had another conversation, the contents of which are not disclosed by the record (R. 79).

It was stipulated by and between the prosecution, the defense, and the accused that Private First Class Dale Maple, Company A, 1800th Engineer Service Battalion, then the 620th Engineer General Service Company, deserted the service of the United States on 15 February 1944 at Camp Hale, Colorado, and did remain absent in desertion until apprehended at Palomas, Chihuahua, Mexico, on or about 18 February 1944 (R. 14).

On 19 February 1944, Maple, Erhard Schwichtenberg, and another German prisoner, Heinreich Kikilius, were taken into custody by agents of the Federal Bureau of Investigation, at Columbus, New Mexico. Schwichtenberg had in his possession an unsigned, undated letter, written in German, and a compass was found on one of the group (R. 88-91, 93; Pros. Ex. 7). Schwichtenberg admitted that he attempted to escape to Mexico in January or February 1944 (R. 61).

Accused made four extra-judicial statements, all of which were properly admitted in evidence. He said that he came to the United States in 1923 when he was nine years of age, settling in Texas. He attended college and university there. As he matured he became conscious of two emotional allegiances, one for Germany and the other for the United States. When Hitler became chief of the German state, accused was delighted because he thought it would mean the resurgence of Germany as a world power. He openly defended the Govern government against criticism, although at the same time he was unsympathetic toward any movement whose objective was to place "a Hitler" at the head of the United States Government. He knew the German counsul at New Orleans, Von Spiegel, and his predecessor, Ernst Wendler, but was never employed by them to do any propaganda work for the Reich. Despite the fact that he had a high draft number; that he had reached an age at which, under the then existing regulations, he could reasonably expect deferment; and that he had to interrupt his scholastic pursuits; he volunteered for, and was inducted into, the Army, on 2 October 1941 (the charge sheet says 30 September 1941). A few days later he tried to enlist in the Regular Army but was rejected because he was not a citizen. Eventually, he was assigned to the 40th Division and remained with it until August 1942. During this period, he filed an application for naturalization and, as a result of orders, also filed an application for a position as an investigator in the Provost Marshal's Office. In August 1942, he was suddenly, without any warning, transferred from the 40th Division to the 68th Evacuation Hospital, ostensibly because he was a noncitizen. On investigating the disposition of his application for citizenship, he was informed that it had been lost and he submitted another application. Within a relatively short time, however, he was transferred on orders of The Adjutant General to the "620th," then located at Fort Meade, South Dakota. On arriving there, he soon learned that he and the other members of the 620th were in a "semi-honorable internment camp" or an "alien concentration camp," although no explanation was forthcoming as to the reason why he had been transferred there. The members

of the organization were hostilely received, and required to perform menial work. He was convinced that these discriminations were designed to provoke resistance with its consequent severe punishment. The result was that the German and Italian members agreed among themselves to stand together and so far as possible prevent individual punishments. About this time, accused learned that his application for naturalization had been denied and he concluded that he owed no further allegiance to the United States Government (R. 98; Pros. Ex. 12).

When Dale Maple joined the company in the spring of 1943, accused became a close friend of his (R. 96; Pros. Ex. 6; R. 98; Pros. Ex. 12). Maple had grandiose ideas involving sabotage, insurrection and resistance to the authorities. Accused regarded these ideas as ridiculous. Early in January 1944, however, after the unit had been transferred to Camp Hale, Maple broached the idea of deserting with some escaped German prisoners. He made inquiries of accused as to the territory near the Mexican border, the conditions in Central America, and expressed the hope that he could get to Germany. Accused had long planned an archeological tour in Mexico and at Maple's request furnished him with a list of equipment for traveling in Mexico. This equipment included, among other things, a compass, hunting knife, mosquito net, and a .22 calibre rifle. Accused advised Maple that he could probably procure the last item in a hock shop in Denver. While Maple expected accused to join him in his planned desertion, accused, although the idea appealed to him, never gave it serious consideration for two reasons: First, he believed that there was little chance of ultimate success. Secondly, he wanted to make representations to the German government through the Swiss legation to the effect that German citizens were being held in the United States Army against their will, in the hope that a settlement might be effected between the two governments (R. 96; Pros. Ex. 8; R. 98; Pros. Ex. 12).

As the escape plans matured, Maple and Schwichtenberg became cool toward accused because of his apparent lack of enthusiasm for the scheme. Anxious that Schwichtenberg bring good reports of him to Germany in the unlikely event that he succeeded in escaping, accused wrote him a letter in which he stated that he was remaining behind as leader of the Germans in the "620th." Accused decided that his loyalty and allegiance belonged to the Reich and to convince the German authorities of this, he included a statement that he was at the disposal of the German intelligence service and requested that their agents communicate with him (R. 96; Pros. Ex. 6; R. 98; Pros. 12). He admitted that if, in response to the letter, he had been called upon to become involved in sabotage or espionage, he would have complied (R. 97; Pros. Ex. 11). He "stood willing to perform the duties of a German whatever they may be" (R. 98; Pros. Ex. 12). To identify himself, he included in the letter the names of two German consuls and some people in Germany (R. 98; Pros. Ex. 12).

On 13 February 1944, Maple told accused that he had purchased a car. Accused had no doubt in his own mind that Maple intended to use the car in deserting. About 0800 hours, 15 February, Maple said to accused, "Well, this is it." He gave accused a silver identification bracelet to keep as a remembrance of him and accompanied him to the dump where they worked. En route, he speculated on how the prisoners were to escape. Accused last saw him about 0930 hours on that day (R. 96; Pros. Ex. 6).

It was stipulated by and between the prosecution, defense and accused (R. 97; Pros. Ex. 10) that Prosecution's Exhibit 13 (R. 98) was an accurate and fair translation of the letter which he had written to Schwichtenberg. This translation is identical with that set out in the Specifications. Accused also admitted as much in one of his extra-judicial statements (R. 97; Pros. Ex. 11). Similarly, he stipulated that Prosecution's Exhibits 14 and 15 (R. 98) were in his own handwriting. In his extra-judicial statement, he admitted that these exhibits were in his handwriting and that they referred to items which Maple asked him to get. (R. 97; Pros. Ex. 10).

5. Evidence for the defense: Accused, after being advised of his rights, elected to remain silent (R. 103). It was stipulated by and between the prosecution, the defense and the accused that the latter had registered as an enemy alien at Los Angeles, California, in February 1942, in compliance with Presidential Proclamation No. 2537, January 1942; that in his registration he declared himself to be a citizen of Germany and that "by law stood in a condition of allegiance to said German Reich," notwithstanding the fact that he had been inducted into, and was a member of, the military forces of the United States. (R. 103, Def. Ex. A).

The defense introduced into evidence "DSS Form 304," a form issued by the Director of Selective Service entitled "Alien's Personal History and Statement" (R. 103, Def. Ex. B). In introducing this, the defense stated that it was referred to in Prosecution's Exhibit 6. The reference was to the effect that accused had not filled out such a statement because he had entered the Army in peacetime and at that time it was not required (R. 96; Pros. Ex. 6). The defense, however, stressed the statement contained in Section XI of the form, entitled "Statement of Alien." This reads as follows:

> "You are informed that if you are an enemy alien or subject of a country allied with the enemy, you will not ordinarily be acceptable for service in the land or naval forces of the United States if you indicate in Item 41 above that you object to such service. If you are a citizen or subject of any other country, you may indicate in Item 41 whether you do or do not object to service in the land or naval forces of the United States

> but such objection may be disregarded. If you are a citizen or subject of a neutral country, and you do not wish to serve in the land or naval forces of the United States, you may apply to your local board for Application by Alien for Relief from Military Service (Form 301) which, when executed by you and filed with the local board, will relieve you from the obligation to serve in the land or naval forces of the United States, but will also debar you from thereafter becoming a citizen of the United States."

6. There are three specifications alleging that accused wrote and delivered a letter in German to Schwichtenberg, a German prisoner of war. Specification 3 of Charge I and Specification 1 of Charge II are almost identical in form and contain the common allegations that, on 5 February 1944, accused wrote and delivered a letter in the German language to Unteroffizier Erhard Schwichtenberg, a German prisoner of war, then knowing that Schwichtenberg planned to escape and proceed to Germany and intending that the letter should be communicated to the enemy. Specification 3 of Charge I further alleges that by this means accused "knowingly (held) correspondence with the enemy," in violation of Article of War 81, and Specification 1 of Charge II alleges that by this means he "knowingly attempted to give intelligence to the enemy," in violation of Article of War 96. The third specification involving this letter, Specification 2 of Charge II, is in slightly different form. It is there alleged that for the purpose of aiding the German government to the detriment of the United States accused wrongfully attempted to make contact with the Reich by preparing and delivering a letter in German to Schwichtenberg, then in military confinement and in the custody of the United States, knowing that Schwichtenberg intended to escape from confinement and proceed to Germany, in violation of Article of War 96.

At the outset of the trial, the defense moved to strike Specification 3 of Charge I and Specification 1 of Charge II on the grounds that the prosecution was unreasonably multiplying charges in making the same transaction the subject of three specifications. While the practice complained of is ordinarily not proper, this is clearly a case where "sufficient doubt as to the facts or law exists" (MCM 1928, par. 27, p. 17) to justify the prosecution's action, and as there was "no assessment of multiple punishment" (CM 233196, 2 Bull. JAG, p. 271), we detect no prejudice to the rights of the accused.

The evidence, apart from accused's admissions and confession, shows that he, Maple, and others were embittered against the United States Army ostensibly because of what they regarded as discriminatory treatment.

It shows that accused was friendly toward German prisoners of war who were confined at accused's post, a friendship which in one instance culminated in an unauthorized and bizarre week end trip with a prisoner by the name of Schwichtenberg. It shows that accused was present when Kissman, another recalcitrant, and Maple discussed the purchase of certain articles, including a compass and a gun; that Maple deserted the service of the United States; that he, Schwichtenberg and Kikilius, German prisoners of war, were apprehended in Mexico; and that an unsigned, undated letter in the German language was taken from Schwichtenberg's person. In addition, there were at least three specimens of accused's handwriting - where he signed stipulations - in evidence. In this connection we have purposely refrained from using several other examples of his writing because of the confusing limitations under which they were stipulated into evidence. From the specimens in evidence, the court could, of course, conclude that accused wrote the letter in question (MCM, 1928, par. 116b, p. 120). Lastly, there was read to the court with accused's consent an accurate English translation of this letter.

The court could find or infer from the foregoing evidence that accused who had previous friendly relations with Maple and Schwichtenberg wrote a subversive letter which was found in the latter's possession when he was apprehended after an unsuccessful attempt to escape. There was accordingly, in our opinion, sufficient evidence to warrant the conclusions that the offense charged was "probably committed" (MCM, 1928, par. 114a, p. 115) and a foundation was therefore laid for the admission of accused's confessions.

These confessions - and no contention was made that they were not voluntary; indeed, one was unsolicited - abundantly establish that accused, no longer feeling, if in fact he ever did feel, any allegiance to the United States, wrote the letter in question with fore-knowledge of Maple's plan to desert with German prisoners of war, one of whom was Schwichtenberg, with the intention of ultimately reaching Germany. Accused, then, according to his statements, stood in readiness to perform any task which the German Government saw fit to assign him including, if necessary, sabotage and espionage. Nothing is to be gained by discussing the content of these confessions further. They are set out in detail above and seldom has an accused so volubly, so willingly, and so convincingly admitted his own guilt.

With the acts charged thus completely established there remains only the question of the proper construction of Specification 3 of Charge I and the interpretation of "intelligence" in Specification 1 of Charge II.

With respect to the first of these Specifications, it seems clear that the pleader intended to charge that the authorities in the German Reich were the enemy with whom accused was holding correspondence. This is shown by the juxtaposition of the allegation that accused intended the letter to reach the "enemy" with the allegation that he held correspondence with the enemy by writing and delivering the letter to a German prisoner of war. The draftsman, in framing the charges in this manner, was undoubtedly influenced by two statements of Winthrop. At the time when that author was writing, the present Article of War 81 was contained in two Articles, viz., 45 and 46. Winthrop, Military Law and Precedents, 1920 Reprint, p. 989. Article of War

45 denounced the offense of relieving the enemy with money, victuals, or ammunition and Article of War 46 denounced holding correspondence with, and giving intelligence to, the enemy. Speaking of the former Article, the author stated that the word "enemy" did not include prisoners of war because by the usage of civilized warfare the capturing power was required to furnish them with subsistence and quarters (id. 631). Speaking of the latter, he said that it was not essential that the letter reach the person for whom it was intended (id. 633). Thus, it might be concluded that the delivery of the letter to Schwichtenberg would not be "holding correspondence" with the enemy unless there was an intent that the latter should redeliver it to some other German, not a prisoner of war, who owed allegiance to the German Reich.

There is, however, a complete failure of proof that accused directed this letter to anyone but Schwichtenberg. The letter, read in the light of the other evidence, clearly is addressed only to this prisoner and there is nothing in it, or in the surrounding circumstances, to show that it was to be delivered to anyone else. The difficulty, accordingly, with this Specification and the proof adduced to support it, is not that the letter failed to reach the person for whom it was intended - as we have seen, that is, not essential - but that the letter was never intended to reach anyone but Schwichtenberg.

It may be argued that since the letter urges Schwichtenberg to "tell my story, also tell my plans to the authorities in Berlin and the gestapo" that this is sufficient to constitute at least an attempt to hold correspondence with the enemy in the Reich. Winthrop states, however, that,

> "The word 'correspondence' is understood to be here employed in its usual and familiar sense, as intending written communications, especially by letter, and embracing of course communications in print and telegrams" (id 633).

While doubtless accused was guilty of some offense in writing Schwichtenberg and telling him to communicate with the authorities in the Reich, it is not the offense of "holding correspondence" with those authorities denounced by Article of War 81. It follows that the record is legally insufficient to sustain the findings of guilty of this Specification.

Specification 1 of Charge II alleges that accused attempted to give intelligence to the enemy by writing and delivering the letter in question.

Intelligence is defined as "information in regard to the number, condition, position, or movement of the troops, amount of supplies, acts or projects of the government in connection with the conduct of the war, <u>or any other fact or matter that may instruct or assist him in the prosecution of hostilities</u>" (underscoring supplied). Winthrop, <u>supra</u>, p. 634.

While much of this letter is concerned with nothing more than emotional glorification of Germany, there is at least one particular where

the information furnished might assist the Reich in its war against the United States. That is found in accused's statement that he is remaining behind as leader of the "boys" who are "ready to stake all for Germany," coupled with his assertion that "everything will be possible" if German agents communicate with him. This assurance, which Schwichtenberg was urged to communicate to the authorities in the Reich is, in our opinion, a fact which might assist them in the prosecution of the war. The proof supports the allegation that accused attempted to give intelligence to the enemy, as alleged.

The only remaining question is whether giving intelligence to a prisoner of war is giving intelligence to the "enemy." As we have already pointed out, Winthrop, in discussing old Article of War 45, stated that the word "enemy" did not include prisoners of war for the reason that the capturing power was required to furnish them with rations and quarters. We are not, however, inclined to carry that construction into the amalgam resulting from combining Articles of War 45 and 46 of the 1874 Code so as to apply it to those portions of Article of War 81, which are derived from old Article of War 46. The capturing power is not obliged to furnish prisoners of war with intelligence and we have no hesitancy in saying that the Article is violated if intelligence is furnished to them. The evidence is legally sufficient to support the findings of guilty of the Specification.

The last of the Specifications dealing with the letter, Specification 2 of Charge II, need not detain us long. Accused is charged therein with wrongfully attempting to make contact with the authorities of the German Reich for the purpose of aiding it by preparing and causing the letter in question to be delivered to Schwichtenberg, knowing that the latter intended to escape to Germany. The evidence outlined above fully supports the court's finding of guilty of this Specification and we see no necessity for recapitulating it in detail ~~again~~. The record is legally sufficient to support the finding of guilty of this Specification.

7. The two remaining Specifications deal with the assistance rendered Maple in his deserting the service. Specification 1 of Charge I, as modified by the action of reviewing authority, charges accused with knowingly attempting to relieve the enemy with information by furnishing Maple with a list of articles needed for travel in Mexico and information as to the most convenient place to purchase a revolver, knowing that Maple planned to use this information in wrongfully assisting German prisoners of war to escape, in violation of Article of War 81. The Specification of Charge III charges that accused by the same acts knowingly assisted Maple in deserting the service of the United States, in violation of Article of War 59.

The evidence, apart from accused's confessions, shows that Maple, a close friend of accused, deserted the service of the United States on 15 February 1944, accompanied by Schwichtenberg and Kikilius, two escaped German prisoners of war, and together with them, was taken into custody in Mexico. One of the two was in possession of a compass and Schwichtenberg was in

possession of the letter, to which reference has already been made. In addition, accused was present at a discussion between Kissman and Maple about the purchase of certain articles, including a compass, suitable for making a cross-country trip. The same trio conferred on the morning that Maple deserted. This evidence is, in our opinion, sufficient to establish the corpus delicti and lay a foundation for the introduction of accused's confessions.

In his confessions accused admitted furnishing Maple with a list of equipment which might be useful or necessary for travelling in Mexico, and he admitted advising him as to the best place to purchase a gun. Other admissions in the confession where accused fully detailed his complicity in Maple's desertion are set forth above and need not be repeated here.

There is a serious question, however, whether the acts charged constitute relieving the enemy, in violation of Article of War 81. That Article provides that:

> "Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or give intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct."

The itemization of means by which the enemy may be relieved is strictly limited to tangible articles, useful in themselves, unless the phrase "or other thing" can be considered broad enough to include anything tangible, even a list of articles which is merely informational in character. As pointed out above, that section of Article of War 81 which deals with relieving the enemy is derived from what was Article of War 45 in the 1874 code. That Article specified three methods of relieving the enemy, viz., money, victuals or ammunition and did not contain a catch-all phrase. Commenting on this, Winthrop said:

> "In this enumeration the Article is bald and imperfect. Some such addition as or other thing, or or otherwise is required to complete and render fully effective the enactment." Winthrop, supra, 631 - emphasis in original.

The discussion of this Article in the 1921 Manual states that it defines five offenses (MCM, 1921, par. 431, p. 389) and under the section entitled "Proof" with respect to relieving the enemy, it further states:

> "(a) That the accused either directly or indirectly furnished the enemy with a certain article or articles."

"Relieves" is defined by that Manual as furnishing or supplying.

We are of the opinion that supplying information or the furnishing of a list which is merely informational in character is not relieving the enemy within the meaning of this Article. The Article should be interpreted so as to give effect to each of its clauses. If a broad sweep is given to the phrase "or other thing" little that is vital would be left of the remainder of the Article. It must be remembered that the present Article is a combination of two Articles, each of which was believed to cover separate acts treasonable in their nature. Winthrop, supra, p. 629-635. There is no reason to suppose that the merger was designed to destroy in practical effect most, if not all, of the old 46th Article. To be sure the addition of the words "or other thing" considerably enlarges the scope of the offense "relieving the enemy but, as we have seen, it was extraordinarily narrow in the old Article. We think that the principle of "eiusdem generis" should apply in interpreting this phrase and that, accordingly, it includes only tangible articles, useful in themselves, and not informational in character. In this way effect is given to the phrase "or other things" without at the same time rendering the rest of the article virtually useless. We conclude, then, that the specification as written fails to state a violation of Article of War 81.

That is not to say, however, that the conviction must be disapproved. In CM 260393 Kissman was charged with relieving the enemy by failing to report the absence of Maple and by falsely reporting that he was absent on sick call. The Board held that while accused was not guilty of relieving the enemy he was guilty of protecting them. They said,

> "The Board of Review is of the opinion, however, that despite its slight lack of artfulness, the Specification clearly states an offense under the 81st Article of War. The substitution of the words "protect" for the word "relieve" is all that is necessary to meet the proof. Accused was at no time mislead by the form of the specification, and never objected to it. The proof was clear. Accused admitted the acts charged, and sought only to explain his reasons for them. We are unable to say that any substantial right possessed was prejudiced by this variance of wording."

On the basis of these principles and on the authority of the Kissman case, we think that this is no obstacle to our substituting for the words "attempt to relieve the enemy with information" the words "give intelligence to the enemy." To be sure the intelligence was transmitted to Maple, but the Article denounces either direct or indirect transmission. It follows, therefore, that the evidence is legally sufficient to sutain the findings of guilty of the Specification, as thus modified.

No question is presented by the Specification of Charge III. The record is legally sufficient to sustain the findings of guilty of that Specification.

8. The charge sheet shows that accused is twenty-nine years, ten months of age and was inducted on 30 September 1941 at Fort Sam Houston, Texas.

9. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted above, no errors injuriously affecting the substantial rights of the accused were committed during the trial. For the foregoing reasons the Board of Review holds that the record of trial is legally insufficient to support the findings of guilty of Specifications 2 and 3 of Charge I, and legally sufficient to sustain all other findings of guilty and the sentence. A sentence of life imprisonment is authorized upon conviction of a violation of Article of War 59, Article of War 81, and Article of War 96.

Confinement in a penitentiary is authorized by Article of War 42, for the offense of aiding a soldier in deserting the service of the United States (Spec., Chg. III), recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 18, section 94, United States Code.

Wilmot T. Baughn, Judge Advocate.

Robert Glennon, Judge Advocate.

Gerald D. Hanna, Judge Advocate.

JAGN-CM 310327 1st Ind 6 August 1946

WD, JAGO, Washington, D. C.

To: Commanding General, Headquarters Fifth Army, Chicago, Illinois.

1. In the foregoing case of Private Theophil J. Leonhard (38034443), Company A, 1800th Engineer General Service Battalion, then the 620th Engineer General Service Company, I concur in the holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 2 and 3 of Charge I. Upon disapproval of the findings of guilty of Specifications 2 and 3 of Charge I, under the provisions of Article of War 50½, you will have authority to order the execution of the sentence.

2. The record of trial and accompanying papers show that the accused was born in Germany and has never become a citizen of the United States. While this factor in no manner excuses him for the offenses of which he has been convicted, it is considered a mitigating circumstance. Accordingly, and in view of the reduction of a life sentence to eight years in CM 260393, Kissman, a similar and related case, it is recommended that the period of confinemwnt be reduced to ten years.

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

(CM 310327).

Thomas H. Green
THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

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

SPJGK - CM 310329

26 APR 1946

UNITED STATES v. Private BERNARD J. KADIN (12237469), Company R, 1st Regiment, 9301 Technical Service Unit, Detachment No. 3, Aberdeen Proving Ground, Maryland.	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Aberdeen Proving Ground, Maryland, 1 March 1946. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
MOYSE, KUDER and WINGO, 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 61st Article of War.

Specification: In that Private Bernard J. Kadin, Company R, 1st Regiment, 9301 Technical Service Unit, Detachment No. 3, Army Service Forces Training Center (Ordnance), Aberdeen Proving Ground, Maryland, did, without proper leave, absent himself from his organization at Aberdeen Proving Ground, Maryland from about 27 December 1945 until he was apprehended by civilian authority on or about 9 January 1946 and returned to military control at New York City, New York on or about 24 January 1946.

CHARGE II and Specification: (Withdrawn by order of appointing authority).

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

Specification 1: In that Private Bernard J. Kadin, ***, with intent to defraud The Western Union Telegraph Company at Aberdeen Proving Ground, Maryland, did, at Aberdeen Proving Ground, Maryland, on or about 17 December 1945 forge the signature of Private Norman Fountain upon a Western Union Money Order in words and figures as follows:

" WESTERN UNION MONEY ORDER WC67069
Issued at APG, Aberdeen, Md. December 15 1945

FACE) When Countersigned
SIDE) at Point of Issue Pay to PVT NORMAN FFOUNTAIN or Order
OF) The Sum of THIRTY THREE AND NO/100 ------- Dollars ($33.00)

MONEY) Amount Telegraphed From ROME GA DECEMBER 15 1945
ORDER) To The Western Union Telegraph Company
Payable through THE WESTERN UNION TELEGRAPH COMPANY
The Chase National Bank
of the City of New York 1-74 S/ E.E. Huntington
Pine Street, Corner of Nassau Treasurer

S/ S. Jordan
Money Order Agent

(This Order May Be Cashed By Anyone To Whom The Payee is Known)"

REAR)
SIDE)
OF) "(Signed) Norman Fountain
MONEY)
ORDER) Photo Copy 1-9-46
Forwarded to Mgr
Aberdeen, Md."

which said money order was a writing of a public nature which might operate to the prejudice of another.

Specification 2: In that Private Bernard J. Kadin, *** did, at Aberdeen Proving Ground, Maryland, on or about 17 December 1945, feloniously take, steal and carry away the sum of thirty-three dollars ($33.00), the property of Private Norman Fountain.

He pleaded not guilty to and was found guilty of each Charge and Specification. No evidence of any previous conviction was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence but reduced the period of confinement to three years, and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Specification of Charge I and of Charge I and of Specification 1 of Charge III and of Charge III, but legally insufficient to support the finding of guilty of Specification 2 of Charge III for the reasons hereinafter set forth.

4. Evidence of offense alleged in Specification 2 of Charge III.

"Some day prior to 17 December 1945," the Western Union Office, Aberdeen Proving Ground, Maryland, according to testimony of Mr. Oliver Todd, manager thereof, received a telegraphic order "from Henry Fountain, Rome, Georgia" to pay $33 to the order of Norman Fountain (R. 9). A

"Western Union money order draft" was accordingly prepared by and held at the Western Union Aberdeen Office (R. 9). This "money order draft" read as alleged in Specification 1 of Charge III. The office then "made a notice upon Form 75-C for the payee to call at our office and to call for this money order" (R. 9, 11). The money order "countersigned *** 'Norman Fountain'" was paid by the Western Union Office, was stamped "non-negotiable," and was held as a receipt (R. 9, 11, 12; Pros. Ex. 3). Money for the payment of such orders was secured by Western Union Aberdeen Office "from the Chase National Bank of New York City. We draw it out of our own money," and it was "Western Union's money until paid" (R. 11,12). Western Union was "merely acting as an agent," and had "an obligation to someone either to pay it to the man here or refund it to the owner" (R. 12,13). In the normal course of business, that office required enlisted men to show their identification tags "to cash a money order" (R. 9).

Private Norman F. Fountain testified that "some time in the week preceding 21 December 1945" accused met him in a barrack and told him the commanding officer wanted Private Fountain's "dog tags," whereupon "I gave them to him. He said write your mother's and dad's address on this piece of paper and I wrote it down and he went out the door" (R. 15). Private Fountain had previously written " a letter home and wired home" for money (R. 15). He had never seen the money order countersigned with his name, did not sign it, and had not given authority to accused nor to anyone else to sign it (R. 16).

Sergeant Leslie H. Branch testified that on 17 December 1945 "at approximately fifteen minutes before retreat, Private Fountain came to me and asked if he could have his dog tags back. We went to the First Sergeant and he said he didn't have them. Meanwhile, the company had fallen out for retreat, so we got Sergeant Dixon and went over and asked to have Kadin (accused) called forward and we requested Kadin to hand over the dog tags, which Kadin did" (R. 18). At the time, accused "stuttered and stammered and said he had permission from the commanding officer to get the dog tags" (R. 18).

On 31 January 1946, accused, after having been warned of his rights under Article of War 24, signed a confession which was admitted into evidence as Prosecution's Exhibit 4 (R. 19,20,22,23,26), and reads in pertinent part as follows:

> "On the morning of 17 December 1945 I was at the Battalion Headquarters. When I was leaving the Sergeant asked what Company I was from and I said Company R, 1st. Regiment. He said for me to take these telegrams to the Sergeant. I said I would and saw Fountain's telegram on top, and not thinking twice, I took it and put it in my pocket, the rest of the telegrams I had handed. It was in the morning about 10:30.
>
> "I went back to the Orderly Room and had handed in the rest of

the telegrams. A corporal told me to go out and get a list of names of some men who were going home for Christmas and I went out and got their names and told Fountain the corporal had wanted his dog tags. I went back to the Orderly Room and handed in the sheet of names of the boys who were going home for Christmas. I then went back to the Barracks and had chow.

"I then took off for the Western Union about 25 minutes of 1:00. I got there and cashed the Money Order which belonged to Fountain, signed Fountain's name on back knowing it was forgery. After cashing the Money Order I went back to my Company." (Pros. Ex. 4)

5. There was no evidence that accused stole $33, the property of Norman Fountain, as alleged and found. Proof of larceny of Fountain's money order does not support the findings of larceny of the proceeds thereof. The rule repeatedly declared by the Board of Review in cases of embezzlement is applicable to the present situation.

"Embezzlement of personal property is an offense separate and distinct from embezzlement of the proceeds of the property, and a finding of guilty of one under an allegation of the other constitutes a fatal variance" (CM 217383, Nelson, 11 BR 251, 252, Sec 451(20), Dig Op JAG 1912-40; CM 188571, Simmons, 1 BR 127, 128; CM 189741, Mulkey, 1 BR 184, 185; CM 218647, Moody, 12 BR 125, 126). Where an accused was alleged and found to have embezzled certain sums of money, and the evidence showed that "checks for the respective amounts involved were entrusted to accused for the purpose of applying them in payment of specific obligations *** but that he *** indorsed and cashed them and failed to pay over or account for the proceeds," the Board of Review held that

"Proof of embezzlement of the checks does not support the findings of embezzlement of the moneys, for the two offenses are separate and distinct and proof of one is fatally at variance with findings of guilty of the other" (CM 191076, Porter, 1 BR 237, 238; see CM 220061, Barnes, 12 BR 334; CM 243794, Moore, 28 BR 100).

