OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD OF
REVIEW AND
JUDICIAL COUNCIL

HOLDINGS
OPINIONS
REVIEWS

VOL. 9

1951

R
16
B63b
v.9

JUDGE ADVOCATE GENERAL'S CORPS

BOARD OF REVIEW
AND
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HOLDINGS, OPINIONS AND REVIEWS

VOLUME 9

Including

CM 343015 - CM 343984

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EXPLANATORY NOTES

1. References in the Tables and Index are to the pages of this volume. These page numbers are indicated within parentheses at the upper corner of the page.

2. Tables III and IV cover only the specific references to the Articles of War and Manual for Courts-Martial, respectively.

3. Items relating to the subject of lesser included offenses are covered under the heading LESSER INCLUDED OFFENSES rather than under the headings of the specific offenses involved.

4. Citator notations (Table V) - The letter in ( ) following reference to case in which basic case is cited means the following:

(a) Basic case merely cited as authority, without comment.

(b) Basic case cited and quoted.

(c) Basic case cited and discussed.

(d) Basic case cited and distinguished.

(j) Digest of case in Dig. Op. JAG or Bull. JAG only is cited, not case itself.

(N) Basic case not followed (but no specific statement that it should no longer be followed).

(O) Specific statement that basic case should no longer be followed (in part or in entirety).

5. There is a footnote at the end of the case to indicate the GCMO reference, if any.

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 343015

11 SEP 1950

UNITED STATES v. First Lieutenant ROBERT T. HUTCHINS (0-2000964), Headquarters and Service Company, 7th Medium Tank Battalion, 3d Armored Division, Fort Knox, Kentucky.	FORT KNOX, KENTUCKY Trial by G.C.M., convened at Fort Knox, Kentucky, 2 and 3 August 1950. Dismissal and total forfeitures after promulgation.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

---

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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 95th Article of War.

Specification: In that 1st Lieutenant Robert T. Hutchins, Company A, 7th Medium Tank Battalion, Combat Command "A", Third Armored Division, Fort Knox, Kentucky, did at Fort Knox, Kentucky, on or about 9 June 1950 with intent to defraud, wrongfully and unlawfully make and utter to the Fort Knox Exchange a certain check in words and figures as follows to wit:

Lt Robert T. Hutchins 73-68
2714 Ordway St., N.W. Washington, DC 832

Washington, D.C. June 9, 1950 No. 92

Pay to the order of Ft Knox Exchange $ 50.00

Fifty Dollars ---------- 00/xx dollars

Planters Bank and Trust Company
Hopkinsville, Kentucky

/s/ Robert T. Hutchins
1st Lt., Inf.
0-2000964

and by means thereof did fraudulently obtain from the Fort Knox Exchange, Fort Knox, Kentucky $50.00, he, the said Robert T. Hutchins, then well knowing he did not have and not intending that he should have sufficient funds in the Planters Bank and Trust Company, Hopkinsville, Kentucky for the payment of said check.

Specification 2: Same as Specification 1 except the date "10 June 1950" and the amount "$30.00".

Specification 3: Same as Specification 1 except the date "13 June 1950", the amount "$20.00".

Specifications 4, 5, and 6: (Findings of not guilty).

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

Specification: In that 1st Lieutenant Robert T. Hutchins, Headquarters, Headquarters, and Service Company, 7th Medium Tank Battalion, 3rd Armored Division, having received a lawful command from Lieutenant Colonel David Radam, his superior officer to report to Headquarters 7th Medium Tank Battalion 5 July 1950, did, at Fort Knox, Kentucky, on or about 5 July 1950, willfully disobey the same.

ADDITIONAL CHARGE II: Nolle Prosequi.

Specification: Nolle Prosequi.

He pleaded not guilty to the charges and specifications. He was found guilty of the Charge and Specifications 1-3, inclusive, thereunder, and not guilty of the other specifications thereunder, guilty of the Specification of Additional Charge I except the words "willfully disobey the same," substituting therefor the words "fail to obey the same," of the excepted words not guilty, of the substituted words guilty, not guilty of Additional Charge I but guilty of a violation of Article of War 96. Evidence of one previous conviction by general court-martial was received in evidence. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. <u>Evidence</u>

a. For the Prosecution

The evidence pertinent to the findings of guilty is summarized as follows:

Accused at all times in issue was a member of the 7th Medium Tank Battalion, CCA, 3rd Armored Division, Fort Knox, Kentucky (R 18,26). There were admitted in evidence, as Prosecution Exhibits 1, 2 and 3, checks drawn upon the Planters Bank and Trust Company, Hopkinsville, Kentucky, payable to the Fort Knox Exchange, bearing the purported signature of accused as drawer and also bearing the Fort Knox Exchange deposit stamp. These checks which were identified as having been cashed at the Fort Knox Exchange were of the dates, amounts, and bore bank cancellation dates as follows:

Date	Amount	Bank Cancellation Date
9 June 1950	$50.00	13 June 1950 (Pros Ex 1)
10 June 1950	$30.00	14 June 1950 (Pros Ex 2)
13 June 1950	$20.00	16 June 1950 (Pros Ex 3) (R 33-36).

It was established by the deposition of Hal W. Johnson, Vice President of the above named drawee bank, that deposit was last made to accused's account in the bank on 5 May 1950, and that on and after 9 June 1950 accused's balance in the bank did not exceed $1.02 (R 46, Pros Ex 7). The three checks (Pros Exs 1, 2 and 3) were returned to the Fort Knox Exchange by the Fort Knox Branch of the Citizens Fidelity Bank and Trust Company (R 12). The signatures "Robert T. Hutchins" appearing upon Prosecution Exhibits 4 and 5 in evidence (Pros Exs 5 and 6 for identification purposes) were identified as having been executed by accused (R 26,27,32,33).

At about "7:30" or "twenty to eight" on 5 July 1950, Colonel Radam, commanding officer of accused, called the quarters of accused by telephone. Colonel Radam, who was acquainted with accused's voice on the telephone, identified accused as the person who answered the phone. Colonel Radam directed accused to report to Battalion Headquarters, about a half mile from accused's quarters, by eight o'clock. Accused answered, "Yes sir." Accused, however, failed to appear, and after waiting approximately an hour Colonel Radam directed that accused be marked "AWOL." Colonel Radam did not see accused at all on 5 July 1950 (R 30-32).

b. For the Defense

The accused, after being apprised of his rights as a witness, elected to remain silent, and no evidence was adduced by the defense.

4. Discussion

Accused has been found guilty of three offenses involving making and uttering with fraudulent intent checks without having sufficient funds on deposit to pay them (Chg, Specs 1-3 incl).

The three checks in issue totaling $100.00 were drawn upon the Planters Bank and Trust Company of Hopkinsville, Kentucky. The checks bore accused's purported signature as drawer, were cashed at the Fort Knox Exchange, and were dated, respectively: 9 June 1950 (Chg, Spec 1); 10 June 1950 (Chg, Spec 2), and 13 June 1950 (Chg, Spec 3). In the absence of objection to their authenticity bank stamps are competent evidence of the facts bespoken by them (CM 335738, Carpenter, 2 BR-JC 245, 262). Bank stamps on the checks indicated that all the checks were in banking channels by 16 June 1950. It is presumed that the checks were executed on the dates shown thereon (CM 332879, Boughman, 81 BR 223, 232). The evidence thus shows that the checks were cashed on dates fairly coincidental to the dates borne by the checks, as alleged. While there was no direct evidence that the checks were signed by accused, his proven signatures were in evidence and by comparison therewith the court could find that the signatures on the checks were his (CM 325112, Halbert, 74 BR 89). From the evidence that accused was the drawer of the checks in question and that they were payable to the order of a named payee who cashed the checks, it may be presumed that accused uttered the checks and received the proceeds thereof (Carpenter, supra, p 262). Although there is no direct evidence that the checks were presented to the drawee bank and dishonored, the evidence that they were in banking channels and were returned to the payee sufficiently shows that they were presented and dishonored and thus negatives any hypothesis that credit would be extended on the checks (CM 340473, Morton, 24 May 1950). The evidence otherwise shows that accused last made a deposit to his account more than a month prior to the utterance of any of the checks in issue and that on and since 9 June 1950, the date of execution of the first check, accused's account has not exceeded $1.02, an amount greatly exceeded by the smallest check in issue. From these facts, the court could infer that accused was aware of the inadequacy of his account, and that he had no intent to make his account adequate. The obtaining of a then present consideration by accused for the checks with the knowledge of the inadequate state of his account and with the lack of intent to make the account adequate constitutes the intent to defraud alleged (CM 335904, Young, 2 BR-JC 317; CM 336419, Halprin, 30 January 1950). The evidence warrants the findings

of guilty of Specifications 1-3, inclusive, of the Charge, in violation of Article of War 95.

The record also shows that on 5 July 1950 accused received at his quarters a telephonic direction from his commanding officer to report to Battalion Headquarters, approximately one-half mile away. An hour later, accused had not so reported, and his commanding officer did not see accused at all on the day in question. It is at once apparent that although the context of the order given was to report to Battalion Headquarters in approximately fifteen minutes, the fair import of the order was to report in a reasonable length of time and had accused so reported the instant offense would not have been committed. The fact that accused never did report to Battalion Headquarters on the day in question establishes the offense found in violation of Article of War 96. A finding of failure to obey in violation of Article of War 96 is lesser to and included in the offense alleged, viz, willful disobedience in violation of Article of War 64.

5. Accused is 35 years of age, married, and the father of two minor children. He completed three years of high school and in civilian life was employed variously as shipping clerk and salesman. He enlisted in the Virginia National Guard in 1933 and entered on active Federal service with the National Guard from 3 February 1941 to 11 November 1941 when he was transferred to the Inactive National Guard. He again had active Federal service as an enlisted man from 17 August 1942 to 23 January 1945 when he was commissioned a second lieutenant. He was subsequently promoted to first lieutenant. He was relieved from active duty on 17 October 1945. His current tour of active duty extends from 29 July 1946. He had foreign service in the European Theater from July 1944 to July 1945 and from December 1946 to September 1949, and has been awarded the Purple Heart, Bronze Star Medal, and Silver Star. His efficiency ratings of record are "Excellent" (6) and "Superior" (2). His overall efficiency ratings are "078", "064", "102", "110", "100", and "81". General Court-Martial Orders Number 111, Headquarters Fort Knox, Kentucky, dated 28 April 1950 show that accused was convicted by general court-martial of the offenses of absence without leave in violation of Article of War 61, and of making a false official statement in violation of Article of War 96, and, as approved by the reviewing authority, was sentenced to forfeit one hundred dollars a month for five months.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 to dismissal is authorized upon conviction of a violation of Article of War 96 and

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

Cecil A. Baskin, J.A.G.C.

ABSENT, J.A.G.C.

J. W. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Robert T. Hutchins, 0-2000964, Headquarters and Service Company, 7th Medium Tank Battalion, 3d Armored Division, Fort Knox, Kentucky, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh Jr
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

3 October 1950

GCMO 67, Oct 11, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

SEP 15 1950

JAGH CM 343076

U N I T E D S T A T E S v. Captain EDWARD W. HOLDEN (O-1287178), Infantry, 10th Infantry Division, on temporary duty with Headquarters Detachment 7822 Station Complement Unit.	)	MUNICH MILITARY POST Trial by G.C.M., convened at Berchtesgaden, Germany, 2,3 August 1950. Dismissal, total forfeitures after promulgation, and confinement for five (5) years.

OPINION of the BOARD OF REVIEW
HILL, HAUCK, and FITZHUGH
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Captain Edward W. Holden, 10th Infantry Division, Fort Riley, Kansas, on temporary duty with Headquarters Detachment, 7822 Station Complement Unit, Munich, Germany, then with the Berchtesgaden Sub-Post and Recreation Area, did, at Berchtesgaden, Germany, during the period from about 1 September 1949 to about 21 February 1950, more particular dates being unknown, conspire with Sergeant Wayne K. Kellogg, Berchtesgaden Sub-Post and Recreation Area, to commit an offense against the United States, to wit: misappropriate gasoline, of the value of more than $50.00, property of the United States furnished and intended for the military service thereof, by wrongfully disposing of the said gasoline for personal gain.

Specification 2: In that Captain Edward W. Holden, 10th Infantry Division, Fort Riley, Kansas, on temporary duty with Headquarters Detachment, 7822 Station Complement Unit, Munich, Germany, then with the Berchtesgaden

Sub-Post and Recreation Area, did, in conjunction with Sergeant Wayne K. Kellogg, Berchtesgaden Sub-Post and Recreation Area, at Berchtesgaden, Germany, from about 1 September 1949, to about 21 February 1950, feloniously steal between 8,000 and 10,000 gallons gasoline, more particular amounts being unknown, of the value of over $50.00, property of the United States furnished and intended for the military service thereof.

Specification 3: In that Captain Edward W. Holden, 10th Infantry Division, Fort Riley, Kansas, on temporary duty with Headquarters Detachment, 7822 Station Complement Unit, Munich, Germany, then with the Berchtesgaden Sub-Post and Recreation Area, did, in conjunction with Sergeant Wayne K. Kellogg, Berchtesgaden Sub-Post and Recreation Area, at or near Berchtesgaden, Germany, during the period from about 1 September 1949, to about 21 February 1950, more particular dates being unknown, wrongfully and knowingly dispose of by selling between 8,000 to 10,000 gallons gasoline, of the value of over $50.00, property of the United States furnished and intended for the military service thereof.

The accused pleaded not guilty to the Charge and its Specifications. He was found guilty of Specification 1 of the Charge, except the words "1 September 1949 to about 21 February 1950", substituting therefor the words "1 November 1949 to about 31 January 1950;" of the excepted words: Not Guilty, of the substituted words: Guilty; guilty of Specification 2 of the Charge, except the words "1 September 1949 to about 21 February 1950" and the words "8,000 and 10,000", substituting therefor the words respectively "1 November 1949 to about 31 January 1950" and "3,000 and 4,000"; of the excepted words: Not Guilty, of the substituted words: Guilty; guilty of Specification 3 of the Charge, except the words "1 September 1949 to about 21 February 1950;" substituting therefor the words "1 November 1949 to about 31 January 1950" and the words "8,000 and 10,000", substituting therefor the words "3,000 and 4,000"; of the excepted words: Not Guilty, of the substituted words: Guilty; and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for six years. The reviewing authority approved only so much of the sentence as provides for dismissal, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for five years, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

Accused was the officer in charge of Berchtesgaden Sub-Post motor pool from 7 November 1947 until 19 December 1949 (R 91).

In November 1949 accused told Josef Rakoschi, a truck driver in the motor pool, that he intended to start selling government gasoline to German filling station operators (R 28,29). He and Rakoschi then visited and took orders from several German dealers, and delivery of the gasoline started the next day with Gerhard Stuewe, truck master at the motor pool, delivering the gasoline by truck and Rakoschi collecting the money (R 28-33). Gerhard Kittlaus, an employee at the motor pool, was in charge of gasoline records and made out all reports to higher headquarters. He at one time destroyed all the gasoline records up to January 1950 under instructions given him by the accused (R 17,18). During November 1949 Stuewe and Rakoschi made the first deliveries of gasoline to German dealers at which time Rakoschi collected the money. Stuewe made subsequent deliveries about "three times a month" and collected the money which he later turned over to the accused. In all, he delivered fifty to sixty 55-gallon drums of gasoline to the German dealers (R 35-37).

Five German dealers testified to receiving gasoline as follows: Johann Spiegelsberger was first offered gasoline by an officer he could no longer identify. He identified Rakoschi as the person who collected for the first delivery of gasoline in November or December 1949, and Stuewe as the person he paid for the last delivery. In all he received five drums (R 40-42). Helene Bartl did not remember the officer but identified Stuewe as the man she paid for three drums of gasoline (R 43-45,52,53). Leonard Lechner testified that an American officer, whom he cannot now identify, approached him in October or November 1949 and offered to sell him gasoline. He later received eight or ten drums. On one or two occasions he paid Rakoschi and on three occasions he paid Stuewe (R 46-51). Karl Schaffler, after being solicited by a young German man, whom he would no longer recognize, received seven drums of gasoline for which he paid Stuewe 120 to 130 marks per drum (R 54,55). Joseph Wieser identified Rakoschi as the person who offered him "surplus" gasoline to come "from an American Captain." He received gasoline "two or three or four times" delivered by Stuewe. He paid Rakoschi for the first 15 or 16 drums. The other deliveries were from 3 to 5 drums for which he paid Stuewe (R 56,57).

General Prisoner Wayne K. Kellogg was the motor sergeant in charge of the motor pool under the accused. When Kellogg returned from temporary duty in Munich in November 1949, the accused told him that "he had devised a method whereby gasoline could be diverted from Government sources, where the purpose of the gasoline was to be as an expenditure in Government vehicles, and it was to be diverted to the black market" (R 60,61). The accused told Kellogg that Stuewe and Rakoschi were taking care of the deliveries and that Kittlaus was handling the records to show no shortages of gasoline (R 61).

First Lieutenant Robert S. Britton replaced the accused as motor pool officer (R 12). The accused had known Britton about two months (R 11) and while instructing him in his duties told Britton if he would "overlook" certain irregularities in the motor pool, he would be paid from time to time. Accused told Britton that he "would not have to know where it came from, or how it was handled" (R 14,15). Lieutenant Britton promptly reported this to his superiors and later cooperated with the CID in the investigation which followed (R 8,9).

Thirteen cents a gallon was stipulated as the value of government motor vehicle gasoline (R 59).

b. For the defense.

After being warned of his rights as a witness, the accused elected to testify under oath. He stated that all he did was to orient Lieutenant Britton in his motor pool duties. He denied that he made any proposition to Britton to sell gasoline. He also denied that he had any dealings or agreement with Kellogg, Stuewe, or Kittlaus or that he ever received any money from anyone from the sale of unauthorized gasoline. He denied that he participated in any manner in illegal sale of government gasoline to German nationals. He stated that the paper records would bear him out that there was no shortage (R 90-114).

The testimony of Captain Henry Vogler, Gerhard Kittlaus, Corporal John W. Werner, and Gerhard Kirschneck in general tended to establish that no record shortage existed (R 81-90).

Major Harold H. Richardson, Special Services Officer, and Robert C. Lockman, Assistant Property Officer for Munich Military Post, testified that the accused had a good reputation for integrity (R 82,83,99).

4. Discussion.

Specification 1 alleged that the accused from 1 September 1949 to 21 February 1950 conspired with Sergeant Wayne K. Kellogg to misappropriate government gasoline. In Specifications 2 and 3 the theft and illegal sale of the same gasoline are charged. The court in its findings by exceptions and substitutions, cut the period of time to from 1 November 1949 to 31 January 1950. This was justified on the basis of the testimony of Rakoschi who stated that contacts were first made with the German dealers early in November 1949. In its findings the court also cut the amount of gasoline to "between 3,000and 4,000 gallons" from "between 8,000 and 10,000" as alleged. This action appears logical in the light of Stuewe's statement that he delivered between 50 and 60 drums of 55 gallons each. In any event, the evidence is sufficient to establish beyond controversy a value of over $50.00, for the gasoline referred to in each Specification.

As to the conspiracy alleged in Specification 1, there is no direct evidence of an agreement between the accused and Sergeant Kellogg. The accused vehemently denies that any such agreement existed. However, the undisputed evidence is that Rakoschi, Stuewe, and Kittlaus, all employees working under the direct supervision of the motor sergeant, performed in a fixed pattern over a period of months to deliver and conceal the sale of illegal gasoline in a manner which could not have escaped his notice. The conclusion is unavoidable that a tacit understanding and agreement existed between the accused and Kellogg. The fact that most of the evidence against the accused is circumstantial does not weaken the case. The principle is quoted with approval in CM 319747, Watson, 69 BR 47,65:

> "The fact of a conspiracy may be proved by any competent evidence. The conspiracy may of course be shown by direct evidence, and, it is apprehended should be so proved if this character of evidence is attainable. Direct evidence is, however, not indispensable. Circumstantial evidence is competent to prove conspiracy. Proof of the combination charged, it has been said, must always be extracted from the circumstances connected with the transactions which form the subject of the accusation. The nature of the crime usually makes it susceptible of no other proof, and the rule which admits this class of evidence applies equally in civil and criminal cases. Circumstantial evidence if sufficiently strong may outweigh the positive statement of a party or witness (12 C.J., sec. 266, pp.633,634). (CM 301983, Young, 19 BR (ETO) 105)."

The testimony of Rakoschi is positive that he acted as translator and contact man for the accused in arranging sales of gasoline to German dealers. He collected the money on first sales and turned the money over to the accused. Rakoschi ordered Stuewe to make subsequent deliveries to these same dealers and Stuewe collected the money which was later turned over to the accused. The evidence is sufficient to establish beyond any reasonable doubt that the accused "master-minded" a system, understood, agreed to and cooperated in by those who participated, for the theft and illegal sale of government gasoline as alleged in Specifications 2 and 3.

The reviewing authority out of an abundance of precaution reduced the sentence to five years confinement viewing the case "in its most serious aspect only." However, each of the three Specifications alleges a separate offense and there is no multiplicity. In CM 320681, Watcke, 70 BR 125,134, it is stated:

> "A conspiracy, or agreement, to commit a criminal offense and the subsequent commission of the offense itself, even though

done pursuant to the agreement, are each separate, substantive offenses. There was, therefore, no improper multiplication in charging accused with having entered into an unlawful agreement to steal Government property and with the actual larceny thereof (Ellerbrake v. United States, 134 F. (2d) 683,685)."

Furthermore, the theft and the illegal sale of stolen property are separate offenses (MCM, 1949, Par. 180h, p.251).

The reviewing authority designated a United States penitentiary, reformatory, or other such institution, as the place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides on page 97:

"If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving . . . dismissal and confinement of officers, . . . the confirming authority will designate the place of confinement."

In the instant case, pursuant to the provisions of Article of War 48(c)(3), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

5. The records of the Department of the Army show that the accused is 45 years of age. He graduated from Central High School, Houston, Texas, in 1923. He is married to Margaret M. Holden and has three sons, ages 4 to 7. Four other dependent children by a former wife live with their mother. There is no record of civilian delinquencies and no record of his civilian occupation between the time he got out of high school in 1923 and the time he enlisted in the Army in 1928. Accused served as an enlisted man from 10 July 1928 until he was commissioned a Second Lieutenant, 8 July 1942. He was promoted to First Lieutenant, 23 January 1943, and to Captain, 28 March 1946. He has had infantry experience in a wide variety of assignments, most recently as a training officer, assistant S-3, and motor officer. On 17 July 1949 he received a reprimand under Article of War 104 for a two day absence without leave, Headquarters 350th Infantry, APO 88. He served two tours of duty overseas, from 13 November 1944 to 1 October 1945 and from 30 August 1946 to about 20 February 1950, and is entitled to wear the European Theatre Ribbon, the American Theatre Ribbon, and Victory Medal. His last over-all numerical efficiency ratings have been 083, 084, 067, 060, 076 and 076.

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

authority, and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures after promulgation, and confinement at hard labor for five years is authorized upon conviction of an officer of violations of Article of War 94.

C. P. Hill, J.A.G.C.

(Absent), J.A.G.C.

William C. Fitzhugh, J.A.G.C.

(16)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,076

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Captain Edward W. Holden, 0-1287178, Infantry, 10th Infantry Division, on temporary duty with Headquarters Detachment 7822 Station Complement Unit, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

13 Nov 1950

I concur in the foregoing action.

Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

13 Nov. 1950

GCMO 84, Nov 20, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

SEP 2 1950

JAGH CM 343118

U N I T E D S T A T E S	)	FORT ORD
v.	)	Trial by G.C.M., convened at Fort Ord, California, 14 August 1950. Dismissal and total forfeitures after promulgation.
First Lieutenant ALLAN L. RUTAN (01334632), Company F, 12th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, HAUCK, and FITZHUGH
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

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 Allan L. Rutan, Company F, 12th Infantry, Fort Ord, California, did, at Seaside, California, on or about 16 May 1950, wrongfully fail to maintain a sufficient bank balance in his account with the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California, to meet payment of a certain check made and uttered by the said First Lieutenant Allan L. Rutan, on or about 11 May 1950, in words and figures as follows, to wit:

ALLAN L. RUTAN 90-1331
U. S. Army 1211

MONTEREY, California 11 May 1950 No. 16

Pay to
the order of Casa Blanca Cafe $ 25.00

Twenty-Five & 00/100 Dollars

TO Monterey Branch
Monterey County Trust & Savings Bank
Monterey, California S/S Allan L. Rutan

Specification 2: In that First Lieutenant Allan L. Rutan, Company F, 12th Infantry, Fort Ord, California, did, at Seaside, California, on or about 13 May 1950, wrongfully and unlawfully make and utter to the Casa Blanca Cafe a certain check, in words and figures as follows, to wit:

ALLAN L. RUTAN
U. S. Army

90-1331
1211

MONTEREY, California, 13 May 1950 No. 18

Pay to
the order of Casa Blanca Cafe $ 25.00

Twenty-Five & 00/100----------Dollars

TO Monterey Branch
Monterey County Trust and Savings Bank
Monterey, California

S/S Allan L. Rutan

and by means thereof did obtain from the said Casa Blanca Cafe lawful money of the United States and merchandise of the total value of about $25.00, he, the said First Lieutenant Allan L. Rutan, then well knowing that he did not have and not intending that he should have sufficient funds in the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California for the payment of said check.

Specification 3: In that First Lieutenant Allan L. Rutan, Company F, 12th Infantry, Fort Ord, California, did, at Seaside, California, on or about 3 June 1950, wrongfully and unlawfully make and utter to the Veterans' Club a certain check, in words and figures as follows, to wit:

ALLAN L. RUTAN
U. S. Army

90-1331
1211

MONTEREY, California 3 June 1950 No. 37

Pay to
the order of Cash $ 25.00

Twenty-Five & 00/100----------Dollars

TO Monterey Branch
Monterey County Trust & Savings Bank
Monterey, California

S/S Allan L. Rutan

and by means thereof did obtain from the said Veterans' Club $25.00, lawful money of the United States, he, the said First

Lieutenant Allan L. Rutan, then well knowing that he did not have, and not intending that he should have sufficient funds in the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California, for payment of said check.

Specification 4: In that First Lieutenant Allan L. Rutan, Company F, 12th Infantry, Fort Ord, California, did, at Carmel, California, on or about 18 June 1950, wrongfully and unlawfully make and utter to the Pine Room a certain check, in words and figures as follows, to wit:

ALLAN L. RUTAN
U. S. Army

90-1331
1211

MONTEREY, California 18 June 1950 No. 43

Pay to
the order of Cash $ 10.00

Ten and 00/100----------Dollars

TO Monterey Branch
Monterey County Trust and Savings Bank
Monterey, California

S/S Allan L. Rutan

and by means thereof, did obtain from the said Pine Room $10.00, lawful money of the United States, he, the said First Lieutenant Allan L. Rutan, then well knowing that he did not have, and not intending that he should have sufficient funds in the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California, for payment of said check.

Specification 5: In that First Lieutenant Allan L. Rutan, Company F, 12th Infantry, Fort Ord, California, did, at San Francisco, California, on or about 23 June 1950, wrongfully and unlawfully make and utter to the United Air Lines a certain check, in words and figures as follows, to wit:

ALLAN L. RUTAN
U. S. Army

90-1331
1211

MONTEREY, California 23 June 1950 No. 45

Pay to
the order of United Air Lines $146.57

One Hundred and Forty-Six & 57/100---------- Dollars

TO Monterey Branch
Monterey County Trust and Savings Bank
Monterey, California

S/S Allan L. Rutan

and by means thereof did obtain from the said United Air Lines an air transportation ticket which entitled him to service of a value of about $146.57, he, the said First Lieutenant Allan L. Rutan, then well knowing that he did not have, and not intending that he should have sufficient funds in the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California, for payment of said check.

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

Specification: In that First Lieutenant Allan L. Rutan, Company F, 12th Infantry, Fort Ord, California, did, without proper leave, absent himself from his organization at Fort Ord, California, from about 0001 hours, 14 July 1950 to about 0815 hours, 22 July 1950.

He pleaded not guilty to, and was found guilty of, all the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

As to Specification 1 of Charge I.

First Lieutenant Allan L. Rutan, the accused, was stationed at Fort Ord, California, from April to July 1950 (R 11,12,14). On 11 May 1950, he gave his check of that date in the sum of $25.00 and drawn on the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California, to the Casa Blanca Cafe, Seaside, California (R 16,17,19,25, 70; Pros Ex 1). In return he received cash after "the price of the drink" had been deducted (R 26). At that time the accused had a balance of $54.00 in his account, but a "few days later" when the check was presented at the bank for payment in the normal course of business, there were insufficient funds in the account to pay the check (R 17,28,66,76; Pros Ex 7). The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 18,79). The payee was reimbursed "about the 22d or 23d of June" (R 23,24).

As to Specification 2 of Charge I.

On or about 13 May 1950, the accused gave his check of that date in the sum of $25.00 and drawn on the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California, to the Casa Blanca Cafe, Seaside,

California (R 19,23,70; Pros Ex 2). In return, he received cash after the price of "two or three drinks" had been deducted (R 21,27). At that time the account of the accused had been overdrawn in the amount of $6.00 and within a "few days" when the check was presented at the bank for payment in the normal course of business, there were insufficient funds with which to pay the check (R 21,22,28,66,76,77; Pros Ex 7). The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 22,79). The payee was reimbursed "about the 22d or 23d of June" (R 23,24).

As to Specification 3 of Charge I.

On 3 June 1950, the accused gave his check of that date in the sum of $25.00 and drawn on the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California, payable to "Cash", to Mr. Oscar Hellums, Manager of the Veterans' Club, Seaside, California (R 30,34,70; Pros Ex 3). He received $25.00 cash in return (R 31). At that time the account of the accused had been overdrawn in the amount of $4.00 and on 4 June 1950 when the check was presented at the bank for payment in the normal course of business, the account was overdrawn in the same amount (R 31,67,77; Pros Ex 7). The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 32,79). The payee received payment on the "9th or 10th" of August (R 34).

As to Specification 4 of Charge I.

On 18 June 1950, the accused gave his check of that date in the sum of $10.00, and drawn on the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California, payable to "Cash," to the Pine Room (R 36-38,40,41,56,71,82; Pros Ex 4). In return he received $10.00 in cash (R 38). At that time the account of the accused was overdrawn in the amount of $9.65, and when the check was presented at the bank for payment in the normal course of business, the balance was insufficient to pay the check (R 40,67,77; Pros Ex 7). The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 41, 79). The payee was reimbursed on 8 August 1950 (R 44,50,51).

As to Specification 5 of Charge I.

On 23 June 1950, the accused gave his check of that date in the sum of $146.57 and drawn on the Monterey Branch, Monterey County Trust and Savings Bank, Monterey, California, to United Air Lines (R 59,62,71; Pros Exs 5,6). In return he received a ticket for an air line passage from San Francisco, California, to Toledo, Ohio, of the value of $146.57 (R 60,62). At that time the account of the accused was overdrawn in the amount of $12.65 and on 24 June 1950 when the check was presented at the bank for payment in the normal course of business the account was overdrawn in the same amount (R 67,77; Pros Exs 6,7). The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 79; Pros Ex 6). The payee received payment on 10 August 1950 (Pros Ex 6).

As to the Specification of Charge II.

The accused absented himself without proper authority from his organization at Fort Ord, California, at 0001 hours, 13 July 1950, and returned to military control at Fort Ord, California, at about 0815 hours, 22 July 1950 (R 74,75; Pros Ex 9).

b. For the defense.

The accused after being warned of his rights as a witness elected to testify under oath (R 85,86). He related in detail his honorable military service and his educational background (R 87,88,94). He believes that his unfortunate marital difficulties were "steadily driving me down" (R 89-84). He further explained that his debts had piled up and that he did not know which way to turn (R 89,91). He finally asked help from his father, which help arrived a week before the trial (trial held on 14 August 1950)(R 92). All of his obligations are in the process of being liquidated (R 93). Upon returning from emergency leave, the accused did not "report in immediately." He was "so confused." He did not know what to do or which way to turn. Prior to returning from leave he wired for an extension, which was refused. However, he learned about this from a wire mailed to him by his mother and received by him after he had gotten "back" (R 92,93).

Letters of clemency were submitted on behalf of the accused, copies of which are attached to the record of trial.

4. Discussion.

The wrongful failure to maintain a sufficient bank balance to meet a check issued by the accused constitutes an offense under Article of War 96. Proof that the check was issued as the result of an honest mistake made by the accused with respect to the sufficiency of his bank balance may excuse such conduct, but proof that the check was carelessly issued is no excuse, because negligence is the essence of the offense (CM 284260, Hayes, 55 BR 319,324). Proof that a check given for value by a member of the military establishment is returned because of insufficient funds, imposes upon the drawer of the check, when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake and not caused by his own carelessness or neglect (CM 284447, Turner, 55 BR 351,357; CM 250484, Hebb, 32 BR 397,402; CM 319556, Wagner, 68 BR 371,375,376). The test of whether the failure to maintain a sufficient balance is wrongful, is that of reasonableness. An accused is properly chargeable with responsibility for the status of his bank account (CM 279483, Davis, 52 BR 227,231). In a case in which the accused has sole control of the account he should be charged with the responsibility for its depleted

state, and his failure to provide funds adequate for the payment of checks upon presentment, while lacking the elements of fraud and deceit, is necessarily and manifestly of a nature to bring discredit and disrepute to the military service (CM 283726, Bowles, 55 BR 131).

> "A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Such conduct is not only a reflection on the individual and a violation of civil law if committed with wrongful intent, but is service-discrediting as well. Frequently checks are cashed not because of the assurance derived from the implied representation attached to the check so much as the faith created by the uniform. The individual may be satisfied by the exculpation which flows from an explanation rooted in carelessness or neglect. The hurt to the credit and reputation of the Army is not so easily removed." (CM 249232, Norren, 32 BR 95,103).

It is concluded that the failure to maintain an adequate bank balance to meet the 11 May 1950 check issued by the accused constitutes, under the circumstances of this case, a violation of Article of War 96 as set forth in Specification 1 of Charge I.

Specifications 2 to 5 of Charge I allege that the accused wrongfully made and uttered the described checks then well knowing that he did not have and not intending that he have sufficient funds in the bank for their payment. The offense described constitutes a violation of Article of War 96 (CM 277799, Dowd, 51 BR 207,216; CM 337978, Gallo, 4 BR-JC 193,204). The accused is chargeable with knowledge of the condition of his bank account (CM 202601, Sperti, 6 BR 171,214; CM 236070, Wanner, 22 BR 279,283; CM 258314, Reeser, 37 BR 367,378; CM 259005, Poteet, 38 BR 197,206). From his conduct in issuing a series of NSF checks within a short period of time, an intent not to have sufficient funds in the bank to meet the checks may be inferred. Under these conditions the making and uttering of the checks was wrongful (CM 337978, Gallo, supra). Violations of Article of War 96 as set forth in Specifications 2 to 5 of Charge I are sustained by the record.

Absence without leave as charged in the Specification of Charge II is established by the admission in evidence of the copy of the appropriate morning report and by the acceptance in evidence of the oral stipulation that the accused returned to his organization at a particular time. It is presumed that the absence without leave continued, in the absence of evidence to the contrary, until the time of his return as stipulated (MCM 1949, Par. 146a).

5. Consideration has been given to oral representations for and on behalf of the accused by his father, Ed. J. Rutan, Congressman Thomas H. Burke and Mr. John Larson, to copies of letters addressed to the

Commanding General, Fort Ord, California, to letters addressed to The Judge Advocate General, and to the letter of 20 September 1950 addressed to Major General Franklin P. Shaw, The Assistant Judge Advocate General, from Congressman Thomas H. Burke, with inclosures.

6. The records of the Department of the Army show that the accused is 27 years of age and married. He was graduated from high school in Toledo, Ohio, in 1941 and thereafter took a half year of college work in civil engineering and one year of premedical work. In civil life he worked in an electrical power plant. He enlisted in the Army on 11 February 1943, and attained the rank of sergeant. He attended officer candidate school and was commissioned a Second Lieutenant in April 1945. He was separated from the Army at his own request in July 1946. He was recalled to active duty on 25 July 1948 for the purpose of entering upon a competitive tour for a regular army commission, but he was not accepted. He was promoted to First Lieutenant in January 1949, and was retained on active duty. He is entitled to wear the Asiatic-Pacific Theatre Ribbon, the American Theatre Ribbon, the Victory Medal and the Japanese Occupation Medal. His over-all numerical efficiency ratings are 52, 57, 51, 52, 92 and 79.

7. The court was legally constituted and had jurisdiction of the person 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. A sentence to dismissal and total forfeitures after promulgation is authorized upon conviction of violations of Articles of War 96 and 61.

C. P. Hill, J.A.G.C.

C. J. Hauck, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,118

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Allan L. Rutan, 01334632, Company F, 12th Infantry, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

OCT 2 3 1950

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

25 October 1950

(GCMO 77, Oct 31, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 343152

13 SEP 1950

UNITED STATES	YOKOHAMA COMMAND
v.	Trial by G.C.M., convened at Headquarters Yokohama Command, APO 503, 3 and 16 August 1950. Dismissal, total forfeitures after promulgation, and confinement for one (1) year.
Second Lieutenant ROBERT WILLIAM GROTH (0-2208223), Battery "A", 64th Anti-aircraft Artillery Gun Battalion, Johnson Air Base, APO 994.	

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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

2. The accused was tried upon the following charge and specifications:

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

Specification 1: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Irumagawa, Honshu, Japan, on or about 1 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Custodian Eighth Army Exchange Fund, a certain check, in words and figures as follows, to wit:

No. _____ SAN ANTONIO, TEXAS 1 April 1950 30-65/1141
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO
PAY TO THE ORDER OF CUSTODIAN EIGHTH ARMY EXCHANGE FUND $110.00
One Hundred Ten Dollars
Lt Robert W. Groth

and by means thereof did fraudulently obtain from the Custodian Eighth Army Exchange Fund, one hundred ten dollars ($110.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he

should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas for payment of said check.

Specification 2: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Irumgawa, Honshu, Japan, on or about 5 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Custodian Eighth Army Exchange Fund, a certain check, in words and figures as follows, to wit:

No. _____ SAN ANTONIO, TEXAS 5 April 1950 30-65/1141
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO
PAY TO THE ORDER OF CUSTODIAN EIGHTH ARMY EXCHANGE FUND $90.00
Ninety 00/100 Dollars

Lt Robert W. Groth

and by means thereof did fraudulently obtain from the Custodian Eighth Army Exchange Fund, ninety dollars ($90.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas for payment of said check.

Specification 3: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Irumagawa, Honshu, Japan, on or about 7 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Custodian Eighth Army Exchange Fund, a certain check, in words and figures as follows, to wit:

7 April 1950

NATIONAL BANK OF FORT SAM HOUSTON
SAN ANTONIO, TEXAS

PAY AGAINST THIS CHECK
TO THE ORDER OF CUSTODIAN EIGHTH ARMY EXCHANGE FUND $185.00 MPC

One Hundred Eighty five and No/100 Dollars MPC

Lt. Robert W. Groth

Lt. Robert W. Groth
"A" Battery, 64th AAA Gun Bn
APO 994

and by means thereof did fraudulently obtain from the Custodian Eighth Army Exchange Fund, one hundred eighty five dollars ($185.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas for payment of said check.

Specification 4: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Yokohama, Honshu, Japan, on or about 27 March 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Bank of America, Yokohama, Honshu, Japan, a certain check in words and figures as follows, to wit:

30-65
No. 68 SAN ANTONIO TEXAS 27 March 1950 1141
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO
PAY TO THE ORDER OF Cash $165.00
One Hundred Sixty Five Dollars

Lt Robert W. Groth

and by means thereof did fraudulently obtain from the Bank of America, Yokohama, Honshu, Japan, one hundred sixty five dollars ($165.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for payment of said check.

Specification 5: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Irumagawa, Honshu, Japan, on or about 14 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Johnson Air Force Base Officer's Club, a certain check, in words and figures as follows, to wit:

30-65
No. ____ SAN ANTONIO, TEXAS 14 April 1950 1141
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO
PAY TO THE ORDER OF JAFB Officers Club $25.00
Twenty Five 00/100 Dollars

0-2208223 Lt Robert W. Groth
A Btry
64th

and by means thereof did fraudulently obtain from the Johnson Air Force Base Officers Club, twenty five dollars ($25.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for payment of said check.

Specification 6: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Irumagawa, Honshu, Japan, on or about 17 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Johnson Air Force Base Officer's Club, a certain check, in words and figures as follows, to wit:

30-65
No.____ SAN ANTONIO, TEXAS 1141
17 April 1950
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO
PAY TO THE ORDER OF JAFB Officers Club $25.00
Twenty Five 00/100 Dollars
0-2208223 Lt Robert W. Groth
"A" Btry
64th

and by means thereof did fraudulently obtain from the Johnson Air Force Base Officers Club, twenty five dollars ($25.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for payment of said check.

Specification 7: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Irumagawa, Honshu, Japan, on or about 21 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Johnson Air Force Base Officer's Club, a certain check, in words and figures as follows, to wit:

30-65
No.____ SAN ANTONIO, TEXAS 21 April 1950 1141
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO
PAY TO THE ORDER OF JAFB Officers Club $20.00
Twenty 00/100 Dollars
0-2208223 Lt Robert W. Groth
A Btry
64th AAA Bn

and by means thereof did fraudulently obtain from the Johnson Air Force Base Officers Club, twenty dollars ($20.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas for payment of said check.

Specification 8: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Irumagawa, Honshu, Japan, on or about 22 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Johnson Air Force Base Officer's Club, a certain check, in words and figures as follows, to wit:

88-2233
SOUTHWEST NATIONAL BANK 1120
OF EL PASO

EL PASO, TEXAS 22 April 1950 No._____

PAY TO THE ORDER OF JOHNSON A.F.B. Officers Club $25.00
Twenty Five 00/100 Dollars

0-2208223 Lt Robert W. Groth
A Btry
64th AAA Bn

and by means thereof did fraudulently obtain from the Johnson Air Force Base Officers Club, twenty five dollars ($25.00), in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the Southwest National Bank, El Paso, Texas for payment of said check.

Specification 9: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Irumagawa, Honshu, Japan, on or about 22 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Johnson Air Force Base Officer's Club, a certain check, in words and figures as follows, to wit:

88-2233
SOUTHWEST NATIONAL BANK 1120
OF EL PASO

EL PASO, TEXAS 22 April 1950 No_____

PAY TO THE ORDER OF JOHNSON A.F.B. OFFICERS CLUB $25.00
Twenty Five Dollars
0-2208223 Lt Robert W. Groth
A Btry
64th AAA Bn

and by means thereof did fraudulently obtain from the Johnson Air Force Base Officers Club, twenty five dollars $25.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the Southwest National Bank, El Paso, Texas for payment of said check.

Specification 10: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Irumagawa, Honshu, Japan, on or about 22 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Johnson Air Force Base Officer's Club, a certain check, in words and figures as follows, to wit:

88-2233
1120

SOUTHWEST NATIONAL BANK
OF EL PASO

EL PASO, TEXAS 22 April 1950 No._____

PAY TO THE ORDER OF JAFB Officers Club $25.00

Twenty Five 00/100 Dollars

Lt Robert W. Groth

0-2208223
"A" Btry
64th AAA Bn

and by means thereof did fraudulently obtain from the Johnson Air Force Base Officer's Club, twenty five dollars ($25.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the Southwest National Bank, El Paso, Texas for payment of said check.

Specification 11: In that Second Lieutenant Robert W. Groth, Battery A, 64th Antiaircraft Artillery Gun Battalion, did, at Tokyo, Honshu, Japan, on or about 18 April 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Chase National Bank, Tokyo, Honshu, Japan, a certain check, in words and figures as follows, to wit:

30-65
1141

No._____ SAN ANTONIO, TEXAS 18 April 1950
NATIONAL BANK OF FORT SAM HOUSTON
AT SAN ANTONIO
PAY TO THE ORDER OF Cash $130.00
One Hundred Thirty 00/100 Dollars

Lt Robert W. Groth

and by means thereof did fraudulently obtain from the Chase National Bank, Tokyo, Honshu, Japan, one hundred thirty dollars ($130.00) in Military Payment Certificates, he, the said Second Lieutenant Robert W. Groth, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for payment of said check.

CHARGE II and Specification: Nolle prosequi.

He pleaded guilty to and was found guilty of the charge and specifications. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

For the Prosecution

The evidence for the prosecution was submitted in the form of a stipulation. The eleven specifications of the charge can be conveniently classified into two groups and those in each group discussed together.

Specifications 1 to 7 and 11

Between 27 March 1950 and 21 April 1950 the accused made and uttered eight checks totaling $750.00. These checks were drawn by the accused on the National Bank of Fort Sam Houston, San Antonio, Texas. At the time the checks were issued and at all times thereafter the accused knew that he did not have and did not intend to have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for the payment of the mentioned checks. By means of these checks the accused obtained their face value in military payment certificates from the various payees at Honshu, Japan.

Specifications 8-10

The accused made and uttered three checks on 22 April 1950 totaling $75.00. These checks were drawn by the accused on the Southwest National Bank, El Paso, Texas. At the time the checks were issued and at all times thereafter the accused knew that he did not have, and did not intend to have, sufficient funds in the Southwest National Bank, El Paso, Texas, for the payment of the mentioned checks. By means of these checks the accused obtained their face value in military payment certificates from the various payees at Honshu,

Japan (R 15, Pros Ex 1).

For the Defense

The accused, after having been duly apprised of his rights as a witness, elected to testify in his own behalf (R 17). He testified that he is 23 years of age and served as an officer in the Naval Air Corps from February 1944 to 3 October 1945, at which time he received an "honorable discharge." As a Naval Air Corps officer he took his training at the Universities of Missouri and Georgia. He also attended Augustana College in South Dakota. At the latter institution the accused was very active in extracurricular activities. He served as a member of the seven man student council of the college and was president of the Senior Class. He had been "elected to Who's Who of Colleges and Universities." He attended college under the "GI Bill of Rights," and maintained himself during this period by borrowing money from his friends. At the time the accused entered on active duty as a second lieutenant in the Army in January 1949 he was having pecuniary difficulties. He accumulated more debts in the service and became "so involved" that five of his checks had been returned unpaid; this resulted in his being tried by a general court-martial in January 1950. "The sentence was a reprimand and a thousand dollar fine." The accused has not been paid the past three months. He had no money to fall back on and the specifications before the court are the result of his being put to this financial strain. He hopes to pay off the checks which are now in arrears. His wife whom he married five weeks ago "has money" and he might "be able to get some financial help from home" (R 17,21).

It was stipulated by and between the prosecution, defense and the accused that if Colonel George E. Young were present he would testify substantially as follows:

> "That he has known the accused Lieutenant Groth from about the 1st of June 1949 until approximately 10 January 1950, and that during that time the accused was an officer in one of his batteries, to wit: the 753rd AAA Battery, and that he had occasion to observe the accused as an officer; that in his opinion the accused is technically well qualified; that he does an above-average job as a lieutenant in the battery. In fact, he would say an excellent job. He is an excellent instructor. He has the confidence of his men. He is a trained and born leader of men as evidenced from his handling of the troops under his command. Further that he would rate him as an excellent officer. Further, that the general concensus of opinion among the officers of his battery is that the

accused is a born leader and all rate him as excellent." (R 21)

It was further stipulated that if the Range Officer of the 40th AAA Brigade were present he would testify substantially as follows:

> "That at the last firing of the 64th AAA Group at Katakai the accused's battery, which is Battery A, had the highest score of Battery B, C, and D, which was also in competitive firing with Battery A of any battery in the battalion. Further, that Lieutenant Groth was the range officer of Battery A and conducted all the problems of the firing. He would further testify that at the end of the firing period in his recommendations to the Battalion Commander he recommended that Lieutenant Groth conduct a series of classes for both officers and enlisted personnel who are assigned to all other batteries of the battalion in firing and range procedure and problems." (R 22)

Major Gerald A. Lake, 64th AAA Gun Battalion, S-3, and Executive Officer, testified that accused was probably the best qualified range officer in the battalion and probably one of the best in the entire brigade. The accused has exhibited fine qualities of leadership and he would fight to get a man with the accused's technical qualities and qualifications as a range officer (R 22,23).

First Lieutenant Murray Richman testified that the accused was a member of his battery and that he has known him for approximately seven months. He found his work to be of the highest and rated him superior (R 24).

4. Discussion

The accused's plea of guilty, the stipulations received by the court, and the judicial admissions of the accused compel the findings of guilty of the charge and specifications.

Before the court accepted the accused's plea of guilty the law member clearly and concisely explained the meaning and effect of the plea of guilty and the accused personally stated that he understood the effect of such plea and that he wished his plea of guilty to stand. This, coupled with the admission of other independent evidence of guilt, negates any thought that the guilty plea was improvidently entered (CM 337701, Foster, 4 BR-JC 81,84).

5. Department of the Army records show that the accused is 23 years of age and married. He attended Northwest Missouri State Teachers College, Maryville, Missouri, one and one-half years. He also attended Augustana College, South Dakota, for two and one-half years. In civilian life he

was employed variously as a truck driver, shoe salesman and seed inspector. The accused had prior service with the Navy as an aviation cadet from 1 July 1944 until his relief from active duty on 3 October 1945. He received an honorable discharge from the Navy on 30 June 1947. He was commissioned a second lieutenant, Coast Artillery Corps Reserve, on 26 January 1949 and entered on active duty on 31 January 1949. He has been serving in the Far East Command since 7 June 1949.

General Court-Martial Orders Number 11, Headquarters Yokohama Command, dated 27 January 1949 show that the accused was convicted by general court-martial of five offenses involving the making and uttering, with fraudulent intent, checks without having sufficient funds on deposit to pay them in violation of Article of War 96. The sentence as approved by the reviewing authority consisted of a reprimand and a forfeiture of $100.00 per month for five months.

On 27 October 1949 he was reprimanded under Article of War 104 for being drunk and disorderly in the Officers Club at Tomioka Seaplane Base, Honshu, Japan.

His only overall efficiency rating of record is 065.

5. 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 and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of a violation of Article of War 96.

_____, J.A.G.C.

(ABSENT), J.A.G.C.

_____, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,152

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Robert William Groth, 0-2208223, Battery "A", 64th Antiaircraft Artillery Gun Battalion, Johnson Air Base, APO 994, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

SEP 2 1 1950

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

21 September 1950

(GCMO 69, Oct 13, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 343153

28 SEP 1950

UNITED STATES v. First Lieutenant PRESTON N. DANIEL, JR. (0-1062720), Headquarters 80th Airborne Antiaircraft Artillery Battalion, 82d Airborne Division.	82D AIRBORNE DIVISION Trial by G. C.M., convened at Fort Bragg, North Carolina, 4 and 18 August 1950. Dismissal and to pay to United States a fine of five hundred dollars.

OPINION of the BOARD OF REVIEW
BARKIN, SHULL and WOLF
Officers of The Judge Advocate General's Corps

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

2. The accused was tried upon the following charges and specifications:

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

Specification 1: In that First Lieutenant Preston N. Daniel, Jr., Headquarters 80th Airborne Antiaircraft Battalion, 82nd Airborne Division, Fort Bragg, North Carolina, did, at Fort Bragg, North Carolina, on or about 31 January 1948, for the purpose of obtaining an increased allowance for a dependent, present for payment to Major E. Harding, Jr., Finance Department, Finance Officer at Fort Bragg, North Carolina, an officer of the United States, duly authorized to pay such claims, a claim against the United States, to-wit: An Officer's Pay and Allowance Account (W. D. Form 336a), which said writing he, the said First Lieutenant Preston N. Daniel, Jr., then knew contained a certification by him that the income of his father, Preston N. Daniel, Sr., for the month of January 1948, was "$80.00", which certification was false and then known by the said First Lieutenant Preston N. Daniel, Jr., to be false, in that the income of the said Preston N. Daniel, Sr., for the month of January 1948 was $125.00, or more.

Specification 2: In that First Lieutenant Preston N. Daniel, Jr., ***, did, at Fort Bragg, North Carolina, on or about 29 February 1948, for the purpose of obtaining an increased allowance for a dependent, present for payment to Major E. Harding, Jr., Finance Department, Finance Officer at Fort Bragg, North Carolina, an officer of the United States duly authorized to pay such claims, a claim against the United States, to-wit: An Officer's Pay and Allowance Account (W. D. Form 336a), which said writing he, the said First Lieutenant Preston N. Daniel, Jr., then knew contained a certification by him that the income of his father, Preston N. Daniel, Sr., for the month of February 1948, was "none", which certification was false and then known by the said First Lieutenant Preston N. Daniel, Jr., to be false, in that the income of the said Preston N. Daniel, Sr., for the month of February 1948, was $125.00, or more.

Specification 3: In that First Lieutenant Preston N. Daniel, Jr., ***, did, at Fort Bragg, North Carolina, on or about 31 March 1948, for the purpose of obtaining an increased allowance for a dependent, present for payment to Major E. Harding, Jr., Finance Department, Finance Officer at Fort Bragg, North Carolina, an officer of the United States duly authorized to pay such claims, a claim against the United States, to-wit: An Officer's Pay and Allowance Account (W. D. Form 336a), which said writing he, the said First Lieutenant Preston N. Daniel, Jr., then knew contained a certification by him that the income of his father, Preston N. Daniel, Sr., for the month of March 1948, was "$60.00", which certification was false and then known by the said First Lieutenant Preston N. Daniel, Jr., to be false, in that the income of the said Preston N. Daniel, Sr., for the month of March 1948, was $125.00, or more.

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

Specification 1: In that First Lieutenant Preston N. Daniel, Jr., ***, being authorized to make and present an Officer's Pay and Allowance Account certifying his entitlement to receive the therein specified sums, did, on or about 30 April 1948, at Fort Bragg, North Carolina, make and present to Major E. Harding, Jr., Finance Department, Finance Officer at Fort Bragg, North Carolina, an officer duly authorized to pay such accounts, an Officer's Pay and Allowance Account (W.D. Form 336a), which paper he, the said First Lieutenant Preston N. Daniel, Jr., then knew contained a certification by him that the income of his father, Preston N. Daniel, Sr.,

for the month of April 1948, was "none", which certification was false and was made by First Lieutenant Preston N. Daniel, Jr., without having full knowledge of the truth of the statements therein contained and with the intent to defraud the United States.

Specification 2: In that First Lieutenant Preston N. Daniel, Jr., ***, being authorized to make and present an Officer's Pay and Allowance Account certifying his entitlement to receive the therein specified sums, did, on or about 31 May 1948, at Fort Bragg, North Carolina, make and present to Major E. Harding, Jr., Finance Department, Finance Officer at Fort Bragg, North Carolina, an officer duly authorized to pay such accounts, an Officer's Pay and Allowance Account (W. D. Form 336a), which paper he, the said First Lieutenant Preston N. Daniel, Jr., then knew contained a certification by him that the income of his father, Preston N. Daniel, Sr., for the month of May 1948, was "none", which certification was false and was made by First Lieutenant Preston N. Daniel, Jr., without having full knowledge of the truth of the statements therein contained and with the intent to defraud the United States.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to pay to the United States a fine of Five Hundred Dollars. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence

a. For the Prosecution

Between 1 January 1948 and 30 May 1948, and thereafter, accused was in the military service of the United States and Battalion S-4 of the 80th Airborne Antiaircraft Battalion, 82nd Airborne Division (R 14). Photostatic copies of five officer's pay vouchers (Pay and Allowance Account WD Form 336) covering accused's pay account for the months of January through May, 1948, were received in evidence without objection as Prosecution Exhibits 1 through 5 (R 10). It was orally stipulated that the signatures "Preston N. Daniels" appearing on each pay voucher (Pros Exs 1 to 5 incl) are the signatures of accused (R 10). Above the signature of accused, appears the following statement on each pay voucher:

"I certify that the foregoing statement and account are

true and correct; that payment therefor has not been received; and that payment to me as stated on the within voucher is not prohibited by any provisions of law limiting the availability of appropriation(s) involved. (Applicable certificates on reverse made a part hereof.)"

On the reverse side of each of the aforementioned pay vouchers, the name Preston N. Daniel, 306 West 112th Street, New York, New York, is listed as the "dependent father" of accused. Below the name is the declaration that the dependent father's living expenses required and actually incurred are $125 to $150 per month, that the amount contributed thereto by accused is $100 per month, that the total gross income of the dependent is "$60.00" for the month of January 1948, "none" for the month of February 1948, "$60.00" for the month of March 1948, "none" for the month of April 1948, and "none" for the month of May 1948. Immediately following this information is the following statement on each pay voucher:

"For the purpose of obtaining payment of certain allowances from the Government, and in support of my contention that the above-named person is in fact dependent on me for his or her chief support, I certify that the information shown above is true and correct; that the amount required for reasonable and proper living expenses per month is as stated; that I have contributed to his or her support without any consideration therefor or hope or expectation of return therefrom the sum stated above; that the total gross income of my dependent from all sources (including in such income any payment or contributions of others toward his or her proportionate share of household living expenses) other than my contributions has not or does not exceed the amount shown for the period stated."

It was orally stipulated that Major E. Harding, Jr., F.D., Finance Officer at Fort Bragg, North Carolina, was an officer of the United States Army duly authorized to disburse officers pay and allowance accounts for the period of 1 January through 31 May 1948 (R 12).

Mrs. Alberta Forde testified by deposition that she is the sister of accused; that during the months of January through May 1948 she and her husband resided at 306 West 112th Street, New York, New York, with her father, Preston N. Daniels, Sr., who is also accused's father; that her father was unable to "work steady"; and that during that period of time accused assisted his father financially by sending him "money every month" (R 10-11, Pros Ex 6).

Etta Israel testified by deposition that she is the office manager and "actual custodian" of the records of the Frances Adams Hat Corporation, 711 5th Avenue, New York, New York, and that Preston N. Daniel, Sr., 306 West 112th Street, New York, New York, employed by that firm, was paid the following amounts, exclusive of income tax from 1 January to 31 May 1948:

January 1948	-	$237.69	
February 1948	-	188.34	
March 1948	-	141.54	
April 1948	-	173.61	
May 1948	-	148.04	(R 11, Pros Ex 7).

Jack S. Balaban testified by deposition that he is an investigator of the General Accounting Office. On 10 June 1949 he interviewed accused's father at his home and accused's father informed him that he had received certain allotment checks from his son. He also stated that he had returned to accused all or part of the proceeds of the allotment checks obtained thereby (R 28, Pros Ex 9).

Preston N. Daniel, Sr. testified by deposition that he is the father of accused; that he is employed by the Frances Adams Hat Corporation; that his earnings for the months of January to May 1948, inclusive, after deduction of State and Federal income tax, and exclusive of any "dependency benefits" received from accused, were "$140.00 (approximately)" for each month; that during this period he received an allotment check of $100 a month from accused which was not more than 50 percent of his income for that period; and that during this period he was not dependent upon accused, but had requested accused for "some financial help" to pay doctor bills and other household debts. He had not furnished accused with information as to his employment or his monthly earnings and accused had never requested such information. He had made "small loans of money" to accused at accused's request but denied stating to an investigator that he had returned the proceeds of "dependency checks" to accused. He knew accused claimed him as a dependent (R 11, Pros Ex 8).

The trial judge advocate requested the court to take judicial notice of AR 35-1465 and TM 14-501, pertinent paragraphs of which provide in substance that where an officer is the chief support of a parent, he may claim the parent as his dependent. By chief support is meant contributing more than 50 percent of the parent's total gross income. Where the facts do not show that the contribution of the officer is the chief support of the parent, he may not be allowed to claim such parent as a dependent.

b. For the Defense

By deposition for the defense, Preston N. Daniel, Sr. testified that

he was the same person who had previously given testimony by deposition. He stated that he requested financial assistance from accused to pay bills incurred from the illness of his wife and himself and that accused gave him the money to pay these expenses which included previously incurred bills. He could not state what it cost him to live during the first half of 1948, but that an estimate, including food, rent, clothing, laundry, transportation, church contributions and doctor bills, would be about $184.75 per month. The money he earned from January through May 1948 was used in part to pay debts incurred during his wife's last illness. The loans he had made to accused had been repaid and at no time had he returned to accused any part of the allotment checks he had received from him (R 13, Def Ex A).

After being advised of his rights as a witness accused elected to testify under oath (R 13-14). He stated that he has been in the United States Army for about 10 years, has had two overseas tours, and that his present duty assignment is Battalion S-4. He was unmarried from January through May 1948 and claimed his father as a dependent during that period. During that time he had a Class "E" allotment of $100 per month payable to his father. He stated that he "was led to believe" from weekly letters and telephone conversations with his father and sister that his father "during some periods of time was not working." His father worked for a "hat concern" but he did not know where it was located nor did he make independent inquiry as to his father's income. He had not received any part of the money allotted by him to his father. He verified the fact that the five officer pay vouchers in evidence (Pros Exs 1 through 5) were his. He determined his father's income to be "$60.00" or "none" as stated in the voucher in the following manner: When his father told him he was working, accused estimated his father's income to be $60 as "That is the figure that I expected he would make." When his father told him he was not working, accused listed his income as "none" (R 14-20).

Relative to this matter, accused further testified:

"Q: During this period January 1948 through May 1948, did you ever talk to your father about how much money he earned?
"A: I talked to him, naturally, about his financial condition, and he stated that he was in poor health, and that he had bills to pay, and that he needed my help.

"Q: Did you ask him if he was working at that time?
"A: Yes, I did.

"Q: And what was his answer?
"A: He said that it was off and on because of his poor health.

"Q: Did you ask him how much money he earned?

"A: I don't think that I asked him directly how much money he earned, because I don't think that my father would ever tell me that." (R 19)

Major Leon S. Barwick, 82nd Airborne Division Finance Officer, testified that during the period in issue pay vouchers for accused's organization were prepared about the 10th and 15th of the month for payment for that month and that an officer may claim a parent as a dependent, provided he contributes more than 50 percent of the normal living expenses of the parent for the month (R 21-22).

Four officers of field and company grade who know or have served with accused for various periods of time testified that his reputation for honesty and veracity was "above reproach" and that his military efficiency was "high excellent" and "superior" (R 23,25,26,27).

4. Discussion

The accused was found guilty of five offenses of presenting or making and presenting for payment claims against the United States containing false certificates for the purpose of obtaining an increased allowance for a dependent, for each of the months of January through May 1948. The first three specifications allege that the certificates were known by accused to be false when made and are properly charged in violation of Article of War 94 (CM 334323, Reigler, 1 BR-JC 161,168). The last two specifications,which allege that the certificates were made by accused without full knowledge of the truth of the statements therein contained and with intent to defraud the United States, were erroneously charged in violation of Article of War 96 and should also have been charged in violation of Article of War 94 (MCM, 1949, par 181b). In applying the rules of law applicable to these specifications, the offenses and not the Articles of War as described therein is the determinant (MCM, 1949, par 28). Accordingly, the time lapse between the date of the commission of all offenses and charges and accused's arraignment thereof being less than three years is not within the application of the statute of limitations (MCM, 1949, par 67).

It is uncontroverted that accused certified on his pay vouchers for the months of January through May 1948 that his father was his dependent, and that his father's total gross income was $60 for each of the months of January and March 1948, and none for each of the months of February, April, and May 1948, as alleged. It is also uncontroverted that accused's father, employed by a New York hat concern, received "take home" pay in the amount of $140 per month or more from January through May 1948. Accused's certification that his father earned only $60 for two months and nothing for the three remaining months of this period was therefore obviously false.

The remaining element of proof in determining accused's guilt or innocence is whether accused knew or should have known that the certifications of his father's total gross income were false. It was incumbent

upon accused to state this amount accurately as it was material to his claim for increased allowances. Although accused stated that he communicated with his father and sister about once a week during the period in issue, he did not request this information because, as he stated, he did not think his father would tell him, notwithstanding the fact that accused was sending him $100 a month by allotment and his father knew accused claimed him as a dependent. Instead of asking his father how much he earned for the months he was claiming him as a dependent, accused stated he estimated his father's monthly income at $60 or nothing depending upon his father's casual remarks as to the extent of his employment for that particular month. Although accused admitted that his father was employed by one firm during the period in issue, he stated he did not know the name of the firm, his father's rate of pay or the number of days during the month that his father was employed, and upon this lack of information accused stated he estimated his father's earnings as $60 or as nothing during five consecutive months using as his reason for doing so, "That is the figure that I expected he would make." If accused, in reality, had no knowledge of his father's earnings, his action in entering an arbitrary figure concerning them on his monthly pay vouchers cannot be justified. However, the Board is of the opinion that accused knew that the amount of the total gross income received by his father as stated on his pay voucher was false. For a commissioned officer, particularly one holding a responsible staff assignment and highly regarded by his superiors for his efficiency, to have made these certificates for five succeeding months without having made a sincere effort to ascertain the facts and then to declare that he believes them to be true, is incredible. Where, as here, one makes a statement that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, he does so at his own peril. From the circumstances in this case the court was fully warranted in inferring that at the time accused presented each of the certificates he was aware of their false and fraudulent character and accordingly the evidence is legally sufficient to support the findings of guilty of all specifications and charges.

5. After announcing the sentence the President of the court stated: "The court recommends clemency in this case."

6. Records of the Department of the Army show that accused is 29 years of age and married. He graduated from high school, attended the City College of New York for six months, and was employed as a shipping clerk for about two years. On 4 November 1940 he enlisted in the New York National Guard in the grade of private, and was inducted into active military service of the United States on 13 January 1941. On 8 December 1943 he was honorably discharged in the grade of sergeant to accept an appointment as a second lieutenant, AUS. On 14 June 1945 he was promoted to first lieutenant and has had continuous active duty as a commissioned officer since 9 December 1943. He is authorized to wear the Asiatic Pacific, American Theater, American Defense and Victory Medals and ribbons and has been awarded the Expert Infantryman's Badge. His efficiency ratings from 1 January 1945 to 30 June 1947 average 4.9. Thereafter his efficiency reports show ratings of 096,079,108,103,118,102 and 094.

7. The court was legally constituted and had jurisdiction over the person 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 and to warrant confirmation thereof. A sentence to dismissal is authorized upon conviction of violations of Articles of War 94 and 96.

Edward Tarpey, J.A.G.C.

Lewis E. Shull, J.A.G.C.

Samuel S. Cowles, J.A.G.C.

(48)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,153

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Preston N. Daniel, Jr., 0-1062720, Headquarters 80th Airborne Antiaircraft Artillery Battalion, 82d Airborne Division, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

13 October 1950

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

13 October 1950

(GCMO 74, Oct 20, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

SEP 26 1950

JAGH CM 343156

U N I T E D S T A T E S	)	UNITED STATES ARMY, EUROPE
	)	
v.	)	Trial by G.C.M., convened at Heidelberg, Germany, 26 and 28 July 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for thirty-five (35) years. Federal Institution.
Private First Class JAMES W. DUKE (RA 19340039), 7969 Depot Detachment, Rhine General Depot.	)	

REVIEW by the BOARD OF REVIEW
HILL, HAUCK, and FITZHUGH
Officers of The Judge Advocate General's Corps

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

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

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

Specification: In that Private First Class James W. Duke, 7969 Depot Detachment, did, at Kaiserslautern, Germany, on or about 2000 hours 22 June 1950, forcibly and feloniously, against her will, have carnal knowledge of Karin Christmann, a German National.

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

Specification: In that Private First Class James W. Duke, 7969 Depot Detachment, did, at Kaiserslautern, Germany, on or about 2000 hours 22 June 1950, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Karin Christmann, a German National.

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such

place as proper authority may direct for thirty-five years. The reviewing authority approved the sentence, designated a United States penitentiary, reformatory, or other such institution as the place of confinement, the prisoner to be committed to the custody of the Attorney General, or his designated representative, for classification, treatment, and service of sentence of confinement, and pursuant to Article of War 50(e) withheld the order directing execution of the sentence.

3. Evidence.

a. For the prosecution.

The accused, Private First Class James W. Duke occupied rooms at 11 Stiftwaldstrasse, Kaiserslautern, Germany (R 19). Mrs. Erna Christmann and her four children, Hannelore, Hermann, Alfried, and Karin lived at Number 7, Stiftwaldstrasse. Karin was 10 years old (R 20). At about 1900 hours, 22 June 1950, Karin was playing on the street in Kaiserslautern when the accused approached her. He at first told her that she was to go with him to his rooms to take care of a baby but after she had gone upstairs he gave her some money and sent her to buy some beer which she frequently had done for him on prior occasions (R 9,27-28). Upon her returning with the beer, the accused indicated to Karin that she should accompany him. She did so and they proceeded in the direction of a lake to a wooded area where the accused took her into some bushes. He told her to lie down, and when she failed to do so, threw (R 9) (pushed (R 16)) her to the ground. He lay on top of her (R 17), removed her panties and attempted to insert his penis into her vagina. He was unsuccessful at first but subsequently succeeded in effecting penetration with his penis, between one quarter and one half inch (R 9-10). Failing in his efforts to achieve complete penetration, the accused forced Karin to take his penis into her mouth. She did so only after he struck her, held her head and "pinned" her mouth. Karin "didn't want to do anything" but when she failed to comply with the accused's verbal commands he struck her. When she tried to scream he choked her (R 9-10). His carnal desires satisfied, the accused gave Karin one mark and sat down to drink his beer. Karin went home and told her mother what had happened to her (R 10).

Prior to going with the accused, Karin was dressed in a "fresh dress" (R 19). She returned home "a few minutes before nine o'clock" (R 21). "Her hair was loose." "Her clothes were covered with mud." She had marks on her neck. Her face was swollen. There were thorns in her hands and legs. Her vagina was swollen. She was vomiting. Her panties had a hole in them and were spotted with a little blood. She told her mother that "she had been raped" (R 21,22,23). Her mother took her to a hospital in Kaiserslautern and later to the American hospital in Heidelberg (R 23).

Karin was examined by a medical officer and by a German physician at the 130th Station Hospital, Heidelberg, at about 0200 hours, 23 June

1950 (R 31). Her thighs, buttocks and legs were found to be covered with minute reddish spots and scratches which were determined to have been caused by thorns. Examination of her genitalia revealed longitudinal striations of dried blood on both sides of the labia majora as well as fresh blood issuing from a superficial abrasion in the floor of the vagina. The hymen had been penetrated. Laboratory examination of a vaginal smear taken at the time of the physical examination revealed the presence of many sperm cells. There were no marks on her throat (R 32).

A pair of trousers obtained from the accused by a CID agent were found to have grass stains on the left knee and leg and also showed seminal stains in the area to the right and below the fly (R 58).

On 24 June 1950, Karin identified the accused in two different groups of 27 soldiers as the man who had assaulted her. She also pointed out to CID agents the area where the assault had taken place. The site was found to be heavily wooded with many thorned bushes (R 34).

The accused was questioned by the Provost Marshal at Rhine General Depot and by CID agents on 23 June 1950 for fifteen minutes; on 24 June for ten minutes (R 36); and on the 26th of June (R 38,50). He was warned of his rights under the 24th Article of War, and on each occasion declined to make a statement. Agent Dunn informed him that he would take his statement if he desired to make one. (R 34,35,37,38). On 29 June, the accused having volunteered to take a lie detector test was taken to Frankfurt, Germany, for such purpose (R 45). He was again warned of his rights against self-incrimination and after discussing the matter with the polygraph operator decided to make a statement (R 43). Thereupon, he was taken into an adjoining room where he wrote out the statement in his own handwriting. After the 24th Article of War again had been read to him, a CID agent witnessed the writing and signing of the statement (R 45). No force, duress, threats or promises were used to obtain the statement (R 46,49,73-74). Its preparation was the voluntary act of the accused (R 46). The statement was admitted in evidence over the objection of the defense (R 55). The statement amounts to a complete confession of the act of sodomy per os, but denies the rape (Pros Ex 4).

b. <u>For the defense.</u>

The accused, at his own request, was sworn as a witness for the limited purpose of testifying as to the circumstances under which his statement was made. He maintained that although he had been warned of his rights under the 24th Article of War and had declined to make a statement at least three times, the persistency of the CID agents led him to believe that he had to make a statement to explain his side of the case. He also was influenced by Agent Dunn who promised him that if he "plead guilty" to one of the two charges against him the other would "probably

be dropped" (R 51,52). During the course of this limited testimony, the accused stated that the last thing he remembered on the afternoon in question was being in a gasthaus and that he remembered nothing more until he found himself "going down stairs in Kaiserslautern with two MPs" (R 51). He attributed his lack of memory to the fact that he was "dog drunk" (R 54). The law member directed that the latter statement be stricken (R 54).

Having been duly advised of his rights as a witness in his own behalf, the accused elected to make an unsworn statement through counsel. In this statement he repeated his testimony to the effect that he had been induced to make the statement which he had made to the CID by reason of the promise of Mr. Dunn, and that actually he was so drunk on the 22d of June that he was unable to remember anything which had taken place that evening. He further stated that he drank heavily because of nervousness resulting from wounds received during the war (R 115-116). He attributed the testimony against him by Mrs. Christmann, to her desire to obtain a large sum of money for injuries to her daughter (R 117).

Lieutenant Colonel John A. Faust, Ordnance Corps, First Lieutenant Thomas A. O'Donnell, the accused's detachment commander, and his first sergeant, all testified that the accused's character was excellent. The first sergeant further testified, however, that any man who stayed out of trouble for thirty days was given an excellent character rating in that organization (R 62,63-64).

Ten witnesses, all close neighbors of Mrs. Erna Christmann, testified that her reputation for truth and veracity was bad (R 67,82,85,102,104, 105,108,110,112,113). Two of them stated that they would not believe her testimony under oath (R 82,104). Four of them also testified that the reputation of Karin Christmann for truth and veracity was bad (R 82,85, 110,113); of which one also testified that she would not believe Karin under oath (R 110).

The accused's testimony as to his drunkenness was corroborated by Maria Hausmann who saw him about 2115 hours, 22 June 1950, and observed that he could not talk normally and had to be assisted in walking (R 78). Miss Hausmann also corroborated the accused's statement that he drank frequently and at such times could not remember anything that happened during his period of drunkenness (R 79-80).

A doctor, who examined the accused for sobriety at about 2400 hours, 22 June 1950, testified that at the time of such examination the accused "was a little bit drunk, a bit drunk, but not too much * *" (R 92). A blood alcohol test made at the same time indicated the accused to have 3.5 mg of alcohol per cc of blood (R 93). An expert in toxicology testified that, according to recognized authorities, a blood alcohol level of

3.5 mg per cc indicated serious intoxication (R 95). However, he qualified his opinion by further stating that as the tolerance of persons to alcohol varied, a blood alcohol test was of value only as confirmation of a doctor's diagnosis (R 96,97). He further stated that he had observed accident or shock to exercise a sobering influence on intoxicated persons without reducing the blood alcohol index (R 101).

It was stipulated that Karin Christmann was 4 feet 4 inches tall and weighed 63 pounds, 13 and 1/3 ounces (R 120).

4. Discussion.

The accused is charged with committing the crimes of rape and sodomy. Rape is the unlawful carnal knowledge of a woman by force and without her consent (Par. 179b, MCM, 1949). Sodomy may be committed by placing the sexual organ in the mouth of another (Par. 180j, MCM, 1949). Since force is not an essential element of the crime of sodomy and accused admitted performing an act of sodomy per os with the person alleged it is not material whether his version that the act was without force or hers that she was forcibly compelled to perform the act be accepted as true.

The prosecution proved and the accused admitted being with the prosecutrix, Karin Christmann, a ten year old child, on the evening of 22 June 1950. It also appears that Karin was well acquainted with the accused as a neighbor, was accustomed to perform small tasks for him, and had no reason to fear him or to refuse to accompany him when he asked her so to do.

Her testimony as to the essential elements of the rape committed upon her is uncontradicted except for the statement of the accused made to the CID. This statement corroborates her testimony up to the point of actual physical contact between her and the accused, but thereafter contradicts her testimony as to the elements of force, consent and penetration. A factual situation consequently was presented for determination by the court on all of the evidence before it.

The record contains compelling evidence which corroborates Karin's testimony. At 1915 hours she had on a fresh dress. At 2115 hours her clothes were covered with mud, her hair was loose, there were marks on her neck, her face was swollen, her legs, thighs and buttocks were scratched and punctured with thorns. On examination by a medical officer approximately five hours later, her hymen was found to have been ruptured and she was found to be bleeding from an abrasion in the floor of her vagina. Laboratory analysis revealed the presence of sperm cells in her vagina. Such evidence is inconsistent with any hypothesis other than that of a forcible violation of her person against her will. It is entirely inconsistent with the accused's statement to the CID that, if there was a

penetration of her person, it was with her consent and at her invitation. The court had the right and the duty to exercise its discretion and, where the evidence so justified, to disbelieve the story of the accused and accept the facts as being to the contrary, as was done in CM 288015, Giles, 56 BR 307,312-314; CM 292689, Flores-Galarza, 57 BR 269,278,279; CM 335138, Bright, 3 BR-JC 305,307).

The statement made by the accused to an agent of the Criminal Investigation Division amounts to a complete confession of the crime of sodomy and also contains admissions seriously compromising the accused in the rape alleged. It is well established that to be admissible in evidence, a confession must be voluntary (Par. 127a, MCM, 1949). It will be rendered involuntary if induced or procured through duress, threats or promises of reward or benefit of a substantial nature (MCM, 1949, ibid). In the instant case, much of the record is devoted to an attempt by the defense to establish the involuntary nature of the confession. The accused took the stand twice for this purpose and all other witnesses involved in its taking were cross-examined extensively on this subject. No useful purpose would be achieved in discussing this evidence in detail. Even the accused does not deny that he was repeatedly warned of his rights under the 24th Article of War. That he understood his rights in this respect is evidenced by the fact that he consistently declined to make any statement until faced with a lie detector test which he had volunteered to take. While it appears that he was interrogated on numerous occasions, it appears equally certain that such interrogations were each of brief duration and that at no time were threats, force or duress used. There remains the question of the alleged promise of Agent Dunn, that if he (the accused) pleaded guilty to one of the two charges against him the other probably would be dropped. If the accused's testimony to such effect is taken as true, such "promise" must be taken to constitute a promise of leniency which would invalidate the confession (CM 284729, Peschiera, et al, 55 BR 409,411,412; CM 298315, Stevens, 58 BR 277,281; CM 307004, Butters and Yelton, 60 BR 1,6,9; CM 316223, Evans, 71 BR 385,388; CM 325329, Holland, 74 BR 147,154-158). We are not compelled to accept such testimony as true, however, in view of the testimony of Agent Dunn to the effect that he made no effort to obtain a statement from the accused but simply told him that he would take his statement if he wanted to make one. It is thus seen that there is a substantial dispute as to whether such a promise was or was not made. From all the evidence on this subject an inference that such a promise was not made is equally as probable as an inference that such promise was made. Under such circumstances, the Board of Review finds no basis for setting aside the determination of the court that the confession was voluntary (CM 312092, Currey, et al, 61 BR 363,374 and cases there cited).

In spite of his confession, the accused testified while on the stand and in an unsworn statement through counsel that he was so drunk on the evening of 22 June 1950, that he remembered nothing of what had happened until he found himself in the custody of the military police. When examined by a medical officer three to four hours after the commission of the offenses with which he is charged, the accused was found to be "a

little bit drunk" and to have a blood alcohol index of 3.5 mg. per cc. One witness corroborated the accused's testimony as to his drunken condition at about 2115 hours on the date in question. On the other hand there also was testimony to the effect that he appeared to be normal at 1915 hours. Thus, again, a substantial conflict in evidence was presented which, in the first instance at least, it was the duty of the court to resolve. The Board of Review finds no basis on all the evidence to disagree with the court's determination, necessarily included in its findings of guilty, that the accused was sufficiently sober at the time of the rape to entertain the necessary criminal intent (CM 288446, Arvizu, 56 BR 361,367; CM 302846, Dayton, 58 BR 391,395; I Wharton, Criminal Law, Sec. 753).

Much of the record is devoted to an attack upon the reputation of the prosecutrix and of her mother for truth and veracity. In view of the physical evidence corroborating the testimony of these witnesses we do not find it necessary to reject their testimony on this ground.

5. The Board of Review has given careful consideration to the several letters of clemency attached to the record of trial.

6. The accused served in the Navy from 30 November 1943 to 8 December 1945. He contends that from July 1944 to November 1945, he served on an aircraft carrier in the South Pacific; and that he is entitled to wear the Asiatic-Pacific campaign ribbon with four battle stars and the Philippine Liberation ribbon with one star. There are no records available to the Board of Review to substantiate this contention. He enlisted in the Army to serve three years on 5 January 1949. His character of service prior to this offense is rated as excellent. There is no record of other civil or military offenses.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to confinement at hard labor for thirty-five years is authorized upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 18; U.S.C., Section 2031.

C. P. Hill, J.A.G.C.

C. J. Hauck, Jr., J.A.G.C.

William C. Pittsburgh, J.A.G.C.

(56)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

SEP 26 1950

Board of Review

CM 343156

UNITED STATES v. Private First Class JAMES W. DUKE (RA 19340039), 7969 Depot Detachment, Rhine General Depot.	UNITED STATES ARMY, EUROPE Trial by GCM, convened at Heidelberg, Germany, 26 and 28 July 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for thirty-five (35) years. Federal Institution.

HOLDING by the BOARD OF REVIEW
HILL, HAUCK, and FITZHUGH
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

C. P. Hill, J.A.G.C.
C. J. Hauck, Jr., J.A.G.C.
William C. Fitzhugh, J.A.G.C.

1st Indorsement

12 OCT 1950

Dept. of Army, J.A.G.O. To the Commanding General, United States Army, Europe, APO 403, c/o Postmaster, New York, New York

1. In the case of Private First Class James W. Duke (RA 19340039), 7969 Depot Detachment, Rhine General Depot,

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 and the sentence . Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence .

2. A radiogram is being sent advising you of the foregoing holding. Please return the said holding and this indorsement and, if you have not already done so, forward therewith six copies of the published order in this case.

(CM 343156).

