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HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

PACIFIC OCEAN AREAS



VOLUME 1 B.R. (POA)
CM POA 15-CM POA 379

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OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

Judge Advocate General's Department

Holdings Opinions and Reviews

BOARD OF REVIEW

Branch Office of The Judge Advocate General

PACIFIC OCEAN AREAS

Volume 1 B.R. (POA)

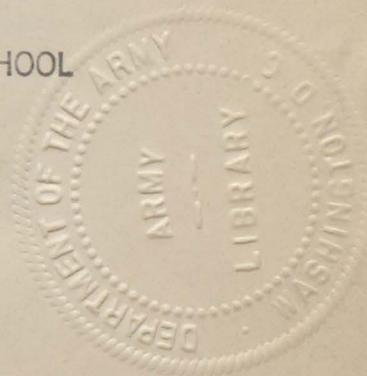
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FOREWORD

By direction of the President, pursuant to Article of War 50 $\frac{1}{2}$, the Branch Office of The Judge Advocate General with the United States Army Forces in the Pacific Ocean Areas was established 25 September 1944. Concurrently with its establishment, the Secretary of War by direction of the President vested in the Theater Commander confirming authority under Article of War 48 and the powers set forth in Articles of War 49 and 50. From its inception until 11 June 1945, Brigadier General James E. Morrisette, U.S. Army, was the Assistant Judge Advocate General in charge, and from the latter date until its inactivation 30 June 1945, Lieutenant Colonel Samuel M. Driver was acting in charge.

The present collection contains (to the best information available at the time of publication) all the holdings and opinions of the Board of Review of this Branch Office. There is also included the 1st Indorsement of the Assistant Judge Advocate General in cases where he differed with the Board of Review, in cases of legal insufficiency in whole or in part, or where addressed to the Theater Commander. A note indicating final disposition with GCMO reference appears at the end of cases ordered executed by the Theater Commander. "Short holdings," which find the record of trial legally sufficient to support the findings of guilty and the sentence, without any discussion of the facts or arguments, are not included. In the CONTENTS of each volume, there is indicated, opposite the original POA number of each case, the CM number allocated to the case in the JAGO when the record of trial was received.

Similar collections of the Board of Review materials are being made for each of the several Branch Offices which operated in overseas theaters. This includes the Branch Offices of The Judge Advocate General which were established to serve the Army Forces in the European Theater of Operations, in the Mediterranean Theater (originally North African Theater) of Operations, in the India-Burma (originally China-Burma-India) Theater, in the South West Pacific Area, in the Pacific Ocean Areas, and the Pacific. An Index and Tables covering these materials will be added as soon as practicable. The volumes of materials from the foreign Boards of Review will constitute a companion series to the compilation of Holdings, Opinions and Reviews of the

Boards of Review sitting in Washington, D. C. Together these will make conveniently accessible the most comprehensive source of research materials on military justice in the zone of the interior and in combat areas.

15 June 1946

A handwritten signature in black ink, appearing to read 'T. H. Green', written in a cursive style.

THOMAS H. GREEN
Major General
The Judge Advocate General

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

10 NOVEMBER 1944

BOARD OF REVIEW

POA 015

UNITED STATES	)	27TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at APO 27, 6
	)	and 9 October 1944. Dishonorable dis-
Private CIPRIANO DIAZ (39280396),	)	charge and confinement for life.
Company I, 105th Infantry.	)	Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
DRIVER, LOTTERHOS and SYKES, Judge Advocates

1. The Record of Trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Private First Class Cipriano Diaz, Company I, 105th Infantry did, at Saipan Island, on or about 30 June 1944 absent himself without proper leave from his company until on or about 27 August 1944.

Charge II: Violation of the 75th Article of War.

Specification: In that Private First Class Cipriano Diaz, Company I, 105th Infantry, did, at Saipan Island, on or about 30 June 1944 run away from his company, which was then engaged with the enemy, and did fail at any time to rejoin it, being apprehended on or about 27 August 1944, at Saipan Island, forty-five (45) days after the engagement was concluded.

He pleaded not guilty to and was found guilty of all Specifications and Charges. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The Record of Trial was forwarded for action under Article of War 50½.

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3. The evidence for the prosecution:

In June 1944 accused (then a private first class), a member of Company I, 105th Infantry, was on the Island of Saipan with his company. On one occasion he was absent from his platoon for two days, and the platoon leader ascertained that he had been "with the medics" on account of blistered feet (R. 5, 10, 12, 13).

On 29 June the platoon "jumped off up the hill" and had reached the second of two roads when "the tanks came up to the top of the hill". Then the "commotion started" and there was machine gun and mortar fire (R. 14). On the morning of 30 June, Companies I and K were "fighting in the front lines". The men were moving forward to take a designated hill, there was artillery and mortar fire, and the enemy were "Very close". "Everything was mixed up" and the men of different companies were "all together to get cover the best we could". Accused was with his platoon at about 0730 but was "a nervous wreck". He had his safety off, was excited, and would "go to pieces" when he heard any kind of shot. Later in the morning T/5 Lowell F. Banks, a mail orderly of Company I, who was at the "C.P.", saw accused going toward the "106th Aid Station", which was about 400 yards to the left of Company I command post. Other men of the platoon did not see accused any more during the day. A search made that evening disclosed that accused was missing. Neither the platoon sergeant nor the first sergeant saw accused from 30 June to 27 August (R. 9-22).

After accused was back in the company, sometime in September, he told a sergeant in Company I "after he left the line" he went back to "Blue Beach", stayed there a while, "got in some colored outfit", went to a boat to get something to eat, and traded "some stuff that he found on the island" for a clean suit of clothes. Blue Beach was "quite far away" from the scene of the engagement of 30 June, "more than several hundred yards" (R. 15-17).

The morning report of Company I for 5 July 1944 (Ex. 1) shows accused from duty to missing in action as of 30 June. It was stipulated that if "the alleged witness" were present he would testify that accused was arrested on 27 August (R. 6-7).

On 30 August 1944 Lieutenant Colonel Richard Burke, investigating officer, read the 24th Article of War to accused and explained to him that he could remain silent, then questioned accused under oath. The interview was transcribed and accused read and signed the recorded statement (Ex. 2). Accused was not intimidated and made the statement "Willingly" (R. 23-26). The statement of accused was substantially as follows: He landed on Saipan on 16 June and participated in battles. About six days before 30 June he stayed behind the lines for two days because of a sore foot, then caught up with his outfit. The "boys they sort of laughed" at him. When the attack began, his foot was still sore but he told "the lieutenant" it was "OK". When they attacked, "something come into my head", he "couldn't pull the trigger" and "didn't know what to do". It "seemed as though" the Japs were shooting at him. Accused "got sick when the mortars started firing", and when they were advancing "got nervous, scared and sick and started running

back". He went back and told Banks he was going to the aid station. Accused did not have permission to leave his company, but told another enlisted man he was falling out to go to the aid station because of his foot. He went to the "106th aid station" where he was told to go to his own aid station. He "got mad and came out and stayed out here on the beach, cause they said they couldn't do anything" for him. He remained on Blue Beach, "wandering back and forth", until he "went out to the ship". He ate with a colored outfit for a while and picked up abandoned C rations, but many times was without food. He had left most of his equipment at the front lines. He left the beach about 27 August (Ex. 2).

4. Accused testified that he was born in Mexico and came to the United States when about ten years of age. He attended school to the fifth grade, went to vocational school, and later worked as a furrier, nailing skins to the frames. He has five brothers, two sisters, and his parents, living, and supported his parents because of his father's drinking habits. One of his brothers had been subject to "some kind of attacks" as a boy, during which he foamed at the mouth. Accused was inducted 6 February 1943, joined Company I in June 1943 in Oahu, went on the "Makin operation", but on account of changed plans did not go ashore there but merely unloaded ammunition. He got along well with the men of his company. His organization landed in Saipan on 17 June 1944, but did not go into action at first. When they went to the front lines he was "scared". He fell out once on account of a blistered foot, and rejoined his company two days later (R. 29-32, 46).

On 29 June there was an enemy tank attack and accused was "doing all-right". Then "the boys" were getting killed "left and right", blood was "running down their faces" and "it got in my head. I don't know what I felt. I kept going with the boys although I was nervous. I didn't want to tell anybody". The following morning "we made an advance and got back what we had lost". As the attack began, "artillery started falling" near accused, the "boys" had gone forward, it "seemed everywhere I moved the artillery fire would fall", accused "didn't know what happened" to him, his "head kept ringing", something "was wrong" with him, and he wanted to go to the aid station to "find out what was wrong" with him. Accused went to the aid station and remained there about a half hour, but was told to return to his outfit as he had no wound. He then went back to the beach, "just walked around, back and forth". He did not return to his company because he was "nervous and scared". He was "thinking in my mind, thinking, just thinking and thinking". About 27 August he was on a ship in sailor's clothes which he had bought because his own were torn and dirty. He went to the ship to get food (R. 32-34).

On cross examination accused stated that he had always suffered from "nervousness" and when he was "in action" he "got more nervous". On 30 June his foot hurt but not enough to make him leave. His head was "ringing from the banging" of the shells that fell near him, and he kept thinking of that and of his mother. The shells were falling all around and he "just

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backed up". He wanted to go forward, but was confused. When he would start forward shells fell in front of him. He then went to the aid station. When he told the sergeant there that he was sick and "didn't feel good" the sergeant told him to go back to his outfit and see if they could do anything for him. Accused could not find the 105th Infantry aid station, so went to the beach and remained there. The beach was "pretty far", "Miles", away. While he was on the beach, until 27 August, he was still confused. He "wanted to go back to my outfit, but I just couldn't. All the boys had a bunch of friends killed. They all depended on me. I felt that I had double-crossed them, but I did want to go back to them". Accused was "picked up" on 27 August (R. 34-41).

Major Albert D. Pattillo, division psychiatrist, made an examination of accused a few days prior to the trial. The examination consisted of taking an "elaborate history", questioning him about events leading up to the occurrence, and three tests to determine mentality. Major Pattillo concluded that accused is in a moderately severe psycho-neurotic anxiety state, and of a mental age of eight and a half years, or on a "borderline of mental deficiency". Battle neurosis, or psycho-neurosis, is "born of a conflict between fear and obligation". Major Pattillo acted as psychiatrist throughout the Saipan operation and saw cases of psycho-neurosis ranging from a mild condition to some that were psychopathic patients. The latter were diagnosed as casualties. The treatment for battle neurosis is primarily rest near the front. During the Saipan operation about 76 percent of the cases treated were returned either to the front lines or to a service area, and the others were evacuated. It would be difficult to say whether accused was similar to most of the cases, as Major Pattillo did not see him at the time, but based on the description of his condition that accused gave, he believed that accused suffered from moderately severe psycho-neurosis on 30 June. If accused did not tell him the truth the diagnosis would not be correct, but Major Pattillo felt that accused had given him truthful answers. Although he would not say that accused was "not mentally responsible" Major Pattillo stated "I don't think he could help his actions" (R. 47-60).

Captain Harry Brick, chief of the neuro-psychiatric section, 31st General Hospital, examined accused and diagnosed him as "a psycho-neurotic, hysteria manifested by anxiety and that was superimposed upon a mental deficiency condition". His sub-conscious mind is so augmented that he "has no control over his premeditated action". Captain Brick was of the opinion that accused was afflicted with battle neurosis, which he considered severe; that he was of a mental age of eight years and eight months; and that when accused deserted the front lines he was not responsible for his actions but it was his sub-conscious mind working. Captain Brick stated that there was no classification of battle neurosis more severe than "severe". These cases are "confused", have amnesia to some extent, and act in accordance with the "confusion". Accused is not insane, but "during the psycho-neurotic manifestation he is temporarily insane because he has no control over his actions". When Captain Brick examined him, accused was tremulous, tense,

depressed and very emotional, but related without hesitation his entire background. The statements of accused were consistent with what Major Pattillo had told Captain Brick. The "breaking point" of nervous men varies. Accused was in a state of amnesia (R. 60-65, 76-78).

First Lieutenant Frederick C. Spreeman, who had been the platoon leader of accused since July 1943, stated that accused had a good reputation in the company, had always been truthful with him, and was a good soldier, though not overly intelligent. During the Saipan operation accused seemed nervous, and the safety on his rifle was always off though he was instructed to put it on. From personal observation, Lieutenant Spreeman considered him "just a scared kid". There were three cases of men in the platoon who suffered nervous breakdowns and were sent back to the aid station. Others who displayed nervousness went through the campaign. Lieutenant Spreeman did not give accused permission to leave the platoon on 30 June (R. 66-68).

The first sergeant of Company I, the platoon sergeant of accused, as well as another sergeant and two privates of Company I, all of whom had known accused for more than a year, were of the opinion that accused had a good reputation in the company, was truthful and a good soldier. His platoon sergeant noticed during the Saipan operation that accused continually had his safety off, although he was told "time and time again" to put it on. He was "always laying back" and was "jittery". Other men displayed the same symptoms but went on through the operation. Another one of these witnesses noticed that accused was "jittery and nervous" and "didn't think that he could possibly stand the rigors of combat". The nervousness was "sapping the man's will power". Two others observed his nervousness. He seemed more nervous than other soldiers (R. 68-75).

5. In rebuttal, it was shown that records of the aid station of the 2nd Battalion, 106th Infantry, for 30 June did not show that accused was treated there, but no record would be made of a man not treated and sent to another aid station. The Form 20 of accused (Ex. 4) was placed in evidence. Private Joseph C. Renderman, the guard who brought accused from Saipan after his apprehension, testified that accused said that he was on the beach and "eating rations with some other company", and that he "went to a ship and was going back to Oahu and then he was going home". Accused also stated that the ship was delayed one day, and the guard on the ship saw him (R. 78-85).

6. Accused was recalled by the defense, and denied that he had talked to Renderman. He also denied that he intended to go back to Oahu when he got on the ship at Saipan. Renderman's platoon sergeant, who had known him for about eight months, stated that he is "mentally abnormal" and that his word is not to be taken seriously (R. 85-88).

7. a. The evidence shows that accused landed on Saipan about the middle of June 1944 with his organization, Company I, 105th Infantry. While in combat with the enemy on 29 June he was in a very nervous condition but

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remained with his company. The next morning Company I participated in an attack and was subjected to artillery and mortar fire by the enemy, who were very close. Accused seemed to be a "nervous wreck" and was excited. During the battle accused left his company, without permission, and went to the 106th Infantry aid station. He had not been wounded, but felt sick from his nervousness and fright. When he was advised at the aid station that nothing could be done for him, he proceeded to "Blue Beach", a considerable distance from the fighting, and remained there until 27 August, when he was taken into custody. While at Blue Beach, he obtained what food he could from other organizations than his own and from abandoned supplies.

The conduct of accused clearly constituted a violation of the 61st and 75th Articles of War as alleged, unless it be found that he was not responsible for his actions.

b. The division psychiatrist and the chief of the neuro-psychiatric section, 31st General Hospital, examined accused a few days prior to the trial, and both were of the opinion that although accused was not insane, yet that he was of low mentality (with an approximate mental age of eight and a half years), was a psycho-neurotic, and on 30 June suffered from moderately severe or severe battle neurosis. They did not think that accused could control his actions at the time he left his company during the battle. Severe cases of battle neurosis are diagnosed as casualties and given treatment, consisting primarily of rest. There was no expert testimony other than that of the two psychiatrists.

Where a board of medical officers finds that an accused did not have the "necessary criminal mind" to commit the act charged, and the evidence for the prosecution does not tend to refute the finding but tends to substantiate it, findings of guilty should be set aside, as there is reasonable doubt as to the mental capacity of accused (Dig. Op. JAG, 1912-40, sec. 395 (36); CM 128252). Although accused was not examined by a board of medical officers, the conclusions of the two psychiatrists who testified were, under the circumstances, substantially equivalent to findings by a board, in view of the official positions held by these officers. However, in the opinion of the Board of Review, the court was not bound by this testimony. When an accused testifies, so that the court has an opportunity to observe him and form an opinion of his mental capacity, it is not bound to accept as facts what the division psychiatrist has stated in his testimony (Dig. Op. JAG, 1912-40, sec. 395 (36); CM 125265). The findings of a medical board and testimony of medical witnesses, supporting the defense of insanity, may not be disregarded by the court, but are not binding when there is other evidence to the contrary (Dig. Op. JAG, 1912-40, sec. 395 (36); CM 204790, 8 BR 57).

The conclusions of the psychiatrists were based on examinations of the accused made approximately three months after 30 June, the date on which accused left his company; the accused testified at length and the court had an unusual opportunity to observe and appraise him; he remained absent from his company after sufficient time had elapsed for him to overcome his fears

arising in the heat of battle, and until he was apprehended on 27 August; and several witnesses testified to the actions and reactions of accused on and prior to 30 June, as a basis for the court to appraise his mental condition.

c. Applying the rules stated above to this record, the Board of Review concludes, without weighing the evidence, that it was sufficient to support the finding by the court that accused was responsible for his actions on 30 June. This holding is in accord with and supported by a recent case (3 Bull. JAG 228; CM NATO 2047) involving the 75th Article of War wherein the facts were strikingly similar to those in the present instance.

8. There is attached to the record a letter dated 9 October 1944, signed by all members of the court (seven), recommending that accused be "brought before a Board of Medical Officers for the purpose of determining any issue of the mental condition of the accused at the time of his offenses" and that "if such Board finds the accused to have been mentally irresponsible at the time of his offenses, that consideration be given to the remission of his sentence". There is also attached a recommendation by four members of the court, dated 23 October, that execution of the dishonorable discharge adjudged be suspended. In explanation of these two documents, the president of the court states in a letter dated 25 October 1944, likewise attached to the record, that the members of the court have "given careful consideration in informal secret session to the remarks made by the convening authority concerning the inconsistency between the recommendations" in the letter of 9 October and the finding of guilty of the Specification, Charge II, and that "as a result of such deliberation, not less than five of the members present desire to withdraw the letter of 9 October 1944 and four members wish to submit another letter of clemency which will not suggest the existence of a reasonable doubt". He further states that although the original letter "may have suggested that a reasonable doubt existed, this was not the fact".

Undoubtedly, the letter of 9 October suggests that the members of the court were not satisfied beyond a reasonable doubt that accused was responsible for his actions, and it appears that at least two members of the court adhere to the statements contained in the letter. However, in the opinion of the Board of Review, it must be presumed, especially in the light of the explanation given by the president of the court, that the members of the court observed the obligation of their oath and believed beyond reasonable doubt, from the evidence, that accused was responsible for his acts and was guilty. It will be assumed that the wording of the letter of 9 October was inadvertent to the extent that it suggested an inconsistency with the findings of guilty.

9. The charge sheet shows that accused was twenty-four years and eleven months of age when the charges were drawn, and that he was inducted on 30 January 1943.

(8) -

10. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Samuel M. Driver, Judge Advocate

F. Lottus, Judge Advocate

Charles S. Sykes, Judge Advocate

(10)

Wallace W. China, Avery Patterson, Timmie Tate, and James Wilder, in a tent located in the "company area" of Company B, 1894th Engineer Aviation Battalion. The accused became "broke and he asked for a cut". Patterson began to "tease" the accused who "turned around and grabbed a rifle". Then Wilder started "teasing" the accused which "teasing" continued until Wilder and the accused began to fight each other with their fists, the rifle having been discarded by the accused. The evidence is conflicting as to which of the two soldiers struck the first blow. The accused weighed 139 pounds and Wilder weighed 181 pounds. At some time during the fight, Wilder had a knife in his hand but stated that he did not need a knife and did not use it. The fighters were separated and the accused "started out of the tent". He was again hit by Wilder as he was leaving. The accused then told Wilder to "stay here until I come back" (R. 50, 56, 57, 61, 75-81).

The accused walked toward his tent which was "about the third row of tents", approximately thirty or thirty-five feet from the tent in which the card game and fight had occurred. Wilder then went to his tent which was next to the tent where they had been playing cards, secured his rifle and returned to the front of the tent. After the lapse of a short time varying from "two or three minutes" to "four or five minutes" from the time when he had left the "card game" tent, the accused came back from his tent with a rifle and said "where is the bad mother fucker". Wilder, who had his rifle at "port arms", replied "Here I am", and "knocked the safety off his rifle", and the accused, who was walking toward Wilder, "threw up his gun". After Wilder's reply, the accused fired in "no time" from a distance of three or four feet, and the bullet struck Wilder in the neck (R. 7, 31, 32, 39, 50, 51, 57, 58, 64, 66, 72, 78, 82).

"Very shortly after the injury", which occurred at 1830, Wilder was taken to the 369th Station Hospital, where an examination disclosed that he had a "small wound of entry on the left side of the neck, and a wound of exit on the right supra-scapula area". The "bullet had gone through the neck, transecting the spinal cord, and it presented a typical picture of complete paralysis from the neck down". In the opinion of Lieutenant Colonel Joseph Kuncl, Jr., M.C., the patient, Wilder, at such time "was in extremis * * * and was going to die", and a normal person suffering from a gunshot wound of this type, resulting in paralysis from the neck down, would have cause to realize impending death. Colonel Kuncl saw Wilder each day thereafter until Wilder's death which took place on 10 October. On 8 October he asked Wilder if he was aware of the seriousness of his condition to which Wilder replied "Yes, doctor, I am going to die, ain't I". The doctor informed Wilder that "there is a very great possibility of it" and then asked the patient how he happened to be shot. Wilder informed him that he had been shot by a "fellow soldier" who had threatened him about twenty minutes before the shooting and who had come to his tent looking for him and asking "Where is that mother-fucking son of a bitch?". Wilder also informed the physician that although he had his gun he made no attempt to defend himself and kept the butt of his rifle on the ground (R. 7, 11-15, 19).

On 7 October Captain Holt B. Grace, IGD, in the performance of his official duties, interviewed Wilder in the station hospital. Wilder informed him that he, Wilder, was "pretty low" and "suffering now". In response to Captain Grace's questions, Wilder told him that "We had a fight in a card room, he slapped me and I slapped him back", and that the other person said "He was going to kill that bad son of a bitch", went to get his gun, came back and shot Wilder through the neck with a rifle. Wilder also told Captain Grace that he, Wilder, had secured a gun but did not try to shoot, that there was no cartridge in the chamber, and that the person who shot him was "D. S. Davis" (R. 24-26).

Wilder died on 10 October 1944. His death was caused by "paralysis, respiratory failure, which was secondary to, either directly or indirectly, a gunshot wound of the neck" (R. 16, 21-23).

4. For the defense, the accused, after his rights as to testifying or remaining silent had been explained to him, testified that during the evening of 5 October, "we was in the tent gambling, and I got broke, and I got up to take my cards, and Avery Patterson, he got up and slapped me on the head". When Wilder "got in" the argument, the accused told him not to interfere, to which Wilder replied "I been wanting you anyway". The accused answered "Well, here I am". The accused slapped Wilder after Wilder had slapped him and they "started fighting". During the struggle Wilder "had his knife" and was "pulled" away from the accused. As the accused "started to walk" from the tent, Wilder "knocked" him out of the tent. The accused then told Wilder "to wait until I come back" and left the tent. The accused "seen him [Wilder] run out of the tent and run to his tent to get his rifle, and I went to my tent and got my rifle and came back". Wilder "was behind some boys, and I [the accused] said, 'Where is the mother fucker?' and he [Wilder] said, 'Here I am' and threw his rifle up and knocked the safety off, and I shot". The accused, who had not previously intended to use his rifle, thought that Wilder was going to shoot him. After "the shot" the accused returned to his tent where he left his rifle and then went to the "orderly room" where "he told the first sergeant how it happened" (R. 85-89).

The accused also testified that he was afraid of Wilder and that when he told Wilder to "wait until I come back" he was "just bluffing" and had "no intention" of getting his rifle. When he obtained his rifle and "started back" he thought that Wilder was going to shoot him. He had never before had any trouble with Wilder (R. 86-89).

On cross examination, the accused testified that he returned to the scene where Wilder was because he "seen him when he got his rifle". He then admitted that he did not "know" while he was in his (the accused's) tent that Wilder had his rifle but did "know he was going to get it". He "come back down there" to keep Wilder from shooting him (R. 90-92).

5. a. The undisputed evidence shows that the accused shot the deceased in the neck with a rifle on 5 October 1944 and that the deceased died five days later as a result of the wound so inflicted. The shooting was an

aftermath of an altercation arising out of a dispute about a card game. After the altercation, which involved the passage of blows between the parties and in which the accused appears to have been bested although not appreciably harmed by his heavier opponent, the accused left the tent where the scuffle took place, admonishing the deceased to "stay here until I return". The deceased then left the tent, went to his own nearby tent, where he obtained his rifle, and returned to the vicinity of the tent where the altercation had taken place. During this time, the accused proceeded to his tent which was located several rows of tents away—a distance of approximately thirty or thirty-five feet—and procured his rifle. He then came walking back and called out "Where is that bad mother fucker?", to which the deceased replied "Here I am". They were about three or four feet apart. Immediately following the deceased's answer, the accused shot him with his rifle. The deceased fell to the ground and the accused left the scene and proceeded to the orderly room where he reported the affray to the first sergeant.

The testimony of the witnesses with respect to the altercation which preceded the shooting is substantially the same except as to which of the participants struck the first blow. As to this, the accused and one of the prosecution's witnesses testified that the deceased first hit the accused. On the other hand, several witnesses testified, and the deceased in a dying declaration stated, that the accused had inflicted the first blow.

The principal conflict in the evidence relates to the position and actions of the deceased immediately preceding the time when the rifle was fired. In this connection, the accused testified that when the deceased answered "Here I am", he, the deceased, "threw his rifle and knocked the safety off". Two witnesses for the prosecution testified that the deceased was holding his rifle at "port arms" or "high port arms" and took off the safety of the rifle. This testimony is irreconcilable with the deceased's dying declaration that he made no effort to defend himself and kept the butt of the rifle on the ground.

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in such definition means "* * * without legal justification or excuse". "A homicide done in the proper performance of a legal duty is justifiable". An excusable homicide is one " * * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray * * *". The definition of murder required that "the death must take place within a year and a day of the act or omission that caused it * * *" (MCM, 1928, par. 148a). The most distinguishing characteristic of murder is the element of "malice aforethought". This term, according to the authorities, is technical and cannot be accepted in the ordinary sense in which it may be used by laymen. The Manual for Courts-Martial defines malice aforethought in the following terms:

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor the

actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark).

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit a felony, * * *" (M.C.M., 1928, par. 148a, underscoring supplied).

When the record is examined in the light of the above principles, it is apparent the evidence sustains the findings of guilty, unless it be held (a) that the accused acted in self-defense as he contended or (b) that the death of deceased was inflicted in the heat of a sudden passion, caused by adequate provocation.

b. As to the claim of self-defense, by merely arming himself after the fist-fight and returning to the tent where the deceased was likely to be, the accused did not sacrifice his right to self-defense in case of an unauthorized attack, but before one may take the life of an assailant he must reasonably believe that his life is in danger or that great bodily harm will be inflicted upon him, and he must also reasonably believe that it is necessary to kill to avert the danger (CM 235044, Winters, Bull. JAG II, p. 340, 21 BR 265). Furthermore, he must retreat if by so doing he may lessen the danger (id.). The facts show that the accused withdrew after the fist-fight, advising the deceased to await his return. The deceased, who availed himself of the right to arm himself in view of this threat, made no attempt to follow the accused, but to the contrary, remained near his tent. The accused obtained his rifle and returned in search of the deceased asking for him in opprobrious terms and firing promptly upon deceased's answer. Although the accused testified that he was "just bluffing" when he told the deceased to "wait" for him, the surrounding circumstances justify an inference of the falsity of this assertion. It appears, therefore, that there is ample competent evidence to show that the accused became the assailant, even though the deceased

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may have raised his rifle to "port arms" and unlocked it after being challenged. The court was, therefore, justified in rejecting the claim of self defense made by accused.

c. As to whether the deceased's death was inflicted "in the heat of a sudden passion, caused by adequate provocation", the evidence shows that the accused left the tent where the provocative acts may have occurred, walked to his own tent several rows of tents away to obtain his rifle and returned after the lapse of a period of time variously estimated at from two or three to four or five minutes. As a matter of law, it cannot be said that the court acted arbitrarily in rejecting this as being an insufficient "cooling-off" period, especially when coupled with the fact that the testimony of the accused and the principal argument of the defense stressed the fact that the accused acted in self-defense (CM 232400, Thomas, Bull. JAG II, p. 188, 19 BR 67). Malice is shown, not only by the use of a deadly weapon, but also by the attendant threats and actions of the accused. Deliberation is indicated by the fact that after the original scuffle the accused left the tent, walked a distance of thirty to thirty-five feet to his own tent, armed himself with a rifle, returned and sought the deceased, and fired the fatal shot promptly after finding the deceased (id.).

6. The Board of Review has considered the competency of the dying declarations which the deceased made to Colonel Kuncl and to Captain Grace. To authorize the admission of a dying declaration, the victim must have been "in extremis and under a sense of impending death, i.e., in the belief that he was to die soon; though it is not necessary that he should himself state that he speaks under this impression, provided the fact is otherwise shown" (MCM, 1928, par. 148a). In the present case, the deceased was paralyzed from the "neck down" after being shot. The physician who examined the deceased was of the opinion that he was "in extremis * * * and was going to die". That the deceased realized the seriousness of his condition is evidenced by his statement to such effect to the physician on 8 October. Although no such statement had been previously made, the fact that the deceased's condition had not appreciably changed warranted the inference that on 7 October when his declarations were made to Captain Grace he then was under a sense of impending death (CM 228571, Dockery, Bull. JAG II, p. 8, 16 BR 249). The declarations were properly admitted.

7. The charge sheet shows that the accused was twenty years of age when the charges were drawn, and was inducted at Fort Bragg, North Carolina, on 1 September 1943.

8. For the reasons stated, the Board of Review holds the Record of Trial legally sufficient to support the findings of guilty and the sentence.

Samuel M. Davis Judge Advocate

J. J. Lotterhos, Judge Advocate

Charles H. Sykes Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

21 December 1944.

BOARD OF REVIEW

POA 038

UNITED STATES	)	SOUTH PACIFIC BASE COMMAND
)	
v.	)	Trial by G.C.M., convened at APO
	)	932, 4 November 1944. Sentence
Privates GEORGE W. ABRAHAM, JR.	)	(as to each accused): Dishonorable
(37223914), and JAMES J. HARDIN	)	discharge and confinement for five
(37224138), 3388th Quartermaster	)	years. Disciplinary Barracks,
Truck Company.)	

HOLDING by the BOARD OF REVIEW -
DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. The only question requiring consideration is that of the authority of the Commanding General, South Pacific Base Command, to act as reviewing authority and approve the sentences. The facts applicable to this question, as disclosed by the record and papers now accompanying the record, are as follows:

On 6 May 1943 authority was granted, pursuant to the 8th Article of War, to the Commanding Officer, IV Island Command (subsequently redesignated as Espiritu Santo Island Command), to appoint general courts-martial. On 25 October 1944 the Commanding Officer, Espiritu Santo Island Command, a major general, referred the charges in this case to a general court-martial appointed by him on 9 and 11 October 1944. The accused were arraigned and tried on 4 November 1944. An officer of the United States Navy, a captain, assumed command of Espiritu Santo Island Command on 5 November 1944 and relieved the major general who had previously been in command. Thereafter, the senior Army officer at Espiritu Santo Island, a colonel, was Commanding Officer, United States Army Forces, Espiritu Santo. Effective 5 November 1944, the Commanding General, South Pacific Base Command, assumed general court-martial jurisdiction over all United States Army Forces under Espiritu Santo Island Command. The record of trial in

Classification
 Date - 27 May 1974
 By - TJA6, A&H

(18)

was forwarded to the Commanding General, South Pacific Base Command, who on 27 November 1944 approved the sentences, after the record had been referred to his Staff Judge Advocate.

3. It is provided that the record of trial of a general court-martial shall be forwarded to "the appointing authority or to his successor in command" (AW 35) and that no sentence shall be carried into execution until it shall have been approved by "the officer appointing the court or by the officer commanding for the time being" (AW 46).

In this case the record of trial was not forwarded to, nor were the sentences approved by, the appointing authority. It is therefore necessary to consider whether the officer who acted as reviewing authority and approved the sentences (the Commanding General, South Pacific Base Command) was, under the circumstances, the "successor in command" or the "officer commanding for the time being", as contemplated by the Articles of War. As commanding officer next above the appointing authority in the chain of command, and vested with the power to appoint general courts-martial, he falls within the scope of the term "officer commanding for the time being" if it can be said that the command formerly exercised by the appointing authority had ceased to exist as a distinctive organization (see MCM, 1928, par. 87a; Dig. Op. JAG 1912, (CIV C 1 and CIV C 2) pp. 174-175).

It appears that Espiritu Santo Island Command remains in existence for military purposes, but since 5 November 1944 it has been under the command of an officer of the Navy and not an Army officer. It is provided in the Articles of War that "nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States Naval jurisdiction unless otherwise specifically provided by law" (AW 2). It obviously results that an officer of the Navy could in no instance act as reviewing authority on a record of trial by a general court-martial appointed under the Articles of War. Therefore, although this command continues in being for military purposes, it does not remain in existence for Army court-martial purposes, inasmuch as it is no longer commanded by an Army officer.

The senior Army officer on Espiritu Santo since 5 November 1944 merely commands the Army personnel on the island and did not succeed the appointing authority as Commanding Officer, Espiritu Santo Island Command.

The Board of Review therefore concludes that the Commanding General, South Pacific Base Command, properly and effectively approved the sentences as "the officer commanding for the time being".

4. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences.

Samuel M. Dwyer, Judge Advocate

J. J. Lotterhos, Judge Advocate

Charles S. Sykes, Judge Advocate

1st Ind.

WD, Branch Office TJAG with USAFPOA, APO 958, 23 December 1944.
TO: Commanding General, South Pacific Base Command, APO 502.

1. In the case of Privates GEORGE W. ABRAHAM, JR. (37223914) and JAMES J. HARDIN (37224138), 3388th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentences, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$ you now have authority to order execution of the sentences.

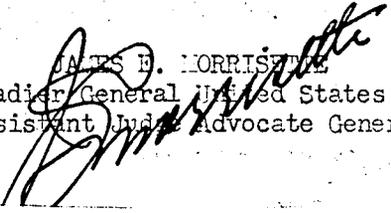
2. Neither the Commanding Officer, IV Island Command, later designated as Espiritu Santo Island Command, nor the Commanding Officer, United States Army Forces, Espiritu Santo Island Command, may exercise general court-martial jurisdiction under Article of War 8 without being expressly empowered by the President so to do. The President did so empower the Commanding Officer, IV Island Command, later designated as Espiritu Santo Island Command, to exercise general court-martial jurisdiction, and it was in that capacity that he appointed the court in this case. It follows of course that the record of trial must therefore be acted upon by that officer in the same capacity or by his successor in command or by the officer commanding for the time being. It is clear that a Naval Officer may not act as reviewing authority on a record of trial by general court-martial appointed under the Articles of War for the government of the Armies of the United States. It is equally clear that the Commanding Officer, United States Army Forces, Espiritu Santo Island Command is not the "successor in command" or "officer commanding for the time being" within the meaning of the Articles of War, first, because he commands a different lesser command with another distinctive designation, included in the original one now commanded by a naval officer, superior to him in rank, and also because another officer, an officer of the Navy, has succeeded to the original command and, of course, two officers may not at the same time be in command of the same organization or activity.

It therefore follows that for the purposes of general court-martial jurisdiction the Espiritu Santo Island Command has changed,

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has ceased to exist, as a distinctive (Army) organization, and has been merged in a higher command, namely, the South Pacific Base Command, the commanding officer of which becomes the reviewing authority in this case under Article of War 46.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is POA 038. For convenience of reference please place that number in brackets at the end of the order.
(POA 038)


JAMES E. MORRISSETTE
Brigadier General United States Army
Assistant Judge Advocate General

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

BOARD OF REVIEW

19 December 1944.

POA 066

UNITED STATES

) CENTRAL PACIFIC BASE COMMAND

v.

) Trial by G.C.M., convened at APO
958, 28 and 29 November 1944.

Technician Fifth Grade ALBERT
PITTMAN (36887237), 474th Amphib-
ian Truck Company.

) Dishonorable discharge and con-
finement for life. Penitentiary.

HOLDING by the BOARD OF REVIEW
DRIVER, LOTTERHOS and SYKES, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Albert Pittman, 474th Amphibian Truck Company, did, at Amphibious Training Center, APO 952, on or about 6 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fifth Grade Hue S. Dickerson, 474th Amphibian Truck Company, a human being, by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Specification and Charge. Evidence of one previous conviction (for absence without leave for 10 days) was considered by the court. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50¹/₂.

3. The evidence for the prosecution shows that on 6 November 1944 accused was a technician fifth grade in the 474th Amphibian Truck Company, stationed at Waimanalo Amphibious Training Center on the island of Oahu. The men of the organization were quartered in huts which were 16 by 20 feet in size. A plan of the area (Exhibit 1) shows that hut number 577, occupied by the accused, was near number 560, in the adjoining row, and

that number 526, in the same row with number 560, was the second hut from it in the direction away from number 577. Rifles had been issued to the men of the organization and were kept in the barracks. When ammunition was issued for firing on the range, an inspection was made afterward to determine that all had been turned in (R. 10-14,26).

At about 1830 or 1900 on 6 November a "crap" game was started in hut 560. About 12 men were in the game, including T/5 Hue S. Dickerson and accused. During the game (about 2000) accused and Dickerson "were talking, and it looked like they couldn't decide who had win". Dickerson "got up" and when accused "went to get up" Dickerson "threwed" his left arm up and knocked accused down on the bed. Dickerson then removed a sheath knife with a 5-inch blade (Def. Ex. A) from his pocket and raised it in his right hand "in a threatening way". "Corporal Brown" kept him from "reaching" accused. Then accused sat on the bed and "They all told" Dickerson he was wrong. Accused said "Okeh, you took that". When the game was resumed Dickerson told accused "not to slip up behind him and try to do anything". The two men "tussled around" and it "seemed like" Dickerson was trying to "get to" accused. Dickerson dropped his knife "some way" and accused said "It is your knife. Pick it up". When Dickerson picked up the knife he "happened" to cut his finger. "Sergeant Dixon" came in and "tried to stop them". Dickerson pushed him out the door, threw out the blanket on which the men had been shooting dice, said Sergeant Dixon "was dirty was the reason he pushed him out", and left the hut. Then accused left. Dickerson had been drinking a lot that day (R. 14-18, 19-21).

In about five minutes accused returned to hut 560, where Private Ennis Boyd said to him "You all ought to forget about that". Accused replied "No one ever do anything like that and get away with it"; then left the hut. Accused had no weapon at this time (R. 18,21, 25).

At about 2000 that night T/5 Luther Hutchins saw Dickerson in the company area with a cut hand. The blood was "streaming". Hutchins and another man took Dickerson to the dispensary, where two stitches were put in his hand. After about 30 minutes Hutchins and Dickerson returned to the company area, and entered hut 526, where a card game was in progress. A diagram (Def. Ex. B) of the interior of the hut shows that there was a table near the front door, that four cots were on the left side and four on the right, and that there was an open space near the back door. The two men entered the back door, Hutchins lay on a cot, and Dickerson stood by the table, watching the card game. In two or three minutes, accused opened the back door and stepped partly into the room, so that the door did not close behind him. Accused had a rifle in his hands, either at "high port" or at his side. It was pointed toward Dickerson, who was about 14 feet from accused (R. 26-36,41,46-49).

When accused came to the door he said "All you mother-fuckers fall out except Hue S. Dickerson". As the men moved out of the way,

accused said to Dickerson, who remained standing at the table, "Don't you move. If you move, I am going to shoot you--if you don't, I am going to shoot you". Dickerson stated "I don't know what you have on your mind, but don't shoot me--why shoot me?" Dickerson turned and took a step or half-step toward accused, with his hands at his sides and slightly advanced forward. At this moment accused fired and the shot struck Dickerson, who fell to the floor. One witness testified that the deceased was "Standing by the table" when the shot was fired. (R. 28-31,35,38,43,45,48-49).

Dickerson said "Don't let him shoot any more", and accused replied "I ought to kill you. I ought to blow your brains out". When one of the men present said to accused "you are out of your head", he replied "I am tired of him fucking with me". Accused backed out of the door. Shortly afterward First Lieutenant Edward A. Busch, who happened to be nearby, asked accused what was wrong and accused replied "I just shot a man. I should have killed the son of a bitch". When Lieutenant Busch asked for the rifle accused surrendered it to him. The rifle contained two rounds of ammunition (R. 29-30,36-37,50-52).

Dickerson was taken to the dispensary and then to the hospital, where he died from shock and hemorrhage as a result of the wound at about 2130. The bullet had entered his left buttock and had come out on the right hip (R.53-55,58).

4. The evidence for the defense shows that on the morning of 6 November Dickerson went into Honolulu on pass with other enlisted men and while there drank a considerable amount of liquor. He returned to camp about 1800, and had some beer at the "PX". Dickerson was "intoxicated", "pretty full", "pretty high", but not "all the way drunk". During the "crap" game he "got kind of boisterous" and started cursing. He "drew" a knife on accused similar to the one introduced as Defense Exhibit A. Dickerson and accused were "just arguing", about "some money--a bet". Dickerson "made a start for to cut" accused, but Corporal Herman Brown intervened. Dickerson cut his finger and was taken to the dispensary. Accused left the hut, but returned a few minutes later. The occupants told him to "keep away from there that night", and he went away (R. 62-67,70-71,73).

Staff Sergeant David B. Dixon testified that on the evening of 6 November there was "quite an argument" in hut 560 and Dickerson was using "violent and abusive" language toward accused. After Sergeant Dixon entered the hut, Dickerson stood up and became "more violent and abusive". When Dixon and one or two others attempted to hold him, Dickerson pulled away from them. Accused was seated on a cot. When Dixon attempted to quiet Dickerson, the latter "grabbed" Dixon's shoulders, calling him a "damned sergeant" and "throwing" him toward the door. Dickerson dropped his knife and cut his finger. Sergeant Dixon left at the request of the other men, who said they would quiet Dickerson (R. 68-69).

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It was stipulated that Dickerson was treated at the dispensary the first time at 2000 and was taken there after the shooting at 2025 (R. 61).

Sergeant Dixon and also Second Lieutenant William Reichman testified to the good reputation of accused for truth and veracity and that his work had been satisfactory. Lieutenant Reichman, who had been the immediate commanding officer of accused for about nine months, stated that he was generally considered a "peaceful man" (R.69,85-89).

Accused testified that prior to entering the Army he worked for one company for 10 years. He had been married, and has a daughter four years of age, who lives with his mother. All of his monthly pay except \$3.70 goes to his family and for insurance under allotments. He had never had any trouble with Dickerson prior to 6 November (R. 91-94).

When accused finished his work at about 1930 on 6 November he started to his barracks (number 577). Observing that there was a "crap" game in the cooks' barracks (number 560), accused went in and joined the game. After 20 or 30 minutes Dickerson "claimed" that accused had picked up some of his money, and snatched a dollar from accused. Corporal Brown told Dickerson he was wrong and recovered the dollar for accused. Dickerson began to curse accused, calling him a "mother-fucker and son of a bitch". Dickerson snatched the money again, pulled out his knife and lunged at accused. Brown and others intervened. Dickerson said "I will get you, you mother-fucker". When Sergeant Dixon came in and tried to quiet him, Dickerson pushed him out. When somebody took Dickerson out, he said "I am going to kill you tonight. If I don't you better not be in the motor pool the next morning". Accused left a few minutes later (R. 94-100).

Accused walked "in the air" for not over five minutes, then went back to the cook's barracks, where the crowd was, thinking they "will kind of stop him": When he went in there the cooks told him "Get on out of here: We don't want him coming back in here and shooting us". When they made him leave, he went to his own barracks. He sat there for about 15 minutes. During that time two soldiers came along and one said "Pittman, you better watch yourself with that Dickerson. That Dickerson will kill you". A minute later "Sergeant Coach" came by and, when asked whether he had seen Dickerson, replied "Forget it--why don't you forget about it". After that, accused took his rifle from the wall and loaded it. (He had found the ammunition in "ducks" that he had cleaned.) He sat looking out his door to see whether Dickerson was coming. Accused was "worried" and could not go to bed with Dickerson threatening him "like that". (R. 100-105).

When accused saw Dickerson enter a hut nearby he "wanted to know whether he was going to--if he still have it on his mind to kill me". Accused picked up his rifle, followed Dickerson into the hut, and asked him "Are you still going to kill me?" When Dickerson turned and

made a step toward him, accused shot him. Accused "didn't want to kill him", "didn't want to be killed" himself, "wanted to rest in peace around the company" and "intended to shoot him in the ass". If accused had intended to kill, he would have fired the other two rounds. When Dickerson started toward him, accused "figured" he was "going to come again" with the knife. Accused lowered his rifle so as to shoot him in the hip or "somewhere down there". He did not intend to kill Dickerson. On cross-examination, accused denied that he had said "Nobody can do that and get away with it" (R. 100-109, 114).

5. The evidence shows that on the evening of 6 November 1944 accused and T/5 Hue S. Dickerson were engaged in a "crap" game with several other enlisted men. Dickerson, who had been drinking heavily that day, began to curse and abuse accused on account of a disagreement arising from the game. Dickerson knocked accused over on a bed and drew a sheath knife with a 5-inch blade. He threatened accused with it, but other men restrained him. When Dickerson accidentally cut his hand he was taken to the dispensary.

Accused returned to his barracks, loaded his rifle, waited until he saw Dickerson enter a hut nearby (about 25 minutes after the first altercation), then followed Dickerson. When he came to the door of the hut accused advised all present except Dickerson to "fall out", and when Dickerson (who had been standing about 14 feet from the door, watching a card game) turned and took a step or half-step toward him, accused shot Dickerson with the rifle. Dickerson had no weapon in his hand at this time. The bullet struck Dickerson in the left buttock and came out of the right hip. As a direct result Dickerson died about an hour later. Accused surrendered the rifle to an officer immediately after the shooting, and fired only the one shot although there were two additional rounds of ammunition in the rifle. It is not necessary to repeat the various remarks shown in the evidence (pars. 3 and 4, supra).

In the opinion of the Board of Review these facts disclose that accused willfully, deliberately and unlawfully killed Dickerson, with premeditation and malice aforethought, as alleged in the Specification, and fully sustain the finding of guilty of murder. Accused claimed that he did not intend to kill Dickerson, but merely to wound him. However, the evidence sustains the inference that accused did intend to kill when he followed Dickerson into the hut and fired almost immediately, inflicting death within about an hour. Even if accused had intended to inflict a non-fatal wound, his act would have constituted murder, as he must have known that it probably would cause death or grievous bodily harm (see MCM, 1928, par. 148a). It was also claimed that accused fired in self-defense, but it is obvious that the facts do not support such contention. Accused fired upon an unarmed man whom he had followed into the hut. The attack made on accused by Dickerson about a half hour earlier cannot be used as a basis for a plea of self-defense, as the danger to accused had vanished at the time of the shooting.

6. During the examination of a defense witness who had been a personal friend of the deceased for many years, he was interrogated as to the temperament of deceased when intoxicated, and the defense stated that it would be shown that when in such condition deceased was violent and dangerous. An objection to this line of examination was sustained (R. 70,73-75). "The rule is clear that where there is no showing of self-defense, or where it is shown that the accused * * * could have safely retreated while the danger was imminent, * * * the reputation of the deceased as a dangerous man is wholly irrelevant. But where a doubt is raised as to whether or not the accused acted in self-defense, then the character of the deceased is relevant to the issue." (Wharton's Criminal Evidence, 11th Ed. Sec. 324).

In view of the circumstances surrounding the homicide, the Board is of the opinion that technically the objection was properly sustained, inasmuch as the aggressive act of deceased occurred about 25 minutes prior to the shooting. However, since accused claimed (in his testimony subsequently given, and as suggested by the argument on the objection) that he feared the deceased was about to use his knife again at the second encounter, the evidence might well have been admitted in order to give the accused the benefit of a close point.

In any event, the substantial rights of accused were not prejudiced, as the evidence as a whole reflected the violent nature of deceased, and accused was later permitted to testify to the characteristics of deceased when drunk (R. 110-112).

7. Confinement in a penitentiary is authorized under the 42nd Article of War for the offense of murder, by section 22-2404, District of Columbia Code.

8. The charge sheet shows that accused was 29 years of age when the charges were drawn, and was inducted at Fort Sheridan, Illinois, on 18 November 1943.

9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Samuel M. Brown, Judge Advocate
J. J. Lottichos, Judge Advocate
Charles S. Sykes, Judge Advocate

CONFIDENTIAL

(27)

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

26 December 1944.

BOARD OF REVIEW

POA 068

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

v.

Privates ALFRED R. IHNE (32898828)
and WOODROW THOMPSON (15090557), Can-
non Company, 102nd Infantry Regiment.

) SOUTH PACIFIC BASE COMMAND

) Trial by G.C.M., convened at Head-
quarters, Espiritu Santo Island
Command, 2 and 3 November 1944.

) Sentence (as to each accused): Dis-
honorable discharge and confinement
) for life. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
DRIVER, LOTTERHOS and SYKES, Judge Advocates.

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

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

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

Specification: In that Private Woodrow Thompson, Cannon Company, 102nd Infantry Regiment, and Private Alfred R. Ihne, Cannon Company, 102nd Infantry Regiment, acting jointly, and in pursuance of a common intent, did, at APO 708, on or about 11 October 1944, with intent to do them bodily harm, commit an assault upon Captain George R. Johnson, an officer in the New Hebrides Defense Force, and 1st Lieutenant Marion D. Nutt, 31st General Hospital, by shooting at them with a dangerous weapon, to wit, a rifle.

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

Specification: In that Private Woodrow Thompson, Cannon Company, 102nd Infantry Regiment, and Private Alfred R. Ihne, Cannon Company, 102nd Infantry Regiment, acting jointly, and in pursuance of a common intent, did, at APO 708, on or about 11 October 1944, wrongfully, and by force and arms, to wit, by threatening them with a rifle, compel 1st Lieutenant Marion D. Nutt,

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31st General Hospital, their superior officer and Captain George R. Johnson, an officer in the New Hebrides Defense Force, against their will and protestations, to walk along a highway a distance of about 100 yards.

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

Specification: In that Private Woodrow Thompson, Cannon Company, 102nd Infantry Regiment, did, at APO 708, on or about 11 October 1944, wrongfully lift up a weapon, to wit, a rifle against 1st Lieutenant Marion D. Nutt, 31st General Hospital, his superior officer, who was then in the execution of her office.

Both of the accused pleaded not guilty to and were found guilty of Charges I and II and the Specifications thereunder. The accused, Thompson, also pleaded not guilty to and was found guilty of Charge III and its Specification. Each of the accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentences and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that between 2230 and 2300 on 11 October 1944, Captain George R. Johnson of the New Hebrides Defense Force (British) and a woman, First Lieutenant Marion D. Nutt, a physical therapist in the Medical Corps, 31st General Hospital, APO 708, were riding in Captain Johnson's jeep along certain highways at APO 708. Both Captain Johnson and Lieutenant Nutt were in uniform and were wearing their insignia of rank. "A squeak of brakes" in the rear of their jeep at the intersection of Routes 1 and 1D (Ex. A) brought to their attention the fact that another jeep was "following" them. They continued driving on Route 1 and when opposite the "Trash Dump" the jeep which had continued behind them "came along side and kept pace of them" and then pulled in front" and "slowed down". Captain Johnson in turn passed the jeep and "became suspicious". Before they had "gone very far", Lieutenant Nutt remarked that the "other jeep was following" them, which fact was known to Captain Johnson who by this time had left Route 1 and was driving on Route 10 (R. 8-10,13,15,16,20,21,24,82; Ex. A).

Captain Johnson "increased his speed slightly" and in the vicinity of the "Bottle Warehouse" there were at least six shots fired from the car, which was at a distance of about 30 yards behind his "jeep". Thereafter, he "increased his speed" to "about 45 or 50" and "it was obvious that the jeep in rear was firing at" them. Still further increasing the speed of his car, Captain Johnson attempted a right turn into Route 1A and in so doing his jeep "overturned on the corner". Neither he nor Lieutenant Nutt was seriously injured (R. 9,10-13,16,17;26,27,39; Ex. A).

Captain Johnson left his jeep and walked toward the other jeep, which "had pulled up about 60 - 70 feet away". One of the occupants, the

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accused, Thompson, got out of the "right side" of this jeep and approached Captain Johnson. The other occupant, who was in the "driver's seat", remained in the jeep. Thompson had a "white handkerchief over the lower part of his face" and was carrying in a "threatening" manner a "rifle" (carbine), which was pointed at Captain Johnson. Upon being asked by Captain Johnson "what was the meaning" of his actions, the accused, Thompson, ordered him "to halt" and "put up his hands" and also ordered Lieutenant Nutt, who had remained near the overturned jeep, to "come out of the wreckage" with her "hands up". He further "told" them "to march in front of him back on Route No. 10". Captain Johnson asked Thompson what he intended to do and Thompson replied that it would be "all right and to keep on walking". They walked (Lieutenant Nutt walking "slowly deliberately") approximately 50 yards in the designated direction and the accused, Thompson, was "two or three paces behind" them. He had them "covered". During this time, he "tried to get the fellow in the jeep to help him" by requesting that he should "come on with the jeep". While going up Route 10 Lieutenant Nutt had informed Thompson that she was an officer and that "what he had done would go pretty badly with him", to which the accused replied that "he was an officer himself" and that she should "keep quiet". Suddenly, Captain Johnson "rushed" Thompson, who fired another shot. After a struggle in which he was assisted by Lieutenant Nutt, Captain Johnson obtained possession of the carbine, which had no sling, and thus succeeded in gaining control of Thompson (R. 9-14,18,19,21-24).

In the meantime, the jeep from which the accused, Thompson, had emerged "drove up past" the place where the aforesaid "struggling" was occurring and "went right on past * * * very fast" although Thompson had told the driver to "come on" (R. 9).

After losing possession of his carbine to Captain Johnson, Thompson informed him that he was "an FBI agent and an officer". Captain Johnson then "marched him back down the hill on Route 10" toward the wrecked jeep and saw "a naval vehicle" coming from the direction of a nearby airfield. The occupants of this car were Navy personnel who had heard the shots fired and had set out to investigate the disturbance. While Lieutenant Nutt went ahead "to beckon these people to come to their assistance", Thompson "made a break" and "sang out" that he could only be stopped by "a bullet". Captain Johnson stumbled while running after Thompson and dropped the carbine. Thompson was promptly caught by one of the men who had arrived in the Navy "truck". He was later turned over to the military police (R. 9,10,12,19,20,21,33-36,39-40,42).

A search for the other jeep was undertaken by Ensign William C. Clyatt, USNR, and several members of a "crash crew" who went to the scene of the accident at about 2325. At approximately 2350 a "jeep" was located on the shoulder of the road near the intersection of Routes 9 and 10. Examination disclosed "five or six fired carbine shells on the bottom of the jeep" and "a handkerchief between the steering wheel post and the dash". The painted organizational number had been obliterated on the front, right side and rear of the jeep. (R. 29,30; Exs. A,D,E.F.)

A considerable distance up Route 10 from the wrecked jeep, there

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were found an unloaded carbine, an empty carbine magazine, and a bracelet belonging to Lieutenant Nutt. The left rear fender of the overturned jeep had a hole caused by a "projectile of low muzzle velocity" and the right rear tire had been punctured by a carbine slug which was found embedded in the rim (R. 21,30,31,36,38,44-46; Ex. G, H).

At approximately 0015 on 12 October, the accused, Ihne, was "picked up" near the intersection of Routes 9 and 12 by a soldier who was hauling cargo in a truck. This place was near "a jeep" sitting on the right hand side of the road" (R. 48-50).

On 13 October 1944, the accused, Thompson, executed a written statement (Ex. I) after having been "warned" of his rights under Article of War 24, and that "he did not have to make a statement". The statement, which was admitted in evidence after the court had been instructed by the law member that "any reference to Ihne" in the statement "should not be considered as to the guilt or innocence of Ihne", is substantially as follows:

During the afternoon of 11 October 1944, Thompson drank some beer. After supper, he met the accused, Ihne, who had a "jeep" and offered him a ride. They drove to several different places, alternating in driving the car. On one occasion, Ihne got out of the "jeep" and was "doing something around back and at the side of the car" but Thompson did not know "whether he was putting mud over the vehicle's insignia or not". Up to this time Thompson had not seen the carbine. They again started the "jeep" and on Route 1, in the vicinity of "the road that leads off to the Pallikula Docks, Ihne began to follow after a jeep driven by an officer and the other occupant was a nurse" but Ihne did not "say he was following them and didn't act like it for awhile". Thompson first realized that Ihne was following the "jeep" when they increased their speed and he "sped up to keep up with them". Ihne stopped his "jeep" and Thompson drove. He passed the other "jeep". Ihne "didn't like the idea" of Thompson driving. Then Ihne again drove the "jeep" and "we followed after the officer's jeep". Ihne "drove pretty close" and "a little before the bottle salvage warehouse was reached he [Ihne] reached over between the seats and pulled a carbine out". Thompson was "watching" the car ahead. Ihne fired one shot from the carbine with his left hand "out the left side of the car". Thompson said nothing to him. Then Ihne fired "about four more shots" and failed to answer Thompson's inquiry of "what's the idea". At the end of Route 10, the "officer's jeep turned over" and Ihne stopped his "jeep" about 40 feet away. Thompson "got out and started over to see whether anyone * * * was injured". Ihne told him "to stay in the car", "started backing up the jeep to turn" and "threw out the carbine", which landed near Thompson who picked up the carbine "by the sling". The "officer * * * and then the nurse" walked toward Thompson and asked "what was wrong". Thompson replied that he "didn't know; that it was the other fellow's idea". They "grabbed" Thompson and took the carbine away from him. When the fire truck arrived from "Pallikula field", Thompson "got in" and "sat around there until the M.P.'s came and * * * brought [him] down to the stockade". Thompson denied that he had a handkerchief "around the lower part of his face * * * [or] neck at any time" (R. 50-53; Ex. I).

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The accused, Ihne, also executed a written statement (Ex. J) on 13 October 1944 after being informed of his "rights" and told that "he didn't have to make a statement". The introduction in evidence of the statement was objected to on the ground that there "is no evidence at all that will connect Ihne to the offenses charged". The written statement which was received in evidence is summarized as follows:

During the afternoon of 11 October 1944, Ihne drank "a considerable amount of beer". After supper, he and the accused, Thompson, obtained the "jeep" of "Lt. Wallace", and drove back to the company area. Ihne obtained "4 bottles" of beer and they drove to the Red Cross building. Thompson had a carbine, "which he laid in the back of the jeep", and said that he "wasn't going to use it". At the Red Cross building, Ihne changed the "trip ticket" by erasing the name and date. They then "drove around some more" and "near the 25th Evac" they smeared mud over "the identification insignia on the jeep". After this, they drove toward the General Hospital to see a friend. On the way there, Thompson fired a shot. They turned around and Ihne fired a couple of shots. "Up to this time" they had consumed the four bottles of beer. "This was about 20 minutes before /they/ started following the officer and the nurse". Ihne had suggested that they "go in" because he had a headache. On Route 1, they followed the "officer and nurse * * * quite a distance". Thompson stopped the "jeep" and Ihne, who was told to "follow them", drove on past "them". Then Thompson again took over the driving and "continued to follow the jeep", which had passed them while they were changing drivers. On Route 10, Thompson started firing the carbine at the "jeep" ahead. Ihne did not "know what to do". Thompson fired "over 6 or 7 shots and probably more". The "officers' jeep" turned over and they "pulled on around it". Thompson had a handkerchief over the lower part of his face. Ihne had no handkerchief on his face. Thompson got out of the car with the carbine and walked toward the "officers' jeep", told them to get out, and "started walking them up the road". He told Ihne to "come on" in the "jeep". Ihne "took some time to turn the jeep around and then went on up the hill where they had walked". He saw them "wrestling" and "drove on past and parked his jeep off the road a couple hundred yards on up". Ihne obtained a ride on a truck after having walked down Route 9 an undisclosed distance. During the "events mentioned above", Ihne "didn't fully realize what was going on" (R. 53-56; Ex. J).

4. For the defense, the accused, Ihne, testified that at about 2000 on 11 October 1944, he and the accused, Thompson, decided to obtain a "jeep" and "take a ride". They "got into" vehicle number 48 at the "officers' parking lot" and Thompson put a carbine in the seat, stating that he "wouldn't use it". Thompson drove the car "to the Red Cross building because /they/ wanted to get a pencil with an eraser to change the trip ticket." Ihne erased the name and date on the trip ticket and gave it to Thompson. Then they drove to their company area, where they obtained four bottles of beer. Thereafter, they rode toward the "25th Evac Hospital" and when near the firing range Thompson, who was driving, fired a shot. At the "range", Ihne fired two rounds. Continuing their ride, they encountered a fire truck and spent some time looking for a fire. Later, while on Route 1, they saw a "jeep" ahead of them, the occupants of which were an "officer" and a "nurse."

Thompson told Ihne to drive and not to "get too close" to the leading "jeep". Ihne drove the "jeep" as directed but finally passed the other "jeep", stopped and Thompson then became the driver and continued to follow the other "jeep". On Route 10, Thompson placed a handkerchief over the lower half of his face, told Ihne to "put one on" and stated that he was going to "scare them". Thompson "started firing". Ihne who "didn't know what the hell to do" was "looking ahead and hoping it wouldn't hit anybody". At least six or seven shots were fired. The "jeep up in front" turned over "near an airport". After he had "pulled in to the right of the road", Thompson got out of the "jeep" and walked half way to the wrecked car, where he met the "officer" and told the "nurse" to "come out of there". They "started walking up the hill" and Thompson told Ihne who had remained in their vehicle "to turn around". Ihne did so, and "started up the hill and didn't go very fast and [he] saw them wrestling and [he] passed them up 100 yards or so and pulled the jeep to the side and got out and started walking up the road". He had "no idea" what Thompson had meant to do and he "just wanted to get away from there". After leaving the "jeep", Ihne "flagged a driver" and "bummed a ride" back to his organization (R. 58-62,67).

On cross examination, accused, Ihne, testified he "didn't think" that Thompson was going to use the carbine, that he knew that they were "following" the jeep carrying the "nurse and officer" and "figured something was wrong", that he "wasn't too drunk", that he thought "something was badly wrong" when Thompson put the handkerchief on his face and said he was "going to scare them", that he did not know what "to do" or "to say" when Thompson fired at the "jeep ahead", that Thompson "got out" on the "left hand side of the jeep" and advanced toward the "officer and the nurse" with the gun in his hand, and that he, Ihne, wanted "to get away" (R. 63-67).

The accused, Thompson, also elected to take the stand as a witness. He testified that he was not with the accused, Ihne, when the latter obtained the "jeep". He joined Ihne outside of his hut and Ihne drove to the Red Cross building. Enroute to the "25th Evac", Thompson drove and inquired of a "fellow" there about a fire. They then went to "Ordnance" behind a fire truck and were told that the fire was a "dry run". Turning around, they started toward the 31st General Hospital. At Ihne's request, Thompson stopped the car "between the G.I. laundry and the swimming beach". Ihne got out. During the time that Ihne was not in the "jeep", Thompson was engaged in picking up some cigarettes which had spilled on the floor and did not know what Ihne was doing. Thompson drove again when Ihne reentered the "jeep" and first noticed the "jeep that the officer and nurse were riding in" at the 122nd Station Hospital and Pallikulo Bay. They were on Route 1 and "changed drivers while the vehicle was still moving". Thompson also testified that near the "trash dump" on Route 1 Ihne drove his "jeep" past the other "jeep", and then testified that he (Thompson) was "going around their jeep and pulled up in front", and that Ihne started arguing about the driving, got out, and drove the vehicle from that time on. Thompson was wearing around his neck a handkerchief which he had placed

there at about 1700 because his neck was "sore and burns". Ihne followed the other jeep into Route 10 and when in the vicinity of "aviation overhaul and the bottle warehouse" Ihne fired one "shot", then "a couple fired together" and some "more shots". He was driving with his right hand and firing with the left and made no answer to Thompson's inquiry as to "what was the idea". The "officer's jeep" overturned near the intersection of Routes 10 and 1A. Thompson "dismounted" from the "right side" of the car when Ihne had stopped it and had a carbine in his hand at the time. The carbine had been handed to him by Ihne when he saw that the "officer's jeep" was going to turn over. Thompson walked toward the "officer" who asked him "what's the matter, fellow". Thompson replied "it was the other fellow's idea" and told the "officer to come over to where [he] was". He said nothing to the "nurse", who "came herself", but did tell Ihne to "come on". His desire was to "get in front of the jeep lights of the jeep that was turned over" and he had no intention of assaulting or robbing "these two people". He wanted to avoid getting into trouble and to get away (R. 68-72).