Even if it were held that there was no larceny of the money order from Norman Fountain, there is no proof that the sum of $33 obtained by accused from Western Union belonged to Norman Fountain, as alleged and found. This money was the property of Western Union and was not the property of Norman Fountain. Although it has been held, in a single case, that in such circumstances Western Union was a bailee, and that a person misrepresenting himself (through an agent) to be the payee and thus obtaining money from Western Union thereby committed larceny from the payee (English v. State, (Fla 1920) 85 So 150), no other support for this proposition has been found. In Primrose v. Western Union Telegraph Company ((US 1893) 38 L. Ed. 883), it was declared that,

"*** telegraph companies are not bailees, in any sense. They are entrusted with nothing but an order or a message, which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols by means of electricity ***". (id, 889, underscoring supplied)

The evidence in the present case shows, and it is obvious from the physical facts, that the money itself was not sent from Rome to Aberdeen. Although the telegraph company is in a legal sense a common carrier, it is not engaged in the transportation of the physical property of the sender:

"Strictly speaking, nothing is actually transmitted over the wires, but by the use of them as a medium of communicating intelligence the same result may be accomplished as if the money were sent, and so we speak of it as sending money by telegraph." (Reaves v. Western Union Telegraph Co. (SC 1918), 96 S.E. 295, 297)

Where the same result was secured by means of a cable running from New York to Petrograd, the New York Court of Appeals said,

"The term 'cable transfer' precludes the idea that an actual transfer of money is contemplated. The seller of a cable transfer sells a credit for a sum of money payable at the place indicated in the contract, and the buyer purchases a credit for such sum, available at such place, *** the money paid becomes the property of the seller of the transfer, and the buyer receives the obligation of the seller to pay over the equivalent in foreign money to the payee". (Underscoring supplied) (Oshinsky v. Taylor (NY 1918) 172 N.Y.S. 231,232)

accord, Strohmeyer & Arpe Co. v. Guaranty Trust Co. of New York (NY 1916) 157 N.Y.S. 955, 958. Safian v. Irving Nat. Bank (NY 1921) 188 N.Y.S. 393,394.

The transaction is simply a commercial transfer of credit; the fact that the medium of communication is cable, or even wireless, instead of mail, does not alter its nature:

"Thus the custom has developed of selling credit to be established by cable or wireless. A purchaser does not receive a draft or check which is to be transmitted by mail, but pays for a credit, which will be given him *** by an immediate cable or wireless *** The thing sold is the same in the case of the cable or wireless transaction as in the case of the draft or check. It is the credit of the bank or seller" (Legniti v. Mechanics & Metals Nat. Bank of New York et al, (NY 1921) 130 N.E. 597).

accord, Equitable Trust Co. v. First Nat. Bank (US 1928), 72 L. Ed.

313,316. Plischner v. Taylor (NY 1921) 193 N.Y.S. 236,237.

Western Union Money Orders are transmitted subject to the terms of that company's standard money transfer contract, now filed with the Federal Communications Commission (Western Union Telegraph Co. v. Nester (US 1939) 84 L. Ed. 960), and formerly filed with the Interstate Commerce Commission (Western Union Telegraph Co. v. Esteve (US 1920) 65 L. Ed. 566). Under this contract, requiring return of money to the sender unless it is delivered within 72 hours, it was held in Green v. Western Union Telegraph Co. (Miss 1927) 111 So. 750, that a creditor of one Farrar, the sendee, had no cause of action against Western Union for money order funds payable by Western Union to Farrar, the court saying,

> "The title to the funds in such a case does not pass to the sendee until delivery." (id., 751)

Norman Fountain had neither title to nor possession of the sum of $33 accused obtained from Western Union, and therefore there was no larceny of this money from Fountain.

6. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 2 of Charge III; and legally sufficient to support the findings of guilty of the Specification of Charge I and of Charge I and Specification 1 of Charge III and of Charge III and the sentence.

Thomas W. Moyer, Judge Advocate

William B. Kuder, Judge Advocate

Earl W. Wingo, Judge Advocate

SPJGK - CM 310329 1st Ind

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

TO: Commanding General, Third Service Command, Army Service Forces, Baltimore 2, Maryland.

1. In the case of Private Bernard J. Kadin (12237469), Company R, 1st Regiment, 9301 Technical Service Unit, Detachment No. 3, Aberdeen Proving Ground, Maryland, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge III, and legally sufficient to support the findings of guilty of the Specification of Charge I and of Charge I and Specification 1 of Charge III and of Charge III and the sentence, which holding is hereby approved. Upon disapproval of the findings in accordance with this holding you will have authority to order the execution of the sentence.

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

(CM 310329).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JAGK - CM 310352

23 SEP 1946

UNITED STATES v. Second Lieutenant JOHN D. BRUNKE (O-2032431), Air Corps	EIGHTH AIR FORCE Trial by G.C.M., convened at Eighth Air Force, APO 239, c/o Postmaster, San Francisco, California, 22 January 1946. Dismissal, total forfeitures and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
SILVERS, McAFEE and ACKROYD, Judge Advocates

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

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

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

Specification: In that Second Lieutenant John D. Brunke, 346th Station Complement Squadron, did, at Loly Beach, Okinawa, on or about 29 December 1945, unlawfully and feloniously kill Private Frederick W. Brown, Jr., by wrongfully, recklessly and negligently piloting an L-5 airplane at an altitude of approximately five feet above the ground at Loly Beach motor pool and causing said airplane to collide with and strike the person of the said Private Frederick W. Brown, Jr.

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

Specification: In that Second Lieutenant John D. Brunke, 346th Station Complement Squadron, did, at Loly Beach, Okinawa, on or about 29 December 1945, wrongfully pilot an L-5 airplane at an altitude of less than ten feet above the ground, in violation of paragraph 16d, Contact Flight Rules, contained in Pilots' Information File 2-1-3.

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

sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

On 29 December 1945, at about 1015 or 1020, the accused, Second Lieutenant John D. Brunke, requested the Flight Section, Eighth Air Force, to authorize the use of an L-5 airplane for the purpose of getting in his (Lt. Brunke's) flying time for the month. First Lieutenant Clyde Q. Allen explained the details of the ship, its capabilities and limitations to the accused. Lieutenant Allen made a test flight with the accused, after which he (Lt. Allen) left the plane, and the accused took off alone. (R-6-7). Between 1000 and 1100, the same day, a plane was flown from south to north over the Loly Beach motor pool (R-9-11-21) at an altitude of about twenty feet. The pilot of the plane was recognized to be the accused by Private Gillispie (R-13), and Private Collins (R-20-22), who were acquainted with accused and who were in the motor pool at the time, watching the plane. The plane then made another pass over the motor pool from south to north, at an altitude of about four or five feet directly towards Privates Gillispie and Brown who were standing in the clearing of the motor pool, (R9-17-21). As the plane came in the second time Brown said to Gillispie, "Brunke is going to give me another buzz job," and motioned with his arms. (R-17). Gillispie dived for the ground and Brown started to run. (R-14-16). When the plane passed over the men, it was pulled up, and the tail dipped down and caught Brown on the right side, knocking him down. (R-9-10). He was taken to the hospital and died a few hours later as a result of his injuries. (R-22-26). When the plane was examined between 1100 and 1130 by Lieutenant Carnes, the operations officer of Eighth Air Force Flight Section, the tail wheel was missing and the framework was broken at the tail of the plane. Lieutenant Carnes stated that he was acquainted with the "Pilots' Information File" and that it was in effect and operation at that time. (R-24).

4. Evidence for the defense:

Lieutenant Jack L. Perryman, who had known accused for one and a half years, testified that the accused had never had a plane accident prior to 29 December 1945. (R-26). Lieutenant Frank E. Cash, who had known the accused for two years testified to the same effect and that accused was a very fine pilot, one of the better pilots of their P-39 Photo Reconnaissance Squadron. (R-27). Captain Robert Y. Dean, weather officer, testified that on 29 December 1945, there was a north to south wind of 19 miles per hour, which would increase to a velocity of 25 to 27 miles per hour over a normal sized hill such as existed in the area where the offence occurred. A small plane would be easily influenced by such a wind. (R-28-29).

The accused, his rights as a witness having been explained to him, elected to remain silent. (R-30).

5. As to the Specification to Charge I.

The undisputed evidence clearly shows that the plane piloted by accused struck and killed Private Frederick W. Brown, Jr., and that the plane was being operated in violation of Army Air Forces Regulations 60-16 War Department, 6 March 1944, which regulations were in force at the time of the incident. Section I, paragraph 1, of these regulations provides that:

> "An AAF pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons, or property, on the ground."

The court could properly take judicial notice of this regulation. (M.C.M. 1925 Par. 125).

Manslaughter is defined in Federal law as follows:

> "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: Voluntary - upon a sudden quarrel or heat of passion. Involuntary - in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. (Criminal Code, Sec. 274, 18 U. S. 453).
>
> "Involuntary manslaughter is homicide unintentionally caused * * by culpable negligence in performing a lawful act * * *
>
> ** ** **
>
> "Instances of culpable negligence in performing a lawful act are: negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger; believing, but without taking reasonable precautions to ascertain that it could not be discharged; * * (Par. 149a M.C.M. 1928)."

In C M 218240, Howard (12 B.R. 17) it was held that the action of the accused in operating a plane in a culpably negligent manner which caused the death of a human being constituted manslaughter.

The Board of Review is of the opinion that the evidence clearly shows that accused was culpably negligent in operating the plane in a lawful but unauthorized manner, and without due caution and circumspection, resulting in the death of Private Frederick W. Brown, Jr., as charged in the Specification, Charge I.

As to the Specification to Charge II:

AAF Regulation No. 62-15, 24 November 1944, provides for the publication of the "Pilots' Information File." Paragraph 5 of this regulation provides for its distribution to "* * * one each to each pilot * * *". Paragraph 7 provides that the personnel specified in paragraph 5 shall certify that they have read and understand all instructions and information contained in their files. The court could take judicial notice of Pilots' Information File as a part of AAF Regulations (M.C.M. 1928 Par. 125).

An inspection of Pilots' Information File 2-1-3 discloses that Paragraph 16 refers to Contact Flight Rules and is as follows:

> "16. Minimum Altitude of flight:
>
> a. Except during takeoff and landing, aircraft will not be operated:
>
> (1) Below the following altitudes:
>
> (a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.
>
> (b) At an altitude above the congested sections of cities, towns, or settlements to permit an emergency landing outside of such sections in the event of complete power failure.
>
> (c) 1,000 feet above any open-air assembly of persons.
>
> (d) 500 feet above the ground elsewhere than as specified above.
>
> (2) Within 500 feet of any obstruction to flight.
>
> (b) Any maneuver may be conducted at such altitude above the ground or water as is necessary for its proper execution in places other than specified above, when such maneuver is required to accomplish an ordered tactical flight, engineering, or training mission.

It is noted that the Specification of Charge II alleges a violation of paragraph 16d. Contact Flight Rules File 2-1-3. The correct designation of the section referred to is paragraph 16a(1)(d). Specifications should be worded in such a manner to give the accused sufficient notice of the offense with which he is charged (Dig. Op. JAG 1912-1940, Section 428 (10); C.M. 257469 Mackay 37 BR 140). However, inspection of paragraph 16, Contact Flight Rules File 2-1-3, as quoted above, discloses that there is only one subparagraph d contained therein, and that no confusion could result by the incorrect designation of the subparagraph of paragraph 16 of said Contact Flight Rules.

The accused clearly violated paragraph 16a(1)(d) Contact Flight Rules 2-1-3, by flying over the Loly Beach motor pool at an altitude well below 500 feet while buzzing the pool. His actions in flying at this low altitude are shown to be deliberate in that he buzzed the pool twice.

6. War Department records show that accused is 21 years and 4 months of age, that he enlisted in the Army on 17 June 1943, was discharged to accept an appointment as a Flight Officer on 20 November 1944 and was discharged to accept a temporary appointment as a Second Lieutenant in the Army of the United States on 27 November 1945.

7. Consideration has been given to the recommendations for clemency accompanying the record of trial from Lieutenant Colonel Henry S. Howard, Air Corps, defense counsel, and Lieutenant Colonel William J. Clasby, Chaplain, Eighth Air Force.

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

Chester D. Silvers, Judge Advocate.
Carlos E. McAfee, Judge Advocate.
Gilbert E. Lakeman, Judge Advocate.

JAGK - CM 310352 1st Ind

SEP 28 1946

WD, JAGO, Washington 25, D. C.

TO: The Under 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 John D. Brunke (0-2032431), Air Corps.

2. Upon trial by general court-martial this officer was found guilty of manslaughter in violation of Article of War 93 and of wrongfully flying an airplane at an altitude of less than ten feet above the ground contrary to paragraph 16A(1)(a) Contact Flight Rules contained in Pilots Information Files 2-1-3 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 five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

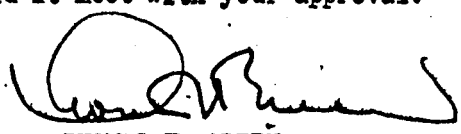
3. A summary of the evidence may be found in the accompanying opinion of the Board of Review. I concur in the opinion of the Board that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof.

On 29 December 1945 while stationed on Okinawa, accused obtained permission to fly an airplane for the purpose of securing his flying time for the month. While flying the plane the accused "buzzed" the Loly Beach motor pool where several of his friends were standing. During his second "buzz" over the motor pool the tail of the plane struck and killed Private Brown, a friend of the accused. The act of flying over the motor pool at this low altitude was in violation of Army Air Forces Contact Flight Rules as contained in Pilots Information File 2-1-3.

The accused is 21 years of age and is single. He enlisted 17 June 1943 and has been in the Army since that date. He was appointed flight officer on 20 November 1944 and commissioned a second lieutenant, AUS, 27 November 1945. The Staff Judge Advocate's review shows that the accused left the United States in May 1945. He participated in a number of missions as a pilot of P-38 aircraft assigned to the 28th Photographic Reconnaissance Squadron. He was awarded battle participation credit for Air Offensive, China, Third Fleet Operations against Japan, Air Offensive Japan and Western Pacific Campaign. The homicide committed by the accused amounts to involuntary manslaughter and occurred while the accused was entertaining some of his friends, including the deceased. In view of the three year period of maximum confinement for involuntary manslaughter prescribed by section 275, Criminal Code of the United States (18 U.S.C.453), and all the circumstances of the case, it is recommended that the sentence be confirmed but 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. Record of trial
2. Form of action

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 307, 15 Oct 1946).

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

DEC 16 1946

JAGQ - CM 310354

UNITED STATES v. Private EUGENE L. D. NEWSOM (34991543), 3715th Quartermaster Truck Company, Camp Schwanewede, Germany.	BREMEN PORT COMMAND Trial by G.C.M., convened at Bremen, Germany, 14 and 26 December 1945. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
DICKSON, OLIVER and BOYLES, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Eugene L. D. Newsom, 3715th Quartermaster Truck Company, did, at Camp Schwanewede, Germany, on or about 28 November 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade James E. Thomas, 3985th Quartermaster Truck Company, a human being by shooting him with a carbine.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. With three-fourths of the members of the court present at the time the vote was taken concurring, the accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The Board of Review adopts the statement of the evidence and opinion in the Staff Judge Advocate's review.

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

must take place within a year and a day of the act that caused it (MCM, 1928, par. 148a). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (Wharton's Criminal Law (12 Ed.), Vol. 1, sec. 426).

The evidence in the record of trial conclusively proves that accused willfully and intentionally shot the deceased and that deceased died the same day as a result of the gunshot wound inflicted upon him by accused. No legal justification or excuse for the act of accused appears in the record.

4. The court was legally constituted and had jurisdiction over the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence. A sentence of death or imprisonment for life is mandatory upon a conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42, recognized as an offense of a civil nature and punishable by penitentiary confinement for more than one year by sections 452 and 454, Title 18 of the Criminal Code of the United States.

Charles M Dickson, Judge Advocate

Wayne Olivier, Judge Advocate

James P. Smith, Judge Advocate

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

SPJGH - CM 310362

3 MAY 1946

UNITED STATES	OKINAWA BASE COMMAND
v.	Joint trial by G.CM., convened at Headquarters Okinawa Base Command, 6, 7, 8 February 1946. Dishonorable discharge and confinement for life as to each. Penitentiary, McNeil Island, Washington.
Private THOMAS J. BOSWELL (15376935) and Private BENJAMIN E. GRATTON (30107569), both of 1908 Engineer Aviation Battalion,	

REVIEW by the BOARD OF REVIEW
TAPPY, STERN and THEVETHAN, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Thomas J. Boswell, Company C, and Private Benjamin E. Gratton, Company B, both of 1908th Engineer Avaition Battalion, acting jointly, and in pursuance of a common intent, did, at or near Kyeda, Okinawa, on or about 5 January 1946, forcibly and feloniously, against her will, have carnal knowledge of Toyo Tamashiro.

Both accused pleaded not guilty to and were found guilty of the Charge and Specification. Evidence of one previous conviction was introduced as to accused Boswell. Each accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. On 5 January 1946 about 1630, Toyo Tamashiro of Sukuta, Nago, native Okinawan female, twenty-three years of age and married, was hauling lumber for household use in the vicinity of Kyeda. She was accompanied by her cousin, Juko Kishimoto, a male seventeen years of age (R. 11,14,16). While walking along the road they encountered a large truck which was brought to a stop in front of them in such a manner as to block their path (R. 17). Three "colored boys" got off the truck. Toyo became frightened and started to run. She was pursued and caught by two of the truck occupants.

They dragged her to the truck and forced her into it. She succeeded in jumping off but they again caught her and placed her in the truck (R.11,17). In the meantime the third member of the group approached Juko with a knife and threatened him. Juko, observing Toyo being dragged to the truck, was powerless to come to her aid and as the truck drove away, he tried to follow on foot but was soon outdistanced (R.17).

As the truck was driven from the scene of the abduction, Toyo called for help shouting, "M.P., M.P.," but one of her assailants placed his hand over her mouth and "the truck rolled along the road leading to the mountain." She was offered a cigarette but threw it on the floor of the truck. After a short drive, the vehicle was brought to a stop and Toyo was dragged out (R.11).

One of the men tried to unbuckle her belt but she struggled so two of them held her while the third removed it. They pushed her and she fell to the ground. While one held her hand, another "unbuttoned her underpants." She struggled but one of them got on top of her. As she continued to struggle he struck her a couple of times and "inserted his penis." All three of these individuals had sexual intercourse with her. After the first one had finished, he got off and held her while the second accomplished sexual intercourse with her. During the progress of these two assaults, the third member of the gang was "standing by the truck, more or less like a guard." Upon completion of the second assault, he came to where Toyo was lying and had sexual intercourse with her while the other two held her (R.12). She had resisted throughout to the extent of her ability and had offered no cooperation to any of her assailants (R.28).

Juko, seeking aid after Toyo's abduction, stopped a jeep that approached him on the road but could not make the driver understand. He entered the jeep and they encountered a military police patrol car (R.17). With the assistance of a child who spoke "broken English," Juko informed the military police who took him to the village of Ota (R.52). Subsequently, Lieutenant Charles R. Anthony received a report about 5:00 p.m. while at a Military Police Camp located at "Road junction 1 and 108." He obtained a jeep and accompanied by an enlisted military police began a search. On a side road a few hundred yards from the highway he came upon a truck alongside of which the accused Boswell was standing. When asked by the Lieutenant if there were any others with him, Boswell replied that he did not know and, when asked what he was doing there, stated that he was sightseeing. Some five yards away, Lieutenant Anthony observed Toyo crouching and pulling up her trousers. She was "nervous and excited" and grabbed the lieutenant's arm, patting it. Her clothing was in disarray. She indicated that there were two others in the vicinity beside accused Boswell (R. 8,9,10,32). Thereupon Anthony found accused Gratton lying in the grass "level on the deck" at a point about fifteen yards away. When asked what he was doing there Gratton replied, "I am hiding, just to be hiding, you know how it is." The third member of the group (Morgan) was found nearby. All were placed in arrest and under guard were taken in the truck to Company Headquarters. Toyo rode with Lieutenant Anthony in the jeep (R.8,9). She was very nervous

and continued holding on the Lieutenant's arm until she was taken to the company area where she eventually was calmed (R.33). At the time of trial Toyo was unable to identify any of her assailants although she was certain that the three men Lieutenant Anthony had taken into custody at the scene were the three men who had intercourse with her (R.13,29). Lieutenant Anthony identified Toyo and the accused Boswell and Gratton as the persons who were present at the scene when he arrived about 5:20 p.m. (R.31,50).

Subsequently, Sergeant Walter Cox interviewed the accused while they were in confinement and both recounted the incidents which occurred on the day in question. Boswell related to Cox that he had taken a ride in a truck and while driving observed a girl along the road. He thought she waved to him so he stopped and talked to her. She entered the truck and they proceeded to a road off the main highway where he stopped the vehicle, got out and led the girl to a spot about 15 yards away and had intercourse with her. (R.21,22). Gratton's statement to Cox was substantially the same as Boswell's with respect to the picking up a native girl in a truck while out for a drive, of proceeding to a side road where the truck was parked and of the girl going to a point removed from the truck. As to the events which thereafter transpired, Cox testified that Gratton told him that "the girl went down the bank and a few minutes later * * * (he) went down and came back." Gratton further told Cox that when the military police arrived in the jeep, he hid and was discovered by the officer and that the girl in talking to the officer "raised three fingers and pointed to the bushes" (R.28).

4. Each accused, upon being advised concerning his rights as a witness, elected to testify under oath. Their testimony was substantially the same in all respects. Accompanied by one Private Morgan they left their area at about 1630 on 5 January 1946 in a truck driven by accused Boswell (R.34,42). They drove about ten or fifteen miles, travelling north on Route 1, to a point south of Nago, where they turned into a side road (R.34, 43,45). Morgan had to relieve himself so accused Boswell brought the truck to a halt. As he did so they observed a woman coming out of the bushes. She was alone. They called to her and said, "Cigarettes, chewing gum, push, push" (R.35,43,44). Gratton gave her two packages of cigarettes (R.35) and Boswell gave her chewing gum (R.44). She nodded her head and Boswell led her down an embankment where she took off her pants, lay down and had intercourse with him (R.44). After completion of the act, he returned to the truck and Gratton went to her (R.45). She took off all her clothing and had intercourse with him (R.35,36,39). No force was employed by either accused; she cooperated and did not object in any way (R.36,44,49). After completion of the act, Gratton arose and went to the bank where he sat for about five minutes while the girl awaited Morgan. At his point Lieutenant Anthony and an enlisted man drove up in a jeep (R.37,47). It was then about 6:00 p.m. (R.38). Boswell was standing by the truck (R.46). while Gratton, who had been sitting on the bank, then lay down in the grass (R.38). The officer observed the woman in the bushes and questioned her. In reply to his question as to how many were there, she raised three fingers (R.38). She did not appear "scared" or excited until the arrival of the military police (R.38,47). At that time she ran up and put her hand on Lieutenant

Anthony's arm (R.48). Neither accused knew whether Toyo was the woman with whom they had sexual intercourse because she wore a veil at all times (R.39). Gratton, Boswell and Morgan were placed in arrest. Accused Boswell and Gratton denied that the woman with whom they had intercourse was ever in the truck (R.35,48) and that she was with Juko when they came across her (R.41,43,49).

5. The evidence clearly shows that about 4:30 p.m. on 5 January 1946, Mrs. Toyo Tamashiro, a married woman, was kidnapped by the two accused and one Private Morgan while she was walking along a highway near the town of Kyeda, Okinawa, and spirited away in a truck driven by the accused Boswell. In a secluded spot some several hundred yards from the main highway she was forcefully removed from the truck and though she fought with her abductors was finally overpowered by the combined efforts of the three. During the struggle one of them struck her and she finally "gave in," though sexual intercourse was accomplished by each only through assistance of the others in holding her down. When Lieutenant Anthony arrived upon the scene he found Toyo "nervous and excited" and she remained so for some time thereafter. Her clothing was in disarray. Accused Boswell, when first seen by the lieutenant standing by the truck near the scene, stated that he was sight-seeing and didn't know if anyone else was there, and accused Gratton when observed nearby lying in the grass and asked what he was doing replied, "I am hiding, just to be hiding, you know how it is." Both accused made pre-trial statements admitting sexual intercourse with the woman and repeated the same story as witnesses at the trial but contended that such intercourse was with her full consent and cooperation. While they stated they could not identify Toyo as that woman and Toyo could not at the time of trial identify either one of her assailants, it is clear from the testimony of Lieutenant Anthony that Boswell and Gratton were the men identified by Toyo and that the accused had reference to Toyo as the woman with thom they engaged in sexual intercourse. Both of the accused denied that Toyo had ever entered the truck or that Juko, her cousin, was present at any time.

Thus there was presented for the consideration of the court a single question - was the sexual intercourse with Toyo by the accused Gratton and Boswell with or without her consent? This was a question of fact to be determined by the trial court. Although it is not within our province to determine controverted questions of fact in this case, we cannot refrain from remarking that in our opinion the overwhelming weight of the evidence points unerringly to the guilt of both accused. Their story of the events which transpired was utterly incredible and, in the light of human experience, unworthy of belief. All the facts and circumstances establish beyond reasonable doubt that the accused were guilty of rape as alleged.

6. The charge sheets show that the accused Boswell is 21 years of age, having been inducted 29 November 1942 and that accused Gratton is 22 years of age with service since 13 December 1943.

7. The court was legally constituted and had jurisdiction of the accused and the offenses. No errors injuriously affecting the substantial rights of either 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 as to each accused. A sentence either of death or of imprisonment for life is mandatory upon conviction of rape, in violation of the 92nd Article of War. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 22 - 2801 of the District of Columbia Code.

Thomas H. Tuttle, Judge Advocate.

Joseph J. Stern, Judge Advocate.

Robert E. Trentham, Judge Advocate.

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

SEP 18 1946

JAGQ - CM 310403

UNITED STATES v. Private ELMO HOOVER (34982448), Company I, 329th Infantry.	83RD INFANTRY DIVISION Trial by G.C.M., convened at Linz, Austria, 24 January 1946. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD OF REVIEW
WURFEL, OLIVER and MCDONNELL, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Elmo Hoover, Company I, 329th Infantry Regiment, APO 83, on Detached Service with Service Battery, 324th Field Artillery Battalion, APO 83, did at Schoerfling, Austria, on or about 20 December 1945, forcibly and feloniously against her will, have Carnal Knowledge of Angela Schraeder, an Austrian civilian.

Accused pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of three previous convictions by special court-martial for absence without leave and one by summary court-martial for willful disobedience of a standing order was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the Prosecution. The prosecutrix, Angela Schraeder, of Oberachmann, age 12, was sworn and qualified as knowing the meaning of her oath (R 9). On the 20th of December 1945 she left her home at Oberachmann (R 9)

and went to Kammer which is twenty or twenty-five minutes walking distance from where she lives. After getting a newspaper at Kammer she went to Schorfling, which is fifteen minutes walking distance from Oberachmann. She left Schorfling and started home (R 10, 19). She could not definitely state the time (R 10). She left home at 2:15 PM, it took her twenty to twenty-five minutes to go to where she bought the newspaper, and about fifteen minutes to go from there to Schorfling. She has no idea how long it was from the time she left Schorfling until the man in the truck stopped her, but it was still light. She thinks she was in the company of the man who was in the truck twenty minutes, can't say what time she arrived home (R 19), but it was "not much" dark. She was walking and did not have a bicycle that day (R 20). On the way home near a church (R 17) a truck pulled up and the driver called to her (R 10). The truck was not an American truck (R 20).

"Q. Who did you see in the truck?
"A. An American.

"Q. How did you know he was an American?
"A. He had a uniform on.

"Q. Do you see anyone in this courtroom you saw that day?
"A. Yes.

"Q. Will you point out who you mean?
"(The witness indicated the accused, Private Hoover)" (R 11).

* * * *

"Q. The first time that the truck stopped and the man forced you into the truck did you notice any blood or any other marks or stains on his clothing?
"A. I don't know how I can say it - some blue, I don't know.

"Q. At that time when you got into the truck there was no blood on him that you could see?
"A. No.

"Q. Are you sure that the man you see sitting in court right now is the same man you saw on that day? Could it possibly be somebody else?
"A. No, he is it." (R 20).

* * * *

"Q. When the man asked you to get in the car did he offer you anything?
"A. Yes, chocolate.

"Q. Why didn't you tell us that before when we asked you?
"A. I didn't know.

"Q. Had you ever seen this man before?
"A. Yes, I can say it sure when I come from Kammer. I can't say it for sure it was the man he have driving a car, maybe he was it. I don't know for sure.

"Q. Did you ever sit in the car with him before?
"A. No, just when it happens." (R 21).

