OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD
OF REVIEW

HOLDINGS
OPINIONS
REVIEWS

VOL. 49

(SUPPLEMENTING
VOLS. 1-26)

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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XLIX

including

CM 187201 - CM 241788

(Supplementing Volumes I - XXVI)

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

(1)

Military Justice
C.M. 187201

JUN 29 1929

U N I T E D S T A T E S	PANAMA CANAL DEPARTMENT
vs.	Trial by G.C.M., convened at Fort Sherman, Canal Zone, May 27, 1929.
Private RUSSELL W. BOKOSKI (6752228), Battery D, 65th Coast Artillery.	Dishonorable discharge, suspended, and one (1) year's confinement. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW,
TURNBULL, BURNS, and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by WICKLIFFE, Judge Advocate.

1. The record of trial in the case of the soldier named above having been examined in The Judge Advocate General's Office and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Russell W. Bokoski, Battery "D", 65th Coast Artillery, having received a lawful command from 2nd Lieutenant Robert J. Moulton, 65th C. A., his superior officer, "to return to the kitchen and go to work", did, at Fort Randolph, Canal Zone, on or about May 15, 1929, wilfully disobey the same.

He pleaded not guilty to the charge and specification, and was found guilty of both. Evidence of three previous convictions was considered by the court. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority might direct, for one year. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge until the soldier's release from confinement, and designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement. The sentence was published in General Court-Martial Order No. 46, Headquarters Panama Canal Department, June 11, 1929.

(2)

3. The record of trial shows that by the order appointing the court (Paragraph 1, Special Orders No. 154, Headquarters Panama Canal Department, July 10, 1928), Major John H. Cochran, Coast Artillery Corps, was detailed as law member, and that by an amendatory order (Paragraph 7, Special Orders No. 207, Headquarters Panama Canal Department, September 11, 1928), Major Cochran was relieved as member and law member of the court, and Major Frank Drake, 2nd Coast Artillery, detailed as member and law member thereof. By a further amendatory order (Paragraph 11, Special Orders No. 116, Headquarters Panama Canal Department, May 20, 1929), Major Drake was relieved as member of the court, but no officer was detailed as law member in his stead. This case was tried subsequent to Major Drake's relief and at a time when there was no law member detailed to the court.

The provisions of the 8th Article of War requiring the detail to general courts-martial of law members have been held to be mandatory (C.M. 187098, Henshaw, and cases therein cited). No member of the court in this case having been detailed as law member at the time of the trial and the record containing nothing to show that an officer of The Judge Advocate General's Department or an officer of some other branch of the service specially qualified to perform the duties of law member was not available for such detail, it must be concluded that the court was not properly constituted and that the proceedings were null and void ab initio.

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

W. A. Trumbull, Judge Advocate.

William [illegible], Judge Advocate.

_____, Judge Advocate.

To The Judge Advocate General.

Military Justice
C.M. 187201

1st Indorsement.

War Department, J.A.G.O., JUN 29 1929 - To the Secretary of War.

1. Herewith transmitted for the action of the President is the record of trial in the case of Private Russell W. Bokoski (6752228), Battery D, 65th Coast Artillery, together with the foregoing opinion of the Board of Review.

2. I concur in the said opinion of the Board of Review and for the reasons therein stated recommend that the findings and sentence be vacated, that the accused be released from the confinement adjudged by the sentence in this case, and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed herewith is a draft of a letter for your signature, transmitting the record to the President for his action, together with a form of Executive action designed to carry into effect the recommendations hereinabove made should they meet with his approval.

E. A. KREGER,
Major General,
The Judge Advocate General.

4 Incls.
Incl. 1 - Record of trial.
2 - Opin. by Bd. of Rev.
3 - Draft of let. for sig. of Secy. of War.
4 - Form of Exe. action.

(Findings and sentence vacated. G.C.M.O. 8, 3 Jul 1929)

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

JUL 9 - 1929

Military Justice
C.M. No. 187302.

U N I T E D S T A T E S	)	HEADQUARTERS PANAMA CANAL DIVISION
	)	
vs.	)	Trial by G.C.M. convened at Fort Clayton, Canal Zone, May 10, 1929. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
	)	
Private EDWARD SHAW (6788843), Company E, 11th Engineers.	)	

REVIEW by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BROWN, Judge Advocate.

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1. The accused was tried upon the following charge and specifications.

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Edward Shaw, Co. E, 11th Engrs., did at Cabuya, R. de P., on or about March 30, 1929, in the night time feloniously and burglariously break and enter the cantina of Angelo Manchia, with intent to commit a felony, viz., robbery, therein.

Specification 2: In that Private Edward Shaw, Co. E, 11th Engrs., did, at Cabuya, R. de P., on or about March 30, 1929, with intent to commit a felony, viz., robbery, commit an assault upon Rafael Andara, by willfully and feloniously throwing a bottle at him.

Specification 3: In that Private Edward Shaw, Co. E, 11th Engrs., did, at Cabuya, R. de P., on or about March 30, 1929, by force and violence, and by putting him in fear, feloniously take, steal and carry away from the presence of Rafael Andara, fourteen (14) bottles of liquor, two dollars and fifty cents ($2.50) gold, and two (2) cans of sardines, value of about thirty seven dollars and fifty cents ($37.50).

Specification 4: (Findings of guilty disapproved by reviewing authority).

Specification 5: (Findings of guilty disapproved by reviewing authority).

The accused pleaded not guilty to the charge and specifications and was found guilty of Specifications 1, 2 and 4; of Specification 3, guilty except the words, "fourteen (14) bottles of liquor, two dollars and fifty cents ($2.50) gold," substituting therefor the words, "twelve (12) bottles of liquor, five dollars ($5.00) gold," of the excepted words, not guilty, and of the substituted words, guilty; of Specification 5, guilty, except the words, "seventeen (17) bottles of whiskey, value of about fifty-one dollars ($51.00)", substituting therefor the words, "three (3) bottles of whiskey value of about nine dollars ($9.00)," of the excepted words, not guilty, and of the substituted words, guilty; and, of the Charge, guilty; and was sentenced on May 10, 1929, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority might direct for twenty years. The reviewing authority disapproved the findings of guilty as to Specifications 4 and 5 of the Charge, approved only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record pursuant to Article of War 50½.

2. The material evidence appears as follows:

Rafael Andara testified that on March 30, 1929, he worked and slept in the "Imperial" Cantina, in Cabuya, R. de P., owned by Angelo Manchia; that he knows the accused but not his name, having seen him two or three times when he, the accused, came in to the bar to get a drink; that he closed the cantina about 7 o'clock, P.M., on March 30th, and "had just a little bit of light in the cantina"; that about 9 to 9.30 P.M., the accused, who was dressed in blue clothes, and whom the witness recognized because of the accused's height, being "a tall man", and by his voice, broke in the door, "entered the cantina and took without having permission, twelve quarts of liquor", two cans of sardines, and ten dollars silver, total value, $37.50; that the witness said to the accused, while the latter was taking the liquor, "I don't jawbone" and the accused then threw a bottle of beer which hit the witness and put him in fear of his life; and that the accused drank some of the liquor, took some in his shirt and gave the rest to other men whom the witness heard talking outside (R 19-23).

Captain Lewis A. Murray testified that on March 31, 1929 he investigated a report that the accused had robbed a cantina in Cabuya; that he visited the cantina that evening where he "saw a broken bottle on the floor near the door leading into the sleeping room", and observed that "the fastening of the rear door had been broken"; and that the accused had the appearance on March 31st of having drunk considerable liquor (R 23-25).

First Sergeant Harold V. Goddard testified that Company E to which the accused was assigned was stationed near Cabuya, R.P., on February 28, and March 30, 1929; that he saw the accused and Privates Rodkevtch and Hanks on March 31st, and they appeared "to have been drinking considerably". On March 1st he took three quart bottles of "W.A.W." liquor from the accused and hid them out of camp in the bushes, but did not know where the accused got the liquor; and that when searching the camp on March 31 for the alleged stolen liquor, he found a Sergeant Goforth with about a quarter of a quart bottle of liquor which he turned over to Captain Murray (R 9-11).

Private George Barry testified that he was on camp guard duty in Cabuya on March 30, 1929, patroling the area of the cantina; that he received instructions from the Sergeant of the Guard "to drive every soldier home"; that he saw the accused in company with Sergeant Goforth, Private Hanks and Private Rodkevtch, near this cantina, "two in front and two in back", about 9.30 P.M., and told them to go home; that the accused replied "he would not go home, and would fix me for this", that Sergeant Goforth replied, "he would go home in a few minutes"; and that he saw the accused about an hour later down by the cantina, dressed in fatigue clothes and without a hat, but had nothing with him and witness estimated "he (accused) was pretty well drunk as he was staggering around", (R 12-14).

A Private Rysh testified that he saw the accused walking through the center of the street in Cabuya in the vicinity of the cantina in the evening of March 30, 1929, accompanied by Sergeant Goforth, Private Hanks and Private Rodkevtch and MacDougal, whom the Sergeant of the Guard was "chasing" out of town; that the accused had a bottle from which he was drinking and after they all stopped on the road, the accused and Sergeant Goforth went back and later, when it was dark, returned with a bottle which they all drank and went to sleep, and that later the accused and Private MacDougal "woke him up and took him into camp", (R 15-16).

Private Ronald MacDougal testified that he saw the accused the evening of March 30, 1929 when "on my way home from town about 7.30"; that "they were sitting alongside the road with the other three fellows", until about 9 o'clock; that the accused and Hanks were talking about getting "jawbone" booze, that they went back to town and later returned with three quarts which he saw in the possession of Private Hanks, but did not know who bought it (R 16-18).

The accused, advised of his rights as a witness, elected to remain silent.

3. The evidence shows that on the night of March 30, 1929, accused forced open a door thereof and entered a cantina at Cabuya, R. de P., which was used, among other things, as sleeping quarters of one Rafael Andara, an employee of the proprietor. Accused started to take property from the cantina and was accosted by Andara. Accused thereupon threw at and struck Andara with a bottle of liquor, putting Andara in fear and preventing further

interference by him. Accused then took and carried away the liquor, money and merchandise as described in the findings. In view of the circumstances, the court was justified in concluding that accused in breaking and entering the building intended to commit robbery and that the assault on Andara was made with similar intent. The essential elements of the offenses of burglary, assault with intent to commit a felony, and robbery, as found by the court under Specifications 1, 2 and 3 of the Charge, are established.

By Specification 3 of the Charge it was alleged that accused took and carried away from the presence of Andara, fourteen bottles of liquor, two dollars and fifty cents gold, and two cans of sardines, value about $37.50. In its finding on this specification the court, by exceptions and substitutions, found that accused took and carried away twelve bottles of liquor and five dollars gold and two cans of sardines, of the total value as alleged. The power of a court-martial to make exceptions and substitutions in its findings does not authorize in a case of this nature the substitution of property of a greater value than that alleged to have been stolen. Such substitution would result in finding accused guilty of an offense more serious than that charged. So much of the finding by the court with respect to the theft of money, therefore, as involved a finding that accused took, stole and carried away more than two dollars and fifty cents gold as charged, was unauthorized. Inasmuch as the offense charged and found was robbery, and the difference between the findings and allegations with respect to the value of the stolen property was comparatively slight, it is apparent that the substantial rights of accused were not injuriously affected.

4. No evidence of previous convictions was introduced. The charge sheet shows the accused enlisted September 6, 1928, at the age of 24 years and 8 months, with no prior service.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence.

W. A. Trudell Judge Advocate.

William E. Burns Judge Advocate.

Luther W. Hoover Judge Advocate.

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

Military Justice
C.M. 187800

SEP 25 1929

U N I T E D S T A T E S vs. Private STANLEY F. MICHALOWSKI (6124004), 2nd Motor Repair Section, Quartermaster Corps.	FIRST CORPS AREA Trial by G.C.M., convened at Headquarters First Corps Area, Army Base, Boston, Massachusetts, August 2, 1929. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

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

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

Specification: In that Private Stanley F. Michalowski, 2nd Motor Repair Section, Quartermaster Corps, did, at Army Base, Boston, Massachusetts, on or about May 3, 1929, feloniously take, steal and carry away one automobile "Oldsmobile" sedan, value about One Thousand Dollars ($1000.00), the property of Colonel Henry C. Bonnycastle, Quartermaster Corps.

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

Specification: In that Private Stanley F. Michalowski, 2nd Motor Repair Section, Quartermaster Corps, did at Army Base, Boston, Massachusetts, on May 4, 1929, desert the service of the United States and did remain absent in desertion until he was apprehended at New Britain, Connecticut, on May 13, 1929, (returned to military control at Fort H.G. Wright, New York, May 15, 1929).

He pleaded not guilty to the charges and specifications and was found guilty of the Specification, Charge I, except the words "Colonel Henry C. Bonnycastle, Quartermaster Corps", substituting therefor the words "the estate of Lieutenant Colonel Craig, deceased, and properly in the possession of Colonel Henry C. Bonnycastle, Quartermaster Corps", of the excepted words, not guilty, of the substituted words, guilty; guilty of Charge I, and guilty of Charge II and its specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five (5) years. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement and forwarded the record under Article of War 50½.

2. The evidence shows that in the latter part of April, 1929, following the death of Lieutenant Colonel Daniel F. Craig, Field Artillery, a dark gray colored Oldsmobile coach (R. 9,10), purchased by him on April 18, 1929, at a cost of $1,015.00 (Ex. 3), was, at the request of the widow, turned over to Colonel Henry C. Bonnycastle, Quartermaster Corps, for storage (R. 14), and, with ignition locked, was placed on the second floor of Section "A" of the main warehouse at the Army Base, Boston, Massachusetts. The car was last seen in storage at this place about May 2, 1929. The accused worked as a painter in the room where the car was stored on Friday, May 3, 1929, and prior thereto (R. 17). On May 4th he absented himself without leave (R. 17; Ex. 1), and remained absent until apprehended at New Britain, Connecticut, about May 13, 1929 (R. 46; Ex. 1,6). On May 6, 1929, the car was found to be missing from the warehouse (R. 11). During the early evening of May 3d accused was seen driving a new, dark colored Oldsmobile coach or sedan from near the freight elevator of the building in which the Craig car was stored (R. 28). Later, on the same day, accused was seen in South Weymouth, Massachusetts, driving a new sedan with a cream stripe around the body (R. 33,34). At about this date he was seen driving a new, dark colored, two door Oldsmobile sedan, the speedometer of which registered about 90 miles (R. 30,31). He was also observed, on May 6th, in South Boston, driving an Oldsmobile sedan (Ex. 4). On May 9th the car taken from the warehouse was found in a shed on the farm of accused's mother-in-law near Haddam, Connecticut. The ignition switch had been tampered with and had to be replaced (R. 39-41). In the car was found a pawn ticket made out in the name of accused and claimed by him as his property (R. 40,41). The plate bearing the serial number of the car had been removed from under the front seat and was lying on the floor of the car (R. 42). When accused was apprehended by the civil authorities he was dressed in civilian clothes (R. 46). When asked what became of the automobile he stated that "he had brought the automobile back; that he had left the automobile on the street, and a man from the Army took it away" (R. 44).

A Private John Grasso testified as a witness for the defense that he saw accused drunk on the afternoon of May 3, 1929, in the paint room of Section A of the warehouse at the Army Base (R. 49).

Accused, after being advised of his rights as a witness, elected to remain silent at the trial (R. 50).

3. The evidence sufficiently shows that at the time and place alleged in the Specification, Charge I, accused took and carried away the automobile described, of the approximate value alleged. The circumstances under which the car was taken, tampered with, used and stored sufficiently establish the intent to steal. It was charged that the automobile in question was the property of Colonel Henry C. Bonnycastle, Quartermaster Corps, whereas the only proof of title or ownership consisted of the testimony to the effect that the car had been purchased by Lieutenant Colonel Craig, since deceased. It was, however, shown, and found by the court, that the automobile was at the time of the larceny lawfully in the possession of Colonel Bonnycastle and that he had therefore such special property in, or ownership of, it as to justify the finding of larceny from him (Manual for Courts-Martial, page 173; U.S. vs. Barlow, Fed. Case No. 14521; U. S. vs. Jones, 31 Fed. 718; 36 Corpus Juris 860.

The evidence also shows that accused absented himself without leave from his organization at the Army Base, Boston, Massachusetts, on the date alleged in the Specification, Charge II, and remained absent until apprehended at New Britain, Connecticut, about May 13, 1929. The circumstances under which he absented himself sufficiently show that he did not intend to return to the service. Desertion as found was sufficiently established.

4. The charge sheet shows that Michalowski enlisted June 26, 1926, at the age of 22 years, with no prior service.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

(13)

FEB 8 1930

Military Justice
C. M. No. 189745

U N I T E D S T A T E S	)	FIRST DIVISION
	)	
v.	)	Trial by G.C.M., convened at Madison Barracks, New York, December 16, 1929, and January 3, 1930. Confinement at hard labor for five (5) years. Disciplinary Barracks.
	)	
General Prisoner JOSEPH E. MILLERICK.	)	
	)	
	)	

REVIEW by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by WICKLIFFE, Judge Advocate.

---

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

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

Specification: In that General Prisoner Joseph Millerick, did, at Madison Barracks, N.Y., on or about November 17, 1929, with intent to do him bodily harm, commit an assault upon Private Clifford R. Storie, Battery E, 7th Field Arty., a sentinel who was then in the execution of his office, by striking him on the head with a dangerous thing to wit, a club.

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

Specification: In that General Prisoner Joseph Millerick, having been duly placed in confinement at Madison Barracks, N.Y., on or about September 17, 1929, did, at Madison Barracks, N.Y., on or about November 17, 1929, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that General Prisoner Joseph Millerick, did, at Madison Barracks, N.Y., on or about November 17, 1929, feloniously take, steal and carry away one pistol, automatic, caliber .45, of the value of about twenty-six dollars and

thirty-eight cents ($26.38), property of the United States furnished and intended for the military service thereof.

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

Specification: In that General Prisoner Joseph Millerick, did, at Madison Barracks, N.Y., on or about November 17, 1929, desert the service of the United States and did remain absent in desertion until he was apprehended in the town of Hounsfield, County of Jefferson, State of New York, on or about November 17, 1929.

Accused pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved only so much of the sentence as provided for confinement at hard labor for five years, directed its execution and designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement. The sentence was published in G.C.M.O. No. 25, Headquarters First Division, January 13, 1930.