On cross examination, Thompson stated that he did not know that Ihne was going to get the "jeep", and Ihne asked him to ride with him, and that he did not know that Ihne had altered the "trip ticket" when they were at the Red Cross building. He neither saw Ihne obliterating the insignia on the "jeep" nor aided him in doing so. Thompson was driving when they "met" the "jeep" in which the "officer and nurse" were riding, and he followed the vehicle and finally passed it near the "trash dump". Thereafter, Ihne drove and Thompson then knew that he was "pursuing" the other "jeep". Thompson was watching the "jeep" ahead when Ihne fired. He said nothing "to prevent [Ihne] from firing". Thompson further testified that he took the carbine when he approached the "jeep" after it had overturned as protection in case "they wanted to start any trouble or get [him] arrested". He "didn't give her [Lieutenant Nutt] any orders at all", but did tell the officer (Captain Johnson) to put up his hands. He admitted that part of his statement made on 13 November (Ex. I) was not true (R. 72-82).

A radiogram from "COM SOS SPA" interpreting Executive Order 9454, relating to the status of members of the Army Nurse Corps and to all female physical therapy personnel of Medical Department, was offered in evidence by the defense without objection and was accepted (R. 82; Def. Ex. A).

5. The evidence shows that on 11 October 1944 shortly after supper, which had been preceded by beer drinking, the accused, Ihne and Thompson, without authority obtained a jeep from the officers' parking lot near their organization, altered the "trip ticket" and then obliterated the distinguishing insignia on the "jeep". After visiting several places over a period of about two and a half hours, during which time they had fired a carbine which they had in the car, had each consumed two or more bottles of beer, and had alternated in driving the car, they began to follow a "jeep" in which Captain George R. Johnson, New Hebrides Defense Force (British), and First Lieutenant Marion D. Nutt, a physical therapist in the Medical Corps, were driving. They passed this vehicle, stopped, and changed drivers. The accused, Ihne, then drove after the officers' "jeep", with the accused, Thompson, at the seat on his right. They followed the officers' "jeep" from Route 1 into Route 10, increasing speed to keep up with that vehicle, which was moving at a

much faster rate because its occupants had become alarmed at the actions of the accused. Thompson, in the meantime, had placed a handkerchief over the lower part of his face and had told Ihne to do likewise but the latter remained unmasked. When in the vicinity of the "Bottle Warehouse" on Route 10, APO 708, Thompson fired approximately six shots from the carbine at the fleeing vehicle, at least two of which shots hit the vehicle in the rear. The "jeeps" at this time were about 30 yards apart and were speeding in excess of 45 or 50 miles per hour. The leading "jeep" turned over near the intersection of Routes 10 and 1A when Captain Johnson, its driver, attempted to turn it to the right. The pursuing "jeep" stopped a short distance from the overturned "jeep" and the accused, Thompson, armed with a carbine, emerged from the right side of the "jeep" with the handkerchief still covering the lower part of his face. The accused, Ihne, remained in the "driver's seat" in the "jeep". Captain Johnson, who had extricated himself from the wrecked "jeep" and had ascertained that Lieutenant Nutt was unhurt, approached Thompson, who was walking toward him. Captain Johnson asked "what was the meaning" of their actions. The masked Thompson, who was carrying the rifle in a "threatening manner", pointing toward Captain Johnson, ordered him "to halt" and "put up his hands", and also ordered Lieutenant Nutt, who had remained near the overturned jeep, to "come out of the wreckage" with her "hands up". He further directed them to "march in front of him back on Route No. 10". They walked in the designated direction for approximately fifty yards followed by the accused, Thompson, at a distance of two or three paces. Lieutenant Nutt was walking "slowly deliberately". Thompson had them "covered". During this time, Thompson told Ihne to turn around and come on with the "jeep". Ihne turned the "jeep" around and followed at a slow rate of speed. Lieutenant Nutt, while going up Route 10, informed the accused, Thompson, that she was an officer and that "what he had done would go pretty badly with him", to which Thompson replied that he was "an officer himself" and that she should keep quiet. Captain Johnson then attacked Thompson, who fired another shot, and with the assistance of Lieutenant Nutt succeeded in overpowering him and in obtaining possession of the carbine. The accused, Ihne, who saw the struggle, drove past "very fast", abandoned the jeep after a short time, and soon obtained a ride back to his organization.

The principal conflict in the evidence appears in the testimony of the two accused. Each testified that the other not only drove the "jeep" but also at the same time fired the shots and that the witness had no previous knowledge that the shots would be fired. No direct evidence was presented by the prosecution as to which one of the accused was driving or firing. It does appear, however, by the testimony of Lieutenant Nutt that when the pursuing "jeep" stopped near the overturned "jeep" the accused, Thompson, emerged from the "right side" with the carbine, and that the other occupant was in the "driver's seat", which fact, coupled with the testimony of Thompson that the accused, Ihne, was driving justifies an inference that Ihne was driving. The conclusion that Thompson fired the shots is properly drawn from Ihne's testimony to such effect and also from the fact that Thompson had possession of the gun when the "jeep" stopped in the vicinity of the wrecked "jeep". The testimony of each accused as to the party responsible for the firing, obviously calculated to cast the

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sole blame on the other, is palpably false in the light of their previous joint actions and the attendant circumstances and was properly disregarded by the court. This is also true with respect to the conflicting testimony concerning minor circumstances.

a. As to Charge I:

(1) The specification alleges in appropriate language that the two accused, acting jointly, "with intent to do them bodily harm", assaulted certain named parties by shooting a rifle at them. As heretofore stated, the evidence supports the inference that the accused, Thompson, fired the shots while the accused, Ihne, was driving the car. The specific intent to commit bodily harm, an essential element of the alleged offense, may be inferred from the surrounding circumstances and the nature of the weapon used (CM 193085, Teindl, 2 BR 73, Dig. Op. JAG, 1912-1940, Sec. 451(10)). The fact that six or more carbine shots were fired at close range from a fast moving car toward another vehicle which carried the victims of the assault at a comparable rate of speed and that at least two of the shots struck that vehicle clearly shows that the weapon was used in a manner "likely to produce death or great bodily harm" (MCM, 1928, par. 149m). It is immaterial that no injury was inflicted (MCM, 1928, par. 149l). Under the circumstances it was a mere fortuitous circumstance that neither of the victims of the assault was killed or wounded. When one fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group (MCM, 1928, par. 149l). This is likewise true when the intent is to do bodily harm (CM 238389, Kincaid, 24 BR 254).

(2) There is no direct proof that the accused had a pre-conceived plan of mutual action against the victims of the assault. From the fact that the accused were together for over two and one half hours prior to the commission of the offense, that they had a carbine with them in the "jeep", that they followed the officers' car for some distance before the assault and that one drove while the other fired toward the "jeep" in which the officers were riding, the court was justified in inferring that the accused were acting in pursuance of a common design and were aiding and abetting each other in the furtherance of the unlawful enterprise. Any person who assists in or aids, abets or induces the commission of an act constituting an offense under any law of the United States is a principal and may be charged directly with the commission of such offense (CM 240646, Hall; 18 U.S.C. 550; Meyer v. United States, 67 F(2d) 223; United States v. Hoderowics, 105 F(2d) 218). Where, as in the instant case, two persons by common design jointly engage in the same unlawful act, each is chargeable with liability and is guilty to the same extent as if he were the sole offender (CM 240646, Hall; 16 C.J. 128; 1 Wharton's Criminal Law 1114; Hicks v. State (Ala), 26 So. 337; Brown v. Commonwealth (Va), 107 S.E. 809; see Annotation 16 ALR 1043, 1047).

(3) In the light of the foregoing principles, the Board of Review is of the opinion that the evidence is sufficient to support the findings of guilty as to Charge I and its Specification.

b. As to Charge II:

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The Specification alleges that the two accused, acting jointly, did "wrongfully, and by force and arms, to wit; by threatening them with a rifle, compel" two named persons, one of whom was their "superior officer" and the other an "officer in the New Hebrides Defense Force", against "their will and protestations, to walk along a highway" for about 100 yards. The offense alleged is clearly a disorder to the prejudice of good order and military discipline, violative of Article of War 96 (See MCM, 1928, par. 152a). That the accused, Thompson, did "wrongfully" and "by threatening" with a rifle "compel" the named persons "against their will and protestations" to walk along a highway is clearly and convincingly disclosed by the evidence. The variance between the allegation (100 yards) and the proof (50 yards) of the distance which they were required to march is immaterial. The participation by the accused, Ihne, in this offense could be inferred from the fact that he remained seated in the "jeep" at the scene of the crime until ordered by Thompson to turn around and follow them, that he did turn the "jeep" as directed and actually followed them, that he left the vicinity of the crime only after Captain Johnson and Lieutenant Nutt began to struggle with Thompson, and further that the two accused had been together for several hours previously and had jointly committed the offense alleged under Charge I, which immediately preceded the offense here discussed. If Ihne had not desired to aid in the commission of this offense ample opportunity was afforded him to leave promptly after his arrival on the scene. Under the principles heretofore set forth, the court was justified in finding that the accused were "joint participants", and the evidence sustains the findings of guilty.

c. As to Charge III:

(1) The Specification alleges that the accused, Thompson, did "lift up * * * a rifle" against Lieutenant Nutt, "his superior officer, who was then in the execution of her office". The offense is laid under Article of War 64. The evidence as to lifting up the weapon against Lieutenant Nutt is discussed under the last preceding paragraph. It is convincingly clear that Thompson did so and that the evidence fully sustains the findings of guilty of the Charge and Specification, if Lieutenant Nutt was "then in the execution of her office".

(2) Lieutenant Nutt is a physical therapist in the Medical Corps and was on active duty as such on 22 June 1944 (R. 15). By Executive Order 9454, 10 July 1944, female physical therapy personnel of the Medical Department on duty on 22 June 1944 were appointed officers in the Army of the United States in commissioned grades corresponding to the relative rank held on such date. "They have authority in and about military hospitals * * * otherwise shall exercise command only over thos (sic) members of the Army specifically placed under their command" (Def. Ex. A). The evidence fails to show that she was on any official duty while driving with Captain Johnson on the night of the alleged offense or that the accused, Thompson, had been "specifically placed under her command".

(3) "An officer is in the execution of his office 'when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage.' (Win-

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throp.) It may be taken in general that striking or using violence against any superior officer by a person subject to military law, over whom it is at the time the duty of that superior officer to maintain discipline, would be striking or using violence against him in the execution of his office" (MCM, 1928, par. 134a). Assuming that Lieutenant Nutt, by virtue of her position as an officer of the Army of the United States, had power and authority, despite the limitations as to command above described, "to maintain discipline" under the circumstances, the evidence fails to disclose that she took affirmative measures to exercise her power or authority. To the contrary, when asked on cross-examination if she had "ordered the defendant not to walk her up the highway", Lieutenant Nutt testified "I did not order him, no" (R. 23). She testified, however, that after "they started back upon Route Number 10 she told the fellow that she was an officer and what he had already done would go pretty badly with him" (R. 19). In the absence of evidence, either direct or circumstantial, that Lieutenant Nutt affirmatively endeavored at the time "to maintain discipline"; the conclusion follows that she was not then "in the execution of her office" (CM 150434 Pace; CM 196923 Frakes; CM 211978 Riddle 10 B.R. 179; CM 234756 Merrill, 21 B.R. 155), and the evidence fails to sustain the findings of guilty as to Charge III and its Specification. The evidence is sufficient, however, to sustain the lesser included offense of lifting up a weapon against a superior officer, in violation of Article of War 96. However, such lesser included offense is virtually the same as one of the essential elements ("by force and arms, to wit, by threatening * * * with a rifle") of the offense of which the accused was found guilty in the court's findings as to Charge II and its Specification. Thus, to hold him guilty of such lesser included offense in violation of Article of War 96 would in effect be twice penalizing him for the same offense under the same Article of War.

(4) For the reason stated, the Board of Review is of the opinion that the evidence is insufficient to sustain the findings of guilty as to Charge III and its Specification.

6. It is necessary to determine the maximum limit of punishment applicable to the offenses of which the accused were found guilty and as to which the Board of Review has held the record of trial to be legally sufficient.

a. The maximum punishment applicable to Charge I and its Specification (assault with intent to do bodily harm with a dangerous weapon) is five years (Table of Maximum Punishments, MCM, 1928, par. 104c).

b. The offense alleged in the Specification of Charge II (wrongfully and by threatening with a rifle, compelling a superior officer and an officer of the New Hebrides Defense Force to walk along a highway) is not listed in the Table of Maximum Punishments. It is not analogous to the crime of lifting up a weapon against a superior officer in violation of Article of War 64 because it lacks the essential element of "being in the execution of * * * office". Neither is there any Federal statute which is applicable to this offense. The alleged offense is one involving the use of a dangerous weapon, aggravated by the requirement that the victims

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march along a highway against their will and by the fact that one of the victims was a superior officer and the other an officer of an allied nation, both of whom were in proper uniform (R. 20,24). Under the circumstances, the offenders may be "punished at the discretion of the court" (AW 96; see CM 241197).

c. The Board of Review is therefore of the opinion that the punishment which might legally be imposed was within the discretion of the court.

7. The Board of Review deems it advisable to comment on certain other phases of this case.

a. At the beginning of the trial, the accused, Ihne, unsuccessfully moved for a "severance of trial" on three grounds: (1) that he was "not charged with" Charge III and its Specification, (2) that the introduction in evidence of the statement made by the accused, Thompson, after the commission of the acts would prejudice the court against Ihne and (3) that the defense of the two accused was "antagonistic". Although an antagonistic defense is one of the more common grounds for granting a motion to sever (MCM, 1928, par 71b), the court did not err in refusing to grant the motion. In any event even if error was committed by the court in its action thereon, the error will not vitiate the proceedings unless the substantial rights of the accused were injuriously affected thereby (CM 144367, Dig. Op. JAG, 1912-1940, Sec. 395 (49)). In this case, each of the accused was represented by separate counsel (R. 3), the court was properly cautioned that the written statement of each accused when introduced in evidence was of evidentiary value only against him and not his co-accused (R. 53,56), and each accused was afforded the opportunity of cross-examining the other (R. 57, 67,80). It appears therefore that the rights of the accused were fully protected. The fact that Thompson was individually charged with a separate offense under the circumstances is immaterial.

b. The accused, Ihne, objected to the introduction in evidence of his written statement (Ex. J) on the ground that there was no evidence connecting him with the alleged offenses (R. 55) and moved "for acquittal" at the end of the prosecution's case (R. 56,57). The court in each instance ruled against him (R. 56,57). The ruling on the first objection of the accused was clearly proper. It is not so clear that the failure of the court to find the accused not guilty in accordance with the motion made at the end of the prosecution's case was proper, but even if such action was erroneous the findings of guilty are not thereby invalidated in view of the provision that the proceedings of a court, "shall not be held invalid, nor the findings or sentence disapproved" for any such error unless "after an examination of the entire proceedings" it appears that the accused has been substantially prejudiced (AW 37). In this case, each of the accused voluntarily testified and the record as a whole reveals Ihne's active participation in the crimes.

8. The charge sheet shows that when the charges were drawn the accused,

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Thne, was 20 2/12 years of age and that he was inducted at New York on 28 April 1943; and that the accused, Thompson, was 20 10/12 years of age and was inducted at Fort Thomas, Kentucky, on 18 February 1942.

9. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge III and its Specification, legally sufficient to support the findings of guilty of Charges I and II and the Specifications thereunder, and legally sufficient to support the sentences.

Samuel M. Driver, Judge Advocate.

J. Lott, Judge Advocate.

Charles S. Sykes, Judge Advocate.

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1st Ind. **JAN 15 1945**
WD, Branch Office TJAG with USAFPOA, APO 958
TO: Commanding General, South Pacific Base Command, APO 502.

1. In the case of Privates ALFRED R. IHNE (32898828) and WOODROW THOMPSON (15090557), Cannon Company, 102nd Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge III and its Specification, involving accused, Thompson, legally sufficient to support the findings of guilty of Charges I and II and the Specifications thereunder with reference to both accused, Ihne and Thompson, and legally sufficient to support the sentence as to each, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$ you now have authority to order execution of the sentences.

2. The guilt of accused, Thompson, under Charges I and II and the Specifications thereunder, is established by positive, affirmative testimony undisputed in any detail except by his own testimony, which is obviously false. Although the evidence fails to establish that accused, Ihne, shot at the officers as alleged in the Specification of Charge I or that he himself threatened them with a rifle and compelled them to walk along the highway as alleged in the Specification of Charge II, his participation as an accomplice is clearly established and it is equally clear that he withdrew from and ceased to participate in the commission of the offenses only when he discovered that his accomplice was in difficulty and about to be overcome by his victims. I entertain no doubt whatsoever of his guilt.

3. The Board of Review finds the evidence legally insufficient to support the findings of guilty of Charge III and its Specification because the evidence fails to show that Lieutenant Nutt, an Army physical therapist, was in the execution of her office at the time of the assault upon her by accused, Thompson. At the time of the assault Lieutenant Nutt had left the hospital, her place of duty, and late at night after ordinary duty hours had been driving with a British officer for her own pleasure or convenience in no way connected with her duties, her office, or her rank. To hold that under such circumstances the assault on her constitutes a violation of Article of War 64 would render the provision therein that at the time the assaulted officer must be in the execution of his office entirely meaningless and useless surplusage. I accordingly concur in the holding by the Board of Review that the evidence is legally insufficient to support the findings of guilty of this Charge and its Specification, and recommend that the findings of guilty thereunder be disapproved.

4. The maximum punishment authorized for conviction of the Specification of Charge I is dishonorable discharge, total forfeitures and confinement at hard labor for five years. There is no maximum punishment specified for the offense alleged in the Specification under Charge II. Neither that offense nor any offense closely related to it is listed in the Table of Maximum Punishments. The offense is therefore punishable as authorized by statute or by the custom of the service. There is no such offense denounced by

any applicable statute. Accused put the victims in fear of their life, and subjected them both to violence and great indignity. One of them was an officer of an Allied Army. A consequence which might have been reasonably expected by the accused, namely, the commendable effort of the British officer to protect his woman companion, further endangered his life. It is reasonable to believe that the woman and her protector justifiably feared that Thompson and probably his accomplice intended to rape her. No other motive is apparent because, had the accused desired to rob their victims, there is no apparent reason why that offense could not have been committed at the place where their motor vehicle overturned. At any rate, I am of the opinion that the probability of intent to rape, at least insofar as it may have existed in the minds of the victims, is a proper consideration in determining the gravity of the offense and appropriate punishment for it. Under all of these circumstances the conduct of accused constitutes an unprovoked, vicious and aggravated assault at night upon a woman, an officer in the uniform of her rank, and her companion, an officer of an Allied Army in time of war, likewise in uniform. The offense approaches in seriousness a violation of Article of War 64. I am accordingly of the opinion that the sentences are legally authorized.

I am, however, of the opinion that life imprisonment is unduly severe and out of proportion to punishment which might have been imposed by any civil court for offenses of similar gravity. Even had accused been convicted of the offense of assault with intent to murder, which is indicated by the evidence, or for assault to commit rape, the maximum punishment for such an offense would be twenty years. In my opinion both accused are equally guilty. I accordingly recommend that the period of confinement in the case of each of the accused be reduced to twenty-five years.

5. Penitentiary confinement is authorized on conviction of the Specification of Charge I. In my opinion these accused made a vicious, unprovoked attack upon a young woman and her companion, an officer in an Allied Army, subjecting them to indignities and putting them in fear of death, and are not fit persons for confinement in a disciplinary barracks. It is accordingly recommended that in spite of their youth a penitentiary be designated as the place of confinement.

6. 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. The file number of the record in this office is POA 068. For convenience of reference please place that number in brackets at the end of the order.
(POA 068)

JAMES L. MORRIS
Brigadier General United States Army
Assistant Judge Advocate General

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

31 January 1945.

BOARD OF REVIEW

POA 1114

UNITED STATES)

v.)

Second Lieutenant Thomas W. Smith
 (O-737286), Headquarters, Espiritu
 Santo Island Command.)

SOUTH PACIFIC BASE COMMAND)

Trial by G.C.M., convened at Head-
 quarters, Espiritu Santo Island
 Command, 20 and 21 November 1944.
 Dismissal.)

HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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

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

Specification: In that 2nd Lieutenant Thomas W. Smith, AC, Headquarters Espiritu Santo Island Command, did, at APO 708, on or about 22 October 1944, behave himself with disrespect toward Captain Alan Summers, CMP, his superior officer, by saying to him, "Fuck you, I know my name" and "I'll remember your face, you Goddam son of a bitch" or words to that effect.

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

Specification: In that 2nd Lieutenant Thomas W. Smith, AC, Headquarters Espiritu Santo Island Command, did, at APO 708, on or about 22 October 1944, offer violence against Captain Alan Summers, CMP,

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his superior officer, who was then in the execution of his office, in that the said 2d Lieutenant Thomas W. Smith did strike at and kick at the said Captain Alan Summers.

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

Specification: In that 2d Lieutenant Thomas W. Smith, AC, Headquarters Espiritu Santo Island Command, was, at APO 708, on or about 22 October 1944, drunk and disorderly in uniform near the entrance gate of the Nurses Quarters of the United States Naval Base Hospital number 6.

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

Specification 1: In that 2d Lieutenant Thomas W. Smith, AC, Headquarters Espiritu Santo Island Command, did, at APO 708, on or about 22 October 1944, wrongfully strike C. W. Nutt, Pharmacist Mate 2d Class, Assistant Night Master at Arms, United States Naval Base Hospital Number 6, Espiritu Santo, by kicking him in or about the groin with his foot.

Specification 2: In that 2d Lieutenant Thomas W. Smith, AC, Headquarters Espiritu Santo Island Command, was, at APO 708, on or about 22 October 1944, drunk and disorderly in uniform in or near the area of Base Police Headquarters.

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

Specification: In that 2d Lieutenant Thomas W. Smith, AC, Headquarters Espiritu Santo Island Command, was, at APO 708, on or about 28 October 1944, drunk and disorderly while in uniform near the Officers Club of the 57th Quartermaster Battalion (Mobile).

He pleaded guilty to Specification 2, Charge IV, and to Charge IV, and not guilty to all other Charges and Specifications. He was found guilty of all Charges and Specifications and was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, disapproved the findings of guilty of Charge I and the Specification thereunder, approved only so much of the findings of guilty of Charge II and of the Specification thereunder as involve findings of guilty of assault upon the person named and at the time and place and in the manner alleged in violation of Article of War 96 and confirmed the sentence but remitted the forfeitures of pay imposed. Pursuant to Article of War 50½ the order directing the execution of the sentence was withheld.

3. The evidence for the prosecution:

On the evening of 22 October 1944, accused and a navy nurse who accompanied him, were the guests of First Lieutenant Jess Thierry, Jr., United States Marine Corps, at a dinner dance at an Officers' Club. After spending the "biggest part of the evening" at that club they dropped in at a "Service Command" dance and at both places participated in "the ordinary cocktail party...." Between midnight and 0100 Lieutenant Thierry took accused and his "date" to United States Naval Base Hospital Number 6 where she was stationed, parked his "jeep" near the main gate where there was a sentry box and waited for accused to take his lady companion to her quarters and return. On his way back to the "jeep" accused became involved in an argument with the sentry at the gate. Thierry and two other officers who happened to be present could not get him to go back to the "jeep" and he did not recognize Thierry. When Coxswain Bill D. Craft, the corporal of the guard, came up to him accused said "damn" and "fuck you" and stated that he was not "going home with those cocksuckers". Accused then "really started acting up". The obscene remarks just quoted were made by accused in a loud voice. Two members of the Navy Nurse Corps and "a Red Cross girl" were present near "the scene of this struggle". Accused broke away from the officers who were trying to put him in the jeep and fell down. He "got up and smacked a 27th Division officer in the face". Accused was in uniform and wore his insignia of grade. He was loud and boisterous and "staggered around", his speech was thick, and in the opinion of Lieutenant Thierry and three other witnesses who were in a position to observe him, he was drunk (R. 7-10,12-20).

Pharmacist Mate Second Class Clarence W. Nutt, the Assistant Night Master at Arms at the Naval Hospital, joined the group about accused in order to help "quiet him down". Accused was struggling, trying to break loose, "swinging at everybody", and kicked Pharmacist Nutt in the groin. Shortly thereafter some members of the Base Patrol, who had been called by the corporal of the guard, came up, put accused in a "recon" car and took him to the Base Police Headquarters (R. 11-13,16,21).

At Police Headquarters accused called the enlisted men "horse-shit, cocksucker MP's" and "cocksucker SP's". He staggered around, took off his shirt and "challenged all hands". When Captain Alan Summers, the Provost Marshal came in and asked the accused his name, the latter replied "Fuck you, I know my name". Upon being asked again he said that his name was "Lieutenant Smith". According to the testimony of one witness, a Base Patrolman, accused "laid his hand on him [Captain Summers] and pushed him back". Two others stated in effect that accused lunged at Captain Summers. According to another Base Patrolman, accused "made an effort to strike Captain Summers". The testimony of Captain Summers was to the effect that accused made a move in his direction but was seized by several Shore Patrolmen who, at the direction of Captain Summers, started to take him to the detention tent. As Captain Summers turned to go through the door accused remarked "You son of a bitch, I'll remember your face" and kicked at him. The kick missed Captain Summers by only about two inches. Accused staggered, his face was flushed, his eyes were bloodshot and

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and glassy, he "smelled of alcohol", and his speech was incoherent. Captain Summers and three members of the Base Patrol who were present were of the opinion that he was drunk (R. 21-38).

On 28 October 1944, accused went to a dance at an Army Officers' Club and sat at a table drinking with his tentmate Second Lieutenant Foster Graesser and some other persons. When the dance ended at approximately 2345 Lieutenant Graesser went out to look for accused, who had left the club about half an hour before, and found him staggering around in the parking lot in what appeared to be a drunken stupor. Lieutenant Graesser tried to take accused by the arm and lead him away, but accused either struck or pushed Graesser, he did not know which it was, and then fell on top of him. After they had wrestled around "a couple of minutes" someone took accused off of Graesser and the latter got up and walked away. As T/5 Leo Thompson, a member of the orchestra which played at the dance, was carrying out the musical instruments about ten minutes after the dance was over, he heard a noise and saw "a fight taking place" between accused and Lieutenant Graesser. He saw blows being struck. Accused struck Graesser "anywhere from the shoulders up to his face". Other officers were grouped around trying to separate them. They were "mumbling and not talking very loudly" and accused was using "general curse words". T/5 Thompson estimated that the fight occurred about 40 feet from the door of the officers' club. After the fight he saw a "Red Cross girl" who was trying to "calm down" accused. Corporal Howard G. Burton, who was also a member of the dance orchestra, saw accused and Lieutenant Graesser rolling around on the ground about 15 feet from the door of the officers' club. Burton heard a noise but could not distinguish any words. Lieutenant Thierry put accused in a jeep and drove to his quarters. Accused was staggering and "swearing and carrying on". He was in uniform without a hat or cap, was very untidy after the fight, and in the opinions of Lieutenant Thierry and T/5 Thompson was drunk (R. 9,39-47).

4. For the defense Major Thomas B. Jones testified that for the past several months while he was Passenger Officer of the Port of Embarkation on Espiritu Santo Island, accused had been his assistant. Accused had worked "daily - - and nightly" embarking and disembarking ships in the harbor, had not complained about working overtime, and had been efficient and courteous and a hard worker. Major Jones "would be glad to have him back". When Major Jones went to Base Police Headquarters to see accused after midnight on 23 October 1944, the latter did not know who he was at first, but after being addressed as "Smithy", recognized Major Jones. He became very apologetic and expressed regret that Major Jones should see him "there in that condition". Major Jones told accused to go to his quarters but did not place him in arrest or tell him to remain there (R. 48-50).

Captain William S. Jones, Transportation Corps, had been engaged in work connected with the Port of Embarkation on Espiritu Santo Island

and over a period of a year had come into contact with accused in an official way. He regarded accused as a "damn fine officer" and would be willing to have him as an assistant. Accused was willing to work and conducted himself in a military and courteous manner (R. 73-74).

Second Lieutenant John J. Matulich, who had known accused for approximately seven years, saw him at the Naval Hospital at about 0040 on 23 October 1944. Accused did not recognize him. There was "a little commotion" and "a little cussing" and "there seemed to be an argument going on" between accused and the sentry. Accused was staggering "very badly". Lieutenant Matulich saw accused several hours later at Base Police Headquarters. Accused was extremely apologetic but still "very much in doubt" and "very unstable". In the opinion of Lieutenant Matulich accused was so drunk that he did not know what he was doing and was not in possession of his reasoning faculties either at the Naval Hospital or at the Base Police Headquarters (R. 51-52).

First Lieutenant Bayard H. McGeer also saw accused at the Naval Hospital at about 0045 on 23 October. He talked to accused in an effort to assist him but accused was not in a condition to understand what was said to him. He did not recognize McGeer although the latter had known him for a year. Accused was kicking and falling down "all over the place and rising again and falling down", his speech was thick and incoherent, and in the opinion of Lieutenant McGeer he was very drunk and unable to rationalize at all. At approximately 2330 on the night of 28 October 1944 McGeer saw accused fighting with Lieutenant Graesser outside of the Officers' Club but did not observe the fight closely as he had an engagement with a young lady and proceeded to his car. He heard "loud noises who should hit who" but did not recall "any curse words" (R. 53-54).

Captain Harry Brick, a Neuropsychiatrist, testified that for a week prior to 3 November 1944 accused had been under his observation in the Neuropsychiatric Section of the 31st General Hospital. Captain Brick read into the record a certificate (Received in evidence later in the trial with a history of accused attached as Def. Ex. C) which was dated 3 November 1944 and showed the following diagnosis of accused: "(a) Occupational Fatigue, severe (b) Alcoholism, acute. Lt. Smith knows the difference between right and wrong, and is able to adhere to the right. He is sane and cannot, therefore, be released from responsibility of his actions." In explanation of the certificate Captain Brick stated that the conclusions therein expressed as to the sanity and mental responsibility of accused applied only to the time when he was under observation in the hospital and not to any other time. The diagnosis of occupational fatigue was based upon examination and "review of history" while the diagnosis of acute alcoholism was based upon "the history obtained through the other sources". While in the hospital accused was entirely free from acute alcoholism. Defense Counsel then asked Captain Brick the following hypothetical question:

"Assume that the accused, or any other individual, had been participating over a period of several hours of drinking alcohol--whiskey--or some alcoholic beverage and later in the evening this person was seen staggering around, falling down, words were mumbled, his eyes were glassy, his face was flushed and he wanted to whip all the MPs and SPs on the island. Assume that he had some friends that came along, some of them he has known seven or eight years, others he has been associated with almost daily for six to twelve months, and he could not recognize who they were. He did not recognize them at all. He wanted to fight. In your opinion would that man be able to rationalize or exercise his reasoning power?"

Captain Brick answered the question in the negative and added that: "This behavior would fit in with delirium tremens which is a part of alcoholic-psychosis". He also expressed the opinion that the hypothetical individual would not know the difference between right and wrong. He stated that occupational fatigue is caused by a prolonged period of work that does not interest the worker (R. 55-62; Def. Ex. C).

Lieutenant Colonel Selvie J. Curtis, Medical Corps, testified that he had known accused since about 1 October 1944 and on occasions had given him minor treatments and talked to him. In answer to a hypothetical question directing him to make substantially the same assumption of facts as in the question propounded to Captain Brick, Colonel Curtis stated that the individual involved would be in a state of acute alcoholic intoxication. He also expressed the opinion that such an individual would not have possession of his mental faculties, would not know the difference between right and wrong or know that he was doing something wrong. He stated that an individual who has occupational fatigue has a job which he is not best suited to do or one that he is tired of for some reason or other. One so affected is often inclined to drink alcoholic beverages and drinking may cause him to become aggressive and quarrelsome. Colonel Curtis defined aero-neurosis as an Air Corps word which would be expressed in Army Medical Corps terminology as "psycho-neurosis--anxiety state". "Aero-neurosis means scared". (R. 63-68).

Captain John L. Brown, Medical Corps, testified that he had known accused since 25 March 1944, and had seen him frequently but had not examined or observed him professionally. In answer to a hypothetical question practically identical to the one put to Colonel Curtis, Captain Brown testified that in his opinion the individual concerned would be intoxicated. He further stated that such an individual was not responsible for his actions and would not know right from wrong. He defined "occupational fatigue, severe" as a condition "demonstrated by a patient which makes him unable to carry on his duties". Such a person would be apt to have an anxiety complex. Alcohol tends to aggravate the condition. The reactions of a person suffering from occupational fatigue who has taken alcohol are that his imagination "gets away from him", he loses all sense

of orientation and time and place and next day forgets what happened (R. 69-72).

The accused testified that after several semesters in college he left school to take up music "professionally". Two years later, on 9 March 1942, he entered the Army as an aviation cadet. Upon the completion of his training course accused graduated as a combat pilot and began flying the P-39. After about eight weeks of combat training in Hawaii and about three months of advance training in "Fiji and Caledonia" he was sent with a group of replacements to Guadalcanal on 1 August 1943. Shortly after his arrival there he had "a little trouble with his health" which was diagnosed as aero-neurosis and was grounded by a Flight Evaluation Board. He served as assistant intelligence officer of his squadron for about six weeks and was sent to APO 708 where he eventually was placed in the Passenger Section of the Port of Embarkation. His duties were to embark and disembark passengers and the work was in no way related to his previous training. He liked his work in the Air Corps but definitely did not like his work "with the Port". He had tried to get back into the Air Corps but without success (R. 75-77; Def. Ex. A).

The trouble with his health which accused experienced was a slight ear and sinus infection which affected his climbing, preyed on his mind, and made him fearful that he might "blackout" and injure some other pilot. The P-39 plane which he was operating was very sensitive and difficult to operate. Shortly before his appearance before the Evaluation Board he ran into bad weather while on a mission with a group of P-39's, lost control of his plane, "climbed out" of it, and landed in the water near the Island of San Christobal. Just prior to being grounded he experienced headaches, loss of direction and dizziness. After he had a conversation with the flight surgeon the latter recommended an Evaluation Board and accused acquiesced in the suggestion. Should he be permitted to remain in the service accused would prefer to be in the Air Corps but would do the best he could with any assignment that might be given him (R. 78-80; Ex. B).

With reference to the incidents upon which the charges against him were based accused testified that on 22 October 1944 he was not normal mentally or physically because of his dislike for the work he was doing and his worries about the illness of his wife and the lack of mail from her. He wanted "to get soused and get it off [his] mind". He had too many strong drinks and the last he remembered that evening was standing at the service command bar with his "date". She was having a beer and he was having his first drink there. The next thing that he remembered was being at the Base Police guardhouse when Major Jones was talking about taking him home. Accused attributed his mental lapse to the alcohol which he had consumed (R. 81-82).

After talking with Major Jones at police headquarters accused remembered nothing further until he awoke in his tent "the next morning". Although he was not placed in arrest he stayed in his quarters at the suggestion of Major Jones and for the next week the state of his mind was about the same as it had been before. On the evening of 28 October 1944 Lieutenant Thierry came around to the quarters of accused as a guest of his roommate Lieutenant Graesser and the three of them went "over to the club" for some drinks before dinner. Accused had "three pretty good stiff cocktails". After dinner they went back to the tent and had "a couple more". The other two had planned to attend a dance and accused went with them. He sat at their table which was "full of drinks" all the time. Accused drank steadily and the last thing he remembered was dancing with one of the ladies and taking her back to the table at what he judged to be "around ten or ten-thirty". He did not recall any incident after that on the night of 28 October. He "would say" that his not remembering was the effect of the "alcohol" he had drunk and the reason he "got too much alcohol is the fact that the party kept the table full of drinks at all times" (P. 82-84).

5. The essential facts are not in dispute. On the evening of 22 October 1944 accused took a Navy Nurse to a dinner dance at an officers' club as the guest of a Marine Corps officer, First Lieutenant Jess Thierry, Jr. Later in the evening the party went to a "service command" dance and accused drank intoxicating liquor at both places. Between midnight and 0100 Lieutenant Thierry drove accused and his lady companion to the Naval Hospital where she was stationed, parked the "jeep" near the main gate and waited for accused to take her to her quarters and return. On his way back accused became involved in an argument with the sentry at the gate. At that time accused was staggering, repeatedly falling down and getting up again, he was loud and boisterous, he did not recognize and would not listen to other officers of his acquaintance who tried to get him to leave, and in the opinions of numerous witnesses was drunk. He used foul and abusive language toward the Naval Corporal of the Guard, shouted grossly obscene words in the presence of three ladies, and kicked in the groin the assistant night master at arms at the Naval Hospital who was trying to quiet him. After accused had been overcome and taken to Base Police Headquarters he staggered around, used profane and obscene language, took off his shirt, "challenged all hands" and was drunk. He advanced upon or "lunged" toward and kicked at Captain Alan Summers, the Provost Marshal and according to the testimony of one witness laid his hand upon and shoved Captain Summers.

On 28 October 1944 accused attended another dance at an Officers' Club and sat at a table drinking intoxicating liquor. When the dance ended and the enlisted men who played in the orchestra and the officers and their lady guests were leaving, accused was seen in the yard where the cars were parked, staggering around in a drunken stupor. When another officer, his tentmate, tried to take him away accused struck him about the shoulders and face, pushed or knocked him down, got on top of him, and rolled around on the ground until someone pulled him off. This incident occurred at a distance variously estimated by the witnesses to be from fifteen to forty feet from the door of the officers' club.

It thus clearly appears that accused was drunk on each of the three occasions mentioned in the Specifications, namely, at the Naval Hospital (Spec., Chg. III) and at the Base Police Headquarters (Spec. 2, Chg. IV) on 22 October and near an officers' club (Spec., Add. Chg.) on 28 October. The evidence shows, and accused by his plea of guilty admitted, that at the Base Police Headquarters he was drunk and disorderly in violation of the 96th Article of War. The only question as to the other two occasions is whether the drunkenness and accompanying conduct of accused were such as to constitute violations of the 95th Article of War. On each occasion he was grossly drunk and conspicuously disorderly in a public place, in uniform, and in the presence of other officers, enlisted service personnel and ladies. He engaged in an unseemly altercation and without provocation committed an assault and battery upon an enlisted man of the Navy on 22 October and assaulted and fought with another officer on 28 October. On each occasion he made a disgraceful exhibition of himself and under all of the circumstances violated the 95th Article of War (M.C.M., 1928, par. 151; Winthrop's Military Law and Precedents 717; CM 228502 Toliaferro, 16 B.R. 187; CM 235461 Ronemous, 22 B.R. 81; CM 240512 Morris, 26 B.R. 53).

It is also established by the undisputed evidence that on 22 October accused assaulted Captain Summers substantially in the manner alleged in the Specification, Charge II, and kicked in the groin Pharmacist Mate Second Class C. W. Nutt as alleged in Specification 1, Charge IV. Accused was drunk at the time he committed these offenses but since they do not involve any specific intent voluntary drunkenness is no legal excuse. (M.C.M., 1928, par. 126a). One Medical Corps officer as a witness for the defense testified that in his opinion accused was suffering from delirium tremens but such testimony is unworthy of serious consideration not only because it is contrary to the testimony of two other expert medical witnesses called by the defense but also for the reason that it is inconsistent with the undisputed facts. It is clear from the record as a whole that accused was not a chronic alcoholic and had been drinking only a few hours before the commission of the offenses under consideration. Manifestly his mental condition was the direct and immediate result of his alcoholic over-indulgence. It was only a temporary condition. In order to relieve an individual of responsibility for crime, where a specific intent is not involved, intoxication must be such as to produce settled insanity or fixed mental disease or derangement (Wharton's Criminal Law 93, Winthrop's Military Law and Precedents 295). If he voluntarily makes himself intoxicated when sane and responsible, the resulting temporary insanity does not destroy responsibility (1 Wharton's Criminal Law, 95).

In the opinion of the Board of Review the evidence sustains all of the findings of guilty of the Specifications and Charges as approved by the confirming authority.

6. The charge sheet shows that accused is 27 year and 11 months of age. He enlisted as an aviation cadet and served as such until he was com-

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missioned a Second Lieutenant, Air Corps Reserve, on 6 February, 1943. He entered upon active duty on the same date.

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

Samuel M. Dwyer, Judge Advocate

J. J. Lott, Judge Advocate

Charles S. Sykes, Judge Advocate

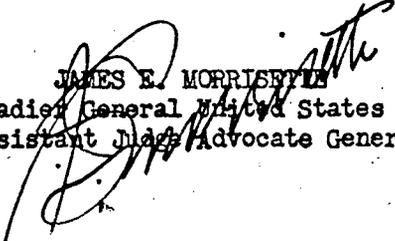
1st Ind.

WD, Branch Office TJAG, with USAFPOA, APO 958
TO: Commanding General, USAFPOA, APO 958.

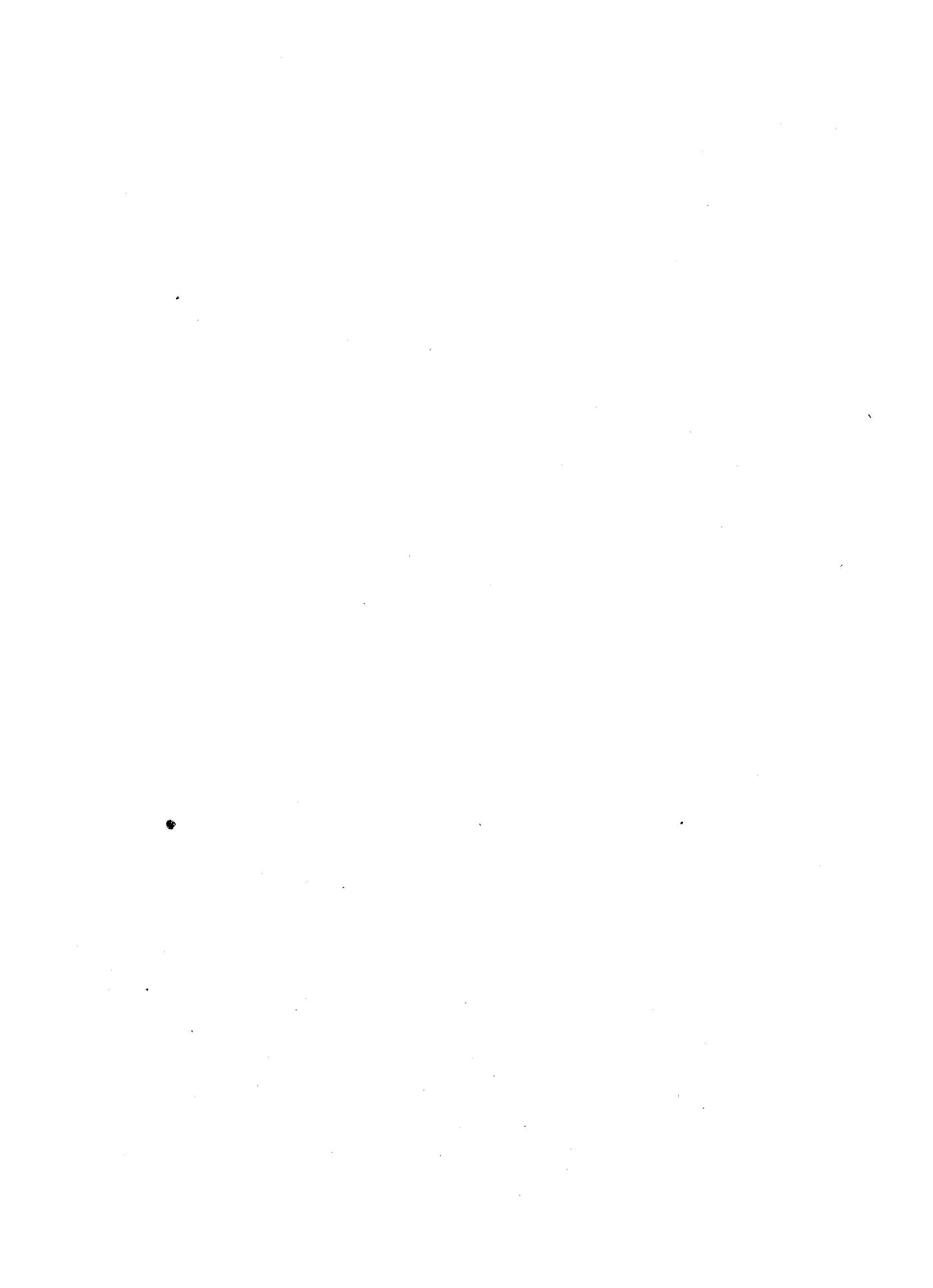
FEB 1 1945

1. In the case of Second Lieutenant THOMAS W. SMITH (O-737286), Headquarters, Espiritu Santo Island Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as modified and confirmed, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is POA 114. For convenience of reference please place that number in brackets at the end of the order. (POA 114)


JAMES E. MORRISSETTE
Brigadier General United States Army
Assistant Judge Advocate General

(Sentence as modified ordered executed. GCMO 2, USAFPOA, 1 Feb 1945.)



BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

9 February 1945

BOARD OF REVIEW

POA 124

UNITED STATES

v.

Private ALFRED RENNER (37407609),
Headquarters Company, 27th Infantry
Division.

) HEADQUARTERS 27TH INFANTRY DIVISION
)
) Trial by G.C.M., convened at APO 27,
) 18 January 1945. Dishonorable dis-
) charge and confinement for six years.
) Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
DRIVER, LOTTERHOS and SYKES, Judge Advocates.

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

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

CHARGE I: Violation of the 84th Article of War.

Specification 1: In that Private Alfred Renner, Headquarters Company, 27th Infantry Division, APO 27, did, at APO 27, on or about 6 November to 23 November 1944, unlawfully sell to Staff Sergeant Barney Van der Hyde, revolver caliber 38, serial number V 344496, of the value of \$20.00, issued for use in the military service of the United States.

Specifications 2 through 12, inclusive: Each specification is the same as Specification 1, except as to serial number of revolver, name of purchaser, inclusion of shoulder holster (value alleged, \$1.67) in the sale and method of sale, as follows:

SPEC.	SERIAL NO.	PURCHASER	HOLSTER	METHOD OF SALE
2	V 352643	Pvt. Harold Ashbough	Yes	No Assistant
3	V 354475	Tec-5 Andrew Cogdill	Yes	"
4	V 339586	Pvt. David C. Burg	No	"
5	V 341112	Tec-5 George D. Drewes	Yes	"
6	V 337027	Tec-5 Walter D. Valenson	Yes	In conjunction with Pvt. Norman Kramer

SPEC.	SERIAL NO.	PURCHASER	HOLSTER	METHOD OF SALE
7	V 352729	Cpl. Harold E. Lang	Yes	In conjunction with Pvt. Norman Kramar
8	V 205978	Tec-4 Frank Catanzaro	Yes	"
9	V 346436	Pfc. Sylvester A. Silluzio	Yes	"
10	V 350665	Tec-5 Timothy M. Clark	Yes	"
11	V 289345	Tec-5 Walter Micke	Yes	In conjunction with Tec-5 Abraham Lamberg
12	V 273175	Tec-5 Irving Dinkin	Yes	"

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

Specification 1: In that Private Alfred Renner, Headquarters Company, 27th Infantry Division, APO 27, did, at Aviation Supply Depot, Navy 140, Fleet Postoffice, c/o Postmaster, San Francisco, California, at some time between 6 November and 23 November, 1944, knowingly purchase from Ensign David W. Rewick, U.S.N.R., in the armed forces of the United States, two (2) revolvers, caliber 38, of the value of forty dollars (\$40.00), property of the United States, the said Ensign David W. Rewick, not having the lawful right to sell the same.

Specification 2: Similar to Specification 1 except as to number of revolvers, alleged to be sixteen, of the value of \$320.00.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications except Specification 3 of Charge I, of which he was found not guilty, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for six years. The reviewing authority approved only so much of the findings of guilty of Specifications 5, 8 and 10 of Charge I as involves the unlawful sale respectively of one revolver of the value of \$20 or less, and only so much of the findings of guilty of Specifications 2, 6, 7, 9, 11 and 12 of Charge I as involves the unlawful sale respectively of one revolver and one holster of the value of \$20.00 or less, approved the sentence, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence for the prosecution shows that early in November 1944 the accused, Private Alfred Renner, of Headquarters Company, 27th Infantry Division, APO 27, was brought to the Aviation Supply Depot (Navy), on the island where the 27th Division was stationed, by Seaman First Class George M. Ebersole for the purpose of displaying for possible sale some "Jap" souvenirs which the accused had in his possession. Ebersole introduced the accused to Ensign David W. Rewick, U.S.N.R., Ordnance Officer at the Aviation Supply Depot. After Ensign Rewick had seen the "Jap" souvenirs displayed by the accused he suggested in "a rather joking manner" that "maybe we could make a trade". When "the subject came up" as to whether he had "any 38's", Ensign Rewick informed the accused that he had some, to which the accused replied that he "could possibly use * * *

two of them". They "made a trade for two 38's and the trade consisted of * * * twenty-eight Jap bills and a small Jap flag for the two 38's with shoulder holsters". At that time the accused asked Ensign Rewick whether the revolvers had any "distinction on them as United States government property". Ensign Rewick informed the accused that he did not know because he "had never looked at a 38 before" but that he knew that the revolvers had serial numbers and that "if they had serial numbers they could be traced to their source and would definitely be U. S. property". A few days thereafter, the accused returned to the Depot to see Ensign Rewick and brought some additional "Jap" souvenirs. Several enlisted men and officers were present at the time. The accused and Ensign Rewick went outside of the building and made an appointment for a few nights later. About 6 November they again met in the same building. After some conversation Ensign Rewick informed the accused that he would "accept" a "Jap" flag, four wrist watches and several coins in exchange for sixteen .38 caliber pistols. The exchange was effected. Rewick did not have sufficient shoulder holsters for the revolvers but obtained them later and gave them to the accused. The valuation which the accused and Rewick had placed on the souvenirs received by Rewick at the first transaction was \$40.00, and at the second transaction \$320.00. Rewick made lists of the serial numbers of the revolvers turned over to the accused (Exs. 1 and 2). The pistols were described by Ensign Rewick as being "under our custody" and he stated that they "had been sent to us either from the states or we had obtained them from Navy Supply", that the pistols were normally used by the Navy and that he had not mentioned to the accused that the pistols were obsolete (R. 5-17).

By the testimony of the purchasers alleged in the Specifications (excepting Specification 3) of Charge I, and by the testimony of Private Kramar and Corporal Lamberg, it is established that the accused sold to each of such purchasers, either directly or indirectly as alleged, one of the specified revolvers. Most of the revolvers were in sealed boxes when delivered. The revolvers (Smith and Wesson) were introduced in evidence and the serial numbers of the eleven that were sold (except one) corresponded with the serial numbers on the lists made by Ensign Rewick. Each was sold for the sum of \$50.00 (R. 18-63; Pros. Exs. 4-6, 12,13,15,17-21).

4. For the defense, the accused, whose rights as a witness had been explained to him, testified that he was 30 years and 4 months of age, was married, and had been in the Army for 24½ months. He admitted that he had received "certain pistols" from "Lieutenant Rewick" but said that Rewick had not indicated that he had no right or authority to dispose of the pistols. In answer to the question of whether Rewick had said anything about the use or the condition of the pistols, the accused testified:

"He said that he had heard the navy was going to discontinue these 38 caliber pistols he had in his stock and as they were there and knowing I was in a combat outfit and would no doubt be able to use them." (R. 67,68)

5. The evidence shows that early in November 1944 the accused, Private Alfred Renner, of Headquarters Company, 27th Infantry Division, purchased from Ensign David W. Rewick, U.S.N.R., Ordnance Officer at Aviation Supply Depot, on the island where the 27th Division was stationed, two new Smith and Wesson revolvers, caliber .38, and a few days thereafter, purchased from Ensign Rewick sixteen additional revolvers of the same type. The purchase price in each case paid by the accused for the revolvers consisted of certain "Jap" souvenirs, which were valued by the two parties involved in the transactions at \$40.00 and \$320.00, respectively. All of the revolvers were property of the United States Government issued to the Navy for its use, and Rewick had no authority to sell them, which facts, it may reasonably be inferred from the evidence, were known to the accused. A few days thereafter the accused, either personally or in conjunction with a named party, made individual sales of eleven of these revolvers to various soldiers at the purchase price of \$50.00 each.

6. As to Charge I and the Specifications thereunder alleging that the accused unlawfully sold certain revolvers "issued for use in the military service" in violation of Article of War 84, the fundamental question presented is whether or not the term "military service" as used in that Article includes "Naval" as well as "Army" service.

In its more comprehensive sense "military service" may be deemed to embrace service in the Navy as well as in the Army (TM 20-205; Bl. Law Dict. (3d Ed.) 1186; Soldiers' and Sailors' Relief Act, 50 U.S.C., 4489; Act of 16 September 1942 (Wartime Voting), 50 U.S.C., Supp. III, 740). In each of the congressional acts cited, for the purpose of eliminating doubt as to the sense in which the term was intended to be used, it was specifically provided that the Navy as well as the Army was to be affected thereby. However, in its ordinary and more restricted sense, the term applies specifically to the Army "as a separate community" (Winthrop's Military Law and Precedents, 2nd Ed., p. 15) as indicated by established definitions (Webster's Collegiate Dictionary; MacMillan's Modern Dictionary). Recognition of this more limited meaning of the term appears in the Federal Criminal Code and in Army Regulations by the use of the words "military or naval service" (18 U.S.C. 56, 1262a; AR 35-3900, Sec. 26(e)).

In determining whether the term "military service" as used in Article of War 84 should be given the comprehensive or the restricted meaning, as above described, recourse may properly be made to the other Articles of War in which the term is frequently used (Crawford, Construction of Statutes, page 351 et seq.). Article of War 4 provides that officers in the "military service of the United States" and officers of the Marine Corps detached for service with the Army are competent to serve on courts-martial. In an opinion of The Judge Advocate General which considered the extent of the provisions of Article of War 4 it was decided that a Naval officer detailed for service with the Army was not competent to serve on an Army court-martial (Dig. Op. JAG 1912-40, Supp. I, Sec. 361(a)). By necessary implication that opinion held that an officer of the "Navy" is not an officer in the "military service"—a recognition of the more restricted meaning of the term under discussion. In Article of

War 60 it is made an offense for an officer to retain in his command and fail to report, after discovery, a soldier who is a deserter "from the military or naval service". This provision clearly indicates the use of the term "military service" in its restricted meaning. Furthermore, naval personnel are explicitly excepted from the jurisdiction of "military" law (A.W. 2).

It is well settled that a court in construing a statute "cannot isolate words or give them their abstract meaning, or consider different parts of the statute separately and independently" and that every part of a statute must be "considered as an integral part of the whole" (Crawford, Construction of Statutes, par. 204). There is nothing in Article of War 84 indicating that the term "military service", as used therein, should be given a meaning different from that given the term as used in the other Articles of War. To the contrary, the title of Article of War 84 (Waste or Unlawful Disposition of Military Property Issued to Soldiers) clearly indicates that the Article was never intended to include naval property or service (see M.C.M., 1928, p. 222, Stat. at L., 66th Cong. 1919-1921, Vol. 41, Part I, p. 804). From the foregoing, it is concluded that the term "military service" as set forth in Article of War 84 does not include "Naval" service.

The evidence, in disclosing that the revolvers sold by the accused were Navy weapons and not issued for use in the "military service", sustains neither a finding of a violation of Article of War 84 nor a finding of guilty of the Specifications as drawn. It is pertinent to consider whether or not the record is sufficient to show the commission of any lesser included offense. The accused was charged with unlawfully selling certain property, explicitly described, issued for use in the military service. It seems apparent that an allegation of this kind necessarily implies that the property is owned by the Government. In a case where the accused was charged with assault with intent to commit murder by cutting another soldier with a razor, the court by exceptions and substitutions found the accused guilty of assault with intent to do bodily harm without just cause or excuse and added thereto the words "dangerous instrument". It was held that where the weapon named in the specification is per se a dangerous instrument and one from which it is apparent that fatal wounds might be inflicted and an intent to murder is stated in terms, the specification might be treated as if the weapon had been described as a dangerous one and that the addition of such words does no violence to the rules of pleading or to the rights of the accused (CM 162417; Dig. Op. JAG 1912-40, Sec. 451 (3)). By analogy, the Specifications under Charge I may be considered as alleging that the property therein was owned by the Government. The sale without authority of Government property is clearly to the prejudice of good order and military discipline and violative of Article of War 96. That such an offense is a lesser one and included within that alleged is indicated not only by the fact that it is provable by the same evidence, although of a more limited degree than would be required in proving the alleged offense, but also by reference

to an analogous case in which it was held that where the evidence failed to show that certain Government property alleged to have been stolen in violation of Article of War 94 had been furnished for the military service the record was legally sufficient to support a finding of guilty in violation of Article of War 93 (CM 199737 Taft, 4 BR 163, Dig. Op. JAG 1912-40, Sec. 452 (8)).

7. As to Charge II and the Specifications thereunder, alleging in the prescribed form that the accused "knowingly" purchased from a Naval officer revolvers which were property of the United States, in violation of Article of War 94, a question, similar to that discussed under Charge I, is presented.

Article of War 94 makes it a criminal offense for one subject to military law to knowingly purchase arms from "any soldier, officer or other person who is a part of or employed in said forces or service", such soldier, officer or other person not having the lawful right to sell the same. The quoted term "said forces or service" refers to "military service" (see A.W. 94, par. 9).

There appears in Article of War 94 no language from which it may be inferred that the term "military service" as used therein should be given any particular meaning. In the absence of such language, the term should be construed to have the same meaning that it has when appearing in other Articles of War which, as heretofore decided, is not inclusive of the "Navy". Since the accused purchased the alleged property from a Naval officer, a member of the Naval as distinguished from military service, he did not commit the offense denounced by Article of War 94.

The proof, however, sustains the findings of guilty of the Specifications, in violation of Article of War 96.

8. The record contains no direct proof as to the value of the Government property described in the Specifications. The revolvers were, however, introduced in evidence. In view of the nature, type and make of the revolvers and their condition, it may properly be inferred that each revolver was of some value, that the two revolvers described in Specification 1 of Charge II had an aggregate worth more than \$20 and not more than \$40, and that the sixteen revolvers described in Specification 2 of Charge II had a value in excess of \$50 (CM 193003, Simpkins, 2 BR 72; CM 228272, Small, 16 BR 105).

Inasmuch as no punishment is listed in the Table of Maximum Punishments for the offenses proved in violation of Article of War 96, the maximum punishment applicable is that prescribed for the closely related offenses violative of Articles of War 84 and 94, which exceeds the sentence imposed by the court and approved by the reviewing authority (M.C.M., 1928, par. 104c).

9. The Charge Sheet shows that the accused was 30 years and 2 months of age when the charges were drawn, and that he was inducted at St. Louis, Missouri, on 30 December 1942.

10. 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 Specifications of Charge I and Charge I as approved by the reviewing authority as involves findings of guilty of the unlawful sale of the Government property therein described in violation of Article of War 96, legally sufficient to support only so much of the findings of guilty of the Specifications of Charge II and Charge II as involves findings of guilty of the Specifications as a violation of Article of War 96, and legally sufficient to support the sentence.

Samuel M. Driver Judge Advocate

J. L. Litchner, Judge Advocate

Charles A. Styles Judge Advocate

(62)

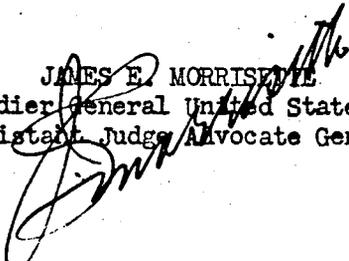
1st Ind.

WD, Branch Office TJAG with USAFPOA, APO 958 FEB 15 1945
TO: Commanding General, 27th Infantry Division, APO 27.

1. In the case of Private ALFRED RENNER (37407609), Headquarters Company, 27th Infantry Division, I concur in the foregoing holding of the Board of Review. For the reasons therein stated I recommend that only so much of the findings of guilty of the Specifications of Charge I and Charge I as approved by the reviewing authority as involve findings of guilty of the unlawful sale of the Government property therein described in violation of Article of War 96, and only so much of the findings of guilty of Charge II and the Specifications thereunder as involve findings of guilty of the Specifications in violation of Article of War 96 be approved. Thereupon you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is POA 124. For convenience of reference please place that number in brackets at the end of the order.

(POA 124)


JAMES E. MORRISSETTE
Brigadier General United States Army
Assistant Judge Advocate General

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

6 March 1945.

BOARD OF REVIEW

POA 160

U N I T E D	V S T A T E S	)	ARMY GARRISON FORCE APO 244
)	
	v.	)	Trial by G.C.M., convened at APO
		)	244, 23 December 1944. Dishonor-
Technician 5th Grade WILLIE J.		)	able discharge and confinement
DEXTER (34753887), Company B, 1894th		)	for life. Penitentiary.
Engineer Aviation Battalion.)	

HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Technician Fifth Grade Willie J. Dexter, Company B, 1894th Engineer Aviation Battalion, did, at APO 244, on or about 30 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal Polean Davis, Company B, 1894th Engineer Aviation Battalion, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification and was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The reviewing authority approved the sentence but recommended that it be commuted to dishonorable discharge, total forfeitures, and confinement for life and forwarded the record of trial for action under the 48th Article of War. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, confirmed the sentence

but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, and designated the United States Penitentiary, McNeil Island, Washington as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$ the order directing the execution of the sentence was withheld.

3. The evidence for the Prosecution:

On 30 November 1944 accused was quartered with six other enlisted men in tent number 5 in the area of Company B, 1894th Engineer Aviation Battalion. The tent stood on the north side of the company street which extended east and west and was approximately level. Tent 5 and tent 6 which adjoined it on the west were connected by a common, enclosed passageway. At about 1800, shortly after accused had returned to his tent, Private First Class Jimmie L. Lacy entered and began going through the equipment of Tec 5 Winston Anderson under the latter's bed, looking for a book. Other occupants of the tent remonstrated and when Anderson, who was digging a "fox-hole" near by was called in, a rather heated argument ensued between him and Lacy, in the course of which Lacy remarked, "What do you want to do, whip me about it", to which Anderson replied, "It don't make no difference to me" (R. 9, 37, 50, 53, 62, 65, 74-75, Exs. 1 and 3).

Accused joined in the argument, in effect said that Lacy "had no business" going through another soldier's belongings without permission and told Lacy to "get out of here". It appears that Lacy made some response but the witnesses who were present did not hear it or could not make out or remember what was said. Accused then advanced toward Lacy who was standing beside Anderson's bed on the west side of the tent and Lacy ran out through tent number 6. Anderson testified that his unloaded carbine was lying on a table in the center of the tent, that accused picked it up when he went toward Lacy and that Anderson and Staff Sergeant Rufus W. Brownlee took it away from accused. No other witness saw accused pick up the carbine and Sergeant Brownlee specifically stated that accused did not have it in his hands (R. 37-38, 41-42, 50-51, 54-55, 58, 65, 67, 72-73, 75, 77, 82-83).