FOR THE JUDGE ADVOCATE GENERAL:

WILLIAM P. CONNALLY, JR.
Colonel, JAGC
Assistant Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

OCT 6 1950

JAGH CM 343172

U N I T E D S T A T E S	)	UNITED STATES ARMY, EUROPE
v.	)	Trial by G.C.M., convened at Wuerzburg, Germany, 19, 20 July 1950. Dismissal and total forfeitures after promulgation.
Captain JACK WILDER (0-307013), Headquarters 7806 Station Complement Unit, Kitzingen Sub-Post, APO 800.	)	

OPINION of the BOARD OF REVIEW
HILL, TIBBS, and FITZHUGH
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

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

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

Specification 1: In that Captain Jack Wilder, 7806 Station Complement Unit, did, at Kitzingen, Germany, on or about 14 April 1949, with intent to defraud, forge the signature of Major David L. Evans upon a certain official document made in the following words and figures, to wit:

FINANCE OFFICE
WURZBURG MILITARY POST
APO 800 U S ARMY

APPLICATION AND APPROVAL FOR THE PURCHASE OF FOREIGN CURRENCIES

SECTION I DATE 14 April 1949

Request the sum of $ 30.00 in U. S. Military Payment Certificates or other acceptable dollar instruments, tendered herewith be exchanged for the equivalent, the quantity and types of foreign currencies denaminated.

DOLLARS			FOREIGN CURRENCY
30.00	TYPE M.P.C.	QUANTITY	100.00 DM

Payment for services of bookkeeper month of April 1949

Designation of Fund or Name, Rank, ASN, and Organization of Individual

JACK WILDER, Capt. Inf. Custodian 7806 EM Club, Kitz. Sub-Post

Address

/s/ Jack Wilder
/t/ JACK WILDER
Capt. Inf.

Signature

SECTION II (For use of finance officer only)

Request (as amended) approved and effective _____
Date

/s/ David L. Evans
Signature

/s/ Major FD
Rank and Organization

EFR 30-4 (18 July 47) APPLICATION NO. 1370

which said document was a writing of a public nature which might operate to the prejudice of another.

Specification 2: (Identical to Specification 1, except the date "26 May 1949," the amount "$222.45," quantity of foreign currency "741.50 DM," paymentfor services of "german employees month of May 1949," organization of accused "Collections Officer, Kitz. Sub-Post, APO 800," and application number "1575.")

Specification 3: (Identical to Specification 2, except the date "20 June 1949," the amount "$133.50," quantity of foreign currency "445.00 DM," forgery of the signature of "W. P. Galloway, 1st Lt FD," application number "1724," and payment for services of "german employees month of June 1949.")

Specification 4: (Identical to Specification 3, except the date "12 July 1949," the amount "$101.40," quantity of foreign currency "338.00 DM," and application number "46.")

Specification 5: (Identical to Specification 2, except the date "6 September 1949," the amount "$30.00," quantity of foreign currency "100.00 DM," payment for services of "german bookkeeper, for month Spet. 1949," and application number "387.")

CHARGE II: Violation of the 94th 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 previous convictions was introduced. He was sentenced to be dismissed the service, and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

The evidence pertinent to the findings of guilty is summarized as follows:

a. For the prosecution.

The accused is a member of the military service (R 15,54,86). In April 1949 he was in charge of the United States Army Collection Agency in Kitzingen Sub-Post, Germany, and from 1 June 1949 to 1 February 1950 he was commissary sales officer (R 92,98). Miss Ingeborg Seitz was the office cashier and worked under the accused's supervision (R 54,55). To pay the salaries of German civilian employees, she was required to convert Military Payment Certificates into Deutsche marks (R 55,56,62). The conversion was accomplished by submitting an application signed by the section head, in this case the accused, to the Finance Officer at Wurzburg (R 55). In practice the application would not be honored until it had been approved by the Finance Officer or Assistant Finance Officer in which case it would be so endorsed and would also bear the officer's signature. The approved application would then be retained in the office files as a voucher to account for what would otherwise be a shortage of Military Payment Certificates (R 55,56,62; Pros Exs 4,5,6,7,8).

Between 14 April and 16 September 1949, the accused had Miss Seitz prepare five separate applications in the amounts of $30.00, $222.45, $133.50, $101.40 and $30.00, respectively. These instruments form the

basis for Specifications 1 through 5 of Charge I (R 55-60; Pros Exs 4,5, 6,7,8). Each of the applications is signed by the accused as Collection Officer (Pros Exs 4,5,6,7,8). Three of the applications bear a signature in the section for Finance Officer's approval purporting to be the signature of Major D. L. Evans, F.D., Finance Officer (Pros Exs 4,5,8) and two have a signature purporting to be that of First Lieutenant W. P. Galloway, F.D., Assistant Finance Officer (Pros Exs 6,7).

By stipulation, it was agreed that if these two officers were present, they would testify, in effect, that neither of them had signed any of the instruments involved (Pros Exs 4,5,6,7,8), nor had either authorized the accused, or anyone else, to sign the approving signatures for the Finance Office (Evans: R 63,64, Pros Exs 4A,5A,8A; Galloway: R 64, Pros Exs 6A,7A).

Miss Seitz knew the handwriting of Major Evans and Lieutenant Galloway, having seen their signatures many times on official papers, but she stated, in her opinion, neither officer had signed any of the approval signatures appearing on Prosecution Exhibits 4,5,6,7 and 8 (R 56-60). She stated that she was familiar with the signature of the accused, having "seen it almost every day many times" (R 55). She saw the accused sign his name to two of the applications, Prosecution Exhibits 4 and 5 (R 55,57). She recognized his signature on the remaining applications although he did not sign them in her presence (R 58,59,60; Pros Exs 6,7,8). On one occasion, the accused signed, in her presence, the name of Major Evans to a conversion application although she could not remember whether it was one of the prosecution exhibits or some other application (R 61). At the time the accused was completing the conversion represented by Prosecution Exhibit 4, he told Miss Seitz that he was going to Wurzburg to get Major Evans' signature, but he was back in fifteen to twenty minutes with the application completed and bearing the fictitious signature of the Finance Officer (R 55,56). The normal time for a round trip to Wurzburg was an hour, and that was the only place where the accused could have accomplished the conversion legitimately (R 62). Miss Seitz, when asked by the accused to prepare the application, warned him that he had better be careful and that, "it is not worth doing things like this," to which he replied that it was none of her business (R 60,61).

The defense agreed that Mr. Lawrence A. Kelly was qualified as a handwriting expert (R 66). He stated that in his opinion, the same person signed all the signatures appearing as "Jack Wilder," "David L. Evans," and "W. P. Galloway," on Prosecution Exhibits 4,5,6,7,8 (R 66). Referring to Prosecution Exhibit 5, one of the applications that Miss Seitz saw the accused sign, the witness stated that in his opinion the signatures "Jack Wilder" and "D. L. Evans" were written by one and the same person (R 67).

b. For the defense.

The accused, after being warned of his rights as a witness, elected to take the stand for the limited purpose of testifying under oath with respect to Charge II only, of which he was found not guilty (R 85,86).

The testimony of Major William H. Daniels, Captain Peter M. Belloberk, Captain Thomas F. Whelan, and the stipulated testimony of Major Leroy D. Brummitt, in general indicate that the accused's performance of duty has been excellent to superior, and that his conduct has in the past been beyond reproach (R 108-112, Def Ex C).

4. Discussion.

The accused is charged with five separate violations of the 93rd Article of War by forging the essential validating signatures of the officers of the local Finance Office to effect an unauthorized conversion of United States dollar credits into German currency. The essential elements necessary to prove the crime of forgery against the government are that the accused falsely made the writing, that the writing was of such nature as to operate to the prejudice of the government in impairing or impeding a governmental function, and that the accused acted with intent to defraud or deceive (MCM, 1949, Par 180i, pp. 243,244, and cases hereinafter cited).

The undisputed evidence is that Miss Seitz, at the accused's request, prepared five applications for conversion of Military Payment Certificates into Deutsche marks. She saw him actually sign in her presence two of these applications. From seeing the accused's signature many times previously on official papers, she had become familiar with his handwriting so that she recognized his signature on the other three applications also. Miss Seitz stated that she was familiar with the handwriting of Major Evans and Lieutenant Galloway and that the signatures appearing in their names on Prosecution Exhibits 4,5,6,7, and 8 were not written by them. While she did not say so much in words, the inference is strong from the rest of her testimony that she believed the accused did all of the writing, for she warned him and cautioned him against taking any chances, only to have the accused tell her it was none of her business. Defense counsel objected strenuously and repeatedly to Miss Seitz' testimony that Major Evans and Lieutenant Galloway's names were not in their own handwriting on the ground that the witness had not qualified as an expert and was, therefore, incompetent to testify, but the court overruled the objections. The ruling of the court was correct. The testimony of Miss Seitz that she was familiar with the handwriting of the accused, having many times seen him write, was sufficient to qualify her. As stated in CM 234521, Culberson, 21 BR 29,33:

> "* * the law member declined to permit the introduction of the statement upon the ground that the genuineness of the handwriting would have to be established by an expert. This ruling was, of course, erroneous. The testimony of the investigating officer that he was familiar with the handwriting of accused, having often seen him write, and that in his opinion the signature in question was that of the accused, was sufficient to qualify the witness (Wharton's, Criminal Evidence, Vol. 2, secs. 982-985)."

The fact that accused signed the names of Major Evans and Lieutenant Galloway is further proved by the testimony of Mr. Lawrence A. Kelly, admitted by the defense to be a qualified handwriting expert, who stated that all of the signatures on Prosecution Exhibits 4,5,6,7 and 8 were written by the same person, including those on Prosecution Exhibit 5, the application which Miss Seitz saw the accused sign.

Careful consideration has been given to the able brief filed by defense counsel, which on analysis raises only two main questions bearing on Charge I: (1) Is there proved "intent to defraud?" and (2) Are the documents writings "of a public nature which might operate to the prejudice of another?" Both questions must be answered in the affirmative on the authority of CM 318342, Irvin, 67 BR 239,253 wherein it is stated:

> "It is well established that pecuniary loss to the Government need not necessarily be involved in the forger's intent to defraud it.
>
> 'It is enough if the acts charged * * * tend to impair or impede a governmental function' (Head vs. Hunter, Warden (CCA 10th 1944) 141 Fed (2d) 449, 451, and cases cited therein).
>
> "An indictment may be maintained for forgery when the fraud is directed against the public at large (Wharton op cit, sec 908). At common law the forgery of any matter of judicial or executive record was indictable (Wharton, op cit, sec 890). In United States v. Randolph (1853) (24 Fed Cas No. 16,120) it was held that naturalization papers were instruments subject to forgery. (See also Johnson v. Warden (CCA 9th, 1943, 134 Fed 2nd 166,167, cert. denied 319 U.S. 763; United States v. Mullin (D.C. E.D.Mo. 1943) 51 Fed Supp 785, 787)."

Judicial notice may be taken that the European Command has established regulations governing the conversion of Military Payment Certificates into Deutsche marks (CM 316809, Pardee, 66 BR 59,65). There is no necessity to inquire into the reasons for these regulations or to consider why they were required to stabilize German currency at a certain level of exchange. It is enough that such regulations were binding on the accused and on all other military personnel, and as to them represented the exercise of a governmental function. These regulations were of general application, including the use of the prescribed forms for making conversions of dollar values into Deutsche marks. It follows that the application forms herein involved were, in fact, public documents "and writings of a public nature." That the accused circumvented these regulations by affixing spurious signatures purporting to be those of the validating finance officer, is proved beyond doubt. That he

thereby obtained for himself the advantage of being able to convert Deutsche marks into Military Payment Certificates without attracting official attention to the transaction and under circumstances where otherwise he would not have been able to make the conversion, seems equally apparent. At the same time, the government was deprived of the opportunity to exercise its governmental function, through the Finance Department, of supervising the exchange of currencies, and of maintaining the necessary stabilizing controls for the protection of the German Deutsche mark. The inevitable conclusion must be reached that the acts of the accused did in fact "tend to impair or impede a governmental function."

There is also another aspect of these transactions which emphasizes that they were done "with intent to defraud" and "to the prejudice" of the government. The completed applications, bearing the approving indorsement and signature of the finance officer, were placed in the files of the Army Collection Agency and were there retained as vouchers. Upon an audit of the Collection Agency books, these vouchers would be used to account for what would otherwise appear as an unaccounted for shortage of Military Payment Certificates, and they, therefore, represent receipts in the most technical sense. But in CM 233611, Eckman, 20 BR 29,33,35, it was held that signing the name of another to a false receipt was sufficient to sustain a conviction under Article of War 93, even though made only with intent to deceive a superior and without actual financial loss to anyone.

From the foregoing, it is concluded that the evidence is sufficient beyond a reasonable doubt to sustain the findings of guilty of Specifications 1 to 5 of Charge I, and Charge I.

5. Consideration has been given to representations for and on behalf of the accused by his counsel, Lorber and Vogel, in a brief filed in the case and made a part of the record. On 12 September 1950, Major Samuel D. Wilder, brother of the accused, appeared before the Board of Review and made oral representations for and on behalf of the accused, referring to his clean record and ability as an officer, and his prospects if given another chance. He also presented letters in the form of character references from W. V. Larcade, Sheriff of Acadia Parish, Crowley, Louisiana, Denis T. Canan, Judge, Crowley City Court, Crowley, Louisiana, and Joseph H. Kuttner, formerly commanding officer of 156th Infantry Louisiana National Guard, now of Lake Charles, Louisiana. These letters have been attached to the record of trial.

6. The record indicates that the accused is 41 years of age, married, and has one child. He was graduated from high school and thereafter completed a two-year course of study at Acadia Commerical College, Acadia, Louisiana. In civil life, he was engaged in rice planting and cattle buying. As a member of the Louisiana National Guard from 6 September

1926 to 10 January 1940, he served both in enlisted grades and as an officer. He has been on active duty since 25 November 1940 and was promoted to the grade of Captain 1 February 1942. He served in the European Theater from September 1942 to September 1946 and from 11 January 1949 to the date of trial and is entitled to wear the American Theater Ribbon and the World War II Victory Medal. Through June 1947 he had an efficiency rating of high excellent, but since 1 July 1949 his over-all numerical efficiency ratings have been 058, 056, 072, 068, 059 and 052.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal and total forfeitures after promulgation is authorized upon conviction of an officer of violations of Article of War 93.

C. P. Hill, J.A.G.C.

Richard L. Gibbs, J.A.G.C.

William C. Pittsburgh, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 343172

NOV 7 1950

UNITED STATES v. Captain JACK WILDER, 0-307013, Headquarters 7806 Station Complement Unit, Kitzingen Sub-Post, APO 800	UNITED STATES ARMY, EUROPE Trial by G. C. M., convened at Wuerzburg, Germany, 19, 20 July 1950. Dismissal and total forfeitures after promulgation.

- - - - - - - - - -

Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

- - - - - - - - - -

1. Pursuant to Article of War 50d(2) the record of trial and the opinion of the Board of Review in the case of the officer named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of the forgery of an officer's signature upon each of five official documents containing approvals of the exchange of Deutsche Marks for United States Military Payment Certificates, in amounts and on dates, respectively, as follows: $30.00, 14 April 1949; $222.45, 26 May 1949; $133.50, 20 June 1949; $101.40, 12 July 1949; and $30.00, 6 September 1949; at Kitzingen, Germany, in violation of the 93rd Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. 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.

3. The evidence is substantially as stated by the Board of Review in its opinion. For the reasons stated below, the Judicial Council concurs with the Board in its conclusion that the record of trial is legally sufficient to support the findings of guilty of forgery as alleged and the sentence.

Each of the instruments which are set forth in the five Specifications of Charge I bears the heading "Finance Office, Wurzburg Military Post, APO 800 US Army" and is designated "Application and Approval for the Purchase of Foreign Currencies." Section I of each instrument consists in substance of a request signed by the accused that a specific sum in Military Payment Certificates be exchanged for a specific sum in Deutsche Marks to be used for the purpose of paying German employees for services rendered. Section II of each instrument is prescribed "For use of finance officer only" and consists in substance of an approval by a finance officer of the request of the accused set out in Section I thereof.

The evidence establishes that the accused falsely signed the name of a finance officer upon each of the instruments in question. We take judicial notice of the fact that the European Command has established regulations concerning the procedure to be followed in the conversion of Military Payment Certificates into Deutsche Marks. Each of the completed official instruments purportedly constituted a receipt by the finance officer for Military Payment Certificates and a voucher covering the payment of Deutsche Marks. In other words, each of the completed official instruments constituted a purported accounting of the transaction for the finance officer.

If the instruments were genuine they would apparently impose a legal liability upon the finance officer to account for the Military Payment Certificates received and for the Deutsche Marks paid out. Such a situation, in our opinion, would apparently change the liability of the finance officer to his prejudice. Also, in our opinion, the facts and circumstances of this case indicate that the accused must have been aware of the probable result of his actions and therefore intended to defraud the finance officers involved.

4. We therefore conclude that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

Robert W. Brown

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,172

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Captain Jack Wilder, 0-307013, Headquarters, 7806 Station Complement Unit, Kitzingen Sub-Post, APO 800, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

NOV 7 1950

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

8 Nov. 1950

GCMO 82, Nov 16, 1950)

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D.C.

JAGN-CM 343173

26 SEP 1950

UNITED STATES v. Sergeant ADRON B. WILKES (RA 6984792), Headquarters Company, Yokohama Command, APO 503.	)	YOKOHAMA COMMAND Trial by G.C.M., convened at Yokohama, Honshu, Japan, 1, 2, August 1950. Bad conduct discharge (suspended), forfeiture of $45 pay per month for six (6) months and confinement for six (6) months. (Confinement suspended as to unexecuted portion).

HOLDING by the BOARD OF REVIEW
YOUNG, TIBBS and MICKEL
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier above named and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of Not Guilty on motion of defense).

Specification 2: In that Sergeant Aldron B Wilkes, Headquarters Company, Yokohama Command, APO 503, did, at Yokohama, Honshu, Japan, at irregular intervals between December 1949, and February 1950, feloniously steal about five (5) cases of cigarettes, value more than fifty dollars ($50.00) property of Eighth Army Central Exchange.

Specification 3: (Finding of Not Guilty).

He pleaded not guilty. On motion of the defense made at the close of the prosecution's case he was found not guilty of Specification 1. He was found not guilty of Specification 3 but guilty of Specification 2 and of the Charge. No evidence of previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct

discharge, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for six months. The Reviewing Authority approved only so much of the sentence as provides for bad conduct discharge, forfeiture of $45 per month for six (6) months, and confinement at hard labor for six (6) months and ordered the sentence executed, but suspended execution of that portion thereof imposing a bad conduct discharge and the unserved portion of the confinement at hard labor for a period of six months, at which time the sentence will be automatically remitted unless the suspension is previously vacated. The result of trial was promulgated in General Court-Martial Orders No. 178, Headquarters, Yokohama Command, 16 August 1950.

3. Evidence.

a. For the Prosecution.

From September 1949 through February 1950, a portion of which period is embraced in the offense alleged in Specification 2, First Lieutenant Gideon J. Harris, in addition to six other assigned duties, was the Post Exchange Officer for the Camp McNeely Branch Exchange No. 185. As such, it was his responsibility to supervise and administer the activities of the Branch Exchange (R 8,9). As a part of Branch Exchange No. 185 there was a sub-branch located at Camp Coe, about 1-1/2 to 2 miles from Camp McNeely. These Post Exchanges did a monthly business of approximately $14,000 to $20,000, and the exchange activities included the operation of several concessions (R 9,13,17). The exchanges were staffed by enlisted men and by Japanese personnel (R 9).

At the time Lieutenant Harris was assigned as Post Exchange Officer the accused had been on duty with the Exchange for about two months. Accused was the manager and, to a large extent, ran both exchanges (R 9,12,13). Operations at the Camp McNeely exchange actually commenced in the month of October 1949, when the troops moved in, and at the Camp Coe exchange in November 1949 (R 17). Accused was relieved from duty in Branch Exchange No. 185 on about 15 February 1950 (R 52).

Among other things the Exchanges handled cigarettes, which normally were sold by the carton to individuals possessing ration cards (R 9). Cigarettes were selling at the Exchange for $1.00 per carton (R 18). They sometimes were sold by the case (50 cartons), especially to the local service club, but then usually only in one case lots and ordinarily at a rate of one or two cases per month (R 17,18). No specific instructions had been issued that such sales would be in one case lots, although that was the policy of the Exchange System (R 19). An "S I & I" (Stock Issue and Invoice) report was used as a voucher to such sales (R 9,48)

and the money therefor subsequently was paid to the office and received by either Lieutenant Harris or the accused (R 10). The Exchange records showed a sale of one case of cigarettes to the Service Club on 31 October 1949 and another on 24 December 1949; there was only one club purchasing in case lots from the Post Exchange (R 52, Pros Exs 8,9,10).

Merchandise required for current operations would be drawn by the Camp McNeely Exchange. As necessary items would be alloted and delivered from the storeroom at Camp McNeely to the sub-branch at Camp Coe; this would be a paper transaction not involving cash (R 10). Cigarettes were transferred in case lots from the Camp McNeely Post Exchange storeroom to the Camp Coe Post Exchange in any quantity up to 15 or 20 cases at a time, according to the needs of the personnel at Camp Coe (R 18,19).

The Japanese storeroom attendant at the Camp McNeely Post Exchange, Taichi Kato, testified for the prosecution that his duties consisted of receiving, handling, and issuing items received there, and of keeping the stock and the records thereof; that his immediate supervisor was the accused. As an incident of their duties he and the accused were authorized to, and often did, take cigarettes out of the storeroom into the store to be sold, although upon other occasions the Post Exchange clerks physically moved the cigarettes (R 42,43).

Kato testified that he, on three occasions in November or December 1949, at the specific direction of accused, carried two cases of cigarettes out of the storeroom; that accused was in his office when he gave Kato the instructions and was not actually present when Kato moved the cigarettes (R 45). On one of these occasions Kato left the two cases "outside the door before [he] went home" (R 43,44,45). On the other two occasions, Kato assisted accused's friend, who was present, in carrying the two cases outside and loading them into the back trunk of the friend's Hudson automobile (R 43). The purported "friend" a "PFC", was never otherwise identified (R 49). At one of these times a case of soap was carried out along with the cigarettes (R 50). Kato did not know where these six cases of cigarettes were taken, but believed "that if [the merchandise] was going to be taken to the Service Club it would not be put in the * * * car because the * * * Club is but 100 meters away from the store room." He did not know whether an "S I & I" report was made for the six cases (R 48).

Kato's method of keeping the "bin card" records was to make entries thereon as to disposition of stock on Saturday at the end of each week, rather than to make the appropriate entries as merchandise was removed from the storeroom. Although he had not been specifically

so instructed by accused, Kato showed on the bin cards that the six cases of cigarettes mentioned above "had gone to the PX" (R 45-47). Kato testified that it was his duty to keep the records correctly, and that he did so except that he made false records of "the fact that some items which were supposed to go to the PX had gone somewhere else" (R 48). Kato testified (R 47):

"* * * * *

"Q Did [the accused] ever talk to you about the cigarettes he took out for himself?

"A He told me not to mention it to anyone.

"* * * * *"

Kato further testified that, when he also was working as cashier four or five times either before or after his carrying out of the six cases of cigarettes, the accused gave him sums of money to put in the cash register. The individual amounts were about $50, and totaled approximately $300 (R 44). Although accused did not tell him so, Kato "assumed [the money] was in payment for those cigarettes" (R 51). On one or two occasions when Kato came to work in the morning two or three cases of cigarettes were missing from the storeroom. Kato habitually gave the keys of the storeroom to either the accused or to a Corporal Brown at night after the door was locked and checked by "the soldier" (R 49,50).

Lieutenant Harris testified that he "always found the keys" in the safe (R 55), that the first notice he had of anything wrong was when the accused mentioned that "we * * * have a shortage", and that on the following day, 8 February 1950, an auditor from the Army Central Exchange "came out and went through the records" (R 54).

There was testimony concerning the method used in taking the regular monthly inventory in Branch Exchange No. 185. This, in brief, was that on about the 25th day of each month independent inventory officers would count the stock on hand. Prior to their doing so, Post Exchange clerks would have made out count sheets reflecting a tentative count and would have placed each sheet beside the pertinent merchandise; the officers would make their physical count of the merchandise; if it coincided with that shown on the count sheet, the officers would merely initial the sheet, otherwise they would correct the sheet and initial it. Thereafter, the bookkeeper and "the NCO manager" (the accused) would make up a pencil copy of the physical inventory form,

which would then be typed in final by the bookkeeper, submitted by accused to the inventory officers and others for signature and be sent to the "depot" (R 10,11,93-95, Pros Ex 1,2,3).

A Japanese girl of no great experience and doubtful qualification employed in the Exchange to assist in the bookkeeping testified that with respect to the final physical inventory form for 25 December 1949, at accused's direction, she altered the figures pertaining to Phillip Morris cigarettes to show a total of 823 cartons instead of the 100-odd which she originally had entered on the form (R 27-41, Pros Ex 4,5).

Without objection by the defense Mr. Raymond L. Marshall testified that, acting as an auditor for the Army Exchange Service, he had made an audit of the books of Branch Exchange No. 185 for the period from 1 October 1949 to 14 February 1950, as a result of which he noted "inventory discrepancies" of $304.49 in the inventory of January 1950, $578.73 in that of December 1949, $728.20 in November 1949, and $111.44 in October 1949 (R 20,21,25). He found additional discrepancies for the period 25 January to 14 February 1950. He concluded that all of these showed a "shortage" of $1,558.58, after making certain adjustments (R 22-27, Pros Ex 7). He testified that he was unable to tell when the "shortage" occurred; that "* * * in all probability, it is a shortage * * * of merchandise. But that is just an informed guess * * *"; that he was unable to "definitely tell the court that here cigarettes were stolen or there money was stolen", or whether the shortage took place at the "main PX", the storeroom, the Beer Garden, or at Camp Coe (R 25). Additionally, Mr. Marshall ran an "inventory disposition" for the month of January 1950 in an effort to determine whether the disposition of any particular item appeared to be improper. His conclusion was "That none of these items * * * listed, (which included cigarettes) as far as inventory disposition is concerned, appear to be out of line" (R 26).

By stipulation, the record of accused's testimony before a Board of officers appointed to determine and investigate a shortage of Branch Exchange No. 185 was received in evidence (R 57-65, Pros Ex 11). The testimony was substantially the same as accused's later testimony before the court, and in effect it was a full denial of guilt. In it he offered no explanation of the apparent discrepancies; he stated that he "had nothing to do with it", averred that he did not believe that the testimony (of other witnesses) was correct, except as to that of the auditor, Mr. Marshall, and admitted that he had no testimony to present other than his own word (R 59-65); he testified that Mondays, Tuesdays, Thursdays and Fridays the Exchange was open for business from 1130 to 1300 hours and again from 1700 to 1930 hours, and on Wednesdays and Saturdays it was open from 1300 to 1700 hours (R 61).

b. For the Defense.

Accused's commanding officer subsequent to February 1950 attested to accused's good character, ability, competence, and trustworthiness (R 69), as did the commanding officer of the battalion to which accused was assigned from January to July 1949 (R 91).

An agent of the Criminal Investigation Division, who investigated the activities and financial status of the accused in the Yokohama area in connection with the alleged shortage here involved, found that accused, between October 1949 and February 1950, did not have large sums of money in his possession, did not maintain a bank account, and did not own an automobile (R 71,72).

Accused testified in substance as follows: He first went to work at the "Camp McNeely PX" on 25 July 1949, but for the first few months did nothing except study the operation manual. The "PX" started to operate in about mid-October 1949, and shortly thereafter Lieutenant Harris became exchange officer. Lieutenant Harris told accused "to do the best [he] could and run and operate the PX as it should be." Both Harris and accused were inexperienced in the operation and management of an exchange. Among other things, accused supervised the bookkeeping. With reference to the testimony of the Japanese girl that she changed an entry on a physical count sheet at the direction of the accused, he testified that he directed the change because "there was an error made in the account. * * * She made a mistake in typing it and I had her change it" (R 76). Based upon the count sheets, the accused considered that the figure "823", which he told the bookkeeper to write on the physical inventory report, was correct (R 77). Accused testified that he "never took any cigarettes out except what was authorized to go to the PX"; that he did not give cigarettes to a friend, except when one might have a ration card; that he did not load any cigarettes into a Hudson passenger car; that he did not instruct the stock room clerk to give cigarettes to a friend of his, or tell him to not say anything about accused's taking out cigarettes (R 80); and that he never had benefited personally by the sale of "PX cigarettes" (R 77). Concerning his nine years of service in the Army, accused testified that he had been in the European Theatre of Operations during the war, had come back in 1947, gone to Korea for a year and then had come to Japan; that he had been a "tanker", and had engaged in combat in "Tunisia, Naples, Toggia, North Appenies, and Po Valley" (R 77).

On cross-examination accused testified that every business day during the period in question either he or one of the other enlisted men in the course of business had taken cigarettes in small quantities from the storeroom to the Camp McNeely Exchange (R 78); that cigarettes for use at the Camp Coe Exchange were called for by the assistant manager

of that exchange and delivered to him at the direction of either accused or one of the other enlisted men (R 78). His explanation of the giving of money on several occasions to the Japanese boy to ring up on the cash register was that the money came from legal sales made to authorized customers on those days prior to the official opening of the exchange and the clearing of the cash register. For the protection of the Japanese personnel the cash registers would not be rung before opening hours, when the registers were set at zero; this would be done daily at about 1125 hours (R 79,80). He told the cashier to ring up sums smaller than the total delivered until the total was reached in order to keep track of the number of individual sales during a day (R 80). Accused spot-checked all inventories and worked over the reports with the bookkeeper (R 82-86).

The Japanese girl, who had testified for the prosecution, took the stand for the defense and testified that she had not at any time actually looked at the cigarettes at either the Camp Coe or Camp McNeely Exchange or in the storeroom (R 87). When cross-examined, she testified that accused did not assist her in checking the physical inventory sheets, but that he obtained the signatures thereto (R 88).

Three soldiers, two of whom had worked in the Camp McNeely Exchange, testified that they often had seen the bookkeeper and accused working together on the inventory reports (R 96-102, 103-106, 107-109). One of them testified that he had never been in the stockroom when accused carried out cigarettes, and that such work usually was done by two or three Japanese boys (R 102).

First Lieutenant Gordon H. Fisher testified that he was one of the "inventorying officers" for the Camp McNeely "PX" for the month ending December 25, 1949, and that sometime after New Years' he signed the physical inventory sheets (of which Prosecution's Exhibit 5 is one) for the month; that he did not check any of the entries thereon, but signed them when presented to him by accused (R 93). He actually participated on 28 December 1949 in making the 25 December 1949 inventory, and his verifying initials appear on the count sheets, Prosecution's Exhibits 2 and 3, but not on Prosecution's Exhibit 1 (R 94). The Lieutenant testified that he did not cause to be made the apparent erasures under the figures "73" and "7300" on Prosecution's Exhibit 2, and could not say whether the erasures had been made at the time he placed his initials thereon (R 94,95).

c. Rebuttal for the Prosecution.

The cashier at Post Exchange Branch No. 185, a Japanese who had not testified previously, testified in substance as follows. That during the period the accused was his supervisor (dates not specified)

"some cigarettes were found missing in the morning and apparently [were] taken away at night and there were times that Sgt. Wilkes would hand over some money even if no articles were sold"; that when the store was open he received directly money for merchandise sold; that on the three occasions referred to, when accused handed him money, it was in the amounts of $200, $250 and $50, respectively; that accused told him to put the money in the cash register a little at a time (R 110). This witness did not see accused take anything for the money or take any merchandise from the stock room; he had seen accused make purchases in the "PX" and pay therefor, but had never seen him take anything without paying for it (R 111).

d. Surrebuttal for the Defense.

A week prior to trial, accused's defense counsel had purchased some items in the Camp McNeely Exchange from Lieutenant Harris during the time the Exchange was closed for inventory and had carried the items out of the Exchange in a paper bag (R 113,114). (This evidence indicates that it was not uncommon for purchases to be made outside of regular business hours.)

e. Findings of Not Guilty.

In addition to the offense of which he was found guilty, the accused was arraigned and tried on, but found not guilty of, specifications alleging the offenses of stealing $1558.58, property of "Eighth Army Central Exchange" (Specification 1) and of "forging" the figures "823" and "823.00" upon page 15 of a Physical Inventory report dated 25 December 1949 (Specification 3). Although portions of the foregoing summary of the evidence relate to Specifications 1 and 3 rather than exclusively to Specification 2, substantially all the evidence reflected by the record of trial has been summarized. The recapitulation has been completed without regard to whether certain portions of the evidence adduced were legally competent for the purposes of this trial.

f. Documentary evidence and testimony of auditor.

The only records of Branch Exchange No. 185 offered by the prosecution and received in evidence were three Inventory Count Sheets (Pros Exs 1,2 and 3); a pencil and a final copy of page 15 of the Physical Inventory form for 25 December 1949 (Pros Exs 4 and 5); and two stock issue invoices (Pros Exs 8 and 9).

Additional documents relating to the alleged shortage made up Prosecution's Exhibit No. 7, received in evidence without objection (R 24, 25). This exhibit consisted of a series of computations and reports made

by Mr. Marshall which served as a basis for his testimony. Prosecution's Exhibit No. 6 for identification, an "Inventory Cover Sheet for 24 January," referred to by Mr. Marshall in his testimony, was not offered or received in evidence.

Mr. Marshall, who acted as auditor for the Army Exchange Service, testified that "the shortage as determined by the records of the Branch Exchange No. 185 amounts to $1558.58" (R 22), and explained how he reached that figure as follows (R 26,27):

> "Inventory as reported 25 January was $21,818.24. Receipts for period 25 January to 14 February, $15,655.42. Total charges for the period, $37,473.66. Sales for the same period $10,058.10. Merchandise returns and sundry credits $770.58. Inventory as of 14 February 1950, $26,369.12. Merchandise spoiled and damaged on hand, $27.39. Total credits of $37,225.19 which revealed and reflected a shortage for that period, $248.47. Shortage reported as of 25 January, $1,466.95, total shortage period 25 December to 14 February, $1,715.42. Against that shortage was a price change voucher that was not reflected, represents a credit to the Branch 185 and that adjusted shortage again for the period 25 December to 14 February 1950, $1,558.58."

4. Discussion.

The evidence of shortage found in the testimony of the auditor and in the manuscripts of which he was the author was admissible in evidence only under the basic rule that when the original consists of numerous writings which cannot conveniently be examined by the court, and the fact to be proved is the general result of the whole collection, and that result is capable of being ascertained by calculation, the computation may be made by some competent person, and the result of the calculation testified to by him (MCM, 1949, subpara. 129a). Further, the general rule is that to render evidence of this nature competent, a condition precedent is the establishment of the competency of the records on which the computation is based (CM 334097, Anderson, 4 BR-JC 347,366, 8 Bull. JAG 122,123). The Board of Review does not consider it necessary to determine whether the evidence of "shortage" is wholly incompetent in view of its conclusion hereinafter expressed. However, that such evidence in this case was incompetent is not free of doubt.

The conclusions contained in the testimony of Mr. Marshall last quoted also were reflected by the cover sheet, or first page, of Prosecution's Exhibit 7. The explanation of the shortage for the period

25 January 1950 to 14 February 1950 apparently was based on usually recognized theories of audit. One of the papers included with Prosecution's Exhibit 7 (Sheet R-1) is entitled "Inventory Discrepancies, 25 January 1950"; the figures thereon indicate that an effort was made to arrive at a "corrected inventory" as of that date. The manner in which the correction was obtained is not clear. Nevertheless, the uncorrected inventory was used in determining the shortage for the period 25 January to 14 February. Although the auditor commenced his work on about 8 February 1950 and indicates in arriving at his conclusions that he relied on a closing inventory of 14 February 1950, it is not shown whether this closing inventory was an actual independent physical count of the goods and merchandise on hand or whether the inventory figures came from other sources.

There is no development or explanation in the testimony or in the evidence of the manner in which the shortage "25 December to 14 February" was computed. On the "Cover Sheet" and in the auditor's testimony it is simply stated to be "$1466.95". There is no showing of what computation was made or of the facts upon which it was based, or whether the whole matter was anything other than a result of poor management and improper bookkeeping by inexperienced personnel.

Thus analyzed, the testimony of the auditor to the effect that there was a net shortage for the period "25 December to 14 February 1950" is of doubtful probative value and lends parsimonious assistance to the Board in considering the real question in this case, which is whether the evidence of record is sufficient to support the findings of guilty.

The evidence adduced for the purpose of indicating that there was a shortage is merely a narrow circumstance to be considered along with all the other circumstances and evidence bearing on the issue of accused's guilt or innocence of the offense of stealing.

The only competent direct evidence adduced by the prosecution to support the alleged offense of stealing cigarettes consisted of the testimony of Taichi Kato, the Japanese stock room boy, that during November and December 1949 on one occasion he placed 2 cases of cigarettes outside the door and on two occasions he carried 2 cases of cigarettes out of the storeroom and placed them in the automobile of accused's unidentified friend; that this was done at the direction of the accused, who was the exchange manager; and that he kept false "bin cards" in the respect that he showed these cigarettes as having gone into the Post Exchange.

Opposed to this testimony of Kato is that of accused, who as a witness absolved himself of complicity in the offense of stealing and on the whole told a coherent and credible story of his activities as

manager of Branch Post Exchange No. 185. In addition there is uncontradicted evidence of record as to accused's good character, honesty and excellent service. Were it necessary to weigh all the evidence the Board would be disposed to disbelieve the Japanese witness and accept the testimony of the defense as representing the truth.

Subparagraph 180g of the Manual for Courts-Martial, U.S. Army, 1949, provides that:

> "Larceny, or stealing, is the unlawful appropriation of personal property which the thief knows to belong either generally or specially to another, with intent to deprive the owner permanently of his property therein. Unlawful appropriation may be by trespass or by conversion through breach of trust or bailment.
>
> * * *
>
> "The appropriation by the thief must be without the consent of the owner and must be complete. * * * As a general rule * * * any movement of the property or any exercise of dominion over it with the requisite intent is sufficient. * * *"

The record of trial is devoid of any testimony to indicate that accused was acting other than as manager of the Branch Exchange. It is clear that as a part of his responsibilities accused had not only the right but the duty of controlling the movement of the merchandise of the exchange. There is no evidence that accused claimed ownership of the cigarettes or dealt with them in any way inconsistent with his position in the exchange. Nor is there any evidence to show that accused's control was without the consent of the owner or was in any way improper (CM 325523, Hanni, 74 BR 285,298; CM 334097, Anderson, supra). There is utter and complete lack of evidence of any unlawful appropriation, proof of which is requisite to the offense of stealing. Neither is there a scintilla of evidence indicating that the appropriation imputed to the accused was with an intention on his part permanently to deprive the exchange of its property in the cigarettes. Every taking even without claim of right does not constitute stealing. In addition "there must be an intent to deprive the owner permanently of his property" (MCM, 1949, subpara. 180g). And, this has not been shown. (CM 325523, Hanni, supra; CM 330733, Moran, 79 BR 151,156).

The evidence for the Government, both direct and circumstantial, presents a situation closely analogous to that in the Hanni case, supra,

in which the accused, a lieutenant, was found to have in his quarters a room heater and a Chinese coat, property of the post exchange of which he was manager. The Board of Review, in holding the record legally insufficient to sustain findings by the court that the accused was guilty of embezzlement, said pertinently:

> "* * * At no time did accused claim ownership in the heater or deal with it in any way inconsistent with an acknowledgment of a superior right to possession in the field exchange over which he exercised control. There is not a scintilla of evidence indicating an intention on the part of accused to permanently deprive the exchange of its property in the heater. Consequently, even though accused's use of the heater may have been improper, such use did not constitute the offense of embezzlement.
>
> * * *
>
> "We think it may be said that every shred of evidence relating to the coat is as consistent with accused's professed intention of examining it with a view to purchase as it is with an inference that he intended to permanently appropriate it to his own use without paying for it. This being the state of the proof, accused's guilt of embezzlement of the coat may not be predicated upon the single circumstance that it was found in the closet of his room."

In the Hanni case, supra, the accused said with respect to the Chinese coat that he intended to purchase it for himself, which was contrary to regulations. The Board commented that the intent requisite to the offense of embezzlement had not been shown and said:

> "In a sense, it may be said that accused's intent to acquire the coat by direct purchase was generally wrongful and that his mind was bent upon evading the regulations restricting the sale of 'critical' items. But is this the 'guilty mind,' the 'fraudulent purpose,' which is the hallmark of every embezzlement? Stated otherwise, did accused intend to deprive the owner permanently of his property, without his consent? We think he did not, for where property is placed upon the market for sale, even though that market be restricted for some particular reason by the seller, the seller has impliedly agreed that his proprietary interest shall become subject to a change of specie. He has agreed to take a price

in money or other valuable consideration in place of the article sold and, even if the sale is consummated in violation of the seller's instructions, such sale does not become void but is voidable only. It could hardly be said that the seller's subsequent avoidance would fasten upon one who bought with notice of the violated restrictions the odium of embezzlement. * * *"

So in the instant case, if the testimony of Kato, the Japanese stock room boy, that accused paid $300 for the cigarettes is to be believed, accused effected a sale of the cigarettes either to himself or to others, and a sale of the cigarettes cannot be held to be an embezzlement or theft thereof.

In order to sustain findings of guilty "the circumstances must not only be consistent with guilt but inconsistent with innocence" (CM 195705, Tyson, 2 BR 267); they must exclude "any fair and rational hypothesis except that of guilt * * *." (MCM, 1949, subpara. 78a; CM 336675, Friedland, 3 BR-JC 185,194).

"Circumstantial evidence giving rise to suspicion, conjecture or surmise, or merely showing opportunity but not excluding a reasonable hypothesis of innocence is insufficient to support findings of guilty. While it is well established that all the elements of the offense may be proved by circumstantial evidence (16 CJ 766), proof of mere opportunity to commit a crime is not sufficient to establish guilt (CM 216004, Roberts, et al, 11 BR 69, 71; CM 313466, Daniels, et al, 63 BR 91, 94). A conviction cannot be sustained on suspicion, surmise, or conjecture (16 CJ 779 and authorities cited therein; CM 207591, Nash, et al, 8 BR 359, 363; CM 216004, Roberts, et al, supra; CM 277983, Kelley, et al, 51 BR 281, 282; CM 313466, Daniels, et al, supra; CM 330388, Liston, 79 BR 9, 13; CM 337089, Aikins, et al)." (CM 341786, Bussard, (1950)).

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.

Chas. B. Young, J.A.G.C.

Richard D. Gibbs, J.A.G.C.

George W. Nickel, J.A.G.C.

JAGN-CM 343173 1st Ind
JAGO, Department of the Army, Washington 25, D. C.

TO: Commanding Officer, Yokohama Command, APO 503, c/o Postmaster, San Francisco, California.

1. In the case of Sergeant Adron B. Wilkes (RA 6984792), Headquarters Company, Yokohama Command, APO 503, 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. Under Article of War 50e(3) this holding and my concurrence vacate the findings of guilty and the sentence.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

3. When copies of the published order in the 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 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 343173).

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

2 Incls
1. Record of trial
2. Draft of GCMO

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGV CM 343206

26 SEP 1950

U N I T E D S T A T E S	)	THE ARTILLERY CENTER
	)	
v.	)	Trial by G.C.M., convened at
Private First Class LAWARANCE	)	Fort Sill, Oklahoma, 17 and 18
R. CATE (RA 38642224), Fourth	)	August 1950. Bad conduct dis-
Detachment, 4050th Area Service	)	charge (suspended), total
Unit, The Artillery Center, Fort	)	forfeitures after promulgation
Sill, Oklahoma	)	and confinement for six (6)
		months. Post Guardhouse.

HOLDING by the BOARD OF REVIEW
GUIMOND, BISANT and OEDING
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class Lawarance R. Cate, Fourth Detachment, 4050th Area Service Unit, The Artillery Center, Fort Sill, Oklahoma, formerly Technician Fifth Grade, Battery "A", 87th Rocket Field Artillery Battalion, Fort Sill, Oklahoma, did, at Fort Sill, Oklahoma, on or about 15 December 1947, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Fort Hood, Texas, on or about 10 July 1950.

By exceptions and substitutions the accused pleaded not guilty to the Charge and Specification but guilty of absence without leave for the period stated in violation of Article of War 61, and by exceptions and substitutions was found guilty of absence without leave in violation of Article of War 61. Evidence of one previous conviction was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit all pay and allowances to become

due after the date of the order directing execution of the sentence and to be confined at hard labor at such place as proper authority may direct, for six (6) months. The reviewing authority, the Commanding General, The Artillery Center, Fort Sill, Oklahoma, approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging bad conduct discharge until the soldier's release from confinement, and designated the Post Guardhouse, Fort Sill, Oklahoma, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders Number 128, Headquarters, The Artillery Center, Fort Sill, Oklahoma, dated 5 September 1950.

3. Accused was tried on 17 August 1950 for desertion alleged to have begun on 15 December 1947 and to have been terminated by surrender on or about 10 July 1950. He was found guilty of the lesser included offense of absence without leave for the same period, and the president announced the findings and sentence (R 18). The findings were announced as follows:

> "Of the Specification: Guilty, except the words 'desert' and 'In desertion', substituting therefor respectively the words 'absent himself without leave from' and 'without leave.' Of the excepted words, not guilty; of the substituted words, guilty.
>
> "Of the Charge: Not Guilty, but Guilty of a violation of the 61st Article of War." (R 17)

On the following day, 18 August 1950, the court reconvened and in pertinent part the following proceedings took place:

> "PRESIDENT: Pursuant to Manual for Courts-Martial, 1949, paragraph 79b, and Article of War 40, this court, on its own motion, has reconvened for the purpose of reconsidering the findings and sentence in the case of the United States versus Private First Class Lawarance R. Cate. The findings and sentence previously announced by the court are vacated.
>
> LAW MEMBER: Now, come around a minute, Cate. Just stand at ease. Yesterday when you entered your plea, you plead not guilty to a violation of the 58th Article of War, not guilty to desertion, but guilty of a violation of the 61st Article of War, guilty of absence without leave for the period named in the specification, is that correct?
>
> ACCUSED: Yes sir.
>
> LAW MEMBER: I failed to advise you at that time that the Manual has, as in civil law, what we call a Statute of Limitations. That means that after a certain period of time you cannot be tried for certain offenses that you have committed. Do you understand that?

ACCUSED: Yes sir.

LAW MEMBER: Now, in absence without leave the offense begins the first day you go absent. What was the date on that?

PROSECUTION: 15 December 1947.

LAW MEMBER: That means that your offense began on the 15th of December 1947. Now, after two years has expired from that date, that is barred by the Statute of Limitations, do you understand what that means?

ACCUSED: Yes sir.

LAW MEMBER: That means that you have a rights, you or through your counsel, - - - has a right to plead that Statute of Limitations as a bar to trial. Do you understand that?

ACCUSED: Yes sir.

LAW MEMBER: That means that the court could not try you for absence without leave, do you understand that?

ACCUSED: Yes sir.

LAW MEMBER: Now, in desertion, the limitation period is three years, so it has not run on desertion, and that means this further, that if you want to avail yourself of the right to plead the Statute of Limitations, that the court * * then, whether you do or do not avail yourself of that, we again have to vote on the findings and sentence in your case. If you avail yourself of the privilege and plead the Statute of Limitations, we cannot find you guilty of absence without leave. We can find you guilty of desertion, or acquit you. Do you understand that?

ACCUSED: Yes sir.

LAW MEMBER: That means that the offense of AWOL would forever be barred; we couldn't try you for it. Do you understand that?

ACCUSED: Yes sir.

LAW MEMBER: I want you to go over and consult it with your counsel a minute and then state to the court whether you want to plead the Statute of Limitations or whether you want to waive it. Discuss it with your counsel a minute.

ACCUSED: Sir, I wish to waive the Statute of Limitations.

LAW MEMBER: All right. Now, I want you to understand that by waiving that, that the court does not have to find you guilty of absence without leave, but we still can find you guilty of desertion, if the court so finds; do you understand that?

ACCUSED: Yes sir.

LAW MEMBER: And with that in mind you still wish to waive the Statute of Limitation, is that correct?

ACCUSED: Yes sir." (Underscoring supplied) (R 19, 20)

That the Statute of Limitations (AW 39, MCM, 1928 and AW 39, MCM, 1949) had run in this case against the offense of which accused was found guilty (absence without leave) and not against the offense charged (desertion) and of which he was found not guilty, is obvious, and requires no further discussion. It is also too well settled to require discussion here, that, when an accused is charged with an offense against which the Statute of Limitations has not run, and is found guilty of an offense against which it has run, the court is obliged to advise him of his right to plead the statute as a bar where there is no indication in the record that he was aware of this right (CM 313593, Sawyer, 63 BR 185; CM 315512, Pittman, 65 BR 5; CM 315713, Williams, 65 BR 81; CM 335181, LaVigne, 2 BR-JC 93).

In the Manual for Courts-Martial, 1949, paragraph 67, at page 62, it is stated:

"If it appears from the charges that the statute has run against an offense or (in the case of a continuing offense) a part of the offense charged, the court will bring the matter to the attention of the accused and advise him of his right to assert the statute. This action should, as a rule, be taken at the time of the arraignment. If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the court will advise the accused of his right to interpose the statute in bar of trial and punishment as to that offense." (Underscoring supplied)

And paragraph 78a, page 75, Manual for Courts-Martial, 1949, states in pertinent part:

"If by exceptions and substitutions an accused is found guilty of a lesser included offense against which it appears that the statute of limitations (A.W. 39) has run, the court will advise him in open court of his right to avail himself of the statute in bar of punishment if he so desires." (Underscoring supplied)

JAGV CM 343206

The accused's plea of guilty in this case did not relieve the court of its obligation to advise him of his right to impose the Statute of Limitations in bar of punishment. In CM 335583, Draper, 2 BR-JC 141, 143, the Board of Review stated:

> "* * * The accused having pleaded guilty to absence without leave, it was then mandatory upon the court to advise him of his right to raise the defense of the statute of limitations, and failure to do so was fatal error."

It is undisputed that the accused herein was not so advised at the hearing held on 17 August 1950. Thus, the question to be determined is whether the Law Member's statements, supra, in attempting, at the reconvening of the court on 18 August 1950, to advise the accused of his right to plead the Statute of Limitations, were sufficient to apprise the accused fairly of said right.

The statement of the Law Member at the second session of court to the effect that accused could be found guilty of desertion is in error. The accused had been acquitted of desertion and the court was without authority to change that finding of not guilty. At paragraph 78d, Manual for Courts-Martial, 1949, page 78, it is stated in pertinent part:

> "Voting is by secret ballot (A.W. 31) and is obligatory. A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon; but a court may reconsider any finding before the same is announced or the court has opened to receive evidence of previous convictions; and the court may reconsider any finding of guilty on its own motion at any time before the record of trial has been authenticated and transmitted to the reviewing authority." (Underscoring supplied)

Therefore, as the court had announced its findings on the day previous, the only finding left for the court to reconsider was that of which the accused had been found guilty (CM 251451, Menaghan, 33 BR 243) and against which the Statute of Limitations had run.

It is our opinion that the only logical conclusion the accused could draw from the proceedings on 18 August 1950, supra, was that if he pleaded the Statute of Limitations the court would probably find him guilty of desertion. Consequently, as the accused had already been acquitted of desertion, we hold that the explanation to the accused by the Law Member on 18 August 1950, in attempting to correct the error of omission committed at the previous hearing, was so erroneous and prejudicial, that it constituted fatal error.

JAGV CM 343206

4. For the reasons stated above, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

J.A.G.C.

J.A.G.C.

J.A.G.C.

JAGV CM 343206 1st Ind

JAGO, Department of the Army, Washington 25, D. C.
TO: Commanding General, The Artillery Center, Fort Sill, Oklahoma

1. In the case of Private First Class Lawarance R. Cate (RA 38642224), Fourth Detachment, 4050th Area Service Unit, The Artillery Center, Fort Sill, Oklahoma, 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. Under Article of War 50e(3), this holding and my concurrence vacate the findings of guilty and the sentence.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and the sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

3. When copies of the published order in the 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 343206).

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

Incls:
1. Record of trial
2. Draft GCMO

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 343249

3 OCT 1950

UNITED STATES v. Lieutenant Colonel JAMES R. GIFFORD (0-21964), Headquarters 50th Antiaircraft Artillery Automatic Weapons Battalion (SP), Fort Bliss, Texas.	ANTIAIRCRAFT ARTILLERY AND GUIDED MISSILE CENTER Trial by G.C.M., convened at Fort Bliss, Texas, 8 August 1950. Dismissal.

OPINION of the BOARD OF REVIEW
BARKIN, SHULL and WOLF
Officers of The Judge Advocate General's Corps

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

2. The accused was tried upon the following charges and specifications:

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

Specification 1: In that Lieutenant Colonel James R. Gifford, Headquarters 50th Antiaircraft Artillery Automatic Weapons Battalion (Self-Propelled), Fort Bliss, Texas, did, at Fort Bliss, Texas, on or about 8 July 1950, wrongfully, willfully and knowingly attempt to commit suicide by drinking Potassium Cyanide.

Specification 2: In that Lieutenant Colonel James R. Gifford, ***, did, at Fort Bliss, Texas, on or about 8 July 1950, with intent to deceive Colonel John L. Goff, officially state to the said Colonel John L. Goff that he was sick in quarters from an injured toe which was becoming infected and that he had been to William Beaumont General Hospital where he had received penicillin shots, which statement was known by the said Lieutenant Colonel James R. Gifford to be untrue in that he had not been to William Beaumont General Hospital nor had he received penicillin shots.

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

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

Specification 1: In that Lieutenant Colonel James R. Gifford, ***, did, at Fort Bliss, Texas, on or about 8 July 1950, wrongfully, willfully and knowingly attempt to commit suicide by drinking Potassium Cyanide.

Specification 2: In that Lieutenant Colonel James R. Gifford, ***, did, at Fort Bliss, Texas, on or about 8 July 1950, with intent to deceive Colonel John L. Goff, officially state to the said Colonel John L. Goff that he was sick in quarters from an injured toe which was becoming infected and that he had been to William Beaumont General Hospital where he had received penicillin shots, which statement was known by the said Lieutenant Colonel James R. Gifford to be untrue in that he had not been to William Beaumont General Hospital nor had he received penicillin shots.

Specification 3: In that Lieutenant Colonel James R. Gifford, ***, was, at Fort Bliss, Texas, drunk in station, on or about 8 July 1950.

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 dismissal. The reviewing authority disapproved the findings of guilty of Specification 3, Charge I, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

On or about 7 July 1950 the accused, Lieutenant Colonel James R. Gifford, had been assigned as the commanding officer of the 50th AAA AW Battalion (SP). At about 1600 hours 7 July 1950 Colonel John L. Goff, the commanding officer of the 11th AAA Group, and the immediate commanding officer of the accused, received information that the accused's battalion had been alerted for immediate overseas movement. He contacted the battalion at once, but could not locate the accused at that time. Throughout the evening of 7 July and the morning of 8 July 1950, Colonel Goff unsuccessfully attempted to locate the accused (R 11,12).

At about 1430 hours on 8 July 1950 Colonel Goff requested Colonel Robert C. Rauscher, Medical Officer of the Day at William Beaumont General Hospital, and Captain Carpenter, S-2 of the 11th AAA Group, to accompany him to the quarters of the accused. Colonel Goff stated:

"The occasion for which I had Colonel Rauscher accompany me and Captain Carpenter was in view of the fact that I had previously proceeded to Beaumont Hospital to investigate whether or not Colonel Gifford had received treatment at Beaumont Hospital for an alleged toe injury and also to determine whether or not Colonel Gifford's injury was of such a nature that he could not be expected to resume command of his Battalion in time for movement. I determined that Colonel Gifford had not been to Beaumont Hospital that morning from all available evidence at the Hospital. ***" (R14) (Underscoring supplied.)

At the time the three officers arrived at the quarters of the accused, he was unshaven, seated in a chair in his underwear and was barefooted. He remained seated, rising only to permit examination of the site of an injection (R 16,23,41). There was no evidence of alcoholic liquors in the quarters. The conversation of the accused was logical and connected, and in the opinion of Colonel Goff and Colonel Rauscher there was no evidence that he was under the influence of intoxicating liquors (R 16,23,25,41,46,47).

At that time the accused stated to Colonel Goff that he had dropped a motor part on his toe and had been to the William Beaumont General Hospital that morning where he had been given a physical examination and received a penicillin shot for the toe injury (R 15,28,40, 50). At the request of Colonel Goff, Colonel Rauscher examined the injured toe and that portion of the accused's anatomy in which the accused stated the penicillin had been injected. The area referred to by the accused was found by Colonel Rauscher to be in an area not ordinarily used for a penicillin injection for the described injury (R 40,45). Colonel Rauscher was unable to find any visible indication of such injection (R 40,41). The accused was indefinite as to the section of the William Beaumont General Hospital where he received the injection, but stated there were several civilians in that part of the hospital (R 47, 48). After the examination, Colonel Goff directed the accused to report to the hospital for treatment of his toe and the three officers departed (R 17).

Colonel Rauscher stated that he checked the records of the Out-Patient Service as well as "other parts of the Hospital where penicillin might conceivably be given," and there was no record that "penicillin had been administered to Colonel Gifford" (R 48). He stated that it was possible for a penicillin injection to have been administered

in the hospital without a record having been made, but asserted that "standing instructions" of the hospital require that "every patient who comes in" to the hospital be registered on a card and any injections administered recorded thereon (R 49-50).

At about 1700 hours, 8 July 1950, Colonel Goff drove by the quarters of the accused and observed the accused's car parked there. He thereupon "picked up" Major John D. Maynard of the 11th AAA Group and returned to the accused's quarters. The two officers found the accused in a stupor or asleep on a chair with two partially empty glasses of brown liquid, which smelled like whiskey, on the table beside him. Colonel Goff awakened him by shaking him on the shoulder and told him to clean up, bathe and dress and prepare to go to the hospital (R 17,20,29,31). The accused was slow in complying, but with assistance he shaved and dressed and was ready to leave at approximately 1815 hours (R 18,30). During the time he was dressing the accused talked only in monosyllables, staggered to a visible degree, and in the opinion of both officers present was drunk (R 21,22,26,32,33,35).

When the accused was ready to leave, Colonel Goff asked him about locking the quarters and the accused informed him that a Corporal Pipkin was the custodian of the keys. Major Maynard called the 34th Battalion Headquarters Battery to locate Corporal Pipkin (R 18,30). While awaiting the arrival of Corporal Pipkin, the accused stated he wanted a drink of water and went to the bathroom. Colonel Goff followed him and arrived just as the accused finished drinking a glass of water. Colonel Goff noticed at that time a half empty vial of white powder partly spilled on the shelf in the bathroom. He picked up the vial and asked what the contents were and the accused answered, "Never mind, it is too late, that stuff acts quick." The vial was labeled "Poison KCN" (R 19). Major Maynard was called and advised the accused, "Stick your fingers in your mouth and get that stuff up." Again the accused stated, "It is too late, that stuff acts quick." Colonel Goff immediately administered first aid by forcing the accused to drink a glass of milk and attempted to get him to swallow a raw egg, which the accused was unable to do, but shortly after drinking the milk he vomited (R 19,31). An ambulance was called and the accused was rushed to William Beaumont General Hospital, arriving there about 1840 hours (R 20,31). At the hospital a stomach pump was used and measures taken to combat the poison (R 20,42). Colonel Rauscher, who was present, observed that the stomach washings were white with an appearance of glutinated whitish substance and had the odor characteristic of potassium cyanide (R 42).

The vial labeled "Poison KCN" which Colonel Goff had taken from the bathroom shelf was handed by him to Major Maynard (R 19,30), who took it with him to the hospital and turned it over to Colonel Rauscher (R 31, 42-44). Colonel Rauscher marked the vial and kept it in his possession until he turned it over to Major Corcoran, the investigating officer (R 45,50). In the opinion of Colonel Rauscher, as a medical officer, death would have resulted within a period of thirty minutes to two hours if antidotes had not been administered (R 44, 45).

On or about 9 July 1950 at 2000 hours Agent Don E. Morris, 48th MP CID Detachment, Fort Bliss, Texas, interviewed the accused at William Beaumont General Hospital. At the outset of the interview, he read to the accused the 24th Article of War and satisfied himself that the accused was fully cognizant of his rights thereunder. The accused informed Agent Morris that he believed he had taken enough potassium cyanide to kill ten men. He further stated that he believed the vial contained potassium cyanide and that he had taken it from someone during an uprising in Hawaii (R 55,56,59,61). The accused told Agent Morris that he was familiar with the reaction of potassium cyanide, citing the instance of Hermann Goering in Germany (R 56). Agent Morris identified in court a vial labeled "Poison KCN," which he stated he received from Colonel Rauscher and to which he saw Colonel Rauscher affix his initials (R 58). It was stipulated by and between the prosecution and defense that "the vial now contains apparently a little less than half of its normal full capacity" and further "that the contents of the vial exhibited by the witness on the stand is now and was at the time of the alleged offense potassium cyanide" (R 62,63). The vial and its contents were admitted in evidence to be withdrawn at the conclusion of the trial and a suitable photograph thereof substituted in the record (R 63,64; Pros Ex 1).

Captain Roy L. Phillips, MSC, 9955 TSU-SGO, Medical Registrar at William Beaumont General Hospital, the custodian of all medical records maintained at the hospital, testified that he made a complete search of the In-Patient Clinical Records, the Out-Patient Clinical Records, and the records of the Recovery and Emergency Admitting Office for 7 and 8 July 1950 and found that they did not disclose a record of any treatment of penicillin for the accused on those dates (R 53).

b. For the Defense

Major Paul J. Schrader, MC, Assistant Chief of Neuropsychiatric Service, William Beaumont General Hospital, a witness for the defense, testified that he first saw the accused on 9 July 1950 in the "closed section" of the neuropsychiatric ward at the William Beaumont General Hospital. The accused stated at that time that he "did not know what had happened," that he last recalled being in his quarters, and from that time on things were "very vague in his mind" (R 92,93). In subsequent days, the accused was given clinical interviews and psychological and physical examinations with the assistance of Dr. Helen Campbell, Staff Psychologist (R 93).

In his study of the case, Major Schrader learned that the accused was one of six children. The father, an Army master sergeant, died when the accused was ten years of age and the accused attempted to step into the gap left by his father (R 93). Major Schrader expressed the opinion that it was because of these circumstances that the accused decided upon a military career, which he subsequently followed with superior ability and distinction. Nevertheless it was the opinion of the witness that the accused had not used his best talents in going into military life. He has a definite artistic trend and is not the type that seems to survive best in the military service. With respect to the recent behavior of the accused, the witness testified that within the last few months a physical change has taken place in the accused which has resulted in a lack of ability to tolerate alcohol (R 94,95,96). The witness confirmed a statement contained in a previously written disgnosis as follows:

> "Acute situational maladjustment, manifested by disinterest, increased psychic tension and attempted suicide by the ingestion of an unknown quantity of potassium cyanide; predisposition unknown; stress, recent stress of concern over meeting Reclassification Board and normal stresses of military life; incapacity, moderate impairment. ***" (R 96)

Major Schrader was of the opinion that the accused was not a chronic alcoholic and that there was no loss of mental efficiency and brain function. He also confirmed that part of his previously written

diagnosis of the case in which he stated that the accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able to distinguish right from wrong, and was at the time of the alleged offense so far free from mental defect, disease or derangement as to be able concerning the act charged to adhere to the right and that he is now sufficiently sane to conduct or cooperate intelligently in his defense (R 96,97,98).

Seven officers of field and company grade who had known or served with the accused for various periods of time testified to his excellent efficiency as an officer. The accused was described as a person who kept to himself a great deal and was deeply interested in his hobby of repairing locks and making keys (R 65-91).

The rights of the accused as a witness were explained to him and he elected to take the stand and testify under oath (R 102). On 7 July 1950, at about 1700 hours, the accused learned from his adjutant that the battalion was to move out shortly (R 103). Later that evening the accused talked to a Captain Parr in the accused's quarters regarding the possibility of Captain Parr transferring to the battalion. The accused stated that they had a few drinks, and after Captain Parr left the accused sat alone making plans for the following day. His personal reaction to the "whole thing" was one of great elation, as he was glad to leave Fort Bliss. He had previously made an attempt to be assigned on a military mission to Pakistan. When that assignment had "fallen through," he telephoned Washington and requested an overseas assignment, "the sooner the better" (R 104). During the evening, he had been drinking but expressed the belief that he drank no more than a pint of whiskey at the most. He stated that under normal conditions and circumstances that should have produced no ill effects, but upon arising Saturday morning, at the usual time, six o'clock, he had a "very, very unusual feeling," not a headache, but the back of his head and neck felt extremely heavy, so he poured himself "a good slug of whiskey" (R 105). After that he vaguely recalled Captain Parr coming to his quarters but he did not recall how long he stayed or the gist of the conversation. He recalled calling Colonel Goff later but did not remember the context of the conversation. He next remembered seeing "a man in a green coat," and then Colonel Goff and Major Maynard, then remembered nothing until he felt someone shaking him, saying, "Do you remember me?" He awoke to find two tubes in his nose and down his stomach and that he was wearing an oxygen mask (R 106-107). Accused stated he did not know how much whiskey he had consumed "that Saturday" beyond the fact that he took the drink when he first got up. He examined the bottle after his release from the hospital and found it contained about half a pint, which indicated to him that he had consumed approximately a fifth of whiskey less half a pint on Friday evening and Saturday. He was therefore of the opinion that he could not have been drunk the day of 8 July

1950 (R 107). Nevertheless the accused stated there was something wrong with him in view of his conduct throughout the day, of which he had subsequently been informed. In his opinion there was something "mentally wrong" with him and that it "was not drunkenness." He stated, "Whether I went to the William Beaumont General Hospital I have not the vaguest idea. The only thing I can say along that line is that the night before I intended to go" (R 110). The accused cited various incidents of his irrational conduct such as failure to rise when a full colonel, "Colonel Goff," entered his quarters, asking someone to get the key to the lock of his quarters when he always kept them locked with a combination lock, the fact that there were two partially filled glasses of whiskey ~~on the~~ table, and the fact that although he is familiar with the proper area for the administration of penicillin shots, he indicated his hip as being the place where he had received the alleged shot (R 108,109,110). The accused explained that he had obtained a vial of potassium cyanide in 1940 from a "crazy" soldier in Hawaii and had put it among his possessions. He has no recollection of where he had been keeping it, but believed that sometime during Saturday "something in /his/ mind decided /him/ to commit suicide" and he must have "gotten this stuff out" (R 111,112). He has no intention now or at any time of ending his life. He does not believe any man does when he is in his right mind. He is of the opinion that Major Schrader is correct in his diagnosis, that he had "reached the point of tolerance where a small degree or amount of alcohol has an effect that is without any point or reason, beyond any bounds of reason" (R 113). With respect to continuing in the service of the Army of the United States the accused stated that he agrees with Major Schrader that he is "in the wrong wagon" but at a time like this he owes it to the "country in general" to make his ability available (R 114).

4. Discussion

a. Specification 1, Charge I and Specification 1, Charge II (Attempt to Commit Suicide)

The evidence shows that on or about 1815 hours on 8 July 1950 the accused intentionally swallowed a portion of potassium cyanide. The statements of the accused made immediately after taking the poison indicated that he took the poison with the intention of committing suicide. Had preventive measures not been administered, death would have quickly followed. Thus the evidence is clear that the accused attempted to commit suicide as alleged. It is well established that such conduct constitutes an offense in violation of Article of War 95 (CM 283727, Farris, 55 BR 135,147; CM 252628, Earle, 34 BR 111,116). It is also a disorder to the prejudice of good order and military discipline and constitutes a viola tion of Article of War 96 (MCM, 1949, par 183a).

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b. Specification 2, Charge I and Specification 2, Charge II (False Official Statement)

Under these specifications the accused was found guilty of making a false official statement with intent to deceive Colonel John L. Goff, his commanding officer, in violation of Articles of War 95 and 96.

The following elements of proof are required to establish the commission of the offense as charged:

(a) That accused made a certain official statement,
(b) that the statement was false,
(c) that the accused knew it to be false, and
(d) that such false statement was made with intent to deceive the person to whom it was made (CM 338837, Kelley, 4 BR-JC 319, 323; CM 324352, Gaddis, 73 BR 181,186, citing CM 262360, Campbell, 41 BR 58, CM 316750, Ortiz-Aponte, CM 318167, Green, CM 318705, Jackson).

The evidence shows that on the afternoon of 8 July 1950 the accused stated to Colonel Goff, his commanding officer, in the presence of Colonel Rauscher and Captain Carpenter that he had gone to the William Beaumont General Hospital that morning where he had received a penicillin injection for an injured toe and that he was sick in quarters. The accused, however, was unable to describe where he had reported in the hospital, and the hospital records failed to disclose any account of such treatment. Colonel Goff proceeded to the William Beaumont General Hospital to investigate whether the accused had received treatment there. "I determined," Colonel Goff testified, "that Colonel Gifford had not been to Beaumont Hospital that morning from all available evidence at the Hospital." The accused in his testimony declared, "Whether I went to the William Beaumont Hospital I have not the vaguest idea. The only thing I can say along that line is that the night before I intended to go."

Colonel Rauscher testified that it is possible for a penicillin injection to be administered without a record being made, but asserted that standing instructions require that a card be made for every patient who comes in to the hospital. He stated that he checked the records of the Out-Patient Service as well as other parts of the hospital where penicillin might conceivably be given, and that there was no record that penicillin had been administered to Colonel Gifford.

From all the facts the court was justified in concluding that the statement of the accused was false and was made with a knowledge of its falsity. We find no cogent reason to disagree with the court-martial in its findings of guilty of these specifications. Since the statement was made by the accused to his commanding officer in an attempt to explain his absence from duty it was an official statement. As the accused would

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have made himself amenable to disciplinary action for having been absent from his duties the motive for the accused's attempt intentionally to deceive his superior officer is thus apparent. The intent to deceive may be inferred when the statement is knowingly false.

The making of a false statement by an officer, knowing it to be false and with intent to deceive, has been consistently held to be a violation of Article of War 95 (CM 288574, Wilkins, 56 BR 373,377; CM 202819, Rogers, 6 BR 303, 317; CM 338837, Kelley, supra, page 325). It is also a disorder to the prejudice of good order and military discipline and constitutes a violation of Article of War 96 (MCM, 1949, par 183a).

c. Specification 3, Charge II (Drunk in Station)

On or about 8 July 1950, the accused was found by Colonel Goff and Major Maynard in a drunken stupor or asleep in a chair in his quarters. Two partially empty glasses of brown liquid, which smelled like whiskey, were on a table beside him. Colonel Goff awakened the accused by shaking him and ordered him to get dressed. The accused was slow in complying, but was able to dress with assistance. The evidence that he staggered to a visible degree, talked in monosyllables, and displayed other symptoms of intoxication was sufficient to justify the witnesses in concluding that the accused was drunk. Such conduct is prejudicial to good order and military discipline and violative of Article of War 96 (CM 269523, Moore, 58 BR 163,165; CM 315403, Drilling, 64 BR 401, 405).

d. Mental Responsibility

The issue of sanity was not raised by defense on motion. Major Schrader, Assistant Chief of Neuropsychiatric Service, William Beaumont General Hospital, a witness for the defense, who examined accused on 9 July 1950 and for several days thereafter, stated that the accused's behavior indicated an acute maladjustment aggravated by a lack of ability to tolerate alcohol. However, he was not a chronic alcoholic and was sane both at the time of the alleged offenses and at the time of trial, and could adhere to the right and conduct or cooperate intelligently in his own defense. The holding of the court that the accused was sane at all material times, necessarily included in its findings of guilty, is fully sustained and justified by the evidence.

5. Attached to the record of trial is a letter to the convening authority signed by the trial judge advocate, the defense counsel, and three of the nine members of the court recommending that the dismissal from the service of the accused adjudged by the court be remitted.

6. Records of the Department of the Army show that the accused is 36 years of age and unmarried. He graduated from the United States Military Academy in 1939 and was commissioned a second lieutenant on 12 June 1939. He was promoted successively to first lieutenant, on 9 September 1940; to captain, on 1 February 1942; to major, on 21 October 1942; and to lieutenant colonel, on 23 December 1943. He was awarded the Bronze Star Medal and the Croix de Guerre. He is entitled to wear the American Theater ribbon, the Victory ribbon and the European, African, Middle East ribbons with five bronze service stars for "Rhineland, "N France," "Ground Combat England," "Normandy" and "Cent Europe" campaign. His adjectival efficiency ratings from 6 October 1939 to 30 June 1944 show ten of "Superior," four "Excellent," and three "Very Satisfactory." His overall efficiency ratings of record from 20 December 1948 to 31 May 1949 and from 25 November 1949 to 22 January 1950 are 108 and 092, respectively.

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and is authorized upon a conviction of a violation of Article of War 96.

Grant Brown, J.A.G.C.

Lewis B. Shull, J.A.G.C.

Samuel S. Cowles, J.A.G.C.

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,249

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Lieutenant Colonel James R. Gifford, 0-21964, Headquarters 50th Antiaircraft Artillery Automatic Weapons Battalion (SP), Fort Bliss, Texas, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

18 October 1950

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

20 October 1950

GCMO 75, Oct 26, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

(105)

OCT 12 1950

JAGH CM 343259

U N I T E D S T A T E S	)	UNITED STATES ARMY, EUROPE
	)	
v.	)	Trial by G.C.M., convened at
	)	Wuerzburg, Germany, 10, 11
Private First Class WEBSTER J.	)	August 1950. Dishonorable
HALE (RA 34423475), 447th	)	discharge, total forfeitures
Transportation Truck Company.	)	after promulgation, and con-
	)	finement for life.

OPINION of the BOARD OF REVIEW
HILL, TIBBS, and FITZHUGH
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

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

Specification: In that Private First Class Webster J. Hale, 447th Transportation Truck Company did, in the vicinity of Wirtheim, Germany, on or about 21 June 1950, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Lina Jork (German Civilian).

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

Specification: In that Private First Class Webster J. Hale, 447th Transportation Truck Company, having received a lawful command from Second Lieutenant John Hashem, his superior officer, to stay on his authorized route, did, at Wirtheim, Germany, on or about 21 June 1950, willfully disobey the same.

He stood mute and a plea of not guilty was entered on behalf of the accused by the court with respect to all Charges and Specifications. He was found guilty of all Charges and Specifications. Evidence of one previous conviction by summary court-martial for appearing in a public place in a fatigue uniform was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to

become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private First Class Webster J. Hale, was identified as a member of the 447th Transportation Truck Company (R 11,26), one platoon of which, on 21 June 1950, was stationed in the Wildflecken maneuver area, approximately five miles north of Bruckenau, Germany (R 11). The accused was the assigned driver of a 4-ton diamond T wrecker. This wrecker had "twin booms" and "920 tires" (R 12). At about 0800 hours, 21 June 1950, Second Lieutenant John Hashem, motor officer, 447th Transportation Truck Company, dispatched the wrecker, with the accused as driver, on a mission to Giessen, Germany. The accused was ordered to follow "the northern route" via Fulda, Alsfeld, the Autobahn and Steinbach to Giessen, reporting on arrival to Lieutenant Karge at the 447th Transportation Truck Company kaserne in Giessen (R 12,19). Lieutenant Hashem told accused to stop and call in, if for any reason he got off this route (R 19). The accused had been over this route before and acknowledged to Lieutenant Hashem that he understood his orders (R 15,18). The 4-ton diamond T wrecker driven by the accused was the only one of its type in the Wildflecken area (R 17,24).

A second route between Wildflecken and Giessen, known as "the southern route" existed via Wildflecken, Bruckenau, Wurzburg, Aschaffenburg, Markt-Heidenfled, Hanau, Frankfurt or Bad Nauheim, Steinbach and Giessen. Normal driving time for a single truck dispatch between Wildflecken and Giessen via the northern route was about three and one-half hours, via the southern route about five and one-half hours (R 18,28). The distance by the northern route was approximately eighty-five miles (R 23). The mileage by the southern route was approximately one hundred and fifty miles (R 25). The accused was told that he would be expected to arrive in Giessen at approximately 1200 hours (R 22,23).

First Lieutenant Robert W. Karge, the commanding officer of the 447th Transportation Truck Company, inspected the four-ton diamond T wrecker assigned to that organization and driven by the accused on 17 June 1950. At that time he noted that the tires mounted on the rear wheels were commercial tires "re-built by the Oberammergau re-build shop." One tread was of "a diamond type and the other * * a sort of zig-zag effect." He again inspected the wrecker on 22 June 1950, and noted that the same tires were on the rear wheels (R 27-28). The tire with the diamond type tread was mounted on the inner left rear wheel, and the tires giving a zig-zag

or "snake" type pattern were on the outer rear wheels (R 28). It was the only vehicle in the unit equipped with tires of this type (R 35).

The accused reported by telephone to Lieutenant Karge at Giessen between 1400 and 1430 hours, 21 June 1950 stating that he was then at the kaserne in Giessen (R 29,35).

Mrs. Lina Jork, a 54-year old widow, residing in Waechtersbach, Germany, left her home at about 0900 hours, 21 June 1950, for the purpose of visiting the refugee office in Gelnhausen, Germany. She had reached a junction of the Waechtersbach-Gelnhausen and Bad Orb roads when a "truck with a crane on it" driven by a colored soldier stopped beside her. The driver "invited [her] to go to Gelnhausen" (R 40). She accepted the invitation. The vehicle proceeded in the direction of Gelnhausen until upon reaching a wooded area the driver suddenly turned it into a forest path (R 40-41). He drove along the path at a high rate of speed to a point beyond which the way was blocked by difficult terrain (R 41-42). When the driver stopped the vehicle, Mrs. Jork got out on the right side of the cab and, calling for help, attempted to run away. She described the ensuing assault upon her as follows:

> "He ran around the other side of the truck and I ran again. When I saw him at that corner, I ran back. He ran around the truck. I wanted to get away from him but I hardly could move. I wanted to get away from him. And then by the hood of the vehicle, he grabbed me and threw me on some kind of a boulder, and then he threw himself upon me and covered my nose and my mouth with his hands so that I almost choked. I had bruises on several places on my face. He closed my mouth and my nose for quite a while, * * *.
>
> * * * *
>
> "Then he took out his male organ, pulled up my leg so hard and threw it over his shoulder I had a stabbing cramp in my hip. And then he used me.
>
> "Q. How did he use you, Mrs. Jork?
> A. How shall I explain that?
>
> "Q. Explain exactly what he did, Mrs. Jork?
> A. He put his male organ into me.
>
> "Q. Do you know that his male organ went inside your organ?
> A. Yes.
>
> "Q. And did he complete his act there?
> A. Yes." (R 43-45)

During the assault, she felt the accused reaching in his pocket and she was afraid he was going to stab her (R 43-44). She begged the accused to

let her go "because I am an old woman" but he replied: "No, you are not an old woman" (R 44). The accused eventually released Mrs. Jork whereupon she ran further into the woods finally making her way to a road where she was taken to Gelnhausen. The accused did not pursue her and she heard the truck depart. Upon her arrival in Gelnhausen, she went to the refugee office and reported what had happened to her to a Mrs. Schlaeper (R 46). At a later date, Mrs. Jork identified the accused as her assailant from a group of eight soldiers assembled at Frankfurt (R 47,101).

Wilhelm Schum, a farmer residing at Wirtheim, Germany, was working in his fields between Waechtersbach and Gelnhausen, Germany, on 21 June 1950. The field was bordered by a forest into which a small road led from the highway (R 61). During the morning "an American vehicle with a crane" turned off the highway into the small road leading into the forest. He observed the vehicle disappear into the woods. Sometime later he heard "a cry coming from the forest." The voice was that of a woman or child (R 62). Between fifteen and twenty minutes after the vehicle had gone into the woods he observed it returning along the same forest road. No other vehicle used that road that morning (R 63).

Elizabeth Schlaeper, an employee at the Landrats office, Gelnhausen, Germany, found Mrs. Jork waiting for her at her office when she came in between 1030 and 1130 hours, 21 June 1950. Mrs. Jork was "very upset," "completely confused" and crying so hard that she was unable to speak for several minutes (R 68). She was quite dirty. She had needles and leaves on the back of her sweater. Her hair was tousled. She had scratches on her hands and the calves of her legs. One side of her face was swollen (R 69). She told Mrs. Schlaeper that she had been raped by a colored soldier driving a truck with a crane from whom she had accepted a ride (R 69). Mrs. Schlaeper called the police.

Doctor Erwin Jahn, a physician residing at Gelnhausen, Germany, saw Mrs. Jork at about 1400 hours, 21 June 1950. She was restless, nervous, disturbed and bewildered (R 74). Her clothing was disarranged. Her panties were torn and soiled with earth, blood and mucous. Examination revealed a "fresh redness" of the outer parts and of the mucous membranes of her genitals. Blood was oozing from the vagina and was found in "the deeper parts of the vagina." Microscopic examination of a vaginal smear revealed the presence of blood, mucous and sperm cells. There were scratches on her hands. The left side of her face was swollen, and there were "marks of pressure" on her wrist, forearms, and upper and lower legs (R 77). In the doctor's opinion, Mrs. Jork had been the victim of "a forced intercourse" (R 75-76).

Captain Leroy S. Allen, 547 Combat Engineers, Gelnhausen, Germany, took Mrs. Jork to the 547th Engineer Combat Battalion motor pool on 21

June 1950 for the purpose of identifying the type of vehicle driven by her assailant. No such vehicle was found in the motor pool but upon examination of an ordnance catalog she "picked out a 4 ton wrecker diamond T with half doors open cab job" as the type of vehicle in question (R 80).

On 23 June 1950 Mrs. Jork guided Master Sergeant Wilbur D. Borden, 52nd CID, Frankfurt, Germany, to the spot where the alleged rape occurred. The sergeant made impressions of tire prints which he discovered at the spot indicated by Mrs. Jork. The inside tire print showed "a diamond pattern" and the outside one "a snaky pattern" (R 87). The original impressions taken by the witness were admitted in evidence as Prosecution Exhibits 3 and 4 over the objection of the defense (R 90). On 26 June 1950, Sergeant Borden compared the tire impressions taken at the scene of the alleged rape with the tires on the 4 ton diamond T wrecker belonging to the 447th Transportation Truck Company and found the treads to be the same (R 95).

After warning the accused of his rights under the 24th Article of War on 26 June and again on 28 June, which the accused stated he understood, Sergeant Borden asked the accused to "account [for] his proceedings, his happenings on the day of the 21st" (R 98). The accused stated that:

> "* * * he was ordered to drive his vehicle, this four ton wrecker from the Wildflecken training area through to Giessen * *. (R 98)
>
> * * *
>
> "* * he [was] directed to proceed in the direction of Fulda and take the autobahn from Fulda to Giessen. * * he had also been told that Fulda was close to the Russian line and that he was frightened about that and that he had decided not to go that way. Instead, * * he drove to Wuerzburg and from Wuerzburg drove through to Frankfurt, caught the autobahn there through to Giessen." (R 99)

No threats or promises were made to obtain the foregoing statement (R 96). The accused later refused to make a formal statement (R 107).

b. <u>For the defense.</u>

Lieutenant Robert W. Karge was recalled as a witness for the defense and examined concerning the visit of Sergeant Borden to the 447th Transportation Truck Company motor pool on 26 June 1950. No new significant facts were developed (R 117-119).