2. The evidence shows that on November 17, 1929 accused was a general prisoner under a suspended sentence of dishonorable discharge at Madison Barracks, New York (R 5-6), and during that afternoon was engaged in police work about the post in custody of Private Clifford R. Storie, a sentinel (R 5, 9). In performing this work accused was using a broomstick with a nail in the end of it for the purpose of picking up paper. At the place where the offenses are alleged to have occurred, the ground was rough and covered with rocks. Private Storie testified that while the accused was so employed, he (Storie) momentarily took his eyes off accused and at that instant Storie was struck on the head by some hard substance and rendered unconscious. At this time there was no one near except accused who had been standing about ten feet away. When Storie regained consciousness accused who was covering Storie with a pistol, said "You are coming with me", and threatened to shoot but when Storie "looked again he was backing away" (R 9, 10). Storie then discovered that his pistol holster was open and that the Government pistol, of the list value of $26.38, which had been issued to him (R 6, 10, 16) for the purpose of guarding accused was missing (R 9-12). The testimony of a medical officer who treated Storie's injuries shows that the wound inflicted indicated that Storie had received a blow from "a rock or a blunt instrument like a club" (R 12).

The evidence further shows that shortly after the assault on Storie he got up and went for help (R 10). A Corporal Versailles and a Private Rogers who were on duty in the vicinity then saw Storie and accused, the latter "running up the embankment" of a stream. Storie "kept looking back over his right shoulder * * *watching this man". He told Versailles and Rogers that accused was a prisoner, whereupon Versailles and Rogers secured the assistance of two other soldiers, stopped an automobile and with it proceeded along a road in pursuit "and dropped the men off here

and there along the road, and we cornered the prisoner" (R 13, 14). Rogers and another soldier having alighted from the car, "went over across the field, and we saw Millerick just coming out from behind some trees", whereupon they went up to him, Versailles and another soldier approaching from a different direction. Accused drew a pistol but threw it down and surrendered (R 15). On returning to the post accused "asked if he hurt the kid much" (R 8).

Accused elected to remain silent before the court.

3. The evidence shows that at the time and place alleged in the Specification, Charge I, an assault was committed upon Private Storie, a sentinel, someone striking him on the head with a blunt instrument with sufficient force to render him temporarily unconscious. In view of the fact that accused was armed with a club with which the wound inflicted might have been caused, the fact that he was the only person aside from Storie in the immediate vicinity and the fact that immediately after the assault he threatened the sentinel with a pistol and thereupon attempted to escape, the court was justified in finding that the assault was committed by accused in the manner alleged and with intent to do bodily harm. The fact that the sentinel's pistol with which he had been armed just before the assault was taken from him during the period in which he was unconscious and that accused was immediately thereafter in the possession of a similar pistol sufficiently justifies the finding of larceny of the weapon under Charge III and its specification. Proof of the list value of the pistol was made but the pistol was not in evidence and no direct proof of its actual value was introduced. Since it had been issued for use in the military service it may be assumed only that it was of some value. Such being the case the maximum authorized confinement which might be imposed for the offense of larceny, is confinement at hard labor for six months (Par. 104c, M.C.M.).

With respect to Charges II and IV and their specifications alleging escape and desertion, respectively, the Board of Review is of the opinion that the evidence shows nothing more than an attempt to escape and an attempt to desert, the attempts being lesser included offenses within those charged. In the discussion of the offense of escape as contained in paragraph 139 b of the Manual for Courts-Martial, it is stated that

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

In this case there was an immediate pursuit resulting in the apprehension of accused before the lapse of any considerable period of time. While it may be implied from the evidence that accused was momentarily lost to the sight of his pursuers, there is nothing to indicate that his whereabouts was unknown or that the pursuit was in any manner shaken off. On the contrary, it appears that the pursuers quickly and effectively placed

themselves in such position that accused's avenues of escape were cut off and that such temporary concealment as accused may have gained did not serve to deceive his pursuers or interfere with their successful plan for his apprehension. This office has heretofore held that similar acts of a prisoner amounted to nothing more than an attempt to escape (C.M. No. 147506, Lawler). If there was not a completed escape it follows that there could not have been a completed absence without leave which constitutes an essential element of the offense of desertion. The acts of accused, however, clearly amounted to overt acts within the law of attempts, and that he intended not only to escape but to desert must be inferred from all the circumstances. The maximum punishment by confinement authorized for the offenses of which accused stands properly convicted under Charges II and IV and their specifications is one year and three months, that is, six months for attempting to escape from confinement and nine months for attempting to desert.

To sum up, the maximum punishment by confinement authorized for the four offenses of which accused stands properly convicted is six years and nine months—five years for the assault, six months for the larceny, six months for attempting to escape and nine months for attempting to desert.

4. The charge sheet shows that accused enlisted October 3, 1928, and that he is 26 years and 8 months of age.

5. The court was legally constituted. Other than as noted above no errors injuriously affecting the substantial rights of the accused were committed during the trial. The record of trial is legally sufficient to support the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Military Justice
C. M. No. 190497

Apr 4, 1930

U N I T E D S T A T E S	PANAMA CANAL DIVISION
v.	Trial by G.C.M., convened at Fort Clayton, Canal Zone, February 11, 1930. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private JOHN SMITH (6042310), 1st Signal Company, Signal Corps, alias Private John Weaver, 5th Infantry.	

HOLDING by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found to be legally sufficient to support the findings of guilty of Charges I and II and their specifications, and the sentence.

2. By Specifications 1 and 2, Charge III, it is alleged that accused on November 16 and on November 21, 1927, respectively, procured himself to be enlisted in the military service by wilfully concealing the fact in each case that he was then "a deserter from the United States Army". The only evidence of such concealments lies in the proof that at the times of his enlistments on November 16 and 21, 1927, he was already in the military service, and that in each case on applying for enlistment he answered in the affirmative when asked whether he had served as an enlisted man in the Army and replied "Army (see affidavit)" in response to questions requiring him to state his last service and date of discharge. Neither of the affidavits referred to in his replies was introduced in evidence. Had it been shown that he had concealed the fact that he was in the military service, it might be inferred that he concealed his status of desertion, as charged. It was not so shown and there is nothing in the declarations signed by accused or elsewhere in the record to show directly, or by inference, that at the time of applying for either of these enlistments accused concealed the fact that he was then absent in desertion. It follows that the evidence is not legally sufficient to show that either of these enlistments was procured by fraud (C. M. No.

185932, Stinner; C. M. No. 186540, Yost; C. M. No. 190368, Clark).

These specifications, moreover, allege offenses of fraudulent enlistment purporting to have been committed more than two years prior to the time of arraignment, February 11, 1930, and no manifest impediment to the bar of the statute of limitations (A.W. 39) appears. The statute could, therefore, have been successfully pleaded in bar of trial for these offenses. It does not appear that accused was in any manner advised by the defense counsel (Par. 45 b, M.C.M.) of his right to plead in bar, and the record shows that the court did not elect so to advise him. It cannot be said, under all the circumstances of the case, that accused intended to or did waive his rights in the premises. Such being the case his trial upon these specifications, in plain violation of the provisions of the 39th Article of War, was erroneous and unauthorized.

3. For the reasons hereinabove stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charges I and II and their specifications and the sentence, but legally insufficient to support the findings of guilty of Charge III and its specifications.

E. C. McCrea, Judge Advocate.

William F. Burns, Judge Advocate.

Richard D. Hoover, Judge Advocate.

1st Indorsement

War Department, J.A.G.O., APR 4 - 1930 - To the Commanding General, Panama Canal Division, Fort Amador, Canal Zone.

1. In the case of Private John Smith (6042310), 1st Signal Company, Signal Corps, alias Private John Weaver, 5th Infantry (C. M. No. 190497), your attention is invited to the foregoing holding by the Board of Review. I concur in the holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty of Charge III and its specifications be vacated. 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 together with the record of trial, which is returned herewith, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this case in this office is 190497. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the said number in brackets at the end of the published order as follows:

(C. M. No. 190497).

E. A. KREGER,
Major General,
The Judge Advocate General.

Incl.
Record of trial.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

(21)

Military Justice
C.M. 191876.

JUN 14 1930

U N I T E D S T A T E S	)	FIRST DIVISION
vs.	)	Trial by G.C.M. convened at Madison Barracks, New York, May 13, 1930. Confinement for five years. Disciplinary Barracks.
General Prisoner DANIEL MILLER.	)	

REVIEW by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

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

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

Specification: In that General Prisoner Daniel Miller, Fort Ontario, New York, having been duly placed in confinement in the guardhouse at Fort Ontario, New York, on or about November 10, 1929, did, at Fort Ontario, New York, on or about February 4, 1930, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that General Prisoner Daniel Miller, Fort Ontario, New York, did at Fort Ontario, New York, on or about February 4, 1930, desert the service of the United States and did remain absent in desertion until he was apprehended by civil authorities at South Russell, New York, on or about March 22nd, 1930.

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

Specification: In that General Prisoner Daniel Miller, Fort Ontario, New York, did at Fort Ontario, New York, on or about February 4, 1930, with intent to do bodily harm, commit an assault upon one Private William C. Carnal, Company I, 28th Infantry, by striking the said Private Carnal on the head with a dangerous instrument, to wit: an improvised blackjack.

Accused pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for eight years and six months. The reviewing authority approved only so much of the sentence as provides for confinement at hard labor for eight years and six months, but reduced the period of confinement to five years, and as thus modified, directed its execution and designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement. The sentence was published in General Court-Martial Order No. 250, Headquarters First Division, May 31, 1930.

2. The evidence shows that accused was confined at Fort Ontario, New York, in November, 1929, serving sentence of a general court-martial, and on February 4, 1930, he was a Class A prisoner working without a guard (R 9). On the evening of February 4th, Private William C. Carnal, Company I, 28th Infantry, was on duty as a sentry, in charge of two prisoners, Albert True and Lawrence Jalbert, who were engaged in cleaning a harness in the stables (R 4-5). About 7.30 P.M. (R 6), while they were thus engaged, accused, whom the sentry "was not watching", entered the stable and assaulted the sentry in that

> "he choked me first with his left arm and tried to take my rifle away from me, and after I fired a shot at him with my rifle which didn't hit him, he hit me with a blackjack." (R 5).

The blow rendered Carnal unconscious. After the sentry became unconscious, accused and Jalbert left the post (R 4-5). During accused's assault on the sentry, Prisoner True endeavored to help the sentry and as he turned to do so, Jalbert struck him over the head with an instrument that resembled a ball (R 7) and he was rendered unconscious for about two minutes (R 8). The blackjack was identified and received in evidence (R 4).

The evidence further shows that accused voluntarily approached and accompanied a civil police officer with the intention of turning in the escaped prisoner Jalbert, as a deserter, and that at that time he himself voluntarily stated to the police officer that he was a deserter (R 10). This was near South Russell, New York (R 12). Accused was thereupon confined, on or about March 22, 1930, and subsequently turned over to the military authorities (R 11).

3. As to Charge I and its specification, alleging escape in violation of the 69th Article of War, the evidence shows that accused left the post at Fort Ontario without authority while a Class A prisoner working without a guard. It follows that at the time of absenting himself he was not under any actual physical restraint and that without such restraint there could not be an escape within the meaning of the 69th Article of War (C.M. 191403, Evans; M.C.M. p. 153-154). It is apparent that the sentry upon whom the assault was made attempted to assume some physical control over accused but it also appears that the sentry's attempt in this direction was not successful. Inasmuch as the sentence is supported by findings of guilty of

other offenses further action with respect to this charge and specification is not necessary.

As to Charge II and its specification, the evidence sufficiently shows accused's absence without leave between the dates alleged. In view of the duration of the absence and the circumstances under which he absented himself the court was fully justified in finding that he intended to desert. The evidence does not, however, show that he was apprehended as alleged and found. On the contrary, it appears that his desertion was terminated by his arrest following his voluntary act in approaching a civil police officer and stating to him that he was a deserter. Accused should be punished for this offense only as for desertion terminated by surrender after an absence of less than sixty days.

With respect to Charge III and its specification, there is ample direct proof that at the time and place alleged accused assaulted Carnal, the sentry, by striking him on the head with an instrument described by witnesses as a blackjack. In view of the nature of the weapon used and the circumstances surrounding the assault there can be no doubt that the assault was committed with intent to do bodily harm as alleged. Inasmuch as the sentry was rendered unconscious by the blow it must be assumed that the instrument used by accused was in fact a dangerous one.

4. Attention is invited to the companion case of Jalbert, C.M. 191875, wherein accused was convicted of offenses similar to those herein charged and arising out of the same transaction. Jalbert was sentenced to dishonorable discharge, suspended, forfeiture of all pay and allowances, and confinement at hard labor for two years only.

5. The charge sheet shows that accused enlisted September 15, 1924, without prior service, and that he is 24 years of age.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the sentence as approved by the reviewing authority.

E. C. Allen Judge Advocate.

_____ Judge Advocate.

Arthur W. Hoover Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 192031.

JUL 8 1930

U N I T E D S T A T E S	)	EIGHTH CORPS AREA
vs.	)	Trial by G.C.M. convened at Fort Huachuca, Arizona, May 26, 1930.
Private First Class MILTON R. ALLEN (R-3631383), Machine Gun Troop, 10th Cavalry.	)	Dishonorable discharge and confinement for fifteen (15) years. Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
McNEIL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BEER, Judge Advocate.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private 1 cl. Milton Allen, Machine Gun Troop, 10th Cavalry, did, at Fort Huachuca, Arizona, on or about March 15, 1930, unlawfully enter the dwelling house of Major W.H.W. Youngs, 10th Cavalry, with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that Private 1 cl. Milton Allen, Machine Gun Troop, 10th Cavalry, did, at Fort Huachuca, Arizona, on or about March 15, 1930, feloniously take, steal, and carry away one bar pin, value about $75.00, the property of Mrs. W.H.W. Youngs; one necklace value about $15.00, one necklace value about $2.00, one ring value about $10.00, one pair cuff links value about $1.00, and one jewelry box, value about $2.00, the property of Miss Elizabeth Virginia Youngs.

Specification 3: In that Private 1 cl. Milton Allen, Machine Gun Troop, 10th Cavalry, did, at Fort Huachuca, Arizona, on or about March 31, 1930, unlawfully enter the Officers' Mess Building at Fort Huachuca, Arizona, with intent to commit a criminal offense, to wit, larceny therein.

Specification 4: In that Private 1 cl. Milton Allen, Machine Gun Troop, 10th Cavalry, did, at Fort Huachuca, Arizona, on or about March 31, 1930, feloniously take, steal and carry away three pairs of silk drawers, value about $3.00, one white dress shirt, value about $1.50, and three handkerchiefs, value about $0.15, the property of Private Robert H. Johnson, Troop E, 10th Cavalry.

Specification 5: In that Private 1 cl. Milton Allen, Machine Gun Troop, 10th Cavalry, did, at Fort Huachuca, Arizona, on or about April 22, 1930, in the night time feloniously and burglariously break and enter the dwelling house of Captain Carey E. Goodwyn, Quartermaster Corps, with intent to commit a felony, to wit, larceny therein.

Specification 6: In that Private 1 cl. Milton Allen, Machine Gun Troop, 10th Cavalry, did, at Fort Huachuca, Arizona, on or about April 22, 1930, feloniously take, steal and carry away one watch, value about $16.00, the property of Mrs. Mattie Stampley.

Accused pleaded not guilty to, and was found guilty of, the charge and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for fifteen years, three-fourths of the members of the court present at the time the sentence was adjudged concurring. The reviewing authority approved the sentence, designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

2. The evidence shows that on March 15, 1930, between the hours of 6 P.M. and about 10:20 P.M., Major William H. W. Youngs, 10th Cavalry, and his family were absent from the quarters of that officer at Fort Huachuca, Arizona. Major Youngs himself took the precaution to see that all doors and windows were closed, though not locked, when they left the house, as the weather was cold and windy with rain in prospect. No one was left in the house other than the cook, Clara Bracy, who lived in a building outside but had access to the house at all times (R. 41-42,38). Upon returning to the house, Major Youngs' daughter, Miss Elizabeth Virginia Youngs, discovered that a jewelry box with

its contents, among other things, a pair of West Point cuff links, value about $1, a ring, value about $10, a necklace, value about $15, and a necklace, value about $2, all belonging to Miss Youngs, were missing from her room. The jewelry box was of a value of about $2. A bar pin, value about $75, belonging to Mrs. Youngs was also missing from Mrs. Youngs' room (R. 37,41). No one had permission to remove these articles and the accused had no authority to enter the house of Major Youngs (R. 36-38,43). Clara Bracy, the cook, testified that at about fifteen minutes to eight on the evening of March 15, 1930, she noticed that the lights were on in Major Youngs' quarters. Upon entering the house she heard a noise as if someone were moving around, followed by the slamming of the front door, but made no investigation at the time as she thought it was a member of the family (R. 43-45). (Specifications 1 and 2.)

Private Robert H. Johnson, Troop E, 10th Cavalry, a cook at the officers' mess, Fort Huachuca, Arizona, testified that upon returning to his room in the officers' mess building on the night of March 31, 1930, he found that the room had been entered during his absence and, among other things, six pairs of silk drawers, for which he had paid about $7.50, a civilian shirt, for which he had paid about $2.50, and some handkerchiefs, for which he had paid about 5 cents each, had been taken therefrom. No one had permission to take any of this clothing. There were screen doors on the building which were kept closed at all times (R. 21-26). (Specifications 3 and 4.)

Mrs. Mattie B. Stampley, employed as maid at Captain C. E. Goodwyn's quarters, Fort Huachuca, Arizona, testified that she went out a few minutes after eleven on the night of April 22-23, 1930. Upon reentering the house a few minutes later she noticed that a shade and window curtain in her room had been "knocked down" and saw a man standing by a window. Thinking it was her husband, she called to him, but he made no response. She then ran to the door and looked out in time to see a man jump through the window and run "across the valley". Upon looking to see if anything had been taken she found that her watch, which had cost $16.75, was gone. About ten minutes later accused came and scratched on the window and said "What is the matter, what is going on here, looks like you had a robbery". The quarters were locked when witness left that night, the lights were out, except in the bathroom, and the windows were closed. Upon her return the windows of her room were open and the light was burning (R. 45-48). Mrs. Stampley's testimony as to the condition of the window shade and curtains was corroborated by Captain Goodwyn (R. 49-52). He also testified that during the night he heard a noise as of someone opening a tight window or ripping off the screen.