After Lacy left, accused turned around and said that Lacy had gone to get his rifle, that "He is going to kill me", and that he (accused) wanted to get out of the lighted tent. Brownlee tried to restrain him but accused broke away and "grabbed" his M1 rifle which was hanging over his bed. Tec 4 Henry L. Burnett, who entered tent 5 while Brownlee was holding accused, testified that he heard accused say, "Let me loose, turn me loose, I am going to kill him before he kills me". Burnett "grabbed ahold of Dexter's rifle, and they was wrestling around", but Burnett released him and accused went out the front of the tent to the company street. Upon leaving he worked the bolt of the rifle and "a cartridge jumped out". It was dark at that time and the lights were on in the tent. As accused went out the front way everyone in tent 5 and at least two occupants of tent 6 hastily departed in the opposite direction (R. 19, 38-39, 41-43, 45, 48-49, 51, 55-56, 60, 62, 65-66, 72-73, 75, 80, 83).

On the night of 30 November, Tec 4 Rogene Milton was sitting on his bed in his tent which was across the company street from and directly opposite the tent of accused when he heard a noise which sounded like one person "tussling" with another. He looked up and saw Brownlee and Burnett each in turn unsuccessfully try to restrain accused. Accused came down the steps from the tent, "threw a bullet in the chamber", walked westward along the street about thirty feet carrying the rifle in his right hand at "trail arms", stopped, raised his rifle and fired. Milton then heard a voice, which he "could recognize" as that of Corporal Polean Davis, cry out three times, "I isn't the one". At the time the shot was fired Milton could not see the flash of the gun and he could not see Davis. He ran to his fox hole and hid but returned at about the time that "Captain Sloan and Captain Williams come up" and saw Davis on the ground out on the company street about twenty or twenty five feet from the place where accused was standing when he fired the shot (R. 19-24).

On 30 November, "about supper time", Tec 5 Willie Jones was walking along the company street about "six paces" behind Corporal Davis who was walking in the same direction when he heard in front of him a loud voice which he identified as that of the accused say, "Who are you?", and heard a low voice which he thought said, "Willie". It was dark and he could not see the accused and could not recognize the person walking ahead of him. The next thing he heard was "the fire". When the gun was fired he saw the flash and "would say" that it was about three feet from the ground and it seemed about ten paces away. He went behind his tent where he remained "about two minutes" and returned to the scene of the firing. Accused was "standing up" and Davis was "laying down from a shot" about six paces "in front" of the place where Jones had been walking, when the shot was fired (R. 24-29).

When he heard Corporal Davis say, "It wasn't none of me" and heard accused calling for someone to come and get him (Davis), Tec 5 Anderson went out in the company street and found Davis lying on his back propped up on one of his elbows. When Davis turned over Anderson could see that he was bleeding. Accused who was standing by Davis' head said that he didn't intend to shoot and that he "wouldn't shoot him for anything in the world". Anderson took the rifle from accused and gave it to Corporal Edgar L. Lockhart, the Corporal of the Guard. Captain William B. Sloan, the commanding officer of the company of accused, appeared upon the scene and accused came up to him and said, "I shot him, Captain Sloan, but I didn't mean to shoot him or anyone". Corporal Lockhart handed the gun to Captain Sloan. It was a caliber .30, M1, rifle and examination disclosed that it contained 5 cartridges in a clip and one cartridge in the chamber. Davis was sent to the hospital and Captain Sloan took accused to the orderly room and called First Lieutenant Milton K. Pigg, the officer of the day, who took accused to the base stockade. On the way to the stockade accused talked constantly. Without interrogation by anyone, he stated that he had been sitting in his tent in the light, there had been an argument, another soldier who had threatened to shoot him left the tent to get his rifle, and as accused felt in "a tough spot" in the lighted tent he took his rifle and went out into the company street. Accused further stated that he did not

know that his rifle was loaded, nor that his finger was on the trigger and that he did not intend to shoot anyone, but that the rifle "did go off and he did shoot a man". Accused was acting unnaturally and talking very loudly and in the opinion of Lieutenant Pigg was under the influence of alcohol. Accused was coherent, however, although he talked very rapidly and very loudly and "was in possession of his faculties, but he was not reacting quite as fast or as normally" (R. 7, 9-10, 11-16, 51-52).

Corporal Davis was taken to the Station Hospital and a medical examination disclosed that he had sustained a wound of the lower abdomen from a bullet which entered practically in the midline just above the pubic bone, directly in front of the bladder and came out through the right buttock leaving a wound of exit approximately four inches in diameter. He died on 1 December 1944 from hemorrhage and shock resulting from the bullet wound (R. 29-33, 81-82).

4. The evidence for the Defense:

Captain Samuel B. Kurnick, who performed an autopsy on the body of Corporal Davis, testified that if Davis had been erect when the fatal bullet wound was inflicted, then the course taken by the bullet would have been "essentially horizontal". The wound of exit was two inches in diameter and a line drawn through its center and the wound of entry would not vary from a horizontal line more than half an inch one way or the other assuming that Davis was in an erect position (R. 84-86).

Captain Sloan, the commanding officer of the company of accused, First Lieutenant Verner Ruwe, who had been serving with the company for fifteen months, and the First Sergeant Lawrence E. Hardiman testified in effect, that accused was an excellent and dependable soldier who did his work well, was well liked by everyone and had no trouble with the other soldiers of his company. They also testified that the company had been bombed and strafed several times, and that accused had been getting progressively more nervous until shortly before the incident of 30 November he was "almost to the breaking point". He had been put on night duty as a cook so that he could sleep in the day time but had continued to complain about being unable to sleep, and the night before the shooting "somebody had to cook for him" (R. 87-91, 92-96).

Private First Class Elijah O. DeBerry testified that he had known and worked with accused for about a year and that he was an "excellent fellow" who had no difficulty with anyone and performed his duty in a satisfactory manner. DeBerry had worked in place of accused the night before "this incident" and had agreed to work for him on that night also. Accused had always been nervous and after the air raids had become worse. When he asked DeBerry to work in his place accused was sitting on his bed crying and said that he was nervous and that "if those air raids and things didn't quit he didn't think he could take it" (R. 96-98).

Private First Class Jimmie L. Lacy, having first been warned of

his rights as to self-incrimination, testified that he had been in the tent of Tec 5 Anderson the night Corporal Davis was shot but had said nothing to accused and the latter made no statement to him. Upon being asked whether accused had started over toward him for any purpose, Lacy replied, "I can't answer that, sir". He admitted that there had been "some words" between him and Anderson when he looked under Anderson's bed for a magazine and that he had gone out through "the other tent". In answer to the question, "Why didn't you go out the way you came in?", he stated, "I can't answer that". He heard a shot fired "that night" and was then in the tent of another soldier looking at some rings (R. 98-102).

After the accused had been informed of his rights he elected to make an unsworn statement which was substantially as follows:

At about 1400 on 30 November 1944 accused went to a cave used as an air raid shelter, to write a letter and get some sleep but found that he was too nervous to write. When he was informed that it was pay day he went to the orderly room and "got paid off", then went to his tent and counted his money. Lacy came in and went to Anderson's bunk, looking for something. When Anderson came in he "got after" Lacy who "spoke concerning a fight". Accused then said, "Lacy, you know you are wrong, you had no business going under anybody's bunk. If anything is missing they will be charging some of us instead of you." The remark offended Lacy who said that it did not concern accused and "kept talking". Accused then told Lacy that "the best thing he could do was just go on out". Lacy said that he was going to get a gun and for accused to "stay there" until he returned, and went out through the other tent. Accused went back to his bed, picked up his rifle and started to leave but met Sergeant Burnett who "grabbed me with the rifle". Accused told Burnett to let him go because Lacy had gone for a gun "and he liable to come back and shoot me before I could get out of the light". After a "tussle" Burnett released accused who "started down by the latrine and come back by the mess hall". It was his intention to go back to the cave as soon as he "got on the outside". "This boy Polean" was coming down the street but it was so dark that accused could not recognize him and asked him "who it was". Accused did not hear him make any reply, looked to see whether he had a gun but could see none, and carrying his own rifle, which he held in one hand, "a little more back", started to go around the figure in front of him. Accused carried the gun "in case he run into me". It "just went off and jumped clean out of my hands, and fell in the street". Accused picked up the gun and Davis said, "I ain't the right one, I am Polean" and accused replied, "No, I wouldn't have shot you for anything". Accused did not intend to fire the gun and it was not his intention to do so "even if Lacy had of had the gun, and tried to shoot" accused. After Davis fell and "kind of turned over" so that accused could see that he was wounded, accused called "some of the boys" and told them to take Davis to the dispensary. Anderson and several others came up and accused gave his rifle to Corporal Lockhart. There was nothing "between" accused and Davis, they had never had an argument, accused had no cause to shoot him and did not intend to do so. In fact, accused did not intend to shoot anyone (R. 102-106).

5. The evidence shows that after dark on the evening of 30 November 1944 accused was in his tent on the company street when Private First Class Jimmie L. Lacy entered, looked under another soldier's bed for a book or magazine and became involved in a somewhat heated argument with the soldier. Accused joined in the argument and eventually ordered Lacy to leave. After Lacy had departed through an adjoining and inter-connected tent, accused took down his M1 rifle from the place where it was hanging over his bed and stated that Lacy had gone to get a gun and would return and kill him. When Tec 4 Henry L. Burnett unsuccessfully tried to restrain accused, the latter said, "Let me loose, turn me loose, I am going to kill him before he kills me". Accused worked the bolt mechanism so as to insert a cartridge into the chamber, went down the front steps of the tent and along the company street about thirty feet, shouted "who are you", and raised up his rifle and fired. Corporal Polean Davis who happened to be walking along the company street toward accused and twenty to twenty five feet away was struck by the bullet which entered his lower abdomen and came out through his right buttock. Davis died the next day from hemorrhage and shock induced by the wound.

Murder is the killing of a human being with malice aforethought and without legal justification or excuse. Malice does not necessarily mean hatred or personal ill will toward the person killed nor an actual intent to take his life, but may mean that preceding or co-existing with the act or omission by which death is caused, the accused entertained an intention to cause the death of, or grievous bodily harm to, any person, whether or not such person is the one actually killed (M.C.M., 1928, par. 118a). It is a reasonable inference from the evidence in the present case that the accused did not intend to kill Corporal Davis but in the darkness of the company street mistook Davis for Lacy. He told Tec 4 Burnett that he intended to kill Lacy, and malice as above defined is further shown by his loading and raising up and firing at the figure in front of him an M1 rifle, a weapon likely to inflict death or grievous bodily harm. In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty of the Charge and Specification.

The defense presented was that the accused unintentionally discharged the rifle and accidentally shot Corporal Davis. The defense was directly supported only by the unsworn statement of accused to that effect. The testimony of Tec 5 Jones and Captain Kurnick furnished corroboration to the extent of indicating that when the gun was discharged it had not been raised to the normal firing position at shoulder height. Jones testified that the flash of the gun was only three feet above the ground, but he was about six paces from Davis and it was so dark that he could not see accused who was twenty to twenty five feet beyond Davis. Manifestly his statement as to the distance of the gun flash above the ground was only a rough approximation. Captain Kurnick testified that the course of the bullet through the body of Corporal Davis was "essentially" horizontal, assuming that he was standing upright. In view of the distance between accused and Davis, the raising of the gun to the level of the shoulder of the accused at the time of firing would not cause any considerable

deviation in the course of the bullet from the horizontal. At any rate, the issue raised by the defense was one of fact as there is substantial evidence in the record that the rifle was intentionally discharged.

6. The Charge Sheet shows that the accused is 33 years and 6 months of age and was inducted 16 June 1943.

7. The court was legally constituted. No errors 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. Confinement in a penitentiary is authorized under the 42nd Article of War by Section 22-2404 of the District of Columbia Code.

Samuel M. Driver, Judge Advocate

J. Lottin, Judge Advocate

Charles H. Sykes, Judge Advocate

(70)

1st Ind.

WD, Branch Office TJAG, with USAFPOA, APO 958 MAR 8 1945
TO: Commanding General, USAFPOA, APO 958.

1. In the case of Technician 5th Grade WILLIE J. DEXTER (34753887), Company B, 1894th Engineer Aviation Battalion, 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, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is POA 160. For convenience of reference please place that number in brackets at the end of the order. (POA 160)

JAMES E. MORRISON
Brigadier General United States Army
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 4, USAFPOA, 8 Mar 1945.)

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

23 March 1945

BOARD OF REVIEW

CM POA 190

UNITED STATES

v.

Technician Fifth Grade CLARENCE
 CHEATHAM (32361015), 477th Amphibian
 Truck Company, Transportation Corps.)

) XXIV CORPS

) Trial by G.C.M., convened at APO
 235, 19 February 1945. Dishonorable
 discharge and confinement for life.
 Penitentiary.

HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician 5th Grade Clarence Cheatham, 477th Amphibian Truck Company, APO 235, did, at APO 235, on or about 0015 23 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal Richard A. Wyche, 477th Amphibian Truck Company, APO 235, a human being by shooting him with a rifle, U. S. Calibre .30 M1 (Carbine).

He pleaded not guilty to and was found guilty of the Specification and Charge. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence ("The sentence is approved and will be duly executed") and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on the night of 23-24 January 1945 several men of the 477th Amphibian Truck Company engaged in a card game in the supply tent, located in the company area, Abuyog, Leyte. The tent (20 by 16 feet) faced north. It was illuminated by an electric light, about 4 feet inside the door. In the northwest corner (to the right of one entering the tent) was a wooden table (8 by 4 feet) placed in a "Catty-cornered" position against the side wall of the tent. The table (Ex. A) was 3 feet high and had a shelf (13 inches high) lengthwise on it. There were also 3 cots in the tent—one located on the west side of the tent, 5 or 6 feet from the front end; the next about 3 feet further back on the same side; and the third at the south end of the tent, 2 or 3 feet from the second cot. (One witness testified that the cots were on the other side of the tent.) Also on the west side of the tent ("in the right half of the tent as you face towards the tent from the North end") were some boxes about 3 feet high and "some other things". Next to the table were an old tent and a box about 3 by 6 feet in size. About a foot and a half south of the table (or about 4 feet from it) was an ammunition chest (Ex. B), which was on another box (or on a keg of nails). The record shows that a diagram was drawn on a blackboard during the trial to demonstrate the arrangement of articles inside the tent, but a copy was not included in the record (R. 7-12, 16, 23-24, 28, 31, 42-43).

That night about 2330 hours Tec 5 Edward R. Hodges, Tec 5 Milton E. Hudson and accused (APO 235) were playing the card game (called "tonk"—similar to rummy) on the table in the supply tent. They had an understanding that if any 2 or 3 men had the same hand they would "split the pot". After they had been playing about 10 minutes "Corporal Wyche" (or "T/5 Wyche") joined in the game. The players were standing about the table or sitting on it. Staff Sergeant Ernest T. Wright, the supply sergeant, had gone to bed and was lying on his cot, the one nearest to the table, reading a magazine. His mosquito bar was lowered. Private Andrew J. Nixon was asleep on his cot, which was next to that of Sergeant Wright (R. 7-8, 11, 18-19, 22, 24-26, 31-32, 37, 42-43, 45).

When Wyche had been in the game 3 or 4 minutes, he and accused had an argument because Wyche did not want to "split the pots" as the other three had agreed. Accused, Hudson and Hodges had "spread it out to one card and when the deck run out" accused and Hodges each "had an ace but Wyche said you couldn't spread and divide a pot with three (3) men and he grabbed his money out". Then they decided to play the game over and this time Wyche "tonked out", which entitled him to double stakes. He "got the money" from Hudson and Hodges but he "didn't ask" accused for his money. They started another game and as they were "plucking cards" Wyche took a pocket knife out of his pocket, opened the 3-inch blade, and told accused to pay him his money. He "didn't point the knife". Both men were standing and Wyche held the knife in his right hand. Accused asked "What money" and Wyche replied "You know I tonked out" and "You didn't pay for that game I just now won". Thereupon accused stated "Yeah, I am going to pay you", gave the money (2 pesos) to Wyche, "threw down his cards and quit". Accused "said he was tired and he was quitting, said go

ahead and play". Wyche closed his knife and put it on the table. Accused "walked back" toward the south end of the tent. The three men who remained in the game continued "on playing the hand out" and had "plucked" 3 or 4 cards (had played 2 or 3 minutes) when Hodges heard a "rifle click" (R. 13-14, 16-17, 19-21, 26, 37-38, 40-41).

When Hodges heard the "click" he "looked around" and saw accused standing near his cot in the south end of the tent, putting a clip into his carbine. Accused said "Look out Ed"; Hodges "hollered" and said "Cheatham don't shoot"; and accused said "I am tired of people taking advantage of me". Thereupon accused started shooting "Towards and down at the table", and fired 6 or 8 rounds from the "Right side, on the hip". Hodges "jumped behind the first bed", and when the ammunition chest, about a foot and a half from the table, started to smoke and flare up, Hodges left the tent. Sergeant Wright, who was reading a magazine, heard "some" argument between accused and Wyche, noted that the "tone of their voices did not seem as if it would lead to anything further", but did not look at them. When he heard accused say "Look out Hodges", he sat up in his bed, facing south toward accused, and saw accused firing the carbine, which "was pointed as if it would go over the table". When accused stopped firing Wright asked him "what had he done", "went around" and reached for the rifle, and accused handed it to him. When Wright "got the rifle" he looked back and could see Wyche's head and shoulders under the corner of the table. Wyche was on his back and right side. When Wright saw the ammunition chest smoking, because it had been fired into, he opened it and "got the smoke stopped". When asked whether any first aid was rendered to Wyche, Sergeant Wright testified that an officer "with some man took him out and put him" on the table. An ambulance arrived about 5 minutes later. Wyche "might have been" on the ground about 5 minutes before he was placed on the table (R. 14-16, 21-23, 26-30, 33, 36-37, 48-49).

When Hudson, who was playing cards, heard accused tell Hodges to "look out", he "turned around" and saw accused with the carbine in his hand. Hudson then ran "pretty fast" past accused and out of the back of the tent, and was outside when the shooting occurred. After the shooting Hudson entered the front door of the tent, saw "someones feet" under the table, "came on back" and told "some sergeant, somebody was shot". Nixon, who had been asleep, was awakened by the shooting. He sat up in bed and saw accused nearby, facing north. Nixon began putting on his clothes and, as he was going out of the tent, he heard Sergeant Wright ask accused "a question", to which accused replied "He drawed a knife on me" (R. 38-39, 41-44).

On the next day Sergeant Wright made an examination of articles in the tent and found several bullet holes in two file boxes on the table, one hole in the table, two holes in one end of the ammunition chest and one hole in the other end. Inside the chest he found two "exploded" .30 caliber shells (R. 29, 34-36).

On the night of 23-24 January 1945, Captain Harry Gibel (APO 235), 394th Collecting Company, 71st Medical Battalion, was medical officer of the day. The collecting company was "located" in a school house at Abuyog,

Leyte. He retired at 2200 hours, but shortly after midnight "a call came over from the DUKW Company that someone had been shot and requested we dispatch the ambulance. * * * The distance was about one (1) city block. The ambulance came back about fifteen (15) until one (1) 23 January". Captain Gibel examined "the patient" on arrival and found him fully clothed, with fresh blood on the front right side of his shirt. "There was a bullet wound, the point of entrance on the front anterior section of the right clavicle, located approximately two (2) inches below the clavicle. There was no other entrance would (sic) and no exit wound. The man was dead on examination." Captain Gibel did not probe the wound and did not conduct a post mortem, but concluded "solely on visual basis" that the bullet "drifted from right to left and downward", punctured the lung "entering from the aorta or some large muscle near that", and entered the spinal column. The testimony with respect to identification of the body was as follows:

"Q. What steps if any did you take to secure the identification of this person?

"A. A number of boys from the DUKW company assisted in bringing the body in and I asked a number of them for filling the information on the EMT record. And I searched the body and found a wallet in the pocket which had the same name as the boys stated.

"Q. What was that name?

"A. I believe it was spelled 'W-Y-C-H-E'. That is the name in the wallet and that is the name given me." (R. 5-7).

On cross-examination of witnesses who belonged to the 477th Amphibian Truck Company it was brought out that in previous card games in which accused participated there had been no arguments. During approximately a year that accused had been his assistant, Sergeant Wright, the supply sergeant, had had no difficulty with accused (R. 17, 31-32, 39, 44-45).

4. Accused testified that he was born 6 January 1908, is not married, and lived with his mother, an invalid brother, and a sister who has been crippled since the age of 12 years. He entered the Army in September 1942, was sent to Hawaii in May 1943, and joined his present organization in January 1944. He left the Hawaiian Islands in May 1944, went to Saipan in June, and arrived at Leyte in December. The service record of accused shows (Def. Ex. 1) character—good, and efficiency—satisfactory (R. 46-48, 50).

5. The evidence shows that about 2330 hours on the night of 23 January 1945 accused and two other men of the 477th Amphibian Truck Company were playing a card game called "tonk" in the supply tent located in the company area, Abuyog, Leyte. After about 10 minutes "Corporal Wyche" joined the game. The players were standing about a table in a corner of the tent. Two other men were in their cots in the tent, one asleep and the other reading.

About 3 or 4 minutes after Wyche entered the game he objected to accused and another "splitting a pot" and he "grabbed his money out". He and accused had an argument. When the game proceeded Wyche "tonked out", which entitled him to double stakes. The other two paid him but accused did not. Wyche opened his pocket knife, which had a 3-inch blade, held it in his right hand, and demanded his money (2 pesos). Accused then paid Wyche the money, "threw down his cards and quit", said he was tired, told the others to "go ahead and play", and went to the back part of the tent where his cot was. Wyche closed his knife and placed it on the table.

When the game had continued for 2 or 3 minutes accused loaded his carbine, said "I am tired of people taking advantage of me", and fired 6 or 8 times from the hip in the direction of the table. When the shooting was over Wyche was on his back and right side under the table. In possibly 5 minutes Wyche was placed on the table by an officer and "some man", and about 5 minutes later an ambulance arrived.

Shortly after midnight Captain Harry Gibel, a medical officer on duty at the station of the 394th Collecting Company, 71st Medical Battalion, "located" in a school house at Abuyog, received a call from "the DUKW Company that someone had been shot" and an ambulance was requested. When the ambulance returned Captain Gibel examined "the patient" and found that he was dead, had fresh blood on the right front of his shirt, and had a bullet wound on the front of his body, about 2 inches below the right clavicle. There was no exit wound. Captain Gibel did not probe the wound but concluded from appearances that the bullet went from right to left and downward, punctured the lung, and entered the spinal column. The only identification of the body (other than what unidentified persons told the medical officer, which was hearsay and incompetent) was that Captain Gibel searched the body and found in a pocket a wallet with the name "W-Y-C-H-E" in it.

6. a. Although the prosecution presented only a chain of circumstantial evidence to show that Wyche died and that his death resulted from a gunshot wound inflicted by accused, when apparently clear and direct proof could have been used, the Board of Review has concluded that the evidence is sufficient to sustain the inference drawn by the court. Accused fired 6 or 8 rounds toward Wyche with his carbine at a distance of about 15 feet and immediately afterward Wyche was lying on the ground under the table. There is no evidence that he moved during approximately 5 minutes that he remained there. He was then picked up and placed on the table where he remained about 5 minutes until an ambulance came. These facts sustain an inference that Wyche was struck by at least one of the bullets. The shooting occurred about midnight. Shortly after that time a medical officer on duty in the same town received a request from an amphibian truck (DUKW) company, about a block away from his station, to send an ambulance for someone who had been shot. When the ambulance returned, the medical officer found the "patient" dead, with a bullet wound in his chest and fresh blood on his shirt. Apparently the bullet had punctured the lung and lodged in the spinal column. A wallet in a pocket of the dead man's clothing contained the name Wyche. These facts afford a sufficient basis for the court's inference that the dead man was the same person that accused shot and that he

died as a result of the wound. In homicide cases death and identity of the deceased may be proved by circumstantial evidence (Wharton Cr. Ev., 11th Ed., Secs. 273, 871, 873; Wigmore Ev., 3rd Ed., Sec. 2081).

b. The proof shows that "Corporal Wyche" was killed, without identifying him as Corporal Richard A. Wyche, as alleged. The Board is of the opinion that this failure of proof did not prejudice the rights of accused.

c. Accused shot Wyche about 3 minutes after Wyche had drawn a pocket knife with a 3-inch blade and caused accused to pay him 2 pesos which accused had lost in the card game. The two men had engaged in an argument, apparently not particularly violent, a few minutes prior to the knife incident. Obviously accused acted in the heat of sudden passion since he obtained his carbine and fired at deceased almost immediately after Wyche made him pay his gambling loss. Therefore, the question arises whether there was sufficient provocation to reduce the offense to manslaughter (MCM 1928, Par. 149 a).

Insulting or abusive words or gestures are not adequate provocation (MCM 1928, Par. 149 a). An argument in a gambling game, followed by threatening remarks by deceased to the group, and a "clinch" between accused and deceased, during which deceased had one hand on the collar of accused and pushed him, did not constitute adequate provocation (CM 238138, 24 BR 173). Nor was it merely manslaughter where accused killed deceased when the latter had just desisted from physically abusing the woman on whom accused was calling (CM 239710, 25 BR 247). Where deceased followed accused to his room, "playing with" him, shoving him around, tickling him and boxing and sparring with him, after accused made several requests that he stop, the Board of Review stated that although the court had found accused guilty of manslaughter only, findings of guilty of murder would have been legally justified, as the above facts did not constitute sufficient provocation (CM 222737, 13 BR 313).

In the present case, although the deceased had drawn a knife, he had made no attempt to cut accused but merely held the knife in his hand. Accused had not paid to deceased money that the latter had won. No threats were made by deceased (other than what may have been implied by the presence of the knife) and he closed the knife after payment was made. The Board is of the opinion that adequate provocation was not shown. Accordingly, the homicide was murder.

Murder is the unlawful killing of a human being with malice aforethought. Unlawful means without legal justification or excuse. 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 (MCM 1928, Par. 148 a). The evidence sustains the findings of guilty.

7. The charge sheet shows that accused was 37 years of age at the time of the offense and that he was inducted on 28 August 1942.

8. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the offense of murder.

Samuel M. Drives, Judge Advocate

J. J. Lottin, Judge Advocate

Charles S. Sykes, Judge Advocate

Engineer Combat Battalion did, at APO 235, on or about 1 February 1945, strike Staff Sergeant Roy P. Miller, Company A, 170th Engineer Combat Battalion, a noncommissioned officer who was then in the execution of his office, by striking him in the face with an open fist.

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

Specification 1: In that Private John Roberts, Company A, 170th Engineer Combat Battalion did, at APO 235, on or about 1 February 1945, with intent to do him bodily harm commit an assault upon First Lieutenant Burton S. Angell, Company A, 170th Engineer Combat Battalion, by attempting to strike him with a dangerous instrument, to wit a trench knife.

Specification 2: In that Private John Roberts, Company A, 170th Engineer Combat Battalion did, at APO 235, on or about 1 February 1945, with intent to do him bodily harm commit an assault upon Staff Sergeant Roy P. Miller, Company A, 170th Engineer Combat Battalion, by attempting to strike him with a dangerous instrument, to wit a trench knife.

ADDITIONAL CHARGE III: (Disapproved by Reviewing Authority.)

Specification: (Disapproved by Reviewing Authority.)

He pleaded not guilty to all Charges and Specifications and was found guilty of all Charges and Specifications except Charge I and its Specifications, of which he was found not guilty. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 18 years. The reviewing authority disapproved the findings of guilty of Charge III and its Specification, and of Additional Charge III and its Specification, approved only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for 12 years, and designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution, insofar as pertinent to the offenses to be discussed hereinafter, shows that on 1 February 1945 the accused was on "KP in the kitchen" of Company A, 170th Engineer Combat Battalion, APO 235. He had been "drinking" during the morning. Staff Sergeant Roy P. Miller, Mess Sergeant of the company, had the "first sergeant" relieve the accused at about 1230 from his duties as "KP". About 1245, Sergeant Miller reported to his company commander, Captain Howard W. Coldren, in the "Officers' Tent" located about "forty steps due west" of the company mess hall. When the sergeant entered the tent, the accused and an officer and non-commissioned officer were present, as well as Captain Coldren. In response to his company commander's question,

Sergeant Miller informed him that he had asked for the "relief" of the accused. One "word lead to another" and the accused "slapped" Sergeant Miller in the face with his "open hand" and called him a "Nigger". Sergeant Miller in turn called the accused a "son-of-a-bitch". The accused "got pretty mad", started after the sergeant and said that he "would get him that night". At Captain Coldren's order, the sergeant left the tent and returned to the kitchen. About 1300, the accused entered the kitchen from the "south door" with a knife in his hand and "was looking at * * * and coming toward" Sergeant Miller who went out the "north door" and ran down to the "Officers' Tent". The accused was "after" him. Sergeant Miller testified that when he reached the tent he threw a chair at accused who was "right behind" him, and then went back to the kitchen. The accused followed. Sergeant Miller then "came back past the Officers' Tent" to the "Battalion" where "one of the boys in the company stopped the accused" (R. 8-15; 16).

First Lieutenant Burton S. Angell, a platoon leader of Company A, who was in the "Officers' Tent" when Sergeant Miller and the accused entered the tent on the second occasion, testified that the accused was about "five seconds" behind Sergeant Miller and had a knife, that the accused "chased the mess sergeant around the tent a few more times and made several thrusts" at him, and that accused ran after the sergeant when the latter left the tent. Then Lieutenant Angell, who "saw that it was a dangerous position", obtained his carbine, loaded it and stood "outside the CP" which was about six or eight feet from the "Officers' Tent". About five minutes later, he saw the accused "twirling" a knife at another enlisted man, heard him saying, "You are a good friend of mine, Jim, but you better be good or I will kill you", and saw him following the enlisted man toward his tent. The accused then "came by" the "CP tent" and saw Lieutenant Angell standing there with a carbine pointed "toward the ground". He "made a grab for the muzzle of the carbine" and said to Lieutenant Angell "I am not afraid of you". Lieutenant Angell stepped back and the accused "still kept coming toward him with the knife" which he "thrust" * * * to within four or five inches of his stomach". Thereupon, Lieutenant Angell fired two shots into the ground at accused's feet. Accused took two steps forward and Lieutenant Angell retreated a similar number of steps and fired two more shots toward accused's feet, one of which penetrated accused's shoe and burned or grazed his foot without breaking the skin. Accused staggered and "fell flat on his face" and the knife which was a "model 1918 knife with brass knuckles" dropped from his hand. Two minutes later, accused attempted to get up and tried to grasp the knife, but was restrained and knocked out. He was kept in the company area and at various times between three and six o'clock he "made vigorous attempts to get off the cot". At 1800 Lieutenant Angell took accused, who was tied up, to Base K Stockade where the latter remarked, "I'll bet you were scared of me when I thrust that knife at you this afternoon, weren't you?" (R. 15-20).

Both Lieutenant Angell and Sergeant Miller testified that the accused was drunk when he committed the alleged assaults. As to the degree of drunkenness, Lieutenant Angell testified that accused "couldn't walk straight" (R. 14, 18).

A certified extract copy of the morning report of Company A, 170th Engineer Combat Battalion, evidencing a change in the status of accused on 4 December 1944 from duty to AWOL and on the next day from AWOL to arrest, was admitted in evidence, without objection, as Exhibit A (R. 37).

4. For the defense, no pertinent evidence was offered. The accused limited his testimony to one of the alleged offenses of which he was found not guilty (R. 40-42).

5. The evidence shows that at about 1245 on 1 February 1945 at APO 235 the accused "slapped" Sergeant Roy P. Miller, mess sergeant of the company of the accused, in the face with his hand, when the Sergeant informed the company commander, in response to a question of the latter, that the accused had, a short time before, been relieved of his duty as "KP". The incident occurred in the "Officers' Tent" in the presence of the company commander and two others. Upon order of the company commander, Sergeant Miller went to the kitchen, which was about "forty steps" from the "Officers' Tent". Within a period of fifteen minutes, the accused entered "the south door" of the kitchen with a knife in his hand and "was looking at * * * and coming toward" Sergeant Miller, who left the kitchen through the "north door" and ran down to the "Officers' Tent", followed by the accused. The only occupant of the "Officers' Tent" at this time was First Lieutenant Burton S. Angell. Sergeant Miller entered the tent, followed at an interval of "five seconds" by the accused, who had a knife and chased the sergeant around the tent and made several "thrusts" at him. The chase continued back to the kitchen and then by the "Officers' Tent" to "Battalion" where the accused was "stopped" by one "of the boys in the company". A few minutes later, the accused approached Lieutenant Angell, who was in front of the "Officers' Tent" with a carbine pointed at the ground. He "made a grab for the muzzle of the carbine" and informed Lieutenant Angell that he was "not afraid of" him. The officer stepped back and the accused continued approaching him with a knife which he "thrust * * * to within four or five inches of his stomach". Thereupon Lieutenant Angell fired two shots into the ground towards accused's feet. The accused "took two steps forward", and the officer "took two steps back and fired two more shots in the ground toward his feet", one of which shots grazed the accused's foot without breaking the skin. The accused staggered and fell and dropped the knife which was described as a "model 1918 knife with brass knuckles".

It thus clearly appears that the accused assaulted Sergeant Miller, who was in the execution of his office, by striking him in the face with his hand as alleged in the Specification of Additional Charge I, and that a short time later he assaulted with a knife Sergeant Miller and Lieutenant Angell. The two latter assaults are alleged to have been made "with intent to do * * * bodily harm" by attempting to strike the victims "with a dangerous instrument, to wit, a trench knife" (Specifications 1 and 2, Additional Charge II). Such an intent is to be inferred from the surrounding circumstances and from the nature of the weapon used (CM 190270,

Gibson; CM POA 068, Ihne et al). In the present case, the intent to do bodily harm to Sergeant Miller is properly drawn from his being persistently pursued by the accused over an extended area during which time a knife was "thrust [by accused] at him several times" in the confines of a tent, and from the discontinuance of such pursuit only after the accused had been stopped by another soldier (CM 190270, Gibson; CM POA 139, Covington). A similar intent to harm Lieutenant Angell is inferable from the accused's advancing on him and reaching for the carbine, informing him of his lack of fear, thrusting his knife to within a few inches of the officer's stomach and continuing to advance on him until one of several shots fired by the latter into the ground had grazed a foot of the accused (id.). The knife with which the assaults were made was not introduced in evidence. It was, however, described as a "model 1918 knife with brass knuckles", a standard Army weapon (see ASF Catalogue, ORD 9 SNL B-37), with a blade approximately 6 3/4 inches in length, of which the court could take judicial notice (see CM 122193, Dig. Op. JAG, 1912-40, sec. 451 (27); CM 223134, Dudley, 13 BR 354). Such a weapon, coupled with the manner in which it was used, suffices clearly to justify an inference that it was a dangerous instrument. Accused was stated to have been drunk and, according to one witness, "couldn't walk straight" at the time when he committed the alleged assaults. Drunkenness is not an excuse for crime committed while in that condition, but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense (M.C.M., 1928, par. 126a). The attendant circumstances including his clear recognition of events several hours after the occurrence indicate that the accused was capable of having the intent to inflict bodily harm on the victims of his assaults (see CM 241176, Petty, 26 BR 213; CM 238771, Linebuger, 24 BR 345).

The evidence also clearly shows that the accused was absent without leave at the place and for the time alleged in the Specification of Charge II.

6. The Charge Sheets show that accused was 26 years of age when the charges were drawn, and that he enlisted on 1 October 1938.

7. There is a discrepancy concerning the serial number of accused in the record of trial and accompanying papers. It appears as 6291642 in the original charge sheet and the action of the reviewing authority while the additional charge sheet and the extract copy of the morning report (Exhibit A) set it forth as 6291648.

8. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of assault with a dangerous weapon, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-502, District of Columbia Code. However, since the accused is over 25 years of age and is sentenced to confinement for more than 10 years, a penitentiary, rather than a reformatory, should be designated as the place of confinement (W.D. Cir. No. 25, 22 Jan. 1945).

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9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty not disapproved by the reviewing authority, and legally sufficient to support the sentence.

Samuel M. Driver Judge Advocate

J. Lottinor , Judge Advocate

William S. Sykes Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

15 March 1945.

BOARD OF REVIEW

POA 200

UNITED STATES)

XXIV CORPS

v.)

Private WINSTON G. JONES (20265994),)
 477th Amphibian Truck Company.)

) Trial by G.C.M., convened at APO
 235, 22 February 1945. Dishonor-
 able discharge and confinement
 for fifteen (15) years. Disciplin-
 ary Barracks.

HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charges and Specifications:

CHARGE I: (Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Private Winston G. Jones, 477th Amphibian Truck Company, APO 235, having received a lawful command from 1st Lt. William D. Bell, his superior officer, to remain in the company orderly room until the return of 1st Lt. Jack S. Wittwer, did at APO 235, on or about 1245 2 February 1945, willfully disobey the same.

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

Specification: In that Private Winston G. Jones, 477th Amphibian Truck Company, APO 235, did, at APO 235, on or about 1245 2 February 1945, behave himself with disrespect toward 1st Lt. Malcolm Z. Brown, his superior officer, by saying to him in a threatening tone of voice, "I will and can whip anyone in this office and that includes you," or words to that effect.

CHARGE IV: (Motion for finding of not guilty granted.)

Specification: (Motion for finding of not guilty granted.)

He pleaded not guilty to all Charges and Specifications and was found guilty of Charges II and III and the Specifications thereunder and not guilty of Charges I and IV and the Specifications thereunder. Evidence of two previous convictions, one by summary court-martial for absence without leave and being drunk and disorderly in violation of the 61st and 96th Articles of War, and the other by special court-martial for "wilful disobedience of a lawful command" in violation of the 64th Article of War, was introduced. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50¹/₂.

3. The evidence for the prosecution in pertinent part is as follows:

At about 1215 on 2 February 1945 First Lieutenant William D. Bell, 477th Amphibian Truck Company, was in the mess tent eating lunch when he observed accused, a member of the same company, in a mess line about twenty feet away talking in a loud and boisterous voice and "making some kind of signs" to the mess personnel. Lieutenant Bell sent accused to his tent and a short time later took him to the company orderly room. Lieutenant Bell then placed a chair in one corner of the room and said to accused, "Have a seat and stay in the orderly room until Lieutenant Wittwer [the company commander] comes back". Accused replied, "I am not going to stay anywhere. I am going to my tent. If you want me I will be in my tent". Lieutenant Bell told the first sergeant, who was present, to see that accused stayed in the orderly room. Accused remarked, "You better go get your gun because I am going to my tent" and immediately left the orderly room. Lieutenant Bell then sent for "M.P.'s to come and take" accused. The first sergeant, Robert T. Whiteside, who testified concerning the foregoing incidents in the orderly room, stated that it was "Lt. Brown" who told accused to "have a seat and stay there until Lt. Wittwer came" (R. 6-9, 12-13).

At about 1255 accused was brought to the orderly room or tent by the "M.P.'s" and they were standing near the entrance when First Lieutenant Malcolm Z. Brown, then the company executive officer, came in, talked to the military policemen and directed them to take accused away. The latter stated that he could "whip" anybody in the tent and repeated the statement while "looking right at" Lieutenant Brown who asked "are you talking to me?". Accused answered, "Yes, that goes for you, too." At the direction of Lieutenant Brown the "M.P.'s" then took accused away (R. 13-15).

4. The defense offered no evidence pertinent to the Charges and Specifications under consideration. The accused, after being informed of his rights as a witness, testified concerning only Charge I and the Specification thereunder of which he was found not guilty (R. 18-19).

5. a. (Spec., Chg. II) The evidence shows that when First Lieutenant William D. Bell took accused to the orderly room and ordered him to "have a seat" and stay in the room until the company commander returned, accused announced that he would not do so, stated that he was going to his tent and immediately left the room. His deliberate and emphatic refusal to obey the direct and simple order showed an intentional defiance of authority and constituted a violation of the 64th Article of War.

b. (Spec., Chg. III) After the military police had been summoned and had taken accused back to the orderly room or tent he stated that he could "whip" anybody in the tent and repeated the statement, at the same time looking directly at Lieutenant Malcolm Z. Brown, the company executive officer. When the latter asked, "Are you talking to me?" accused replied, "Yes, that goes for you, too". This insolent and threatening language directed to the superior officer of accused clearly was disrespectful and in violation of the 63rd Article of War.

6. A notation on the charge sheet shows that a copy was served upon the accused on 21 February 1945. The trial was held on the following day. The charges were sworn to on 4 February and the investigating officer's report dated 17 February recites that accused had been informed of the nature of the charges alleged against him. At the outset of the trial accused stated that he desired to be defended by the regularly appointed defense counsel, Major Garth Stevens, and assistant defense counsel, Captain Robert M. Armstrong, both of whom were present. Neither the accused nor his counsel requested a postponement or indicated in any way that additional time to prepare a defense was desired, and at the time of the arraignment of accused his counsel stated that they had no special pleas or motions to present (R. 6). The case did not involve any difficult or complex legal or factual issues. The evidence concerning the Charges and Specifications of which accused was found guilty consisted of the direct testimony of eye-witnesses, and was not disputed. The proof of the guilt of accused is compellingly convincing.

Article of War 70 provides that "In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges against him." The provision does not mean that in time of war an accused may be deprived of his right to prepare his defense but he may be tried as soon after the service of charges as he has had a reasonable time to advise with counsel and prepare his defense. What constitutes a reasonable time depends upon the facts and circumstances of each particular case (CM 236323, McLain, 22 B.R. 379; CM 245664, Schuman, 29 B.R. 225, 3 Bull. JAG 95).

In the opinion of the Board of Review the holding of the trial in the present case such a short time after the service of the charges upon accused did not under the circumstances injuriously affect his substantial rights. (See CM 240753 Shapiro, 26 B.R. 107, 112).

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7. The charge sheet shows that accused was 23 years of age when the charges were drawn and that he was inducted on 13 January 1941.

8. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Samuel M. Driver, Judge Advocate

J. J. Lotterhos, Judge Advocate

Charles S. Sykes, Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

14 April 1945

BOARD OF REVIEW

CM POA 206

UNITED STATES	)	96TH INFANTRY DIVISION
)	
v.	)	Trial by G.C.M., convened at APO
	)	96, 9 February 1945. Dishonorable
Private First Class ROY J. CLARK	)	discharge and confinement for life,
(36384485), Company E, 383d In-	)	Penitentiary.
fantry.)	

HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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 Roy J. Clark, Company E, 383rd Infantry, did, at or near APO 96, c/o Postmaster, San Francisco, California, while his unit was engaged in combat with Japanese forces, misbehave himself before the enemy by absenting himself without proper leave from his organization from about 20 October 1944 to 14 January 1945.

He pleaded not guilty to and was found guilty of the Charge and Specification and was sentenced to be shot to death with musketry. The reviewing authority approved the sentence but recommended that it be commuted to dishonorable discharge, total forfeitures, and imprisonment for life and forwarded the record of trial for action under the 48th Article of War. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, and designated the United States Penitentiary, McNeil Island, Washington,

as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$ the order directing the execution of the sentence was withheld.

3. The evidence for the prosecution:

Early in the morning of 20 October 1944, accused, a rifleman of the second squad, first platoon, Company E, 383rd Infantry, with other members of his squad, was aboard an "L.S.T." lying about two or three thousand yards off shore in the Gulf of Leyte. The mission of the company was to "hit the beach and engage the enemy" as a part of the first assault wave. The squad leader, Staff Sergeant William G. Cox, called the men together on the top deck and gave them a "pep talk". Accused was present. Japanese planes were flying over, "they were firing at them", and destroyers and "L.C.T.'s" were bombarding the coast where the landing was to be made. At 0830 accused and the other men of his squad went down to the "tank deck" where they entered an "L.V.T.". After an interval of an hour the vehicle moved out into the gulf, "rendezvoused" for about ten minutes, and in formation with other craft, moved toward the beach. The "L.V.T.s" were releasing their rockets and the "battle wagons" were still firing their guns against the coast. It was then almost H hour which was 1000 (R. 5-7).

When the "L.V.T." carrying the squad of accused reached the beach it was caught on a tank trap and the men dismounted, deployed and started moving inland. The platoon guide, Staff Sergeant Kenneth W. Davis, saw accused get out of the "L.V.T." at the beach. After the squad had advanced about 50 yards it was under mortar or artillery fire coming from inland. There were "tree bursts right on the beach". At about 1100, after the advance had been continued to a point 500 yards from the beach, the squad halted, deployed and waited for from thirty minutes to an hour to make contact with the rest of the company. Sergeant Cox looked for accused but could not find him. Staff Sergeant Kenneth W. Davis, platoon guide of the platoon of accused, also unsuccessfully searched the area for accused. The squad made its next stop at approximately 1300 at a point a mile to a mile and a half inland. Sergeant Cox again looked around for accused but was unable to find him. The company of accused was engaged in operations against the Japanese forces from 20 October 1944 until about 5 January 1945. After 20 October Sergeant Davis next saw accused on 14 January and Sergeant Cox did not see him again until the morning of the trial (R. 7-9, 13-14).

About 2000 on 14 January 1945 accused was brought to the company orderly room by "Lieutenant Green", who then left. First Sergeant Charles R. Briggs, who had been the first sergeant of the company of accused since 24 November 1944, then questioned accused as shown by the following quotation from Briggs' testimony:

"A. I ask him if he had any orders in his possession assigning him back to the company and he said he did not. I ask him why he didn't, because I was under

the impression that he had been in the hospital. When he told me that he didn't have any orders, I asked him where he had been when he was in the hospital all the time and he told me he hadn't been in the hospital. So, I asked him where he had been and he told me he had been on the beach. I asked him again if he was sure he had not been in the hospital and he repeated the same fact to (sic.) again that he hadn't been and said he had been on the beach, and I asked him what he had been doing on the beach and he said he had just been living down there by himself. I asked him if he had made any effort to contact or get back to the company and he told me he had not. I asked him the reason why he hadn't come back and he said he was scared and that he didn't want to come back to the company.

- "Q. Did you have any conversation with him as to whether or not there were other military installations on the beach?
- "A. I told him that it looked to me like that a man on the beach, that as many sailors, soldiers, marines and civilians working, that he would certainly have reported himself to somebody during that length of time.
- "Q. Did he make any response to that statement?
- "A. Yes, sir, he said that he didn't care to report it to anybody because he was afraid they would bring him back to the organization" (R. 11).

At the time the foregoing conversation took place accused had not been placed in arrest and had not been charged with any offense. Sergeant Briggs did not threaten accused or offer him any reward. After Sergeant Briggs left the orderly room, Sergeant Davis asked accused why he did not try to find "the outfit" and accused stated that he "didn't want to find the outfit" and that he "was afraid of combat" (R. 10-12, 14-15).

The prosecution offered in evidence a stipulation signed by the trial judge advocate, defense counsel and the accused to the effect that accused had not been present for duty with his organization from 20 October 1944 until 14 January 1945 and that he had not received permission to be absent for any part of that period. The stipulation was received in evidence (Ex. 1) and read to the court. After the prosecution had rested the court closed and upon reopening the president stated that in the opinion of the court the stipulation was inconsistent with the plea of not guilty "and the court therefore rejects the stipulation" (R. 15-16).

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4. The defense offered no evidence. Accused, whose counsel stated that his rights had been explained to him, elected to remain silent (R. 16).

5. Sergeant Cox, recalled as a witness for the court, testified that "to my authority" accused did not have permission to be absent from his squad at any time between 20 October 1944 and 14 January 1945. When he was asked whether he would have known it if "he [accused] had the company commander's permission" Sergeant Cox replied "I think I should have and would have" (R. 16).

6. The Specification alleges that the accused, while his unit was engaged in combat with Japanese forces, misbehaved himself before the enemy by absenting himself without proper leave from his organization from about 20 October 1944 until 14 January 1945. The offense of misbehavior before the enemy may consist in the refusal or failure of a soldier to advance with his command when ordered forward to meet the enemy, or in his going to the rear or leaving the command without permission when engaged with the enemy or expecting to be engaged, or when under fire. It is not necessary that the enemy be in sight in order for the command to be before the enemy. It is sufficient if the command is in the neighborhood of the enemy, although separated from him by a considerable distance, and the service upon which the accused is engaged, or which he is properly required to perform, is one directed against the enemy, or resorted to in view of the enemy's movements (Winthrop's Military Law and Precedents, Reprint, 623, 624).

It is established by the evidence that although the accused landed on the beach with his company in the Leyte Island operation on the morning of 20 October 1944, he failed to advance with the company when it moved inland under fire. He disappeared and was not again seen in the company until 14 January 1945. During practically all of the intervening period the company had been engaged in combat operations against the Japanese. The sergeant who was the leader of the squad accused testified that, to his "authority", accused did not have permission to be absent and that if the company commander had given such permission he (the sergeant) thought he would have known it. According to his statements to the first sergeant, accused remained on the beach and lived alone because he was "scared" and did not wish to be sent to his organization. In the opinion of the Board of Review the evidence is sufficient to support the conviction of accused of the offense of misbehavior before the enemy as alleged, in violation of the 75th Article of War.

7. The Board of Review has considered the question whether the statements made by accused to the first sergeant and to another sergeant in the orderly room were properly admitted in evidence. The statements will be regarded as a confession, inasmuch as they constitute, in practical effect, an acknowledgment of guilt on the part of accused. A thorough

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search of available Board of Review decisions has disclosed no case directly in point. Therefore, in the determination of the question presented resort necessarily must be had to the basic rules of evidence governing the admissibility of confessions. The Manual for Courts-Martial in its discussion of such rules states:

"It must appear that the confession was voluntary on the part of the accused. * * * No hard and fast rules for determining whether or not a confession was voluntary are here prescribed. The matter depends largely on the special circumstances of each case. The following general principles are, however, applicable.

"A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made.

* * *

"The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior.

"Facts indicating that a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is, subject to the following observations, evidence that the confession was involuntary. Much depends on the nature of the benefit or of the punishment or injury, on the words used, and on the personality of the accused, and on the relations of the parties involved.

* * *

"Evidence that the accused stated that he made a confession freely without hope of reward or fear of punishment, etc., or evidence that the accused was warned just before he made the confession that his confession might be used against him or that he need not answer any questions that might tend to incriminate him is evidence, but not conclusive evidence, that the confession was voluntary." (Par 114a, MCM, 1928, p 116).

From the foregoing quoted excerpts it is clear that the Manual makes the voluntary character of a confession the fundamental and ultimate

test of its admissibility. If it is voluntary it will be admitted and if it is not voluntary it will be excluded. The Manual does not state that a confession made by a soldier to a military superior necessarily is inadmissible, but requires only that in such a case further inquiry be made. Whether or not the confession is to be regarded as voluntary will depend upon the special circumstances developed by the inquiry. The fact that the accused was warned as to his rights is evidence, but not conclusive evidence and certainly not the only competent evidence which could be adduced to show the voluntary character of the confession.

The 1928 Manual does not specifically define the term "voluntary confession", but the 1921 Manual (Sec. 225b, p. 187) quotes the following definition from Winthrop's Military Law and Precedents (1920 Reprint, p. 328):

"A confession is, in a legal sense, 'voluntary' when it is not induced or materially influenced by hope of release or other benefit or fear of punishment or injury induced or influenced by words or acts, such as promises, assurances, threats, harsh treatment, or the like, on the part of an official or other person competent to effectuate what is promised, threatened, etc., or at least believed to be thus competent by the party confessing. And the reason of the rule is that where the confession is not thus voluntary there is always ground to doubt whether it be true" (Underscoring supplied).

The foregoing definition is substantially the same as the one adopted by civilian courts (2 Wharton's Criminal Evidence, Sec. 592, p. 980). Such courts also recognize the same basic reason for the rule excluding involuntary confessions, namely that they are testimonially unreliable (Ibid. Sec. 603, pp. 1006-1007).

In one instance a Board of Review has, in the following language, expressed dissatisfaction with this basic reason for the rule on the ground that it is unrealistic and of doubtful utility in many cases:

"Here again the Board finds a rule of evidence excluding involuntary confessions, on the theory that, if involuntary, the confession is likely to be false, i.e., the statement of an innocent man falsely accusing himself. The rule is of undoubted utility in preventing the use of confessions obtained by torture or so-called third degree methods, but of these there is no suggestion in the present case. As applied in other cases, the rule is of doubtful utility, as the Board considers the likelihood of an innocent soldier falsely accusing himself, except as a result of torture or other very strong pressure, so remote as to be negligible. The rule is, of

course, too well established for the Board to overthrow, and it makes no attempt to do so; but the Board is unwilling to extend the rule in doubtful cases further than the precedents require" (CM 210693, Alexander 9 BR 331, 341) (Underscoring supplied).

The foregoing language was quoted with approval in a latter case (CM 211989 Shelton, 10 BR 153, 159).

In one case an additional reason has been given for the rule excluding involuntary confessions, as follows:

"The above authority clearly reveals that it is not only the purpose of military justice to safeguard the soldier and the court from the consequences of a false confession, but that it is also its purpose to protect the soldier from the consequences of his own ignorance, and to assure to him that trust and confidence reposed in the statements or promises of superior officers shall be well placed.

"In this particular, the present question must be determined in the light of the precedents and interpretations of military law alone, for the problems and the purposes of military justice has no exact counterpart in other legal systems. It should also be observed that one of the major purposes of military justice is the promotion of military discipline. Any act or practice, therefore, such as the procuring of a confession by trick, promise, or false statement which would tend to destroy the confidence of the soldier in his superior officer would be detrimental to the basic purpose which military justice is designed to serve" (CM 230377 Wilson, 17 BR 361, 366; 2 Bull. JAG 96).

In that case, the accused, an enlisted man, had admitted the theft of two dollars. A sergeant in the presence of two officers persuaded the accused to confess to the theft of other sums of money (one of which amounted to forty dollars) by telling him that the penalty would not be any more severe. The Board held that the confession was inadmissible. It is clear that the confession could have been excluded under applicable well established and generally accepted rules of evidence, since it was induced by what amounted to a false promise of immunity from added punishment for the additional thefts confessed, without invoking the principle enunciated relative to the protection of the soldier from the consequences of his own ignorance. The language of the last paragraph of the quotation is not applicable to the facts in the present case as the first sergeant made no "statements or promises" and did not indulge in a "trick" of any kind.

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The Manual for Courts-Martial indirectly indicates that testimonial unreliability is the controlling reason for the rule excluding involuntary confessions in military justice the same as it is in civilian jurisprudence. The Manual provides that an involuntary confession becomes admissible insofar as it is corroborated by the discovery, through information furnished by the confession, of other inculpatory evidence (par. 1114a, MCM, 1928, p. 1114). In a trial by court-martial those portions of a confession thus shown to be true will be admitted in evidence regardless of the manner in which the confession was procured. It is thus apparent that courts-martial as well as civilian courts primarily are concerned with the verity of the confession rather than with the protection of the accused from unfair or improper treatment.

Although, as pointed out above, the definition of "Voluntary Confession" quoted from Winthrop in the 1921 Manual is substantially the same as the definition recognized by civilian courts, in its application in military cases consideration should be given to the fact that a confession was made by a soldier to a military superior, for the reason that the relationship has a bearing on the strength of any inducement that may have been offered. A soldier is much more likely to be unduly influenced by a military superior than by someone who does not stand in that relationship to him. This principle is expressed in the 1921 Manual as follows:

"In military cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influenced. Statements, by way of confession, made by an inferior under charges to a commanding officer, judge advocate, trial judge advocate, or other superior whom the accused could reasonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior should not in general be admitted [Quoted from Winthrop. See 1920 Reprint, p. 329]. * * * Confessions made by private soldiers to officers or noncommissioned officers, though not shown to have been made under the influence of promises or threats, etc., should, in view of the military relations of the parties, be received with caution.

* * *

"Where the confession was made to a civilian in authority, such as a police officer making an arrest, the fact that the official did not warn the person that he need not say anything to incriminate himself does not necessarily in itself prevent the confession from being voluntary. But where the confession is made to a military superior the case is different. Considering the

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relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, it devolves upon an investigating officer, or other military superior, to warn the person investigated that he need not answer any question that might tend to incriminate himself. Hence, confessions made by soldiers to officers or by persons under investigation to investigating officers should not be received unless it is shown that the accused was warned that his confession might be used against him, or unless it is shown clearly in some other manner that the confession was entirely voluntary" (Sec. 225b, MCM, 1921, pp. 187-188).

In a number of cases where a confession was made to a military superior without the accused being warned as to his rights and the circumstances under which it was made were not shown in the record of trial the Board of Review has held that the confession was inadmissible (CM 234561 Nelson, 21 BR 55; CM 237255 Chesson, 23 BR 317; CM 242082 Reid, 26 BR 391).

On the other hand, a confession made by a subordinate to a military superior has been held admissible where it affirmatively appeared that the confession was made spontaneously upon the initiative of the subordinate although the latter had not been warned as to his rights (CM 255162 Lucero, 35 BR 47; CM 233611 Eckman, 20 BR 29; see also CM 224549 Sykes, 14 BR 159).

In the Lucero case cited above the accused, an enlisted man, and another soldier appeared at the company orderly room where the latter informed the company commander, a captain, that accused said he had shot a man, and had asked to be taken to the orderly room. Accused told the Captain that he was sorry, the captain asked him what had happened and the accused confessed. Accused was not informed of his right to remain silent and no promises or threats were made. The Board of Review held that the confession was voluntary and had been properly admitted.

From the foregoing authorities it appears that when there is offered in evidence a confession of a soldier made to a military superior without any previous warning to the soldier of his rights concerning self-incrimination it is the duty of the trial court to see that further inquiry is made into the attendant circumstances. If no such inquiry is had and the record is silent as to the circumstances it will be presumed that the confession was not voluntary. If further inquiry is conducted and the record shows the circumstances under which the confession was made, then it will be determined from such circumstances and with due regard for the relationship existing between the parties whether the confession was voluntary, namely, whether it was induced or materially influenced by promises,

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assurances, threats, harsh treatment, fear or hope of benefit or the like. The confession will be regarded by the Board of Review as admissible, if the circumstances are such as to support an inference that it was voluntary.

In the instant case the circumstances concerning the making of the confession are fully shown in the record. At the time he made it the accused was not under arrest or investigation or suspected of the commission of any offense. Inasmuch as he was not in custody it fairly may be assumed that he voluntarily returned to his company after his long absence. First Sergeant Briggs thought that accused had been in a hospital and in the routine pursuit of his military duties asked accused for a copy of the orders assigning him back to the company. There was absolutely no call for Sergeant Briggs to make any statement to accused regarding the latter's rights as the revelation that accused had committed an offense was wholly unexpected. Briggs was not in any respect derelict in the performance of his duties and he did not employ any trick, false promise, or duress. The confession came out incidentally as an unforeseen development in the course of a conversation concerning a different subject. There was no "grilling" or prolonged questioning of accused and the statements made by him were not influenced in the least by any threat or promise. There is not the slightest indication in the record that they may not be true. Their spontaneous and voluntary character is further shown by the fact that when the first sergeant left the room accused readily made some of the same incriminating admissions to another sergeant. In the opinion of the Board of Review the confession was voluntary and was properly admitted in evidence.

8. In neither the record of trial nor the accompanying papers is there satisfactory proof that a copy of the charges was served on the accused. Attached to the record is a certificate dated 7 April 1945 and signed by the Trial Judge Advocate which states "upon information and belief" that the charges were served upon the accused on 4 February 1945. The charges were sworn to on 17 January and it appears from the report of investigation that accused was informed of the charges against him on 26 January 1945. The charges were referred for trial on 3 February and the trial was held on 9 February.

The fourth paragraph of Article of War 70 makes it the duty of the Trial Judge Advocate to cause to be served on the accused a copy of the charges. It has been held in numerous cases that the requirements of the first three paragraphs of the Article, although expressed in positive and mandatory language, are directory and not jurisdictional and that failure to comply with them does not necessarily constitute fatal error (CM 172002 Nickerson; CM 201563 Davis; CM 202511 Godfrey; CM 206697 Brown; CM 229477 Floyd). There is particular justification for applying the same rule to the requirement of the fourth paragraph that charges be served upon the accused. That paragraph provides that failure to make

such service shall be ground for a continuance and that in time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

It is well settled that even in time of war the accused may not be denied a reasonable time to confer with his counsel and prepare his defense (CM 231119, 2 Bull. JAG, 139; CM 236323, 2 Bull. JAG, 305; CM 245664 Schuman, 29 BR 225, 3 Bull. JAG, 95). In each of the cited cases the defense moved for a continuance and the Board of Review held that under the circumstances the denial of the motion by the court constituted an abuse of its discretion. In the present case neither the accused nor his counsel moved for or requested a continuance or indicated in any way that additional time to prepare a defense was needed or desired. There is a presumption of the regularity and legality of the proceedings of a court-martial unless the contrary clearly appears on the face of the record (Dig. Op. JAG, 1912 XIV E 5, p. 557, XV C p. 570) and a presumption that the officer representing the accused as his counsel performed his full military duty (Dig. Op. JAG, 1912, XI A 2, p. 529; MCM, 1928, par. 112a; CM 201537 Fouts; CM 231504 Santo, 18 BR 235, 237, 3 Bull. JAG, 58). In the present case even if a copy of the charges was not in fact served upon the accused it may be presumed that if the defense counsel required additional time to prepare a defense he would have moved for a continuance in accordance with the provisions of the 70th Article of War. The failure of the record to show affirmatively the service of charges on the accused does not affect the validity of the proceedings.

9. As stated above, in the instant case the confirming authority upon commuting the sentence of death to life imprisonment, designated a penitentiary as the place of confinement. Article of War 42 provides that with certain exceptions not applicable here:

" * * * no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year * * *" (Underscoring supplied).

Paragraph 90 of the Manual for Courts-Martial, 1928, authorizes the designation of a penitentiary as the place of confinement if the sentence "is wholly or partly based on one or more of the offenses listed below or was imposed by way of commutation of a death sentence: * * *".

hospital. When he told me that he didn't have any orders, I asked him where he had been when he was in the hospital all the time and he told me he hadn't been in the hospital. So, I asked him where he had been and he told me he had been on the beach. I asked him again if he was sure he had not been in the hospital and he repeated the fact to again that he hadn't been and said he had been on the beach, and I asked him what he had been doing on the beach and he said he had just been living down there by himself. I asked him if he had made any effort to contact or get back to the company and he told me he had not. I asked him the reason why he hadn't come back and he said he was scared and that he didn't want to come back to the company.

"Q. Did you have any conversation with him as to whether or not there were other military installations on the beach?

"A. I told him that it looked to me like that a man on the beach, that as many sailors, soldiers, marines and civilians working, that he would certainly have reported himself to somebody during that length of time.

"Q. Did he make any response to that statement?

"A. Yes, sir, he said that he didn't care to report it to anybody because he was afraid they would bring him back to the organization." (R. 11).

Sergeant Briggs stated that he did not subject accused to a "third degree", did not threaten him, and did not offer him any reward. Accused was not under arrest during the conversation and Sergeant Briggs had not charged him with any offense (R. 11-12). After the conversation, Sergeant Briggs left accused and Sergeant Davis in the orderly room, and went for one of the company officers, who came to the orderly room and placed accused in arrest (R. 12).

Sergeant Davis testified as follows with respect to what occurred during the absence of Sergeant Briggs:

"When the first sergeant went out to get the company executive officer to place the accused under arrest, I asked him why he didn't try to find the outfit and he said he didn't want to find the outfit. He said he was afraid of combat. I told him that our platoon leader had been killed and several of our buddies and he said he knew that" (R. 15).

The record does not indicate that accused was informed, prior to nor during the interview, that he need not incriminate himself.

Neither is there any evidence to show the manner in which accused, who had been absent since 20 October 1944, returned to his company, other than that he was "brought" to the orderly room by an officer.

3. The following military authorities, it seems to me, apply to the facts of this case and require that the confession be excluded from consideration:

"But the most familiar requisite to the admissibility of a confession is that it must have been voluntary; and the onus to show that it was such is upon the prosecution in offering it. * * * In military cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influenced. Statements, by way of confession, made by an inferior under charges to a commanding officer, judge advocate, or other superior whom the accused could reasonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior, should not in general be admitted. * * *" (Winthrop, Mil. L. and P. (1920 reprint) 328-329).