The man told her to get in the truck. She refused (R 11). He dismounted and after some struggle he forcibly put Angela on the seat in the truck. "He take my legs and put me into the car" (R 11, 12). At the time she resisted and screamed (R 16). She tried to get out but was restrained (R 12). He was drunk and she was frightened (R 12, 16). He forced her down on the seat of the cab and forcibly removed her underpants, tearing them in the process (R 13, 14). He opened his pants and got on top of Angela. Then "'Fergewatig' - I have been raped." It hurt her "under there". She felt something enter her body and she was crying (R 15). The part of the man's body that entered her body was that part she saw outside of his pants because they were open, and it entered her and hurt her "in the under body" (R 17). She continued to fight back but finally was not able to fight any more (R 18). She screamed again when accused got up (R 16). The attack took about 20 minutes. Angela did not see anyone on the road when she got out of the truck (R 19). When she got out of the truck she was bleeding between her legs (R 18). She then went home and told her mother what had happened (R 18). Angela did not have her gray woolen fingerless gloves when she got home. The last time she saw them was "when it happens on the 20th". She doesn't know or remember if she took them off or lost them at that time. She had the gloves when the car stopped and "I don't know if it was in the car, I don't remember". She doesn't know where the gloves are now (R 47, 48).

That night Angela went to Doctor Joseph Jirsa (R 18). It was stipulated that the doctor's finding was:

"... The libia (sic) minor display a little swelling and on their inner side little haemorrhagical spots. The hymen is badly

swollen and torn on its hind and lower part; the fissure is ranging to the side of the vagina. The fissure and side of the vagina to which the fissure extends are bleeding newly. The hymen is strikingly thick and pulpous. At the examination on 3 January 1946 I perceived that seemingly the ends of the fissure have nearly grown together but were bleeding slightly when unfolded. According to my medical statement of 20 December 1945 the girl might have been freshly deflowered. ..." (R 9).

On 20 December Ludwig Asenstorfer and Franz Verwanger, prisoners of war at Ebensee, were given permission to visit their families at Schorfling, and, with a guard, they left their place of work to go to Schorfling (R 22, 28). Asenstorfer rode in a truck (also referred to as a car by the witness) driven by the accused (R 23, 25), and Verwanger drove another truck and was accompanied by the other guard (R 28). Accused returned to Asenstorfer's house between 12:30 and 1:00 o'clock and had dinner there, then left again about 1:00 (R 23, 45). Accused next came to Asenstorfer's house about 3:00 o'clock, stayed only a few minutes and then went back to the car and left; he had not had anything to drink at that time (R 24, 25, 26, 45). At that time accused did not have any red spot on his trousers (R 24, 26). The next time Asenstorfer saw accused was about 4:00 or 4:30 o'clock (R 24), "both cars were coming to my house to take me", and they left Schorfling to return to the prison at Ebensee between 4:00 and 4:30 (R 25, 45). Accused was drunk (R 26, 27). They were in a German truck with a trailer (R 27). "In the time during four and four-thirty", or at five o'clock, Asenstorfer saw that accused's pants were open and at the opening there was "a red thing on the pants", a spot or spots — "It looks like blood red" — and accused said he had fallen (R 24, 25, 26, 27). That morning Asenstorfer helped accused get his truck out of a ditch, but helped no one get a truck out of a ditch during the afternoon (R 47). During questioning by the court Asenstorfer testified that he did not notice anything about the seat of the truck when he got in to go home (R 28); on direct examination when called as a rebuttal witness by the prosecution he again testified that he did not see anything on the seat of the truck when he got in to return to prison with the accused (R 45). On redirect examination he testified:

"TJA: You were asked the question before 'did you see anything in the seat of the truck' and you answered no.
"A. Yes.

"Q. Did you understand that question when it was asked of you?
"A. I didn't remember this time.

"Q. Do you remember now?
"A. Yes.

"Q. Which statement is true?
"A. Gloves, we found them"

"LM: What color were the gloves?
"A. I don't remember.

"LM: Did they have fingers or were they mittens?
"A. No fingers, just mittens.

"LM: Two of them?
"A. Two.

"TJA: Do you know what was done with the gloves or what became of them?
"A. No.

"Reexamination By the Court

"Questions by the court:

"Q. Of what material were the gloves made of?
"A. Woolen" (R 46, 47).

Verwanger testified that after accused left him at his home, he next saw accused about "Three or three-thirty" at Verwanger's home; that at that time accused had "a blood spot on the opening of his pants" and said in German "that is coming from a fraulein"; and that he next saw Asenstorfer at "a quarter after four" (R 29).

4. Evidence for the defense.

Private James testified that at Ebensee on the morning of 20 December 1945 he was told by an officer to take two prisoners of war to visit their homes. Accused told him he would take one of the prisoners. When they arrived at the town where the prisoners lived accused stopped with his prisoner and James "went on to my prisoner's home ". About 12:00 or 12:30 accused came on over to the house where James' prisoner lived, stayed just long enough to unload some wood and both of them then left (R 30, 31). About 1:00 or 1:30 James went for a drive and saw accused's truck parked on the side of a road. Accused was there and a girl about twenty-three or twenty-four years old was standing there with him. There was a bicycle on the back of the truck. The girl was not the same one who was a witness in this case. Accused had blood around the fly of his trousers and on his hands, and the girl also had a little on her hands. James asked accused what was wrong, and accused said he had had intercourse with the girl and "busted

the leader under his penis. The little string under his penis". Both James and accused asked the girl if she wanted them to take her home. "She said no. She got her bicycle out and left". This was not later than one-thirty (R 32, 33). James and accused then went back to the town; going down a hill, rounding a curve, accused stopped and James drove into the back of his truck and broke the water hose on James' truck. James took his truck to a garage, and accused left. This was about 2:00 or 2:30. James had consumed a pint of schnapps since that morning but that did not cause him to run into accused's truck (R 33, 35). About 4:00 or 4:30 accused brought James' prisoner to the garage and left. After the truck was repaired James and his prisoner went to the home of the other prisoner, and accused drove up and got his prisoner and all left to return to the organization at about 4:30 (R 34).

After being advised of his rights, the accused elected to testify under oath. Private James' testimony is true insofar as the events of the morning are concerned (R 36, 37). After leaving the prisoners at their homes, accused and James went to the town and accused separated from James (R 37). Accused saw a bunch of girls walking on a road, picked them up, took them to the edge of town and put them all off except one. "She was going that way so I took her". She stopped at her house and got a bicycle, came back out and said she was going on. Accused put the bicycle on his truck, drove through town, and stopped on the side of the road (R 41). There the accused had intercourse with this girl, who was "chubby, rather heavy build, black hair, looked about 22 or 23 years of age". She was not the little girl who was the first witness called by the prosecution, and accused never saw the complainant prior to trial except "Just one time when she picked me out on New Year's Evening" (R 37, 38, 40, 41, 44). It was about ten or fifteen minutes till one o'clock, just before James drove up, or around one o'clock, that the intercourse occurred (R 38, 40). It occurred on the seat of the truck, the girl did not resist or fight or holler, did not bleed, accused did not have to argue with her, it was just a matter of course, she took her pants down herself, and accused is sure she had previously had intercourse (R 40, 41, 44). Accused used a rubber; when he took it off it was not broken and was full of blood; his penis was bleeding; while having intercourse with the girl he "broke that little cord on the head of my penis" (R 37, 38, 40, 42, 44). He removed the rubber in the truck, and got blood on his pants and hands and some got on the girl (R 38, 40, 44). Accused only had intercourse with the one girl (R 40). They had been stopped there about fifteen minutes and were talking when James drove up (R 37, 41). James asked accused why he had blood on him and accused told him he had broken the little cord on the head of his penis. James did not ask how it happened and accused did not tell him (R 37). After a short conversation, both accused and James asked the girl if she wanted them to take her home, and she said no. "She got her wheel and went up the road" (R 38, 42). On the way back to town, on a curve,

accused stopped his truck and James ran into the back of it damaging the radiator and breaking the water hose. Accused had no reason for stopping (R 38, 41, 42). They took the radiator off and accused left to go after James' prisoner and accused's prisoner. This was about 2:00 or 2:30, "maybe three o'clock" (R 38, 42). Accused started to get the prisoners, there was a tractor in the middle of the road and accused slid in the ditch about 2:00 or 2:30, a man with a pair of oxen pulled him out, and his prisoner came to him there about 3:00 or 3:30; accused then went back to where James was and told him he would go after James' prisoner (R 38, 39, 40, 42, 43). That took about an hour, and when he got back James was ready to go and they left about 4:00 or 4:30 to return to their quarters (R 39). Some time after one o'clock, after intercourse with the girl, and before his truck got stuck in the ditch, accused had dinner at the prisoner's house. Accused did not have a watch (R 42, 43). During the morning accused and James had each consumed a pint of schnapps (R 39). Accused was worried about the condition of his penis, but did not go to a doctor (R 40).

5. From her testimony, Angela Schraeder arrived at Schorfling about 2:55 PM. She did not know when she left Schorfling nor how long afterwards the attack occurred. But the attack lasted about twenty minutes, and it was "not much" dark when she got home. The identity of the accused, the force employed by him, the fact of penetration, and the victim's resistance and nonconsent were established by her testimony, which was corroborated by the testimony that a pair of mittens, answering substantially the description she gave of hers, was found in the cab of accused's truck. Whether accused had intercourse with another girl about one o'clock, and discrepancies as to whether or not he had blood on his trousers at one o'clock, three o'clock or four o'clock, were all matters for the court to reconcile and determine. However, it does not appear that the accused could not have been at the place of the crime during the period between the time he left James at the garage about 2:00 or 2:30 and the time he returned with James' prisoner at about 4:00 or 4:30 o'clock. It appears probable that the crime was committed between 3:00 and 4:00 o'clock. Accused produced no evidence to corroborate his story about getting into a ditch with his truck. In fact, his prisoner Asenstorfer, whom he said came to him when the oxen were pulling him out, testified that it was during the morning that he helped get the truck out of the ditch and helped no one do so in the afternoon. Moreover, both Asenstorfer and James testified that when they were ready to start back to camp at 4:00 or 4:30 accused picked Asenstorfer up at his home. Accused testified that after his truck was pulled out of the ditch about 3:00 or 3:30 it took about an hour to go after James' prisoner. But the prisoner, Verwanger, testified that after seeing accused at his home about 3:00 or

3:30 he did not see him again until 4:15. The court was warranted, upon this record, in believing the child and in disbelieving the accused.

6. The accused is 25 years of age, was inducted on 8 March 1944 at Camp Shelby, Mississippi, for the duration of the war plus six months. He is single and attended grammar school for only one year. His AGCT score of 52 (Grade V) indicates below normal intelligence. However, the Division Psychiatrist after examination stated that the accused was able to distinguish right from wrong, to adhere to the right, and to cooperate in his defense. The accused was tried and convicted by Special Court-Martial on 1 February 1945 for an absence without leave for thirteen days; on 23 March 1945 for an absence without leave from guard with intent to abandon same; and on 31 May 1945 for an absence without leave for three days. He was tried and convicted by a Summary Court-Martial on 27 June 1944 for an absence without leave for eight days; and on 30 July 1945, for willfully disobeying a Third Army curfew order. His Company Commander states that his attitude toward his duties has been indifferent and he would not desire to retain him in the company.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92.

Seymour W. Wurfel, Judge Advocate

Thayne Olivey, Judge Advocate

On Leave, Judge Advocate

(G.C.M.O. 286, 26 September 1946).

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

SPJGQ - CM 310421

MAY 6 1945

UNITED STATES v. Technician Fifth Grade ANDREW J.SMITH (33408302) and Private HERMAN J. TOLL (35303512), both of 1469th Ordnance Medium Maintenance Company Aviation (Q), 91st Air Depot Group.	9TH BOMBARDMENT DIVISION (M) Trial by G.C.M., convened at Paris, France, 15, 16, 17, 18 January 1945. Sentence as to each accused: To be hanged by the neck until dead.

OPINION by the BOARD OF REVIEW
DANIELSON, BURNS and DAVIS, Judge Advocates

1. The accused were tried in a joint trial upon the following Charges and Specifications:

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

Specification: In that Technician Fifth Grade Andrew J. Smith, 1469th Ordnance Medium Maintenance Company Aviation (Q), 91st Air Depot Group, and Private Herman J. Toll, 1469th Ordnance Medium Maintenance Company Aviation (Q), 91st Air Depot Group, acting jointly, and in pursuance of a common intent, did, at Chartres, Eure et Loir, France, on Highway N-188, on or about 10 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal William Nunn, Jr., a human being by shooting him with a carbine.

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

Specification: In that * * * acting jointly, and in pursuance of a common intent, did, at Chartres, Eure et Loir, France, on Highway N-188, on or about 10 October 1944, with intent to commit a felony, to-wit: murder, commit an assault on Sergeant Mitchel Harrison by willfully and feloniously shooting him in the shoulder with a carbine.

Each accused pleaded not guilty to and, all the members of the court present at the time the votes were taken concurring, were found guilty of both Charges and Specifications. No evidence of previous convictions was introduced against accused Smith. All of the members of the court present at the time the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The reviewing authority, the Commanding General, 9th Bombardment Division (M), approved only so much of each sentence as provided that accused be hanged by the neck until dead, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater of Operations, confirmed each sentence, as approved and modified, but withheld the order directing the execution thereof pursuant to Article of War 50½. On 22 June 1945 the Board of Review of the Branch Office of The Judge Advocate General with the European Theater of Operations examined the record of trial and held it legally insufficient to sustain the findings of guilty and the sentence as to Toll, and legally sufficient to support the findings of guilty and the sentence as to accused Smith. The Board of Review's holding containing a summary of the evidence, a discussion of the law pertinent thereto, and the reasons and conclusions of the Board, is attached to the record. The Assistant Judge Advocate General in charge of that Branch Office approved the holding of the Board of Review, and on 23 June 1945 forwarded the record of trial to the Commanding General, United States Forces, European Theater of Operations, for execution of the sentence as to accused Smith. General Court-Martial Orders were published on 3 July 1945 vacating the findings of guilty and the sentence as to accused Toll. The sentence of accused Smith was not ordered into execution because of his escape from confinement at IX Air Force Continental Stockade on 13 March 1945.

2. On 21 February 1946 the record of trial was forwarded to The Judge Advocate General, Washington, D. C., for appropriate action due to the fact that on 19 January 1946 the powers conferred by the direction of the President upon the Commanding General, United States Forces, European Theater, under the provisions of Articles of War 48, 49, 50, and 50½ were terminated.

3. The record of trial of accused Smith has been examined by the Board of Review in the Office of The Judge Advocate General, Washington, D. C., and it adopts and concurs in the holding of the Board of Review of the Branch Office, a copy of which is hereto attached, and, for the reasons set forth therein, is of the opinion that the record of trial as to Smith is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92.

Lester A. Pamelson, Judge Advocate

John R. Burns, Judge Advocate

Walter W. Davis, Judge Advocate

SPJGQ - CM 310421 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 20 1946

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 Technician Fifth Grade Andrew J. Smith (33408302) and Private Herman J. Toll (35303512), both of 1469th Ordnance Medium Maintenance Company Aviation (Q), 91st Air Depot Group.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to Smith and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life, that the United States Penitentiary, Lewisburg, Pennsylvania, be designated as the place of confinement, and that the sentence, as thus commuted, be ordered executed.

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

THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1 - Record of trial
2 - Form of action
3 - Draft ltr for sig Sec of War
4 - Holding by ETO B/R

(G.C.M.O. 222, 13 July 1946)

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

JAGK -CM 310446

8 JUL 1946

UNITED STATES	83D INFANTRY DIVISION
v.	Trial by G.C.M., convened at Linz, Austria, 17, 18 and 28 January 1946. Dismissal, total forfeitures, to pay a fine of $20,000, confinement for ten years, and additional confinement until fine is paid not to exceed five years.
Second Lieutenant JOHN RUPPEL (0-2026294), Infantry.	

OPINION of the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, 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. (Finding of not guilty.)

Specification: (Finding of not guilty).

ADDITIONAL CHARGE I: Violation of the 80th Article of War.

Specification 1: In that Second Lieutenant John Ruppel, Company G, 331st Infantry, did, at Kremsmunster, Austria, on or about 7 October 1945, wrongfully and unlawfully sell the following captured property of the United States: one Wanderer passenger motor vehicle, of the value of about $1500.00, thereby receiving as a profit, benefit and advantage to himself the sum of 40,000 German marks and Austrian schillings, of a lawful exchange value of about $4000.00.

Specification 2: In that Second Lieutenant John Ruppel, ***, did, at Kremsmunster, Austria, on or about 10 October 1945, wrongfully and unlawfully sell the following captured property of the United States: one Opel Blitz truck, of the value of about $2000.00, thereby receiving as a profit, benefit and advantage to himself the sum of 70,000 German marks and Austrian schillings, of a lawful exchange value of about $7000.00.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant John Ruppel, ***, did, at Kremsmunster, Austria, on or about 8 November 1945, wrongfully and in violation of Administrative Memorandum Number 35, Headquarters Supreme Headquarters Allied Expeditionary Force, dated 25 October 1944, subject: "Transactions in Currency and Foreign Exchange Assets", exchange, at a rate of exchange in excess of the official and lawful rate of exchange, and outside official channels, $300.00 United States currency into Austrian Schillings.

Specification 3: (Nolle Prosequi by order of the convening authority.)

Specification 4: In that Second Lieutenant John Ruppel, ***, did, at Kremsmunster, Austria, on or about 25 November 1945, wrongfully and in violation of Administrative Memorandum Number 35, Headquarters Supreme Headquarters Allied Expeditionary Force, dated 25 October 1944, subject: "Transactions in Currency and Foreign Exchange Assets", import by mail, $50.00 United States currency into occupied territory from the United States.

Specification 5: In that Second Lieutenant John Ruppel, ***, did, in conjunction with First Sergeant Vernon Vigen, and Technical Sergeant Alfred Jantz, both of Company H, 330th Infantry, at Kremsmunster, Austria, on or about 10 October 1945, wrongfully, unlawfully and fraudulently procure and obtain United States Postal Money Orders in the sum of $7000.00 for unlawful transmittal to the United States.

Specification 6: In that Second Lieutenant John Ruppel, ***, did, in conjunction with Private Robert K. Jolly and Private First Class Clarence E. Devener, both of 756th Tank Battalion, at Kremsmunster, Austria, on or about 2 November 1945, wrongfully, unlawfully and fraudulently procure and obtain United States Postal Money Orders in the sum of $1500.00 for unlawful transmittal to the United States.

Specification 7: In that Second Lieutenant John Ruppel, ***, did, at Kremsmunster, Austria, on or about 6 November 1945, wrongfully, unlawfully and fraudulently attempt to procure

and obtain United States Postal Money Orders in the sum of $5000.00 for unlawful transmittal to the United States.

He pleaded not guilty to the Charge and its Specification, not guilty to Additional Charge I and its Specifications, and guilty to Additional Charge II and Specifications 5, 6 and 7 thereunder but not guilty to Specifications 1, 2 and 4 of Additional Charge II. No evidence of previous convictions was introduced. The court found the accused guilty of Additional Charge I and Specification 1 thereunder and guilty of Additional Charge II and Specifications 2, 4, 5, 6 and 7 thereunder. He was likewise found guilty of Specification 2 of Additional Charge I except the sum "70,000", substituting therefor the sum "50,000", and except the sum "7,000", substituting therefor the sum "5,000." Accused was found not guilty of the Charge and its Specification, not guilty of Specifications 3 and 4 of Additional Charge I and not guilty of Specification 1 of Additional Charge II. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay the United States a fine of $20,000, to be confined at hard labor, at such place as the reviewing authority might direct, for a period of ten years, and to be further confined at hard labor until the said fine was so paid, but for not more than five years, in addition to the ten years before adjudged. The reviewing authority approved "only so much of the finding of Specification 1 of Additional Charge I as involves a finding that accused did at the time and place alleged wrongfully and unlawfully sell one Wanderer automobile, ownership unknown, and thereby receive a profit, benefit and advantage to himself in the sum alleged, in violation of Article of War 96." The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution.

As to Specification 1, Additional Charge I.

Franz Strehle, a chauffeur and movie operator of Vienna, Austria, testified that on or about 10 October 1945, while the accused was checking his papers at Kremsmunster, Austria, he asked the accused if accused knew where he could buy a car. The accused replied that he knew where there might possibly be one for him. A week later he returned to Kremsmunster and met the accused in the Burgermeister's office. Strehle asked the accused if accused had found a car for him and accused replied that he had found a Wanderer automobile. Thereupon, accused and Strehle went to a civilian garage in Kremsmunster where the Wanderer was kept and accused asked a price of 40,000 marks for the car. Strehle agreed to the price and received the keys from the person in charge of the garage. The accused did not tell Strehle who owned the car but did say that it did not belong to him alone. Strehle then drove the Wanderer to the Burgermeister's office. He put the purchase price of 40,000 marks on a table in that office

in the presence of the accused, an American soldier named Prince and a civilian named Gruenwald. He never talked to Prince about the Wanderer before he purchased it (R. 57,58,59,60). At the time he placed the money on the table, the accused and Prince were standing at the table and neither touched the money while he was in the room, although "Prince looked at it" (R. 66). Thereafter he drove the Wanderer to Vienna and later sold it for 50,000 marks (R. 61). The Wanderer was a dark blue six passenger limousine in "fifty per cent" condition (R. 60). It would cost about 15,000 marks new (R. 61). When asked on cross-examination whether the Wanderer was a Wehrmacht vehicle, Strehle said that it was and when asked if it was a civilian automobile he said, "yes, it was a civilian automobile but the Army must have confiscated it" (R. 68). When asked by the court why he said the Wanderer was a Wehrmacht car he replied, "Because there was still signs on the Army paint, for all tires, how many tire pressures it has to have.PKW signs on all civilian sedans" (R.70).

Alfred Gruenwald, a writing teacher from Vienna, Austria, testified that he had been present in the Burgermeister's office when Strehle put some money and a camera on a table in the presence of the accused and an American soldier named Prince. He did not know the amount of the money. He left the room before any of the others and while he was there no one had picked the money up from the table (R. 71,73).

As to Specification 2, Additional Charge I.

Private First Class Samuel G. Loyacon testified that in the month of October 1945, he was a member of Company G, 331 Infantry and during that month had obtained an Opel Blitz truck from a Linz, Austria, junk yard. It was not in running condition, was painted in German camouflage and had license plates on front and rear and two numbers on the hood. He had paid a few cigarettes for it. He towed it back to the Service Company where he was stationed at the time and, with the aid of a few soldiers and civilian employees and the use of parts from junked trucks around the motor pool, put it in running condition again. The truck was then used by the Service Company for hauling garbage and gasoline. Thereafter Private Loyacon was transferred to another organization and was not allowed to bring the truck with him. He did not see the truck again until he was assigned to work with the accused. Accused allowed him to drive the truck hauling displaced persons from Kremsmunster to Kirchdorf with instructions to bring the keys to the accused each time he was finished with the truck. At this time it was being kept in a civilian garage in Kremsmunster by instruction of the accused. Private Loyacon was later transferred to still another organization and left the truck in the civilian garage and gave the keys to the accused (R. 83,84,85,86). About two weeks after he had left, Private Loyacon returned and asked accused if he could have the truck. Accused told him he could, but that another officer was using it and it would be returned to him when that officer was through with it. Still later, Private Loyacon again asked the accused for the truck and accused replied that he thought it had been stolen (R. 86,87). Sometime in December Private Loyacon again saw the Opel Blitz truck which at that time

was in the possession of the Criminal Investigation Division and noticed that it had been repainted in a blue color. The original camouflage paint was that common to German military vehicles (R. 87). The license plates which were on it when he got it were the same as those on civilian cars. The truck could be started without a key by use of a cotter key or a nail (R. 88).

Franz Strehle of Vienna, Austria, testified that at the time he purchased the Wanderer automobile in Kremsmunster (see evidence under Spec 1, Add. Charge I), the accused told him that he could buy an Opel Blitz for 70,000 marks. He did not see the Opel Blitz at this time. He sold the Wanderer in Vienna for 50,000 marks and returned to Kremsmunster about fourteen days after he had bought the Wanderer. He there bought the Opel Blitz but did not know from whom he bought it. He got the key to the Opel Blitz from the accused in the same garage from which he had taken the Wanderer. The accused told him that the truck did not belong to the accused and that he would have to pay the man who would go with him to Vienna. Strehle had told the accused that he did not have the money to pay for the Opel Blitz with him (R. 61,62,63). Strehle described the Opel Blitz as "a three and a half ton truck, a Wehrmacht Army truck with yellow paint" (R. 63). After receiving the keys from the accused, he drove the truck to Vienna in the company of an American soldier named Prince. When they got to Vienna, Prince told Strehle to give him the money right away because he needed it. Strehle then gave Prince 50,000 marks and promised to pay the other 20,000 marks in about 14 days. He had never talked to any one other than the accused about the purchase of the Opel Blitz prior to the time he had bought it. After his return to Vienna he put a new motor in the truck and painted it. He later turned it over to Mr. Stewart of the Criminal Investigation Division (R. 63,65). There were Wehrmacht registration numbers on the Opel Blitz when he bought it. He has never paid the balance of the purchase price of 20,000 marks (R. 69,70). On cross-examination upon being asked if Prince had sold him the Opel Blitz, Strehle replied, "yes, I gave him the money for the Opel Blitz" (R. 68). On re-direct examination he testified that he never spoke to Prince about the Opel Blitz before his return to Vienna (R. 69).

Alfred Gruenwald of Vienna, Austria, testified that he had accompanied Strehle and Prince on the trip from Kremsmunster to Vienna after Strehle had bought the Opel Blitz. He described the Opel Blitz as a "Wehrmacht truck with Wehrmacht paint, three and a half ton."

Private First Class Harold M. Prince testified that in the early part of October he asked the accused, an officer of his organization, to get him a ride to Vienna. Several days later the accused told him that accused had procured a ride for him and that he could go to Vienna that evening at the prearranged time. Private Prince got into a civilian automobile with three civilians, one of whom was named Franz and who later was known to him as Franz Strehle. The accused then asked him to

bring back 100,000 schillings which he was to get from one of the men he was going with. An Opel Blitz truck accompanied the car in which the accused was riding on the trip to Vienna. This truck was painted in a camouflage color and this camouflage was the type peculiar to German military vehicles. Private Prince remained in Vienna about six days and received 40,000 marks and 10,000 schillings from Franz Strehle. When he returned to Kremsmunster he turned the money over to the accused and told the accused that Strehle had promised to send the balance of the money the following week (R. 92,93,94). Private Prince again went to Vienna in the early part of December with Mr. Stewart and Mr. Lewis of the C.I.D. and identified the civilians he had accompanied on the earlier ride to Vienna (R. 96,99).

Lieutenant William H. Sharpe, company commander of Company G, 331 Infantry, the organization to which accused was assigned, testified that the company had an Opel Blitz truck which was used for company duties and that he gave no one any instructions as to its disposition. It was about two and a half tons and was painted in camouflage paint. It was absent from the company from the latter part of October to about the 5th of December, at which latter time it was returned to the company by Agent Stewart of the C.I.D., having been painted a greyish blue during its absence (R. 129, 130).

As to Specification 2, Additional Charge II.

Joseph Bernath, a tailor from Wels, Austria, testified that sometime during the end of October, 1945, he came to Kremsmunster, Austria, and was taken to see the accused by one Prince, an American soldier. The accused told Bernath that he had three hundred dollars coming from America and that he would exchange it at the rate of one hundred schillings for each American dollar. Later the same month in the accused's room in Kremsmunster, Bernath laid 9,000 schillings on the accused's table as part of the exchange for the three hundred dollars, the accused being present at the time (R. 49, 50,53). Three or four days after this transaction, Bernath again came to Kremsmunster and put 18,300 schillings on the table in the accused's room, whereupon the accused told him that the three hundred dollars had not yet come from America but was expected soon. At this time Bernath received three diamond rings and a brooch from the accused who told him to keep them until he received the $300 (R. 51). On 9 November 1945 Bernath received three hundred American dollars (three fifty, seven twenty and one ten-dollar American bills) from Prince in the accused's room, the accused being present at the time. Prince had taken this money out of his pocket before handing it over to Bernath and the latter did not know to whom it belonged. The accused did not speak during this transaction (R. 52,54). At the time Bernath laid the 9,000 schillings on the accused's table and later when he laid the 18,300 on the accused's table only the accused and Bernath were present in the accused's room. Prince had led Bernath to the accused's room on each of these occasions but had withdrawn before the money was laid

on the table (R. 53). On 21 November 1945, Bernath delivered the balance of 2700 schillings to Prince in Prince's room at the latter's request (R. 53,54). A few days after he had received the $300 Bernath returned the rings and brooch to the accused (R. 51). Bernath "sold $50" of the $300 in Linz and gave the rest of it to Mr. Stewart of the C.I.D. on 22 November 1945 (R. 52). Bernath speaks Hungarian and very little German. Bernath, accused and Prince spoke to each other in German (R. 55).

Private First Class Harold M. Prince testified that sometime about the beginning of November the accused told him that he, the accused, had accepted from a civilian 27,300 schillings in advance payment of three hundred dollars in American money. Private Prince, then a member of accused's organization, did not know the civilian's name at the time but later learned that it was Bernath. Later he received $300 in American money (three fifty, seven twenty... and one ten dollar bills) from the accused and was told to give it to the civilian in case the accused was not present when the civilian came for it. About 10 November 1945, the accused asked Private Prince to bring the money to accused's room. When Private Prince came to accused's room with the money accused was present with the civilian Bernath. Private Prince put the money on the table and was told to stand by the door and make sure no one entered. This he did and thereupon accused gave Bernath the money and received back from the civilian three rings and a brooch. On 19 November 1945, on instructions from Mr. Lewis or Mr. Stewart of the C.I.D. he asked for and received 2700 schillings from Bernath, which sum he turned over to the C.I.D. (R. 94,95,96, 97).