On April 23, 1930, accused's quarters at Fort Huachuca, a servant's room of Captain R. C. Gibbs' house, were searched, and Johnson's shirt and missing handkerchiefs were found therein (R. 21). In the shirt was the pair of West Point cuff links belonging to Miss Youngs (R. 8,37). Accused was not then present but was located, brought back to his room in arrest and directed to open his foot locker. Johnson's drawers (R. 8,21), Mrs. Youngs' bar pin, and Miss Youngs' jewelry box, ring and necklaces were found therein (R. 9,37,41). Upon searching the person of accused a gold watch, identified as the property of Mrs. Stampley, was found in his pocket (R. 8,47). After accused had been sent to the guardhouse, a bunch of keys was taken from his possession (R. 7-17). By the testimony of a competent expert witness it was established that this bunch of keys included two skeleton keys capable of opening any ordinary house door (R. 52-55).

Major H. L. Connor, Medical Corps, Post Surgeon at Fort Huachuca, Arizona, testified for the prosecution that as a result of a recent examination he had found accused normal mentally (R. 56-57).

The defense introduced no witnesses and accused, upon being advised of his rights as a witness, elected to remain silent.

3. The commission of the offenses of which accused was convicted is sufficiently established by the evidence summarized above. While there is no direct evidence of the unlawful entry by accused of the premises described in Specifications 1 and 3, or of the unlawful breaking and entering described in Specification 5, the corpus delicti in each case was proven as was the fact that articles unlawfully removed from these premises were shortly thereafter found in the possession of accused. The possession of the fruits of crime, recently after its commission, justifies the inference that such possession is guilty possession, and though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence (Wilson v. U.S., 162 U.S. 613,619; See, also, C.M. 157982, Acosta).

4. The charge sheet shows accused enlisted July 25, 1929, with prior service in "338th Serv. Bn, 7/17/18 to 7/21/19; Co. I, 25th Inf. 7/22/19 to 7/21/20; Co. C, 25th Inf. 7/22/20 to 7/21/23; Co. A, 24th Inf. Tr C 10th Cav. 7/23/23 to 7/24/26; Tr C & MG Tr. 10th Cav. 7/25/26 to 7/24/29". He was 36 years and 7 months of age at the time of the commission of the offenses.

b. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 192319.

AUG 19 1930

U N I T E D S T A T E S	)	FOURTH CORPS AREA.
	)	
vs.	)	Trial by G.C.M. convened at Fort Oglethorpe, Georgia, June 26, 1930.
	)	
General Prisoner GORDON LINDSAY.	)	Confinement for five (5) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by FRANKLIN, Judge Advocate.

1. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that General Prisoner Gordon Lindsay did, at Fort Oglethorpe, Georgia, on or about May 16, 1930, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with a person unknown.

Accused pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved only so much of the sentence as provides for forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record for action under Article of War 50½.

2. The evidence shows that on the evening of May 16, 1930 accused, who was in confinement at the post guard house, Fort Oglethorpe, Georgia, was seen by Garrison Prisoner Dee Calloway, Service Company, 29th Infantry, and Private James F. Miller, Troop B, 6th Cavalry, other prisoners, in the act of committing sodomy by mouth with an unidentified man (R. 5-8). Concerning this act both of the eye witnesses stated, in substance, that having previously been told that accused was in a solitary cell where he probably would commit sodomy, they went to this cell and by observing through a small

crack in the wall saw accused, whose face they could clearly discern, with the penis of an unknown man in his mouth, this man's body being only visible from his chest to his knees (R. 5, 7). Miller testified that it was Prisoner Barnett who told him and Calloway that accused was in the cell (R. 7, 15); and Calloway testified that he did not know who it was that gave the information, though witness thought the person was of about the same size as Barnett (R. 11). Both witnesses observed accused for several minutes during which time there was no conversation, and each believed that accused was committing the act voluntarily (R. 11-17, 58). Accused, when asked, after the event, "why did he do such a thing" replied "to cultivate his voice." (R. 6, 15).

During the course of an investigation of the offense accused, after being warned of his rights, stated in substance that on the day in question, after being threatened and struck several times, he was forced by Barnett, a fellow prisoner, to commit sodomy first by accused's mouth and then by his rectum (R. 10-11).

General Prisoner Lee Barnett testified that on the night in question he did not tell Calloway or Miller anything about accused; and did not commit sodomy with accused (R. 17-19).

Accused after being advised of his rights as a witness in his own behalf elected to remain silent (R. 11).

3. There has been forwarded to this office and attached to the record of trial proceedings of a Board of Medical Officers, appointed by the reviewing authority subsequent to the trial of accused, which contain findings that accused is now sane and was sane at the time of the commission of the offense, but that he is a constitutional psychopath (liar and homosexual). The Board recommended his discharge under Section VIII, A.R. 615-360.

4. The evidence including the positive testimony of two eye witnesses, shows that at the time and place alleged accused committed sodomy with an unknown person, as charged, by taking into his mouth the penis of the unknown man.

5. The specification fails to allege the particular manner in which the offense charged was committed, but the evidence shows that it was committed per os with a man. No objection to the specification was made and since the evidence supplies the omitted facts as to the manner in which the offense was committed, the defect in the specification did not injuriously affect accused's substantial rights (C.M. 187221, Sumrall; C.M. 186139, Kelly).

6. Though accused, in his statement prior to trial said that it was Barnett with whom the offense of sodomy was committed, it fairly appears, on the whole record, that the identity of this person was not known and was not susceptible of satisfactory proof. It was, therefore, proper to charge that the offense was committed with a person unknown, and the court was

justified in so finding. The present case is to be distinguished from C.M. 157842, Greening and C.M. 191369, Selusky, in which the name of the co-offender was pleaded but not proved though in fact known. In the present case all known facts as to time, place and persons were in substance alleged and were proved. The circumstance that the name of the cooffender was not known does not affect the legality of the conviction (See C.M. 192192, Robstock).

7. The charge sheet shows that accused enlisted on a date not shown, with no prior service, and that he was 30 years of age at the time of the commission of the offense.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of sodomy, recognized as an offense of a civil nature and so punishable by confinement in a penitentiary for more than one year by Section 910 of the Code of the District of Columbia.

W. A. Trumbull Judge Advocate.

William F. Barnes Judge Advocate.

Herbert A. Hoover Judge Advocate.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 192409.

Aug 14, 1930

U N I T E D S T A T E S	)	PANAMA CANAL DIVISION
vs.	)	Trial by G.C.M. convened at Fort Davis, Canal Zone, June 4, 1930. Dishonorable discharge and confinement for five (5) years. Penitentiary.
Private JAMES E. WILSON (6685193), Company C, 14th Infantry.	)	

HOLDING by the BOARD OF REVIEW
TURNBULL, BURNS and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by BEER, Judge Advocate.

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

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

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

Specification: In that Private James E. Wilson, Company C, 14th Infantry, did, at Fort Davis, Canal Zone, on or about April 22, 1930, attempt to desert the service of the United States, by assaulting and escaping from sentinel placed over him, with the intent to remain permanently absent from his proper station.

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

Specification: In that Private James E. Wilson, Company C, 14th Infantry, having been duly placed in confinement in the 14th Infantry guardhouse, on or about March 17, 1930, did, at Fort Davis, Canal Zone, on or about April 22, 1930, escape from said confinement before he was set at liberty by proper authority.

Charge III: Violation of the 93rd Article of War.

Specification 1: In that Private James E. Wilson, Company C, 14th Infantry, did, at Fort Davis, Canal Zone, on or about April 22, 1930, with intent to do him bodily harm, commit an assault upon Private Horace Fields, Company E, 14th Infantry, a sentinel in the execution of his duty, by throw-

ing a cup of hot coffee in his face.

Specification 2: In that Private James E. Wilson, Company C, 14th Infantry, did, at Fort Davis, Canal Zone, on or about April 22, 1930, with intent to commit a felony, viz., kill, commit an assault upon 1st Sergeant Stanley Mikowski, Company E, 14th Infantry, by willfully and feloniously shooting at the said 1st Sergeant Mikowski with a rifle.

Specification 3: In that Private James E. Wilson, Company C, 14th Infantry, did, at Fort Davis, Canal Zone, on or about April 22, 1930, with intent to commit a felony, viz., kill, commit an assault upon Sergeant Thomas Y. Wright, Company E, 14th Infantry, by willfully and feloniously shooting at the said Sergeant Thomas Y. Wright, with a rifle.

Specification 4: In that Private James E. Wilson, Company C, 14th Infantry, did, at Fort Davis, Canal Zone, on or about April 22, 1930, with intent to commit a felony, viz., kill, commit an assault upon Private William Jeavons, Company E, 14th Infantry, by willfully and feloniously shooting at the said Private William Jeavons, with a rifle.

Specification 5: (Not Guilty).

He pleaded not guilty to the charges and specifications and was found guilty of the charges and all specifications except specification 5, Charge III, of which he was found not guilty. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years. The reviewing authority approved the sentence, reduced the period of confinement to five years, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence shows that on April 22, 1930, while Private 1st Class Horace D. Fields, Company E, 14th Infantry, was a member of the guard at Fort Davis, Canal Zone, on duty as sentinel in charge of two prisoners, of whom accused was one, the prisoners being at breakfast in the kitchen of Company C, 14th Infantry, accused threw a cup of hot coffee in the face of Fields and, together with the other prisoner, leaped upon Fields and tried to gain possession of his rifle. In the scuffle which ensued Fields, who was temporarily blinded by the hot coffee, dropped his rifle. About this time he received a blow in the face which stunned him and when he came to his senses accused and the other prisoner were in the Bolivar Highway, accused having possession of the rifle (R.15, 16, 23, 24). The rifle was loaded with four cartridges, three of which were in the magazine and one in the chamber (R.17). Fields started in pursuit but accused fired a shot "towards him", and Fields then ran back and called the guard (R. 16).

A group of soldiers, including First Sergeant Stanley Mikowski, Sergeant Thomas Y. Wright, Private William Jeavons, and Private Flanery, all of Company E, 14th Infantry, having heard the alarm, went in pursuit of the prisoners (R. 11, 26, Ex. A). After they had proceeded for some distance, and were from 50 to 150 yards from the prisoners (R. 13, 27, Pros. Ex. A), accused turned about and fired the rifle directly at the men of the group, the bullet striking near them. Mikowski testified that it "passed close to my hat" (R. 11, 12, 28, Pros. Ex. A). Wright testified that accused fired directly "at us" (Pros. Ex. A). Just before the shot was fired Jeavons told Mikowski to "hit the ground" and that the prisoners were firing at him (R. 11, 26). After this shot the prisoners started on and when the pursuers had followed for about 50 yards accused again turned and fired, the bullet striking near the group (R. 26, Pros. Ex. A). Jeavons testified with respect to this shot that he heard accused's companion tell accused to shoot Jeavons, and that witness thereupon sprang behind a building as accused raised his rifle and pointed it at him, the bullet striking nearby, in front of Flanery (R. 26, 27). After the second shot the prisoners passed over a knoll, and shortly afterward Wright, at a range of 250 or 300 yards fired upon and wounded accused, who fell and was then captured along with the other prisoner (R. 26, Pros. Ex. A). The entire transaction from the throwing of the coffee to the recapture of the accused occupied about fifteen minutes, and except for the time when he ran to call the Guard Private Fields, the sentinel, was, during this fifteen minute period, in pursuit of accused (R. 20).

The accused, who was sworn as a witness in his own behalf, admitted his attempt to escape and the firing of the shots, not, he asserted, with the intention of hitting any one but solely for the purpose of intimidation (R. 29-30). The first shot was "more or less by accident" (R. 30). He was pointing the rifle at no one in particular but, "As I swung around, the rifle went off and went off in such a manner that it was in no way possible to hit anything or any one on the surface" (R. 30). He testified that-

> "The reason the second time the rifle was fired was because after the first shot was fired-after that one that went off from my swinging round-I fired the second shot because I didn't want the people who were behind me to actually think that I was firing at them, but at the same time I fired the rifle I knew that they would hesitate in following me." (R. 30-31).

Accused testified further that the prisoner with him told him to shoot, and that both knew he meant to fire in the air as they had made an agreement that morning not to injure any one (R. 31); that he had never before fired a rifle like the one in his possession at the time and that when he pointed it up in the air "knew it wasn't going to hit anywhere" (R. 31a).

It was shown that accused had in 1929 made a mark at target practice of 303 with the rifle, a mark but 2 points less than the requirement for "expert" (Def. Ex. A).

4. The deposition of Sergeant Wright as it appears in evidence as Exhibit A, is not duly authenticated in that the day of the month on which it was taken and sworn to does not appear, but since the defense participated in taking the deposition by submitting cross interrogatories, and at the trial stated that it had no objection to its introduction in evidence, it must be assumed that there was a waiver of the defect and of any possible objection on account of it (Par. 119, M.C.M.).

5. The evidence shows that at the time and place alleged in the Specifications under Charges I and II, and Specification 1, Charge III, accused and another prisoner, while in confinement and under the charge of Fields, the sentinel, assaulted Fields by throwing hot coffee in his face, and in the confusion and struggle which followed, gained possession of the sentinel's rifle, drove him back temporarily by firing in his direction, and ran away. An immediate and close pursuit followed, and as alleged in Specifications 2, 3, and 4, Charge III, accused, in the course of this pursuit, assaulted the pursuers, including Mikowski, Wright and Jeavons, by firing at them with the rifle. The firing caused the pursuers to take cover at times and it fairly appears that accused may have been out of sight of some of his pursuers momentarily, for he passed over a knoll and had gained not less than a hundred yards in distance when stopped by Wright's shot, and captured.

From these facts there can be no doubt of accused's intent to desert. His conduct in assaulting the sentinel and in running away, was, under the circumstances, clearly an overt act within the law of attempts. The evidence is legally sufficient to support the findings of guilty of an attempt to desert, in violation of the 58th Article of War, as found under Charge I and its specification.

In the opinion of the Board of Review, the evidence does not, however, show a completed escape, as found under Charge II and its specification. The following language of the Board in its holding in the similar case of Millerick (C.M. 189745), is appropriate here:

> "there was an immediate pursuit resulting in the apprehension of accused before the lapse of any considerable period of time. While it may be implied from the evidence that accused was momentarily lost to the sight of his pursuers, there is nothing to indicate that his whereabouts was unknown or that the pursuit was in any manner shaken off. On the contrary, it appears that the pursuers quickly and effectively placed themselves in such position that accused's avenues of escape were cut off and that such temporary concealment as accused may have gained did not serve to deceive his pursuers or interfere with their successful plan for his apprehension."

Though there was not, under the circumstances, an escape in this case within the definition of that offense as it appears in paragraph 139b, of the Manual for Courts-Martial, the evidence shows what amounts to an overt act

in furtherance of an unquestioned purpose to escape, and, therefore, an attempt to escape, a lesser offense included in escape, punishable under the 96th Article of War.

As to the assault alleged in Specification 1, Charge III, the circumstances surrounding and following it, together with the nature of the means employed and the fact that Fields was temporarily blinded, sufficiently show that the hot coffee was thrown with intent to do bodily harm, as charged and as found by the court.

With respect to the assaults alleged in Specifications 2, 3 and 4, Charge III, accused testified, in effect, that he did not aim at or fire upon the persons named in the specifications, but fired the rifle for the purpose of intimidation and not intending that the bullets should strike the pursuers. The evidence shows, however, that the shots were fired by accused while facing his pursuers and while they were relatively near him, and that the bullets struck in the immediate vicinity of the pursuers. These, together with the other circumstances in evidence were sufficient to justify the court in finding that the shots were in fact fired at Mikowski, Wright and Jeavons with intent to injure or kill them. In view of the nature of the weapon used, a service rifle, and the circumstances under which the shots were fired the intent feloniously to kill must be inferred. Had the shots struck and killed any of the victims of the assaults, murder would, no doubt, have been the result. The evidence is legally sufficient to support the findings of guilty. These specifications are, perhaps defective, inasmuch as each alleges an assault with intent to commit a "felony, viz., kill", without alleging the degree of the unlawful homicide intended, that is whether murder or voluntary manslaughter. However, no objection was made to the specifications, they were clearly sufficient to apprise accused that it was intended to charge assaults with intent to murder, and the evidence shows that such intent existed. This being the case the defect, if such it was, was immaterial and was cured by the proof. These three specifications allege offenses arising out of the same transaction and resulting from the same two shots. It fairly appears, however, that a distinct and separate assault was committed as to each man fired upon, for the evidence indicates that the shots were fired by accused at his pursuers as a group and with the purpose of striking any one of them.

6. The charge sheet shows that accused enlisted December 29, 1928 with approximately three years prior service and that he was 26 years and 4 months of age at the time of the commission of his offenses.

7. For the reasons hereinabove stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its specification and of Charge III and specifications 1, 2, 3 and 4 thereunder, and the sentence; but legally sufficient to support only so much of the findings of guilty of Charge II and its specification as involves findings of guilty of attempting, at the time and place alleged, to escape from confinement before set at liberty by proper authority, in violation of the 96th Article of War. Confinement in a penitentiary

is authorized by the 42nd Article of War for the offenses of felonious assault alleged in specifications 2, 3 and 4, Charge III, recognized as offenses of a civil nature and so punishable by confinement for more than one year by Section 276 of the Federal Penal Code.

W. A. Trumbull Judge Advocate.

William L. Burns Judge Advocate.

Herbert W. Hoover Judge Advocate.

Military Justice
C.M. 192409.

1st Ind.
AUG 14 1930

War Department, J.A.G.O., - To the Commanding General, Panama Canal Division, Fort Amador, Canal Zone.

1. In the case of Private James E. Wilson (6685193), Company C, 14th Infantry (C.M. No. 192409), 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 of Charge II and its specification as involves findings of guilty of attempting, at the time and place alleged, to escape from confinement before set at liberty by proper authority, in violation of the 96th Article of War, be approved. Under the provisions of Article of War 50½, you will then have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial which is returned herewith, they should be accompanied by the foregoing holding and this indorsement. The file number of the record of this case in this office is 192409. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place that number in brackets at the end of the published order, as follows:

(J.A.G.O. No. 192409).

E.A. Kreger,
Major General,
The Judge Advocate General.

1 Incl.-record of trial.

WAR DEPARTMENT
In The Office Of The Judge Advocate General
Washington.

Military Justice
C.M. 192790.

SEP 30 1930

U N I T E D S T A T E S vs. Privates HARRY ROSS (6812708) and JOHN G. WHITAKER (6373131), both of 31st Hospital Company, 11th Medical Regiment.	HAWAIIAN DIVISION Trial by G.C.M. convened at Schofield Barracks, T.H., July 25 and August 8, 1930. Dishonorable discharge, suspended and confinement for three (3) years in case of Ross. Dishonorable discharge, suspended, and confinement for five (5) years in case of Whitaker. Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
McNEIL, CLINE and HOOVER, Judge Advocates
ORIGINAL EXAMINATION by DINSMORE, Judge Advocate.