"It must appear that the confession was voluntary on the part of the accused. * * * No hard and fast rules for determining whether or not a confession was voluntary are here prescribed. The matter depends largely on the special circumstances of each case. The following general principles are, however, applicable. A confession not voluntarily made must be rejected * * * The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior. * * *" (MCM, 1928, par. 114a).

"It must be shown, before admitting it, that the confession was entirely voluntary on the part of the accused. * * * In military cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influencee. Statements, by way of confession, made by an inferior under charges to a commanding officer, judge advocate, trial judge advocate, or

other superior whom the accused could reasonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior should not in general be admitted. * * * Confessions made by private soldiers to officers or noncommissioned officers, though not shown to have been made under the influence of promises or threats, etc., should in view of the military relations of the parties, be received with caution. * * *

"Where the confession was made to a civilian in authority, such as a police officer making an arrest, the fact that the official did not warn the person that he need not say anything to incriminate himself does not necessarily in itself prevent the confession from being voluntary. But where the confession is made to a military superior the case is different. Considering the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, it devolves upon an investigating officer, or other military superior, to warn the person investigated that he need not answer any question that might tend to incriminate him. Hence, confessions made by soldiers to officers or by persons under investigation to investigating officers should not be received unless it is shown that the accused was warned that his confession might be used against him, or unless it is shown clearly in some other manner that the confession was entirely voluntary" (MCM, 1921, pp. 187-188). (Emphasis supplied.)

"Upon trial for the larceny and unlawful sale of a pair of field glasses, a confession was introduced which was made to accused's company commander without any warning in the premises, and while the officer was questioning accused concerning the loss of another pair of field glasses. There is no showing that this confession was a voluntary one, and it should not, therefore, have been admitted in evidence" (CM 150320 (1922), Dig. Op. JAG, 1912-30, p. 639).

In the trial of a murder case it was shown that shortly after his arrest accused was questioned by his regimental commander without any warning of his rights being given. When asked whether he intended to shoot the deceased, accused answered "Yes". The Board of Review stated: "The answer of accused, in effect, confessed that he had intentionally shot deceased. That confession, involving a serious offense, made wholly without warning and elicited by the question of his regimental commander, was clearly not voluntarily made and should not have been received in evidence (par. 1114a, MCM, 1928)". However, it was held that the temporary admission of the testimony (subsequently excluded) was not fatal. (CM 222148, Griggs (1942), 13 BR 269, 277, 1 Bull. JAG 158).

It was stated in another case that a confession made by accused (a second lieutenant) during "conversations" with his commanding officer (a major) "should have been excluded in the absence of a showing that accused had been advised of his rights prior to the making of the confession". The error was held non-fatal. (CM 234561, Nelson (1943), 21 BR 55, 59).

The Board of Review held a confession inadmissible in a subsequent case in the following language:

"5. With reference to the Specification, Charge II, an oral confession by accused was admitted in evidence without objection (R. 14-16). The confession was made to Captain John W. Fritts, the investigating officer, and there was no proof regarding the circumstances surrounding it, and nothing to show that accused was advised of his rights. By reason of this omission, the confession was incompetent (MCM, 1928, par. 114a, p. 116). The mere failure to object to its introduction does not amount to a waiver (MCM, 1928, par. 126c)."

It was not necessary to consider the effect of the erroneous admission of the confession as the evidence was legally insufficient with or without the confession. The corpus delicti was not shown (CM 237225, Chesson (1943), 23 BR 317, 319).

One of the specifications of which accused (a second lieutenant) was found guilty in another case involved absence without leave from 23 March to 28 March 1943. The opinion in this case shows (26 BR 394) that on 28 March Captain Malcolm T. Powell, Corps of Military Police, then on duty, saw accused in a hotel in Los Angeles. He asked accused to identify himself and to show authority for his presence in Los Angeles. With respect to this specification the Board said:

"a. With reference to Specification 1, Charge I, Captain Powell testified by deposition that accused admitted being absent without leave. This was in the nature of a confession and should not have been admitted in evidence in the absence of affirmative proof that accused was properly advised of his rights (CM 234561, Nelson). However, the error was not prejudicial, since the prosecution's other evidence was 'compelling' * * * (CM 242082, Reid (1943), 26 BR 391, 398).

In a murder case, where the record was held legally sufficient, the facts and decision with respect to a confession that was held inadmissible are shown in the following language by the Board of Review:

"6. There was introduced in evidence a statement

(Ex. C) made by accused on 15 February 1944 to Second Lieutenant Frode Anderson. In this statement accused admitted that he "actually aimed and fired the gun at the woman, Isabella Ray", and in effect made a confession of his guilt. The record shows that Lieutenant Anderson "cross-examined" accused for about two hours before the confession was made, and does not show that accused was advised of his right not to incriminate himself. The statement was made to a military superior, an officer. When accused was advised of his rights the night before, shortly after the homicide, he was being interrogated by civilian policemen. In the opinion of the Board this confession was not admissible, as it does not sufficiently appear that it was voluntarily made. However, the other evidence of the guilt of accused is clear and convincing, and accused subsequently, on 19 February, made another statement (Ex. D) after proper warning in which he made substantially the same admissions. The Board of Review is of the opinion that the erroneous admission of the statement (Ex. C), did not injuriously affect the substantial rights of accused" (34 BR 188).

The review in this case shows (34 BR 184) that Lieutenant Anderson did not use any force nor make any threats or promises (CM 252772, Gentry (1944), 34 BR 181).

In another murder case, where the record was held legally sufficient, the facts and decision with respect to a statement in the nature of a confession are shown in the following language of the Board:

"5. The statements in the nature of a confession of guilt made by accused to Lieutenant Frontera were not shown to have been voluntary. Accused, an enlisted man, had been arrested by Lieutenant Frontera, the officer of the day, and the statements were made in response to questions propounded by the officer. The accused had not been informed of his rights under the 24th Article of War and he had not been advised that he need not make a statement if he did not wish to do so. In the absence of such advice it may reasonably be assumed that accused would feel under compulsion to answer the questions asked of him by the officer who had him in custody, and the absence of threats, promises, or duress was not sufficient to establish the voluntary character of the statements. Under the circumstances the confession was incompetent and should not have been received in evidence (MCM, 1928, par. 114a; CM 222148, Griggs, Bull. JAG I, p. 158, 13 BR 269, 277; CM 237225, Chesson, Bull. JAG II, p. 306, 23 BR 317, 319).

"The erroneous admission of the confession did not however injuriously affect the substantial rights of the accused since his guilt is established by other compellingly convincing evidence properly in the record" (35 BR 248).

The review in this case shows (35 BR 245) that Lieutenant Frontera arrived at the scene of the shooting immediately afterward, asked what the trouble was, and received a rifle from a sergeant, who stated that accused fired it. The officer then asked accused whether the rifle belonged to him, and upon receiving an affirmative reply asked whether accused had fired it, to which accused answered "yes". Accused also stated that he was the only one firing in the barracks. On the way to the guardhouse the officer asked accused why he had "done that", and the latter replied that he had had trouble with the military police and wanted to make them pay for what they did to him. Lieutenant Frontera testified that the statement by accused was "fully voluntary" because he only asked accused "what the trouble was". Neither force, rank, promise nor duress was used (CM 254423, Gonzalez (1944), 35 BR 243).

4. There is no argument about the fact that a voluntary confession is admissible and that an involuntary confession is not admissible. The difficulty arises in determining whether a particular confession is of the one kind or the other. As the Manual states, this "matter depends largely on the special circumstances of each case."

It seems clear that a confession made to a military superior is normally considered involuntary unless the soldier involved has been informed that he is not required to make a statement. No warning is necessary, of course, where the soldier spontaneously informs his superior of the offense, as such a statement is obviously voluntary. A confession to a military superior made without warning may be admissible where other evidence shows that it is voluntary, as, for example, where the accused is shown to have been aware of his rights without being advised thereof. It appears to me that the reason a soldier must normally be informed of his rights is that, otherwise, he would feel himself obliged to answer any questions put to him by his military superior. His first duty is to obey. When he is asked a question concerning a matter in which the superior has an official interest, it seems to me that there is an implied order to reply, unless at the same time the soldier is advised that he need not answer. If he makes a statement under the compulsion of a military command, though implied, it is certainly involuntary.

I have been unable to find any circumstances existing in the present case which would indicate that the confession was voluntary. No force, threats or promises were used. However, this was likewise affirmatively shown in the Gentry and Gonzalez cases, and was apparently true in CM 150320 and in the Griggs, Nelson, Chesson and Reid cases (see par. 3, supra). Accused was not in arrest nor had charges been preferred at the time of his questioning. Apparently the same comment applies to some of the cases mentioned above. The fact that a soldier is not in arrest or under charges would appear to make it more clearly his duty to answer official questions propounded by a superior.

In its holding the Board of Review concludes that "courts-martial as well as civilian courts primarily are concerned with the verity of the confession rather than with the protection of the accused from unfair or improper treatment." Even so, it seems to me that the secondary basis for the rule against receiving involuntary confessions is important.

In a case where the proof of guilt of larceny under four of the five specifications depended upon a confession made by accused, under questioning, to a first lieutenant, in the presence of another first lieutenant, a first sergeant and a private, accused was warned of his rights, but the sergeant further stated to him that he might as well admit it if he was guilty, as the penalty would not be any more severe. Accused had already admitted the fifth larceny. The Board of Review held the confession inadmissible and the record legally insufficient as to the four specifications depending on the confession. In so holding the Board said:

"The above authority clearly reveals that it is not only the purpose of military justice to safeguard the soldier and the court from the consequences of a false confession, but that it is also its purpose to protect the soldier from the consequences of his own ignorance, and to assure to him that trust and confidence reposed in the statements or promises of superior officers shall be well placed.

"In this particular, the present question must be determined in the light of the precedents and interpretations of military law alone, for the problems and the purposes of military justice has (sic) no exact counterpart in other legal systems. It should also be observed that one of the major purposes of military justice is the promotion of military discipline. Any act or practice, therefore, such as the procuring of a confession by trick, promise, or false statement which would tend to destroy the confidence of the soldier in his superior officer would be detrimental to the basic purpose which military justice is designed to serve. It follows, therefore, that the confession in the present case was improperly received into evidence, and that, therefore, the evidence is not legally sufficient to support the findings of guilty of Specifications 1, 2, 3 and 4." (CM 230377, Wilson (1943), 17 BR 361, 2 Bull. JAG 95-96).

In another case (CM 229062, Irskens (1943), 17 BR 43, 2 Bull. JAG 191), involving disloyal statements, The Judge Advocate General did

not concur in the Board holding of legal sufficiency, and stated in his indorsement:

"The proceeding was an official investigation resulting from declarations by accused upon his induction. One of its purposes was to encourage accused to tell the truth about his state of mind. This he did, with complete frankness and honesty, as it was his military duty to do. To have lied would have subjected him to trial and punishment. Had he remained silent he would have been guilty of legal fraud in failing to disclose his true feelings * * *".

This case did not involve a confession but it illustrates the importance of encouraging soldiers to make truthful answers to official inquiries.

If the sole object of the rule against admitting involuntary confessions were verity, then the confessions in the cases cited above (par. 3) would have been held admissible, because there is nothing shown in any of these cases to cast doubt on their truth. Both Winthrop and the Manual point out a marked difference in the principles applicable to confessions to a military superior as distinguished from ordinary confessions under civil rules of evidence. Although the Board has expressed some dissatisfaction with the rule against involuntary confessions, except where the use of "torture or other very strong pressure" makes it likely that an innocent soldier may have falsely accused himself (see the Alexander and Shelton cases, cited in the Board's holding herein), the Board added that the "rule is, of course, too well established for the Board to overthrow, and it makes no attempt to do so."

5. In the present case the accused had been absent from his organization for nearly three months. Upon his return he was brought to the orderly room by an officer. It does not appear whether accused had returned voluntarily or otherwise. In either event he was undoubtedly aware that he had committed an offense, and probably believed that his offense was known to the authorities. The Staff Judge Advocate's review shows that accused appears intellectually sub-normal, with an AGCT score of 63, and seems weak-willed and ignorant.

When brought to the orderly room, accused was questioned at length by his first sergeant and subsequently by his platoon guide, without being informed that he was not required to answer them. His answers to their questions amounted to a confession of guilt.

In view of the circumstances shown, it seems clear to me that the confession was not voluntary.

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6. For the reasons stated, I am of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

J. Lott, Judge Advocate.

1st Ind.

Branch Office TJAG with USAF/POA, APO 958
TO: Commanding General, USAF/POA, APO 958

APR 19 1945

1. In the case of Private First Class ROY J. CLARK (36384485), Company E, 383d Infantry, attention is invited to the foregoing majority holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed and commuted. Attention is also invited to the minority opinion of one member of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. I concur in the majority holding and the same is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$ you now have authority to order execution of the sentence.

2. The record of trial raises the question whether a confession by accused was properly admitted. The nature of and the circumstances under which the confession was made are sufficiently stated in the majority and minority opinions and do not require repetition here. The question arises because it does not affirmatively appear that prior to making the confession and admissions in answer to questions by two non-commissioned officers, the accused had been advised of his privilege against self-incrimination and his right to remain silent. Although I am of the opinion that proof aliunde the confession sufficiently establishes the guilt of accused to an extent that would render even improper admission of the confession non-prejudicial, I believe that the question and especially the rule and precedents relied upon in the dissenting opinion require discussion.

In my opinion it sufficiently appears that the confession, the admission of which in evidence was not objected to by the defense, was voluntarily made without fear, duress, coercion or inducement. The only suggestion that any one of these elements exists is based upon the contention that there is constructive or presumptive coercion whenever an individual in the military service answers, without first having been warned of his rights to remain silent, a question propounded to him by a military superior. The rule contended for, as I understand it, requires the exclusion of the confession even though not objected to or the witnesses to it cross-examined, and even though other circumstances indicate that it was voluntarily made. In other words it makes a warning an indispensable prerequisite for the admission of such a confession regardless of all other established and existing circumstances. I cannot concur.

Neither the Fifth Amendment nor any other provision of the Federal Constitution expressly or by implication requires any such warning. Neither does the 24th Article of War nor any other Federal statute. There is no such requirement contained in the Manual for Courts-Martial prescribing rules of evidence and procedure. The rule announced in some of the opinions relied upon by the dissenting member of the Board of Review is thus without statutory or other similar authority and is admittedly contrary to the

common law rule and to the prevailing procedure in Federal civil courts (Bram v. U.S., 168 U.S. 532 has not been overlooked). It is the creation by the Boards of Review announcing it, based entirely upon the peculiar relation of a military subordinate to his military superior from which it is inferred that compulsion must be presumed whenever a subordinate answers without prior explanation and warning a question by his military superior.

It is established law that the only reason for excluding a confession as involuntary is that it might not be true, but if and when the circumstances under which it was made sufficiently eliminate that probability then the only valid objection to its admission in evidence disappears and the rule against hearsay falls with it. For example, although it appears that a confession was obtained through coercion, by inducement, or even by torture, a statement or statements therein, the truth of which is established by other evidence, are still admissible as proof of guilty knowledge on the part of the accused, thereby making it clear that the test is the testimonial reliability of the confession and not the manner in which it was obtained. If a confession is shown to be true and is admissible as such or to show guilty knowledge then it is wrong and without legal justification to exclude it because it was obtained by trickery or even by coercion or because of failure to advise the individual of his privileges against self-incrimination. If an undesirable administrative practice is involved then the remedy is to correct it administratively and not at the expense of discipline or to the advantage of a criminal who may thereby be allowed to escape just punishment.

The provisions of the present manual (par. 114a) make it entirely clear by specifically so stating that "no hard and fast rule for determining whether a confession was voluntary are here prescribed", and yet that is exactly in effect what the dissenting opinion in this case and opinions by other Boards of Review in other cases do. They announce a hard and fast rule subject to no exceptions excluding confessions although the circumstances may clearly establish their voluntary nature, for the sole reason that the accused was not advised of his rights against self-incrimination before making a confession. Instead of announcing such a rule the manual clearly indicates exactly the contrary. It provides that

"The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior."

Certainly if any such requirement as contended for by the dissenting opinion was desired or intended here was the place to state it. Instead the only reasonable interpretation of the provision so included is that it states exactly the contrary rule, namely that under such circumstances where the confession was made to a military superior, further inquiry will be made into the circumstances not merely to determine whether the accused was warned but to determine whether under all the circumstances the confession may be regarded as having been voluntarily made. The test is not whether some technical procedure or requirement has been complied with but whether under all of the circumstances the confession was made voluntarily and therefore possesses the testimonial reliability which may be safely attributed to a statement by an individual confessing to a crime with the serious consequences which flow therefrom.

In concluding the discussion of this question I am of the opinion that there is no place in our courts-martial procedure for a rule which will exclude every confession made to a military superior or to his representative or agent merely because the confessor was not warned in advance of his privilege against self-incrimination and his right to remain silent. I believe that the sound rule is that when it is not shown that such warning or explanation was given, then the confession should be received with caution and the prosecution required to show to the reasonable satisfaction of the court that the confession was made voluntarily without fear, without actual, implied or constructive coercion, and without inducement. If made to an officer investigating accusations or charges against an accused under Article of War 70 or otherwise, then there may be a strong presumption that statements amounting to a confession were involuntary unless it affirmatively appears that accused was first advised of his privilege against self-incrimination and his right to remain silent. Even under such circumstances a confession might be admissible if it sufficiently appears to have been submitted voluntarily. Under other circumstances, such as the one disclosed by this case, I think whatever presumption there exists against admissibility of the confession has less strength and weight, but in all instances the confession is admissible once it is established that it was voluntarily made. I think it was in the instant case.

3. A penitentiary has been designated as the place of confinement. Although such penitentiary confinement is authorized, attention is invited to the fact that in a similar case arising under equally or more greatly aggravated circumstances in the North African Theater of Operations, commuted by the President to life imprisonment, a disciplinary barracks was designated as the place of confinement. In my opinion the existing War Department policy indicates that unless accused is a confirmed criminal a disciplinary barracks and not a penitentiary will be designated as the place of confinement in practically all cases involving purely military offenses. Under these circumstances it is suggested that in publishing the general court-martial order in this case consideration be given to changing the place of confinement from a penitentiary to a disciplinary barracks.

(114)

4. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 206. For convenience of reference please place that number in brackets at the end of the order.
(CM POA 206)

JAMES E. MORRISETTE
Brigadier General United States Army
Assistant Judge Advocate General

(Sentence as commuted ordered executed. GCMO 8, USAFPOA, 20 April 1945.)

RESTRICTED

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

19 March 1945

BOARD OF REVIEW

CM POA 214

UNITED STATES

v.

First Lieutenant Emmet J. Nelson
(O-1114241), 431st Engineer Dump
Truck Company.

) GUADALCANAL ISLAND COMMAND

) Trial by G.C.M., convened at APO
) 709, 15 January 1945. Dismissal.

HOLDING by the BOARD OF REVIEW
DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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

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

Specification: In that First Lieutenant Emmet J. Nelson, 431st Engineer Dump Truck Company, was at the bivouac area of the 431st Engineer Dump Truck Company, APO 709, on or about 17 December 1944, drunk and disorderly.

Charge II: (Disapproved by Confirming Authority).

Specification 1: (Disapproved by Confirming Authority).

Specification 2: (Disapproved by Confirming Authority).

Specification 3: (Disapproved by Confirming Authority).

He pleaded not guilty to and was found guilty of all Charges and Specifications and was sentenced to dismissal, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence but reduced the period of confinement to three years and forwarded the record of trial for action under the 48th Article of War. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, disapproved the findings of guilty of Charge II and the Specifications thereunder and confirmed only so much of the sentence as provides for dismissal of accused from the service. Pursuant to Article of War 50½ the order directing the execution of the sentence was withheld.

3. The evidence for the prosecution in pertinent part is as follows:

About 1600 or 1700 on 16 December 1944, Private Cleo Long, an officers' orderly in the company of accused, was in the officers' quarters for fifteen or twenty minutes and saw accused "doing a little drinking". Accused took four or five drinks from a bottle. Private Long was forty or fifty feet away, did not see the label on the bottle and did not smell the bottle (R. 4-7).

At about 0305 on 17 December, accused entered the enlisted men's barracks near the motor pool and approximately one hundred and fifty feet from the officers' quarters, sat on the floor, pounded it with his fists and said "Wake every son of a bitch in this barracks up. I want them to come over and see Lieutenant Yeary, he's dead". All of the men were awakened, there was "quite a bit of commotion" and accused went outside. After listening to the noise for awhile, Tec 4 Daniel R. Scholidon dressed and went to the steps of the barracks where "the rest of the motor pool boys" were assembled. Accused had a rock in his hand and was chasing Second Lieutenant Robert Conway around "the personnel carrier". When the men walked up to him "in a body" he stopped and asked them to come to the officers' barracks and see Lieutenant Yeary. They followed him to the barracks where he tried to arouse Yeary. Accused seemed to be afraid of Lieutenant Conway and did not want Conway to come near him. The men returned to the motor pool where the night mechanics were working on a motor which they had taken out of a "Dodge". Accused also went to the motor pool, asked each of them if he had seen Lieutenant Yeary and when they all answered in the negative, insisted that they go with him to see Yeary. Accused picked up a hammer and with the others following him walked over to the officers' quarters where he went over toward Lieutenant Yeary but turned away from him and "came over with the hammer" and told Lieutenant Conway to sit on a chair. He directed Tec 4 Scholidon to "hold Lieutenant Conway down" and in order to "humor" the accused, Scholidon put his hand on Conway's shoulder. Accused then went toward his bed at the other end of the barracks, picked up "a .45", opened the drawer of a desk, pulled out "what looked like bullets and shoved them in the revolver". As he was "cocking the gun" accused said "Scholidon, Conway; either one of you move and you're dead pigeons". Conway said "that gun's loaded" and he and Scholidon ran out of the room and around

the corner of another barracks (R. 7-9, 11, 12, 14-16).

Accused returned to the motor pool where he stood in front of the mechanics who were working on a dismantled motor and talked about spies being all around. He was swinging the pistol and "gesturing" with it but was not pointing or aiming it at anyone. The gun was discharged twice. One bullet went into the floor about three or four feet from the motor and the other struck and dented the motor belt housing (Ex. A). At that time three enlisted men were standing or kneeling around and near the motor. After he had fired the second shot accused said that the others "could all hang around there and be killed" but "he was going to get out of there" (R. 14-17).

A short time after the two shots were fired accused was observed with the "automatic down to his side" walking along behind a group of men (variously estimated as eight to fourteen in number) marching ahead of him in double file toward the officers' barracks. When Tec 5 Timothy R. Donovan approached the group, accused pointed "a gun" at him and said "Donovan, get over here in line with the rest of these fellows". Donovan complied and at the direction of accused the formation moved toward the officers' quarters. Accused walked at the left rear of the double file. When Sergeant Robert S. Davis, Jr. came out from behind a tree and started toward accused the latter turned around but Davis seized his right wrist and pulled it down and at the same time the pistol was discharged. After a struggle in which both accused and Davis fell to the ground the latter succeeded in getting possession of the pistol. Accused was then put to bed and placed under guard and it was necessary for three of the men to hold him down for awhile (R. 10, 13, 18-19).

On one occasion when accused was at the motor pool Tec 5 Donovan heard him call "T/5 Gaber" a "cocksucker" and the latter "was going to tangle" with accused but was restrained. On another such occasion as the sergeant of the guard was removing a jeep from the motor pool accused threw rocks at him. All of the incidents related above occurred in the bivouac area of the 431st Engineer Dump Truck Company at APO 709. During all of them which occurred on the morning of 17 December accused was wearing only his shorts and undershirt, he was staggering, his voice was thick, his breath smelled of alcohol and in the opinion of Tec 4 Scholidon, Tec 5 Donovan, Tec 5 Franklin B. Groff, Tec 5 Eugene N. Smith and Sergeant Davis he was drunk (R. 7-13, 15-17).

4. For the defense accused testified that he did not think he drank enough "that night" to make him do the things he did and there were a "lot of things" on his mind. One thing that had been on his mind for years was that he "wet the bed" at times. Before entering the service he had consulted a doctor, who told him that he should never drink anything after dinner. He followed that advice and "had it pretty well under control" until he entered the army "where you work day and night and sometimes you

just have to take a drink of water". Another thing on his mind was that he had seen motion pictures and had read books on the subject of Japanese atrocities and had been greatly impressed. At one time "several months ago" after seeing "a Japanese picture" he had a bad dream either the same night or the next night and "was yelling" and awakened Lieutenant Conway. On 14 December he read a book "called Bushida" and on the evening of 16 December saw a motion picture entitled "Dragon Seed", which depicted Japanese atrocities. He had been admitted to the hospital but had not told anyone "these things". All of his life he had been concealing the fact that he "wet the bed". He was very much in love with a girl, her letters had been "very few lately", and he felt that something was "going wrong there". He had played baseball on the afternoon of 16 December and took a shower and "ate" immediately afterward. After calling at the orderly room in connection with a checker tournament then in progress he went to the "movie", stayed until "Dragon Seed" was over and went to his quarters. He was in bed "when Lieutenant Conway and Lieutenant Yeary came home" and that was when "things started" (R. 20-21).

After accused had finished his testimony the defense requested a continuance "until an opportunity is afforded for a complete physical and psychiatric examination of the accused". The president of the court asked whether the defense had any medical testimony to offer in support of the motion and the response was that "The defense has no medical testimony to offer the court. I ask the court to make the motion by their own volition." The prosecution offered to call as a witness Lieutenant Colonel George V. LeRoy, Medical Corps, Chief of the Medical Service, 48th Station Hospital, and the defense agreed to a stipulation as to his testimony "with the provision that the accused may again take the stand in explanation of the stipulation".

The stipulated testimony of Colonel LeRoy was substantially as follows: Accused entered the hospital "Sunday night" and was interviewed by Colonel LeRoy the following day. A physical examination disclosed that accused was "completely normal". A routine psychiatric history was taken and showed essentially normal background and personality. "The clinical impression was effected by the performance of a special psychology test... administered by Major L. L. Beaton". The results of the test indicated a normal personality. From his own examination and the results of the test Colonel LeRoy concluded that accused was not suffering from any psychiatric disorder (R. 21-22).

Accused was recalled and testified that Colonel LeRoy had talked to him the night he "got in" and examined him three days later. Accused told Colonel LeRoy everything about himself except the enuresis. Colonel LeRoy had taken his blood pressure and sent him to another ward for a psychiatric examination. The psychiatrist had asked him his age, whether he smoked many cigarettes and how long he had been overseas. "That was the extent of his questioning". Accused was also given a very simple test which consisted of taking out of a box cards bearing short inscriptions and putting them in appropriate compartments labeled "True" and "False".

Anyone "except an idiot" could take the test and pass it without any difficulty. Upon examination by the court accused stated that he had not told either the psychiatrist or Colonel LeRoy "about the Jap atrocities" because he had not been asked (R. 22-23).

The court denied the motion for a continuance (R. 23).

Lieutenant Conway testified that about 0200 on 17 December 1944 accused left the officers' quarters and went over to the motor pool "and after returning once and back to the motor pool a gain, he had it in his mind that he was in a combat area or something". Accused regarded Lieutenant Conway and all of the motor pool personnel as spies and had said "all of you are spies" and "we are surrounded". It was fixed in his mind that Conway was a spy and that he (accused) was in danger. His speech was slow but coherent. He seemed to Lieutenant Conway to be "more or less out of his head... You could tell he had been drinking." When he was asked by a member of the court whether accused had been drinking Lieutenant Conway answered in the affirmative (R. 23-24).

5. There is no dispute concerning the material facts. It appears that about 0300 on 17 December 1944 accused, wearing only his shorts and undershirt, went from his own officers' quarters to a barracks about one hundred and fifty feet away occupied by enlisted men of his company, sat on the floor, pounded on it with his fists, and directed that "every son of a bitch in the barracks" be awakened as he wanted them to come to his quarters and "see Lieutenant Yeary, he's dead". Accused then chased another Lieutenant of his company around a "personnel carrier" with a rock and several times went back and forth between his quarters and the motor pool where several mechanics were working on a motor which they had taken out of the chassis of a car. At the motor pool accused threw rocks at the sergeant of the guard, who was driving a jeep out of the place, and called an enlisted man "a cocksucker". In officers' quarters he picked up a .45 caliber revolver or pistol, loaded it with ammunition which he took from the drawer of a desk, cocked it and said to a lieutenant (the same one he had previously chased with a rock) and a sergeant who were in the room with him—"either one of you move and you're dead pigeons". When they ran out of the building accused again went to the motor pool, where he talked about being surrounded by spies, waved the pistol about and without aiming it at anyone fired two shots. One bullet struck the belt housing of the motor near which three men were standing and the other bullet went into the floor about four feet from the motor. Accused was thereafter seen walking along with the gun in his hand at the rear of a double file of enlisted men, variously estimated at from eight to fourteen in number, moving toward the officers' quarters. When a sergeant approached the accused the latter pointed the gun at him and told him to get into line with the rest of the men. After the sergeant had complied and the column had moved on a short distance another sergeant seized and overpowered the accused and took the pistol away from him. In the struggle the weapon was discharged. The accused was staggering, his voice was thick, his breath smelled of alcohol and in the opinion of numerous witnesses he was drunk.

Winthrop gives as an instance of violation of the 61st (95th) Article of War, drunkenness of a gross character committed in the presence of military inferiors or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused (Winthrop's Military Law and Precedents, Reprint, 717). The evidence shows that accused was grossly drunk and conspicuously disorderly in the presence of numerous enlisted men, endangered the lives of some of them by recklessly discharging a firearm, and called one of them an unspeakably foul and insulting name. His conduct was unbecoming an officer and a gentleman and in violation of the 95th Article of War.

6. After the prosecution had rested and the accused had testified, the defense moved for a continuance in order that an opportunity might be afforded for a physical and psychiatric examination of the accused. The motion was denied. The charges were referred for trial on 3 January 1945 and were served upon the accused the following day. The trial was not held until 15 January. At the time the motion was made the defense stated that it had no medical testimony to offer. It affirmatively appears from the record that accused had been examined by Lieutenant Colonel George V. LeRoy, Chief of the Medical Service, 48th Station Hospital, and found to be "completely normal" and free from personality defect or psychiatric disorder. In consideration of the circumstances the denial of the motion was within the discretion of the court.

7. The charge sheet shows that accused is 29 years of age and that he served as an enlisted man from 2 June 1942 until 25 May 1943 and was "Commissioned in Corps of Engineers" on 26 May 1943.

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

Samuel M. Driver, Judge Advocate

J. J. Lotterhos, Judge Advocate

Walter H. Sykes, Judge Advocate

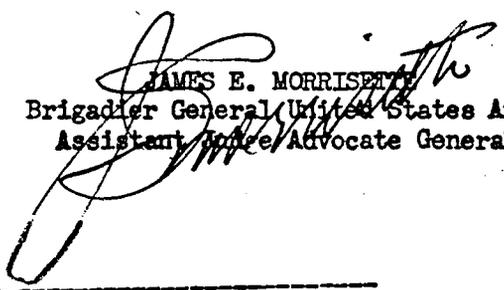
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WD, Branch Office TJAG, with USAFPOA, APO 958. MAR 24 1945
TO: Commanding General, USAFPOA, APO 958.

1. In the case of First Lieutenant Emmet J. Nelson (O-11114241), 431st Engineer Dump Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as modified and confirmed, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 214. For convenience of reference please place that number in brackets at the end of the order.

(CM POA 214)


JAMES E. MORRISSETTE
Brigadier General, United States Army
Assistant Judge Advocate General

(Sentence as confirmed ordered executed. GCMO 5, USAF, POA, 27 Mar 1945.)



BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

29 May 1945

BOARD OF REVIEW

CM POA 228

U N I T E D	S T A T E S	)	96TH INFANTRY DIVISION
)	
	v.	)	Trial by G.C.M., convened at APO
		)	96, 28 February and 1 March 1945.
Private LELAND BOOHER (35898732),		)	Dishonorable discharge, total for-
Company D, 382nd Infantry.		)	feitures, and confinement for life.
		)	Penitentiary.

HOLDING by the BOARD OF REVIEW
DRIVER, LOTTERHOS and SYKES, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Leland Booher, Company D, 382nd Infantry, did, at or near APO 96, on or about 7 February 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Preciosa Mercader, a human being, by shooting her with a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction (for using insulting language to a non-commissioned officer) was considered by the court. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence for the prosecution shows that about 1930 on 7 February 1945, the accused, Private Leland Booher, Company D, 382nd Infantry, and Private James E. Puccini, 382nd Infantry, met at a dance in the Municipal Building at Burauen. Accused was carrying in a holster

a .45 caliber pistol which was unloaded. Some time later, the two soldiers left the dance and "went to a native's hut" where they purchased some whiskey. After drinking some of the whiskey, they returned to the dance where they continued to drink until all their whiskey was gone. About 2230, a brawl, involving some shooting with a "BAR", occurred between some Filipino soldiers, and soon afterward accused and Puccini left. Accused had obtained a round of ammunition from Private Philip Villanueva just before departing. At the suggestion of accused, they "went down to some native's hut" (R. 51-53, 55, 58, 59).

Simiona De Mercader testified, through an interpreter, that on 7 February she saw accused sitting on the doorstep of her house and that "Abraham, * * * Preciosa, Maria and Isabel" were also present. There was a light inside the house "because Isabel was preparing flour". Simiona had been asleep when accused arrived at the house. Accused had greeted her daughter, Preciosa De Mercader, on arrival with "Mahusay ka nga daraga" which in Visayan means "You are a beautiful girl". Preciosa was lying on the floor at a distance of four or five feet from where the accused was seated. Simiona heard accused conversing with his "co-American soldier" but did not see the latter. Accused said something to Preciosa and Simiona asked what it was. Preciosa told her that accused had inquired if she was her Preciosa's mother. Accused then talked to Simiona in English, which she did not understand, and Preciosa told her that accused had said that "your daughter is beautiful and I like her". Simiona further testified that "after that he told me hambug ka" (a Visayan phrase meaning "phooey" or "boastful" which is commonly used by Filipinos who "just use it sometimes for fun") and that he tried to slap her head but actually hit her forearm which had been raised to protect her head. At this time, accused "was in a bad humor * * * and looked angry". To the question of "What happened immediately after he had slapped you", the witness answered: "Later on I saw him draw his pistol like this (demonstrating to the court) and fire". The pistol was carried "on the left side of his waist". Accused drew it with his right hand and "was holding the pistol with his right hand and pointed and fired it at Preciosa", who was hit, and Simiona "grabbed Preciosa toward her". (R. 30-35, 37, 38, 40).

Abraham De Mercader, an eighteen year old student son of Simiona De Mercader, testified that "on the evening that * * * his sister was killed" he had been asleep and was awakened "when the door was thrown out from our home". He "got up" and sat in the same place, which was about eight feet from accused, who was sitting on the doorstep. His sister, Preciosa, was about four or five feet from accused. Accused told Preciosa that she was "a beautiful girl" and that he "loved" her. In answer to her mother's inquiry, Preciosa told her in Visayan that accused had said that "he loved me and would like to have me". Abraham further testified that "A while later the accused said, 'Hambug ka' (meaning "liar", "boastful") to his (Abraham's) mother and attempted to

slap her face, but the blow was blocked with his mother's left forearm. At this time, accused's expression was "souring". According to Abraham, the accused "then drew his pistol and fired it toward Preciosa", who "fell down". The accused then ran away. Accused's pistol was on his left side in a holster and accused drew it with his right hand and looked at Preciosa at this time. On cross examination, Abraham testified that he saw no companion of the accused, that he had no remembrance of giving sugar cane to accused or of his sister's offering bananas to accused, that he did not remember telling officers on that night that he gave sugar cane to accused and saw his sister offer him bananas, that everything was "in confusion at that time", that his sister Isabel was sifting flour in a corner of the room and Maria was asleep in the corner before the shot was fired, that he did not leave the house before the incident, that Preciosa and his mother were "happy" while accused was talking with them, and that accused "did not smile during that time he was in our house" (R. 41-50).

Private Puccini, who had accompanied accused to a "native's hut" after the dance heretofore described, testified that he became sick in front of the house and vomited in a hole there. He stayed there about ten minutes, during which time some one gave him a drink of water and poured water over him. He was then helped into a house (he believed) by more than one person and "layed on the floor". Five minutes later he "got up and came out by the same hole" to vomit again, and a "few minutes later * * * heard shots and * * * heard Private Bocher [the accused] holler * * * to come on" by calling "Come on Puccini". By the time that Puccini had arisen from the ground, the accused was out of sight and Puccini went to the rear of the house and then to his company. On cross examination, Puccini testified that he and accused had bought five bottles of rice whiskey which he described as "round beer bottles, glass, small"; that they and two natives drank two bottles before they returned to the dance; that they and others drank the rest at the dance; that he was "sick and pretty drunk"; and that accused had drunk about the same amount of whiskey as he had (R. 52-56).

At 2250 that night the accused entered the headquarters of Lieutenant Colonel Charles W. Johnson, 382nd Infantry, APO 96, located in the vicinity of Burauen, and "called out" Colonel Johnson's name, saying that he wanted to speak with him. Colonel Johnson went outside of headquarters and accused immediately turned to him and said "I just shot a woman. I was drunk". (On cross examination Colonel Johnson stated that the men were required to carry their weapons and helmets when they were out of the battalion area.) Colonel Johnson returned to headquarters where he ordered Captain Robert B. Best, MC, Medical Detachment, 382nd Infantry, to go with accused. Captain Best did so and accused led him "to a native hut". On the way there, accused told him that "he had shot

a native girl; that he had been drinking; that he was afraid she was seriously wounded and he kept urging * * * /Captain Best/ to hurry". Captain Best on arrival entered the "hut and there were many natives inside crying and wailing and lying on the floor was a young native girl". He immediately examined the girl and pronounced her dead. He noticed a penetrating wound just below the right cheek bone. On the following morning, according to the testimony of Captain Best, he re-examined the body and failed to discover any other wounds or injuries. While the prosecution was asking the witness his opinion of the wound, the defense interrupted the proceedings by saying:

"Please the court, the defense counsel concedes that the death was caused by the firing of a pistol in the hands of this accused. The defense sees no reason for carrying this examination further." (R. 20, 23, 25, 26, 59, 60).

4. For the defense, the accused, who, according to his counsel, had been "advised of his rights", testified that after changing into khaki clothes at 1600 on 7 February he borrowed a pistol "to take to the dance", a common practice, his regular T/E weapon, the M1 rifle, being too "unhandy". He went alone to the dance which was held in the Municipal Building at Burauen. As soon as the dance started, accused and Private Puccini and a "Filipino boy" bought five bottles of rice whiskey at a place "across the road from the dance". Accused and Puccini gave a drink to the "Mexican boy" and the "Filipino boy" and then drank the rest "at the dance, back in one corner". A "fight broke out downstairs" and some shots were fired which came "right beside" accused who was upstairs. Accused started down, met Private Villanueva and asked if he had any ammunition. Villanueva gave him one round. Accused's gun had been empty but he "didn't want an empty gun with a lot of shooting around". Accused did not remember whether he loaded his gun. Accompanied by Puccini, who was "pretty drunk", accused left the dance. Accused told Puccini that he would take him to the battalion area as soon as he "went down to the girl friend's house". He did not know the name of his "girl friend" but she had "been around * * * /his/ tent quite a bit" and he called her "Pesing". Back "in the other area when * * * /his organization/ first came to Burauen, * * * /the accused/ saw her almost every day as she would go to school". The girl spoke good English and she and accused would talk with each other in Filipino and in English. Accused had learned "about five or six lines" of Filipino language. Accused had been at the girl's house on the night before (R. 62-66).

As he and Puccini approached the house, accused noticed a light burning in it. He opened the door and spoke to the "girl, Preciosa" who told him to sit down. Also present in the house were Preciosa's mother, her brother, Abraham, and her sister, Isabel. Accused "sat down on

the door". Isabel was sifting flour in the corner, "the girl's mother" was just sitting there, and Abraham was standing up. They and accused were "all talking Filipino and English there and had been talking quite a bit". Puccini was "laying on the ground outside". Preciosa offered some water for Puccini. Accused poured a cup of water over Puccini's head and gave him another cup. Puccini "laid there awhile", and Preciosa gave accused some sugar cane and bananas. Preciosa told accused to bring Puccini into the house. With the help of Abraham, accused complied, but Puccini remained in the house less than five minutes. He became sick again and accused "took him out". Then accused returned and sat by the door and talked. He did not "remember exactly" what the talk was about but testified that they were "joking around". He would say something in Filipino, and they would laugh. Preciosa talked back to him in English. Her mother was laughing with him. Accused further testified that at this time his back was against the door and his "feet were outside; one was on the edge". He used the phrase "hambug ka" often that night "more or less as a joke" and they "were all laughing" when he did so. The girl's mother used the same phrase to him. Then the accused testified as follows:

"We talked quite a bit. I was sitting there. The first think I knew I had the pistol and it went off in my hand. I had my right hand over the top of the slide, and the pistol was in my left hand. I saw she fell and I saw her head fall forward, and I came back to the battalion area".

Accused denied that any angry words had been exchanged or that he had struck at "the girl's mother". He had been wearing the pistol on his "left hip, butt out". He had no intention of doing bodily harm to Preciosa or any members of her family, did not "know how * * * he got it the gun out" and did not wilfully or intentionally discharge the pistol (R. 66-73).

After he saw Preciosa fall, accused ran to the battalion area about "four blocks" away and reported to Colonel Johnson what had happened. At Colonel Johnson's order, he took "Dr. Best" to "the house" where he was later told that "she was dead" (R. 73).

On cross examination, accused testified that he remembered borrowing a round of ammunition from Private Villanueva between 2100 and 2130 but did not remember inserting it in the pistol, that he arrived at Preciosa's house about twenty minutes later, that the pistol was pointing inside the house when he discharged it, and that he "wouldn't say for sure" if he called Puccini after the shot was fired. The accused admitted making a voluntary statement to the investigating officer which statement was admitted in evidence, without objection, as Exhibit 2.

The statement recites substantially the same facts as those to which the accused testified. However, the statement did not mention that Abraham assisted him in carrying Puccini into the house, and did mention that Abraham (and not Preciosa) had given him some bananas (R. 72-77).

5. In rebuttal, the prosecution recalled Colonel Johnson, who testified that upon return to battalion headquarters after the victim had been pronounced dead, the accused was "more or less sobering up" but understood and responded intelligently to his questions. In Colonel Johnson's opinion, accused "knew everything in detail that he had done and was doing with the exception of when the pistol was fired. At the exact time the pistol was fired, from that time until the time that he met me at 2250, he didn't have a clear recollection of what happened". Private Villanueva was also recalled. He testified that accused was sober at the time when he gave accused the round of ammunition. Captain Best, on being recalled, testified that his "opinion was that he [accused] had been drinking, but that he wasn't intoxicated", and that a sudden emotional shock will not accelerate the process of sobering up, nor "get rid of" the alcohol in the blood, but "gives * * * the appearance of sobering up" (R. 80-84).

6. The uncontradicted evidence shows that on the night of 7 February 1945 the accused shot the deceased in the face with a pistol and that the deceased died from the wound so inflicted a few minutes later. Prior to arriving at the deceased's home where the shooting occurred, the accused and another soldier had attended a dance and had been drinking whiskey. At the dance the accused was armed with an unloaded .45 caliber pistol which was carried in a holster on his left side. The accused and the other soldier left the dance soon after a fight had arisen there between Filipino soldiers, during which time several shots were fired. As they were leaving, the accused obtained a round of ammunition from another soldier. At the suggestion of the accused, they went to the home of the deceased. While his friend remained outside attempting to sober up, the accused sat on the doorstep of the house and conversed with the deceased, who was lying down on the floor about four feet away. In the same room with the deceased were her mother, brother and sisters. At the request of her mother, who did not understand English, deceased translated to her in Visayan the remarks made to her by the accused to the effect that she was a beautiful girl and that he loved her. The accused then said something in English to deceased's mother which was translated by deceased and was substantially to the same effect as the other statements. The deceased and her mother during this time were "happy". The accused, however, "did not smile". Then the accused remarked "Hambug ka" (a Visayan phrase meaning "phooey" or "boastful") to deceased's mother and tried to slap her head. The blow was blocked by deceased's mother raising her arm and catching the blow on it. At this time, accused "was in a bad humor * * * and looked angry". He then drew his pistol from the holster with his right hand and pointed and fired it at the deceased, who "fell down". Accused immediately left

the house and ran to the headquarters of his battalion, located about ¼ blocks away, where he reported to his battalion commander that he had "just shot a woman" and was "drunk". At the battalion commander's suggestion accused led a medical officer back to the house, during which time he stated to the officer that he had shot a "native girl", that he had been drinking and that he was afraid she was seriously wounded. On arrival - at the house, the deceased was found to be dead, with a wound in her face below her cheek bone.

The evidence is conflicting as to whether the term "Hambug ka" had been used repeatedly during the conversation between accused and the others at deceased's home, as to whether the soldier who accompanied the accused was taken into the house for a short time, and as to certain other minor details. Furthermore, the accused denied that any angry words had been exchanged, that he had struck the deceased's mother, and that he had intentionally discharged the pistol. He stated that the pistol "went off" in his hand, that it was in his left hand, and that his right hand was over the slide. The court, acting within its province, disbelieved the accused and there is nothing in the record to indicate that it acted arbitrarily or capriciously in so doing.

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in such definition means "* * * without legal justification or excuse". "A homicide done in the proper performance of a legal duty is justifiable". An excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray * * *". The definition of murder requires that "the death must take place within a year and a day of the act or omission that caused it * * *" (MCM, 1928, par. 148a). The most distinguishing characteristic of murder is the element of "malice aforethought". This term, according to the authorities, is technical and cannot be accepted in the ordinary sense in which it may be used by laymen. The Manual for Courts-Martial defines malice aforethought in the following terms:

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor the actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark).

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person,

whether such person is the person actually killed or not (except when death is inflicted in the heat of sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit a felony, * * *" (MCM, 1928, par. 148a).

In light of the foregoing principles it is patently clear that there was neither legal justification nor excuse for the killing. A careful analysis of the evidence must, however, be made to ascertain whether or not there is sufficient proof to show that the killing was done with malice aforethought. The contention of the defense was, in effect, that the accused was drunk and that he did not remember how the pistol was taken from its holster and pointed at the deceased. Neither did he remember whether he had loaded the pistol with the bullet which had been given to him at the dance by another soldier. The contention virtually amounted to a claim that the shooting was accidental. However, the evidence is convincingly clear that the accused remembered vividly and in detailed manner practically all of the events which otherwise befell him on the fatal night. In the opinion of a soldier who saw him as he left the dance, the accused was sober. In the opinion of the medical officer and his battalion commander who were with him a short time after the homicide, the accused appeared to have been drinking but was not intoxicated. Under the circumstances, it is apparent that the evidence shows the accused to have been capable of entertaining the specific intent required (CM 234838, Blizzard, 21 BR 183; CM 20728898, Stevenson, 22 BR 367; CM 31043021, Prentiss, 24 BR 111; CM 238389, Kincaid, 24 BR 247).

The failure of the court in its province to accept the accused's version of the homicide as being accidental and involuntary manslaughter leaves the record bare of any provocation or excuse whatever, and except for the unexplained action of the accused in attempting to slap the face of the deceased's mother while he was "in a bad humor * * * and looked angry", it otherwise appears that the killing was done in cold blood. Under such circumstances, deliberate taking of the pistol from the holster, which pistol had been loaded a short time prior to arriving at the victim's house, and pointing and firing it at the deceased who was only 4 feet away, inflicting on her a wound which caused almost instantaneous death, constitutes murder and the court was justified in reaching a finding of guilty.

7. The Board of Review deems it advisable to comment on another question presented in the record. During the examination of accused by the court, a member commented to accused that it seemed "strange to the court that you can remember vividly all those times and yet you cannot remember loading the pistol and drawing the pistol" (R. 78). This remark in open court was highly improper (CM 187894, Waschak, 1 BR 101, Dig. Op. JAG, 1912-40, sec. 395 (48)). On the record as a whole, the improper conduct of this member does not constitute error to the prejudice of accused and does not, under Article of War 37, affect the legality of the proceedings.

8. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of murder by Section 22-2404 of the District of Columbia Code.

9. The charge sheet shows that the accused was nineteen years of age when the charges were drawn, and was inducted on 12 November 1943.

10. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Samuel M. Drives Judge Advocate

J. J. Lotterhos, Judge Advocate

Charles S. Sykes Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL,
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

9 April 1945.

BOARD OF REVIEW

CM POA 247

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

27TH INFANTRY DIVISION.

v.)

Trial by G.C.M., convened at Headquarters, 27th Infantry Division, 27 February 1945. Dismissal and total forfeitures.

First Lieutenant PETER DONAGHY
 (O-355045), Company E, 105th
 Infantry.)

HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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

CHARGE I: (Disapproved by the confirming authority.)

Specification: (Disapproved by the confirming authority.)

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

Specification: In that First Lieutenant Peter Donaghy, 105th Infantry, was, at APO 27, on or about 062400 February 1945, drunk and disorderly in camp.

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

Specification 1: In that First Lieutenant Peter Donaghy, 105th Infantry, did, at APO 27, on or about 070515 February 1945, in a tent in Company E street, wrongfully, and without his consent, attempt to unbutton the pants and touch the private parts of Private First Class James C. Dickey, Company E, 105th Infantry.

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Specification 2: In that First Lieutenant Peter Donaghy, 105th Infantry, did, at APO 27, on or about 070515 February 1945, in a tent in Company E street, wrongfully, and without his consent, attempt to unbutton the pants and touch the private parts of Private Walter F. Redmon, Company E, 105th Infantry.

Specification 3: In that First Lieutenant Peter Donaghy, 105th Infantry, did, at APO 27, on or about 6-7 February 1945, render himself unfit for duty by excessive consumption of alcoholic beverages, to the prejudice of good order and military discipline.

Specification 4: (Finding of not guilty.)

He pleaded not guilty to all Specifications and Charges. He was found not guilty of Specification 4, Charge III; not guilty of Charge II, but guilty of a violation of the 96th Article of War; guilty of Specification 1, Charge III, except the words "attempt to unbutton the pants and", substituting therefor the words "did unbutton the pants and attempt to"; guilty of Specification 2, Charge III, except the words "attempt to unbutton the pants", substituting therefor the words "attempt to loosen the belt"; and guilty of all other Specifications and Charges. Evidence of one previous conviction by general court-martial (of being drunk in quarters on two occasions and of being drunk and disorderly while in uniform in a public place on another occasion, all in violation of the 96th Article of War) was considered by the court. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due.

The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, disapproved the findings of guilty of Charge I and the Specification thereunder; approved only so much of the findings of guilty of Specifications 1 and 2 of Charge III as finds that accused did, at the times and placed alleged, attempt to touch the private parts of the persons named; and confirmed the sentence. The record of trial has been forwarded for action under Article of War 50½.

3. The evidence for the prosecution, in pertinent part, shows that accused entered a tent occupied by some of the enlisted men of his organization, Company E, 105th Infantry, about 2200 hours on 6 February 1945. Private First Class James C. Dickey, Private Walter F. Redmon and three or four other enlisted men were there. Accused sat down, picked up a bottle of whiskey containing four or five drinks, and said "Let's have a drink". He and some of the men finished the bottle. Accused remained in the tent all night. In the course of the evening accused furnished the money for three additional quarts of whiskey that were purchased. The men were all drinking. Accused drank about six or seven drinks during the evening (R. 6-7, 13-14, 22-23, 25, 30, 27).

About 2330 hours Staff Sergeant Austin J. McGuire "asked" that the party be broken up so that two men waiting outside could get some sleep. Everybody got up except accused, who said McGuire "couldn't order him out of the tent because he was an officer". Accused took off his shirt and wanted to fight with McGuire. He threatened to have Sergeant McGuire "busted" the next day. During the episode accused said to McGuire "Fuck you", and was talking "pretty loud" (R. 7-8, 16, 25, 32-33, 38).

About 0200 hours on 7 February accused undressed and "laid down" on one of the beds. He tried to "crawl in" with an enlisted man who was half asleep. The soldier "jumped out" and left the tent. Accused slept in one of the beds all that night. Two of the men were of the opinion that accused was drunk before he went to bed (R. 26-27, 33-34, 38-40).

Private Redmon awakened about 0430 hours and saw accused in one of the beds, apparently asleep. After the company fell out for reveille accused got up and talked to Redmon, who was not required to stand reveille. Redmon dressed and then "laid back" to wait for breakfast. Accused "came around and started feeling" Redmon's stomach and chest, and "started to undo" Redmon's belt. When Redmon stopped him, accused "started again and tried to put his hand" in Redmon's "britches". Redmon thought accused was drunk because he staggered and was thick-tongued. Private Dickey entered the tent and saw accused sitting on the side of Redmon's bed and "playing with Redmon around his groin". The edge of the hand of accused was "out of Redmon's pants". Dickey could not see all of the hand. Redmon left the tent and Dickey "laid down" on his bed. Accused "came over" to Dickey and "rubbed my stomach and he pushed his hand inside my belt and unbuttoned two buttons of my pants". Dickey "shoved" his hand away and then helped accused get his clothes on. It was then about 0630 hours (R. 26, 28, 33-34, 36).

About 0630 hours, First Lieutenant Gaspard O. Picard, the company commander, went to the tent and attempted to awaken accused, whom he found asleep in bed. Lieutenant Picard "stood him up and sat him back down and shook his head with one hand", but did not succeed in awakening him. The charge of quarters had attempted to awaken accused about 0430 hours. (On cross examination he stated that he did not see accused until 1000 or 1100 hours.) Redmon was in and out of the tent during the morning and saw accused there. When Dickey returned from the field about 1145 hours accused was sitting on Redmon's bed (R. 13, 16-17, 26, 34, 41-42).

On 14 February, accused made a sworn statement (Ex. 1) to Lieutenant Colonel Rayburn H. Miller, the investigating officer, after the latter had informed him of his rights. This statement shows that accused had six or eight drinks at the officers' club on the night of 6 February;

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went to the company street about 2200 hours to see the supply sergeant; observed some of the men drinking in a tent; went in and had a few drinks; paid for a bottle of "liquor" that one of the men obtained "some place"; had about five drinks from that bottle; and had an argument "about some silly thing". He remembered nothing more until he woke up the next day about lunch time in one of the tents (R. 45-46).

4. For the defense, accused testified that he is thirty-five years of age and has been married twelve years. He enlisted in the National Guard in February 1931, received three honorable discharges, was commissioned second lieutenant 25 July 1938, and was promoted to first lieutenant in March 1941. He stated that he had never had any "off-colored" relationship with men, and his sex life had been normal. As to the occurrences of the night of 6 February his testimony was substantially the same as the statements in Exhibit 1. He had no recollection of what happened (other than as stated), did not remember arguing with Sergeant McGuire, and awakened the next morning about 1130 or 1145 hours. When he was first confronted with the allegations against him about two days later, he was "horrified" (R. 54-58).

Five officers, who had known accused from a few months to several years, appeared as character witnesses. They testified that his reputation for moral character was excellent or good, that they had heard nothing that would indicate that he was sexually abnormal, and that they accepted him as a friend. It was also shown that reclassification proceedings had been instituted with respect to accused, and were pending (R. 47-53).

5. The evidence shows that on the evening of 6 February 1945 accused had several drinks; then went to the tent of some enlisted men of his company; drank with them from about 2200 hours until about 0200 hours the next morning; became drunk; and got into an argument with a sergeant, removed his shirt and wanted to fight, addressed obscene language to the sergeant, threatened to have him "busted", and talked in a loud voice. He tried to get in bed with one of the men, and afterward slept on one of the beds in the tent. Early the next morning after he awakened he fondled two different enlisted men, as named in Specifications 1 and 2, Charge III, and attempted to touch their private parts. He was in an intoxicated condition at the time. He went back to sleep, could not be awakened, and remained in the tent until nearly noon.

In the opinion of the Board of Review the evidence sustains the findings of guilty as approved.

6. The charge sheet shows that accused is thirty-five years of age; and that he enlisted (National Guard) 19 February 1931, served until 24 July 1938, with three honorable discharges, was commissioned a second lieutenant in the National Guard of the United States on 25 July 1938, and entered on active duty 15 October 1940.

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

Samuel M. Driver Judge Advocate

F. J. Lott, Judge Advocate

William S. Sykes Judge Advocate

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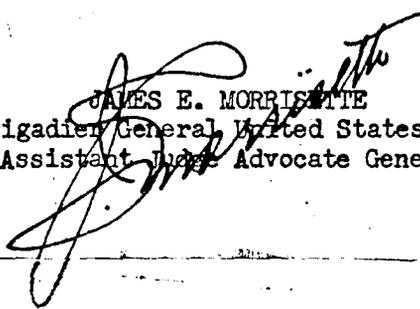
Branch Office TJAG, with USAF/POA, APO 958
TO: Commanding General, USAF/POA, APO 958.

APR 10 1945

1. In the case of First Lieutenant PETER DONAGHY (O-355045), Company E, 105th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 247. For convenience of reference please place that number in brackets at the end of the order.

(CM POA 247)


JAMES E. MORRISSETTE
Brigadier General, United States Army
Assistant Judge Advocate General

(Sentence ordered executed, GCMO 7, USAFPOA, 11 April 1945.)

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

18 April 1945

BOARD OF REVIEW

CM POA 255

U N I T E D S T A T E S v. Private ALFRED HAYES (34153052), 469th Aviation Squadron.)))))	ARMY AIR FORCES PACIFIC OCEAN AREAS Trial by G.C.M., convened at APO 953, 30 and 31 January 1945. Dis- honorable discharge and confinement for 20 years. Penitentiary.
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HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Alfred Hayes, Headquarters and Service Company, 928th Air Base Security Battalion (Then 384th Aviation Squadron), did, at APO #953, on or about 24 October 1944, assault with intent to forcibly and feloniously, against her will, have carnal knowledge of Barbara Worth, a civilian, residing at Air Depot Dormitory, APO #953.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions (one for wilful disobedience of a non-commissioned officer and the other for destruction of Government property and insubordination to a non-commissioned officer) was considered by the court. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. The reviewing authority approved the sentence, and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that Miss Barbara Worth, civilian employee of the Hawaiian Air Depot, met by prearrangement Private

First Class Joseph S. Reese at the "Housing Dormitories" about 2200 on 23 October 1944 on her return from a submarine party. Between thirty minutes and an hour later, during which time Reese repaired a punctured tire, they went for a ride "around the field" in Reese's car. They stopped by the "water tower" and were "chased" away twenty or thirty minutes later by the military police. Thereafter they drove to the "marine fence" in back of the "company motor pool" at APO 953 where they again stopped and Miss Worth left the car for a few minutes. When she returned, the car would "not start". Reese left the car in search of aid. He entered a nearby latrine where he unsuccessfully sought help from a "colored fellow". Then he returned to the car which he had left ten minutes earlier and tried to start it again. About fifteen to thirty minutes later, he left once more to find assistance. In the latrine on this occasion, he talked with another "colored fellow, about six feet one" who was taking a shower. This man had a scar on his chest which was "like a half-moon one way and a half-moon on the other side". Reese explained that his car was stalled, that he had a girl in it, and that he wanted help. The man promised aid as soon as he was dressed, and also said he would bring some cigarettes for which Reese had asked. Reese then went back to the car (R. 7, 8, 10, 22, 23, 25, 26, 33-37, 44-52, 73, 74).

A minute or so later, the same "colored fellow" who "just had on a pair of trousers" came to the right side of the car where Miss Worth was sitting and "began talking to Private Reese" after giving them some cigarettes. He informed Reese that "Henry Smith" could push his car with a jeep. The two men then left together. Miss Worth had informed Reese that she was "a little frightened about staying there alone" and to "come right back if he heard a horn blowing" (R. 10, 11, 27, 28, 35, 36).

Reese and the "colored fellow" walked from the car by the "wash rack" at the end of the "motor pool" and came up the "last row of huts" where the members of the 702nd Chemical Company resided. At the "third shack", the man pointed out the "last hut" as the one to which Reese should go for "Henry Smith" and told Reese not to inform "Henry Smith" who had sent him. Reese proceeded alone to the designated hut, which was seven hundred feet from the car (R. 36-38, 56, 58, 65, 70).

In the meantime, Miss Worth had rolled up all the windows and locked all the doors of the car. About five or ten minutes later, the "same man that had gone away with Reese" returned to the car "walking very hurriedly" and said "The C.Q. is coming * * * Get out of the car." He "tried" the handle of the door nearest Miss Worth, who started blowing the horn and "kept blowing" it. The man "went around and tried all the other doors" and continued saying "open the door". Then he picked up "a rock or a stone and went back like this" (demonstrating the initial part of a throwing motion) but did not throw. He pried open "one of the little back side windows", opened the back door and entered the rear of

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the car. He then opened the front door, hit Miss Worth "a couple of times" and "dragged" her out of the car. "Then he really started to hit" her. Each time she screamed, he hit her with his fist. He hit her "about twenty times". Twice he knocked her down, and he kept saying "God damn it! Stop screaming." He had hold of her and was "dragging" her along toward some trucks that were parked near a "corrugated building" about fifty five feet away. Although the night was bright, it was "pretty dark" in the locality of the trucks. Miss Worth was "pulling back" during this time (R. 11-16, 18, 29, 46, 65).

Private Reese, who heard the horn of the car blowing as he emerged from the "last hut" where he had been told that there was no "such man /as Henry Smith/ around here", ran as fast as he could to Miss Worth, picking up a club on the way, and saw a tall man "dragging" Miss Worth. At this time they were about ten feet from the trucks. When Reese was ten or fifteen feet away, the assailant turned Miss Worth loose and ran away. Miss Worth who was "hysterical" rushed over and held on to Reese. Miss Worth was "beaten up" around her face, had "big bruises" on her head and body, and had blackened eyes and bruised legs. Her clothing was in a disheveled condition (R. 16, 17, 38, 57, 61, 71).

Miss Worth testified, among other things, that she had her purse on the seat beside her, that her assailant mentioned nothing about money, and that he did not try to take a bracelet which she was wearing (R. 17). On cross examination, she testified that her attacker did not place his hand on her breasts or under her dress, did not ask her to have sexual intercourse with him and did not make any effort to kiss her (R. 32).

On the following day, Reese identified the accused as the "colored man" with whom he had conversed and who had directed him to "Henry Smith". Reese also identified accused at the trial after his scar was exposed as the same man (R. 39-42, 69).

About three or four days after the assault, Miss Worth picked accused from five men of the same type and build as her assailant. She testified that the accused was "absolutely, positively" the man who attacked her (R. 18-20).

Captain Edward W. Burke, Medical Corps, testified that on the afternoon of 24 October 1944 he examined the accused and found "superficial and minor abrasions * * * in the skin of the left wrist, right forearm, right leg, and right upper arm", estimated to be about "48 hours old" (R. 62-64).

In neither the 384th Aviation Squadron (accused's organization at the time) nor the 702nd Chemical Company on the date of the crime or on the preceding date was there any person named Henry Smith (R. 75, 78, 81, 92).

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4. The accused elected to remain silent (R. 126).

For the defense, Private Wilbert Allen, 469th Aviation Squadron, testified that on the night of 23 October 1944 he had been on guard from "ten to twelve", that he then went to sleep in his hut, that accused whose bed was next to his own was in bed, that later that night at an unknown time he was awakened by "some screaming", that he walked about fifteen yards "out of the door to listen" where he stood until the screaming was over, "turned around and went back into the house", and that accused was in bed. He had been out of the shack about "ten seconds" (R. 94-96). On cross examination, Allen testified that he had known accused one week (R. 94-96).

Staff Sergeant Harry West, 384th Aviation Squadron, testified that at "2:15" on the morning of 24 October 1944, he was aroused by the sergeant of the guard; that he "got up and went to the motor pool" and then to a car forty or fifty yards away where he was told by "a sergeant, with CKC's" that he had "stopped in to see a friend * * * by the name of Henry Smith"; and that the girl with the "sergeant" did not seem excited (R. 106-108).