Mr. Ralph Stewart, agent, C.I.D., testified that during the latter part of November 1945 he received $250 dollars in American blue seal money from one Josef Bernath.

The prosecution offered in evidence as Prosecution Exhibit No. 15 a certified true copy of Administrative Memorandum Number 35, Supreme Headquarters, Allied Expeditionary Forces, dated 25 October 1944, subject: "Transactions in Currency and Foreign Exchange Assets." This exhibit was received in evidence without objection by the defense (R. 104). The provisions of this Administrative Memorandum pertinent to this Specification read as follows:

> "2. Except as authorized, personnel in occupied German territory or liberated territory are prohibited from:
>
> a. Importing, holding, transferring, exporting or in any way dealing in United States or British paper currency.
>
> b. Participating in transactions involving the purchase, sale or exchange of any currency against any other currency, except through authorized agencies.
>
> * * *
>
> e. Participating in the transfer of any currency against any other currency on behalf of persons not belonging

to the Allied Forces in liberated or occupied territory.

* * *

"3. This order applies to all personnel in occupied German territory or liberated territory who are subject to Allied military, naval or air force law, except those serving in and subject to the laws of their own country.

"4. Violations of any provision hereof will subject the offender to trial by courts martial or other appropriate disciplinary action."

As to Specification 4, Additional Charge II.

Ralph Stewart, Agent, C.I.D., testified that in the latter part of November, 1945, he was assigned to investigate certain alleged activities of the accused and during the course of his investigation had occasion to pick up the mail of the accused at Company G, 331st Infantry. At this time the accused was in confinement in the Stockade of the 83rd Military Police Platoon. In one letter addressed to the accused he noticed a small part of a second lieutenant's bar protruding through the envelope and upon glancing into the envelope could see a fifty dollar bill in American blue seal currency. He took the letter to the accused who opened it in his presence and the fifty dollar bill was taken from the latter. Agent Stewart seized the bill as evidence (R. 110,114,115).

The accused, on cross-examination, testified that he had met one Isabella Murin, a Czechoslovakian civilian, in Kremsmunster and that she had asked him to convert 60,000 marks into American occupation schillings. Accused agreed to do this for her. It was not possible to effect this exchange through military channels but she gave him the 60,000 marks to give to a courier in the town hall who took the money to Linz for this purpose. After about six weeks had elapsed and the money had not been returned accused told her that if the courier did not bring the money back he would give her some American money. Thereafter, he wrote home for $600. He received $150 before he was put in confinement and after he was in confinement he received the rest. He never had the money, for it was turned over to the C.I.D. The day he was put in confinement he also received the 60,000 schillings from the courier. Accused knew he was not supposed to exchange, and that one was not supposed to sell, American money or buy anything with it. He did not know that one was not supposed to have American money in one's possession (R. 153,154). Isabella Murin's testimony substantially corroborated that of the accused (R. 161-168).

The provisions of the above mentioned Administrative Memorandum No. 35 (Pros. Ex. 15) pertinent to this Specification read as follows:

"2. Except as authorized, personnel in occupied German territory or liberated territory are prohibited from:

a. Importing, holding, transferring, exporting or in any way dealing in United States or British currency.

* * *

c. Importing or exporting any currency through mail or parcel post facilities, except currency as souvenirs not exceeding one dollar or five shillings in value.

* * *

f. Participating in the transfer of any currency against any other currency on behalf of persons not belonging to the Allied Forces in liberated or occupied territory.

"3. This order applies to all personnel in occupied German teritory or liberated territory who are subject to Allied military, naval or air force law, except those serving in and subject to the laws of their own country.

"4. Violations of any provision hereof will subject the offender to trial by courts martial or other appropriate disciplinary action."

As to Specification 5, Additional Charge II.

On 10 October 1945, First Sergeant Vernon Vigen and Technical Sergeant Alfred Jantz, both members of H Company, 330th Infantry, went to the monastery in Kremsmunster, Austria, to get some wine for their company. There they met the accused, Lieutenant Ruppel, who asked them if they wanted to make some money. Upon receiving an affirmative reply, the accused gave them approximately $7,000 worth of Austrian schillings and told them to purchase United States postal money orders with it (R. 8,12). On 18 October 1945 Sergeant Vigen purchased $3,000 worth of money orders and Sergeant Jantz purchased $4100 worth of money orders with the money the accused had given them. Both informed their company officers that they had won the money gambling, as accused had told them to do, so that they could obtain permission to convert it into money orders (R. 9,13,14). On or about the 25th of October 1945, Sergeants Vigen and Jantz again saw the accused and indorsed over to him the money orders they had thus purchased, each retaining, however, $300 thereof in consideration for their services (R. 10, 14). Sergeant Vigen identified Prosecution Exhibit 1, consisting of twenty $100 money orders, as part of the group of money orders he had indorsed delivered to the accused and Prosecution Exhibit 2, consisting of three $100 money orders, as the three money orders he had retained (R. 10,11). Sergeant Jantz identified Prosecution Exhibit 3, consisting of thirty $100 money orders as part of the group of money orders he had indorsed and delivered to the accused and Prosecution Exhibit 4, consisting of two $100 money orders, as two of the three money orders he had retained. Prosecution Exhibits 1 and 3 had been found in accused's room by First Lieutenant William H. Sharpe, Company Commander of Company G, 331st Infantry, during a search of the room made by him sometime during November 1945, after the accused had been arrested (R. 134,136).

The prosecution offered in evidence as Prosecution Exhibit No. 14 a certified true copy of Section II of "GHQ No. 85," Headquarters Theater

Service Forces, European Theater, Office of the Fiscal Director, 2 October 1945, Subject: "Conversion of Currency." This exhibit was received in evidence without objection by the defense (R. 104). The pertinent parts of this directive read as follows:

"1. Letter Hq United States Forces European Theater dated 29 September 1945, file AG 121 GAP-AGO, subject: "Currency Exchange Control" is quoted for the information and guidance of all concerned:

* * *

'2. Until further notice, the transmission of funds which have not been derived from U.S. official sources to any point outside the theater or conversion of funds which have not been derived from U.S. official sources, by all personnel in this theater subject to U.S. military law who enjoy the privileges of either the Army or Navy finance or postal facilities or who purchase War Bonds for cash from either Army or Navy agencies, is prohibited. The utilizing for such transmission or conversation means other than those afforded by U.S. Army or Navy fianance officers, Army or Navy war bond officers, or through the Army or Navy postal service is also prohibited.

'3. The provisions of paragraph 2, above, will be implemented as follows:

a. All field grade officers and all civilians who hold assimilated rank of field grade and above, will, prior to every transmission of funds to the U.S. via Army or Navy postal services, execute and submit to the agency concerned the following certificate:

"I certify that these funds sought to be transmitted via (Personal Transfer Account) (Money Order) (War Bond) (et cetera) were derived only from United States official sources."

such certificate will be legibly signed and the grade, serial number or comparable civilian designation furnished together with complete address and APO number.

b. All military personnel (excluding officers of field grade and above) and all civilians who have no assimilated rank and those who have assimilated rank up to and including company grade desiring to deposit money in Soldiers Deposits or to transmit funds by personal transfer account, postal money order, or by purchase of war bonds, will submit applications in suitable form to the appropriate commander, who is charged with assuring himself that the funds sought to be transmitted by the applicants concerned were derived only from U.S. official sources. Such commander is thereafter charged with causing approved applications to be transmitted to the agency responsible for final processing thereof, together with appropriate evidence of such approval.

* * *

'4. U.S. official sources, as used herein, are defined as including only monies derived, directly or indirectly, from pay and allowances or monies imported from the zone of interior.

* * *

'6. It is desired that the foregoing be brought to the attention of all concerned including all civilians and civilian organizations under the jurisdiction of the Army and Navy.'

"2. Under the provisions of par 3c of letter quoted above, Finance Officers will be governed by the following instructions in making conversions for personnel defined in above mentioned directive:

a. Conversations of currently legal tender currency of one country for currency in current use of another country will be made only when amounts presented for conversion by the individual indicate that such amounts were derived from U.S. Official sources as defined in the above mentioned USFET directive. Each individual will be required to sign a certificate (in roster form if desired) certifying to the above mentioned facts. Finance Officers will require the presentation of travel orders, when deemed necessary, to establish authority for possessing certain currencies. If amounts deemed excessive are presented they will not be accepted until an investigation has been made to determine the source of the funds. In such cases a certificate from the individual's commanding officer will be required indicating that the statement of the individual has been investigated and it has been determined that the funds were derived from U.S. official sources."

As to Specification 6, Additional Charge II.

On or about 29 October 1945, Private Robert F. Jolly, Company G, 331st Infantry, mentioned to accused that the ban on money orders had been lifted and accused said that he knew it (R. 16). The same day or a day later accused asked Private Jolly if he would send $1500 worth of money orders home for the accused, to which Private Jolly replied that he would try. Accused then gave Private Jolly $1601 worth of Austrian schillings and gave him the name and address of a person residing in Detroit, Michigan, to whom the money orders were to be sent (R. 17). On 1 November 1945 Private Jolly made an application for $1500 in money orders which was rejected and later made an application for $1,000 in money orders which was approved. The $1000 in money orders were given to the accused by Private Jolly on that day and accused told him to keep the rest of the money. Later Private Jolly asked one Private Devener, a member of his organization, if he would get $500 in money orders and, upon receiving an affirmative answer, gave Private Devener $500 in schillings (R. 18,20). Private Devener, on 1 November 1945, procured $500 in money orders made out to the person residing in Detroit, Michigan, whose name and address

had been supplied to Private Jolly by the accused, and delivered them to the mail clerk from whom Private Jolly later picked them up (R. 20). Private Jolly gave Private Devener $10 with which to pay the fees for the money orders and kept what was left after paying the fees and purchasing the money orders (R. 18,19).

A certified true copy of Section I of "GHQ No. 85," Headquarters Theater Service Forces European Theater, was admitted in evidence as Prosecution Exhibit No. 14 (R. 104). The pertinent parts of this directive have been quoted above.

As to Specification 7, Additional Charge II.

On or about 6 November 1945, Corporal Ross V. Grant, the company mail clerk of Company G, 331st Infantry, the organization to which the accused was assigned, was asked by accused if he was taking money orders. Corporal Grant told the accused that he was taking them and thereupon received $5700 worth of Austrian schillings from the accused who told him that he could have $700 if he could get the accused $5000 in money orders. Accused said that he did not want to have his name on the application and gave Corporal Grant a list of names to whom the money orders were to be written out. Corporal Grant received from the accused some blank applications with accused's signature on the back and was to have some of the men in the company fill out the application forms. The only writing on the application forms was that of Corporal Grant with the accused's signature on the back. Corporal Grant saw accused place his signature on the back of the application blanks. No money orders were obtained with this money because the APO was filled up and could not write them up for Company G. Corporal Grant returned all of the $5700 to the accused and destroyed the application blanks at the request of the accused (R. 20,21, 22).

A certified true copy of Section II of "GHQ No. 85," Headquarters, Theater Service Forces European Theater, was admitted in evidence as Prosecution Exhibit No. 14 (R. 104). The pertinent parts of this directive have been quoted above.

A certified true copy of Finance Circular No. 80, Currency Directive, Headquarters European Theater of Operations, Office of the Fiscal Director, dated 22 January 1945, was admitted in evidence without objection by the defense as Prosecution Exhibit No. 16 (R. 104). According to Section III of this Directive the following rate of exchange in the European Theater of Operations was established: "10 German Marks equal 1 Dollar." A certified true copy of Changes Number 4 to the above Finance Circular No. 80, dated 5 June 1945, was admitted in evidence without objection by the defense as Prosecution Exhibit 17 (R. 104). According to this directive the following rate of exchange in the European Theater of Operations was established: "10 Austrian Schillings equal 1 Dollar."

4. Evidence for the Defense.

The accused testified under oath in his own behalf and said that because he spoke German one Lieutenant Kellog, then of his Company, had asked him to look around for a civilian car for the use of the company. While doing so he noticed the Wanderer in a private civilian garage. It was all torn apart and no one knew to whom it belonged. He did not take the Wanderer (R. 149). The first time he met Franz Strehle, Strehle asked him if he could get any vehicles and accused replied in the negative. Accused took Strehle to the garage where the Wanderer was kept so that Strehle could buy some oil and that was the only time Strehle and accused were in the garage together. Strehle had been in the Burgermeister's office with accused but the only thing Strehle left there for accused was a camera and Strehle had not left any money on the table (R. 150). Accused did not talk with Strehle about a Wanderer vehicle (R. 151).

Lieutenant Kellog had told accused that Private Loyacon was on detached service and was coming to Kremsmunster driving an Opel Blitz truck and asked accused to take it and put it somewhere. Accused took the truck and had a man drive it to the civilian garage. Several times thereafter the Company would use the truck, but no trip ticket or registration was issued for it. "Anybody could take the truck" (R. 149). When accused accompanied Franz Strehle to the civilian garage there were about fifteen cars there altogether and Strehle asked accused if he could buy them. Accused replied that they did not belong to him but to the civilian garage. Accused had informed Private Loyacon that the Opel Blitz truck had been put in the civilian garage and he never told Private Loyacon that the truck had been stolen. The key to the Opel Blitz had been left with the accused but those who wanted to use the truck never came to him for the key but would use a nail or a piece of wire to start it. He did not sell the truck to Franz Strehle and had no conversation with Private Prince relative to selling it. Prince did not deliver any money to him after going to Vienna (R. 151,152).

Accused never saw Josef Bernath until two days before the sale of the three hundred dollars took place. Private Prince brought Bernath to the accused at that time. Accused had a few small rings which he "wanted to trade for gold or have another ring made" (R. 150). Accused gave the rings to Bernath with instructions to trade them and if he could not trade them to sell them. A few days later Bernath came to accused's room in the company of Private Prince and gave accused back his rings. At this time accused saw Prince give Bernath some money and Bernath give Prince some schillings. Bernath never gave the accused any schillings (R. 150).

Prior to coming to Austria from Camp Bushay which was located near Innsbruck, the accused had a little over seven thousand dollars in allied marks and gave Sergeants Vigen and Jantz this money so they could send it home for him (R. 155). He did not ask the sergeants if they would like to make some money but at the time they got the money they understood

that they would get something for their trouble, although no definite amount was agreed upon. He told them that the money had no value to him and if he got five or six thousand or any part of it, it would be better than what he had, because he could not do anything with it. He only got five thousand dollars worth of money orders back and did not know what had happened to the rest of it. He had given them the money in Germany, not in Kremsmunster as they had testified, and had given them no instructions as to the method of obtaining the money orders (R. 159,160,161).

Sergeant Robert Smith, Jr., Company G, 331st Infantry, testified that he had been in the accused's Company in July and August, 1945, and that the accused had won quite a large sum of money gambling and that he had seen as much as three thousand dollars on the accused at one time. Accused had paid 100 to 175 dollars for hay for a dozen horses used by the Company (R. 123). Sergeant Smith was in the same platoon with the accused in combat and knew that the accused had won the Silver Star. When he first knew the accused about 29 January 1945, accused was a private first class. Accused later became a staff sergeant. When asked what accused's reputation in combat had been, he replied, "You would call him a good man, not afraid to go ahead. Everybody seemed to like him" (R. 124).

Staff Sergeant Albert E. Wilson, Company G, 331st Infantry, testified that he was company mess sergeant and that large quantities of food were bought for the Company mess other than that issued. When accused was mess officer he paid for potatoes and a few of the vegetables. Accused won a lot of money gambling (R. 126,127).

Technician 4th Grade Harold E. Segedy, Division MP Platoon, testified that he had been in combat with accused and that accused was "a good soldier" and "all the fellows were his friends" (R. 128).

5. Additional Charge I and its Specifications.

Article of War 80 appears for the first time in the present Articles of War. In the discussion of these Articles before Congress Brigadier General Crowder, then The Judge Advocate General, said, "Article of War 80 deals with captured or abandoned property. It is built upon a Civil War Statute, and was found very necessary during that period. *** Our new Article 80, which is carved out of the Revised Statutes, confers no new jurisdiction upon courts-martial. I am simply giving the Civil War statute a place in the military code, where students of military law may become familiar with it." (Senate Report No. 130, 64th Congress, 1st Session, page 79.) The Civil War statute to which General Crowder referred is Revised Statutes, section 5313, 50 USC 217, and is still in effect. It provides that,

"All persons in the military or naval service of the United

States are prohibited from buying or selling, trading or in any way dealing in captured or abandoned property, whereby they shall receive or expect anv profit, benefit, or advantage to themselves, or any other person, directly or indirectly connected with them; and it shall be the duty of such person whenever such property comes into his possession or custody, or within his control, to give notice thereof to some agent, appointed by virtue of this chapter, and to turn the same over to such agent without delay. Any officer of the United States, civil, military or naval, or any sutler, soldier or marine, or other person who shall violate any provision of this section, shall be deemed guilty of a misdemeanor, and shall be fined not more than $5,000, and imprisoned in the penitentiary not more than three years. Violations of this section shall be cognizable before any court, civil or military, competent to try the same."

The various statutes dealing with captured and abandoned property passed by Congress during the Civil War, of which the above is but one, were applied in cases involving captured or abandoned enemy private property as well as captured or abandoned enemy public property. (See Lamar v. Browne, 92 U.S. 187.) Article of War 80 provides that,

"Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, ***, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties."

Although there is no discussion of Article of War 80 in the 1928 Manual for Courts-Martial, the 1921 Manual contains a useful interpretation thereof. There it is said that,

"This article is broader than the preceding one in the following particular: It protects abandoned as well as captured property, and private as well as public captured or abandoned property." (MCM, 1921, p. 430. See also CM ETO 9573, Konick, 4 Bull JAG 338.)

The preceding Article of War, 79, provides that,

"All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation

thereof shall be punished as a court-martial may direct."

This course of legislation is in accord with principles of modern international law which on the one hand hold that upon its capture enemy public property becomes the property of the captor state and not the property of the individual soldier who captures it (AW 79; FM 27-10, par. 327; Hague Regulations, Art. 53, TM 27-251, p. 33; SPJGD/D75534, 4 Bull JAG 389) and, on the other hand, protect enemy private property from plunder and pillage (FM 27-10, par. 329; Hague Regulations, Art. 47, TM 27-251, p. 31). Although the words "plunder or pillage" as used in Article of War 75 have been held to mean a taking by force or violence (CM ETO 11725, Whitfield, 4 Bull JAG 488; see Winthrop's Mil. Law and Prec., 2d Ed., p. 626), "pillage" in the broader sense, the sense in which that term is used in the Hague Regulations and generally in writings on international law, may be defined simply as the unauthorized taking away of property, public or private. (Westlake, International Law (2d Ed.), Part II, p. 104; Hunt Report on Am. Mil. Govt. Vol. 4, p. 360; Nast, 26 Revue Generale de Droit International Publique (1919) p. 111 et seq.). Winthrop says, speaking of enemy private property,

> "But all the captures recognized as legitimate in our law and practice have been captures for, and by authority of, the United States. No taking for private use or gain has been allowed, but such taking has been regarded as a grave military offense in violation of the 42nd (now 75th) or other Articles of War." (Winthrop's Mil. Law and Prec., 2d Ed., p. 781.)

Such an unauthorized taking or unlawful disposition of captured or abandoned enemy private property is now prohibited by Article of War 80, a protection to the inhabitants of occupied territory not afforded by Article of War 79 or Article of War 75. Thus it is said in the 1921 Manual for Courts-Martial, page 430, in reference to Article of War 80,

> "Unless the captured or abandoned property is private, or unless the acts charged fall within the descriptions of this Article, the offense should be charged under Article 79, supra."

Also, it may well be that Article of War 80 seeks to protect abandoned private property of friend and foe alike from acts of pillage. Winthrop, speaking of the earlier Article of War 42, now Article of War 75, prohibiting pillage under certain circumstances, says, "and whether private property sought to be taken belonged to persons hostile or friendly can in no manner affect the legal character of the offence." (Winthrop's Mil. Law and Prec., 2d Ed., p. 627). Obviously, Article of War 80 prohibits the wrongful appropriation or disposition of enemy public property as well as enemy private property (CM ETO 9573, Konick, 4 Bull. JAG 338; CM ETO 17667, Truex (CM 308337)).

The Wanderer car, the subject of Specification 1 of Additional Charge I, was found by the accused in a civilian garage in Kremsmunster, Austria, sometime after our troops had occupied that territory. It was a civilian type car and, aside from some markings on the tires, there was nothing to show that it had been owned or used by the armed forces of the enemy. No one knew to whom the Wanderer belonged and it was all torn apart when accused first discovered it. The location of the vehicle, its type and condition, would be clearly sufficient to give rise to a presumption that this vehicle had been private property, abandoned by its owner sometime prior to the advant of our forces in this area, and that the owner was an inhabitant of the enemy state. However, apparently on the erroneous theory that a conviction under Article of War 80 necessitated a substantial showing that the Wanderer had belonged to or at least had been used by the enemy armed forces, the reviewing authority, in his action, approved only so much of the finding of guilty of Specification 1 of Additional Charge I as involved a finding "that accused did at the time and place alleged wrongfully and unlawfully sell one Wanderer automobile, ownership unknown, and thereby receive a profit, benefit and advantage to himself of the sum alleged, in violation of Article of War 96." Having in mind the fact that the ownership of abandoned property is generally unknown, by the very nature of the property in question, if it is considered that the reviewing authority in effect simply restated the offense proscribed by Article of War 80 as an offense in violation of Article of War 96, the accused cannot be punished for a violation of section 5313, Revised Statutes (50 USC 217) set out above, laid under the 96th Article of War, for the elements of that offense are substantially, if not exactly, similar to the offense described in Article of War 80 (MCM, 1928, p. 188). However, the offense set out in that part of the action of the reviewing authority quoted above, considered as a lesser included offense, clearly charges the accused with a course of conduct in violation of the Rules of Land Warfare and of a nature to bring discredit upon the military service. Members of the occupational forces of the Army, particularly officers, are expected to conduct themselves in occupied areas in such a manner as to give the enemy inhabitants not the slightest cause to reproach the victor for lack of rectitude. Also it was no part of the desigh of the American people in waging war upon the German state to give the members of their successful armed forces an opportunity to engage in transactions for private gain in the enemy territories these forces might occupy. Such conduct is specifically prohibited by paragraph 328, FM 27-10, which reads as follows:

> "Private gain by officers and soldiers prohibited.-- Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate."

There is substantial and convincing evidence that the accused, an officer

in the occupational forces, sold a Wanderer car of unknown ownership at a substantial profit to himself. There can be no doubt that the sale was made possible because of accused's position as an officer and member of the occupational forces. According to the 1921 Manual for Courts-Martial, page 430, the elements of the offense of dealing in captured or abandoned property in violation of the 80th Article of War are set forth as follows:

> "(a) That the accused has disposed of, dealt in, received, etc., certain public or private captured or abandoned property."
> "(b) That by so doing the accused received or expected some profit or advantage to himself or to a certain person connected in a certain manner with himself."

To this may be added, in view of the history of the Article and the very nature of the offense sought to be prohibited, the further element that the forbidden dealing in captured or abandoned property was accomplished by a member of our armed forces in occupied territory of the enemy. All the above elements are included in the above quoted action of the reviewing authority with the single exception of a finding that the property disposed of, the Wanderer automobile, was "captured or abandoned property" and no new element has been added by the negative substituted phrase "ownership unknown." Therefore, it is the opinion of the Board of Review that the conduct described in the action of the reviewing authority is an offense lesser than and included in the unlawful sale prohibited by Article of War 80, and constitutes a violation of Article of War 96. Although the accused, testifying under oath, denied that he sold the Wanderer, the court could rightly refuse to accept accused's denial of participation in the sale thereof.

The evidence adduced in relation to Specification 2 of Additional Charge I is amply sufficient to sustain a finding of guilty thereunder. The Opel Blitz truck was painted in camouflage of a type commonly used by the German Army and one witness testified that it had Wehrmacht registration numbers on it. However, even if the Opel Blitz truck was considered abandoned instead of captured property since it was found in a junk yard in Linz, Austria, and private enemy property instead of public enemy property since one witness testified that it had civilian license plates on it when found, the truck still comes within the class of property covered by Article of War 80. If considered as abandoned property

the accused could hardly be prejudiced by the variance between the Specification, which alleged that it was captured property, and the proof, for there is nothing in the evidence to indicate that the accused was ever misled as to the identity of the one Opel Blitz truck referred to throughout the trial. There is substantial evidence that he sold the truck at great profit to himself and it was within the province of the court to refuse to believe accused's denial of participation in the sale of the Opel Blitz.

Additional Charge II and its Specifications.

Although the evidence is conflicting as to the manner in which the three hundred dollars in American paper currency was handed over to Joseph Bernath and as to the date when Bernath returned the rings and brooch to the accused, there is no conflict in the testimony of the prosecution witnesses as to the fact that three hundred dollars in American paper money belonging to the accused was given to Bernath and that the accused received 27,300 schillings from Bernath under an agreement whereby the latter was to give the accused 30,000 schillings in exchange for three hundred American dollars. On cross-examination accused admitted that he knew he was not supposed to exchange or sell American money. Such transaction was clearly a violation of the above quoted directive of Supreme Headquarters regulating transactions in currency, was prejudicial to good order and military discipline and tended to bring discredit upon the military service in the eyes of the inhabitants of occupied territory. Also, this exchange was at a rate far in excess of the lawful and official rate of exchange (Pros. Ex. 17, quoted supra). Thus there was sufficient evidence to sustain a finding of guilty under Specification 2 of Additional Charge II and the court could rightly refuse to accept accused's denial of complicity in the transaction.

The accused admitted on cross-examination that he wrote home and asked that $600 be sent to him so that he could give this sum to a civilian from whom he had received 60,000 marks. A C.I.D. agent later seized an American fifty-dollar bill extracted, in the presence of accused, from a letter sent to accused. This was a clear violation of the above-quoted currency directive of Supreme Headquarters and was prejudicial to good order and military discipline. This evidence was sufficient to sustain a finding of guilty under Specification 4 of Additional Charge II.

By his plea of guilty of Specifications 5,6 and 7 of Additional Charge II and of the Charge, the accused admitted having unlawfully obtained money orders in the sum of $7,000 on or about 10 October 1945 (Specification 5), in the sum of $1500 on or about 2 November 1945 (Specification 6), having unlawfully attempted to obtain money orders in the sum of $5,000 on or about 6 November 1945 (Specification 7) and that such conduct was prejudicial to good order and military discipline in violation of the 96th Article of War. The evidence adduced at the trial, apart from the above pleas, thoroughly established that the accused did procure the United States money

orders mentioned in Specification 7, using marks and schillings in payment therefor, in violation of the above quoted directive of Headquarters, Theater Service Forces, prohibiting the conversion or exchange of funds not derived from U.S. official sources or the transmission of such funds to any point outside the European Theater. The directive defined funds derived from U.S. official sources as including only monies derived, directly or indirectly, from pay and allowances or monies imported from the zone of the interior. Although the evidence is not clear as to the source of the funds the accused used to buy or attempt to buy the money orders in question, apart from a suggestion that he may have won them gambling, the court could rightly infer, especially in view of his plea of guilty, that such a large sum had not been derived from accused's pay and allowances or from funds sent to him from the United States.

6. War Department records show that the accused is 27 years of age and is married. He attended high school for three years and did not graduate therefrom. He is a graduate of the "Chevrlet" Trade School which he attended for four years, majoring in metalurgy. From July 1940 to April 1944, he was employed by a manufacturing concern as metalurgical technician supervising steel treatment and laboratory research at a final salary of $8,000 per year. On 22 July 1944 he entered the service as an enlisted man and rose to the grade of staff sergeant. He was appointed and commissioned a temporary second lieutenant in the Army of the United States on 4 June 1945 while serving overseas with the 101st Infantry Regiment. On 4 June 1945 he was awarded the Bronze Star Medal for heroic achievement in connection with military operations against an armed enemy in the vicinity of Saarlautern, Germany, and on 5 June 1945 he received an Oak Leaf Cluster to the Bronze Star Medal for heroic achievement in connection with military operations against an armed enemy in the vicinity of Oberhaus, Germany. On 31 July 1945 he won the Silver Star Medal for gallantry in action at Fraulautern, Germany.

7. On 17 May 1946, Mr. M. J. Keane, Jr. of Washington, D.C. appeared at a hearing before the Board of Review as counsel for the accused and filed a brief in his behalf. Attached to the brief is a letter to counsel from accused's former commanding officer, Lieutenant Colonel Albert J. McWade, and a sworn affidavit of John Gray Paul, Jr., the regularly appointed defense counsel in the trial of accused. Both the brief and its attached correspondence were given careful consideration by the Board of Review.

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 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 80 or Article of War 96.

William B. Kuder, Judge Advocate

Gilbert Eckhardt, Judge Advocate

Earl W. Wingo, Judge Advocate

JAGK - CM 310446 1st Ind

WD, JAGO, Washington 25, D. C. JUL 2 0 1946

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 John Ruppel (0-2026294), Infantry.