The accused having been duly informed of his rights as a witness elected to make an unsworn statement through counsel. This statement amounted to "a general and specific denial of each and every charge and

allegation" (R 120). In substance, the accused contended that he had made the trip from Wildflecken to Giessen as ordered, alone and without stopping and was not in the vicinity of the alleged rape (R 120).

4. Discussion.

a. Charge I and the Specification.

Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1949, par. 179b). Carnal knowledge means sexual bodily connection between a male and a female to include the penetration of the sexual organ of the female by the sexual organ of the male (I Wharton, Criminal Law, sec. 685).

Force and want of consent are indispensable in rape (MCM, 1949, supra) Consent, however reluctant, negatives rape. Whether there was consent may be determined by the resistance offered by the victim to her violation and where her resistance is honest and the utmost "according to her lights" that she could offer she will be taken not to have consented (I Wharton, supra, sec. 701). The amount of resistance necessary to satisfy the requirement of "the utmost according to her lights that she could offer" depends upon the circumstances surrounding the female at the time, the relative strength of the parties and the particular circumstances of each case (I Wharton, supra, sec. 734).

The accused contends that at the time of the commission of the offense he was driving the wrecker of which he was the assigned driver along "the northern route" between Wildflecken and Giessen, Germany, no point of which route is less than thirty miles from the place where the crime occurred. There is compelling proof in the record of trial which refutes that offered by the defense. The wrecker of which the accused was the assigned driver was the only one of its type in the Wildflecken area on 21 June 1950. It was equipped with distinctive tires mounted in a specific order on its rear wheels. These tires were inspected by the commanding officer of the accused's unit four days prior to the offense. The accused admitted that he was the driver of this vehicle on 21 June 1950, and that he was dispatched that morning with the vehicle to make a trip to Giessen. He further admitted to a noncommissioned officer of the Criminal Investigation Detachment that he did not go by "the northern route" through Fulda as directed but in order to avoid proximity with the Russians went by "the southern route" through Wuerzburg; a route from which he could have reached the vicinity of Waechtersbach and Gelnhausen without difficulty or much delay. A farmer, who had no interest other than to speak the truth, observed a vehicle similar to the one driven by the accused enter the forest via a narrow trail or path leading from the highway and after the lapse of fifteen or twenty minutes observed it return along the same pathway. The pathway was not a part of the road or highway system but existed for the convenience of woodcutters. No other vehicle had used this trail or path on the morning

of 21 June 1950. Impressions of vehicular tires were found in the soft earth at the exact scene of the crime which impressions on comparison were found to correspond precisely with the impressions made by the tires on the vehicle driven by the accused. The accused was between two and two and one-half hours late in reaching Giessen. This evidence brands the accused's account of his activities on the morning of 21 June 1950, as false, places him at the scene of the crime, and proves his defense to be pure fabrication (CM 279398, Randolph, 52 BR 193,198). These facts corroborate the positive identification of the accused as her assailant by Mrs. Jork and, when taken together with her testimony, establish beyond any reasonable doubt that it was the accused who assaulted her.

Examining the evidence we cannot say that the court erred in reaching a finding of guilty of rape. The victim was a 54-year old woman. The accused's design having become apparent to her, she attempted to escape by running away but the accused pursued her and caught her. She screamed for help and the accused covered her nose and mouth with his hands until she "almost choked." She felt the accused reaching in his pocket and, because she was defending herself, she feared he might stab her. She begged the accused to let her got but he refused. He forcibly separated her legs and thrust his penis into her vagina. She made an immediate complaint to the first woman she could contact after the attack upon her at which time it was observed that she was dirty, scratched, bruised and in extreme emotional distress. An examination performed by a physician shortly thereafter revealed her underclothing to be soiled by earth, blood and mucous. Her genitals exhibited a "fresh redness." Blood and sperm cells were found in her vagina. None of this testimony is contradicted. It establishes beyond a reasonable doubt all of the essential elements of proof of the crime of rape. The Board of Review, therefore, finds the record of trial legally sufficient to sustain the findings of guilty of Charge I and its Specification.

b. The specification, Charge II, alleges that the accused willfully disobeyed a lawful command of his superior officer to stay on a designated authorized route. The offense alleged is a willful disobedience manifesting an intentional defiance of authority, of an order, relating to a military duty, given by an authorized superior officer (MCM, 1949, par. 152b; CM 325635, Richardson, 74 BR 381,383; CM 255602, Prichard, 36 BR 151,157). Analysis of this part of the case is as follows:

The uncontroverted evidence is that Second Lieutenant John Hashem, the commanding officer of the accused, gave the accused a positive and specific command to drive his truck from Wildflecken to Giessen by the northern route. Lieutenant Hashem carefully and painstakingly described the route in detail to the accused, naming all the larger towns he was to pass through and instructing the accused to stop and call in, if, for any reason, he got off the route. The accused told Lieutenant Hashem he understood his orders, and he was familiar with the northern route,

having traveled it before. But instead of taking the northern route by turning north toward the town of Fulda as ordered, he disregarded his orders and started almost due south and proceeded by way of Wurzburg and Frankfurt over the southern route.

After being duly warned of his rights as a witness, the accused elected to make an unsworn statement through counsel. This statement amounted to "a general and specific denial of each and every charge and allegation." Specifically, he asserted that he in fact complied with the orders given him by his commanding officer and traveled to Giessen without stopping and by the northern route. But Sergeant Borden testified that he gave the accused warning of his rights under the 24th Article of War on 26 June and again on 28 June and that the accused, after acknowledging he understood his rights, voluntarily made an oral statement. The accused admitted that he received an order to proceed from Wildflecken to Giessen by way of Fulda and the northern route but he said that he decided not to take that route and instead to go by way of Wurzburg and Frankfurt, or in other words by the southern route. The only excuse the accused offered for not following his orders was that "he had been told Fulda was close to the Russian line and that he was frightened about that and that he had decided not to go that way."

Reference to the maps, Prosecution Exhibit 1, and to the above-digested testimony in connection with them, shows that in driving the so-called southern route the accused had to start out in the opposite direction from the route he was ordered to take and that he had to travel approximately 65 miles further requiring about two hours more running time. The very positive testimony of Mrs. Jork and of Wilhelm Schum places the accused as having traveled the southern route, and this is corroborated by the investigation of Sergeant Borden tracing the tire tracks of the accused and by the accused's own statement to Borden. Thus, it is concluded that the unsworn statement of the accused is untrue and that the evidence establishes beyond a reasonable doubt that the accused is guilty of an intentioned defiance of authority in willfully disobeying the lawful order of his authorized superior officer. The Board of Review, therefore, finds the record of trial legally sufficient to sustain the findings of guilty of Charge II and its Specification.

5. The accused is 30 years of age. He has a Class E allotment of $80.00 per month to his dependents. He had prior service of six years, three months, and twenty-three days completed 29 March 1949. His current service began 30 March 1949 for a term of three years. Prior to the commission of the offenses reviewed herein, his service was characterized by his commanding officer as poor.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substanti

rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of rape in violation of Article of War 92.

C. P. Hill, J.A.G.C.

Richard T. Gibbs, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 343259

UNITED STATES	)	UNITED STATES ARMY, EUROPE
	)	
v.	)	Trial by G.C.M., convened at Wuerzburg, Germany, 10,11 August 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
Private First Class WEBSTER J. HALE, RA 34423475, 447th Transportation Truck Company	)	

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(2) the record of trial and the opinion of the Board of Review in the case of the soldier named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused was charged with the rape of Mrs. Lina Jork (German civilian) in the vicinity of Wirtheim, Germany, on or about 21 June 1950, in violation of Article of War 92 (Charge I and Specification), and willfully disobeying the lawful command of Second Lieutenant John Hashem, his superior officer, to stay on his authorized route, at Wirtheim, Germany, on or about 21 June 1950 (Charge II and Specification). He stood mute and a plea of not guilty to the charges and specifications was entered on his behalf by the court. He was found guilty of both charges and specifications. Evidence of one previous conviction by summary court-martial was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The Board of Review has expressed the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The Judicial Council concurs with the Board of Review in its opinion that the record of trial is legally sufficient to support the findings of guilty of rape as alleged in the specification of Charge I. The only question is whether the record supports the findings of guilty of willful disobedience of a command in violation of Article of War 64,

as alleged in the specification of Charge II and Charge II. The evidence under that specification, which is substantially as set forth by the Board of Review in its opinion, with additions hereinafter discussed, establishes that while the accused obeyed so much of the command of Second Lieutenant John Hashem as directed him to drive the wrecker from Wildflecken to Giessen, the accused did not obey that portion of the Lieutenant's command which directed him to take the "northern route." The accused understood the entire command, but decided to follow the "southern route," which was about 65 miles longer than the directed route and required about two hours more driving time, because he had "been told that Fulda (on the northern route) was close to the Russian line and that he was frightened about that and that he had decided not to go that way" (R 99).

In our opinion the primary aspect of Lieutenant Hashem's command to the accused was to drive the wrecker to Giessen, and his directions as to the route, were subordinate thereto, and were so considered by the accused. The willful disobedience contemplated by Article of War 64 is such as shows an intentional defiance of authority, as when a soldier is given an order by an officer to do or cease doing a particular thing at once, and refuses or deliberately omits to do what is ordered. A neglect to comply with an order, such as through heedlessness, remissness or forgetfulness is an offense under Article of War 96 (MCM 1949, par 152b, page 206). There must be a specific intent to defy authority, deliberately and consciously (CM ETO 106, Orbon, 1 BR (ETO) 95, 105). In our opinion the evidence in this case does not establish beyond a reasonable doubt that the accused's action in following the southern instead of the northern route was such a direct and flagrant act of disobedience as is contemplated by the term willful disobedience in Article of War 64. (CM 124276, Dig. Op. JAG, 1912-1940, sec 422(5), pages 285-286; CM ETO 4376, Jarvis, 12 BR (ETO) 319, 323; and see CM 237138, Kohlhepp, 23 BR 271, 277 and CM 269791, Summerford, 45 BR 133, 138). His conduct, however, in failing to comply with the order in the manner directed, involved the lesser included offense of failure to obey the lawful command of his superior officer, to the prejudice of good order and military discipline in violation of Article of War 96 (CM 269791, Summerford, supra; CM ETO 4376, Jarvis, supra).

4. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its specification, legally sufficient to support only so much of the findings of guilty of Charge II and its specification as involves findings of guilty of failing to obey the command alleged, received as alleged, at the place and time alleged,

in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,259

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Webster J. Hale, RA 34423475, 447th Transporation Truck Company, upon the concurrence of The Judge Advocate General only so much of the findings of guilty of Charge II and its specification as involves findings of guilty of failing to obey the command received as alleged, at the place and time alleged, in violation of Article of War 96, is approved. Upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C B Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E M Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

31 October 1950

(GCMO 79, Nov 6, 1950)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

NOV 2 1950

JAGH CM 343284

UNITED STATES v. Second Lieutenant ELLIS M. CLARK (0963090), 63rd Transportation Truck Company (Troop).	)	1ST INFANTRY DIVISION Trial by G.C.M., convened at Grafenwohr, Germany, 31 August 1950. Dismissal.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Ellis M. Clark, 63rd Transportation Truck Company (Troop), did, at Wendelstein, Germany, on or about 31 July 1950, wrongfully and unlawfully in a public place and in the presence of other persons assist Marie Seibold to disrobe herself and encourage and assist the said Marie Seibold in putting on and modeling a brassiere all to the disgrace of the military service.

Specification 2: In that Second Lieutenant Ellis M. Clark, 63rd Transportation Truck Company (Troop), did, at Nurnberg, Germany, on or about 31 July 1950, wrongfully and indecently expose his penis in the presence of other persons and did in the presence of other persons attempt to have sexual intercourse with Hedwig Bindheim, all to the disgrace of the military service.

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

3. Evidence.

a. For the prosecution.

Sometime between 2230 and 2245 hours on 31 July 1950, the accused and his wife took a taxi to "The Golden Angel," a restaurant on the main road in Wendelstein, Germany (R 7,8,10,11,13,15). At the request of the accused, the driver locked his cab, went into the restaurant, and sat down at a table with the accused, his wife and two German girls who had been invited to the table (R 8,16). One of the German girls showed a French brassiere to Mrs. Clark who expressed a desire to try it on. When Mrs. Clark returned to the table, she told the accused to buy the brassiere. The accused replied he would only if he could see it on Miss Seibold, one of the German girls (R 8,16). Mrs. Clark agreed to this and after some discussion Miss Seibold consented to go out to the cab with the accused and to model the brassiere (R 8,9,13,16). The cab was parked about two and one-half meters from the entrance to the restaurant (R 11).

At the direction of the accused, the taxi driver left the table with the accused and Miss Seibold and unlocked the cab for them. He saw the accused help Miss Seibold remove her dress (R 9). She then pulled her petticoat down and took off her brassiere so that she was naked to the waist (R 10,21). When she put the new brassiere on, the accused fastened it, touching her on the left breast during the process (R 9,12,14,19).

A second cab driver who arrived in the meantime glanced in the cab, where he saw a man in uniform and, "a lady in there with the naked upper part of the body" (R 21,23,24). Shortly thereafter, Miss Seibold dressed and returned to the restaurant with the accused and the cab driver (R 9). The accused then purchased the brassiere for four marks (R 9).

Later in the same evening, the accused, his wife, the two German girls, three soldiers, and three other girls took two taxis to the accused's house in Nurnberg (R 9). They were all invited by the accused to a farewell party as he planned to leave the next morning for the United States (R 25). Several hours later, the accused and his wife, who was a little "tipsy," left their guests in the living room saying they were going to bed (R 30,34,38,52). Shortly thereafter, the accused returned to the living room clad only in "GI" underwear, with his penis exposed (R 26, 28,29,30,38). Two girls, Hedwig Bindheim and Eleonore Feuchtmeier, and two soldiers, Sergeant Craven A. Covington and Private First Class Edwin T. Dudley, were present (R 27). The accused "cracked a few jokes" and,

after he noticed his penis was "out of his fly," turned "away from the people," and put it in (R 28). He approached Miss Bindheim, turned out the light, and suggested sexual intercourse. She refused. Whereupon he grabbed her, pressed her to the floor, and put his penis between her legs. She cried out for assistance and told the accused several times to go to his wife and child (R 38,41,43). She was able to roll over on her side to prevent the intercourse but the accused held her to the floor and put his tongue in her vagina (R 38,43). During this time Sergeant Covington heard "sucking or kissing" sounds but was unable to see what the accused and Miss Bindheim were doing as a large chair obstructed his view (R 27, 32). Sergeant Covington started to get up from his chair to see what the noise was when the accused's wife entered the room and turned on the lights saying, "You son-of-a-bitch, you German girl" (R 34,38). She then threw a knife at Miss Bindheim which cut the latter severely on the wrist (Def Ex A-1, Def Ex B-1).

Upon re-cross-examination, Miss Bindheim admitted that she had made two statements to the CID, one dated 1 August 1950, and the other dated 31 August 1950 (R 46,47; Def Exs A,A-1,B,B-1). She further admitted that the first statement was false in many particulars (R 45,46). Both statements were received in evidence as defense exhibits (R 48).

b. For the defense.

After 2400 hours on 31 July - 1 August 1950, Misses Bindheim and Feuchtmeier, Sergeant Covington, Private First Class Dudley, and another soldier and girl, took a taxi from the "Golden Angel" to the accused's house in Nurnberg (R 51). There they conversed and drank. After some time, Miss Bindheim's "boy friend," Private First Class Dudley, departed (R 59). The accused and his wife went into the "sleeping room." Shortly thereafter the accused returned to the living room dressed only in his underwear (R 52). Miss Feuchtmeier saw the accused at the time but did not notice anything indecent about him (R 53). Private First Class Dudley had asked Miss Bindheim to leave with him but she pretended she could not find her pocketbook. Her actions indicated that she did not want to leave at that time (R 50,53,59).

The accused, after being apprised of his rights as a witness, elected to testify under oath specifically limiting his testimony to matters concerning his background (R 55). He is 26 years old. He entered the Army 4 December 1943 (R 55). As he had had a commerical course, he was assigned to personnel and served in that section until January 1946 when he was discharged. He reenlisted and did administrative work until he received a direct commission in September 1948. He has received no training regarding the customs of the service and has not attended an "officer orientation course" (R 56). He has served continuously as an officer since being commissioned. When his mother died in December 1949, he found that money

put aside for her had been stolen, a check he had sent her had been forged, and some of her clothing and other things had been taken out of her house. Upon his return to duty, he tended to worry quite a bit because he was in debt. In May 1950 he requested relief from active duty (R 57).

4. Discussion.

The accused stands convicted of two specifications both in violation of the 95th Article of War. The first specification alleges that he wrongfully and unlawfully assisted Marie Seibold to disrobe herself and that he encouraged and assisted her in modeling a brassiere in a public place and in the presence of other persons. The second specification charges him with attempting to have sexual intercourse with Hedwig Bindheim in the presence of other persons after having wrongfully and indecently exposed his penis to such persons.

The 95th Article of War makes conduct unbecoming an officer and a gentleman a military offense punishable by dismissal (AW 95, MCM 1949, p. 298). The Manual for Courts-Martial, 1949, defines such conduct in the sense applicable here, as:

> "* * * action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously compromises his position as an officer and exhibits him as morally unworthy to remain an officer of the honorable profession of arms." (MCM, 1949, Par. 182).

Winthrop describes the misconduct contemplated as follows:

> "Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents" (Winthrop's Military Law and Precedents, 2d Ed, pp.711-712).

Among other conduct which has been held violative of this article is conduct "Offending against good morals, in violation of the local law or of public decency and propriety" (Winthrop, op.cit. supra, p.718). Instances of such conduct include: illicit sexual intercourse (CM 282113, Kramer, 54 BR 325; CM 333420, Hummel, 81 BR 349,355); indecencies toward women (CM 307087, Bonet, 60 BR 191,194); and indecent exposure (CM 249211, Stone, 32 BR 55,58).

a. Specification 1 of the Charge.

The evidence adduced by the prosecution in support of specification 1 of the charge was not refuted by the defense in any respect. It

established conclusively that at the insistence of the accused Miss Seibold accompanied him to a taxicab parked about two and one-half meters from the entrance to a restaurant, located on a main street, where he assisted her to remove her dress. Thereafter he entered the taxicab with her where she stripped to the waist by pulling down her petticoat and removing her brassiere, after which he assisted her in putting on another brassiere during which act he touched her left breast. There is nothing whatsoever to show that the accused was not aware of the public nature of the place in which these acts took place. To the contrary, it appears that he knew that at least one other person was present as the taxi driver at the accused's request had accompanied them to the cab in order to unlock it. The accused was in uniform.

The accused's course of conduct reveals him to be totally lacking in moral discernment and responsibility and to be contemptuous of restraints imposed by standards of public decency and propriety. The events leading up to the public disrobing of Miss Seibold and the trifling amount paid by the accused for the brassiere reveal his real purpose in insisting that she model it not to be one having any relation to the brassiere but rather one dictated by a lewd and lascivious mind. His indecent and undecorous actions were aggravated by their public nature and fall within those acts "offending against good morals" denounced as violations of the 95th Article of War (CM 251370, Blanton, 33 BR 221,225).

b. Specification 2 of the Charge.

There is no conflict in the testimony that, after having taken his wife out of the room, the accused returned clad only in his underwear. Of the four people present at the time, two testified that the accused's penis was exposed; one did not notice anything indecent about his person; and the fourth was not questioned on this subject. Sergeant Covington further testified that "after he [the accused] detected his penis was out of his fly he turned his back and put it in." It thus appears that the accused's indecent exposure of his private parts may have been negligent rather than willful. However, for the purposes of this discussion it is immaterial whether the exposure was willful or negligent. At common law, "an intentional or negligent indecent exposure of the private parts of the person to public view is a nuisance" (2 Wharton, Criminal Law, 12th Ed., 1932, Sec. 1747). Furthermore, it is the opinion of the Board of Review that the specification under consideration alleges a course of continuing conduct of which the indecent exposure was but one incident rather than several separate offenses, although indecent exposure in and of itself is an offense in violation of the 95th Article of War (CM 249211, Stone, supra, at 58).

The evidence as to the accused's attempt to have sexual intercourse with Hedwig Bindheim, in the presence of other persons, is found almost

solely in the testimony of Miss Bindheim, who, because of inconsistent pretrial statements, was shown to be a person of doubtful credibility. There is, however, no evidence to refute her testimony and the court in reaching its findings of guilty apparently determined that her credibility had not been successfully impeached. She testified that the accused told her he wanted "to fuck." She refused, whereupon he grabbed her, pressed her to the floor, and put his penis between her legs. She jumped away and the accused put his tongue in her vagina. During this time and while the lights were "out," the accused and Miss Bindheim were observed by Sergeant Covington to be behind a chair on the floor, but he could not see what they were doing. Sergeant Covington and Miss Feuchtmeier did, however, hear "sucking or kissing sounds," and Sergeant Covington could see the lower parts of the legs of the accused.

The accused's acts, together with his statements to Miss Bindheim, leave no doubt as to his designs. Nor is it material whether Miss Bindheim was a willing participant as indicated by some of the witnesses or was forced against her will to accede to the accused's lewd and criminal acts. The fact that the accused, in the presence of an enlisted man and another girl engaged in the indecent, lewd and perverted acts alleged and proved, show him to be guilty of an offense, which offense being against good morals and in violation of public decency and propriety constituted a violation of the 95th Article of War (CM 307087, Bonet, supra, at 194; CM 254349, Willets, 35 BR 231,237).

5. Records of the Department of the Army show that the accused is 26 years of age, married and has one child. He is a graduate of Dunbar High School, Baltimore, Maryland. He served in the Army of the United States from 4 December 1943 until 14 January 1946 when he was discharged as a Staff Sergeant. On 15 January 1946, he enlisted in the Regular Army at Fort George G. Meade, Maryland, and on 24 September 1948 he was appointed as Second Lieutenant, Staff and Administrative Reserve, AUS. He was discharged to accept a commission on 5 December 1948 and entered on his present tour of extended active duty as a Second Lieutenant on 6 December 1948. He is entitled to wear the American Theater Ribbon, Good Conduct Medal, and the World War II Victory Medal. His last two overall numerical efficiency ratings were 059 and 053, respectively. There is no record of previous convictions or of civil offenses.

6. The court was legally constituted and had jurisdiction of the person 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, and to warrant confirmation of the sentence. A sentence to be dismissed the

service is mandatory upon conviction of violation of Article of War 95.

C. J. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,284

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Ellis M. Clark, 0963090, 63rd Transportation Truck Company (Troop), upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

9 Nov. 1950

GCMO 81, Nov 16, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 343316

30 OCT 1950

UNITED STATES v. Captain MERRITT EDWARD HARTLEY (O-1308816), Headquarters, Headquarters and Service Company, 29th Armored Infantry Battalion, Combat Command B, 3d Armored Division, Fort Knox, Kentucky.	FORT KNOX, KENTUCKY Trial by G.C.M., convened at Fort Knox, Kentucky, 18 and 25 July and 1 August 1950. Dismissal.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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

2. The accused was tried upon the following charges and specifications:

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

Specification 1: In that Captain Merritt E. Hartley, Headquarters, Division Trains, 3d Armored Division, Fort Knox, Kentucky, then of Company C, 29th Armored Infantry Battalion, Combat Command B, 3d Armored Division, Fort Knox, Kentucky, did, at Fort Knox, Kentucky, on or about 14 February 1950, feloniously steal one hundred and twenty five ($125.00) dollars, the property of trainees of Company C, 29th Armored Infantry Battalion, Combat Command B, 3d Armored Division, Fort Knox, Kentucky.

Specifications 2 and 3: These are identical with Specification 1, except for dates and amounts, which are as follows:

Spec.	Date	Amount
2	24 Feb 1950	$ 50.00
3	10 Mar 1950	$100.00

Specification 4: Motion for finding of not guilty granted.

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

Specification : In that Captain Merritt E. Hartley, ***, did, at Fort Knox, Kentucky, on or about 20 December 1949, feloniously steal twenty ($20.00) dollars, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Captain Merritt E. Hartley, ***, on or about 1 May 1949, being indebted to 1st Lt. Wilcher C. Stotts, Service Battery, 67th Armored Field Artillery Battalion, Combat Command B, 3d Armored Division, Fort Knox, Kentucky, then of Battery C, 67th Armored Field Artillery Battalion, Combat Command B, 3d Armored Division, Fort Knox, Kentucky, in the sum of twenty ($20.00) dollars, for personal use, which amount became due and payable on or about 31 May 1949, did, at Fort Knox, Kentucky, from 31 May 1949 to 23 May 1950, dishonorably fail and neglect to pay said debt.

Specifications 2 to 9, and 11 to 13: These are practically identical with Specification 1, Charge III, except for dates, amounts, creditors and nature of indebtedness, as follows:

Spec.	Dates	Amounts	Creditor	Nature of Indebtedness
2	31 May 1949 to 23 May 1950	$60.00	Capt Ventura M. Barata	Money borrowed
3	30 June 1949 to 23 May 1950	10.00	Capt Ventura M. Barata	" "
4	31 Jan 1950 to 23 May 1950	10.00	Capt Ventura M. Barata	" "
5	31 Jan 1950 to 23 May 1950	10.00	1st Lt Walter L. Wheeler	" "
6	30 June 1949 to 23 May 1950	10.00	M/S Ernest E. Cowles	" "
7	30 Apr 1950 to 23 May 1950	10.00	M/S Robert E. Quamme	" "
8	30 Apr 1950 to 23 May 1950	8.42	Simon Bros Svc Station	Mdse purchased

Spec.	Dates	Amounts	Creditor	Nature of Indebtedness
9	30 Apr 1950 to 23 May 1950	$ 3.63	Simon Bros Svc Station	Mdse purchased
11	14 Feb 1950 to 23 May 1950	125.00	Post Barber Supply	Haircut chits
12	28 Feb 1950 to 23 May 1950	50.00	" " "	" "
13	31 Mar 1950 to 23 May 1950	100.00	" " "	" "

Specification 10: In that Captain Merritt E. Hartley, ***, on or about 20 December 1949, with intent to deceive Major Clayton T. Hathaway, officially certify to the said Clayton T. Hathaway, the certificate that follows, to wit: "I Certify that the amount shown on the attached money lists in the column captioned "Amount Paid" have been paid by me to the individuals listed thereon, after proper identification, as Agent Finance Officer to Clayton T. Hathaway, Major, F.D." which certificate was known by the said Captain Merritt E. Hartley to be untrue in that Sergeant Robert D. Heidrick, Battery C, 67th Armored Field Artillery Battalion, Combat Command B, 3d Armored Division, Fort Knox, Kentucky, had not been paid.

CHARGE IV and Specifications 1 and 2 thereof: Findings of guilty disapproved by reviewing authority.

Specification 3: Motion for finding of not guilty granted.

Specification 4: Nolle prosequi entered by direction of appointing authority.

He pleaded not guilty to all charges and specifications. He was found guilty of Specifications 1, 2 and 3, Charge I, and the Specification of Charge II, excepting, in each of the four specifications the words "feloniously steal," substituting therefor in each of the four specifications the words "with intent to deprive the owner temporarily of property wrongfully appropriate," of the excepted words, not guilty, of the substituted words, guilty; of each of Charges I and II, not guilty, but guilty of a violation of Article of War 96; guilty of Specifications 1 to 10, inclusive, Charge III; guilty of Specification 11, Charge III, except the words and figures "28 February 1950" and "from 14 February 1950," substituting therefor, respectively, the words and figures "10 March 1950" and "from 10 March 1950," of the excepted words and figures, not guilty, of the substituted words and

figures, guilty; guilty of Specification 12, Charge III, except the words and figures "28 February 1950" and "from 28 February 1950," substituting therefor, respectively, the words and figures "10 March 1950" and "from 10 March 1950," of the excepted words and figures, not guilty, of the substituted words and figures, guilty; guilty of Specification 13, Charge III, except the words and figures "31 March 1950" and "from 31 March 1950," substituting therefor, respectively, the words and figures "10 April 1950" and "from 10 April 1950," of the excepted words and figures, not guilty, of the substituted words and figures, guilty; guilty of Charge III; and guilty of Specifications 1 and 2, Charge IV, and Charge IV. By direction of the appointing authority, a nolle prosequi was entered as to Specification 4, Charge IV. The court granted a motion for findings of not guilty as to Specification 4, Charge I and Specification 3, Charge IV. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Charge IV, and Charge IV, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

In the interest of brevity and coherence, the specifications are hereinafter grouped to describe and discuss more conveniently the incidents to which they refer.

Specifications 1, 2, and 3, Charge I, and Specifications 11, 12, and 13, Charge III

Accused and Master Sergeant Robert E. Quamme were commanding officer and first sergeant, respectively, of Company C, 29th Armored Infantry Battalion, Combat Command B, 3rd Armored Division, Fort Knox, Kentucky, hereinafter called Company C, during the month of February 1950 when approximately 180 enlisted men called "trainees" joined that organization (R 47-48,59). Sergeant Quamme testified that, on accused's orders, he collected the sum of $2.15 from an undetermined number of trainees upon their arrival, explaining to them that the purpose of the collection was to provide them with three barber tickets or haircut chits (each worth fifty cents and redeemable for one haircut), a name stamp, stamp pad, and a name card holder (R 48, 62).

Sergeant Quamme further testified that he turned over the money thus collected to accused as soon as received and neither requested nor was furnished a receipt (R 48, 49, 52, 60). Apparently all the trainees received a name stamp and stamp pad, but two or three trainees of each

platoon of four platoons did not receive a name card holder, some did not receive two haircut chits, and the majority did not receive one haircut chit (R 52,53). Accused furnished haircut chits to Sergeant Quamme who personally distributed the first chit to all trainees present for duty and thereafter gave them to the platoon sergeants for distribution in their respective platoons (R 54). He received a total of 365 haircut chits from accused and made at least two requests for additional chits but received no more (R 56).

Five trainees testified that they were assigned to Company C on about 14 February 1950; that each gave $2.15 to Sergeant Quamme and observed their names checked off on a roster; and that they received a name stamp, stamp pad, and name card holder. Two testified they received two haircut chits, two stated they received one haircut chit, and one stated he did not receive all three haircut chits but could not recall how many he did receive (R 61-64, 67-72, 73-75, 76-78).

Duly authenticated extract copies of morning reports of Company C, for 8 February through 24 February and 10 March 1950, were admitted in evidence as Prosecution Exhibit 5 for the purpose of showing the strength of Company C on those dates and especially the dates mentioned in Specifications 1, 2, and 3, Charge I (R 80). The morning reports dated 14 February, 24 February and 10 March 1950 show as present for duty 130, 183 and 175, respectively. (Pros Ex 5)

Samuel G. Crockett, bookkeeper of the Post Barber Supply, Fort Knox, Kentucky, testified that he furnished accused, at accused's request, 250 haircut chits on 14 February 1950, 100 haircut chits on 24 February 1950, and 200 haircut chits on 10 March 1950, all of which were obtained on credit. On each occasion accused promised to pay the debt on the 10th day of the following month (R 92-96). At the time the haircut chits were issued, Crockett prepared three bills, admitted as Prosecution Exhibits 9, 10 and 11, which listed thereon the Post Barber Supply, Fort Knox, Kentucky, as creditor, Company C, as debtor, and the dates, number of tickets and total amounts due, as follows:

Date	Number of Tickets	Total
14 Feb 1950	250 tickets @ 50¢	$125.00
24 Feb 1950	100 tickets @ 50¢	50.00
10 Mar 1950	200 tickets @ 50¢	100.00

On each bill was typed the following statement which accused signed in the presence of Crockett:

"I understand this bill is due and payable the 10th of the

following month and assume responsibility for payment of it.

(Signed) Merritt E. Hartley, Capt"
(R 92-96; Pros Exs 9, 10, and 11).

Crockett stated that he requested payment by telephone on numerous occasions and each time accused stated that he would pay. On one occasion accused said that he had the money but "had been put on bivouac" and would make payment on his return. However, he did not do so and the three debts remain unpaid (R 97-99).

Charge II and its Specification, and Specification 10 of Charge III

In December 1949 and thereafter Sergeant Robert D. Heidrick was a member, and accused was commanding officer, of Battery C, 67th Armored Field Artillery Battalion, Fort Knox, Kentucky. Between 12 and 23 December 1949, Sergeant Heidrick was on furlough in Missouri and was not with his organization at any time between those dates (R 12,18; Pros Exs 1 and 2). In anticipation of the Christmas holidays, a partial pay roll for his organization, which included Sergeant Heidrick's name, was prepared for payment on 20 December 1949 (R 39,41,44). Although he knew his name was on the pay roll, Sergeant Heidrick stated that he neither signed the signature appearing opposite his typewritten name nor received payment thereon, and that he had not authorized anyone to sign for him or obtain the $20 shown as due him (R 42, 45-46). Sergeant Heidrick returned to duty on 23 December 1949 and saw accused between 23 and 31 December 1949, but did not speak to him, and accused did not contact him during that period (R 43, 45). Sergeant Heidrick was present at the regular monthly pay call at 0900 hours, 31 December 1949, and received his pay for the month of December 1949 from accused who was then paying the troops. Accused asked Sergeant Heidrick if his pay was "all right." Sergeant Heidrick replied that it was short about $20. At about 1200 hours that day, accused met Sergeant Heidrick on the street and gave him $20 in cash (R 18, 43-46).

A retained copy of the pay roll hereinabove described, identified by Major Clayton T. Hathaway, Post Finance Officer, Fort Knox, Kentucky, and a certified true copy of the original of the same pay roll, identified by First Lieutenant John D. Murphy, Adjutant of Headquarters Combat Command B, Fort Knox, Kentucky, of which accused was then a member, were admitted in evidence without objection (R 38,101; Pros Exs 4 and 12). The following certificate on said pay roll is signed by accused:

"I certify that the amount shown on the attached money lists in the column captioned 'Amount Paid' have been paid by me to the individuals listed thereon, after proper identification, as Agent Finance Officer to Clayton T. Hathaway, Major, F.D."

Line 8 thereof lists Sergeant Heidrick and the amount due him as $20.

Specifications 1 to 9, inclusive, Charge III

As to Specification 1, Charge III, First Lieutenant Wilcher C. Stotts testified that about the first week of May 1949 accused requested a loan of $20 until he could get to the bank. Lieutenant Stotts loaned him the money and did not discuss repayment until about Christmas 1949 when accused approached him for an additional loan which Lieutenant Stotts refused. About the last of May 1950 accused told Lieutenant Stotts he would repay the loan on next pay day. The loan has never been repaid (R 86-88).

As to Specifications 2, 3, and 4, Charge III, Captain Ventura M. Barata testified that, on 2 May 1949, he loaned accused $60 after accused told him he was short of cash as he had been required to pay a note which he had signed for a friend. There was no agreement as to the time of repayment. About a month later, accused borrowed another $10 from Captain Barata and as to this loan also there was no agreement as to the time of repayment. In October 1949, Captain Barata asked accused for his money and accused promised to return it next pay day but did not do so. On 15 or 16 January 1950, while accused and Captain Barata were on flood control duty at Vincennes, Indiana, accused requested an additional loan of $10 until they got back, which Captain Barata gave him. They returned from that duty about 20 January 1950, but accused did not repay him. Although Captain Barata twice asked accused to repay the loans, accused has not done so. Captain Barata stated that prior to the date of the loan of $60 accused had borrowed from him on six occasions sums varying from $5 to $20, which accused usually repaid the following day (R 82-85).

As to Specification 5, Charge III, First Lieutenant Walter L. Wheeler testified by deposition that on 8 January 1950, when both he and accused were on flood control duty at Vincennes, Indiana, he loaned accused $10. At that time, accused stated he would repay Lieutenant Wheeler when he could get a check cashed, but no date was set for its repayment. On 2 March 1950, Lieutenant Wheeler asked accused if he had not forgotten about the $10 he had loaned him and accused replied that he had not forgotten about it, but did not state when he would repay it (R 88, Pros Ex 6).

As to Specification 6, Charge III, Master Sergeant Cowles stated that on 24 June 1949 he loaned $10 to accused, his commanding officer, at accused's request. Nothing was said about the time of repayment and the loan has never been repaid (R 90-91).

As to Specification 7, Charge III, Master Sergeant Robert E. Quamme testified that he was accused's first sergeant, in March 1950, when accused requested a loan of $10 "until Monday." As Sergeant Quamme did not have the money, he borrowed $10 from the mess sergeant and gave it to accused. No date was set for repayment. Accused paid it sometime in May 1950 after the investigation in this case had begun (R 50).

As to Specifications 8 and 9, Charge III, Louis Simon and Paul Simon, brothers, operate a service station at Radcliffe, Kentucky, about four miles from Vine Grove, Kentucky. About 10 April 1950, Louis Simon sold accused $3.63 worth of gasoline and accepted a check in the same amount, agreeing not to deposit the check but to hold it until 1 May 1950 when accused would give him the money and pick up the check. Accused did not keep his promise. Two or three days later, Louis Simon saw accused and accused promised to pay him the following day. This accused also failed to do. Louis then took the check to Headquarters Combat Command B, and, unable to see accused, gave the check to the Adjutant, Lieutenant Murphy. Accused paid the $3.63 about "The last day of May or the first day of June" 1950 (R 121-124).

About 25 April 1950, Paul Simon sold accused service station items totaling approximately $8.00 and accepted a check in the amount due, agreeing not to deposit it but to hold it until 1 May 1950 when accused promised to pay the debt and return the check. This he failed to do. About the first of June 1950, an officer, not the accused, paid the bill apparently on accused's behalf (R 125-126).

Each of the two debts hereinabove discussed were paid by accused after the beginning of the investigation in this case.

b. Evidence for the Defense

After being advised of his rights as a witness, accused elected to testify under oath (R 131-132). He testified that he was in poor financial condition due to the following incidents: In the latter part of 1948, he signed a note for a Lieutenant Mosely to the Lincoln Loan Company in the sum of $300.00. Lieutenant Mosely made one payment on the loan, was separated from the service, and accused had to pay the balance. In January 1949, he purchased a Buick automobile and could neither meet the payments nor pay for its maintenance. The automobile was repossessed in three months and the man who bought it informed accused that "the contract was cleared up." About two months later the finance company informed him that he still owed about $400, part of which he paid. The day before Thanksgiving, 1949, he bought a new Ford automobile. On 2 December 1949, his father died and he and his brother paid the funeral expenses. At the present time his total indebtedness is "in the neighborhood of $800.00" to "the barber shop, a loan company and for the automobile," which amount he is paying with the assistance of a Colonel Tarpley "through whose supervision each month I am making payments on my obligations." He tried to keep his wife from finding out about his debts but "couldn't very well pay those things and take home a pay check too" (R 132-134).

As to the offenses charged, accused further testified that Sergeant

Quamme collected money from trainees of his company which he gave to accused (R 134). Concerning the disposition of the money, accused testified as follows:

> "Q. You stated you received the money from Sergeant Quamme, what happened to the money?
> "A. I tried to keep some of my creditors off my back sir" (R 138).

Accused obtained 550 haircut chits from Mr. Crockett of the barber shop which he did not pay for but obtained on credit. He gave the tickets to Sergeant Quamme and possibly to others for distribution to the trainees (R 134-135, 138). Later Mr. Crockett called accused on the telephone and stated that accused "owed him on the account." On cross-examination accused stated that the testimony of prosecution witnesses, Lieutenant Stotts, Captain Barata, Lieutenant Wheeler, Sergeant Cowles, Sergeant Quamme and the Simon brothers was substantially correct (R 135-136).

4. Discussion

As to Specifications 1, 2, and 3, Charge I and Charge I, accused, charged with larceny in violation of Article of War 93, was, by exceptions and substitutions, found guilty of the lesser included offenses of wrongfully appropriating, on three occasions, the sums of $125, $50 and $100, respectively, the property of trainees of Company C, with intent to deprive them temporarily of their property therein, in violation of Article of War 96. It is well established that the offenses found are necessarily included within those charged and are lesser included offenses (MCM, 1949, par 180g, p 241; CM 336688, Vargas, 3 BR-JC 199, 201-203).

The offenses as found may be defined as the unlawful appropriation of personal property which belongs either generally or specially to another, with intent to deprive the owner temporarily of his property therein.

The evidence shows that during the month of February 1950 Sergeant Quamme, first sergeant of Company C, on orders of accused, his commanding officer, collected the sum of $2.15 from an undetermined number of trainees as they joined the company, which money he turned over to accused as soon as received. The purpose of the collection, of which the trainees were informed at the time they paid the money, was to defray the cost of providing each trainee with three haircut chits, a name stamp and stamp pad, and a name card holder. Each haircut chit was valued at fifty cents. On the three occasions alleged, accused obtained on credit 250, 100, and 200 haircut chits, valued at $125, $50, and $100, respectively, from Mr. Crockett, bookkeeper of the Post Barber Supply. Accused stated he gave

all the haircut chits, a total of 550, to Sergeant Quamme and possibly "to someone else." Sergeant Quamme stated that he received only about 365 haircut chits from accused, and that he asked accused at least twice for the balance of the haircut chits, which accused promised but never furnished. The testimony of five trainees that they did not receive all three haircut chits tends to corroborate the testimony of Sergeant Quamme that accused did not turn over to him all the 550 haircut chits that accused had obtained. The record is silent concerning the disappearance of the haircut chits not shown as having been distributed to the trainees. However, there is no mystery as to accused's disposition of the funds which he received to pay for them. By his judicial admission, accused stated that he used the money in order to try "to keep some of /his/ creditors off /his/ back," thereby stating in effect that he used the money to pay his personal debts. There is thus established three statements of fact:

(1) That accused as commanding officer obtained money from trainees under his command for the sole and limited purpose of purchasing haircut chits and other items for the trainees.

(2) That accused used the money thus obtained to pay his personal debts.

(3) That accused procured haircut chits, on dates and in amounts as alleged, on credit instead of paying for them with the money collected from the trainees for that purpose.

It remains to be determined whether these facts amount in law to the offenses of wrongful appropriation as found by the court.

As accused procured haircut chits valued in amounts and on the dates as alleged, it is presumed that he received the trainees' funds in those amounts from Sergeant Quamme on or about those dates. A person who thus receives money to be applied to a particular purpose, to which he does not apply it, is a trustee of the funds thus obtained (In re Interborough Consolidated Corporation, 288 F 334, 347). It is the opinion of the Board that accused, as commanding officer of trainees under his command from whom he received the funds, was a trustee and custodian of the funds thus obtained for a specific purpose, and that these funds were not used for that purpose. As custodian of the funds which accused admitted using for his private purposes, the burden of going forward with proof of exculpatory circumstances devolved upon accused (CM 334214, Brown, 81 BR 389, 393). No such evidence was presented. Each wrongful appropriation alleged in the instant case consisted of a conversion through breach of trust and is analogous to the offense formerly known as embezzlement and now properly chargeable as larceny. In a case involving embezzlement, as contemplated by the Manual for Courts-Martial, 1928, the Board of

Review stated:

"'The means by which fraudulent conversion is accomplished are immaterial. It may be effected by any exercise of the right of ownership inconsistent with the owner's rights, and with the nature and purposes of the trust" (29 C.J.S. 683; People v. Beale 267 N.Y.S. 575, certiorari denied 54 S. Ct. 717; Commonwealth v. Barnes (Pa.), 162 A. 670).' (CM 276435, Meyer, 48 BR 331) (Underscoring supplied)

"'"*** There must be a criminal intent, but this intent must, of necessity, be gathered from the acts of the agent and the circumstances surrounding the particular case, rather than from his express declarations, and if the agent knowingly appropriates money belonging to his principal to his own use, even though at the time he does so he intends to restore it, it is nevertheless embezzlement within the spirit as well as the letter of the law, for when one knowingly appropriates money belonging to another to his own private use, the law presumes a criminal intent."' (National Life & Accident Ins. Co. v. Gibson 101 S.W. 895; CM 276435, Meyer, supra). (Underscoring supplied)." (CM 322220, Prentiss, 71 BR 83, 90).

The Board is of the opinion that the rationale hereinabove stated is applicable to each of the three specifications under discussion. The accused was in exclusive possession and control of the funds which, under the agreement implied from the circumstances, he was bound to use in accordance therewith and for no other purpose. Accused did not use the funds as impliedly agreed but instead used them for his own private purposes. This fraudulent conduct on the part of accused established a wrongful appropriation with intent to deprive temporarily the owners of their interest therein.

The only remaining question is as to the amount alleged to have been wrongfully appropriated in each of the three specifications under consideration. The proof thereon is that Sergeant Quamme collected $2.15 from each of an undetermined number of trainees and turned the amounts thus collected over to accused, who obtained haircut chits on credit on dates and in the amounts as alleged. That accused received the amounts collected by Sergeant Quamme and wrongfully appropriated them is proven beyond a reasonable doubt. The evidence as to the actual amounts collected and received by accused, however, is not definitely proved and is legally insufficient to establish the amounts alleged. Accordingly, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of each of Specifications 1, 2, and 3 of Charge I as involves findings of guilty that accused on the dates and from the persons alleged wrongfully appropriated $20 or

less with intent to deprive the owners temporarily thereof.

As to the Specification of Charge II and Charge II, the court found, by exceptions and substitutions, similar to the findings as to Specifications 1, 2, and 3, Charge I, and Charge I (see 1st paragraph of paragraph 4, supra), that accused was found guilty of wrongfully appropriating $20, property of the United States, furnished and intended for the military service thereof. To support the conviction, there must be competent evidence of record that (a) accused misappropriated certain property in the manner alleged, (b) that the property belonged to the United States and was furnished or intended for the military service thereof as alleged; (c) facts and circumstances indicating that the act of the accused was willfully and knowingly done; and (d) the value of the property, as alleged (MCM 1949, par 181h).

The proof shows that on 20 December 1949, accused, as Agent Finance Officer, paid certain troops of his organization listed on a partial pay roll dated 20 December 1949. Sergeant Robert D. Heidrick's name was listed thereon as due a payment of $20 but he neither signed the pay roll nor was present to receive the amount indicated due him. However, accused returned the pay roll to the Finance Office, certifying that he had paid all persons listed thereon, but retained Sergeant Heidrick's $20. A wrongful appropriation of that money was thereby consummated. Money received by an agent finance officer for the payment of troops is property of the United States and remains the property of theUnited States until disbursed to the proper parties in accordance with existing regulations (CM 317655, Warmenhoven, 67 BR 1, 9). The Board of Review takes judicial notice of paragraph 10a, Army Regulation 35-320, dated 5 February 1945, which requires that Class A agent officers will make necessary returns, including amounts not paid to enlisted personnel whose names are red-lined, on pay rolls, to the accountable finance officer within 24 hours after completion of the particular payments for which they are designated. As Sergeant Heidrick was not present to receive his pay, accused should have red-lined his name on the pay roll and returned it and the $20 to the Finance Office pursuant to the aforementioned directive. Evidence of accused's intent to wrongfully appropriate the money is presumed from the fact that after Sergeant Heidrick returned to duty on 23 December 1949, accused did not return the money to him although Sergeant Heidrick saw accused between 23 and 31 December 1949. It was only on 31 December 1949, after Sergeant Heidrick informed accused of the shortage of $20 in his December pay that accused gave $20 to Sergeant Heidrick under circumstances indicating that he had reconsidered his original intention to keep the money. The fact that accused gave Sergeant Heidrick the $20 does not purge the wrongful appropriation of its criminality or constitute a defense to a prosecution therefor (2 Wharton's Criminal Law, Sec 1147, p 1465; CM 317655, Warmenhoven, supra).

As to Specification 10 of Charge III, accused was found guilty of

making a false official certificate on a pay roll that Sergeant Heidrick had been paid, which certificate was known by accused to be false in that Sergeant Heidrick had not been paid thereon. To support a conviction of this offense the record must show that (a) accused made a certain official certificate, (b) the certificate was false, (c) that accused knew it was false, and (d) that such false certificate was made with intent to deceive the person to whom it was made (CM 339485, Braun, 27 Jan 1950). That the certificate was false and accused knew it was false when he made it was shown by the fact that he retained Sergeant Heidrick's pay and certified that Sergeant Heidrick had received it. His intent to deceive is presumed from the falsity of the certificate and is also apparent from the evidence (CM 339485, Braun, supra; CM 314746, Garfinkle, 64 BR 215, 222). The making of a false certificate with intent to deceive has been consistently held to be a violation of Article of War 95 (CM 318313, Davis, 67 BR 223, 230).

As to Specifications 1 to 9, inclusive, and 11 to 13, inclusive, Charge III, accused was found guilty of offenses of dishonorable failure and neglect to pay certain debts as alleged. Merely failing to pay a debt or failing to keep a promise to pay a debt contracted with persons with whom one has dealt on an equal basis is not of itself an offense (CM 320687, Terrebonne, 70 BR 143, 148). However, the failure of an officer to pay a debt constitutes a military offense if the officer's conduct with respect thereto shows an intent to defraud, deceive, or evade payment and is of such a nature as to bring dishonor upon the military service (CM 335586, Wilkins, 2 BR-JC 153, 166; CM 284157, Willey, 55 BR 279, 286).

That accused owed the debts alleged in each of the specifications under discussion is undisputed. Accused negotiated the debts either from officers whom he knew, enlisted men under his command, or civilians accustomed to extending him credit. The debts were incurred during the months of May and June 1949 and January, February, March and April 1950. He usually promised to repay at some future date, and invariably failed to keep his promise. He repaid three of the twelve debts alleged in the amounts of $10, $3.63 and $8.42 after the investigation in this case had begun, but has not paid any of the others totaling $375.

Accused does not deny his debts as alleged. His defense appears to be based upon the facts that his financial difficulties were due to his purchases of automobiles which he could not afford, his penchant for signing notes for officers who defaulted necessitating his paying the notes, and his desire to deceive his wife as to his financial obligations. Other than an uncorroborated assertion to having assisted in defraying his father's funeral expenses to an undisclosed extent, the other facts and circumstances show that accused's failure to repay his debts was not caused by circumstances beyond his control such as long and serious illness of his family, accidents, or other unforeseen events. His failure

to repay was caused by his inflated standard of living, his guise of good fellowship, and his inability to humble himself in his wife's eyes. Such a course of conduct which resulted in his failure to pay a large number of debts due not only to officers and enlisted personnel under his command but also civilians both on and off the post is consistent only with a fraudulent design to evade or escape payment. The length of time over which many of the obligations ran, the fact that he borrowed money from his first sergeant and another noncommissioned officer under his command, and accused's complete indifference to and disregard of his just obligations which he displayed toward all his creditors, are sufficient to characterize his failure and neglect to pay his debts as dishonorable in violation of Article of War 95 (CM 335586, Wilkins, supra; MCM 1949, par 182). The fact that accused repaid some of the debts after the investigation of this case had begun is no defense (CM 270942, MacDonald, 46 BR 1, 16).

5. Department of the Army records show that accused is 39 years of age and married. He is a high school graduate and attended Purdue University, Lafayette, Indiana, for three years. He was construction superintendent of the American Gas Service, Greenwood, Indiana, supervising construction crews installing rural gas service for two years, and was employed by the Allison Division General Motors Corporation, Indianapolis, Indiana, for a similar period. He enlisted in the United States Army on 1 March 1942, was commissioned a second lieutenant on 21 January 1943, and was promoted to first lieutenant on 5 October 1943 and to captain on 22 July 1945. He was honorably separated from the service on 15 February 1946, and reverted to extended active duty on 6 September 1948. He served an overseas tour in Hawaii and Japan from 26 March 1944 to 7 February 1946 and is entitled to wear the Asiatic-Pacific and American Theater ribbons, the World War II Victory Medal, and the Expert Infantryman's badge. His efficiency ratings from 2 January 1943 to 2 September 1945 are "excellent." His overall efficiency reports of record are 109, 108, 101 and 130. On 9 November 1944, he received a letter of commendation from Colonel F. R. Schucker, Commanding Officer, 390th RCT, APO 98, for his participation in amphibious training between 22 and 28 October 1944.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1, 2, and 3, Charge I, as finds that accused did at the time and place and from the persons alleged wrongfully appropriate $20 or less, with intent to deprive the owners temporarily thereof, legally sufficient to support the finding of guilty of Charge I, legally sufficient to support the findings of guilty of Charge II and its specification and Charge III

and its specifications, and legally sufficient to sustain the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Lawrence Bacon, J.A.G.C.

Samuel S. Cowles, J.A.G.C.

F. W. Lynch, J.A.G.C.

(142)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 343,316

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Captain Merritt Edward Hartley, 01308816, Headquarters, Headquarters and Service Company, 29th Armored Infantry Battalion, Combat Command B, 3d Armored Division, Fort Knox, Kentucky, upon the concurrence of The Judge Advocate General only so much of the findings of guilty of Specifications 1, 2 and 3 of Charge I with respect to value as find some value not in excess of $20.00 is approved. Upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

9 Nov 1950

(GCMO 83, Nov 20, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 343356 — 25 October 1950

U N I T E D S T A T E S	)	1ST INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Grafenwohr, Germany, 29 August 1950. Dismissal.
First Lieutenant GLENN E. RAY (O-1331096), Headquarters Company, 3rd Battalion, 26th Infantry Regiment.	)	

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

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

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

Specification 1: In that First Lieutenant Glenn E. Ray, Headquarters Company 3rd Battalion 26th Infantry Regiment did, at Bamberg, Germany, on or about 11 March 1950, with intent to defraud, wrongfully and unlawfully make and utter to Second Lieutenant M. E. Crum, Bamberg Military Sub-Post, a certain check, in words and figures as follows: to wit,

THE FIRST NATIONAL BANK — No. 2 4359
Herington, Kansas — 11 March 1950
Pay to the order of cash — $150.00
One hundred and fifty dollars
/s/ Glenn E Ray, 1st Lt
Hq Co 3rd Bn

and by means thereof did fraudulently obtain from said Second Lieutenant M. E. Crum one hundred and fifty dollars ($150.00),

he, the said First Lieutenant Glenn E. Ray, then well knowing that he did not have and not intending that he should have any account with The First National Bank of Herington Kansas for payment of said check.

Specification 2: (Identical to Specification 1, except the Number of the check "4780," the date "3 April 1950," and the amount of the check "$500.00.")

Specification 3: (Finding of not guilty).

He pleaded not guilty to the Charge and its Specifications. He was found guilty of Specifications 1 and 2, not guilty of Specification 3, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

As to Specification 1.

First Lieutenant Glenn E. Ray, the accused, was assigned to the 26th Infantry Regiment, stationed in Germany (R 6,7). On 11 March 1950 he gave his check of that date in the sum of $150.00 and drawn on The First National Bank, Herington, Kansas, payable to the order of "cash," to Second Lieutenant M. E. Crum, Finance Officer, Bamberg Military Sub-Post. He received $150.00 in return (R 7-9,17,25; Pros Exs 1,4). The check was dishonored by the bank and returned to Lieutenant Crum on 11 April 1950, for lack of any account in the bank to the credit of the accused (R 8,9, 15,25,26,55,56; Pros Exs 1,4). Lieutenant Crum contacted the accused, who evidenced surprise over the return of the check (R 28,29). He was unable to recover the amount of the check from the accused although the accused assured him that he would be reimbursed (R 9,10,29).

As to Specification 2.

On 3 April 1950, the accused gave his check of that date in the sum of $500.00 and drawn on The First National Bank, Herington, Kansas, payable to the order of "cash," to Second Lieutenant M. E. Crum, Finance Officer, Bamberg Military Sub-Post. He received $500.00 in return (R 10, 11,18,30; Pros Exs 2,4). Lieutenant Crum knew that it took about a month for a check to "clear," and that although "it wasn't quite a month in this case" since the 11 March check was cashed "it was nearly a month so I took this check in; Lieutenant Ray told me at that time that he had

a sum of money coming over by cable," and "it was a verbal agreement that if he wanted to pick it up for cash before I deposited it he could do so" (R 12,13). Lieutenant Crum normally made his deposits in "three to five days," but he never mentioned this to the accused (R 13,20). "It was the understanding" that accused "would pick it up" for cash (R 18,19). The accused "was to pick that check up and redeem it" . . . "only within a limited time" (R 19,20). The check was not considered by Lieutenant Crum as an "I.O.U." (R 19). He did not deposit the check immediately. Three days later on 6 April, he learned that the 11th March check was being returned "by reason of no account" (R 8,13-15,18). Lieutenant Crum "figured" that his "chances of collection" on the check dated 3 April "were better here than it would be to send it through because since the first one bounced it was unlikely that the second one would be of any more value" (R 15). He believed it would also be dishonored (R 19). However, after approximately a month and a half he did deposit the second check "in the latter part of May" in order that he "would at least have something concrete to work with" (R 15,18,35). He was attempting collection from the accused in the meantime. Lieutenant Crum was unable to recover anything even after repeated calls on the accused (R 15,16,20). The check was dishonored by the bank for lack of any account in the bank to the credit of the accused (R 11,20,30,31,36; Pros Exs 2,4).

In general.

The accused maintained a bank account in The First National Bank, Herington, Kansas, from January 1944 to January 1945 at which time it was closed. Thereafter the accused did not maintain an account in the bank. Fred Ray /his father/ maintained an account in the bank but he did not during March, April or May 1950 deposit any funds to the credit of the accused during that period (R 54,55; Pros Ex 4).

In addition to the two checks mentioned above the accused on 26 April 1950 gave his draft in the form of a check of that date in the sum of $400.00, and drawn on The First National Bank, Herington, Kansas, to The American Express Company, Inc., at Bamberg, Germany (R 32,33; Pros Exs 3,4). He received $250.00 cash in return, with the understanding that he would be paid the balance of $150.00 when the check "cleared" (R 32, 36,37). The check was dishonored by the bank and returned to the payee for lack of any amount standing to the credit of the accused in the bank (R 33,43,44,54,55; Pros Exs 3,4). The indebtedness was satisfied in full by the transfer of $400.00 by cable from the "States" four or five weeks later (R 36,37). After the sum of $250.00 plus $5.00 charges was deducted, the balance of $145.00 was paid to the accused by the American Express Company (R 34). At that time the accused represented that he "needed all of it right away" and objected to this deduction (R 34,35).

b. For the defense.

The accused after being duly warned of his rights as a witness elected to testify under oath (R 60,61). When he entered on active duty

in 1948, he had "some indebtedness" which was "taken care of" out of an allotment of $150.00 per month made to his father, Fred Ray (R 62,73). In January 1950 he cashed a check with Lieutenant Crum in the sum of $150.00 and wrote to his parents to cover the check, which they did, as he had no account in the bank (R 62,63,69; Def Ex A). His father had helped him before "on various financial transactions." He never had "any difficulty in obtaining money from him" (R 63). On or about 11 March 1950, and without any money in his bank account, the accused gave a $150.00 check payable to "cash" to M. E. Crum, Finance Officer (R 63,64,69). He had written his father that he would write a check and requested that his father "put the amount into the bank as he did before" (R 64,69). His father did not receive this letter (Def Ex A). About 3 April 1950, the accused gave a check payable to the order of cash in the amount of $500.00 to M. E. Crum, Finance Officer (R 64). He had no account in the bank but he expected the check to be paid the same as the check written in January. "My father was notified both by letter and by telephone call that the amount would be deposited into the bank to take care of the check" (R 65, 69,70,74). "When I went up to see Lieutenant Crum I told him that I was to have a certain amount of money coming from the States. I did not know when the amount of money was to arrive but it should have been within the next few days. At that time he told me that he would cash the check and hold it until such time as I could receive the money and pick up the check" (R 65). "There was no definite date set that I would have to pick up the check" (R 75). At no time did Lieutenant Crum tell the accused that "he was going to send the check forward for payment" (R 65). The accused had no intention of defrauding Lieutenant Crum of this money (R 65,66). He believed the "check would be paid even if presented for payment" (R 66). About 26 April 1950 the accused gave his check of that date, in the sum of $400.00, drawn on The First National Bank of Herington, Kansas, to the American Express Company at Bamberg. He had no account in the bank. "Both by letter and by telephone conversation with my father the check was to be taken care of. The amount was to be deposited in my name" (R 66,69,72). He received $250.00 less "one dollar charge" and $150.00 was held in his account with the American Express Company (R 66). The money from these checks was required for the purchase of an automobile (R 67). The seller wanted his money and complained to the commanding officer. "I arranged with my parents to have the money placed in the bank and I wrote the checks" (R 68,77,78). He never had "any intent to defraud anyone" (R 68). His father did not receive several of his letters (R 69). He did not know "when the error or why the error was made" when he was asked about the apparent discrepancy as to which check was to be held for payment. The letter to his father mentioned a $400.00 check while the arrangement with Lieutenant Crum was for holding the $500.00 check (R 70,71,76; Def Ex A). Lieutenant Crum made several calls on the accused. The accused assured Lieutenant Crum that he would "make arrangements as soon as possible to redeem the check" (R 72). He did not write any further checks after he found out that the first check had been dishonored (R 72,73). He then telephoned twice and sent several

wires to his parents "to obtain the money and to find out what had happened that the checks were not covered" (R 73). His parents sent him money to pay the American Express Company, but "to date they have not sent sufficient money to cover the funds for the checks given to Lieutenant Crum" (R 73). The accused hopes to make the Army his career (R 68).

The accused is an extremely capable officer with excellent efficiency ratings and a character beyond reproach (R 56,57).

4. Discussion.

The accused has been found guilty of making and uttering two checks with intent to defraud. The first check, covered by Specification 1, was for the sum of $150.00, dated 11 March 1950, drawn on the First National Bank, Herington, Kansas, and payable to the order of cash. This check the accused induced Second Lieutenant M. E. Crum, Finance Officer, Bamberg Military Sub-Post, to cash receiving therefor $150.00 in military payment certificates. As to Specification 2, on 3 April 1950, accused gave Lieutenant Crum a second check identical with the first, except that the amount was $500.00. Lieutenant Crum cashed this check also and gave the accused $500.00 worth of military payment certificates. As to both checks, the evidence is indisputable that the accused had no account in the First National Bank of Herington, Kansas, either at the time he gave the checks or afterwards.

> "The passing of checks by an officer in uniform, drawn on banks in which he did not have an account, and on a bank in which he must have known did not contain sufficient credits to cover his checks, and the obtaining of value for said checks, constitutes a set of circumstances from which fraudulent intent may properly be inferred by the court." (CM 236069, Herdfelder, 22 BR 271,276).

His request to his parents to "cover" the check when it arrived at the bank and his hopes that they would do so as they had done with regard to another check in January 1950, do not constitute a defense to the offense charged (CM 280747, Duncan, 53 BR 305,312). In the case of CM 285460, Mooney, 56 BR 89 at page 95, it is stated:

> "At the time he issued these checks he had no account in the drawee bank and had not had one for over a month and a half. Under such circumstances the court was fully warranted in concluding that accused intended to defraud when he issued these checks. Even if, as he contended, he had sought to have his mother make a deposit to cover these checks his reckless conduct in issuing these checks without ascertaining whether or not the deposit had in fact been made demonstrates his gross indifference as to the sufficiency of his bank balance to pay these checks and brands his conduct as fraudulent (CM 270061, Sheridan)."

It is concluded that the record of trial is legally sufficient to support the findings of guilty of both specifications of the charge.

5. Department of the Army records indicate that the accused is 28 years of age, married and has one child. He graduated from high school in Herington, Kansas, and briefly attended Wisconsin State Teachers College, Stevens Point, Wisconsin, and Bethany College, Lindsberg, Kansas. In civil life he was employed as a shipping clerk and in accounting work. He served as an enlisted man from February 1943 to January 1945 at which time he was commissioned a second lieutenant. He was promoted to the grade of first lieutenant in May 1946 and remained on active duty until August 1946. He reentered the service in October 1947 and in January 1948 for short periods of active duty. He reported 1 November 1948 for overseas service. He is entitled to wear the American Theater Ribbon, the World War II Victory Medal and the Japanese Occupation Medal. His efficiency ratings range from very satisfactory to superior and his overall numerical efficiency ratings prior to the offense charged are 066, 090, 078, 102, 103, and 103.

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

C. J. Hauck, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,356

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Glenn E. Ray, O-1331096, Headquarters Company, 3rd Battalion, 26th Infantry Regiment, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

1 Nov 1950

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

3 NOV. 1950

(GCMO 80, Nov 8, 1950).

DEPARTMENT OF THE ARMY
In the Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 343385

24 OCT 1950

UNITED STATES v. Master Sergeant ALEX L. ALLEN (RA 6592649), Headquarters and Headquarters Company, 17th Transportation Major Port.	BREMERHAVEN PORT OF EMBARKATION Trial by G.C.M., convened at Bremerhaven, Germany, 8, 9 September 1950. Dishonorable discharge (suspended), total forfeitures after promulgation and confinement for two (2) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
YOUNG, MICKEL and MOBERLEY
Officers of the Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldier above named and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

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

CHARGE I: Violation of the 93rd Article of War. (Finding of Guilty disapproved by Reviewing Authority).

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

Specification 3: (Finding of Guilty disapproved by Reviewing Authority).

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

Specification 1: In that Master Sergeant Alex L. Allen, Headquarters and Headquarters Company, Seventeenth Transportation Major Port, did, at Bremen, Germany, on or about 9 December 1949, with intent to deceive Captain Raymond F. Collier, officially report to the said Captain Raymond F. Collier, that on 9 December 1949, in his capacity as Cashier, Class B Agent, Finance Office, APO 751, he had converted United States

Military Payment Certificates of a value of $263.00 into 1104.62 Deutsche Marks, which report was known by the said Master Sergeant Alex L. Allen to be untrue, in that, on 9 December 1949, an additional amount of eighty dollars and no cents ($80.00) were so converted by him.

Specification 2: In that Master Sergeant Alex L. Allen, Headquarters and Headquarters Company, Seventeenth Transportation Major Port, did, at Bremen, Germany, on or about 13 July 1950, with intent to deceive Chief Warrant Officer B. S. Mallory, officially report to the said Chief Warrant Officer B. S. Mallory, that, in his capacity as Cashier, Class B Agent, Finance Office, APO 751, he had turned in for deposit all checks which he had on hand at the close of business on 13 July 1950, which report was known by the said Master Sergeant Alex L. Allen to be untrue, in that, he knew that there was a check for eight hundred eighty five dollars and ninety cents ($885.90) in the funds for which he was responsible, which check he had not reported or turned in.

Specification 3: (Finding of Not Guilty).

He pleaded not guilty and was found guilty of Specification 3 of Charge I and of Charge I and of Specifications 1 and 2 of Charge II and of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for two years. The Reviewing Authority disapproved the findings of guilty of Specification 3, Charge I, and of Charge I, approved the sentence and ordered it executed, but suspended execution of that portion thereof adjudging dishonorable discharge until accused's release from confinement. The Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army may direct, but not in a penitentiary, was designated as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders Number 30, Headquarters, Bremerhaven Port of Embarkation, dated 15 September 1950.

3. Evidence.

a. For the Prosecution.

The record of trial shows that Captain Henry A. Gordon, Finance Corps, was the accountable disbursing officer of the Bremerhaven Port of Embarkation, and that an officer assigned as his Class "B" Agent Finance Officer in Bremen was responsible to him (R 8).

Captain Raymond F. Collier was the Class "B" Agent at the Bremen Finance Office during the period 5 November 1949 to 22 April 1950 (R 9,24). Chief Warrant Officer Burwell S. Mallory was the Class "B" Agent Officer at Bremen Finance Office after 3 July 1950 (R 30). The Bremerhaven Finance Officer assigned the accused to the Bremen Finance Office early in 1948, and accused remained there until 2 August 1950, when he was relieved. Subsequent to 1 December 1949 accused was the chief clerk and alternate cashier of the Finance Office in Bremen. It was the responsibility of the cashier to make collections, effect disbursements, and convert "MPC's" (Military Payment Certificates) into currencies carried by the Class "B" Agent, such as "U.S., DM's, and BAFSV" (United States currency, Deutsche Marks and British Armed Forces Services Vouchers) (R 9,64).

(1) As to Specification 1 of Charge II.

It was stipulated that if Captain Collier were present he would testify as follows (R 24,25):

> "* * * The procedure for converting Military Payment Certificates into Deutsche Marks during the entire period when I was in charge of the Class "B" Agent Finance Office, APO 751, was as follows: the person desiring to make such conversion would sign Section I of 'Application and Approval for the Purchase of Foreign Currencies,' Form EFR 30-4 (18 July 47), and sometimes fill it out. A separate form EFR 30-4 was made out for each converter, and this form was given a number. The name of the person desiring to make the conversion, together with the amount in Military Payment Certificates to be converted, the equivalent amount of Deutsche Marks to be obtained, the number of the 'Application and Approval for the Purchase of Foreign Currencies', was entered on a form entitled 'Exchange of Currency' prepared locally in the Bremen Class 'B' Agent Finance Office. A new 'Exchange of Currency' form was started each day for each cashier; all Deutsche Mark conversion transactions were entered on that form; and the form, together with the related 'Application and Approval for the Purchase of Foreign Currencies' forms, were usually turned in at the end of each day, but sometimes they were turned in after two or three days. The daily amounts of Military Payment Certificates received from conversion into German currency, and the amounts of Deutsche Marks exchanged for the Military Payment Certificates, were required to balance with the increase of Military Payment Certificates and the decrease in the amount of Deutsche Marks in the hands of each cashier, who were the only persons authorized to convert Military Payment Certificates into Deutsche Marks in this office except the Finance Officer. All conversion transactions were required to be entered on the two forms mentioned. On 9 December 1950 the only person acting as cashier and the only person authorized to convert Military Payment Certificates into Deutsche Marks was M/Sgt Alex L. Allen. * * *"

Captain Gordon testified that he was familiar with the records of the Bremen Finance Office (R 8). From the entire file of "conversions" for December 1949 (a part of the official records of the Bremen Finance Office) he identified Prosecution Collective Exhibit No. 2, received in evidence without objection, as a currency control sheet with eleven attachments purporting to show that on 9 December 1949 "$263.00 of MPC's were exchanged for DM's, totaling 1,104.62". These eleven currency conversions are numbered 3669 to 3679, inclusive, such numbers following serially the last number used for conversions on the preceding day (R 11). Page 1 of the Exhibit is as follows (Pros Coll Ex 2):

"EXCHANGE OF CURRENCY

Request currency exchange from MPC's to Mks

NAME	FROM	TO	
Floyd S. Bird	35.00	147 -	3669
Helen Nickols	4.00	16.80	3670
Ann Westermann	15.50	65.10	3671
Ann Westermann	23.45	98.49	3672
Ann Westermann	18.10	76.02	3673
Ann Westermann	1.40	5.90	3674
Ann Westermann	15.55	65.31	3675
J. F. Bernard	20.00	84 -	3676
William A. DaRoja	60.00	252 -	3677
Gustin G. Oller	50.00	210 -	3678
Archibald K. Smith	20.00	84 -	3679
TOTAL	263.00	1,104.62	

I certify that the above stated funds were legally received by the above enlisted personnel from their pay, and for their personal use only and not an unauthorized party.

5,073.65
(Cashier)"

The first of the eleven attachments thereto consists of a form dated 9 December 1949 and numbered "3669"; Section I thereof appears to be signed "Floyd S. Bird" and requests the exchange of $35.00 in Military Payment Certificates for 147 Deutsche Marks; Section II thereof purports to be an approval of the request prepared for the signature of Captain Collier, although it is unsigned.

The other ten attachments are identical in form with appropriate entries as to names, amounts, and serial numbers corresponding to those listed on the first page of the Exhibit set out above. One of the attachments (#3674) bears the signature "Raymond F. Collier, by A.L.A.".

Corporal Eli J. Snyder, cashier at the Bremen Finance Office at the time of trial, described the use of forms such as those in Prosecution Collective Exhibit No. 2 as follows (R 28):

> "We have one original master copy, and that is turned in at the end of the day, with duplicate copies of the transactions we have made of different amounts. We turn those into the bookkeeper, and with those forms balance out at the end of the day. There is no such thing as a duplicate master copy of the Mark sales."

In April 1950 Corporal Snyder found "underneath the shelves where we work in the cashier's cage" certain documents, which he turned over to Captain Collier (R 27,29). These documents, received in evidence without objection as Prosecution Collective Exhibit No. 1, were described by Snyder as "Mark conversion sheets, and one master copy" (R 10,27, Pros Coll Ex 1). The Exchange of Currency sheet (Pros Coll Ex 1) is in the same form as the first page of Prosecution Collective Exhibit No. 2, supra, is unsigned, and reflects the following entries:

"NAME	FROM	TO	
Clare M. L. van de Wall	50.00	210	3670
Agnetha Duerksen	10.00	42	3671
Anne Daniels	20.00	84	3672

The first attachment to Prosecution Collective Exhibit No. 1 consists of a form similar to the first attachment to Prosecution Collective Exhibit No. 2 (Ex 1-A); it is dated 9 December 1949 and numbered 3670; it requests the exchange of $50.00 in Military Payment Certificates for 210 Deutsche Marks and bears the signature, "Clara M. L. van de Wall." The other two attachments are identical as to form, except that they are numbered 3671 and 3672, respectively, and bear names, amounts, and serial numbers corresponding to those shown on the Exchange of Currency form set forth above as page 1 of Prosecution Collective Exhibit No. 1 (Exs 1-B and 1-C).

Captain Gordon, the Finance Officer at Bremerhaven Port of Embarkation, testified that he had "checked the Mark sale record for the Bremen Office for the month of December" and found that "there were no discrepancies in the sales, from the official record submitted by the Bremen Finance Office" (R 9); that the transactions purportedly reflected by Prosecution Collective Exhibit No. 1 were over and above the transactions as shown by the official records; that Prosecution Collective Exhibit No. 1 is not a part of the official records; that were the transactions covered by Prosecution Collective Exhibit No. 1 official, the business shown by the records of the Bremen Finance Office for December 1949

Captain Armstrong described what occurred at the inspection at the Bremen Office as follows (R 19,20):

"[On 12 July] * * * We started with the cage, and M/Sgt Allen assisted me in counting his cash. I asked him to present to me all the assets he had in his bank, and we counted the bank together. During the course of this count Sgt Allen told me that he had between $80.00 and $90.00 of his own personal funds co-mingled with the government funds. I asked him if he had them separate, in an envelope, and he said no, they were in the drawer. We continued with the count, and when I had finished we went in the other room, and I told Mr. Mallory that the cage was completed and that he might open it for business if he chose, and that we would go ahead with the vaults. We were working on the vault when Sgt Allen came in and presented me with an envelope. He told me he had forgotten to present it before and that it contained mutilated currency. We counted the mutilated currency, and I added it to Sgt Allen's bank. We completed the count on the Class 'B' Agent's funds, and the account showed an overage. I told Sgt Allen that it did not come to $80.00 or $90.00, and he told me he would be glad to settle for $60.00 or $70.00. I told him it didn't even make that much, that it was a little over $58.00, and that according to the custom of the IG office, for the time being at least it would have to be impounded. * * * We returned two days later, on 14 July. I came into the Bremen office shortly after eight o'clock, and no one was in the finance office as yet. I found Mr. Mallory up in the Adjutant's office, told him I had returned to make another count, and he went with me to the finance office and unlocked the doors and the vault. All of the assets of the Class 'B' Agent at that time were in the vault, and no one had had any access to it before we got there. We started with Sgt Allen's bank, counted it through, and we found after we had finished - we got to the mutilated currency in an envelope, opened the envelope, took out the mutilated currency, and it included a check in the amount of $885.90, dated 14 March. We were both amazed that the check was so old, and I called Sgt Allen in and asked him about the check. I questioned him in some detail. He said he had never seen it before, he knew nothing about it, and didn't know where it came from. At this point I want to point out that on 12 July Sgt Allen presented to me checks only in the amount of $239.95. On 14 July there was present in his account a check dated 14 March in the amount of $885.90. The account then would not have come anywhere near balancing had we not included this check. * * *"

Captain Armstrong testified that he could not state exactly what accused said upon discovery of the check; that he interrogated the accused for five or ten minutes, and accused seemed quite agitated; that accused's answers were generally negative and amounted to an assertion that he did not know where the check came from (R 22). Mr. Mallory testified that accused could not identify the check as one that he cashed the day before; that accused claimed that he had no knowledge of how it came into his accounts and said that "he didn't remember" (R 31,32,33).

Mr. Mallory testified that the established practice at the Bremen Finance Office was for the cashier each evening when the office closed to check his own cash, make out his cashier's report, "and hand them in"; Mr. Mallory did not physically "check" the reports to ascertain if they were correct, but "left that up to the bookkeeper" (R 33). Corporal Snyder testified that the cashier customarily did not list the checks handled by him, but that he turned the checks over to the bookkeeper to be deposited, and the bookkeeper would list them; that the total is recorded in the cashier's book and subtracted in the cashier's report from his total accountability (R 28,29). There was no requirement that the cashier's report show a breakdown of the checks turned in for deposit, as "they can be checked against the deposits made by the Class 'B' Agent every day " (R 16).

The cashier's report used by Captain Armstrong, the Inspector General, to balance accused's account as of the close of business on 13 July 1950 was received in evidence without objection (R 16-20, Pros Ex 6). It is as follows (Pros Ex 6):

"CASHIERS REPORT

	DATE	13 Jul 1950
Balance Preceding Day		4250.41
Debits		
Ck for Cash		150.00
Adv of Mks	5,000 -	1190.48
Adv of BAFSV	100-0-0	280.00
TOTAL DEBITS		5870.89
CREDITS		
Pd Vou		213.00
CID		1874.77
TOTAL CREDITS		2087.77
BALANCE		3783.12

INFORMATION	Gain	.03
		3783.15
NO VOUCHERS PAID		
NO PAYEES PAID		
NO OF FOREIGN CURRENCY SALES		
CHECKS CASHED AMOUNT		
NO OF CHECKS CASHED		
CASHIER		/s/ Allen"

[On reverse side of Pros Ex 6]

"MPC	2723.88	
US	355.15	
Mks	432.52 -	1816.54
BAFSV	271.60 -	97-0-0
	3783.15"	

The report showed a balance of $3783.15, but accused's "bank balanced at $3,726.12, which left a $57.03 shortage" (R 20). This shortage was not off-set by the $58 overage found for 11 July 1950 because the $58 was not included in the report of that day (R 33). The term "CID" appearing on the cashier's report for 13 July 1950 (elsewhere in the evidence referred to as "CD") means "checks deposited" (R 29,30). The report for the 13th showed "CID" in the amount of $1874.77 (R 17, 31, Pros Ex 6).

The cashier's reports for 11 and 12 July 1950 likewise were received in evidence without objection (R 16, Pros Exs 4 and 5). In form they are identical with the report dated 13 July 1950. The report for the 11th shows as a credit "CID--1703.09", and reflects on the reverse side "MPC 2888.35"; the report for the 12th shows as a credit "CID--3164.22", and reflects on the reverse side "MPC 3036.50" (R 16). The $58 overage found by Captain Armstrong on the morning of 12 July 1950 was not reflected in the report dated 11 July 1950, although the money was impounded (R 17,20). The checks totaling $239.95 were not listed in the report dated 11 July 1950, although they were present on the morning of 12 July 1950 and were counted as part of the "MPC" balance reflected in that report (R 22).

Captain Armstrong testified that he took exception to the check because of its date (14 March 1950) and because it appeared to have an initial signature; that he had no reason at that time to believe the check to be valueless, so he included it in the assets of the "Class 'B' Agent" (R 20). "The check" found by Captain Armstrong and Mr. Mallory, received in evidence without objection, is as follows (R 20, Pros Ex 7):

"No. 021852 * Account No. 270
.....14.March....1950.

THE AMERICAN EXPRESS COMPANY, INC.
BREMEN BRANCH
Bremen, Haus des Reichs

PAY AGAINST THIS ORDER FROM ~~MY~~ ~~OUR~~ CREDIT BALANCE ONLY IN
MILITARY PAYMENT CERTIFICATES
TO.....Treasurer.of.the.U.S.....885.90..
DOLLARS..Eight Hundred Eighty Five and 90/100**********
.....
THIS ORDER IS NOT NEGOTIABLE, SEE REVERSE

.....(Illegible).....
SIGNATURE

G 15 10 000, 11.48."

The $885.90 check was not listed on the cashier's report dated 13 July 1950 but "an equal amount of cash was reflected" (R 22). The check was considered a part of the $2723.88 shown on the report as Military Payment Certificates (R 17,20,22-24). If that amount had not been included, accused would have been short an additional $885.90 (R 33).

Mr. Mallory testified that the $885.90 check "was not there on the cash count of the 12th" and was not "turned in * * * on the 13th * * * according to any records we could find" (R 30); that he could not specify the particular denominations of the checks which totaled "CID—1874.77" on the cashier's report dated 13 July 1950, without referring to the check deposits for that day; that he submitted the check to The American Express Company for payment but payment was refused (R 31).

The stipulated testimony of the manager of the Bremen office of The American Express Company was to the effect that the check (Pros Ex 7) is not that of any depositor of the Bremen Office; that account No. 270, shown on said check, was closed more than a year prior to trial; that it was usual for his company to use blank checks of closed accounts as counter-checks, and consequently it was possible that someone could have picked up from the counters maintained for the convenience of customers a blank check such as Prosecution Exhibit 7 bearing the old account number (R 25).

Peter Stoeken, employed by the International Refugee Organization, testified that his Organization has an account, Bremerhaven Number 270, with The American Express; that he writes and signs checks on behalf of the Organization; that he does not use the type of blank check reflected by Prosecution Exhibit 7; and that the signature thereon is not his signature (R 26,27).

Captain Gordon testified that his policy with respect to cashing checks for individuals was that under the provisions of "SR 35-400-1" finance officers are not permitted to cash checks if commercial banking facilities exist in the same town where the finance office is located; that exceptions are made in Bremerhaven and Bremen in the case of unit funds for the purchase of "DM's", of agents aboard transports, and with respect to checks from "EES and IRO because of the large amounts of cash involved in their transactions" (R 12,13).