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1. Accused Privates John H. Whitaker and Harry Ross, both of 31st Hospital Company, 11th Medical Regiment, were jointly tried on the following charge and specifications:

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

Specification 1: In that Private John G. Whitaker, 31st Hospital Company, 11th Medical Regiment, and Private Harry Ross, 31st Hospital Company, 11th Medical Regiment, acting jointly and in pursuance of a common intent, did, at Honolulu, T.H., on or about May 7, 1930, unlawfully enter the dwelling of Mr. Gaylord P. Wilcox, 2535 Nuuanu Avenue, Honolulu, T.H., with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that Private John G. Whitaker, 31st Hospital Company, 11th Medical Regiment, and Private Harry Ross, 31st Hospital Company, 11th Medical Regiment, acting jointly, and in pursuance of a common intent, did, at Honolulu, T.H., on or about May 7, 1930, feloniously take, steal, and carry away, one (1) silver cigarette case, value about fifty ($50.00)

dollars, and one (1) platinum wrist watch, value three hundred ($300.00) dollars, total value about three hundred and fifty ($350.00) dollars, the property of Mrs. Gaylord P. Wilcox, 2535 Manoa Avenue, Honolulu, T.H.

Specification 3: In that Private John G. Whitaker, 31st Hospital Company, 11th Medical Regiment, and Private Harry Ross, 31st Hospital Company, 11th Medical Regiment, acting jointly, and in pursuance of a common intent, did, at Honolulu, T.H., on or about May 7, 1930, feloniously take, steal, and carry away, one (1) platinum diamond ladies Gruen wrist watch No. 148802 C.S. 10681, 17 jewel, 73 diamonds, value three thousand ($3000.00) dollars; one (1) platinum diamond bracelet with forty (40) diamonds, single row, flexible, value one thousand five hundred ($1500.00) dollars; one (1) platinum animal bracelet ox blood pig charm with eighteen (18) diamond figure thirteen (13) charm with fourteen (14) diamonds, one (1) rabbit ruby eyes fifteen (15) diamonds, one cat twenty (20) diamonds, one (1) horse ruby eyes fifteen (15) diamonds, value four hundred ($400.00) dollars; one (1) star sapphire ring surrounded by forty diamonds set in platinum, value four hundred and thirty-five ($435.00) dollars; one (1) gold and platinum ring with three pearls surrounded by twenty diamonds, value three hundred ($300.00) dollars; one (1) platinum sapphire ring, value two hundred ($200.00) dollars; one (1) platinum diamond necklace with twenty-seven (27) diamonds, value about one thousand two hundred and fifty ($1250.00) dollars; one (1) gold and platinum pearl and diamond brooch, value about two hundred ($200.00) dollars; one pearl necklace with pearl and diamond pendant set in platinum and gold, value about seven hundred and fifty ($750.00) dollars; one (1) platinum wrist watch set with four (4) diamonds, value two hundred and fifty ($250.00) dollars; one (1) gold class ring "Hitchcock Military Academy, class 1927", value forty ($40.00) dollars; one (1) gold seal ring, crown crest agate stone, value thirty-five ($35.00) dollars; one (1) gold and onyx man's ring, value thirty-five ($35.00) dollars; one (1) silver and onyx man's ring crest bursting star two cross battleaxe, value twenty ($20.00) dollars; one (1) gold seal ring, bloodstone with crest, value thirty-five ($35.00) dollars; one (1) platinum wedding ring, embossed, value fifty ($50.00) dollars; one (1)

gold setting, value five ($5.00) dollars; one (1) pair imitation pearl earrings, value two dollars ($2.50) and fifty cents; one (1) pearl and gold clasp, value twenty-five ($25.00) dollars; one (1) novelty bar pin three (3) horses, 14K, value twenty-five ($25.00) dollars; one (1) frat pin engraved on back "Christian L. Ecklon", AT '29, value twenty-five ($25.00) dollars; one (1) frat pin, Phi Kappa Alpha, value seventy-five ($75.00) dollars; one (1) frat pin with safety guard, 14K, value one hundred ($100.00) dollars; one (1) gold plated and laquer jewel box, value fifty ($50.00) dollars; one (1) agate and gold jewel box 1 inch square, value ten ($10.00) dollars; one (1) change purse containing one (1) nickle and ten (10) pennies, value sixty-five ($0.65) cents; total value about eight thousand eight hundred eighteen dollars ($8818.15) and fifteen cents, the property of Miss Alice Wilcox, 2535 Nuuanu Avenue, Honolulu, T.H.

Specification 4: In that Private John G. Whitaker, 31st Hospital Company, 11th Medical Regiment, and Private Harry Ross, 31st Hospital Company, 11th Medical Regiment, acting jointly, and in pursuance of a common intent, did,at Honolulu, T.H., on or about May 7, 1930, feloniously take, steal, and carry away, one (1) Luz Swiss make silver wrist stop watch with leather strap, value sixty ($60.00) dollars; three (3) pairs of shoes, value thirty-five ($35.00) dollars; two (2) pairs of white flannel trousers, value forty ($40.00) dollars; one (1) black suit, value eighty-five ($85.00) dollars; two (2) light grey woolen suits, value one hundred and fifty ($150.00) dollars; three (3) dress shirts, value four dollars ($4.50) and fifty cents; four (4) undershirts, value two ($2.00) dollars; seven (7) pairs of drawers, value fourteen ($14.00) dollars; twenty-three (23) neckties, value thirty-four dollars ($34.50) and fifty cents; four (4) pairs of silk socks, value three ($3.00) dollars; six (6) handkerchiefs, value one ($1.00) dollar; one grey cap, value two dollars ($2.50) and fifty cents; one (1) black suit case, value fifteen ($15.00) dollars; total value about four hundred and forty-six ($446.50) dollars and fifty cents, the property of Mr. Albert Wilcox, 2535 Nuuanu Avenue, Honolulu, T.H.

and accused John G. Whitaker was tried on the following Additional Charges and specifications:

ADDITIONAL CHARGES:

CHARGE I: Violation of the 58th Article of War. (Not Guilty).

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

Specification: In that Private John G. Whitaker, 51st Hospital Company, 11th Medical Regiment, Schofield Barracks, T.H., having been duly placed in confinement in the Prison Ward, Station Hospital, Schofield Barracks, T.H., on or about May 10, 1930, did, at Schofield Barracks, T.H., on or about 4.00 A.M., July 16, 1930, escape from said confinement before he was set at liberty by proper authority.

Each accused pleaded not guilty to the Original Charge and its Specifications. Whitaker pleaded not guilty to Additional Charge I and its Specification, and guilty to Additional Charge II and its Specification. Whitaker was found not guilty of Additional Charge I and its Specification and guilty of Additional Charge II and its Specification, and each was found guilty of the remaining charges and specifications except as to Specification 3 of the Original Charge, of which each was found guilty

> "except the words and figures 'forty ($40.00) dollars' following the words and figures 'one (1) gold class ring, Hitchcock Military Academy, class 1927,' substituting therefor the words and figures 'five ($5.00) dollars'; and except the words and figures 'fifty ($50.00) dollars', following the words and figures 'one (1) platinum wedding ring, embossed,' substituting therefor the words and figures 'two dollars ($2.00) and fifty cents'; and excepting the words and figures 'total value about eight thousand eight hundred eighteen dollars ($8818.15) and fifteen cents', substituting therefor the words and figures 'total value about eight thousand seven hundred thirty-five dollars ($8735.65) and sixty-five cents'; of the excepted words and figures NOT GUILTY, of the substituted words and figures GUILTY."

Evidence of one previous conviction of Whitaker by summary court-martial for being drunk and disorderly and one previous conviction of Ross by special court-martial for absence without leave and breach of arrest, was introduced. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Whitaker for 12 years and Ross for 3 years. The reviewing authority approved the sentences, reduced the period of confinement in Whitaker's case to 5 years, suspended the dishonorable discharge in each case, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz,

California, as the place of confinement. The sentences were published in General Court-Martial Order No. 77, Headquarters Hawaiian Division, August 23, 1930.

2. The evidence shows that the two accused were absent without leave from their organization on May 7, 1930 (R. 13). At about 1.15 P.M. on May 7th Mr. Gaylor P. Wilcox left his residence at 2535 Nuuanu Avenue, Honolulu, T.H. and noticed at the time that two men were sitting on a stone wall directly across the street from the entrance to the house (R. 15). Wilcox and his wife returned to the house at about 5.30 P.M., noted that "things had been ransacked" and discovered that there were missing from the house (R. 16)

Article	Value
a silver cigarette case	$50.00
a platinum wrist watch	300.00

property of Mrs. Gaylor P. Wilcox (R. 26) (Specification 2, Original Charge);

Article	Value	
a diamond and platinum wrist watch	$3000.00	
a platinum and diamond bracelet	1500.00	
a platinum animal bracelet	400.00	
a star sapphire ring with diamonds	435.00	
a gold and platinum ring with pearls and diamonds	300.00	
a platinum sapphire ring	200.00	
a platinum necklace with diamonds	1250.00	
a gold and platinum diamond brooch	200.00	
a pearl necklace with pearl and diamond in platinum	750.00	
a platinum wrist watch	250.00	(R. 16, 26, 27)
a gold class ring	5.00	(R. 24)
a gold seal ring	35.00	
a gold and onyx man's ring	35.00	
a silver ring	20.00	
a gold seal ring	35.00	
a wedding ring	2.00	
a gold setting	5.00	
a pair of imitation pearl ear rings	2.50	
a pearl and gold clasp	25.00	

a novelty bar pin	$25.00
a fraternity pin	25.00
a fraternity pin	75.00
a fraternity pin with safety guard	100.00
a gold and lacquer jewel box	50.00
an agate and gold jewel box	10.00
a small purse containing a small amount of money,	.50

all the property of Miss Alice Wilcox (R. 16, 26 and 27) (Specification 3, Original Charge), and

Article	Value
3 pairs of shoes	$35.00
2 pairs of flannel pants	40.00
a black suit	85.00
2 gray woolen suits	150.00
3 dress shirts	4.50
4 undershirts	2.00
7 underdrawers	14.00
23 neckties	34.50
4 pairs of silk socks	3.00
6 handkerchiefs	1.00
1 gray cap	2.50
a black suitcase	15.00

the property of Albert Wilcox (R. 21) (Specification 4, Original Charge).

Most of the jewelry had been taken from Miss Alice Wilcox's bed room and the clothes had been taken from Albert Wilcox's room (R. 17). Mr. Gaylord P. Wilcox testified to the values of the articles as above set forth, stating that he had personal knowledge of some of the values but that the values of most of the things as given had been taken from appraisals by an insurance company (R. 24, 25). On May 8th accused left two suit cases in a restaurant in Honolulu (R. 39). During the day the two were apprehended in a pawn shop in Honolulu while showing a clerk a platinum watch (R. 33). After accused had been taken to the police station the police went to the restaurant and obtained the suit cases which contained much of the stolen jewelry and clothing (R. 32, 34). Later on the same day Wilcox saw accused at the police station and there identified all of the stolen articles. At that time each of the men was wearing a pair of the stolen

shoes. In Wilcox's presence Whitaker stated that all of the articles described had been taken from Wilcox's house (R. 17).

Still later on the day of May 8th each accused made a separate statement to police officers at Honolulu to the effect that the two accused had entered the house together and had taken a quantity of jewelry and clothing therefrom (R. 40-43, 45-48). Whitaker stated that they entered the house at about 11.30 A.M. on May 7th (R. 40), and Ross stated that they entered during the afternoon (R. 46). Whitaker stated that he did not believe that Ross would have entered the house if he (Whitaker) "had not started it" (R. 41), and that "I picked it all myself-Ross did not have anything to do with the picking of the stuff" (R. 41). He further stated that plans to enter the house had been made while the two were walking about the streets (R. 42) and that they happened to be sitting across from Wilcox's house when the latter left (R.43). Ross stated that "both of us schemed" on entering the house (R. 47) and that "we both picked" up the jewelry (R. 46). Whitaker stated that he had been smoking opium (R. 42-43) and Ross stated that the two had been drinking "paragoric" and that both had smoked "marrianna" (R. 48). A police officer testified that the statements of accused were voluntary and that no force, duress, threats or promises were used to induce them (R. 39, 34). After the confessions to the civil police had been made each accused, on the same day, after having been warned that they need not make statements and that whatever they might say could be used against them, made a separate statement to an officer of the Army (R. 52, 60). These statements were similar in substance to those previously made to the civil police. Among other things accused reiterated their addiction to the use of opium and stated that prior to entering the building they had been drinking paregoric (R. 54-57, 61-64).

Major Earl D. Quinnell, Medical Corps, testified that on May 10, 1930, Whitaker was admitted to the Tripler General Hospital and that on this occasion witness examined him to determine the possibility of drug addiction (R. 94). Witness found no evidence that Whitaker was under the influence of opium or was a confirmed opium user (R. 95). Witness testified that paregoric contains a small amount of opium and that if used in sufficient quantity by a drug addict "would steady him if nervous." If used by a normal person the only effect would be to make him somewhat drowsy (R. 95, 96). He also testified that the drug "marianna" (marihuana) usually produces for a time "a feeling of hilarity somewhat like alcohol" followed by sleep for a few hours, after which the effects disappear, but that some few individuals are

affected with "a sort of mania and want to smash things in general and act like wild men; then go to sleep." (R. 96). Witness also testified that opium contains a certain amount of morphine and that the smoking of it produces some of the effects of morphine (R. 99). One who is a habitual user of opium would get excited and nervous and be subject to vomiting, stomach pains, nose bleading and diarrhea if deprived of it for a considerable period. Whitaker had exhibited none of these symptoms while being observed in the hospital (R. 100).

Second Lieutenant L.Q. McComas, 21st Infantry, testified that he saw both accused two or three hours after their arrest by the civil police on May 8th and that at this time they appeared to be sober and normal mentally (R. 102). (Original Charge and its Specifications).

The evidence further shows that Whitaker was confined in the prison ward of the station hospital at Schofield Barracks on July 15, 1930 and that during the night of July 15-16 effected his escape from the ward, apparently by passing through a broken screen on a porch (R. 67-69). The wardmaster testified that accused was present at midnight but had disappeared at about 6.00 o'clock on the following morning (R. 68). Whitaker was apprehended by a civil police officer at "Wahiawa court house", late on the night of July 16th (R. 70-73). (Additional Charge II and its Specification).

3. Staff Sergeant Roy L. Bachus, 11th Medical Regiment, testified that he had observed Whitaker to some extent for a period of seven or eight months and that in so far as witness knew Whitaker had been honest and had borne a reputation of honesty (R. 74). Corporal Frank N. Smith, 31st Hospital Company, testified that he had known Whitaker for about four or five months and that the reputation of both Whitaker and Ross with respect to honesty was good (R. 79).

Private Ernest F. Gunnoe, 31st Hospital Company, testified that he was with the two accused in Honolulu on May 3, 1930 and that at that time they drank "oke and beer" (R. 82). Witness left them on May 4th and at that time accused had consumed six or eight bottles of paregoric (R. 80). When witness left them "they acted foolish like they didn't care what they said or did". (R. 82). Another soldier testified that he saw Whitaker in Honolulu on "June" 3rd and that the latter "didn't act like himself" (R. 86).

4. The evidence, including the confessions of accused, shows that at the time and place alleged in the specifications under

the original charge, the two accused together entered the dwelling house of Mr. Gaylord P. Wilcox and that while therein they took and carried away the articles described in Specifications 2, 3 and 4, of the approximate values found by the court, the property of the persons alleged. The circumstances leave no doubt that the entry was made with intent to steal. The essential elements of the offenses of housebreaking and larceny are fully established. Since the taking of the various articles described in Specifications 2, 3 and 4 amounted substantially to but one transaction the larceny should have been charged in a single specification (Par. 149g, M.C.M.).

The evidence, together with the pleas of guilty, also shows that at the time and place alleged in the Specification, Additional Charge II, Whitaker escaped from confinement as charged.

5. The charge sheet shows that Whitaker is 25 years of age and that he enlisted November 6, 1929 without prior service; and that Ross is 19 years of age and that he enlisted August 27, 1929 without prior service. At the trial Ross stated to the court that his correct age was 17 years (R. 105).

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentences.

E. C. McNeil Judge Advocate.

Walter D. Cline Judge Advocate.

Hubert D. Hoover Judge Advocate.

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

Military Justice
C. M. 192823

SEP 23 1930

U N I T E D S T A T E S	SIXTH CORPS AREA
vs.	Trial by G.C.M., convened at Jefferson Barracks, Missouri, August 9, 1930. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.
Private CHARLES C. RAWLINS (6802049), Company G, 6th Infantry.	

REVIEW by the BOARD OF REVIEW
McNEIL, CLINE and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by DINSMORE, Judge Advocate.

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

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

Specification: In that Private Charles C. Rawlins, Company G, 6th Infantry, did at Jefferson Barracks, Missouri, on or about the 3rd day of May, 1930, desert the service of the United States and did remain absent in desertion until he was apprehended at St. Louis, Missouri, on or about the 7th day of July, 1930.

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

Specification: In that Private Charles C. Rawlins, Company G, 6th Infantry, did at St. Louis, Missouri, on or about July 7, 1930, feloniously

take, steal and carry away one Buick automobile, sedan, model 1926, value about Five Hundred Dollars ($500.00), the property of Mr. Charles M. Stewart, 2606 St. Vincent Ave., St. Louis, Missouri.

Accused pleaded not guilty to, and was found guilty of, the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Governors Island, New York, as the place of confinement, and forwarded the record for action under Article of War 50½.

2. The evidence shows that accused absented himself without leave from his organization, Company G, 6th Infantry, at Jefferson Barracks, Missouri, on May 3, 1930 (Ex. 1). About April 15, 1930, a complaint that accused had failed to make monthly payments on the purchase from a civilian concern of an overcoat had been made to accused's company commander, and that officer talked to accused about the debt, whereupon the latter promised to resume payments on May 1st (R. 7). About April 26, 1930, accused had been required to take special instruction in rolling his pack, whereupon he had become somewhat angered and had stated to a noncommissioned officer that "This is the last God-damn time I'll roll a pack" and that he intended to go away (R. 9,10).