2. Upon trial by general court-martial the accused was found guilty of wrongfully and unlawfully selling a Wanderer automobile, captured property of the United States, at a profit to himself of about $4000, and of wrongfully and unlawfully selling an Opel Blitz truck, captured property of the United States, at a profit to himself of about $5000, in violation of the 80th Article of War. He was also found guilty of exchanging, at a rate of exchange in excess of the official and lawful rate of exchange and in violation of standing currency regulations, $300 United States currency into Austrian schillings and of wrongfully importing by mail, in violation of standing currency regulations, $50 United States currency into occupied territory from the United States, in violation of the 96th Article of War. He pleaded guilty to and was found guilty of wrongfully, unlawfully and fraudulently obtaining United States postal money orders in the sum of $7000 for unlawful transmittal to the United States on one occasion, of wrongfully, unlawfully and fraudulently obtaining United States postal money orders in the sum of $1500 for unlawful transmittal to the United States on another occasion and of wrongfully, unlawfully and fraudulently attempting to obtain United States postal money orders in the sum of $5000 for unlawful transmittal to the United States on still another occasion, in violation of the 96th Article of War. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay the United States a fine of $20,000, to be confined at hard labor at such place as the reviewing authority might direct, for a period of ten years, and to be further confined at hard labor until the said fine was paid, but not for more than five years. The reviewing authority approved only so much of the finding of guilty of the specification concerning the sale of the Wanderer automobile as involved a finding that accused wrongfully and unlawfully sold a Wanderer automobile, ownership unknown, and thereby received a profit, in violation of the 96th Article of War, 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof.

On or about 17 October 1945, at Kremsmunster, Austria, the accused sold a civilian type Wanderer limousine to one Franz Strehle, a resident of Vienna, Austria, receiving from Strehle 40,000 marks therefor and about two weeks later, at the same place, the accused sold to Franz Strehle a two and one-half ton Opel Blitz truck, painted in camouflage of a type commonly used by the German army, receiving from Strehle 50,000 marks for this vehicle. Both vehicles were kept in a civilian garage at Kremsmunster. The ownership of the Wandererer was unknown and the Opel Blitz truck had originally been found in a dump in Linz, Austria, from which it had been taken by a soldier of the United States Army. Before the sale the Opel Blitz truck had been used by the accused's organization. The official rate of exchange was ten German marks to one dollar.

Sometime about the end of October or the beginning of November, 1945, at Kremsmunster, Austria, the accused gave one Joseph Bernath, a tailor from Wels, Austria, three hundred dollars in United States currency, and received from Bernath 27,300 schillings under an agreement whereby the latter was to give the accused 30,000 schillings in exchange for three hundred American dollars. The official rate of exchange was ten Austrian schillings to one dollar. In the latter part of November, 1945, at Kremsmunster, Austria, the accused imported by mail fifty dollars in United States currency into occupied territory from the United States so that he could repay with such currency one Isabella Murin, a Czechoslovakian civilian, for some money she had intrusted to him. On 10 October 1945, at Kremsmunster, Austria, he gave two enlisted men $7000 worth of Austrian schillings and had them procure an equivalent amount of United States postal money orders for him, and again, on or about 29 October 1945, gave another enlisted man $1601 worth of Austrian schillings and had this enlisted man procure $1500 in United States postal money orders for him. On or about 6 November 1945 the accused made final arrangements with the company mail clerk of his organization for the conversion of $5000 worth of Austrian schillings into an equivalent amount of United States postal money orders and gave the mail clerk $5700 in Austrian schillings for this purpose, of which the clerk was to keep $700 for his services. No money orders were obtained with this money because the Army postoffice was "filled up" and could not write them for the organization. The foregoing transactions violated Theater orders.

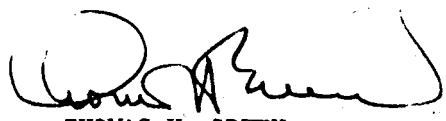
The accused is 27 years of age and is married. He attended high school but did not graduate therefrom. He is a graduate of a trade school and from July 1940 to April 1944 was employed by a manufacturing concern as a metalurgical technician at a final salary of $8,000 per year. On 22 July 1944 he entered the service as an enlisted man and rose to the grade of staff sergeant before being commissioned a temporary second lieutenant in the Army of the United States on 4 June 1945 while serving overseas with the 101st Infantry Regiment. On 4 June 1945 he was awarded the Bronze Star Medal for heroic achievement in connection with military operations against the enemy in the vicinity of Saarlautern, Germany, and on 5 June 1945 he was awarded the Oak Leaf Cluster to the Bronze Star Medal for heroic achievement in connection with military operations against the enemy in the vicinity of Oberhaus,

Germany. On 31 July 1945 he won the Silver Star Medal for gallantry in action at Fraulautern, Germany.

4. Consideration has been given to the brief filed on behalf of the accused by Mr. M. J. Keans, Jr. of Washington, D. C. and the letter of accused's former commanding officer and the sworn affidavit of the regularly appointed defense counsel attached thereto.

5. While there is nothing in the record to justify the acts of the accused, which clearly demonstrate that he is not worthy of his commission, due to his excellent combat record, I recommend that the sentence be confirmed but that so much of the fine as is in excess of $10,000, and so much of the confinement as is in excess of three years be remitted, and that the sentence as thus modified be carried into execution.

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



THOMAS H. GREEN
Major General
The Judge Advocate General

3 Incls
1. Record of trial
2. Form of action
3. Brief filed by counsel for acc'd

(G.C.M.O. 263, 21 August 1946).

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

SPJGH - CM 310473

2 MAY 1946

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at MacDill Field, Tampa, Florida, 8 March 1946. Dishonorable discharge and confinement at hard labor for ten (10) years. Disciplinary Barracks, Fort Leavenworth Kansas.
Private JEWELL T. HINES (36513585), Squadron C, 326th AAF Base Unit.	)	

HOLDING by the BOARD OF REVIEW
TAPPY, STERN 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 Charges and Specifications:

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

Specification 1: In that Private Jewell T. Hines, attached to Squadron C, 326th Army Air Forces Base Unit, MacDill Field, Florida, formerly a member of Squadron CR, 316th Army Air Force Base Unit (EAUTC), did, while enroute from Lakeland Army Air Field, Lakeland, Florida, without proper leave, absent himself from his organization at MacDill Field, From about 11 December 1944 until returned to military control at Lakeland Army Air Field, Lakeland, Florida, on or about 20 February 1945.

Specification 2: In that * * *, did, without proper leave absent himself from his organization at MacDill Field, From about 25 February 1945 to about 5 March 1945.

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

Specification 1: In that * * *, having been duly placed in confinement in the Post Guard House, Lakeland Army Air Field, Lakeland, Florida, on or about 20 February 1945, did, at Lakeland Army Air Field, Lakeland, Florida, on or about 22 February 1945, escape from said confinement before he was set at liberty by proper authority.

Specification 2: (Nolle Prosequi).

Specification 3: In that * * *, having been duly placed in confinement in the Post Guard House, MacDill Field, Florida on or about 7 June 1945, did, at MacDill Field, Florida, on or about 14 June 1945 escape from said confinement before he was set at liberty by proper authorities.

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

Specification: In that * * *, did, at MacDill Field, Florida, on or about 14 June 1945, desert the service of the United States and did remain absent in desertion until he returned to Military Control at Orlando Army Air Base, Orlando, Florida, on or about 21 January 1946.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen (15) years. The reviewing authority approved the sentence, remitted five (5) years of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The record of trial is legally sufficient to support the sentence. The only question requiring special consideration is whether the proof adduced at the trial is legally sufficient to support the court's findings of guilty of Specification 1 of Charge II, viz: escape from confinement at Lakeland Army Airport, Lakeland, Florida, on or about 22 February 1946, as alleged.

4. To prove the commission of this offense the prosecution introduced in evidence an extract copy of the guard report of the Lakeland Army Airport Base Guardhouse (Pros. Ex. C) containing an entry relating to accused reading as follows:

"2-20-45 Detained this date, 2330 EWT, Pvt. Jewel T. Hines, ASN 36513585, Org. 316th Base Unit, Sqd. C. R., McDill Field, Tampa, florida."

There was also introduced an extract copy of the guard report of the same Base Guardhouse (Pros. Ex. D) containing an entry relating to accused reading:

"2-22-45 Escaped from detainment this date, 0700 EWT, Pvt. Jewel T. Hines, ASN 36513585, Org. 316th Base Unit, Sqd. C. R. McDill Field, Tampa, Florida."

5. The first entry showing accused "detained" at the Base Guardhouse on 20 February 1945 is no proof that accused was in fact in confinement nor is the second entry showing accused to have "escaped from detainment" at the Base Guardhouse on 22 February 1945, proof that accused in fact escaped from confinement. In order to prove an escape from confinement, it must first be shown that an accused was in confinement prior to such escape. The word "detained" does not necessarily import the physical restraint required to establish confinement. Indeed, an accused may be "detained" by simple arrest which does not involve physical restraint. Thus, the proof is legally insufficient to show that accused was in confinement on 20 February 1945 as alleged. Accordingly, the proof that he escaped from confinement on 22 February 1945 is likewise legally insufficient.

6. For the reasons above stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 1 of Charge II, legally sufficient to support all other findings of guilty and legally sufficient to support the sentence.

Thomas N. Tappy, Judge Advocate.
Joseph J. Stern, Judge Advocate.
Robert C. Trueblood, Judge Advocate.

1st Ind

SPJGH - CM 310473

Hq ASF, JAGO, Washington 25, D.C. May 20 1946

TO: Commanding General, Third Air Force, Tampa Florida

1. In the case of Private Jewell T. Hines (36513585), Squadron C, 326th AAF Base Unit, I concur in the holding by the Board of Review and for the reasons stated therein recommend that the findings of guilty of Specification 1, Charge II, be dissapproved. Upon compliance with the foregoing recommendation, under the provisions of Article of War 50½, you will have authority to order execution of the sentence.

2. In view of the nature of the offenses of which accused was properly convicted and in order to bring the sentence within the limits of War Department post-war clemency policies, it is recommended that the term of confinement be reduced to six (6) years.

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

(CM 310473).

1 Incl
Record of trial

THOMAS H. GREEN
Thomas H. Green
Major General
The Judge Advocate General

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

SPJGK - CM 312008

6 JUN 1946

UNITED STATES v. Private JOHN F. ARMSTRONG (32801258), Battery C, 267th Field Artillery Battalion, U.S. Forces, European Theater.	WESTERN BASE SECTION THEATER SERVICE FORCES Trial by G.C.M., convened at Paris, France, 24 January 1946. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates.

---

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

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

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

Specification: In that Private John F. Armstrong, Battery C, 267th Field Artillery Battalion, Camp Baltimore, United States Forces, European Theater, (then of Headquarters Company, Camp Baltimore), did, at Headquarters Company, Camp Baltimore, France, on or about 4 August 1945, desert the service of the United States, and did remain absent in desertion until he was apprehended at Paris, France, on or about 5 November 1945.

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

Specification: In that Private John F. Armstrong, ***, did, at Paris, France, on or about 5 November 1945, wrongfully carry a concealed weapon, to wit, a pistol.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave from 21 November 1944 to 7 December 1944 and for failure to obey a lawful order of a commissioned officer in violation of Articles of War 61 and 96 respectively, for which he was sentenced to be confined at hard labor for six months and to forfeit $25 of his pay per month for six 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 five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Specification of Charge II and Charge II but not legally sufficient to support the findings of guilty of the Specification of Charge I and Charge I. In view of this holding, discussion will be limited to those portions of the record of trial considered legally insufficient to support the findings.

4. Evidence of offense alleged in Specification of Charge I.

The prosecution offered into evidence a purported extract copy of a morning report as Prosecution Exhibit A, and simultaneously offered into evidence as Prosecution Exhibit A-1, "as supplementary to the certificate on the extract copy of the morning report, a certificate of the personnel officer of the Headquarters Battery, 267th Field Artillery Battalion, Camp Baltimore Field" (R. 5). These two documents read as follows:

"Armstrong, John F 32801258
Pvt Hq Co Camp Baltimore, Suippes Sub-Area, AAC

EXTRACT COPY OF MORNING REPORT OF -

Hq Co Camp Baltimore Suippes Sub-Area AAC

6 August 1945
Armstrong, John F 32801258 Pvt
Above EM dy to AWOL 0615 4 Aug 45

HOWARD C HAHN
2d Lt Inf
Commanding

11 Dec 45
Hq Co Camp Baltimore Suippes, France

I, THOMAS R. SNEE, Maj. CE, certify that I am the commanding officer of 267 FA Bn and official custodian of the morning reports of said command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Camp Baltimore for the dates indicated in said copy which relates to
Armstrong, John F 32801258 Pvt Hq Co Camp Baltimore Suippes Sub-Area AAC
/s/ THOMAS R. SNEE
THOMAS R. SNEE
Major CE" (Pros. Ex. A)

"HEADQUARTERS BATTERY 267 FA BN
CAMP BALTIMORE

APO 513
11 Dec 45

C-E-R-T-I-F-I-C-A-T-E

I certify that Headquarters Company, Camp Baltimore, was deactivated per GO #35, Headquarters Camp Baltimore, effective 31 Oct 45 and that personnel and records were transferred to the 267th Field Artillery Battalion per SO 159, dtd 4 Nov 45, SO 160, dtd 5 Nov 45 and SO 164, dtd 9 Nov 45, Headquarters Camp Baltimore.

/s/ George W. Moye
GEORGE W. MOYE
1st Lt. QMC
Personnel Officer" (Pros. Ex. A-1).

The defense objected to the admission of the above two documents in pertinent part as follows:

"*** there is no designation of the officer, Major Thomas R. Snee, who authenticated it as official custodian. Objection is also made to the admission of prosecution A-1 for the reason as being incompetent, irrelevant, immaterial and hearsay and is not the best evidence" (R. 5).

Both documents were admitted into evidence over these objections (R. 5).

Two extra-judicial statements signed by accused (Pros. Exs. C,D) were then offered and admitted into evidence, without objection, wherein accused stated he was absent without leave from his organization for the period between 4 August 1944 and 5 November 1945 and that he was apprehended on the latter date.

5. After an explanation of his rights as a witness accused elected to make an unsworn statement in which he made no reference to the commission of the offenses alleged (R. 10,11).

6. The admission into evidence of the extract copy of the morning report (Pros. Ex. A) over the objection by the defense on the ground of improper authentication, presents the question as to whether or not Major Snee was a custodian within the contemplation of the Manual for Courts-Martial, 1928, and therefore qualified to authenticate the extract copy of the morning report.

A properly authenticated extract copy of a morning report may be admitted into evidence (par. 116a, MCM). The admission of such an extract copy however is subject, in addition to certain tests applicable to the admission of an original morning report, to attack on the ground of improper authentication. The defense in this case specifically objected on this ground.

In CM 218201, Witkowski, 12 BR 11, the Board of Review, in holding that the company commander was the "custodian" of the morning report and that he alone was the proper person to authenticate an extract copy thereof, stated:

> "The extract copy dated September 18, 1941, of the morning report (Ex. 1) is also defective in that it is certified and signed by the Regimental Personnel Adjutant, Lieutenant Peterson, who states therein that he is the 'Official custodian of the morning reports of Battery "B", 198th CA (AA)' and that it is a 'true and complete copy ***'.
>
> * * *
>
> "The unit personnel officer of a regiment is not the official custodian of the company morning reports. Those reports are retained by the company commander as basic records (par. 13a (1), AR 345-5, Aug. 15, 1941).
>
> "The certification of the extract copy (Ex. 1) as a true and complete copy of the morning report by Lieutenant Peterson as regimental personnel adjutant is not such an authentication as makes the extract copy admissible in evidence, notwithstanding his statement therein that he is the official custodian of the morning reports of Battery B, 198th Coast Artillery (AA)". (Underscoring supplied.)

In CM 227831, Gregory, 15 BR 375, where the record of trial disclosed that the purported extract copy of the morning report was authenticated by a certificate signed by an officer who designated himself "Pers Adj" and recited that he was custodian of the morning reports concerned, the Board of Review stated that CM 218201, Witkowski, was controlling and further stated:

> "It is true that paragraph 13b (1) AR 345-5, April 15, 1942, provides that a company commander will daily submit to the unit personnel officer his completed morning reports, or extracts therefrom, for the purpose of enabling the personnel officer to obtain data therefrom, but this authorization does not make the personnel officer custodian of the morning reports. Paragraph 13a (1) of the same regulation explicitly excepts morning reports from the company records of which the unit personnel officer is custodian.
>
> "The rule of paragraph 116a of the Manual for Courts-Martial authorizing the introduction in evidence of copies of War Department records when authenticated by the custodians is an exception to the best evidence rule. As an exception it may not properly be extended by implication beyond its terms. To permit authentication of a copy of a record by an officer into whose hands the record may temporarily come for limited and defined purposes but who is not the custodian as recognized by law or regulations would not only amount to an extension by implication of the exception to the general rule, but would be an innovation apt to endanger the substantial rights of accused persons."

Under existing regulations (AR 345-400, 3 Jan. 1945), however, the morning report is prepared in triplicate, the first original is forwarded to The Adjutant General where the eventual custody thereof rests, the duplicate original is retained by the reporting organization and the triplicate original is forwarded to the unit personnel section where it becomes a record of that section. Thus it is now held that under these regulations the commanding officer of the reporting unit, the unit personnel officer and The Adjutant General are each the official custodian of the original morning report in a command, unit, or branch of the Army and as such authorized to duly authenticate an extract copy thereof (SPJGJ, 1944/3281) 4 April 1944, 3 Bull JAG 96).

In other opinions of this office it has been established that under certain specific circumstances other persons may also be custodians within the contemplation of the provisions of the Manual for Courts-Martial, 1928, and thereby authorized to authenticate morning reports. Thus a "Records Administrator" appointed pursuant to Circular 416, WD, 23 October 1944 and who has possession of the records of an inactive command may be the official custodian within the contemplation of the Manual for Courts-Martial (SPJGJ 1945/1884, 1 February 1945), or "The commanding officer of *** a depository, or other officer thereat" duly appointed as "Records officer" under the provisions of AR 15-15, 20 September 1945 (which regulation supersedes Circular 416, WD, 23 October 1944) and "who in fact has custody of noncurrent Morning Reports, may lawfully authenticate extract copies of Morning Reports in his custody," but the authenticating certificate "should show the authenticating officer's status, for example, Commanding Officer, Seventh Service Command Records Depot; Records Officer, Fort Sill, Oklahoma" (SPJGJ 1945/1884, 2 April 1946). This office has also stated, in opinions rendered prior to the publication of Circular 416, supra, and Army Regulations 15-15, supra, that the commanding officer of a station, or another officer, may be, where the facts indicate that they are in actual custody of the morning reports of inactivated units, a proper custodian for the purpose of authenticating extract copies of a morning report (SPJGJ 1943/19626, 3 Jan. 1944; SPJGJ 1944/10566, 27 Sept. 1944).

From these opinions it appears that if the officer purporting to authenticate the extract copy of the morning report is not declared in the authenticating certificate to be one of the custodians specifically authorized by the War Department it then becomes necessary that competent evidence outside the authenticating certificate show that such officer did in fact have custody of the morning report.

An examination of the extract copy of the morning report accepted in evidence in this case to show the initial absence of accused without leave reveals that the certificate of authentication is signed by Thomas R. Snee, Major, CE, who certified that he was the commanding officer of "267 FA Bn and official custodian of the morning reports of said command." The extract copy purports to be that of a morning report of the "Hq Co Camp Baltimore Suippes Sub-Area

AAC." Although we assume Major Snee is certifying that he is the custodian of the morning reports of the "Hq Co Camp Baltimore Suippes Sub-Area AAC" it is obvious on the face of the instrument that he is not the commanding officer of the reporting unit and that he is not one of the other two custodians authorized by Army Regulations 345-400, supra, to have possession of original morning report. Also there is nothing in the authenticating certificate which shows that he is a "Records Administrator" or "Records officer" or that he holds any position from which it may be assumed he was a lawful custodian.

Although Prosecution Exhibit A-1, a statement designated as a "Certificate," was offered in evidence in an attempt to show that the 267th Field Artillery Battalion was the proper depository of the morning reports of the Headquarters Company, Camp Baltimore, which had been inactivated, the admission of the certificate into evidence was clearly error. The certificate was not made under oath nor was the signer thereof present to confront the court and subject himself to the inquisitive test of cross-examination. The reception of this instrument in evidence offended, therefore, every principle the hearsay rule was designed to protect (CM 236914, Micillo, 23 BR 175). Such hearsay is not evidence (par. 113, MCM, 1928). There was therefore no competent evidence offered to show that Major Snee did in fact have custody of the morning reports.

In view of the foregoing considerations, there remains no evidence of the corpus delicti to support the confession and "An accused can not be convicted legally upon his unsupported confession" (par. 114a, MCM, 1928).

7. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Specification of Charge I and Charge I but legally sufficient to support the findings of guilty of the Specification of Charge II and Charge II and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds of accused's pay per month for three months (par. 104c, MCM, 1928).

William B. Neely, Judge Advocate

Gilbert Pickhardt, Judge Advocate

Earl W. Wingo, Judge Advocate

JUN 18 '46 AM
RECEIVED

SPJGK - CM 312008 1st Ind JUN 18 1946

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

TO: Commanding General, Western Base Section, Theater Service Forces, APO 513, c/o Postmaster, New York, New York

1. In the case of Private John F. Armstrong (32801258), Battery C, 267th Field Artillery Battalion, U.S. Forces, European Theater, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of the Specification of Charge I and Charge I, but legally sufficient to support the findings of guilty of the Specification of Charge II and Charge II and legally sufficient to support only so much of the sentence as involves confinement at hard labor for three months and forfeiture of two-thirds of accused's pay per month for three months, which holding is hereby approved. Upon the disapproval of the finding of guilty of the Specification of Charge I and Charge I and the approval of only so much of the sentence as provides for confinement at hard labor for three months and forfeiture of two-thirds of accused's pay per month for three months, you will have authority to order the execution of the modified 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 312008).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

SPJGQ - CM 312022

APR 19 1946

UNITED STATES	9TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Ingolstadt, Germany, 15 June 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania.
Private JOSEPH J. KAVCHAK (33678744), Company B, 39th Infantry	

REVIEW by the BOARD OF REVIEW
DANIELSON, BURNS and DAVIS, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Joseph J. Kavchak, Company B, 39th Infantry, did, at Esglandes, France, on or about 16 July 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at Ponterson, France, on or about 3 March 1945.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for larceny of property of the value of $3.60, and for quitting his post before being regularly relieved, in violation of Articles of War 93 and 86 respectively. All the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence but recommended commutation thereof to dishonorable discharge, total forfeitures and confinement for life, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, United States Forces, European Theater, confirmed the sentence but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge, total forfeitures and confinement for life, designated the United States Penitentiary, Lewisburg,

Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 16 July 1944 accused was serving as a member of a "BAR" team with his organization near Esglandes, France (R 7, 10, 12). His battalion was in regimental reserve and was being subjected to shelling by the enemy (R 7). His company commander testified that accused was reported absent on 16 July, at which time it was impossible to search the company area for him because of heavy shelling. However, a search of the area was made the following day and accused could not be found (R 7). According to both his company commander and a former member of his platoon, accused was not present for duty between this time and 3 March 1945 (R 7, 10). He had no permission from his company commander to be absent during that period, and nobody else had authority to give him such permission (R 7). The company was in contact with the enemy during the entire period of his absence except for about six weeks (R 9).

It was stipulated that he voluntarily surrendered himself to military control on 3 March 1945 at Ponterson, France (R 11, Pros. Ex. 1).

4. After his rights as a witness were explained to him, accused elected to remain silent and no evidence was offered in his behalf (R 12).

5. Competent testimony establishes without contradiction that accused absented himself without leave from his organization at about the time and at the place alleged in the Specification, and that he remained absent without leave for nearly eight months in an active theater of operations, until he surrendered himself at the time and place alleged. Such facts alone constitute abundant proof from which the court was fully authorized to infer an intent to remain permanently away from the service (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll; CM ETO 13018, Ostrowski).

The defense objected to the testimony relating to the amount of time during which accused's company was in contact with the enemy during his absence, because the Specification alleged only "simple" desertion, and moved that the Specification "be properly amended" in the event the prosecution intended to prove elements of desertion under Article of War 28 (R 8). It is unnecessary for us to determine the propriety of the action of the court in overruling the objection and denying the motion. Proof as to the tactical situation existing at the time of accused's initial absence was properly admitted even though only "simple" desertion was charged (CM ETO 13018, Ostrowski); and proof as to subsequent combat operations by his company, if improper, could not have affected the result reached by the court because of the compelling and undisputed evidence showing a period of unauthorized absence of almost eight months (see CM ETO 1693, Allen; CM ETO 3811, Morgan et al.). As a finding of guilty of "simple" desertion is abundantly supported by the record of trial, accused's substantial rights could not have been prejudiced by a failure of the prosecution

to allege desertion attended by an intent to avoid hazardous duty or to shirk important service (cf. CM ETO 5117, DeFrank; CM ETO 5196, Ford; CM 245568, Clancy, 29 BR 215 (1943), III Bull. JAG 142).

6. The charge sheet shows that accused is 21 years three months of age and was inducted 16 April 1943 at Pittsburg, Pennsylvania, to serve for the duration of the war plus six months. He had no prior service.

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

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of War may direct, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Lester C. Daniel, Judge Advocate

John A. Burns, Judge Advocate

Walter W. Dawe, Judge Advocate

(G.C.M.O. 18, 29 January 1947).

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

SPJGQ - CM 312023

MAY 3 1946

UNITED STATES v. Private ELMUND G. SCHIRMER (32964259), 483d Reinforcement Company, Detachment 105, Ground Force Reinforcement Command.	SEVENTH UNITED STATES ARMY Trial by G.C.M., convened at Marburg, Germany, 4 February 1946. Dishonorable discharge (suspended) and confinement for seven (7) years. Wurzburg Disciplinary Training Center, Wurzburg, Germany.

HOLDING by the BOARD OF REVIEW
DANIELSON, BURNS and DAVIS, Judge Advocates

1. The record of trial of the above named soldier, having been examined in the Office of The Judge Advocate General and there found legally insufficient, 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 Edmund G. Schirmer, attached-unassigned, Detachment 105, Ground Force Reinforcement Command, did, without proper leave, absent himself from his station at or near Bracht, Germany, from on or about 3 July 1945, to on or about 27 December 1945.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for seven years. The reviewing authority approved the sentence, ordered it executed, but suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Wurzburg Disciplinary Training Center, Wurzburg, Germany, as the place of confinement. The result of his trial was published in General Court-Martial Orders No. 59, Headquarters Seventh United States Army, 18 February 1946.

3. The evidence consists of an extract copy of the morning report of Detachment 105, Ground Force Reinforcement Command, for 4 July 1945, evidencing a change in accused's status as of 3 July 1945 from duty to absent without leave (Pros. Ex. A), and a stipulation reciting that accused was on 3 and 4 July 1945 attached-unassigned to Detachment 105, Ground Force Reinforcement Command, then located at Bracht, Germany, and that he returned to military control on 27 December 1945 (Pros. Ex. B). In addition thereto, the following stipulation was received with reference to the preparation of the morning reports of Detachment 105, Ground Force Reinforcement Command (R 7):

"It is stipulated and agreed by and between the Trial Judge Advocate, the accused, and his counsel, that the following is the regular course of business and the standard operating procedure of Detachment 105, Ground Force Reinforcement Command, followed with respect to absentees without leave in that Detachment and that this procedure is followed from day to day in Detachment 105: The first step in accounting for the personnel is the holding of formations. At reveille each morning, a roll call is made of all the personnel in Detachment 105, broken down by companies. Any absentees from that reveille roll call are reported to the company commander. Normally, a search is made of the area, immediately following that report, in order to determine if someone has overslept, or is ill in quarters and hasn't shown up at reveille for that reason. At various intervals during the day in Detachment 105, AWOL checks are made--that is, a roster of these men who were missing from the morning reveille roll call is again called out to the various companies, and any man who was absent at reveille might make his presence known. Again at retreat, a company roll call of all personnel is made. At the conclusion of the day's business, the company clerk within the company makes up his morning report for that company, of all the attached unassigned personnel, on a worksheet, which is similar in form to a regular morning report form. All the personnel who entered into the company, or departed from the company during that day, are accounted for by remarks, indicating that they had arrived pursuant to a certain authority, or had shipped pursuant to a certain authority. Personnel dropped to the hospital are accounted for on that worksheet, and men who are AWOL are entered thereon. The company commander then signs the worksheet and it is sent to Battalion Headquarters. The worksheets of the four companies, are then consolidated by the Battalion morning report clerk. By consolidation is meant, the bring~~to~~ing together of the figures for the four companies. The individual remarks remain the same, and appear in the same manner on the Detachment 105 morning report, as they do on the company worksheet. In the event the Battalion morning report clerk fails to enter on the consolidate report, on the proper day, the remark showing an absentee who was so reported absent, he makes an as

of entry on a subsequent day when the error is discovered. Otherwise stated, if through clerical error, the Battalion morning report clerk over-looks including in his consolidated report, an AWOL as of a particular date, he subsequently makes an entry on the morning report as of the date when the absence reported actually occurred, after establishing the fact from the records in his possession. The Detachment 105 morning report is then signed by the Personnel Officer of Detachment 105 and submitted to Depot Headquarters: That this procedure was followed in Detachment 105 from the date of activation to date, and is known as the standard operating procedure in the Detachment."