Corporal Snyder testified that it was the practice to cash checks for officers and civilians upon the furnishing of proper identification; that checks would be in amounts varying from $100 to $500; that he does not remember ever cashing a check in an amount greater than $500 (R 28,29).

b. <u>For the Defense</u>

Captain Turner C. McNeese, Finance Officer for the United States Constabulary, had been a finance officer for approximately eight years, he had served in that capacity at Bremen from approximately 5 June until November 1949, and was acquainted with the policies then in effect in the operation of that office. (R 38,39). With respect to the procedure used in the Bremen Finance Office by the cashier in obtaining the numbers for foreign currency conversion application forms, Captain McNeese testified that at the beginning of a day's business the cashier would obtain the opening number from the bookkeeper, which would be the next number serially from the last for the previous day; that there were occasions when duplications erroneously resulted from this procedure (R 39).

Captain McNeese testified that there were a few times when accused, while acting as cashier, was over or short in his account in small amounts; that on those occasions the overages were picked up as unexplained balances and that shortages not accounted for were paid by accused. There was one occasion when Captain McNeese advanced accused $1500 without obtaining a receipt therefor, due to the press of other business, and when Captain McNeese closed his books for the day he was short $1500 until the accused called attention to the fact that the $1500 was in his possession (R 39,40).

Captain McNeese attested to the honesty of the accused and to the fact that he did superior work. He testified that he trusted accused even to the extent of becoming co-signer on a note at a time when accused was in debt; that this obligation had been paid by accused prior to July 1950 (R 40); that he would like to have the accused working for him again in any capacity (R 41); that during the time he was finance officer at Bremen the policy was for the "turn-in" forms to be submitted each day, but in actual practice this did not happen; that "sometimes it went from one to three days before these forms were turned in, and before an actual balance was made * * *" (R 40); that personal checks could be cashed at the Bremen Finance Office, providing the person cashing a check was well known; that it would be possible for him to forget having cashed a check for $885, since he had cashed many checks for ten thousand dollars and more (R 42,43).

Captain McNeese was familiar with the writing of the accused and testified that the signature on the $885.90 check (Pros Ex 7) had not been made by the accused (R 40,41).

Peter Stoeken, a prosecution witness recalled by the defense, identified Defense Exhibit A as a sheet of paper bearing his signature (which is illegible) over the stamped phrase "For Interzonal Movements Office". He testified that this was the official signature which he used in his capacity as Deputy Comptroller for the "IRO"; that his signature did not in any way resemble the one on Prosecution Exhibit 7; and that the stamped legend "For Interzonal Movements Office" did not appear on Prosecution Exhibit 7 (R 43,44).

The accused testified in his own behalf in substance as follows. That he entered the Regular Army in 1939 and attained the rank of warrant officer; that during the war he operated harbor craft at Cherbourg, Marseille, Le Havre and Rouen, and received three campaign stars (R 45). After the termination of hostilities he returned to the United States, terminated his warrant officer status, and reenlisted in the grade of master sergeant. He never before has been court-martialed. He started doing finance work in the spring of 1947 and has been continuously so engaged since that time (R 46). He is married and has two step-children, ages 16 and 14 (R 53).

Accused acknowledged the making of the cashier's report for 9 December 1949 (Pros Ex 3). He testified that it was true and correct; that there was no shortage in his accounts for the month of December 1949; and that in said month there was no loss to the Government caused by any of his actions (R 54,66).

He explained the presence of his own funds in his cashier's box on 12 July 1950 by saying (R 53):

"A. * * * My wedding anniversary was on 15 July. I had some money with which I wanted to buy the wife an anniversary present, and rather than carry it around in my pocket I put it in the drawer for safekeeping. The cash was never touched by anyone except myself, and I knew it would be safer there than in my pocket.

"Q. Is that the first time you have ever put money in your own box for safekeeping?
"A. That is the first time, to my knowledge, that I have ever done it."

Accused testified that he was "working the cage those days" because "Cpl Morton", the alternate cashier, had gone on pass to get married (R 47,48); that he was working in the capacity of cashier and chief clerk, and "the job alone of chief clerk would keep [him] busy" (R 60); that the cashiers report dated 13 July 1950 (Prox Ex 6) was made by him and was a correct report to the best of his knowledge, but due to the fact that he did not count the cash, his bank was short $57.03; that this did not affect his total accountability, however, and that he repaid the $57.03 the following day (R 50,54,66); that on 13 July 1950 he deposited checks in the amount of $1874.77; that this is correctly shown on the report (R 50), and "according to the records and the actual money belonging to the government, it was all in balance" (R 53); that if he cashed a check after his daily report had been turned in the total "MPC" would not be altered, but there would be fewer Military Payment Certificates in his cash box with the balance being in checks (R 50); that this was what occurred in his account on 11 July 1950 with respect to the $239.95 in checks found by the Inspector General on the morning of 12 July 1950 (R 51).

Accused testified that 13 July 1950 was on Thursday, and the office operated only half a day; that he was very busy "right up until 12:00 o'clock"; that Mr. Mallory was supposed to come in at "12:00" and put the money in the vault; that he did not actually count his money, because he did not have time, so he made a bookkeeping balance computed from the previous day's figures and the current day's transactions (R 48, 49); that quite a number of mutilated bills were in a plain white unsealed envelope, which was placed in the same box with his cash and other instruments (R 47); that if he had counted the money he would have discovered the shortage of $57.03; that he went to Mr. Mallory's office and asked Mr. Mallory about locking up the money, but Mr. Mallory told him to put it in the other safe and "'we will lock it up in the evening'"; that he put his money into the one safe to which he had access, and it

remained there until about 2:15 p.m., when he and Mr. Mallory locked the money in the vault; that he did not again see his "box" until the following morning, when it was being counted by Captain Armstrong; that checks are not turned in every day; that the custom was that if the cashier had less than $1000 in checks he just carried them "in the MPC figure and add it into your MPC total"; if the day's business was large they tried "to make the CD on that day and turn them in" (R 49,52); that the arrangements with respect to the safe in which Mr. Mallory put the money was that only Mr. Mallory and Captain Linford, who was then in the hospital and not on duty, knew the combination (R 59,60).

Accused testified that the check for $885.90 was not in his writing (R 52); that he had been shown the check and knows it was in his account, "but the individual transaction I can't put my finger on"; that during the particular period surrounding the discovery of the $885.90 check the business of the Bremen Finance Office was very heavy, and he could not recall the individual checks or the identity of persons cashing them (R 46); that it was his practice in cashing checks to take the necessary precautions with respect to identification (R 47). He testified that evidently the bearer of the $885.90 check was known to him or had some sort of identification, but he did not remember seeing any identification card bearing the same signature as appears on the check (R 47); and that (R 52):

"Q. When this check was found in your mutilated currency on the morning of 14 July of this year, did you give that check to anyone for payment, or put it down as an asset in your favor?
"A. No, sir, it was in my account, and I added it into my assets because I was under the impression that it was a legal instrument. It had never been presented to anyone as yet, except to myself, and I guess I took it.

"Q. Do you know that you took it?
"A. I had to, sir, because I don't know of any other way that it could have gotten into my box, but I don't recall the transaction itself."

c. Rebuttal for the Prosecution.

Captain Gordon, recalled as a rebuttal witness for the prosecution, identified the cashier's report of the Bremerhaven Finance Office for 8 December 1949, which was received in evidence without objection by the Defense (R 66, Pros Ex 8). He testified that a comparison of the closing Deutsche Mark balances for the 8th and 9th of December 1949 indicated that transactions in Deutsche Marks for the 9th were in the amount of "1,104.62 DM's" (R 67).

Captain Gordon identified "an application and approval for the purchase of foreign currency, as used by the Class 'B' Agent Office in Bremen", which was received in evidence without objection (R 67, Pros Ex 9). He testified that Prosecution Exhibit 9 is a duplicate of the first attachment (Ex 1-A) to Prosecution Collective Exhibit 1 (except that Pros Ex 9 bears a signature "Raymond F. Collier by A.L.A."); that it is not part of the official records; that the conversions reflected by Prosecution Collective Exhibit 1, totaling "$80 MPC's converted to 336 DM's", were not included in the "December business" (R 66,67).

Referring to the cashier's report dated 13 July 1950, Captain Gordon testified that "the cashiers in balancing out at the end of the day are supposed to work their bookkeeping balance and then prove it by an actual count of cash"; that "if the cash does not agree, the cashier is supposed to work it out until he gets the two figures reconciled" (R 68); that it would have been simpler to count the cash than to obtain a bookkeeping total (R 69). He testified that the $885.90 check was included on the report in the figure "MPC's, $2,723.88", but that this was improper, and "it should have been listed as a check" (R 70). Captain Gordon again described the sources of checks coming in to the finance office and testified that personal checks were not supposed to be cashed (R 70).

Captain Gordon testified further that subsequent to 27 October 1949, when he became disbursing officer at Bremerhaven, he had made many changes in policies governing the operation of the Bremen office, and that among those changes was a directive that accused cease cashing personal checks (R 72).

d. Surrebuttal for the Defense.

Captain McNeese testified further for the Defense to the effect that before he left his assignment at Bremen he had been the Class "B" Agent Officer for a period of about a month subsequent to the taking over of the Bremerhaven office by Captain Gordon; that during such time no change in policy had been made by Captain Gordon; that the cashier was authorized to cash personal checks upon full identification of the persons cashing them (R 73).

Accused was recalled and testified similarly that Captain Gordon made no change in policy with respect to cashing personal checks (R 74).

4. Discussion.

The court found accused not guilty of stealing the $80.00 and the $942.93 alluded to in the testimony (Specifications 1 and 2, Charge I) and of uttering as forged the $885.90 check (Specification 3, Charge II); the reviewing authority disapproved the court's finding of guilty of

forging the check (Specification 3, Charge I). The evidence relevant to the specifications of which accused was found guilty has been summarized. That much of the evidence was incompetent or otherwise inadmissible is not entirely free from doubt. However, for the purpose of this discussion all the evidence will be regarded as competent and as having some probative value, and it will be considered in a light most favorable to the prosecution.

a. Specification 1, Charge II-False official report on 9 December 1949.

Specification 1, Charge II, alleges in substance that accused on 9 December 1949, with intent to deceive, did officially report to Captain Collier that as cashier he had converted $263.00 Military Payment Certificates into 1,104.62 Deutsche Marks, which report was known by him to be untrue, in that on said date an additional amount of $80.00 was so converted by him.

Any allegation that accused reported the $263.00 to be all the Military Payment Certificates converted by him or that he had converted only $263.00 is conspicuously absent. Without such an averment the conclusion inherent in the specification that the report was false does not logically flow from the allegation that accused had converted an additional $80.00. The report averred to be false could well be the absolute truth even though accused may have exchanged the added $80.00 as alleged.

The general rule is that in order to be legally sufficient, any criminal allegation must so unequivocally state a cause of action and sufficient quantum of the facts that the accused is fully apprised of all the elements of the crime against which he must defend (CM 329522, Love, 78 BR 93; CM 330998, Santiago, 79 BR 281; MCM, 1949, subpara. 29a).

> "That a specification must exclude every reasonable hypothesis of innocence — must be so drawn that if all the facts expressly or impliedly pleaded therein be admitted as true or duly proven to be true, the accused cannot be innocent — may be regarded as the settled law of this office as it is the settled law of the land * * *" (CM 187548, Burke, 1 BR 55,56).

> "The specification should be so drawn that if the allegations therein are proven the accused could not still be innocent" (Dig. Op. JAG, 1912-1940, sec. 451 (8)).

Measured by this fundamental rule, Specification 1 of Charge II wholly fails to allege an offense.

The evidence, regarded in the light above mentioned, tends to prove the facts as set forth in the specification. The record of trial shows that accused, apparently as a part of his cashier's report of 9 December 1949, turned in an "Exchange of Currency" sheet indicating that on 9 December 1949 he had exchanged $263.00 in U.S. Military Payment Certificates for 1,104.62 Deutsche Marks; that he had in fact made such exchange of currency; and that he also had exchanged an additional $80.00. The evidence thus proves that accused's report was not complete, but it does not show that his report was false in the particulars alleged in the specification. Failure to make a full and complete disclosure is not tantamount to making a specified and particularized false report. (Dig. Op. JAG 1912-40, Sec 454 (49); CM 245866, Wallis, 29 BR 317,322; CM 324352, Gaddis, 73 BR 181,186 (and cases therein cited); CM 326039, McCarthy, 75 BR 133,141).

Accordingly, as to this specification, an offense under the Articles of War was neither pleaded nor proved.

b. Specification 2, Charge II-False official report on 13 July 1950.

Specification 2, Charge II, does not suffer from the same defect as Specification 1. It states an offense under the Articles of War and sufficiently alleges in substance that accused on 13 July 1950 did, with intent to deceive, officially report to Chief Warrant Officer B. S. Mallory that as cashier he had turned in for deposit all checks which he had on hand at the close of business on 13 July 1950, which report was known by accused to be untrue, in that "he knew that" there was a check for $885.90 in the funds for which he was responsible, which check he had not reported or turned in. The core of the offense alleged is that accused reported that "he had turned in for deposit all checks which he had on hand at the close of business on 13 July 1950".

To support the conviction of the alleged offense the record must show that the accused (1) made a certain official statement or report, (2) that the statement or report was false, (3) that accused knew it to be false, and (4) that it was made with intent to deceive the person to whom it was made. (CM 324352, Gaddis, supra; CM 336558, Armstrong, 3 BR-JC 133,139; CM 337961, Sykora, 4 BR-JC 187,189; CM 338522, Howard, 4 BR-JC 291,294).

In this case the problem presented by the evidence relative to Specification 2 of Charge II is not whether the report made by accused was false, whether he knew it to be false, or whether he made it with intent to deceive. Rather the only question presented for determination is: Did the accused make the report alleged?

The specification avers that the accused reported that he had turned in for deposit all checks which he had on hand at the close of business on 13 July 1950. The Board of Review is of the opinion that the evidence as well as all the reasonable inferences based thereon wholly fail to show that accused so reported, and that the proof does not establish the first of the essential elements requisite to the offense of making a false official report.

The record of trial shows that the report alleged to be false must of necessity have been in whole or in part the "Cashier's Report" made by accused on 13 July 1950 (Pros Ex 6). There is nothing in the record to indicate that the report was one required by law or regulation. The making thereof by the cashier was simply a matter of custom in the office of the Class "B" Agent Officer at Bremen.

The customary practice in that office was clearly shown to be that toward the end of each business day the cashier would prepare a bookkeeping statement reflecting his debits and credits for the day and containing a statement of the amount of cash he had on hand, which was supposed to correspond with the cash in his custody, as determined by a physical count thereof. The report was turned in to the bookkeeper and was not verified daily by Chief Warrant Officer Mallory, the accused's superior. The statement of cash on hand was itemized by categories, i.e., "MPC," "US," "MKs" and "BAFSV"; the total thereof was the balance shown on the report. There was no requirement that checks included as a part of the "MPC" balance be listed in the report.

As one of the credit items the cashier's report reflected the total amount of checks which the cashier had turned over to the office bookkeeper for deposit preceding the making of his report; it was not required that the report list by item or amount the instruments making up the total of checks turned in for deposit, nor was it required that the cashier hand to the bookkeeper on a given day checks received after he had handed in the day's report. In the event the cashier received checks subsequent to the time he made up the daily report, it was the practice for him to include them as a part of his "MPC" balance, without indicating in the report that such balance in fact consisted of both Military Payment Certificates and other instruments.

The evidence establishes that as of the close of business on 13 July 1950 accused had in his cash box a check for $885.90; that this check was not turned in to the bookkeeper for deposit and was not among the items used in computing the total of checks deposited, as stated on his cashiers report; that the check in the amount of $885.90 was among the assets accused had on hand and was included and counted as a part of the "MPC" total reported.

The cashier's report of 13 July 1950 is absolutely devoid of any statement or expression either direct or inferential that accused had turned in for deposit all of the checks which he had on hand at the close of business on that date. In making this report accused adhered to the custom and practice of the Bremen Finance Office. It is shown conclusively that he did not by word or deed represent that he had turned in for deposit all checks received. Thus, the proof fails to establish that accused made the statement attributed to him by the allegations of the specification, and the finding of guilty cannot be permitted to stand.

It is noted that the sentence as approved by the Reviewing Authority includes dishonorable discharge and confinement at hard labor for two years. The Table of Maximum Punishments provides as the maximum sentence for the offense of false official report knowingly made by a noncommissioned officer bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the sentence, and confinement at hard labor for six months (MCM, 1949, subpara. 117c, Sec A, p 140). Accordingly, if the record of trial were legally sufficient to support the findings of guilty, the maximum sentence sustained by such findings would be bad conduct discharge, confinement at hard labor for one year, and forfeitures as last above detailed.

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 H. Young, J.A.G.C.

George W. Wilson, J.A.G.C.

Lyle E. Moberly, J.A.G.C.

JAGE CM 343385 1st Ind

JAGO, SS USA, Washington 25, D. C. 14 NOV 1950

TO: Chairman, the Judicial Council, Office of The Judge Advocate General, Dept of the Army, Washington 25, D. C.

In the foregoing case of Master Sergeant Alex L. Allen (RA 6592649), Headquarters and Headquarters Company, 17th Transportation Major Port, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50e(4) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

1 Incl
Record of trial

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 343385

UNITED STATES v. Master Sergeant ALEX L. ALLEN, RA 6592649, Headquarters and Headquarters Company, 17th Transportation Major Port	)	BREMERHAVEN PORT OF EMBARKATION Trial by G.C.M., convened at Bremerhaven, Germany, 8 and 9 September 1950. Dishonorable discharge (suspended), total forfeitures after promulgation and confinement for two years. Disciplinary Barracks.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50e(4) the record of trial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of certain offenses of which the following violations of Article of War 96 were approved by the reviewing authority: officially reporting at Bremen, Germany, on or about 9 December 1949, to Captain Raymond F. Collier, with intent to deceive him, that on that date in the accused's capacity as Cashier, Class B Agent, Finance Office, APO 751, he had converted United States Military Payment Certificates of a value of $263.00 into 1104.62 Deutsche Marks, which report was known by the accused to be untrue, in that on that date an additional amount of $80.00 was so converted by him (Specification 1, Charge II); and officially reporting at Bremen, on or about 13 July 1950, to Chief Warrant Officer B. S. Mallory, with intent to deceive him, that in the accused's capacity as Cashier, Class B. Agent, Finance Office, APO 751, he had turned in for deposit all checks which he had on hand at the close of business on that date, which report was known by the accused to be untrue, in that he knew that there was a check for $885.90 in the funds for which he was responsible, which check he had not reported or turned in (Specification 2, Charge II). No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor for two years. The reviewing authority, along with action disapproving certain of the findings,

approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the accused's release from confinement, and designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement. The proceedings were promulgated in General Court-Martial Orders Number 30, Headquarters Bremerhaven Port of Embarkation, dated 15 September 1950.

The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has not concurred in the Board's holding.

3. The evidence is substantially as stated by the Board of Review in its holding.

The Board has concluded that Specification 1 of Charge II fails to allege an offense and that the proof thereunder fails to establish an offense. This specification alleges in substance that the accused, with intent to deceive Captain Raymond F. Collier, officially reported to him that on 9 December 1949 the accused in his capacity as Cashier, Class B Agent, Finance Office, APO 751, had converted $263.00 in Military Payment Certificates into 1104.62 Deutsche Marks, which report he knew to be untrue in that he had converted an additional amount of $80.00 on that date.

The elements of the offense of making a false official report are: that the accused made the alleged report, that it was official, that it was false, that he knew it to be false, and that the report was made with intent to deceive the person to whom it was made (see CM 339494, Clifford, 5 BR-JC 131, 138, and authorities there cited). The instant specification follows Form 147 of the forms for specifications prescribed in Appendix 4, Manual for Courts-Martial, 1949, at page 329. All of the elements of the offense stated above are included in the instant specification. The Board of Review in effect states that the specification is legally insufficient because it lacks any allegation that the accused reported the $263.00 to be <u>all</u> the Military Payment Certificates converted by him or that he had converted <u>only</u> $263.00, and that without such an allegation the conclusion that the report was false does not follow logically from the allegation that the accused converted an additional $80.00. In other words, the Board is of the opinion that since under the specification the report could have been correct as a partial report, it could not be considered false in the absence of an allegation that the accused submitted it as a complete report.

We are unable to agree with the reasoning or conclusion of the Board. In our opinion, from the facts alleged in the specification, it may reasonably be implied (1) that the accused was under a duty to report all of his conversions on the day in question and (2) that the report

was false because of its incompleteness. We therefore conclude that the specification alleges the offense of making a false official report (see MCM 1949, par 29a, p 22).

The evidence shows in summary that on 9 December 1949 the accused was the only cashier on duty in the Finance Office at Bremen, Germany, in which Captain Raymond F. Collier was the Class B. Agent. Except for the Finance Officer, the accused was the only person authorized to convert Military Payment Certificates into Deutsche Marks. Such conversions were supposed to be made pursuant to formal application and official approval for each individual conversion. It was also the duty of the accused to record all such conversions on a daily "Exchange of Currency" form, which, together with the corresponding individual application and approval forms, was required to be turned in as part of the office records.

On 9 December 1949 the accused turned in as part of his cashier's report for that day an "Exchange of Currency" form, together with eleven individual application and approval forms, recording the exchange in eleven transactions of a total of $263.00 in Military Payment Certificates for 1104.62 Deutsche Marks. In April 1950, the then cashier discovered in the cashier's cage an "Exchange of Currency" form and three accompanying individual application and approval forms, showing three conversions on 9 December 1949 of a total of $80.00 in Military Payment Certificates into 336 Deutsche Marks. The serial numbers of these three conversion transactions were identical with the numbers of three of the eleven transactions previously reported by the accused. The three conversions disclosed by these later discovered documents were not reflected in any official records. The evidence as to two of these transactions was corroborated by the stipulated testimony of two witnesses that they exchanged a total of $70.00 in Military Payment Certificates for Deutsche Marks at the Finance Office on or about the date in question.

The accused in his capacity as cashier was required to make a daily report of all currency conversions made by him. In his report for 9 December 1949 he showed a conversion of only $263.00 in certificates into Deutsche Marks notwithstanding the fact that he had on that day converted an additional $80.00 in certificates into Deutsche Marks. It must have been obvious to the accused that the essential value of the daily report consisted of its completeness, i.e. the inclusion therein of all conversions from Military Payment Certificates into Deutsche Marks on a given day. It follows that the accused's failure to include in this official report the conversion of $80.00 of certificates into Deutsche Marks rendered the report false in its very incompleteness, precisely as alleged in the specification.

From the known falsity of the report may be inferred the intent to deceive (CM 337961, Sykora, 4 BR-JC 187, 190; CM 339004, Shea, 5 BR-JC 1, 17, and authorities there cited). In our opinion, the record of trial fully supports the conviction under Specification 1, Charge II.

The Board of Review refers to the rule that failure to make a complete and full disclosure is not tantamount to making a specified and particularized false report. We consider this rule and the authorities cited by the Board (CM 136021 (1919), Dig Op JAG 1912-1940, Sec 454 (49), p 357; CM 245866, Wallis, 29 BR 317, 322; CM 324352, Gaddis, 73 BR 181, 186, and cases there cited; and CM 326039, McCarthy and La Borde, 75 BR 133, 141) inapplicable to the question under consideration. In the cited cases the particular false statements with which the accused were charged did not consist of failure to make full disclosure in the premises, and the evidence did not establish the false statements alleged but rather that the accused failed to make such full disclosure. Thus each of these cases involved a variance between pleading and proof. In the instant case the particular report is alleged and proved to be false by virtue of its incompleteness.

Specification 2 of Charge II alleges in substance that the accused, with intent to deceive Chief Warrant Officer B. S. Mallory, officially reported to him that the accused in his capacity as Cashier, Class B Agent, Finance Office, APO 751, had turned in for deposit all checks which he had on hand at the close of business on 13 July 1950, which report he knew to be untrue in that he knew that there was a check for $885.90 in the funds for which he was responsible, which check he had not reported or turned in. We concur with the Board of Review in its conclusion that this specification states an offense. The question is whether the evidence sustains the allegations. In our view, the evidence does not establish beyond a reasonable doubt that the accused was required to or did report that he had turned in for deposit all checks which he had on hand at the close of business on 13 July 1950, either under the entry of "CID," meaning checks deposited, or under the entry "MPC," on the Cashier's Report for that day. We therefore concur with the Board of Review in its conclusion that the record of trial is legally insufficient to support the conviction under this specification.

The sentence against the accused, as approved and modified by the reviewing authority, is total forfeitures after promulgation, confinement at hard labor for two years, and dishonorable discharge suspended until the accused's release from confinement. The maximum punishment for the only offense of which he was legally convicted, false official report knowingly made by a noncommissioned officer (Specification 1, Charge II), is bad conduct discharge, total forfeitures after promulgation, and confinement at hard labor for six months (MCM 1949, par 117c, p 140). To the extent the approved sentence exceeds this maximum, it is illegal and must be disapproved.

4. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge II and Specification 1 thereof, legally insufficient to

support the finding of guilty of Specification 2 of Charge II, and legally sufficient to support only so much of the sentence, as modified by the reviewing authority, as involves forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, confinement at hard labor for six months, and bad conduct discharge suspended until the accused's release from confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Master Sergeant Alex L. Allen, RA 6592649, Headquarters and Headquarters Company, 17th Transportation Major Port, upon the concurrence of The Judge Advocate General the finding of guilty of Specification 2 of Charge II is disapproved and only so much of the sentence as modified by the reviewing authority as involves forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, confinement at hard labor for six months, and bad conduct discharge suspended until the accused's release from confinement is confirmed and will be carried into execution. An appropriate Guardhouse is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

15 December 1950

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGZ CM 343407

UNITED STATES v. Private ROY F. MARKHAM (RA 33914782), and Private JACK DOUTHIT, JR. (RA 38147785), both of 599th Composite Service Company, Port of Whittier, Alaska.	)	UNITED STATES ARMY, ALASKA Trial by G. C. M., convened at Fort Richardson, Alaska, 23 August 1950. Markham: Dishonorable discharge (suspended), total forfeitures after promulgation, and confinement for two (2) years. Douthit: Dishonorable discharge, total forfeitures after promulgation and confinement for three (3) years. As to both: Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LUDINGTON, LENEY and BYRNE
Officers of the Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldiers named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

2. The accused were tried in a common trial upon the following Charges and Specifications:

As to Private Roy F. Markham:

CHARGE: Violation of the 93rd Article of War

Specification 1: In that Private Roy F. Markham, 599th Composite Service Company, Port of Whittier, Alaska, did, at Whittier, Alaska, on or about 16 July 1950, in the night time, feloniously and burglariously break and enter the dwelling quarters of Wallace W. Morrison and James M. Macleod located in the Alaska Railroad Barracks a building used for dwelling purposes, with intent to commit a felony, viz: larceny, therein.

Specification 2: In that Private Roy F. Markham, 599th Composite Service Company, Port of Whittier, Alaska, did at Whittier, Alaska, on or about 16 July 1950, feloniously steal a barracks bag, one-fifth gallon of whiskey, two silver dollars, lawful money of the United States, and a wallet, all of a total value less than $20.00, the property of Wallace W. Morrison.

As to Private Jack Douthit, Jr.:

CHARGE I and Specifications 1 and 2 thereof, same as for Private Markham.

CHARGE II: Violation of the 96th Article of War

Specification: In that Private Jack Douthit, Jr., 599th Composite Service Company, Port of Whittier, Alaska, did, at Whittier, Alaska, on or about 16 July 1950, wrongfully strike Sergeant Pratt Wright, 512th Transportation Port Company, Port of Whittier, Alaska, on the face and head with his fists.

Each accused pleaded not guilty to, and was found guilty of, the Specifications and Charges pertaining to him. The accused Markham was sentenced to dishonorable discharge, total forfeitures after promulgation and confinement at hard labor for three years. Accused Douthit was sentenced to dishonorable discharge, total forfeitures after promulgation and confinement at hard labor for four years. No evidence of previous convictions was introduced as to the accused Markham. Evidence of two previous convictions by summary courts martial for brief periods of absence without leave, was introduced as to the accused Douthit. The reviewing authority approved the sentence as to Markham, remitted one year of the confinement adjudged and suspended execution of the dishonorable discharge until the soldier's release from confinement. The result of trial was published in General Court-Martial Orders No. 38, Headquarters United States Army Alaska, dated 19 September 1950. As to accused Douthit 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 50e. The Branch United States Disciplinary Barracks, Camp Cooke, California, was designated as the place of confinement for each accused.

3. Evidence

a. For the prosecution.

The evidence pertinent to the offenses charged is substantially undisputed and reveals that at about 2100 hours on the night of 15-16 July 1950 the accused visited the quarters of Mr. Wallace W. Morrison, an employee of the Alaska Railroad, to obtain whiskey. Both of the accused were quite

intoxicated and left Mr. Morrison's quarters at about 2200 hours when Mr. Morrison went to work. Some time between 2200 and 2315 the accused returned to Morrison's quarters, slit the window screen with a knife and upon gaining entry removed therefrom a barracks bag, a bottle of whiskey and a billfold containing $7, including two silver dollars. The room that was entered is a part of the sleeping quarters furnished by the Alaska Railroad for its employees (R 8 - 12, Pros Exs 1, 2 and 3).

Sergeant Pratt Wright, 512th Transportation Port Company, Whittier, Alaska, saw the accused in his barracks at about 0100 hours, 16 July 1950. They were making considerable noise in the latrine and when Sergeant Wright told them to be quiet the accused Douthit asked if he (Wright) was Sergeant of the Guard. When Wright replied that he was not and repeated, "I am telling you to be quiet", the accused Douthit struck Wright in the face (R 32 - 33).

b. For the defense.

It was stipulated by and between the prosecution and the defense with the consent of each of the accused that the official records in the office of Arctic Weather Control Officer, 11th Weather Squadron, Elmendorf Air Force Base, Fort Richardson, Alaska, recorded sunset at Whittier, Alaska, 15 July 1950, at 2120 hours and sunrise at Whittier, Alaska, 16 July 1950, at 0252 hours, the period 2300 hours to 2400 hours, 15 July 1950, is recorded as being within the astronomical twilight period during which the sun is approximately 18° below the horizon (Def Ex A).

Sergeant First Class Roy Maxwell, 512th Port Company, Whittier, Alaska, testified substantially that he was working on a pier on the night of 15-16 July at Whittier, Alaska, and that there was sufficient daylight between the period 2400 hours 0100 so that it was unnecessary to use lights for working on the pier. He stated further that during this period "I believe you could recognize a man 200 feet" (R 34, 35).

Corporal Virgil A. Porter testified that he was Charge of Quarters on duty on the night of 15-16 July and that it was not completely dark all night. He was able to see a waterfall approximately one-half mile away (R 35 - 36).

Private First Class Fred E. Stanley who was with the two accused earlier in the evening of 15 July testified that they had purchased a fifth of whiskey from Mr. Morrison earlier in the evening for $10. The accused Douthit also testified concerning the purchase of whiskey from Morrison and both the accused testified under oath concerning their military records.

4. Discussion.

The only question requiring consideration is whether the evidence is legally sufficient to sustain the findings of guilty of burglary,

Specification 1, of Charge I, with particular reference to whether the offense was committed in the "night time" as defined by the common law in the offense of burglary.

The Manual for Courts-Martial, 1949, in defining burglary, states in part:

> "Both the breaking and entry must be in the nighttime, which is the period between sunset and sunrise, when there is not sufficient daylight to discern a man's face," * * *. (MCM, 1949, par. 180d)

> "It is of the essence of burglary at common law that it shall be committed in the night-time, or, as it is termed in the old pleadings, noctanter. * * * The ancient legal definition of night was the interval between sunset and sunrise; but from a very early date a different signification has been given to the term night-time, as employed in the description of burglary, namely that period of the twenty-four hours during which there is not enough light from the sun—either daylight or twilight—to enable one to perceive and distinguish with reasonable accuracy the features of the countenance of another. Or, as Blackstone expresses it,—'if there be daylight or crepusculum enough, begun or left, to discern a man's face withal, it is no burglary.' But the prevalence of moonlight, however full and bright, is held to affect in no manner the question whether or not the breaking and entering were committed in the night; the law of burglary recognizing no middle space between night and day." (Sec. 1061, Winthrop's Military Law and Precedents, 2d Ed., p. 684). (Last underscoring supplied)

This doctrine though not discussed has been affirmed by the Board of Review in CM 263301, Blachura, 41 BR 245, 247.

> "The nighttime, according to the old English common law, extends from the termination of daylight, beginning at the time when the countenance ceases to be reasonably discerned, and extending to the earliest dawn of the next morning. * * * When twilight has ceased, allowing for this an hour after the setting of the sun, night may be considered to have begun." (Sec. 1023, Wharton's Criminal Law, 12th Ed. 1305-1306).

The evidence discloses that the accused broke and entered the sleeping room of Mr. Morrison between 2200 hours, 15 July, and 2315 hours, 15 July. The parol testimony of the defense witnesses, which is uncontroverted, establishes that there was sufficient light for the dock crew to work without artificial illumination and to make a waterfall visible at a distance of one-half mile, one witness stating that, "I believe you could recognize a man 200 feet." The stipulated testimony concerning the official records of the 11th Weather Squadron reveals that the period 2300 to 2400 hours, 15 July, was within a period of time known as the astronomical twilight and that sunset at Whittier, Alaska, was at 2120 hours on 15 July and sunrise at 0252 hours. We are informally advised

by the United States Naval Observatory, Washington, D. C., that the sun set at 2120 hours on 15 July 1950 and rose at 0252 hours on 16 July 1950 at Whittier, Alaska; that during this intervening period the sun was less than 12° below the horizon; that this intervening period of time was illuminated by the sun creating a light condition commonly known as "twilight" but that it was not dark; that the term "astronomical twilight" is generally defined as that period of time from the setting of the sun until total darkness.

This informal information from the United States Naval Observatory, together with the stipulated facts (Def Ex A) strongly corroborate the uncontroverted testimony of defense witnesses that it was not dark or "night-time" at the time this offense was committed inasmuch as persons could be recognized at a distance and outside work could be performed without aid of lights.

In the opinion of the Board of Review every element of the offense of burglary is proved except that it is not shown that these accused entered the room in the "night-time". To constitute burglary a breaking and entry must be in the night time (MCM, 1949, Par. 180d). Accordingly, since the evidence establishes that at Whittier, Alaska, on 15-16 July there was no "night-time" for the purposes of burglary, the evidence supports only a finding of guilty of the lesser included offense of housebreaking, as was held in CM 263301, Blachura, supra.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification of the Charge as to Private Markham, and Specification 1, Charge I, as to Private Douthit, as involves a finding of guilty of housebreaking; legally sufficient to support the findings of guilty of all other Specifications and Charges; and legally sufficient to support the sentence as to each accused.

_____, J.A.G.C.

Absent, J.A.G.C.

_____, J.A.G.C.

JAGZ CM 343407 1st Ind

JAGO, Dept of the Army, Washington 25, D. C.

TO: Commanding General, United States Army, Alaska, APO 942, c/o Postmaster, Seattle, Washington

1. In the case of Private Roy F. Markham (RA 33914782) and Private Jack Douthit, Jr. (RA 38147785), both of 599th Composite Service Company, Port of Whittier, Alaska, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 1 of the Charge as to accused Markham, and Specification 1 of Charge I as to accused Douthit, as involves findings that each accused did, at the time and place alleged, unlawfully enter the dwelling quarters of Wallace W. Morrison and James Macleod with intent to commit a criminal offense, to wit: larceny, therein; legally sufficient to support the findings of guilty of all other Specifications and Charges; and legally sufficient to support the sentence as to each accused. Under Article of War 50e this holding and my concurrence vacate so much of the findings of guilty of Specification 1 of the Charge in the case of Private Roy F. Markham, and of Specification 1 of Charge I in the case of Private Jack Douthit, Jr. as is in excess of findings that each accused did, at the time and place alleged, unlawfully enter the dwelling quarters of Wallace W. Morrison and James Macleod, with intent to commit a criminal offense, to wit, larceny, therein.

2. It is requested that you publish a general court-martial order in the case of Private Roy F. Markham modifying the finding of Specification 1 of the Charge in accordance with said holding and this indorsement. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence in the case of Private Jack Douthit, Jr. The published orders as to accused Douthit will reflect the modification of the finding of Specification 1 of Charge I in accordance with the foregoing holding and this indorsement.

3. When copies of the published order in the case of Private Douthit, and the supplemental order in the case of Private Markham, 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 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 orders, as follows:

(CM 343407).

Franklin P. Shaw

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

2 Incls
1. Record of trial
2. Draft of GCMO

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 343472 9 October 1950

UNITED STATES	)	25TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 25, 25 August, 5 and 6 September 1950. Death.
First Lieutenant LEON A. GILBERT (01304518), Company A, 24th Infantry Regiment, APO 25.	)	

HOLDING by the BOARD OF REVIEW
HILL, TIBBS, and FITZHUGH
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50d.

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

CHARGE: Violation of the 75th Article of War.

Specification: In that First Lieutenant Leon A. Gilbert, Company A, 24th Infantry Regiment, did, at or near Sangju, Korea, on or about 31 July 1950, misbehave himself before the enemy, by refusing to advance with his command, which had then been ordered forward by Colonel H. V. White, Commanding Officer, 24th Infantry Regiment, to engage with North Korean forces, which forces the said command was then opposing.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be put to death in such manner as proper authority may direct, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Mental responsibility.

a. Subsequent to arraignment, but prior to pleading to the general issue, the defense made a special motion to dismiss the specification and the charge against the accused on the ground that the accused

lacked mental responsibility at the time of the commission of the alleged offense as defined in paragraph 110b, page 121 of the Manual for Courts-Martial U. S. Army 1949 (R 8). The following evidence was offered in support of this motion:

A board of three medical officers consisting of Lieutenant Colonel George Zalkan, MC, Major George V. Potter, MC, and Captain William W. Krause, MC, psychiatrist, was appointed to examine into the sanity of the accused pursuant to paragraph 111 of the Manual for Courts-Martial U. S. Army 1949. A report of this examination on 14 August 1950 contains the following findings of the board:

> "a. That at the time of the alleged offense, Lt Gilbert was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong.
>
> "b. That at the time of the alleged offense Lt Gilbert was so emotionally disturbed (anxiety reaction acute, severe) as to be unable to adhere to the right.
>
> "c. That Lt Gilbert possesses sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense." (R 9; Def Exs A,B)

First Lieutenant Charles C. Zipp has known the accused since about May of 1949. He saw him "now and then" and came "to know him pretty well." On or about 31 July 1950 Lieutenant Zipp was battalion motor officer of the 1st Battalion. He and the accused had been "on the line for four days then." He had not seen the accused under combat conditions before. "I saw Lt Gilbert with about a squad of men sitting under a tree about the time Colonel Roberts came around . . . He seemed quite more depressed then than he was usually . . . he seemed to be under a strain . . . He didn't appear to notice anything or I noticed his head was down and he seemed depressed . . . we got some sniper fire at the time. We were all serious minded, I believe . . . It seemed like he was depressed to the extent that he wasn't aware of the few things happening around there. In fact, he wasn't even aware or conscious of the sniper fire sitting up near the tree . . . Colonel Roberts told him to take his men out, to go ahead to the tanks. He didn't seem ready to go right away as an officer should do when he gets an order from a senior officer . . . I said 'Let's go, Gil' and he just seemed to nod his head and made no remark at all . . . I don't know. I wouldn't say . . . he looked different from the other men in combat at that time . . . I wouldn't know if he was capable of carrying out an order. In my opinion, I believe, physically, he was capable but I don't know anything about whether he was mentally or not." The squad moved out but the accused did not (R 17-20).

First Lieutenant Charles Perilli was regimental communications platoon leader on 31 July 1950. He had known the accused for six months and had seen the accused three or four times a week in the company. On this day he saw the accused for about ten minutes after the accused had received an order to move forward. He "watched his reactions while others were talking to him, the colonel for one" "I said 'Come on, Gil. Captain Simonovich and I are going up with you' . . . He did not answer me." In his opinion the accused looked a little stunned, confused. He did not believe the accused looked "different physically in any way." But he "would think twice about following him at that particular time." He "wouldn't say he [accused] was rational." He "couldn't get a rational answer out of him." The accused looked worse than "other men in that area that had been under fire." As to "how he looked different from these other people" Lieutenant Perilli stated: "It is kind of hard to describe something like that other than to say you know the man for a long time. You know how he acts, how he talks and gets around. Then you see his normal way of acting and talking and from which then you know something is wrong." As to "what specifically changed about his attitude that day . . . I wouldn't want to pin it down to anything." As to his refusal to go being possibly "because he was afraid to go . . . It occurred to me that we were all afraid . . . I don't think . . . he had been a little more afraid than the rest . . . I don't think . . . he was completely incapable of carrying out orders at that time." Under peaceful conditions back at camp, the accused was quick to observe orders, follow instructions and quick to move out . . . He was alert in his reactions where he looked dull and unable to react to instructions and orders he received that day" (R 21-24).

Sergeant Clarence J. Paul had been in A Company thirty-five months. The accused came to the company about five months later than did Sergeant Paul. On 31 July 1950 the accused was company commander and Sergeant Paul was a platoon leader. They were together on the afternoon of that day on the main line of resistance near Sangju, Korea. "Lt Gilbert wasn't looking the same, the way he was looking before in the past few days he was on the front line with us together." He acted "differently that day than from what he had been normally acting . . . He had a different action . . . he was acting a little shocked . . . when the mortars fired and then they fired machine guns and rifles . . . Lt Gilbert was in a shocked condition." The rest of the men in the organization did not also appear slightly shocked when the guns were firing. The accused appeared shocked in that "he was sitting down. He was quiet, sir, wasn't saying anything to anyone of the rest of the guys and they were talking with the other fellows." In the estimation of Sergeant Paul "mere quiet on the part of a man" did "indicate he was shocked." He knew of nothing wrong with the accused physically, and could not "definitely say there was something mentally wrong," but he believed the accused was "incapable of carrying out orders." He did not consider the assigned mission "a suicide mission"

in combat. Sergeant Paul and the "rest of the men" left the accused behind and went forward under orders of "the colonel" (R 24-27).

Subsequent to the time that the court arrived at its findings in the case and prior to the closing of the court to consider the sentence, there was admitted in evidence a certificate of Medical Testimony dated 8 August 1950, as follows (Def Ex I):

"1. This is to certify that I have on this date examined ----- Gilbert, 1st Lt Inf, O----, as provided in paragraph 111 MCM 1949.

"2. In my opinion, Lt Gilbert is, at the present time, so far free from mental disease, defect, or derangement as to be able to distinguish right from wrong and to adhere to the right. He is mentally competent to cooperate in his own defense.

"3. As a result of my examination, I believe that, at the time of the alleged offense, Lt Gilbert was suffering from a nervous illness, classified as anxiety reaction, acute, severe, which would prevent him from carrying out his duties as ordered. In the course of the past 15 days in my work as psychiatrist for the 8054th Evac Hosp., I have seen approximately 200 cases of a similar anxiety reaction in officers and enlisted men of the U. S. forces in Korea. In most of these cases the history indicates a period during which the individual loses control of his emotions and nerves and is unable to direct his actions. This is accompanied by nervousness, intolerance to loud noises, insomnia and upset digestion, in varying degrees. Lt Gilbert evidenced many of these symptoms, and his description of his feelings at the time of the alleged offense is very similar to the description of similar periods given to me by patients.

"4. Such anxiety reactions are more frequent in persons with a predisposition as shown by similar illnesses previously. In Jan 1945, while serving with the 92nd Division in Italy, Lt Gilbert was examined by the Division psychiatrist because of an intolerance to artillery fire. At that time it was recommended that Lt Gilbert be assigned to rear area duties and this was done for the remainder of the war. It would seem that Lt Gilbert's nervous condition at that time, was similar to that which developed in the present conflict.

"5. Because of these facts, I believe that, while he was able to distinguish right from wrong at the time of the alleged offense,

there is reasonable doubt that Lt Gilbert was able to adhere to the right at that time.

William W. Krause
1st Lt MC
Psychiatrist"

It is apparent that this certificate was not considered by the law member in ruling upon the defense motion to dismiss the charge and specification by reason of lack of mental responsibility at the time of the alleged offense.

Upon direct examination, defense witness Lieutenant Zipp, was shown Defense Exhibit B, consisting of the report of a board of three medical officers concerning the sanity of the accused, and was asked this question:

> "From your observation of the accused, would the accused, in your opinion, be a type of person suffering from the type of ailment mentioned in that?" (R 17)

The law member sustained an objection by the prosecution, and explained: "The lieutenant is not a doctor. He can testify as to an incident that occurred on a certain day but any testimony as to that exhibit, now in his hands, would not be pertinent to the issue" (R 17,18).

The defense offered to put the accused on the stand for the express purpose of testifying to "a similar psychological incident in his army career that happened a few years ago" (R 27). The prosecution objected "to any further discussion on this matter by the defense counsel as this appears to be an attempt on the part of the accused and the defense to place the accused on the stand for the purpose of making a self-serving unsubstantiated statement." The law member ruled: "We can only hear testimony with respect to the date in question, not on something that might have occurred some years prior to this time" (R 28). Thereafter during the presentation of the defense case the law member made the following announcement and ruling:

> "LAW MEMBER: . . . I wish to point out to the defense in regard to an offer of the defense counsel at the first meeting of the court. At that time, the defense stated that he wanted to place the accused on the stand for the express purpose of testifying as to a psychological incident that had happened earlier in his career--that happened a few years ago. At that time, the law member ruled that such evidence would be irrelevent since it pertained to a similar but unconnected incident. So that the accused may be afforded every opportunity to present any evidence

he wishes on the issue of sanity which is before the court, it is the desire of the court that the defense counsel consult with the accused and advise him as to his rights as a witness to take the stand for the limited purpose of testifying as to the sanity issue. The ruling of the law member denying the motion to dismiss the charge on the grounds of insanity merely placed that issue before the court. So, the defense counsel may place the accused on the stand now for the limited purpose of testifying as to the sanity issue only and the defense may offer any other evidence that he may desire on that issue at this time. The denial of the motion to dismiss the charge on the grounds of insanity does not preclude the defense from offering further evidence on the subject.

. . . .

"DEFENSE: The defense counsel and the accused have discussed the law member's offer of the accused taking the stand as a witness for the express purpose--the limited purpose of testifying on the sanity issue and the accused informs me that he desires to remain silent.

"LAW MEMBER: Lieutenant Gilbert, do you understand that you can take the stand for the limited purpose of testifying as to the sanity issue and that if you do take the stand, you cannot be cross-examined on the question of your guilt or innocence?

"ACCUSED GILBERT: Yes, sir." (R 45)

b. Rebuttal evidence was offered by the prosecution in opposition to the motion as follows:

Lieutenant Colonel Paul F. Roberts testified that he was the Regimental Executive Officer, 24th Infantry Regiment at the time of the alleged offense on or about 31 July 1950. The regiment was in a defensive position in the Sangju area, defending a "pass or road." The accused had command of one of the companies in the outpost. "We got some sniper fire." There was "some resistance" in the outpost line which the accused was in and in the main line of resistance "and in cleaning it out we had a little fight. I saw the lieutenant [accused] come to the line with approximately fifteen men. I asked him what he was doing and he said that he had come from the outpost line . . . I explained to him what was going on in the area and showed him the direction in which his organization was." The accused and the witness were no farther apart than "a foot to a foot and a half," close enough to observe "quite personally." He talked to the accused at least three times "within a period of two hours, from the early afternoon until the middle of the afternoon" for "Short periods of time in each case" - - "The first time probably . . . maybe a couple of minutes." Colonel Roberts observed that the accused "looked like a man that was in combat. He had on a uniform similar to the one he is presently wearing. He wasn't perfectly at ease . . . I think anybody being shot

at is a little bit jittery . . . As far as remembering particular details of his reactions, I can't in detail, but there was nothing about it that I particularly remember as being outstanding or being any different from . . . any others in the area, I presume." No physical disabilities were noticed or reported. Colonel Roberts "didn't know Lt Gilbert too well . . . I didn't know his mannerisms." The accused did look "as though he were a man that had been shot at." Colonel Roberts was not "given any reason to believe that his [the accused] mental attitude was such that he might be incapable of carrying out an order." "He answered questions and when I spoke to him he appeared to understand." At no time when he "talked to him did he give . . . any information to indicate that he was irrational or unable to grasp what was going on or that he did not understand the situation." He did not "appear to be more emotionally disturbed than the other men who were under the same conditions" as far as Colonel Roberts "would notice or did notice in any manner or form." When he first talked to the accused, the accused gave no indication, by way of telling him, that there was "anything wrong with him." "Later he made a statement that was contrary" (R 11-13).

Major Horace E. Donaho was commanding officer of the 2d Battalion, 24th Infantry and commanding officer of the outpost line of resistance for the 24th Infantry Regiment in the vicinity of Sangju. Approximately between 1500 and 1700 hours on or about 31 July 1950, he talked to the accused who was not a member of his battalion but was a "member of the Outpost Line of Resistance," "about five to ten minutes," and again about ten minutes later. This was the first day he had known of the accused. They were near each other, "three to four feet or closer." "We were approximately or an estimated 1200 yards behind the Outpost Line of Resistance" which was "some 1200, 1400, or 1600 yards forward of the Main Line of Resistance." Major Donaho knew of no casualties in the immediate vicinity. "There was firing taking place. We had friendly tanks within fifty, seventy-five to one hundred yards from where we were, but it was definitely quiet enough where one could understand the other." The accused did not appear to have any physical disability. He appeared rational and "physically and mentally capable of carrying out any order that he might be given." The accused did not say "there was anything wrong with him physically or mentally." He talked coherently. He definitely appeared to understand the subject of the conversation. Major Donaho thought there was nothing "in his actions or speech that would indicate that he was, at that time, different from any of the other officers or men in the immediate vicinity" (R 14-16).

c. The special motion to dismiss the specification and the charge was denied (R 28).

4. Evidence.

a. For the prosecution.

The accused, First Lieutenant Leon A. Gilbert, was assigned to the

24th Infantry Regiment. He was in command of Company A on 31 July 1950 on the outpost line of resistance, near Sangju, Korea (R 30,31,37). Elements of the outpost line of resistance were in contact with the enemy (R 30).

Colonel Horton V. White was commanding officer of the 24th Infantry Regimental Combat Team, of which the accused was a member. On or about 31 July 1950 he had occasion to observe the accused.

> "On that day, our Regimental CP was well forward--behind the front lines which was about 200 yards away. Forward of that we had an out-post line manned by three companies, one of which was 'A' Company of the 24th Infantry. A small enemy group or battalion had come down the wash from the north cutting between the OPLR and the MLR, and we were sending 'G' Company up to make an attack and clean the enemy opposition out. Along about 1600 in the evening, I left the CP and went up the road to where the MLR crossed it and I met one man there coming back from the line and I stopped him and asked him where he was from and where he was going and he said that he was from Company 'A'. Then, I asked him if he wasn't supposed to be up on the out-post line and he--his reply to that was that he was afraid that he had been cut off and that he was retiring from that out-post line. Then, I went up immediately in front of the MLR where Colonel Roberts was standing and I asked him if he realized that 'A' Company wasn't up on the OPLR. He said that he knew nothing about their being cut off or anything and pointed out to me where they were supposed to be, and that as far as he knew, they were still there in that particular area. In that company, Lieutenant Gilbert was commanding officer as I found out. He had taken over command of Company 'A' that morning, since he, Lieutenant Gilbert, having the seniority. Then I asked--I called Lieutenant Gilbert over and asked him why he and his men had left the out-post line and he stated that he and half of his company had been--had come down because he was afraid that they either would be or had been cut off. He had about fifteen men with him. I told him to get ahold of his group and get back up to the out-post line and rejoin the rest of his company." (R 37)

> "I do not remember what he said, but I think he said: 'Yes Sir,' and that is all" (R 38).

Colonel White did not notice anything apparently wrong with the accused, physically or mentally or anything about him that would cause him to believe that he was not in full possession of his mental and physical faculties (R 38,39).

> "Then, about that time, about, I would say 300 yards distance, there was an enemy detachment coming down the hill and my attention

was distracted and I started watching and concentrating my thoughts on the tanks that were using white phosphorus shells and the actions of the 81 millimeters laying down on the detachment that was coming down the hill. Then, after that, I returned back to the CP. About 20 minutes after I had returned, Lieutenant Gilbert came in and stated that he desired to report that he wasn't going to obey the order which I had given him. I asked him why and he replied that he was scared. Then, upon asking him if he was aware of the seriousness of his action, and that it might lead to disciplinary action, or even a court-martial with a death sentence or life imprisonment, he said that he was aware of what he was doing and that he would not go back to the OPLR. I then asked him if he would repeat what he had just told me in front of Colonel Roberts, my Executive Officer, and he said that he would. So, we went over, Lieutenant Gilbert and myself to Colonel Roberts and he stated the same thing in his presence--in front of him. He also said that although he realized the seriousness of it and that his actions would probably lead to disciplinary action, he still refused to obey. I immediately relieved him of his command, . . ." (R 37,38).

Prior to this incident the accused was observed by Major Horace E. Donaho, the commanding officer of the outpost line of resistance, and Lieutenant Colonel Paul F. Roberts, executive officer, 24th Regiment (R 11,30,33). Major Donaho related the following account:

"I approached Lt Gilbert and told him to take his group back to the 'A' Company position which was in the Outpost Line of Resistance. Lt Gilbert stated to me that he could not return and I instructed him that that was an order, that he would return. Again he said that he could not return and I asked him if he meant that he would not return. He said that was correct, he would not return. I then asked for the senior noncommissioned officer in charge. Lt Gilbert told me who the senior noncommissioned officer was and I told him to move his group out to his position. They did move out. I called back over to Lt Gilbert and told him that he still had an opportunity to take the group out. He said no, he would not return with the group. I instructed him to report to the Regimental Commander." (R 31)

"Lt Gilbert stated to me, when he first said 'I cannot go back', that 'I have a wife and two children', I believe, or that 'I have a wife and child. I just can't do it.' That was as nearly a 'why' as he gave me." (R 32)

Colonel Roberts related the following account:

"On or about the 31st of July, the accused and also this regiment, the 24th Infantry Regiment, of which he was commanding

a company, was on an out post. That was the first time I saw him that day. He was with a group of his men moving into the main line of resistance. There was some local resistance at that time, there was some small sniper fire, and there had been a local penetration. There were several small groups from the regiment attempting to clear this up with the assistance of tanks and other supporting fire. I noticed the lieutenant coming from the OPLR and I queried, or asked him where he was going because I knew that he and his small group were one of the forward units and he stated something to the effect that the sniper fire had cut him off, or cut off his unit so that they could not return. I explained the situation to him as to what was going on and indicated the direction in which his unit could return as the sniper fire was cleared out. Shortly thereafter, the regimental commander spoke to the lieutenant and ordered him to return to his unit, to the out post line. That is the summarization of everything that occurred in the first meeting that day . . . A second time [was] in the Headquarters of the 24th Infantry. The lieutenant came in and reported to the regimental commander and stated in a tone--or in an audible manner--stating the following words to the effect that he could not obey the commander's order--the regimental commander's order to return to his unit. The regimental commander asked him to say it in front of me after he had been brought into me, so, he brought him over to me to repeat the statement that he had told him. It was repeated in my presence that he could not obey the order. He was asked if he knew what he was doing and if he understood the consequences if he didn't obey the command and he said: 'Yes'. He stated that he knew what he was doing and he said: 'Yes', again and still refused to go after he was told to go again. He was placed in arrest and immediately relieved of his command." (R 33,34)

When he reported to the Regimental Commander the accused explained that he did not comply with the order because "he had a wife and a child . . . to consider" (R 36).

b. <u>For the defense.</u>

The accused was warned of his rights as a witness and elected to remain silent (R 45,46).

Due to the local "tactical situation and the nonavailability of important (and valuable) defense witnesses," certain testimony was introduced in the form of stipulations (R 39-41).

First Lieutenant Hairston, A Company, 24th Infantry Regiment:

"On the afternoon of 31 July 1950, about 1400 or 1500 hours, in the vicinity of Sanju, Korea, I was commanding a platoon of 'A' Company on the OPLR occupied by 'A' Company. About this time we were receiving enemy fire from the opposite side of the hill we were occupying. This fire became so intensive it looked like we would be forced to withdraw. Lieutenant Gilbert and I observed Lieutenant Barnes and his platoon, back of 'A' Company, coming up the draw to the OPLR. Lieutenant Gilbert informed me that he was going to intercept Lieutenant Barnes and have him use his platoon to set up a road block to cover the road which would be used by us in case of withdrawal. I agreed to this and told Lieutenant Gilbert to try and get mortar fire on the enemy positions that were firing upon us. I then observed Lieutenant Gilbert leave the hill and make contact with Lieutenant Barnes.

"In my opinion, Lieutenant Gilbert has always performed his military duties in peace and combat in a superior manner." (R 41, 42; Def Ex C)

Second Lieutenant Albert Barnes, A Company, 24th Regiment:

"On the afternoon of 31 July 1950, at about 1400 or 1500 hours, in the vicinity of Sanju, Korea, I was taking the third platoon of 'A' Company, about 30 men, up the hill to the OPLR where the three other platoons of 'A' Company were situated. About three-quarters of the way up this hill, I was met by Lieutenant Gilbert. He told me to take my platoon and set up a road block which was to secure the road for members of 'A' Company who might be forced to withdraw from their positions which the enemy had partially penetrated. Lieutenant Gilbert went with me to show me where to place my men. Upon reaching the road we were fired upon by enemy automatic weapons. This fire dispersed and disorganized the platoon. To reassemble the platoon, it was necessary to go to the river bed at the bottom of the hill in front of the MLR as the men had run in that direction. I was unable to do this myself as I was pinned down by enemy automatic fire.

"In my opinion, Lieutenant Gilbert has always performed his military duties in peace and combat in a superior manner." (R 42, 43; Def Ex D)

Captain Jackson, commanding officer of A Company, 24th Infantry:

"I have known Lieutenant Gilbert approximately seven (7) years and I have been his commanding officer since Company 'A' has entered combat in Korea. Lieutenant Gilbert's performance in combat has been superior. I would rate the character and efficiency of Lieutenant Gilbert as superior." (R 43; Def Ex E)

It was further stipulated:

"1. The accused departed zone of interior on 1 October 1944; served in Italy as a platoon leader with Company 'F', 365th Infantry; participated in the North Appinneis and Po valley campaigns; and was returned to the Zone of the Interior on 2 December 1945.

"2. The accused has been awarded the Combat Infantryman's Badge, two Bronze Battle Stars, World War II Medal, American Defense Medal, Occupation (Japan) Medal, Good Conduct Medal and the EAME Medal." (R 44; Def Ex F)

There were also admitted in evidence a cablegram from the wife of the accused referring to the dependency of the wife and two children of the accused and to the "considerable combat service in World War Two," and pictures of the wife and children of the accused (R 53; Def Exs G,H).

5. Discussion.

It is charged that the accused misbehaved himself before the enemy by refusing to advance with his command which had been ordered forward by his commanding officer, to engage with North Korean forces, which forces the said command was then opposing, in violation of Article of War 75.

"Misbehavior Before the Enemy.—Any officer or soldier who, before the enemy, misbehaves himself . . . shall suffer death or such other punishment as a court-martial may direct." (Article of War 75)

"Misbehaviour Before the Enemy. This offense may consist in . . any officer or soldier . . . refusing or failing to advance with the command when ordered forward to meet the enemy . . ." (Winthrop, Military Law and Precedents (2d Ed., 1920 reprint) 622,623).

The specification plainly sets forth an offense under Article of War 75 (MCM, 1949, par. 163a, p. 216 and Appendix 4, Form No. 39, p.318).

Except for the issue of mental responsibility, the evidence fully supports the allegations of the specification. On 31 July 1950 the accused was in command of Company A, 24th Infantry Regiment, in the vicinity of Sangju, Korea. He was ordered by his regimental commander to advance with elements of his command to the positions assigned to his command which was engaged with enemy forces. It is a matter of common knowledge of which judicial notice may properly be taken, that the enemy consisted of North Korean forces (CM 231445, Teixeira, 18 BR 197,213). He refused

to obey this order. "He also said that although he realized the seriousness of it and that his actions would probably lead to disciplinary action, he still refused to obey" (R 38). This evidence is uncontradicted.

The question of the mental responsibility of the accused at the time of the alleged offense was made an issue in the case by the defense motion to dismiss for lack of mental responsibility and the evidence offered in support thereof (R 8).

> "Lack of mental responsibility.--If a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, the accused can not legally be convicted of that offense" (MCM, 1949, par. 78a, p.75; par. 110b, p.121).

> "A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase 'mental defect, disease, or derangement' comprehends those irrational states of mind which are the result of deterioration, destruction, or malfunction of the mental, as distinguished from moral, faculties. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses or otherwise does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged" (MCM, 1949, par. 110b, p.121).

Pursuant to the provisions of paragraph 112b, page 123 of the Manual for Courts-Martial U.S. Army, 1949, the court conducted an inquiry into the mental responsibility of the accused (R 8-28). Evidence was offered in the form of a report of a board of medical officers and the testimony of lay witnesses. The board of medical officers was appointed pursuant to the provisions of paragraph 111, pages 121 and 122 of the Manual for Courts-Martial U.S. Army, 1949, and consisted of three medical officers, one of whom was a psychiatrist. The report of this board, dated 14 August 1950, was admitted in evidence pursuant to paragraph 112c, page 124 of the Manual for Courts-Martial U.S. Army, 1949. Although the report certifies that the accused was at the time of the alleged offense, so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong, and that he possessed sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense, it further certifies:

> "That at the time of the alleged offense Lt Gilbert was so emotionally disturbed (anxiety reaction acute, severe) as to be unable to adhere to the right" (R 9, Def Ex B).

Lay witnesses were permitted to testify pursuant to the provisions of paragraph 112c, page 124 of the Manual for Courts-Martial U.S. Army, 1949:

> "Although the testimony of an expert on mental disorders as to his observations and opinion with respect to the mental condition of the accused may be given greater weight than that of a lay witness, in a proper case a lay witness who is acquainted with the accused and who has observed his behavior may testify as to his observations and may also give such opinion as to the accused's general mental condition as may be within the bounds of the common experience and means of observation of men. As in the proof of other matters, evidence should be presented by the testimony of witnesses in open court, depositions, stipulated testimony, or documentary evidence."

The testimony of the three lay witnesses, offered by the defense was to the effect that at the time of the alleged offense the accused was depressed, under a strain, shocked, confused, stunned, looked different than usual and looked different from others, incapable of carrying out orders, and that he appeared not to be aware of sniper fire. These witnesses had been well acquainted with the accused.

The testimony of the two lay witnesses offered by the prosecution was to the effect that at the time of the alleged offense the accused did not appear different than others in combat, he answered questions and appeared to understand, he never complained of anything wrong with him, and he talked coherently. These witnesses had not been well acquainted with the accused. One witness had not seen him before.

The accused offered to testify in support of the defense motion to dismiss, relative to "a similar psychological incident to his army career that happened a few years ago." (R 27) An objection by the prosecution was sustained (R 28).

> ". . . evidential facts are available to show a human quality or condition: . . . having either a prospectant or a retrospectant indication, . . . namely, prior or subsequent condition, as showing condition at a given time. Thus, to prove insanity, we may offer (1) conduct as the effect illustrating its cause, mental aberration, (2) circumstances of unsuccessful business, domestic troubles, and the like, tending to bring on insanity; and (3) prior or subsequent insanity, pointing forwards or backwards to insanity at the time in question." (Wigmore on Evidence, (3d Ed) sec. 190).

> "Courts are today universally agreed that both prior and subsequent mental condition, within some limits, are receivable for consideration; stress being always properly laid on the truth that these

conditions are merely evidential towards ascertaining the mental condition at the precise time of the act in issue" (Wigmore, supra, sec. 233).

Remoteness as to the incident to be testified to, may tend to weaken the evidence as it applies to the point in issue, but it is nevertheless evidence to be considered, and is admissible. The accused was erroneously excluded from testifying. However, subsequent to the ruling on the sanity of the accused, the court may hear further evidence on the question.

"If the issue of insanity is raised as an interlocutory question and the court finds the accused sane the defense is not precluded by this finding from offering further evidence on the issue of insanity and, when all the evidence in the case has been received, the court may proceed to its findings on the guilt or innocence of the accused. If in consideration of its findings upon the general issue the court entertains a reasonable doubt that the accused was mentally responsible for his acts it will enter findings of not guilty as to the proper charges and specifications." (MCM, 1949, par. 112b, p.124).

Later in the trial the court ruled that the accused might testify "for the limited purpose of testifying as to the sanity issue and that if you do take the stand, you cannot be cross-examined on the question of your guilt or innocence" (R 45). The accused elected to remain silent (R 45). In the light of this ruling, it does not appear that the earlier ruling on the subject prejudiced the substantial rights of the accused (CM 329500, Durden, 78 BR 75,79). It is noted that the separate report of the psychiatrist, Captain Krause (previously First Lieutenant), refers to an incident in 1945 (Def Ex I).

While the defense was offering the testimony of lay witnesses on the issue of the mental responsibility of the accused, defense witness Lieutenant Zipp was asked, in effect, if in his opinion the accused was suffering from insanity. Instead of referring to the "type of ailment" inquired about as "insanity," defense counsel referred to the "type of ailment" mentioned in Defense Exhibit B. The court ruled that since the witness was not a doctor, he could not testify "as to that exhibit" (R 17,18). Although the ruling had the effect of preventing the witness from expressing his opinion as to the sanity of the accused in answer to the question put to him, the witness thereafter answered numerous questions calling for his opinion on the subject (R 18-20). It is not considered that the substantial rights of the accused were prejudiced by this ruling.

The evidence relating to the issue of the mental responsibility of the accused at the time of the alleged offense does not reflect a thorough

and exhaustive presentation of the subject. The testimony of the lay witnesses is conflicting. The testimony offered by the defense came from witnesses who were acquainted with the accused. That testimony offered by the prosecution came from one witness who had not known the accused, and the other witness had known him only slightly. The sole expert opinion is evidenced by the report of the board of medical officers, one of whom being a psychiatrist. This report was introduced by way of stipulation because of the critical need for their services (R 9, Def Ex B). These medical officers were not produced in court although it was announced that they could be made available. They were not thereby made subject to cross-examination relative to their stipulated testimony (R 9). In the absence of any further testimony from these officers, and in the absence of evidence of any further examination by other professional medical men, the conclusion drawn by them as appearing in their report to the effect that at the time of the alleged offense, the accused "was so emotionally disturbed (anxiety reaction acute, severe) as to be unable to adhere to the right," together with the lay testimony to the same effect, is sufficient to raise a doubt as to the mental responsibility of the accused. This conclusion has support in the separate report of the psychiatrist member of the board, Captain Krause, who examined the accused on 8 August 1950, six days prior to the examination by the board. In his report of this examination he states that he found the accused on that date able to adhere to the right, but that "at the time of the alleged offense, there is reasonable doubt that Lieutenant Gilbert was able to adhere to the right at that time" (Def Ex I).

The "burden of ultimate persuasion on the issue of mental responsibility" beyond a reasonable doubt, rests upon the prosecution when properly placed in issue (CM 223448, Rieseman, 13 BR 389,399; CM 332151, Missik, 3 BR-JC 243,267).

> "The burden of proving the sanity of the accused, like every other fact necessary to establish the offense alleged is always on the prosecution . . . [when] the question of sanity becomes an issue in the case" (MCM, 1949, par. 112a, p.123).

The Board of Review is invested with authority, under the provisions of Article of War 50(g), "to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact." The advisability of disturbing a finding of the court on the controverted issue of the mental responsibility of the accused poses a serious question in this case. The court has the advantage of observing the witnesses and of being in the presence of the accused. In this case, although the lay witnesses on the issue of mental responsibility did appear and testify and were cross-examined at length by opposing counsel and by members of the court, none of the medical officers comprising the board that examined

the accused appeared in court to testify as to the facts upon which they based their conclusions, nor was there any opportunity for cross-examination. As they provided the sole expert opinion in the case, the Board of Review is considered justified, under all the circumstances, to weigh the evidence presented (CM 280093, Hughes, 53 BR 47,61; CM 332151, Missik, 3 BR-JC 243,267). In the face of the sole expert opinion in the case, the medical officers, one of whom is a psychiatrist, to the effect that the accused was unable to adhere to the right, a conclusion that the accused was mentally responsible at the time of the alleged offense, is not considered justified. Cases holding that a diminished or impaired ability to adhere to the right, a partial irresponsibility, is no defense to crime, are distinguished from the case at issue which involves the inability of the accused to adhere to the right (CM 319168, Poe, 68 BR 141,170; CM 320805, Hamilton, 70 BR 191,195; CM 338934, Jones, January 1950). A reasonable doubt exists as to the mental responsibility of the accused at the time in issue, and his conviction of the offense alleged is unwarranted (CM 286435, Whek, 56 BR 205,207).

It is, therefore, concluded that the record of trial is legally insufficient to sustain the findings of guilty and the sentence.

6. Consideration has been given to communications received and attached to the record.

7. Department of the Army records indicate that the accused is 31 years of age, married and has two children. He completed three years of high school. His civilian occupations were waiter in hotel restaurant, instructor in Community Center, and property supply clerk. He entered the service 16 August 1940, and on 18 December 1942 was commissioned a second lieutenant after successful completion of the Officers' Candidate Course. He was relieved from active duty in February 1946. He again served in an enlisted status from October 1947 to April 1949. He entered upon active duty in his commissioned grade on 7 April 1949, and was promoted to first lieutenant 25 July 1949. He has served overseas from October 1944 to November 1945, and since 9 February 1948 has served in Japan and the Far East. He is entitled to wear the Combat Infantryman's Badge, the American Campaign Medal, the European-African-Middle Eastern Theater Medal with two battle stars, the World War II Victory Medal, and the Japanese Occupation Medal. His efficiency ratings range from very satisfactory to excellent and his over-all numerical efficiency ratings are 119 and 083.

8. The court was legally constituted and had jurisdiction of the person and the offense. For the reasons stated, the Board of Review

holds the record of trial legally insufficient to support the findings of guilty and the sentence.

C. P. Hill, J.A.G.C.

Michael L. Gibbs, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

JAGE CM 343472 1st Ind

JAGO, SS USA, Washington 25, D C 11 OCT 1950

TO: Chairman, the Judicial Council, Office of The Judge Advocate General, Dept of the Army, Washington 25, D. C.

In the foregoing case of First Lieutenant Leon A. Gilbert (01304518), Company A, 24th Infantry Regiment, APO 25, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50d(4) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:

1 Incl
Record of trial

FRANKLIN P. SHAW
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(202)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 343472

UNITED STATES v. First Lieutenant LEON A. GILBERT, 01304518, Company A, 24th Infantry Regiment, APO 25	25th INFANTRY DIVISION Trial by G.C.M., convened at APO 25, 25 August, 5 and 6 September 1950. Death.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(4) the record of trial and the holding by the Board of Review in the case of the officer named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of misbehaving himself before the enemy, at or near Sangju, Korea, on or about 31 July 1950, by refusing to advance with his command, which had then been ordered forward by Colonel H. V. White, Commanding Officer, 24th Infantry Regiment, the accused's regiment, to engage with North Korean forces, which forces the said command was then opposing, in violation of the 75th Article of War. No evidence of previous convictions was introduced. He was sentenced to be put to death in such manner as proper authority may direct, all the members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has not concurred in the holding by the Board of Review and accordingly has transmitted the same and the record of trial to the Judicial Council for appropriate action.

3. Evidence

The evidence, which is reviewed at length by the Board of Review in its holding, is substantially as follows.

a. For the prosecution.

On the morning of 31 July 1950, the accused assumed command of Company A, 24th Infantry Regiment, in the vicinity of Sangju, Korea. Pursuant to orders of Colonel Horton V. White, Commanding Officer of the 24th Infantry Regimental Combat Team, Company A was occupying the right flank of the Regimental Outpost Line of Resistance. Two other companies completed this line, elements of which were in contact with "the enemy" (R 30, 31, 37). The Main Line of Resistance lay between 1200 and 1600 yards behind the Outpost Line, and the Regimental Command Post was situated about 200 yards to the rear of the Main Line. By mid-afternoon, there had been a local "enemy" penetration of the Outpost Line, accompanied by local resistance and sniper fire. Units from the Main Line were attempting to eliminate the opposition, with the assistance of tanks and other supporting fire (R 16, 30, 33, 37).

Lieutenant Colonel Paul F. Roberts, Regimental Executive Officer, testified that sometime in the early afternoon of 31 July he saw the accused proceeding with a group of enlisted men from the direction of the Outpost Line into the Main Line (R 11, 33, 35). When Colonel Roberts asked the accused where he was going, the accused replied "to the effect that the sniper fire had cut him off, or cut off his unit so that they could not return" (R 33). The accused gave as an explanation that he had "lost contact with some of his people, or the people on his flank." Colonel Roberts testified that "it could have happened as he [the accused] stated it" (R 34). Colonel Roberts explained the tactical situation to the accused and indicated the direction in which his unit could return to the Outpost Line by following the tanks, which would protect the group from sniper fire (R 33, 34), after which its members could take cover at the top of a hill. Although there was "enemy" automatic weapon fire in the area at this time, Colonel Roberts felt the accused could continue moving through the area, or at least the distance that the tanks were traveling (R 35).

Major Horace E. Donaho, Commanding Officer of the Outpost Line of Resistance, testified that at about mid-afternoon he saw the accused with a group of enlisted men about 1200 yards behind the Outpost Line. Believing it his duty to keep as many men in the line as possible, Major Donaho told the accused to take his group back to Company A's position in the Outpost Line (R 30, 31). The accused said, "I cannot go back" and "I have a wife and two children" or "a wife and child. I just can't do it" (R 30, 32). When the major "instructed him that that was an order, that he would return, the accused repeated that he could not return." To the major's question whether the accused meant he would not return, "he said that was correct, he would not return." Major Donaho thereupon ordered the senior noncommissioned officer present to move the group out to its position, whereupon the group moved out. When Major Donaho thereupon told the accused he still had an opportunity to take the group out, the accused "said no, he would not return with the group."

The major then instructed the accused to report to the Regimental Commander (R 30-31).

Colonel Horton V. White, the Regimental Commander, testified that he met the accused at about 4 p.m. coming from the Main Line and inquired where he was from and where he was going. When the accused replied he was from Company A, Colonel White asked him if he was not supposed to be up on the Outpost Line. The accused answered that he was afraid that he had been cut off and that he was retiring from the Outpost Line. Upon Colonel White's inquiry, Colonel Roberts stated that he knew nothing about Company A's having been cut off and that, as far as he knew, they were still in the Outpost Line area. Colonel White then asked the accused why he and his men, of whom there were fifteen, had left the Outpost Line. The accused replied "that he and half of his company had come down because he was afraid that they either would be or had been cut off." The colonel thereupon "told him to get ahold of his group and get back up to the out-post line and rejoin the rest of his company" (R 37). Colonel White believed the accused said "Yes Sir" (R 38).

After having his attention distracted by an "enemy" detachment coming down the hill, Colonel White returned to the Regimental Command Post. About twenty minutes later, the accused entered and stated that he desired to report that he was not going to obey the colonel's order. The colonel "asked him why and he replied that he was scared." Colonel White advised him of the seriousness of his action and that it might lead to a court-martial sentence of death or life imprisonment. The accused stated "that he was aware of what he was doing and that he would not go back to the OPLR." Colonel White then asked the accused to repeat his statement in front of Colonel Roberts. The two then proceeded to the presence of Colonel Roberts, where the accused repeated his statement.

> "He also stated that although he realized the seriousness of it and that his actions would probably lead to disciplinary action, he still refused to obey."

Colonel White immediately relieved the accused of his command (R 38). Colonel Roberts corroborated Colonel White's testimony that the latter, in the vicinity of the Main Line, ordered the accused to return to the Outpost Line and that later at Regimental Headquarters the accused stated in effect that he could not obey the commander's order to return to his unit, and repeated that statement in Colonel Roberts' presence (R 33, 34). The accused

> "was asked if he knew what he was doing and if he understood the consequences if he didn't obey the command and he said:

'Yes'. He stated that he knew what he was doing and he said: 'Yes', again and still refused to go after he was told to go again." (R 34).

The accused "stated some reasons -- a family; * * * to the effect that he had a wife and a child or a wife and children to consider" (R 36).

Colonel White testified that he did not notice anything apparently physically or mentally wrong with the accused at the time (R 38), or anything about him that would cause the witness to believe the accused was not in full possession of his mental and physical faculties. Colonel White further testified that the purpose of the Outpost Line was to delay "the enemy" pending the establishment of the Main Line. If "the enemy" cut between the Outpost Line and the Main Line, that, generally speaking, would not require withdrawing the Outpost Line to the Main Line (R 39).

b. For the defense.

After the prosecution rested, the defense requested a recess until two valuable witnesses, then engaged with their unit in a fire fight not more than 200 yards from the courtroom, could be made available (R 39-40). The court then adjourned until the following morning, at which time the defense stated that "due to the present tactical situation and the nonavailability of important defense witnesses, the defense, prosecution, with the consent of the accused"had agreed to enter into a stipulation (R 40-41). Testimony of three officers of the accused's company was thereupon introduced by means of stipulations between the prosecution, the defense and the accused. The stipulated testimony was substantially as follows.

First Lieutenant Hairston was commanding a platoon of Company A on the Outpost Line at about 2 or 3 p.m. on 31 July 1950. "Enemy" fire from the opposite side of their hill became so intense that it appeared they would be forced to withdraw. The accused stated he was going to intercept Lieutenant Barnes, who with his platoon was coming up the draw to the Outpost Line, and have him use his platoon to set up a road block for use in case of withdrawal. Hairston agreed and told the accused to try to direct mortar fire on the "enemy" positions. The accused then left the hill and made contact with Barnes (R 41-42; Def Ex C).

Second Lieutenant Albert Barnes, at about the same time, was taking a platoon up the hill to the Outpost Line. He was met by the accused, who told him to have his platoon set up a road block to secure the road for the possible withdrawal of members of Company A. The accused accompanied Barnes to the road, where "enemy" automatic weapon fire dispersed and disorganized the platoon. To reassemble the platoon, it was necessary to go to the bottom of the hill in front of the Main

Line, in which direction the men had run. Barnes was unable to do this since he was pinned down by the automatic fire (R 42-43; Def Ex D).

Captain Jackson had known the accused about seven years and had been his company commander since the company entered combat in Korea. He would rate the accused's character and efficiency as superior (R 43; Def Ex E).

All three officers agreed that the accused's performance in combat had been superior (R 42, 43; Def Ex C, D, E). Lieutenants Hairston and Barnes also agreed that the accused's performance in peace had been superior (R 42, 43; Def Ex C, D).

It was stipulated as a fact that the accused participated in the "North Appinneis" and Po Valley campaigns in Italy as a platoon leader, and had been awarded the Combat Infantryman's Badge, two Bronze Battle Stars, and World War II, American Defense, Occupation (Japan) and EAME Medals (R 44).

After the law member explained to the accused his rights to testify, make an unsworn statement or remain silent, the accused elected to remain silent (R 45-46).

After the court voted on the findings and before it closed to vote on the sentence, the defense introduced the following evidence: (1) a cablegram from the accused's wife, requesting that consideration be given him in view of the dependency of herself and two children of tender years and because of her pregnancy. She also referred to the accused's service of nearly ten years, including considerable combat service in World War II (R 53; Def Ex G); and (2) individual photographs of the accused's wife and two children (R 53; Def Ex H).

4. Mental Responsibility of the Accused.

Immediately following the arraignment, the defense moved that the specification and charge against the accused be dismissed on the ground that he lacked mental responsibility at the time of the alleged offense. The evidence introduced with respect to the motion, which is set forth in detail by the Board of Review in its holding, is substantially as follows.

a. For the defense.

The prosecution, the defense and the accused stipulated testimony identifying a letter issued by Headquarters, 25th Infantry Division, dated 11 August 1950, requesting an examination of the accused by a board of three medical officers, including one psychiatrist, under

the provisions of paragraph 111, Manual for Courts-Martial, 1949, and requesting a report of the board's proceedings, which letter was introduced into evidence (R 8; Def Ex A). Testimony was also stipulated identifying a report of examination of the accused by a board of three medical officers, dated 14 August 1950, which report was introduced into evidence (R 9; Def Ex B). The defense stated that the stipulation was entered into due to the critical need for the services of the three medical officers at the 8054th Evacuation Hospital, but that they would be made available as witnesses if any member of the court wished to question them in the interests of justice (R 9).

The report recites that on 14 August 1950 the board of medical officers conducted an examination into the sanity of the accused, pursuant to paragraph 111 of the Manual, and states that the board's findings were that (a) at the time of the alleged offense, the accused was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong; (b) at the time of the alleged offense, the accused "was so emotionally disturbed (anxiety reaction acute, severe) as to be unable to adhere to the right"; and (c) the accused possessed (on 14 August 1950) sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense. The report is signed by two medical officers, and by "William W. Krause (per WRH), Capt, MC, Psychiatrist-Recorder" (R 9; Def Ex B).

b. For the Prosecution.

Lieutenant Colonel Paul F. Roberts, the Regimental Executive Officer, testified with respect to conversing with the accused on 31 July 1950. Colonel Roberts was between a foot and a foot and a half from the accused (R 11), who "looked like a man that was in combat" and was not perfectly at ease (R 12). Colonel Roberts did not know the accused "too well," did not know his mannerisms, and conversed with him only for short periods from early to mid-afternoon (R 13). He could remember nothing about the accused's reactions as outstanding or different from anyone else, since "everybody being shot at is a little bit jittery" (R 12). The accused did not appear to be more emotionally disturbed than other men under the same conditions (R 13). He appeared to be capable of carrying out any orders that might be given to him and gave Colonel Roberts no reason to believe that his mental attitude was such that he might be incapable of carrying out an order. Colonel Roberts observed no wounds or physical disabilities, and the accused reported no wounds (R 12). At the time of the first conversation, the accused gave no indication that there was anything wrong with him. As to whether the accused appeared to be rational in his speech, Colonel Roberts stated that he answered questions and when spoken to appeared to understand. The accused gave no indication that he was irrational or unable to understand what was happening (R 13).

Major Horace E. Donaho, Commanding Officer of the Outpost Line of Resistance, testified that he talked to the accused, whom he did not know before, for not more than ten minutes on two occasions between 3 and 5 p.m. on 31 July 1950. The accused, who was about three or four feet from the major, did not appear to have any physical disability and appeared to be rational. He appeared physically and mentally capable of carrying out any order that might be given (R 14-15). Nothing in his actions or speech indicated that he was mentally incapable of so doing, or that he was different from any other officers or men in the immediate vicinity (R 15). The accused did not say there was anything physically or mentally wrong with him (R 16). He was able to talk coherently with Major Donaho and appeared to understand the subject of their conversation (R 14, 16).

c. Rebuttal evidence for the defense.