Privates Jerrie Holmes, Herman E. Hawkins, Eugene Black and Corporal John H. Fant, all of 384th Aviation Squadron, testified that Miss Worth identified accused when the four of them and accused were placed in a "line-up". They were dressed in fatigues. One witness said that before entering the room where they were in line an officer was near Miss Worth, that she "turned as though someone had spoken to her", that the officer "raised his hand up * * * and pointed out", and that then Miss Worth entered the room and identified the accused (R. 110-123). Miss Worth was recalled to the witness stand for further cross examination. She testified that as "soon as [she] got to the defendant, [she] knew who it was" (R. 125).

5. In rebuttal, the prosecution introduced in evidence the stipulated testimony of Captain Marvin J. Robb, Medical Corps, to the effect that he examined Miss Worth at 0300 hours on 24 October 1944, that "her hair was disheveled, clothing dirty but not torn, she was excited but cooperative. No odor of alcohol was noted. Examination revealed subcutaneous ecchymosis about both eyes, a subconjunctival hemorrhage of the left eye, multiple bruises of both arms and the right leg. There was no evidence of any serious injury. She was given a sedative and sent home" (R. 126; Pros. Ex. 6). Second Lieutenant Erwin F. Uhde, 543rd Air Base Squadron, testified that he had examined Private Allen about "the incident", and that Allen told him he had seen accused when he went to bed and later after the screams were heard he had seen accused standing in the doorway of the hut but not in bed (R. 126, 127). Captain Robert N. Skalwold, 543rd Base Headquarters and Air Base Squadron, testified that in his investigation of the charges against accused, he interviewed Private Allen. In answer

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to his question whether accused was in his quarters at the time or shortly after the "screams were heard", Allen did not "indicate in any way * * * that [accused] was there at the time" (R. 129). Private Reese testified that he saw Sergeant West on the night in question, that he did not tell him that he came into the area to see "Henry Smith", and that he was not wearing "sergeant stripes" (R. 130, 131).

6. The evidence shows that the accused, in response to the request of Private First Class Joseph S. Reese to assist him and a girl in starting a stalled car, approached the car and engaged in conversation with Reese. The time was approximately 0200 hours on 24 October 1944, and the locale near a "motor pool" on an Army post. At the suggestion of accused, Reese accompanied him about 700 feet away to find one Henry Smith who would be able to assist in starting the car. Under the pretext of not desiring Henry Smith to know who had sent Reese to him, the accused managed to return alone to the car while Reese proceeded to find Smith. The occupant of the car, Miss Barbara Worth, had closed the windows and locked the doors of the car because she was frightened at being left alone at that time of night. Before Reese had left she informed him that in case of need she would blow the horn of the car. When accused reached the car, he told her to get out. She refused. He thereupon endeavored to open the door nearest Miss Worth. She immediately began blowing the horn of the car. The accused tried to open all the doors, continually saying "open the door". Then he pried open a small window and was able in this manner to enter the car. He immediately hit Miss Worth and dragged her from the car. She was screaming for aid and the accused kept saying "God damn it, stop screaming". He hit her about twenty times, knocked her down twice and dragged her about forty five feet toward some parked trucks. It was "pretty dark" in the locality of the trucks although the night was bright. Miss Worth was resisting the accused. The attention of Private Reese, as he emerged from the hut designated by accused as where Henry Smith (who was fictitious) could be found, was aroused by the horn and screams. He immediately ran back toward the car, with a club in hand, and observed Miss Worth being pulled toward the trucks by accused who released her and ran away only when Reese was 10 or 15 feet away.

It thus appears that at the time and place alleged the accused assaulted Miss Worth by hitting her with his fists, knocking her down and dragging her toward some nearby trucks. The identity of the accused is so definitely established by the testimony of Miss Worth, corroborated in many respects by the testimony of Private Reese, that there is no doubt as to the court's justification in finding the accused to be the assailant. The principle question involved concerns the intent with which the assault was made. "The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice" (MCM, 1928, par. 1491). Intent being a

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mental process can only be inferred in cases such as this from the character and degree of the violence applied, the language, threats and entire conduct of the accused, and the place, time and other circumstances of the attack (see Winthrop, 2nd Ed., p. 688). It is a question of fact and not a question of law except in a case where the facts proved afford no reasonable ground for the inference drawn (CM 234190, Torres, 20 BR 277, 283, citing People v. Moore, 100 Pac. 688). The actions of the accused in luring the male companion of his victim away from the scene by artifices, in breaking into the locked automobile and promptly hitting his victim and then dragging her from the car, and in continuing to hit her with his fists and repeatedly admonishing her to discontinue screaming and then dragging her toward some trucks about 50 feet away where it was dark, his making no move to steal her purse which was in the car beside her or to take from her wrist a bracelet and his desisting from his vicious attack and design only after his victim's companion had come upon the scene brandishing a club, and the other facts and circumstances of this case are sufficient to warrant the finding that the assault was made with the intent to commit rape (CM 195035, Talley, 2 BR 181; CM 233183, Gray, 19 BR 349). As was said by the court in Ware v. State (67 Georgia 352):

"* * * What other motive could he have had? * * *
The fiendish flame of lust alone could impel him to such acts. In seeking the motives of human conduct the jury need not stop where the proof ceases; inferences and deductions from human conduct are proper to be considered where they flow naturally from the facts proved, and such conduct as this points with reasonable, if not with unerring, certainty to the lawless intent he had in view."

7. The charge sheet shows that the accused enlisted on 24 October 1941. His age, according to the review of the Staff Judge Advocate, is 25 years. The accused did not know the date of his birth.

8. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of assault with intent to commit rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-501, District of Columbia Code.

9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Samuel M. Driver, Judge Advocate

J. J. Lott, Judge Advocate

Charles S. Sykes, Judge Advocate

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

1 May 1945

BOARD OF REVIEW

CM POA 272

UNITED STATES v. Staff Sergeant JOSEPH F. MUNDY (36439413) and Private First Class CLYDE H. BLAIR (15091122), 149th Army Airways Communications System Squadron.) NEW CALEDONIA ISLAND COASTLAND)) Trial by G.C.H., convened at Camp) Benson, New Caledonia, 2 and 13) April 1945. Sentence (as to each) accused): Dishonorable discharge) and confinement for 20 years.) Penitentiary.
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HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES; Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.
2. The accused were tried upon the following Charges and Specifications:

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

Specification: In that Staff Sergeant Joseph F. Mundy, 149th Army Airways Communications System Squadron, and Private First Class Clyde H. Blair, 149th Army Airways Communications System Squadron, acting jointly and in pursuance of a common intent, did, at APO 502, on or about 11 March 1945, with intent to commit a felony, viz. rape, commit an assault upon Mrs. Claudette David, by forcibly holding her, partially removing her clothing, and attempting to have sexual intercourse with her.

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

Specification: In that Staff Sergeant Joseph F. Mundy, 149th Army Airways Communications System Squadron, and Private First Class Clyde H. Blair, 149th Army Airways Communications System Squadron, acting jointly and in pursuance of a common intent, did, at APO 502, on or about 11 March 1945, wrongfully strike Mr. Jacques David on his head and body with their fists.

Accused Mundy pleaded not guilty to all Specifications and Charges. Accused Blair entered a special plea of insanity but through his counsel consented that the trial proceed and that at its close a continuance be granted in order that evidence as to his insanity might be presented. Accused Blair then also pleaded not guilty to all Specifications and Charges. Both accused were found guilty of all Specifications and Charges and were sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years. The reviewing authority approved the sentences and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on the afternoon of 11 March 1945, Jacques David and his wife, Claudette David, French citizens, accompanied by their "cousins", two young ladies, seventeen and sixteen years of age respectively, were traveling on horseback along a road near Corovin, New Caledonia, which was the home of their friend or relative, Mr. Leon Devillers. Mr. David was 23 years of age and his wife was 27. Neither of them spoke or understood the English language. A khaki colored "peep" came along and started to follow them. When they turned around and rode toward Corovin the vehicle also turned around and continued to follow them. Accused Mundy was driving and accused Blair and a sailor were riding with him. The car stopped near the party on horseback and Blair and the sailor alighted. Mr. David fell or was pulled from his horse by Blair. He started to run and Blair and the sailor pursued him. Mr. David picked up a rock and threw it but did not hit anyone. He fell down and they struck him with a stick and punched and kicked him. He covered his head with his hands. He did not know whether Mundy struck him because he could not see while he was on the ground. He heard his wife call out for help and when he got up she said "My dear". He saw that she was "against the bank" and that someone was holding her. Mr. David ran down the road to summon assistance and Blair followed and threw stones at him (R. 11, 25-29, 34-35, 40).

Mrs. David did not see her husband fall from his horse but saw him on the ground. Blair was beating him with a stick and with his fists. She also saw Mundy strike her husband when the latter was on the ground. She had dismounted from her horse and the sailor seized her and held her upright "by the two wrists against the bank". She saw a small jackknife in "the hands of the sailor" and he "menaced" her with it and "pushed it into" her left side. Mundy came up close to her and he and the sailor held her by the arms and proceeded to strip her from the waist down by taking off the slacks and underclothing which she was wearing. When she cried out as loudly as she could the sailor put his hand over her mouth. She tried to push them away but was unable to do so. She fell and the sailor "fell on" her but "got up" again. Mundy "laid" on her "completely covering her". She fought him off as much as she could. He was lying on her and "spreading" her legs. She could not see whether

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he had his clothing unbuttoned. Then Mundy and the sailor "spoke among themselves", Mundy arose and the sailor "got on" her and "attacked" her. At this point in Mrs. David's testimony the interpreter in answer to a question by the Law Member said that the French word which she apparently had used "would mean having carnal knowledge or using somebody against their will" (R. 13-17, 19, 25).

After the sailor "got up" Blair "came and laid completely on top" of Mrs. David. She was still on the ground and dressed only in her blouse. In the meantime Mr. Devillers, who was at his house in Corovin, had been informed of the "disturbance" by a "kanaka". Mr. Devillers mounted a horse and started to gallop "down the road to their rescue". He passed Mr. David, who was cut around the temple and had blood on his shirt, and saw Mrs. David struggling with "an American" who had hold of her "with his hands" and she was trying to get away from him. The man released her and entered a "peep" which had driven away by the time Mr. Devillers arrived. Mrs. David was standing up "completely undressed up to the waist" and was holding her "khaki pants" in front of her. As Mr. Devillers approached them, Blair "had begun to penetrate" Mrs. David. She "felt it" although she could not see whether any part of his body was exposed. When he was distant about "two hundred meters cross country", Mr. Devillers "cried out" and Blair arose, held Mrs. David by the right arm and tried to pull her "toward the auto". The other men had run back to the car. She freed herself after Blair had pulled her "a few meters". Mrs. David testified that she resisted all three of her assailants "with all of my strength" but that when Mundy was on her she had more strength and "was able to fight him off better [than Blair]". (R. 18, 22, 24, 36-37).

It was stipulated between the prosecution and both accused and their counsel (Ex. 1) that if "Dr. Albert Gabillon, a French civilian" were present he would testify that he had examined Mr. David and his wife at their request at 1600 hours on 12 March 1945 and found that they had the following injuries: Mr. David had a superficial linear contusion wound in the region of the right cheek bone, a contusion of the right mastoid region, discoloration of the extreme angle of the right eye socket, and abrasions of the left chest, the right side and the tibial region of both legs; Mrs. David had discoloration below the right shoulder blade, slight discoloration in spots on both arms and on the left leg, and a number of abrasions on the right thigh and right buttock (R. 6-7).

Mrs. David testified that all of her assailants "smelled of alcohol" but from their actions she "would say" that they were not drunk. Mr. David testified that the accused were not "very drunk" and that they knew what they were doing. The testimony of the older one of the two young ladies was to the same effect. On cross examination the defense confronted Mr. David with the following portion of a statement (subsequently introduced in evidence as Def. Ex. A) which he had given to

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the French civilian police and had signed: "Among the three military men who were in the peep there were certainly some among them who had had something to drink". When Mrs. David was recalled for further cross-examination a portion of a similar statement which she had signed was read to her as follows: "The two American military men, that is to say the sailor and the one that was dressed in khaki, and wearing a garrison hat, were in a state of complete drunkenness at the time of this savage attack". She denied making the quoted portion of the statement. She admitted that the "French Police" had read to her the statement which she signed but she did not remember "him adding that statement". The excerpt from her statement was admitted in evidence as Defense Exhibit B (R. 20, 32-33, 40, 43-44).

On 17 March 1945 after each of them had been informed of his rights as to self-incrimination, accused voluntarily made written statements which were received in evidence as Exhibits 2 (Blair) and 3 (Mundy). The Law Member permitted only those portions of the statement of each accused (the portions not inclosed in brackets) which he regarded as not prejudicial to the other accused to be read to the court. In the parts of the statements thus read the accused both stated that on Sunday, 11 March 1945, they had gone on a cross-country pleasure trip in a jeep with a sailor by the name of Flowers. About 1100 hours they stopped and had dinner, during which they drank a quart of wine. They took another quart of wine with them and drank it as they drove along. At 1300 or 1400 hours they stopped at another town where they went to a bar and each drank three or four "double shots" of whiskey. They drove on for about 15 miles and came upon a party of French civilians, a man and two or three women, on horseback. Mundy was driving. When they came up opposite the Frenchman Blair reached out and slapped his horse on its "rump" (R. 7-10; Exs. 2 and 3).

The remainder of the statements differ substantially and will be summarized separately. Blair's statement recites that he "got out of the jeep" and "took a swing at the Frenchman" but did not remember hitting him. His "next recollection was to find the Frenchman on the ground". The Frenchman picked himself up and started to run with Flowers "chasing" him. Blair turned the car around and saw Flowers standing over the Frenchman, who was lying on the ground with the blood flowing from a cut on his face. He observed that "her Mrs. David's pants" were down below her knees and after he walked around "the rise in the hill" he saw her on the ground with Flowers lying on her. The Frenchman ran down the road and Flowers got off of the woman and began to throw rocks at him. Blair grabbed the woman by her arm and tried "to pull her around the rock". He tried "to get an erection" but failed to do so. He put her hands on his shoulders and "felt her breasts" but still could not "get a hard on". He heard a "jeep" coming and he and his companions entered their car and drove away (Ex. 2).

The remainder of Mundy's statement is to the effect that when he alighted from the "jeep" the Frenchman ran at him and tried to strike him with a "boulder" which the Frenchman held in his left hand. Mundy struck him on the jaw and knocked him down. The Frenchman "got up and ran toward Flowers" and when the two of them met the former went down. Mundy saw Flowers talking to one of the French women and walked up to her and asked if she would give him "a little (meaning intercourse)" and she replied "In a minute". He then reached over and unbuckled the belt of her tan slacks and she did not resist but when he started to unbutton her slacks she pushed his hand away. He put his arm about her, she started "screaming for help", and Flowers put one hand over her mouth and held one of her arms with the other. "Several minutes later" she "ducked" under Mundy's arm and by the time he had turned around she was lying on the ground "legs extended, together" and with her slacks and "under pants" below her knees. By this time the Frenchman and the other two girls had disappeared. Mundy walked over to the woman on the ground, knelt down, took out his penis which was erect and tried to "insert" it, but she prevented him from accomplishing his purpose by keeping her body in motion. He had an ejaculation before he could "enter her". He got up and stepped back and Flowers lay on top of the woman for several minutes. She did not resist or scream. Mundy thought he saw a "peep" coming and went to his own vehicle and "got in followed by Flowers". They then drove off in a northerly direction (Ex. 3).

4. For the defense Captain John G. Grigsby, adjutant and formerly for four months commanding officer of the organization of the accused, testified that accused Mundy had been in the organization for several months, that he recently had been chief mechanic and at one time was in charge of the motor pool, that he had earned two promotions and that the manner of the performance of his duty was excellent. Captain Grigsby also testified that he had no reason to believe that the "character and performance" of accused Blair had been other than excellent (R. 41-42).

Each of the accused elected to remain silent (R. 45).

5. The court granted the motion of the defense for a continuance for the purpose of ascertaining the mental condition of accused Blair and adjourned. When the court again met on 13 April 1945 it was duly stipulated that the report of the Sanity Board which had examined accused Blair be received in evidence and that the findings of the board be read to the court. The findings were to the effect that Blair was a "Psychopathic Personality, Emotional Instability - asocial and amoral trends", that this condition, which had existed at the time of the alleged offense, did not render him unable to distinguish right from wrong or to adhere to the right at that time, that he was able to understand the nature of court-martial proceedings and to intelligently cooperate in his own defense, and that he was not insane (R. 45-47, Def. Ex. C).

6. The defense offered no testimony with the exception of one character witness; and the evidence for the prosecution shows that on the afternoon of 11 March 1945, as the two accused were riding in a "peep" with a sailor on a recreation trip on a road in New Caledonia, they encountered a party of French civilians on horseback, Mr. and Mrs. David, who did not understand the English language, and two young ladies who were their cousins. Acting in concert the accused and their companion pulled the husband from his horse; knocked him down, struck him with a stick and with their fists, threw rocks at him and drove him from the scene. The sailor seized Mrs. David. He and accused Mundy held her by the arms against a bank and, despite her screams for help and her efforts to resist them, stripped her from the waist down and placed her on the ground. Mundy lay on top of her and spread her legs apart, but she resisted him by keeping her body in motion and he had an emission before he could effect penetration. The sailor then had sexual intercourse with Mrs. David. Accused Blair next lay on top of her and started to penetrate her person but ran to the "jeep" and fled with his two companions at the approach of a horseman, a French civilian, who came galloping up to assist Mrs. David. She resisted the advances of both accused "with all of my strength" but because she had more strength at the beginning was able to "fight him Mundy off better" than Blair who was the last of her three assailants.

The Manual for Courts-Martial defines assault with intent to commit rape as follows:

"This is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. * * * The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice.

"Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted." (MCM, 1928, par. 1491).

Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 148b).

It is clear that each of the accused attempted to rape Mrs. David. Each of them actually assaulted her and their concerted actions and the admissions contained in their respective statements made before the trial show that their intentions were to carnally know her by force

and without her consent. The brutal and summary manner in which they disposed of her husband in her presence was such as to impress upon her the futility of further resistance on her part. She did not consent to their advances. The extent and character of the resistance required of a woman to establish her lack of consent depends upon the circumstances and the relative strength of the parties (CM 236801 Smith, 23 B.R. 129, 133; CM 238172 Spear, 24 B.R. 181, 187; CM 239356 Brown, 25 B.R. 137, 141). The evidence supports the findings of guilty of Charge I and of the Specification thereunder.

It is also established by the evidence that an assault and battery was committed upon Mr. David at the time and in the manner alleged in the Specification of Charge II and that both of the accused, with a common intent, participated in such assault.

7. The charge sheet shows that accused Mundy is 23 years of age and that he was inducted on 15 December 1942; and that accused Blair is 30 years of age and that he enlisted on 5 March 1942.

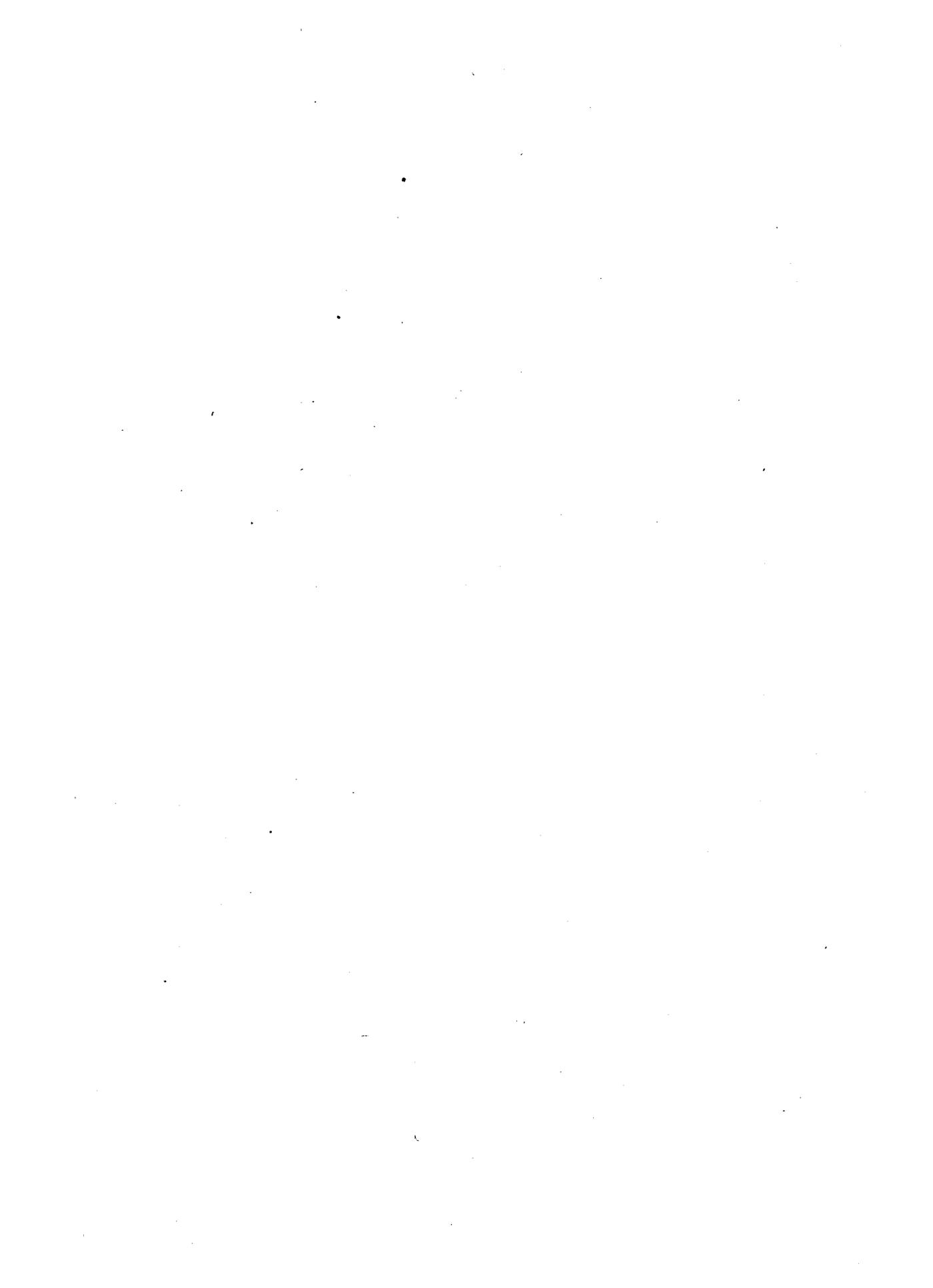
8. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of assault with intent to commit rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-501, District of Columbia Code.

9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences.

Samuel M. Driver Judge Advocate

J. Lotterhos, Judge Advocate

Charles S. Sykes Judge Advocate



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

Specification: In that Corporal Major McRae and Corporal Mano A. White, both of the 4013th Quartermaster Truck Company, acting jointly, and in pursuance of a common intent, did, at APO 244, on or about 13 February 1945, feloniously take, steal, and carry away a Record Chest, value about nine dollars and forty cents (\$9.40), and a United States Censor Stamp, Number 41512, value about three dollars (\$3.00), property of the United States, furnished and intended for the military service thereof.

The accused, McRae, pleaded not guilty to the Charges and Specifications. The accused, White, pleaded guilty to the Charges and Specifications. Both accused were found guilty of the Charges and Specifications with certain minor exceptions and substitutions, and were sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved as to each accused only so much of the respective findings of guilty of Charge I and its Specification "as involves a finding of guilty of larceny of seven hundred fifty-five dollars and eighty-six cents (\$755.86), of money orders in the value of one hundred sixty-eight dollars (\$168.00), and stamps of the value of two dollars (\$2.00), at the time and place alleged", and only so much of the respective findings of guilty of Charge II and its Specification "as involves a finding of guilty of larceny of one (1) record chest and a censor's stamp, both of some value, at the time and place alleged", approved the sentences, reduced the period of confinement as to White to two and one-half years, suspended the execution of the dishonorable discharges and designated the Post Stockade, APO 957, as the place of confinement for McRae and the Army Garrison Force Stockade, APO 244, as the place of confinement for White.

3. The record shows that in accordance with their expressed desires, both of the accused were represented by the regularly appointed defense counsel and assistant defense counsel (R. 3). As heretofore stated, the accused White pleaded guilty and the accused McRae pleaded not guilty (R. 6). The thefts of the described property (except in minor particulars, corrected by the reviewing authority) at the time and place alleged were clearly shown (R. 6, 7, 9, 10, 12-19, 30; Pros. Ex. 1). About three weeks after the thefts, the sum of approximately \$192.00 was found in a bag belonging to White, who, when asked for an explanation, after being advised of his rights under the 24th Article of War, admitted to a commissioned officer his participation in the thefts and implicated McRae as his accomplice (R. 8, 22-32, 35, 41, 42). When this confession of White was introduced in evidence (Pros. Ex. 3), the court was properly cautioned that it would not be considered as evidence against McRae (R. 32, 38). The accused White was called by and testified as a witness for the prosecution (R. 39). He testified that the thefts were committed by him and McRae acting together in accordance with a preconceived plan (R. 39-46).

White's testimony constituted the sole evidence of McRae's guilt. For the defense as to White, there was "no defense" because he "has thrown himself upon the mercy of the court" (R. 47). On his own behalf, the accused McRae took the stand as a sworn witness and maintained his innocence of the alleged offenses (R. 47-55). At the conclusion of the trial the argument of the defense counsel was as follows:

"All I'd like to do, sir, is to point out that only one witness has been presented against McRae, that is the other accused. It is a case of one's word against the word of another. In his testimony, Corporal White insisted that at no time during the alleged thefts, did McRae leave him, except on one occasion when he left him guarding the box. Private Williams testified that he saw McRae sitting alone in his tent. That's all." (R. 63, 64).

4. The fundamental question for consideration is whether or not the accused McRae was denied that fair and impartial trial to which he was entitled by the fact that both he and his co-accused, whose defenses were antagonistic, were represented by the same defense counsel.

Article of War 17 reads in part as follows:

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

Officers or other military persons "acting as individual counsel for the accused before a general or special court-martial, will perform such duties as usually devolve upon the counsel of the defendant before civil courts in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty * * * to represent the accused with undivided fidelity" (MCM, 1928, par. 45b (emphasis supplied)). "When the defense is not in charge of a counsel of the accused's own selection, the duties, etc., of the defense counsel are those of a military counsel of the accused's own selection." (MCM, 1928, par. 43).

The Supreme Court has held in numerous cases that the "Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment" and that the court will look into the attendant facts and circumstances to ascertain that an accused has been "accorded the right of counsel" in a "substantial sense" (Moore v. Dempsey, 261 U.S. 56; Powell v. Alabama, 287 U.S. 45; Avery v. Alabama, 308 U.S. 444). This principle has been held applicable to trials by courts-martial (CM 204483, O'Donnell, 8 B.R. 15).

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That courts-martial protect the rights and interests of an accused in this respect more vigorously than was done by common law courts is shown by the indorsement of the Acting Judge Advocate General to CM 200989, Osman, 5 B.R. 28, in which it was said in part:

"The rule of the courts of common law, both civil and criminal, that a party has no relief against errors, omissions, or poor judgment of his counsel, can have but a limited application in court-martial practice, where the majority of counsel are not learned in the law, and where it is the duty of everyone connected with the administration of military justice, and not least my own, to see that the rights of every accused are adequately protected."

In CM 194997, Elberson et al, 2 B.R. 173, one defense counsel represented four accused charged with a joint larceny. Each accused pleaded not guilty. The court refused to grant a severance as to one accused despite the defense counsel's statement that the defense of this accused (Kozo) was antagonistic to that of the others. At the close of the case for the prosecution, the evidence as to the extent of participation of the several accused in the larceny was doubtful. The Board of Review said:

"It is evident throughout the record that the defense counsel prepared a defense for three of the accused directly antagonistic to accused Kozo. Not only did the defense counsel attempt, by his method in the direct examination of his own witnesses, to prove that Kozo was a thief, and the one and only thief, but in his argument to the court, he stated:

'The evidence as brought out all the way through shows that these men were in an automobile. It points very clearly to the fact that one man was the thief, was the man that actually took this car. In the opinion of defense the man who committed the act, who went to the automobile, turned on the ignition, stepped on the starter and drove it away is the man that is guilty of larceny.' (R. 32).

It is thus clear that the defense counsel was nothing other than a self-imposed prosecutor as far as the rights and privileges of accused Kozo were concerned and that the latter was deprived of counsel guaranteed to him under the express provisions of the 11th and 17th Articles of War and paragraphs 6, 43 and 45, Manual for Courts-Martial."

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The foregoing authorities show that it is the duty of the Board of Review carefully to examine the circumstances of cases such as this to determine whether the accused was in fact substantially represented by counsel of undivided fidelity. The rules to be followed in reaching a proper conclusion are also shown thereby.

In the case under consideration, it does not appear that at the time when he chose his counsel the accused McRae knew that his co-accused's strategy of defense would be antagonistic to his own. It is clear, however, that McRae was convicted solely as a result of the testimony of accused White who appeared as a witness for the prosecution. White's own guilt had been established by his plea of guilty, and by his confession introduced in evidence after the corpus delicti had been proved. White testified as to his own guilt and implicated McRae as his accomplice. There was nothing in his testimony relating to any extenuating circumstances. It is thus apparent that the purpose in permitting White, who could become a competent witness only upon his own request (MCM, 1928, par. 120(d)), to testify for the prosecution, was to obtain for him either a pardon or a milder punishment than that imposed upon his accomplice, an accepted practice (see MCM, 1921, par. 216). That is not a defensive strategy ordinarily planned and executed without the suggestion and advice of counsel, and in the absence of a showing of an objection, it is apparent that his defense counsel participated in the effort to obtain a lighter sentence for White, an object which was achieved, since White's sentence was reduced by the reviewing authority to one half that of McRae. It follows that, despite his statement that the "defense has no defense for the first defendant, Corporal Mano White. He has thrown himself upon the mercy of the court" (R. 47), the defense counsel did not abandon the defense of White and devote his efforts exclusively to the defense of McRae. Had he abandoned White, he would have made some effort to have prevented White from testifying for the prosecution since White's testimony was necessary to prove McRae's guilt. A request for a severance would have been proper under the circumstances. Since he made no attempt of any kind to protect McRae from the damaging testimony of White, except by cross-examination, which it is difficult to believe would not have been more searching and effective had he been under no obligation to White, his undivided efforts cannot be said to have been given to McRae. The authorities, heretofore cited, entitle every accused to have counsel devote his undivided attention and efforts on his own behalf. When the defense is forced by the conflicting interests of two accused to cross-examine one of them and to state to the court in effect that one of the two accused whom he represents is lying (it is significant that in his argument in the present case defense counsel did not indicate which one), he is admittedly not giving to each of them that unswerving loyalty required by the existing relationship. Under the circumstances of this case, it appears to the Board of Review that the substantial rights of the accused McRae were injuriously affected

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by the fact that his counsel also represented a co-accused whose interests conflicted with his own. The fact that McRae stated at the beginning of the trial that he desired to be defended by his counsel does not preclude the Board of Review from searching the record as a whole to determine whether substantial error exists (see CM 199465, Lichtenberger, 4 B.R. 132).

5. For the reasons heretofore stated, it is the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of both Charges and Specifications and the sentence as to the accused, McRae.

Samuel M. Dixon Judge Advocate

J. L. Lott Judge Advocate

Charles S. Taylor Judge Advocate

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1st Ind.

Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas, APO 958, 18 May 1945.

TO: Commanding General, United States Army Forces, Pacific Ocean Areas, APO 958.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$ as amended by Act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Act of 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Corporal MAJOR McRAE (34667058) and Corporal MANO A. WHITE (33919993), both of 4013th Quartermaster Truck Company.

2. The record of trial has been examined in this office and found legally sufficient to support the sentence as to Corporal MANO A. WHITE.

3. Accused White and McRae were charged and tried jointly. With their express consent both were represented throughout the trial by regularly appointed defense and assistant defense counsel.

Prior to the preferring of any charges accused White, when confronted with the discovery of \$192.00 in his possession, voluntarily confessed to the larcenies, implicating McRae. At the formal investigation of charges against him, he again confessed, again implicating McRae. The charges were redrafted to include the latter, but if they were again investigated this fact is not disclosed by the record of trial or related papers. At the trial White pleaded guilty and after full and complete explanation of his rights took the stand as a witness for the prosecution, confessing in detail to the larcenies and again implicating McRae. McRae, on the other hand, pleaded not guilty and, testifying as a sworn witness in his own behalf, stoutly denied any connection with the offenses. The only evidence against McRae is the testimony of White.

It sufficiently appears from the record that accused White, who had confessed to the offenses prior to trial and therefore before having consulted his counsel, pleaded guilty and testified for the prosecution at the trial in order to throw himself upon the mercy of the court. In other words, "he turned state's witness" in the hope of obtaining some leniency, which in fact was accorded him, because although by his own testimony he was the instigator, his sentence as approved by the reviewing authority involves only two and one-half years' confinement while that of accused McRae, likewise approved by the reviewing authority, includes five years' confinement.

Under these circumstances it was obviously impossible for the same counsel to represent both accused in an adequate and proper manner. It is unreasonable to suppose that White pleaded guilty and "turned state's witness" other than by advice of counsel. In any event in such a situation counsel found himself in a dilemma from which he could not extricate

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himself without abandoning one or the other of his clients. Had he attempted on cross-examination or otherwise to discredit accused White, then he would have destroyed, or at least impaired, the hope of leniency towards that accused by reason of his testifying as a witness for the prosecution. Failure however to do so obviously left McRae without adequate or material assistance from counsel. The result speaks eloquently for the conclusion that it was McRae who was abandoned. In view of White's pre-trial voluntary confessions to some extent corroborated by incriminating circumstances, his defense, except for a plea for leniency, was hopeless. Yet, although the instigator of the offenses, his sentence was materially less than that of McRae, who was convicted and received the maximum sentence (although alleged in two specifications there was only one larceny) on the sole and substantially uncorroborated testimony of the alleged accomplice.

The Articles of War (AW 11 and AW 17) and the Manual for Courts-Martial (pars. 43, 44 and 45) expressly provide that an accused before a general or special court-martial shall have the right to be represented by counsel either of his own selection or by counsel appointed for the court. The provision is not an empty one and mere formal compliance is not enough. The Manual itself provides:

"He will be carefully selected. When it appears to the president of the court or to the defense counsel himself that the latter is for any reason, including bias, prejudice, or hostility in a particular case, disqualified or unable properly and promptly to perform his duties, the facts will be reported at once to the appointing authority through appropriate channels."

His duties are further emphasized in paragraph 45b of the Manual. I think it clear when it appears that an accused has been deprived of or denied the benefit of advice and counsel to the extent disclosed by this record it necessarily follows that he has not had the fair and impartial trial contemplated and required by our court-martial procedure and that his substantial rights are thereby injuriously affected.

In concurring in the Board of Review's opinion that for the reasons stated therein the record of trial is legally insufficient to support the findings of guilty and the sentence as to accused McRae, I have not overlooked the fact that he not only made no objection to being represented by the same counsel as White but formally consented thereto.

Accused is a private soldier. He was approximately twenty years of age at the trial, a negro, who quit school in the tenth grade, and had an AGCT score of only 73. Such an individual is hardly capable of making such an important decision, one in itself requiring the advice of able, qualified and impartial counsel. Without, as it sufficiently appears, the advice of such counsel, he failed to exercise his right to demand a severance or at

least to demand individual counsel. On a question of prime importance at the very beginning of the trial he was called upon to act on his own judgment unaided by the protection which the Articles of War and the Manual for Courts-Martial expressly provide for. When, added to these circumstances, it definitely appears that he was inadequately represented and no defense offered in his behalf I think that, in the complete absence of a showing that he was advised by counsel or the court of the situation in which he was involved and his rights therein, it sufficiently appears that his waiver of right to demand a severance or separate counsel was not intelligently made. (Williams v. Huff, 146 Fed. 2nd 867).

4. I accordingly concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of both Charges and Specifications and the sentence as to the accused, McRae, and for the reasons stated therein recommend that the findings of guilty and the sentence as to him, Corporal Major McRae, be vacated and that all rights, privileges and property of which he may have been deprived by reason of such findings and sentence, so vacated, be restored.

5. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made, should it meet with your approval. Also inclosed is a draft of a general court-martial order for use in promulgating the proposed action. It is requested that the record of trial be returned with nine copies of the general court-martial order.

JAMES E. MORRISETTE
 Brigadier General
 Assistant Judge Advocate General

3 Incl.
 Incl. 1 - Record of Trial
 Incl. 2 - Form of Action
 Incl. 3 - Draft of GCMO

(Findings and sentence as to McRAE vacated, GCMO 12, USAFPOA, 22 May 1945.)

The accused pleaded not guilty to the Charge and Specifications. He was found not guilty of Specification 1, guilty of Specification 2 and the Charge, and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for three years, suspended the execution of the dishonorable discharge, and designated the Army Garrison Force Stockade, APO 244, as the place of confinement.

3. A question for initial consideration is whether or not the action in this case was taken by the proper reviewing authority. The case was tried by a court-martial duly appointed by the Commanding General, Army Garrison Force, APO 244, who on 1 May 1945 signed the action approving the sentence and ordering its execution.

By General Orders No. 49, Headquarters United States Army Forces, Pacific Ocean Areas, 3 May 1945, "Headquarters and Headquarters Company, Army Garrison Force, APO 244, is discontinued, effective 25 April 1945." By previous orders of the same command (G.O. No. 43, 14 April 1945), the Western Pacific Base Command and the Headquarters and Headquarters Company of Western Pacific Base Command were established, effective 25 April 1945. The commanding general of the new command is the same individual who commanded the aforesaid Army Garrison Force, and the new command embraces (for purposes of this discussion) substantially the same area and units as the Army Garrison Force.

Assuming, without deciding, that the general orders discontinuing Headquarters and Headquarters Company, Army Garrison Force, APO 244, abolished the Army Garrison Force as a command, there is a question as to the legality of the retroactive effect of the orders. As heretofore stated, the orders were dated 3 May 1945, but made effective on 25 April 1945. It is inconceivable that general orders, such as this, can retroactively make ineffective acts which when taken under Presidential authority were valid, especially when rights of an accused have been fixed thereby. Assume that the reviewing authority in this case had reduced the punishment imposed, below the legal maximum for involuntary manslaughter. (He did, in fact, reduce it to that limit.) If the action of the reviewing authority is a nullity, which is the purport of the general orders, then another action might be taken to approve so much of the sentence as is legal and order its execution. Clearly such a situation would be unjustifiable because the orders under which it was authorized would be analogous to ex post facto legislation (see 16 CJS, p. 889, 895). In 1 Bull. JAG 68 et seq., it was decided that original orders relieving an officer from active duty which had been executed could not subsequently be

revoked. Furthermore, it is a general principle of construction that statutes which impair or destroy vested rights are contrary to justice and should not be given retroactive operation (see Crawford, Statutory Construction, Interpretation of Laws, sec. 277 et seq.).

Since the rights of an accused are of a vested nature when the reviewing authority acts, it appears from the foregoing authorities which apply to general orders as well as to statutes that retrospective effect should not be given to the aforesaid General Orders No. 49 insofar as the action of the reviewing authority on general courts-martial cases is concerned. The prospective operation of the orders in this respect is not affected by this conclusion (Ex parte Palm, 238 NW 732, cert. denied 285 US 547).

4. A summary of the facts necessary to a determination of the questions presented is as follows:

After having spent the morning of 11 March 1945 in swimming, in taking a few drinks, and in driving to various places on the island (APO 244), the accused and Technician Fifth Grade James L. Ashburn, returned to their camp, where they had dinner. In the afternoon, they continued to have more drinks and when they left camp in a command car which accused had been authorized to use they were accompanied by another soldier, Private Georgie L. Covey, who had joined them about 1630. They obtained more whiskey and all three soldiers took drinks from time to time. They drove "around over the island" and then to a beach on the north shore. Covey, who had brought along a carbine and some ammunition, had been firing "at sign-boards along the side of the road" despite the repeated attempts of Ashburn to restrain his doing so. The accused and Ashburn began "unloading his clips, and disposing of the ammunition" with the intention of preventing any additional firing after Covey had fired "this one clip left in the gun". Covey got out of the car, stood "on the beach" and had a few drinks. Ashburn and Covey then "got in the front" with a "couple of more drinks to go". The carbine was between them. Ashburn examined the gun and manipulated the bolt. When he laid it back down on the seat, Covey lifted it and "slipped out, with one foot on the fender, and tried to shoot it". He then asked Ashburn why he had removed the ammunition, and hit him four or five times "across the head with the barrel of the gun". This occurred about midnight. The accused, who was on the back seat "in a stretched-out position", "hollered" at Covey and "by the time" he "got up to where" he could stop him, Covey had "already quit beating on him". Accused placed Ashburn, then unconscious, in the back and informed Covey that they would "take him home now". Covey wanted to "leave him out here some place" but finally drove the car with its occupants to the 1398th dispensary, where Ashburn lived (R. 12, 22, 51-60; Statement Ex. 1).

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Accused, whose rights had been explained to him by the defense counsel, testified that after the car was stopped about 0030 near the dispensary, he carried Ashburn from the car but fell when he had covered about half the distance. He finally reached the door with him where he again fell down. At accused's request, Covey came to his assistance. Then the accused, who "was holding [Ashburn] around the chest from the back", with the aid of Covey, "who had ahold of his feet", carried Ashburn into the dispensary and left him on the floor near his "bunk" because they "didn't seem to be able to lift him up" to his "bunk". He did not notify anyone that Ashburn had been left there, because he wanted "to keep from further trouble". Accused further testified that when he first fell Ashburn made "some kind of a sound", and when he deposited Ashburn on the floor he "kind of mumbled something", "mumbled and groaned", and that he "figured" Ashburn "was about to come to, and being a medic * * * will be able to take care of his head where he got hit." (R. 56, 60-62, 64, 65).

About 0645 on 12 March 1945, Ashburn was found lying on the floor of the dispensary. His body was cold. An autopsy which was performed on Ashburn's body about 1430 on the same day revealed lacerations on the upper forehead, on the neck and upper lip, swelling of one eye, tear of mucous membrane about the junction of the teeth with the sockets, and further revealed about the brain blood "in the meninges", and "considerable blood in the ventricles". According to the testimony of a medical officer, death of the deceased occurred "as a result of hemorrhage of the brain" "several hours" before the autopsy. He further testified that in "any person with a hemorrhage such as this man had, the early treatment may be beneficial", and that medical attention "might have prolonged his life or might have assisted in his recovery" but that "Probably [in] over half" such cases "nothing can be done to save the individual" (R. 11-20, 45-47).

About 0600 or 0615 on 12 March 1945, the accused told Private First Class Jay B. Phillips that "Covey killed a man. If he didn't, he looked awful dead to me". Similar statements were made by accused about 0900 on the same date to Corporal Dorsey B. Moss (R. 26, 27, 30, 31).

5. The specification alleges that the accused at a named time and place committed "the crime of involuntary manslaughter by failing to exercise due care and circumspection for the safety and life" of another soldier, "an unconscious and dying person", in his "possession and custody, by negligently and carelessly leaving and abandoning" him "to die * * * without attempting to summon aid, and that" he "did thereafter die without ever receiving aid or assistance".

The form of the specification is technically defective because it fails directly to allege that the negligence of the accused caused or accelerated the death of deceased (see State v. Lowe (Minn), 68 N.W. 1094). In view, however, of the provisions of Article of War 37, the technical insufficiency of the Specification is not deemed fatal as the accused was not misled thereby (MCM, 1928, par. 87b).

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Involuntary manslaughter, according to an authoritative definition, is "homicide unintentionally caused * * * by culpable negligence in performing a lawful act, or in performing an act required by law. (Clark.)" (MCM, 1928, par. 149a).

"A man is not responsible for the death of another unless it was the proximate consequence of his act or omission. The first essential of causation is that the culpable act or omission should be a causa sine qua non. Although the defendant may have been guilty of some culpable act or omission, if the death was solely due to some other cause for which he is not in any way responsible he is not guilty. * * * If defendant is guilty of failing in the performance of some legal duty, yet if the person toward whom the duty is owing dies from some cause which would have been fatal even had the duty been performed defendant is not guilty". (Clark and Marshall Crimes, 4th Ed., sec. 231 (emphasis supplied); see also State v. Cop (N.C.), 167 N.E. 456; Tomerlin v. State (Tex.), 26 S.W. 66; Quinn v. State (Miss.), 64 So. 738; Fitzpatrick v. Commonwealth (Ky.), 275 S.W. 823). The rule of law that the negligence must be the proximate cause of the homicide has been recognized as applicable to courts-martial proceedings (see CM 240043, Vislan, 25 B.R. 352).

In Bradley v. State (1920), 79 Fla. 651, 84 So. 677, it was held that where an epileptic child under sixteen years of age fell into a fire and was severely burned, from which burns she later died, her father who had refused or failed in the meantime to provide medical attention for her was not guilty of negligent manslaughter. The court there said that it was not "proven that if the child had had medical attention it would have recovered". In State v. Barnes-(Tenn.), 212 S.W. 100, the court, in holding that it is the legal duty of a father to provide medical attention for his child and that he could be held guilty of manslaughter if the death of the child resulted from his breach of this duty, said that if "one owes to another a plain part and personal duty, imposed either by law or contract, an omission, resulting in death, renders the delinquent guilty of homicide". (emphasis supplied).

Thus, in the case under consideration, even if the accused was under a legal duty to summon medical assistance for the unconscious Ashburn (discussed hereinafter in paragraph 6), his failure so to do is alone insufficient to sustain a conviction of the crime of manslaughter. Such a conviction can be upheld only if it appears from the evidence that his omission to perform any such required duty caused or accelerated the death of Ashburn. The record shows that Ashburn died as a result of hemorrhage of the brain. The blows which caused the hemorrhage were inflicted by Covey and the accused was in no manner responsible for them. Fatality in injuries of the type suffered by Ashburn, according to medical testimony in the record, is high. In "Probably over half" such cases "nothing can be done to save the individual", although medical treatment "might have prolonged his Ashburn's life or might have assisted in his recovery."

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In CM 216004, Roberts et al, 11 B.R. 71, the following appears:

"Proof which goes no further than to show that an injury could have occurred in the alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.' (Southern Ry. Co. v. Dickson, 100 So. Rep. 665; Georgia Power Co. v. Edmunds, 171 So. Rep. 256, 258.)"

In view of the foregoing authorities, the Board of Review is of the opinion that the evidence is insufficient to show substantially that the death of deceased was attributable to failure of accused to summon aid. In so holding, the Board has not failed to consider cases such as Reg. v. Senior, 1 Law Reports Q. B. 283 and Reg. v. Morby, 15 Cox C.C. 35, L. R. 8 Q. B. Div. 571, holding parents guilty of manslaughter where medical attention, not summoned, might have prolonged life. Decisions in such cases are not applicable because they are based on the provisions of certain statutes (id).

6. The next question requiring consideration is whether or not the accused was proven guilty of any lesser included offense.

An omission to perform an act cannot be "the basis of penal action unless it constitutes a defect in the discharge of a responsibility specially imposed" (Wharton's Criminal Law, 12th Ed., sec. 455). "In the first place, the duty omitted must be a plain duty. * * * In the second place it must be one which the party is bound to perform by law or contract and not one the performance of which depends on his humanity, or his sense of justice or propriety. * * * In the absence of such obligation, it is undoubtedly the moral duty of every person to render others assistance when in danger; to throw for instance, a plank or rope to a drowning man, or make other efforts for his rescue, and if such efforts should be omitted * * * he would by his conduct draw upon himself the just censure and reproach of good man; but this is the only punishment to which he would be subjected by society" (U.S. v. Knowles, Fed. Cas. No. 15540). This rule is stated in the Manual for Courts-Martial as follows:

"Where there is no legal duty to act there can, of course, be no neglect. Thus where a stranger makes no effort to save a drowning man, or a person allows a mendicant to freeze or starve to death, no crime is committed" (MCM, 1928, par. 149a).

The facts in the case under consideration show that the accused had undertaken to assist Ashburn, when the latter had been knocked unconscious by Covey, by bringing him back to his quarters.

He, therefore, voluntarily assumed during such time the "possession and custody" of Ashburn, as alleged. It is unnecessary to decide whether he was under the legal obligation to do so.

However, since the accused undertook the assistance of Ashburn, the necessity for determining what, if any, legal duties were thereby imposed on him is apparent. Under the law of torts, the rule is clear that where "one voluntarily assumes the care of an injured person, he is charged with the duty of common and ordinary humanity, to provide proper care and attention and the breach of that duty constitutes actionable negligence" (5 A.L.R. 514; 120 A.L.R. 1525; Kendall v. Louisville & N. R. Co. 76 S.W. 376; Northern C. R. Co. v. State, 29 Md. 420). "The good Samaritan incurs a responsibility avoided by those who 'pass by on the other side'". (38 Am. Juris., sec. 17). The applicability of this rule to criminal cases in the absence of special circumstances is not clear. The special circumstances mentioned involve such relationships as those of parent and child, guardian and ward, master and servant, and the like, where the duty assumed, if breached and resulting in injury, would constitute an indictable offense (Wharton's Criminal Law, 12th Ed., sec. 484 et seq.).

Article of War 96 denounces "all disorders and neglects to the prejudice of good order and military discipline" and "all conduct of a nature to bring discredit upon the military service" (emphasis supplied). The act must be directly prejudicial, not remotely or indirectly, merely. "An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense or manner prejudicing military discipline; but it is hardly to be supposed that the Article contemplated such distant effects, and the same is therefore deemed properly to be confined to cases in which the prejudice is reasonably direct and palpable. It is also to be noted that the act or duty neglected must be one which a military person may legally and properly be called upon to do or perform." (Winthrop, 2nd Ed., p. 723; see also MCM, 1928, par. 152a). In CM 199391, Klima, 4 B.R. 46, it was said:

"It is the traditional duty of officers and non-commissioned officers to be solicitous of the welfare of enlisted men of the lower grades. Had a civilian acted as the evidence shows and as the court found that Sergeant Klima acted, he would undoubtedly be the subject of disapproving comment by those aware of the facts. Such actions are even more discreditable on the part of officers and non-commissioned officers of the Army."

A soldier, by virtue of his responsibilities incurred upon entry into the military service, is subject to punishment for many offenses unknown to the civil law. Some of these offenses are not

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exactly defined, but arise from the broad duties which rest upon the personnel of the Army. With respect to the general purpose of what is now Article of War 96, Winthrop states:

"As will be illustrated in construing its separate terms, its evident purpose was to provide for the trial and punishment of any and all military offences not expressly made cognizable by courts-martial in the other and more specific Articles, and thus to prevent the possibility of a failure of justice in the army. In practice, the greater number of the charges that are preferred against soldiers, and a large proportion of those preferred against officers, are based upon this, the 'general' article of the code. Wherever the offence committed is one not certainly, or fully, designated or described in some other particular Article, or where, though so designated, no punishment is assigned for its commission, or where it is doubtful under which of two or more Articles the offender should be prosecuted, recourse is had to this comprehensive and serviceable provision as the authority and foundation for the charges and proceedings." (Winthrop, 2nd Ed., p. 720).

The accused in this case voluntarily engaged in rendering assistance to another soldier, Ashburn, who was in an unconscious condition. After witnessing the brutal attack on the soldier by a third party, the accused in accordance with a positive moral duty brought the helpless victim back to his camp and carried him into his quarters. There he abruptly left his charge, despite his pitiable condition of utter helplessness, and made no effort whatever to seek medical assistance or to report the location and condition of the dying soldier to higher authority. That he realized his delinquency in thus leaving Ashburn is shown by the accused's testimony to the effect that he did so "to keep from further trouble". In other words, he intended to remain silent about and distant from the whole affair. His explicit testimony of the manner in which Ashburn was carried from the car into the dispensary indicates that he was not so drunk that he did not appreciate the significance of his act. The seriousness of Ashburn's condition was apparent to him. This fact is shown by the accused's admissions several hours later to two soldiers that Covey had killed a soldier the night before or that the soldier looked nearly dead.

It is the opinion of the Board of Review that accused, having assumed custody and control of Ashburn, a fellow soldier, in an obviously critical condition as a result of the attack on him by Covey, was under the duty, military if not legal, of summoning medical assistance or reporting Ashburn's condition to higher authority so that

proper aid could be rendered. It follows that failure to perform that duty constitutes an offense under Article of War 96, for which there is no definitely prescribed punishment, nor is there prescribed punishment for any closely related offense. Hence, the punishment is within the discretion of the court, provided that it be not greater than dishonorable discharge, total forfeitures and confinement at hard labor for three years, the maximum authorized punishment for involuntary manslaughter.

7. For the reasons heretofore stated, it is the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of crime of manslaughter in violation of Article of War 93, legally sufficient to support the findings of guilty of Specification 2, excepting therefrom the words "involuntary manslaughter by", in violation of Article of War 96, and legally sufficient to support the sentence as approved by the reviewing authority.

Samuel D. Brown, Judge Advocate

J. J. Lottus, Judge Advocate

Charles S. Ayke, Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

30 May 1945

BOARD OF REVIEW

CM POA 300

U N I T E D	S T A T E S	)	NEW CALEDONIA ISLAND COMMAND
)	
	v.	)	Trial by G.C.M., convened at Noumea,
		)	New Caledonia, 27 April 1945. Dis-
Private HENRY S. BEDNARCZYK		)	honorable discharge and confinement
(35896988), 3563d Quartermaster		)	for ten (10) years. Disciplinary
Truck Company, 42d Quartermaster		)	Barracks.
Battalion, Mobile.)	

HOLDING by the BOARD OF REVIEW
DRIVER, LOTTERHOS and SYKES, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Henry S. Bednarczyk, 3563d Quartermaster Truck Company, 42d Quartermaster Battalion, Mobile, APO 502, did, at APO 502, on or about 4 April 1945, with intent to do him bodily harm, commit an assault upon Technician Fifth Grade Steve A Csanyi, by unlawfully and feloniously and in a threatening manner advancing toward Technician Fifth Grade Steve A Csanyi with a dangerous weapon, to wit, a knife.

Specification 2: In that Private Henry S Bednarczyk, 3563d Quartermaster Truck Company, 42d Quartermaster Battalion, Mobile, APO 502, did, at APO 502, on or about 4 April 1945, with intent to commit a felony, viz, murder, commit an assault upon First Lieutenant Carl V Church, by willfully and feloniously shooting at him with a dangerous weapon, to wit, a carbine.

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He pleaded not guilty to and was found guilty of the Specifications and Charge. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years. The reviewing authority approved the sentence but remitted ten (10) years of the confinement and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence for the prosecution shows that on 4 April 1945, the accused was a member of the kitchen police of the 3563d Quartermaster Truck Company, APO 502. About 1400, he received permission from Technician Fifth Grade Steve A. Csanyi, cook, to return to his tent to finish writing a letter. Upon failure of accused to return to the mess hall at 1530, Corporal Csanyi "started to look" for him and about 1600 saw him at the "reefer" talking with a mechanic. Accused returned to the kitchen and started to cut bread, as ordered, and then "got angry" because he was told to "cut off the part of the bread where the rats or mice nibbled on it". He "started to swear" at Corporal Csanyi, saying "damn it, everybody is picking on me". Then he put down the knife and left the kitchen. The corporal called to accused to return. Accused complied, and when told again to slice the bread, walked out, answered the corporal's question as to his purpose with the remarks, "I'll be right back". A few minutes later, accused returned and when again told by Corporal Csanyi to slice bread, said, in an "angry tone", "Sure I'll slice the bread". At the same time, he "pulled his knife out of his jacket" and held it in his right hand waist high, not far from his body. He was about one foot from the corporal and "came" toward him "pointing the knife right" toward the latter's stomach. Accused was "very mad and mean". Corporal Csanyi, who was "too scared to stand there," backed away around the table. Accused paid no heed when he was told by Corporal Csanyi to put the knife away, but followed him at a distance estimated by several witnesses to be two or three feet. Accused held the knife in his right hand "ready to strike" in a "more or less threatening manner" and was "real angry". After Csanyi had retreated about ten feet, Private First Class Alden O. Allen, who was also in the kitchen, handed a meat cleaver to the corporal who held it at his side and continued to back away until near the mess hall. The total distance over which accused had followed him was about "twenty five feet or so". Corporal Csanyi left the mess hall, "sailed out of the door" for the "CP" where he reported the incident. After Csanyi's departure, accused, at Private Allen's suggestion, put his knife in his blouse "right after" the corporal had left. The knife, described as a hunting knife with a blade approximately six inches long and one and one-quarter inches wide at its base, was introduced in evidence (R. 5-9, 11-20, 26, Pros. Ex. 1).

First Lieutenant Carl V. Church, commanding officer of accused, in response to a message, returned to the company area about 1600 where he found some men "milling around the CP" in the orderly room. Captain Clark and a military policeman were there. He asked "where the man was", borrowed a ".45 pistol, automatic" from the MP, and walked "up to the area" where he saw two other military policemen "just below" and "about three tents left" of where accused was reported to be. He told the military police, in response to their question as to what they should do, that he would "take care of it". Then he "crawled up" a bank and approached the tent of accused. Upon reaching the entrance, he could see the "far left corner and the far right and also the near right". Realizing that "the man" could only be in the "near" left corner, he jumped into the tent to the left. Accused was sitting on the floor, with a carbine "cradled" in his arms. His right hand was over the trigger with the forefinger on the trigger and thumb on the small of the stock. With his other hand, accused was putting on a gas mask. "Immediately upon seeing" him, accused "swung the carbine up with his right hand", aiming it at Lieutenant Church's "adam's apple" where it "stopped swinging". He was trying to pull off his gas mask with his left hand. Lieutenant Church dropped to his knees and hit the muzzle of the carbine with his "thumb", moving it about three inches. The "shot went off immediately" about one inch from his face. He grabbed the barrel and a "scuffle" followed. Then he hit accused with the pistol which he had carried with him into the tent and a few seconds later "wrenched the carbine" from accused. Thereupon he took the carbine out of the tent and the accused left with the military policemen. Lieutenant Church also testified that it "could be possible" that he forced the carbine to fire when he shoved it (R. 21-25).

4. The accused, whose rights as a witness were explained to him, elected to make an unsworn statement, through counsel, as follows:

"I get spells when I don't know what I'm doing and I want to run off. I get pains in my head. Sometimes when I'm doing something I wonder what I'm doing. Everyone's against me. God knows I'm innocent. No one believes me. They think I'm kidding. It's been going on for eighteen months. I can't think. It's getting worse and worse. I have terrible pains in my head. Something's going to happen but it's going to be too late. God knows it's true.' The accused just now stated, 'He knows it's getting worse and worse and no one will believe him.'" (R 31, 32).

For the defense, Major Woodrow W. Burgess, M.C., Chief of Neuropsychiatric Section, 8th General Hospital, testified that accused had been under observation at the hospital from 24 January 1945 to 15 March 1945 and from 4 April 1945 to 18 April 1945, and on both occasions

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he recommended "his disposal under AR 615-368". Accused had an "extremely inadequate personality * * * never able to take the ordinary trials of life, who is subject to temper tandrums and emotional instability when things didn't go to suit him". While "in these emotional storms he is less apt, he is less capable of realizing the consequences of his action", but he is at such times not "insane". During "these emotional upheavals he is capable of realizing what he is doing but * * * is more apt to disregard the consequences at those periods." When asked his opinion as to whether accused, in a period of emotional instability, was capable of distinguishing right from wrong and adhering to the right, Major Burgess testified:

"My opinion is that he could distinguish right from wrong but his ability to adhere to the right is definitely impaired by his emotional turmoil that he was experiencing at that time."

Major Burgess also expressed the opinion that the accused was at the time of trial able to distinguish right from wrong and adhere to the right and to cooperate intelligently in his defense. He further testified that in a report submitted on 16 April 1945, he stated that accused was "not insane and that he was legally responsible for his actions." (R. 27-30).

5. Specification 1 alleges that the accused at a named time and place assaulted Technician Fifth Grade Csanyi "with intent to do bodily harm" by advancing on him in a threatening manner with a dangerous weapon, a knife.

The evidence shows that after an altercation extending over a period of fifteen minutes or longer between accused and Corporal Steve A. Csanyi over slicing some bread in the kitchen the accused in an angry tone said to Csanyi who was one foot away, "Sure I'll slice the bread", drew a knife with a six inch blade and held it at his side with the blade toward Csanyi's stomach. He then advanced toward Csanyi who "backed" around a table. Another soldier present handed a meat cleaver to Csanyi who made no effort to use it. He continued to retreat, followed by accused, until he had covered a total distance of about 25 feet, and finally fled from the mess hall. Two witnesses testified that accused was about three feet from Csanyi while following him. Csanyi testified he was about two feet away during such time and was holding the knife "ready to strike" and was "real angry".

Thus it is clear that the accused assaulted Csanyi with a dangerous weapon as alleged. The only question requiring discussion is whether the record is sufficient to sustain the finding that the assault was made with "intent to do bodily harm".

An assault to do bodily harm is one "aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended" (MCM, 1928, par. 149n). Such an intent is to be inferred from the surrounding facts and circumstances and from the nature of the weapon used (CM POA 191, Roberts). It has been held that it is a jury matter to determine the intent from the character of the instrument, the distance apart of the parties and other circumstances (State v. Schumann (Iowa), 175 NW 75). It is the "act and the intention with which the act is done, rather than the result, which fixes the crime or degree of crime" (State v. Shaver, 198 NW 329; 6 CJS 937).

Where antecedent facts indicated that accused had been having an argument with the person assaulted, of such heat as to give rise to a desire to commit bodily harm, and during such argument the accused drew and opened a razor, and then advanced a distance of from two to ten feet toward his victim holding the razor by the side of his body, the act of advancing coupled with the argument preceding it, was held sufficient evidence from which to infer an intent to do bodily harm (CM 190270, Gibson). In a case where the accused (who had shortly before assaulted a soldier) advanced on an officer, reached for a carbine carried by the latter informing him of his lack of fear, thrust the trench knife he was carrying to within a few inches of the officer's stomach and continued to advance on him for several more steps until one of several shots fired by the officer into the ground had grazed his foot, it was held that the court was justified in inferring an intent of accused to do bodily harm to the officer (CM POA 191, Roberts).

The foregoing authorities appear to be applicable to, and controlling of, the case under consideration. The primary difference between this case and the Roberts case, supra, is that in the Roberts case, the accused made a "thrust" at the victim with his knife. In this case, no thrust of the knife was made but the assault was preceded by an extended argument, an element not involved in the Roberts case. That the accused here made no effort to strike his victim when they were initially only one foot apart is not considered to be conclusively indicative that he intended no bodily harm, since the evidence indicates that his victim retreated and the accused followed him in a "threatening" manner for over 25 feet at a distance of two or three feet with the knife in his "right hand" ready to strike. The case is clearly distinguishable from CM 209862, Yaple, 9 BR 146, where accused made no attempt to cut a woman whom he was holding with an open razor in his hand and the Board said that "had he intended to cut her he could no doubt have done so". In view of the persistent nature of the assault with a deliberately drawn knife held throughout in a

"ready to strike" position, the pursuit of his victim for 25 feet and desistance in the assault only when the person assaulted ran from the building, and the angry mood of accused resulting from an altercation with his victim, sufficient facts are shown, in the opinion of the Board of Review, to justify the inference of the court that accused intended to inflict bodily harm on his victim.

6. Specification 2 alleges that the accused at a named time and place assaulted First Lieutenant Carl V. Church "with intent to commit a felony, viz, murder" by "willfully and feloniously shooting at him" with a dangerous weapon, a carbine.