It was further stipulated that if the officer who signed the morning report were called as a witness he would testify that he had no personal knowledge of the facts recited in the entry thereon (R 8).

4. The only question for determination raised by the record of trial is the competency of the morning report (Pros. Ex. A), which was admitted over objection by the defense (R 8). It was urged that inasmuch as the officer who signed the morning report had no personal knowledge of the facts recited therein, the morning report was of hearsay character and therefore incompetent (R 7). In the view we take of the question it becomes unnecessary for us to determine whether Prosecution's Exhibit A (the morning report) was admissible as a morning report in exception to the hearsay rule within the sanction given to official writings by paragraph 117a, pages 120, 121, Manual for Courts-Martial, 1928. The exhibit was not offered or received as an official writing under the provisions of paragraph 117a, but was, rather, tendered and admitted as a record made in the regular course of business within the meaning of the Federal "shop-book" statute (Act of 20 June 1936, c. 640, § 1; 28 U.S.C., § 695; 49 Stat. 1561), which reads as follows:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

In CM 261107, DuBoff, 40 BR 131, the Board of Review held that certain tally sheets, shown to have been made in the regular course of business, were admissible

in evidence by virtue of the statute. It observed that "a clear channel has been cut by the Articles of War and the Manual for Courts-Martial through which this statute flows into the body of evidential rules applicable in courts-martial", and that--

> "There is no prohibition in the Manual which prevents application of this rule of evidence in trial by courts-martial. Neither has Congress prescribed, either in the statute itself or elsewhere, that it shall not apply to courts-martial. The failure of Congress specifically to include courts-martial within the tenor of the act is not a proscription against its application in such proceedings. * * * the Federal statute covering entries made in the regular course of business is a rule of evidence having application in trials by courts-martial."

The Board was prompted to reach this conclusion by reason of paragraph 111, page 109, Manual for Courts-Martial, 1928, which provides that so far as not otherwise prescribed in the Manual or by act of Congress, the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States will be applied by courts-martial.

The Board of Review in the Branch Office of The Judge Advocate General with the European Theater has held repeatedly that entries made in the regular course of business are admissible under the statute to establish absence without leave (CM ETO 2185, Nelson, 6 BR (ETO) 193; CM ETO 2481, Newton, 7 BR (ETO) 65; CM ETO 4740, Courtney, 13 BR (ETO) 241; CM ETO 4691, Knorr, 13 BR (ETO) 215; CM ETO 10199, Kaminski; CM ETO 14165, Pacifici; cf CM ETO 7686, Maggie and Lewandowski; cf CM ETO 6107, Cottam and Johnson). In the Kaminski case the Board observed that the rule of evidence contained in the statute--

> "* * * constitutes an exception to the general rule against hearsay distinct from the exception which permits the introduction of official writings. The former is based upon the probability of the trustworthiness of the records because they are the routine reflections of the day to day acts, transactions, occurrences or events of an organization (Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 645). The exception relating to an official writing is based upon the probability of the truth of its contents because the officer or other person making it had the duty to know the matter stated and to record it (MCM, 1928, par. 117a, p. 121). Since the two exceptions are separate and distinct from each other, the limitation contained in the Manual with reference to official writings which excludes entries 'obviously not based on personal knowledge' is inapplicable to records made in the regular course of business (MCM, 1928, par. 117a, p. 121). Furthermore, it is specifically provided in the statute above cited that 'lack of personal knowledge by the entrant or maker' shall not

affect the admissibility of a writing or record made in the regular course of business, but may be shown to affect its weight. There is no reason in principle why an official writing, or what purports to be an official writing, may not be admissible as a record made in the regular course of business if it meets the requirements of the statute. There is nothing in the Manual for Courts-Martial which leads to the conclusion that a morning report may be introduced in evidence only as an official writing. The two bases of admissibility are not mutually exclusive and may coexist with reference to the same writing. Thus, it has been held that a death certificate signed by a county coroner and made pursuant to state law which also provided that such certificate is to be prima facie evidence of the facts therein stated, including the cause of death, is a record made in the regular course of business within the meaning of the statute (Hunter v. Derby Foods, 110 F 2nd 970)."

Absence without leave, like any other fact, may be proved in many ways. It may, for example, be established by a corroborated extrajudicial confession, by a judicial confession, by circumstantial evidence, by direct evidence, and by a morning report in exception to the hearsay rule when the requirements for official writings are met. We see no reason why absence without leave may not be shown also by entries made in the regular course of business within the meaning of the statute. Paragraph 117a does not purport to limit documentary proof of this fact to official writings. Although entries made in the regular course of business may not satisfy the requirements for official writings, they may nevertheless be admissible by reason of compliance with the statute, which, among other things, does not demand personal knowledge of the entrant.

The record of trial discloses that the exhibit in question here meets all the requirements of the statute. It was shown to have been a product of the regular course of business followed by the reporting organization from the date of its activation with respect to absentees without leave. It was, in fact, an entry made in pursuanceof "the standard operating procedure in the Detachment".

In reaching the conclusion which we do, we are not unmindful of the opinion of The Judge Advocate General of 29 March 1945 (SPJGN 1945/3492, 29 March 1945, IV Bull. JAG 86) which appears to deny admissibility under the statute to documentary evidence of absence without leave. We share the opinion that mere compliance with the statute does not qualify a morning report for admission as an official writing, but we do not agree that a document shown to be the product of a regular course of business is not admissible under the statute to prove absence without leave even though it be described as a "morning report". In such circumstances we look to substance rather than to form. We need not consider documentary evidence solely as a "morning report", and therefore as an official writing, merely because it is so labeled and described, where, as here, the evidence clearly shows it to be a record of an event made in the regular

course of business and not a "morning report". That being true, its admissibility is not to be determined by the rules applicable to official writings, but, rather, by the statute which gives it a different basis for admission. It is, of course, true that both bases for admission may coexist, and a document may then be admissible as an official writing and also as a record made in the regular course of business.

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

Lester A. Danielson, Judge Advocate
John A. Burns, Judge Advocate
Walter W. Davis, Judge Advocate

SPJGQ - CM 312023 1st Ind

TO: The Judge Advocate General

For his information.

Lester A. Danielson
LESTER A. DANIELSON
Major, JAGD
Chairman, Board of Review No. 4

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

JAGK - CM 312079

19 JUN 1946

UNITED STATES v. Private First Class THOMAS P. SMITH (33839705), Company A, and Private First Class EDGAR J. CLAY (35777601), Company B, both of the 802d Replacement Battalion, Fort Jackson, South Carolina.	)	HEADQUARTERS V CORPS Trial by G.C.M., convened at Fort Jackson, South Carolina, 13 March 1946. Sentence as to accused SMITH: Dishonorable discharge (suspended), total forfeitures, and confinement for two (2) years. Disciplinary Barracks. Sentence as to accused CLAY: Dishonorable discharge (suspended), total forfeitures, and confinement for six (6) months. Post Stockade.

OPINION of the BOARD OF REVIEW
KUDER, ACKROYD and WINGO, Judge Advocates.

---

1. The record of trial in the case of the above-named soldiers has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence as to accused Clay. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class Thomas P. Smith, Company A, 802d Replacement Battalion, Fort Jackson, South Carolina, and Private First Class Edgar J. Clay, Company B, 802d Replacement Battalion, Fort Jackson, South Carolina, did, at Columbia, South Carolina, on or about 5 February 1946, without the consent of the owner, wrongfully take and carry away, one 1936 Buick Tudor Sedan, Motor number 43080032, Serial number 2910130, value in excess of $50.00, property of Major W. H. Hazelwood.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced as to either accused. Each 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 two years. As to accused Smith, the reviewing authority approved the sentence and ordered it executed, suspended the execution of that portion thereof adjudging dishonorable discharge until his release from confinement, and designated the Southeastern Branch, United

States Disciplinary Barracks, Camp Gordon, Georgia, or elsewhere as the Secretary of War might direct, as the place of confinement. As to accused Clay, the reviewing authority approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until his release from confinement, reduced the period of confinement to six months, ordered execution of the sentence as thus modified, and designated the Post Stockade, Fort Jackson, South Carolina, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 8, Headquarters V Corps, 18 March 1946. The record of trial was forwarded to the Office of The Judge Advocate General pursuant to Article of War 50½.

3. The evidence for the prosecution in pertinent part is as follows: At about 1800 hours 5 February 1946, Major Wendell H. Hazlewood parked his automobile on a street in Columbia, South Carolina (R. 8). The car was a black, 1936 Buick Tudor coach or sedan, bearing license number D5533 (R. 8, 9). The motor number of the vehicle was 43080032 and its serial number, 2910130 (R. 9). The rear end of the automobile was in a damaged condition. Upon his return at about 2100 hours the same evening, Major Hazlewood discovered that his automobile was missing and reported the fact to the police (R. 8). He had not given anyone permission to use his machine on 5 February (R. 9), and next saw it at the police station at about 2200 hours the same evening (R. 11).

At about 2100 hours 5 February 1946, a civilian policeman apprehended both accused who were riding in a black 1936 Buick coach, bearing license number, D5533. The rear end of the automobile was "mashed in." Accused Smith was driving the car and, when questioned by the policeman, stated that the car belonged to him. Accused Clay "was a passenger" in the automobile (R. 11,13).

It was stipulated by the prosecution, the defense and each accused that the automobile described in the Specification of the Charge, had a value in excess of $50.00 (R. 13,14; Pros. Exs. 1,2).

4. For the defense, Private First Class Dewane A. Shoemake, Casual Detachment, V Corps, testified that he was in the same company with both accused in France, that accused were well liked in the organization, were good soldiers and never "served" company punishment to witness' knowledge (R. 14, 15).

Both accused elected to remain silent (R. 16).

5. The evidence clearly supports the findings of the court that accused Smith, at the time and place alleged and without consent of the owner, wrongfully took and carried away the vehicle described, of the ownership as alleged. The unexplained possession of the automobile by accused Smith shortly after the theft thereof, raises the presumption that it was taken by him (par. 112a, MCM, 1928 (Cor.4-20-43), p. 110; CM 230928, Lanyon, 18 BR 122). Moreover, accused Smith falsely claimed ownership of the automobile when he was

apprehended by the police and was driving the car at the time. The court, being the trier of the facts, could properly infer from these circumstances that accused Smith was guilty of the offense alleged.

As to accused Clay, the only evidence tending to connect him in any way with the wrongful taking and asportation of the vehicle is the fact that he was a passenger in the automobile when the civilian policeman apprehended both accused. There is no proof that Clay took the automobile or knew it to have been wrongfully taken, and there is nothing in the evidence to form the basis of a reasonable inference that Clay intended to, or did aid, abet, encourage, or otherwise assist Smith in the commission of the offense alleged. There is no proof that Smith's acts were the result of any plan or arrangement between the accused (see CM 264342, Reis, 42 BR 93). Furthermore, there is no evidence that Clay, either by word or act exercised any control over the automobile so as to indicate possession thereof and thus raise the presumption that it was taken by him.

To infer Clay's guilt from the facts as established in this case would be basing a finding of guilt upon pure conjecture or at most upon a mere possibility, which is not sufficient to sustain such a finding.

> "Circumstantial evidence creating a mere conjecture or a mere probability of guilt is not sufficient. The guilt of an accused must be founded upon evidence, which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except that of a defendant's guilt. The circumstances must not only be consistent with guilt but inconsistent with innocence (16 C.J. 766, CM 233766, Nicholl, CM 238435, Rideau)." (CM 258020, Palomera, 37 BR 299.)

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

William B. Rudy, Judge Advocate

Gilbert Rotenberg, Judge Advocate

Earl W. Wingo, Judge Advocate

JAGK - CM 312079 1st Ind

WD, JAGO, Washington 25, D. C. JUN 25 1946

TO: Under Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and the act of 1 August 1942 (56 Stat. 732), is the record of trial in the case of Private First Class Edgar J. Clay (35777601), Company B, 802d Replacement Battalion, Fort Jackson, South Carolina.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

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

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

THOMAS H. GREEN
Major General
The Judge Advocate General

(G.C.M.O. 250, 5 August 1946).

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

JAGN-CM 312080

U N I T E D S T A T E S	)	FIRST AIR FORCE
	)	
v.	)	Trial by GCM convened at Mitchel Field, New York, 21, 22, 23, 24, 25, 28, 29, 30 and 31 January 1946. Dismissal.
	)	
First Lieutenant MICHAEL T. RUSSO (0-1535278), Medical Administrative Corps.	)	

HOLDING by the BOARD OF REVIEW
HARDY, JOHNSON and TAYLOR, Judge Advocates

---

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Michael T. Russo, Medical Administrative Corps, 110th Army Air Forces Base Unit (Staging), did, at Mitchel Field, New York, on or about 26 January 1945, wrongfully and without authority, cause Private Matthew V. Marino, Second Air Force Replacement Pool, Lincoln Army Air Base, Lincoln, Nebraska, Attached Unassigned to Detachment of Patients, Army Air Forces Regional Station Hospital, Mitchel Field, New York, to be transferred to the War Department Separation Center, Fort Dix, New Jersey, for the purpose of being discharged from the military service.

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

Specification 5: (Finding of not guilty).

Specification 6: (Finding of not guilty).

Specification 7: In that First Lieutenant Michael T. Russo, Medical Administrative Corps, did, at Mitchel Field, New York, on or about 6 December 1944, wrongfully and without authority cause Corporal Ralph M. Cardinale, 32573657, formerly assigned to 1st Training Company, 848th Signal Training Battalion, Eastern Signal Corps Unit Training Center, Fort Monmouth, New Jersey, and then attached, unassigned, to the Detachment of Patients, Army Air Forces Convalescent Center and Regional Station Hospital, Mitchel Field, New York, to be transferred to the War Department Separation Center, Fort Dix, New Jersey, for the purpose of being discharged from the military service under the provisions of Army Regulations Number 615-365, and Section II, War Department Circular Number 370, 12 September 1944, for the convenience of the government on the ground that he was below minimum physical induction standards, the said First Lieutenant Michael T. Russo then well knowing that the said Corporal Ralph M. Cardinale had not been found by competent authority to be below minimum physical induction standards.

Specification 8: In that First Lieutenant Michael T. Russo, Medical Administrative Corps, did, at Mitchel Field, New York, on or about 3 January 1945, wrongfully and without authority cause Private Vincent DiGiacinto, 42137517, formerly attached, unassigned, to Company A, Casual Battalion, Army Ground Forces Replacement Depot No. 1, Fort George G. Meade, Maryland, and then attached, unassigned, to the Detachment of Patients, Army Air Forces Convalescent Center and Regional Station Hospital, Mitchel Field, New York, to be transferred to the War Department Separation Center, Fort Dix, New Jersey, for the purpose of being discharged from the military service under the provisions of Army Regulations Number 615-365, and Section II, War Department Circular Number 370, 12 September 1944, for the convenience of the government on the ground that he was below minimum physical induction standards, the said First Lieutenant Michael T. Russo then well knowing that the said Private Vincent DiGiacinto had not been found by competent authority to be below minimum physical induction standards.

The accused, prior to pleading generally, interposed special pleas which will hereafter be discussed. He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 5 and 6 of the Additional Charge, and guilty of all other Specifications and Charges.

There was no evidence of previous convictions. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution.

General: The accused, during the period in question, was commanding Officer of the Detachment of Patients of the "Army Air Forces Convalescent Center and Regional Station Hospital, Mitchel Field, New York" [hereinafter referred to, in the interest of brevity, as the "Hospital"] and, for the purpose of signing orders, Assistant Adjutant of the Hospital (R. 48-49, 106, 113, 294).

All three of the Specifications of which the accused was found guilty involved discharges under the provisions of AR 615-365, referred to throughout the record, and for clarity and brevity in this opinion, as "Section X." Section X provides for discharge, for the convenience of the Government, of men found to be below minimum physical induction standards for limited service by reason of physical defects existing at the time of induction, and for whom no suitable assignment then exists. The following is a resume of the evidence adduced by the prosecution to develop the background of regulations and applicable Hospital procedure necessary to an evaluation of the utlimate facts.

If a soldier from some organization not stationed at Mitchel Field appeared at the Hospital and requested medical attention he was examined by a medical officer and, if he required hospitalization, was admitted as a "direct casual" (R. 50). At such times a Form 55-A (admission slip) was made out; one copy going with the patient to his ward, and the remaining copy being sent (usually by courier) to the office of the Hospital Registrar who was the custodian of the "professional" records of the Hospital patients (R. 64-65). The Registrar then, usually the following day, notified the man's commanding officer of such admission (R. 63). War Department Circular 280, 6 July 1944, directed the manner in which such patients were to be carried on the morning report of the Detachment of Patients. In this type of case he would be picked up as "attached from other organizations." If he was to remain in the Hospital for more than ninety days, or it appeared he was entitled to a certificate of disability discharge (CDD), or he was from an organization alerted for overseas movement and would be unable to regain it before its departure, or if while en route to a port of embarkation or overseas replacement depot he required treatment in a general or regional hospital, the original organization commander would be requested to, and he would transfer the man to the Detachment (this could be done by the Surgeon in the case of a man from an alerted unit) and he would then be carried as "attached unassigned" (WDC 280, 1944).

If a medical officer, usually the ward officer, determined that a patient was below the minimum physical induction standards for limited service, he would initiate a recommendation for the patient's discharge under the provisions of Section X. This recommendation was processed through medical channels to the Surgeon's Office. The Surgeon, or the Assistant Surgeon, by written first indorsement, personally approved such recommendation and forwarded it to the patient's commanding officer; if he was attached unassigned to the Detachment of Patients then to the commanding officer of that organization (R. 54-59; Pros. Ex. 1). A Section X discharge required, in addition to physical disability, a determination by competent authority that no suitable assignment existed for the subject. If the patient was an Air Forces man the Detachment Commander would request the Liaison Officer, maintained at the Hospital by the Air Forces Personnel Distribution Center, for either an assignment or authority to discharge, and his action respecting the patient was governed by the reply to such request. If the patient was a Ground Forces or Service Forces man he would be transferred to the nearest Service Forces Distribution Station together with a letter stating the medical recommendation (R. 56-57).

If, in the case of Air Forces personnel, the discharge was authorized, orders would be requested, in letter form, by the Detachment of Patients and would then be issued by the Hospital Headquarters; such orders being actually prepared in the Headquarters of the Detachment and usually signed by an Assistant Adjutant (R. 79-80).

The medical officers at the Separation Center, Fort Dix, regardless of their own opinion as to the propriety of such action could only proceed to execute such a discharge unless they wished to appeal the matter to The Adjutant General (R. 103-104).

Additional evidence of a general nature was also introduced to show the following matters. Hospital records, and portions thereof, respecting individuals were sometimes lost (R. 142, 154, 383, 387). No information respecting any Section X discharges was forwarded by the Detachment of Patients to First Air Force pursuant to a letter (Pros. Ex. 28) directing that it be done (Stipulation, R. 756). Prior to 25 June 1945 any administrative verifications, relating to Section X discharges, in the files of the Detachment of Patients were destroyed after three months (Stipulation, R. 756).

The Original Charge and Specification:

Private Matthew Vincent Marino testified, in substance, as follows: That being transferred from Sioux Falls, South Dakota, to Lincoln Army Air Field, Nebraska, he was given a delay en route and visited his home in Jersey City; That while thus at home, early in January 1945, he was suffering from a "nervous condition" and went

to the Hospital at Mitchel Field for a physical checkup; That he was given a checkup, by someone he assumed to be a medical officer, lasting about five minutes, and during it or immediately thereafter he was directed by someone, believed by him to be an officer, to report to the Medical Motor Pool where he was assigned duty as an ambulance driver; That he continued such duty for "two or three weeks," during which period his "nervous condition" continued but did not interfere with his work, he was not ill otherwise, and was not again examined by any doctor, nor was he ever, during his stay at the Field, admitted to the Hospital; That he was then told by "someone in the dispatcher's office" to report to the Detachment of Patients where he was given a sealed envelope and mimeographed orders, and was told to clear through "Supply," go to "Rail Transportation," and then report to Fort Dix; That accordingly he reported at Fort Dix and was sent to the Separation Center there, put on a roster, "went through the regular discharge procedure" including a physical examination by fourteen to seventeen doctors, and was then given a white discharge from the Army which, to the best of his recollection, stated it was given under the provisions of "Section X"; That he paid no one to obtain his discharge and that it came as a complete surprise to him (R. 464-483).

Shortly after Marino's arrival at Mitchel Field a TWX was sent by Major Fabbricatore, Executive Officer of the Hospital, to Marino's organization stating he had been hospitalized and requesting his service record and allied papers. Marino was transferred by the Lincoln Army Air Field to "atchd unasgd Det of Pnts, AAF Reg Sta Hosp, Mitchel Field, N. Y. as patient" (Pros. Ex. 24). There is nothing in the files of the office of the Hospital Registrar to show that Marino was ever admitted to the Hospital (R. 490). The morning report of the Detachment of Patients for the month of January 1945 shows no entry relating to Marino. The 10 February morning report shows an entry "* * * Marino, Matthew V 42 105 867 Pvt MOS-UNK Reld fr atchd and atchd unasgd this Org P 14 SO 14 Hq Lincoln Army Air Field, Neb dtd 14 Jan * * *," but this was "Deleted" by a correction entry on 12 February 1945, the latter morning report being purportedly signed by accused (R. 456-459; Pros. Exs. 22, 23). Sergeant Salomons, First Sergeant of Squadron "B" [administrative unit for assigned Hospital personnel] testified in part that Marino was not a member of that organization prior to April 1945, that he did not know who sent Marino to work at the motor pool, but that accused did not send him (R. 277, 280). The records in the office of the Adjutant of the Hospital failed to disclose that any records were initiated by any medical officer pertaining to the discharge of Marino under Section X (R. 125, 143, 147).

Miss Judith Small testified in substance: That on 26 January 1945, when she was a clerk typist in the Service Records and Special Order Request Section of the Detachment of Patients Headquarters, the accused directed her to place Marino's name on a request for orders sending

him to Fort Dix for discharge under Section X; That she could find no locator card for Marino in her office files and, assuming it had been lost, prepared a new one from his records in her files, added Marino's name to a request for orders already prepared for a man named Burke, and left the request with the Special Order clerk (R. 358-363; Pros. Exs. 25, 26); That since Marino was in the Air Corps authority for such action required a written verification from the Hospital Liaison Officer, which she was unable to find (R. 359, 388); That when she mentioned this to accused she was told he would get the written verification (R. 397); That she could not recall telling accused of the missing locator card (R. 386), but that she made a notation on the back of the new card "if any question is raised about this man see Lt. Russo" and told accused she had done so (R. 386, 398; Pros. Ex. 25); That she was going on pass the following day and such notation was made by way of a personal clearance (R. 394); That she sometimes received verifications orally but they were always confirmed shortly thereafter in writing (R. 402); That she did not know whether this verification ever arrived (R. 397).

In accordance with the Request for Orders (Pros. Ex. 26) Marino was ordered to Fort Dix for discharge under "* * * AR 615-365, WD Cir. 370, 1944, and VOCG AAF PDC per HLO * * *" by paragraph 17 of Special Order 26 purportedly signed by the accused (Pros. Ex. 27).

Captain Wolff, Army Air Forces Liaison Officer at the Hospital testified, in substance, that his records show each man processed through his office for discharge under Section X (R. 351-352); that such records fail to disclose any such processing of Marino (R. 529); and that no authority for Marino's discharge was ever given by him (R. 530).

Specification 7 of the Additional Charge:

Corporal Ralph M. Cardinale, whose home was in Newark, New Jersey (R. 291), arrived at Mitchel Field in the fall of 1944 and worked for about a month in the Payroll Section of the Headquarters of the Detachment of Patients (R. 296, 331). On 30 October 1944 a TWX was sent to his unit commander stating he had been admitted to the Hospital as a patient 29 October 1944 and requesting his service record and allied papers. On 13 November 1944 a second TWX was sent to the same addressee stating Cardinale would probably be discharged under "* * * Sec. II, AR 615-360 cma diagnosis epilepsy." Both TWX's were purportedly signed by Lieutenant Liaskos, Assistant Commanding Officer, Detachment of Patients (Pros. Exs. 9, 10). On 28 November 1944 a third TWX, signed by the accused, was dispatched to the same addressee stating:

> "Cpl Ralph M Cardinale ASN 32 573 657 to be disch from Mil SV UP AR 615-361 Pd Request orders be issued relieving EM from ASGMT your ORGN and Attch him unasgd to Det of Pnts this Sta pd end" (Pros. Ex. 11).

[Accused was found not guilty of having knowingly made a false official statement in sending this TWX - Specification 6 of the Additional Charge]. On 2 December 1944 Cardinale was assigned by his regular organization to the Detachment of Patients (Pros. Ex. 16) and was picked up on the Detachment morning report for 6 December 1944 as of 2 December (Pros. Ex. 13). The records of the office of the Registrar fail to show that he was ever admitted to the Hospital as a patient (R. 288-289). The records in the office of the Adjutant of the Hospital fail to disclose that any recommendation by a medical officer was ever made that Cardinale be discharged either under the provisions of Section X or by CDD (R. 125-126, 143, 147). During his stay in the Detachment Cardinale was never absent on account of illness and, during his duty hours, he never had an epileptic fit or was sick (R. 331-333). The Sergeant Major testified he was instructed at that time, by either the accused or Sergeant Rosenberg, to leave Cardinale's name off his personnel roster (R. 296-297). There was no record of Cardinale's processing in the office of the Liaison Officer, as was required under Section X, although he kept a record of each man so processed (R. 352).

Sergeant Wells, in charge of the Service Records Section of the Headquarters, Detachment of Patients, testified, in substance: That accused instructed him to prepare a request for orders for Cardinale's transfer to Fort Dix for discharge under Section X; that he used the regular form authority and then when the request was typed doubted its applicability and referred the matter to accused who advised him how to change it, which he did (R. 333-338; Pros. Ex. 14). Such orders were issued signed by the accused (Pros. Ex. 15).

Cardinale was called as a witness by the prosecution but, aside from a few immaterial matters, refused to testify, claiming the privilege of Article of War 24.

Specification 8 of the Additional Charge:

Private Vincent DiGiacinto, whose home was in Brooklyn (R. 407) came to Mitchel Field about November 1944. On 23 November 1944 a TWX, purportedly signed by Lieutenant Liaskos, was sent to the commanding officer, Replacement Depot No. 1, Fort George Meade, Maryland, stating:

> "UP Par 9A 615-360 request SR and AP pertaining to Pvt Vincent Di Giacinto 42137517 AGF be fwd co Det of Pnts this sta pd EM admitted this hosp 23 Nov pd Probable disp sec 2 AR 615-360 diagnosis epilepsy pd end" (Pros. Ex. 16),

in reply to which DiGiacinto was transferred to the Detachment of Patients on 2 December 1944 (Pros. Ex. 17). The morning report of the Detachment of Patients shows the following entries:

"Ending 2400 28 Nov 44: DiGiacinto, Vincent
Pvt 42 137 517 Atchd & jd fr Proper Sta. Camp
Blanding, Fla 27 Nov 1944"

"Ending 2400 5 Dec 44: DiGiacinto, Vincent
Pvt 42 137 517 MOS-UNK Reld fr atchd this
Orgn & atchd unasgd Per P 43 SO 337 Hqs Repl
Depot Ft Geo Meade, Md 2 Dec"

both signed by the accused (Pros. Exs. 18, 19). The records of the Hospital Registrar's office do not show that DiGiacinto was admitted to the Hospital 23 November 1944, but they do show an entry to the effect that he was admitted 27 November 1944, which entry was deleted the following day as "erroneous," and that he was later admitted 23 May 1945 and again 29 May 1945 (R. 419-424). During his stay at the Hospital DiGiacinto worked about six weeks (in November and December 1944) in the Service Record Section of the Headquarters, Detachment of Patients, and then two or three more weeks in the Special Order Section of the same Headquarters (R. 425-426). During these periods of work he showed no signs of illness (R. 426). The Hospital Adjutant's records fail to show that any records were initiated by any medical officer for the discharge of DiGiacinto under Section X (R. 125).

Sergeant Wells, in charge of the Service Record Section of the Headquarters, Detachment of Patients, testified, in substance, as follows: That about the first of January 1945 the accused directed him to prepare a request for orders sending DiGiacinto to Fort Dix for discharge under Section X; That when he started preparing the request he realized DiGiacinto had come to the Hospital from the Ground Forces and requested accused for the proper authority to be cited in the request; That accused appeared to read from a desk memo pad, the face of which the witness could not see, and advised him to cite as authority a TWX from the Army Ground Forces Replacement Depot No. 1, Fort George Meade, Maryland, which he did (R. 427-429, 447, 448; Pros. Ex. 20). Orders were issued pursuant to such request, and an extract of DiGiacinto's service record was prepared, both signed by the accused (Pros. Exs. 8, 21). The records of the Detachment of Patients fail to show receipt of any such TWX (R. 455).

DiGiacinto was called as a witness by the prosecution but, aside from a few immaterial matters, refused to testify, claiming the privilege of Article of War 24.