At sometime during his absence accused secured employment at the Chase Hotel in St. Louis, Missouri (R. 11,30). During the day of July 7, 1930, he telephoned to Private Milan Church of his company, and Church as a result went to a room occupied by accused in St. Louis. At about 5 P.M. that day accused went to work at the hotel but at about 11 P.M. or midnight met Church on the street (R. 11), the two having planned to "go see a girl on Park Avenue" (R. 12). They walked together for about a block(R. 11) whereupon accused told Church to wait for him on the street corner, said no more, and left. Church continued walking along the street and very shortly thereafter accused drove up in a Buick sedan automobile (R. 12). This automobile was the property of Mr. Charles M. Stewart and was of the value of about $500. Stewart had left the car parked in front of his residence

at 2606 St. Vincent Avenue, at about 10:30 that night. He did not miss it until the police notified him about 1 or 2 o'clock on the following morning that it was at the police station (R. 19,20). When accused drove up in the car, Church entered it and accused

> "turned left off Jefferson and went around three sides of one block, across Jefferson avenue again and went one block and turned left again and went about fifty feet and the detectives blew the siren on their car and he stopped the car and jumped out while it was still going." (R. 12,13.)

In driving the car accused reached "a pretty good rate of speed". (R. 13). Church saw the police car following and asked accused if he had stolen the automobile, but accused did not make any reply(R. 17,18). At the time accused jumped from the car it was going at a speed of about 15 miles an hour. He ran between some houses and was not again seen in the vicinity. The police car ran alongside, whereupon Church stopped the Buick (R. 13,23). The police officer who pursued accused and Church testified that he saw Church enter the Buick car hurriedly and that this aroused his suspicion and caused him to follow; that as he followed, the Buick car gained speed continually until it pulled over to the curb and stopped. This witness did not see accused leave the car (R. 22,23). Church was placed in arrest and taken to the police station (R. 14,24). There he told where accused roomed and the police officers went to the address given, and found accused in bed. Accused gave his name correctly but at first denied knowledge of the automobile episode (R. 24). Later, however, on the way to the police station, he stated that he "got tired of waiting for a street car and thought I would get a machine to go home in" (R. 25). He stated also that he intended to abandon the car near where he lived and then go to his home (R. 27). At the police station, upon being questioned, accused stated that he was a member of the Army and had been absent for about three months (R. 27). Church testified that he saw accused three times during the latter's absence from his organization and that on one occasion accused said that he intended to return to his organization but did not state when he intended to do so (R. 16).

Accused testified that at no time during his absence did he intend to remain away permanently (R. 29,30). He left his organization because he was worried on account of his father's financial distress, the latter having been injured and having no one to care for him. While employed at the hotel accused earned $40 a month in addition to his board and tips running from $3 to $5 a day, and intended to send money home but did not do so (R. 32,33). On the night of July 7th, after meeting Church, it was too late "to go to see the girls" and a light rain was falling. He "got tired of waiting for a street car. One car passed * * * and we had to wait something like an hour for another car." At this juncture, while on the street, accused saw the Buick automobile. He had driven this type of car before, and knew that there were no keys or switches on it, so he "told Church to wait a minute and we would drive home." Church did not respond but accused walked across the street and entered the machine (R. 30). The car was not locked and accused drove along the street until Church was overtaken. After the latter entered the car nothing was said until they had driven for a little distance, whereupon Church remarked that a car was following. After driving further and making some turns, accused heard the "detectives' siren" blow, whereupon accused attempted to stop. He thought that he had succeeded in stopping before he jumped from the car. He ran between the houses and went to his room (R. 31). He did not have any plans when he took the car other than to ride in it to the vicinity of his home which was about 40 blocks away. He intended to abandon the car nearby, thinking that the police would find it and return it to the owner (R. 32).

3. The evidence sufficiently shows that at the time and place alleged in the Specification, Charge I, accused absented himself without leave and remained absent until apprehended at St. Louis, Missouri, on July 7, 1930, following the automobile episode. The circumstances under which accused absented himself, together with the duration of his absence, were sufficient to justify the conclusion of the court that accused intended to desert.

The evidence also shows that on the night of July 7, 1930, accused wrongfully took and drove away from its parking place the automobile belonging to the civilian, Stewart, of the approximate value alleged. Intent on the part of accused to deprive the owner permanently of his property was sufficiently established by the circumstances under which the car was taken, the

fact that he drove rapidly from the scene of the taking, the fact that he sought to elude the police, the fact that when overtaken he jumped hurriedly from the car and ran away, and the fact that, upon arrest, he denied knowledge of the transaction. Accused testified that he intended to use the car only temporarily, but in view of all the circumstances in evidence the court was justified in rejecting this testimony as untrue.

4. The charge sheet shows that accused is about 20 years of age, and that he enlisted July 15, 1929, for three years, without prior service.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence.

E. C. McNeil, Judge Advocate.

Walter D. Ames, Judge Advocate.

Robert H. Moore, Judge Advocate.

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

Military Justice
C. M. 192973.

DEC 12 1930

U N I T E D S T A T E S	)	FIRST DIVISION
	)	
v.	)	Trial by G. C. M., convened at
	)	Plattsburg Barracks, New York,
Private MELVIN N. SMITH	)	July 15, August 5-9, 1930.
(6684368), Quartermaster	)	Dishonorable discharge and con-
Corps.	)	finement for five (5) years.
	)	Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW -
McNEIL, CONNOR and MOFFETT, Judge Advocates.
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Melvin N. Smith, Detachment Quartermaster Corps, did, at Plattsburg Barracks, N. Y., on or about April 15, 1930, present for approval a claim against the United States, by presenting to Lieut. Colonel William E. Murray, an officer of the United States, duly authorized to approve such claims, a voucher in the amount of $88.40, for services alleged to have been rendered to the United States by one John Leroy, as carpenter, which claim was false and fraudulent, in that the said John Leroy had in fact performed no such services, and was then known by the said Private Melvin N. Smith to be false and fraudulent.

Specification 2: In that Private Melvin N. Smith, Detachment Quartermaster Corps, did, at Plattsburg Barracks, N. Y., on or about

April 15, 1930, present for approval a claim against the United States, by presenting to Lieut. Colonel William E. Murray, an officer of the United States, duly authorized to approve such claims, a voucher in the amount of $88.40, for services alleged to have been rendered to the United States by one Fred Moras, as carpenter, which claim was false and fraudulent, in that the said Fred Moras had in fact performed no such services, and then was known by the said Private Melvin N. Smith to be false and fraudulent.

Specification 3: In that Private Melvin N. Smith, Detachment Quartermaster Corps, did, at Plattsburg Barracks, N. Y., on or about April 15, 1930, present for approval a claim against the United States, by presenting to Lieut. Colonel William E. Murray, an officer of the United States, duly authorized to approve such claims, a voucher in the amount of $88.40, for services alleged to have been rendered to the United States by one Charles Moras, as carpenter, which claim was false and fraudulent, in that the said Charles Moras had in fact performed no such services, and was then known by the said Private Melvin N. Smith to be false and fraudulent.

Specification 4: In that Private Melvin N. Smith, Detachment Quartermaster Corps, did, at Plattsburg Barracks, N. Y., on or about April 15, 1930, present for approval a claim against the United States, by presenting to Lieut. Colonel William E. Murray, an officer of the United States, duly authorized to approve such claims, a voucher in the amount of $88.40, for services alleged to have been rendered to the United States by one Fred Garrow, as carpenter, which claim was false and fraudulent, in that the said Fred Garrow had in fact performed no such services, and then was known by the said Private Melvin N. Smith to be false and fraudulent.

Specification 5: In that Private Melvin N. Smith, Detachment Quartermaster Corps, did, at Plattsburg Barracks, N. Y., on or about April 16, 1930, present for payment a claim against the United States, by presenting to Captain M. H. Flint, Finance Department, an officer of the United States, duly authorized to pay such claims, a voucher in the amount of $88.40 for services alleged to have been rendered to the United States by one John Leroy, as carpenter, which claim was false and fraudulent, in that the said John Leroy had in fact performed no such services, and was then known by the said Private Melvin N. Smith to be false and fraudulent.

Specification 6: In that Private Melvin N. Smith, Detachment Quartermaster Corps, did, at Plattsburg Barracks, N. Y., on or about April 16, 1930, present for payment a claim against the United States, by presenting to Captain M. H. Flint, Finance Department, an officer of the United States, duly authorized to pay such claims, a voucher in the amount of $88.40 for services alleged to have been rendered to the United States by one Fred Moras, as carpenter, which claim was false and fraudulent, in that the said Fred Moras had in fact performed no such services, and was then known by the said Private Melvin N. Smith to be false and fraudulent.

Specification 7: In that Private Melvin N. Smith, Detachment Quartermaster Corps, did, at Plattsburg Barracks, N. Y., on or about April 16, 1930, present for payment a claim against the United States, by presenting to Captain M. H. Flint, Finance Department, an officer of the United States, duly authorized to pay such claims, a voucher in the amount of $88.40 for services alleged to have been rendered to the United States by one Charles Moras, as carpenter, which claim was false and fraudulent, in that the said Charles Moras had in fact performed no such services, and was then known by the said Private Melvin N. Smith to be false and fraudulent.

Specification 8: In that Private Melvin N. Smith, Detachment Quartermaster Corps, did, at Plattsburg Barracks, N. Y., on or about April 16, 1930, present for payment a claim against the United States, by presenting to Captain M. H. Flint, Finance Department, an officer of the United States, duly authorized to pay such claims, a voucher in the amount of $88.40 for services alleged to have been rendered to the United States by one Fred Garrow, as carpenter, which claim was false and fraudulent, in that the said Fred Garrow had in fact performed no such services, and was then known by the said Private Melvin N. Smith to be false and fraudulent.

Specification 9: (Finding of not guilty)

Specification 10: (Finding of not guilty)

Specification 11: (Finding of not guilty)

Specification 12: (Finding of not guilty)

Specification 13: (Stricken prior to trial)

Specification 14: (Finding of not guilty)

Specification 15: (Disapproved by reviewing authority)

Specification 16: (Stricken prior to trial)

Specification 17: (Finding of not guilty)

Specification 18: (Finding of not guilty)

Specification 19: (Nolle Prosequi)

He pleaded not guilty to the Charge and all specifications and was found guilty of the Charge and Specifications 1, 2, 3, 4, 5, 6, 7, 8 and 15, and not guilty of the remaining specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority disapproved the finding of guilty of Specification 15, approved the sentence, designated the Atlantic Branch, United States Disciplinary Barracks, Fort Jay, New York, as the place of confinement, and forwarded the record pursuant to the provisions of Article of War 50½.

2. As to the approved findings of guilty, the evidence shows that on April 15, 1930, and for about four years prior thereto, accused was on duty in the fiscal branch of the Post Quartermaster's office, Plattsburg Barracks, New York (R. 15). A warrant officer, a civilian, and a Private Fancher worked in the same office with accused during the period January to April 15, 1930 (R. 27). One of accused's duties was the preparation of pay rolls and vouchers for the payment of civilian employees (R. 15) in the execution of which he obtained the necessary data for the preparation of vouchers covering the pay of civilian employees employed on barracks and quarters from W. E. Field, Superintendent of Construction. Field personally kept and was the custodian of the time book (Ex. H), in which was entered the names of carpenters employed and the hours each worked. No other authorized record containing this information was kept on the post. Carpenters were employed by either Field or Fred Rabideau, post carpenter, for a given number of days. Field then entered the name of each man in his time book and kept his time until the man was discharged. Accused had nothing to do with the employment of carpenters. After they were employed their names were given accused in order that he might prepare pay vouchers for them at the proper time according to data supplied by Field (R. 16,43,45,60). There was no prescribed or customary method of making use for voucher purposes of the data contained in the time book kept by Field (R. 51,52), who, however, periodically supplied the accused such data, in person or by memoranda (R. 45,46,49,144). The blank forms used by accused in preparing pay roll vouchers came in pads, which were kept in a cabinet in accused's office. The blanks were not numbered (R. 31). They were available to anyone in the office (R. 32), and

several persons in the Quartermaster's office knew how to make out pay vouchers. Private Fancher was being trained to succeed accused, and one of his duties was to assist in making out vouchers (R. 37). Blank forms for vouchers were also kept in the office of the Post Finance Officer and were available to anyone in that office (R. 96).

After vouchers for the payment of civilian employees were prepared they were usually submitted by accused to (R. 24) Lieutenant Colonel William E. Murray, Post Quartermaster for approval. After Colonel Murray signed them they would ordinarily go to accused for delivery to the payees (R. 24.41). Fifteen or twenty such vouchers were usually approved monthly. They were submitted on the 15th and last day of each month (R. 28). On or about April 15, 1930, accused submitted to Colonel Murray for approval four vouchers for pay of civilian employees, each for the period April 1 to 15, 1930, and drawn in favor of Fred Garrow (Ex. A), Fred Moras (Ex. B), John Leroy (Ex. C), and Charles Moras (Ex. D). Each of the four vouchers called for the payment of $88.40, for carpenter labor performed between April 1 and 15, 1930. Colonel Murray is of the opinion that two of the vouchers were submitted on April 15th and two on the 16th. The four were approved by Colonel Murray as is attested by his signature thereon (R. 17,18,19). When the last two were submitted, Colonel Murray asked accused if they were correct and if he had compared them with the time book. Accused replied in the affirmative, and it was on the strength of this statement that the vouchers were signed. After signature they were returned to accused by Colonel Murray (R. 20,21,22).

On or about April 15, 1930, accused delivered to Sergeant Berrios, Chief Clerk and Cashier in the office of the Post Finance Office, Plattsburg Barracks, about ten vouchers, all for the pay of civilian employees. Included in these vouchers were Exhibits A,B,C and D (R. 82,103,156). Sergeant Berrios was authorized by the Finance Officer, Plattsburg Barracks, to receive such vouchers for payment and to pay money due on them (R. 68,83,92). His attention was attracted to the four vouchers in question at the time they were presented because of the fact that the cash receipts on the vouchers were then signed. Berrios, at the time the vouchers were delivered to him, asked accused when the payees would call for their pay, and accused replied that some would be in that afternoon but that others would not appear until the next day (R. 83,84). On or about April 15th, the four vouchers, Exhibits A,B,C and D, in the natural course of business came to Captain Maxton H. Flint,

Finance Officer, Plattsburg Barracks, for payment (R. 68). The following day accused again appeared at the Finance Office and was again asked by Berrios when the payees on Exhibits A,B,C and D would draw their pay. Accused replied by asking if they had not yet drawn it (R. 83,156). On the same day Captain Flint "asked" accused "about the civilians" and accused said, "the men had been there at noontime and the office was closed and they had to go back to work" (R. 155,156). Between April 15th and 18th accused entered Captain Flint's office and asked the officer if he could obtain the money due on one of the vouchers then unpaid if he obtained a receipt from the payee for cash payment. He was answered in the negative. Captain Flint is unable to say which of the vouchers was referred to at the time or as to what vouchers were then unpaid, but Sergeant Berrios is certain that at the time Exhibits A,B,C and D were the only unpaid vouchers in the Finance Office (R. 70-73,89,155,157). No carpenters by the names of Fred Garrow, Fred Moras, John Leroy or Charles Moras were ever employed or worked at any time at Plattsburg Barracks, and there is no record of such residents in the town of Plattsburg. The time book (Ex. H) kept by Mr. Field shows only three carpenters by the names of Fred Garrett, William Mayette, and Harry Rabideau, as working on the post between April 1 and 15, 1930. The data contained in Exhibits A,B,C and D were not supplied by Field (R. 20,45,58,61,66,67).

John Meurice and Fred Beaudet, civilian laborers, testified in substance that on or about April 18th, in Plattsburg, Private Edward Fancher, a clerk in the fiscal branch of the Quartermaster's office at Plattsburg Barracks, approached them and inquired if they wanted work. When they replied in the affirmative, Fancher brought them to the post. After their arrival at a certain gate on the post, Fancher instructed them to wait while he crossed the road. After Fancher crossed the road a man in uniform appeared and instructed them to follow him to the office. This man was identified by Beaudet as the accused, but Meurice, who had previously known accused, testified that the man was neither the accused nor Fancher. On the way to the office the man told them that "everything is fixed" and "there is nothing to be done, they will give you an envelope and you will pass them to me and there is $10.00 apiece for you." Neither Meurice nor Beaudet represented themselves to either of the men as Charles or Fred Moras. Upon arrival at the office they were asked to sign their names but as neither could write nothing further occurred (R. 133-135,137, 138,140).

As to this incident, the testimony of Private Fancher shows that on or about April 18th, at the direction of accused, Fancher took two men named Moras who "were supposed to have performed duties on this post for which pay was due them" to the Finance Office (R. 107). Accused told Fancher that "the two Moras men were expected at the post on that day and that if they came to the office that I was to take them over and I was to identify them as the two Moras men." Fancher did not know the men, but accused said they would be in front of post headquarters. When Fancher arrived in front of post headquarters two men came to him and said they were the "Moras men," and talked of drawing pay for labor that they had performed on the post (R. 108). Fancher took the men to post headquarters and left them standing on the porch while he entered the office and told accused the two men were there to draw their pay. Accused did not see the men but told Fancher to take them to the Finance Office. Fancher followed these directions and reported to Sergeant Berrios that the two Moras men were there to draw their pay. He knew them as the "Moras men" only because of what they said, and because he had been told that "the two Moras men were expected up there to draw their pay." They were not paid (R. 109) because when Sergeant Berrios asked them to sign receipts they both claimed that they could neither read nor write. Fancher then took the men back to the Quartermaster's office and reported to the accused what had happened at the Finance Office, but accused said nothing. Fancher had no agreement with accused whereby he was to receive any money as the result of this transaction (R. 111).

Sergeant Berrios among other things testified in substance that when Meurice and Beaudet were brought to the Finance Office by Fancher he, Sergeant Berrios, produced the Fred and Charles Moras vouchers (Exhibits B and D) and asked the two civilians to sign a cash receipt which he had prepared (R. 87). Such receipts are always prepared when the receipt on the bottom of the voucher is not signed in the presence of the paying officer or clerk (R. 96). Sergeant Berrios asked, "Who is Fred", and Fancher replied, "This is Fred" (R. 87). The men did not sign the receipts because they said they couldn't write, and when asked why they had signed their names before and couldn't sign now, replied that "they had signed no vouchers and knew nothing about it." Accordingly they were not paid, and together with Fancher they left the Finance Office (R. 88,99). No carpenters were ever paid at the Finance Office until they were identified by accused, Field, or Rabideau. According to Captain Flint's

testimony this duty was usually performed by accused (R. 69,70), and Sergeant Berrios has never known it to be performed by anyone else. Prior to April 18th, Fancher had never identified carpenters at the Finance Office (R. 86,112). No money was paid by the Finance Office on the Fred and Charles Moras vouchers (R. 76), and no attempt was made by anyone to collect on the Fred Garrow and John Leroy vouchers (R. 52).