First Lieutenant Charles C. Zipp testified that he was a member of the accused's company and had known him since about May 1949 and "got to know him pretty well" (R 17). Prior to 31 July 1950 he had not seen the accused under combat conditions. On that day he seemed more depressed than usual - "He always was ready to say 'hello' to me but at that time he seemed to be under a strain" (R 18). "He was depressed to the extent where he wasn't aware of the few things happening around there" - not even "of the sniper fire sitting up near the trees" (R 19). Zipp could not say whether the accused looked different from any other men in combat at that time; the accused did not appear to notice anything, his head was down and he seemed depressed (R 18). All the officers and men were serious minded at that time (R 19). When Colonel Roberts told the accused to take his men out, "he didn't seem ready to go right away as an officer should do when he gets an order from a senior officer" (R 18). When Zipp prepared to move out, pursuant to Colonel Roberts' order to help remove certain vehicles from the stream, the accused inquired where the squad was going with Zipp. The latter said, "let's go, Gil" but the accused merely seemed to nod his head and said nothing. Other than in this instance, Zipp did not talk to the accused at all (R 19). Zipp believed the accused was physically capable of carrying out an order, but did not know whether he was mentally capable of so doing and could express no opinion as to his mental attitude (R 18-19). The accused appeared not to have control of the men with him and did not move out with them (R 20).

First Lieutenant Charles Perilli, regimental communications platoon leader, testified that he had known the accused for six months, and had talked to him for eight to ten minutes on 31 July 1950. In his opinion, the accused looked stunned and confused. He looked worse than any other man in the area who had been under fire. Perilli "would think twice about following him at that particular time." After the accused had been ordered to move forward, Perilli suggested to him, "Let's go, Gil. Captain Simonovich and I will go with you." Perilli would not say the

accused was rational, because when Perilli said, "Let's go," he could not get a rational answer out of the accused (R 21, 22, 23). In fact, the accused did not answer him (R 24). From his knowledge of the accused's normal way of acting and talking, Perilli knew something was wrong. He did not notice anything physically wrong with the accused. As to whether the accused might have refused to go because he was afraid, it occurred to Perilli that they all were afraid, but he did not believe the accused was more afraid than the rest (R 22). Nor did he believe the accused was completely incapable of carrying out orders at that time. Under peaceful conditions the accused was alert in his reactions and quick to observe orders, follow instructions and move out. On the day in question he looked dull and unable to react to instructions and orders. Perilli's impression was based upon the accused's reactions not only when Perilli suggested that he move up, but also while others, including "the colonel," were talking to him (R 23).

Sergeant Clarence J. Paul testified that he had been a member of the accused's company for thirty-five months. The accused had joined the company about five months after him. Paul was an acting platoon leader on 31 July 1950 (R 24, 26). In the middle of the afternoon, the accused looked different from the way he had looked on the previous few days on the front line. "He was acting a little shocked" (R 24). Paul would say the accused was in a shocked condition (R 25). He first noticed the difference in the accused when they were attacked in the morning on the road coming to the stream bed (R 27). He did not notice that the other men also appeared slightly shocked when the guns were firing. The accused's appearance was different from the others. He was sitting down and was not talking, as the others were. Paul would say there was reason to believe the accused was incapable of carrying out orders (R 25). He knew of nothing physically wrong with the accused nor could he say definitely there was something mentally wrong. Paul testified reluctantly: "Sir, I believe why he didn't do it was because they had seven or eight enemy machine guns and the enemy had * * * the majority of us pinned down and was dropping mortars all around us" (R 26). Paul did not consider the assigned mission a suicide mission, in combat (R 27).

The law member refused the defense request "to put the accused on the stand for the express purpose of testify [sic] to a similar psychological incident in his army career that happened a few years ago" (R 27), stating, "We can only hear testimony with respect to the date in question." The law member then denied the defense motion to dismiss, subject to objection by any member of the court (R 28). Subsequently during the presentation of the defense's case, the law member, after adverting to his prior ruling, offered the defense an opportunity to place the accused on the stand for the limited purpose of testifying as to the sanity issue. After a recess of five minutes to give the defense counsel an opportunity to consult with the accused, the defense counsel stated that the accused informed him that he desired to remain silent (R 45).

After the court voted on the findings and before it closed to vote on the sentence, the defense introduced a "Certificate of Medical Testimony" dated 8 August 1950, signed "William W. Krause, 1st Lt MC Psychiatrist" (R 53; Def Ex I). The certificate states that the certifying officer examined Lieutenant Gilbert as provided in paragraph 111, Manual for Courts-Martial, 1949, and expresses the opinion that Lieutenant Gilbert was (on 8 August 1950) so far free from mental disease, defect, or derangement as to be able to distinguish right from wrong and to adhere to the right and was mentally competent to cooperate in his own defense. The certificate continues:

"3. As a result of my examination, I believe that, at the time of the alleged offense, Lt Gilbert was suffering from a nervous illness, classified as anxiety reaction, acute, severe, which would prevent him from carrying out his duties as ordered. In the course of the past 15 days in my work as psychiatrist for the 8054th Evac Hosp., I have seen approximately 200 cases of a similar anxiety reaction in officers and enlisted men of the U.S. forces in Korea.

"In most of these cases the history indicates a period during which the individual loses control of his emotions and nerves and is unable to direct his actions. This is accompanied by nervousness, intolerance to loud noises, insomnia and upset digestion, in varying degrees. Lt. Gilbert evidenced many of these symptoms, and his description of his feelings at the time of the alleged offense is very similar to the description of similar periods given to me by patients.

"4. Such anxiety reactions are more frequent in persons with a predisposition as shown by similar illnesses previously. In Jan 1945, while serving with the 92nd Division in Italy, Lt Gilbert was examined by the Division Psychiatrist because of an intolerance to artillery fire. At that time itwas recommended that Lt Gilbert be assigned to rear area duties and this was done for the remainder of the war. It would seem that Lt Gilbert's nervous condition at that time was similar to that which developed in the present conflict.

"5. Because of these facts, I believe that, while he was able to distinguish right from wrong at the time of the alleged offense, there is reasonable doubt that Lt Gilbert was able to adhere to the right at that time."

d. Discussion.

The Board of Review has concluded that the opinion of the psychiatrist that there was reasonable doubt that the accused at the time of the alleged offense was able to adhere to the right and the opinion of the board of medical officers that he "was so emotionally disturbed (anxiety reaction acute, severe) as to be unable to adhere to the right," together with the lay testimony "to the same effect," are sufficient to raise a reasonable doubt as to the mental responsibility of the accused. The Board held that since a conclusion that the accused was mentally responsible at the time of the alleged offense was not considered justified, the accused's conviction was unwarranted and the record of trial is therefore legally insufficient to support the findings of guilty and the sentence.

After full consideration of all the evidence in the case and the applicable law, we are impelled to the opinion that the Board of Review fell into error in its conclusion and holding. The principles involved are well settled. The only question for determination is their application to the facts of this case.

If a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, he cannot legally be convicted. A person is not mentally responsible in a criminal sense for an offense unless he was at the time so far free from mental defect, disease or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. His mental defect, disease or derangement must involve an irrational state of mind which is the result of deterioration, destruction or malfunction of the mental, as distinguished from moral, faculties. A defect of character, will power, or behavior, as manifested by one or more offenses or otherwise, does not necessarily indicate insanity even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged (MCM 1949, par 110b, p 121). A person is insane within the meaning of the Manual if he lacked mental responsibility at the time of the offense (Ibid, par 110a, p 121).

The initial presumption that the accused was sane at the time of the alleged offense supplies the required proof of mental responsibility and authorizes the court to assume the accused's sanity unless evidence is presented to the contrary. When evidence tending to prove that the accused was insane at the time of the alleged offense is introduced, the sanity of the accused is an essential issue. The burden of proving the accused's sanity, like every other fact necessary to establish the offense alleged, is always on the prosecution, but it is not incumbent upon the prosecution to introduce any evidence tending to prove sanity until it becomes an issue in the case. If in the light of all the evidence, including that supplied by the presumption of sanity, a reasonable doubt remains as to the accused's mental responsibility at the time of the alleged

offense, the court must find him not guilty of that offense (Ibid, par 112a, pages 122-123).

The issue of the accused's sanity is one of fact. Although the testimony of an expert on mental disorders on the issue may be given greater weight than that of a lay witness, in a proper case a lay witness who is acquainted with the accused and has observed his behavior may testify as to his observations and give such opinion as to the accused's general mental condition as may be within the bounds of common experience and means of observation (Ibid, par 112c, p 124).

In an appropriate case in which the issue is resolved against the accused, the court in arriving at its sentence may consider any evidence with respect to his mental condition which falls short of creating a reasonable doubt as to his sanity. The fact that by virtue of a curable mental or neurological condition his ability to adhere to the right is diminished may be a mitigating factor. On the other hand, in determining the severity of the sentence, the court may consider evidence of a nature tending to show that the accused has little regard for the rights of others (Ibid, par 113, p 125).

The role of expert testimony by a psychiatrist on the issue of mental responsibility is well defined and illustrated in CM 291191, Balfour, 21 BR (ETO) 237, wherein the accused was convicted of two specifications alleging that he ran away from his platoon which was engaged with the enemy, on 12 and 15 March 1945, respectively, and did not return thereto, in violation of Article of War 75. The evidence showed that on each occasion the accused deliberately and consciously left his place of duty in the front line of combat and sought and found safety in the rear at the company command post. The defense introduced the report of an Army psychiatrist dated 21 March 1945 which included his conclusions that the accused: (1) was able to understand the nature of the court-martial proceedings and to conduct or cooperate in his defense, (2) was at the time of the alleged offense suffering from a defect of reason resulting from disorder of the mind which prevented him from knowing the nature, quality and consequences of his act, or if he did know, then rendered him unable to refrain from such act, (3) was suffering from fear reaction which might affect his behavior by disturbing his judgment and self-control, and (4) was not at the time of the alleged offense free from mental defect, disease or derangement so as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right. The prosecution introduced testimony by lay military witnesses to the effect that on 12 March 1945 the accused was in his right mind, seemed to know what he was doing and was calm rather than excited, but was scared; and that on 15 March he still appeared calm and normal. There was also testimony that when the accused appeared at the company command post and the captain asked him why he had come back, "he said he just came back, he

could not take it any more." The accused thereupon refused to obey a direct order by the captain to go back to the front and said he would rather be court-martialed. The captain explained to him the consequences of a court-martial and asked the accused if he knew what he was doing, and the accused answered in the affirmative.

The Board of Review, in concluding that the record of trial was legally sufficient to support the findings of guilty and the sentence, pointed out that the question as to the accused's mental capacity was one of fact, peculiarly for the court, whose finding was entitled to the presumption that it was correct. The Board stated:

> "It is manifest that there is disclosed in the record of trial a conflict of testimony which it was the duty of the court to resolve. * * *
>
> "Opposed to the opinion of the psychiatrist is the explicit testimony of fellow soldiers who observed accused's condition, actions and attitude at the crucial times and places. * * * Accused displayed only a cold-blooded determination not to return to combat. There is therefore testimony in the record of trial of a substantial nature which supports the finding that accused was sane." (p 242)

The Board quoted authority to the effect that in case of a conflict between expert testimony and other evidence in the case, the trier of fact was not bound to accept the expert testimony in preference to the other, but might judge the weight of each and determine the issue of fact as it deemed proper (22 C J sec 828, p 738). The Board also quoted authority to the effect that medical opinion as to sanity or insanity is by no means conclusive upon the point and that the trier of fact is entitled to place whatever weight it chooses upon such testimony (20 Am Jur, sec 1211, pages 1063, 1064). The Board concluded that the court's findings that the accused was sane were supported by the prosecution's objective evidence even though it was opposed by the opinion of the expert psychiatrist, and that the court had simply resolved a conflict in the evidence against the accused.

The Board was careful to recognize that in the administration of military justice extraordinary care and circumspection are required whenever a question arises as to the accused's mental condition. Referring to the provisions of the Manual for Courts-Martial, 1928, which exemplified this solicitude, the Board stated:

> "* * * The foregoing are proper and practical provisions prompted in the endeavor to insure that the administration of military justice is humane and consonant with the standards of civilized society in the treatment and care of mentally afflicted persons. However, they should not be interpreted

as endowing the report or the opinion of a mental specialist or a psychiatric board with the power of ultimate determination of the question of an accused's mental responsibility in a case before a court-martial. That is the duty of the court in the first instance and of the reviewing or confirming authority when they are required to act upon a sentence. The testimony of a specialist or of a member of a psychiatric board before a court is entitled to the respect and consideration of like testimony before a civil court, but it is not binding or conclusive on a court-martial any more than it binds a jury or a civil court sitting without a jury. It is part of the evidence in the case to be weighed and evaluated as any other evidence. It was not the intention of Congress or of the Manual for Courts-Martial to constitute a board convened under AR 600-500 as an independent fact finding agency whose findings must be accepted as final by a court-martial. A fortiori, the opinion of a psychiatrist, although an officer of the Army with recognized professional duties to perform in his command, does not oust the court from its duty to determine the ultimate fact of an accused's mental responsibility for his acts. Such experts are but witnesses before a judicial body and their evidence is subject to the same tests as to weight, value and sufficiency as to the testimony of any other witness (CM ETO 9611, Prairiechief, supra). To consider the testimony of the psychiatrist in the instant case in any other light would be to give him a status not contemplated by the Acts of Congress, the Manual for Courts-Martial or the Army Regulations." (pages 243-244)

In CM 289418, Aasen, 26 BR ETO 305, the accused was convicted of misbehaving himself before the enemy by running away from his platoon, which was then engaged with the enemy, and seeking safety in the rear. The prosecution established the commission of the offense, but an Army psychiatrist testified for the defense that, after examining the accused about two weeks after the alleged offense, he concluded that the accused was suffering from "psychoneurosis, anxiety state, moderately severe," that he was "emotionally labile" with an "unstable type of personality" and that he, therefore, had a "defect of reason resulting from a disorder of the mind" which prevented him from knowing the consequence of a wrongful act, and was unable at the time to distinguish between rightful and wrongful acts and to control his behavior.

The Board of Review in the Aasen case held that the psychiatrist's testimony was sufficient to dissipate the presumption of sanity, but concluded that, even in the absence of rebutting medical testimony, there was substantial evidence establishing that the accused knew the difference between right and wrong and could adhere to the right.

The court could infer from the accused's statement that he ran down the hill from the platoon command post about 200 yards, stopped and tried to summon courage to go back, that he had some comprehension of his obligation to stay at his post and some consciousness that what he was doing was wrong. The Board stated:

> "* * * Certainly the court could conclude that a man who was capable of deliberating and deciding on the desirability of a course of conduct was not a man whose faculty of choice had been paralyzed and whose moral sense had been destroyed. The testimony of a psychiatrist is valuable, but he will not be permitted to usurp the function of the judge. Such opinion evidence will be given careful consideration, but it is not binding and the conclusions thereof need not decide the ultimate issue. The responsibility for decision was the court's. Particularly is this true when not all the assumed facts, as the premise of the hypothesis, are in evidence, as is the case here. The effect of the expert's conclusion is that the accused was afraid, so afraid that he did not know what he was doing. The 75th Article of War is intended to punish cowardice, and it would be reductio ad absurdem to hold that a man cannot be punished for cowardice because he was too cowardly. The Article is essential to military success in battle and must be enforced to deter cowardice and panic." (p 311)

An example of the treatment of the question by the Federal courts is Holloway v. United States (CA, DC 1945), 148 F 2nd 665, cert. den. 334 U.S. 852. There the defendant appealed from a conviction of rape on the ground that the record disclosed such substantial doubt of his sanity that the verdict should be set aside. The evidence showed that for years prior to the crime the defendant was suffering from mental disease and was an abnormal psychopathic personality. He had been held for mental observation and later confined in a Federal instutition as a mental case. He had been released, not as recovered, but in the custody of his mother with directions for treatment of his mental disorders. Some months after his release he raped two women on the same day. Two psychiatrists testified that the defendant was of unsound mind and at the time of the offense could not tell right from wrong. A third psychiatrist testified that the defendant was a constitutional psychopath but that his condition did not amount to a psychosis and that he was able to tell right from wrong. This witness admitted that he did not know the defendant's previous mental record. The Government introduced the record of a lunacy inquisition wherein the jury found that the defendant was of sound mind. The court by Justice Arnold affirmed the conviction on the following grounds: The ordinary test of criminal responsibility

is the ability to tell right from wrong. A slightly broader test, recognized by the Supreme Court (Hotema v. U.S., 1902, 186 U.S. 413, 419), is whether the defendant's will was controlled not by rational thought but by mental disease. But there is no objective standard for measuring the judgment of an admittedly abnormal offender. It must be based on the instinctive sense of justice of ordinary men. There is a conflict between the science of psychiatry and the traditional idea that an offender who can talk and think rationally is morally responsible for what he does. To the psychiatrist mental cases represent gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. An offender is wholly sane or wholly insane.

> "* * * For that reason the principal function of a psychiatrist who testifies on the mental state of an abnormal offender is to inform the jury of the character of his mental disease. The psychiatrist's moral judgment reached on the basis of his observations is relevant. But it cannot bind the jury except within broad limits. To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do.
>
> "The institution which applies our inherited ideas of moral responsibility to individuals prosecuted for crime is a jury of ordinary men. These men must be told that in order to convict they should have no reasonable doubt of the defendant's sanity. After they have declared by their verdict that they have no such doubt their judgment should not be disturbed on the ground it is contrary to expert psychiatric opinion." (page 667)

Recognition of the dangers inherent in the approach of the science of psychiatry discussed in the Holloway case, and the need for a realistic attitude in the analysis of medicolegal problems in combat psychiatry, has led to intensive study of the subject. The analysis thereof in TM 8-240 AFM 160-42, September 1950, Psychiatry in Military Law, Section 3, Paragraph 16, Page 17, is highly significant. Among four of the six general diagnostic categories encountered in medicolegal combat psychiatry, only one subdivision of one category prevents the individual from recognizing the difference between right and wrong or from adhering to the right. This particular diagnosis is designated "combat-precipitated psychiatric disorders * * * anxiety reactions, severe, with major personality disorganization and clouding of consciousness" (par 16a(5)(c), p 17). The other categories, including anxiety reactions which are severe without major personality disorganization, do not absolve the individual from criminal accountability.

> "Severe anxiety reactions * * * may cause the individual in given combat circumstances to experience greater than average difficulty in avoiding offenses against the military code. In such cases, the anxiety reaction may properly be reported as rendering 'adherence to the right' more than normally difficult. This then may be taken into account by

the court in extenuation of the offense. However, individuals with reactions falling into this category are criminally accountable." (par 16b(2)(b), p 19)

The mentioned category which prevents the individual from adhering to the right involves acute disorganization of reactions. An example is the true panic, involving temporary major disorganization of thinking and control, with clouding of consciousness. The individual's actions are usually wholly unadaptive and compromise his safety. This phenomenon is illustrated in the panic run, in which, usually during a shelling, the individual deserts cover and dashes about impulsively, as often toward the enemy as away, exposing himself to flying shell fragments. Most individuals developing actions of this type do not survive (par 16b(3), pages 19-20).

In summary, the Army psychiatrist is required to bear in mind that in combat most soldiers experience symptoms that would be considered abnormal in a civilian setting. Normality of action must be defined in relation to the situation in which these reactions take place. Pathological battle reactions must be evaluated against the base line of normal battle reaction (Bull US Army Med Dept, Combat Psychiatry, Supplemental Number, November 1949, Summary, p 11).

The evidence in the instant case is that following an enemy penetration of the Outpost Line of Resistance, the accused left the company under his command on the line, with fifteen enlisted men, and proceeded to the vicinity of the Main Line of Resistance, some 1200 to 1600 yards in the rear. In our opinion, his explanations to his superior officers that he had been or would have been cut off and that he had lost contact with others, his persistent refusal to return to his place of duty on the ground that he had a wife and child or children to consider, and his statements to Colonel White that he was aware of what he was doing and of its seriousness and that his reason for not obeying the colonel's order was that he was scared - all bespeak not irrationality, but a deliberate, determined, rational purpose to justify avoiding extreme personal danger.

The accused's mental responsibility is further confirmed by the testimony of Colonel Roberts that although the accused looked like a man who was in combat (which was perfectly natural under the circumstances), his reactions did not seem different from those of others in the same situation, and that he appeared to understand what was happening and to be capable of carrying out orders; the testimony of Major Donaho that the accused gave no indication of mental incapacity, talked coherently, understood their conversation and appeared rational; and the testimony of Colonel White that the accused gave no indication that he was not in full possession of his mental faculties.

Against the foregoing evidence, the defense introduced: (1) the conclusion of the three medical officers, including a psychiatrist, that the accused "was so emotionally disturbed (anxiety reaction acute, severe), as to be unable to adhere to the right;" (2) the conclusion of First Lieutenant Krause, the psychiatrist, that there was reasonable doubt that the accused was able to adhere to the right at the time of his alleged offense because of his evidencing many anxiety reaction symptoms, his description of his feelings at the time of the incident and his history of a similar nervous disorder in Italy during World War II; and (3) the testimony of three witnesses, who had known the accused for a substantial period of time, that he seemed to be under a strain, was depressed and unresponsive, was not even aware of sniper fire, appeared not to have control of his men, looked stunned and confused, lacked his usual alertness in reactions and observance of orders, and was in a shocked condition. We also note, however, with respect to other defense testimony, that Lieutenant Zipp could not testify whether or not the accused was mentally capable of carrying out an order and could express no opinion as to his mental attitude; that Lieutenant Perilli did not believe the accused was completely incapable of carrying out orders, and that Sergeant Paul not only could not say definitely that there was something mentally wrong with the accused, but actually believed the reason the accused did not go forward was because the "enemy" had the majority of the men pinned down by machine gun and mortar fire. Moreover, the stipulated testimony of the defense witnesses on the merits generally to the effect that the accused left the hill to make contact with Lieutenant Barnes in order to have a road block set up for withdrawal of his troops, indicates rationality at that time on the part of the accused.

We are of the opinion that the court was fully warranted in concluding from the totality of the evidence that the accused was mentally responsible beyond a reasonable doubt for his actions on 31 July 1950. Under the provisions of the Manual for Courts-Martial and the doctrine of the Balfour, Aasen and Holloway cases, supra, as well as under ordinary principles of common sense and logic, we conclude that the court properly denied the defense motion to dismiss the charge and specification on the ground of the accused's insanity.

In the interest of justice the Judicial Council caused the record and allied papers, including the opinion of the Board of Review, to be transmitted to The Surgeon General of the Army for a further report upon the accused's mental responsibility. In response, the Chief, Psychiatry and Neurology Consultants Division, Office of the Surgeon General, has submitted a memorandum, dated 30 October 1950, to the effect that after careful review of the record of trial and accompanying papers it is the opinion of that office that the accused was at the time of the alleged offense so far free from mental defect, disease or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right, and that the accused at the time of trial possessed sufficient mental capacity to

understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense. The memorandum further states that there is no evidence in the record to indicate that the accused was suffering from a mental condition of such a degree as to render him not mentally responsible (referring to Suppl No, Bull US Med Dept and par 16, sec III TM 8-240, supra). The memorandum concludes: "In the light of [the accused's] prior combat service and prior emotional instability in combat, it is believed that a measure of clemency would be entirely justified." The Surgeon General of the Army concurred in the above opinion and recommendation.

5. Discussion.

a. Procedural matters.

It is contended by counsel upon appellate review that the record does not reveal that an impartial and full investigation of the charges was made in conformity with Article of War 46b, or that the accused was represented or given the opportunity to be represented at the investigation, if one did occur.

The report of the Investigating Officer in this case, which quite properly was not made a part of the record of trial proper (MCM 1949, App 6, pages 348-359, App 12, pages 372-374) is attached to the record as one of the allied papers and states, among other things, that the investigation was made in accordance with the provisions of Article of War 46b and paragraph 35a, Manual for Courts-Martial, that the accused was advised of his rights to have counsel represent him at the investigation, to cross-examine all available witnesses against him, to present anything he might desire on his own behalf either in defense or mitigation, to have the investigating officer examine available witnesses requested by him, and to make a statement, if he so desired, in any form regarding the offense being investigated. The report states further that the accused requested First Lieutenant Robert B. Ellard as counsel, that that officer was present as counsel for the accused throughout the investigation, and that the contents of attached statements by the three prosecution witnesses were made known to the accused, who stated he did not desire to cross-examine such witnesses. It thus appears that the investigation was conducted in compliance with Article of War 46b and the Manual for Courts-Martial.

Place of trial.

It is objected, in effect, that because the trial was held within 200 yards of the front line, where a "fire fight" was in progress at the time, it was impossible under these circumstances for the court-martial to act impartially and that the accused was therefore denied a fair trial. At the trial no objection or motion was made concerning the place of trial.

The Articles of War do not impose any requirements as to where a court-martial shall sit, and permit any place which will promote the ends of justice (CM 324235, Durant, 73 BR 49, 70). The administration of military justice must, and may properly, respond to practical exigencies. To have held the trial in a rear area probably would have prevented the personal appearance of any of the witnesses. To have delayed the trial for any great period might have resulted in the loss of vital witnesses as casualties. There is no evidence that the members of the court were subjected to any outside influence. We are of the opinion that, under all the circumstances, the holding of the trial where it was held was clearly proper, regardless of the proximity to combat operations.

Adequacy of defense.

It is contended upon appellate review that the accused was not adequately defended at the trial. The grounds of this contention are that the defense counsel, an officer of The Judge Advocate General's Corps, by whom the accused expressly stated in court he desired to be defended, did not take adequate steps to introduce evidence or address arguments to the court with a view to raising a reasonable doubt in the minds of its members on the issue of the accused's mental responsibility. It is also complained that defense counsel should have placed the accused on the witness stand, and improperly entered into stipulations covering the testimony of three defense witnesses, instead of insisting that they be called to testify before the court. The defense may well have concluded that it was to the accused's tactical advantage not to expose him or the others to cross-examination. In this connection, it is to be observed that the defense counsel did call three witnesses to testify concerning the accused's mental responsibility, the principal issue in the case. A careful examination of the record of trial leads us to conclude that the matters complained of related essentially to trial tactics and afforded no ground for invalidating the proceedings (CM 337951, Lawrence and Smith, BR-JC April 1950, pages 24-25). Clearly there is no evidence of such disloyalty or carelessness by defense counsel, in aid of the prosecution, as to require invalidating the proceedings (see CM 320618, Gardner, 70 BR 71, 78). Upon the whole record we conclude that the accused was adequately and effectively represented by counsel.

Law member's advice concerning presumption of innocence and burden of proof.

It is argued that the law member's advice to the court just prior to the time it closed to vote upon the findings (R 51) was inadequate in that it was limited to a "verbatim" repetition of the

last sentence of Article of War 31, and that the advice should have included in substance the discussion in the Manual for Courts-Martial, 1949, Paragraph 78a, Pages 74-75, concerning "reasonable doubt." We are unable to perceive any error in the law member's advice to the court. There is certainly no impropriety in literal compliance with the provision of Article of War 31 as to the law member's duty to advise the court as to the presumption of innocence and the burden of proof. His advice in this case was precisely as prescribed in Appendix 5, page 334 of the Manual for Courts-Martial, 1949, entitled "Procedure for trials before general and special courts-martial" (see p 345). It may be presumed that the members of the court, who comprised two lieutenant colonels, four majors and one captain, were sufficiently intelligent, educated and informed thoroughly to understand and appreciate the advice as given as well as its implications.

b. Misbehavior before the enemy.

Status of North Korean forces as enemy.

It is strenuously urged by counsel for the accused on appellate review that the court did not have jurisdiction to try the accused under Article of War 75 because that Article denounces only offenses committed in time of war. The Article so far as here material provides:

> "Any officer * * * who, before the enemy, misbehaves himself * * * shall suffer death or such other punishment as a court-martial may direct."

It is contended, in effect, that war did not exist on 31 July 1950, the date of the alleged offense, and that since the United States has no enemies, in a military sense, except those with whom Congress has legally declared war, there was on that date no "enemy" at or near Sangju, Korea, or elsewhere, before whom the accused could have misbehaved himself in violation of Article of War 75.

The Manual for Courts-Martial, 1949, specifically defines the word "enemy," as used in Article of War 75, in the following language:

> "'The enemy' includes not merely the organized forces of the enemy in time of war, but also imports any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades." (par 163a, p 216).

The definition of "enemy" under the Article, contained in the Manual for Courts-Martial, 1928 (par 141a, p 166) reads as follows:

"'The enemy' imports any hostile body that our forces may be opposing, such as a rebellious mob, a band of renegades, or a tribe of Indians."

The elaboration of the definition in the 1949 version confirms what is apparent from that version itself, that the "enemy," within the contemplation of Article of War 75, includes not only organized opposing forces in time of war, but also any other hostile body that our forces may be opposing, whether or not in time of war. See also Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, page 624, stating that the enemy may be hostile Indians and misbehaving before the enemy may be committed in the course of warfare with Indians equally as in a foreign or civil war. That the North Korean forces constituted on 31 July 1950 a hostile body that our forces were opposing is a matter of common knowledge and, therefore, a proper subject of judicial notice both by the court and by appellate agencies in the Office of The Judge Advocate General, including the Judicial Council (See CM 292616, Richey, 57 BR 249, 251; CM 231445, Teixeira, 18 BR 197, 213). It follows that the North Korean forces which our forces were opposing at or near Sangju, Korea, on or about 31 July 1950, constituted "the enemy" in the sense of Article of War 75, irrespective of whether the United States was or was not at war with the government of North Korea at that time.

Even assuming, as contended by counsel, that a state of war is a prerequisite to the application of Article of War 75, we still conclude, for the reasons hereinafter set forth, that the Article was in full force and effect at the time and place of the accused's offense, notwithstanding the legislative termination of World War II on 25 July 1947 so far as Article of War 75 is concerned (61 Stat 449, ch 327, sec. 3). The background, extent and nature of the hostilities between the United States and North Korean forces on 31 July 1950, and the inevitable results of such hostilities up to that time in terms of casualties, again matters of common knowledge and therefore proper subjects of judicial notice, are genuine proof of the existence of a state of public war between the two governments on that date.

Reference to Department of State Publication 3922, Far Eastern Series 34, July 1950 (United States Policy in the Korean Crisis), setting forth historical facts of which we take judicial notice, discloses the following. The 38th parallel in Korea was originally the line of demarcation between the zones fixed for Soviet and American acceptance of the surrender of Japanese troops. The government of the Republic of Korea was established on 15 August 1948, following an election, supervised by a United Nations Commission, which had been confined to southern Korea due to Soviet intransigence. The new government was accepted by the United Nations in December 1948 as the lawful government of Korea and was recognized by the United States on 1 January 1949. The

United States has given continuous assistance and support to the Republic in order to enable its people to progress toward freedom and independence. Meanwhile, in Korea, north of the 38th parallel, which line had become a part of the "Iron Curtain," the Soviet Union in September 1948, in defiance of the United Nations, established a Communist regime which claimed jurisdiction over the entire country.

On 25 June 1950, North Korean forces launched an all-out offensive across the 38th parallel against the Republic of Korea. Considering this assault as a breach of the peace and an act of aggression, the United States Government brought the matter to the attention of the United Nations at once, requesting an immediate meeting of the Security Council. The Security Council promptly met and considered a report from the United Nations Commission on Korea which confirmed the attack and invited the attention of the Secretary-General to the "serious situation developing which is assuming character of full-scale war and may endanger the maintenance of international peace and security" (UN doc S/1496). The Council adopted a resolution which determined that the armed attack upon the Republic of Korea constituted a breach of the peace and called for immediate cessation of hostilities and withdrawal of North Korean forces to the 38th parallel. The resolution also requested members of the Council to render every assistance to the United Nations in the execution of the resolution and to refrain from giving any assistance to the North Korean authorities.

The United States also immediately ordered the evacuation of the American women and children from Korea and provided air cover therefor. Pursuant to the Council's resolution and following a conference on 25 June 1950 attended by the President, the Secretaries of State and Defense, their senior advisors, and the Joint Chiefs of Staff, General MacArthur was authorized to furnish to the South Korean government additional military supplies and assistance. On 27 June, the President announced that he had ordered United States air and sea forces to give cover and support to the South Korean government troops. The Security Council met later on the same day and considered, among other things, a report from the United Nations Commission on Korea, to the effect that efforts to make contact with North Korean authorities in the preceding 18 months had met only with negative response, that North Korea would neither heed the Council's resolution nor accept the Commission's good offices, and that rapid developments might render academic the question of cease-fire and withdrawal called for in the resolution. The Commission's view was that the Northern regime was carrying out a well planned, concerted, and full-scale invasion of South Korea, that South Korean forces were deployed on a wholly defensive basis in all sectors of the parallel, and that they were taken completely by surprise as they had no reason to believe from intelligence sources that invasion was imminent. The Council subsequently received a report dated 24 June

1950 from United Nations field observers, indicating that even before the major attack began, the North Korean forces had been in effective possession of salients on the south side of the 38th parallel, and that the Army of the Republic of Korea was not prepared for offensive action.

At the meeting of 27 June, pursuant to a statement by the United States Representative that the continuing invasion in the face of the Council's resolution of 25 June was an attack on the United Nations itself and calling on the Council to invoke stringent sanctions to restore international peace, the Council adopted a resolution recommending that the members of the United Nations furnish such assistance to the Republic of Korea as might be necessary to repel the armed attack and to restore international peace and security in the area. On 30 June, the President announced that, in keeping with the Security Council's resolution, he had authorized the United States Air Force to conduct missions on specific military targets in North Korea and had ordered a Naval blockade of the entire Korean coast, and that General MacArthur had been authorized to use certain supporting ground units.

The great majority of the other members of the United Nations joined the United States in prompt and overwhelmingly favorable response to the Security Council's resolution of 27 June, promising either material or moral support. Only three members opposed the resolution, the Soviet Union, Czechoslovakia and Poland.

In order better to utilize the various offers of assistance and to unify the operations and defense of the Republic of Korea, the Security Council on 7 July 1950 adopted a resolution requesting the nations supplying forces and other assistance to put them under a unified command headed by the United States, and requesting the United States to designate the commander of such forces. On 8 July, pursuant to this resolution, the President designated General MacArthur as Commanding General of the forces operating in Korea.

We further take judicial notice that on 31 July 1950, the date of the alleged offense, hostilities in Korea had reached an advanced combat stage. The North Koreans had at that time an estimated eleven divisions in the line, opposed by four and one-half United States and five Korean divisions. On 21 July 1950, the North Korean forces had attacked astride the Taejon-Taegu Road with the end in view of seizing the base at Pusan by a wide turning movement down the west coast and then eastward parallel to the south coast. Aware of the danger involved in the North Koreans' turning movement, the United States Eighth Army ordered the 25th Infantry Division, posted north of Taegu, to the south coast. By 1 August the division was in position and the North Korean forces had passed Chinju and were near Masan, some 35 miles from Pusan. Meanwhile the 2d Infantry Division had arrived from the United States on 31 July. During this

period, the United States Air Force gave constant tactical air support to the troops in battle, preventing the North Koreans from using roads and carrying on extensive bombing operations in rear areas. Also, the United States Navy blockaded the Korean east coast and shelled and bombed North Korean installations on or near the coast.

Official casualty statistics, which we judicially notice, indicate the serious extent of military operations at the time in question. Battle casualties among United States personnel since the commencement of hostilities had reached a substantial number by 31 July 1950.

In The Eliza (Bas v. Tingy) (1800), 4 Dallas 37, the question was whether in March 1799 France was an enemy of the United States within the meaning of a statute authorizing increased salvage upon recapture, after a certain period, of an American vessel from the enemy, although Congress had not declared war. Washington, Justice, stated that the question was whether a state of war subsisted between the two nations, and continued:

> "* * * every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; * * *. [p 39]
>
> "But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities, such as in a solemn war, where the government restrain the general power." (p 40)

The United States and France "certainly were not friends"

> "because there was a contention by force; nor were they private enemies, because the contention was external, and authorized by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy." (p 40)

Chase, Justice, stated:

"So far it is, unquestionally, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.
"* * * As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of 'enemy' extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. * * *" (p 44)

In the Prize Cases (The Brig Amy Warwick, et al (1862)), 67 U. S. 635, certain vessels with cargo belonging to citizens of Confederate States were captured and brought in as prizes of war by public ships of the United States. The claimants appealed from decrees of condemnation in the Federal District Court. The Supreme Court was called upon to determine whether the United States was legally in a state of war in 1861 following the commencement of hostilities with the Confederate States. Only a legal status of war could justify and legalize the capture of neutral vessels which violated the blockade imposed on those States by President Lincoln. Since the war was never declared, the question was whether a legal status of war automatically resulted from the organized hostilities against the Union commencing with the attack upon Fort Sumter, or whether under the Constitution congressional action was required. Mr. Justice Grier, considering the question whether the President's blockade of Confederate ports in April 1861 was justified, wrote as follows:

"War has been well defined to be, 'That state in which a nation prosecutes its right by force.' * * * [p 666]
"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral'. Lord Stowell observes ' * * * war may exist without a declaration on either side. * * *' [p 668]
"The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." (p 670)

In Hamilton v. McClaughry (CC D Kan, 1905), 136 F. 445, the question was whether "time of war," within the former 58th Article of War providing for trial by court-martial of murder committed by soldiers in time of war, existed during the Boxer Uprising in China in

June 1900. During the uprising the United States, without declaring a war, assembled an Army of 15,000 men, over 5,000 of whom proceeded to China, where they assisted the forces of the allied nations in quelling the uprising and released foreign legations from confinement in the City of Pekin. The court stated:

> "Again, it is the well-settled law that the existence of a condition of war must be determined by the political department of the government; that the courts take judicial notice of such determination and are bound thereby * * *. "* * * In the present case, at no time was there any formal declaration of war between the political department of this government against either the government of China or the 'Boxer' element of that government. A formal declaration of war, however, is unnecessary to constitute a condition of war. * * * the question here is whether this government was at the time of the commission of the homicide by petitioner, prosecuting its right in Chinese territory by force of arms." (pages 449-450)

and held that at the time the homicide was committed, "there prevailed in China a condition of war, within the spirit and intent of the fifty-eighth article of war."

The Board of Review has recognized and applied the foregoing principles. In CM 292616, Richey, 57 BR 249, the accused was convicted of desertion commencing on or about 8 December 1941. Judicial notice was taken that the Japanese attack occurred in Hawaii on the morning of 7 December 1941. The evidence showed that the accused absented himself without leave at 6 a.m. on 8 December 1941, prior to the passage by the Senate and House of Representatives of the resolution formally declaring war upon Japan. The Board reviewed the authorities and concluded that the accused's desertion commenced in "time of war" within Article of War 39, so that his prosecution in 1945 was not barred by the statute of limitations. The Board considered and rejected a contrary result reached in three cases involving litigation over life insurance policies (West v. Palmetto State Life Ins Co (1943), 202 SC 422, 25 SE 2d 475; Rosenau et al v. Idaho Mut Ben Ass'n (1944), 65 Idaho 408, 145 P 2d 227; Savage v. Sun Life Ass'ce Co of Can (DCWD, La, 1944), 57 F Supp 620). We likewise do not agree with the result reached in the cited cases but regard the opinions in the Supreme Court cases and Hamilton v. McClaughry, supra, as a correct expression of the law on this question.

Applying the principles of the last mentioned cases to the judicially noticeable facts regarding the hostilities between United States forces and those of the government of North Korea on 31 July 1950, we are impelled to conclude that a state of war then existed and that the North Koreans were the enemy within the contemplation of Article of War 75.

Misbehavior.

The specification herein follows Form 39, under Article of War 75, Appendix 4, page 318, Manual for Courts-Martial, 1949, and clearly states an offense under that Article. The evidence shows that the accused, having left his assigned position which was with the company under his command in the Outpost Line of Resistance, elements of which were in contact with the enemy, was found with fifteen of his enlisted men some 1200 yards to the rear. He then deliberately refused to advance with or without the men to rejoin his company, which had been ordered by Colonel H. V. White, his regimental commander, to engage in combat with the opposing enemy forces. Beyond question the accused was "before the enemy." The clause "before the enemy, misbehaves himself" covers any act of cowardice, insubordination or like conduct committed by an officer or soldier in the presence of the enemy (MCM 1949, par 163a, p 216). The clause includes such acts by a commanding officer as failing to advance against the enemy when ordered or properly called upon to do so (Winthrop's Military Law and Precedents, 2nd Ed, 1920 Reprint, p 622), and such acts by any officer as refusing or failing to advance with the command when ordered forward to meet the enemy (Ibid, p 623). It is well established that conduct of the nature of the accused's in this case constitutes a clear violation of Article of War 75 (CM 267114, Langer, 3 BR (NATO-MTO) 167; CM 285209, Ison, 5 BR (ETO) 185; CM 285211, Dixon, 5 BR (ETO) 217; CM 290609, Shera, 13 BR (ETO) 173; CM 290632, Skovan, 13 BR (ETO) 321; CM 289472, Scheck, 14 BR (ETO) 47; CM 284783, Acers, 14 BR (ETO) 157; CM 288797, Young, 18 BR (ETO) 121).

It is contended that the accused was given conflicting orders by at least three superior officers within a short period of time, one by Colonel Roberts to rejoin his platoon by any way he could, a second by Lieutenant Zipp to have his men help release certain vehicles, and a third by Colonel White to return to the Outpost Line of Resistance. The record shows that Colonel Roberts merely indicated to the accused the direction by which his unit could return to the Outpost Line under the protection of advancing tanks; that Major Donaho directed the accused to take his group back to his company's position on the Outpost Line; that Lieutenant Zipp merely said to him, "Let's go, Gil"; and that Colonel White directed the accused to take his group back up to the Outpost Line and rejoin the rest of his company. Lieutenant Zipp's statement was a suggestion rather than an order and there is nothing in the evidence to show any conflict or inconsistency among the orders given by Colonels Roberts and White and Major Donaho. Although they varied in details, their intent and purpose were obvious and were essentially the same, i.e., to have the accused return to his place of duty with his company on the Outpost Line of Resistance. In this connection, the accused was not charged with disobeying any specific order but with refusing to advance with his command which had been ordered forward by Colonel White. As

indicated, the record establishes the charge.

6. The Judicial Council has considered carefully the arguments on behalf of the accused as well as various communications received and atached to the record of trial.

7. The accused is thirty-one years of age, is married and has two children. He had enlisted service from 18 August 1940 to 18 December 1942 and from 2 October 1947 to 6 April 1949. He had commissioned service from 19 December 1942 to 7 February 1946 and from 7 April 1949. He was promoted to first lieutenant on 25 July 1949. He has served overseas from October 1944 to November 1945 and since 9 February 1948 has served in Japan and the Far East.

8. The court was legally constituted and had jurisdiction of the accused and the offense alleged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Judicial Council 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. In view of all the circumstances of the case, including the accused's anxiety state at the time of the offense, we recommend that the sentence be commuted to dismissal from the service, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for thirty years. A sentence to death or imprisonment is authorized upon a conviction under Article of War 75.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr. Brig Gen, JAGC
Chairman

JAGU CM 343472 1st Ind.

JAGO, Department of the Army, Washington 25, D.C. 16 NOV 1950

TO: The Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial, the holding by the Board of Review and the opinion of the Judicial Council in the case of First Lieutenant Leon A. Gilbert, 01304518, Company A, 24th Infantry Regiment, 25th Infantry Division, APO 25.

2. Upon trial by general court-martial convened on 25 August and 5 and 6 September 1950 this officer was found guilty of misbehaving himself before the enemy, in violation of the 75th Article of War, at or near Sangju, Korea, on or about 31 July 1950, by refusing to advance with his command, which had been ordered forward by Colonel H. V. White, Commanding Officer of the 24th Infantry Regiment, to engage the North Korean forces, which forces the said command was then opposing. He was sentenced to death, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. I do not concur in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, but I concur in the opinion of the Judicial Council 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 Judicial Council and I recommend that the sentence be confirmed but, in view of all the circumstances in the case, including the accused's anxiety state at the time of the offense, the Judicial Council and I further recommend that the sentence be commuted to dismissal, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for thirty years, and that the sentence as thus commuted be carried into execution. I further recommend that the United States Disciplinary Barracks or one of its branches be designated as the place of confinement.

4. Consideration has been given to a brief on behalf of the accused submitted by William W. Wogan and Judson E. Ruch, Attorneys at Law; to documents submitted and representations in his behalf made by representatives of the Harlem Branch of the New York Civil Rights Congress, the Harlem Trade Union Council and the American Labor Party; to expressions of interest by Governor James Duff of the State of Pennsylvania, Senators Scott W. Lucas, Edward J. Thye, Eugene D. Millikin, Edwin C. Johnson, Edward Martin, Francis J. Myers, Margaret Chase Smith, Sheridan Downey,

Wayne Morse, Millard E. Tydings, Alexander Wiley and Herbert H. Lehman; Representatives James G. Fulton, Mike Mansfield, James F. Lind, Louis B. Heller, John J. Allen, Jr., Foster Furcolo, Walter B. Huber, Omar Burleson, Clarence J. Brown, Leonard W. Hall and Cecil R. King; and Mr. Frank M. McHale, Democratic National Committeeman for Indiana; and to letters, telegrams, statements and petitions, on behalf of the accused, addressed variously to the President, the Secretary of Defense, the Secretary of the Army, the Chief of Staff, The Adjutant General and The Judge Advocate General of the United States Army, from the following individuals: 50 residents of New York, 14 residents of Connecticut, 11 residents of Washington, 8 residents of New Jersey, 8 residents of California, 6 residents of Pennsylvania, 5 residents of Michigan, 5 residents of Oregon, 4 residents of Ohio, 3 residents of Georgia, 3 residents of Illinois, 2 residents of Virginia, 2 residents of Colorado, 2 residents of North Carolina, 2 residents of Minnesota, 2 residents of Wisconsin, 2 residents of Indiana, 2 residents of Massachusetts, 2 residents of Iowa, 2 residents of Montana, 1 resident of Mississippi, 1 resident of Maine, 1 resident of Arkansas, 1 resident of Florida, 1 resident of Oklahoma, 1 resident of Alabama, 1 resident of Kansas, 1 resident of Texas, 1 resident of South Carolina, 1 resident Idaho, 1 resident of Kentucky, 1 resident of Washington, D.C., and 2 residents of Canada; and from the following organizations: National Sunday School and B. C. H. Congress; National Fraternal Council of Churches; Berkley College Chapter, NAACP, Berkley, California; University of Wisconsin Chapter, NAACP; Washington Bureau, NAACP; Robert L. Carter, New York Chapter, NAACP; Student Council, School of Education, New York University; Brooklyn Students, Brooklyn, New York; Ladies Improvement Club, Oxford, Ohio; New York Joint Council of Arts, Sciences and Professions, Inc.; Veterans of Foreign Wars; Colored Veterans of America, Inc.; National Director, American Legion; Charles E. Williams Post 794, American Legion; Joe Purcell Post No. 173, American Legion; Charles F. Caldwell Post No. 3498, American Legion; 34th Infantry Division Association; Consumers Union of New York; New York Civil Rights Congress; Harlem Trade Union Council; Pan-Hellenic Council, Roanoke, Virginia; Les Seize Club, Inc., New York; V. C. Jones School, New Orleans, Louisiana; Woman's Society of Christian Service, Metropolitan Methodist Church, Pomonkey, Maryland; ANJV Executive Committee, Amsterdam, Holland; Managing Editor, Pittsburgh Courier; Bedford Stuyvesant Tenant Consumers and Welfare Council; Troop 61, Girl Scouts, New Orleans, Louisiana; Furriers Joint Council of New York; Joint Board of Fur Dressers and Dyers Unions; Union of Marine Cooks and Stewards; Lerner Workers, New York; Bronx County American Labor Party; Labor Youth League, Elizabeth, New Jersey; UPW Local 20, New York; Executive Board, Health Chapter, UPW Local 111, New York; and The George Washington Carver Club, Bowling Green, Kentucky.

5. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action

designed to carry into effect the recommendations hereinabove made, should such recommendations meet with your approval.

Franklin P. Shaw

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

5 Incls
1. Record of trial
2. Holding Board of Review
3. Op Judicial Council
4. Draft of ltr to Pres sig S/A
5. Form of action

(GCMO 88, 1 December 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGZ CM 343542

NOV 24 1950

UNITED STATES v. Private First Class LeROY D. TYLER (RA 19293415), Company A, 16th Infantry Regiment.	1ST INFANTRY DIVISION Trial by G.C.M., convened at Grafenwohr, Germany, 8 September 1950. Dishonorable discharge, total forfeitures after promulgation and confinement for twelve (12) years. Federal institution.

HOLDING by the BOARD OF REVIEW
LUDINGTON, LENEY and BYRNE
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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 LeRoy D. Tyler, Company A, 16th Infantry Regiment did, at Camp Omaha Beach, Grafenwohr, Germany, on or about 2045 hours 6 August 1950, with malice aforethought, willfully, feloniously, and unlawfully kill Private First Class Julius H. Hum, Company A, 16th Infantry Regiment, a human being, by shooting him with a rifle.

The accused pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor for fifteen years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing

execution of the sentence and confinement at hard labor for twelve (12) years, designated a federal institution as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. Evidence.

a. For the Prosecution.

The accused and Private First Class Julius H. Hum, the deceased, became acquainted about June 1949 and from then until the date of the fatal shooting, 6 August 1950, were seen in each other's company a great deal of the time (R 20, Pros Ex 1). Their association was a strange one, in that they argued constantly and quarreled frequently and then appeared to be friends again (R 10, 13, 15, 17, 20, 28, 30, Pros Ex 1). The deceased constantly bullied and dominated the accused and "liked to make Tyler say uncle" (R 13). He beat the accused on numerous occasions, and once threatened to beat him with brass knuckles when he refused to obey Hum's orders. Tyler was afraid of Hum, who was a dirty fighter and who, on at least one occasion, had kicked another soldier in the face after knocking him down in a fight (R 15, Pros Ex 1).

Private Charles LaFlamme related that on or after 1 August 1950 the accused, who shared a tent with him, came in about 2300 hours "fairly drunk" and told about a beating he had taken from members of the Third Platoon for being AWOL. The accused stated at that time that he "would never take a beating like that again, it wasn't fair, and the next man if he couldn't do it with his fist he would do it with a gun". The witness told the accused he didn't believe him and that he was drunk, at which time Tyler showed him two clips of ammunition from under the tent floor and another from his gas mask cover (R 9, 123).

Early in the evening on 6 August 1950, the accused and Hum were arguing violently about where each wished to spend the evening (R 10). They eventually spent the evening in the "beer hall" (Pros Ex 1). At about 2030 hours, when they had returned to the company area, Private First Class James E. Schirack observed Hum strike the accused and knock him to the ground. This took place in front of Schirack's tent, which was located one tent down and across the company street from accused's tent. Hum laughed and the accused got up and staggered toward his tent (R 30). At approximately 2045 hours several witnesses heard a number of shots fired in rapid succession from the vicinity of the accused's tent (R 18, 19, 22, 23, 25, 27, 31). Just before the shots were fired one witness heard a voice say "Don't fool with me", and another, who recognized the voices, heard arguing and some mumbling in the accused's tent and then heard Hum say "Go ahead, go ahead". The same witness then heard Tyler say "You don't think I'll do it", and then heard the shots (R 24, 25). Immediately after the shots a man was seen to drop the rifle and run out the rear door of the tent. Private Hum was lying on the floor of Tyler's tent and no pulse or heartbeat could be discovered

(R 19-25). The rifle found on the floor was warm. The accused ran up the company street to the orderly room and thence to the guard tent, where he reported "I'm going to turn myself in, I just killed a man" (R 11). He reported the same information to the Charge of Quarters and the Corporal of the Guard. Tyler requested that the Military Police be notified (R 33, 34).

A medical officer identified the body as that of the deceased and diagnosed the cause of death as a bullet wound in the cardiac region. There were four other bullet wounds. He also identified the certificate of death issued on the date following the homicide (R 48-50, Pros Ex 2).

An extrajudicial statement taken from the accused on 7 August 1950 is as follows:

> "I have been in the Army since October 1947. I am 20 years old. I came in Co 'A', 16th Infantry in January 1949. I first met Pfc Julius HUM at Grafenwohr, Germany, about June 1949. I started hanging around with HUM. Where he went, I went. We'd been going around together for about two to four months when HUM started pushing me around and hitting me. I told him to lay off or I'd quit hanging with him. HUM would get drunk and order me around and slap me around. He'd do it when he was sober, too. One night, after a Company party, HUM got into a fight with CAPPS. He knocked CAPPS down and I saw him kick CAPPS in the face. Robert KERNS saw HUM kick CAPPS, too. About a month or two later, HUM, me, Billy PRICE, and Bill KARLSON were driving to Munich in HUM's car. PRICE was driving, I think. We'd been drinking quite a lot. HUM was in the middle of the front seat, between me and PRICE. He put his arm around me and I said something like, 'What are you, a queer?' HUM turned on me and tried to gouge my eye out with his finger. I pushed him off and he stopped. PRICE stopped the car. I told HUM my eye was crooked, and I couldn't see right. He made me get out of the car and told me to stand there until I could see straight. I stood there for 10 or 15 minutes before he let me get back in the car. HUM wouldn't let me in until I told him my eye was straight again.
>
> "One day, DeMATTHEWS and I were playing checkers in the Dayroom. HUM was sitting beside us, watching. I made a move and jumped about 2 or 3 of DeMATTHEWS' men. HUM said it wasn't my move, and I said it was. DeMATTHEWS said it was my move, too, but HUM said no, it wasn't. I told HUM if he didn't leave me alone I'd rip up the cigarette I was smoking. HUM had asked me for the butt. He said I wouldn't dare, so I tore it up. HUM reached over and hit me about 4 times in the arm. I stood up and started to walk out of the Dayroom. HUM came after me and started punching me in the chest and face, until he knocked me down on a couch. He threatened to pour water in my bed unless I went and got him a cigarette, so I got him one.

"On New Year's Eve, HUM asked me to go out with him. I told him I didn't feel like it. HUM left, and a little while later, I went out with NODAY. I met a girl in Nurnberg and shacked up with her. I got back to the Company about 1800 hours on New Year's Day. I went to the beer hall. I met HUM there later on, when he came in. HUM took me outside. I saw that he had a pair of brass knuckles. He started shoving me around, and I asked him to leave me alone. He told me I had to do what he wanted me to do.

"At about 1000 hours, 6 August 1950, FISHER or KENYON woke me up and told me I had to pull a weekly on my Jeep. I went down to the motor pool and worked on my vehicle. I worked on it until about 1630 hours. I went back to the Company and made out my laundry. HOOPER came down and told me I had to fix my camouflage net. I was standing, talking to a couple guys when HUM came around. He had been drinking. He said, 'Why didn't you come to the beer hall?' I told him I'd been working. Just then we were called for chow. After chow, HUM said, 'After you get through fixing that camouflage net, make sure you stop at my tent'. He said we were going to the beer hall, so I said O.K. I went to the tent and we waited until about 1830 hours, for the beer hall to open. Then, we went to the beer hall. HUM started ordering beers four at a time, and making me drink them down fast. We left the beer hall at about 2030 hours and HUM said, 'You're going to make me some soup'. I told him I wanted to go to bed because I felt sick. We were walking down the Company street. HUM said, 'Bullshit, you're going to make some soup. We got to HUM'S tent and I went in to look at a deer NEEDHAM had killed. When I went inside NEEDHAM told me they wanted all the drivers at the motor pool. HUM said I didn't have to go, I had to make him some soup. I told him to go to hell and took off for the motor pool. I was halfway up the street when HUM stuck his head out of the tent and hollered, 'Make it fast, so you can get back here and make my soup. I ran to the beer hall and told two of the drivers they'd better get their vehicles. I went to the motor pool and got my vehicle and drove it to the Company. I went to HUM'S tent. He was getting his stove out, and he said, 'Get me some water'. I went and got him a canteen cup of water. He said, 'The stove's out of gas. Get me some gas'. I went to my Jeep and got some gas in an empty soup can. I brought the gas back and HUM said, 'I'll fix the soup. You're going on a little errand for me'. He told me to go to the Snack Bar and get as many hot dogs as I could buy with the change I had. I went to the Snack Bar and stood in line about 20 minutes, talking to O'HARA, the Company clerk. I bought five hot dogs and brought them to HUM'S tent. HUM was laying down on his bed. I said, 'Here's your hot dogs. I'm going to bed'. He said, 'No, you're not going to bed'. He sat up and ate a hot dog, then laid back down. I said, 'I'm going to bed'. HUM said, 'Sit down a while'. I said, 'HUM, I'm going to bed'. He said, 'No, you're not. Sit down'. I sat down on his footlocker and he moved over on his side, leaving a space for me to sit on his bed. He said, 'Sit here'. I said, 'No, HUM', and he said, 'I said sit here'. I said no, got up and walked

out of the tent. I was about 15 feet from the tent when I heard someone behind me. I heard someone say something and turned my head to look around, when HUM hit me in the jaw with his fist, and knocked me down. Somebody was walking down the Company street and I heard them laughing. HUM said, 'You better get back in that tent'. HUM went back in his tent and I got up and started walking towards mine. I was standing outside my tent and HUM came up to me. He slapped me in the face with his open hand and then hit me in the face with the sack of hot dogs. He said, 'You started this. You're not going to bed tonight'. He sat down on the ground for a minute. I told him, 'HUM, quit your screwing around'. 'I want to go to bed'. He said, 'I haven't even started screwing around'. He got up and went inside the tent. I stood outside and watched him. He tore up the hot dogs and rubbed them into my bed. He came out and said, 'Don't think youre smart. You're not going to bed. He picked up a cup from someplace and went over to the faucet. I was burning up. I remembered that there was a clip of M-1 ammunition under the floorboard. I got a rifle off the wall and loaded the clip into the rifle after I got it out. I think it was FISHER's rifle. HUM came in with the cup of water. I told him, 'Don't pour that water on my bed, HUM. I'm not kidding'. I had the M-1 in my hands, and I think I ejected a shell. HUM said something like, 'You yellow son of a bitch, I'll beat your head in'. He started towards me. Everything he did came back to my mind. Everything seemed to go black in front of me. I remember hearing the gun go off more than once. I remember running out of the tent, through the back door. I think I tripped over a tent rope. I went to the Orderly Room and told the C.Q. that just shot a guy, and asked them to call the M.P.'s. I said for them not to mind, that I'd go to the guardhouse myself. I walked over to the guardhouse and told a Corporal there what had happened."

After the shooting, the accused's bed was discovered to contain the fragments of three or four hot-dogs which had apparently been rubbed into the mattress cover and there was a wet area surrounding the fragments. (R 43).

b. For the Defense.

The defense called numerous witnesses whose pertinent testimony, which is uncontroverted, shows that the deceased was a larger and stronger man than the accused, sturdily built, and weighed about 160 pounds (R 46, 50). He was a bully and the accused as well as others was afraid of him (R 65, 74-76). In all of their arguments, Hum was the aggressor (R 51, 63). He compelled the accused to run his errands, perform menial tasks and forbade him to associate with other people (R 50, 52, 57, 70, 73, 76, 79). For about a year next preceding the

homicide Hum had constantly abused, belittled, degraded, and physically injured the accused by slapping him (R 51, 52, 55, 68), "messing up" his food, and throwing it on the floor (R 51, 82), forcing him to eat hot peppers in front of other men (R 51), jabbing his finger in accused's eye (R 53, 79), "blacking" his eye (R 74), marking "X" on his head and "H" on his hand (apparently with a sharp instrument)(R 81), forcing him to go AWOL from detail (R 82), beating him up and cutting his lip (R 50, 55). On at least one prior occasion Hum poured water on Tyler's bed and Tyler asked another soldier to aid him "if he [Hum] starts anything" (R 56). Hum generally "treated Tyler as a slave" (R 78). On another occasion Hum talked Borgerding and Karlson into whipping Tyler and when they found him Hum threatened Tyler with brass knuckles and when Tyler asked not to be hit with the knuckles "Hum took the knuckles off and I saw him slap Tyler a few times" (R 79).

On the night of the fatal shooting, Hum knocked the accused down (R 45), struck him in the face with a bag (R 68), and witnesses observed Hum getting a canteen cup of water just before the shooting (R 67-68). During all of this abuse Tyler never struck back (R 67).

The accused took the stand as a witness. He met Private Hum in 1949 at Grafenwohr when he had occasion to borrow $10 from him. Hum was very friendly and refused any interest on the loan when it was repaid. Later Hum borrowed money from the accused. They became quite friendly and occasionally Hum would ask Tyler to run small errands when Hum was busy with other duties, and Tyler gladly accommodated him. Later Hum began to order him around and Tyler told him to quit "or I'd quit hanging with him. And after a while he started bending and pushing me around. I told him to leave me alone. It kept on like that until I'd say about around October or November last year" (R 87). The accused and Hum then went on furlough together and they had a good time, Hum paying most of the expenses because Tyler had only $50. "When we came back he started giving me a hard time again" (R 87). On New Year's night (1949) the accused refused to go out with Hum and instead went out with Private First Class William Noday. That night the accused heard that Hum was looking for him and the following afternoon Hum found him in the "EM Club". Hum was wearing brass knuckles and ordered the accused outside. The accused pleaded with him not to hit him in the face because he didn't want his face cut up. Hum removed the knuckles and "slapped me around", saying "you're drunk" (R 88). Hum constantly watched the accused and seemed to sneak around to keep track of him. As duty NCO at the Motor Pool, Hum would keep Tyler from driving in his turn and have others take the trips even over instructions of the motor officer. As a result, Tyler was relieved from the motor pool. When the accused would go to the latrine, Hum would follow him and, saying he took too long, throw water

on the latrine (R 90). On another occasion, Hum insisted that accused sleep in Hum's bed (with Hum), and when he refused, struck him several times and forced him to sleep on the floor. After Hum went to sleep the accused was able to leave. Hum appeared to object to any other friends Tyler might have and made him stop associating with them. On occasion, Hum took Tyler's equipment which he had polished, and beat him up for objecting to it (R 92). He would disarrange Tyler's clothing and equipment after it was ready for inspection. After they returned from furlough, Hum began to insist on repayment, although he had offered to pay the expenses before the trip. When out with girls together, Hum would become angry if a girl liked Tyler and, on occasion, "he'd kick them out of the car and beat them up" (R 93). Another time, in May 1950, Tyler didn't want a drink and Hum "threw it over the back seat and all over me, all over my uniform and everything like that" (R 93). Hum forced the accused to "bum" cigarettes for him, would "hock" his ration cards and refuse to return them, prevent him from writing letters, took field rations and candy from him without permission, and even prevented him from resting or sleeping, by annoying him or pouring water on his bed (R 95-97). Tyler tried to go out for basketball and boxing, but was prevented from doing so by Hum. On other occasions Hum tried to give him alcohol while on guard duty and, in general, made life miserable for the accused.

The accused knew there was ammunition under the tent floor, because he had seen it while cleaning up the tent when he first occupied it. He did not remember the conversation with Private La Flamme on 1 August 1950, or making any threats on that day (R 99, 100).

Concerning the date of the shooting, the accused testified that he had been ordered to perform maintenance on his truck, preparatory to a problem the following day. He worked on it most of the day. About "2 o'clock" [pm] Hum asked accused to go to the "beer hall" and became angry when the accused failed to come after he finished work on his truck. That night at supper, Hum wanted Tyler to eat a "hot pepper", which he did as a joke. Hum got another one and when Tyler spit out half of it, made him eat it all. After supper they went to the "beer hall" and had some drinks. Hum was quite intoxicated and was ordering "beers three or four at a time". When it came time to leave, Hum had several "beers" left and made Tyler drink them before they left. When they returned to Hum's tent in the company area, Hum ordered Tyler to make some soup, at about which time the accused was called to the orderly room and instructed to bring his truck up to the company area. When he returned to the deceased's tent Hum sent him for a cup of water and then changed his mind and sent Tyler after hot dogs. This errand took about 20 minutes (R 101-102).

Describing the events following his return with the hot dogs to the tent in the company area, the accused testified:

"Q. Which tent?"

"A. In his tent. When I walked in I told him, 'Here's your hot dogs, I'm going to bed.' He says, 'No, don't go to

bed, sit down.' So I sat there. I gave him the hot dogs. I says, 'I'm going to bed.' He says, 'Just sit down and talk to me awhile.' I sat down on the footlocker and he pulled over on his side and he says, 'Sit here on my bed.' I says, 'I'm going to bed.' He says, 'Sit here.' I says, 'The hell with you, I'm going to bed.' I walked out of the tent. I heard something behind me, I turned, not full; by the time I turned he got me with his fist right on the side of the face and knocked me down. It sort of stunned me. I got up, I heard somebody laughing, I heard him say, 'You better get your ass back in this tent.' So I got up and started walking towards my tent. And I don't know, I was walking down the middle of the street and I got in front of my tent and Hum come down and says, 'You're not going to bed' - so I stood up, I says, 'Why don't you leave me alone? I want to go to bed, I have a problem tomorrow.' He jumped up and tore these hot dogs up and started rubbing them on my bed. I started getting mad. So he come out with a cup to get some water and I ran in the tent and I grabbed this rifle and took the floor board up and grabbed the ammunition and I loaded the rifle and he walked back in the tent and I told him to leave me alone, 'I'm not kidding, just leave me alone, that's all I want.' He said, 'You dirty yellow son-of-a-bitch' - something like that. He come at me. I seemed to freeze. I guess I pulled the trigger. I never had the feeling before...I don't know.. I couldn't say what it was like... I could never explain that feeling again... until my life I couldn't explain it... I tripped outside even. I went up to the orderly room and I said, 'I just shot a man, would you call the MPs.' So I don't know, something was wrong, I don't know what it was, I just left, and I went to the guardhouse and walked up and I said, 'Where is the sergeant of the guard?' They said something. I said, 'Well, I just shot a man, will you please call the MPs.' I sat around there I don't know how long it was. * * *—

Q. How did you feel at the time you fired those shots?

A. I couldn't explain it, sir, it's something I never experienced before, I don't know, I just sort of froze there, my body tightened - I don't know what it was, scared, I guess, I don't know what happened, I just can't explain it. I don't know - just something you never experienced before. I could never tell you what it was like. Like something you never tried, I don't know how to explain it, there is no possible way I can explain it." (R 103, 104).

* * *

"Q. Did you ever report any of those matters to anyone?

A. No sir, I did not.

Q. Why?

A. Well, sir, I guess I was too scared to, I just didn't want to get beat up. After that time he threatened me with those brass knuckles - I seen him give a pretty good beating - I seen blood

on the floor after he beat up some Germans, some pretty bad scars, I just didn't want my face to look like that, I couldn't go to anyone because if I did those guys they just would be sticking their neck out for me and most of the time they just mind their own business and I didn't want them to get beat up. Hum was the kind of guy that just lay and wait for you." (R 105).

* * *

On cross-examination, the accused testified in part as follows:

"Q Now you state that after a period of approximately one year that Hum has been working you over, to use a slang expression, is that right?
A Yes sir.

Q And you stated the reason you never reported this to anyone is you were afraid to get beat up by Hum?
A Yes sir." (R 106).

The accused further testified on cross-examination that he ejected a shell out of the gun when Hum reentered the tent (R 110). About fifteen minutes elapsed from the time Hum knocked him down, during which the other events transpired until the shooting (R 116).

First Lieutenant James Nick, the accused's company commander, testified that he had known the accused since January 1950 and that his reputation in the company was good. His personal appearance was always very good and he was always cheerful and very willing to do what was asked of him. The accused had served as a rifleman and driver in the company during that period.

Concerning the deceased Lieutenant Nick described him as a capable soldier but one requiring constant supervision. Both witness and his predecessor in command regarded him as being an agitator (R 44-48).

4. Discussion.

Accused stands convicted of a charge and specification alleging unpremeditated murder.

The evidence, both for the prosecution and the defense, clearly establish that the accused committed a homicide at the time and place and upon the victim as alleged. The only question presented is whether the evidence is legally sufficient to sustain the finding that the accused was guilty of unpremeditated murder.

"Murder is the unlawful killing of a human being with malice aforethought." By "unlawful" is meant "without legal justification or excuse." (MCM, 1949, par. 179).

The elements of proof of the offense of unpremeditated murder are:

"Proof. -(a) That the accused unlawfully killed a certain person named or described by certain means, as alleged * * *

(b) That such killing was with malice aforethought; * * *". (MCM, 1949, par. 179).

Concerning "malice aforethought" it has been said:

"[It includes] not only anger, hatred, and revenge, but every other unlawful and unjustifiable (emphasis supplied) motive. It is not confined to ill will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief." (Commonwealth v. Webster, 5 Cush. 296, 52 Am. Dec. 711, 717).

And again:

"Malice may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death." (MCM, 1949, par. 125, p. 151).

However, an unlawful homicide "intentionally committed in the heat of sudden passion brought about by provocation" is not murder, but is voluntary manslaughter (MCM, 1949, par. 180), and the sudden passion or "heat of passion" may be produced by fear as well as by rage. (Stevenson v. United States, 162 U S 313; 16 S. Ct. 839).

In distinguishing murder from manslaughter the Manual for Courts-Martial states:

"* * * The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by provocation, and not by malice, he may strike a fatal blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if the killing were done with malice aforethought. The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man, and the act of killing must be committed under and because of the passion. The provocation must not be sought or induced as an excuse for killing or doing harm.

If sufficient cooling time elapses between the provocation and the blow, the killing is murder, even if the passion persists." (MCM, 1949, par. 180).

It has also been held that under certain circumstances a homicide may be reduced from murder to manslaughter, even though the killing was not done in the heat of passion, as when the killing was done when the slayer believed he was in great danger although the facts did not warrant such belief (40 C. J. S. Sec. 42, p. 904). This rule was adopted in CM ETO 6074, Howard, 16 BR (ETO) 105, 108, wherein the Board of Review stated:

> "Imperfect self-defense, or shooting unnecessarily in danger but without malice, is manslaughter. Imminent danger and resultant fright of an accused are clearly sufficient to reduce murder to manslaughter, in the same manner as is rage or any other violent emotion (29 CJ, sec. 114, p. 1127). Apparent imminent danger of personal violence is adequate provocation (29 CJ, sec. 120, p. 1137)."

In determining whether an accused was "provoked to such an extent" that he acted in the heat of passion we must not only look at the immediate cause which precipitated the mortal act but we must consider those circumstances, if any, leading up to the final provocation which had a bearing upon, or contributed to, the intensity of the passion of the accused. As was succintly stated by the Texas Court of Criminal Appeals:

> "[The jury] could look not only to the cause at the time of the homicide, but they could view said cause from all the circumstances in evidence bearing on that provocation" and "that any condition or circumstance or any combination of conditions or circumstances, which is capable of creating some one or all of the conditions of mind above referred to, may be adequate cause, and, in determining whether or not adequate cause existed to produce anger, rage, sudden resentment, or terror, the jury will look to all the evidence in the case, previous relations of the parties toward each other and the relative strength and size of the parties." (Hatchell v. State, 84 SW 234, 236).

In considering the above precedents and requisites of legal proof it is necessary to first determine whether the accused acted with malice aforethought. To determine this question we must examine the immediate circumstances which caused the accused to act. We are particularly impressed by the undisputed evidence in the instant case showing that the deceased was the violent aggressor at all times and a few minutes before the regretable killing, had viciously struck the accused, knocking him to the ground. The accused retreated to his own tent seeking to avoid further difficulty, but the deceased, with violence in his heart, pursued the accused to his tent, slapped the accused, struck him in the face with the sack of "hot dogs" and over the protests of Tyler to "leave me alone"

the deceased forcibly entered accused's tent and rubbed the "hot dogs" into Tyler's bed. It is at this point that the accused became enraged, for his uncontradicted testimony is:

> "He [Hum] jumped up and tore these hot dogs up and started rubbing them on my bed. I started getting mad." (Emphasis supplied).

Immediately after rubbing the "hot dogs" on Tyler's bed, Hum went to secure a canteen cup of water, at a point some twenty to thirty feet away, to throw on the bed and at the same time Tyler "ran in the tent", loaded the rifle and as Hum reentered the tent told the deceased to "leave me alone, I'm not kidding, just leave me alone, that's all I want'." Hum cursed the accused and "He [Hum] came at me." (R 103). The fatal shots were then fired by Tyler.

This evidence is convincing as well as undisputed and unequivocally demonstrates that the fatal action taken by the accused was caused by a consuming rage which was provoked and precipitated by the deceased's wrongful acts of rubbing the "hot dogs" in Tyler's bed and throwing the canteen cup full of water thereon. The whole incident, covering a period of seconds, was uninterrupted from the inception of the provoked rage to the firing of the fatal shots. There was no "cooling time" within this short interval of time and it is clear that the accused acted before he had time to regain control of himself. It is patent that Tyler's actions were not motivated by malice aforethought.

It is no doubt true that when the accused was provoked by Hum's final wrongful acts his rage was intensified beyond control when "Everything he [Hum] did came back to my mind." (Pros. Ex. 1). The fact that all of the numerous indignities, violent assaults, sordid beatings, threats, and public humiliations suffered by the accused over a period of about twelve months at the hands of the deceased flashed through Tyler's mind during his rage does not prove malice aforethought under these circumstances. However, all of these former provocations suffered by Tyler do go to show the condition of Tyler's mind, the extent of his provocation and the intensity of his rage. (Hatchell v. State, supra).

In this connection the Board has considered CM 342409, Woodall, 9 August 1950, wherein the accused had been provoked by the deceased prior to the homicide. However, the Woodall case is easily distinguished from the present case by the fact that the accused left the scene of the last provocation, and did not accost the deceased until after he had gone to the quarters of another soldier, thence to the arms room seeking a weapon, and, after arming himself, the accused returned to the quarters of the deceased, who offered no further provocation, and stated "Big Tom I'm going to shoot you"., before firing the fatal shot. Such "cooling

period" is not present in the case under consideration.

There is no evidence in the record of trial to demonstrate that the accused acted with malice aforethought at the time of the firing of the weapon and the attendant circumstances effectively rebut the presumption of malice arising from the deadly use of such weapon.

Although not necessary to the determination of the issue in this case it is noted that there is convincing, undisputed evidence that at the time of this homicide the accused fired unnecessarily at Hum when he believed himself to be in imminent danger of personal violence and acted by reason of his fright. This constitutes imperfect self defense and is manslaughter (CM ETO 6074, Howard, supra,).

We are of the opinion that the evidence in this case indubitably established that the accused did not act with malice aforethought and that the offense of which the accused was found guilty, viz: unpremeditated murder, is thereby reduced to manslaughter. (CM ETO 6074, Howard, supra; CM ETO 10338, Lamb, 22 BR (ETO) 185).

5. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification of the Charge and the Charge as involve findings that the accused did at the time and place alleged willfully, feloniously and unlawfully kill Private First Class Julius H. Hum, a human being, by shooting him with a rifle in violation of Article of War 93, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for ten years.

_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

JAGZ CM 343542 1st Ind.

JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, 1st Infantry Division, APO 1, c/o Postmaster, New York, New York

1. In the case of Private First Class LeRoy D. Tyler (RA 19293415), Company A, 16th Infantry Regiment, APO 696, U. S. Army, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification of the Charge and the Charge as involve findings that the accused did at the time and place alleged, willfully, feloniously and unlawfully kill Private First Class Julius H. Hum, a human being, by shooting him with a rifle, in violation of Article of War 93, and is legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for ten years. Under Article of War 50e this holding and my concurrence vacate so much of the findings of guilty as are in excess of findings that the accused did at the time and place alleged willfully, feloniously and unlawfully kill Private First Class Julius H. Hum, a human being, by shooting him with a rifle, in violation of Article of War 93, and so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for ten years.

2. Pursuant to the provisions of Article of War 51(a), and under the direction of the Secretary of the Army, so much of the sentence as exceeds dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for five years is remitted. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence as thus modified.

3. It is recommended that the attached draft of that portion of the general court-martial order pertaining to the action, be included in the published order. 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 343542).

E. M. Brannon

1 Incl
Partial
Draft GCMO

E. M. BRANNON
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 343546

9 NOV 1950

UNITED STATES	FORT LEWIS, WASHINGTON
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 8 and 9 September 1950. Dismissal, total forfeitures after promulgation, and confinement for one (1) year.
First Lieutenant PATRICK H. CASSIDY (0-1304682), 6006 Area Service Unit, Station Complement	

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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

2. The accused was tried upon the following charges and specifications:

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

Specification: In that 1st Lieutenant Patrick H. Cassidy, Service Company, 38th Infantry Regiment, did, at Fort Lewis, Washington, on or about 16 February 1950, feloniously steal $40.00, lawful money of the United States, property of Private First Class John J. Plunkett.

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

Specification: In that 1st Lieutenant Patrick H. Cassidy, Service Company, 38th Infantry Regiment, for the purpose of aiding another, viz., Private First Class John J. Plunkett, to obtain the approval, allowance, and payment of a claim against the United States by presenting to Lt. Colonel O. Aden Lesley, Finance Officer of 2d Infantry Division at Fort Lewis, Washington, an Officer of the United States, duly authorized to approve, pay, and allow such claim, did, at Fort Lewis, Washington, on or about 16 June 1950, make and use a certain paper, to wit: Military Pay Order No. 437, Company G, 38th Infantry Regiment, Fort Lewis, Washington,

dated 16 June 1950, which said paper, as he, the said 1st Lieutenant Patrick H. Cassidy, then knew contained a statement that Private First Class John J. Plunkett was due leave rations from 7 January 1950 to 17 February 1950, which statement was false and fraudulent in that Private First Class John J. Plunkett was not due such leave rations, and was then known by the said 1st Lieutenant Patrick H. Cassidy to be false and fraudulent.

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

Specification: In that 1st Lieutenant Patrick H. Cassidy, Service Company, 38th Infantry Regiment, did, at Fort Lewis, Washington, on or about 29 June 1950, desert the service of the United States, and did remain absent in desertion until he was apprehended at Seattle, Washington, on or about 27 July 1950.

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

Specification 1: In that First Lieutenant Patrick H. Cassidy, 6006 Area Service Unit (Post Operating Company), then of Service Company, 38th Infantry, did, at Seattle, Washington, on or about 21 July 1950, with intent to defraud, willfully, wrongfully, and unlawfully make and utter to Peoples National Bank of Washington, a certain check, in words and figures as follows, to wit:

Seattle, Washington 21 July 1950

National Bank of Wash.
Ft. Lewis

Seattle
Branch

Pay to Cash or order $20.00

Twenty & 00/100 ---------- Dollars

SW /s/ Patrick H. Cassidy 1st Lt
C-319329

and by means thereof did fraudulently obtain from Peoples National Bank of Washington twenty dollars ($20.00) in lawful money of the United States, he, the said First Lieutenant Patrick H. Cassidy, then well knowing that he did not have and not intending that he should have sufficient funds in said National Bank of Washington, Fort Lewis, Branch, for payment of said check.

Specification 2: In that First Lieutenant Patrick H. Cassidy, 6006 Area Service Unit (Post Operating Company), then of Service Company, 38th Infantry, did, at Seattle, Washington, on or about 24 July 1950, with intent to defraud, willfully, wrongfully, and unlawfully make and utter to Peoples National Bank of Washington, a certain check, in words and figures as follows, to wit:

Seattle, Washington 24 July 1950

National Bank of Wash.
Ft. Lewis

Seattle
Branch

Pay to Cash or order $20.00

Twenty & no/100 ---------- Dollars

SW /s/ Patrick H. Cassidy 1st Lt. Inf.

and by means thereof did fraudulently obtain from Peoples National Bank of Washington twenty dollars ($20.00) in lawful money of the United States, he, the said First Lieutenant Patrick H. Cassidy, then well knowing that he did not have and not intending that he should have sufficient funds in said National Bank of Washington, Fort Lewis Branch, for payment of said check.

He pleaded not guilty to all charges and specifications. He was found guilty of the Specification of Charge I and of Charge I; guilty of the Specification of Charge II and of Charge II; guilty of the Specification of Charge III except the words "desert the service of the United States," and "did remain absent in desertion," substituting therefor the words "did without proper leave absent himself," of the excepted words, not guilty, of the substituted words, guilty; of Charge III, not guilty, but guilty of a violation of the 61st Article of War; and guilty of Specifications 1 and 2 of the Additional Charge and of the Additional Charge. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor at such place as proper authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

Corporal John J. Plunkett testified by deposition that he is a

member of Company G, 38th Infantry Regiment, Fort Lewis, Washington, and that he had a Class E allotment in the amount of $40 per month, which became effective in October 1949, and which the Government did not deduct from his pay. On 16 February 1950 Corporal Plunkett, then a private first class, went to the Personnel Office of his regiment in an effort to make a partial repayment. He explained his desire to the accused, who was the personnel officer, and gave him $40, for which accused gave him a receipt. The accused was to deliver this money to the Finance Office to be applied to Plunkett's indebtedness to the Government. The accused informed Plunkett that a "receipt from the finance office would be coming down in a week or so," but Plunkett never received it (R 15,16,20; Pros Ex 1).

At a subsequent date Plunkett inquired of the Personnel Office if the $40 was deducted from his debt and was informed that there was no record of it (R 17, Pros Ex 1). Plunkett had given the accused the $40 for the sole purpose of delivering it to the Finance Office and did not at any time give accused permission to use this money for any other purpose. At the behest of the accused Plunkett destroyed the receipt the accused had given him for this amount.

On 16 June 1950, Plunkett, at the suggestion of the accused, accompanied the accused to the 2nd Infantry Division Finance Office of which Lieutenant Colonel O. Aden Lesley was then Finance Officer. Here Corporal Plunkett signed a pay roll for $42 and received that amount in cash. He was told by the accused that this sum was to reimburse him for the $40 he had delivered to the accused in February 1950. Plunkett later learned that this money was paid to him for leave rations for the period of 7 January 1950 to 17 February 1950. During the mentioned period Plunkett had not been on leave and was therefore not entitled to this ration money (R 16-21,22,37; Pros Ex 1).