4. <u>Evidence for the defense:</u>

The Hospital's administrative operation was characterized by irregular procedure. There were instances where the names of the Assistant Commanding Officer, Detachment of Patients, and the Hospital Adjutant were signed by others without authority (R. 626-631, 641-642). If a TWX was received for authentication, stating that a patient was

hospitalized, the authenticating officer would not check to determine its verity (R. 627). Sergeant Cohen signed the accused's name on various papers, including special orders (R. 632-633). Requests were made by others, including the Registrar, Hospital Adjutant, Hospital Executive, doctors, and the Surgeon's Office, for the Detachment of Patients to send telegrams requesting service records and allied papers (R. 622-623). On occasion the Hospital Executive (Major Fabbricatore) directed the Detachment to send telegrams notifying units of hospitalization of members of their commands (R. 624-625).

There were sixteen men on duty with Squadron "B", 110th Army Air Forces Base Unit [administrative unit covering Hospital personnel as distinguished from patients] whose exact status was unknown. These included Marino, Cardinale, and DiGiacinto. A list was kept in the orderly room of Squadron "B" and the group was generally referred to as "Fabby's fair haired boys" or "fast shuffles" by reason of the orders and activities of Major Fabbricatore affecting them, although the witnesses were unable to state who originally sent the three men here in question to the Squadron (R. 670-677, 780; Def. Ex. J). The Squadron Commander took this matter up with Major Fabbricatore on several occasions, and, on one occasion with the Surgeon, but no corrective action was taken (R. 680-693).

Ambulatory convalescent patients were assigned to duties throughout the installation (R. 634-639).

Mr. Ira Gullickson, "civilian expert questioned document examiner," testified, in substance, that the signature of the accused was genuine as it appeared on Exhibits 4, 8, 11, 15, 18, 19, 21, and 23, and that the purported signature of the accused as it appeared on the following Exhibits was not genuine: 13, 27, B, C, D, and E; That Exhibits F and G (purportedly both signed by Captain Manrow, Hospital Adjutant) were signed by two different persons; That as to documents purportedly signed by Lieutenant Liaskos, Assistant Commanding Officer, Detachment of Patients, Exhibits 3 and 10 were written by the same person and 9 and 16 by someone else, none being executed by the accused (R. 697-703).

Testimony of the accused: Having been first duly advised of his rights in the premises the accused elected to testify and twice took the stand, first to testify only as to the genuineness of what appears to be his signature on documents in evidence and, secondly, to testify generally as to all matters referred to by the Specifications. In the latter instance he was allowed to more or less tell the story as he wished, which resulted in a considerable mixture of argument with factual statements. Hereinafter the Board has attempted to delete from its summary that portion of such testimony in the nature of argument.

His name as it appears signed on the following exhibits is his

genuine signature: 4, 8, 11, 15, 18, 19, 21, A-1, A-2, A-3, A-4, A-5; on the following Exhibits such purported signature is not genuine: 13, 23, 27, B, C, D, and E (R. 610-617).

As to administrative procedure: Morning reports were signed, if by the accused, as a matter of routine, accuracy depending upon the drafting clerk because of the large number of entries (R. 709). He never authorized anyone to sign his name on morning reports and he did not know of anyone doing so (R. 774-775). He signed them when present but did not check back to determine who signed them when he had not been present (R. 787-789).

His office included the following sections: Sergeant Major's Section; Special Order Section; Discharge (CDD) Section; Special Order Request Section; Service Records Section; File Section; Correspondence Section; Payroll Section; and Headquarters Section. There were about 55 or 70 enlisted men all under his control with one officer assistant (Lieutenant Liaskos). There was a very high turnover of enlisted personnel except for Section Chiefs (R. 780). So far as he knew all men in his office presumably patients were actually so (R. 737). About fifteen to twenty men a day were discharged from the Detachment of Patients on Special Orders (R. 784); about 10 a week being Section X and CDD cases (R. 810).

Requests for the sending of TWX's to obtain service records and allied papers originated on various occasions with the Registrar's Office, the Surgeon's Office, the ward doctors, or in his own office, and were often oral (R. 722-724). If any diagnosis as to a patient appeared in the records of his office it could only have come from the medical department or the Registrar (R. 732). Information upon which to base TWX's prepared in his office was usually taken from the Detachment files. He assumed the accuracy of such messages and made no independent personal check as to the statements therein contained (R. 790-792). Separation of the offices of Detachment and Registrar made checking difficult (R. 793). He trusted and still trusts the men who were in his office (R. 787). No one was authorized to sign his name to special orders, TWX's, morning reports, or any other documents other than passes (R. 713-714). On at least one occasion his name was signed by another, without authority (R. 714).

Section X cases, generally, were routine administrative matters in which his job was simply to execute orders in compliance with (in the case of Air Force Personnel) instructions from the Hospital Liaison Officer (R. 711-712). There was no special section in his office set up to take care of Section X cases and they "cleared the whole office" (R. 796). The Hospital Liaison Officer had given him oral instructions by phone but he could not say that it was so done as to any Section X case (R. 738-739). "Colonel Morehouse [Surgeon]

gave me verbal instructions on numerous occasions in reference to getting particular men out on orders. I cannot give a definite answer on whether he ever called me in reference to men on Section X. * * * it was the policy of the Hospital to expedite disposition of patients. Therefore it is to be understood that there were many verbal orders given by phone. In case of discharges, Section X's, on occasion we would receive verbal orders to place the men on orders. I don't remember specific cases." Such verbal orders "were always followed up by a written verification" (R. 740-742). He received at least one such verbal instruction "from the Surgeon's office" (R. 740). Neither he, nor the personnel of his office would question such an oral order from Major Fabbricatore (Hospital Executive Officer), R. 785-786, 799). When he received any such telephone instructions he made a note on his memo pad and orally directed the proper office personnel to take the necessary administrative action. Such orders were always with authority but he has no clear recollection of each case and the records which would show such authority have been destroyed (R. 786) since he was relieved from command (R. 792). Written verifications came to his office but not to his personal attention and he assumed they came in each instance since he was never advised to the contrary by the personnel of his office (R. 808-811).

In his opinion one of the reasons for distribution of copies of special orders was to provide a check by each interested office as to the correctness of their contents (R. 716). His office was inspected monthly by the Base Inspector General and, three times during his tour of command, by a representative of the Inspector General's Department, and in each instance only minor discrepancies were noted (R. 794-795).

Particularly as to the Specification of the Charge: He did not know and never inquired as to whether Marino was in truth a patient (R. 758). He has no recollection of any conversation with Miss Small respecting the Marino discharge, but does not deny it may have taken place as she stated (R. 709-711, 757). He did not sign the special order transferring Marino for discharge (Pros. Ex. 27) nor authorize anyone to sign his name to it (R. 712-713). The morning report entry of 12 February 1945 (Pros. Ex. 23) was only a routine correction, its correctness depended upon the office clerks who prepared it, and it was not signed by him (R. 708-709). The special order sending Marino for discharge (Pros. Ex. 27) was a routine type order and was not signed by accused (R. 712-713).

Particularly as to Specification 7 of the Additional Charge: The TWX asking for Cardinale's assignment (Pros. Ex. 11) was a routine follow up based on office records including two previous TWX's (R. 721-726, 732; Pros. Exs. 9, 10). He did not intend it to deceive (R. 734-735). He has no recollection of discussing the Cardinale order with Sergeant Wells but does not deny the truth of Sergeant Wells' testimony (R. 733, 769). It would not be uncommon for a man with epilepsy to be discharged under Section X (R. 727, 737-738). Accused would have no personal

knowledge of Cardinale's physical condition, which was the duty of the examining doctor (R. 734-736). He did not know Cardinale was not a patient or that he was working in the Detachment Office (R. 762-763).

Particularly as to Specification 8 of the Additional Charge: "I do not recall giving specific instructions to Sergeant Wells in the case of DiGiacinto, and I will so state, that if I had given these instructions to Sergeant Wells, I did have the authority" (R. 743, 783). A man might be considered for CDD by reason of epilepsy and then be recommended for discharge under Section X (R. 737-738). If DiGiacinto worked in his office he would have assumed him to be a patient (R. 737).

He never received the 7 December 1944 letter of instructions from the First Air Force (Pros. Ex. 28) and made no reports as mentioned therein (R. 754-755).

He has known Major Fabbricatore since September 1940, serving with him at that time when both were enlisted men. They were friends but never "close." There is no basis of truth in any suggestion of any fraudulent relation between them respecting the discharge of these or any other men (R. 728-729, 782). He was never solicited by anyone, officer or civilian, to procure such discharges and he in no way profited by them (R. 729-731, 777). His actions in the matter of the discharges mentioned in the Specifications were simply administrative acts and he had no personal interest in them, financial or otherwise (R. 729). He had heard of "Fabby's Boys" (R. 781) but he wrote the letter concerning the transfer of some of them to Squadron "B" [none of whom are mentioned in these Specifications] by order of Major Fabbricatore (R. 784, 793, 798-799; Pros. Ex. 29).

The accused enlisted in the regular army 28 August 1940, at the age of 23, as a specialist - laboratory technician and bacteriologist - and was assigned to Mitchel Field. He had taken a specialized course at a technical college licensed by the State of New York. Within six months he was in charge of the Laboratory at Mitchel Field. He went to Camp Edwards, Massachusetts, with a cadre to form a new hospital, returned and was first sergeant of the Medical Detachment for about six months when he was accepted for OCS; attended school at Carlisle Barracks, Pennsylvania, was graduated top third in his class, and assigned to March Field, California, After about 10 days he was reassigned to a desert station at Tonapah Air Field, Nevada, where he was Personnel Officer and Adjutant of the Regional Hospital and where he remained 18 months. He applied for pilot training and was sent to Santa Ana Air Base, California, but was disqualified on some aptitude tests. He returned to Tonapah and applied for and was appointed to the Adjutant General's School, Fort Washington, Maryland. After graduation he requested and was assigned to Mitchel Field to be closer to his father's home in Floral Park. His father died in October 1944. He received his commission 27 February 1943. He was born in

Richmond Hill, approximately 12 miles from Mitchel Field. His father was a builder and contractor. His family and he has always been of good character. He has never been in conflict with the law. There was a divorce by the accused. He requested 15 days leave of absence to go to Nevada where he stayed four weeks in a hospital for gastric disturbance, until his divorce proceedings were completed, but hospitalization was only coincidental. He has had four or five efficiency ratings of "Superior" and the remainder were "Excellent." However, after he was in confinement he received one rating of "Very Satisfactory." In February 1945 he was found physically disqualified for overseas duty because of duodenal ulcers and asked if he wanted to be let out of the Army but he requested to remain in the service until the end of the emergency, which request was approved (R. 743-754, 760-762).

5. Rebuttal evidence for the prosecution:

Corporal Hutchinson, of the Special Order Section, Headquarters, Detachment of Patients, testified, in substance: That he had signed the accused's name to Special Orders without authority; That he advised the accused, on one occasion, of such action, but that the accused said nothing to him about it (R. 823); That Corporal Brooks, Corporal O'Hara, and Sergeant Cohen had also signed the name of accused to various documents and, in the case of Cohen, to correspondence, special orders, morning reports, and passes (R. 823).

Corporal Brooks, of the Discharge (CDD) Section, Headquarters, Detachment of Patients, testified, in substance: That he signed accused's name to a morning report entry without authority, advised accused of such action, and received no reply (R. 826); That Sergeant Cohen signed "many papers" with accused's name, and "I am sure" accused knew of such action (R. 824-825).

Corporal O'Hara, Clerk of the Morning Report Section, Headquarters, Detachment of Patients, testified in substance: That he was authorized to sign, and did sign the accused's name to the morning reports if the accused were not present; That when he so signed he attempted to make it look like a genuine signature; That he probably signed Pros. Ex. 13; That Sergeant Cohen also so signed the morning report and Corporal Jacobs was authorized by the accused so to do (R. 827-829); That he never called the accused's attention to occasions where he signed the morning report, and that his authority so to sign was verbal (R. 830).

Sergeant Cohen, Sergeant Major, Headquarters, Detachment of Patients, testified, in substance: That he had authority to sign "all papers * * *, everything within the routine of the office, such as discharges, certificates, morning reports, service records, extracts, correspondence, passes, furloughs * * * special orders * * * TWXs"

with the name of accused whether the accused were present or absent at the time (R. 831-832); That his writing naturally resembles that of accused; That he had so signed accused's name hundreds of times and such occasions arose almost every day (R. 833-835).

Major Fabbricatore, at the time of the alleged offenses Executive Officer of the Hospital, testified, in substance: That respecting the transfer of Tafuri as alleged in Specification 5 of the Additional Charge "I am the officer fully responsible for Tafuri's retention here at Mitchel Field - the status of attached unassigned" (R. 838-839); And that he never attempted to "frame" the accused (R. 843). Upon being asked certain questions by the Trial Judge Advocate respecting them, the court ruled "that the witness need not answer any question concerning his having had anything to do with the discharge of the following named enlisted men: Private Vincent DiGiacinto, Private Ralph M. Cardinale, and Private Matthew V. Marino" (R. 843). The witness chose to avail himself of Article of War 24 and refused to answer such questions (R. 839-845).

6. Discussion.

Pleas and Motions:

The Charge was preferred against the accused 26 May 1945, the report of investigation is dated 25 July 1945, and a copy of the Charge Sheet was served upon the accused 5 July 1945, although the statement of such service on the Charge Sheet shows date of 10 October 1945. Additional Charge I, with 12 Specifications, and Additional Charge II (appearing in the same Charge Sheet) with 4 Specifications, were not dated, but the affidavit of the accuser is dated 8 August 1945. The report of investigation is dated 25 September 1945, wherein it was recommended that Specifications 7, 10, and 11 of Additional Charge I, and Specifications 1, 3, and 4 of Additional Charge II be dropped. When served upon the accused 10 October 1945 the Additional Charge Sheet contained an "Additional Charge" with 8 Specifications; the Additional Charge II with its Specifications and the Specifications originally numbered as 5, 7, 11, and 12 of Additional Charge I having been crossed out.

The accused was placed in administrative restriction 27 April 1945, confined 12 May 1945, released from confinement and placed in administrative restriction 4 October 1945, and released from administrative restriction 19 October 1945.

At the commencement of the trial 21 January 1946, and prior to arraignment of the accused, a nolle prosequi was entered as to Specifications 1, 2, 3, and 4 of the Additional Charge.

Upon arraignment counsel for the accused interposed "a plea in bar of trial, on these grounds:

"1. That there have never been that thorough and impartial investigation of these Charges as is required by the 70th Article of War. That is, in effect, a plea to the jurisdiction.
"2. That there has been a condonation by proper authority of the offenses specified against this accused, principally by reason of the restoration to duty of this accused, and
"3. The abuse of military power exercised upon this accused over a considerable period of time, and, as claimed by us, in violation of the Articles of War * * *.
"I have made those pleas, and I should like to be permitted to introduce evidence in support of them" (R. 19-20).

This plea was overruled by the court after argument by counsel but without affording accused the opportunity to introduce evidence. For the reasons hereinafter stated the Board refrains from expressing any opinion as to the merits of such ruling.

Following the action of the court on the plea in bar the accused "demurred" to the Specification of the Charge on the ground that it failed to state an offense. A reasonable question arises not as to whether <u>any</u> offense is stated, but as to whether the language of the Specification is sufficient to charge the accused with doing such acts with guilty knowledge and intent. The court overruled the "demurrer" and the trial continued with all parties proceeding on the theory that such Specification was being construed to include the element of guilty knowledge and intent the same as if it had been drawn in the language of the other two Specifications of which the accused was found guilty. Without determining that such an interpretation was justified, for reasons that will hereinafter appear this Board has formulated its opinion upon the basis of the same broad construction of that Specification as was accorded it by all parties through the trial.

<u>Sufficiency of Proof:</u>

The accused was found guilty of knowingly, wrongfully and without authority causing Marino, Cardinale, and DiGiacinto to be transferred for discharge as alleged. The elements of each offense are the same (except perhaps as to that alleged in the Specification of the Charge as hereinabove noted) and the essence of each is the guilty knowledge and fraudulent intent of the accused.

Direct evidence proves that in each instance the transfer was made for the purpose of discharge under the purported authority of Section X, that each transfer was directed by the accused, and that such transfers were each without proper authority. It would then appear that the sole question to be determined is whether or not there is sufficient substantial evidence to prove that the accused participated in such transfers with guilty knowledge and an accompanying fraudulent intent.

Obviously such proof can only be by inferences, reasonably drawn from facts established in evidence. In abstracting the record for this opinion the Board has endeavored to call attention to all basic evidentiary matters. Such a case demands a detailed examination of every scintilla of evidence, its evaluation for inference, and an ultimate weighing of the results in their entirety. It is probable that some such factors appearing in the record of trial are not clearly reflected in the necessarily abbreviated synopsis of evidence hereinabove published. Any such omissions in no way indicate a failure by the Board to give such facts full consideration in arriving at its conclusions, but are purely in the interests of brevity.

Circumstances tending to infer guilt:

The accused was instrumental in getting Cardinale transferred to the Detachment of Patients since such transfer was apparently in response to a TWX sent by him although it should be noted that accused was acquitted (Specification 6 of the Additional Charge) of sending such a message with any criminal intent or knowledge. The records of the Registrar's Office fail to show that Marino, Cardinale, or DiGiacinto were ever admitted to the Hospital prior to the alleged discharge transfers, and there is no evidence to show any of them were, in fact, so admitted. Such records were available to the accused for check purposes at the time these transactions took place. The records of the Adjutant's office fail to show that Marino, Cardinale, or DiGiacinto were ever recommended for discharge by a medical officer as was required in such cases. The records of the Liaison Office fail to show that such transfers were authorized for any of these men, as was required (as to Air Force personnel) in such cases. The accused personally instructed Miss Small to prepare the necessary office papers for Marino's transfer and, when his attention was called by her to the lack of written authority from the Liaison Office, advised her he would see that it was obtained. The accused personally instructed Sergeant Wells to prepare the necessary office papers for the transfer of Cardinale, who had worked in accused's office about a month. Upon being questioned by Sergeant Wells as to the proper citation of authority to be made in the request and order accused advised him how to word it. DiGiacinto worked for about two months, prior to his transfer, in accused's office and it is evident , from his signature on morning report entries concerning the man, that accused on at least one occasion had reason to check his status. The accused personally instructed Sergeant Wells to prepare the necessary office papers for DiGiacinto's transfer. Upon being reminded by Wells that DiGiacinto was a Ground Forces soldier accused, apparently reading from his desk memo pad described a TWX from a Ground Forces installation as authority to be cited in the transfer orders. The records of the Detachment of Patients fail to show receipt by that office of any such TWX

Superimposed upon all these items is the duty of the accused, as

a responsible officer, to check the verity of his official acts.

Circumstances tending to infer innocence:

It is quite apparent from the evidence that virtually every administrative function in the Hospital operated with looseness and inefficiency. Records were lost. There was no proper cross check of official action within or between offices. There was a most unmilitary concept of command responsibility. Soldiers signed the names of their officers to documents without authority. Obviously a great deal of such looseness was condoned by higher authority as being in the interests of speedy action, but it nonetheless existed and created a situation in which strict compliance with regulations and procedure appears to have been more the exception than the rule. Administrative actions requiring written authority were frequently taken based on oral instructions only. To be sure in such instances the written verification apparently usually was executed later but there appears to have been no check system provided to insure such execution. The offices of Registrar and Detachment were many miles apart and there seems to have been a prevalent opinion among Hospital administrative officers that their responsibilities began and ended at their office doors without regard to how strongly a check with other sections might have been indicated by the facts. Such condition would appear to have been largely brought about by Major Fabbricatore, Executive Officer of the Hospital, whose instructions, proper or improper, oral or written, seem to have been followed with very little if any question. He undoubtedly exercised officially a direct control over all officer and enlisted personnel of the office of the Detachment of Patients while accused commanded that organization.

Marino, Cardinale, and DiGiacinto were all members of a group of some 16 enlisted men at the Hospital in questionable status known generally among the regular Hospital personnel as "Fabby's fair haired boys" or "fast shuffles" by reason of the activities of Major Fabbricatore in their behalf.

As a result of such activities Major Fabbricatore was tried by general court-martial and found guilty (CM 307119, Fabbricatore (1946)) of wrongfully causing issuance of a furlough (1 Specification), wrongfully causing false official reports to be made (4 Specifications), wrongfully causing transfers of soldiers to enable them to evade duty (5 Specifications), wrongfully causing soldiers to be transferred for discharge (2 Specifications similar in nature to those found in this case), acceptance of a bribe to effect an unauthorized transfer (1 Specification), and conspiracy to defraud the United States by effecting unauthorized transfers (4 Specifications). Of the twelve enlisted men who benefited by such criminal actions (including Marino) seven were on the list of men commonly known as "Fabby's fair haired boys" (Def. Ex. J). In Fabbricatore's case neither Cardinale nor DiGiacinto were mentioned in any of the Specifications of which Fabbricatore was found guilty.

From its outset it is apparent that this case is an outgrowth of the same general investigation of administrative irregularities at the Hospital which resulted in the Fabbricatore trial. Prior to accused's trial charges and specifications, of the same nature as those upon which he was ultimately tried, were preferred against him whereby certain acts were alleged affecting a total of nine men, each of whom appears on the list of "fair haired boys." Seven of these men were likewise involved in charges and specifications, similar in nature, on which Fabbricatore was tried. Prior to the arraignment of accused all Specifications other than the ones upon which he was here tried were either dropped or nolle prossed; in several instances because it appeared that Fabbricatore was in fact the guilty party. During this trial Fabbricatore was called to the stand by the prosecution and admitted responsibility for the transaction involved in Specification 5 of the Additional Charge [of which the court found accused not guilty]. Fabbricatore was not charged with implication in the discharge transfers of Marino, Cardinale, and DiGiacinto, and when questioned in this trial about those men he availed himself of the protection of Article of War 24 and refused to testify.

Such circumstances raise a strong implication that as to "Fabby's fair haired boys" all unauthorized administrative maneuvers were guided by Major Fabbricatore. No substantial evidence appears in this record to show any collusion or conspiracy between the accused and Fabbricatore; or any relationship other than an ordinary, but not "close" friendship, and that created by virtue of their respective official positions. We do not wish to imply that conspiracy or collusion are essential elements of the offenses as here charged against the accused, since he could have acted alone with an independent criminal knowledge and intent in each case, but we are of the opinion that such individual action appears unlikely in view of all of the circumstances.

It is also noteworthy that from the entire record it is impossible to find any motive which might infer criminality in the accused's actions. Again, motive is not an essential element of proof but its lack, even by implication, certainly tends to infer innocence.

General Discussion:

From a careful consideration of the record of trial in its entirety it might be said that a suspicion of guilt is raised, but we are forced to the conclusion that there does not appear therein that substantial competent evidence necessary to sustain the findings of guilty (Footnote, Article of War 50½, App. 1, MCM, 1928, page 216; par. 78a, MCM, 1928, page 62). In view of our opinion on the merits we have foregone any determination in the matter of special pleas or errors in the record of a minor nature. This case was exceptionally well tried and the record is singularly free from error. The Board, in arriving at its conclusions has considered the brief and oral argument presented by Ansell and Ansell, civilian counsel for the accused during and after the trial.

7. The accused is 29 years old and is divorced. War Department records show he entered the service 28 August 1942 and served as an enlisted man (attaining a Staff Sergeant's rating) until 27 February 1943 when he was commissioned a Second Lieutenant in the Army of the United States upon completion of the Officer Candidate course of the Medical Field Service School. He was promoted to the temporary rank of First Lieutenant on 28 August 1944.

8. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Edward W. Harvey, Judge Advocate.

Edward T. Harrison, Judge Advocate.

Edward R Taylor, Judge Advocate.

JAGN-CM 312080 1st Ind
WD, JAGO, Washington 25, D. C.
TO: Commanding General, First Air Force, Mitchel Field, New York

1. In the case of First Lieutenant Michael T. Russo (O-1535278), Medical Administrative Corps, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, and for the reasons stated recommend that the findings of guilty and the sentence be vacated.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, 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 312080).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

CM 312092
SPJGQ

APR 25 1946

UNITED STATES v. Privates First Class LEWIS R CURREY (39467822), Headquarters Company, 3rd Battalion, 359th Infantry, 90th Infantry Division, and THOMAS L. PADGETT (34056787), Company D, 28th Infantry, 8th Infantry Division, and Privates DEARRION M. JACKSON (33654239), 4003rd Quartermaster Truck Company, EMITTE P. JIMMERSON (34403303), 120th Infantry, 30th Infantry Division, TONY J. VASATURO (32887114), Company G, 134th Infantry, 35th Infantry Division, and CHARLES WILLIAMS (38485037), 240th Port Company, 494th Port Battalion	NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS Trial by G.C.M., convened at Cherbourg, France, 13-17 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. U. S. Penitentiary, Lewisburg, Pennsylvania.

HOLDING of the BOARD OF REVIEW
DANIELSON, BURNS AND DAVIS, Judge Advocates

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

2. Accused were tried upon the following charges and specifications:

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

Specification 1: (Disapproved by the confirming authority).

Specification 2: In that Private First Class Lewis R. Currey, Headquarters Company, 3rd Battalion, 359th Infantry, did, at or near Isigny, France, on or about 18 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Heauville, France, on or about 26 October 1944.

Specification 3: In that Private Dearrion M. Jackson, 4003rd Quartermaster Truck Company, did, at or near La Cambe, France, on or about 13 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Vauville, La Reu, France, on or about 23 October 1944.

Specification 4: In that Private Charles Williams, 240th Port Company, 494th Port Battalion, did, at or near La Cambe, France, on or about 9 August 1944, desert the service of the United States and did remain in desertion until he was apprehended at or near Vauville, France, on or about 26 October 1944.

Specification 5: In that Private First Class Thomas L. Padgett, Company D, 28th Infantry, did, at or near La Cambe, France, on or about 13 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Heauville, France, on or about 27 October 1944.

Specification 6: In that Private Emitte P. Jimmerson, 120th Infantry, did, at or near La Mercerie, France, on or about 27 July 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Heauville, France, on or about 26 October 1944.

Specification 7: In that Private Tony J. Vasaturo, Company G, 134th Infantry, did, at or near Le Mans, France, on or about 16 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Heauville, France, on or about 26 October 1944.

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

Specification 1: In that Private First Class Lewis R. Currey, Headquarters Company, 3rd Battalion, 359th Infantry, Private Dearrion M. Jackson, 4003rd Quartermaster Truck Company, Private Charles Williams, 240th Port Company, 494th Port Battalion, Private Emitte P. Jimmerson, 120th Infantry, and Private First Class Thomas L. Padgett, Company D, 28th Infantry, acting jointly, and in pursuance of a common intent, did, at or near Depot Q-171, Cherbourg, Manche, France, on or about 22 September 1944, knowingly and willfully apply to their own use and benefit, clothing of a value of more than $50, property of the United States, intended for the military service thereof.

Specification 2: In that * * *, acting jointly, and in pursuance of a common intent, did, at or near Depot 0600, Reauville la

Bigot, Manche, France, from on or about 23 September 1944 to on or about 22 October 1944, knowingly and willfully apply to their own use and benefit, subsistence rations of a value of more than $50, property of the United States, intended for the military service thereof.

Specification 3: In that * * * and Private Tony J. Vasaturo, Company G, 134th Infantry, acting jointly, and in pursuance of a common intent, did, at or near Couville, Manche, France, from on or about 10 October 1944 to on or about 27 October 1944, knowingly and willfully apply to their own use and benefit, subsistence rations of a value of more than $50, property of the United States, intended for the military service thereof.

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

Specification 1: In that Private First Class Lewis R. Currey, Headquarters Company, 3rd Battalion, 359th Infantry, Private Dearrion M. Jackson, 4003rd Quartermaster Truck Company, Private Emitte P. Jimmerson, 120th Infantry, and Private Charles Williams, 240th Port Company, 494th Port Battalion, acting jointly, and in pursuance of a common intent, did at or near Senoville, Manche, France, on or about 17 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Emile Padet, a human being, by shooting him with a gun.

Specification 2: In that * * * acting jointly, and in pursuance of a common intent, did, at or near Senoville, Manche, France, on or about 17 October 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Bertha Padet, a human being, by shooting her with a gun.

Each accused pleaded not guilty to all charges and specifications against him. Two-thirds of the members of the court present at the time the votes were taken concurring as to Jackson, Jimmerson, Padgett and Vasaturo, and all of the members of the court present at the time the votes were taken concurring as to Currey and Williams, each accused was found guilty of all charges and specifications against him. Evidence was introduced of two previous convictions of Vasaturo, both by special court-martial, one for absence without leave for one day and for willful disobedience of the lawful order of a non-commissioned officer in violation of Articles of War 61 and 65 respectively, and one for absence without leave for eight hours and for wrongfully making a military pass in violation of Articles of War 61 and 96 respectively. No evidence of previous convictions was introduced as to the other accused. Three-fourths

of the members of the court present at the time the votes were taken concurring, accused Jackson, Jimmerson, Padgett and Vasaturo were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. All members of the court present at the time the votes were taken concurring, accused Currey and Williams were each sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Normandy Base Section, Communications Zone, European Theater of Operations, approved the sentences as to each of the accused, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½ as to Jackson, Jimmerson, Padgett and Vasaturo, and forwarded the record of trial for action under Article of War 48 as to Currey and Williams. The confirming authority, the Commanding General, United States Forces, European Theater, disapproved the finding of guilty of Specification 1 of Charge I, confirmed the sentences as to both Currey and Williams, but commuted each to dishonorable discharge from the service, forfeiture of allpay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the U. S. Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentences pursuant to Article of War 50½.