During the month of November, 1929 (R. 122), Harry E. Rabideau, a carpenter (R. 121), worked six days on the post of Plattsburg Barracks (R. 122,123), but on November 12th he was given a Government check (Ex. G) by accused for $68.00 (R. 123), which represented pay for ten days labor. At the time accused handed him the check Rabideau knew that he was being overpaid (R. 126), and accused said, "Here's the balance of the crating money. I got it all for you. Take it and say nothing" (R. 122). Prior to the receipt of this money Rabideau signed a blank voucher which was brought to him by accused (R. 123). No part of the proceeds of this check was given to accused nor has Rabideau ever given him anything else of value (R. 129).

Accused, being sworn as a witness in his own behalf, testified in substance as follows: He has been in the service five years, during all of which time he was on duty in the office of the Quartermaster, Plattsburg Barracks (R. 160). One of his duties was the preparation of pay vouchers (R. 161), with the assistance of Private Fancher since about January, 1930 (R. 162). In preparing such vouchers for carpenters he obtained the data from Mr. Field who either personally delivered memoranda containing the same or if accused was not in his office left the memoranda on accused's desk (R. 161). Field and Rabideau were his only sources of information in preparing vouchers for carpenters (R. 164). Field delivered his data at intervals of from two to three days and if he was on leave he waited until his return to present it (R. 168). It was necessary for all such vouchers to go to the Quartermaster for approval and accused, as well as others, took them to the Quartermaster for this purpose. After approval the vouchers sometimes came back to accused and other times to the Chief Clerk or to any other person who had taken them in for approval. When vouchers were returned to accused, after approval, he would send them to the Finance Officer or put them in the basket to be taken over by a messenger (R. 161,162). Accused did not prepare the vouchers, Exhibits A,B,C and D (R. 163). He prepared some vouchers on April 14th and 15th, but

can only recall vouchers for Fred Garrett and William Mayette. He knows no persons by the names of Fred Garrow, Fred Moras, John Leroy or Charles Moras. He prepared no vouchers which were not based on data submitted to him (R. 164). The only time book was kept by Field (R. 165) and accused did not feel that he had any right to inspect it or to use it to check against vouchers. For this purpose he used only the data supplied him (R. 166). To the best of his knowledge he did not present the vouchers, Exhibits A,B,C and D, to Colonel Murray for approval, although it is possible that he took them to the Colonel along with other papers. If such was the case it was done with no intention of defrauding the Government (R. 165). He presented no vouchers to Colonel Murray on April 16th (R. 169). Accused delivered some vouchers to Sergeant Berrios at the Finance Office on April 15th, but he did not know how many. At that time he told Sergeant Berrios that the payees were then working but would come to the Finance Office later (R. 167). Accused did not tell Captain Flint that one of the payees named on Exhibits A,B,C and D would be in later to get his pay. He remembers a conversation with Captain Flint on April 16th (R. 169), in which he stated that William Mayette would be in later for his pay. He remembers no conversation on that date with Sergeant Berrios (R. 170). Accused does not "recall" having entered into any agreement with Fancher to procure men to collect money on pay vouchers, nor has he ever obtained money directly or indirectly from the Finance Office as a result of any agreement with Fancher. Accused knows the witness Meurice because of the latter having worked on the post at one time, but he had never seen the witness Beaudet prior to the investigation of this case. He had no conversation with either relative to their coming to the post to collect money (R. 173), nor did he see either Meurice or Beaudet on April 18th. He did not know that they were on the post. He "recalls" no conversation with Fancher that morning relative to men coming to collect pay (R. 174). The time book (Ex. H) shows that Harry Rabideau worked eight days during the month of November, 1929 (R. 172). Accused did not deliver the check, Exhibit G, to Rabideau and he received no money from that check, nor has Rabideau ever given him any other money or thing of value (R. 171,178).

Accused is married and is the father of one child (R. 160). Recently his pay has been $46.50 per month, plus ration money (R. 194). Between November, 1929, and April, 1930, he received $75.00 from an uncle (R. 182). At one time in the past he had a boarder in his home. The income from this source was

used to meet family expenses (R. 195). He had an automobile for which he agreed to pay $200 in addition to a car which he turned in to the dealer. On April 18th, a balance of approximately $100 remained unpaid on the car (R. 181). The payments on his car were made in monthly installments of about $20.00 (R. 195). He paid from $10.00 to $15.00 per month on the furniture in his home. Accused's commissary bill amounted to $12.00 to $15.00 a month, and rent from $18.00 to $20.00 per month, plus about $5.00 a month for fuel (R. 195). His automobile and furniture were repossessed by the owners shortly after accused was confined for the reason that he was several months in arrears in his payments (R. 196).

3. It was thus shown by the evidence that at the times and places alleged in Specifications 1 to 8 inclusive of the Charge, accused, as a clerk in the Quartermaster's office at Plattsburg Barracks was, among other things, charged with the duty of preparing and presenting to the Quartermaster for approval and to the Finance Officer, for payment, vouchers covering the pay of civilian carpenters employed on the post. At that time four false Government vouchers, each in the sum of $88.40, for labor as carpenter from April 1 to 15, 1930, and payable to Fred Garrow, Fred Moras, John Leroy, and Charles Moras, were presented by accused to Lieutenant Colonel William E. Murray for that officer's approval. After obtaining Colonel Murray's approval of each of the vouchers, as evidenced by his signature thereon, accused presented them for payment to Captain Maxton H. Flint, Finance Officer, Plattsburg Barracks, by delivering the vouchers to Sergeant Jose R. Berrios, Chief Clerk and Cashier to the Finance Officer, one authorized to receive for payment vouchers of this nature. The evidence further shows that during the period covered by the vouchers no such persons as those named performed the labor alleged in the vouchers as the basis of claims for money due from the Government. Accused at the time of presentation of at least two of these vouchers to Colonel Murray assured that officer of their correctness. When they were delivered to Sergeant Berrios for transmission to the Finance Officer accused stated that the payees would be in later to draw their pay, and the following day made statements to Captain Flint which left no doubt as to his knowledge of the existence of the false vouchers. His subsequent action in endeavoring to collect on two of the vouchers by having his assistant, Fancher, present at the Finance Office Maurice and Beaudet as Charles and Fred Moras, payees named in two of the false vouchers, clearly manifests accused's fraudu-

lent intent in connection with the vouchers. As further evidence of accused's intent in presenting these vouchers for approval and payment resort may be had to the evidence showing accused's wrongful overpayment on November 12, 1929, with Government funds, of the witness Rabideau. Criminal intent and guilty knowledge being issues involved in the offenses charged against accused, his prior acts of a similar nature are admissible evidence against him under the provisions of paragraph 112 b, Manual for Courts-Martial. The fact that he was found not guilty of a specification, the basis of which was the wrongful overpayment to Rabideau, does not preclude the use of the evidence offered in support of that specification, to sustain the other specifications and charge (C.M. 157982,Acosta).

While there is no direct evidence of record showing Lieutenant Colonel Murray's authority to approve the fraudulent vouchers or Captain Flint's authority to pay them, such are facts of which the court might properly take judicial notice. There is also ample circumstantial evidence of record justifying the inference that both Lieutenant Colonel Murray and Captain Flint were clothed with all the authority alleged in the specifications and charge.

The evidence as a whole substantiates accused's guilt, as found by the court and as approved by the reviewing authority, of Specifications 1 to 8 inclusive and the charge. Motive, opportunity and fraudulent intent to commit the offenses charged are apparent throughout the record. The presentation by accused for approval and payment of the vouchers in question is conduct violative of the provisions of the 94th Article of War.

4. The defense objected to the testimony of Sergeant Berrios relative to Fancher bringing Meurice and Beaudet to the Finance Office, and as to the conversation that occurred between the four at that time on the grounds that such testimony was irrelevant, incompetent and immaterial, and on the further ground that the conversation constituted hearsay evidence not binding on accused (R. 86,87). The evidence of record fully justifies the inference that Fancher, Meurice and Beaudet were at the time either agents, accomplices or co-conspirators of accused. In either event, their actions and statements were binding on accused and admissible in evidence against him (Paragraph 114 c, M.C.M.; Wharton's Criminal Evidence, pp. 1429, 140, 1712, 1430, 1434). The objection was properly overruled.

Over accused's objection the court erroneously permitted Lieutenant Colonel Murray to testify that the vouchers in ques-

tion were false (R. 38). Sergeant Berrios was also permitted to testify over accused's objection that from a statement made by accused he "judged" that accused knew the payees named on the vouchers. Lieutenant Colonel Murray's testimony as to the falsity of the vouchers constituted nothing more than a conclusion or statement of opinion on the part of the witness. (Paragraph 112 b, M.C.M.; C.M. 159208, Wolberg). This, as the chief issue in the case, was a question for the court, and not the witness. (C.M. 159208, Wolberg). The testimony of Sergeant Berrios as to the impression made upon him by certain statements of accused was likewise inadmissible in evidence and should have been excluded, but neither this error nor the preceding one can be said to have adversely affected the substantial rights of accused within the meaning of Article of War 50½.

5. The charge sheet shows that accused enlisted July 13, 1928, with prior service in the Quartermaster Corps from July 13, 1925, to July 12, 1928, from which enlistment he was discharged as Private First Class with character excellent. He was 22 years of age at the time of the commission of the offenses.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

Military Justice
CM 193449

NOV 12 1930

U N I T E D S T A T E S	EIGHTH CORPS AREA
vs.	Trial by G.C.M., convened at Fort Huachuca, Arizona, October 7, 1930. Dishonorable discharge, suspended, and five (5) years' confinement. Disciplinary Barracks.
Private ELMETT JOHNSON (6278655), Company I, 25th Infantry.	

REVIEW by the BOARD OF REVIEW
McNEIL, CONNOR, and HOOVER, Judge Advocates.
ORIGINAL EXAMINATION by DINSMORE, Judge Advocate.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Emmett Johnson, Company I, 25th Infantry, did, at Garden Canyon, Arizona, on or about August 29, 1930, with intent to do him bodily harm, commit an assault upon Corporal Charles Hamilton, Headquarters Troop, 10th Cavalry, by stabbing him in the right chest, with a dangerous weapon to wit, a knife.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction for being disorderly in quarters was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, directed its execution, but suspended the dishonorable discharge, and designated the Pacific Branch, United States Disciplinary Barracks, Alcatraz, California, as the place of confinement. The sentence was published in General Court-Martial Order No. 611, Headquarters, Eighth Corps Area, October 28, 1930.

2. The evidence shows that on the night of August 29, 1930, Corporal Charles Hamilton, Headquarters Troop, 10th Cavalry, entered a small house at Garden Canyon, Arizona, for the purpose of making what he described in his testimony as a "friendly visit" on a woman who, he believed, was a prostitute (R.4,5,7,9). One witness testified that she knew this woman as the wife of accused, but this and another witness also testified that they had seen men other than accused enter her house (R.11,12,14). Upon entering, Hamilton found accused in bed with the woman. After some conversation between the three accused arose, dressed and left the room, whereupon the woman solicited Hamilton to have intercourse with her. Hamilton said he had no money, but, the woman's solicitations continuing, he removed his leggins and shoes. He then sat down on the bed and a little later said that he had "changed" his mind. An argument arose and the woman ran from the room taking one of Hamilton's shoes with her. She returned in about 15 or 20 minutes and said to Hamilton that she had hidden the shoe and would not allow him to leave "until you pay me." At about this time accused came into the room, called Corporal Hamilton "bad names," threatened to kill him and struck him several times with his fists. The woman closed the entrance door, seized Hamilton by the arm, shook him and repeatedly demanded "you pay me." While this was going on accused said "Wait a minute, I will fix him," began to "fumble with something," and then returned to the encounter. Hamilton then "made a lunge" at accused, and turned about and as he turned "felt a knife" in his side. He then ran away (R.5), and later that night was taken to the hospital at Fort Huachuca (R.19).

Shortly after the stabbing accused stated to two women of the neighborhood that he had cut Hamilton with a knife which he exhibited, and that he had tried to kill him. The knife had blood on it and accused called attention to the blood (R.11,14). Accused was arrested a short time thereafter and the knife, one with a long blade, fairly dull, was taken from him (R.11,14,17). On the end of that "knife, or for about half an inch" (R.17) was blood stain (R.17,19). Hamilton was treated by a medical officer for a "stab wound" in the right chest. The medical officer testified that the wound "might have been" an extremely serious one and might have produced death (R.20).

Accused elected to remain silent (R.21).

3. It was thus shown by the evidence that at the time and place alleged accused committed an assault upon Corporal Hamilton, by stabbing him in the right chest with a knife, obviously a dangerous weapon. In view of the circumstances surrounding the event, including the nature of the weapon and accused's statements both before and after the stabbing, the court was justified in finding that the assault was committed with intent to do bodily harm, as charged.

4. Accused re-enlisted on March 25, 1930, and had completed over seven years' service at the time of the commission of the offense. His age at that time was 24 years and 10 months. He had twice been honorably discharged.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record of trial is legally sufficient to support the findings and sentence.

E. C. McCoy, Judge Advocate.

Jas. M. Connor, Judge Advocate.

Herbert W. Hoover, Judge Advocate.

WAR DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

WASHINGTON

Military Justice
CM-193666

JAN 3 - 1931

U N I T E D S T A T E S)	HAWAIIAN DIVISION
)	
vs.)	Trial by G.C.M., convend at
)	Schofield Barracks, Territory
Private ANGELO G. PARIS)	of Hawaii, October 13, 1930.
(6696308), Headquarters)	Dishonorable discharge and ten
Battery, 11th Field)	(10) years' confinement.
Artillery.)	Penitentiary.

REVIEW by the BOARD OF REVIEW,
McNEIL, CONNOR, and MOFFETT, Judge Advocates.
ORIGINAL EXAMINATION by MOFFETT, Judge Advocate.

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1. The accused was tried on the following charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Angelo G. Paris, Headquarters Battery, 11th F. A., did, at Schofield Barracks, T.H., on or about June 23rd, 1930, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Frank Dorsett Donovan, a minor son of Captain A. C. Donovan, 8th F.A., Schofield Barracks, T.H.

Specification 2: In that Private Angelo G. Paris, Headquarters Battery, 11th F.A., did, at Schofield Barracks, T. H., on or about June 23rd, 1930, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Richard Donovan, a minor son of Captain A. C. Donovan, 8th F.A., Schofield Barracks, T. H.

He pleaded not guilty to and was found guilty of the charge and specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record for action under Article of War 50½.

2. The evidence shows that accused as a member of Headquarters Battery, 11th Field Artillery, was sick in quarters with an injured foot from June 21st to June 29th, 1930. The remaining members of the battery were absent from the post from June 23rd to 25th (R. 6, 7, 76, 77).

Richard Donovan, age 9 years (R. 33) and his elder brother, Frank Dorsett Donovan, whose age does not appear of record, are the sons of Captain Albert C. Donovan, 8th Field Artillery. The officer and his sons occupy quarters in the Artillery Area at Schofield Barracks (R. 34).

After a satisfactory examination as to their competency, the Donovan boys testified in substance as follows:

While they were playing football with other boys, at Schofield Barracks during June or July, 1930, accused approached the two Donovan boys and said "Come here and I will give you some candy". At that time accused's regiment was on a road march and he stated that he had not accompanied the regiment because of an injured foot. One of his feet was bandaged and on that foot he wore a slipper. In response to accused's offer to give them candy, the brothers accompanied him to Headquarters Battery, 11th Field Artillery. There the three sat on the steps and at that time accused put his hand inside of the boys pants and played in turn with the penis of each (R. 12, 13, 27-33). Here he again asked them if they wanted candy and when they replied in the affirmative, accused instructed them to go into the bath room and remain there until he returned. After about two or three minutes he appeared with some candy and the three again sat on the steps. Accused resumed playing with the penis of each boy. In a few minutes accused suggested that they go to a room in the barracks and upon their arrival there, accused suggested that they enter a closet in the room. The two boys accompanied him to the closet and there accused took each boy's pants down. He then took Frank Dorsett Donovan's penis into his mouth and sucked it for "not more than a couple of minutes". Following this he took Richard Donovan's penis into his mouth and sucked it for a few minutes (R. 15, 16-30). Accused then put his penis between each boy's buttocks but did not penetrate the rectum in either case (R. 15-16). Later while still in the closet, accused told the boys that he would show them how to "milk" and thereupon proceeded to rub his own penis until "some white thick stuff came out". The elder boy then told ac-

cused that he would tell his father "if you don't let us go home". Accused instructed the boys not to tell their father and they buttoned up their pants and went home. "A little while afterwards", on the same day, Frank Donovan met Private Charbonneau, Battery A, 8th Field Artillery, and related what had just transpired between accused and the brothers (R. 17, 18, 70, 71). Subsequently on that day he went with Private Charbonneau to Headquarters Battery and there pointed out to him the accused (R. 19). He made no complaint to his father until "a long time afterwards"; he did not want to do so but finally did tell him "because he (accused) chased us off Captain Bartlow's roof" (R. 67-70). Witness probably would have told his father even though accused had not ordered him off the roof because his father "told me about some other case-about a Boy Scout Master. I told him right after he told me about that". (R. 71, 72, 73, 74, 75).

Private John Charbonneau, a witness for the court, testified in substance that he saw Frank Donovan on or about June 24, 1930 (R. 79), and stopped him because "he looked as though he had been crying". When witness asked "What is the matter with you?", he replied that "a man did something to him", but refused to tell more. After Charbonneau threatened to "tell" Captain Donovan the child then "went on and told the story". (R. 83). He said that he believed the man was a member of Headquarters Battery and he would know him if he should see him again. Charbonneau and a Private Bothel then accompanied Frank Donovan to Headquarters Battery and upon arrival there the child identified accused. Accused denied any wrongful conduct and Charbonneau and the child left the barracks (R. 78). Over objection by the defense (R. 80) Charbonneau was directed by the court to relate the details of the complaint made to him by Frank Donovan. The court was, however, instructed by the president and law member as follows: "I warn every member not to accept that story as evidence against this accused Paris, but to accept the story only as corroboration of the things the boy might or might not have told the correct story now as he remembers it. In other words, the question is asked for the purpose of ascertaining whether Frank Donovan's story today is the same story he told to the witness on or about June 23rd or 24th of June. The witness' story will not be accepted as evidence against the man" (R. 79). Charbonneau then testified that the boy told him that accused "was lying on the grass and asked if they wanted a piece of candy". He went over and got the candy. Then he told them he would take them in and show them how to shoot pool. He took them into a room. He told them he would show them how to milk. Dicky went in first and the other boy second. Paris took down their pants. He then sucked the penis of each boy, in turn, whereupon he put the penis of each back into the pants and asked them if it felt good (R. 82).