Corporal Curtis Rhodes testified by deposition that he is assigned for duty to the Division Finance Office, 2nd Infantry Division, Fort Lewis, Washington. His specific duty was to examine for errors all Military Pay Orders received by his office. Rhodes identified Prosecution Exhibit 4, duly stipulated as a true photostatic copy of the original document, as Plunkett's Military Pay Record for the period of 1 January to 30 June 1950, which contains an entry that Plunkett had been paid $43.05 for leave rations for the period of 7 January 1950 to 17 February 1950. Rhodes also identified Prosecution Exhibit 5, duly stipulated as a true photostatic copy of the original document, as a Military Pay Order made in favor of Private First Class Plunkett and containing the entry "Due EM LV Rats, 7 Jan - 17 Feb" 1950, signed by the accused as certifying officer in his capacity as assistant personnel officer. This signature certified to the correctness of the contents of the Military Pay Order as required by the Finance Office before payment is made. After payment is made an entry to that effect is posted on the individual's Military Pay Record (R 23, 27-48, 62,69,70; Pros Exs 2,3,4,5,6).

Mr. Robert R. Rose, 61st MP CID Detachment, identified a pretrial statement made by the accused on 28 June 1950. He testified that prior to the interrogation the accused was advised of his rights under Article of War 24 and without the use of force, duress, or undue influence the accused made a voluntary statement which he signed (R 76). This pretrial statement was received in evidence without objection as Prosecution Exhibit 10.

This statement of the accused was a complete confession of the offense of aiding Plunkett in presenting a false claim against the United States as alleged in the Specification of Charge II. As to the Specification of Charge I, alleging larceny from Corporal Plunkett in violation of Article of War 93, the accused admitted that he received $40 from Plunkett to deliver to the Division Finance Officer to the credit of Plunkett's account. The accused stated however that "When the money was turned in to me, it was put in my desk. I had no safe or any other security in the office. This was in the afternoon and was never thought of again until the following morning. When I searched the desk for the money, the money was gone." The accused did not notify any one of this loss.

Two duly authenticated extract copies of morning reports of Service Company, 38th Infantry Regiment, Fort Lewis, Washington, were admitted into evidence without objection by the defense as Prosecution Exhibits 11 and 12 (R 77,78).

These exhibits list the following pertinent entries:

"4 July 1950

CORRECTION 29 June 1950

Cassidy, Patrick H. 01304682 1st Lt 2200

Fr dy to AWOL 0600 hrs 28 June 50

SHOULD BE

Cassidy, Patrick H. 01304682 1st Lt 2200

Fr dy to AWOL 0600 Hrs 29 June 50" (Pros Ex 11).

"Service Company 38th Inf Regt Ft Lewis, Wn 28 July 50

Cassidy, Patrick H. 01304682 1st Lt 2200

Fr AWOL to conf Post Stockade 1530 27 Jul 50" (Pros Ex 12).

Selma F. Welch, Assistant Cashier, Peoples National Bank of Washington, Seattle, Washington, testified that on or about 21 July 1950 the accused came into the bank and wrote a check in the amount of $20.00 payable to the order of "Cash" drawn on the Fort Lewis Branch of the National Bank of Washington. After the accused identified himself Miss Welch initialed the check approving it for payment and sent him to the teller. At that time the accused discussed with Miss Welch the transfer of his bank account from the Fort Lewis Branch of the National Bank of Washington to the Peoples National Bank of Washington in Seattle (R 84,85,86; Pros Ex 13).

On 24 July 1950 the accused returned to the bank, executed the necessary documents to accomplish the transfer of his bank account and wrote another check for $20 payable to the order of "Cash." This check, also drawn on the Fort Lewis Branch of the National Bank of Washington, was approved for payment by Miss Welch (R 89,90,91; Pros Exs 14,15,16, 18). The signature "Patrick H. Cassidy" appearing on each of the aforementioned checks dated 21 and 24 July 1950, admitted in evidence as Prosecution Exhibits 13 and 18, was identified as having been executed by the accused (R 86,97). Each of the mentioned checks was duly presented to the drawee bank for payment and was returned unpaid because accused's account had been closed (R 129,130; Pros Exs 19,20). Photostatic copies of the checks bore cancellation stamps of the Peoples National Bank of Washington, Seattle, Washington, and the Federal Reserve Bank of San Francisco, at Seattle, Washington, dated 24 and 25 July 1950, respectively (R 86,96,106).

Rodman E. Heidberder, Assistant Chief Clerk, National Bank of Washington, Fort Lewis Branch, testified that on 22 May 1950 the bank statement of the accused showed a balance of $1.16 at the Fort Lewis Branch of the National Bank of Washington, and that on 22 June 1950 the accused's bank balance was eleven cents. The bank balance of the accused was zero on 6 July 1950, and his account was closed. Notice of this fact was mailed to the accused's address on file at the bank (R 106-109,115; Pros Exs 21, 21a, 21b). Between 6 July 1950 and 22 August 1950 the accused had no balance in the bank (R 110). On the latter date, the accused reopened his account with a deposit of $475.00 (R 110,115; Pros Ex 22).

Mr. Robert R. Rose, 61st MP CID Detachment, was recalled as a witness for the prosecution. He identified a pretrial statement made by the accused on 28 July 1950. He testified that prior to the interrogation the accused was advised of his rights under Article of War 24 and,without the use of force, duress, or promises, the accused voluntarily made an oral statement which was reduced to writing and signed by him (R 117, 118; Pros Ex 23). This pretrial statement was received in evidence over objection by the defense (R 119,121; Pros Ex 23). In this statement the

accused admitted that he was absent without leave at the time and place alleged in the Specification of Charge III. The accused also admitted writing and cashing two checks in the amount of $20 each with the Peoples National Bank, Seattle, Washington, while absent without authority (R 121,122,123; Pros Ex 23).

b. For the Defense

First Lieutenant Leonard P. Hibbard, MSC, testified that on 21 August 1950 he deposited the sum of $475 in the National Bank of Washington, Fort Lewis Branch, at the request of the accused. He "understood" this amount represented the pay due the accused through July. The accused had instructed Lieutenant Hibbard to deposit this money to cover his (accused's) outstanding debts. At the time this deposit was made Lieutenant Hibbard was informed by the cashier of the bank, Mr. Pinkham, that the accused's account had been closed. Mr. Pinkham at first refused to reopen the account but did so only after discussing the matter with Colonel Rothmie and Captain Romeris of the Finance Office (R 132,133).

The accused, after being apprised of his rights as a witness, elected to testify under oath (R 135). He is 43 years of age, married and has five children. His present tour of duty extends from 12 November 1948. During World War II he served from June 1941 to December 1945 which included 28 months in the Pacific Theater of Operations. He had never before been tried by court-martial. The accused stated that he was awarded the Bronze Star and Combat Infantryman's Badge, and is authorized to wear the Asiatic-Pacific ribbon with two service stars and the Victory Medal. He absented himself without leave on 29 July 1950 because he had been under a

> "*** terrific strain over in the 38th Infantry. *** I had had two mail robberies, my desk had been robbed, a warrant officer who was at work for me for about a month, his desk had been robbed of checks. I had signed for these checks at the personnel, or at the Finance Office. The Finance Office had my signature for these checks. They were leave checks for men who had been on leave. And the CID was naturally investigating these mail robberies, the theft of these checks. I was under--naturally, I was the last one who had signed for these checks and the last one that they could trace the particular checks to. Of course I was under the stigma of -- I felt in my own mind that they felt that I had stolen the checks. I had made statements to the CID. In fact, they had even had a Secret Service man down there, a Mr. Koffman, and he had had one of the checks that they had located that had been cashed. I was sent for and went over to the CID and gave them copies of my handwriting. They compared the handwriting that was on the particular check

that they had, and in the comparison between the CID agent and this Mr. Koffman they left me with the impression that some *** of my handwriting compared favorably to the handwriting on the particular check that they had a photostatic copy of. And they didn't---they weren't able to solve the particular crimes or find the checks ***. Just finally, in June, near the last part of June, the CID finally solved the particular case, and it was four people out of my office that were working for me that had robbed the mailroom and taken these particular checks and things out of my desk." (R 137-138)

The accused also stated that he was under "emotional stress" because of domestic difficulties which had been brought to the attention of his superiors and two prosecuting attorneys in Tacoma. He was told to try to solve his family difficulties, but he could not. "I made every human attempt to solve it. I've offered everything, I did everything I could." His wife would not live on the post and caused him a great deal of trouble in connection with his pay. During this period the accused was the personnel officer and had to virtually operate the personnel office alone as the assistants assigned to him were continually being transferred. After he went absent without leave, he made three attempts to return to his organization, but he decided not to because of shame and embarrassment. He was apprehended on 27 July 1950 (R 135-151).

4. Discussion

Charge I and its Specification

The competent evidence of record adduced by the prosecution in support of the above-mentioned specification shows that at the place and time alleged the accused was the personnel officer of the 38th Infantry Regiment and that Corporal Plunkett, then a private first class, was an enlisted man in the same organization. On 16 February 1950 Plunkett came to the accused's office and there turned over $40 to him. The accused was to deliver the money for Plunkett to the Finance Office to be applied to Plunkett's indebtedness to the Government. The accused's acceptance of Plunkett's money while serving as personnel officer of the 38th Infantry Regiment created a relationship of trust between the accused and Plunkett whereby it became the accused's duty to deliver or cause to be delivered to the Finance Office the money Plunkett had given him for that purpose. That he did not perform the act required of him by reason of his fiduciary relationship with Plunkett is amply proven by the evidence and the accused's admissions.

The accused contended that the $40 was missing from his desk where he had put it. He admitted however that he did not report this purported loss. Plunkett testified that the accused told him to destroy the receipt which he (the accused) had given to him for that amount. The

accused subsequently attempted to reimburse Plunkett by means of a fraudulent claim against the United States. Under these circumstances the explanation given by the accused is unworthy of belief.

Larceny is defined in the Manual for Courts-Martial, U.S. Army, 1949, paragraph 180g, as follows:

> "Larceny, or stealing, is the unlawful appropriation of personal property which the thief knows to belong either generally or specially to another, with intent to deprive the owner permanently of his property therein. Unlawful appropriation may be by trespass or by conversion through breach of trust or bailment. In military law former distinctions between larceny and embezzlement do not exist."

The elements of proof necessary to sustain a conviction of larceny under Article of War 93 are as follows:

> "Proof - (a) The appropriation by the accused of the property as alleged; (b) that such property belonged to a certain other person named or described; (c) that such property was of the value alleged, or of some value; and (d) the facts and circumstances of the case indicating that the appropriation was with the intent to deprive the owner permanently of his interest in the property or of its value or a part of its value." (MCM, 1949, par 180h)

In view of the incriminating nature of the evidence, the court was warranted in finding that the accused appropriated the funds for personal use, thus constituting larceny as alleged (CM 341018, Melton, 30 Aug 1950; CM 335586, Wilkins, 2 BR-JC 153, 162; CM 334905, Johnson, 1 BR-JC, 343,354).

Charge II and its Specification

The accused was convicted of an offense involving the signing by him of a Military Pay Order, knowing it to contain a false and fraudulent statement and with the intention of aiding another person through the use of such pay order to obtain the approval, allowance and payment of a claim against the United States, in violation of Article of War 94. The fourth clause of Article of War 94 denounces this offense. It reads as follows:

> "Any person subject to military law *** who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper

knowing the same to contain any false or fraudulent statements; ***"

The essential elements necessary to establish the offense are (a) that the accused made or used, or procured or advised the making or use of a certain writing or other paper, as alleged; (b) that certain material statements in such writing or other papers were false or fraudulent, as alleged; (c) that the accused knew the statements were false or fraudulent; (d) facts and circumstances indicating that the act of the accused was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as specified; and (e) the amount involved as alleged (MCM, 1949, par 181c).

The evidence shows that the accused as personnel officer of the 38th Infantry Regiment caused a Military Payment Order to be prepared for the purpose of aiding Corporal (PFC) John J. Plunkett, a member of that organization, to obtain the payment of a claim against the United States. The accused signed the pay order and accompanied Plunkett to the 2nd Division Finance Office of which Lieutenant Colonel O. Aden Lesley was then Finance Officer, where Plunkett received a certain sum of money in lieu of leave rations for the period 7 January 1950 to 17 February 1950. In his pretrial statement the accused admitted that Plunkett had not been on furlough during the mentioned period and that he was aware at the time he signed and presented the Military Pay Order to the Finance Office that it was false. In his deposition Plunkett corroborated the admissions of the accused in this respect and further testified that the accused stated that he was giving him (Plunkett) this money to reimburse him for the $40 he had given the accused in February.

It is apparent from the summary of the evidence set forth above that each of these elements was conclusively established. The prosecution's evidence stands unrefuted. In view thereof we are of the opinion that the evidence is sufficient to support the findings of guilty of this specification in violation of Article of War 94 (CM 319514, Robbins, 68 BR 337, 346).

Charge III and its Specification

In this specification, accused was found guilty, by exceptions and substitutions, of absenting himself without proper leave from 29 June to 27 July 1950. Two duly authenticated extract copies of morning reports, admitted into evidence without defense objection, constituted prima facie evidence of accused's guilt of absence without leave for the period alleged (MCM, 1949, par 146a; CM 340589, Bell, 6 Apr 1950).

The evidence thus adduced by the prosecution and the accused's judicial admissions establish beyond a reasonable doubt that the

accused was absent without authority during the period alleged in violation of Article of War 61 (CM 341216, Cherwak, 27 Apr 1950).

Additional Charge and Specifications 1 and 2

Under these specifications the accused has been found guilty of two offenses involving the making,with fraudulent intent,checks without having sufficient funds on deposit to pay them.

The two checks in issue totaling $40 were drawn upon the Fort Lewis Branch of the National Bank of Washington, Seattle, Washington. The checks bore the accused's signature as drawer, were cashed at the Peoples National Bank of Washington, and were dated, respectively, 21 July 1950 (Add'l Chg, Spec 1), and 24 July 1950 (Add'l Chg, Spec 2). In the absence of objection to their authenticity bank stamps are competent evidence of the facts bespoken by them (CM 335738, Carpenter, 2 BR-JC 245, 262). The bank cancellation stamps on the checks indicated that both checks were in banking channels by 25 July 1950. The evidence thus shows that the checks were cashed on dates fairly coincidental to the dates borne by the checks. From the evidence that the accused was the drawer of the checks in question and the admission of the accused that he cashed two checks for $20 each with the Peoples National Bank of Washington at or about the dates borne by the checks in issue, the court was warranted in inferring that the accused uttered the two checks and received the proceeds thereof as alleged.

The evidence otherwise shows that the accused's account had been closed on 6 July 1950, and he was seasonably notified of such fact. Notwithstanding this fact, on 21 July and on 24 July he issued the checks set forth in the specifications against his closed account. Under such state of facts it can reasonably be inferred that he issued the checks with full knowledge that he did not have and not intending that he should have sufficient funds on deposit to meet payment thereof. The transactions were therefore fraudulent as alleged (CM 343015, Hutchins, 11 Sept 1950). The only proof deduced by the defense to overcome the inference of fraud is the evidence that on 22 August the accused had deposited to his account the sum of $475. This is not sufficient to remove the taint of fraud initially attaching to such transactions (CM 322346, Barton, 71 BR 257, 261).

In CM 336515, Stewart, 3 BR-JC, 115, 131, the Judicial Council said:

"*** although *** evidence that the accused after uttering the check, failed to maintain an adequate balance in the drawee bank would be competent on the issue of fraudulent intent, proof of such failure is not legally requisite. To hold otherwise might well enable a 'bad check operator', after his offense is complete, to purge himself of guilt and avoid

the just penalty for his offense by covering a worthless check, fraudulently issued, when confronted by a threat of prosecution. ***."

In CM 307125, Keller, 60 BR 335, 345, the Board of Review stated:

"*** The essence of the fraud is that the checks relied upon were of no value. Whether they were worthless because drawn against no account or against an empty account is relevant only in so far as the amount of proof of intent to defraud is concerned. ***" (See also CM 337978, Gallo, 4 BR-JC 193, 201; CM 280997, Newman, 54 BR 25, 34.)

The intent denounced in these specifications is not the intent never to cover such checks but the intent not to have sufficient funds to pay them when they were presented in the ordinary course of business to the drawee bank. Moreover, the accused's deposit of $475 on or about 22 August 1950, made about six weeks after his account was closed and about four weeks after he had cashed the checks in issue, was received by the bank only after it had first refused to reopen the account and reluctantly did so at the request of several Army officers. From all the evidence it is clear that the accused knew he did not have sufficient funds on deposit to pay these checks when presented in the ordinary course of business, and the court was justified in concluding that he did not, at the time they were made and uttered, intend to have funds on deposit to pay them when presented. The evidence sustains the findings of guilty of these specifications of the Additional Charge and the Additional Charge (CM 320020, Jones, 69 BR 217, 224; CM 257417, Sims, 37 BR 111,117).

5. Department of the Army records show that the accused is 42 years of age, married, and has three children, one by a former marriage. Accused, as a witness in his own behalf, stated that he has five children. He is a high school graduate, and in civilian life worked variously as a salesman, theater manager, shoe store manager, and surveyor's assistant. He was commissioned a second lieutenant (AUS) on 19 December 1942 and was promoted to first lieutenant (AUS) on 23 December 1944. He served overseas from 5 April 1943 to 5 June 1945 in the Pacific Theater. He has been awarded the Bronze Star medal and Combat Infantryman's badge. His adjectival efficiency ratings from 12 December 1943 to 17 May 1945 show three of "Excellent," one "Very Satisfactory," and one "Satisfactory." His overall efficiency ratings of record are one of 075, two of 116, and one of 112. On 12 July 1949 he was reprimanded under Article of War 104 for false certification of his pay voucher.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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, 94 or 96.

_____, J.A.C.C.

_____, J.A.G.C.

_____, J.A.G.C.

(260)

CM 343,546

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Patrick H. Cassidy, 0-1304682, 6006 Area Service Unit, Station Complement, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

17 Nov 1950

I concur in the foregoing action.

Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

17 Nov. 1950

(GCMO 85, Nov 27, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 343572

11 DEC 1950

UNITED STATES v. Corporal JESSIE J. EDWARDS (RA 14257778) and Corporal ROY J. STEWART (RA 36187987), both of Headquarters and Headquarters Company (Pipeline), Staff Battalion, Headquarters and Service Command, General Headquarters, Far East Command.	HEADQUARTERS AND SERVICE COMMAND GENERAL HEADQUARTERS, FAR EAST COMMAND Trial by G.C.M., convened at Tokyo, Japan, 22, 23 and 24 August 1950. EACH: Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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

2. Pursuant to authorization by the appointing authority, the accused were tried in a common trial. Edwards was tried upon the following charges and specifications:

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

Specification: In that Corporal Jessie J. Edwards, Headquarters and Headquarters Company (Pipeline), Staff Battalion, Headquarters and Service Group, General Headquarters, Far East Command, did, at or near Tokyo, Japan, on or about 2 July 1950, forcibly and feloniously, against her will, have carnal knowledge of Setsuko Omata.

CHARGE II and Specification: (Finding of guilty disapproved by reviewing authority).

Stewart was tried upon the following charges and specifications:

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

Specification: In that Corporal Roy J. Stewart, Headquarters and Headquarters Company (Pipeline), Staff Battalion, Headquarters and Service Group, General Headquarters, Far East Command, did, at or near Tokyo, Japan, on or about 2 July 1950, forcibly and feloniously, against her will, have carnal knowledge of Setsuko Omata.

CHARGE II and Specification: (Finding of guilty disapproved by reviewing authority).

Each accused pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced as to accused Edwards. Evidence of two previous conviction was introduced as to accused Stewart. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct for the term of his natural life. The reviewing authority disapproved the findings of guilty of Charge II and its specification as to each accused, approved the sentence as to each accused, and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

On 2 July 1950, at approximately 8 p.m., the two accused, Corporals Jessie J. Edwards and Roy J. Stewart, accompanied by two Japanese girls drove a dark blue 1947 Chevrolet automobile into the American Vacuum Oil Company service station located in Tokyo, Japan, where Stewart and an attendant did some repair work on it. The vehicle carried Japanese occupation license plates. Stewart was attired in a "white undershirt with short sleeves and also a pair of soldier's trousers." Edwards was wearing "a GI shirt and trousers." Inside the car were "about two cases of coke," and the accused had with them a bottle of whiskey. Neither of them appeared to be drunk. After a short time the two girls departed on foot (R 14-16, 21-24,26).

In the meantime, Setsuko Omata, the prosecutrix, a ten year old fifth grade student, four feet, two inches in height, was standing in front of the patent office across the street. Stewart approached her and asked her in poor Japanese if she liked chocolate or chewing gum, to which she replied that she did. Edwards, who drove away from the service station at approximately 8:30 p.m., stopped alongside Stewart and Setsuko. Stewart picked her up, placed her on the back seat, got in beside her, and Edwards drove off. Inside the car she observed "cases" of Coca Cola. Stewart offered her a drink from a Coca Cola

bottle but she refused. Thereupon Stewart removed her pants, "took out his penis," got on top of her, and "He did something funny with it," "He put it where water comes out from." She felt pain in the region of her genital organ and was frightened. She remonstrated with him, saying, "Iyada, iyada - no, no," but he put his hand over her mouth (R 28-36,50,51). Stewart hurt her very much and she cried. She did not actually feel his penis go inside of her, but she was certain he was doing "that" with his penis. He remained on top of her "about twenty minutes," all of which time Setsuko felt "that pain" (R 27-35). After Stewart accomplished his purpose, Edwards stopped the car, and Stewart got out. Edwards entered the back of the car and, Setsuko testified, "he [Edwards] *** opened his trousers *** came on top of me," and "did something funny to me," with his penis, "the same thing the other soldier did to me," but she "did not make sounds" (R 37-46). She saw Edwards's penis when he opened his trousers and indicated with her hand that he placed his penis in the vicinity of her genital organ. Edwards kept his penis there for "about fifteen minutes," and she felt him pushing her with it, but she could not tell whether he had his penis inside her because "the thing had never happened to me prior to that date." It hurt her very much, but she did not cry. After he had finished she felt moisture around her private parts (R 37,49).

Setsuko stated she put on her pants and got out of the car. Stewart gave her two hundred yen and Edwards gave her one hundred yen. She denied that she asked them for money. At no time had she consented to the acts hereinabove described. She identified Prosecution Exhibits 1 and 2 as her pants and chemise, respectively, which she had worn on 2 July 1950, the day of the alleged offense, and which were clean when she got into the accused's automobile (R 36-38, 42,51,78).

On cross-examination, Setsuko testified that "I have to think hard to remember" what happened on the night of 2 July. She admitted having made a pretrial statement that one of the accused hurt her with his hand but that is not what happened. She recalled making a statement that Stewart never had his pants unbuttoned and also that she never saw his private parts, but, she continued, "he had his private parts next to my private parts." In reply to a question whether the moisture she felt as a "result of these actions" was blood, she answered in the affirmative, but denied that the blood resulted from the soldier playing with her with his hand. Asked if she saw "any private parts of any men that night," she replied, "the taller man's" (R 40-49). The record reflects that Edwards is taller than Stewart (R 17,31).

Mitsumaru Yeizo, a Japanese national, testified that about 9 p.m. on 2 July 1950 he saw the prosecutrix in the street and she asked him for directions to her home. She also told him that she had been in a car with Americans. He asked her, "Did somebody do anything wrong to you?" She replied, "nothing happened." As it was very dark Yeizo became suspicious and brought her to the police. At the time he observed that "all her back was soaked wide with blood" (R 53-55).

Yoshitake Okabe testified that he is a Japanese policeman and that about 9:20 p.m. on 2 July 1950 Yeizo brought Setsuko Omata to the police box. She had three hundred yen in her hands. The witness noticed the blood stains on her clothing and asked her what had happened. She replied "that she had gone to buy firecrackers earlier in the evening and when she came by the Patent Office an American soldier came by and put her on a car, and she also stated that one of the soldiers got beside her and took her pants off and she said that 'when he held me the lower part of my abdomen hurt very much,'" and she cried. "She also stated that the car finally stopped on a wide road near a bridge and the other soldier who was sitting in the front also did the same thing to her." Okabe took Setsuko "to Doctor Takeda's hospital" (R 56,57).

Dr. Fumiko Takeda testified that she was a graduate of Joshi Medical School in Tokyo and had been in practice for five years, specializing in female diseases (R 59,65). She examined Setsuko Omata at 10:00 p.m. on 2 July 1950 and found the following:

Setsuko "did not seem to be particularly excited." There were blood stains on her slip and pants. Her private parts and the inside of her thighs were soaked with blood and there were lacerations on the right side of her vagina and a laceration on the hymen "between where 5 o'clock and 7 o'clock is." The doctor observed that blood was oozing out from both these wounds. It was her estimate that the injuries must have occurred less than two hours before her examination (R 60,62). The witness drew a sketch (Pros Ex 3) which was admitted in evidence without objection (R 237) describing to the court the lacerations inflicted on the child and indicating thereon the following:

> "*** This is 'A', clitoris - 'B' is urethra; 'C' is hymen; 'D' is a labium minus; 'E' and 'F' are the lacerations which were on the hymen; 'G' is a laceration which was on perineum or damm; 'H' is a laceration on minus labium and it was about five millimeters long and this laceration - 'G' - was about eight millimeters long. 'I' is hypodermal bleeding" (R 61).

Setsuko was not sufficiently developed "to do a normal sexual intercourse," and did not have any hair on her private parts. Doctor Takeda was of the opinion that the injury was caused by the penis of a male, that "Considerable big force" was used, and "There was no indication that it (vagina) had been opened by the fingers" (R 62,63,69,71). It was necessary to sew two stiches on Setsuko's private parts. The witness identified the pants (Pros Ex 1) and slip (Pros Ex 2), which Setsuko had worn that night (R 60,69,180), and stated, "When I examined the pants I observed hair, and when I examined the blood microscopically I did not know whether it was spermatozoa or not, but I observed something like a very thin thread." "There was so much blood and some spermatozoa must have gotten mixed up with the blood and it was hard to examine." By examining the lacerations and observing the hair, "I concluded that penis must have been against it. Because the penis was being pushed inside or inserted inside the cut it must have been caused on the hymen, but I did not think the penis had gone in very deep. It must have gone in just about one centimeter - one or two centimeters" (R 62,67). The brown curly hair which she found inside the pants of Setsuko was about five centimeters long and "I could tell it was hair from private parts." In her opinion it was not a Japanese person's hair (R 63,72).

This hair, which she wrapped in a piece of gauze and placed in a glass tube (Pros Ex 4), was given to Policeman Okaya. Also given to Okaya were Setsuko's pants, her slip, and a glass tube containing a piece of gauze soaked with blood taken "from the inside of Setsuko" (R 63-65, Pros Ex 5).

Private First Class Kenneth D. McDonald, Company C, 720th MP Battalion, testified that he and Private First Class Curtis A. Price were on duty the night of 2 July 1950. They saw the two accused, about 10 p.m. that night in Shinjuku. Stewart's shirt was unbuttoned, he was hatless, and his clothes were dirty. He said he had been working on his car. McDonald searched the car and found a caliber "45" pistol which the accused "said they lost." In the glove compartment were "3 boxes of .45 ammunition." McDonald also observed "laying on the floor of the car a whiskey bottle and a case of coke" (R 39). Stewart appeared to be drunk, but "he knew what he was doing and what he was saying." Edwards appeared to be sober. The two accused were taken to the Provost Marshal's Office. "When we got them inside we noticed *** the front part of his [Stewart's] pants *** had red stains on them." The witness identified Prosecution Exhibit 7 as the trousers Stewart had worn that night and Prosecution Exhibit 6 as the trousers belonging to Edwards (R 90-92). He stated that the two accused were turned over to a Criminal Investigation Division agent who advised them of their rights under Article of War 24. Although Stewart appeared "very drunk," at this time, he discussed the disposition of

his wallet and the money that were taken from him by the Criminal Investigation Division agent (R 93). The two accused were required to undress. Specimens of pubic hair were taken from each and Stewart's finger nails were scraped. McDonald observed that the hair around Stewart's private parts "looked like he had either grease or stain or paint in the hair that was causing it to stick together" (R 94). Prosecution Exhibit 9, which McDonald identified as the photograph of Stewart, Price and himself which was taken that night, was admitted in evidence without objection (R 100).

George Q. Keithahn testified that he is employed in a civilian capacity by the Department of the Army and is attached to the 23rd Criminal Investigation Division Provost Marshal's Office in Tokyo. He stated that the two accused were brought to the office late in the evening of 2 July 1950 by two military policemen. "Edwards appeared to be perfectly sober, this man Stewart mildly under the influence of liquor, that is, when they first came into the office" (R 112,113). He identified Prosecution Exhibits 6 and 7 as the trousers that were removed from Edwards and Stewart, respectively (R 116). An examination of their bodies disclosed that "On Stewart the lower abdominal pubic hair and skin evidently was all covered with blood." No blood was found on the body of Edwards. "I examined their hands, fingers; and on account of the appearance of Stewart's hands I asked the photographer to take pictures and directed the laboratory technician to make finger nail scrapings" (R 117). Both the accuseds' finger nails were blunted (R 126). Stewart's hands and the area underneath his fingers appeared to be stained with blood (R 118). Keithahn made an examination of the interior of a blue Chevrolet sedan which was parked outside the Provost Marshal's building. He observed a case of Coca Cola on the floor of the back seat, and "on the back seat itself, *** was a deep stain that appeared to me to be blood." In the back of the car he picked up an undershirt that appeared to have blood and grease on it (R 116-118). Prosecution Exhibit 11 which Keithahn identified as the rear seat of the automobile was received in evidence (R 119). Also received in evidence was Prosecution Exhibit 12, the undershirt hereinabove described (R 120). The witness removed pubic hair from both the accused, put them in cellophane bags, and turned them over to Richard D. Tenney, the serologist at the Criminal Investigation laboratory, in Tokyo (R 121).

Richard D. Tenney, employed as a chemist and serologist at the Criminal Investigation laboratory in Tokyo, testified that blood samples were taken from the two accused and the prosecutrix. The tube containing the blood of Stewart was marked "ST" and that of Edwards marked "E" (R 227-229). The analyses of these blood specimens revealed that the tube marked "ST" had blood type "A" and the tube marked "E" had blood type "O". Setsuko Omato, the prosecutrix, has blood type "B" (R 229). The blood on Setsuko's pants and chemise (Pros Exs 1 and 2)

was blood type "B" (R 230-231). The stains on Stewart's trousers (Pros Ex 7) and the undershirt (Pros Ex 12) were analyzed as blood type "B" (R 232). Stains on the car seat (Pros Ex 11) as well as on the clotted hair taken from the pubic area of Stewart were also analyzed as blood type "B" (R 117,123,235). No seminal fluid was found in Prosecution Exhibit 5 (gauze with blood taken from the genital organ of Setsuko) or Prosecution Exhibit 4 (hair found in Setsuko's pants) (R 233). The witness stated, however, that "Spermatozoa when dry or when acted upon by heat will likely break up. They start breaking up sometimes as early as twelve or twenty four hours afterwards. Sometimes they will stay for a period up to six months if they have been very carefully handled and kept away from heat and light" (R 234).

First Lieutenant Shigeshi Madokoro, Investigation Division, Office of the Provost Marshal, Tokyo, testified that he saw the two accused in the Criminal Investigation Division office about 10 a.m. on 3 July. After explaining to them their rights under Article of War 24 he interrogated them briefly (R 133-134). The accused expressed their willingness to take a polygraph examination (lie detector test). The following day the accused were brought to the polygraph room and there Major Jack B. Richmond of the Provost Marshal's Office, Tokyo, talked to Stewart first. He advised him of his rights under the 24th Article of War but Stewart did not make a statement. He did, however, submit to a polygraph test (R 136-138). Edwards was also apprised of his rights under Article of War 24 by Major Richmond and without the use of threats, promises of reward or immunity (from punishment) Edwards made an oral statement which Lieutenant Madokoro reduced to writing at his (Edward's) request and which he signed. Before signing it however Lieutenant Madokoro "read the statement of fact to Edwards in the presence of Captain Johnson [accused's company commander] *** after I got through reading it, I asked Edwards again if he knew his rights under the 24th Article of War, to which Captain Johnson was also a witness, and advised him [Edwards] again not to make a mistake and asked him if he understood that, at which time I asked him to stand up and swear to it" (R 143-147, 183). The witness admitted that he told Edwards that "we had a lot of evidence against him" (R 182). Lieutenant Madokoro identified Prosecution Exhibit 13 as the sworn pretrial statement he received from accused Edwards (R 147).

Edwards, after being apprised of his rights, elected to testify under oath concerning the circumstances under which his pretrial statement was given (R 139).

On 4 July Lieutenant Madokoro and Major Richmond asked him if he would take a polygraph test. Lieutenant Madokoro added that "it would be better if I took the polygraph test and that it would convince the court when I got on trial that it was a lie." He agreed although he

knew he did not have to take it (R 152,162). Lieutenant Madokoro was then called out of the room and Major Richmond proceeded to question him and he was asked if he would make a statement. "He told me if I made a statement it would help me. *** I told him I would make a statement." Whereupon Major Richmond left the room and returned with Lieutenant Madokoro (R 153-154).

> "*** Major Richmond asked me did I still want to make a statement or take a lie detector test. I said I would make a statement, that I was scared of the lie detector test and I didn't know if it would help me out. *** I did make a statement to Lieutenant Madokoro. *** He just took the paper in front of him and asked me questions" (R 154-155).

After Edwards made the statement, he (Lieutenant Madokoro) asked "me if I wanted my company commander to come in the room and be present. *** I told him yes, sir."

Edwards signed the statement, after he was told to do so, but he did not read it (R 154,155). Asked whether he was apprised of his rights under Article of War 24, Edwards stated, "Well, he [Major Richmond] read something to me, but I didn't pay any attention to it." "It could have been" the 24th Article of War but it was not explained to him, nor was he told that he did not have to make a statement. During the three years he has been in the Army the 24th Article of War had been read to him, but he is familiar with only some parts of it. In addition to signing his statement, he initialed it two or three times (R 157,158,159,162). At the time he signed the statement Lieutenant Madokoro asked him to raise his hand which he did, but he did not remember why, nor did he know the normal way of taking an official oath. He believed he had made a statement, not a confession. He understood a statement to be "something you write on a piece of paper and sign it" (R 160). He believed if he made a statement it would help him because, "Major Richmond and Lieutenant Madokoro both told me it would help me" (R 161). Lieutenant Madokoro wrote down the statement as he (Edwards) talked. When it was read back to him he said he understood what was read, but he was not given an opportunity to read it. He did not object to signing the statement nor did he tell Lieutenant Madokoro that the statement he read back to him was not the truth. Before he signed it he was asked if he knew his rights under Article of War 24 and he replied that he did because he wanted to get "out of there" (R 164-165).

Captain Johnson was present with Lieutenant Madokoro when Edwards signed the statement (R 166).

This statement, with certain portions pertaining to another person obliterated, was admitted in evidence over objection and read to the

court as follows (R 147,177,185):

"On the night of 2 Jul 50 we came down to Tokyo after picking up some Japanese girls. At a gas station we got some transmission oil and took it to a Japanese garage to have it put in. There the two Japanese girls we had in the car ran away. When I drove the car down the road a ways to test it for noise *** didn't come with me. When I came back *** called me over and said the little girl wanted a coca cola. So I went to the gas station and paid the Japanese for putting the oil in the transmission, came back and picked up *** and the little Japanese girl. I drove down a street a ways and I heard the girl scream and hollering. I asked *** 'what the hell are you doing?' He answered 'I'm getting me some.' *** When I said 'a little girl like that,' he said, 'yes'. That was the last thing he said till he said he had come. Next thing I know it was when we stopped at the bridge *** got out of the car, and in a couple of minutes I got in back. I had intercourse with her and I came. *** was talking to the girl in Japanese most of the time. The girl did not do anything to resist me. I got up and went back to the front seat. The girl got out of the car by herself. *** paid the girl some yen and got into the car. We drove off then" (Pros Ex 13).

The law member instructed the court that this statement was to be considered only against the accused Edwards and that any reference to any other person was to be "disregarded entirely" (R 185).

Ernest T. Yonamine, employed as a fingerprint examiner at the Provost Marshal's Office, Tokyo, testified that on the night of 2 July 1950 he examined the interior of the mentioned Chevrolet automobile for latent fingerprints. He stated that he compared the known fingerprints of Edwards (Pros Exs 15,16) with the fingerprints he examined on a Coca Cola bottle taken from the back seat of the vehicle and found that they were identical (R 186-189,199,200,206,207,209; Pros Exs 8,14,15,18).

b. For the Defense

After the accused were duly informed as to their rights to present evidence in their own behalf, they respectively elected to be sworn and testify (R 240).

Stewart testified that he is 29 years of age and has had eight years of military service. His parents are deceased. He is divorced and has two children by his former wife. On 2 July he received permission from his first sergeant to go to Shinjuku, Tokyo, to get his

pistol, which was being repaired there (R 242). As his unit was about to leave for Korea most of the personnel in his company including himself had been drinking during this period. Edwards who owned an automobile agreed to drive Stewart to Shinjuku. "Edwards said he was going to clean up. *** he told me to hurry and I went in the room and grabbed a pair of trousers and a T-shirt and a shirt and put on my shoes and stockings and got a hat and left from there" (R 244). On the way they stopped and bought three bottles of whiskey and a case of Coca Cola (R 243-246). That afternoon Stewart "drank just about a fifth of whiskey." He remembered "getting" to the gun shop at Shinjuku where he picked up his weapon. From there they went to a garage and thence to a "sake house," but he did not recall leaving there. He did, however, remember that he and Edwards had two girls in the car and that they went back to the garage. At the garage "the car was up on the rack on a hoist and I climbed up on something and climbed into the car and had the bottle of whiskey; *** then I don't know if I was talking to these two girls with us or not *** the next thing I remember was riding in the car and stopping and Edwards *** was hitting me in the face. *** I kind of woke up a little bit and he asked me something about a girl - I don't know - about a young girl at the time who was sitting on my lap. He hit me a couple of more times and asked me what I was doing with a young girl. I came out a little bit and I had this girl sitting on my lap and he told me she was young and I pushed her off my lap on the seat" (R 245,246,247,248). After he pushed the girl off his lap, they drove a little farther and stopped.

> "Corporal Edwards said something about being young again and I told him, 'Lets get her out of the car', and he stopped on the bridge. I got out of the back seat; this girl got out of the back seat and stood there and I reached in my pocket - I knew there was a station - a bus station as I could see the lights pretty good and I gave her some money to catch one or a taxi to go home. I reached in my pocket and handed it to her" (R 248).

He discovered that his gun was missing and told Edwards to drive back to Shinjuku to find the girls who had been in the car to see if they had the gun (R 248,249). At that time Stewart was wearing a "T-Shirt." "I remember I took off my undershirt and put on my khaki shirt." He also remembered meeting some military policemen and told them that he thought that one of the girls had stolen his gun. "I asked them to take me down to the PMO so I could find out from the girl - where the girl was as I thought she or her girl friend had stolen the gun from me in the car" (R 249). He did not remember the trip to the Provost Marshal's Office, but recalled that a military policeman there told him they were taking a specimen of his blood (R 250). The following day he was asked by Lieutenant Madokoro if he wanted to make a statement

but he declined. "I said not until I see defense counsel and I asked him about calling a Captain Alexander from the company and he refused to." The lieutenant asked him if he had seen Setsuko Omata the previous night and he said he had not (R 250,251). The witness stated that he did not remember any conversation with Japanese children and he had no recollection of his conduct with a Japanese girl prior to the time Edwards slapped him on the face (R 252). When he let the girl out of the car he had his trousers on and he believed they were buttoned in the normal manner, but he is not positive because "I was pretty drunk, sir" (R 252). He observed that Setsuko was attired in a white dress but he did not notice any blood on her dress or on his trousers. On the evening of 3 July he shaved and showered and did not notice any blood or unusual residue on his body. He recalled that the previous night two Criminal Investigation Division agents had washed his stomach and they told him that there was no blood on his body (R 253,254). He had taken his "T-shirt" off and "threw it in the back seat of the car" and put on a khaki shirt, but he does not know why he did that (R 255,262). He did not recall checking his wallet or discussing its contents at the Provost Marshal's Office, nor did he remember anyone examining him there or removing his pubic hair (R 256,260,262). He did, however, remember that he told Edwards to put the gun in the glove compartment of the car. He looked for it there but could not find it (R 256, 260-262). The witness stated that they did not let Setsuko out of the car when Edwards stopped the first time because "it was real light out there and we didn't want to get in trouble" (R 264).

The accused Edwards testified that he is 23 years of age and had been in the Army over three years. He had also served in the Navy. On the afternoon of 2 July he accompanied Stewart to Shinjuku to pick up a weapon Stewart had left at a gun shop there (R 270). He had a "little" to drink but he was not drunk. They stopped at a Sake house, met two girls and he, Stewart and the two girls subsequently went to an automobile service station. Here Stewart dressed in a "T-Shirt" and trousers got under the car to make some repairs. Thereafter Stewart departed, leaving Edwards and the car at the service station. Edwards next saw Stewart across the street with some children about him. He thereupon drove over and Stewart got into the car followed by another person. He paid no attention to the person who got in the car with Stewart and started up the street (R 271,272,273,274). He drove for approximately five or six minutes and then heard some rattling from the back seat. Whereupon he stopped, looked to the rear, and, believing that Stewart had passed out, slapped him three or four times. "I asked him what he was doing and he said playing around, and I raised up a little further and looked back and noticed he had a young girl in back with him. I said 'My God, what are you doing with such a young girl?' I thought she was a grown woman" (R 274,283). Stewart became angry and

Edwards drove off. "I told Stewart we better get rid of this girl and he said, 'Let's get rid of her.'" He stopped the car and Stewart let the girl out. The witness stated he never got out of the front seat of the car and that he did not touch the girl (R 275). On the way back to camp Stewart asked him where his (Stewart's) weapon was. "I told him, 'I don't know,'" whereupon Stewart proceeded to search the car but without success. They drove back to Shinjuku as Stewart believed that the "girls must have got it when they left us from the service station." At Shinjuku they met two military policemen who took them to the Provost Marshal's Office (R 276-277). Here Stewart was photographed and some pubic hair was taken from each of the accused. Stewart's hands were also photographed because there appeared to be blood on them. The accused were given blood tests and lodged in the stockade at about 2:00 or 2:30 the morning of the 3rd. The following day the witness reported to the lie detector room. Present in this room were Lieutenant Madokoro and Major Richmond. Lieutenant Madokoro left the room for about ten or fifteen minutes, during which time Major Richmond talked to Edwards. "He gave me a bunch of stuff like he had enough evidence on me to convict me, and that Corporal Stewart had already taken the lie detector test and found out that he was lying" (R 279-280). He was asked if he would make an oral statement. "I told him yes, sir, I would make a statement." About five minutes later Lieutenant Madokoro started writing it down. The witness denied that he stated to Lieutenant Madokoro, "I heard the girl scream and hollering" and "I'm getting me some." He also denied that he said "That was the last thing he said till he said he had come" and "In a couple of minutes I got in back. I had intercourse with her and I came." He acknowledged that he said, "What the hell are you doing?" (R 280). At the time he observed the little girl in the back seat with Stewart he stopped the car by a street light but did not let the girl out because Stewart was "mad" at him. "I didn't want to rouse him up - taking the girl away from him." However the girl was "young *** and small," and he wanted to get her out of the car (R 282). The girl did not scream and the noise he heard was Coca Cola bottles rattling. The witness admitted that he did not hear the bottles rattle before that time. He did not take the girl back where he found her because he was worried about getting back to camp (R 284,286). When the girl got into the car with Stewart they were headed back to camp. He did not ask Stewart where he was taking her, nor was he at all concerned about it. At the time he did not know whether this person that got into the car with Stewart was male or female and he was not curious about it (R 286,287). Lieutenant Madokoro advised him of his rights under Article of War 24 when he questioned him on the morning of the 3rd and he told him he did not care to discuss the incident. He agreed, however, to take the lie detector test. Concerning his pretrial statement (Pros Ex 13), Edwards testified that Lieutenant Madokoro read it to him (R 258).

Upon examination by the court, Edwards testified as follows:

"Q Did he advise you of the 24th Article of War.
"A Yes, sir, he did. (R 288)

* * *

"Q Did you at any time tell him that this statement contained facts which were not true?
"A That was not the statement he read to me, sir.

"Q This is not what?
"A That is not the statement he read to me - not the same words he read back off the paper.

"Q Was the battery commander present at the same time?
"A Yes, sir, he was.

"Q Did you understand that you were making a confession at the time?
"A No, I did not. I told them I would make a statement.

* * *

"Q Did you sign this statement?
"A Yes, sir, I did.

"Q And as important as this statement is to you you didn't read it?
"A I didn't know it was so important to me, sir. I just thought I was signing a regular statement.

"Q You heard Major Richmond say you said you wanted to make a confession?
"A I did not tell him make a confession. I told him I wanted to make a statement." (R 288,289)

Edwards examined Prosecution Exhibit 13 and admitted that the signature and the initials thereon were written by him. He stated that Captain Johnson was present when he signed the document.

"Q Did you read it at the time?
"A No sir, I didn't have a chance to read it, sir.

* * *

"Q Did you feel he read to you from the paper in his hand - what was on the paper?

"A Yes, sir, I felt he read to me the truth." (R 293-294)

The witness stated that he did not read what he had initialed. Lieutenant Madokoro pointed to the place and told him to initial it. He did not request that the lieutenant write down his statement but he was aware of the fact that he was doing it and spoke slowly to assist him. He neither requested nor was refused permission to read it. Captain Johnson was present when the statement was read to him and witnessed his signature (R 283,289,293-295,297).

First Lieutenant Robert W. Hudson, Headquarters and Service Group, Judge Advocate Section, testified that he is a defense counsel of the accused (R 229). In connection with the pretrial investigation of the case he had a conversation with Lieutenant Madokoro concerning an alleged confession made by Edwards. Lieutenant Madokoro told him that the confession of Edwards was not in his (Edward's) handwriting because "at that time things were very much touch and go and he was afraid if he asked Edwards to write it in his handwriting he would change his mind about it" (R 279,290).

4. Discussion

The accused have been found guilty of rape in violation of Article of War 92. The record of trial shows that on the night of 2 July 1950 in Tokyo, Japan, the accused abducted Setsuko Omata, a ten-year old Japanese girl, in a motor vehicle operated by the accused Edwards. According to Setsuko, the accused Stewart joined her in the rear of the car, removed her pants, and despite her protestations entered his penis into her genitals. As may be expected from her immaturity, Setsuko's testimony was inclined to be indefinite and uncertain. There was, however, corroborative evidence which conclusively established that she was ravished by the accused. Thus it was shown that Setsuko was of blood type "B", Stewart was of blood type "A", and that serological tests made of Stewart's pubic hairs and his trousers, the same being obtained from him on the night of 2 July, showed the presence thereon of "B" type blood. It was also shown that sutures were required to repair the injuries inflicted on Setsuko's genitalia. Setsuko testified that Edwards succeeded Stewart in the back of the car and that she was also ravished by Edwards. Edwards in a pretrial statement, which we hereinafter conclude was voluntarily made, admitted that he had sexual intercourse with Setsuko, but that his act was not resisted by the girl.

Rape is defined as "the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1949, par 179b, p 232). Where there is, in fact, no consent by the female victim, the force required for penetration is sufficient. While ordinarily resistance by the victim is required to show that lack of her consent was real, the

circumstances of a given case may dispense with the need of such a showing. The circumstances of the instant case which show that the victim was but ten years of age, that her assailants were soldiers of the occupying power, and that they abducted her, are such that it is obvious the victim had no ability to resist, and, hence, resistance is not required to show the genuineness of her lack of consent (CM 333860, Haynes and Lussmyer, 81 BR 375,384).

Stewart, in his testimony, recounted that on the date in question he had been drinking heavily and had no memory of the incident in question. The court had ample reason for rejecting his testimony. The evidence shows that Stewart first attempted to entice the prosecutrix with chocolate and chewing gum, and then lifted her bodily into the vehicle driven by Edwards. Upon his apprehension a relatively short time after his criminal act, Stewart, although he appeared to be intoxicated also appeared to know what he was doing and saying and exhibited a rational concern over the disposition of his wallet and its contents, the loss of his weapon, and his meeting with the military police. A court would be justified in not considering intoxication to such a degree as "affecting mental capacity to entertain a specific intent or state of mind, when a particular intent or state of mind is a necessary element of the offense" (MCM, 1949, par 140, p 188). In any event, voluntary drunkenness does not excuse rape nor does it nullify the criminal liability therefor (CM 320489, Velasquez, 69 BR 395, 403).

Relative to Edwards' pretrial statement, the prosecution's evidence shows that prior to its making Edwards received the warning prescribed by Article of War 24, and that the statement was not induced by any unlawful means. The only issue of substance raised by the defense was Edwards' assertion that he was not told that he did not have to make a statement. Edwards' testimony at the trial including his evasive answers under cross-examination fully supports the conclusion that he was familiar with his rights against self-incrimination. We are unable to find any cogent reason for resolving the issue thus joined other than as resolved by the law member.

5. The Board of Review therefore concludes that the evidence is legally sufficient to sustain a finding that the act of carnal knowledge alleged, as against each accused, was committed against the will and without the consent of Setsuko Omata.

6. The reviewing authority designated a United States penitentiary, reformatory, or other such institution as the place of confinement. Paragraph 87b, Manual for Courts-Martial, U.S. Army, 1949, provides on page 97:

"If the sentence of a general court-martial as ordered

executed provides for confinement, the place of confinement will be designated. In cases involving imprisonment for life, *** the confirming authority will designate the place of confinement."

In the instant case, pursuant to the provisions of Article of War 48(c) (2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

7. Accused Edwards is 23 years of age and single. He had prior service of over four years. His current enlistment extends from 21 May 1950 and has been characterized as excellent.

Accused Stewart is 29 years of age. He is divorced and has two children by his former wife. He had prior service of over four years. His current enlistment extends from 10 March 1948 and has been characterized as good.

8. A brief submitted by Mr. Charles W. Jennings, Attorney at Law, Lawton, Oklahoma, on behalf of the accused has been attached to the record of trial. The Board has given due consideration to the matters therein presented.

9. The court was legally constituted and had jurisdiction over the persons and of the 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 sustain the findings of guilty and the sentences and to warrant confirmation of the sentences. A sentence to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for life is authorized upon conviction of a violation of the 92nd Article of War.

Robert Burdon, J.A.G.C.

Samuel T. Cowles, J.A.G.C.

Geo. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Corporal Jessie J. Edwards, RA 14257778, Headquarters and Headquarters Company (Pipeline), Staff Battalion, Headquarters and Service Command, General Headquarters, Far East Command, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC C. B. Mickelwait, Brig Gen, JAGC

J. I. Harbaugh, Jr., Brig Gen, JAGC
Chairman

28 December 1950

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Corporal Roy J. Stewart, RA 36187987, Headquarters and Headquarters Company (Pipeline), Staff Battalion, Headquarters and Service Command, General Headquarters, Far East Command, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

28 December 1950

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

NOV 2 1950

JAGH CM 343693

UNITED STATES v. First Lieutenant MARTIN H. PLOTKIN (038160), 37th Transportation Highway Transport Division	)	UNITED STATES ARMY, EUROPE Trial by G.C.M., convened at Wurzburg, Germany, 7 September 1950. Dismissal, total forfeitures after promulgation, and confinement for two (2) years.

HOLDING by the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50d(3).

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Martin H. Plotkin, 37th Transportation Highway Transport Division, did, at or near Lager Hammelburg, Germany, on or about 19 October 1949, wrongfully and unlawfully conspire with Dragutin Yosifovitch to defraud the American International Underwriters Corporation by presenting a false claim, and that said First Lieutenant Martin H. Plotkin, 37th Transportation Highway Transport Division and said Dragutin Yosifovitch did, for the purpose of effecting said conspiracy, agree that said Dragutin Yosifovitch should arrange to have his, the said First Lieutenant Martin H. Plotkin's 1947 Buick automobile, motor number 47522395, taken and concealed under such circumstances as would make it appear that said automobile had been stolen.

Specification 2: In that First Lieutenant Martin H. Plotkin, 37th Transportation Highway Transport Division, with intent to defraud the American International Underwriters Corporation, did, at Bad Kissingen, Germany, on or about 21 November

> 1949, unlawfully pretend and represent to the said American International Underwriters Corporation that his, the said First Lieutenant Martin H. Plotkin's 1947 Buick automobile, motor number 47522395, had been stolen, well knowing that said pretenses and representations were false, and by means thereof did fraudulently obtain from the said American International Underwriters Corporation the sum of two thousand dollars ($2000.00).

The accused pleaded not guilty to, and was found guilty of, the Charge and its Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

It was stipulated by and between the prosecution, defense and accused that First Lieutenant Martin H. Plotkin (the accused) was the legal owner of a 1947 Buick Sedanette, registry plate C-22638, motor #47522395, serial #34546360, during the period from October 1948 to 10 January 1950 (R 9).

Around the end of September 1948, the accused drove his 1947 Buick to the (EES), EUCOM Exchange System, garage in Bad Kissingen, Germany, for repairs (R 66,78). While in the garage the accused informed Leo Loeser and Franz Geis, auto mechanics, that his automobile was insured for $2300.00 or $2400.00 (R 78). After repairs on the vehicle were completed, accused drove the two mechanics to the railroad station, and during the conversation enroute, he asked them "to steal his car" (R 67, 78) and "to do it before October because the insurance would expire in October" (R 67). He informed them that his car would be parked in front of his residence in the German Post Office at Bad Kissingen, the "papers" would be in the car, and the ignition would be turned on. He said that the best time for taking the car would be on a Saturday between eight o'clock in the evening and eight o'clock the following morning (R 67). Accused also stated that if the mechanics were apprehended by the MP's during the period, he would "cover up" for them (R 67,78), but after that it would be a "theft on our part" (R 67). Accused added that at eight o'clock in the morning, he would report to the MP's that his car had been taken and would deny everything (R 78). They were to pick the car up and put it away. It was up to them whether they sold the car or took it apart; "because of the insurance, [accused] had to wait another sixty

days" (R 78). Loeser informed accused that he was not interested, and the plan was never executed (R 68). The conversations between Loeser, Geis and the accused were carried on in "Half German. Half English." "We made ourselves understood with hands and feet" (R 84).

In October 1949 Dragutin Yosifovitch, a Yugoslav employed by the American Forces as utilities superintendent at Lager Hammelburg, rode with accused in his car from Hammelburg to Bad Kissingen (R 10). During the ride, accused offered to give Yosifovitch his car. Yosifovitch declined because the accused's car would be too expensive for him to operate. Accused suggested to Yosifovitch several times thereafter that he find another man to take away his car. Upon meeting one Joseph Eilingsfeld, the owner of an auto repair shop, Yosifovitch told him that there was an American officer who was interested in giving a car away (R 11,12) on condition that the vehicle was not to be seen for the next three months, after which time Eilingsfeld could do whatever he pleased with it (R 34). Eilingsfeld agreed to take the car, and Yosifovitch passed on this information to accused (R 12). Accused told Yosifovitch that the car could be taken at night from in front of accused's residence in the Post Office building at Bad Kissingen and that no key would be required because the vehicle would be unlocked (R 13,36). Accused also instructed Yosifovitch that "from seven o'clock in the evening to in the morning, you have plenty of time, so if any time - - German police or MP's stop the car and ask for papers - - say he is a mechanic" giving the car "a test ride" (R 28). If any question arose, the police were to call the accused at his home in Bad Kissingen (R 28,41). Eilingsfeld arranged to store the vehicle at Gochsheim (R 34), and on the appointed night, sometime during the middle of October (R 16), Yosifovitch pointed out accused's Buick to Eilingsfeld and explained to him how to operate it (R 35). Eilingsfeld thereupon drove the vehicle to Gochsheim, but, because the promised storage space was not then available, returned the car to the street in front of accused's quarters at Bad Kissingen (R 36). Yosifovitch explained the difficulty to accused who replied that the man "better hurry up" as the car had to be taken by a "certain date" (R 15). Yosifovitch relayed this information to Eilingsfeld and a date was fixed for the taking of the car. On that day as Yosifovitch was riding with the accused in his car, they stopped in front of accused's quarters to adjust the generator. While they were parked, Eilingsfeld approached the vehicle and Yosifovitch pointed him out to accused as the man who was going to take the car. At accused's request, Yosifovitch asked Eilingsfeld if it were possible for him to drive the vehicle with the generator in its present condition. Upon receiving a negative reply from Eilingsfeld, accused attempted unsuccessfully to have the generator repaired at once at the EES garage. He then postponed the taking of the car for two days (R 17,18,30,31). During the night of 19-20 November 1949 Eilingsfeld again attempted to take accused's vehicle from the yard at the post office, but being unable to start the motor, he so informed Yosifovitch by telephone. Yosifovitch telephoned this information to accused who went down and started the car

himself. Accused then telephoned Yosifovitch that the car was running perfectly and that everything was "O.K." Upon receiving this information, Eilingsfeld reentered the vehicle and drove it to Gochsheim (R 18,19,28, 38,39). At Gochsheim the vehicle was hidden in a barn and concealed by chopped wood until its discovery by the police in June 1950 (R 40,64,86).

The accused had renewed his insurance policy on his 1947 Buick Sedanette with the American International Underwriters Corporation, on 8 November 1949, effective 21 November 1949, the expiration date of his existing policy (R 89; Pros Ex 2). On 21 November 1949, accused reported the theft of his vehicle to the insurer and at the same time submitted a stolen vehicle report (R 89; Pros Ex 1). The make and motor number of the automobile appearing on accused's old insurance policy and renewal application were the same as those of the vehicle discovered in the barn at Gochsheim by a CID agent on 19 June 1950 (R 86-89,90). On 10 January 1950 accused submitted a proof of loss to the insurer who issued a check for $2000.00 payable to the accused (R 93-98; Pros Exs 3,4).

Approximately fourteen days prior to the trial accused approached the witness, Franz Geis, with the request that Geis change his previous statement. He asked witness to say that accused had said that he would notify the police immediately if his car was stolen and not to say that accused had said that he would wait until morning. Then, approximately four days prior to the trial accused again approached Geis and asked him to state that, when accused spoke to them about stealing his car, he had done so in a joking manner. Accused also told witness to deny that he had been in Wurzburg (R 83).

On cross-examination Yosifovitch denied ever being present when the vehicle was taken by Eilingsfeld (R 21) and he testified that during all of his conversations with accused nothing was mentioned about stealing the car for the purpose of getting insurance (R 22). Yosifovitch arranged for the vehicle to be taken by Eilingsfeld as a favor to accused for which he expected nothing in return from either accused or Eilingsfeld (R 24).

On cross-examination Eilingsfeld testified that Yosifovitch was present the first time he took the car (R 43). He denied that he had ever met accused (R 44,54) and admitted that his only knowledge or information concerning the vehicle was obtained from Yosifovitch (R 54). He stated that he had a "quiet agreement" with Yosifovitch that "if I had sold the car, I would have given part of the proceeds to him" (R 50). Eilingsfeld admitted having been convicted in Berlin for larceny and in Schweinfurt for assault and theft (R 58).

b. <u>For the defense.</u>

In the early part of October 1949, accused was offered $2300.00 for his vehicle but accused was not interested in selling it. The offer was

again made and refused at the end of the month (R 99a-100).

Yosifovitch is to be trusted only as long as he can be watched. He will do anything for money and will lie if it will aid him (R 104-105). His reputation for honesty is "not clean" (R 109), and he has been known "to be involved in dishonest deals" (R 111).

First Lieutenant Joseph H. Delaney has known accused since December 1947, both on and off duty. He was a "conscientious" officer with "a very soldierly appearance" who acted "as an officer and gentleman" at all times. In the three years witness has known accused he had never heard of any misconduct on the part of the accused (R 103).

Jack Guss, Educational Advisor for Hammelburg Sub-Post, has known accused since July 1948. He considers accused "an honest man, a man of integrity, highly intelligent, hard working" (R 112).

Accused worked directly under Captain William J. Welsh, who has known him for approximately two years. Captain Welsh testified as to accused's superior performance of duty and stated that "he could work for me now or he could work for me twenty years from now, because I know his capabilities" (R 114).

Major Lyle J. Sundet, who has known the accused since November 1948, testified, "His honesty and integrity not only on duty but socially have been beyond reproach. I think every officer out there feels the same as I do. It is common knowledge" (R 115).

Accused, having been advised of his rights as a witness, elected to take the stand and testify under oath (R 116). He denied that he had ever conspired with Yosifovitch at any time to cause his car to disappear (R 117). He stated that in November 1949 his vehicle was in excellent condition because during the fall of that year he had expended approximately $700.00 for parts and labor for the repair thereof (R 117-121; Def Exs A and B). Although he had several offers to purchase his car, he was not interested in selling it because he needed transportation (R 121).

Accused admitted that he had given Yosifovitch a ride several times but insisted that he had never discussed the stealing of his automobile with him. He recalled that Yosifovitch was with him at the time that his car had generator trouble between Hammelburg and Bad Kissingen and that Yosifovitch had accompanied him directly to the EES garage to act as interpreter. From the garage they proceeded to his quarters. He denied meeting Eilingsfeld at this time and stated that the first time he saw Eilingsfeld was at the Article of War 46b investigation. He denied having ever had a conversation with Yosifovitch, telephonic or otherwise, relative to taking, stealing, removing or secreting the car (R 122-123).

Accused admitted that in September 1948 he had given Loeser and Geis a lift in his car and that he had said to them "Well, why don't you steal the car?", but he was not serious at that time or at other times when he had made similar remarks in public. He had never talked to Loeser and Geis about insurance or the best time for taking the car (R 124-125). A few days before the trial, he had seen Geis in the EES garage and had told him to tell "exactly what he told to Major Hammer" (R 126).

On cross-examination accused stated that he had never discussed insurance with Yosifovitch or with Loeser and Geis and that in his opinion the similarity of testimony about events in 1948 and 1949 was due to connivance between the witnesses since Loeser worked for Eilingsfeld and knew about the theft (R 127-128).

In answer to questions by the court accused stated that it was normal for him not to lock his car. He usually just locked the doors (R 130). On 20 November 1949 between 9:30 and 10:00 o'clock, he discovered his car was missing and notified the military police (R 131).

Accused is 31 years of age, enlisted in the Enlisted Reserve Corps in May 1940, and entered on active service in January 1942. He was graduated from Transportation Corps Officer Candidate School in April 1944 and served with a port company in England and France. He was integrated into the Regular Army in July 1946. His father is a retired Colonel, Medical Corps, U.S. Army Reserve (R 134-135).

The following letters of commendation to the accused were received in evidence:

Lt General C. R. Huebner (Def Ex C; R 136)
Maj General F. W. Milburn (Def Ex D; R 136)
Assistant Field Director, American Red Cross (Def Ex E; R 136).

4. Discussion.

The accused is charged with two specifications in violation of the 96th Article of War; conspiracy with intent to defraud and obtaining money under false pretenses. The first specification alleges that accused wrongfully and unlawfully conspired with Dragutin Yosifovitch to defraud the American International Underwriters Corporation by presenting a false claim in that the accused and Yosifovitch further agreed that the latter would arrange to have accused's automobile taken and concealed under such circumstances as would make it appear that the vehicle had been stolen.

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, 1949, Par. 181j). This is common law conspiracy. The crime of

conspiracy also is denounced in Title 18, USC, sec. 371, which, in addition to the corrupt agreeing together requires that the indictment allege and the proof show an overt act in furtherance of the unlawful agreement (MCM, 1949, Par. 183c). The code provision referred to has not, however, changed the nature of the common law offense of conspiracy (CM 328248, Richardson, 77 BR 1,18-19). It is our opinion that the specification in the instant case does not allege the commission of an overt act and consequently, that the offense alleged is that of common law conspiracy (CM 320681, Watcke, 70 BR 125,133; CM 336639, Cole, 3 BR-JC 159,169). In the Watcke, Richardson and Cole cases, supra, it was held that the common law offense of conspiracy constitutes conduct of a nature prejudicial to good order and military discipline tending to bring discredit upon the military service in violation of Article of War 96. The Board of Review consequently concludes that the conspiracy here charged is unlawful and that the specification states an offense of which a court-martial may take cognizance.

It is undisputed that on 19 November 1949, accused was the owner of a 1947 Buick Sedanette, motor number 47522395, which vehicle was insured against theft with the American International Underwriters Corporation, that on the night of 19-20 November 1949, this car was taken from in front of accused's quarters at Bad Kissingen, Germany, and that the accused reported the loss as a theft to the insurance company on 21 November. It also is undisputed that on 10 January 1950, accused submitted a statement in proof of loss to the insurer and received a check in the amount of $2000.00 which he subsequently cashed. There is no conflict in evidence proving the fact that the automobile in question was taken from the vicinity of the accused's quarters in Bad Kissingen on the night of 19-20 November 1949, by one Eilingsfeld and driven by him to Gochsheim, Germany, where it was concealed by one Doucet; nor that it was discovered there by police agents approximately seven months later. Upon being arrested for the theft of the automobile, Doucet, Eilingsfeld and Yosifovitch appear to have denied the theft and to have maintained that the car was taken and concealed pursuant to the wishes and instructions of the accused. The accused denied any agreement whatsoever with Yosifovitch concerning his automobile and insisted that it had been stolen on the night of 19-20 November 1949, by persons unknown to him at that time. The issue in the instant case, therefore, is the single controverted issue of fact whether there was an agreement between the accused and Yosifovitch for an unlawful purpose. As indicated by its findings, the court resolved this issue against the accused. While we recognize the fact that the court's findings are entitled to considerable weight (CM 323161, Lacewell et al, 72 BR 105,109), it is our right and duty to weigh the evidence, judge the credibility of witnesses and resolve controverted questions of fact to our own satisfaction in determining the legal sufficiency of the record of trial (AW 50g, MCM, 1949, p. 290; CM 320681, Watcke, supra, at p.135).

If the conviction of the accused is to be sustained, it must be sustained on the testimony of his purported accomplices to the effect that

accused arranged with Yosifovitch to secure a third person, Eilingsfeld, to take and conceal the accused's car. Yosifovitch testified that the accused suggested the taking, that he (Yosifovitch) had contacted Eilingsfeld and had acted as go-between between accused and Eilingsfeld in arranging the details as to time and place. Eilingsfeld admitted taking the vehicle according to the plan communicated to him by Yosifovitch allegedly pursuant to the instructions of the accused. Yet, both of these witnesses insisted that the taking, which was to be done in the nighttime without the knowledge of the accused but with arrangements to deceive the police in case of apprehension, was not a taking by trespass or for an unlawful purpose but was in the nature of a gift and for the sole purpose of relieving the accused of an unwanted automobile. They further denied concealing the automobile, yet the evidence shows that the car was placed in a barn under precautions of secrecy and that firewood was so piled around it as to hide it from view. The contention of these two that they harbored no suspicion of wrongdoing in taking the automobile is incredible and is belied by the subsequent concealment thereof.

In addition to the foregoing there are other inconsistencies between the testimony of Yosifovitch and Eilingsfeld which also cause the Board of Review to doubt their veracity. Yosifovitch admittedly had ridden several times with accused in his car from Hammelburg to Bad Kissingen. He was, by reputation, "a smooth operator" who could not be trusted albeit a shrewd, capable organizer with a knack for getting things done, especially if they were to his advantage. It does not strain the imagination to conceive that Yosifovitch observed the careless habits of the accused in parking his car without locking the ignition so that anyone who could get in could drive it away without using a key. He admits that all negotiations for the taking of the vehicle were made through him, but insists that he introduced Eilingsfeld to accused which both the accused and Eilingsfeld flatly deny. Moreover, Yosifovitch claims that he expected no compensation for his services in the scheme. Yet, Eilingsfeld says that Yosifovitch asked him several times if he had sold the car and stated that he needed money.

The character of both Yosifovitch and Eilingsfeld leaves much to be desired. Yosifovitch was described as worthy of trust only so long as he could be watched. His reputation for honesty was "not clean." He was known to be a liar and to have been involved "in dishonest deals." Eilingsfeld was an admitted thief and had been convicted in Berlin for larceny and in Schweinfurt for theft and assault.

When the testimony of these witnesses is viewed in the light of the established rule that the testimony of an accomplice or coconspirator is of doubtful integrity and is to be considered with great caution (CM 267651, Boswell, et al, 44 BR 35,42; Holmgren v. U.S., 217 U.S. 509,523-524) the Board of Review is compelled to the opinion that their testimony is not worthy of belief.

To strengthen the prosecution's contention of conspiracy, testimony of witnesses, Loeser and Geis, to the effect that accused had proposed a little over a year prior to the present alleged offense that they steal his car was admitted over the objection of defense counsel. It is apparent upon a review of the record that the alleged prior act of the accused is similar to the offense here alleged. The question of remoteness in time was properly within the discretion of the trial court (Neff v. United States, 105 Fed. 2d 688; CM 277030, Williams, 51 BR 85,95-96), and no error was committed in admitting this testimony.

Loeser and Geis testified that in the fall of 1948 the accused proposed that they steal his car so that he could collect the insurance thereon and that he told them in detail how the taking could be accomplished. Yet the evidence indicates that accused knew very little German and the witnesses knew very little English and that "we make ourselves understood with the hands and feet." Although accused admits that he jokingly said to the witnesses at that time "Why don't you steal my car?", it seems incredible that in view of the language difficulty he could have made himself so well understood as to all the details to which the witnesses testified. Loeser and Geis also stated that accused had never made another proposition to them, but that they had heard him make similar remarks about wanting to get rid of his car in a joking manner to mechanics in the EES garage, where he had the vehicle serviced periodically. In May 1949, Loeser went to work for Eilingsfeld and was still in his employ when the vehicle was discovered at Gochsheim. It appears that Loeser knew who stole the car and, worried by this knowledge, contacted Geis to refresh his memory about the alleged incident in 1948. A similar doubt arises as to what actually transpired between accused and Geis at the time of their meetings prior to the trial. The association between Loeser and Eilingsfeld taints the testimony of both Loeser and Geis with the same unreliability found in the testimony of Eilingsfeld and Yosifovitch.

In addition to the doubtful character of the testimony against the accused discussed heretofor, the record of trial contains compelling evidence corroborating the accused's denial of participation in the alleged conspiracy. The fact that accused had received a bona fide offer of $2300.00 in October 1949, for the purchase of his car added to the fact that accused had spent $700.00 for parts and labor during the fall of that year to put his car in a serviceable condition, negative the concept of a man who is planning to have his car stolen so that he can recover upon the insurance.

The accused's character for honesty and integrity as well as for truth and veracity, in the opinion of witnesses who were shown to have known him intimately, appears to be beyond reproach. Such good reputation is an important factor in cases of this character (CM 320681, Watcke, supra; CM 204259, Allen, 7 BR 333,391).

For the reasons stated the Board of Review is of the opinion that the evidence is insufficient to establish beyond a reasonable doubt that the accused conspired with others to defraud as alleged in Specification 1 of the Charge (CM 341603, Whitcomb, 10 Nov 50).

The second specification, obtaining money under false pretenses, alleges commission of the act itself, done pursuant to the conspiracy, and states a separate, substantive offense. To establish the offense of false pretenses the prosecution must prove four essential elements, (a) the intent of accused to defraud the person or persons named, (b) an actual fraud committed, (c) the false pretense and (d) that the fraud resulted from the employment of the false pretense (CM 302889, West, 59 BR 161,163). Since the Board of Review has determined the evidence to be insufficient to prove the conspiracy alleged in Specification 1 of the Charge and as there is no other independent evidence pertaining to Specification 2, it follows that the evidence also is insufficient to prove the false pretenses and that the fraud alleged resulted from the employment of the false pretenses. As these essential elements are not proven, the court's finding of guilty of Specification 2 of the Charge cannot be sustained.

In view of the Board of Review's opinion that the evidence is insufficient to sustain the findings of guilty and the sentence, it is unnecessary to discuss the several technical questions arising during the course of the trial.

5. Consideration has been given to representations for and on behalf of the accused, orally and in writing, by his counsel, Mr. Emil Katzka.

6. Records of the Department of the Army indicate that accused is 31 years of age, married, and has two children. He was graduated from high school in Brooklyn, New York, in 1937, and completed two years of college at St. John's University, New York, in 1939, when he left to secure civilian employment. Prior to his entry into the service he was assistant manager of a bottling plant for Pilsner Brewing Company in New York. On 17 May 1940, he enlisted in the Enlisted Reserve Corps and on 27 January 1942, he was called to active duty. Accused was graduated from the Transportation Corps Officers Candidate School 4 April 1944, and commissioned a second lieutenant. During World War II, he served twenty months in England, France and Germany, being promoted to first lieutenant on 28 December 1945. He returned from overseas on 26 March 1946 and reverted to inactive status 23 May 1946. He was subsequently integrated into the Regular Army as a first lieutenant on 5 July 1946. Accused was later reassigned to the European Command where he has served continuously since October 1947. His efficiency ratings indicate three adjectival ratings of excellent, one of superior and numerical ratings of 3.6, 5.0, 4.5, 4.5, 6.0, 4.5, 3.5 and 5.8 for the period from 7 April 1944 to 30

June 1947. Subsequent ratings have been 117, 094, 116, 105 and 117. He has received commendations from Lieutenant General C. R. Huebner and Major General F. W. Mulburn for the manner in which he performed his duties as Troop Information and Education Officer at the 7719 EUCOM Transportation Training Center in Hammelburg, Germany, the position which he occupied at the time of the commission of the offenses for which he was tried.

7. The court was legally constituted and had jurisdiction of the person and the offenses. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

C. J. Hauch Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Lodland, J.A.G.C.

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 343693

UNITED STATES v. First Lieutenant MARTIN H. PLOTKIN, 038160, 37th Transportation Highway Transport Division	UNITED STATES ARMY, EUROPE Trial by G.C.M. convened at Wurzburg, Germany, 7 September 1950. Dismissal, total forfeitures after promulgation, and confinement for two years.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(4) the record of trial and the holding by the Board of Review in the case of the officer named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of wrongfully and unlawfully conspiring with Dragutin Yosifovitch to defraud the American International Underwriters Corporation by presenting a false claim and, for the purpose of effecting said conspiracy, agreeing with Yosifovitch that the latter should arrange to have the accused's 1947 Buick automobile taken and concealed under circumstances making it appear that said automobile had been stolen, at or near Lager Hammelburg, Germany, on or about 19 October 1949 (Specification 1 of the Charge); and unlawfully pretending and representing to said corporation, with intent to defraud it, that said automobile had been stolen, well knowing that said pretenses and representations were false, and by means thereof fraudulently obtaining from said corporation the sum of $2,000.00, at Bad Kissingen, Germany, on or about 21 November 1949 (Specification 2 of the Charge); both in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has not concurred in the Board's holding.

3. The evidence is substantially as set forth by the Board of Review in its holding. We concur in the Board's conclusion that the evidence fails to establish beyond a reasonable doubt that the accused was guilty of the conspiracy alleged in Specification 1 of the Charge or of obtaining money by false pretenses, as alleged in Specification 2 thereof.

In our opinion, the case against this accused cannot stand unless we are to believe the testimony of the alleged conspirator Yosifovitch. (As hereinafter indicated, we are of the opinion that, even assuming arguendo the credibility of this witness, the evidence fails to establish the accused's guilt of the conspiracy alleged in Specification 1.) The opinion by our dissenting member herein is premised upon the credibility of Yosifovitch's testimony and its corroboration inter alia by the testimony of Eilingsfeld, Loeser and Geis, whose credibility is also assumed in that opinion. Careful analysis of the record of trial, with due consideration for our authority, and duty in a proper case, to weigh evidence and judge the credibility of witnesses on both sides and to determine controverted questions of fact, leaves us in substantial doubt as to the credibility of all of the mentioned witnesses, particularly the key prosecution witness, Yosifovitch, and thus as to the accused's guilt as charged. This doubt is not dissipated by our recognition of the fact that the trial court saw and heard the witnesses. We believe that this is a case where detached and thorough analysis, upon appellate review, of the evidence as a whole and its implications demonstrates grave danger of a miscarriage of justice which evidently was not apparent to the trial court. Such being the case, our conclusion is also not altered by our recognition of the rule, peculiarly apposite and necessary in cases of this nature, that a conspiracy may be established by circumstantial evidence which shows merely an informal or implied agreement between the alleged conspirators. No rule of evidence, however tempting may be its application to a given situation, can permit us to dispense with the essential requirement that we be convinced beyond a reasonable doubt that the accused is guilty as charged.

The heart of the prosecution's case, as presented by Yosifovitch, is that the accused proposed to Yosifovitch that the latter relieve him of his car, or get someone who would do so, "for nothing." Yosifovitch testified that the accused did not want to know the identity of the man who was to take the car, wished it to be taken after dark and before a certain date, did not wish to see it again, and gave instructions that false information should be given if police stopped the car. In the face of this testimony, Yosifovitch insisted upon cross-examination that he had no suspicion that any impropriety was involved in the transaction (R 23, 25). The evidence of the subsequent concealment of the car corroborates the probable falsity of Yosifovitch's protestation of innocence. Yosifovitch's denial of any expectation of monetary advantage from the deal (R 24) is equally unworthy of belief, under all the circumstances.

We fail to find substantial corroboration of Yosifovitch in the testimony of the repair shop owner, Eilingsfeld. Indeed, the vital inconsistencies between their stories serve further to impugn Yosifovitch's credibility. Although Yosifovitch denied suspecting any impropriety in

the deal, Eilingsfeld testified that Yosifovitch told him the car was not supposed to be seen by anyone for three months (R 34). Again, although Yosifovitch denied expectation of any monetary advantage from the deal, Eilingsfeld testified that if he had sold the car he would have given Yosifovitch something (R 49), pursuant to "a quiet agreement from my part" (R 50), and that Yosifovitch on one occasion asked him "if the car had been sold, he needed some money" (R 51). Yosifovitch testified positively that on the occasion when the accused was having difficulty with the generator in his car, Eilingsfeld was present and Yosifovitch introduced him to the accused (R 17). But Eilingsfeld denied any recollection of this incident and denied having met the accused (R 44-45). These denials are corroborated by the accused's testimony at the trial (R 123).

Moreover, Eilingsfeld's own credibility is open to serious question by reason of internal inconsistencies in his story. His protestations upon cross-examination that he did not suspect any impropriety in the transaction (R 44) matched those of Yosifovitch in their apparent falsity. Eilingsfeld had already testified on direct examination that he had arranged for a place to store the car during the three months when it was to be concealed (R 34), and that Yosifovitch instructed him to telephone the accused if stopped in the car by the American police (R 41).

In short, the testimony neither of Yosifovitch nor of his supposed corroborator, Eilingsfeld, rings true. We are unable, nor, in our opinion, is it our duty under the circumstances, to determine which portions of their testimony are true and which false. Yosifovitch's reputation for lack of veracity and for dishonesty and Eilingsfeld's larcenous record make us doubly reluctant to regard the testimony of these two men as a sufficient basis for the instant conviction. The rule that the uncorroborated testimony of an accomplice, even where apparently credible, is of doubtful integrity and is to be considered with great caution (MCM 1949, par 139a, p 184), in our opinion fully justifies our conclusion.

The reliability of the supposed corroboration of Yosifovitch in the testimony of the mechanics, Loeser and Geis, is likewise subject to substantial doubt. This doubt arises from the evidence of Loeser's employment in 1949 by Eilingsfeld and the suspicious nature of Loeser's contacts first with him and then with Geis, following Eilingsfeld's arrest in June 1950 (R 70-72). We entertain serious doubt upon this evidence as to whether the accused's remarks concerning the stealing of his car were serious or merely in jest.

From the prosecution testimony itself, with its inconsistencies, improbabilities and suspicions, emerges the distinct probability that the accused's car was in fact stolen, that the theft was engineered by Yosifovitch and executed by Eilingsfeld, and that the accused was innocent of complicity in its removal. Their testimony is calculated

to exculpate themselves and accordingly to inculpate the presumably innocent accused. The probability is also strong that Eilingsfeld influenced Loeser, and through him Geis, to corroborate the accused's guilty implication by falsifying their testimony.

Finally, in addition to these grave infirmities in the prosecution's case, we find in the record affirmative indications of the accused's innocence. Wiggins, a store manager employed by the EUCOM Exchange System, testified that on two occasions in October 1949, the very month of the alleged conspiracy, he seriously offered the accused $2300.00 for his car, but the accused was not interested in selling it (R 99a-102). This testimony stands unimpeached and is apparently credible. The same applies to the evidence as to the accused's honesty, integrity and intelligence and as to his prompt report of the theft of the car, which he carefully described as the "only two door Buick of its kind I have seen in EUCOM with the peculiar light blue color my car has" (R 89; Pros Ex 1). The accused's sworn denials of guilt, unlike the implicatory testimony of the prosecution witnesses, are thus substantially corroborated.

With respect to the conspiracy specification, even assuming arguendo the credibility of the most damaging portions of Yosifovitch's testimony, we deem it insufficient to support the inference that the accused intended to defraud the insurance company or that Yosifovitch so understood. The most this testimony could establish would be that the accused arranged with Yosifovitch to have his car disposed of, without remuneration and in time to avoid the necessity of paying further insurance, because of his extreme dissatisfaction with the car. Yosifovitch specifically denied that anything about collecting insurance or of that nature was discussed with the accused (R 23). The suspicious character of the circumstances attending the transaction and the accused's remarks, which well may have been in jest, concerning the stealing of his car, are not, in our opinion, a substitute for proof of the intent and purpose which are the essence of the alleged conspiracy. The same may be said of the unsatisfactory nature of the accused's testimony herein.

We concur with the Board of Review in its conclusion that the prosecution's evidence is also insufficient to establish beyond a reasonable doubt the accused's guilt of defrauding the insurance company of $2,000.00 by falsely representing that his car had been stolen, as alleged in Specification 2 of the Charge.

We are not apprehensive that our conclusion in this case will hamper the prosecution and conviction of persons subject to military law of offenses involving conspiracy with foreign nationals. We need merely reiterate that the rule we apply here is that requiring that we be convinced of the accused's guilt beyond a reasonable doubt by the evidence as a whole. We are not so convinced by the evidence in this record.

4. For the foregoing reasons, we are of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence and that the same should therefore be disapproved.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

(Dissent)
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

Dissenting Opinion
by
Harbaugh
Chairman of the Judicial Council

I am unable to concur in the conclusion, arrived at by the Board of Review and the majority of the Judicial Council, that the evidence is legally insufficient to support the findings of guilty and the sentence. The basis for their conclusion is that the conviction rests primarily upon the testimony of Yosifovitch, an alleged accomplice and conspirator of unsavory character, whose testimony is deemed unworthy of belief. But a conviction may properly be based upon such testimony if it is corroborated in substantial measure (see MCM 1949, par 139a, p 184). Furthermore, a conspiracy may be established by circumstantial evidence which shows merely an informal meeting of the minds of the conspirators, or an implied agreement, with intent to commit an offense as alleged (Ibid, par 127b, p 159; CM 273791, Gould, 47 BR 29, 66, et seq.). In my opinion, Yosifovitch's testimony, plus the substantial corroborating evidence in the record, justified the court in finding the accused guilty as charged.