The evidence shows that, after the assault on Corporal Csanyi, discussed in paragraph 5, supra, Lieutenant Carl V. Church, accused's commanding officer, was summoned. Upon his return to the company area, he found some men "milling around the CP." The battalion adjutant and an "MP" were also there. After borrowing a pistol from the "MP", he proceeded toward the tent where the accused was. A few tents away from accused's tent, he encountered two other "MPs" who asked what they should do. He told them that he would "take care of it". Thereafter Lieutenant Church approached accused's tent, and jumped into it. Accused was sitting on the floor endeavoring to put on a gas mask with his left hand while holding a carbine in his arms. Accused had his right hand on the gun; forefinger on the trigger, thumb on the small of the stock. Immediately upon seeing Lieutenant Church, accused swung the carbine toward the officer, at the same time trying to pull off the gas mask with his left hand. As soon as the carbine was pointed at the officer's "adam's apple", it "stopped swinging". Lieutenant Church dropped to his knees and hit the muzzle of the carbine with his thumb, moving it about three inches. A shot was "immediately" fired from it. At the time the muzzle of the carbine was about one inch from his face. A scuffle followed resulting in Lieutenant Church's gaining possession of the carbine after he had hit accused over the head with his pistol.

According to the Manual for Courts-Martial, an assault with intent to murder is "an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt. To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense. When the intent to murder exists, the fact that for some reason unknown the actual consummation of the murder is impossible by the means employed does not prevent the person using them from being guilty of an assault with intent to murder when the means are apparently adapted to the end in view." (MCM, 1928, par. 1491).

From the evidence, an inference that accused intended to resist apprehension by all force at his disposal is proper. He had committed an assault a short time previously and had gone to his tent where he had armed himself. The presence of military police near his tent and the accused's state of preparedness indicate that he was fully aware of the desire of the authorities to capture him. These facts, coupled with his prompt and accurate aiming of a carbine at the throat of Lieutenant Church with his finger on the trigger and the firing of a shot which failed to hit its mark by one inch due to the officer's instant action in deflecting the muzzle of the weapon, show a clear and purposeful pattern of action to murder Lieutenant Church which the court was justified in finding was not broken by the mere "possibility" that Lieutenant Church's averting the gun with his thumb caused the shot to be fired (see CM POA 202, Horstman). In the opinion of the Board of Review, there is substantial evidence to support the finding of guilty as to Specification 2.

7. Another question requiring consideration relates to the sanity of accused. At the conclusion of the testimony of Major Burgess, defense moved that an inquiry be made into the sanity of accused at the time when the actions were committed (R. 30). The law member, subject to objection by any member of the court, denied the motion on the ground that the only medical testimony in the case indicates that accused "was able to distinguish right from wrong and adhere to the right" and further stated that the accused's "emotional instability may be considered by the court as a factor in extenuation and it may be considered by the court on the question of whether the accused is capable of entertaining a specific intent to commit murder." (R. 31). In view of CM 225837, Gray, 14 BR 339, 1 Bull. JAG 360, and CM NATO 2047, 3 Bull. JAG 228, 229, it is the opinion of the Board of Review that the court, acting through the law member, was within its rights in denying the motion. It is noted that after trial and before the sentence was approved the accused appeared before a sanity board which on 3 May 1945 found that he was a psychopathic personality, that this condition did not prevent his being able to distinguish right from wrong or to adhere to the right at the time of the offenses, and that he is not insane.

8. The charge sheet shows that when the charges were drawn the accused was 31 years of age and that he was inducted at Indianapolis, Indiana, on 13 October 1943.

9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

Samuel M. Driver Judge Advocate

J. F. Lott, Judge Advocate

W. S. Dyer Judge Advocate

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

17 May 1945

BOARD OF REVIEW

CM POA 303

U N I T E D	S T A T E S	)	NEW CALEDONIA ISLAND COMMAND
)	
	v.	)	Trial by G.C.M., convened at
		)	Noumea, New Caledonia, 10 April
First Lieutenant WILLIAM J. LOUDEN		)	1945. Dismissal.
(O-1588702), Transportation Corps.)	

HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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

CHARGE I: Violation of the 85th Article of War.

Specification: In that First Lieutenant William J. Loudon, 850th Transportation Corps Service Company (Harbor Craft), was, at APO 502, on or about 29 March 1945, drunk while on duty as commanding officer of the 850th Transportation Corps Service Company (Harbor Craft).

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

Specification: In that First Lieutenant William J. Loudon, 850th Transportation Corps Service Company (Harbor Craft), was, at APO 502, on or about 29 March 1945, drunk and disorderly in a public place, to wit: in the vicinity of Rue General Gallieni and Rue de la Republique, in the city nearest Headquarters, Island Command, APO 502, while in uniform.

He pleaded not guilty to and was found guilty of all Specifications and Charges. He was sentenced to be dismissed the service and to forfeit

all pay and allowances due or to become due. The reviewing authority approved the sentence, but remitted the forfeitures of pay, and forwarded the record of trial for action under the 48th Article of War. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, confirmed the sentences as approved by the reviewing authority. Pursuant to Article of War 50 $\frac{1}{2}$ the order directing the execution of the sentence was withheld.

3. The evidence for the prosecution shows that accused had been assigned to the 850th Transportation Corps Service Company (Harbor Craft), APO 502, for about two or three months before 29 March 1945. On that date he was in command, and had been for about 48 hours. The company barracks were along one side of Rue General Gallieni, a public street, and on the other side was a Navy Quonset hut (R. 6, 8, 15, 21-22, 27, 52, 62, 64; Exs. 1, B).

About 2100 hours on 29 March accused, who was in his office, directed that the company be assembled in front of the barracks. The acting First Sergeant formed the company in three ranks between the barracks and the street. The space between the barracks and the street was about 10 feet wide. There were only about 50 men present as the others were out on various details or on pass (R. 6, 16-17, 26, 28-29, 32, 39, 49-50).

Four noncommissioned officers of the company who were present testified to the following events that occurred after the company was assembled. Accused took charge and lectured the men for about 15 minutes, walking back and forth in a space four or five feet wide between the front rank and the barracks. He talked about his intentions in operating the company and what he expected from the men. He was in proper and neat uniform. Accused walked with a "very slight stagger", a "slight falter" and a "slight sway"; he was "staggering"; his knees were "weak"; his eyes were "red and bloodshot"; his voice was "rather loud", "loud and boisterous", "loud and harsh"; he "faltered" in conversation, repeated himself, and "jumbled" his words; his tongue was "very thick"; and he used profane and obscene language. All four of the noncommissioned officers were of the opinion that accused was drunk (R. 6-7, 10-11, 17, 28-30, 33, 37, 39-41, 43, 50-51, 53, 58).

After about 15 minutes accused gave the commands "About Face" and "Forward March". There was a vehicle parked at the curb on the other side of the street, and as the men marched across the street one or two, thinking "all this was a big joke", climbed over or through it, but others went around the vehicle. No command to halt was given and the men "marched into a hut across the street" and then marked time. About a minute later accused crossed the street and gave them "About Face". The lecture then continued for about ten minutes more. After accused left, a sergeant dismissed the company (R. 8-9, 18, 20, 30, 44-47, 52, 57).

During the time that accused was talking to the men, another lieutenant of the company and also a Navy officer joined the group. Both were under the influence of liquor, and the lieutenant was naked from the waist up. They talked and caused some confusion, and accused told them to "keep quiet" and to "move out" (R. 12-13, 19-20, 23-25, 41-42, 47-48, 57-59).

4. Accused elected to remain silent, and the defense introduced no evidence.

5. It was shown that accused, a company commander, had his company form along a public street next to the barracks of the organization in the evening of 29 March 1945 about 2100 hours. He was conspicuously drunk at the time, and proceeded to lecture his men for about fifteen minutes, using in part profane and obscene language. Another officer of the company and a Navy officer, both under the influence of liquor, were present and caused some confusion. Accused marched the company across the street, although a vehicle was parked directly in front so that the men went over or around it. He did not halt his men on the other side but permitted them to proceed up against a Navy structure there. He then lectured them about ten minutes more.

It clearly appears that accused was on duty at the time and that he was drunk. His conduct, in the presence of his subordinates, making a farce of military discipline and decorum, constituted disorderly conduct of the most flagrant kind, in the opinion of the Board.

Winthrop includes among instances of offenses in violation of the 61st (95th) Article of War--"Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Winthrop, Mil. L. and P. (1920 ed.), p. 717). No more shameful exhibition by a company commander before the men of his command can be imagined than that disclosed by the evidence in this case.

6. The charge sheet shows that accused is 27 years of age, was inducted 19 February 1942, at Fort Meade, Maryland, and was commissioned a second lieutenant in the Quartermaster Corps 26 February 1943.

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

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Dismissal is mandatory upon conviction of a violation of the 85th Article of War (offense committed in time of war) or of a violation of the 95th Article of War.

Samuel M. Driver, Judge Advocate

J. J. Lott, Judge Advocate

Charles S. Sipes, Judge Advocate

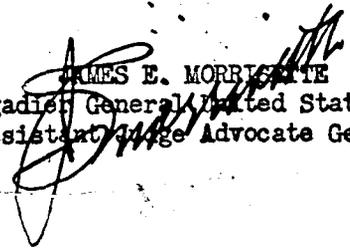
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Branch Office TJAG with USAF, Pacific Ocean Areas, APO 958
TO: Commanding General, USAF, Pacific Ocean Areas, APO 958.

1. In the case of First Lieutenant WILLIAM J. LOUDEN (O-1588702), Transportation Corps, 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, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 303. For convenience of reference please place that number in brackets at the end of the order.

(CM POA 303)


JAMES E. MORRISSETTE
Brigadier General, United States Army
Assistant Judge Advocate General

(Sentence ordered executed. GCMO 9, USAFPOA, 19 May 1945.)

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

24 May 1945.

BOARD OF REVIEW

CM POA 304

UNITED STATES v. Technician Fifth Grade WILLIE MABANE (34144250), Headquarters and Service Company, 1894th Engineer Aviation Battalion.))))))))	ARMY GARRISON FORCE, APO 244 Trial by G.C.M., convened at APO 244, 23 and 24 February 1945. Dis- honorable discharge and confinement for life. Penitentiary.
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HOLDING by the BOARD OF REVIEW
 DRIVER, LOTTERHOS and SYKES, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Technician 5th Grade Willie (nmi) Mabane, Headquarters & Service Company, 1894th Engineer Aviation Battalion, did, at APO 244, on or about 21 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician 5th Grade Thomas L. Burton, Headquarters & Service Company, 1894th Engineer Aviation Battalion, a human being by shooting him with a rifle.

Specification 2: In that Technician 5th Grade Willie (nmi) Mabane, Headquarters & Service Company, 1894th Engineer Aviation Battalion, did, at APO 244, on or about 21 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician 5th Grade Linwood Smith, Headquarters & Service Company, 1894th Engineer Aviation Battalion, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specifications and was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. The reviewing authority approved the sentence. The record of trial was forwarded for action under the 48th Article of War. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life, and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$ the order directing the execution of the sentence was withheld.

3. The evidence for the Prosecution:

On 20 December 1944 accused was a member of the Headquarters and Service Company, 1894th Engineer Aviation Battalion, APO 244. The company was quartered in tents and from a diagram introduced by the prosecution (Ex. 2) and the testimony of a defense witness (R. 133) it appears that they were arranged in two rows of seven each extending east and west and separated by a company street about twenty feet wide. From west to east in the northerly row the tents were numbered 6 to 12 inclusive and in the southerly row from 19 to 25 inclusive. The spaces between the tents varied from about ten feet to sixteen and a half feet. A crap game started about 2200 in tent 24 where Tec 5 Roosevelt Johnson lived and play continued until about 0230 the following morning. Shortly after 0200 when Johnson, Tec 4 Lloyd F. Standback, Tec 5 Chester Pritchett and the accused were playing at a table in the center of the tent, Tec 5 Linwood Smith who had previously been playing but had withdrawn from the game was standing at the table, and Tec 5 Thomas L. Burton was lying on Johnson's bed at the rear of the tent, accused became involved in an argument with the other players. Accused contended that he had won a particular bet and started to pick up the money but Pritchett who was "shooting the dice" said that accused had lost. The accused became angry, picked up the dice, said that he was going to his tent and left. There was another pair of dice in the game and play was resumed. Johnson, Standback and accused were seen drinking beer that night (R. 8-13, 20-23, 32-35, 40).

In a few minutes accused returned to tent 24 and said, "How you all feel now?" and "Do you fellows like what I did tonight?" and Pritchett told him to come back and bring the dice into the game. Accused then left the tent. In two to five minutes the occupants of the tent heard two or three shots followed by a number of others in rapid fire. Someone turned out the lights and they all dashed out the back of the tent and jumped into foxholes. Smith on his way out knocked over the bed on which Burton was lying "and the bed and all was all hanging in the foxhole." After the firing was over Smith called out that he was

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shot and asked someone to help him. Burton was lying face down in a foxhole and Smith was sitting "right behind" with his hand on his side. Both men were placed in an ambulance and taken to a hospital. Burton was dead when he reached the hospital at about 0230 on 21 December, and Smith died at 1520 that day. In each instance death resulted from a gunshot wound. The bullet passed through Burton's left arm, entered his left chest, "grooved" the heart, passed through the stomach and liver and lodged in the pelvic portion of the peritoneal cavity. The bullet was recovered. In Smith's case the bullet entered the front part of the lower abdomen on the right side and came out over the left buttock (R. 13-16, 23-26, 35-39, 49-57).

Tec 4 J. D. Marshall, who lived in tent 6, the tent of accused, went to bed between 1900 and 2000 hours on 20 December. He was awakened "late that night" when "the light came on in the tent". He looked up and saw accused reaching for an M1 rifle which was hanging suspended on the "rafter post" or center pole of the tent. There were two M1 rifles hanging on the post. When Marshall looked up accused turned off the light and "went right out the back". Marshall did not see whether accused had anything in his hands as he "rushed out". Shortly thereafter, "around about 5 minutes" as he was "about to dose off back to sleep" Marshall heard "a shooting". He did not get up and about four or five minutes later he saw accused come back into the tent in a crouching posture. Accused "rushed into his bed", but soon "jumped up in a rage" and "was calling for him to get up, get up, and he said 'There is going to be trouble here in a few minutes'". Then accused "crawled back to his bed", took off his clothes and "got into" it. As Marshall had heard some one coming down the street say "that two men had got shot" he asked accused, "Why did you shoot those men", and the latter replied, "We had been arguing all night". When accused came back into the tent Marshall did not see anything in his hands (R. 57-65, 70, 73, Ex. 2).

On cross-examination Marshall admitted that about a week prior to 20 December there had been "some words" between him and the accused regarding a foxhole. During an air raid accused entered Marshall's foxhole, Marshall "couldn't get in" and Marshall told him to dig a foxhole of his own. When he was asked whether he had told "Private Graham who was then on his way to the stockade, to save a place for Mabane because you were going to see that he was sent to the stockade", Marshall answered that he "never had no talk with no one about that" (R. 67-69).

Tec 4 Willie Crayton, also quartered in tent 6, had an M1 rifle which was hanging "up on the post" on the night of 20-21 December. It was loaded with eight rounds of ammunition. There was only one other M1 rifle in the tent that night and it was hanging on the opposite side of the post. Crayton was awakened by the shooting and after sitting for three or four minutes went to the tent where the firing had occurred and stayed there about three minutes. He returned to his own tent and accused

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said to him, "Don't go back to bed, keep your clothes on" and "There is going to be some trouble". Crayton turned on the lights and accused said "go out there and get the gun, and take it and throw it away, don't let them get it". Crayton then looked at the post and observed that his rifle was gone from the place where it had been hanging. Tec 5 Pritchett's M1 rifle was still hanging on the post. Crayton asked accused, "Where is the gun?" and the latter said that it was "down at the steps." Crayton found the rifle "under the steps, under the walkway" and returned it to its place on the post. The barrel of the rifle was warm. Crayton "laid back down" and in about five minutes "Colonel Stewart and Sergeant Newsome came in" and examined the two M1 rifles in the tent (R. 84-91).

Private First Class Lawrence Ellis, Jr., finished his tour of guard duty at 0200 hours on 21 December and was on his way to tent 10 where he was quartered when he saw some one coming out of tent 6. He flashed his light in the other person's face and saw that it was the accused and that he was carrying a rifle. Ellis went on to his tent, "about a step or two" ahead of accused who went on to tent 24, looked into it and then entered. Ellis "couldn't be positive" whether accused took the rifle with him or left it outside when he entered the tent. Ellis went to bed and in seven to ten minutes heard "one or two shots fired slow, and the rest of them coming right behind them" (R. 74-80).

Lieutenant Colonel George E. Stewart, the Battalion Commander, with Sergeant Doward Newsome, entered tent 6 shortly after the firing and Newsome examined the two M1 rifles in the tent. One of them contained eight rounds of ammunition and "hadn't even been touched". The other rifle "was empty" and had soot in the muzzle of the barrel indicating that it had been fired. Newsome handed that rifle to Colonel Stewart who "smelled it, and there was the smell of powder on the gun". There was also fresh mud on the rifle. It was the one which had been issued to Sergeant Crayton. The rifle was received in evidence, as Exhibit number 4 (R. 91-107).

Second Lieutenant Howard J. Miller was awakened by rifle fire and immediately went to "the area" and after he had "wandered around" for about half an hour, found eight empty cartridges, ".30 caliber M-1 ammunition and one clip", at the rear of the space between tent 11 and tent 12. Tent 11 was directly opposite to and across the company street from tent 24 (R. 107-110; Ex. 2).

Test bullets were fired from Tec 4 Crayton's M1 rifle, taken from tent 6, and micro photographs were made of the test bullets and of the bullet recovered from the body of Tec 5 Burton. James E. Cunningham, a police sergeant in charge of the Honolulu Police Experiment Crime Laboratory and a qualified firearms expert testified that in his opinion, based upon examination and comparison of the micro photographs, the bullet taken from Burton's body had been fired from Crayton's rifle (R. 110-120, Exs. 5, 6, 8).

4. The evidence for the Defense:

Private Willie F. Graham, formerly a staff sergeant in the battalion of accused, Master Sergeant Bennet J. Cooper, the battalion sergeant major, Tec 4 Obey L. Robinson of the company of accused and the First Sergeant of the company, Luther Waugh, testified that accused had a good reputation for truth and veracity and for being peaceable and law-abiding and that he was a good and obedient soldier (R. 120-121, 130-132, 134, 141-142).

Private Graham also testified that on "September 28" when he was placed under arrest he had a conversation with Tec 4 Marshall. Graham had remarked that he would probably have to go to the stockade and Marshall had told him "to save a space for T/5 Willie Mabane" (R. 121-122).

Private David Jones, who lived in tent 6, went to bed "right after the show" on 20 December and awakened "when the shot was fired". He was awake from that time until the lights in the tent were turned on about fifteen minutes later. During that time he did not see any one "going in or out of the front door". His bed was near the "front door", which was not the door opening upon the company street but the one on the opposite side of the tent from the street (R. 122-125).

On the night of 20-21 December Private Sylvester Scott, who was quartered in tent 20, across the company street from and one tent to the east of tent 6, the tent of accused, had been lying on his "stomach" on his bed talking with some tent mates for about an hour before the firing started. He was looking out the front of his tent and could see the "back entrance" of tent 6. He did not see anyone leave the rear entrance of that tent "a short time before the shooting" and did not at any time "before this shooting" see accused leave his tent through such entrance (R. 126-130).

Tec 4 Robinson who lived in tent 11, directly opposite and across the company street from tent 24, and Sergeant Cooper in tent 12, the next tent to the east of tent 11, heard the rifle fire in the early morning of 21 December and each of them testified that the sound came from the direction of the latrine south or to the rear of tent 24 and Robinson estimated that the shots were fired at a point twenty five yards from his tent (R. 130-136).

Sergeant Samuel S. Kinsey was awakened by "the shots" on 21 December. His bed was on the west side of tent 12 (the side nearest to tent 11) and when the firing started he "made for" his foxhole which was "just on the outside" of the tent, and "jumped in and squatted down". He did not see anyone in the area between tents 11 and 12 and did not smell any powder smoke "out there" (R. 136-139).

Tec 4 Samuel R. Warts who was in his bed in the northeast corner of tent 11 on the night of 20-21 December heard four or five shots which came from "down by the latrine back of my tent". He estimated that the shots were fired about twelve feet away. He did not smell "any smoke or powder" (R. 140-141).

After his rights had been fully explained to him, accused testified that the crap game started in tent 24 about 2200 and that he stayed there until about 0130 the next morning. Accused had only fifteen cents, he "got broke", borrowed two dollars from another player, won five or six dollars, repaid the loan and left the game with three dollars. After leaving the game he "sat down on the bed and talked with Shavers" for ten or fifteen minutes. Accused then told Tec 5 Johnson that he was going to his tent to go to bed. He had reached his tent and was sitting on the side of the bed taking off his clothes "when the gun starts firing". He thought that it was an air raid and put on his clothes and went to bed where he remained until the sergeant of the guard came and directed him to go to the orderly room. Accused had not at any time "that evening" turned on the lights in his tent, he did not have any conversation with Marshall and did not take Tec 4 Crayton's rifle from the tent. Marshall had become very angry because accused had gone into Marshall's foxhole during an air raid. Marshall "got the screw driver", walked up to the bed of accused and asked him if he wanted to fight. When "Sergeant Graham" was under arrest and remarked that he had to go to the stockade, Marshall had said to him "When you go down there save T/5 Willie Mabane a space because I am going to send him down there". Accused testified that he did not shoot Smith or Burton (R. 142-147).

5. The evidence for the prosecution shows that shortly after 0200 on 21 December 1944 accused, who was in a crap game in tent 24 in the company area, became involved in an argument with other players as to whether or not he had won a particular bet. He went to his own tent at the other end of the company street, took the M1 rifle of another soldier from the place where it was hanging on the center pole, and returned to tent 24 which he entered but left again in a short time. From a point across the company street he then fired several rounds from the rifle into the lighted tent where the game was still in progress--two or three rounds slowly and a number of others in rapid fire. One of the bullets struck Tec 5 Thomas L. Burton and another struck Tec 5 Linwood Smith, both of whom were in the tent, and both of them died from the wounds thus inflicted, Burton almost immediately and Smith in the afternoon of the same day. The foregoing factual summary is based in part upon the direct testimony of witnesses and in part upon inferences drawn from the circumstances related in detail above.

Accused in his testimony denied that he had fired into tent 24 and maintained that he was in his own tent at the time the shots were fired, but such testimony together with the corroborative testimony of other defense witnesses merely presented an issue of fact, which the court, acting within its province, obviously resolved against the accused.

The Manual for Courts-Martial defines murder as "the unlawful killing of a human being with malice aforethought" and in explanation of the term malice states:

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. * * * Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused" (MCM, 1928, par. 148a).

In the present case it is immaterial whether accused intended to kill one or more of the men with whom he had engaged in an argument in the crap game or willfully fired indiscriminately, since malice as above defined is shown by his conduct in firing an M1 rifle, a weapon likely to inflict death or grievous bodily harm, into a tent which he knew to be occupied, in reckless and wanton disregard of consequences. In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty of the Charge and Specifications.

6. The charge sheet shows that accused is 25 years of age and that he was inducted on 25 July 1941.

7. The court was legally constituted. No errors 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. Confinement in a penitentiary is authorized under the 42nd Article of War by Section 22-2404 of the District of Columbia Code.

Samuel M. Drives Judge Advocate

J. J. Lottin, Judge Advocate

Charles S. Sykes Judge Advocate

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Branch Office TJAG with USAF, Pacific Ocean Areas, APO 958 MAY 26 1945
TO: Commanding General, USAF, Pacific Ocean Areas, APO 958.

1. In the case of Technician Fifth Grade WILLIE MABANE (31144750), Headquarters and Service Company, 1894th Engineer Aviation Battalion, 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, which holding is hereby approved. Under the provisions of Article of War 50, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is GM POA 304. For convenience of reference please place that number in brackets at the end of the order.

(GM POA 304)

JAMES E. MORRISSETTE
Brigadier General United States Army
Assistant Judge Advocate General

(Sentence as committed ordered executed. GCMO 13, USAFPOA, 26 May 1945.)

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

21 June 1945

BOARD OF REVIEW

CM POA 313

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

v.)

Private ROBERT J. GREENLEE
(34323525), 4070th Quartermaster
Service Company.)

ARMY GARRISON FORCE, APO 244

) Trial by G.C.M., convened at APO
) 247, 23 April 1945. Dishonorable
) discharge and confinement for ten
) (10) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

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

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

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

Specification 1: In that Private Robert J. Greenlee, 4070th Quartermaster Service Company, having received a lawful command from 2nd Lieutenant Donald C. McCotter, 4070th Quartermaster Service Company, his superior officer, to help move some crates, did at APO 502, on or about 11 February 1945 willfully disobey the same.

Specification 2: (Finding of not guilty.)

Specification 3: (Disapproved by reviewing authority.)

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

Specification 1: In that Private Robert J. Greenlee, 4070th Quartermaster Service Company did, at APO 502 on or about 11 February 1945 behave himself with disrespect toward 2nd Lieutenant Donald C. McCotter, 4070th Quartermaster Service Company

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his superior officer, by saying to him "I don't want to be fucked with," or words to that effect, and contemptuously turning from and leaving him while he was talking to him, the said Private Robert J. Greenlee.

Specification 2: In that Private Robert J. Greenlee, 4070th Quartermaster Service Company did, at APO 502, on or about 11 February 1945 behave himself with disrespect toward Captain Charles D. Gibson, 4070th Quartermaster Service Company, his superior officer, by saying to him "Fuck you," and "Keep your mother fucking hands off of me," or words to that effect.

He pleaded not guilty to all Specifications and Charges; was found not guilty of Specification 2, Charge I, and guilty of all other Specifications and Charges; and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Evidence of two prior convictions (for absence without leave) was considered by the court. The reviewing authority disapproved the finding of guilty of Specification 3, Charge I, approved the sentence, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution, pertinent to the approved findings of guilty, is summarized as follows:

On 11 February 1945, the 4070th Quartermaster Service Company, then located at APO 502, was preparing to "move out" to a ship, and had 44 hours to crate and load equipment and get the troops on the ship. Accused, who had been a member of the company for over a year, was in the stockade. Captain Charles D. Gibson, the company commander, directed that guards be sent "to pick up some men" from the stockade, and the only specific instructions he gave, to the first sergeant, were that the men were not to leave the company area. Captain Gibson gave an order to the first sergeant that no one was to leave the area, because in getting the company on board the ship he "did not have time to fool with anybody leaving the area." He did not know whether accused had a suspended or remitted sentence, and told the guards to keep him in the area for "his own safety." On the morning of 11 February, First Lieutenant Phillip J. Layman, the company executive officer, received a telephone call from the prison officer, requesting him to send guards to the stockade about 1430 hours to "pick up" the prisoners. Lieutenant Layman sent the guards "over there" in the afternoon. Accused was one of the prisoners. They were "released from the stockade so that we could take them with us on board ship." After his release, accused was under guard (R. 12, 16-17, 21-22, 41, 49-51).

About 2100 hours that day Sergeant Russell Baldwin, 4070th Quartermaster Service Company, was guarding several prisoners, one of whom was accused. Baldwin was armed with a "forty-five." He

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testified that "Sergeant Prewitt" had instructed him to guard the prisoners brought from the stockade, "keep an eye on them" at all times, and let them walk around in the area wherever they wanted to. Prewitt told him that he got those orders from the first sergeant, and that the prisoners were not supposed to work. Sergeant Baldwin did not tell the prisoners that they were not supposed to work (R. 28-29, 31, 35, 41).

First Lieutenant Donald C. McCotter, who had been with the company about two years, testified that about 2100 hours on 11 February he was in charge of a detail that was getting ready to crate material to be shipped. Accused was standing about 30 feet away, doing nothing. When Lieutenant McCotter saw four or five men having trouble handling the crates, he "called over to" accused to "give the men a hand." Accused looked at him, turned away, and started walking away from the detail. McCotter walked to within 15 feet of accused, called him by name, and "repeated" the "order * * * to help the other men with the crates." Accused turned toward the lieutenant, looked at him again, and continued walking away. McCotter approached to within about three or four feet of accused, asked whether accused had heard him give the order (to which accused replied that he had), and said "Private Greenlee, help those men with the crates." Accused replied that he "wasn't going to handle any of the 'god damn' crates," started to turn away, and continued walking away. Lieutenant McCotter placed his hand on the shoulders of accused and "started to reason with him." Accused said "I don't want anyone fucking with me." McCotter then reported the incident to Captain Gibson, who was about 40 feet away. Sergeant Baldwin, the guard, stated that accused was a "pretty good distance" from him at the time of these events (R. 6-9, 13, 29).

Captain Gibson testified that he was sitting in a jeep in the company area when Lieutenant McCotter reported the incident to him. He called accused by name and accused replied "Yeah." Captain Gibson told him he should say "Yes, sir", and accused replied "Yeah, and I mean Yeah" or "I said Yeah." Captain Gibson walked toward accused, who had a baseball bat in his hand, and told accused to put the bat on the ground. Accused stood "with a sulky look on his face," leaned forward, and said "Fuck you." The captain called for guards to place accused in the stockade; accused threw the bat down and said "Send me back to the God damn stockade"; and Captain Gibson "reached out" and "touched" accused on the shoulder, at the same time telling the guards to take him to the stockade. Accused shook the captain's hand off his shoulder and said "Keep your mother fucking hands off of me." Second Lieutenant Theodore A. Bouthillier, who was with Captain Gibson at the time, testified to substantially the same facts. These events are in part confirmed by the testimony of Sergeant Baldwin (R. 13-16, 23-26, 29-32).

4. The pertinent testimony for the defense is summarized as follows:

The accused testified that on "the 11th" he was returned from "APO 502 stockade" to his area. Later in the day he started over "to watch a detail, to talk to a friend." Before he got to the detail he met Lieutenant McCotter, who said "How about helping me with the boxes." Accused replied "Lieutenant, I am under guard," and "turned around and walked off." The lieutenant called him again, walked up, and "grabbed" accused by the shoulders. Accused told him to keep his hands off and "Don't touch me," and walked in the opposite direction. The lieutenant went to a jeep where "the Captain" was sitting, and the captain came toward accused, walking fast. He called accused by name, and the latter replied "Yes." At that time accused did not know whether it was the captain or a private calling. The captain asked "What the God damn hell is wrong with you?" When the captain told him to drop the bat, accused threw it away, and the captain called for the guards to take accused to the stockade. Captain Gibson "grabbed" accused by the shoulders, and accused told him "To take his hands off me." Accused testified that Sergeant Prewitt had told him "personally" that "you can walk around the area, but you don't have to work" (R. 69-71, 73-75).

On cross examination accused stated that he did not know Lieutenant McCotter, that prior to leaving APO 502 he was in the stockade, that about 2100 hours on 11 February an officer came up to him and told him to lift some crates, and that he did not do it. Accused walked away and the officer said something to him a second time. Accused walked away again. When the officer put his arm on the shoulder of accused, the latter told him to keep his hands off. That was all he said. When Captain Gibson called him twice, accused said "Yes." When Captain Gibson "grabbed" him by the shoulder he told him to keep his hands off. Accused admitted that he "may have used some profanity" and did use profanity, but could not "remember the exact words." It "had something to do with remembering something" (R. 78-82, 84).

5. The evidence clearly shows that accused willfully disobeyed an order of Lieutenant McCotter, as alleged in Specification 1, Charge I, and behaved with disrespect toward Lieutenant McCotter and Captain Gibson, substantially as alleged in Specifications 1 and 2, Charge II.

It is necessary to determine whether the order given by Lieutenant McCotter and disobeyed by accused was a lawful order, since accused was under guard at the time. Although the exact status of accused at 2100 hours on 11 February is not shown, yet the evidence clearly shows the following facts:

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Accused had been a prisoner in some stockade at APO 502 prior to 11 February. On that day he and other prisoners were released from the stockade and delivered to guards who were sent for them by their company commander. The purpose was in order that they might go with the company, which was preparing to embark on a ship. Thereafter accused and the other prisoners remained under guard in their company area. No one was permitted to leave the area, and the only specific instructions that the company commander issued as to the prisoners were that they were not to leave the company area.

It thus appears that accused, though under guard, was in the custody and control of his own organization. A prisoner, as such, is not relieved of the duty of working, although the nature of his duties is subject to the orders of those having custody and control of him. The stockade authorities had no further control over accused, and he had been transferred to the custody of his company. The Board of Review concludes that one of the company officers had a clear right to order accused to assist other soldiers, when the nature of the work was not such as to interfere with the lawful control of the guard (designated by the company commander) who was charged with the responsibility of keeping accused within the area.

Accused claimed that he had been told by a sergeant that he would not have to work. However, the company commander had not issued an order of that import. It follows that accused was not justified in disobeying the order of a lieutenant of the company, even if the sergeant had made such statement to him. An order requiring the performance of a military duty or act is disobeyed at the peril of the subordinate. A command of a superior officer is presumed to be a lawful command (MCM, 1928, par. 134b).

6. A considerable amount of evidence of a nature tending to prejudice the accused was erroneously heard by the court. Captain Gibson, company commander of accused, stated "we have had several instances were (six) I have had trouble with Greenlee, and I had to send him to the stockade twice before"; referred to "his attitude for the past 16 months"; and said "Knowing the past history of the man and my knowledge of his past character and his actions before, and his direct disobedience of orders before, I knew * * * " (R. 18). Captain Gibson also testified that accused could not have heard the Articles of War in the preceding six months "because Greenlee was in the stockade at that time" (R. 20); that he "has a reputation for going AWOL and taking things into his own hands and going wherever he pleases" (R. 22); and that in order to "have a reputation for going AWOL the man would have to have been convicted or would have had to commit the offense several times" (R. 23). On cross-examination of accused it was brought out that before leaving APO 502 he was in the stockade "For AWOL" (R. 78).

Evidence was heard to the effect that on 11 February 1945, about the time of the events involved in the Specifications, accused disobeyed a direct order of Captain Gibson to put the baseball bat on the ground (R. 15, 25, 30, 36, 42, 46) and a direct order of Lieutenant Layman to get in the jeep (R. 32-33, 38, 44). Neither of these orders was made the basis of a specification against accused. Also, during his cross-examination, the prosecution made an erroneous statement to accused as follows: "If you are adjudicated guilty in this court it means that the material evidence that you have given here is wrong and you arise (sic) a prima facie case of perjury. Now, if the court finds you guilty I will press charges against you for perjury; is that clear?" (R. 80).

Although a part of the testimony referred to was brought out on cross-examination of witnesses for the prosecution, and part of it was to some extent connected with events in issue before the court, yet the total effect of this evidence was to show unnecessarily the bad character of accused and his guilt of offenses with which he was not charged. This type of testimony should not be considered by a court, and if necessarily admitted for some special purpose, or incidentally in the proof of the Specifications, the court should be instructed as to the limited effect of such proof, which was not done.

The test of legal sufficiency to be applied in cases of admission of illegal evidence is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty (see 3 Bull. JAG 185, 227-228, 417). Upon a careful examination of the record, the Board of Review concludes that the competent evidence bearing upon the three Specifications now involved was of such character as to meet the prescribed test. Lieutenant McCotter testified clearly and positively as to the facts alleged in the two Specifications concerning him. Accused did not directly deny these facts, but attempted to minimize the wrongfulness of his conduct. As to the third Specification, Captain Gibson and another officer covered the facts directly and positively in their testimony, and accused, on cross-examination, admitted the use of profanity.

The accused was found not guilty of one Specification where there was a close issue of fact, and the finding of guilty as to the other Specification where there might be doubt was disapproved by the reviewing authority.

7. Although the Board has concluded that the errors referred to (par. 6, supra) do not vitiate the approved findings of guilty, yet it is believed that the matters and evidence there set out may have been prejudicial to accused in the adjudication of the sentence imposed upon him. The Board therefore recommends that the period of confinement be substantially reduced prior to execution of the sentence.

8. The charge sheet shows that accused is 26 years and 10 months of age, and that he was inducted on 26 July 1942.

9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the approved findings of guilty and the sentence.

J. Lott, Judge Advocate

Charles S. Sipes, Judge Advocate

Dissent., Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

21 June 1945

BOARD OF REVIEW

CM POA 313

UNITED STATES) ARMY GARRISON FORCE, APO 244
))
 v.) Trial by G.C.M., convened at
) APO 247, 23 April 1945.
Private ROBERT J. GREENLEE)
(34323525), 4070th Quartermaster)
Service Company.)

DISSENTING OPINION
ROBINSON, Judge Advocate.

1. The accused was charged on three specifications with a violation of Article of War 64. Specification 1, willful disobedience of Second Lieutenant Donald C. McCotter's order, "to help move some crates;" Specification 2, lifting "a weapon, to wit, a baseball bat against Captain Charles D. Gibson * * * his superior officer;" and Specification 3, striking "First Lieutenant Phillip J. Layman * * * his superior officer, who was then in the execution of his office, on the face with his fist." He was also charged on two specifications with a violation of Article of War 63. Specification 1, behaving with disrespect toward Second Lieutenant McCotter, his superior officer; and Specification 2, behaving with disrespect toward Captain Gibson, his superior officer. The accused was found not guilty of Specification 2, Charge I (lifting a baseball bat against Captain Gibson) and the court's finding of his guilt of Specification 3, Charge I (striking Lieutenant Layman on the face with his fist) was disapproved by the reviewing authority. He thus stands convicted of the only remaining Specification to Charge I (willful disobedience of Second Lieutenant McCotter's order "to help move some crates"), and Charge I; also of the two Specifications to Charge II (behaving with disrespect) and Charge II. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years.

2. Each Specification alleging disrespect carries with it a maximum sentence of six month's confinement and forfeitures of two-thirds pay per month for like period (MCM, 1928, par. 104c). It follows that the punishment imposed in excess of the maximum authorized on the disrespect specifications can be sustained only if regarded as punishment for his willful disobedience of Lieutenant McCotter's order. The question of his willful disobedience thus becomes one of prime importance and I cannot concur in the view that the issue was so clearly established that the extraneous matter introduced at the trial (to which reference is hereinafter made) did not influence the court in its final determination of guilt. The majority of the Board admit that the extraneous matters and improper evidence "may have been prejudicial to the accused in the adjudication of the sentence imposed." To my mind it is difficult to conceive how the improper evidence, which may have influenced a court in determining the sentence, may not also have influenced the court in determining guilt.

The willful disobedience contemplated (in Article of War 64) is such as shows an intentional defiance of authority * * *." (MCM, 1928, par. 134b). The *malus animus* is a necessary element. It is a serious offense, punishable by death. Disobedience without such "intentional defiance" (assuming the order to be a legal one) is a comparatively minor offense punishable under Article of War 96, and for which a dishonorable discharge or confinement in excess of six months is not authorized. Here the accused not only denied that any direct order was given him (R. 70)--and it was Lieutenant McCotter's word against his--but the accused, because of his status as a prisoner and the instructions that were given him by his guard, was of the opinion that he was to remain in the company area without working. Accused testified "Sergeant Prewitt told me personally * * * He said you can walk around the company area, but you don't have to work." In this he is supported by the testimony of the prosecution witness, Sergeant Baldwin. "Q. Sergeant Baldwin, did Sergeant Prewitt give any instructions in regard to these men you brought from the stockade? A. Yes, sir. Q. What were those instructions? A. He said the captain was not in and that we are supposed to guard these prisoners and keep an eye on them at all times; let them walk around in the area anywhere they want to. Q. Did he state anything else to you? A. Yes sir, at that time he said he got those orders from the first sergeant, what we was supposed to do with the prisoners. Then he told me the prisoners are not supposed to work. Sergeant Prewitt told me that." (R. 35). The accused stated that he was following those instructions and that when Lieutenant McCotter said "How about helping with the boxes?" he replied that he couldn't help because he was under guard (R. 70).

Mention is made of these facts for the purpose of pointing out that the proof of his guilt, particularly of willful disobedience under Article of War 64, "is not of such quantity and quality as practically to compel, in the minds of conscientious and reasonable men the finding of guilty. CM ETO 3213 (1944)." 3 Bull. JAG, p. 417, and it follows that we cannot disregard the prejudicial testimony introduced at the trial on the theory that it was harmless error.

3. What are the facts? On 11 February 1945 the accused, who was then serving a term in confinement pursuant to the sentence of a special court for having been AWOL (Ex. 3, R. 22) was returned to his organization, the 4070th Quartermaster Service Company, under guard. The 4070th Quartermaster Service Company was about to ship out and several garrison prisoners, including the accused, were released to the custody of their organization. Sergeants Baldwin and Prewitt were detailed to secure their return and stand guard over them. No prosecution witness testified to what occurred from the time of their return until accused was first approached by Lieutenant McCotter. The accused, however, testified without contradiction that within a short time after his return, Lieutenant Layman came into the dayroom and said, "Soldier, what outfit are you in?" I said, 'I don't know Lieutenant whether I am transferred or not.' * * * He said, 'Where are your God damn dog tags?' I said, 'I don't have any. I don't know where they are.' * * * He turned around and went back and called the sergeant of the guard. * * * he told him to take me and sit me down until someone told me to get up. The sergeant found me a chair and I sat down. Then the first sergeant came and asked me about my dog tags. * * * We went to the barracks bags and I looked through the barracks bag and found the dog tags. Then I returned to the first sergeant and he left. I was standing there by myself and I picked up a bat and went up at the other end of the day room and began knocking rocks across the road. I returned from there to watch a detail and to talk to a friend, Private Ellis. I started walking there and before I got to the detail I met Lt McCotter." (R. 69-71). Then started a series of events which caused the accused to be returned to the stockade and which is the basis for the ten-year sentence which was meted out to him.

Lieutenant McCotter testified in substance that he saw the accused and three times ordered him to help with the crates (R. 7); that accused said "he wasn't going to handle any of the 'god-damn' crates." (R. 8); that it was possible accused didn't hear him the first time (R. 9); that he put his hands on the accused "so he wouldn't turn away" (R. 9), and that the accused thereupon turned around and said, "I don't want anyone fucking with me." (R. 12). The incident was reported to Captain Charles D. Gibson, who was seated in a jeep about 40 feet away (R. 8).

Captain Gibson testified that "Lieutenant McCotter approached from my right and said, 'Captain, here is a man who says he doesn't want to be fucked with,' and he pointed to Private Greenlee" (R. 13); that he (Gibson) called Greenlee by name to which he responded "Yeah" (R. 13-14, 17); that he approached the accused who was swinging a bat at his side (R. 14); that as he approached he (Gibson) may have used profanity (R. 19); that he ordered the accused to put the bat down (R. 15); that the accused stood there with a sulky look on his face and said, "Fuck you" (R. 15); that he called Lieutenant Bouthillier "to bear witness to the fact that the man had disobeyed a direct order" (R. 15); that he ordered the accused to the stockade, whereupon the accused threw the bat down (R. 15); that he then placed his hand upon the accused's shoulder and that accused "shook my hand loose" and said, "Keep your mother fucking hands off of me." (R. 16).

Sergeant Russell Baldwin, carrying out Captain Gibson's instructions to return Greenlee to the stockade, walked with him to the jeep (R. 32). Sergeant Baldwin testified that he did not hear the accused use the profane language testified to by Captain Gibson, but that when Captain Gibson put his hand on him, accused "snatched loose and said, 'Take your hands off me. I don't want nobody to put his hands on me'" (R. 31). He testified further that "when we got to the jeep, he (accused) stopped and was talking. I don't know what he said. I put my hands on him to get him in the jeep and he snatched loose and said, 'Don't push me,' and at that time I stepped back and unbuckled the holster of the pistol." (R. 32). Lieutenant Layman came up and said, "I will take care of it now, Sergeant." He said, 'get your ass in that jeep, Greenlee,' and he took the pistol out (of Baldwin's holster). He told Greenlee again and put the pistol in his stomach." (R. 32). The pistol was loaded and cocked. (R. 33, 38). Accused grabbed for the pistol, whereupon the Lieutenant "struck Greenlee on the chin" (R. 34). Sergeant Baldwin was asked "what happened then?" to which he replied, "I had hold of the pistol at that time and Greenlee turned the pistol loose and struck him back in the mouth." (R. 34).

Lieutenant Layman said that he grabbed the pistol because he understood that Baldwin had not been trained with a pistol (R. 43) and "because of the mental state of Private Greenlee, I believed it was necessary for me to interfere. * * * I can't say that I would have killed him. If the situation would have gone to extremes I might have shot the man." (R. 44-45). He insisted that after he cocked the pistol he put the safety on (R. 47) and that his action was simply to "impress Private Greenlee" (R. 47). After accused struck Lieutenant Layman, Private Reed who was standing nearby and others intervened. Reed ordered the accused into the jeep which he obeyed "without hesitation * * * and he stayed there" (R. 48, 53, 60). Shortly thereafter an M.P. took accused away (R. 53).

The defense in substance was that the accused had been abused from the time he was first returned to his organization; that the several officers had used profanity toward him and that he exchanged in kind and that he did not assault anyone except in self-defense and after he was first attacked; further that he didn't help with the crates because he understood he was not supposed to. (R. 69-85).

4. Upon all the evidence it was for the court to determine the right or wrong of the accused's conduct, but such determination must, as a matter of law, be made in an atmosphere free of prejudice and upon testimony which bears reasonably upon the offense charged. Testimony relating to other offenses or to the previous bad character of the accused has always been held to be prejudicial and a denial to the accused of his right to a fair and impartial trial (People v. Zachowitz 172 N.E. 466, 254 N.Y. 192; People v. Shea, 174 N.Y. 78, 41 N.E. 505; Wigmore on Evidence, 3rd Edition, Vol. I, par. 194; Hood v. U.S. 59 Fed. 2nd 153; Dig. Op. JAG, 1912-40, pp. 200-203.

"A fundamental rule is that the prosecution may not evidence the doing of the act by showing the accused's bad moral character or former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him, and any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not ever been tried and convicted of their commission." (MCL, 1928, par. 112b). (Underscoring supplied)

In People v. Molineux, 61 N.E. (N.Y.) 286 at page 294, the court said:

" * * * The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded."

In Coleman v. People, 55 N.Y. 81, the following appears:

"The general rule is against receiving evidence of another offense, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent.

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It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, * * * "

"The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." Wigmore on Evidence, Third Edition, Vol. I, par. 194.

5. In this case the record is replete with references to the fact that accused disobeyed Captain Gibson's order "to put the bat down" (R. 15, 25, 30, 36, 42). The accused was not charged with, nor was he on trial for the disobedience of that order. The rule is stated in Dig. Op. JAG, 1912-40, p. 285 as follows: "If he was tried for disobeying the order of one officer, the evidence of the disobedience of the other was grossly prejudicial. The specification charged but one offense and it is impossible to tell to which of the offenses the finding of guilty applies. Conviction disapproved."

Although it is fundamental that evidence of previous convictions may not be considered by a court except "in the event of conviction of an accused" (MCM, 1928, par. 79a), Captain Gibson, under questioning by the prosecution was permitted to testify as follows:

"Private Greenlee has a reputation for going AWOL and taking things into his own hands and going wherever he pleases. With such a short notice and such a short time before we moved out, I couldn't and wouldn't have the man leaving the area and possibly be charged with desertion at that time. So, along with the reason that I didn't know whether or not the man had a suspended sentence or a remitted sentence from his previous conviction, I placed him under guard and told the guards to keep him in the area for his own safety." (R. 22).

Nor did this testimony pass unnoticed. The court immediately made inquiry concerning same:

"Questions by Court:

"Q. Captain, you just stated that the man had a reputation for going AWOL?

"A. That is correct

"Q. In order to have a reputation for going AWOL

the man would have to have been convicted or would have had to commit the offense several times?

"A. That's right." (R. 23).

The record of the accused's previous convictions was thus brought to the attention of the court in direct violation of the provisions of the Manual for Courts-Martial, 1928, par. 79a. But this was not the only provision of the Manual which the prosecution saw fit to violate. Paragraph 112b specifically forbids any reference to previous bad character or offenses, nevertheless Captain Gibson was permitted to testify: "We have had several instances where I have had trouble with Greenlee, and I had to send him to the stockade twice before." When counsel for the defense stated, "That has nothing to do with this case," Captain Gibson continued:

"If it please the court, I would like to be permitted to answer the question of defense counsel. Knowing the past history of the man and my knowledge of his past character and his actions before, and his direct disobedience of orders before, I knew the man had some reason behind it other than my correcting his saying 'Yes, sir.'" (R. 18).

Not satisfied that sufficient harm had been done to the accused, the prosecution on redirect examination questioned Captain Gibson as follows: "Q. Now, the defense brought this out: Was Private Greenlee recently released from the stockade? A. He was. Q. Was he under guard? A. Yes. Q. How many times in the past year has he been in the stockade? Defense: I object." The question was withdrawn, but the matter was not permitted to rest there. The prosecution when examining Lieutenant Layman about a matter unrelated to any issue in the case, was asked by the law member, "Does this have any bearing on the case?" to which the Trial Judge Advocate responded, "Yes, to show that Lieutenant Layman knew the character of the accused and that is why he took that action when he pulled the pistol." Pursuing the same line of examination the Trial Judge Advocate questioned the accused as follows: "How long out of the two years did you spend in the stockade? Defense: I object. * * * Q. Prior to leaving APO 502 were you released from the stockade? A. I don't understand you. Q. About five days before leaving New Caledonia where were you? A. About five days before leaving New Caledonia I was in the stockade. Q. Why? A. For AWOL." (R. 78). Finally the Trial Judge Advocate, addressing the accused, said:

"If you are adjudicated guilty in this court it means that the material evidence that you have given here is wrong and you arise a prima facie

case of perjury. Now if the court finds you guilty I will press charges against you for perjury; is that clear?

A. That's clear." (R. 80).

6. In view of the foregoing, the introduction of evidence relating to the accused's previous bad character; his commission of other offenses for which he was not then on trial; his record of earlier convictions prior to the adjudication of his guilt and the prejudicial remarks of the Trial Judge Advocate, all taken together, along with the fact that the issues were not entirely free of doubt, compels the conclusion that the substantial rights of the accused have been injuriously affected (Article of War 37). The conviction ought not be permitted to stand.

 Judge Advocate.

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1st Ind.

Branch Office TJAG with USAF, Pacific Ocean Areas, APO 958. JUN 22 1945
TO: Commanding General, Army Garrison Force, APO 244.

1. In the case of Private ROBERT J. GREENLEE (34323525), 4070th Quartermaster Service Company, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$ you now have authority to order the execution of the sentence.

2. Attention is invited to paragraph 7 of the majority holding of the Board of Review, which reads as follows:

"7. Although the Board has concluded that the errors referred to (par. 6, supra) do not vitiate the approved findings of guilty, yet it is believed that the matters and evidence there set out may have been prejudicial to accused in the adjudication of the sentence imposed upon him. The Board therefore recommends that the period of confinement be substantially reduced prior to execution of the sentence."

I concur in the views and recommendation expressed therein and accordingly recommend that the period of confinement be reduced to five years prior to or at the time of ordering execution of the sentence.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 313. For convenience of reference please place that number in brackets at the end of the order.
(CM POA 313)

Samuel M. Driver

SAMUEL M. DRIVER
Lieutenant Colonel, JAGD
Acting Assistant Judge Advocate General

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

7 June 1945

BOARD OF REVIEW

CM POA 317

UNITED STATES v. Private First Class LAWRENCE MYLAN (35507380), 3291st Quarter- master Service Company.))))))))	ARMY GARRISON FORCE, APO 244 Trial by G.C.M., convened at APO 247, 2 May 1945. Dishonorable discharge and confinement for fifteen (15) years. Penitentiary.
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HOLDING by the BOARD OF REVIEW
 LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Lawrence Mylan, 3291st Quartermaster Service Company, did, at APO 247, on or about 31 March 1945, with intent to commit a felony, viz, murder, commit an assault upon Private First Class William C. McKinney, 3291st Quartermaster Service Company, by willfully and feloniously shooting the said Private First Class William C. McKinney in the head with a carbine.

The accused pleaded guilty to and was found guilty of the Charge and Specification. One previous conviction (disrespect toward his superior officer) was considered by the court. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years. The reviewing authority approved the sentence but reduced the period of confinement to fifteen (15) years, and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that about 2300 hours on 31 March 1945, the accused entered the tent occupied by Private First Class William C. McKinney, where a card game, called "Tunk", was being played by McKinney, Private Eddie W. Bryant and one Mosley. All of the soldiers were members of the 3291st Quartermaster Service Company, APO 247. Accused joined the game. When Bryant won the second "game" after accused participated, the latter refused to pay, whereupon Bryant left. "Then a fight occurred between Mosley and Mylan [The accused]". They were separated. Accused left the tent and "came back in with two coral rocks". McKinney took the rocks away from accused and hit him with sufficient force to knock him down. Accused was taken to his tent by "some of the fellows" where he obtained a carbine. Accused, thus armed, went to "Charlie Myer's tent" where McKinney had gone in the meantime. When he "pointed the gun in the door", all of the occupants left (R. 7-9, 16, 17).

First Sergeant Fred Adams, 3291st Quartermaster Service Company, was notified of accused's actions and undertook a search for accused, whom he found in his tent. He told accused to "come out". Accused did so, carrying a carbine. McKinney had "started over to where" they were, and at this time he was shot in the head by accused. McKinney was taken to the hospital. Accused was placed under arrest. En route to the stockade, accused "started to talk" to Staff Sergeant Charles J. Walsh, 745th MP Battalion, who told him "he didn't have to talk". Accused did not seem "worried", asked how the "other man was" and when told "he wasn't dead", said "It's too bad he wasn't", and that his carbine "doesn't kill good enough" (R. 10-14, 17).

4. For the defense, no testimony was adduced. According to defense counsel, the "rights of the accused have been explained to him and he elects to remain silent" (R. 17).

5. The evidence shows that on the night of 31 March 1945, the accused engaged in altercations with two other soldiers arising from a card game which they had been playing. Without legal justification or excuse, he deliberately shot in the head with a carbine one of the soldiers (Pfc. William C. McKinney) with whom he had argued. The shooting occurred some time after the argument had subsided. While being taken to the stockade, accused expressed regret that he had not killed McKinney.

According to the Manual for Courts-Martial, an assault with intent to murder is one "aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt." (MCM, 1928, par. 1491).

The evidence for the prosecution abundantly supplements the accused's pleas of guilty to the Charge and Specification, and amply supports the findings of guilty.

6. A question having arisen as to whether the Commanding General of Army Garrison Force, APO 244, possessed general court-martial powers on and after 3 May 1945, the Board of Review has made an examination of pertinent orders and documents in order to solve this question. He referred this case for trial on 10 April 1945, it was tried on 2 May 1945, and he approved the sentence on 16 May 1945.

The Board has found by its investigation referred to that, although a new command has been established to perform substantially the functions formerly exercised by Army Garrison Force, APO 244, the general court-martial powers of the Commanding General of that Garrison Force were not thereby terminated. As of 1 June 1945, the Commanding General of Army Garrison Force, APO 244, had not relinquished command thereof, and Army Garrison Force, APO 244, had not been abolished, although its Headquarters and Headquarters Company had been "discontinued". Therefore, the Board of Review concludes that the Commanding General thereof retained the general court-martial powers previously conferred upon him by the President, including the reference of cases for trial and the approval or disapproval of sentences in cases referred by him (References: FO 171, USAFICPA, 11 April 1944; GO 1, AGF, APO 244, 11 April 1944; GO 137, USAFICPA, 12 May 1944; GO 153, USAFICPA, 23 May 1944; Sec. I, GO 49, USAFPOA, 3 May 1945; 1st Ind, WPBC to BOTJAG, USAFPOA, 1 June 1945).

7. According to the charge sheet, the accused was 32 years of age when the charges were preferred against him. He was inducted at Fort Thomas, Kentucky, on 1 September 1942.

8. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the offense of assault with intent to murder.

J. Lott, Judge Advocate

Charles W. Hughes, Judge Advocate

James J. [unclear], Judge Advocate



BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

15 June 1945

BOARD OF REVIEW

CM POA 325

U N I T E D	S T A T E S	)	ARMY GARRISON FORCE, APO 244
)	
	v.	)	Trial by G.C.M., convened at APO
		)	244, 7 May 1945. Dishonorable
Private ROBERT GILLILAND		)	discharge, total forfeitures and
(18086717), Battery D, 864th		)	confinement for fifteen (15) years.
Antiaircraft Artillery Automatic		)	Disciplinary Barracks.
Weapons Battalion (Sem).)	

HOLDING by the BOARD OF REVIEW
LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 65th Article of War.

Specification: In that Private Robert Gilliland, Battery D, Eight Hundred Sixty Fourth Anti-Aircraft Artillery Automatic Weapons Battalion (Sem), did, at Section Five, Battery D, Eight Hundred Sixty Fourth Anti-Aircraft Artillery Automatic Weapons Battalion (Sem), APO 244, on or about 1 April 1945, use the following insulting language and behave in an insubordinate and disrespectful manner, toward Sergeant Leonard M. Sisto, Battery D, Eight Hundred Sixty Fourth Anti-Aircraft Artillery Automatic Weapons Battalion (Sem), a noncommissioned officer who was then in the execution of his office, to wit: "You chicken shit bastard." "You dirty black dago." "You dago son of a bitch!" or words to that effect.

CHARGE II: Violation of the 86th Article of War.
(Disapproved by reviewing authority.)

Specification: (Disapproved by reviewing authority.)

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

Specification 1: In that Private Robert Gilliland, Battery D, Eight Hundred Sixty Fourth Anti-Aircraft Artillery Automatic Weapons Battalion (Sem), did, at Section Five, Battery D, Eight Hundred Sixty Fourth Anti-Aircraft Artillery Automatic Weapons Battalion (Sem), APO 244, on or about 1 April 1945, with intent to do him bodily harm, commit an assault upon Sergeant Leonard M. Sisto, Battery D, Eight Hundred Sixty Fourth Anti-Aircraft Artillery Automatic Weapons Battalion (Sem), by attempting to strike the said Sergeant Leonard M. Sisto with a coral rock.

Specification 2: In that Private Robert Gilliland, Battery D, Eight Hundred Sixty Fourth Anti-Aircraft Artillery Automatic Weapons Battalion (Sem), did, at Section Five, Battery D, Eight Hundred Sixty Fourth Anti-Aircraft Artillery Automatic Weapons Battalion (Sem), APO 244, on or about 1 April 1945, with intent to commit a felony, viz, murder, commit an assault upon Sergeant Leonard M. Sisto, Battery D, Eight Hundred Sixty Fourth Anti-Aircraft Artillery Automatic Weapons Battalion (Sem), by willfully and feloniously firing approximately seven (7) rounds of live ammunition at the said Sergeant Leonard M. Sisto from a rifle.

He pleaded guilty to all Charges and Specifications. After the accused had testified, the court directed that his plea of guilty to Specification 2, Charge III, be changed to a plea of not guilty (see par. 5, infra). He was found guilty of all Charges and Specifications and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for eighteen years. The reviewing authority disapproved the findings of guilty of the Specification, Charge II, and Charge II, approved the sentence, but reduced the period of confinement to fifteen years, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution pertaining to the approved findings of guilty shows that shortly after 0300 on 1 April 1945 accused, who was on guard duty, entered his barracks, awakened Sergeant Leonard M. Sisto, the chief of his section, and told him that he (accused) "was through pulling the guard." When Sergeant Sisto could not persuade accused to return to his post or "to get

himself a relief," he performed guard duty in place of accused until 0430. About noon of the same day he entered the barracks and told accused to report to the platoon commander at 1400. Accused asked "what for?" Sergeant Sisto said that it was for "the incident that happened last night." Accused called Sisto a "Chicken shit bastard" and a "Dago son of a bitch and bastard" and invited him to go outside. At first Sisto declined to do so but after the accused had uttered similar insulting epithets, Sisto left the barracks followed by accused (R. 8-10, 27, 31).

Accused picked up some rocks and threw them at Sisto while the latter's "back was turned." When accused approached Sisto with a coral rock about the size of a baseball in his hand, Sisto "made a pass for him" and accused threw the rock at Sisto but did not hit him. They "started to fight," Sisto hit accused three or four times "in the jaw," accused dropped his arms and both of them went back into the barracks. Sisto went to the "water barrel" to get some water to wash his face. He heard some shots fired and saw accused "at the barracks platform" pointing a carbine in Sisto's direction. Accused fired two more shots which struck a water barrel near Sisto and the latter "took cover" behind the barrel and then ran behind "the shower" about fifteen feet away. Several of the men asked accused to stop firing but he advanced "to mid-way between the barracks and the shower" (about 120 feet apart), said "I will kill you, you son of a bitch," and fired two more rounds at Sisto, the last one when Sisto put his head "out around the corner to see where he [accused] was." Accused fired the shots with the carbine at his shoulder, and "muttered" to some of the men who came up to him and persuaded him to stop firing, "He broke my jaw, he broke my jaw. I will kill him." Accused walked back to the barracks with the others and upon being requested to do so surrendered his carbine to one of them. He remarked, "Keep that black son of a bitch down there. If you don't, I am going to kill him. I didn't fire those shots to be firing. I fired them for keeps." When accused gave up the weapon there was one round of ammunition left in it (R. 10-19, 23, 27, 33-35; Ex. 1).

Altogether accused fired seven or eight shots. Some of the bullets passed "right over" Sisto's head, "the first ones * * * pretty close," and "two hit the drums in front of" him. After the firing had ceased accused was seen bleeding at the mouth and had a "dazed expression" (R. 15, 28).

4. After he had been fully informed of his rights by the president of the court, accused was sworn and testified that "at the start of the fight" he "struck at Sergeant Sisto with a coral rock, and missed him." Sisto struck accused "on the jaw" and "everything seemed to black out" for him until two other soldiers were "leading" him back to the mess hall. He did not remember "firing

shots." Both sides of his jaw were broken and he had been in the hospital "ever since then." Accused had been drinking whiskey before he went on guard in the early morning of 1 April and for that reason had asked "the sergeant" to relieve him from duty (R. 36-37, 39).

The prosecution and defense stipulated that the Report of a Board of Medical Officers which examined accused on 28 April 1945 be received in evidence. The findings of the Board were "Psychopathic personality, emotional instability, mild. Alcoholism, chronic, mild." The Board concluded that accused was at the time of the alleged offense and at the time of the examination sane and legally responsible for his actions. The report also stated that accused was incapacitated for duty by reason of a complete, comminuted fracture of the left mandible and a complete compound fracture of the right mandible. (R. 40; Ex. 2).

5. After the defense had rested the court closed and upon being reopened the president announced that "the court directs" that as to Specification 2, Charge III, a plea of not guilty be entered "In view of the fact that accused took the stand and told us during his testimony he does not remember anything regarding the firing of that rifle," and such testimony was inconsistent with his plea of guilty (R. 41).

6. a. The accused pleaded guilty to Charge I and its Specification and to Charge III and Specification 1 thereunder and there is no indication in the record that his pleas in that regard were ill advised or improvident. There is nothing in the testimony of the witnesses for the prosecution or of the accused inconsistent with such pleas of guilty. On the contrary, the undisputed evidence adduced by the prosecution shows that accused used insulting language and behaved in an insubordinate and disrespectful manner toward a non-commissioned officer, then in the execution of his office, substantially as alleged in the Specification of Charge I, and assaulted the same noncommissioned officer by attempting to strike him with a coral rock as alleged in Specification 1, Charge III. (As stated above the reviewing authority disapproved the findings of guilty of Charge II and of the Specification thereunder.)

b. As to Specification 2, Charge III, the court properly set aside the plea of guilty and directed that a plea of not guilty be entered in the record for the reason that the testimony of accused was inconsistent with his plea of guilty. The evidence for the prosecution shows that after Sergeant Sisto had reported accused for an incident that occurred the night before, accused became angry with Sisto, spoke insulting and indecent language to him, invited him outside (obviously seeking a fight), and when the sergeant went outside threw rocks at him and then approached the sergeant with a rock about the size of a baseball. In the resulting fight

accused threw the rock at Sisto, and the latter struck accused several times and broke his jaw. Shortly afterward, accused obtained his carbine and fired seven or eight shots at Sisto from distances varying from about 120 feet to about 60 feet. The shots did not strike Sisto. Accused testified that he remembered nothing from the time he was struck on the jaw until after the shooting.