The boys also made a complaint involving accused to their father, and about two weeks thereafter, on August 1st, they reported to Captain Donovan that "the man was walking past in the rear of the quarters" (R. 35). As a result of this report accused, who was then a member of

the guard, was placed in line at the guard house that evening with other members of the guard and each Donovan boy separately and apart from the other boy identified accused (R. 35, 36, 39).

An officer and two soldiers testified as to accused's previous good reputation (R. 41, 42, 49).

Accused being sworn as a witness in his own behalf testified in substance as follows:

He was sick in quarters on June 23rd with a sore foot (R. 50) and at that time he wore a slipper over his bandaged foot (R. 57). Frank Donovan came to Headquarters Company with Private Charbonneau about the latter part of June and there pointed out accused to Charbonneau and Bothel (R. 53). Accused was on guard in the 13th Field Artillery Area and saw two boys whose names he did not know on top of Captain Partlow's house. He later learned that they were the Donovan boys. He told them to get off the roof as they were likely to get hurt. When he came off guard the two boys were at the guard house and Captain Donovan had preferred a charge of sodomy against him "for no reason at all." Captain Donovan threatened him at the time the two boys identified him at the guard house. At that time he was lined up with other members of the guard but each boy watched the other identify him. He did not commit sodomy on the boys. He is a married man and has children of his own (R. 49-50, 59).

3. During the direct examination of Frank Donovan the defense made a general objection to the prosecution propounding leading questions to the witness. The law member overruled the objection but at the same time advised the defense of its right to object to specific questions. It is a well settled principal of law that leading questions may be asked of immature children to an extent within the sound discretion of the court (Greenleaf on Evidence, Sections 434-435, Vol. 1, 16th Ed.; Underhill Criminal Evidence, Sec. 343, 3rd Ed.; Proper v. State, 55 N.W. (Wis.) 1035).

In rebuttal, and for the announced purpose of establishing the accuracy of Frank Donovan's testimony after his credibility had been attacked by accused in his testimony, and for no other purpose, the court over objection by the defense permitted the witness Charbonneau to relate the details of a complaint made to him by the boys shortly after the commission of the offenses for which accused was then on trial. It is generally recognized that in cases involving charges of rape and kindred offenses testimony of this nature is always admissible under the circumstances and for the purpose it was utilized in this case. (Greenleaf on Evidence, Sec. 162h (1) Vol. 1, 16th Ed.; Underhill Criminal Evidence, Sec. 613, 3rd Ed.; Castillo v. State, 19th S.W. (Tex.) 892; Barnett v. State, 3rd Sou. (Ala.) 612; Proper v. State, 55 N.W. (Wis.) 1035). This rule of evidence applies with equal force to a com-

plaint made by young boy pathic in the trial of an offense involving sodomy (Wharton's Criminal Law,Vol.1,page 974, 11th Ed.; People v. Swist, 69 Pac. (Cal.) 223). In the instant case, under the circumstances of record, such testimony might well have been admitted under the res gestae rule (Underhill Criminal Evidence, Sec. 612, 3rd Ed.; Castillo v. State, 19 S.W. (Tex.), 892).

4. The evidence clearly warrants a positive finding that at the time and place alleged in each specification of the charge, accused committed the offense of sodomy by having carnal connection by mouth with the person of Frank Dorsett Donovan and of Richard Donovan, minor sons of Captain Albert C. Donovan, 8th Field Artillery.

While conviction in this case must rest largely on the testimony of the youthful pathics, there are sufficient corroborative circumstances of record to fully justify the findings of the court. Sodomy by its very nature is a crime of darkest secrecy, usually susceptible of proof only by the testimony of participants, and while such testimony should always be scrutinized with extreme care, it is not by reason of its nature to be rejected, when corroborated, as a basis of conviction.

The failure of the pathics to complain to their father of accused's conduct until the expiration of approximately a month after the commission of the offenses should not cast doubt upon its truth (Honselman v. State, 48 N.E. 304 (Ill.)). It is but natural that boys of their age should hesitate to admit to their father what they doubtless conceived to be their wrongdoing. Especially is this true because of the shameful and degrading nature of the conduct involved. The testimony as to the delay is offset by that showing an immediate complaint by Frank Dorsett Donovan to the witness Charbonneau.

There is some evidence indicating that the complaint to the father was not made until accused, while on guard, "chased" the Donovan boys "off Captain Partlow's roof". As said by the court in the Honselman case, supra, in referring to testimony of almost identical nature and effect:

> "It is hard to believe that he would disgrace himself by such a disclosure merely because he was put out of the fair grounds for want of a ticket. The charge was made several months after the alleged expulsion from the fair grounds. Kesler could gain nothing by the disclosure, which could bring nothing but shame and disgrace upon him, and we are not disposed to believe that it was made for the reason alleged."

The views thus expressed, in the opinion of the Board of Review, are applicable to the case in hand.

5. The charge sheet shows that accused enlisted May 23, 1928, with no prior service and that he was 27 years and 8 months of age at the time the offenses were committed.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The record is legally sufficient to support the findings and sentence. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of sodomy involved in Specifications 1 and 2 of the Charge, recognized as an offense of a civil nature and so punishable by confinement in a penitentiary for more than one year by Section 910 of the Code of the District of Columbia.

_____ Judge Advocate.

Wm. M. Conner Judge Advocate.

C. W. Moffett Judge Advocate.

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

DEC 30 1930

Military Justice
C. M. 193895.

U N I T E D S T A T E S)	THIRD CORPS AREA
)	
v.)	Trial by G. C. M., convened at Fort Humphreys, Virginia, November 13 and 14, 1930. Dishonorable discharge and confinement for ten (10) years. Penitentiary.
)	
Private ALVIN R. SAIN (6353403), Headquarters and Service Company, 13th Engineers.)	

REVIEW by the BOARD OF REVIEW -
McNEIL, CONNOR and MOFFETT, Judge Advocates.
ORIGINAL EXAMINATION by BALCAR, Judge Advocate.

1. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Alvin R. Sain, Headquarters & Service Company, 13th Engineers, did, at Fort Humphreys, Virginia, on or about September 20, 1930, with intent to commit a felony, viz murder, commit an assault upon Private Kenneth Johnson, Headquarters & Service Company, 13th Engineers, by willfully and feloniously striking the said Kenneth Johnson on the head with a hatchet.

He pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement for ten years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record for action under Article of War 50½.

2. The evidence shows that accused and Private Kenneth Johnson were, at the time in question, members of the same organization, Headquarters and Service Company, 13th Engineers (R. 7). On or about September 1, 1930, Johnson prepared a mail order addressed to Montgomery Ward & Company for the purchase of a guitar and various other merchandise, to the value of $12.25 (R. 7,14). Sometime after the order was prepared Johnson, finding it inconvenient to go to the post office himself, gave accused $12.25 in cash, with the request that he purchase the necessary money order (R. 7,23). Johnson never received the articles so ordered, and just before going on "the hike", accused told him that the articles had not arrived. Thereupon Johnson asked accused to "hold them for me as I would not be able to get them on the hike" (R. 7). After returning from the hike, Johnson saw accused on the afternoon of September 20, 1930, at which time accused stated that the articles had arrived and that he had them upstairs (R. 11,61). He then invited Johnson up to the squad-room. There he looked in his footlocker and then declared that the articles were over at his girl's house. Shortly thereafter accused said he was going over to his girl's house to get them and Johnson accepted an invitation to accompany him (R. 11). Accused was the day room orderly, and turned his key to the day room over to a corporal between 3:00 and 4:00 o'clock, with the remark that he was going out (R. 26,27). He wore at that time an olive drab shirt, serge trousers, and a cap (R. 11,29), and appeared sober (R. 14). After accused and Johnson left the barracks they encountered Sergeant Windsor who was polishing a car in his back yard (R. 10). Accused talked to Sergeant Windsor for about a minute and shifted a hatchet which he was carrying in his right hand to the left while he showed the Sergeant how to polish a fender. It was then about 3:45 o'clock p.m. Neither Sergeant Windsor nor Sergeant Harris, who was standing nearby, saw the hatchet (R. 9,11,24,28, 29,30). After leaving Sergeant Windsor, accused volunteered the information that he had a case of beer hidden in an out of the way place and wanted to go there and open the case with the hatchet (R. 10) and take some of the beer to his girl (R. 16).

Johnson testified:

> "We then turned around and went on out around between D and E Companies. As we passed the theatre, it was on the left. We went on up to the Log Cabin and the Log Cabin was on the right.

> We went on across the cement road. We went up to a place there where there are some dug out places, some dug out holes. We turned to the right and went a short distance. While we were on our way to this spot we stopped every few steps to see if we could see or hear anything. Sain said he had been a professional bootlegger and didn't want anybody to see or hear him. He said he didn't want to make much noise because one of the Sweeney kids might be out there * * *. So when we got to the place where he said the beer was at, we stopped there about a minute and a half, I guess, looking to see if we could see or hear anything. He was a couple of paces behind me and I turned sort of a right face and had my back turned to him. As I started to turn back I got far enough to see that he was standing facing me and when I turned he was standing sideways to me. I turned back far enough to see that he made a move with his hand, saw his hand and part of his body and then something slipped and I knew no more until I came out of the plumber's house and I must have been standing in the road for I was blinded and couldn't see" (R. 9,10).

Johnson did not actually see the blow struck, but "I know he hit me" (R. 12). No one but accused and Johnson were present at the time. Johnson felt no pain when the blow was struck, but "it seemed as if something slipped and I was out" (R. 18). He could remember nothing further until he came out of the woods and ran into the post plumber. After that he remembered telling the plumber that Sain hit him (R. 10). Johnson had no idea as to the time he left the barracks that afternoon nor did he remember what time it was when he met the plumber because "I was blind. It looked like night to me" (R. 16). The scene of the assault was about one-half mile from the barracks and by walking fast could be reached in about eight minutes. It was surrounded with undergrowth resembling thick bushes and was shielded from the road (R. 39).

Between 6:10 and 6:20 o'clock p.m., September 20, 1930, Johnson, with coagulated blood on his face, was discovered "staggering" at a slow pace down Gunston Road at Fort Humphreys by another soldier and a civilian plumber. At that time he was in a semi-conscious condition but revived when ice water was applied to his

head. When asked as to what had happened, Johnson replied that he had been struck with a hatchet by Private Sain (R. 55,58,59). He was immediately taken to the post hospital and upon arrival there at about 6:30 o'clock p.m., was examined by a medical officer and found to be "severely injured". As disclosed by the medical officer,

> "he had three very severe lacerated or incised wounds * * *, one was over the right eye on the forehead and I think was about 2 or 2½ inches long. It was through all the tissues to the bone * * * the next was about 2 or 3 inches long transversely across the top of the head and the third was a 'V' shaped injury about 3 inches long about 1 inch back of the second one. These two were also through to the bone and had nicked the periostium, the covering of the bone. At the time I made a digital examination of the skull to see if it was fractured and apparently there was no fracture, but an X-ray made the next morning showed that there was a fracture".

Continuing his testimony, the medical officer stated that one of the cuts looked as if it had been made by a sharp instrument, but that the other two might have been made by either a sharp or blunt instrument due to the fact that a blow on the scalp with a blunt instrument might cause a cracked injury that would resemble one made by a sharp instrument, and "when we found his skull was fractured by X-ray, I considered his chances doubtful, depending a great deal, however, on whether he had a ruptured blood vessel in the brain or not". At the time Johnson was admitted to the hospital the blood on the injury was dry, but as to "how long it had been drying was hard to approximate, an hour or more maybe less" (R. 22).

Another medical officer corroborated the above testimony as to the nature and character of the wounds (R. 41,45).

On June 24, 1930, accused was issued a hatchet by the assistant supply sergeant of his organization, but it is not known whether or not this hatchet was ever returned (R. 47,48). The area surrounding the scene of the assault was searched in vain for a hatchet (R. 69).

A corporal testified in substance that Johnson appeared "short in his mind to what he was before this accident", but "as truthful a man as I have ever run into" (R. 86). Another corporal testified in substance that on one occasion while the accused with other prisoners was at mess at Headquarters and Service Company, Johnson was seen staring at accused and when told to move on he glanced at accused and crossed his throat (R. 88,89).

An attempt by the prosecution and defense to respectively show by prosecution witnesses that the whereabouts of the accused, with reference to the time and exact place of the attack, rendered commission of the criminal act by him both possible and impossible, resulted in evidence to the effect that about 4:00 p.m., on September 20, 1930, accused was seen dressing in the squadroom of his organization, and was again seen about 4:30 p.m., going towards the bus station (R. 49,51). He boarded a bus which left at 4:40 p.m., and when last seen was getting off the bus at some point between Fort Humphreys and Alexandria (R. 52,53).

Accused elected to remain silent before the court (R. 89).

3. It was thus shown by the evidence that at the time and place alleged in the specification and charge accused committed an assault upon Private Kenneth Johnson, Headquarters and Service Company, 13th Engineers, by striking Johnson on the head with a hatchet. Accused's actions prior to the assault in enticing Johnson to the scene of the attack, a secluded spot, the nature of the weapon used, and the character of the injury inflicted, fully justify the inference that it was accused's intent to commit murder at the time of the assault. Motive for the assault is supplied by the evidence, showing that accused had been entrusted with a sum of money by Johnson and was apparently unable to account for the disposition of this money. As accused when seen at about 4:00 o'clock was at a place shown by the evidence to be but eight minutes fast walking distance from the scene of the crime, the attempted alibi failed of effect.

4. Without objection by the defense, the court received in evidence statements made by Johnson while in a semi-conscious condition sometime following the assault, to the effect that he had been attacked by accused. Such statements, while somewhat remote in point of time were, under all the circumstances of record, clearly part of the res gestae and no error was committed by their admission. See Moore v. State, 20 S.W. 565.

The defense attempted to prove by a staff sergeant of the Medical Department, who testified from X-ray pictures taken of Johnson's skull, that it would have been impossible for the injuries to have been inflicted as testified to by Johnson. Such testimony was at most bare conclusions or statements of opinion by a non-expert witness, and are of no evidential value.

5. The charge sheet shows accused enlisted October 3, 1928, with approximately three years prior service, and that he was 25 years of age at the time of the commission of the offense.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The record is legally sufficient to support the findings and sentence. Confinement in a penitentiary is authorized by the 42d Article of War for the offense of assault to commit murder, involved in the specification of the charge, recognized as an offense of a civil nature and so punishable by confinement in a penitentiary for more than one year by Section 276, Federal Penal Code.

E C McNeil, Judge Advocate.

[illegible], Judge Advocate.

A V Moffett, Judge Advocate.

- COPY -

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

Board of Review
CM 214241

UNITED STATES	)	OCT 29 1940 UNITED STATES MILITARY ACADEMY
v.	)	Trial by G.C.M., convened at West Point, New York, August 30, 1940, Dismissal.
Cadet THEODORE K. WHITE, First Class, United States Corps of Cadets.	)	

OPINION of the BOARD OF REVIEW
HILL, SCHLANT and JOHNSON, Judge Advocates.

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

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

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

Specification: In that Cadet Theodore K. White, First Class, United States Corps of Cadets, was at West Point, New York, on or about July 19, 1940, found drunk while on duty as Intermediate Officer of the Guard, Cadet Camp.

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

Specification: In that Cadet Theodore K. White, First Class, United States Corps of Cadets, did, at West Point, New York, on or about July 19, 1940, drunk intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931.

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

He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that accused was detailed as Intermediate Officer of the Guard at Cadet Camp for Thursday, July 18, 1940 (Ex. 1), and was mounted at 5 p.m., July 18 and not relieved prior to 5 p.m., July 19, 1940 (R. 9-11). Accused was sober and not under the influence of liquor at supper July 18 (R. 17). Cadet R. P. Pierpont, First Class, Senior Officer of the Guard, arranged the hours dividing up the night July 18-19, and assigned the period from about 10:30 p.m., to 1:30 a.m., to accused, the period 1:30 a.m., to 3:30 a.m., to Cadet Foster, Junior Officer of the Guard, and 3:30 a.m., to reveille, to himself (R. 120, 121, 124). At about 11 p.m., when Cadet Pierpont went to bed (R. 120) and the last time he saw accused before sick call next morning, the condition of accused was quite normal (R. 79). He did not see accused and purposely avoided him from 11 p.m., until sick call July 19, because he had "a hunch" that accused might be doing something wrong because he saw accused during the evening in front of or inside the guard tent with an empty barrack bag (R. 83, 84).

Cadet H. G. Foster, First Class, was Junior Officer of the Guard, July 18-19, 1940 (R. 127; Ex. 1), had the shift from 1 a.m., until 3:30 a.m., was present in the guard tent or visitors' tent from 1 a.m., until he went to bed at 3 a.m., and saw accused practically the whole time during that period (R. 127, 128, 132, 133, 134). Cadet Foster stated that there was nothing extraordinary in the manner or behavior of accused during that period; that he did not smell liquor on accused; did not know that accused was drinking during that period; that accused had the next prior shift but just stayed on during his shift without giving any reason therefor; that after 2:45 a.m., he did not see accused until 9 a.m., July 19, 1940 (R. 128, 129); when he left at 2:45 or 3 a.m., and went to bed he told accused to wake Cadet Pierpont and fully thought that accused took over the guard then (R. 130); accused was then in the visitors' tent with Cadet Hollis where sandwiches and coffee were kept (R. 133, 134); and he did not see accused take a drink that evening and saw no liquor in guard or visitors' tent nor in the vicinity that night (R. 135).

Cadet J. B. Hollis, Third Class, was Sergeant of the Guard night of July 18-19, 1940, was on duty around the guard tent from

1:30 a.m., to 5 a.m., and saw accused during those hours. He did not notice anything peculiar about, nor detect any odor of liquor on accused during those hours (R. 99, 103). He was pretty sure accused did not go to tent to sleep before 5:30 a.m. (R. 106).

When at 4:30 a.m., Cadet Pierpont woke himself an hour late as Cadet Foster had failed to wake him, and went to the guard tent, he saw Cadet Hollis in front of the tent, but did not see accused or Cadet Foster there (R. 121, 122, 125). Cadet Hollis told him that Cadet Foster had gone to bed and that accused was on duty and would keep going until reveille (R. 125, 126). Cadet Pierpont heard a noise in the visitors' tent but did not check to see what the noise was (R. 126), and then went back to bed until reveille (R. 124). Accused ate one or two sandwiches. Cheese and ham sandwiches were provided that night in the visitors' tent (R. 98, 99, 138).