Yosifovitch testified in pertinent substance as follows: In October 1949 the accused gave Yosifovitch a ride in his car, during which he requested Yosifovitch to take the car "for nothing." Yosifovitch declined the offer and either at that time or subsequently the accused requested him to find someone who would take the car "for nothing." The accused repeated this latter request on several occasions. Yosifovitch accordingly informed the owner of an auto repair shop, Eilingsfeld, of a chance to get a car free (R 10-11). Eilingsfeld said he would take the car. Yosifovitch reported to the accused that he had found a man who would take it, but the accused did not wish to know the identity of the man. He did inquire, however, when the car would be taken (R 12). He also stated to Yosifovitch that he did not wish to see the car any more or care what the taker did with it. The accused stated that the car would be open and no key would be needed to operate it (R 27, 142), and instructed Yosifovitch that if police stopped the car, they should be told it was being tested (R 28). Yosifovitch then informed Eilingsfeld that the car would be available in front of the accused's house "by the post office and you can come any time after seven." Yosifovitch stated that Eilingsfeld would not need keys for the car since the accused would leave it open. The next day the accused complained to Yosifovitch that although his car had been taken the preceding night, it was back that morning, minus one can of gasoline (R 13). Eilingsfeld's explanation to Yosifovitch of the return of the car was the fact that Eilingsfeld could not obtain a place to put it. When Yosifovitch reported this to the accused, the latter said, "That guy better hurry up because * * * he got to" take it by a certain date (R 15).

Subsequently Yosifovitch asked the accused why he did not sell the car, to which the accused replied to the effect that he could get nothing

for it, stating, "'I have been worried. I have been repairing, overhauling -- it would cost me more than my insurance costs me.'" The accused also stated that"the car was so spoiled that he couldn't get enough money by selling it and the car should be taken by such and such a date, that he didn't want to renew his insurance" (R 16).

Pursuant to the accused's request, Yosifovitch again told Eilingsfeld he could take the car at the same place and time of day as before. On the appointed day, the accused complained to Yosifovitch of trouble with his generator and battery. While the accused was examining the generator, Eilingsfeld approached and Yosifovitch pointed out the accused to him as the man who was going to take the car (R 17, 25). Because of the mechanical difficulty, a third day was arranged for the taking of the car. On the evening of that day Yosifovitch received a telephone call from Eilingsfeld (R 18), who stated that he could not start the car. Yosifivitch told Eilingsfeld to call him back later and then telephoned the accused, who said he would "go down there" and telephone Yosifovitch back. When the accused telephoned back he stated that the car was running perfectly. Yosifovitch so reported to Eilingsfeld when the latter in turn again telephoned him. From that time on Yosifovitch had no further dealings with Eilingsfeld until about two weeks before Yosifovitch was arrested (R 19).

It thus appears that Yosifovitch never testified directly that he was an accomplice or conspirator in the accused's plan to dispose of the Buick in order to collect the insurance thereon. Yosifovitch did testify, however, that the accused repeatedly asked him to dispose of the car, which was causing him considerable trouble and expense, under circumstances of such suspicious character that Yosifovitch must have been aware that the deal was illegal. Those circumstances were that the accused did not wish to know the identity of the man who was to take the car, did not want to see it any more or care what was done with it, was desirous that it be taken after dark and before a certain date because "he didn't want to renew his insurance," and was willing to leave it completely unlocked and ready to operate without a key. Yosifovitch's testimony shows that the accused wanted to dispose of his car as a gift to anyone who would take it. His testimony thus demonstrates his awareness of the accused's purpose to have it appear that the car had been stolen so that he could collect the insurance, and thus demonstrates Yosifovitch's complicity in the conspiracy.

Yosifovitch's testimony and the legitimate inference therefrom of the accused's illegal purpose and Yosifovitch's knowledge thereof is corroborated in substantial measure by the witness Eilingsfeld, who testified in this connection substantially as follows. Yosifovitch, after asking the witness if he wanted the car, stated that"the American" did not want to take the car back to the states because the insurance was too high and the car was in "no good condition." Yosifovitch also stated that the car was not supposed to be seen by anyone for the next

three months, so Eilingsfeld arranged for a place where it could be left. He then made arrangements to pick up the car (R 34). Yosifovitch told Eilingsfeld that if he was stopped by American police he should call the accused and "everything would be all right" (R 41). Yosifovitch accompanied Eilingsfeld to the post office, where the car was parked, and explained to him how to start it, no key being necessary (R 35). Eilingsfeld entered the car and drove it away without any key (R 36). (The accused's attempted explanation in his testimony as to why the car was left unlocked is confused and highly unsatisfactory (R 130-132).) Eilingsfeld returned with the car, when he was unable to have it stored, between midnight and 2 a.m., and parked it in front of the post office. Shortly thereafter someone came out of the post office and drove the car into the post office yard (R 36-37). Subsequently Yosifovitch told Eilingsfeld that the accused wished to get rid of the car. Although Eilingsfeld in effect denied seeing or meeting the accused at the time his car had generator trouble (R 37), he did testify that around 19 October he again went to the post office yard and entered the unlocked car, which "did not run." He telephoned Yosifovitch and on his instruction telephoned him again later. At this time Yosifovitch informed him everything was "all right," and the witness was able to start the car and drive it away (R 38-39). In this connection, the record contains no evidence that Yosifovitch himself was familiar with the mechanical idiosyncrasies of the Buick in question.

All this evidence as to the conspiracy is further corroborated by the testimony of the mechanics, Loeser and Geis, that about one year prior to the time in question the accused informed them that the car was well insured and in need of repair (R 75, 78), and that, after repairs were made on the car, the accused asked them to steal it (R 67, 78). Loeser testified that the accused asked them to steal the car before October, when the insurance would expire (R 67). Both testified that the accused made arrangements for the taking and concealing of the car and for their protection in the event of apprehension (R 67, 78). Although Loeser testified that he could not say whether or not the accused's request that they steal the car was in joke or serious (R 70), Geis did not indicate in his testimony that he believed the accused was joking at this time (R 78-80). This evidence of similar acts by the accused at about the same time the year before, under circumstances similar to those obtaining at about the time in question, was admissible to show his motive, intent, and plan of action and to refute his claim of innocence (MCM 1949, par 125b, p 154).

The final and, in my opinion, convincing corroboration of Yosifovitch's testimony and the mentioned inferences therefrom is the accused's own testimony at the trial, which was unconvincing and unsatisfactory generally and particularly with reference to vital points in the case. Although he denied having conspired with Yosifovitch to cause the

car to disappear, he admitted having expended about $700.00 for repairs on the car in the fall of 1949 (R 117). He further admitted having given Yosifovitch rides in his car on several occasions and that Yosifovitch was in his car when he was having generator trouble (R 122). Although the accused claimed he had a number of reasons for keeping his car (R 121), this is belied by his testimony that he left it unlocked and capable of being operated without a key (R 130-132). He also admitted suggesting to Loeser and Geis that they steal his car but claimed that such suggestion was merely a joke (R 124). The accused denied having discussed insurance with Loeser and Geis but was unable to explain how they knew the approximate date of expiration of the insurance policy (R 127).

Giving due consideration to the obvious infirmities in the prosecution testimony, to the testimony of defense witness Wiggins that just before its disappearance he offered to purchase the car for $2300.00, and to the evidence of the accused's good reputation for honesty, integrity and veracity and his apparent lack of need for funds, I am unwilling, on the basis of the overall evidence of record, to conclude that the court erred in finding the accused guilty as charged. In exercising its powers to weigh evidence, judge the credibility of witnesses and determine controverted questions of fact, the Judicial Council should recognize and give due consideration to the fact that the court saw and heard the witnesses. As stated by the Judicial Council in CM 338993, Pelkey, 6 BR-JC 289, 303, 308:

> "Under the circumstances, the discharge of the court's duty of weighing evidence, judging credibility of witnesses and determining controverted questions of fact called for the closest scrutiny and observation of the witnesses on the stand. Their general manner, appearance, deportment, sincerity or lack thereof, and behavior generally and especially under cross-examination were vitally important to the court's determination of their credibility in this case (MCM 1949, par 139a, p 184). We find nothing in the record to justify the general conclusion that the testimony of the prosecution witnesses was false and that of the defense witnesses true. Rather, we are of the opinion that the credibility of the defense witnesses was at least as questionable as that of the prosecution witnesses, if not more so. It is evident to us that this record furnishes no basis for disturbing the trial court's findings. To substitute our judgment for that of the court in a case of this character would, in our opinion, be unwarranted (Cf. CM 335526, Tooze, 3 BR-JC 313, 341, 352)." (p 309)

Another important consideration in this type of case is the fact that a conspiracy is rarely susceptible of direct proof, as conspirators seldom reduce their agreements to writing or make public their unlawful

plans. The terms of the conspiracy frequently have to be gathered by implication from the conduct of the conspirators and from a collocation of circumstances (CM 273791, Gould, 47 BR 29, 67, and authorities therein cited). Even if it be assumed that the evidence as to Yosifovitch's knowledge of the accused's intention to collect on his insurance is insufficient to make him a conspirator as alleged in Specification 1 of the Charge, Yosifovitch's testimony to the effect that the accused gave the car as a gift plus the other corroborative evidence in the record is sufficient to support the findings of guilty of Specification 2 of the Charge and the sentence.

4. For the foregoing reasons I am of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

J. L. Harbaugh, Jr.

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

(300)

343,693

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Martin H. Plotkin, 038160, 37th Transportation Highway Transport Division, upon the concurrence of The Judge Advocate General the findings of guilty and the sentence are disapproved.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

(Dissent)
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

JAN 19 1951

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

15 January 1951

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 343724

4 December 1950

UNITED STATES v. Private First Class ERNEST BELL (RA 18222674), 512th Military Police Company, APO 59.	PUSAN BASE COMMAND Trial by G.C.M., convened at APO 59, 10 October 1950. Confinement for six (6) months (suspended) and forfeiture of $65 per month for six (6) months.

HOLDING by the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found to be legally insufficient to support the findings of guilty and the sentence. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50(e).

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Private First Class Ernest Bell, 512th Military Police Company, did at Pusan, Korea, on or about 17 August 1950, feloniously and unlawfully kill Myung Jung Rhee, a Korean Male, by shooting him in the head with a Sub-machine gun, M-3 calibre .45.

The accused pleaded not guilty to the Charge and Specification. He was found "Of the Specification of the Charge: Guilty, except the word 'feloniously'; substituting therefor the word 'negligently'; of the excepted word Not Guilty, of the substituted word Guilty, Of the Charge: Not Guilty, but guilty of a violation of the 96th Article of War." Evidence was introduced of one previous conviction by special court-martial for leaving his post before he was regularly relieved while being on guard and posted as a sentinel, in violation of Article of War 86. He was sentenced to be confined at hard labor, at such place as proper authority may direct, for six months and to forfeit $65.00

per month for a like period. The reviewing authority approved only so much of the findings of guilty as involves findings that the accused negligently and unlawfully shot and killed Myung Jung Rhee at the time and place alleged with a sub-machine gun, approved the sentence, ordered it executed, but suspended so much of it as related to confinement at hard labor. The results of trial were promulgated in General Court-Martial Orders No. 7, Headquarters Pusan Base Command, APO 59, dated 23 October 1950.

3. Evidence.

a. For the prosecution.

The accused was a member of the 512th Military Police Company (R 18). On the night of 17 August 1950 in Pusan, Korea, the accused with four other soldiers left the Provost Marshal's Office in a 3/4 ton weapons carrier to drive to the company area (R 10-12,23). Since "there was a lot of shooting that night," Lieutenant Winters told the men to carry their weapons (R 12). The accused was riding on the shoulder of the weapons carrier to the left of the driver (R 11,24) and was carrying a "grease gun" (sub-machine gun) which Private First Class Raymond Roy, the driver, had handed to him just prior to leaving the Provost Marshal's office (R 10,23). At approximately 2300 hours as the weapons carrier was passing a police box located on the left of the street, the vehicle struck a bump and a shot was heard (R 10,14-15,24). Myung Jung Rhee, a Korean, who was standing in front of the police box, fell to the ground when the truck made a "bang" (R 14-16). Immediately after the shot was heard, the driver of the truck slowed the vehicle, turned around and drove back to the spot where the deceased lay. "At that time, Bell [the accused] said his gun went off" (R 24). The area was very dark at the time of the incident and there were no street lights (R 12,15,25).

It was stipulated that if Doctor Lee Wa Duck were present, he would testify that Lee Myung Jung, male, was pronounced dead by him at 2330 hours on 17 August 1950 in front of the Bo Su Dong Police Box in Pusan, Korea, and that the type of injury was a bullet through the head (R 9, Pros Ex 1).

The sworn statement of the accused made to a CID agent on 19 August 1950, admitted in evidence as Prosecution Exhibit 2, is as follows:

> "My name is: Ernest Bell
> "At approxemently 11:15 August 17 I was on my way to camp on a 3 quarter ton vehicle and we had recieved the news that the company was pinned down by Koreans. on the way I was given a grease gun by roy and I pulled the slide back and he knocked the clip in. the 3 quarter made a dip missing a bump and in keeping from falling of I accidently discharged one round. I know how to fire a grease gun but the safety I didn't know about it.

"Q. How much training have you had with the grease gun?
A. None.
Q. Did you open the safety cover of the weapon?
A. Yes.
Q. Did you cock the weapon?
A. Yes.
Q. Did you put the safety cover back down?
A. No.
Q. Did you put the magazine in the weapon?
A. No.
Q. If not, who did?
A. Roy Raymond
Q. Was your finger on the trigger?
A. No but when we hit the bump I hit the trigger and fired one round.
Q. How many rounds did you fire?
A. One." (Pros Ex 2)

b. For the defense.

The accused was duly advised of his rights as a witness and elected to remain silent (R 26).

4. Discussion.

The accused was charged with involuntary manslaughter under the 93rd Article of War and was found guilty by excepting the word "feloniously" and substituting therefor the word "negligently" of an offense in violation of the 96th Article of War. The court's action in effect was a finding of guilty of negligent homicide, which is a lesser included offense of involuntary manslaughter (MCM, 1949, Par. 180a; CM 318442, Tyndall, 67 BR 303,307; CM 329832, Senck, 78 BR 175,178; CM 334806, Smith, 1 BR-JC 307,308). Negligent homicide under Article of War 96 is the unlawful killing of a person as a result of the failure to use due caution and circumspection in the circumstances. It is unlawful homicide accomplished by simple negligence (CM 329832, Senck, supra).

In the instant case it is apparent that to sustain a finding of guilty of negligent homicide, it must be shown that the accused failed to use due caution and circumspection under the circumstances. On 17

August 1950, Pusan, Korea, was a part of a beachhead then being maintained by the United Nations forces and fighting was in progress along the entire perimeter embracing a front of 120 miles, approximately 50 miles from Pusan. Since this was a major military operation and a general fact of which the court and reviewing authority may have taken judicial notice (MCM, 1949, Par. 133), the Board of Review will do so here (CM 326147, Nagle, 75 BR 159,168; CM 320957, Boone, 70 BR 223,224; CM 316886, Chaffin, 66 BR 97,101; CM 301154, Hufendick, 15 BR (ETO) 137, 141). At the time of the fatal accident, the accused was performing his assigned duty as a military policeman in the performance of which he was required to be armed. The uncontradicted testimony reveals that there was shooting in the area in which the accused was travelling, that there was talk of a "sniper," that the accused was informed at the time that his company was "pinned down by Koreans" and that the officer in charge had told the men to carry their weapons. Under such circumstances, it was neither unreasonable nor clearly negligent for the accused to carry his weapon in a condition of readiness for action with a round in the chamber. Thereafter when the vehicle, on which the accused was riding, struck a bump through no fault of the accused, he, "in keeping from falling off" the truck, "accidentally discharged one round." Accused had not been riding with his finger on the trigger. It cannot be said that such conduct upon the part of the accused exhibited such lack of due care and circumspection as to render his acts unlawful and negligent beyond a reasonable doubt. Rather, the Board of Review is of the opinion that the facts in the instant case indicate nothing more than an accidental homicide by misadventure or misfortune, which is excusable (MCM, 1949, Par. 179a).

> "Homicide by misadventure is the accidental killing of another, where the slayer is doing a lawful act unaccompanied by any criminally careless or reckless conduct. A homicide committed by accident, misadventure, or misfortune is excusable; and, as in other cases of excusable homicide, the slayer is not criminally responsible therefor. * * * Thus it is excusable homicide if death unfortunately ensues * * *, under some circumstances, where a pistol or other firearm is accidentally and unintentionally, or even intentionally, discharged." (30 C.J. p.87).

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.

C. J. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

15 DEC 1951

JAGH CM 343724 1st Ind

JAGO, Department of the Army, Washington 25, D.C.

TO: Commanding General, Pusan Base Command, APO 59, c/o Postmaster, San Francisco, California

1. In the case of Private First Class Ernest Bell (RA 18222674), 512th Military Police Company, APO 59, 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. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

2. It is requested that you publish a general court-martial order in accordance with this holding and indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and the sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing action is attached.

3. When copies of the published order in the 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 343724)

E. M. Brannon

E. M. BRANNON
Major General, USA
The Judge Advocate General

2 Incls
1. Record of trial
2. Draft GCMO

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

DEC 15 1950

JAGH CM 343775

UNITED STATES v. Private LUTHER D. WILLIAMS (RA 14305046), Company C, 24th Infantry Regiment, APO 25.	))))))))	25TH INFANTRY DIVISION Trial by G.C.M., convened at APO 25, 19 September 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Luther D. Williams, Company C, 24th Infantry Regiment, APO 25, did, at or near Haman, Korea, on or about 7 September 1950, misbehave himself before the enemy by refusing to return to his company on line, while his command was engaged with the enemy.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private Luther D. Williams, was a member of Company C,

24th Infantry Regiment, and had been a member of that organization at least since March 1950 (R 10). On 6 September 1950, Company C, 24th Infantry Regiment was occupying defensive positions near Haman, Korea, and was in actual contact with the enemy. The accused was one of the "front line personnel" (R 11). The company kitchens were located at Masan approximately sixteen miles from the front line (R 10).

During the day of 6 September 1950, Sergeant Edward Turner, Company G, 24th Infantry Regiment, observed the accused in the kitchen area. He approached him and "told him that he wasn't supposed to be there." The accused replied that "he didn't want anyone fucking with him" (R 12). Sergeant Turner reported the fact of the accused's presence in the kitchen area to WOJG Robert G. Deuell of C Company.

Mr. Deuell "looked up" the accused and "attempted to talk to him about returning to his company." The accused

> "* * * said that he wasn't going any place and that he didn't care what happened to him; that he only wanted something to eat * *." (R 9)

Mr. Deuell's testimony continues as follows:

> "* * I attempted to talk to him further about returning to the company and he was very insolent and he stated that the people in the rear area didn't know what was going on and because of that, he wasn't going back. He said that he didn't care what happened to him; just put him in jail or anything else. He wanted something to eat" (R 9).

Mr. Deuell took steps to see that the accused was fed, permitted him to rest overnight, and, as he observed the accused was nervous suggested that he see a doctor. The following morning the accused voluntarily reported to Mr. Deuell and

> "* * said that he had decided not to go to the medics and that he wanted to go to jail instead" (R 10).

Mr. Deuell

> "* * asked him if he fully knew what he was up against by refusing my order and if he knew the seriousness of the charges for not going back to the company, and he said that he did" (R 10).

b. <u>For the defense</u>.

The defense called no witnesses and presented no evidence. The rights of the accused as a witness in his own behalf having been explained

to him, he elected to remain silent (R 14).

4. Discussion.

The accused was charged with and found guilty of violation of Article of War 75 in that he did

> "* * misbehave himself before the enemy by refusing to return to his company on line, while his command was engaged with the enemy."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

> "* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.
>
> * * *
>
> "Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

> "* * acts by any officer or soldier, as -- refusing or failing to advance with the command when ordered forward to meet the enemy; * * refusing to do duty or to perform some particular service when before the enemy" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50).

While the specification in the instant case does not follow the form given in the Manual for Courts-Martial (MCM, 1949, p.318), the Board of Review deems it to be adequate to state an offense in violation of Article of War 75 (CM 289472, Scheck, 14 BR (ETO) 47,49).

The evidence adduced by the prosecution in support of the charge and specification was not refuted by the defense in any respect. It established conclusively that the accused was a member of a unit which, at the time and place alleged, was engaged in combat with the enemy. The accused's post of duty was with the front line elements of his unit; yet, he was discovered at a point some sixteen miles to the rear. When directed to return to his company he refused, stating that he would rather go to jail and that he was aware of the consequences of his decision.

There can be no question but that the accused was "before the enemy" within the meaning of Article of War 75 when discovered in the area occupied by the unit kitchens (CM 257252, Warman, 37 BR 85,90). Nor is it material whether he was in such area by proper authority or otherwise (CM 286156, Black, 25 BR (ETO) 71,73; CM 278019, Folse, 11 BR (ETO) 351,352). Having been directed to return to his company, his refusal to do so constitutes misbehavior within the meaning of the statute (CM 282641, Trostle, 24 BR (ETO) 181,183; CM 294796, Transeau, 16 BR (ETO) 153,156).

5. Consideration has been given to representations for and on behalf of the accused, orally and in writing, by his counsel, Mr. Jack Greenberg.

6. The papers accompanying the record of trial indicate the accused to be 20 years old and unmarried. He completed ten years of elementary school and worked for two years prior to enlisting in the Army at Biloxi, Mississippi, 31 March 1948. He joined his present organization 22 January 1949. His character and efficiency ratings are unknown.

7. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. F. Hauch Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 343775

UNITED STATES v. Private LUTHER D. WILLIAMS, RA 14305046, Company C, 24th Infantry Regiment, APO 25	25TH INFANTRY DIVISION Trial by G.C.M., convened at APO 25, 19 September 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(2) the record of trial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of misbehaving himself before the enemy by refusing to return to his company on line, while his command was engaged with the enemy, in violation of Article of War 75. The offense was alleged to have occurred at or near Haman, Korea, on or about 7 September 1950. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. 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.

3. The facts in the case are not in dispute and may be briefly summarized as follows:

On 6 September Company C, 24th Infantry Regiment, was occupying a defensive position near Haman, Korea, and was in actual contact with the enemy. The accused was a member of the front line personnel of this company. At the time of trial, 19 September 1950, the Company had been in the line for 55 or 56 days. Until 6 September the accused had been on the line with the company. The company kitchen was located at Masan, approximately 16 miles from the front line.

On 6 September the accused was seen in the kitchen area of his company. In the afternoon this matter was brought to the attention of Warrant Officer Junior Grade Robert C. Deuell of C Company, who attempted to talk to the accused about returning to his company. The accused was very insolent and among other things said he was not going back, that "he didn't care what happened to him; just put him in jail or anything else. He wanted something to eat." Mr. Deuell observed that the accused was nervous and excited, thought that he might be a combat fatigue case and tried to get the accused "to go to the medics" for a diagnosis. The accused said he would give an answer after he had eaten. Shortly after the accused had finished eating Mr. Deuell again asked him if he wanted to go to the medics and received the reply that the accused "didn't want to do anything, * * * that he was so nervous that he thought the medics could do him no good." Mr. Deuell again saw the accused on the evening of 6 September, but decided not to talk to him until the following morning.

After breakfast on 7 September the accused voluntarily came to Mr. Deuell and said that he had decided not to go to the medics and that he wanted to go to jail instead. Mr. Deuell then explained to the accused the serious nature of the charges for not going back to the company, and received the reply that the accused understood. Mr. Deuell then took the accused to the rear for preparation of charges.

Mr. Deuell testified that he never gave the accused a direct order to return to his company, but during the talk on the 6th

> "* * * I told him what the regimental policy was. That no one was allowed to stay around the kitchen. That we were not to favor anyone from the front lines in the kitchen area, and that if they wanted food, they had to go back to their company to obtain it. I didn't wish to give him a direct order at that time because he was angry and he wasn't listening. He didn't appear to be listening and started to walk off two or three times. I wanted him to be in full control of his mental powers when I told him to return to his company. I told him -- at the time I talked to him, I felt it would be best to tell him to go to the medics to determine whether or not he was suffering from combat fatigue because I know a lot of cases where a person acts as he did, the medics give the man a rest and I felt this was true in his case because of his nerves and the way he was acting. I also told him that if he did go to the medics and they marked him 'duty', his answer to my question about returning to his company would be obvious and he would have to return to the front lines to his company." (R 11)

4. The accused is charged with misbehaving himself before the enemy by refusing to return to his company on line while it was engaged with the enemy. The evidence is clear and conclusive that at the time in question

the accused's company was on the line and engaged with the enemy. The only questions are whether the accused refused to return to his company and whether he was before the enemy at the time of such refusal.

As to the first question, the evidence clearly shows that Mr. Deuell was very patient and understanding in his treatment of the accused and went to considerable effort to make him understand that he must return to the front unless he went to the medics and was marked unfit for duty. In our opinion the accused understood this proposition and by choosing under these circumstances not to go to the medics, but to jail instead he was in fact refusing to return to his company.

The second question was answered in the affirmative by the Board of Review on the basis of CM 257252, Warman, 37 BR 85, 90. In that case the accused was charged with misbehaving himself before the enemy on or about 23 February 1944 by refusing to advance, having been ordered forward by Lieutenant Bryan to engage the enemy, which forces the said command was then opposing. So far as here material, the evidence showed that the forward echelon of the accused's organization was engaged with the enemy and that the rear echelon to which the accused was assigned as a truck driver was about two miles south and within the sound of the firing in the forward area. The place occupied by the rear echelon appears to have been called the "Kitchen Area." For certain reasons not material here Lieutenant Bryan had told the accused on 21 February 1944 to come up to the front and the accused had replied that he was going to the hospital. Two days later Lieutenant Bryan discovered that the accused had not gone to the hospital but was "still in the Kitchen Area." Lieutenant Bryan forthwith ordered the accused to accompany him to the front, to which the accused replied that he was not going to the front. After quoting from Winthrop's Military Law and Precedents, 2d Ed (p 623), and the Manual for Courts-Martial, 1928 (par 141a) the Board of Review expressed the view that the rear echelon of the accused's organization was before the enemy within the contemplation of Article of War 75.

The quotation from Winthrop referred to above by the Board of Review reads as follows:

> "* * * Such acts by any officer or soldier, as - refusing or failing to advance with the command when ordered forward to meet the enemy; going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; hiding or seeking shelter when properly required to be exposed to fire; feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other active service against the enemy; refusing to do duty or to perform some particular service when before the enemy." (Winthrop's Military Law and Precedents, 2d Ed, p 623)

The quotation from the Manual for Courts-Martial, 1928 referred to above by the Board of Review provides:

> "Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation. For example, where accused was in the rear echelon of his battery about 12 or 14 kilometers from the front, the forward echelon of the battery being at the time engaged with the enemy, he was guilty of misbehavior before the enemy by leaving his organization without authority although his echelon was not under fire." (MCM, 1928, par 141a)

The Manual for Courts-Martial, 1949 explains "before the enemy" as follows:

> "* * * Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy although miles from the enemy lines. On the other hand, an organization some distance from the front which is not a part of a tactical operation then going on or in immediate prospect is not 'before the enemy' within the meaning of this article." (MCM 1949, par 163, p 216)

In the instant case at the time the accused refused to return to his company, he was a member of the front line personnel of his company which was engaged with the enemy approximately 16 miles forward of the kitchen area of the company where accused refused to return to the front line. Considering the means of transportation ordinarily used in modern war by our Army, 16 miles is a relatively short distance. Moreover, we judicially notice the general facts of history that in the present war in Korea infiltration of our lines by the enemy is not uncommon and that there are great numbers of enemy guerrillas operating behind our lines. From a tactical viewpoint, there is a very close relationship between troops of a company on the line and the company kitchen and adjacent area in the rear, because food is essential to the operation of the front line troops. Certainly in this area the accused was not removed from the tactical control of those charged with the effectiveness of combat operations. We therefore conclude, as did the Board of Review, that the accused was "before the enemy" at the time he refused to return to his company.

5. In our study of the record of trial we have noted certain mitigating factors. It is uncontradicted that on 6 September the accused was very nervous and excited and exhibited to Mr. Deuell the outward symptoms of a soldier who was suffering from combat fatigue.

It also appears that before that date the accused had been with his company on the line for 42 or 43 days. There is nothing in the record of trial or allied papers to warrant a conclusion that the accused's condition, either mental or physical, was such as to exonerate him from the offense charged. Nevertheless, we feel his apparent condition at the time warrants consideration with reference to the sentence. In this connection it is pointed out that under Article of War 51 the power to mitigate sentences in cases of this character is vested in The Judge Advocate General under the direction of the Secretary of the Army.

6. We are of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, but for the reasons hereinbefore set forth recommend that the sentence to confinement be reduced to ten years.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

(316)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

343,775

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Luther D. Williams, RA 14305046, Company C, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army and upon the recommendation of the Judicial Council, the term of confinement is reduced to ten years.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

18 January 1951

GCMO 11, January 25, 1951)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

NOV 17 1950

JAGH CM 343781

UNITED STATES v. Second Lieutenant ASAHEL H. JEFFERS (01913223), The Military Police School Detachment (Students), Area Service Unit 3441, Camp Gordon, Georgia.	)	CAMP GORDON Trial by G.C.M., convened at Camp Gordon, Georgia, 20-21-25 September 1950. Dismissal and total forfeitures after promulgation.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

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 Asahel H. Jeffers, The Military Police School Detachment (Students) Area Service Unit 3441, did, without proper leave absent himself from his organization at Camp Gordon, Georgia, from about 9 June 1950 to about 19 July 1950.

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

Specification 1: In that Second Lieutenant Asahel H. Jeffers, CMP, The Military Police School Detachment (Students), Area Service Unit 3441, Camp Gordon, Georgia, did, at Augusta, Georgia, on or about 5 June 1950, with the intent to deceive and injure, wrongfully and unlawfully make and utter to Goodyear Service Stores, Augusta, Georgia, a certain check, in words and figures as follows, to wit:

THE CENTRAL NATIONAL BANK

JUNCTION CITY, KANSAS

5 June 1950

Pay to the order of Goodyear Service Stores $77 36/100

Seventy Seven - - - - - - - - - - - - - - 36/100 Dollars

2nd Lt Asahel H. Jeffers
01913223

and by means thereof did fraudulently obtain thereby seventy-seven dollars and thirty-six cents ($77.36) in merchandise.

Specification 2: (Identical to Specification 1, except the date of the check "8 June 1950," the amount "$35.00," the payee of the check "Mayos," and the amount obtained "thirty-two dollars and fifty cents ($32.50) in merchandise and two dollars and fifty cents ($2.50) in cash.")

Specification 3: (Identical to Specification 1, except the date of the check "9 June 1950," the amount "$120.00," the payee of the check "Bowen Brothers," and the amount obtained "one hundred seventeen dollars and forty-five cents ($117.45) in merchandise and two dollars and fifty-five cents ($2.55) in cash.")

Specification 4: (Identical to Specification 1, except the date of the check "8 June 1950," the amount "$100.00," the payee of the check "Stanley Jewelers," and the amount obtained "ninety-nine dollars and thirty-five cents ($99.35) in merchandise and sixty-five cents ($0.65) in cash.")

Specification 5: (Finding of not guilty).

Specification 6: (Identical to Specification 1, except the date of the check "9 June 1950," the amount "$160.00," the payee of the check "Star Luggage Shope," and the amount obtained "one hundred and fifty-eight dollars and fifty cents ($158.50) in merchandise and one dollar fifty cents ($1.50) in cash.")

Specification 7: In that Second Lieutenant Asahel H. Jeffers, CMP, The Military Police School Detachment (Students), Area Service Unit 3441, Camp Gordon, Georgia, did, at Augusta, Georgia, on or about 9 June 1950, with the intent to deceive and injure, wrongfully and unlawfully make and utter to Lombard Brinson a certain check, in words and figures as follows, to wit:

Augusta, Ga 9 June 1950 $55.00

At Sight Pay to the order of

Lombard Brinson

Fifty five and - - - - - - - - - - - - - - 00/100 Dollars

Value received and charge same to the account of

To The Central National Bank
Junction City, Kansas

2nd Lt Asahel H. Jeffers
01913223

and by means thereof did fraudulently obtain thereby fifty-five dollars ($55.00) in merchandise.

Specification 8: In that Second Lieutenant Asahel H. Jeffers, CMP, The Military Police School Detachment (Students), Area Service Unit 3441, Camp Gordon, Georgia, did, at Augusta, Georgia, on or about 9 June 1950, with the intent to deceive and injure, wrongfully and unlawfully make and utter to Georgia Railroad Bank and Trust Company, a certain check, in words and figures as follows, to wit:

THE CENTRAL NATIONAL BANK

JUNCTION CITY, KANSAS

9 June 1950

Pay to the order of Georgia Railroad Bank & Trust Company $100.00

One Hundred and - 00/100 Dollars

2nd Lt Asahel H. Jeffers
01913223

and by means thereof did obtain from the said Bank one hundred dollars ($100.00) lawful money of the United States, he, the said Second Lieutenant Asahel H. Jeffers, then well knowing that he did not have and not intending that he should have sufficient funds in the Central National Bank, Junction City, Kansas, for payment of said check.

Specification 9: (Identical to Specification 8, except the place "Camp Gordon, Georgia," and the date of the offense and check "8 June 1950.")

Specification 10: (Identical to Specification 9, except the date of the offense and check "1 June 1950," and the amount of the check and amount obtained "$95.00.")

Specification 11: (Identical to Specification 9, except the date of the offense and check "7 June 1950," and the amount of the check and amount obtained "$90.00.")

Specification 12: (Identical to Specification 8, except the place "at or near Augusta, Georgia," the date of the offense and check "4 June 1950," the amount of the check and the amount obtained "$80.00," and the payee of the check "Lawson Douglas.")

Specification 13: (Identical to Specification 12, except the date of the offense and check "7 June 1950," and the amount of the check and the amount obtained "$150.00.")

Specification 14: (Identical to Specification 6, except the amount of the check "$200.00," the payee of the check "Friedman Jewelers," and the amount obtained "three hundred forty-nine dollars and ninety-five cents ($349.95) in merchandise.")

Specification 15: (Disapproved by the reviewing authority).

Specification 16: (Identical to Specification 4, except the amount of the check "$92.00," the payee of the check "Leon Simon," and the amount obtained "ninety-two dollars ($92.00) in merchandise.")

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 5 of Charge II; guilty of Charge I and its Specification, and guilty of all the other Specifications of Charge II and Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority disapproved the findings of guilty of Specification 15, Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The accused was identified as a member of the military service (R 13).

Charge I and its Specification.

A duly authenticated extract copy of the morning report of the accused's organization, introduced into evidence without objection,

shows the accused absent without leave, as of 9 June 1950 (R 13; Pros Ex 1). By stipulation, it was agreed the accused returned to military control on 19 July 1950 (R 13).

Charge II and its Specifications.

Warrant Officer Robert A. Armstrong testified thatas an agent of the CID he was assigned the military duty of returning the accused from Camp Stoneman, California, to his duty station at Camp Gordon, Georgia. Warrant Officer Armstrong explained his rights under the 24th Article of War to the accused after which the accused made a voluntary written sworn statement (R 13-15; Pros Ex 2). On his arrival at Camp Gordon, Georgia, the accused made a second sworn statement, supplemental to the first, in which he disclosed the details connected with certain check transactions (R 17-19; Pros Ex 3). After deleting certain irrelevant portions by agreement between the prosecution, defense and the accused, Prosecution Exhibits 2 and 3 were offered in evidence without objection as the voluntary statements of the accused (R 16-18). The court accepted the statements into evidence conditionally, subject to the corpus delicti being established (R 16-18).

In Prosecution Exhibits 2 and 3, the accused stated that, on 20 December 1949, he was discharged as an enlisted man at Fort Riley, Kansas, to accept a commission as a Second Lieutenant. He was ordered to Camp Gordon, Georgia, to attend the Military Police School and was on duty there when on 9 June 1950, he married "Frankie Morgan" of Augusta, Georgia. On that same day he went absent without leave and remained absent until apprehended and returned to military control 19 July 1950. In the few days prior to his leaving Camp Gordon, Georgia, he cashed a number of checks in Augusta, Georgia, written against his account in the Central National Bank, Junction City, Kansas, for which he received money or merchandise from business concerns or persons in amounts as follows:

1.	Goodyear Service Stores	$ 77.36
2.	Mayos	35.00
3.	Bowen Brothers	120.00
4.	Stanley Jewelers	100.00
5.	Universal C.I.T. Credit Corporation	53.00
6.	Star Luggage Shope	160.00
7.	Lombard Brinson	55.00
8.	Georgia Railroad Bank and Trust Company	100.00
9.	Georgia Railroad Bank and Trust Company	100.00
10.	Georgia Railroad Bank and Trust Company	95.00
11.	Georgia Railroad Bank and Trust Company	90.00
12.	Lawson Douglas	80.00
13.	Lawson Douglas	150.00
14.	Friedman Jewelers	200.00
15.	Ben F. Owens	100.00
16.	Leon Simon	92.00

(Left hand column indicates Specification related to each item. Specification 5 resulted in finding of not guilty; Specification 15 was disapproved by the reviewing authority).

As to these checks the accused stated, "At the time I cashed these checks I did not know whether they were good or not, as I did not know the balance in my account" (Pros Ex 3, p.4). He also said all checks bore his proper name, rank, and serial number and, in some instances, his organization. He used his AGO card as identification in all instances (Pros Ex 3, p.6).

It was stipulated by the prosecution, defense, and the accused that Prosecution Exhibits 4 through 19, inclusive, were photostatic copies of the front and back of each of the accused's "original checks" (R 20).

The prosecution offered evidence as to each of the checks involved as follows:

Specification 1.

Mr. Allan T. Austin was manager of Goodyear Service Store, Augusta, Georgia. He identified Prosecution Exhibit 4 as a photostat of a check given him by the accused 5 June 1950, for which the accused received four tires and four tubes (R 19-21). The check was returned unpaid. At the time the accused could not be located, but after the accused returned to Camp Gordon the store received payment in full (R 21). Prosecution Exhibit 4 was received in evidence without objection (R 22).

Specification 2.

Mr. William Pechter, Manager of Mayos Store, Augusta, Georgia, identified Prosecution Exhibit 5 as a copy of a check given him by the accused for clothes of a value of $32.50 and the balance of $2.50 in cash (R 22,23). The check was returned unpaid. At the time he could not locate the accused (R 23). Later the check was redeemed by a lady (R 24). Prosecution Exhibit 5 was received in evidence without objection (R 23).

Specification 3.

Mr. Henry A. Fulghum, manager of the photographic department of Bowen Brothers, Augusta, Georgia, accepted a $120.00 check on 9 June 1950, from the accused in payment for a camera, six rolls of film and $2.55 in cash (R 25,26). He identified Prosecution Exhibit 6 as a copy of the check in question (R 26). The photostatic copy of the check was received in evidence without objection (R 27). The treasurer of Bowen

Brothers, R. K. Strozier, testified that he handled the check for his firm and that it was returned marked "insufficient funds" (R 28). He was unable to locate the accused, but Mrs. Jeffers redeemed the check about three weeks before the trial (R 29).

Specification 4.

Mr. Victor Charney, manager of Stanley Jewelers, Augusta, Georgia, identified Prosecution Exhibit 7 as a copy of a check given his company by the accused. The check was admitted in evidence without objection (R 31). Accused received $99.60 in merchandise and $0.40 in cash for the check (R 30). The check was returned unpaid because of insufficient funds (R 31). A lady representing herself as Mrs. Jeffers redeemed the check "a good while after the transaction" (R 32).

Specification 5.

The court found the accused not guilty (R 81).

Specification 6.

Mr. Kalmon Saul, owner of the Star Luggage Shop, Augusta, Georgia, accepted a check from the accused in the amount of $160.00 on 9 June 1950 for six pieces of luggage at $158.50 and the balance of $1.50 in money (R 37,38). He identified Prosecution Exhibit 9 as a photostatic copy of the check. The check was returned unpaid. About a month before the trial, a lady paid the $160.00 and picked up the check (R 38-40). Prosecution Exhibit 9 was received in evidence without objection (R 39).

Specification 7.

About 9 June 1950, Joseph A. Mullarky, a salesman at the Lombard Brinson store in Augusta, Georgia, accepted a check for $55.00 from the accused in payment for a purchase of clothing (R 40,41). He identified Prosecution Exhibit 10 as a photostatic copy of the check (R 40). About 19 June 1950, the check was returned unpaid. Sometime between 1 and 10 August 1950, a "Mrs. Jeffers" paid for the check and took it away (R 42). Prosecution Exhibit 10 was received in evidence without objection (R 41).

Specifications 8, 9, 10 and 11.

Mr. George C. Labouseur was a junior officer in the Georgia Railroad Bank, Augusta, Georgia. His bank cashed four checks for the accused, two for $100.00 each, and the others for $95.00 and $90.00, respectively. (R 50-52). He identified Prosecution Exhibits 11, 12, 13 and 14 as photostatic copies of these checks. Mr. Antonakos, the manager of the bank branch at Camp Gordon cashed the checks, Prosecution Exhibits 12,

13, and 14, Mr. Labrouseur cashed the check, Prosecution Exhibit 11 (R 49,56). All were returned because of insufficient funds (R 50-53). They were later redeemed by Mrs. Jeffers (R 54). Prosecution Exhibits 11, 12, 13 and 14 were admitted in evidence without objection (R 49,52, 53,54).

Specifications 12 and 13.

Mr. Lawson E. Douglas, a golf professional at the Municipal Golf Course, Augusta, Georgia, identified Prosecution Exhibit 15 as a photostatic copy of a check he accepted from the accused about 4 June 1950, for $80.00 cash (R 58). It was returned marked insufficient funds (R 59). On 7 June 1950, he cashed another check for the accused in the amount of $150.00, Prosecution Exhibit 16, which was likewise returned unpaid (R 60). About 1 August 1950, Mrs. Jeffers redeemed both checks (R 61). Prosecution Exhibits 15 and 16 were admitted into evidence without objection (R 49,52).

Specification 14.

The credit manager for Friedman's Jewelers, John H. Eyster, accepted a check for $200.00 from the accused as a down payment on a set of rings about 8 June 1950 (R 46). He identified Prosecution Exhibit 17 as a photostatic copy of this check (R 47). The check was returned unpaid (R 47). In August, a lady redeemed the check and paid the balance of the account (R 48). Prosecution Exhibit 17 was admitted into evidence without objection (R 49).

Specification 15.

Disapproved by the reviewing authority.

Specification 16.

By stipulation, it was agreed that if Mr. Leon Simon, Jr., of Pine Hill Apartments, Augusta, Georgia, were present he would testify that on 8 June 1950, he was given a check for $92.00 by a person who represented himself to be the accused, in payment for a purchase of clothing (R 42). He identified Prosecution Exhibit 19 as a photostatic copy of this check. The check was returned unpaid. Mrs. Jeffers redeemed the check between 1 and 12 August 1950 (R 41). Prosecution Exhibit 19 was admitted in evidence without objection (R 42).

Prosecution Exhibit 20, a letter dated 12 September 1950, from the Vice President of the Central National Bank, Junction City, Kansas, inclosing a "duplicate copy of the checking account of Lt. Asahel H. Jeffers, covering period April 1, 1950 to June 16, 1950" was admitted

in evidence without objection pursuant to stipulation between the prosecution and defense (R 42). This Exhibit revealed the accused's balance on 3 June 1950, in his account with the Central National Bank, Junction City, Kansas, to be $61.21.

b. For the defense.

Mrs. Frances Jeffers, the wife of the accused, testified that it was she who redeemed all of Lieutenant Jeffer's outstanding checks (R 73). She said the accused gave her a list of all of his creditors and sent her to pay his accounts because he was himself then in arrest in quarters (R 73-76). She paid in all about $2000.00 (R 74).

The accused, after being advised of his rights as a witness, elected to take the stand to make an unsworn statement (R 80). He stated that his father had been keeping some money for him, that "at the time he left Augusta" and prior to the time he wrote the checks, he had written his father to send money to his bank which money he thought would "take care" of "all of my checks" (R 80).

The deposition of Leslie H. Jeffers, father of the accused, admitted in evidence, corroborates the accused's unsworn statement that his father was holding some $3000.00 for him and that the accused asked him for money about 1 June 1950 (R 72, Def Ex A).

4. Discussion.

a. Charge I and the Specification thereof.

The accused was charged with and found guilty of absence without proper leave from his organization at Camp Gordon, Georgia, from 9 June to 19 July 1950.

Absence without leave is a military offense in violation of Article of War 61 (AW 61, MCM, 1949, p.292). To establish the offense it was necessary for the prosecution to prove that the accused absented himself from his organization as alleged and that such absence was without authority (MCM, 1949, Par. 149). Both of these facts may be proven prima facie by duly authenticated extract copies of the morning reports of the accused's organization (MCM, 1949, Par. 146a, p.199).

In the instant case, the competent evidence sustains beyond a reasonable doubt the court's findings of guilty of Charge I and its Specification. A duly authenticated extract copy of the morning report of the accused's organization shows the accused from duty to absence without leave as of 9 June 1950. By stipulation, it was agreed that he returned

to military control 19 July 1950. The accused admitted his absence in his confession in which he said he left his organization without authorization on the day of his marriage, 9 June 1950, to go on his honeymoon and stayed away from his organization at Camp Gordon, Georgia, until apprehended at "Chicko," California, 19 July 1950.

b. Charge II and the Specifications thereof.

The case against the accused raised by Charge II and its Specifications and the approved findings of guilty thereof involve the making and uttering of fourteen checks. Specifications 1, 2, 3, 4, 6, 7, 14 and 16 allege that the accused did "with the intent to deceive and injure, wrongfully and unlawfully make and utter" checks as severally described "and by means thereof did fraudulently obtain" money and merchandise as described. It is noticed that none of these specifications contains the usual additional allegation: "he, the said ---, then well knowing that he did not have and not intending that he should have sufficient funds in the --- bank for payment of said check," as indicated in the Manual for Courts-Martial (MCM, 1949, spec. No. 110, p.326).

The making and uttering of worthless checks constitutes an offense in violation of the Articles of War (MCM, 1949, Par. 182,183; Winthrop's Military Law and Precedents, 2d Ed., p.716); which offense is aggravated when coupled with an intent to defraud or guilty knowledge (CM 323108, Rockett, 72 BR 83,93). The words "then well knowing that he did not have and not intending that he should have sufficient funds in the -- bank for payment of said check," when coupled with allegations of fraud and fraudulent intent are merely allegations of evidentiary facts pertinent to the allegations of fraud and intent to defraud, proof of which, together with attendant facts and circumstances may or may not be sufficient to show fraud and intent to defraud. Hence, in the instant case, the Board of Review is of the opinion that the specifications under discussion each adequately alleges an offense in violation of Article of War 96. At most, the failure to allege the evidentiary facts constituting the fraud and fraudulent intent in each specification would have made them each subject to a motion for appropriate relief by the defense had it elected to make such a motion (MCM, 1949, Par. 70b). Not having made such a motion, the defense is taken to have waived any objection it may have had to the sufficiency of the specifications in this respect (MCM, 1949, Par. 64a). It manifestly appears from the record of trial that the accused was not misled in his defense by the omission of the words in question from the specifications, with the result that the Board of Review finds no prejudice to the accused to have resulted from such omission (AW 37; MCM, 1949, p. 283).

Specifications 8, 9, 10, 11, 12 and 13 of Charge II, allege that the accused did "with intent to deceive and injure, wrongfully and unlawfully make and utter" checks as severally described and "by means thereof did obtain" money as described, "he, the said Second Lieutenant Asahel H.

Jeffers, then well knowing that he did not have and not intending that he should have sufficient funds in the Central National Bank, Junction City, Kansas, for payment of said check." These specifications thus contain all essential allegations of the offense of "making a check with insufficient funds with intent to defraud" (CM 336515, Stewart, 3 BR-JC 115,120), and follow exactly the form given in the Manual for Courts-Martial except that the word "fraudulently" is omitted. In view of the other allegations in these specifications, the Board of Review does not consider the omission of the word "fraudulently" to be material nor to affect the sufficiency of the specifications severally to state an offense in violation of the Articles of War.

With respect to each specification under Charge II for which there is an approved finding of guilty in the instant case, the accused was shown to have given a check for which he received cash or merchandise, or both, in return. All of these checks were written during the period 1 to 9 June 1950, on which latter date the accused went absent without leave and stayed away until apprehended 19 July 1950. All of the checks were unpaid and were returned by his bank because of insufficient funds. With the exception of one $35.00 check, all of the checks are over $50.00 in amount. Together they aggregate an amount in excess of $1400. These checks were issued by the accused when at no time, then or thereafter, did he have more than $61.21 in his bank account. Most of the payees attempted to locate the accused but could not and all were forced to wait for their money until the checks were redeemed some three weeks or a month before the trial by the accused's wife. In his confession, the accused frankly stated, "At the time I cashed these checks I did not know whether they were good or not, as I did not know the balance in my account."

In defense, the accused, not under oath, stated that he expected the checks to be paid out of funds which he had requested his father to place to the credit of his account. His father corroborated his request for funds.

The foregoing facts establish beyond a reasonable doubt that in each case a check was issued by the accused for value, which check was worthless as the accused did not have funds in his bank account against which it could be paid. His intent at the time of the making and uttering of each check is revealed by his own statement that he did not know "whether they were good or not." It was his duty to know that the checks were good and his indifference as indicated by his statement, together with the fact that he uttered the checks, is strongly indicative of an intent to defraud (CM 236069, Herdfelder, 22 BR 271,276; CM 343356, Ray, 25 Oct 50). As stated in CM 219428, Williams, 12 BR 249,262, and quoted with approval in CM 315578, Bell, 65 BR 47,52 and CM 337978, Gallo, 4 BR-JC 193,201:

> "* * but the course of conduct of accused in writing a large number of checks within a comparatively short period of time, and

his failure to exercise ordinary care with respect to the condition of his bank account at the time these checks were negotiated, reflects more than inadvertence, indifference or carelessness. Such repeated wrongful and unlawful acts lead to but one conclusion, viz., that accused made and uttered the checks specified, with knowledge and /fraudulent/ intent as alleged."

If the accused, in anticipation of the making and uttering of the checks in question, requested his father to deposit funds to the credit of his account out of which the checks could be paid, as he testified, he still is in no better position. As the Board of Review stated in the Mooney case:

"* * Even if, as he contended, he had sought to have his mother make a deposit to cover these checks his reckless conduct in issuing these checks without ascertaining whether or not the deposit had in fact been made demonstrates his gross indifference as to the sufficiency of his bank balance to pay these checks and brands his conduct as fraudulent (CM 270061, Sheridan)." (CM 285460, Mooney, 56 BR 89,95).

The accused caused complete restitution to be made by redeeming his worthless checks. This does not constitute a defense (CM 322546, Barton, 71 BR 257,261; CM 257069, Bishop, 37 BR 7,13; CM 259234, Holliday, 38 BR 293,297; CM 236069, Herdfelder, supra, at 273; CM 280895, Donnelly, 53 BR 403,411).

5. The accused is 23 years of age, born 22 August 1927 at Baylis, Illinois. He graduated from Pittsfield, Illinois High School and entered the Navy 13 January 1945. He was discharged honorably as a Pharmacist Mate 3rd Class, 21 July 1948. On 3 January 1949 he enlisted for three years in the Army and was discharged on 20 December 1949, to accept a commission as Second Lieutenant, AUS, CMP. His first orders sent him to Camp Gordon, Georgia, to attend MP School, reporting for duty 6 January 1950. On 9 June 1950 he married Miss Frankie Morgan of Augusta, Georgia, and that same day went AWOL. He was rated once as a student with the comment "High potential as an instructor." He graduated 32 in a class of 33. He has received one abbreviated efficiency report which shows a slightly better than average rating.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as modified by the reviewing authority, and the sentence, and to warrant confirmation of the sentence. A sentence

to dismissal and total forfeitures after promulgation is authorized upon conviction of an officer of violation of Articles of War 61 and 96.

C. J. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Dodland, J.A.G.C.

(330)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 343,781

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Asahel H. Jeffers (01913223), The Military Police School Detachment (Students), Area Service Unit 3441, Camp Gordon, Georgia, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

7 DEC 1950

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

14 December 1950

(GCMO 90, Dec 21, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 345831

7 DEC 1950

UNITED STATES v. Sergeant HENRY D. WILLIAMS (RA 38688018), Company A, 373rd Infantry Battalion (Separate).	WETZLAR MILITARY POST Trial by G.C.M., convened at Wetzlar, Germany, 11,12,13 and 18 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Henry D. Williams, Company "A" 373d Infantry Battalion (Separate), did, at or in the vicinity of Butzbach, Germany, on or about 31 July 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Elvira Janouch, a human being, by choking and strangling her.

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

He pleaded not guilty to the charges and specifications, and was found guilty of the Charge and its Specification and not guilty of the Additional Charge and its specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution ofthe sentence, and to be confined at hard labor at such place as proper authority may direct for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

(Introductory: In the following statement of facts exhibit numbers are those given the exhibits upon their admission in evidence.)

Accused is in the military service and a member of Company "A", 373d Infantry Battalion. On the morning of 31 July, Sergeant Albert Johnson, a fellow member of accused's unit, lent his car, a 1949 Anglia two-door sedan, to accused. Johnson identified pictures of his car, which were received in evidence as Prosecution Exhibits 1a and 1b (R 13-18).

At about 7:00 o'clock on the evening of 31 July 1950, accused, accompanied by a young lady, drove up to the gasthaus at Licherstrasse, Schneise #11, Giessen, in a black car bearing the inscription "Anglia," the same car pictured in Prosecution Exhibits 1a and 1b. (Note: Schneise is a German term meaning forest path (R 31).) Accused secured a table, drove his car up to it, and turned on the car radio. Accused and his companion gave their order to Mrs. Maria Herz who subsequently struck up a conversation with the couple, neither of whom she had seen before. Mrs. Herz was given a drink of whiskey by accused's companion. She described accused's companion as being of medium size and estimated her age to be 35 or 36. She recalled that the woman was dressed in a dark garment and a "pull over with a pattern on it," and was wearing a necklace with a silver cross. Prosecution Exhibit 9, "a woman's knit sweater about 16 inches across at the shoulders, sort of reddish brown in color with green trim and design of three lines /lions/ in front of green," was shown to Mrs. Herz. She recalled that the "pull over" worn by accused's companion was dark blue, but that the design on the "pull over" was the same as that on Prosecution Exhibit 9. Mrs. Herz found Prosecution Exhibit 14 to be similar to the necklace and cross which accused's companion was wearing (R 20-21,25-26).

Richard Berg, a patron of the gasthaus, listened to the German news which was coming in on the radio of accused's car, and, at that time, observed accused and his companion (R 37-38). Both Berg and Mrs. Herz identified Prosecution Exhibit 2 as pictures of accused's companion (R 23-24,38-39).

Accused and his companion left the gasthaus shortly after 7:30 in accused's car (R 26). Although accused had been drinking he appeared to Mrs. Herz to be sober (R 26). At about 11:30 or 11:45 on the same evening, accused came to Mrs. Herz' window and asked to get a car or horse to pull his car out of a ditch (R 26). Mrs. Herz

directed her son-in-law, Josef Schuerkes, to help accused inasmuch as the latter had been a guest (R 26). Schuerkes accompanied accused to Schneise 14, some 600 meters distant from his house on Schneise 11. Accused explained that he had taken a girl to Frankfurt and that he pulled into Schneise 14 in order to relieve himself. Accused appeared to be sober while with Schuerkes. Schuerkes was with accused until 0130 hours 1 August (R 31-34).

At 1600 hours on 2 August 1950, Heinrich Muell was working in his field located near a parking area on the Giessen-Frankfurt autobahn about 9 kilometers from Butzbach. In his clover field, Muell discovered the body of a female lying face down, her hands tied behind her back, and covered with a skirt, a "pull over" and clover. Muell observed rings on one finger, a wrist watch, and a necklace around the neck. He identified Prosecution Exhibit 9 as the "pull over" which was lying on top of the body. When the field guard came by Muell informed him of his discovery and told him he should tell the burgomeister (R 42-47).

A report was received in the office of the Criminal Police in Giessen at about 1900 hours, 2 August 1950, and Fritz Meinhardt, Ewald Ksoll, and Jacob Geyer, members of the homicide squad, went to a field off the autobahn at the second parking area about 8 kilometers from Giessen. Geyer talked with Muell, and Meinhardt and Ksoll went on to inspect the body (R 52,53,58,59,66). Meinhardt found some paper near the parking space and placed it in an envelope and sealed it. He identified Prosecution Exhibit 26 as the envelope and paper which he placed therein (R 61-62, 65). He also found some paper clenched in the right hand of the body. He placed this paper in another envelope and sealed it. Meinhardt identified Prosecution Exhibit 25 as the envelope and paper which he placed therein (R 61-62,65). Prosecution Exhibits 25 and 26 were given by Meinhardt to members of the "CID" (R 62,64). Meinhardt found the body covered with a "pull over" and a "light blue ladies skirt" which was completely unbuttoned. Prosecution Exhibit 9 was identified by Meinhardt as the "pull over" which was on the body. After the "pull over" and skirt were lifted from the body it was observed to be that of a woman, her hands tied behind her back with a lady's stocking. The left side of the face, the vagina and buttocks were covered with maggots. The woman was wearing two rings, a wrist watch and earrings. The body was again covered to await the arrival of a doctor (R 60-61,66-67,71). Doctor Emil Moerler, a duly licensed physician and surgeon, arrived at the scene at about 2000 hours (R 64,73). In the course of his examination, he turned the body over and at that time it was observed that cloth of fine tissue was protruding from the mouth (R 61). Doctor Moerler's examination of the body led him to the conclusion that death had occurred approximately 24 hours earlier (R 73-74).

Ksoll remained at the scene until approximately 2300 hours and

supervised placing the body with the hands still tied and the gag in the mouth, together with the rings, wrist watch and earrings into a casket preparatory to sending it to the Pathological Institute. The following morning at the Pathological Institute, at Ksoll's direction, the body was placed in the position in which it had been found in the field and six photographs were taken of it. Ksoll identified Prosecution Exhibits 7a through f for identification as the photographs so taken, and testified that they were pictures of the body which he had seen lying in the field the previous day. He also identified Prosecution Exhibits 8a and b as photographs of the same body taken while it was lying on the autopsy table (R 66-68,72).

Ernst Thode, the police official who took the photographs, recalled that the design on the "pull over" seemed familiar and, at that time, recalled that on 10 May 1950 he had taken pictures of a "Mrs. Janouch," "a venereal disease and vagrancy suspect." He identified Prosecution Exhibit 2 (2 pictures of a woman) as the pictures he took on 10 May. Comparison of these pictures with those he made at the Pathological Institute on 3 August led him to the conclusion that the two sets of pictures were of the same subject (R 89-90,92-94).

Ksoll was present at the autopsy which was performed on 3 August 1950 by Professor Foerster and Doctor Ules Schorn, assistant to the Chief Surgeon at the Pathological Institute, Giessen (R 72,74). Doctor Schorn, a licensed physician and surgeon who had specialized in pathology and who incident thereto had performed about 500 autopsies and superintended approximately 750 autopsies annually, performed the actual autopsy while Professor Foerster dictated the findings (R 74-75). Doctor Schorn identified Prosecution Exhibits 8a and b, and 7a-f as pictures of the body upon which he performed the autopsy (R 80-82).

External examination of the nude body showed the hands tied behind the back and a gag in the mouth. Parts of the flesh were covered with maggots. There were several lacerations on the body. When the gag was removed from the mouth it was found to be a pair of lady's pants which were admitted in evidence as Prosecution Exhibit 4 (R 76). Earrings, a wrist watch, 2 rings, and a chain with a silver cross found on the body were identified as being similar, respectively, to Prosecution Exhibits 10,11,12,13 and 14. Prosecution Exhibits 5 and 6 in Doctor Schorn's opinion were respectively identical to the silk stocking with which the hands were tied and that found around the victim's neck (R 76-80).

Doctor Schorn observed that the victim's hands were "bluish" leading him to the conclusion that her hands had been bound prior to death (R.85). In the course of the autopsy Doctor Schorn found a dilation of the side of the heart, hemorrhages under the pleura, an edema of

the lungs, a breaking of the tongue bone, and hemorrhages in the muscular section of the neck, in the area of some glands and on the left tonsil. From the foregoing findings and the pressure marks on the neck, Doctor Schorn concluded that death resulted from suffocation. The condition of the stomach contents showed that the victim had eaten two hours before her death, and based upon the weather conditions existing at Giessen between 21 July and 2 August 1950, Doctor Schorn further concluded that death occurred between 30 and 31 July 1950 (R 83-88).

Hermine Ehmann identified Prosecution Exhibit 2 as pictures of her stepsister, Elvira Janouch, a 36 year old German national, also known as "Elli." Mrs. Ehmann had last seen "Elli" alive approximately two weeks before her burial in August. She recalled the "pull over" shown in one of the pictures labelled Prosecution Exhibit 2 as belonging to her sister and identified Prosecution Exhibit 9 as the "pull over." She further identified Prosecution Exhibits 10,11,12,13,14,15 and 16, respectively, as earrings, a wrist watch, a ring with monogram, a ring, a silver necklace with cross, a skirt "which buttoned from top to bottom," and a pair of low heel shoes as property of her sister and they were admitted in evidence (R 99-104).

Accused appeared at the gasthaus at Schneise 11 on the afternoon of Sunday, 6 August, with a girl other than the one who was with him there on 31 July. Mrs. Herz talked with accused and asked him about the girl "because /she/ had learned about it from the newspapers and he said that he had driven her to Frankfurt, and then /she/ said that she was dead." Accused exclaimed, "'Dead!' 'Dead!'" (R 27,30).

On 11 August 1950, pursuant to investigating an incident in which a woman's body was found on the autobahn, Sergeant First Class Edward L. Galvin, 480th Military Police CID Detachment, Wetzlar, Germany, with Agent Schwoebel, went to the 373d Infantry Battalion to speak to accused and Corporal Johnson. When accused and Corporal Johnson appeared, the group drove to the Criminal Investigation Division office in Wetzlar in Johnson's car. Accused was at the Criminal Investigation Division office most of the day. Galvin talked to accused and Johnson together and subsequently to accused alone. Both interviews were of about three quarters of an hour in duration. Galvin read the 24th Article of War to accused and then explained it to him. Galvin told accused that he did not have to make any statement "either verbally or orally or written, and that he could not be compelled to make any. That was his right under the 24th Article of War. And that any statement he made either orally or written might be used against him in the event of court-martial." Thereafter Galvin did not offer any hope of reward or benefit and did not make any threats of violence to accused to induce a statement. Accused appeared to be calm, and Galvin, after asking him a few questions asked if accused would make a statement. Accused assented and

Galvin typed the statement, after which accused read it and signed it. Galvin identified Prosecution Exhibit 18 as the statement which he took from accused on 11 August 1950, and it was admitted in evidence, without objection (R 117-122).

In this statement, accused related that on 31 July 1950 he left the River Barracks, Giessen, in a car belonging to Corporal Albert Johnson. At a cafe in Giessen, he saw a girl whom he had met ten days earlier and took her for a ride. He took her to a gasthaus set back off the left side of "Licherstrasse" quite a ways out on the road to Steinback and the Giessen "turn-off" to the autobahn. After eating and drinking and listening to the car radio, he started to take the girl, at her request, to Frankfurt. She later asked to be taken to the Kaserne at Bonamies and he left her there at 2330 hours and was back in Giessen at 0045 hours 1 August. On Sunday, 6 August, again driving Johnson's car, accused, with a different girl, stopped at the gasthaus out on "Licherstrasse." While there, the woman who runs the place told accused about "the girl" being found dead on the autobahn. Accused, in turn, told the woman that he had taken "the girl" to Bonamies. Accused added that pictures shown to him at the Criminal Investigation Division office were of "the girl" who was with him on 31 July 1950 and who was taken to Bonamies by him (Pros Ex 18).

Galvin testified that Prosecution Exhibits 19a and b were the pictures which were shown to accused and they were admitted in evidence (R 122-123). These pictures appear to be identical to the pictures admitted in evidence as Prosecution Exhibit 2.

Galvin identified Prosecution Exhibits 20 and 27, respectively, as strips of paper and a soiled khaki shirt found in Johnson's car after taking the statement from accused (R 123-126).

At about 0830 hours, 14 August 1950, Galvin and Master Sergeant Grover Herbert Lynch of Galvin's unit, took accused to Frankfurt to have him tested on the polygraph machine. During 1948 and 1949 Lynch and accused had been stationed at New Orleans, and Galvin recalled that they had discussed their former station. They arrived at Frankfurt between 0950 and 1000 hours and Galvin talked to the sergeant in the laboratory who took accused away. Galvin and Lynch again saw accused at about 1245 hours, at which time accused said he would like to tell Galvin a "story." Galvin asked if accused wanted to tell a "story" and when accused responded, "Yes," Galvin reminded him of the 24th Article of War and added, "You do not have to make any statement or say anything." Accused then told Galvin a "story" and subsequently wrote out the "story" on a statement form, the heading of which was filled out by Galvin. Galvin identified Prosecution Exhibit 21 as the statement written by accused (R 127-130,147-148,152).

The presentation of the prosecution's case was interrupted by accused's voir dire examination concerning the circumstances under which the statement was made.

He testified that he was taken in custody on 11 August and made a statement on that date - after being apprised of his rights under Article of War 24. That night he was permitted to communicate with his wife. At no time was he permitted to communicate with counsel, but he admitted that he made no request for counsel. On 14 August he was taken to Frankfurt for a polygraph test. Prior to taking the test, the agent in charge of the laboratory asked him, "'Williams, do you know your rights under the 24th Article of War?'" to which accused responded, "'Yes.'" After the test had been completed, about 1:00 or 1:30 o'clock, accused was joined by Lynch and Galvin. Accused and Lynch had been acquainted since 1948 when both had served at the same station. Lynch told accused that "it would be better if [accused] made a statement for him and [Lynch] would do everything within his power to help [accused] within the law." Accused "figured" that since Lynch was a "CID Agent" he might be of assistance to him and so made the statement (R 138-144).

Lynch denied saying to accused that it would be better if accused made a statement and that he (Lynch) would do anything he could within the law to help accused (R 152). Galvin denied hearing Lynch give accused any such admonition and promise of help (R 148). The statement (Pros Ex 21) was admitted in evidence over objection by the defense (R 155).

After the statement was made, Galvin told accused they would then eat but that afterwards he would like to get a more detailed statement. After eating, accused made another statement. Galvin asked accused questions and Lynch typed the answers. Some of the language used in the statement was Galvin's. When the statement was completed accused read it, but did not sign it immediately. In response to Galvin's request, accused consented to swear to the statement. Lieutenant Pollack, the summary court officer in the laboratory, asked accused if the statement was his, whether he had read it and wanted to sign it, and if he knew his rights under Article of War 24. After accused was sworn, he signed the statement as did Lieutenant Pollack. Galvin identified Prosecution Exhibit 22 as accused's sworn statement and it was admitted in evidence, over objection by the defense (R 156-159,162-164).

Prosecution Exhibit 21, the first statement made by accused on 14 August is substantially incorporated in Prosecution Exhibit 22, the contents of which immediately follow.

Accused recounted that between 1730 and 1800 hours, 31 July, at

the Cafe Schneider, Giessen, he met a girl known to him as "Elli" whose acquaintance he had made ten days earlier. She was clad in a brown pullover sweater with animal figures drawn across the front of it, a skirt which buttoned all the way down the front, and a pair of black leather pumps. He asked her to take a ride with him. She acquiesced and they went to a German gasthaus off the left side of Licherstrasse going toward the autobahn. While there, accused had several drinks of whiskey and "Elli" had one drink of whiskey and one of wine and also had dinner. Accused brought his car up close to the table at which they were sitting and turned on the car radio. They left the gasthaus between 1930 and 2000 hours and drove toward the autobahn. After getting on the autobahn heading toward Frankfurt from the Giessen "turn-off" Elli, at accused's request, took off her clothes and sat naked beside the accused. They drove to what accused believed was the second "cut-off" for parking and drove in behind a hedge off the parking space. Accused drank and "necked" for a while and then he and Elli decided to have "an intercourse." Accused got out of the car, divested himself of some of his clothing and opened the right door of the car. "Elli" laid across the front seats of the car with her legs dangling outside the car. While having sexual intercourse, accused felt that he would get more satisfaction if he slapped his partner, and thereupon slapped Elli on the left side of her face with his open right hand. Elli, in turn, kicked accused in the mouth cutting his lip and knocking him off balance. She jumped from the car and ran toward the autobahn with the accused in pursuit. He seized her by the hair, spun her around, and hit her in the face. She started to "hollow," and he grabbed her around the throat with both hands, took her into a field and with his hands still around her throat threw her to the ground. When she attempted to kick and strike him, he "put a little more pressure on her throat and her arms and legs seemed to go limp and she was gasping for breath so [he] released [his] hands from her throat." He went to the car, secured her panties and one stocking. He put the panties in her mouth, turned her over on her stomach, and tied her hands behind her back with the stocking. He retrieved her sweater, skirt, and slip from the car and used them to cover her body, and then covered the body and clothing with vegetation. When he left, the girl was motionless and, to the best of his knowledge, dead. He got on the autobahn and headed for the Giessen turnoff. He noticed the girl's shoes in the rear of the car and threw them out. He passed the Giessen turnoff, crossed the autobahn and headed back toward Frankfurt. He took the Giessen turnoff on that side of the autobahn. Near the gasthaus where he had previously eaten with his victim, he turned off on a dirt road and stopped to see if any car pulled in behind him. He procured his victim's pocket book, got out of the car, took some papers from the pocket book, threw the pocket book into a field, and started to burn the papers. The glare of automobile headlights frightened him and

he stamped out the fire. When he attempted to turn his car around he backed into a ditch and needed help to get his vehicle extricated. He went back to the gasthaus and aroused "the old lady" and asked her for help. She asked him where his companion was and he informed her that he had taken the girl to Frankfurt. He finally had his car extricated at about 0200 hours, 1 August 1950. On Sunday, 6 August, he returned to the gasthaus with a girl named Yvonne. The "old lady" at the gasthaus told accused that Elli had been found on the autobahn. Accused responded that he did not know anything about it as he had taken Elli to Frankfurt. He concluded his statement with the assertion that the subject of the photograph shown to him by Agents Galvin and Schwoebel at Wetzlar on 11 August 1950 was "Elli," the girl he was with on 31 July 1950 (Pros Ex 22).

Maria Schneider identified Prosecution Exhibit 16 (shoes otherwise identified as deceased's property by her sister) as a pair of red shoes which she found on 1 August 1950 in the parking area opposite Gruningen on the autobahn, between Kassel and Frankfurt (R 171-172).

The day following the taking of the statement set forth above (Pros Ex 22) Lynch went to the area where according to accused were the papers from the deceased's pocket book. Lynch found some papers in that area bearing the name "Janouch." Some of the paper had ragged brown edges. The papers were admitted in evidence as Prosecution Exhibit 17 (R 110-111).

Livio Vagnina, Chief Forensic Chemist for the 27th Criminal Investigation Division Laboratory, a chemistry graduate and a member of the American Chemists Society, tested the paper labelled Prosecution Exhibits 20, 25, and 26 and found that they could have come from the same source (R 166-168). Vagnina also tested the shirt labelled Prosecution Exhibit 27 and found that it was stained with spots of blood of "O" type. He had previously obtained a sample of accused's blood and found it to be of "A" type (R 168-170).

Between 23 and 30 August 1950, accused was a patient in the psychiatric section at the 98th General Hospital where he was attended by Major Kenneth L. Artiss whose primary duty at the hospital was as neuropsychiatric doctor in charge of the closed section of the hospital. Major Artiss had graduated from the Medical School of the University of Southern California in 1946 with an "MD." He interned in the Los Angeles County General Hospital where he specialized in neuropsychiatry. He was commissioned in the Medical Corps and was sent to Oliver General Hospital where he took the course in military neuropsychiatry. From there he was sent to the 98th General Hospital where he had been serving continuously for a period of almost three years as a neuropsychiatrist. In May 1950, Major Artiss was made a

member of the American Psychiatry Association (R 174).

During the period of accused's hospitalization, Major Artiss observed him daily and in all spent about six hours with him. Accused was examined physically and neurologically. His spinal fluid and his blood were also examined. A Board of Officers, consisting of Colonel Daniel J. Berry, Chief of the Neuropsychiatric Service of the hospital, Colonel Hans Lowenbach, Psychiatric Consultant for the European Theater, who was on loan to the Army from Duke University where he is Professor of Psychiatry, and Major Artiss, was appointed on 29 August 1950 to determine the sanity of accused. Major Artiss identified Prosecution Exhibit 28 as the Board's report (R 174-177).

The findings of the Board incorporated in the report were as follows:

"1. Sgt Henry Williams, RA 36 688 018 is now so far free from mental defect, disease a/o derangement as to be able, concerning the particular act(s) charged, to adhere to the right.

"2. Sgt. Henry Williams, RA 36 688 018 is now so far free from mental defect, disease a/o derangement as to be able, concerning the particular act(s) charged, to distinguish right from wrong.

"3. The Board could not find any psychiatric evidence from which to conclude that Sgt Henry Williams, RA 36688 018 was, at the time of the alleged offense(s) unable, concerning the particular act(s) charged to adhere to the right or to distinguish right from wrong.

"4. Sgt. Henry Williams, RA 36 688 018, possesses sufficient mental capacity to understand the nature of the proceedings and intelligently to conduct and cooperate in his own defense." Pros Ex 28)

Major Artiss found that accused demonstrated a psychopathic personality with certain traits of sex deviation (R 180). He explained that a psychopathic personality is not, however, a mental disease, but rather a developmental disorder, and that sexual sadism likewise is not a mental disease but rather a type of character disorder.

b. For the Defense

Accused after being apprised of his rights as a witness elected to testify in his own behalf, limiting his testimony to the offenses of which he was acquitted and to biographical data. His testimony as to the latter is as follows:

He testified that he is a graduate of Booker T. Washington High School, Dallas, Texas, and that subsequent to his graduation he attended Tuskegee Institute for one year. His financial situation did not permit his return to Tuskegee and he went to work and later married. He was drafted on 1 June 1944 and had served in Germany since August 1949 (R 233-234).

Mrs. Juanita Williams, accused's wife, testified that she and accused had been married for eleven years and had four children, the eldest being eight years of age and the youngest, 11 months. Mrs. Williams received an allotment of $120.00 and in addition she received $130 from accused. Accused was a good husband and father. Mrs. Williams had been hospitalized off and on from November 1949 to January 1950 and as a result the care of the children devolved upon accused during that period. People told Mrs. Williams that accused was taking good care of the children. During the same period, accused was drinking heavily and on some of his visits to the hospital Mrs. Williams observed that he was tipsy. He appeared upset about the children and her illness (R 229-231).

First Lieutenant Harry B. Matney, Sergeants Booker T. Jones, and Bernard Maynard, Willie Adams, Albert Johnson, and Ervin Slater, and Corporal Walter W. Kittrell and Chaplain Charles Fisher, testified that accused was of good reputation, generally (R 218-228).

Sergeant Slater also testified that at about 4:00 p.m., 31 July 1950, he met accused at the Cafe Schneider in Giessen. While they were together they consumed about a fifth of whiskey. The whiskey came from accused's car where Slater saw five bottles (R 227).

4. Discussion

Accused has been convicted of the premeditated murder of Elvira Janouch on 31 July 1950 in violation of Article of War 92. Aside from the accused's pretrial statements, which we hereinafter conclude were voluntarily made, the evidence shows that the deceased was last seen alive in accused's company at about 1930 hours, 31 July 1950, at a gasthaus in the vicinity of Giessen, Germany. On the afternoon of 2 August 1950, in a field off the Giessen-Frankfurt autobahn not far from the gasthaus in which she was last seen alive, the lifeless, bound, and gagged body of Elvira Janouch was found. Medical testimony established that death occurred on or about 31 July 1950 as a result of strangulation. At various places in the field and clenched in the hands of the deceased were found strips of paper which could be of common origin with strips of paper found in a car which accused was using on 31 July. Found also in the same car was a khaki shirt with

blood stains of a type other than that of accused. On the autobahn not far from the field were found Elvira's shoes.

A few hours after accused had left the gasthaus accompanied by the deceased, his car was observed in a ditch not far from the gasthaus and in the same general vicinity wherein Elvira's body was found. Subsequently, at or about the place his car was seen in the ditch were found papers bearing deceased's family name.

It may be seen, therefore, that the uncontradicted evidence, aside from accused's pretrial statements, establishes that the crime alleged was probably committed, that accused had ample opportunity to commit it, and justified the reception in evidence of accused's pretrial statements, their voluntary character being otherwise established.

On 14 August 1950, accused made two substantially identical statements wherein he admitted being the criminal agency of Elvira's death. In his tale of unsurpassed sordidness, he related that at a parking space on the Giessen-Frankfurt autobahn, while engaging with Elvira in sexual intercourse in which she, having previously disrobed at accused's request, was a willing partner, he struck her about the face in order to obtain a greater degree of satisfaction from the sexual act. She retaliated by kicking him in the face, thus disentangling herself from his sexual embrace. She started to flee toward the autobahn, but was overtaken by accused who struck her. He grasped her about the throat with both hands to stifle her cries and without releasing his hold dragged her to an adjacent field. When she attempted to kick and strike him he tightened his hold and held her thus until motion ceased. He then gagged her with her panties, rolled her body over, bound her hands with one of her stockings (medical testimony establishes that death had not occurred when her hands were bound), covered her with her outer garments and then attempted concealment by piling vegetation over the lifeless mound. When he left the scene, Elvira was, to the best of his knowledge, dead.

Murder is defined as "*** the unlawful killing of a human being with malice aforethought" (MCM, 1949, par 179a, p 230). Murder is aggravated by the coincidence of premeditation upon the part of the murderer. Premeditated murder is defined as "*** murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or design" (MCM, 1949, par 179a, p 231).

In the instant case, the facts show without question that the killing was unlawful, i.e., without legal excuse, and that, inasmuch as the act resulting in death was likely to cause death or great bodily harm, malice aforethought exists unless accused's act was

committed in the heat of sudden passion caused by adequate provocation and not malice. Whether accused's act was motivated by deceased's interruption of his sadistic pleasure or by his desire to stifle deceased's cries, "The provocation was not of such nature as to move the average person to the degree of violence to which accused resorted" (CM 329321, Marinez, 78 BR 11, 23-24).

Homicide by strangulation, as in the instant case, from "*** the deliberate nature of [the] act reveals premeditation ***" (MCM, 1949, par 179a, p 231).

Although the evidence reveals that accused had been drinking at or about the time of the murder, he appeared sober, and acted rationally, and there appears to be no basis for a conclusion that he could not entertain a specific intent to kill.

As to "Specification 1 of Charge I," accused pleaded not guilty by reason of "a lack of mental responsibility." Thereafter, the defense offered no evidence showing such lack of mental responsibility of accused. An Army psychiatrist introduced by the prosecution testified that accused was then presently sane and that there was no evidence that he was otherwise at the time of the offense. This testimony was corroborated by a report of a board of medical officers of which the witness was a member. The other two members of the board did not testify but it does not appear that they were unavailable. Upon similar circumstances the Board of Review has stated:

> "*** It is provided that:
>
> '*** The opinions as to the mental conditions of the accused contained in the report of a board of medical officers *** may be received in evidence, provided the officers making such report are made available for call as witnesses by the prosecution, defense, or the court for examination. ***' (MCM, 1949, par 112c).
>
> The record of trial does not establish that the other two members of the Board were not so made available, and it thus appears that the admission of the Board's opinion evidence was proper. ***" (CM 342559, Vennie and Morris, 5 Oct 1950).

In view of the uncontradicted expert testimony establishing the mental responsibility of the accused, the court's conclusion to the same effect, implicit in its findings of guilty, is warranted.

The defense objected to the competency of accused's two incriminating pretrial statements on the ground that they were induced by the promise

to help accused made by Criminal Investigation Division Agent Lynch in the presence of Criminal Investigation Division Agent Galvin. Both Criminal Investigation Division agents denied that such a promise was made. The issue thus joined was decided adversely to the accused and the record shows no cause for the Board to decide the issue differently.

5. Accused is 32 years of age, married, and the father of four minor children. He is a high school graduate and completed one year of college. In civilian life he was employed as a cook. He has had enlisted service since June 1944 and his tour of service in Germany extends from August 1949. His service prior to the offenses charged is characterized as excellent.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for life, is authorized upon conviction of a violation of the 92nd Article of War.

Lucius Bardin, J.A.G.C.

Samuel S. Cowles, J.A.G.C.

J. W. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

343,831

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Sergeant Henry D. Williams, RA 38688018, Company A, 373rd Infantry Battalion (Separate), upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

26 December 1950

(CMO 93, Dec 29, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGZ CM 343838

NOV 2 1950

UNITED STATES v. Private LEO C. SMITH (RA 16269751), 11th Replacement Company, 11th Airborne Division, Fort Campbell, Kentucky.	FORT CAMPBELL Trial by G.C.M., convened at Fort Campbell, Kentucky, 11 October 1950. Dishonorable discharge (suspended), total forfeitures after promulgation and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LUDINGTON, LENEY and BYRNE
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Leo C Smith, 11th Replacement Company, 11th Airborne Division, Fort Campbell, Kentucky, did, at Fort Campbell, Kentucky, on or about 0600 hours 20 March 1950, desert the service of the United States, and did remain absent in desertion until he was apprehended at Saint Louis, Missouri, on or about 0245 hours 9 September 1950.

The accused pleaded guilty to the Specification except the words, "desert the service of the United States" and "in desertion" substituting therefor the words, "without proper leave absented himself from the organization" and "without leave" and not guilty to the Charge but guilty of a violation of Article of War 61. He was found guilty of the Specification except the words, "St. Louis, Missouri, on or about 9 September 1950", substituting therefor, "Popular Bluff, Missouri, on or about 7 September 1950", of the excepted words, not guilty, of the substituted words, guilty; and guilty of the charge. Evidence of one previous conviction was introduced. He was

sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as the proper authority may direct for one year. The reviewing authority approved the sentence, suspended the execution of that portion adjudging dishonorable discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders Number 104, Headquarters Fort Campbell, Fort Campbell, Kentucky, dated 28 October 1950.