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

a. Specification 2 of Charge I: The morning report of the 446th Replacement Company, 85th Replacement Battalion, 19th Replacement Depot, for 18 September 1944, shows accused Currey from duty to absent without leave (R 246, Pros. Ex. 3). In a written pre-trial statement he admitted that he was transferred from a stockade to the 19th Replacement Depot and that after being there about a week he "walked out", intending "to roam around" and then to return to his unit; and that he was apprehended in a German dugout on 26 October 1944 by an agent of the "CID" (R 286, Pros. Ex. 36). Second Lieutenant Charles E. Brill testified that he apprehended Currey in a dugout in a mine field near Heauville, France, on the evening of 26 October 1944, and placed him in arrest (R 107-108).

b. Specification 3 of Charge I: On 25 July 1944, accused Jackson was admitted to the 4th Convalescent Hospital, then near La Cambe, France (R 20, 22). On 13 August 1944 he was absent without permission and on that date was listed as "AWOL" in the hospital admission and disposition report (R 22-24, Pros. Ex. 4B). By stipulated testimony it was shown that he was apprehended in uniform near Vauville, France, on 23 October 1944 by a military police officer (R 24-25, Pros. Ex. 5). In a voluntary pre-trial statement, he admitted that he "took off" from the hospital, where he was receiving

treatment for syphilis, because he did not want to be sent to the front (R 287-288, Pros. Ex. 37). In a subsequent pre-trial statement, he said that "sometime in the middle of August" he was picked up by the military police and was held at a stockade for about eight days, after which he escaped by jumping from a truck, desiring to get back to his unit. When he could not locate his unit, he intended to stay away until he was caught (R 287-288, Pros. Ex. 38).

c. Specification 4 of Charge I: The morning report of Williams' organization shows that on 9 August 1944 he absented himself without leave (R 25, Pros. Ex. 6). On 26 October 1944, after a pursuit by automobile, he was apprehended and arrested by an agent of the "CID", at which time Williams carried a .38 caliber revolver and a false, duplicate, officers' "indentification card" (R 92, 106-107, 109-111, Pros. Ex. 30).

In a voluntary pre-trial statement, Williams admitted leaving the hospital near La Cambe, France, on or after 18 July 1944, subsequently being apprehended by the military police and, on 26 August, escaping from a truck while enroute to a replacement depot (R 284, Pros. Ex. 31).

d. Specification 5 of Charge I: Accused Padgett was admitted to the 4th Convalescent Hospital, near La Cambe, France, on 21 July 1944, and on 13 August 1944 he was absent without permission and was listed in the hospital admission and disposition report as "AWOL" (R 22-24, Pros. Ex. 4A). On 26 October 1944 he was apprehended near Heauville, France (R 85-87).

In a voluntary pre-trial statement dated 1 November 1944, Padgett stated that he left the hospital about 27 July and that he did not intend to return to his unit. He also stated that he was apprehended by the military police sometime in August but escaped from them by jumping from a truck (R 286, Pros. Ex. 35).

e. Specification 6 of Charge I: The morning report of Jimmerson's organization shows that on 5 August 1944 he was entered as "MIA" as of 27 July 1944, and that on 2 January 1945 such entry was corrected to read "fr Dy to AWOL 27 July 44" (R 317, Pros. Ex. 39). By stipulation, the words "La Mercerie" were inserted in the Specification to show the place at which the absence was alleged to have occurred (R 316). Jimmerson was apprehended in a dugout on the night of 26 October 1944 (R 107-108).

In a voluntary pre-trial statement he admitted that he left his company about 24 July because his "nerves were bad" and he "couldn't stand the shelling". He also stated that about the middle of August he was picked up as a straggler, but escaped by jumping from a truck a few days later (R 286, Pros. Ex. 33).

f. Specification 7 of Charge I: The morning report of Vasaturo's organization shows that he absented himself without leave on 16 August 1944 (R 246-247, Pros. Ex. 7). He was apprehended on 26 October 1944 at Heauville, France (R85-87). In a voluntary pre-trial statement, he stated that he left his organization at St. Lo on 19 July 1944, was returned to it the same day, and left it again 10 days later near Le Mans, France, because he was afraid and could not stand to see men die (R 286, Pros. Ex. 34).

g. Specifications of Charge II: The property officer of Q 171, a quartermaster depot in the area of Cherbourg, France, identified a requisition, dated 22 September 1944, upon which certain named items of clothing and equipment were issued to a "representative" of Company A, 778th Engineer Battalion. The requisition appears to have been made by "Robert H. Williams 2nd Lt, C. E. Supply Officer" and to have been approved by "R. M. Brand Capt, C. E. Commanding" (R 28-29, Pros. Ex. 8). Judicial notice was taken of the prices of such items as appear in Army Regulations 30-3000, 31 August 1943, showing the total value of the items listed in the requisition to be more than $50.00 (R 50).

The ration officer of Depot 0600 at Reauville, la Bigot, France, testified that his depot issued 100 field rations, valued at approximately 67 cents each, daily from 23 September to 18 October 1944, and 150 rations per day thereafter until 22 October, to two colored officers who came in jeeps, for the 778th Engineer Battalion. One of the officers, who drew most of the rations, was identified as accused Jackson, a second lieutenant(R 32-34).

The supply officer of the 811th Tank Destroyer Battalion, then located near Couville, Manche, France, testified that from 10 to 28 October 1944, he drew 96 rations per day for the 445th Engineer Battalion. The rations were drawn through 27 October by two American soldiers who stated they were from the 445th Engineers (R 37-41). One of the soldiers was identified as Padgett (R 41). A ration return of "445 Eng. Bn." for "11/10/44", which was obtained from Depot Q-171A near Cherbourg, for 96 "B" rations, is signed by "Capt. John H. Dix" (R 88, 91, Pros. Ex. 28). A crude cardboard "temporary identification" card, dated 5 October 1944, bearing the name "Capt. J. H. Dix 445 Eng. Bn.", was taken from Currey's wallet following his apprehension (R 91, Pros. Ex. 29). It was shown that no 778th or 445th Engineer Battalion appeared on the station list of all engineer troops within the geographical limits of Normandy Base Section between 18 August 1944 and 8 March 1945 (R 30-32).

Accused Currey and Jimmerson were apprehended in a dugout on the night of 26 October 1944 (R 108), and a few hours later Padgett and Vasaturo were arrested as they each drove up to the dugout in jeeps (R 85-87). Inside the dugout were found six double bunks, United States Army blankets, clothing and rations (R 87), and a signed carbon copy of the requisition evidenced by

Prosecution's Exhibit 8, which original requisition had been presented to depot Q 171 in September (R 87-88, Pros. Ex. 27). A purported duplicate of an officer's "indentification card" for "William H. Cabe 1st Lt., C/E", certified by "R. L. Brand Capt., C/E" was taken from Williams' wallet (R 109-111, Pros. Ex. 30).

Voluntary pre-trial statements relating in part to Charge II were made by each accused. Each was limited by the law member as evidence against only the accused making it (R 291-292).

Williams admitted that about 1 September 1944 he joined several other soldiers, later bought some first lieutenant's bars and engineer insignia, and at the suggestion of another soldier, he went to Depot 171 and applied for rations for 96 men in the name of "778 engineers". He started drawing rations the next day, and after about a week they began selling rations to the French, receiving about 60,000 francs from such sales. About 10 September Williams requisitioned and received clothing for six men at "Q-171" in Cherbourg, and also bought officers' clothing to wear. They "split forces" about 1 October and began drawing rations for 150 men. Their "organization" had four stolen jeeps and a weapon carrier (R 284, Pros. Ex. 31).

Jimmerson admitted that shortly after 1 September he drove Williams to the Couville quartermaster dump to apply for rations in the name of "778 Engineers". Early in October they began drawing rations for the 445th Engineers, and from 9 to 26 October they drew "B" rations from the "811 T.D. Bn." Jimmerson helped to sell two loads of rations to French people in Vauville for 9600 francs (R 285, Pros. Ex. 33).

Padgett admitted that from about 12 or 13 September to 5 October 1944 he and other soldiers drew rations for 96 men in the name of "778 Engineers", and on 9 October they began to draw "B" rations daily for 92 men. Padgett sold two loads of the rations for about 8500 francs and split the money with his comrades (R 286, Pros. Ex. 35).

Currey admitted wearing captain's bars shortly after meeting other soldiers in Carentan, deciding to draw rations for a unit, and drawing rations daily for 96 men in the name of "778 Engineers", until the group "split up" on 8 October, after which they drew daily rations for the 445th Engineers until 26 October. He admitted taking the requisition, signed "Capt R. M. Brand" to "QM 171" in Cherbourg, and also splitting money received for two loads of rations he and his friends sold to the French people (R 286, Pros. Ex. 36).

Jackson admitted wearing the bars of a second lieutenant, and that part of the requisitioned clothing was for him. He took his turn at drawing the rations for 98, and later for 150, men at "QM 0-600". He and another soldier lived with some French girls, who sold some of the rations (R 288, Pros. Ex. 37).

Vasaturo did not join the other soldiers until 9 October 1944, after which they drew rations from the "811 T D Bn." for 92 men each day. He received his share of nearly 8700 francs for which two loads of the rations were sold (R. 286, Pros. Ex. 34).

h. Specifications of Charge III: On Thursday morning, 19 October 1944, the dead bodies of Emile and Bertha Padet, husband and wife, aged 22 and 21 respectively, were discovered lying on the floor of a bedroom of their home in Senoville, France. The discovery was made by a Frenchman who had knocked at the house the previous evening without receiving an answer, and who had returned the following morning and looked in a window after hearing the cries of deceaseds' two children, who were in the room with the bodies (R 43-45, 56-58, Pros. Ex. 13). The deceased had been seen alive on Monday night, 16-17 October, by Emile's sister, who had spent that night at their home (R 43-46).

Emile Padet had been shot several times in the back and his wife had several bullet wounds in her chest and arm (R 69-70, Pros. Ex. 13). In the opinion of a physician who examined the bodies on Thursday afternoon at about 1600 hours, each died as a result of the bullet wounds more than 24 and less than 48 hours prior to the examination (R 70-72). The remains of a meal of the type ordinarily eaten in the evening were observed on a table (R 77). The upper part of a door which opened into a bedroom of the house had been "smashed" and it appeared to have been "forced" (R 73, 76, 80, Pros. Ex. 9, 10). By stipulation it was shown that eight empty cartridge cases and seven expended bullets found in the deceaseds' room after the shooting all came from the same gun. Both bullets and cases contained markings peculiar to United States Army .45 caliber sub-machine guns, markings on the bullets being peculiar to the M-3 model, and markings on the cases being peculiar to either the M-3 or Thompson models (R 81-83, Pros. Ex. 25). Both white and colored American troops were stationed in camps in the vicinity of deceaseds' home (R 54-55).

On 24 October 1944, prior to the apprehension of the other accused, Jackson made a pre-trial statement in which he admitted driving with some of the accused to deceaseds' home on Tuesday night, 17 October. He denied having any knowledge of what was going to happen in the house, but admitted asking two of the accused why they were taking a "Tommy gun" and pistol into the house. He followed them to the door, which one accused forced open with the "Tommy gun", and saw a young woman sitting on the bed, and a man in the bed. After some conversation in French between the other accused and the man and woman, while the man had his back turned and was putting on his trousers, one of the accused shot him in the back with the "Tommy gun" and then shot the woman. Two of the accused refused to let Jackson go to the aid of the wounded persons and forced him to leave with them immediately (R 288, Pros. Ex. 37).

At about midnight on the night of 26-27 October, after being apprehended with Williams, Currey was taken to the "CID" headquarters in Cherbourg, where he was separated from the other accused and questioned in a back room by an agent (R 278-281). The agent who questioned him testified that Currey at first denied any knowledge of anything, but witness "kept at him, kept asking him questions", and finally Currey, in a "torrential flow" of words, "finally came out" and stated:

> "Yes, I was there, I was there at the time it happened. I had been seeing this woman before once or twice. I was there at the time with Williams and Jackson" (R 294).

Witness further testified that the "gist" of Currey's statement to him was;

> "that he had been there at that time and place when the shots were fired, that he didn't fire them, that he had known this woman before, and that he got into an argument with the husband when he went there on this particular occasion, and in sum and substance he just admitted his whole connection with the case. * * * then he just turned around and denied everything and said, 'I wasn't there; you forced me to say the whole thing. I wouldn't have said anything" (R 294).

The law member instructed the court to consider only the evidence which indicated that Currey "made a statement in the form of an admission against interest * * * that he was in the house at the time of the shooting, and that he had known the woman before and that he got in a quarrel that night at the time of the shooting * * *" (R 295).

The agent who questioned Currey further testified that later during the night of 26-27 October, when questioned in the presence of Jackson and Williams with reference to who did the shooting, Currey stated, "Jackson pulled the trigger" (R 295-296).

In a subsequent written statement, dated 3 November, Currey admitted his associations with the other accused prior to the killings, but denied ever having seen an M-3 sub-machine gun and stated that he was at the dugout all day and night on 17 October 1944 (R 286, Pros. Ex. 36).

Williams admitted going with an M-3 sub-machine gun to the house with three other accused in two jeeps on the night of 17 October and entering the house by forcing the door, while one accused remained outside as a lookout with instructions to keep the motors running. After one accused said to him, "Let's get it over with", Williams shot the Frenchman in the back and then shot the woman, and ran with the others from the house (R 283, Pros. Ex. 31). On

28 October Williams, with two "CID" agents, pointed out the house where the two murders had been committed and seemed familiar with the house (R 119-120, 285, Pros. Ex. 32).

On 29 October, Jimmerson made a pre-trial statement in which he admitted going to the house with three accused, one of whom carried an M-3 submachine gun, after one of them had stated that he was going to see a girl and that her "old man" was getting suspicious and he "might run into trouble". On the way to the house this accused told Jimmerson that if the man or woman gave him any trouble he would have to "get rid" of them. While Jimmerson was outside the house with instructions to "keep the motor running and to watch out for anything that came by", he heard two short bursts from a gun, and the three other accused ran to the jeeps and they drove away (R 285, Pros. Ex. 33).

4. For the defense, three French sisters, at whose home Jackson and Williams lived during October 1944, testified that one evening in October, after a gendarme advised them it was unlawful to have "American material" in a civilian home, Williams and Jackson loaded two jeeps with rations and took them to Joburg, returning about an hour later. On the previous afternoon, a "white captain", identified as Currey, and a "sergeant" came to the house and went away with Williams and Jackson, who failed to return that night for dinner, and did not return until 2300 hours, this being the only time they were ever late for dinner (R 318-329).

It was stipulated that two United States Navy enlisted men, if called as witnesses, would testify that Williams and Jackson, dressed as Army officers, brought two jeep loads of Army rations to a navy radar station at Joburg at about 2015 hours on 17 October and remained there for about 45 minutes (R 341).

Stipulated testimony of a French woman and her daughter showed that a large colored soldier with a fat face and big, flat nose, and a small colored soldier with a "skinny" face, came by the deceaseds' home on the afternoon of 16 October and asked for cognac and walked away. On Tuesday night, 17 October, at about 1700 hours, the soldiers were met by the mother and daughter walking in a road about 300 yards from the home of deceased. They carried no weapons. One of them asked the mother to "promenade" and then walked on when she declined (R 342-343).

Stipulated testimony of another French woman showed that two soldiers whistled at her at about 1700 hours on 17 October near deceaseds' home, in which she saw no lights at the time (R 344-345). Stipulated testimony of a neighbor who lived about 50 yards from the deceased showed that he last saw them alive at about 1630 hours on 16 October, and that he heard no unusual noise on the night of 17 October. He saw the dead bodies of the Padets on Thursday morning, 19 October, when he was called to the home by a Frenchman who had discovered them (R 343-344).

Padgett's platoon sergeant testified that Padgett had behaved well and had been an excellent combat soldier (R 365-367). It was stipulated that Currey's platoon sergeant would testify that Currey was of excellent character and efficiency as a combat soldier (R 409).

After the rights of each accused were explained to him, Williams, Jackson, Jimmerson and Currey each elected to make unsworn statements (R 346, 349-350, 353-356, 361-362), Padgett elected to remain silent (R 368), and Vasaturo elected to testify (R 369-370).

Williams stated that on the night of 17 October he helped take two jeeps loaded with rations from the French girls' home to the Navy camp at Joburg, and returned to the home and spent the night. He did not go to deceaseds' home and did not know the deceased. He denied ever handling a submachine gun. He admitted drawing rations. He always intended to return to the Army, but was contented living with the girls (R 347-348).

Jackson admitted his absence without leave from 13 August to 23 October and his participation in drawing rations and supplies unlawfully. He intended to return to his organization but was unable to find it. He spent the night of 17 October at the French girls' home after taking the rations to the radar station at Joburg. He never saw the deceased and was not present at the time they were killed (R 350-353).

Jimmerson stated that after 49 days in the front lines, his nerves got bad and he wandered away from his unit after he was told that nothing could be done for his nerves, intending to return when his condition improved. He did not know the deceased and never saw their house (R 356-360).

Currey admitted leaving the replacement depot on 18 September but stated that he intended going back. He never saw the deceased or their home (R 363-364).

Vasaturo testified that his company, while located near Le Mans on a three-day rest, moved out while he was in town and he was unable to locate it in spite of inquiries made by him of the military police (R 370-372). About 8 or 9 October he met and joined the other five accused and stayed at their dugout most of the time, until he was apprehended (R 372-373, 376). He knew nothing about what was going on, but thought there might be something wrong with the "set-up" (R 373-374). He saw a lot of Government rations in the dugout, but never helped the others draw rations and never sold any rations (R 378-379). He admitted accepting 2000 francs from one of the accused (R 388). He saw carbines and revolvers in the dugout, but no sub-machine guns (R 379). He knew nothing about the murders (R 392).

5. In rebuttal, the investigating officer testified that at the request of Williams and Jackson he interviewed the two naval enlisted men whose testimony was stipulated, and that each told him that Jackson and Williams brought the rations to the radar station between 16 and 18 October, neither man being certain as to the date (R 398-402). The officer also testified that both Jackson and Williams denied any connection with the murders, and that Jimmerson denied that he drove the jeep but stated that he was in the dugout with Vasaturo and Padgett at the time of the murders (R 404-405, 406).

6. a. Approximately two days of the trial and 200 pages of the record were consumed in receiving evidence relative to the manner in which the pretrial statements of the accused were taken. Such statements having been made by enlisted men to agents of a military superior, a full inquiry into the circumstances was warranted and proper (MCM, par. 114a, p. 116). Each of the accused testified at length to varying degrees of physical and mental torture and persuasion which he claimed was exerted against him by "CID" agents and officers, and contended that he was not warned of his rights and that he made his statement to escape further abuse and harrassment. On the other hand, testimony was elicited by the prosecution and defense from officers and agents of the "CID" in denial of the alleged abuse and coercion, which indicates that each accused signed his statement voluntarily and of his own free will. No useful end would be served in detailing such testimony. A careful reading of it reveals a substantial dispute as to whether the acts charged to be coercive actually occurred, and all the evidence fairly permits the inference of noncoercion as logically as the inference of coercion. The facts here are unlike those in CM ETO 13279, Tielemans, et al, wherein all the evidence and admitted facts led to the conclusion that the "CID" agent who took the confessions gained the confidence of the accused as a result of a course of insidious conduct and manipulation of a series of events, which caused the accused to agree to confessions formulated and devised by the agent. Here a sharp issue of fact is drawn as to whether or not coercion was employed, and the facts are not "irreconciliable with the possession of mental freedom" by the accused, as in the Tielemans case. Under the circumstances here exhibited, the Board of Review will not substitute its views for those of the court, but will accept the findings of the court as conclusive and binding (CM ETO 5747, Harrison, Jr.; CM ETO 7815, Bailey, et al; CM ETO 9288, Mills; CM ETO 15843, Dickerson; CM ETO 17554, Fields).

b. Charge I and its Specifications. Absence without leave on the part of each accused at the times and places alleged in the various specifications was sufficiently established by the introduction of competent evidence, including the pre-trial statements of each accused. Vasaturo admitted his absence by his sworn testimony, and the other accused, except Padgett, in effect admitted their absences by unsworn statements made at the trial. While the pre-trial statements of Jackson, Williams, Padgett and Jimmerson indicate that they were each apprehended and returned to military control at some time

during their alleged periods of absence, the court was clearly warranted in not believing such statements and in finding that each accused remained absent without leave during the period alleged.

Initial absences without leave of Jackson and Padgett were shown, not by regular morning report entries, but by entries made in a hospital admission and disposition report, to the admission of which entries objection was made by the defense. It was shown by testimony of the hospital registrar and commanding officer of the detachment of patients that such report was an official record made up daily in a certain manner pursuant to a theater directive, which report was sent out to the theater and Army surgeons and which was the only hospital report which carried individual patients by name (R 20-24). Since the record affirmatively shows that the entries were made at the time of the acts or events which they evidenced, or within a reasonable time thereafter, and in the regular course of business of the hospital, they are admissible under the Federal "shop book rule" as evidence of the facts recited in them (28 USCA 695; CM ETO 14165, Pacifici; CM ETO 15433, Burns).

The period of absence without leave established as to each accused appears to be of a duration of at least 38 days (as to Currey) and as long as 91 days (as to Jimmerson). Since each occurred in an active theater of operations, the court was fully warranted in inferring, from the duration of each absence alone, an intent on the part of each accused to remain permanently away from the service (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll; CM ETO 5406, Aldinger). Moreover, in determining whether each accused harbored the requisite intent to desert, the court could have considered, very properly, the cogent evidence showing participation by each accused, during his period of absence, in various unlawful acts, the false impersonations by several of the accused, and the fact that each absence was terminated by apprehension (CM ETO 952, Mosser; CM ETO 2216, Gallagher; CM ETO 2901, Childrey).

c. Charge II and its Specifications. The prosecution sufficiently proved the corpus delicti of each of the offenses alleged under Charge II by showing the issuance of the clothing and subsistence rations to non-existing organizations, and by other evidence directly connecting some of the accused with the illegal drawing and subsequent sale or use of the clothing and rations. The evidence, together with the admissions of each accused in his pre-trial statement, clearly shows that each accused, except Vasaturo, participated jointly with the other accused in, or acquiesced in and benefited from, the wrongful and drawing and use or sale of army clothing and subsistence rations so as to clearly constitute misapplication thereof as alleged in Specifications 1, 2 and 3 of Charge II, in violation of Article of War 94. Vasaturo's pre-trial statement sufficiently implicates him in the misapplication of the subsistence rations as alleged in Specification 3. Moreover, stipulations made on behalf of the defense, as well as the unsworn statements of four of the accused, and the testimony of Vasaturo, all strongly corroborate the other evidence of guilt, leaving no doubt as to the legal sufficiency of the evidence to support the findings of guilty as to each specification.

No objection was made by the defense to the pleading in Specifications 2 and 3 of a series of misapplications over periods of 29 and 17 days respectively. Even if objection had been made because of the possible multifarious character of the pleading, since it does not appear that the accused were misled in any manner or that their substantial rights were prejudiced thereby, the pleading, if multifarious, would not necessitate disapproval of the findings of guilty (MCM, 1928, par. 87b, p. 74; CM 247496, Egalnick, 30 BR 361 (1944)).

d. Charge III and its Specifications. In the view we take of Charge III and its Specifications (murder of Emile and Bertha Padet), it becomes unnecessary for us to discuss in detail the probative quality of the evidence offered in support thereof.

The evidence discloses the deceased were murdered the night of 17 October 1944, and it was the theory of the prosecution that the murders were committed by the joint action of the accused. Although the accused in their extrajudicial statements admitted participation to varying degrees in the commission of the murders, the truthfulness of their statements was drawn in issue by them at the trial. It was contended by them that the statements were the products of duress and were false. Moreover, each accused made an unsworn statement denying any connection with the murders. Jackson and Williams both stated that on the night of 17 October 1944, they delivered rations to a radar station in Joburg, France, and then returned to a French home where they spent the night; and their contention was to some extent corroborated by the testimony of the French women with whom they were living. The accused also offered the stipulated testimony of two enlisted men of the United States Navy which recited that on 17 October 1944 at about 2015 hours Jackson and Williams brought two jeep loads of rations to the radar station at Joburg, and that they remained there for about 45 minutes. When this stipulated testimony is considered in light of the evidence given by the French women to the effect that on the ration-delivery night Jackson and Williams left with the rations shortly after supper, returned at about 2200 or 2300 hours and remained for the night, it is clear that accused sought to account for their activities on the night in question, and to take issue with the admissions made in their pre-trial statements.

The prosecution, however, over objection offered evidence to impeach the credibility of the stipulated testimony without laying the foundation required therefor (R 398 et seq.). In particular, evidence was offered to show that the witnesses whose testimony was stipulated had declared they were uncertain as to the exact day the rations were delivered. The impeaching evidence was offered and received without affording the witnesses an opportunity to explain, admit or deny their prior inconsistent statements. Although the witnesses were not in court, the testimony being stipulated, the impossibility of laying the appropriate foundation did not dispense with the need therefor (Malton v. United States, 156 U. S. 237, 39 L. Ed. 409 (1894).

It is clear that improperly admitted impeaching evidence touching a material fact constitutes prejudicial error. Thus in Brownlow v. United States (C.C.A. 9th, 1925), 8 F. (2d) 711, it was held prejudicial error for the prosecution to improperly impeach a defense witness whose testimony pertained to a material question, and the court declared the error fell without the application of section 269 of the Judicial Code as amended February 26, 1919 (cf. Article of War 37). (See also Verro v. United States (C.C.A. 3rd. 1938), 95 F. (2d) 504.)

In the instant case the stipulated testimony was material to the defensive theory of all accused. It tended to disprove any concert on the murder night, and raised an issue as to the truthfulness of their extrajudicial statements. Accordingly, we conclude that prejudicial error occurred and that the record of trial is not legally sufficient to support the findings of guilty as to Charge III and its Specifications.

7. The charge sheets show Jackson is 24 years of age and was inducted at Ft. Meade, Maryland, on 25 July 1942; that Jimmerson is 24 years of age and was inducted at Camp Blanding, Florida, on 22 September 1942; that Padgett is 23 years of age and was inducted at Camp Blanding, Florida, on 11 September 1941; Vasaturo is 21 years of age and was inducted at New York City on 10 April 1943; and that Williams is 24 years of age and was inducted at Camp Claiborne, Louisiana, on 6 July 1942. None had any prior service.

8. The court was legally constituted and had jurisdiction of the persons and the subject matter. No errors injuriously affecting the substantial rights of any of the accused, except as hereinbefore shown, were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings as to Charge I and Charge II and their Specifications, as approved and confirmed, legally insufficient to support the findings as to Charge III and its Specifications, and legally sufficient to support the sentences. Confinement in a penitentiary is authorized upon conviction of desertion in time of war by Article of War 42.

Peter A. Danielson, Judge Advocate

John A. Burns, Judge Advocate

Walter W. Davis, Judge Advocate

SPJGQ - CM 312092 1st Ind

Hq ASF, JAGO, Washington 25, D. C. MAY 14 1946

TO: The Adjutant General

1. Attention is invited to the foregoing holding by the Board of Review in the case of Private First Class Lewis R. Currey (39467822), Headquarters Company, 3d Battalion, 359th Infantry Regiment, Private Charles Williams (38485037), 240th Port Company, 494th Port Battalion, Private Dearrion M. Jackson (33654239), 4003d Quartermaster Truck Company, Private Emitte P. Jimmerson (34403303), 120th Infantry Regiment, Private First Class Thomas L. Padgett (34056787), Company D, 28th Infantry, and Private Tony J. Vasaturo (32887114), Company G, 134th Infantry Regiment that the record of trial is legally insufficient to support the findings of guilty of Charge III and its Specifications and legally sufficient to support the findings of guilty of Charges I and II and their Specifications and the sentences, which holding is approved. Upon disapproval of the findings of guilty of Charge III and its Specifications execution of the sentence will be authorized.

2. Accused Currey and Williams were sentenced by the court to be hanged by the neck until dead. The sentences in these cases were commuted by the Commanding General, United States Forces, European Theater, to dishonorable discharge, total forfeitures and confinement at hard labor for the terms of the natural lives of accused. In none of the cases has there been published a general court-martial promulgating the proceedings. The proceedings may properly be promulgated by a War Department general court-martial order.

3. In view of all the facts and circumstances and in order that the sentences to confinement may be brought within the standards fixed by War Department postwar clemency policies, it is recommended that the sentences to confinement in the cases of Currey and Williams be reduced to 15 years and that the sentences to confinement as to each of the remaining accused be reduced to 10 years. Orders of remission may be included in the War Department general court-martial order.

4. It is recommended that the remissions be accomplished and that the proceedings be promulgated in a War Department general court-martial order. A draft of order for the purpose indicated is inclosed herewith. When copies of the published order are transmitted to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial. The file number of the record in this office is CM 312092.

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Draft of GCMO
(G.C.M.O. 140, 27 May 1946).

vol 61 Army JAG Bd. Rev.

vol 61 Army JAG Bd. Rev

TITLE

DATE	BORROWER'S NAME	EXT.