The evidence clearly shows that accused assaulted Sergeant Sisto by shooting at him with a carbine. The circumstances and the conduct of accused during the shooting, including his remarks (see par. 3, supra), justified the court in not believing the statement of accused that he did not remember. This issue of fact was for the court. It follows that accused intended to kill Sisto and thus accomplish the result that his act of firing at Sisto was likely to produce.

The Manual for Courts-Martial defines the offense under consideration as:

" * * * an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt. To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense." (MCM, 1928, par. 1491).

It is necessary to determine whether the facts before the court sustain an inference that accused intended murder or merely manslaughter. To state the question in another way, would it have been murder or manslaughter if one of the shots fired by accused had struck and killed Sisto? The Board of Review has given careful consideration to this question and concludes that the court was justified in inferring that the intent was murder. If the sole facts were that accused and Sisto had engaged in a fight, Sisto broke the jaw of accused, and accused thereupon fired at Sisto, there might be doubt on the point. But when all of the facts are considered it is clear that from the very beginning of the incident accused was unjustifiably angry with Sisto, and sought an opportunity to harm him. As the fight between the two men proceeded, this desire to harm grew into a desire to kill. Although the injury to the jaw of accused was serious, and undoubtedly painful, it was not of such nature in the opinion of the Board of Review, as necessarily to reduce the degree of the offense of accused, in view of the malicious and wrongful intent of accused from the inception of the difficulty. The blows struck by Sisto were not disproportionate to the assault upon him by accused.

"Where the difficulty is provoked by accused for the purpose of obtaining an opportunity to kill or do great bodily harm, the homicide cannot be manslaughter, and accused cannot claim the benefit of a sudden passion aroused by an assault made by deceased in consequence of appellant's own conduct. But the mere fact that the killing occurs in a difficulty begun or provoked by accused will not prevent the grade of homicide from being manslaughter. Where a fatal blow is struck under anger or fear suddenly aroused by an assault made upon accused by decedent which constituted a provocation apparently sufficient to make the passion irresistible, the grade of the offense will be manslaughter, even though accused was at fault in provoking the difficulty, and although the assault of deceased was not of such apparent force as would justify defendant in killing in self-defense. Illustrations of killings of this character occur, where an assault by accused is returned with a violence which is manifestly disproportionate to its character. On the other hand, an act which standing alone might be adequate provocation may not be such provocation when in itself provoked by the conduct of accused, as where an insult provokes a battery not disproportionate thereto. * * * " (29 CJ, Homicide, sec. 123).

Among the cases cited in the above text is Phelps v. State (15 Tex. A. 45) to the effect that where deceased was provoked by insulting words into making an attack upon defendants with a whip, which was not a dangerous weapon, and defendants deliberately retaliated by shooting deceased, the crime was murder.

The Board of Review does not weigh evidence (in cases under Article of War 50 $\frac{1}{2}$), but where a finding of guilty rests on an inference of fact it must determine whether there is in the evidence a reasonable basis for the inference (see 1 Bull. JAG 162). For the reasons stated above, the Board concludes that the court, having weighed the evidence in this case, could find a reasonable basis to infer that the intent was murder.

7. The charge sheet shows that the accused is 34 years of age and that he enlisted at Oklahoma City, Oklahoma. The review by the Staff Judge Advocate shows that accused enlisted 25 March 1942, and accused testified that he had been in the Army three years and one month (R. 41).

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RECORDED

8. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the approved findings of guilty and the sentence.

J. Lottich, Judge Advocate

Charles A. Sykes Judge Advocate

Joseph A. Pollock Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

2 June 1945

BOARD OF REVIEW

CM POA 336

U N I T E D	S T A T E S	)	CENTRAL PACIFIC BASE COMMAND
)	
	v.	)	Trial by G.C.M., convened at APO
		)	958, 13 April 1945. Dismissal, total
Second Lieutenant John O. Wainio		)	forfeitures and confinement for one
(O-1643420), Signal Corps.		)	(1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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

CHARGE: Violation of the 93d Article of War.

Specification 1: In that Second Lieutenant JOHN O. WAINIO, 3117th Signal Service Battalion, did, at APO #958, on or about 9 June 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

	ALLENHURST NATIONAL BANK AND TRUST COMPANY	C
	Allenhurst, N. J.	9 June 1944 No. 6
Pay to the		
Order of	John Wainio	\$ 145 ⁰⁰ /100
	One hundred & forty-five ⁰⁰ /100	Dollars
	(Printed)	
	(Seal)	Craig B. Harvey

which said check was a writing of a private nature which might operate to the prejudice of another.

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Specification 2: In that Second Lieutenant JOHN O. WAINIO, 3117th Signal Service Battalion, did, at APO #958, on or about 19 July 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ALLENHURST NATIONAL BANK AND TRUST COMPANY C
Allenhurst, N.J. 19 July 1944 No. 7

Pay to the
Order of John Wainio \$ 50 00/100
Fifty-dollars and no cents Dollars

(Printed)
(Seal) Craig B. Harvey

which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that Second Lieutenant JOHN O. WAINIO, 3117th Signal Service Battalion, did, at APO #958, on or about 12 August 1944, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

ALLENHURST NATIONAL BANK AND TRUST COMPANY C
Allenhurst, N. J. 12 Aug. 1944 No. 8

Pay to the
Order of John Wainio \$ 75 00/100
Seventy-five and no cents Dollars

(Printed)
(Seal) Craig B. Harvey

which said check was a writing of a private nature which might operate to the prejudice of another.

He pleaded guilty to each of the Specifications, except the words "with intent to defraud, falsely", substituting therefor the word "wrongfully", not guilty to the Charge, but guilty of a violation of the 96th Article of War. He was found guilty of all Specifications and of the Charge, and was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority approved only so much of the sentence as provides for dismissal, total forfeitures and confinement at hard labor for two years, and forwarded the record of trial for action under the 48th Article of War. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, confirmed the sentence as approved, but reduced the period of confinement to one year, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50 $\frac{1}{2}$ the order directing the execution of the sentence was withheld.

3. The evidence for the prosecution shows that accused and First Lieutenant Craig B. Harvey were roommates at APO 958 from about 1 April to about 1 December 1944. Lieutenant Harvey had a checking account in Allenhurst National Bank and Trust Company, Allenhurst, New Jersey, and maintained a balance of about \$400. The bank sent statements only on request. Lieutenant Harvey's check book, which originally contained only 10 blank checks, was kept in an unlocked drawer in his room (R. 7-10).

On 19 May 1944, Lieutenant Harvey drew a check (Ex. 1) for \$98 to accused as a loan, which was subsequently repaid. About 1 November, Harvey discovered that three checks were missing from his check book, in addition to what he had used. He requested the bank to send a statement and he received it about the end of December. With the statement were certain cancelled checks, including the three (Exs. 2, 3, 4) described in the Specifications. Lieutenant Harvey did not sign the three checks, nor authorize accused or anyone else to sign them. When Lieutenant Harvey received the three checks from the bank he "called" the commanding officer of accused. Subsequently, accused paid \$270 to Harvey, as the amount of the checks (R. 9-11).

An enlisted man employed at the Officers' Club, APO 958, as a clerk in the office, identified the signature of accused on his application (Ex. 5) for membership in the club. The records of the club disclosed that accused had made payments as follows: 10 June 1944 by check for \$145; 20 July 1944 by check for \$50, and 21 August 1944 by check of 12 August for \$75. In two instances accused received change, and in the other the bill was larger than the check and he paid the difference in cash (R. 12-15).

A handwriting expert testified that he had examined Exhibits 2, 3, 4 and 5 through a binocular microscope and that the signatures on all of them were made by the same hand (R. 17-18).

4. Lieutenant Harvey testified for the defense that about the last of November, after he had discovered the absence of three checks from his check book, he found two slips of paper (Def. Ex. A) in the wallet of accused on the common desk in their room. These slips bore memoranda indicating that \$150 had been "sent" to Harvey's bank account on 3 August, and \$50 on 2 September 1944. Upon finding these slips, Lieutenant Harvey telephoned accused and asked "what do you mean by sending money to my account". Accused said he would "come around to see" Harvey about it, but never did (R. 19-20).

Accused testified that prior to entering the Army he went to high school for two and a half years, but did not graduate, and then held several jobs. In 1938, when he was 18 years of age, he enlisted in the Army. He has been in the Army ever since except for three weeks between discharge and re-enlistment. He went through "Fort Monmouth Officers' School" and received a commission. He is married and has one child, born 9 June 1944 (R. 21-22).

3
RESTRICTED

Accused admitted writing the three checks. He stated that when he borrowed \$98 from Lieutenant Harvey, the latter said "something" about if accused was "ever caught short" he should come to Harvey. At that time his wife was having a baby and accused was having other family troubles and was "pretty short" of cash. Lieutenant Harvey was in the hospital when accused cashed the first check. Accused intended to reimburse him, but could not because of lack of funds. He was sending \$200 a month home by allotment. He wrote "little notes" from month to month to remind himself that he owed the money on the three checks and that he would be in a "pretty nasty mess" if caught. He wrote his wife to deposit some money in Harvey's account, but she failed to do it (R. 22-24).

5. The evidence shows and the pleas of guilty (with exceptions and substitutions) admit that accused, without authority, wrote the three checks on Lieutenant Harvey's bank account, in the form described in the Specifications. Accused denied that he intended to defraud. The evidence shows that the checks were drawn by accused without the knowledge of Lieutenant Harvey, that accused used them to settle accounts due the officers' club at his station, and that he did not repay any part of the amount of the checks until Lieutenant Harvey had discovered the wrongful acts several months later. In the opinion of the Board, the evidence amply sustains a finding that accused intended to defraud, and that he was guilty of forgery.

6. The charge sheet shows that accused was 26 years of age when the charges were drawn; that he enlisted in the Regular Army, Infantry, and served from 4 January 1938 to 9 May 1943; and that he was commissioned a second lieutenant, Army of the United States, Signal Corps, on 10 May 1943.

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

J. F. Fetterhoe, Judge Advocate

Charles S. Stephens, Judge Advocate

James S. Robinson, Judge Advocate

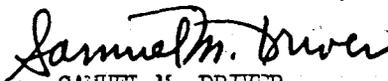
1st Ind.

Branch Office TJAG with USAF, Pacific Ocean Areas, APO 958 JUN 4 1945
TO: Commanding General, USAF, Pacific Ocean Areas, APO 958.

1. In the case of Second Lieutenant JOHN O. WAINIO (O-1643420), Signal Corps, 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 as approved and confirmed, which holding is hereby approved. Under the provisions of Article of War 50¹/₂ you now have authority to order execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 336. For convenience of reference please place that number in brackets at the end of the order.

(CM POA 336)



SAMUEL M. DRIVER

Lt. Col., JAGD

Acting Assistant Judge Advocate General

(Sentence as modified ordered executed. GCMO 14, USAFPOA, 4 June 1945.)

3. The evidence for the prosecution is as follows:

The initial unauthorized absence of accused from his organization on 5 December 1944 is shown by a certified extract copy of the morning report of his organization, introduced in evidence without objection (R. 7; Pros. Ex. 1). The termination of such unauthorized absence by apprehension at Wahiawa, Territory of Hawaii, on 10 April 1945, is established by the testimony of one of the soldiers who apprehended accused (R. 7-11). At the time of apprehension, accused was in a private home, dressed in civilian clothes (R. 8, 9). As the accused and the officials who apprehended him left the house for the police station, accused "brought out his dog tags" (R. 11). On the next day, accused, after proper warning, voluntarily stated to an MP that he had won \$1300 playing dice on 3 December 1944, that the next day he went on pass to Wahiawa, that he spent the remainder of time during his absence in drinking and visiting women, that he gave his uniform to a Filipino to keep for him, and that the Filipino was "supposed to bring it [The uniform] the night of the 10th of April" (R. 13-23; Pros. Ex. 2).

4. For the defense, the accused after being informed of his rights as a witness, made an unsworn statement as follows:

"Sir, I won a lot of money, sir, and I was having a good time, and I think I will come back when it is finished. I sent for my clothes from Ta Ta because my money was short, and I want a chance to be a soldier. That is all I have to say. I have always intended to come back all the time. When the money would run low and I arrange to send for my clothes, but I was coming back to my camp--outfit." (R. 23).

5. The evidence shows that accused was absent without leave from his organization four months and five days and that his unauthorized absence was terminated by his apprehension in civilian clothes. By his own admission he had no uniform in his possession. An unexplained absence of such duration, coupled with the other facts, is sufficient to justify the court's inference that accused intended to remain permanently absent from the service.

6. Charges were served on accused on 29 April 1945. He was tried on 7 May 1945. At the beginning of the trial, defense counsel moved for a continuance on the ground "that the defense counsel, each of whom having a multiplicity of duties, in addition to their regularly assigned duties, has not had time to prepare his defense in this case, and he doesn't feel that he should be placed on trial for his life when so little opportunity has been afforded his defense counsel

to make an exhaustive examination of the authorities or to carefully go into all the facts and circumstances connected with this case." The motion was overruled (R. 6, 7). The record of trial indicates that the court did not act capriciously or unjustifiably in denying the motion and that the accused's rights were not injuriously affected thereby.

7. When the charges were preferred, accused was 24 years of age. He was inducted at Houston, Texas on 28 August 1942.

8. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

J. Lott, Judge Advocate

Charles S. Myers, Judge Advocate

James S. Roberts, Judge Advocate



BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

6 June 1945

BOARD OF REVIEW

CM POA 346

U N I T E D	S T A T E S	)	ARMY AIR FORCES, PACIFIC OCEAN AREAS
)	
	v.	)	Trial by G.C.M., convened at APO
		)	953, 27 April 1945. Dishonorable
Private First Class CHARLIE HILL	)	)	discharge and confinement for
(38201144), 469th Aviation	)	)	twenty (20) years. Penitentiary.
Squadron.))	

HOLDING by the BOARD OF REVIEW
 LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Private First Class Charlie Hill, 469th Aviation Squadron, APO 953, did, at APO 953 on or about 1 February 1945, with intent to commit a felony, viz, murder commit an assault upon Captain Abel Stella, 469th Aviation Squadron, APO 953, by willfully and feloniously shooting the said Captain Abel Stella, in the chest and in the feet with a dangerous weapon to wit, a U.S. Carbine Cal. .30 M1.

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

Specification: In that Private First Class Charlie Hill, 469th Aviation Squadron, APO 953, while posted as a sentinel and having received a lawful command from Captain Abel Stella, 469th Aviation Squadron, APO 953, his superior officer, who was then in the execution of his office, as officer of the day, to turn his weapon over to the Sergeant of the Guard, or words to that effect, did at APO 953, on or about 1 February 1945 willfully disobey the same.

He pleaded not guilty to and was found guilty of both Specifications and both Charges. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on the evening of 1 February 1945 accused was a member of the guard at APO 953. Captain Abel Stella, commanding officer of the 469th Aviation Squadron, to which accused had belonged since its activation on 25 December 1944, was Officer of the Day. At 1700 on 1 February, Captain Stella inspected the guard. He then gave instructions for the guard to be posted. Staff Sergeant Chauncey Tilley was Sergeant of the Guard and assisted at the inspection and guard mount. Accused and another soldier were posted as sentinels in charge of Post 61, located at John Rogers Field, about 1745 that day (R. 7-9, 22-23).

About 1800 Captain Stella and Sergeant Tilley left the squadron area in a jeep to see that the guard was properly posted. Tilley stated that after inspecting about thirty posts they arrived at Post 61 about 1930. Captain Stella stated that they reached that post about 1820. They found one sentry (Morris) at Post 61, but did not see accused. On making a search Sergeant Tilley found accused lying down in a latrine. When asked what was the trouble accused said he was sick. Tilley said Captain Stella wanted to see him and accused replied "OK". They left the latrine and approached Captain Stella. Accused saluted. Sergeant Tilley testified that it was daylight at this time and that he did not see any mechanical lights. Captain Stella testified that it was then about 1830 and was "daylight * * * sunset". The driver of the jeep testified that it was "about dusk; you could see everywhere" (R. 9-11, 13-17, 24, 26, 28-29, 36-38).

Captain Stella walked up to within about two feet of accused and asked why he did not walk his post properly and what was the matter with him. When accused said he was sick Captain Stella told him to turn over his carbine to the Sergeant of the Guard and that he (Stella) would take accused to the hospital. Accused made no effort to hand over the carbine. Tilley testified that accused said he "wasn't intending to give it to anybody while he was on duty." When Sergeant Tilley reached for the carbine accused stepped back quickly, inserted a magazine, "unlocked the piece", pointed it at them, and said "All of you scram or I shoot". Captain Stella took a few steps toward accused and asked whether he knew his 6th General Order. Accused replied in the affirmative and repeated that order correctly. Captain Stella again ordered accused to surrender the carbine to the Sergeant

of the Guard, and said, "You can give your weapon to the Officer of the Day or the Sergeant of the Guard at any time." Accused "insisted he wouldn't give up his gun while he was on guard" and said "No. All of you run or I shoot". During this conversation, the driver of the jeep and Sergeant Tilley left the scene (R. 10-11, 17, 24-25, 36-38).

While Captain Stella was talking to him, accused fired a shot which struck Stella in the right chest, and then another that went through both of Captain Stella's feet. They were about ten or twelve yards apart when the shots were fired. Accused fired from the shoulder and took aim. Captain Stella made no threatening gestures toward accused, and did not touch his pistol until after he had been shot. He had not had any personal difficulties with accused prior to that time. Captain Stella was not wearing an arm band as Officer of the Day, but had identified himself as Officer of the Day at guard mount (R. 11, 14, 25-27, 30-34).

The shooting was reported to a military police officer about 1920 and he and others went to the scene. They saw accused walking his post, and when they came within about thirty-five feet of him accused said "MP, come here". One of the military policemen present approached accused and "grabbed" his carbine, and two of the officers "pinned him down". Accused offered no resistance. One of the officers there had on a blue and white "MP" brassard. A sobriety test (Ex. 1) made on accused at 2005 showed that he was not drunk and had no odor of alcohol on his breath (R. 39-42).

A Board of Officers examined accused as to mental condition on 18 March 1945, after he had been admitted to the hospital on 5 March, and reported (Ex. 2) a diagnosis of "Mental deficiency, Mental Age - approximately 8 years, as determined by Binet-Simon and vocabulary testing" and "Observation for mental disease; no disease found". The Board found him "mentally responsible" at the time of the report and on 1 February 1945. Accused is well oriented in all spheres, shows no delusions or hallucinations, but shows a marked lack of intelligence (R. 42-43).

4. The accused testified that he is forty-one years of age, went no higher than the sixth grade in a country school, is married, and has four children, including two sons in the service. He performed guard duty for about seventeen months on Guadalcanal, and also since coming to Oahu. He also served as a barber in his company at times (R. 44-45).

As to events on 1 February 1945, accused stated that he "met guard mount" about 1700, Captain Stella was standing out in front but accused "didn't see no OD badge" on him, and Captain Stella did not inspect them but "made a little talk" and turned them over to the Sergeant of the Guard. Accused was posted about 1800. During the

"first part of the night", about 2100, when it was dark, the sergeant came to accused, who was walking his post, and said that Captain Stella wanted to see him, "Over there in the area". They walked beyond some buildings and heard someone walking. The sergeant said he thought he heard Captain Stella. Accused yelled and "he" (Captain Stella) turned and came toward accused, who again "hollered 'Halt!'". "He looked dark as the sergeant" to accused and "just kept on coming". When accused said "If you don't stop, I will shoot", "he" (Captain Stella) said "You don't scare nobody". Accused said "I don't recognize you", "Move out". "He" kept on coming, and accused put a "clip" in his gun and "backed up" slightly. Accused told him to "stop twice", saw "the Captain slipping up on" him, and fired. "He" did not stop, so accused fired again. When "he" fell, accused did not shoot any more, but was "hollering for help". Accused whistled for the other sentry, told him he had shot someone but did not know who it was, and on the advice of the other sentry went "up there" to give up (R. 45-46).

Accused stated that he could see "the bulk of" the man coming toward him but could not tell whether he was white or colored. Accused had been instructed to "halt a man three times, and then if he didn't stop to shoot", and that is what he did. Accused had no grievance against Captain Stella, who had treated accused "just as nice as" accused had ever been treated. Accused did not remember the sergeant finding him in the latrine. If he was lying down in a latrine he must have been unconscious. He recognized Sergeant Tilley and knew he was Sergeant of the Guard. When they walked "over there" Sergeant Tilley "wasn't for sure" that Captain Stella was approaching but said "I think here he comes". That was when the sergeant left. Accused did not remember "him" (Captain Stella) asking whether he was sick, and did not hear him tell accused to give up his rifle. Accused had been sick "a long while" but did not remember saying that he was that night. He did not hear Captain Stella say he would take accused to the hospital. It was "real dark" at the time and "he" (Captain Stella) was ten or twelve paces away. Accused estimated the time to be about 2100. Accused challenged three times and called "Halt!", but "he didn't stop for" accused to ask "Who goes there?" and have him "advance close" for recognition. When "he didn't stop" accused fired. Accused did not remember Captain Stella having him repeat any of his general orders (R. 46-53).

Private William H. Morris, who was on guard with accused on 1 February 1945, testified that "it was just about dark" when he saw the Officer of the Day "come in". He thought it was about 2000. Captain Stella called him to the jeep. He did not challenge Captain Stella. In helping the Sergeant of the Guard look for accused, Morris had to use his "light going in the barracks". Later, after the shots were fired, accused whistled for him, and when he "went over" accused said he had "shot a man" (R. 53-55).

5. The prosecution showed in rebuttal that the desk sergeant at the Provost Marshal's office received a call about the shooting at 1920. The records of the Weather Station show (Ex. 3) that on 1 February 1945 the sun set at 1851 and "complete darkness" set in at 1914 (R. 56-60).

6. The evidence shows that about 1745 on 1 February 1945, accused was posted as a sentry, after guard mount and inspection at which Captain Abel Stella, Officer of the Day, and Staff Sergeant Chauncey Tilley, Sergeant of the Guard, were present. About 1800 Captain Stella and Sergeant Tilley started out in a jeep to inspect the numerous posts. They arrived at the post of accused and another soldier about 1820 according to the estimate of Captain Stella. When they did not find accused, a search was instituted, and Sergeant Tilley found accused lying down in a latrine. Accused claimed to be sick, and the sergeant told him Captain Stella wanted to see him. When they approached Captain Stella, at about 1830, he walked up to within about two feet of accused, and asked accused what was the matter. Accused said he was sick, and Captain Stella told him to hand his carbine to the sergeant, and that he would take accused to the hospital. Accused did not comply but stated that he would not surrender his weapon while on duty. Accused stepped back, loaded his carbine, told them to "scram" or he would shoot. Captain Stella had accused repeat the 6th General Order, told him he could give his weapon to the Officer of the Day or the Sergeant of the Guard, and again ordered accused to surrender the carbine. Accused did not obey, but again said he would not give up his gun while on guard and told them to run or he would shoot. Accused then aimed at Captain Stella, from about ten or twelve yards, and shot Captain Stella twice. One shot penetrated his chest and the other went through both feet. Later, accused surrendered his weapon to a military policeman without resistance, when the latter approached accused, who was walking his post.

On 1 February 1945 the sun set at 1851 and "complete darkness" set in at 1914, according to Weather Station records. Several witnesses for the prosecution testified that the shooting occurred at about sunset and that it was light enough to see.

Accused testified that he did not remember being in the latrine, saying he was sick, being told to repeat any of his General Orders, nor being told to give up his weapon. He stated that it was "real dark" at the time, he could not recognize Captain Stella, ordered him to halt several times, and when he continued to advance, stating only that "You don't scare nobody", accused fired twice. He claimed that he was obeying instructions in firing upon a person who failed to halt when told to do so.

The court had the right, in its judgment, to accept the prosecution's evidence, which amply shows that accused wilfully disobeyed the order to surrender his weapon to the Officer of the Day and the Sergeant of the Guard, and that he shot the Officer of the Day with the intent to murder him. Testimony that it was light enough to see at the time, that Captain Stella had been present at guard mount, that he was the squadron commander of accused, and that accused had recognized the Sergeant of the Guard, sustains the finding of the essential fact that accused knew he was dealing with the Officer of the Day. Although there was no apparent motive for the act of accused in firing at Captain Stella, it does not follow that the intent was other than to murder. The fact that accused aimed at Captain Stella and deliberately shot him, even without apparent motive, sustains an inference that he was activated by malice aforethought and intended to murder (See CM POA 228, Booher). Malice may be inferred from a deliberate, unlawful act of violence, likely to cause death (see Wharton, Criminal Law, 12th Ed., secs. 146-147). The court had the right not to believe and accept the claim of accused that he was following instructions as a sentry, and was unaware that the person approaching was the Officer of the Day rather than a possible unauthorized person.

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

7. The charge sheet shows that the age of accused is thirty-eight years and eight months, and that he was inducted on 3 September 1942. Accused testified that he is forty-one years of age (R. 44, 61).

8. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of assault with intent to murder, by Section 22-501 of the District of Columbia Code.

 Judge Advocate

 Judge Advocate

 Judge Advocate

1st Ind.

Branch Office TJAG with USAF, Pacific Ocean Areas, APO 958, 7-June 1945.
TO: Commanding General, Army Air Forces, Pacific Ocean Areas, APO 953.

1. In the case of Private First Class CHARLIE HILL (38201144), 469th Aviation Squadron, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$ you now have authority to order execution of the sentence.
2. A penitentiary has been designated as the place of confinement and such confinement is authorized. However, in this connection it is noted that the accused is a man of very low intelligence, and it appears probable that he was motivated to some extent in committing the offenses by some mistaken idea of his duty as a sentry, and not by a criminal intent of the kind meriting long confinement in a penitentiary. There is no evidence that he had any previous convictions. Under these circumstances, it is suggested that in publishing the general court-martial order in this case consideration be given to changing the place of confinement from a penitentiary to a disciplinary barracks, and to effecting some substantial reduction in the period of his confinement.
3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 346. For convenience of reference please place that number in brackets at the end of the order.
(CM POA 346)



SAMUEL M. DRIVER

Lt. Col., JAGD

Acting Assistant Judge Advocate General

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

6 June 1945

BOARD OF REVIEW

CM POA 350

UNITED STATES	)	XXIV CORPS
)	
v.	)	Trial by G.C.M., convened at APO
	)	235, 7 March 1945. Dishonorable
Technician Fourth Grade MORRIS	)	discharge and confinement for
NATUSKO (36668802), Headquarters	)	five years and six months.
and Service Company, 174th Engineer	)	Penitentiary.
Combat Battalion.)	

HOLDING by the BOARD OF REVIEW
LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

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

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

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

Specification: In that Technician Fourth Grade, Morris Natusko, Headquarters and Service Company, 174th Engineer Combat Battalion, did, in the vicinity of the 174th Battalion Motor Pool, APO 235, on or about 16 February 1945, with intent to do him bodily harm, commit an assault upon Technician Fourth Grade Paul J. Sowers, with a dangerous weapon, to wit, a pistol.

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

Specification: In that Technician Fourth Grade, Morris Natusko, Headquarters and Service Company, 174th Engineer Combat Battalion, did, in the vicinity of the 174th Battalion Motor Pool, APO 235, on or about 16 February 1945, wrongfully kick Private First Class Ralph M. Martin, in the face.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years and six months. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that about 1730 hours on 16 February 1945, the accused and four other soldiers including Technician Fourth Grade Paul J. Sowers, 174th Engineer Combat Battalion, were in a tent in the "motor pool company area" (APO 235). Accused started to "go through" his duffle bag and stated that "somebody's going to dig a six (6) by six (6)." He took an automatic pistol (cal. 45) from the bag and fired one shot into the ground. Then he walked toward the cot on which Sergeant Sowers and Technician Fifth Grade Spencer V. Showalter were sitting. With pistol in hand, accused asked Showalter if he wanted to dig "a six (6) by six (6)" (meaning a grave (R. 9)), to which the latter replied in the negative, said that he "hadn't done nothing" and left the tent. Accused then "came over" to Sergeant Sowers and asked "what about you". Sergeant Sowers told him that it was "immaterial to me" and that he "hadn't done nothing". Accused "stuck the pistol", which was in a "ready position" with "breach * * * forward and the hammer cocked", against the head of Sergeant Sowers, then "took the pistol down", leaving a "grease mark" on Sower's forehead, and said "you would be that damn crazy" and walked out of the tent. Accused promptly returned, picked up his M1 rifle and fired three shots into the ground. A warrant officer entered the tent and said "that will be enough of this stuff", whereupon accused "got ready for guard and went up to the company area of headquarters to go on guard" (R. 5-11, 14-16).

About 1900 hours, accused reported to his commanding officer, Captain Michael C. Guilliani, that he had fired his weapon. Captain Guilliani took accused's rifle, reprimanded him, said "you've been drinking" and ordered him to return to his tent until morning. The officer relieved accused from guard duty. Accused asked for a transfer to the infantry and was told again to return to his tent (R. 13, 14).

About 2000 hours, accused returned to the tent where he found Sergeant Sowers and Private First Class Ralph M. Martin. He told them he was going to get a transfer to the infantry. Accused then "looked at Martin and kicked him in the face", inflicting "just a scratch on his nose and forehead and lower lip". When Sergeant Sowers remarked "what the hell goes on here", accused said "I am going to clear the place out, I am going to get you before the night is over." Sergeant Sowers picked up a "tommy gun" and accused obtained an "M1". At this time an officer walked in and ended the matter (R. 7, 8, 11).

4. For the defense, no evidence was introduced. According to the defense counsel, the accused after an explanation of his rights as a witness, elected to remain silent (R. 17).

5. Specification of Charge I alleges that the accused at a named time and place "with intent to do him bodily harm," assaulted Technician Fourth Grade Paul J. Sowers with a dangerous weapon, to wit, a pistol. The Specification is properly laid under Article of War 93.

The evidence shows that on the afternoon of 16 February 1945 the accused remarked in general to four other soldiers who were in a tent with him that "somebody's going to dig a six (6) by six (6)". Then he took a pistol from his bag and fired one shot into the ground. With pistol in hand, he approached two of the soldiers and asked one of them if he wanted to dig a "six (6) by six (6)". When he received a negative reply he then approached the other soldier, Sergeant Paul J. Sowers, and asked "What about you". When the latter replied that it was "immaterial" to him, the accused placed the pistol he was carrying against the sergeant's head. The pistol was loaded and cocked. The accused then removed the pistol from the sergeant's forehead leaving a grease mark, and said "you would be that damn crazy" and walked out of the tent. A short time later he returned to the tent, picked up a rifle and fired three shots into the ground.

Thus it is clear that the accused assaulted Sergeant Sowers with a dangerous weapon as alleged. The only question requiring discussion is whether the record is sufficient to sustain the finding that the assault was made with "intent to do him bodily harm".

An assault with intent to do bodily harm is one "aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended" (MCM, 1928, par. 149n). Such an intent is to be inferred from the surrounding facts and circumstances and from the nature of the weapon used (CM POA 191, Roberts). It has been held that it is a jury matter to determine the intent from the character of the instrument, the distance apart of the parties and other circumstances (State v. Schumann (Iowa), 175 NW 75). It is the "act and the intention with which the act is done, rather than the result, which fixes the crime or degree of crime" (State v. Shaver, 198 NW 329; 6 CJS 937).

The evidence shows that despite his clear and unhampered opportunity and ability to do so the accused did not, in fact, harm the sergeant. He made no threats directed at the sergeant unless his inquiry as to whether the sergeant wanted to dig a "six (6) by six (6)"

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may be classified as a threat. The previous actions of accused, apparently calculated only to scare the occupants of the tent, are not significant of any intention to harm the sergeant in view of what he actually did and refrained from doing. His entire conduct, especially when considered in the light of his remark to the sergeant immediately after the assault that "you would be that damn crazy", negatives rather than supports an inference of an intent to inflict bodily harm on the sergeant (see CM 209862, Yaple, 9 B.R. 146).

It is, therefore, the opinion of the Board of Review that the evidence is insufficient to support the finding that the assault was committed with the intent to do bodily harm, but is sufficient only to support a finding of guilty of an assault with a dangerous weapon in violation of Article of War 96, for which the maximum punishment is the same as that prescribed for the alleged offense in violation of Article of War 93 (see CM POA 101, Hester).

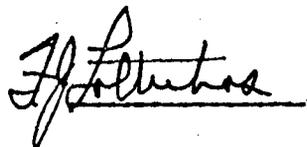
6. The Specification under Charge II alleges assault and battery at a named time and place against Private First Class Ralph M. Martin in violation of Article of War 96.

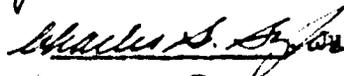
The evidence shows that later in the evening of 16 February 1945 the accused without justification or excuse kicked Private First Class Ralph M. Martin in the face. The court was, therefore, justified in finding the accused guilty of this Specification and the Charge.

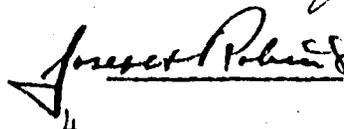
7. According to the charge sheet the accused is 27 years of age and was inducted on 4 June 1943.

8. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of assault with a dangerous weapon, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-502, District of Columbia Code.

9. 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 of guilty of Charge I and its Specification as finds that the accused did at the time and place alleged assault the named victim with a dangerous weapon, to wit, a pistol, in violation of Article of War 96; legally sufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support the sentence.

 , Judge Advocate

 Judge Advocate

 Judge Advocate

1st Ind.

Branch Office TJAG with USAF, Pacific Ocean Areas, APO 958 JUN 6 1945
TO: Commanding General XXIV Corps, APO 235.

1. In the case of Technician Fourth Grade MORRIS NATUSKO (36668802), Headquarters and Service Company, 174th Engineer Combat Battalion, I concur in the foregoing holding of the Board of Review. For the reasons therein stated, I recommend that as to Charge I and its Specification only so much of the findings of guilty as finds that the accused did at the time and place alleged assault the named victim with a dangerous weapon, to wit, a pistol, in violation of Article of War 96 be approved. Thereupon you will have authority to order execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 350. For convenience of reference please place that number in brackets at the end of the order.
(CM POA 350)

Samuel M. Driver

SAMUEL M. DRIVER

Lt. Col., JAGD

Acting Assistant Judge Advocate General

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

with the

UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS

APO 958

21 June 1945

BOARD OF REVIEW

CM POA 352

UNITED STATES

) ARMY GARRISON FORCE, APO 86

v.

) Trial by G.C.M., convened at

) APO 86, 23 May 1945. Dishonor-

Private First Class ANDREW LOCKETT) able discharge and confinement

(36945851), 3753rd Quartermaster) for three (3) years. Disciplinary
Truck Company.) Barracks.

HOLDINGS by the BOARD OF REVIEW
LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Andrew Lockett, 3753rd Quartermaster Truck Company, did, at APO 86, on or about 30 April 1945, unlawfully kill Private First Class James E. Posey, 264th Quartermaster Bakery Company by striking the vehicle in which he, the said Private First Class James E. Posey, was riding, with a truck.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction (disrespectful behavior toward his superior officer) was considered by the court. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for three years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50 $\frac{1}{2}$.

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3. The evidence for the prosecution shows that on the night of 30 April 1945, several soldiers of the 264th Quartermaster Bakery Company, APO 86, were returning from the "movies" to their company area in a weapons carrier (3/4 ton). Their vehicle (travelling in a northeasterly direction) was being driven by Private Frank C. Crooms. Among the passengers was Private First Class James E. Posey who with two or three other soldiers was sitting on the left side of the weapons carrier. Their vehicle had been following, at a distance of 75 to 100 yards, a "six by six" truck which also contained members of the same organization en route to their station. (R. 5, 6, 26, 29, 31).

About 2130 or 2145 hours, in the vicinity of an anti-aircraft gun position, southwest of the 4th Marine Cemetery, Private Crooms observed at a distance of 75 yards ahead a two and one-half ton truck coming toward his weapons carrier. He saw it pass the truck he had been following, which had to "swing out to let" the approaching truck pass by. The driver of the truck ahead of the weapons carrier testified that he met the approaching truck "on a slight curve" and had to "cut out" to let it pass. The approaching truck was travelling in a southwesterly direction. At this time Private Crooms, who was on the right side of the road, "blinked" the lights of the weapons carrier "three times," received no answering signal from the approaching truck, which had bright lights, and "pulled over" his vehicle in an effort to avoid being hit. He was "blinded by the lights." The on-coming truck "swiped the corner of the body" of the weapons carrier, and continued on its way. Its driver was not recognized. The weapons carrier was stopped off the road about ten yards from the place of collision. As to the damage caused to the vehicle, Private Crooms testified:

"The corner of the bed was bent and the top of the board that goes over to hold the canvas over the cab part was broken. The corner of the truck was bent. The rim of the spare tire was bent." (R. 6).

The soldiers who had been riding in the rear of the weapons carrier had fallen on the floor. Private Posey was lying on the bottom with blood "running out of his mouth." Two others had broken elbows and one, a broken hip. An ambulance was called and Private Posey was taken to the 38th Field Hospital, where he was admitted about 2230 hours. Posey was suffering from "multiple internal injuries" from which he died about 2400 hours. (R. 6-12, 19, 20, 23, 24, 26, 27, 29, 31, 32; Pros Ex. F).

The road where the collision occurred was "approximately twenty-six feet wide by measurement." It was "level" and "dusty." One witness testified that it was "a little bumpy" and was straight for about one hundred yards. Another witness described the road as

being "soft" but "a good smooth stretch." Another witness who had been summoned to the scene of the collision about 2215 hours testified that although the road was dusty and the gravel on it "very loose" it was "one of the best on the island in comparison with other roads." A sketch showing the road net of the island and a photograph of the road where the collision occurred were introduced in evidence. The sketch shows the road at the scene of the accident running in a direction from northeast to southwest. The photograph, showing the scene from the southwest, discloses that the road curves to the left just beyond the point where the vehicles struck. (R. 7, 8, 21, 22, 25, 29, 31, 40-43; Pros. Exs. G, H).

The speed with which the weapons carrier had been travelling was estimated by its driver and by a guard on duty near the aforesaid anti-aircraft gun position to be about 15 or 20 miles per hour. One of the occupants of the vehicle testified that its speed was about 25 or 30 miles per hour. According to two witnesses, the truck's speed was 35 miles per hour or "close to it." One of them also stated that it was going 35 to 40 miles per hour. Another witness testified that the truck was "coming pretty fast" down the "middle of the road." One of the occupants of the weapons carrier testified that the weapons carrier was on "the right side" of the road when hit but not "as far as you could go." (R. 7, 9, 10, 21, 23, 29, 30).

On the night of the collision, accused had been hauling cargo in a two and one-half ton truck. Around midnight, a sergeant saw accused drive his truck into the "dispatch office" at White Beach No. 1, noticed that "he had a bad tire" on the "left side" and told him to fix it. The truck was marked "21" on the forward part of the hood. (R. 34, 35).

About 0645 on 1 May 1945, the accused and the soldier with whom he "changed shifts" changed the "left front tire of the truck. Accused told him that a "bulldozer had hit him" on the "hill from the Sulphur Mine in that area." (R. 37-39).

Later that day, an officer examined the weapons carrier belonging to the 264th Quartermaster Bakery Company, which had been involved in the aforesaid collision, and noticed the following damage: spare tire rim dented, sharp mark on tire, left front corner of truck dented, and bed out of line. He also examined a two and one-half ton truck, property of the 3753rd Quartermaster Truck Company, and observed the following damage: groove in front left corner of bed, tire (which had been removed) had a three-inch cut, and left side mudguard had a 17 inch mark. All the marks were "new." Photographs of the trucks and the tire were introduced in evidence. The accused, after being advised of his rights under Article of War 24, informed the officer that the damaged two and one-half ton truck was "his truck," that he was on duty as a driver on 30 April 1945 from 1900 until 0700 the next morning, that about

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2100 he was dispatched from White Beach to Gropac 11 dump with a load of cement, that he neither heard any loud noise between the 4th Marine Cemetery and Gropac dump nor noticed that his truck had been in a collision with "some unknown object," that he returned from Gropac 11 dump to White Beach where he was told that he had a bad tire, that he did not know what caused the damage to his truck, and that it "could be possible" that he "sideswiped" a vehicle. The two vehicles were examined by the court. (R. 13-19, 27, 28, 43, 44; Pros. Exs. A - E, I - X).

4. For the defense, a dispatch record of trucks from Brown Beach on 30 April 1945 was introduced in evidence. The record contained an entry showing that one Chryanowski left the beach at 2130 hours. Technician Fifth Grade Edward S. Chryanowski testified that about 2130 hours on 30 April, he made a trip in a two and one-half ton truck to the "general dump" (north of 4th Marine Cemetery). Thereafter, he entered the road that passed by the cemetery, and he fell in behind a two and one-half ton truck, the rear end guards of which were broken off, that was going toward Gropac 11 dump. He followed about five yards behind it for a short distance and then "dropped back" because of the dust. He next saw the truck near the Navy Post Office. Chryanowski did not see the truck hit another, and did not see any vehicle parked on the road, but "it was so dusty that /he/ couldn't have seen them if they had their lights on." On the road, he passed by a jeep and both the jeep and his vehicle blinked their lights. This occurred between 2130 and 2200 hours. (R. 44-50; Def. Ex. 1).

Accused, whose "rights" were explained by the law member, testified that about 2130 hours on 30 April 1945, he was dispatched from White Beach in a two and one-half ton truck, number 21, with a load of cement for Gropac 11 dump. He passed the 4th Marine Cemetery, "going southeast." He recalled passing a jeep "and some other vehicle" but did not "remember hitting anyone." His speed was "twenty-five miles an hour." When he reached his destination accused was told to take his load to a new dump at White Beach. He did so, following the "cross island road." As a bulldozer approached him, his load of cement "fell over the rack." He tried to "check" his speed, could not stop, and the bulldozer hit him but he "didn't feel anything and * * * kept on going to this new dump." Accused did not know "how the mud guard got bent up." (R. 50-53).

5. Sergeant John G. Baker who had appeared as a witness for the prosecution was recalled by the court, and testified that he knew Private Posey, that Posey died "sometime after the accident," and that he had attended Posey's funeral' R. 53, 54).

6. The evidence shows that about 2130 or 2145 hours on 30 April 1945 on a road near the 4th Marine Cemetery, APO 86, a three-quarters ton weapons carrier, in which Private First Class James E. Posey was a passenger, proceeding in a northeasterly direction, was sideswiped by a two and one-half ton truck going in the opposite direction. Private Posey and three other soldiers in the weapons carrier were injured. About two hours later, Private Posey died from multiple internal injuries in the hospital to which he had been taken.

At the place where the collision occurred, the road was about twenty-six feet wide. It was level and soft but "a good smooth stretch" "one of the best on the island in comparison with other roads." It was slightly curving just northeast of the point of collision. The truck met and passed another truck on the curve. The road was dusty. The weapons carrier had been travelling about 15 or 20 miles per hour. The truck's speed was estimated to be about 35 to 40 miles per hour. Both vehicles had bright lights. The lights on the weapons carrier were dimmed and "blinked" three times but no answering signal came from the truck, whose lights "blinded" to the driver of the weapons carrier. The truck was in the middle of the road. The weapons carrier was on the right side of the road and "pulled over" in an effort to avoid being hit. After the collision, the weapons carrier stopped but the truck, whose driver was not identified, continued on its way.

On the following morning, an investigation revealed damage to the left side of the weapons carrier and also revealed damage to the left side of a two and one-half ton truck belonging to the company of accused. Accused admitted to the investigating officer that he had driven the truck on the previous night but disclaimed knowledge of "sideswiping" the weapons carrier. However, accused had told the driver who relieved him about 0645 that a "bulldozer" had hit him in the "Sulphur Mine" area.

The accused had been dispatched in a two and one-half ton truck with a load of cement from White Beach about 2130 hours. He drove on, among others, the road where the collision occurred but did not remember "hitting anyone." Accused testified that his speed was about twenty-five miles an hour and that he passed a jeep and some other vehicle.

The specification alleges that the accused at a named time and place did "unlawfully kill Private First Class James E. Posey" by "striking the vehicle" in which Posey was riding "with a truck" in violation of Article of War 93. The specification substantially alleges the crime of involuntary manslaughter resulting from culpably negligent operation of a truck. (MCM, 1928, par. 87b; Article of War 37; see Hyde v. State (Ala. 1935), 160 So. 237).

The evidence shows that Posey was injured when the vehicle in which he was riding was "sideswiped" by a truck and that he died a few hours later from the injuries so received. The questions requiring consideration are whether the evidence suffices to show that the accused drove the truck which "sideswiped" the weapons carrier and, if he did, that he displayed such negligence in the operation of the truck as to amount to manslaughter. In determining such questions, the Board of Review does not weigh testimony to ascertain whether the offense has been proved beyond a reasonable doubt but it must be satisfied that there is some substantial evidence to prove each element of the offense involved (CM 152797, Viens; CM POA 325, Gilliland).

a. As to the first of these two questions, the record shows that the weapons carrier was hit by a two and one-half ton truck. The accused admitted that on the night in question he drove such a truck over the road where and about the time that the collision occurred, although he denied knowledge of having hit a weapons carrier and stated that if he hit anything it was a "bulldozer." On the morning after the collision, examination of the weapons carrier and accused's truck disclosed that there was damage to each on the left side toward the front and that the marks on each vehicle were new. The court itself examined the vehicles, as well as photographs of the vehicles taken soon after the collision, and thus had the opportunity of comparing the damage markings on the vehicles.

In connection with the identification by circumstantial evidence of an automobile and driver involved in a collision, the "rule is indubitable that such testimony may present a case sufficiently cogent and connected to go to the jury and afford a basis for a verdict." (State v. Elliot (N.J. 1920), 110 A. 135).

In the case of State v. Durham (N.C.), 161 S.E. 398, deceased was killed about dark on a road by a car similar to one usually driven by defendant. Defendant had taken a young woman home in the late afternoon on that day and the car observed at the scene of the accident came from the direction of the young woman's home. A metal quail of the type usually used on the radiator cap of defendant's car was found near the scene of the accident. At the repair shop on the next day, the radiator cap of defendant's car lacked the quail ornament. Defendant denied being present at the accident. The court held that the evidence was sufficient to go to the jury on the question of whether the defendant drove the car. In State v. McGrath (N.J.), 140 A. 452, defendant was convicted of manslaughter for killing two women by running over them with an automobile. Defendant contended that the evidence was insufficient to identify him with the killing. The evidence showed that on the night in question, defendant, while in an intoxicated condition, was driving a Dodge sedan on the road running from Dover

to Bowlbyville, and that a car of the description of this sedan, containing an occupant of the appearance of defendant's companion, caused the death; that the car of defendant, after the accident, had a bent fender, broken headlight, and a twisted light holder; that pieces of glass corresponding to the type of lens on the sedan were found at the place where the accident happened; and that when first questioned as to the damaged condition of the car, defendant said it had been done on entering his garage, but finally claimed he had, on the night in question, collided with another car. The court held that "these and other circumstances, coupled with incriminating admission by the defendant to a number of persons that he thought he had 'hit something down the road,' made a case which fully justified the verdict of the jury."

In light of the foregoing authorities, the Board of Review is of the opinion that the circumstances afford a substantial factual basis for the court's inference that accused's truck, while being driven by him, was involved in the collision.

b. The final question to be decided is whether the accused operated his truck in such a negligent manner that he is guilty of manslaughter.

Involuntary manslaughter is "homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life or by culpable negligence in performing a lawful act, or in performing an act required by law. (Clark.)" (MCM, 1928, par. 149a).

In the case under consideration, the accused was engaged in the performance of a lawful act, namely, hauling cement. The record does not disclose that he violated any speed law or any other law. To hold accused guilty of manslaughter, therefore, the evidence must show that he displayed "culpable negligence" in driving the truck when it "sideswiped" the weapons carrier.

At common law, "culpable negligence in a criminal prosecution had to be of the quality known as gross negligence, and it is true no doubt that any negligence less than gross negligence in the performance of a lawful act would be insufficient to make of an unintentional killing the offense of involuntary manslaughter." (Held v. Commonwealth (Ky.), 208 S.W. 772; see also CM 240043, Vislan, 25 B.R. 349). "Culpable negligence" has been defined as "the omission on the part of one person to do some act under given circumstances which an ordinarily careful and prudent person would do under like circumstances, showing on the part of such person a careless or reckless disregard for human life or limb." (State v. Murphy (Mo. 1929), 23 S.W. (2d) 136; see also State v. Cape (N.C.), 167 S.E. 456;

People v. Angelo, 221 NYS 47; Sims v. State (Miss), 115 So. 217). In Hiller v. State (Tenn. 1932), 50 S.W. (2d) 225, the court said that "It is uniformly held that the kind of negligence required to impose criminal liability 'must be of a higher degree than is required to establish negligence upon a mere civil issue.'" In State v. Elliot (Del. O.T. 1939), 8 A. (2d) 873, it was said that "Mere negligent driving, without more, is not punished criminally; but where the conduct of the driver is such as to evidence a reckless disregard for the life and safety of others, it is such negligence as is subject to criminal prosecution and punishment."

In the present case, accused, while driving at night in the middle of a dusty road at a speed of about thirty-five miles an hour and after failing to dim his bright lights in answer to the blinking lights of an approaching vehicle on its proper side of the road, "sideswiped" the latter vehicle. The road was twenty-six feet wide and while slightly curving was "good smooth stretch." The collision might have been avoided had accused been more vigilant and attentive, but, as said in Graives v. State (Fla. 1936), 172 So. 719, "While it is possible that the defendant, if he had exercised that vigilance and alertness which one driving a car at night should exercise, might have avoided the collision * * * it is a serious question whether the evidence shows that gross degree of negligence which constitutes culpable negligence."

A search of authorities reveals an analogous case to be State v. Kla (Mo.), 8 A. (2d) 589, insofar as the rate of speed, and type and position of the vehicles is concerned. In that case, involving a prosecution for manslaughter, defendant was driving a heavy bus at a speed of about 35 miles per hour on a state highway through a thick fog described as a "dark room." His car collided with the car of deceased, causing it to turn over. Deceased was killed instantly. The vehicles were struck on their respective left fronts and sides. The left wheels of the bus were on the "center line" and the mudguards and body extended over the line. The court said:

"As already pointed out, the facts proven in this case and inferences reasonably to be drawn therefrom, strongly indicate that the respondent was driving the bus on the right side of the road when the accident occurred in which the decedent was killed. He failed, however, to keep it entirely off the other lane in which the decedent had the right of way. He was driving through a blinding fog under conditions that undoubtedly made it extremely difficult for him to determine his exact position in the road. It may well be

that by the exercise of greater care and caution he could have kept the whole of the bus on its own side of the road. That he failed in this regard does not, however, we think, show a reckless disregard of the safety of other travellers on the way. It can be properly viewed as inattention and inadvertence only, for which a civil action for negligence might lie."

In the present case, the accused had no benefit of a center line to follow. He was driving in the middle of the road, not on the extreme left side, which under the circumstances might have been gross negligence (see Franklin v. State (Fla.), 163 So. 55). The accident occurred near the center of the road. The manner in which the two vehicles collided is best described as "sideswiping." There was no "head on" collision. The weapons carrier was not turned over but proceeded about ten yards, pulled off the road, and stopped. Tested by the foregoing authorities, and many others examined, the evidence does not, in the opinion of the Board of Review sustain a finding that accused was guilty of gross or culpable negligence, which is an essential element of the alleged offense, a common law crime.

That the accused was negligent, although not culpably so, in the operation of his vehicle and that such negligence caused the death of the deceased is clearly shown by the evidence. Therefore, under the authority of CM 252521, Groat, 34 B.R. 67, the record is sufficient to support a finding of guilty of the wrongful killing of deceased by the negligent operation of the truck, in violation of Article of War 96 (see also CM ETO 2788, 3 Bull. JAG 473; CM ETO 7913, Smithey), the maximum punishment for which is dishonorable discharge, total forfeitures and confinement at hard labor for one year (Sec. 40-606, District of Columbia Code).

7. The charge sheet shows that when the charges were drawn the accused was 21 years and two months of age. He was inducted at Chicago, Illinois, on 12 January 1944.

8. 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 as involves the wrongful killing of deceased

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by the negligent operation of the truck at the time and in the manner alleged, in violation of Article of War 96, and to support only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one year.

F. J. Lotterhos, Judge Advocate

Charles S. Sykes, Judge Advocate

Dissent, Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 with the
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

21 June 1945

BOARD OF REVIEW

CM POA 352

UNITED STATES

v.

Private First Class ANDREW LOCKETT
 (36945851), 3753rd Quartermaster
 Truck Company.

) ARMY GARRISON FORCE, APO 86
)
) Trial by G.C.M., convened at
) APO 86, 23 May 1945.

DISSENTING OPINION
 ROBINSON, Judge Advocate.

1. On April 30, 1945 at about 2145 hours, the deceased and others were riding in the rear of a three-quarters ton weapons carrier which was proceeding on its right-hand side of the road in a northeasterly direction at between 15 and 20 miles an hour. It was dark at the time (R. 23). About 75 or 100 yards ahead of the weapons carrier, proceeding in the same direction, was another vehicle belonging to the 264th Quartermaster Bakery Company. Both cars were carrying men "from the movies down on the beach" (R. 26) to the company area.

An accident took place near the gun position of the 483rd AAA AW Gun Battalion (R. 40). The road at this point is approximately 26 feet wide, straight, level and in fair condition. It was "not absolutely smooth" but "there were no large holes." "The gravel was very loose" and it was "dusty." (R. 41).

A two and one-half ton truck, driven by the accused, carrying cement "which was shifting around" (R. 52) was proceeding in the opposite direction between 35 and 40 miles per hour (R. 21), and was, at least partly, over on its wrong side of the road (R. 30).

As it approached the vehicle which was 75 or 100 yards ahead of the weapons carrier, it caused that vehicle to swerve to its right (R. 9, 10, 29). The driver of that car himself testified, "I had to swing out to let this truck pass." (R. 32). Seeing that an accident was imminent if the truck continued on its same course, Crooms, the driver of the weapons carrier, also pulled over to its extreme right-hand side of the road (R. 12, 40-42), or as Crooms testified, "I pulled over as far as I could get over" (R. 8), and continuing he said, "I blinked my lights about three times but didn't get an answer" (R. 5). Continuing on its course, the body of the on-coming truck (which extends out over the chassis) came in contact with the weapons carrier and then continued on its way without stopping. From the nature of the damage to both vehicles (R. 6, 14, 36; Exs. A, B, C and D) it is reasonable to conclude that the impact must have been severe and the accompanying noise equally loud (R. 30). As a result the front left tire of the accused's truck was badly torn (Ex. C) and the tire rim bent back (R. 36-37). In addition the front left side and side of the steel body was dented and scraped. On the weapons carrier the rim of the spare tire carried on the left side was bent; the metal part of the body pushed in and back, and part of the wooden framework along with the steel parts that hold it intact was completely broken off (Ex. A). As a result of the collision, Private First Class James E. Posey was killed and several others were seriously injured (R. 6). The driver of the two and one-half ton truck was tried and convicted of involuntary manslaughter. Upon the evidence that conviction was proper.

2. "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law. (Clark.)

* * * *

"In involuntary manslaughter in the commission of an unlawful act, the unlawful act must be evil in itself by reason of its inherent nature and not an act which is wrong only because it is forbidden by a statute or orders. Thus the driving of an automobile in slight excess of a speed limit duly fixed, but not recklessly, is not the kind of unlawful act contemplated, but voluntarily engaged in an affray in such an act." (MCM, 1929, par. 149a).

In 3 Blashfield's Cyclopeda of Automobile Law, Section 44, the following appears:

"The general rule is, irrespective of statute, that if a motorist, by gross carelessness or culp-

able negligence, implying an indifference to consequences in driving his machine, causes the death of another, he is guilty of manslaughter.

* * * * *

"Thus an automobile driver who kills a person on the highway as a result of gross negligence in failing to keep a proper lookout is guilty of involuntary manslaughter, though at the time of the killing the driver was operating his machine lawfully and at the rate of speed permitted by law."

In People v. Smasoz, 311 Ill. 494, 176 N.E. 768, the court said:

"The question whether a defendant charged with manslaughter by the negligent driving of an automobile is guilty of criminal negligence which was the proximate cause of the death is a question of fact for the jury to pass on under correct instructions by the court. People v. Falkovitch, 280 Ill. 321, 117 N.E. 398, Ann. Cas. 1918B, 1077; People v. Adams, 298 Ill. 339, 124 N.E. 575."

In the instant case it was for the court to determine in the light of all the facts and circumstances whether the accused was guilty of culpable negligence. It made such determination and it is not necessary, as the majority of the Board contend, that there be a showing that the accused violated some speed law or other traffic regulation. (Blashfield's Cyclopedic of Automobile Law, Section 44).

The collision in question was not a mere sideswiping or scraping of fenders; it was a violent impact, brought about, as the court concluded, by the utter disregard of the accused for the rights of others upon the highway. Considering the physical facts, the width and character of the road; the width of the respective vehicles, the fact that the truck was carrying a "shifting load;" the darkness, and the speed and manner in which the accused was driving; his being on the wrong side of the road and his failure to observe the blinking lights and the further fact that he failed to stop after the collision, all taken together, amply supports the court's conclusion that the accused was guilty of culpable negligence. As a matter of law it was within the province of the court to so find. (CM 202359, Turner, 6 B.R. 87; CM 217590, Lamb, 11 B.R. 275; CM 236138, Steele, 22 B.R. 313; People v. Smasoz, supra; People v. Black (Cal. App. 295 Pac. 87); State v. Elliott, 95 N.J. Law 36, 110 A.T.L. 135.

3. The majority of the Board of Review are now holding that, as a matter of law, on the facts recited, the accused may not have

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been found guilty of culpable negligence. In that holding I cannot concur. If the accused was proceeding at 50 miles per hour instead of 40, or had collided head-on with the weapons carrier (which he would have done had not the weapons carrier swerved to its right), would not that have constituted culpable negligence? If the answer be in the affirmative then at what point is the line to be drawn? I am of the opinion that the conviction should be approved.

Joseph S. Robinson, Judge Advocate

1st Ind.

Branch Office TJAG with USAF, Pacific Ocean Areas, APO 958, 23 June 1945.
TO: Commanding General, Army Garrison Force, APO 86.

1. In the case of Private First Class ANDREW LOCKETT (36945851), 3753rd Quartermaster Truck Company, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that only so much of the findings of guilty as involves the wrongful killing of deceased by the negligent operation of the truck at the time and in the manner alleged, in violation of the 96th Article of War, be approved, and that only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for one year be approved. Thereupon you will have authority to order the execution of the sentence.

2. Under all the circumstances of this case, including the youth of the accused, the fact that under the holding of the Board of Review his offense consists only of wrongfully killing the deceased by the negligent operation of the truck, in violation of Article of War 96, and that the portion of the sentence held legally sufficient extends to confinement at hard labor for only one year, and in order that the effect of the sentence will not be to release the accused, after a comparatively short period of confinement, from military service during the present war, thereby giving him immunity from all risk in battle, it is recommended that the execution of the dishonorable discharge be suspended and an appropriate place within the Pacific Ocean Areas designated as the place of confinement.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 352. For convenience of reference please place that number in brackets at the end of the order.
(CM POA 352).

SAMUEL M. DRIVER,
Lieutenant Colonel, JAGD,
Acting Assistant Judge Advocate General.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

21 June 1945

BOARD OF REVIEW

CM POA 367

U N I T E D S T A T E S v. Major DAN A. DELANO (O-341401), Ordnance.))))))	CENTRAL PACIFIC BASE COMMAND Trial by G.C.M., convened at APO 958, 16, 17 and 19 March 1945. Dismissal and total forfeitures.
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HOLDING by the BOARD OF REVIEW
 LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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

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

Specification 1: In that Major Dan A. Delano (then Captain), Ordnance, did, at APO 957, on or about December 1943, knowingly, wrongfully, and willfully apply to his own use and benefit, without proper authority, an engine, Model Dodge T214, of the value of about \$114, property of the United States, furnished and intended for the military service thereof.

Specification 2: (Disapproved by reviewing authority.)

Specification 3: In that Major Dan A. Delano (then Captain), Ordnance, did, at APO 957, during the period between 1 October 1943 and 1 October 1944, knowingly, wrongfully, and willfully apply to his own use and benefit, without proper authority, an unknown quantity of gasoline, of a value of less than \$20, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Major Dan A. Delano (then Captain), Ordnance, did, at APO 957, during the period between 1 October 1943 and 1 October 1944, wrongfully cause enlisted men of the Army of the United States to expend their labor and services toward the repair and maintenance of his private automobile, a 1937 Plymouth Coupe, Territory of Hawaii License Number H-9120.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specifications, not guilty of Charge II, but guilty of the Specification of Charge II in violation of Article of War 96. He was sentenced to dismissal, total forfeitures and confinement at hard labor for five years. The reviewing authority disapproved the finding of guilty of Specification 2, Charge I, approved only so much of the sentence as provides for dismissal, total forfeitures and confinement at hard labor for two years, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, confirmed the sentence as modified and approved by the reviewing authority, and remitted that portion of the sentence which imposes confinement. Pursuant to Article of War 50¹/₂, the order directing execution of the sentence was withheld.

3. The evidence for the prosecution, insofar as pertinent to the approved findings of guilty, shows in brief that between October 1943 and October 1944, accused was stationed at Central Pacific Base Command Motor School, APO 957, where he acted as detachment commander and assistant commandant. Instructional courses in the handling and operation of motor vehicles were given at the school for officers and enlisted men. The accused owned a Plymouth coupe which he used for travel between his home in Honolulu and the school. In the fall of 1943, the accused asked Staff Sergeant Joseph L. Barrus, motor sergeant at the school, to install in his car a Dodge engine (having a stipulated value of \$114) which was then in a new wooden crate at the school. Sergeant Barrus installed the new engine in accused's car during off-duty hours and was paid fifteen dollars for his services. The Plymouth engine which was removed was donated by accused to the school (R. 14-18, 49, 55, 56, 63-68, 72-74, 76-81, 87, 88, 118, 125; Pros. Exs. 1, 2 and 3).

The Dodge engine, a six cylinder Model T-207 or T-213 used in one-half ton weapons carriers, had been delivered to the school in a government truck in a new wooden crate, with brightly painted colors on the corners and marked "Iron Ordnance." A witness testified that the word "Iron" placed on crates indicated military or

naval property, not civilian. Lieutenant Eugene A. Peterson, who was at that time an officer of the school, testified by deposition that the engine was of a type "solely designed for government use," that he had told accused in regard to the engine "messing with 'GI' property was a very serious offense," and that accused replied he "felt the government owed him an engine." By deposition, Captain William J. Long, Jr., formerly in charge of officers' courses at the school, testified that while returning "one morning from Honolulu" to the school in December 1943, accused remarked about and demonstrated the improved efficiency of his car since installation of the Dodge engine which he stated was a "GI" engine that he had obtained by memorandum receipt, then destroyed, from an ordnance company at APO 957. In October 1944, accused told a representative of the Inspector General's Department that he did not know whether the Dodge engine was "a GI engine or not" and that he did not recall having told anyone it was (R. 40, 63-65, 69, 72, 73, 75, 77, 80, 81, 96, 98, 106-108, 126, 128, 131; Pros. Exs. 3 and 4).

At the request of accused, Sergeant Barrus placed in accused's car about five gallons of gasoline once or twice each month from October 1943 to October 1944. In each instance the gasoline was siphoned from government-owned vehicles at the school. Another enlisted man, on six or eight occasions in June and July 1944, put a total amount of sixty or seventy gallons of gasoline in the car. The gasoline had originally been obtained by the school from the government supply station at APO 957. Accused in requesting that gasoline be put in his car had not specified the source from which the gasoline was to be obtained and had given neither money nor gasoline ration coupons for the gasoline. To a representative of the Inspector General's Department, accused stated that he had obtained for the operation of his automobile about five gallons of "government" gasoline on an average of twice a month over a period of one year, and that the gasoline was "in a sense" owed him by the government for his having used his car in government service from 7 December 1941 to February 1942 (R. 17, 18, 24-27, 33, 42-45, 51, 55-60, 70, 71, 92, 121, 124, 128, 133; Pros. Exs. 2, 3 and 4).