3. The principal question to be determined is whether error injuriously affecting accused's substantial rights within the purview of Article of War 37 occurred through the court's examination of accused on the merits where he elected to testify solely in extenuation.

4. Evidence.

a. For the prosecution.

The prosecution, by proper extract copies of the morning reports, established that the accused was absent without leave from his organization on 20 March 1950 and returned to military control on 9 September 1950 (R 9, Pros Ex 1). It was stipulated between the trial judge advocate, the defense counsel and the accused that the accused "was apprehended at Popular Bluff, Mo., on 7 September 1950." (R 9, Pros Ex 2). The prosecution adduced no further evidence.

b. For the defense.

It was stipulated between the prosecution, the defense counsel and the accused that if six witnesses, including the wife of the accused, were present in court they would testify to the following effect: that the accused had stated on different occasions he was going to return to military control and had purchased a bus ticket to return to camp; that he wore his uniform on frequent occasions and that he took a job as a truck driver with the expressed understanding that he would only work long enough to earn some money for his wife and for him to return to camp (R 9, 10, Def Ex A).

The record of trial then reflects the following colloquy and testimony:

"Questions by the Defense:

DEFENSE COUNSEL: I would like to question the accused only on what, I believe, is extenuating evidence.

LAW MEMBER: Will the record reflect that the accused's testimony is limited to the extenuating circumstances.

Q. Did anything happen about 1941 to you, in your life, to cause you to remember that particular date and what was it?
A. Yes, sir, the death of my mother.

Q. Did anything happen the following year that would cause you to remember that year?
A. Yes, sir, my father died.

Q. What happened to you at that time as far as your livelihood was concerned?
A. Well my aunt was made guardian of myself and two other brothers.

Q. Which aunt was that, where did this aunt live?
A. She lived in Oklahoma,-Picher, Oklahoma- then approximately three months later I was sent to my aunt which lived in Missouri. She was my guardian then.

Q. You mean you lived with two different people?
A. Yes, sir.

Q. Are there any other children?
A. I have two brothers which is younger than me and I have a half-sister.

Q. Were these with you at this aunt?
A. Just my two younger brothers.

Q. Have you ever been married?
A. Yes, sir.

Q. When did you get married?
A. First time was 1947.

Q. Were you divorced after that?
A. Yes, sir. I lived with my wife approximately a year then we were divorced.

Q. Were you ever at jump school?
A. Yes, sir.

Q. What date did you graduate from jump school?
A. It was approximately 15 February, between 15 and 30, I forget the exact date.

Q. What year?
A. 1949." (R 11).

Thereafter on cross-examination by a member of the court the following took place:

"Q. Now Smith, you have given us certain evidence under oath to try in the attempt to show that you had a reason or reasons to do this thing of which you are charged or the thing of which you admit. Now I would like for you to clarify in my mind why you consider these incidents in your past life to have a bearing upon your going AWOL?
A. Well, sir, for answering that question I can't hardly answer because the defense counsel asked me the questions and I din't know what he asked those questions for. I just simply answered the questions he asked me.

DEFENSE: Perhaps the questions I asked the accused shouldn't have been asked at that time. What I wanted to do was bring out something in my closing argument and I am fairly new in my procedure." (R 12, 13). (Emphasis supplied).

Whereupon the member of the Court withdrew his question. After the defense rested a member of the court again pursued the inquiry by recalling the accused to the stand and asking him the following questions:

"Q. Did money have anything to do with your going AWOL whichever the case may be?
A. It did not at the time I went AWOL but later on it did.

* * *

"Q. What circumstances caused this need for money at home?
A. Due to the fact that my wife became pregnant.

Q. Did that circumstance you just mentioned of your wife's pregnancy have any bearing upon your staying absent?
A. Yes, sir.

Q. Do you have relatives or friends who could help care for your wife?
A. No, sir, I don't.

Q. Did it occur to you to ask for emergency relief by returning to the service and requesting emergency relief?

A. I thought of it when I found out about it but I thought I wouldn't be able to get it, I thought that I would be court-martialed.

* * *

"Q. When you bought this bus ticket did you have any idea in mind that the fact that you purchased that ticket might be a defense against the charge of desertion?
A. No, sir, I didn't.

* * *

"Q. It was still good when you were apprehended, you could turn it in to the bus driver and return to camp?
A. No, sir, it had expired.

* * *

"Q. Were there any special circumstances or reason that made you stay away from Fort Campbell for such a long period of time?
A. Nothing, sir, except the pregnancy of my wife. The money that I had been sending my wife for an allotment my wife had saved, just a few months before I came home she had loaned the money to her brother who went to Washington and I missed the bus the next morning and being I hadn't been home for awhile I decided to stay a few days longer and it run into a month and then I found my wife pregnant and there was just her mother and I have no relatives whatsoever that she could stay with. There was nothing but that I should go to work.

Q. Was your wife just ill or was there anything unusual about her pregnancy?
A. Well, when I first went home she was working at her job but she couldn't work steadily at it bacause of sickness.

Q. Was there any special reason for your not returning to camp and resuming an honorable status, any special reason why you couldn't have done that?
A. If I would have returned she wouldn't have had any money, when I come back to camp, maturally I would have received a court-martial, maybe they would have given me a kick when I come back to service. So I went to work so that she would have some money in the bank if something did happen then she would have money left to fall back on.

* * *

"Q. How much money, approximately, did you earn at home while you were absent?
A. Well, it was different amounts. You see the job I had was commission, I would get $35.00 a week. It was selling apples. I seen to the picking of the apples and then I took the apples to different markets and after selling them I would get a commission, so it varied."

* * *

"Q. Is that money more or less than you would earn for your rank?
A. It would have been more." (R 14, 16).

No objection was raised by the defense counsel to any of the questions, supra, propounded to the accused by the court. However, thereafter the court asked the accused eight additional questions of similar nature. The law member sustained the defense counsel's objections to three of these questions. (R 16, 17). The defense counsel was not a lawyer.

5. Discussion.

Paragraph 135b, of the Manual for Courts-Martial, 1949, provides:

"*** If an accused testifies on direct examination only as to matters in extenuation and having no bearing on the issue of his guilt or innocense of any offense for which he is being tried, as when he testifies as to the incidents and duration of his military service or as to his family responsibilities and difficulties, he may not be cross-examined on the issue of his guilt or innocence and his cross-examination must be so limited. ***"

3 Wharton's Criminal Evidence (11th Ed. 1912) provides:

Sec. 1303 " * * * Generally, however, a witness cannot be cross-examined as to matters not gone into on the direct examination, unless the question asked tends to show motive, interest, or animus, or unless it is for the purpose of testing his memory or credibility or laying the basis for impeachment. The party in whose behalf the witness is called has the right to restrict the cross-examination to the matters elicited in the direct examination, and a violation of this right is reversible error. * * *"

Sec. 1327 "* * * However, in accordance with the general rule on this point in most jurisdictions, the cross-examination of the accused must be confined to the matters brought out on his examination in chief, and he cannot be cross-examined on subjects not covered by the direct examination, or on subjects on which he was not allowed to testify in chief, especially if the effect would be to self-incriminate him. * * *"

It has been uniformly held by the Board of Review that an accused has the right to testify for a limited purpose without being subject to examination regarding the merits of the case and to refuse him such privilege constitutes reversible error. The same rule applies to the following cases: Where the accused does not take the stand to testify for a limited purpose because the law member rules that the accused is subject to cross-examination on the whole matter, CM 275738, Kidder, 48 BR 145; where the accused limits his testimony to matters not related to the charge and over objection by the defense counsel is required to testify on the merits of the case, CM 326450, Baez, 75 BR 231 and CM 331360, Teaff, 80 BR 29; and also in cases where the testimony of the accused is not expressly limited, but where his testimony on direct examination concerns only extenuating factors and he is required over objection by his counsel to testify concerning his guilt or innocence, CM 330132, Trease, 78 BR 267. The right against self-incrimination is so fundamental that its infringement constitutes a lack of due process and this error is not rectified by the fact that the record of trial contains other clear and compelling evidence of guilt (Baez, supra).

The Board is not unmindful of the recent decision by the Judicial Council in SP CM 1144, Kelley, 5 BR-JC 462, wherein the accused testified on direct examination to facts which appeared to be in extenuation, but which the Judicial Council held were related to his intention to desert the service and thus opened up the right of the prosecution to cross-examine the accused as to the offense. It therefore followed in that case that there was no infringement of the rule under consideration (MCM, 1949, par. 135b, supra).

In the instant case the sole issue before the court and to be determined by the court was whether the accused "intended, at the time of absenting himself or at some other time during his absence, to remain away permanently" from the service. The accused took the stand for the announced limited purpose of testifying in extenuation. The law member ruled that the accused's testimony would be considered limited to extenuating circumstances. On direct examination the accused testified only to facts that occurred before he entered the Army with the exceptions that he had been married the first time in 1947 and divorced a year later, and was graduated from jump school

in February 1949. This testimony was not in denial or in explanation of the offense nor did it corroborate any stipulated testimony of any defense witnesses which had a bearing on the guilt or innocence of the accused. On cross-examination a member of the court, among other things, asked the accused why he had not returned to duty; if he had bought a bus ticket on which to return to camp because it might be a defense to a charge of desertion and whether he earned more money doing civilian work during his absence than he did in the Army. These and other matters brought out by the court clearly exceeded the scope of the direct examination of the accused. The testimony elicited by the court did not go to the credibility of the accused. On the other hand, it is patent that all of the questions propounded by the court to the accused, as extracted in paragraph 3, supra, concerned the merits of the case and went unerringly to the heart of the issue before the court, namely, his guilt or innocence of the intent to desert. Thus the accused was required to testify as to his guilt or innocence of the offense charged when he had stated he desired to remain silent thereon. Under such circumstances an accused cannot be required to testify (CM 312517, Kosydar, et al 62 BR 195).

It is of no moment that the court benignly assured the accused that it only desired to clarify why the accused considered the events in his past life had a bearing upon his unauthorized absence (R 12, 13). The subsequent questions by the court belie this assurance. The law member clearly stated that the testimony of the accused was limited for the purpose stated. The court was bound thereby. It was the duty of the court to scrupulously observe the limits stated by the law member in conducting its cross-examination of the accused.

Nor can the failure of the defense counsel, not a lawyer, to object from the beginning to these questions by the court be considered as a waiver of the basic right of the accused against self-incrimination, which is the basis of the rule under consideration. An accused has the fundamental right to remain silent as to his guilt or innocence before a court, and he can only testify on such matters after his expressed consent to do so (AW 24). A failure to object to evidence, as in this case, does not operate as a consent thereto if the consent of the accused is a condition precedent to its admissibility (MCM, 1949, par. 140d).

In Grantello v. United States, 3 Fed (2nd) 117, the court held that an accused who testified only "that his name was Frank Grantello" was not subject to examination and that it was fatal error for the court to comment on his failure to testify on the merits, concluding that:

> "It is a fundamental principle of our Government, repeatedly emphasized and applied by the Supreme Court, that the provisions of its Constitution and statutes for the protection of the rights and privileges of its citizens accused of crimes shall not be limited, qualified, or frittered away, but shall be fairly and broadly construed and enforced for their protection."

The Board of Review in the Baez case, supra, stated:

> "It must be conceded therefore that the examination of the accused on the merits of the case when he had taken the stand for a limited purpose only was highly improper and constituted serious error."

For the foregoing reasons it is concluded that the cross-examination of the accused by the court in exceeding the scope of the testimony of the accused on direct examination was fundamental error prejudicial to the substantial rights of the accused and, therefore, vitiated the findings of guilty of the offense of desertion in violation of Article of War 58.

There remains a further question as to whether the record of trial is legally sufficient to support a finding of guilty of absence without leave in view of the accused's plea of guilty. In CM 310076, Peterson, 61 BR 177, the accused pleaded guilty and on direct examination testified to facts in extenuation which were not in denial or in explanation of the offense with which he was charged. On cross-examination, without objection, accused testified as to the issues of his guilt. The Board of Review said that "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 had 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," and the record of trial was, therefore, legally sufficient.

The reasoning and the rule of law applied in the Peterson case, supra, applies equally to the present case. The improper cross-examination which prejudicially affected the substantial rights of the accused as to his intent to desert could in no way prejudicially affect those matters admitted by his plea of guilty to absence without leave for the period alleged in violation of Article of War 61.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings that the accused did without proper leave absent himself from his organization at Fort Campbell, Kentucky, from 20 March 1950 to 7 September 1950, in violation of Article of War 61, and so much of the sentence as provides for dishonorable discharge, total forfeitures after the date of the order directing execution of the sentence, and confinement at hard labor for six months.

_____, J.A.G.C.

_____, J.A.G.C.

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JAGE CM 343838 1st Ind

JAGO, SS USA, Washington 25, D. C. 14 DEC 1950

TO: Chairman, the Judicial Council, Office of The Judge Advocate General, Dept of the Army, Washington 25, D. C.

In the foregoing case of Private Leo C. Smith (RA 16269751), 11th Replacement Company, 11th Airborne Division, Fort Campbell, Kentucky, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings that the accused did without proper leave absent himself from his organization at Fort Campbell, Kentucky, from 20 March 1950 to 9 September 1950, in violation of Article of War 61, and so much of the sentence as provides for dishonorable discharge, total forfeitures after the date of the order directing execution of the sentence, and confinement at hard labor for six months. Pursuant to Article of War 50e(4) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:

1 Incl

FRANKLIN P. SHAW
Major General, USA
The Assistant Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 343,838

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Leo C. Smith, RA 16269751, 11th Replacement Company, 11th Airborne Division, Fort Campbell, Kentucky, upon the concurrence of The Judge Advocate General, only so much of the findings of guilty as involves findings that the accused absented himself without leave at the place and time alleged and remained so absent until on or about 7 September 1950, in violation of Article of War 61, is approved, and only so much of the sentence as modified by the reviewing authority as provides for forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, confinement at hard labor for six months and dishonorable discharge suspended until the accused's release from confinement is confirmed and will be carried into execution. An appropriate Guardhouse is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

20 December 1950

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

21 December 1950

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 343929

18 December 1950

UNITED STATES v. Private JESSE IBARRA, JUNIOR (RA 19311040), Headquarters Battery, 64th Field Artillery Battalion, APO 25.	25TH INFANTRY DIVISION Trial by G.C.M., convened at APO 25, 11,12 September 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Jesse Ibarra Junior Headquarters Battery 64th Field Artillery Battalion did, at or near Sadong-ni, Korea, on or about 11 August 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Chung Kwae Sung, a human being, by shooting him with a carbine.

Specification 2: (Finding of not guilty on motion by defense).

Specification 3: (Finding of not guilty on motion by defense).

He pleaded not guilty to the Charge and its Specifications. He was found guilty of Specification 1 and of the Charge. The court granted a defense motion for finding of not guilty as to Specifications 2 and 3. Evidence was introduced of one previous conviction by special court-martial for assault with intent to do bodily harm, and for absence without leave. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the

order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

Private First Class Albert E. Wise testified that between 1630 and 1700 hours, 11 August 1950, he and the accused, as members of Headquarters Battery, 64th Field Artillery Battalion, were on duty near a small village in South Korea, the name of which he did not know, but which was a night's drive from the town of Sanju (R 11,12,21). They were some distance behind the infantry lines. Although they had no authority to do so and had been directed "not to mess around with the civilians" (R 14), they entered the village to look for misplaced government materiel (R 11,12). There they took four unarmed (R 18) Koreans into custody on suspicion that they were North Koreans (R 13), forcing the Koreans to walk ahead of them at the point of their weapons (R 12). One of the Koreans "was an older fellow," "one was about 40 or 45 years old," and the other two were "younger men" (R 18). Wise had seen the older man about an hour earlier sweeping out the schoolhouse occupied by the battalion (R 18-19). While they "were walking [the Koreans] out of the village," the accused told Private First Class Wise "that he was going to take [the Koreans] out of the village and shoot them because he thought that they had acted too wise" (R 10,15). Private First Class Wise thought the accused was joking (R 10,15). At about this time, Private First Class Jerry R. Bault called to Wise that he "was wanted back at camp" (R 10). Wise left the accused and the Koreans, who were then "about half way up a little hill" beyond the village, and returned to the camp. On the way he heard six shots fired and after reaching his tent he heard fourteen or fifteen more (R 11).

Private First Class Bault testified that at the same time he told Private First Class Wise to return to camp, he called to the accused and asked him what he was doing with the Koreans. The accused replied that "he was going to take them up the hill and shoot them" (R 24,26). Bault told the accused, "You must be crazy," and left him (R 24). Bault turned and started back down the hill when he heard a shot. He turned and saw the accused shoot two (or three (R 32)) of the Koreans who fell to the ground -- the other two (or one (R 32)) ran away over a ridge (R 25,30, 32). Bault reported the shooting to Major Smith who sent Bault back to get the accused (R 25). Major Smith took the accused's weapon, a carbine, away from him and placed him under arrest (R 47,52). Thereafter, he sent the accused back to bury his victims (R 47,52,53). The accused later was observed burying the bodies (R 54).

Sergeant Fay D. Myrick was in the area at the time the shooting occurred (R 36). On hearing shots, he looked up a draw and saw the accused fire one shot (R 36). The accused then fired again and Myrick saw a Korean fall into a ditch (R 37). Sergeant Myrick asked the accused "who was doing the shooting" and the accused answered that he was (R 37). Sergeant Myrick then asked the accused "what he was shooting at," to which question the accused replied: "Shooting at Gooks." Myrick asked the accused: "Did you get any?" The accused replied, "Yes, three" (R 37).

Private Stanley F. Sides "was hunting for Private Wise," when he heard "rifle shots." He walked "up the trail," met Bault, and saw the accused "standing on the side of the hill" (R 78). Sides saw one Korean on the ground, saw another one fall and still another "take off" (R 78). He saw the accused shooting (R 83) but he could not testify that any of the shots struck the Koreans he observed (R 78).

Master Sergeant Herbert L. Pogue was looking for the accused, who was absent from his post of duty, when Pogue heard a series of shots "come from behind the little village" (R 41). Sergeant Pogue walked through the village and up a hill on the other side. On the hillside he found the bodies of three dead Koreans dressed in civilian clothes (R 44) who had recently been shot (R 42). Each body had about six "gunshot wounds" all of which were still bleeding (R 42). One had been shot in the back. One was the body of "an old man who helped * * set up the CP" (R 44). One was the body of a "middle-aged" man, and the other was the body of a man in his "early twenties" (R 45). No weapons were found on any of the bodies (R 42). Following the discovery of the bodies, Sergeant Pogue observed the accused "coming down around the side of hill towards -- up towards where the shooting had occurred." Sergeant Pogue asked him, "what he had been doing up there." He answered, "Shooting at a gook running over the hill." Sergeant Pogue asked him "if he got him;" to which the accused replied: "He got away" (R 46).

Major Herman R. Smith went to the scene of the shooting the following day in company with a CID agent. There he photographed the bodies of three Koreans found partially buried on the hill above the village (R 47-51; Pros Exs 1,2,3). One body was that of an elderly man with "a little chin beard," the other two were bodies of younger men between 22 and 25 years of age (R 50).

Arthur F. Weathers, Jr., an agent of the 21st CID, accompanied Major Smith to the scene of the crime. He viewed the three bodies found there and mentally numbered the bodies by location as "'1', '2', and '3' going up the hill" (R 58). He then proceeded to the village where he located a Korean named Chung Kae Chull who he took back with him to the scene of the crime. Chung Kae Chull identified body number 1 as the body of his brother, Chung Kae Sung (R 59,60). A second Korean, Chung Kae Sae,

identified the second body as that of Cho Mun Suk, and the third body as that of Kim Suk Ku (R 60). The second body was that of the old man (R 63). After warning the accused of his rights under the 24th Article of War Agent Weathers questioned him regarding the shooting. No threats, force, duress or promises were used to obtain a statement (R 60).

> "Private Ibarra told me that he and another soldier were on a detail right near a village where they had set up their advanced CP. They proceeded into the village and were searching into the houses in that area looking for North Koreans or snipers and that he and Private Ibarra -- I mean this other soldier started marching these four Koreans whom they had found in the village up to this mountain. Private Ibarra stated that he proceeded along the way up the mountain with these four Koreans and that they had tried to escape from him and when they did that, he was forced to shoot at them" (R 60-61).

Agent Weathers again interviewed the accused on 17 August, after again warning him of his rights, at which time the accused repeated "his same story" adding "that the old man was shot through the arm first and he didn't want to see him suffer so he shot him again" (R 61).

Captain William W. Stockton observed the accused burying a body on the afternoon of 11 August 1950 (R 54) near a village called Sadong-ni (R 84). He disinterred the bodies (R 55) and then went to the village where he found an old man and a woman who claimed to know the deceased. The woman said she was the sister of one of the dead men. They gave him the deceased's name which he wrote on a piece of paper (R 57).

Cho Kim Wa was a laborer who worked for Captain Stockton as "a KP." On 11 August the unit by which he was employed was located at Sadong-ni, Korea (R 66). About a month before the trial, he had seen the bodies of three men partially buried in a ditch (R 66-67), near "Sadong-ni mountain" (R 69). One of the bodies had a "pass" clutched in its left hand. A laborer took the pass from the body and handed it to him. It was a railroad pass written in Korean (R 67). The name on the pass was that of "Chung Kie Sai" or "Chung Kwe Sai" (R 68,71,73). He gave the pass to Captain Stockton (R 70). The pass was received in evidence as Prosecution Exhibit 4 over the objection of the defense (R 70). The name might also be spelled in English as "Chung Qe Se," "Jung Qyae Se," or "Chung Kwae Se" (R 77,78).

b. <u>For the defense.</u>

The defense called no witnesses and offered no evidence. After explanation of his rights as a witness, the accused elected to remain silent (R 89,90).

4. Discussion.

Murder is defined as:

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

* * *

"The presence of malice aforethought distinguishes the offense of murder.

"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 the life of anyone. 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.

* * *

"A murder is not premeditated unless the thought of taking life was consciously conceived and the act * * by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief deliberation or design." (MCM, 1949, Par. 179a, p.230,231).

The evidence is undisputed that the accused on 11 August 1950, in company with Private First Class Wise, took four Korean men in charge and at the point of his carbine marched them from a house in the village of Sadong-ni, Korea, to a hill in the rear of the village. The accused told Private First Class Wise, "I think I will take these Koreans out and shoot them because they are acting too wise." Private First Class Wise thought the accused was joking, but shortly after leaving the accused he heard shots. Private First Class Bault, an eyewitness, saw the accused shoot down two (or three) of the Koreans while the other two (or one) ran over a ridge. Sergeant Myrick called to the accused to find out "who was doing all the shooting." The accused replied that he was doing it. The sergeant asked the accused what he was shooting at and the accused replied: "Shooting at Gooks." Sergeant Myrick asked the accused, "Did you get any?" The accused replied, "Yes, three." Master Sergeant Pogue went to the hillside immediately after hearing the shots. He found the dead bodies of three male Koreans. Each had about six gunshot wounds, all of which were still bleeding.

Within the next twenty-four hours, Major Smith, CID Agent Weathers, and Captain Stockton viewed the three Korean bodies. A Korean named

Chung Kae Chull positively identified one of the bodies as that of his brother, Chung Kae Sung. A railroad pass, found clutched in the hand of one of the dead men, bears Korean characters which may be spelled in English variously as: "Chung Qe Si," "Jung Qyae Si," or "Jung Qwae Se."

After being warned of his rights under Article of War 24, the accused made a voluntary statement to CID Agent Weathers in which he said that the four Koreans tried to escape and that he was forced to shoot at them. He admitted killing one of them "because he didn't want to see him suffer."

The evidence establishes premeditated murder. "The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death" (CM 324088, Soucy, 73 BR 25,27). The accused, having formed the specific intent to kill, proceeded deliberately to carry out his intention. Premeditation is shown not only by what he did but also by what he said. The accused's statement to Private First Class Wise that he intended to shoot the Koreans, and to Sergeant Myrick that he had been "shooting at Gooks" and "got three," shows a cold-blooded decision to kill according to a preconceived plan.

The identification of the deceased is not perfect but the record contains enough substantial evidence from which the court could reasonably infer the identity of the deceased as alleged (CM 319367, Welco, 68 BR 259,262; CM 319474, Mulvaney, 68 BR 315,318).

The variations in spelling of the deceased's name is no more than would be expected in applying English phonetics to Korean characters. The doctrine of idem sonans is applicable. The accused does not appear to have been misled in his defense by any difference in the spelling as alleged and proved (CM 331601, Brill, et al, 80 BR 75,82).

It is the opinion of the Board of Review that the competent evidence is legally sufficient beyond a reasonable doubt to prove the accused guilty of premeditated murder in violation of Article of War 92.

5. The accused is 20 years of age. He enlisted at Fort Ord, California, 7 October 1947 for three years. He had no prior service. His character is rated as "Poor" and his efficiency as "unsatisfactory." He is single and claims his mother as a dependent. His AGCT score is 90 (III). He has no civilian criminal record and has been convicted once by special court-martial, 18 May 1950, for AWOL and assault with intent to do bodily harm for which he was sentenced to three months confinement at hard labor and forfeiture of $50 of his pay per month for a like period.

6. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial

rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of murder in violation of Article of War 92.

C. J. Hauck, Jr., J.A.G.C.

William C. Tillinghast, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

(366)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,929

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Jesse Ibarra, Junior, RA 19311040, Headquarters Battery, 64th Field Artillery Battalion, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

2 January 1951

JAN 4 1951
Original sent to Digest Section

(GCMO 1, Jan8, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

DEC 15 1950

JAGH CM 343949

UNITED STATES	)	25TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 25, 21 September 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
Private First Class CARSIN BRYANT (RA 13123204), Company C, 24th Infantry Regiment, APO 25.	)	

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Carsin Bryant, Company C, 24th Infantry, APO 25, did, at or near Masan, Korea, on or about 7 September 1950, misbehave himself before the enemy by refusing to return to his company on line, while his command was engaged with the enemy.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private First Class Carsin Bryant, was a member of Company C, 24th Infantry Regiment (R 9). On 7 September 1950, and for

some time before, the accused's organization was, and had been, in defensive position opposing the enemy just outside of Haman, Korea (R 9). On 6 September 1950, the accused appeared at one of the field kitchens in the regimental "kitchen area" or "field train area" near Masan, Korea (R 12). The "kitchen area" was to the rear of the C Company position on the line by about sixteen miles (R 10). The accused approached Corporal Dorsey and requested "a clean set of fatigues" (R 12). Corporal Dorsey sent the accused to Sergeant Edward Turner, who asked the accused "what organization he was from" (R 12). The accused replied "I'm from Headquarters Company" (R 12). Sergeant Turner told the accused that in that case "he would have to get them from Headquarters Company." The accused remained in the kitchen area and a few minutes later asked another one of the cooks for fatigues (R 12). Sergeant Turner decided that the accused was a straggler "by the way he acted and kept hanging around the kitchen" (R 12). Consequently, he told the accused that no stragglers were allowed in C Company area and gave him an order "to report back to 'C' Co". The accused "just stood there and didn't move" (R 13). Sergeant Turner reported the matter to Warrant Officer Robert G. Deuell who called the accused in and ordered him to report back to his company (R 9,11,12). The accused replied in the presence of Sergeant Turner, "I am not going to go" (R 11,13).

b. For the defense.

Sergeant Herbert A. Kelley was sergeant of the security guard, First Battalion, Headquarters. The accused was under arrest and was sent under guard from Battalion Headquarters to Sergeant Kelley (R 15). Sergeant Kelley verified that the accused was in an arrest status from Battalion S-1 (R 16,17). The Battalion Headquarters was located near Haman and was constantly under attack. To meet First Battalion needs "the accused was put on a trusty basis" and given the responsibility "of keeping certain portions of the area clean and policed up" (R 15,17). He also was given various other duties including working on trucks operating between the Haman and Masan areas (R 18). Sergeant Kelley explained to the accused the limitations of his arrest and told him that "he would not be allowed to go out of the guard area except to the train yard that was only a few feet from where we were" (R 17). On 6 September 1950, the accused was supposed to be "in the regimental area back in Haman" (R 17). The new CP, where the accused was supposed to be on duty, was located about a mile north of the Haman school area, a distance of 15 to 20 miles from Masan (R 10,18). The accused did not have permission to leave the Haman area that day (R 18).

After explanation of his rights as a witness, the accused elected to remain silent (R 20).

4. Discussion.

The accused is charged with a violation of Article of War 75 in that he did

"* * misbehave himself before the enemy by refusing to return to his company on line, while his command was engaged with the enemy."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM, 1949, p.294). In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50).

The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

"* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.

* * *

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

"* * acts by any officer or soldier, as -- refusing or failing to advance with the command when ordered forward to meet the enemy; * * refusing to do duty or to perform some particular service when before the enemy" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

The specification in the instant case closely follows the form given in the Manual for Courts-Martial (MCM, 1949, p.318), and the Board of Review deems it to be adequate to state an offense in violation of Article of War 75 (CM 289472, Scheck, 14 BR (ETO) 47,49).

The uncontradicted evidence establishes that the accused was a member of an organization which, at the time and place alleged, was engaged in combat with the enemy. From 30 August 1950 through 7 September 1950, the accused was on duty at First Battalion Headquarters near Haman, Korea, under the direct supervision of Sergeant Kelley. The battalion headquarters was under continuous attack by the enemy. At first the accused was in an arrest status. Later he was made "a trusty" and assigned housekeeping duties. Finally, he was a worker on a truck and seems to have

been returned to full military duty, except that he was not supposed to leave the train yard area unless accompanied by Sergeant Kelley. Restoration to military duty terminates the status of arrest (MCM, 1949, Par. 19b). It seems likely that the accused's arrest was so terminated. It is not necessary, however, to decide this point to reach a final conclusion.

The evidence is conclusive that the accused did not have authority to leave the vicinity of Haman, Korea, on 6 September 1950; yet, he was found in the regimental kitchen and field train area near Masan some sixteen miles to the rear on that day. If, therefore, he had been in the status of arrest prior to that time, it is clear that he breached his arrest by going to Masan on 6 September 1950. Such being the case he will not be permitted to claim immunity to orders by virtue of a status which he himself destroyed prior to the issuance of such orders. Warrant Officer Deuell was doing nothing more than performing ordinary deligent military duty when he ordered the accused to return to his company. Such an order was lawful and one which the accused was bound to respect and obey.

The facts above stated show beyond question that the accused was "before the enemy" within the meaning of Article of War 75, as defined in the Manual for Courts-Martial (MCM, 1949, Par. 163a, p.216; CM 257252, Warman, 37 BR 85,90). It is also fully proved that he deliberately absented himself from his place of duty by leaving the place to which he was assigned and that when ordered to return to his unit he verbally stated, "I am not going to go." Such conduct has been held to constitute misbehavior in violation of Article of War 75 (CM 282641, Trostle, 24 BR (ETO) 181,183; CM 294796, Transeau, 16 BR (ETO) 153,156; CM 291200, Reed, 17 BR (ETO) 213,216,217). All the elements of proof required by the Manual for Courts-Martial are therefore present in this case (MCM, 1949, Par. 163a, p.216).

It is the opinion of the Board of Review that the evidence is sufficient beyond a reasonable doubt to support the court's findings of guilty of the Charge and its Specification.

5. Consideration has been given to representations for and on behalf of the accused, orally and in writing, by his counsel, Mr. Jack Greenberg.

6. The accused is 19 years of age. He completed elementary school and after that worked as a laborer at a weekly wage of $45.00. He is single. There is no record of civilian convictions. With no prior service, the accused enlisted 17 August 1948, at Fort Monroe, Virginia, for three years. He completed basic training at Fort Knox, Kentucky, in November 1948 and joined his present organization 11 March 1950. His AGCT score is 71. His company commander did not rate him as to either character or efficiency.

7. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch Jr., J.A.G.C.

William C. Tighe, J.A.G.C.

Arthur P. Ivland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 343949

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 25, 21 September 1950.
Private First Class CARSIN	)	Dishonorable discharge, total
BRYANT, RA 13123204, Company	)	forfeitures after promulgation
C, 24th Infantry Regiment,	)	and confinement for life.
APO 25	)	

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(2) the record of trial in the case of the soldier named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of misbehaving himself before the enemy, at or near Masan, Korea, on or about 7 September 1950, by refusing to return to his company on line while his command was engaged with the enemy, in violation of Article of War 75. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. 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.

3. The evidence, which is substantially as set forth by the Board of Review in its opinion, shows that on 6 and 7 September 1950 the accused's company was in a defensive position opposing the enemy in the vicinity of Haman, Korea. From 30 August through a part of 6 September 1950 the accused was in a state of arrest in the 1st Battalion Headquarters in the same vicinity, but was required to perform policing duties and assist the security guard in the area. On 6 September he left the battalion area without authority and appeared in the company kitchen area, some sixteen miles to the rear of the front line position of the company. On 7 September, Warrant Officer Robert G. Deusll, unit administrator of Company C, who had been ordered by the unit commander to keep

the rear area free from stragglers, observed the accused in the kitchen area. In answer to Mr. Deuell's inquiry, the accused, who had already refused to obey Sergeant Edward Turner's order to report back to C Company, stated that he did not intend to return to his company. Mr. Deuell thereupon gave the accused a direct order to return to his company, but the accused stated "that he wasn't going to go back." Mr. Deuell then placed him under arrest.

The evidence shows beyond question that the accused, while present in the kitchen area of his company some sixteen miles to the rear of the company's front line position, deliberately and intentionally refused to return to his company on the line when ordered to do so by Warrant Officer Deuell. Had the accused been on a full duty status while in the front line area, his refusal to return thereto clearly would have constituted misbehavior before the enemy in violation of Article of War 75 (CM 343775, Williams, BR-JC, Jan 1951). The only question is whether the legal consequences of this refusal are affected by the fact that the accused was in a status of arrest in Battalion Headquarters in the front line area at the time he left that area.

Although a person in a status of arrest cannot be required to perform his full military duty, such status of arrest does not prevent his being required to do ordinary cleaning and policing work or routine training not involving the exercise of command or the bearing of arms, and he is amenable to ordinary military discipline (MCM 1949, par 19b, p 15; CM 127903 (1918), Dig Op JAG 1912-1940, sec 427(2), p 290; CM 279726, Scott, 52 BR 307, 312). Soldiers in a front line area, regardless of their technical status, are all necessarily subject to the tactical control of those charged with the effectiveness of combat operations. The accused in the instant case, even though in arrest, was in the front line area and without termination of that status he could have been required to perform many duties other than bearing arms which would have been in direct support of the troops engaged in combat. Moreover, if the tactical situation so warranted he was subject to having his arrest status terminated and being restored to full military duty, including combat, at any time by proper authority. He thus was clearly before the enemy in the sense of Article of War 75 prior to leaving the front line area (see Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, p 623; MCM 1949, par 163a, p 216). When the accused proceeded to the kitchen area, he did not thereby remove himself from the tactical control of those charged with the effectiveness of combat operations and he therefore was still before the enemy while in that area. The accused clearly had no authority to be in the kitchen area in the rear. His proper place of duty, whatever that duty might be, was in the front line area and it was to that area that Mr. Deuell, in the performance of his clear military duty to keep the rear area free from stragglers, ordered him to return. The accused did not advise Mr. Deuell of his arrest status, and even if it developed upon compliance

with the order that he should have been ordered to Battalion Headquarters, also in the front line area, instead of to his company, that situation could easily have been remedied administratively at that point. Under the circumstances, in our opinion, the order was manifestly proper and legal, notwithstanding the accused's arrest status. The order was calculated merely to get the accused back to the vicinity of his proper place of duty, whatever that duty was, where he would be subject to appropriate orders by those responsible for tactical operations on the line. The accused's willful and deliberate refusal to obey the order to return to his company was therefore clearly misbehavior in the sense of Article of War 75 (Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, p 623; MCM 1949, par 163a, p 216; CM 282641, Trostle, 24 BR (ETO) 181, 183; CM 291200, Reed, 17 BR (ETO) 213, 216, 217; CM 294796, Transeau, 16 BR (ETO) 153, 156).

We have not overlooked the case of CM 287262, Emory, 6 BR (NATO-MTO) 51, wherein the accused was convicted of misbehaving himself before the enemy in the vicinity of Monzuno, Italy, by failing to rejoin his company, then engaged with the enemy, in violation of Article of War 75. The evidence showed that the accused was in a status of confinement in the regimental stockade at Rosignano, Italy. The regimental executive officer directed that the accused and other members of his group be returned to their organizations, which were engaged in combat. Thereafter the group, including the accused, was returned under guard to the stockade about three or four miles from the place where the instructions were given them, in order to procure arms and equipment and to await transportation under guard to their respective companies. The accused had no authority to leave the stockade and return to his company on his own volition, but was to be returned thereto under guard in order to insure his arrival. The men were not to be released from confinement until they had actually rejoined their companies. The accused escaped from confinement while still under guard but did not return to his company. He would have been returned under guard had he not escaped.

The Board of Review was of the opinion in the Emory case that the record of trial was legally insufficient to support the findings of guilty and the sentence. The grounds of the opinion were that the proof wholly failed to establish that the accused was under a duty to return to his company, as impliedly alleged. He was to be returned to his company under guard and had no authority to return thereto on his own volition. At the time of his escape and thereafter his place of duty was not in his company but in the stockade where he had been confined. Had he gone to his company following his escape he would have further violated the specific orders given him.

The instant case is clearly distinguishable from the Emory case. In that case the instructions to the accused were, in effect, to remain in confinement and hold himself in readiness to be transported back to

his company under guard, not to proceed there himself. He was under no duty to return to his company. In the instant case the accused's place of arrest and duty was in the front line area and he was under a duty to return there even without orders to that effect. Mr. Deuell's order was consistent with the accused's status and merely directed him to return to the vicinity where he belonged.

4. The Judicial Council has considered carefully the arguments advanced on behalf of the accused on appellate review.

5. For the reasons stated, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. However, in view of all the circumstances of the case, it is recommended that the sentence to confinement be reduced to twenty years.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

(376)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

343,949

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Carsin Bryant, RA 13123204, Company C, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army the term of confinement is reduced to twenty years.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

23 January 1951

GCMO 13, 29 January 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

DEC 1 3 1950

JAGH CM 343953

UNITED STATES v. Private First Class HOBERT REED (RA 18340554), Company E, 24th Infantry Regiment, APO 25.	)	25TH INFANTRY DIVISION Trial by G.C.M., convened at APO 25, 19, 21 September 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Hobert Reed, Company E, 24th Infantry Regiment, APO 25, did, at or near Masan, Korea, on or about 3 September 1950, misbehave himself before the enemy, by refusing to join his company on the line, while his company was engaged with the enemy.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private First Class Hobert Reed, was a member of Company E, 24th Infantry Regiment (R 10). During the latter part of August and

the first part of September 1950, Company E, 24th Infantry Regiment, was engaged with the enemy in the vicinity of Haman, Korea (R 10,17). The accused was present with his unit "on the line" on 31 August 1950 (R 14). On 1 September 1950, an enemy attack dislodged certain elements of E Company from their positions with resulting disorganization and confusion (R 17-18).

On 2 September 1950, the regimental trains of the 24th Infantry Regiment were located in the vicinity of Masan, Korea, approximately twelve miles from the front lines (R 11). The Service Company of the 24th Infantry Regiment was located approximately 500 yards from the regimental trains area (R 15-16). The 25th Medical Battalion was located approximately three miles from Masan in the direction of Pusan (R 20).

During the day of 2 September, Warrant Officer Junior Grade Walter M. Bartholow, Company E, 24th Infantry Regiment, saw the accused in a Korean village adjacent to the regimental trains area. He directed the accused to report to Sergeant Earl Geralds "so that he could be placed on the roster so that he could be accounted for * *" (R 9). The accused's name was entered on a list of personnel then in the area who were to be returned to the front the following day (R 13).

The following morning, 3 September 1950, the accused was present at a formation of men scheduled for return to the front lines (R 14). Sergeant Phillips, who was in charge of the group, told the group, including the accused, "that they were leaving for the front" (R 14) and marched the detail to "Sv Area" where they were to entruck (R 16). The accused did not accompany the detail. "* * while [Sgt. Phillips] was talking to the men, he started walking off towards a rock bed that was there * * he started to walk away from the formation and he didn't come up with the rest of the group." Sergeant Phillips called him by name, saying: "Reed come up and get on the truck with the rest of the group." The accused did not answer. "He just walked on off in the opposite direction and kept lagging behind" (R 16). "He started walking off to the left away from the group and he didn't stop. He just kept on going instead of going with the rest of the group" (R 17). Between 5:30 and 6:00 o'clock that evening the accused was seen in a jeep assigned to the 25th Medical Battalion. The jeep had passed the area of the Service Company, 24th Infantry Regiment, and was traveling in the direction of Pusan, away from the front lines (R 19-20). The jeep had been reported stolen "from the clearing station" (R 19).

b. <u>For the defense.</u>

It was stipulated between the prosecution, the defense, and the accused that if the commanding officer and members of the accused's platoon were present they would testify:

"* * that the accused was present in the company on the line and in the area of the company on 1 September 1950, and that prior to that time, the accused was present for duty in the company and that he performed his duties most satisfactorily" (R 22).

The assistant defense counsel, sworn as a witness for the defense, testified that he was the battalion adjutant of the 2nd Battalion, 24th Infantry Regiment. As the result of an enemy attack on the night of 31 August - 1 September, Company E was disorganized, its men scattered and most of them unaccounted for on 2 and 3 September. Those remaining were organized into a provisional company as they reported in. "* * insofar as the Bn commander and his staff were concerned, 'E' Co didn't even exist * *" on 2 September (R 24).

Having been advised of his rights as a witness on his own behalf (R 22-23), the accused elected to be sworn and to testify "* * concerning the formation which he [was] accused of leaving in the Sv Co area on the 3rd of September only * *" (R 25). The accused admitted that he had been present at the formation described by Sergeant Phillips and that the group was told it was to be taken back to the front. Thereafter, however, he testified that, as no trucks were then available and would not be available until that afternoon, the group was told to fall out. After "sitting around * * smoking cigarettes and drinking beer" with the other men in the group, he went to a tent near the area, "got some rations and cigarettes and stuff" and "set down behind a little bank that was there near the river bed and ate" (R 29-30). He remained there about an hour and a half (R 31). He did not testify as to his further actions (R 31).

4. Discussion.

The accused was charged with and found guilty of violation of Article of War 75 in that he did

"* * misbehave himself before the enemy, by refusing to join his company on line, while his company was engaged with the enemy."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM, 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

"* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.

* * *

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an

officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

"* * acts by any officer or soldier, as -- refusing or failing to advance with the command when ordered forward to meet the enemy; * * refusing to do duty or to perform some particular service when before the enemy" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50).

The specification in the instant case closely follows the form given in the Manual for Courts-Martial (MCM, 1949, p.318), and the Board of Review deems it to be adequate to state an offense in violation of Article of War 75 (CM 289472, Scheck, 14 BR (ETO) 47,49).

It was established without contradiction that the accused was a member of a unit which, at the time and place alleged, was engaged in combat with the enemy. Because of an enemy attack a day or two before, the accused's platoon had become disorganized. The accused and others finally made their way to the rear where they were organized in a group for return to the front lines. They were told that they were being returned to the front and were marched to an adjacent service company area to entruck. According to the testimony of the noncommissioned officer in charge of the group, the accused left the formation and proceeded away from the group. When called by name, "he just kept going." He did not accompany the group to the trucks. According to the accused's testimony, no trucks were available and the formation was permitted to "fall out." After smoking and drinking beer with the other men, the accused went to a nearby tent where he obtained "rations and cigarettes and stuff" and then sat down to eat. He remained an hour and a half. It is not contradicted that between 1730 and 1800 hours that evening he was found in a vehicle, which had been reported stolen, traveling away from the front.

The first issue raised by the facts described in the foregoing paragraph is the controverted issue of fact raised by the accused as to his acts when told by Sergeant Phillips that he, together with the others in the group, was being returned to the front lines. The determination of

this issue, in the first instance, was the duty of the trial court (CM 325457, McKinster, 74 BR 233,241). It necessarily resolved the issue against the accused as indicated by its findings. This decision appears to the Board of Review to be sound. The accused admitted he was aware that he and the others were being returned to the front. The others entrucked for the front but the accused did not. The accused was next seen in a stolen jeep, still further to the rear, traveling in a direction away from the front. On these facts, the court was fully justified in rejecting the accused's explanation that he would have returned to his unit except for the lack of transportation (CM ETO 1404, Stack, 4 BR (ETO) 279,282).

There can be no question but that the accused was "before the enemy" within the meaning of Article of War 75 when discovered in the area occupied by the unit trains (CM 257252, Warman, 37 BR 85,90). Nor is it material whether he was in such area by proper authority or otherwise (CM 286156, Black, 25 BR (ETO) 71,73; CM 278019, Folse, 11 BR (ETO) 351,352). Having been directed to return to his company, his refusal to do so constitutes misbehavior within the meaning of the statute (CM 282641, Trostle, 24 BR (ETO) 181,183; CM 294796, Transeau, 16 BR (ETO) 153,156).

It thus becomes necessary to determine whether the accused's acts constituted a refusal to join his company as alleged. The word "refuse" in the sense applicable here, is defined by Webster as: "To decline to do, * *" (Webster's International Dictionary, Unabridged, 2d Ed., p.2095). It has been similarly defined by the courts: "The word 'refuse' signifies 'to deny a request, demand, invitation or command,' * *" (Shaler v. Van Wormer, 33 Mo. 386,388). "The ordinary signification of the word 'refuse' is to deny a request or demand; * *" (Burns et al. v. Fox, 14 N.E. 541,542). Some courts have gone so far as to say: "Refusing to comply means the same as failing to comply" (Smith v. Hance, 11 N.J. Law (6 Halst.) 244,251). As stated by Chief Justice Marshall in Taylor v. Mason, 9 Wheat. 344, "Where the condition to be performed depends on the will of the devisee, his failure to perform it, is equivalent to a refusal." In the instant case, the accused having been apprised that the group of which he was a member was being taken back to the front lines, left the group and walked away. He ignored the noncommissioned officer in charge of the group when the latter called after him; and several hours later was found making his way still further to the rear. These acts reveal his intent as clearly as if he had voiced his refusal unequivocally; and are sufficient to prove his refusal to join his company (CM 291200, Reed, 17 BR (ETO) 213,216-217).

5. Consideration has been given to a letter dated 8 November 1950, from Brigadier General Roy W. Kenny, The Adjutant General, Oklahoma National Guard, inclosing a copy of a letter dated 30 October 1950 to the Honorable Roy J. Turner, Governor of Oklahoma, from Annie Hornbeck, aunt of the accused, and to another letter from Annie Hornbeck of the same

date, 30 October 1950, addressed to the President and forwarded through the office of The Adjutant General. Consideration has also been given to oral representation for and on behalf of the accused, by his counsel, Mr. Jack Greenberg.

6. The papers accompanying the record of trial indicate the accused to be 26 years old and unmarried. He has one dependent child. He completed two years of high school in 1940, and thereafter worked as an auto serviceman at $47.50 per week. He served in the United States Marine Corps from 28 April 1944 to 8 March 1946, and enlisted in the Army at Oklahoma City, Oklahoma, 23 June 1948. He joined his present organization 22 January 1949. His company commander rates him unsatisfactory in character and efficiency.

7. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur E. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

343,953

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Hobert Reed, RA 18340554, Company E, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

8 January 1951

I concur in the foregoing action. Under the direction of the Secretary of the Army the term of confinement is reduced to twenty years.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

9 January 1951

NO 6, 16 January 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 343978

7 December 1950

UNITED STATES v. Private First Class EUGENE LEWIS (RA 18341871), and Private JEFFERY MARTIN (RA 18341852), both of Company A, 24th Infantry Regiment, APO 25.	25TH INFANTRY DIVISION Trial by G.C.M., convened at APO 25, 24 September and 2 October 1950. Both: Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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

2. The accused were tried, in a common trial, upon the following Charges and Specifications:

As to Private First Class Eugene Lewis:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Eugene Lewis, Company A 24th Infantry Regiment, APO 25, did, near Haman, Korea, on or about 12 August 1950, run away from his company which was then engaged with the enemy and did not return thereto until he was apprehended by Military Authorities on or about 25 August 1950.

As to Private Jeffery Martin:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Jeffery Martin, Company A, 24th Infantry Regiment, APO 25, did, near Haman, Korea, on or about 12 August 1950, run away from his company which was then engaged with the enemy and did not return thereto until he was apprehended by Military Authorities on or about 25 August 1950.

Each accused pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced as to either of the accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence as to each accused and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

Sergeant Clarence R. Sharrock, Company A, 24th Infantry Regiment, testified that he was the Administrative NCO of the Company, and was responsible for checking up on all dead, wounded, missing in action and stragglers (R 10). During the period from 12 August 1950 to 25 August 1950, Company A, 24th Infantry Regiment, was located on one of the hills near Haman, Korea, and was in contact with the enemy (R 12-13). Sergeant Sharrock knew both of the accused who were members of his organization (R 9). On 12 August 1950, Sergeant Sharrock saw accused, Private Martin, "down in the rear from the hill" where the company was fighting at the time (R 10) and accused, Private First Class Lewis, on the hill with the company, but not where he was supposed to be. "He was supposed to be in the squad up forward, but he was back of the line" (R 11). Witness knew accused Lewis was supposed to be on his position, but as for accused Martin he was not certain (R 11). On 15 August 1950, Sergeant Sharrock saw both of the accused back in Battalion Headquarters about three miles from the position where the company was then located (R 12). Sometime between 15 and 23 August 1950, witness again saw both accused on the trail behind the lines. He picked them up, told them to report to the first sergeant and took them up the hill. On his way back down the hill, witness saw the two accused on the trail going towards a Korean village away from the company (R 12). Witness did not see the accused again until 25 August 1950, when they were brought back to the company area by the first sergeant of Headquarters First Battalion (R 9) who said to witness in presence of the accused "Here are two of your men that were picked up in the village" (R 15). Sergeant Sharrock also testified that "he makes a personal check with the first sergeant [Company A] each time a man goes up and down the hill and they [the accused] never did go back to the hill during the 12th and 25th" and added that "I go up and down the hill once every other day and I never saw them on the line during those dates, either" (R 11).

Master Sergeant Lawrence W. Griffin was first sergeant of Headquarters Company, First Battalion, 24th Infantry Regiment, with the additional duty of checking the area for stragglers (R 17). He recognized the two accused as the two men he found lying on the floor of a Korean house in a small village near Haman, Korea, on 25 August 1950 (R 17). In reply to his

inquiry as to their organization, they said: "A Company." He took the men to First Battalion Headquarters. The place where the accused were found was approximately a mile or so in back of the position occupied by Company A (R 17-18). Witness is positive that the two accused are the same men who he picked up at the house in the Korean village (R 18).

b. For the defense.

The defense called no witnesses and introduced no evidence. The rights of each accused to testify as a witness in his own behalf having been explained to them, each accused elected to remain silent (R 19-20).

4. Discussion.

Each accused was charged with and found guilty of violation of the 75th Article of War in that he

> "* * did * * on or about 12 August 1950 run away from his company which was then engaged with the enemy and did not return thereto until he was apprehended by Military Authorities on or about 25 August 1950."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM, 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

> "* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article" (MCM, 1949, Par. 163a)

Winthrop describes misbehavior before the enemy, as, among other things:

> "Such acts by any officer or soldier, as -- * * going to the rear or leaving the command when engaged with the enemy: * *." (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

In view of the recent decision of the Judicial Council in the Gilbert case no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov. 50).

The evidence adduced by the prosecution established conclusively that both of the accused were members of Company A, a unit which, at the time and place alleged, was engaged in combat with the enemy. The first element of the offense was thus established (CM 257053, Marchetti, supra; CM ETO 1404, Stack, 4 BR (ETO) 279,281; CM ETO 1659, Lee, 5 BR (ETO) 173, 174; CM 258073, Allen, 5 BR (ETO) 233,238).

As to the proof of the running away, the precise time of departure of each accused from the company does not appear in the record but there is the testimony of Sergeant Sharrock, the Company Administrative NCO, that on 12 August 1950 he saw accused, Lewis, in the company area but not up forward with his squad where he was supposed to be and accused, Martin, "down in the rear from the hill" where the company was then fighting. Sergeant Sharrock further testified that it was his duty to "check up on all dead, wounded, missing in action, and stragglers" and that in the performance of his duty he made a personal check with the first sergeant of the company "each time a man goes up and down the hill." Moreover, the sergeant, himself, went up and down the hill once every other day and never saw the accused on the line. Although the witness had seen the two accused in the rear areas several times between 12 August 1950 and 25 August 1950 and had told them to report back to their positions, they did not go back to the hill during that period. Such uncontroverted evidence is, in the opinion of the Board of Review, sufficient to establish the second element of the offense (CM 258073, Allen, 5 BR (ETO) 233, 238).

The testimony of Sergeant Griffin that on 25 August 1950 he apprehended the two accused in a house in a Korean village approximately a mile to the rear of the position occupied by their unit, while unnecessary to establish the offense, makes the evidence of accused's guilt of the offense charged the more complete and compelling (CM 258073, Allen, supra; CM 280852, Jones, 14 BR (ETO) 1,4).

For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings and the sentence (CM 280852, Jones, supra; CM 284146, Sumner, 11 BR (ETO) 235, 237; CM 294789, Cameron and Rawls, 15 BR (ETO) 3,6).

5. The papers accompanying the record of trial indicate the following as to the accused:

Martin is 19 years old, unmarried and claims his mother as a dependent. He completed ten years of schooling in 1947 and thereafter worked as a cook until he enlisted in the Army 8 December 1948 for three years. He joined his present organization in February 1950. He has no prior service. He has an AGCT score of 61 and his commanding officer rates him "satisfactory" as to character and "unsatisfactory" as to efficiency. There is no record of previous convictions.

Lewis is 22 years old, unmarried and has no dependents. He completed ten years of schooling in 1946 and thereafter worked as a truck driver until he enlisted in the Army 11 December 1948 for three years. He joined his present organization in February 1950. He has no prior service. His commanding officer rates him "satisfactory" as to character and "unsatisfactory" as to efficiency. There is no record of previous convictions.

6. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, Jr., J.A.G.C.

William E. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

(390)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 343,978

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Eugene Lewis, RA 18341871, and Private Jeffery Martin, RA 18341852, both of Company A, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence as to each accused is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement of each accused.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army the term of confinement as to each accused is reduced to twenty years.

E. M. BRANNON
Major General, USA
The Judge Advocate General

18 December 1950

(GCMO 92, Dec 27, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 343980 — 28 December 1950

UNITED STATES v. Private First Class GLENN M. FRANKLIN (RA 45038689), Company I, 24th Infantry Regiment, APO 25.	25TH INFANTRY DIVISION Trial by G.C.M., convened at Taejon, Korea, APO 25, 25 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Glenn M. Franklin, Company I, 24th Infantry Regiment, APO 25, did, at or near Masan, Korea, on or about 13 September 1950, misbehave himself before the enemy, by refusing to join his company, while his command was engaged with the enemy.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private First Class Glenn M. Franklin, was a member of

Company I, 24th Infantry Regiment (R 9,10,14-16). During the latter part of August and the first part of September, the accused's organization was engaged with the enemy in the vicinity of Masan, Korea (R 9, 10,15,16). On the 12th and 13th of September 1950, the accused's platoon, and the rest of Company I, were defending a hill about twenty miles from Masan (R 14,15). On 12 September 1950 the accused was found in the Service Company area near Masan approximately twelve to thirteen miles to the rear of the fighting front and the position to which his organization was assigned (R 14-16; 9,10).

On 12 September 1950, Sergeant First Class Daniel Hightower, also a member of Company I, 24th Infantry Regiment, saw the accused in the rear of the regimental bivouac area near Masan and warned him he would be "court-martialed or something" if he did not rejoin his company (R 15). The accused stated that "he didn't want to go back -- he'd rather be court-martialed" (R 15,16). The accused had been away from his company at least a month (R 15,16). Sergeant Hightower reported the fact of the accused's presence in the area to the Service Company, which had been designated to furnish transportation back to their units for stragglers (R 16).

Master Sergeant Frank Latham, Jr., Service Company, 24th Infantry Regiment, talked to the accused on the night of 12 September 1950 (R 9, 10). The accused promised him that he would return to his company (R 11). Sergeant Latham ordered the accused to report to the Service Company orderly room on the following morning for transportation back to his company (R 9). The accused promised that he would be at the orderly room next morning (R 12). On the morning of 13 September 1950, the accused did not report to the Service Company orderly room as ordered, Sergeant Latham searched the area and found the accused in the K Company mess hall (R 10). He took the accused to the latter's tent and "made him pack his bags." He then ordered transportation to take the accused back to his unit, but the accused "said he wasn't going back up to the front line" (R 10). Colonel Cole ordered the accused placed in confinement (R 10).

b. For the defense.

After being warned of his rights as a witness, the accused elected to make an unsworn statement (R 17). He stated that he told Sergeant Latham on 12 September that he would return to his outfit, and that Sergeant Hightower had a personal grudge against him and might have told the regimental commander something about him (R 18). He had been in confinement since 13 September 1950 (R 18).

4. Discussion.

The accused was charged with a violation of Article of War 75 in that he did

"* * misbehave himself before the enemy, by refusing to join his company, while his command was engaged with the enemy."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM, 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

"* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

"* * acts by any officer or soldier, as -- refusing or failing to advance with the command when ordered forward to meet the enemy; * * refusing to do duty or to perform some particular service when before the enemy" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50).

The specification in the instant case closely follows the form given in the Manual for Courts-Martial (MCM, 1949, p.316), and the Board of Review deems it to be adequate to state an offense in violation of Article of War 75 (CM 289472, Scheck, 14 BR (ETO) 47,49).

The uncontradicted evidence establishes that the accused was a member of an organization which, at the time and place alleged, was engaged in combat with the enemy. From the middle of August and up to the time of this offense, 13 September 1950, the accused's platoon and company were in contact with units of the North Korean army and were presently committed to the defense of a certain hill or mountain some twenty miles from Masan. For about a month before and up until 13

September 1950, the accused had been away from his organization. At the time of his offense he was in the regimental bivouac area twelve or thirteen miles to the rear of his company.

On 12 September 1950, two noncommissioned officers talked to the accused warning him that he would get into serious trouble unless he immediately rejoined his unit. He told both that he was not going back up to the front line. To Sergeant Hightower, he said flatly he would rather be court-martialed. The other noncommissioned officer, Master Sergeant Latham, Jr., gave the accused an order to be in the Service Company orderly room the following morning, 13 September 1950, where transportation back to his unit would be furnished him, but when the morning of 13 September came, the accused did not appear. Sergeant Latham after considerable search found the accused, made him pack his bags, and took him to the orderly room. Here the accused again stated that "he wasn't going back up to the front line." Sergeant Latham then reported the matter to the regimental commander who had the accused placed in confinement.

The facts above stated show beyond question that the accused was "before the enemy" within the meaning of Article of War 75, as defined in the Manual for Courts-Martial (MCM, 1949, Par. 163a, p.216; CM 257252, Warman, 37 BR 85,90). It is also fully proved that having been ordered to return to his company, he refused, both by his conduct in failing to appear at the orderly room as directed and by his spoken words of refusal. Such conduct has been held to constitute misbehavior in violation of Article of War 75 (CM 282641, Trostle, 24 BR (ETO) 181,183; CM 294796, Transeau, 16.BR (ETO) 153,156; CM 291200, Reed, 17 BR (ETO) 213,216-217). All the elements of proof required by the Manual for Courts-Martial are therefore present in this case (MCM, 1949, Par. 163a, p.216).

It is the opinion of the Board of Review that the evidence is sufficient beyond a reasonable doubt to support the findings of guilty of the Charge and its Specification.

5. Consideration has been given to oral representations on behalf of the accused by his counsel, Mr. Frank D. Reeves.

6. The accused is 23 years of age. He completed two years of high school, then worked for about a year as a laborer at $30.00 per week. He is single but claims three dependents, a mother and two sisters. There is no evidence of any civilian criminal record. He enlisted 5 February 1949 at Kobe, Honshu, Japan, for three years. Prior service is indicated from 16 January 1946 to 15 January 1949. His AGCT score is 78 (IV). His company commander did not rate him for character or efficiency.

7. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial

rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, Jr., J.A.G.C.

William C. Tilghman, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 343980

U N I T E D S T A T E S	)	25TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Taejon, Korea, APO 25, 25 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
Private First Class GLENN M. FRANKLIN, RA 45038689, Company I, 24th Infantry Regiment, APO 25	)	

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(2) the record of trial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of misbehaving himself before the enemy, at or near Masan, Korea, on or about 13 September 1950, by refusing to join his company while his command was engaged with the enemy, in violation of Article of War 75. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. 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.

3. The evidence for the prosecution shows the following. Sergeant First Class Daniel Hightower testified substantially as follows. Prior to and on 13 September 1950 Company I, 24th Infantry Regiment, the accused's company, was engaged with the enemy in a defensive position on a mountain in the vicinity of Haman, Korea (R 14-15). On 10 or 11 September Hightower, the company supply sergeant, talked to the accused, a gunner on a 2.36 rocket launcher and a member of the 1st platoon of Company I, in the company bivouac area in the vicinity of Masan, about twenty miles to the rear of the company's position on the front line (R 14, 16). The accused had been in the rear bivouac area for "at least a month" and was working around Company K mess hall (R 16). Hightower endeavored to persuade him to return to his company, pointing out that

he would probably be court-martialed "or something" if he did not go back. The accused, however, told Hightower that "he didn't want to go back" and would rather be court-martialed (R 15). On 12 September Hightower attended a meeting at the Service Company at Haman at which he reported the accused as a straggler to the first sergeant of the Service Company (Master Sergeant Frank Latham, Jr. (R 9, 12; Def Ex A)). Latham then came down to the area and talked to the accused, who promised him that he would report up to the Service Company the next morning (13 September) to be transported to Company I (R 16). On the morning of 13 September Hightower again spoke to the accused in the Company I rear area, of which Hightower was then in charge, and told him that he should report back to the company on the front line because Hightower had to report all stragglers in that area. The accused stated that "he didn't want to go back" and "that he did not intend to return when he was supposed to go up to Service Company." Consequently Hightower "reported back to the Service Company who was in charge of furnishing transportation for all stragglers at that time" (R 14, 16). Hightower did not order the accused to return to the company (R 14).

Master Sergeant Frank Latham, Jr., testified on direct examination substantially as follows. On the evening of 12 September the witness, who was in charge of transportation of replacements and stragglers from the rear bivouac area to the front line, attended a meeting in the Service Company orderly room at which was discussed the matter of keeping stragglers out of the rear area and up on the front line. At this meeting Hightower made a report, following which Latham proceeded to the rear area, about twelve or thirteen miles from the front line, saw the accused and told him he could get into serious trouble by staying away from his company. Latham asked him why he was not back with his company, but the accused gave no explanation, so Latham told him to report up to the Service Company orderly room the next morning (13 September) before 8:00 a.m. because the trucks were leaving the Service Company for the front around that time (R 9, 13). The accused did not report at the place and time directed, so Latham again proceeded to the rear area. Upon not finding the accused, Latham waited until he appeared at the Company K mess hall and finished eating. Latham then escorted the accused to his tent, "made" him pack his bags and ordered a jeep. Colonel Cole (apparently the regimental commander (R 18)) asked Latham the status of the accused and Latham replied that the accused was a straggler in the area whom he was trying to return to his company. Colonel Cole then told Latham to have the accused placed in confinement and Latham complied. At that time the accused "said he wasn't going back up to the front line" (R 10).

On cross-examination Latham admitted making a statement to the investigating officer that on 12 September when he advised the accused to return, the accused stated he would (R 11). Latham's sworn statement, which was admitted in evidence over objection by the prosecution, is dated 19 September 1950 and reads in part as follows:

"* * * on or about 12 Sept 1950 * * * I went down and explained to Pfc Franklin how serious it was for him to be absent from his company. After talking to him for approximately thirty (30) minutes he promised that he would rejoin his organization. I told him to report to Service Company CP the following morning. On the following morning he didn't show up so I went down to get him." (R 12; Def Ex A)

Latham further testified substantially as follows. The foregoing written statement was not inconsistent with his testimony because he "didn't mention the facts of the accused's statement that he was not going back (R 11). The accused did not state on 13 September, when Latham saw him at the Company K mess hall, that he would go, but indicated by his conduct that he was willing to go - "even though he didn't say anything, he went over and got his bag and came on back" (R 12). On recross-examination Latham testified that on 13 September the accused had his weapon and ammunition with him (R 13). On examination by the court, Latham testified in substance as follows. On 12 September, after he talked to the accused, the latter did promise him that "he would be up there that morning [13 September] for transportation to go to his company." On 13 September, after the accused finished eating at the Company K mess hall, "he went back and got his stuff and I went back up and after I reported him - I reported to Colonel Cole and Colonel Cole said to put him in confinement." Latham "didn't say anything much" to the accused on 13 September (R 12); he merely told the accused "to come on up to the orderly room and to get his bag packed." Asked whether the accused at any time refused to go back to his company, Latham testified: "Only the morning he was supposed to report up there he refused to be there at the proper time when I had transportation for him." The accused's explanation to Latham of his failure to report to the Service Company was that "he had to go to the dispensary or some place." Latham did not order the accused to go back to his company. At no time on 13 September did the accused state to Latham that he was not going back to his company (R 13).

Following an explanation of his rights in the premises, the accused made an unsworn statement in pertinent substance as follows:

On or about 12 September he told Sergeant Latham that he would go back to his outfit and that he was armed. Latham gave him permission to stay with Company K that night "and to come to his company, which I did do" (R 17). "This other sergeant" (Hightower) held a personal grudge against the accused and "might have told the colonel." When the accused arrived, he was "called by the colonel," the regimental commander, and placed in confinement (R 17-18).

4. The accused is charged with misbehaving himself before the enemy by refusing to join his company while his command was engaged

with the enemy, in violation of Article of War 75. The prosecution's testimony establishes that at the time in question the accused, a combat soldier, had been absent without leave from his company, which was engaged with the enemy, for about a month, and that he was in the rear area of his company, somewhere between twelve and twenty miles behind the company's front line position. It is clear that he was before the enemy in the sense of Article of War 75 (CM 343775, Williams, BR-JC, Jan 1951; CM 343949, Bryant, BR-JC, Jan 1951). The only question is whether he refused to join his company, as alleged. As pointed out by the Board of Review in its opinion in CM 343953, Reed, BR-JC, January 1951, page 5, the word "refuse" means to decline, or to deny a request, demand, invitation or command; and some courts have said that refusing to comply means the same as failing to comply.

As to the accused's refusal to join his company, the evidence establishes that on 12 September he was directed and agreed to be at the Service Company before 8:00 a.m. on 13 September for the purpose of being transported to his company on the front line and that he did not appear at the designated place at the fixed time. The accused told Latham that the reason he did not report at the Service Company was because "he had to go to the dispensary or some place." At the trial in an unsworn statement the accused said he did go to the Service Company. Hightower testified to the effect that he saw the accused on the morning of 13 September and that the accused then said "that he did not intend to return when he was supposed to go up to Service Company." Moreover the accused did not voluntarily report on 13 September to anybody. According to Latham, the accused could not be found early on that morning but was later discovered eating breakfast in K Company mess.

The testimony concerning the accused's actions and statements later on 13 September is most unsatisfactory. Hightower's testimony is of little value in this respect inasmuch as it is confined principally to events on 12 September and the early morning of 13 September. Latham's testimony is contradictory. He first testified that at or about the time Colonel Cole ordered the accused confined, the accused said "he wasn't going back up to the front line." Later he testified that the only time the accused refused to go back to his company was when he failed to report at the Service Company early on 13 September. Still later Latham testified that at no time on 13 September did the accused state that he was not going back to his company. Colonel Cole, who personally ordered the accused into confinement, did not testify. On the other hand, there is the testimony of Latham that sometime before Colonel Cole ordered accused into confinement, the accused had packed his bag and a jeep had been ordered to take him back to his company. Whether the accused packed his bag voluntarily or by compulsion also is in doubt. At one place in his testimony Latham stated that he "made" the accused pack his bag (R 10) and at two other places that the accused "went over

and got his bag and came back." Latham interpreted the accused's conduct in this respect as indicating his willingness to return to his company (R 12).

On the basis of the foregoing testimony we are impelled to conclude that the accused intentionally and deliberately refused to return to his company at about 8:00 a.m. on 13 September, but later on that day he yielded to pressure and reluctantly agreed to return to his company and probably would have returned if Colonel Cole had not intervened and placed him in confinement.

We are thus confronted with the question whether or not the accused's apparently reluctant consent to return to his company, obtained by pressure sometime after a prior refusal, constitutes a defense to his first refusal. It has been held that where there was no necessity for haste in the obedience to the order, tardiness in responding thereto is not the willful disobedience contemplated by Article of War 64 (CM 236888, Hamilton, 23 BR 165, 168; CM 237479, Hill, 24 BR 5, 7; CM ETO 2764, Huffine, 7 BR (ETO) 389, 391). On the other hand, ultimate delayed compliance is no defense where prompt obedience is an essential purpose of the order; and moreover, even an extension of time for compliance with an order, following persistant refusal to obey it, does not retroactively cancel or modify the legal efficacy of the original order or the effect of the accused's disobedience thereof (CM 236888, Hamilton, supra; CM 294927, Emery, 18 BR (ETO) 195, 198; CM 276061, Gayles et al, 8 BR (ETO) 363, 386; CM 295823, Brown, 8 BR (ETO) 259, 269-270).

In the instant case there is no question of tardiness or slowness by the accused in complying with Latham's instructions, inasmuch as it clearly appears that the accused deliberately and intentionally did not report as directed because he did not want to return to his company. The accused's subsequent tacit consent to return to his company as the result of renewed pressure by Latham does not purge him of his previous refusal. It is, however, a mitigating circumstance in an offense of this character.

5. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. In view of all the circumstances of the case, however, including the accused's ultimate tacit consent to rejoin his company, it is recommended that the sentence to confinement be reduced to fifteen years.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 343,980

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Glenn M. Franklin, RA 45038689, Company I, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army and upon the recommendation of the Judicial Council, the term of confinement is reduced to fifteen years.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

26 January 1951

GCMO 14. January 31. 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 343984

DEC 7 1950

UNITED STATES v. Private JOHN W. GLISSON (RA 15224021), Company E, 24th Infantry Regiment, APO 25.	))))))))	25TH INFANTRY DIVISION Trial by G.C.M., convened at Taejon, Korea, APO 25, 25 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private John W. Glisson, Company E, 24th Infantry Regiment, APO 25, did, at or near Sangju, Korea, on or about 29 July 1950, run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of one previous conviction by special court-martial for behaving himself with disrespect toward his superior officer was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private John W. Glisson, was a member of Company E,

24th Infantry Regiment (R 9,14). Prior to 29 July 1950, Company E, 24th Infantry Regiment, had engaged in a fire fight with the enemy in the vicinity of Sangju, Korea, following which a withdrawal was ordered (R 9,16-17,21). The accused was present with the second platoon on the day the withdrawal began (R 14,21), which was some time between 27 and 30 July 1950 (R 10). The withdrawal required two days and was made by marching, truck and train, Company E finally assumed a new defensive position in the vicinity of Masan (R 10-11). The accused was last seen by his platoon sergeant at Sangju on the day the withdrawal began (R 14). Sergeant David Robinson, the acting platoon leader of the first platoon last saw the accused at Masan on the day after the withdrawal was completed (R 9,11, 21). On 3 September 1950, Sergeant Robinson was appointed first sergeant of Company E, 24th Infantry Regiment. Thereupon he examined the company morning reports and noticed that the accused had been carried on the morning reports as absent without leave since 29 July 1950 (R 12). He then searched the company area but was unable to find the accused (R 12). On 3 October 1950, the accused reported to him at Kunsan and "told me that we had left him in Sangju" (R 9).

b. For the defense.

The accused after being advised of his rights, elected to be sworn as a witness in his own behalf (R 18). He testified that while withdrawing on the night of 29 July 1950, he "fell by the side of the road" because he "couldn't walk any further." He "had been given a letter from the medical -- medics in Japan not to wear combat boots," but had "been wearing boots since /he/ had been in Korea" and after "marching all day long" "just couldn't walk any further" (R 18). He continued:

> "After a while Cpl Benjamin Michael stopped and asked me what was wrong, and I told him, and he said that he would attempt to get some transportation back for me, and after he didn't come back and night fall, I started to walk again, and I was just walking in the area there, and after some ammunition went off, I didn't know what to do and I just kept on walking in the mountains there." (R 18).

Sometime thereafter he reached a point "where the English troops were stationed at." He remained there for about two weeks. Eventually, he made his way to Pusan where a replacement depot provided him with transportation back to his unit. He encountered several American units between Sangju and Pusan but did not report to any headquarters to ask for transportation back to his unit, although he did report to the first sergeant of a truck company and "told him my conditions." After the truck company moved forward he "got with the amphibian outfit" from which he "got to Pusan" (R 19). On one occasion he "asked where the 24th was" and was

given "a ride" which he apparently relinquished when he discovered that "they were going into the 24th Division" "instead of going to the 24th Infantry Regiment" (R 19).

The accused had fallen out once on maneuvers in Japan because of his feet (R 10,15).

4. Discussion.

The accused was charged with and found guilty of violation of the 75th Article of War in that he

> "* * did, * * run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

> "* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.
>
> * * *
>
> "Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

> "* * acts by any officer or soldier, as -- * * going to the rear or leaving the command when engaged with the enemy; * *" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov. 50).

The specification in the instant case follows exactly the form given in the Manual for Courts-Martial (MCM, 1949, p.318, spec. No. 41).

The evidence adduced by the prosecution in proof of the charge and specification establishes conclusively that the accused was a member of Company E, 24th Infantry Regiment, which on or about 29 July 1950, was engaged with the enemy in the vicinity of Sangju, Korea. The accused admitted that he was present with his unit on that date and that he

participated in a withdrawal action then being executed by his unit. He also admitted that after "marching all day long" he "fell /out/ by the side of the road" because he "just couldn't walk any further." He did not rejoin his unit until 3 October 1950. During his absence he appears to have made no real effort to find his unit or to return to the front with another unit. To the contrary, it further appears that when a truck company which he had joined moved forward he left it for an "amphibian outfit" and eventually made his way to Pusan. The accused was carried as absent without leave on his unit morning report from 29 July to 3 October 1950.

These facts establish beyond a reasonable doubt that the accused was guilty of leaving his company while it was engaged with the enemy at the time and place alleged and sustain the court's findings of guilty of a violation of Article of War 75 (CM ETO 1408, Saraceno, 4 BR (ETO) 293,295; CM ETO 1659, Lee, 5 BR (ETO) 173,174; CM 263351, Keyes, 7 BR (ETO) 187, 188; CM 276183, Kuykendoll, 9 BR (ETO) 315,316; CM 289896, O'Berry, 11 BR (ETO) 203,204-205; CM 298931, Sexton, 15 BR (ETO) 125,127).

In spite of his testimony there can be no serious contention that the accused was suffering from "a genuine and extreme * * * disability at the time of the alleged misbehavior" such as would constitute a defense (Winthrop's Military Law and Precedents, 2d Ed., p.624). Although his feet may have caused him discomfort, his testimony that he was prevented from continuing the march because of this fact is belied by his subsequent conduct. After leaving his unit, he appears to have walkedmany miles for many days without complaining about his feet or seeking medical attention therefor. In any event such defense presents an issue of fact which the court, as indicated by its findings, resolved against the accused. The Board of Review perceives no basis on the facts as proven for disturbing the court's determination of this question (CM ETO 1409, Mieczkowski, 4 BR (ETO) 299,300; CM ETO 1404, Stack, 4 BR (ETO) 279,282; CM ETO 1408, Saraceno, supra, at 295-296).

5. The papers accompanying the record of trial indicate the accused to be 25 years old, and to have completed 11 years of elementary school. No data as to his marital status or as to his occupation prior to entering the military service is available. His company commander did not rate him on character and efficiency. Evidence of one previous conviction by court-martial is incorporated in the record of trial. There is no evidence of any civilian convictions.

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

sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, Jr., J.A.G.C.

William C. Tighe, J.A.G.C.

Arthur S. Ireland, J.A.G.C.

(408)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 343984

JAN 1 0 [illegible]

UNITED STATES v. Private JOHN W. GLISSON, RA 15224021, Company E, 24th Infantry Regiment, APO 25	25TH INFANTRY DIVISION Trial by G.C.M., convened at Taejon, Korea, APO 25, 25 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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

1. Pursuant to Article of War 50d(2) the record of trial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of running away from his company, which was then engaged with the enemy, at or near Sangju, Korea, on or about 29 July 1950, and not returning thereto until after the engagement had been concluded, in violation of Article of War 75. Evidence of one previous conviction by special court-martial was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. 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.

3. The prosecution's evidence shows that the accused left his company without permission on or about 29 July 1950. During the period 29 July - 1 August 1950 the company withdrew from the Sangju area, following an engagment with the enemy, to the vicinity of Masan where after one night it moved to a defensive position about five miles north of that city. The company was "not being chased" by the enemy and the withdrawal was conducted in an orderly manner. There is some uncertainty from the evidence as to when the accused was last seen with his unit. Master Sergeant David Robinson, First Sergeant of the company, was "almost positive" that he saw the accused in the vicinity

of Masan on the morning after the company's arrival there. Master Sergeant Merritt L. Wynn, platoon sergeant of the accused's platoon, last saw the accused during the battle of Sangju. When the accused reported back to the company on or about 3 October 1950 he told Sergeant Robinson that "we had left him at Sangju." Sergeants Robinson and Wynn testified that when the company was in Japan before it came to Korea, the accused had complained about his feet and on one occasion had fallen out on a march because of his feet. The prosecution adduced no direct testimony concerning the circumstances attending the accused's initial absence.

The accused testified in his own behalf substantially as follows. On the night of 29 July 1950, during the withdrawal, "I fell by the side of the road. I couldn't walk any further. We had been marching all day long." His reason was that, contrary to medical instructions issued to him, he had been wearing combat boots. A Corporal Benjamin Michael stopped and asked the accused what was wrong and said he would attempt to get transportation back for the accused. When Michael had not returned by dark, the accused started walking and "after some ammunition went off" he continued walking in the mountains. Corporal Michael was not called as a witness by either side.

The accused subsequently joined some English troops, with whom he remained for about two weeks. He passed American units during his travels, but he did not request transportation back to his unit, although he did report his condition to "the companies" where he stopped. He reported into one truck company which was transporting troops to the front and told the first sergeant of his condition. The first sergeant stated he possibly could get the accused transportation to his outfit. The truck company moved forward, but the accused "got with the amphibian (sic) outfit and from there on I got to Pusan." On one occasion he inquired as to the position of "the 24th" and got a ride, but "instead of going to the 24th Infantry Regiment, they were going into the 24th Division." The accused finally arrived at the replacement depot at Pusan "by trucks and walking" on 25 or 27 September and was then given transportation back to his outfit.

The evidence establishes that the accused's company was "before the enemy" during the period 29 July - 1 August 1950, notwithstanding that during two days of this period the company was withdrawing from Sangju without being directly pursued by the enemy, and was in bivouac on the third day in the vicinity of Masan prior to taking up a defensive position on the following day. It is clear from the evidence that the purpose of the movement was to withdraw and establish a new defensive position against the enemy. The movement was thus an integral phase of tactical operations against the enemy (See MCM 1949, par 163a, p 216; Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, pages 623-624). Inasmuch as the accused left his company during this period, he was before the enemy regardless of whether he fell out during the withdrawal or left the company after its arrival at Masan.

In our opinion there is a possibility that Sergeant Robinson was mistaken in his belief that he saw the accused the morning after the arrival of the company at the bivouac in the vicinity of Masan. Sergeant Wynn, the accused's platoon sergeant, did not see him there and the accused himself stated both before and at the trial that he left the company in the vicinity of Sangju. Concluding therefore that the accused did fall out during the withdrawal from Sangju and before his company arrived in the vicinity of Masan, he is guilty unless he was so disabled, at the time he fell out and for a substantial time thereafter, that he could not keep up with the column or rejoin it later. If he "was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior" (Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, p 624), he could not properly be convicted of misbehavior by running away from his company (see CM 306808, Satmary, 29 BR (ETO) 295, 298).

We may assume from the accused's testimony, which is corroborated in some measure by the testimony of Sergeants Robinson and Wynn as to the accused's prior foot trouble, that he was experiencing a certain amount of discomfort due to the condition of his feet. But we are not required to believe that his disability was so extreme as to afford him a legal defense. Although he testified that he "couldn't walk any further" because of an all day march in combat boots which he was not supposed to wear, he further testified that by nightfall he started walking and, after hearing some firing, continued walking a long distance and for a long time. He was able to proceed all the way from the vicinity of Sangju to Pusan "by trucks and walking." This testimony belies the existence of the "genuine and extreme illness or other disability" contemplated as a defense to this very serious charge.

In CM ETO 1404, Stack, 4 BR (ETO) 279, the accused was charged with running away from his company which was then engaged with the enemy and not returning until after the engagement had been concluded. The evidence established that, while on the march with his platoon which was moving toward the battle line near Nicosia, Sicily, the accused twice fell out, pursuant to permission, in order to defecate. After the second occasion he did not attempt to rejoin his unit, but remained where he was for over a day, after which he wandered about the island. He claimed he was searching for his unit and that when he did not discover it he went to a central position on the island, where he remained for about a month, and then returned to his organization. The Board of Review held in the Stack case that the accused, in failing to rejoin his company and continue with it following his temporary authorized absence therefrom, ran away from his company within the purview of Article of War 75. The Board further held that the question of the accused's disability at the time in question was one of fact for the court's determination and that the court was justified in rejecting the supposed defense in view of the evidence that the accused was suffering merely from a temporary mild form of dysentery and that

he remained for over two days in the area without attempting to seek medical aid.

In the instant case assuming that the accused was so exhausted at the time he fell out as to have been authorized to do so, his own testimony as to the walking he did after his resting, negates any possibility that his exhaustion was other than temporary or that he made any effort immediately upon recovery to rejoin his company. We therefore conclude that the findings of guilty are warranted by the evidence.

4. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. However in view of all the circumstances of the case it is recommended that the sentence to confinement be reduced to twenty years.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

(412)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 343,984

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private John W. Glisson, RA 15224021, Company E, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army the term of confinement is reduced to twenty years.

E. M. BRANNON
Major General, USA
The Judge Advocate General

18 January 1951

(GCMO 10, January 25, 1951).

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