Between November 1943 and November 1944, enlisted men of the school performed repair and other work on accused's car. At the request of accused, the motor sergeant adjusted the carburetor and "tuned up" the engine a "couple of times" in 1943 and 1944, and placed an oil cell in the differential, adjusted the headlights, and checked the transmission in 1944. He did this work at the school motor pool, part of it during off-duty hours and part while on duty. He understood that this work was not required of him, but did it willingly, without compensation, and as a favor to accused. He also asked other enlisted men at the school to perform work on accused's automobile, some of whom thought that they were being ordered to do so by the motor sergeant, others of whom regarded the matter as

voluntary. According to the men, accused himself gave them no order and made no request that the work be done, although they knew that the automobile was his. According to Lieutenant Peterson, accused asked but did not order certain of the men to do the work. None of the enlisted men was compensated for his services. Upon request of the motor sergeant, various enlisted men, in November or December 1943, tasted the generator of the engine, about May 1944 installed an ignition coil into the cowl of the automobile, in June or July 1944 welded and repaired portions of the trunk door where rust had set in, about July 1944 steam-washed the automobile by machine, and some time in 1944 assisted the motor sergeant in refitting and repairing the exhaust pipe. This work occurred during both duty and off-duty hours, and, except for the steam washing which was done at the motor pool of another organization, was accomplished either at the motor pool or in the shop building of the school. Accused's automobile was washed and lubricated by motor pool personnel during duty hours. In September 1944, the motor sergeant during duty hours, with the assistance of several enlisted men, placed accused's automobile on blocks under the roofed structure of the motor pool of the school, removed the wheels, and prepared the vehicle for painting by sanding off the old paint and welding rusted parts. This work was not completed at the school, for, upon written request by Lieutenant Peterson to the school commandant, the automobile was removed from the motor pool. Accused admitted to the representative of the Inspector General's Department that several repair jobs had been performed on his car at the school by enlisted men, and stated that they were never ordered to do the work and that he had specified no particular time for performance of the work. In May 1944, the school commandant stated to his staff members, including accused, that no work would be done on private or civilian cars in the school shops (R. 14, 19, 20-24, 28, 34, 37, 38, 48-50, 60-62, 71-73, 83-93, 122-124, 128-130; Pros. Exs. 3 and 4).

4. For the defense, the evidence shows that between April and December 1942, the accused used his automobile for government business about once each week on inspection trips. At that time there was a shortage of transportation. In March 1945, an examination of the supply records (since July 1933) of the ordnance company which furnished supplies to the school disclosed no missing engine nor the delivery of any engine to the school. The school kept no crated engines in stock. At the time when the Dodge engine was installed, engines were available from "other sources" than the regular market (R. 140-144, 150-154, 161-166, 169-173).

Various enlisted men who worked on accused's automobile testified that accused did not ask or order them to do the work. Sergeant Barrus testified that accused had never instructed him to have subordinate enlisted men work on the car (R. 146, 156, 158, 160-162).

The commandant of the school testified that accused had performed his duties in an excellent manner. It was stipulated that three colonels would testify that accused during stated periods was reliable, honest, efficient and his conduct above reproach, and that two of them were "eager" for accused to work under them. Accused's service record shows ratings of "Excellent" from 15 April 1943 to 10 November 1944 and "Satisfactory" or "Very Satisfactory" from February 1942 to 11 April 1943. (R. 138, 146, 156, 158, 160-162, Def. Exs. A, B and C).

The accused elected to remain silent (R. 134).

5. Specification 1 of Charge I alleges that accused "about December 1943, knowingly, wrongfully and willfully" applied to his own use and benefit a Dodge engine of the value of about \$144, property of the United States, furnished and intended for the military service. It is laid under Article of War 94.

The evidence shows, and the accused admitted, that about the time alleged a Dodge engine was installed in his car by a non-commissioned officer to whom he paid fifteen dollars for his services. The value of the engine was stipulated to be \$144. The only question requiring consideration is whether the record substantially shows that the engine was property of the United States furnished and intended for the military service thereof.

The engine was of a type suitable for installation in a military vehicle. It was removed from a new crate which had brightly painted colors on the corners and was marked "Iron Ordnance," peculiarly the designation of an Army shipment of military supplies. It was delivered to a military installation. These facts constitute sufficient proof of the corpus delicti aliunde the admissions of accused, amounting to a confession, on different occasions to two subordinate officers that the engine was "GI" property, and that he had it installed because he "felt the government owed him an engine." (CM 202213, Mallon, 6 B.R. 1; CM 243287, Poole, 27 B.R. 321; CM 210693, Alexander, 9 B.R. 331; CM 233461, Binninger, 19 B.R. 391). The evidence is deemed sufficient to show that the property belonged to the United States, furnished and intended for the military service thereof. (MCM, 1928, par. 150i; CM ETO 1631, 3 Bull. JAG 421). The voluntary nature of the confessions of accused to the two officers and their admissibility in evidence is clear (MCM, 1928, par. 114a; CM POA 206, Clark).

In the opinion of the Board of Review, the evidence is sufficient to support the findings of guilty of Charge I and Specification 1 thereof.

6. Specification 3 of Charge I alleges that the accused "between 1 October 1943 and 1 October 1944, knowingly, wrongfully and willfully" applied to his own use an unknown quantity of gasoline, of a value of less than \$20, property of the United States furnished and intended for the military service. This is also laid under Article of War 94.

The form of the Specification is deemed to be sufficient (CM 204878, Fleischer, 8 B.R. 121; CM 219135, Stryker, 12 B.R. 225; CM 192530, Browne, 1 B.R. 383; CM 238266, Campbell, 24 B.R. 215).

The evidence shows that between October 1943 and October 1944, accused used in his automobile quantities of gasoline owned by the government and furnished for the military service which had been put in his car by enlisted men at the school upon accused's request. Accused admitted this practice and endeavored to extenuate his actions by claiming that he had previously used his automobile to transact government business. The Board of Review is of the opinion that the evidence supports the findings of guilty of Specification 3 of Charge I and the Charge.

7. The Specification of Charge II alleges that accused "between 1 October 1943 and 1 October 1944, wrongfully" caused enlisted men to repair his private automobile. Although laid under Article of War 95, the court found the offense to violate Article of War 96.

The evidence shows that during the period alleged, accused on numerous occasions asked the motor sergeant of the school to perform sundry repair jobs on his car, and that the work was duly performed either by the sergeant or other soldiers under the direction of the sergeant. Certain welding, headlight adjustment and preparation painting work was done in the buildings of the school. Other repairs, such as checking the transmission, installation of ignition coil, and washing and lubrication, were accomplished during duty hours. The fact that accused asked and did not order the sergeant to perform the work is of no particular significance in view of the relationship of the parties, his acceptance of the work and continuation of the practice. The employment of soldiers for non-military or other illegal uses is conduct to the prejudice of good order and military discipline (CM 249998, Patka, 32 B.R. 265; CM 247303, Prattsmith, 30 B.R. 315; CM 232451, Cox, 19 B.R. 85). To the extent that the repairs were performed in a government building, the accomplishment of the work violated an Army regulation (AR 850-15, 20 Aug. 1943). The work performed during duty hours when military personnel are required to devote their services to the Government was prejudicial to good order and military discipline (CM 199440, Campbell, 4 B.R. 51; CM 243753, White, 28 B.R. 73; Winthrop, Mil. Law and Prec., 1920, p. 716, 727). Accused, by virtue of his official position, must have known (and in at least one instance is shown to have known) the time and place where the jobs were being done and what men were performing the

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work. Accordingly, the Board of Review is of the opinion that the evidence is sufficient to support the finding of guilty of the Specification of Charge II in violation of Article of War 96.

8. According to the charge sheet, the accused is 29 years of age and entered upon active duty on the 18th day of February, 1940.

9. For the reasons stated, the Board of Review holds the record of trial to be legally sufficient to support the findings of guilty as approved and confirmed and the sentence as confirmed and modified.

J. Lottman, Judge Advocate

Walter S. Sykes Judge Advocate

James R. Robinson Judge Advocate

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1st Ind.

Branch Office TJAG with USAF, Pacific Ocean Areas, APO 958
TO: Commanding General, USAF, Pacific Ocean Areas, APO 958.

JUN 22 1945

1. In the case of Major DAN A. DELANO (O-341401), Ordnance, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence, which holding is hereby approved. Under the provisions of Article of War 50², you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM PCA 367. For convenience of reference please place that number in brackets at the end of the order.
(CM PCA 367)



SAMUEL M. DRIVER

Lieutenant Colonel, JAGD
Acting Assistant Judge Advocate General

(Sentence ordered executed, GCMO 16, USAFPOA, 22 June 1945.)

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
 WITH THE
 UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
 APO 958

20 June 1945

BOARD OF REVIEW

CM POA 373

U N I T E D S T A T E S	)	NEW CALEDONIA ISLAND COMMAND
)	
v.	)	Trial by G.C.M., convened at
	)	Noumea, New Caledonia, 31 Jan-
Private STINSON J. ANDERSON	)	uary and 14 February 1945. Dis-
(34757204), 4215th Quartermaster	)	honorable discharge and confine-
Service Company, APO 502	)	ment for life. Penitentiary.

HOLDING by the BOARD OF REVIEW
 LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Stinson J. Anderson, 4215th Quartermaster Service Company, did, at APO 502, on or about 14 January 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Ray Freeman, 4215th Quartermaster Service Company, a human being, by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Charge and Specification, and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, confirmed the sentence but commuted it to dishonorable discharge, total forfeitures and confinement at hard labor for life, and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½ the order directing the execution of the sentence was withheld.

3. The evidence for the Prosecution:

About 1730 hours on 14 January 1945, accused, a member of the 4215th Quartermaster Service Company, APO 502, left his tent in the company area and walked across open terrain toward the mess hall about 100 yards away. He was carrying in his right hand a Springfield rifle, Model 1903. Approximately 75 men, including Private Ray Freeman, were in the "chow line" by the mess hall. When he had reached a position approximately 15 feet from Freeman, accused told the "other men in the chow line" to move back. The "chow line broke." Freeman held to another soldier who soon "shook" him off and left. Then accused deliberately "put his rifle up," aimed, remarking at the same time "I told you about fucking with me so much," and promptly fired. Freeman, who carried only a mess kit, was hit and slumped to the ground. First aid was administered promptly. Freeman was then taken by ambulance to a general hospital where he died at 1855 hours on that night as a result of the rifle wound which had pierced his arm and abdomen (R. 15, 16, 20, 22, 24-37).

First Lieutenant Kenneth V. Harding, 4215th Quartermaster Service Company, testified that he saw accused, prior to the shooting, carrying a rifle, cross the road toward the mess hall, that he shouted at accused, who "hesitated momentarily," and that accused then placed his rifle to his shoulder, deliberately aimed and fired in the "general direction of the mess hall," but that he could not see the person at whom accused was firing. The mess hall itself was out of his line of vision. He again shouted at accused, who "looked up", and told accused to bring his rifle. Accused brought his rifle to the officer with the "bolt open," and also gave him a round of ammunition. Accused was very calm and quiet. On cross examination, Lieutenant Harding testified that about 10 or 15 minutes after the shooting, he asked accused in the company orderly room "what this was all about." Accused informed him that prior to "this incident" he and Freeman had argued in the shower room about a mirror and "each threatened to kill the other," and that after leaving the shower room he loaded his rifle. In answer to the officer's further question "Why he had shot the man," accused said that "the man" had threatened to kill him and that he did not want to be shot in his sleep as he supposed one threatening him might do (R. 15, 16, 19-21, 38).

4. Evidence for the Defense:

a. After arraignment and before pleading to the general issue, defense interposed a special plea of insanity and requested that accused be examined by a "sanity board." In support of such plea, accused testified that his parents were living, that his father, 45 years of age, has been blind for 2½ years and "would eventually go crazy," that his mother, 44 years of age, is "sickly all the time" with "pains" in her head, that his sister, age 20, is partially blind, has "peculiar ways" and likes to be alone, that he, accused, had headaches "all the time" as a youngster, that he had been suffering recently from the "same attacks", for which he

was "given pills," a "shot in the arm" and his sinus drained at the hospital, and that he still suffers from pains in the head. On cross examination, accused testified that he was inducted in July 1943, that his home is in Albee, Alabama, that he reached the eleventh grade in school, which he left in 1939 or 1940, that he worked in a drug store and at a powder plant for short times, that he was married in April 1944, and came overseas the following month, that his wife is in Youngstown, Ohio, and that he associated with friends in his organization. On examination by the court, he testified that he was charged with the murder of Freeman, that he knew his defense counsel, and that he had known his wife about four years before his marriage. (R. 5-13). The court ruled against accused and ordered the trial to proceed. (R. 14). However, after both prosecution and defense had rested, the court granted defense's motion for a continuance for the purpose of examining the mental condition of accused (R. 61). When the court reconvened, the report of a board of medical officers which had examined accused's mental condition was admitted, in part, in evidence. The board found that accused (a constitutional psychopath with a mental age of 8½ years) was able to distinguish right from wrong and to adhere to the right at the time of the alleged offense, that he is able to intelligently cooperate in his defense, and that he is not insane (R. 61-69; Ex. "1").

b. About 1630 hours on 14 January 1945, according to three witnesses, accused had an altercation with Freeman in the company shower room over the ownership of an inexpensive mirror. As the argument became more intensified, accused "gripped his fists as though he was going to strike Freeman". Freeman did the same and told accused if he put his hands on the mirror he "would shoot the shit out of him." Accused said he had a rifle and plenty of ammunition. After the argument, accused was observed sitting in the door of his tent "just like a mummy," with arms folded across his chest, "looking toward the mess hall." One witness estimated that only forty-five minutes elapsed between the altercation and the shooting. Accused had never been in any fights with other soldiers prior to the shooting. He and Freeman had seemed to be "good friends," and on the day of the shooting Freeman had given accused some "eye shades" while talking about some dances they had attended. (R. 39, 42-45, 48-57).

Several members of accused's organization testified that over a period of several months prior to the homicide, the accused underwent a change of personality; that he stopped talking with them and, according to one witness, "acted like he was crazy or losing his mind or something"; that he became belligerent and at times incoherent in his speech; and that he experienced pains in his head, said he saw the devil, and on an occasion insisted that the medical officer in the dispensary was trying to kill him. (R. 39-40, 42, 46-48, 50, 51, 59, 60).

Accused whose rights as a witness, according to defense counsel, had been explained to him, elected to remain silent. (R. 60, 61).

5. The undisputed evidence shows that the accused shot Private Ray Freeman in the abdomen with a rifle on 14 January 1945 and that Freeman

died a few hours later as a result of the wound so inflicted. The shooting was an aftermath of an altercation arising out of a dispute about the ownership of an inexpensive mirror. The altercation had been of purely a verbal nature in which threatening words had been used by both parties but no blows were struck. About 45 minutes or one hour later, the accused left his tent where he had remained after the argument and calmly walked, carrying a loaded rifle, toward Freeman, who was in the "chow line" about 100 yards distant. When approximately 15 feet from Freeman, accused instructed the other men in the chow line, numbering about 75, to "move back." When this had been done, he deliberately raised his gun, aimed it, remarked while so doing that "I told you about fucking with me so much," and then shot the deceased. The deceased fell to the ground and the accused in a "very cool" and unperturbed manner surrendered his rifle to an officer who had arrived near the scene and had called to him to do so. A short time later, at the officer's request, accused explained that he had shot deceased because the latter had threatened to kill him during an argument about a mirror and that he was, in effect, afraid that deceased might carry out his threat when accused was asleep.

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought." The word "unlawful" as used in such definition means "* * * without legal justification or excuse." "A homicide done in the proper performance of a legal duty is justifiable." An excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray * * *." The definition of murder requires that "the death must take place within a year and a day of the act or omission that caused it * * *" (MCM, 1928, par. 148a). The distinguishing characteristic of murder is the element of "malice aforethought." This term, according to the authorities, is technical and cannot be accepted in the ordinary sense in which it may be used by laymen. The Manual for Courts-Martial defines malice aforethought in the following terms:

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor the actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark).

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of,

or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit a felony, * * * (MCM, 1928, par. 148a, underscoring supplied).

When the record is examined in the light of the above principles, it is apparent that the uncontradicted evidence sustains the findings of guilty, unless it be held (a) that the accused was insane, a complete defense, or (b) that the death of deceased was inflicted in the heat of a sudden passion, caused by adequate provocation, or (c) that accused acted in self-defense.

a. As to the defense of insanity, the court, as it was authorized to do (MCM, 1928, par. 63), granted the request of the defense prior to termination of the trial and continued the case until a "sanity board" had examined the accused. The report of the board, which found the accused to be sane both at the time of commission of the offense and at the time of trial, was introduced in evidence and was not contradicted. The court was justified in relying on such report (CM 200248, Briggs, 4 B.R. 277; CM 237487, Lemley, 24 B.R. 11). The court's findings on the question of insanity, adverse to the accused, are merged in the court's findings of guilty of the Charge and Specification (CM 237487, Lemley, 24 B.R. 11). Furthermore, as a matter of independent inquiry, the confirming authority, after receipt of the record of trial, caused a second board of medical officers to examine accused for the purpose of determining his mental responsibility. The conclusions of the second board conform with the conclusions of the former board (see papers accompanying record).

b. As to whether deceased's death was inflicted "in the heat of a sudden passion, caused by adequate provocation," the evidence shows that about 45 minutes or one hour preceding the homicide the accused and deceased had engaged in a serious verbal quarrel. No blows were struck. "At common law, mere language, however aggravating, abusive, opprobrious or indecent is not regarded as sufficient to arouse ungovernable passion which will reduce a homicide from murder to manslaughter * * *. Threats when unaccompanied by assault do not constitute adequate provocation." (26 Am. Juris. 175). Undoubtedly, accused's passion was inflamed by the quarrel. However, at the time of the homicide he appeared to be cool and deliberate and even warned others away from the scene before firing the fatal shot. He said to deceased while aiming at him that "I told you about fucking with me so much." These circumstances, coupled with the lapse of time of 45 minutes or one hour, indicate that the accused's mind was not so blinded by passion resulting from adequate provocation at the time that reason had not "resumed its control." (CM 246101, Nickles, 29

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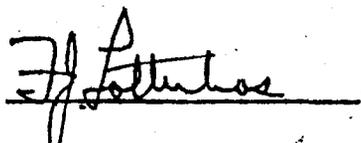
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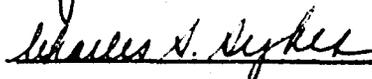
B.R. 381, 3 Bull. JAG 343; CM 232400, Thomas, 19 B.R. 67, 2 Bull. JAG 188; CM POA 023, Davis). Malice is shown, not only by the use of a deadly weapon, but also by the attendant statements and actions of accused. Deliberation is indicated by the fact that after the argument the accused remained in his tent for an appreciable length of time, obtained his rifle, calmly walked about 85 to 100 yards to where deceased was, and in cold blood fired the fatal shot, promptly after clearing others from the immediate vicinity. (CM 232400, Thomas, supra).

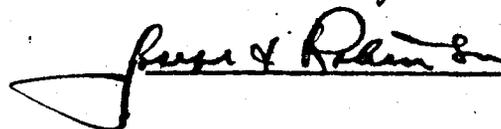
c. As to the claim of self-defense, raised by the contention of defense that by reason of his low mentality and his former experience of having been shot, the accused killed deceased to avoid being killed, the evidence fails to show that there was any imminent danger of death or serious bodily harm to accused at the time. To the contrary, the accused deliberately sought deceased, who was unarmed and defenseless. Clearly, there is no legal basis for considering the accused's conduct to be in self-defense. (MCM 1928, pr. 148a). A similar contention was made by defense in CM 237487, Lemley, 24 B.R. 11, and was rejected by the Board of Review in the following language: "In the absence of insanity which is a complete defense in itself, it is not the opinion of the Board that the doctrine of self-defense has been thus far extended." In that case, the accused's mental development was placed at that of a ten-year-old. In this case, the accused has a mental age of $8\frac{1}{2}$ years. That the accused was and is a constitutional psychopath and a moron constitutes no defense to murder. (CM 237487, Lemley, supra; CM 226219, Rickards, 15 B.R. 27).

6. The charge sheet shows that accused was 24 years of age when the charges were drawn and that he was inducted on 28 July 1943.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence as confirmed and commuted. Confinement in a penitentiary is authorized under the 42nd Article of War by Section 22-2404 of the District of Columbia Code.

 , Judge Advocate

 , Judge Advocate

 , Judge Advocate

(277)

1st Ind.

WD, Branch Office TJAG with USAFPOA, APO 958
TO: Commanding General, USAFPOA, APO 958.

JUN 21 1945

1. In the case of Private STINSON J. ANDERSON (34757204), 4215th Quartermaster Service Company, 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 as confirmed and commuted, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 373. For convenience of reference please place that number in brackets at the end of the order.

(CM POA 373)

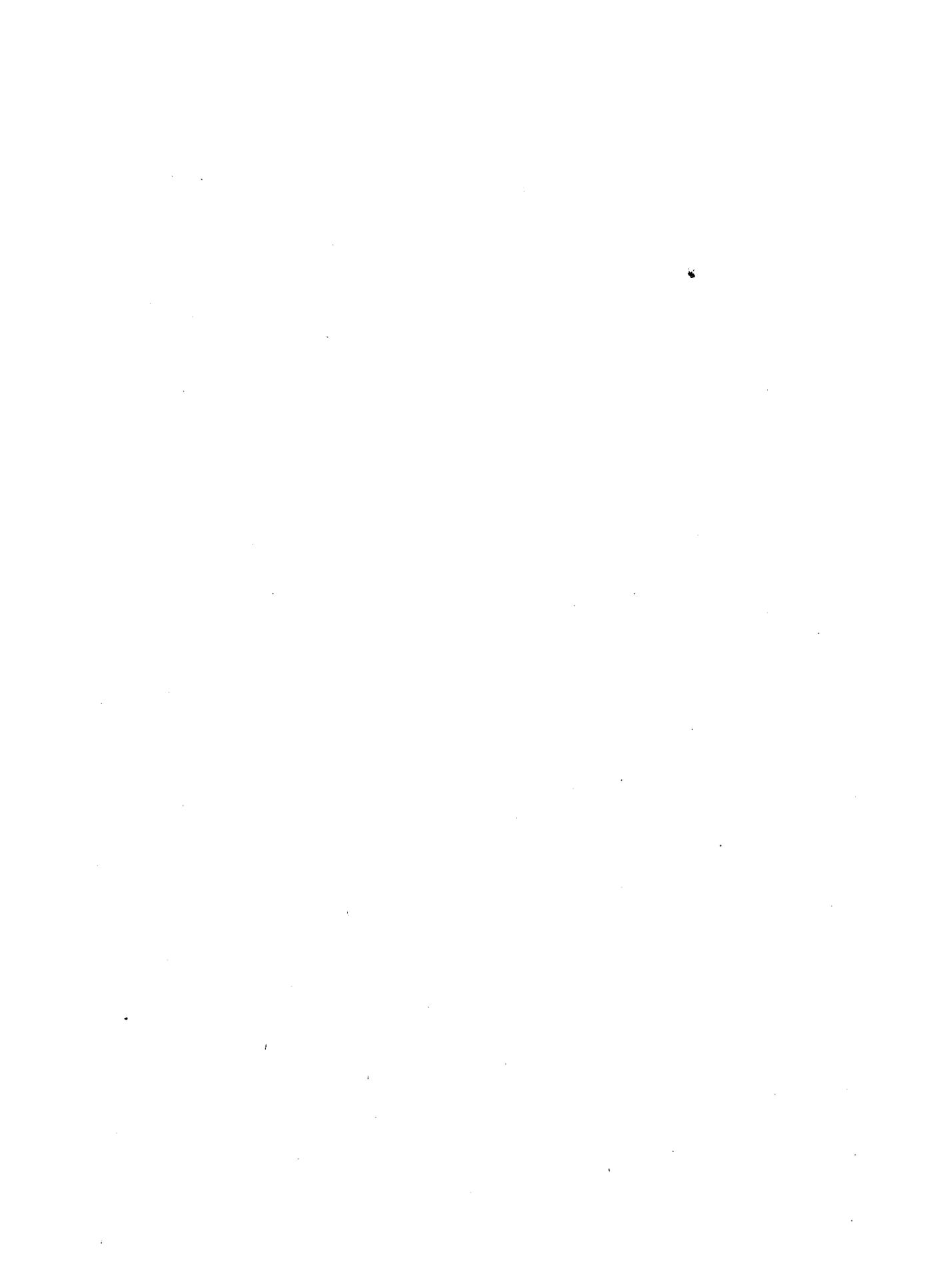
Samuel M. Driver

SAMUEL M. DRIVER

Lieutenant Colonel, JAGD

Acting Assistant Judge Advocate General

(Sentence as commuted ordered executed, GCMO 17, USAFPOA, 22 June 1945.)



Captain Richard C. Conlon, 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 the payment of said check.

Specifications 2 through 10 are similar to Specification 1 except as to date, amount and drawee bank, which are as follows:

	<u>Date</u>	<u>Amount</u>	<u>Drawee Bank</u>
Spec. 2:	27 Nov. 1944	\$300	Central National Bank, Junction City, Kansas.
" 3:	27 Oct. 1944	\$350	Rhode Island Hospital Trust Co., Providence, R.I.
" 4:	18 Nov. 1944	\$250	Central National Bank, Junction City, Kansas.
" 5:	31 Oct. 1944	\$300	Rhode Island Hospital Trust Co., Providence, R.I.
" 6:	31 Oct. 1944	\$331.50	"
" 7:	31 Oct. 1944	\$300	"
" 8:	25 Oct. 1944	\$350	"
" 9:	31 Oct. 1944	\$300	"
" 10:	2 Nov. 1944	\$350	"

He pleaded guilty to the Charge and guilty to each Specification except the words "wrongfully and unlawfully," "fraudulently" and "then well knowing that he did not have, and not intending that he should have," substituting therefor respectively the words "unlawfully," "unlawfully" and "then not having" (R. 7, 27). He was found guilty of the Charge and Specifications and was sentenced to dismissal, total forfeitures and confinement 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 confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, confirmed the sentence but remitted that portion of the sentence which imposed confinement. Pursuant to Article of War 50 $\frac{1}{2}$, the order directing execution of the sentence was withheld.

3. The evidence for the prosecution shows that from 22 August 1944 to 19 December 1944 the accused was custodian of the Willard Inn, a club in Honolulu operated for Army officers and their guests. The club has a restaurant and bar, as well as facilities for overnight accommodations. As custodian, the accused was the "only one authorized to draw on the bank account" of the club. As a cash balance or "working fund," there was kept on hand in the club's safe the sum of \$1,500. (R. 10-11, 16).

At various times between 25 October 1944 and 27 November 1944, the accused "cashed" from the club's funds the ten checks, totaling \$3,131.50, described in the Specifications. The checks were payable to cash, signed by accused as maker, and were dated, in the amounts and drawn on the drawee banks as follows:

<u>Date</u>	<u>Amount</u>	<u>Drawee Bank</u>
27 Nov. 1944	\$300	Central National Bank, Junction City, Kansas.
27 Nov. 1944	\$300	Central National Bank, Junction City, Kansas.
27 Oct. 1944	\$350	Rhode Island Hospital Trust Co., Providence, R.I.

18 Nov. 1944	\$250	Central National Bank, Junction City, Kansas.
31 Oct. 1944	\$300	Rhode Island Hospital Trust Co., Providence, R.I.
31 Oct. 1944	\$331.50	"
31 Oct. 1944	\$300	"
25 Oct. 1944	\$350	"
31 Oct. 1944	\$300	"
2 Nov. 1944	\$350	"

Each check was deposited in the club's account in the Bishop National Bank (Waikiki Branch) on the day after its being cashed. In due time the checks were returned through the mails unpaid and marked "NSF" or "INSP." (R. 12-15, 17; Pros. Exs. 1-10).

By depositions, it was established that the aforesaid seven checks drawn on the Rhode Island Hospital Trust Company were dishonored because of insufficient funds, that accused at the time had a "savings account" in the company of \$1.14 but no checking account, and that accused had a checking account of 72¢ in the Rhode Island Hospital National Bank (an associate institution), which also refused payment. The other three checks, drawn on the Central National Bank of Junction City, Kansas, were dishonored by the drawee bank on account of insufficient funds. The accused's checking account with that bank on the dates of the checks (18 and 27 November 1944) amounted respectively to \$210.21 and \$110.21 and on the dates of presentation (1 and 8 December 1944) amounted respectively to \$35.21 and \$34.96 (R. 19; Pros. Exs. 11, 12).

After the checks had been returned unpaid to the club, the club steward showed them to accused, who instructed him to keep them in the safe and that he would "reimburse me [the steward] for them." An accounts receivable styled "Returned Checks--Captain Conlon" was then "opened" on the books of the club. The sum of \$1,275 was received from accused toward payment of the checks, and the balance was paid to the club on 17 March 1945 by the "Bonding and Insurance Agency", which made bonds on the club's employees. (R. 14-18).

4. For the defense, a letter of the Commanding General, United States Army Forces, Central Pacific Area, dated 27 July 1944, commending accused for a "delicious" luncheon served on that date to the President of the United States, was introduced in evidence without objection (R. 20; Def. Ex. A). A partial extract copy of accused's Form 66-1, which was also admitted in evidence, shows that accused had "superior" ratings from 24 December 1942 to 14 April 1944, and "excellent" ratings from 12 May 1944 to 22 August 1944 (R. 22; Def. Ex. B). Also without objection, copy of a letter of Headquarters, United States Army Forces, Central Pacific Area, 19 March 1944, to The Adjutant General, requesting that accused be assigned to the Central Pacific Area from Cavalry Replacement Training Center, Fort Riley, Kansas, was admitted in evidence. (R. 23, 24; Def. Ex. C). In addition, there was also admitted a paragraph

of a letter dated 11 March 1944, from Colonel R. W. Curtis, Fort Riley, Kansas, to Colonel Clark L. Ruffner, care of Commanding General, Honolulu, T. H., to the effect that accused was "without doubt, the best mess officer" he had ever seen. (R. 25; Def. Ex. D).

Lieutenant Colonel Robert J. Patrick, Lieutenant Colonel Herbert H. Andrae, Captain LeGrand A. Gould, Captain Robert F. Wimmer, and Mr. Edgard Kina appeared as "character" witnesses for defense. They had all known accused after his arrival in Hawaii and testified in effect that his general reputation was "favorable" or "excellent", that he was "very well respected," that his reputation as to truth and honesty was "good" or "excellent", and that his reliability was "excellent." (R. 25-28, 34, 40, 43).

Mr. Herman Luis, general agent for the bonding company which "bonded" accused when he was at Willard Inn, testified that the company paid \$2,381.50 to the club in settlement of the claims made for accused's checks, and that "satisfactory" arrangements had been made with accused to reimburse the company in the amount of \$100 per month, beginning about June. (R. 28-32).

Captain Gould, in addition to testifying as to the reputation of accused, also testified that accused was under "considerable strain because of his then marital situation." Accused was faced with the prospect of divorce and "being a Catholic" it affected everything he did. (R. 35-42).

Accused, who was advised of his rights as a witness, testified that he was educated at the Ross Brown School, Green Briar Military School, Worcester Academy and Cornell. He withdrew from Cornell because of ill health. He entered the hotel business about 1934, had experience in hotels in various parts of the country and in Nassau, and finally became purchasing agent for the corporation which operates Hotel Delmonico, Ritz Tower, and Madison Hotel. In 1940 he joined Squadron A, New York National Guard and entered on "federalized" duty in January 1941. On 4 December 1942, he graduated from Fort Riley Officer Candidate School and became mess officer at Fort Riley, where he remained until April 1944 when transferred to Hawaii. In November 1943, he married an "Army Flight Nurse" who two days later was ordered to Hawaii. He was anxious to join her. Accused telephoned her from Los Angeles, while en route to Hawaii, and was informed that she wanted a divorce so she could marry an Air Corps Major. When he reached Honolulu, accused and his wife talked with a "representative Bishop of Honolulu". Finally, accused agreed to give his wife a divorce. His wife remarried in November. Accused was assigned as mess officer at Fort Shafter soon after he reached Hawaii, where he remained until 19 August when he was transferred to "Special Service" and assigned to the "Hotel and Club Section." During the summer and fall of 1944, accused's conduct was not normal because of the impending divorce. In order to

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"try to forget it" he gambled a great deal at Hickam Field Officers' Club, where the stakes were high--sometimes as much as \$1,000 "on one turn". As a result of gambling losses during October and November he made the checks involved. In September, he had written a friend who in the past had advanced money to him, asking him to deposit \$3,000 in the Rhode Island Hospital Trust Company and \$2,000 in the Central National Bank. As time "went by," accused "assumed that the money was in the bank." When the checks were returned, accused asked the club steward to place the checks in the safe deposit box, made no attempt to conceal them, and wrote another letter to his friend. He borrowed \$1,200 from the Clinton Trust Company in New York, which "went toward the payment of this obligation." In a "pledge" (to the Commanding General), accused acknowledged his original indebtedness of \$3,706.50, part of which had been paid. He has gone through a "bad phase," has now "gotten a grip" on himself, and wants to stay in the Army. On cross examination, accused testified that he made the specific checks, received money from the club for them, and gave them to pay gambling losses; that he had received no reply to his letter requesting deposits to his accounts when he made the checks but "assumed that they would be good;" and that he expected the checks would be paid by the requested deposits. (R. 45-56).

5. The evidence shows, and the accused in his pleas and testimony admits, that between 25 October 1944 and 27 November 1944 he drew and cashed ten checks (as alleged) in amounts of not less than \$250 or more than \$350, totaling \$3,131.50, and received full face value in cash therefor from the Willard Inn, an Army club of which he was custodian. Seven of the checks were drawn on the Rhode Island Hospital Trust Company, Providence, Rhode Island, where accused had only a savings account of \$1.14, and the other three checks were drawn on the Central National Bank of Junction City, Kansas, where accused had a checking account of less than the amount of each check when they were drawn and only about \$35.00 when the checks were presented. All of the checks were returned unpaid to the Army club because of insufficient funds. Accused paid the club the sum of \$1,275 as partial payment of the dishonored checks and the remaining amount was paid by a bonding company.

Accused disclaimed that he acted "fraudulently" in the issuance of the checks, and denied that he knew he did not have, or intended not to have, sufficient funds in the drawee banks for the payment of the checks. The only question requiring consideration is whether or not the evidence shows that accused was guilty of fraudulent conduct accompanied by the specific intent alleged.

Accused testified that the checks were issued to pay gambling debts which he had incurred in an effort to divert his mind from his marital difficulties. He testified that in September 1944 he had written a friend in Kansas City, Missouri, requesting him to deposit \$3,000 in his account with the Rhode Island Trust Company and \$2,000 in his Central

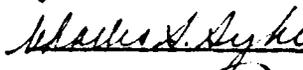
National Bank account. This friend previously had loaned money to accused upon request. Accused, however, admitted that he had not had an answer to his letter before making and issuing the checks, and that he had received no information that the requested deposits had been made. The issuance of checks amounting to approximately \$3,000, solely on the basis of an unanswered letter written at least a month previously to a friend requesting the deposit of funds sufficient to pay the checks, is insufficient, in the opinion of the Board of Review, to negative the fraudulent conduct and intent which are clearly inferable from the evidence. (CM 244106, Lytle, 28 B.R. 197; CM 255260, Porter, 36 B.R. 65; CM 250787, Eyen, 33 B.R. 47). As said in the Eyen case, supra, although "he hoped that he would have enough money in the bank to pay the checks by the time" they were presented "accused had no substantial basis to believe that the checks would be paid when presented." Restitution, or partial restitution, is no defense (CM 237741, Ralph, 24 B.R. 103; CM 244106, Lytle, supra; CM 250787, Eyen, supra).

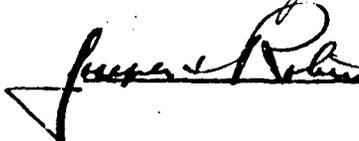
In the light of the foregoing authorities, the Board of Review holds that the evidence is sufficient to support the findings of guilty of the Charge and Specifications.

6. According to the charge sheet, the accused is now 30 years of age. He was commissioned and entered active duty as an officer on 4 December 1942, with prior enlisted service.

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

 Judge Advocate

 Judge Advocate

 Judge Advocate

1st Ind.

WD, Branch Office TJAG with USAFPOA, APO 958
TO: Commanding General, USAFPOA, APO 958.

JUN 23 1945

1. In the case of Captain RICHARD C. CONLON (O-1031219), Cavalry, 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 as confirmed, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 378. For convenience of reference please place that number in brackets at the end of the order.

(CM POA 378)

Samuel M. Driver
SAMUEL M. DRIVER

Lieutenant Colonel, JAGD
Acting Assistant Judge Advocate General

(Sentence ordered executed, GCMO 18, USAFPOA, 24 June 1945.)

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL ,
WITH THE
UNITED STATES ARMY FORCES PACIFIC OCEAN AREAS
APO 958

27 June 1945

CM POA 379

UNITED STATES	)	CENTRAL PACIFIC BASE COMMAND
)	
v.	)	Trial by G.C.M., convened at
	)	APO 961, 20, 21, 23 and 24
Private First Class JESSE D. BOSTON	)	April 1945. Death.
(36590271), 645th Ordnance Ammunition)	
Company.)	

HOLDING by the BOARD OF REVIEW
LOTTERHOS, SYKES and ROBINSON, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the United States Army Forces, Pacific Ocean Areas.

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 Jesse D. Boston, 645th Ordnance Ammunition Company, did, at APO 961, on or about 15 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mrs. Shizue Saito, a human being, by striking her on the head with a blunt object, to wit: a cement weight.

He pleaded not guilty to and was found guilty of the Specification and the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be shot to death with musketry. The reviewing authority approved only so much of the sentence as provides for shooting to death with musketry, and forwarded the record of trial for action under the 48th Article of War. The confirming authority, the Commanding General of the United States Army Forces, Pacific Ocean Areas, confirmed the sentence as approved by the reviewing authority. Pursuant to Article of War 50¹, the order directing execution of the sentence was withheld.

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3. The evidence for the prosecution shows that on and prior to 15 February 1945 accused belonged to the 645th Ordnance Ammunition Company, stationed at Upper Kula Road on the Island of Maui, Territory of Hawaii. This organization was composed of colored troops and was the only organization on the island consisting of colored soldiers. The record indicates that there were some colored marines on the island. Accused left the company area on pass about 1030 on 15 February. The only other men on pass from the company on that day were Corporal John W. Center, Private Mack N. Stover and Private First Class Columbus C. Young. Neither Center nor Stover visited the town of Wailuku, Maui, that day, but both accused and Young did (R. 9-10, 36-39, 52, 56-57).

Masao Saito and his wife, Shizue Saito, resided at No. 21 Olu Drive in Wailuku. Mrs. Saito was a Japanese woman, about 35 years of age and about five feet tall. A sketch of the neighborhood (Ex. 1) shows that Olu Drive runs east and west, and at the west end connects with Market Street running north and south; that the Saito residence is about one block east of Market Street and on the north side of Olu Drive; that Oriental Cafe is located just west of Market Street on an alley that intersects Market Street slightly south of Olu Drive; that Vineyard Street runs east and west about a block or block and a half south of Olu Drive and intersects Market Street; and that Hinano Street, a block and a half long, connects Olu Drive and Vineyard Street and intersects Olu Drive between the Saito house and Market Street. The Saito house is a small frame house, and back of it is a small wash house (photographs, Exs. 2, 3, 4, 5). The Saito's were acquainted with accused, who had visited them in their house three times (R. 7-8, 12-13, 28-29, 32, 247; Ex. 6).

About 1430, or up to 45 minutes later, on 15 February 1945, Yokichi Hiraoka, 14 Olu Drive, returned home from his work, started to water some plants in his garden, and decided to take some drying sweet potato leaves to Mrs. Saito for her rabbits, in a pen beside the wash house. When he came within seven or eight feet of the wash house, Hiraoka saw inside it a colored "soldier" dressed in khaki shirt and trousers, pushing Mrs. Saito's head down into the water in the tub. Hiraoka stood for "about half a minute and then * * * hollered" -- "Usamalla you?", meaning "What's the matter?". The "colored person" took his hands off Mrs. Saito's head and "stood straight up". Blood was "streaming" from the side of Mrs. Saito's head when she "straightened". Hiraoka was frightened and went behind the corner of the Saito residence, where he crouched. The "colored person" walked away "nonchalantly", and "didn't even run". Hiraoka could not identify the man because he "was too afraid to look at him straight in the face", and he did not know the difference between the uniform of a soldier and a marine. Hiraoka returned to his house (R. 79-87, 127, 138-140).

Hiraoka's wife "immediately went out" and saw Mrs. Saito standing outside of "Mrs. Toyota's gate". The Toyota house is directly across the street from the Saito residence. When asked what had happened, Mrs. Saito told Mrs. Hiraoka "I was hit by a cement". Mrs. Saito was conscious but was bleeding from her head. There was blood "splattered" on her both in front and back. Several neighbors saw her at this time. One of them

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had seen her come out of her house and sit on the porch before going into the street. It was three or four minutes from the time this witness saw a negro soldier come out until Mrs. Saito came out. Mrs. Saito was not "unduly excited" when seen outside the gate but the color of her face was not normal. She stated that while she was washing clothes some one "came from the back and pushed her head into the water and struck her with something". Some of the neighbors placed Mrs. Saito in a car and took her to the hospital. She remained conscious until about the time they arrived at the hospital (R. 76-77, 79, 94, 101-102, 122, 125-128, 130-131, 142).

When Mrs. Saito was examined and treated at the hospital about 1530 she was in a state of unconsciousness and severe shock and had a small laceration of the scalp, which was bleeding freely. She died at 2345 the same day as a result of her head injury, a skull fracture, and sub-dural hemorrhage (R. 12-13, 16, 29; Ex. 6).

On the morning of 15 February accused left camp and rode with another soldier about five miles to Makawao junction. He was picked up there by a car going to Kahului. About 1145 two barmaids at the Oriental Bar in Wailuku, who had seen accused there many times before, observed that he came in and had a double "rum and coke". He left about 1200, when the bar closed. The bar reopened at 1300 and accused returned within about 30 minutes after it opened. Accused had four or five "single" rum drinks. He seemed sober, was quiet and neat. He left about 1415. The bar closed at 1430. The operator of a pool hall in Wailuku testified that at 1330 or a little earlier, a negro soldier and three colored marines played one game there, and the soldier left (R. 34-35, 41-43, 48-49, 52-54).

Private Young (on pass that day) left camp about 1300, and went to the Oriental Bar in Wailuku. He arrived there about 1400 and saw accused at the bar. Young left in three or four minutes, went to the "Army PX" and to a show, caught a bus to Kahului, and then went back to camp (R. 56-58).

Between 1400 and 1500, probably about 1430, Mrs. Margaret Gushiken, 19 Olu Drive (second house west of the Saito residence), saw a negro serviceman walking past her house toward the Saito house "with his head down". She testified that she had seen accused "every now and then" previously in the Oriental Bar, where she had formerly worked. At the trial she identified accused as being the man who passed her house on 15 February. Private Young was brought into the courtroom and the witness stated that he was not the man. After she saw accused pass, she heard a "loud noise in the neighborhood", the "neighbors were jabbering", and she went outside. She saw Mrs. Saito, bleeding about the face and back. Mrs. Gushiken admitted she had previously stated that she did not think she would be able to identify "this man" if she saw him again and that she did not know whether he was a marine or a soldier (R. 60-68).

A "little before" 1500, Jitsunosuke Nishimura, 71 years of age, was sitting on his back porch, at 17 Hinano Street (on the corner of that street and Olu Drive, diagonally across the street from the Saito residence).

He had only a limited view of the Saito home, due to a hibiscus hedge. Mishimura saw a negro soldier, whom he could not identify, enter the Saito yard through the fence, walk to the kitchen door at the back and walk in without knocking. He then saw Mr. Hiraoka carrying sweet potato leaves to the Saito home. About "eight to fifteen" minutes later he saw the negro soldier come out. He did not see Hiraoka leave. After an "interval of time" (from three to four minutes) Mrs. Saito came out on her porch (R. 60-79).

Mrs. Shizue Okazaki, also residing at 17 Hinano Street, was in her kitchen from 1300 to 1500. She saw a colored serviceman, dressed neatly in khaki uniform, walk by on Hinano Street going toward Vineyard Street. He was walking "naturally, in no hurry". About three or four minutes later, she saw Mrs. Saito standing by Mrs. Toyota's gate, "all wet and bloody". Mrs. Minnie Evans, residing on the southwest corner of Olu Drive and Hinano Street, saw a negro soldier going down Hinano Street toward Vineyard Street, before 1500, probably between 1430 and 1500. He walked straight, "not fast" and was not staggering. About ten minutes later Mrs. Evans saw Mrs. Saito, who was wet and bloody (R. 89-94, 97-102).

Miss Jesse Okamoto, a typist in a doctor's office on the south side of Vineyard Street, east of Hinano Street, saw a colored soldier walk into the yard next door to the office, after 1430 on 15 February, and then go out. She identified accused as the man she saw. Private Young was brought into the court room and she stated he was not the man (R. 105-106, 108-110, 116).

Private Young saw accused on the bus in Kahului and Makawao after 1700, when they were coming back to camp. Accused seemed normal. Another soldier saw accused at the 8th Station Hospital in Makawao about 1830, when accused came to visit him. Accused smelled of alcohol but appeared normal (R. 58, 119-120).

On the morning of 16 February, or about 1315, there was a "line-up" of 48 men of the organization of accused, in order that Mr. Saito might attempt to identify the colored soldier who had visited his home. When Saito came to accused he said "You are my friend, no?" and accused replied "Yes, yes, I know you". The company was then dismissed and accused was taken to his barracks. Accused was advised of his "constitutional rights" and that he was "not required to answer or make any statements". The authorities took possession of a khaki shirt (Ex. 18), a pair of khaki trousers (Ex. 19), and a pair of shoes (Ex. 20), found among the belongings of accused, and he admitted they belonged to him. The shirt and trousers were soiled. Accused claimed that the day before he had worn the same clothes that he had on at this time (16 February). The uniform taken was the only one that appeared to have been used, and the one that accused was then wearing was "neatly pressed". Accused was taken to the police station in Wailuku some time after 1430, and he was again "warned" of his right not to incriminate himself. Accused stated that he understood. He was questioned at that time, and related his activities of the day before

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(15 February), but did not connect himself with the offense. On 17 February there was an identification line-up of eight colored soldiers. Mr. Nishimura and Mr. Hiraoka could not identify the soldier they had seen the day before. Mrs. Margaret Gushiken "deliberated for a while" and then pointed out accused as the man she had seen. Afterward she stated that she was not sure that he was the man (R. 146-150, 155-156, 168-172, 194-195, 215-217, 223).

The blood of Mrs. Saito was found by standard test to be of type "O", which on the island is the most common of the four types. Some stains were observed on the shirt, trousers and shoes of accused (Exs. 18, 19 and 20) found among his belongings. Some scrapings of wood (Ex. 21) from the Saito wash house and some scrapings (Ex. 22) from the tub in the wash house were introduced in evidence. These five exhibits were subjected to standard tests by Mr. Rudolph W. Newton, an experienced laboratory technologist, who found human blood of type "O" on all of them. The dog tags of accused show that his blood type is "O". A cylindrical cement weight (Ex. 16) of a type used by Japanese in preserving fruits and vegetables was found in the Saito wash house. It weighed about nine pounds (R. 17-18, 136, 149-153, 158-163, 189, 244).

On 18 February a "denial statement" was taken from accused, after he was "warned" of his "constitutional rights". This statement, in question and answer form (Ex. 23), is substantially as follows: Accused left his station on pass about 1030 on 15 February 1945, "caught" rides and rode a bus to Kahului, went from there by bus to Wailuku, and entered the Oriental Bar (or Oriental Cafe) about 1135. He had two or three drinks of "Rum coke", left the cafe at 1200, entered a pool room nearby, played two or three games with two colored marines, left about 1250, and went down Market Street to the "USO". He returned to the Oriental Bar about 1320, remained there until closing time, and then went to Market Street, and down Market Street past Vineyard Street to a bus stop. He went to Kahului by bus, went to a show, came out about 1630, and returned to camp. Accused admitted that he had visited in the Saito house several times (R. 172-176).

On 20 February, during a lengthy interview of accused, Mr. Saito was brought into the room. He asked "What for you hit my wife?" and accused replied "I don't know, Saito. I must be crazy" (R. 219, 230).

After accused was taken into custody on the afternoon of 16 February, he was kept at the Provisional MP Detachment Headquarters for the first day and was then taken to the civilian police station and kept there. A military policeman was present day and night, accused had a cot and blanket, and he was taken to the military police mess hall for meals. Captain Gordon T. Charlton, Provost Marshal, testified that accused was under his custody at all times, and that he wrote a letter authorizing the detention of accused, but providing that accused would remain under military guard and be questioned only if Captain Charlton or one of his representatives was present. Accused was questioned one or more times

on practically every day that he was in custody. The length of each interview is not shown. The questioning usually ended at from 2000 to 2200, but on one occasion lasted longer. It appears that accused was not questioned on 21 February. Accused did not know that Mrs. Saito was dead. On 20 February Captain Charlton had a talk for about 45 minutes with accused, who requested the interview. Captain Charlton emphasized to accused that he was not required to make any statement. Accused displayed emotion, and wanted to know the nature of the charges against him. Captain Charlton told accused that he "didn't file the charges", was concerned only with the investigation and reporting the facts, and that the only promise he could make was that if charges were filed accused would be tried in a military court. He told accused that he was convinced from the evidence that accused was the guilty person. Accused stated that after viewing the evidence he thought he was the guilty person, but had no recollection of it. He stated that he was willing to sign a statement "admitting it, but he didn't remember it". Captain Charlton would not allow him to sign such a statement. Accused was told what he was charged with on 23 February "after he was charged" (R. 169-173, 177, 187-188, 196-199, 226-227, 229-230).

Accused was questioned on the morning and afternoon of 22 February and again about 2015. Those present that evening in addition to accused were Staff Sergeant Chester A. Riebandt, Assistant Chief of Police Andrew S. Freitas, "Lt. Sniffen" and "Captain McManis". No force was used and no threats or promises were made. Accused talked freely and voluntarily. At one time that afternoon, about 1500, Chief Freitas had raised his voice and said to accused "Boston, we have been darn nice to you. From now on things might get rough". During the questioning that evening accused requested paper and pencil and wanted to make a statement in his own handwriting. He then wrote out "his own story" (Ex. 24) and signed it. He was normal and calm at the time. Major Ezra J. Crane was then called in about 2130 to swear accused. He advised accused that he did not have to make a statement, and asked accused whether he had made the statement voluntarily and without force, threats or promises. Accused replied in the affirmative and then swore to the statement (R. 167, 177-182, 192-193, 200-201, 211, 219-221, 224-225, 228, 231-235).

The substance of the statement written by accused is as follows: Hewent to the Saito home between 1430 and 1500 with no intention of doing any harm to anyone. When he knocked at the door and received no answer he went in, but found no one. He went out to the wash house and saw Mrs. Saito washing, but she did not see him. He hit her with a "rock or brick or something of the sort". His "intentions were to take her money if she had any". He had no chance to find whether she had any money, because she yelled for help, he grabbed her by the face to keep her from making noise, they both fell into the water, he let her go, and then left. In the statement he then traced his route back to camp (Ex. 24).

Later, on the night of 22 February, about 2300, accused was questioned further. Those present at this time were Sergeant Riebandt, Captain McManis, Major Crane, Captain Charlton, Detective Edward Wilson,

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and accused. Wilson asked most of the questions. Prior to the questioning accused was "warned" of his rights by Major Crane. This interview lasted until about 0050 on 23 February, and the questions and answers were taken down by a stenographer. Accused talked freely and voluntarily, and there was no use made of force, threats or promises. Accused was alert and calm. About 0900 on 23 February the question and answer statement (Ex. 25) was shown to accused, who read it, stated that it was "exactly true", and signed and swore to it. Accused appeared to be emotionally upset on the morning of 23 February when he first entered the room, but after reading the statement appeared calm again, and then signed it. He was "wide awake and alert". Accused was examined by a medical officer, at the request of Captain Charlton, on 18 February and on 23 February. On the first examination accused was found to be without cuts, abrasions or recent bruises, and without any evidence of bleeding within the preceding three or four days. On the second examination, accused was normal, without any evidence of ill treatment, bruises or violence, and without evidence of extreme fatigue (R. 182-185, 201-210, 236-241).

The question and answer statement (insofar as it deals with the time of the attack on Mrs. Saito) is substantially as follows: Accused left the Oriental Bar at about 1425 on 15 February, went to the Saito house, knocked, but received no answer. He went inside, saw no one, went out to the wash room and saw Mrs. Saito washing there. Accused "thought at once to do wrong * * * picked up some object * * * and struck her on the head". She began to yell, accused "grabbed" her to try to muffle the cry, and in the struggle they both fell into the tub. Both his arms were wet, so he "let her go" and left. Accused had taken three double drinks on his first visit to the Oriental Bar that day and six or seven double drinks on his second visit. The idea of striking Mrs. Saito "popped into" his head "all of a sudden" without "forethought" on his part, and he wanted to keep her from recognizing him when he took her money. He thought he heard somebody say something, but did not see a man near the wash house. His motive was "robbery". He struck Mrs. Saito on the head with a "door weight" or something like that, heavier than a brick. He had no intention of doing anything wrong before he went to the house. The idea "popped in" his head just as he "started down the steps where she was and instead of" turning toward him she turned the other way. He thought he would find money on her person. He had been to the Saito home about eight times before, but three times no one was there. He had never made "any advances" to her "straight forward" but "We've talked on it". She would "just laugh, it was more in a joking way, she laughed, she called me crazy." Accused stated at the end of the interrogation that he had "wanted to get it /his admission of guilt/ off my chest three four days ago but I couldn't" (Ex. 25).

4. The defense introduced no evidence, and the accused elected to remain silent (R. 248-249).

5. a. The evidence shows that on 15 February 1945 about 1030 accused left his company area on the Island of Maui on pass, and went to the town

of Wailuku. On his arrival there he went to the Oriental Bar about 1130 or a little later, remained until 1200, returned about 1330 or a little earlier, and remained until about 1430. While he was in the Oriental Bar he took several rum drinks, but seemed sober, and was quiet and neat.

When he left the bar he went to the home of Masao Saito and his wife, Shizue Saito, who lived about two blocks from the Oriental Bar. Accused was acquainted with these people and had visited in their home several times. When he arrived there he knocked at the door and, receiving no answer, went into the house. Finding no one inside, he went into the back yard; and saw Mrs. Saito in the small wash house, engaged in washing clothes. She did not see him. Accused then picked up a concrete block weighing about nine pounds and struck Mrs. Saito on the head with it. When she yelled, he seized her by the head and pushed her head down into a tub of water (or according to accused they fell into the water). When a neighbor who had entered the yard made a remark to accused, he released Mrs. Saito and left the premises. Several hours later he returned to his camp.

Accused claimed that his motive was robbery and that he had no wrongful intention until he saw Mrs. Saito in the wash house.

When accused released Mrs. Saito she went into her house and then to the street outside. There was a cut on her head where she had been struck, and blood was streaming from it. Neighbors took her to a hospital, where she died before midnight that night, as a result of the wound, which was found to be a skull fracture. She had remained conscious until about the time she arrived at the hospital (about 1530).

The testimony of a number of witnesses who saw accused both before and after the attack on Mrs. Saito shows that accused was not noticeably intoxicated and that he appeared to be in a normal condition.

b. Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. The death must take place within a year and a day of the act that caused it. Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person; knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person (MCM, 1928, par. 148a).

According to the well known standards outlined above, it is clear that accused is guilty of murder. His unprovoked action in striking the little Japanese woman who had befriended him, on the head with a heavy concrete block, thereby causing her death, was obviously willful, deliberate and felonious, and accomplished with malice aforethought and premeditation.

6. The Board of Review has considered the admissibility of statements made by Mrs. Saito in the street after the attack on her, to the effect that she was struck "by a cement" and that someone came from behind, pushed her head into the water and struck her. These statements were made within a short time after the attack (five to ten minutes), Mrs. Saito was bleeding freely, the color of her face was not normal, she had suffered a skull fracture, and about a half hour later was found to be in a state of unconsciousness and severe shock. In view of these circumstances it is clear that her declarations were voluntary and spontaneous and were made at a time so near the principal transaction as to preclude the idea of deliberate design. The Board therefore concludes that they were admissible as part of the *res gestae* (MCM, 1928, par. 115b; Dig. Op. JAG, 1912-40, sec. 395 (22), CM 193895; Wharton, Crim. Evid., 11th Ed., secs. 492, 493, 495).

7. a. Another question that the Board has carefully considered is that of the admissibility of the confessions made by accused. The applicable facts are briefly as follows: Accused was taken into custody on the afternoon of 16 February, after being identified as the soldier who had previously visited in the Saito home. Thereafter he was kept in confinement at military police headquarters and in the civilian police station, but was at all times under military guard and control. Accused was not subjected to any force or threats, nor were any promises made to him. He ate his meals in the military police mess hall, and had a cot and blanket in his cell. There is no indication in the record that accused was mistreated in any way.

When accused was taken into custody, and repeatedly thereafter, his rights against self incrimination were carefully explained to him, and it appears clearly that he knew that he need not confess nor make any statement. The record shows that from 16 February forward, it appeared from numerous circumstances that accused was the guilty party, but direct proof had not been found, so that charges were not preferred against accused until after he confessed. He was not advised that Mrs. Saito had died.

From the afternoon of 16 February through 22 February, accused was questioned every day (except apparently on 21 February) by Army and police authorities. It does not appear that the questioning was of a continuous nature, but that it was conducted in one or more sessions on each day. With one exception, accused was not questioned after 2000 or

2200 at night. On the evening of 22 February, accused made two confessions, one in his own handwriting and the other in question and answer form. After he wrote the former, he was again advised of his rights, then stated that he made the statement voluntarily, and swore to it. He was again informed of his rights before the questioning which resulted in the second confession.

It must appear that the confession was voluntary on the part of the accused. No hard and fast rules for determining whether or not a confession was voluntary are prescribed. The matter depends largely on the special circumstances of each case (MCM, 1928, par. 111a). The Board of Review has concluded that the confessions in this case were voluntary.

b. The Board has considered certain decisions of the United States Supreme Court which involved similar facts concerning confessions admitted in evidence. In McNabb v. United States (318 US 332), confessions obtained after long questioning of the accused, and while they were held in confinement, not having been brought before a United States Commissioner or other judicial officer as required by Federal statute, were held inadmissible. The court stated that it was not necessary to decide the question of Constitutional rights, because "In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, * * * this Court has, from the very beginning of its history, formulated rules of evidence to be applied in Federal criminal prosecutions". It was added that the statutes requiring accused persons to be brought before a Commissioner or other judicial officer were "expressive of a general legislative policy" which the court would follow in establishing rules of evidence. The case of Anderson v. United States (318 US 350) was to the same effect, except that the accused had been kept in unlawful custody by state authorities, in violation of a Tennessee statute, while Federal agents questioned them at length. Both these cases were tried in Federal courts.

The basis for these decisions was that the Supreme Court would not permit the use of confessions obtained as a result of holding accused persons in unlawful confinement in violation of statute. The court was exercising its supervisory powers over the proceedings of Federal courts. The Supreme Court does not exercise such control over military courts-martial, but merely determines questions of jurisdiction and whether there has been a basically fair trial according to Constitutional standards.

Congress has provided (AW 38) that the President may prescribe procedure, including modes of proof, in cases before courts-martial, which regulations shall, insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the Federal courts. The President prescribed rules of evidence in the Manual for Courts-Martial, Chapter XXV (See par. 111). He has there provided that the rules of evidence used in Federal courts will be applied, so far

as not otherwise prescribed in the Manual or by act of Congress. Within well recognized standards prescribed in the Manual, the confessions involved in this case were voluntary and are admissible (See MCM, 1928, par. 111a).

The statutes applicable to courts-martial with respect to holding persons in custody (AW 69, 70) are quite different from those involved in the McNabb case. It is provided that any person subject to military law charged with crime or with a serious offense shall be placed in confinement or in arrest, as circumstances may require (AW 69); and that when he is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him (AW 70). It is further provided that any officer responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished, and that when a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges and furnish the accused a copy (AW 70). It is added, in the Manual, that when it is intended to prefer charges, they should be preferred without unnecessary delay (MCM, 1928, par. 26. See also par. 34). In view of the circumstances shown, it cannot be said that there was an unnecessary or illegal delay in preferring charges in this case.

The McNabb case also involved the doctrine that continuous questioning under psychological pressure may amount to duress which makes a confession involuntary. Two Supreme Court cases illustrate the applicable rules when this question arises. Both cases were tried in state courts, so that the Supreme Court was in the same relative position for review as when military trials are involved. In Ashcraft v. Tennessee (322 US 143) where an accused had been questioned for 36 hours, continuously and without rest, by relays of interlocutors, before he confessed, it was held that the facts showed that the confession was coerced and not admissible. The Constitution stands as a bar to the use of such a "coerced confession".

In Lyons v. Oklahoma (322 US 596) there was a conflict in the evidence as to the means used to obtain a first confession (not introduced in evidence), and the question of admissibility arose as to a second confession made several hours later to a different person at a different place. The Supreme Court declined to interfere with the admission of the second confession because the jury, on proper instructions, had found that it was voluntary. The jury had the right to pass upon the facts, and draw the inferences--particularly as to the extent to which any coercion existing when the first confession was obtained, may have affected the making of the second confession. It was said in the opinion:

"The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom'

to confess to or deny a suspected participation in a crime. * * * When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision."

The Board of Review is of the opinion that the doctrine of the Lyons case applies, and that the court was within its proper field in drawing the inference from all of the facts that the confessions here involved were voluntary and admissible.

c. The Board has not overlooked CM 131194 (Dig. Op. JAG, 1912-40, sec. 395 (10)) where a confession obtained after long questioning was held to be involuntary. In that case it was shown that accused was kept in solitary confinement for ten days prior to his confession, and it is indicated that the facts were such as to lead to the conclusion that the confinement and other circumstances compelled the accused to confess. In the present case, although accused was questioned practically every day, the record shows that he was treated well, given proper rest, fed at the regular mess hall, and protected in all of his rights. The mere fact that a prisoner, in custody under strong suspicion of being the guilty person, is repeatedly interrogated, in a proper way, does not, in the opinion of the Board, automatically show that a confession is involuntary. All the surrounding facts and circumstances must be considered. The court was amply justified in concluding from the facts shown of record that the confessions were voluntarily made.

8. The charge sheet shows that accused is 35 years and 9 months of age, and that he was inducted on 26 March 1943.

9. The court was legally constituted. No errors affecting the substantial rights of the accused were committed during the trial. A sentence to death is authorized upon conviction of a violation of the 92nd Article of War. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence.

J. Lott, Judge Advocate

W. W. W. W. W. Judge Advocate

J. W. W. W. W. Judge Advocate

1st Ind.

Branch Office TJAG with USAF, Pacific Ocean Areas, APO 958
TO: Commanding General, USAF, Pacific Ocean Areas, APO 958.

1. In the case of Private First Class JESSE D. BOSTON (36590271), 645th Ordnance Ammunition Company, 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, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have the authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM POA 379. For convenience of reference please place that number in brackets at the end of the order.
(CM POA 379)

SAMUEL M. DRIVER
Lieutenant Colonel, JAGD
Acting Assistant Judge Advocate General.

(Sentence as confirmed ordered executed, GCMO, 19, USAFPOA, 29 June 1945.)