The testimony that the accused was drunk is confined to the period from reveille, about 6:10 a.m., to the formation of the sick squad following breakfast July 19, 1940. The pertinent testimony for the prosecution and defense may be summarized as follows:

a. For the prosecution four cadets, First Class, testified that accused was drunk, two Barrack Policemen that he was under the influence of liquor, and a third policeman that he was sick from being drunk. Cadet Price testified that accused had a hangover (R. 13); was drunk within the definition of drunkenness under Article of War 85, Manual for Courts-Martial, 1928, page 160, "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article" (R. 14); that after reveille and three or four minutes after accused lay down on bed, he dashed a dipper of cold water in face of accused and put finger down throat of accused to fully awaken accused (R. 12, 13); that he smelled the odor of liquor on the breath of accused (R. 13); that accused was slightly dazed and not fully awakened, and a little unsteady on his feet (R. 14). Cadet Atkinson testified that accused was drunk (R. 18), hard to awaken and not in complete control of himself; had a little trouble getting out to reveille; was unsteady on his feet; that he got accused up for reveille, held accused's left arm at reveille; accused then lay down on bed; and that in his opinion the full exercise of the mental and physical faculties of accused was sensibly impaired through the consumption of alcoholic beverages (R. 18, 19, 22). Cadet Neumeister believed

accused was drunk at time accused went to showers, was acting giddy in the shower, and had odor of liquor after he came back from shower (R. 35-37); and that a combination of incidents led him to reach opinion that accused was drunk (R. 39). Cadet Millikin smelled liquor on breath of accused while in tent (R. 25, 27); had impression that accused had too much to drink (R. 26) and was suffering from after effects of liquor (R. 32); and was of opinion that the full exercise of mental and physical faculties of accused was sensibly impaired through consumption of alcoholic beverages to the extent that he had the smell of liquor on his breath, was slow in walking, and slouched along to sinks, but not otherwise (R. 26, 27); that he saw in the locker of accused a brown quart bottle in a horizontal position with no cork, which was the same size and color as a liquor bottle (R. 25, 28, 30); and that accused acted naturally in the shower, adjusted it rapidly, dried himself off and walked slowly back to the main level (R. 31). Policeman Vineyard testified that after Corps went to breakfast, accused was walking to sinks slightly bent forward, his knees sagging and looked like he was going to fall down (R. 41); half an hour later in tent breath of accused had odor of intoxicating liquor; yellowish spots on trousers of accused looked like vomit; he buttoned up the front of trousers of accused (R. 42); was of opinion that full exercise of his mental and physical faculties was sensibly impaired through consumption of alcoholic beverages (R. 43); and that he first thought accused was sick but later observation of his bleary eyes, facial expression, and walk of accused were basis of opinion that he was under the influence of intoxicating liquor (R. 46-49). Policeman Halvorsen testified that while Corps was at breakfast, accused was sick from being drunk, was sleepy looking, his eyes were red, bleary and foggy looking, and he had odor of liquor on his breath (R. 51-56); and that he handed pair of trousers to accused, and helped put on right sash as accused had on silk sash (R. 52) while one of the men held accused up by the arms (R. 62). Policeman Swim testified that while the Corps was at breakfast, accused was under the influence of liquor; he based that opinion on actions and general appearance of accused, that he staggered, could walk after a fashion but not normally, and had puked on his pants (R. 56-61); and that one of the men held accused up by the arms while they fixed the sash (R. 62).

b. For the defense four cadets and two Barrack Policemen testified that they noticed nothing abnormal or unusual about the appearance of accused during the period from about 6:10 a.m., to the formation of sick squad following breakfast. Cadet J. R.

Sykes, First Class, testified that ten minutes after reveille when he found accused asleep on bunk he tapped accused on head, and accused immediately awoke and got up; that he did not believe that he smelled liquor on breath of accused but did smell an unusual odor for a tent; that accused seemed quite normal except for being a little pale, and that he figured accused "was under his own powers" (R. 64-66). Cadet C. H. Burr, Third Class, testified that accused appeared normal, did not look as if drunk and was able to stand alone (R. 66-68). Cadet R. P. Pierpont, First Class, testified that he started to form the sick squad - which accused was supposed to form - after breakfast and that he noticed nothing abnormal or peculier about accused who walked rapidly up to mess hall, took command, and in the usual manner marched sick squad off (R. 78, 79). Cadet J. B. Hollis, Third Class, testified that at reveille he yelled and shook accused to wake him up because the Officer of the Day left a note to make sure everybody was up, but left when another cadet said he would get accused up; that he was in the tent while accused changed trousers because of a stain, which looked like vomit, on leg; did not assist in dressing accused except to help hold him up "like this" and to adjust sash; and hurried out at brisk walk with accused, who was navigating by himself to take charge of sick call (R. 99-104). Policeman Zwanziger testified that he did not smell any liquor on accused, who was not drunk; the double timing of accused toward the mess hall was perfectly normal; and that he brushed off the shoes of accused because he had the idea that accused was late and not because accused was unable to take care of himself (R. 71, 72). Policeman Baggett testified that there was nothing abnormal in the way the accused ran at double time toward the mess hall (R. 75, 76).

Two cadets, Third Class, members of the sick squad, testified that accused marched the squad to the Cadet Hospital and performed his duties as efficiently as others had done on other days, and that there was nothing unusual in the manner in which accused performed his duty (R. 87-90). One of them, Cadet Starnes, did not smell and liquor on breath of accused as he sat next to accused in the hospital (R. 88).

Captain E. M. Saeger, Medical Corps, who took sick call at Cadet Hospital from July 5 to August 1, 1940, did not notice anything peculiar or abnormal as to coordination, speech, actions or manner of performing duty of Officer of the Guard who reported the sick squad on July 19. A man who had been so drunk at about 7:10 in the morning that he required aid in dressing and required a man to button his trousers, would at sick call be lacking in co-

ordination, would act so out of the ordinary and his speech would be affected, so that you would notice it (R. 110-112). A man who had vomited from eating food might have same appearance as a man who was drunk and had vomited (R. 112). Captain Saeger, at request of defense, had made food allergy skin tests of accused and found that mustard, pork, milk and cheese at that time showed positive, a skin sensitivity to those foods (R. 113, 114). There is much more possibility of a man allergic to certain foods to become sick from eating them than one not allergic (R. 114). Captain Saeger could not recall that the Officer of the Guard reporting the sick squad on July 19, 1940, wanted to be examined (R. 116).

The accused elected to remain silent (R. 119).

4. The evidence fully supports the findings of guilty of Charge I and its Specification alleging that on or about July 19, 1940, at West Point, New York, accused was found drunk while on duty as Intermediate Officer of the Guard, Cadet Camp, in violation of Article of War 85, and of Charge II and its Specification alleging that on or about July 19, 1940, at West Point, New York, accused drank intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, in violation of Article of War 96.

With respect to Charge I the evidence shows that in the period following reveille the rational and full exercise by the accused of his mental and physical faculties was sensibly impaired within the definition of drunkenness on duty under Article of War 85 (p. 160, M.C.M., 1928). He was hard to awaken, had trouble getting out to reveille and was not in complete control of himself, was slightly dazed, unsteady on his feet, his left arm was held at reveille by another cadet, he acted giddy in the shower, he had an odor of liquor on his breath before and after his shower, was suffering from after effects of liquor, his eyes were bleary and foggy looking, and he walked to sinks with sagging knees and looked like he was going to fall down.

With respect to Charge II, there is no direct proof that accused drank intoxicating liquor on or about June 19, 1940. The testimony, however, that he was drunk in the period following reveille on that date, and that a brown bottle the same size and color as a liquor bottle with no cork was seen lying in a horizontal position in the trunk locker of accused shortly after reveille on that day, furnish satisfactory circumstantial proof that accused did on that day drink

intoxicating liquor in violation of paragraph 135, Regulations for the United States Military Academy, 1931, in violation of Article of War 96.

The Board of Review is of the opinion that the evidence shows beyond reasonable doubt that accused was drunk while on duty as Intermediate Officer of the Guard, and drank intoxicating liquor in violation of the stated regulations, as charged.

While the evidence shows that accused was drunk, his drunkenness cannot be characterized as gross. It appears that when accused took charge of the sick squad following breakfast, he marched the squad to the Cadet Hospital and performed his duties in connection with the squad in a normal manner. There is nothing in the record of trial which, in the opinion of the Board of Review, justifies a conclusion that accused is morally unfitted to continue as a cadet or to become an officer of the Army.

5. The Superintendent of the Military Academy, following his formal action approving the sentence, recommended that the sentence be confirmed and commuted to the usual restriction to limits and performance of punishment tours prescribed for cadets undergoing special punishment for a period of five months beginning with the date of action by the President and to postponement of the graduation of accused until the day after the graduation of his class when he shall be graduated and commissioned, if otherwise qualified. He stated that the modification of the sentence as recommended will meet the requirements of justice and discipline.

6. The Cadet Register for the year ending June 30, 1939, the last issue available, shows that the accused was admitted to the Military Academy from New Jersey, that he was twenty-two years of age on April 22, 1940, and that his class standing for the academic year ending June 30, 1939, was 317 in a class of 441 members.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial.

In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. Dismissal is authorized for violation of Articles of War 85 or 96. The Board of Review, however, concurs in the recommendation of the Superintendent,

United States Military Academy, that the sentence be confirmed and commuted to the usual restriction to limits and performance of punishment tours prescribed for cadets undergoing special punishment for a period of five months beginning with the date of action by the President and to postponement of the graduation of accused until the day after the graduation of his class, when he shall be graduated and commissioned, if otherwise qualified.

(Signed) Lester S. Hill, Jr., Judge Advocate.

(Signed) Edward B. Schlant, Judge Advocate.

(Signed) Albert W. Johnson, Judge Advocate.

- COPY -

1st Ind.

War Department, J.A.G.O., Nov 1 1940 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Cadet Theodore K. White, First Class, United States Corps of Cadets.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence, and in the recommendation of the Superintendent, United States Military Academy, concurred in by the Board of Review, that the sentence be confirmed and commuted to the usual restriction to limits and performance of punishment tours prescribed for cadets undergoing special punishment for a period of five months beginning with the date of the action by the President and to postponement of Cadet White's graduation until the day after the graduation of his class, when he shall be graduated and commissioned, if otherwise qualified. The Superintendent stated that the modification of the sentence as recommended will meet the requirements of justice and discipline.

3. Inclosed herewith is a draft of a letter for your signature transmitting the record to the President for his action, together with a form of Executive action designed to carry into effect the recommendation made above.

(Signed) Allen W. Gullion

Allen W. Gullion,
Major General,
The Judge Advocate General.

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

(Sentence confirmed but commuted to described restriction and punishment tours, and postponement of graduation until day after graduation of his class. G.C.M.O. 7, 26 Nov 1940)

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

Board of Review
CM 216425

MAY 29 1941

EIGHTH DIVISION

U N I T E D S T A T E S)	
)	Trial by G.C.M., convened at
v.)	Fort Jackson, South Carolina,
)	April 4, 1941. As to each:
Privates HARVEY W. FRYE)	Dishonorable discharge and con-
(14000735); ARCHIE B. SMITH)	finement for one (1) year.
(14000766), both Company B,)	Disciplinary Barracks.
13th Infantry.)	

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Harvey W. Frye, Company B, Thirteenth Infantry and Private Archie B. Smith, Company B, Thirteenth Infantry, acting jointly, and in pursuance of a common intent, did at Columbia, South Carolina, on or about November 28, 1940, feloniously take, steal and carry away one automobile, a 1936 Ford Coupe having motor number 2819966, value about $400.00, the property of Mr. Fred O. Deal, Columbia, South Carolina.

Each pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence of one previous conviction as to each was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at

hard labor for two years and six months. The reviewing authority approved the sentence but reduced the period of confinement as to each to one year, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. The evidence for the prosecution may be summarized as follows: At approximately 7 o'clock on the evening of November 27, 1940, the two accused, each in uniform, were drinking wine and beer in the Puritan Cafe on Sumter Street in Columbia, South Carolina. About fifteen minutes after they got there Private Frye left. Private Smith stayed on and talked to Private Bosta. About thirty minutes later Frye returned and said to Smith "Let's go". Shortly thereafter they both left together.

The stipulated testimony of Mr. Fred O. Deal is as follows:

> "My name is Fred O. Deal. I was the owner on November 27-28, 1940, of the Ford Coupe, Number 281996, described on the charge sheets in the two cases now being tried for removal of the car on the night in question. I left my car outside my house with the keys in the car. This car is my personal property. I owned it at that time. I gave no one permission to drive it at any time. It was moved without my knowledge or consent. Neither Private Frye nor Private Smith had any permission or authority to move or use such car." (R. 7)

It will be noted that the identifying motor number alleged in the Specification is different from the number set forth in Mr. Deal's stipulated testimony. The cause for the stipulation was stated by the prosecution as -

> "the absence of Mr. Fred O. Deal, who on November 28, 1940, lived at 1905 Sumter Street, Columbia, South Carolina, but has moved and at the present time is several hundred miles away."

Around midnight of November 27, 1940, at a point on highway No. 218, about six or seven miles out of Columbia, on the old Winsboro Road, a Ford coupe driven by one of the accused, Private Frye, accompanied by accused, Private Smith, both in uniform, sideswiped

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NAVY DEPARTMENT

the rear of a Chevrolet driven by a Mr. Cyrus W. Sarratt and immediately thereafter collided head-on with a truck following close behind the Chevrolet and driven by a Mr. Ernest J. B. Brooks. Private Frye was badly injured (suffered a compound fracture of the left femur) and was removed to a hospital. Private Smith, although badly bruised, was able to get out of the car.

Mr. James L. Jervey, a state highway patrolman for the State of South Carolina, received a telephone call at his home about 1 a.m., on November 28, 1940, advising that there had been an accident on highway No. 218, Richland County, State of South Carolina. Upon arrival at the scene of the accident he found one car on one side of the road headed toward Columbia that had been wrecked. Farther up the road was a truck loaded with granite, and just beyond the rear of the truck was a Ford coupe which was also headed toward Columbia. Neither of the accused was present at that time. He called the wrecker and had the road cleared, and then proceeded to the hospital where he saw Private Frye in the emergency room apparently "out" with a broken leg. He then called Military Police Headquarters, City of Columbia, and two M. P. officers came out to the Columbia Hospital. He called the M. P.'s because it was his understanding that all law enforcement bodies in the City of Columbia handled these matters with the Columbia police. There was no other reason for calling them other than "they were in an accident" and he was cooperating with the Provost Marshal's Office.

The following testimony by Patrolman Jervey with respect to the ownership of the Ford coupe involved in the accident is the only evidence in the record on that point:

"Q. Did you make an investigation of the automobile?
A. Yes, sir.
Q. Did you find out whose it was?
A. It was learned that it belonged to a party by the name of Deal.
Q. What was your means of determining the car you found in this accident was connected with any report in the office?
A. I checked the license numbers to see if it had been stolen. The call came in after I left the office. It came in about 11:30.

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Q. Did you check the motor numbers?
A. No, I just checked the license numbers.
Q. It was reported by license number?
A. Yes, sir." (R. 11)

4. It is a fundamental rule of criminal procedure that the corpus delicti, or the fact of the commission of a crime, must be proved beyond a reasonable doubt, and until that is done no conviction of any grade of crime can be had (United States v. Searcey (D.C.), 26 F. 435). It is also elementary that the corpus delicti must be proved and cannot be presumed (Wagner v. United States (C.C.A. 8th), 8 F. (2d) 581). The burden was on the prosecution, as a primary requisite to conviction of guilt, to prove the element that constitutes the crime of larceny, namely, loss of the Ford coupe, Motor No. 2819966, through a felonious taking (State v. McGowan, 1 S.C. 14). There is no positive evidence in the instant record that the particular car described in the Specification of the Charge, a 1936 Ford coupe having motor number 2819966, had been taken, moved, borrowed or stolen by anyone.

It was evidently the theory of the prosecution in this case that a legal presumption of the guilt of the accused of the larceny alleged would arise from their unexplained possession of a recently stolen Ford coupe belonging to the owner, one Fred O. Deal.

The cafe on Sumter Street in which accused were drinking early in the evening appears to be located but a few blocks away from the car owner's residence, on the same street (Sumter), in front of which Mr. Deal had parked his Ford coupe. The inference evidently intended to be drawn from the testimony as to accused's actions in leaving the Puritan Cafe is that Private Frye, during his thirty-minute absence from the cafe, had located Deal's car and that both accused left the cafe together and stole Deal's car. This same testimony may also have been introduced to establish the sobriety of the accused in anticipation of a defense of drunkenness with its consequent legal irresponsibility for their actions. As to this phase of the proof it is clear that mere opportunity to commit the theft of the car in question is wholly insufficient to establish guilt. Where the evidence, as here, is entirely circumstantial, the circumstances must in themselves not only be consistent with guilt but inconsistent

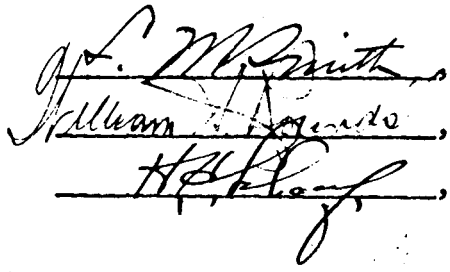
with innocence. It is obvious that the accused's actions in leaving the cafe are quite consistent with innocence. Two of the essential elements of larceny, viz., the taking and carrying away of the stolen property, thus become mere matters of conjecture. A mere conjecture cannot take the place of proof.

The prosecution in this case failed to prove beyond a reasonable doubt that the Ford coupe occupied by the accused at the time of the collision belonged to Fred O. Deal as alleged. One of the essential items of proof in establishing larceny is that the property which has been taken and carried away belonged to a certain other person named or described. Patrolman Jervey identifies "the automobile" (evidently referring to the Ford coupe occupied by the accused at the time of the collision) as belonging "to a party by the name of Deal". He does not identify the owner as the Fred O. Deal named in the Specification. It is reasonably probable that many persons named Deal may possess cars and that those cars might be Ford coupes. Mr. Jervey based his personal conclusion that the Ford coupe involved in the collision was the property of the same Mr. Deal named in the Specification on the ground that he (Jervey) had checked license numbers of reported stolen cars and that a call reporting a stolen car, which came into the office about 11:30 after he had left, was reported by license number, the inference being that the license number on the Ford coupe involved with the accused in the collision on Winsboro Road corresponded to the license numbers on an otherwise unidentified stolen car reported to the State Highway Patrol Office. There is no evidence in the whole record which in any way refers to the specific license numbers on the Ford coupe belonging to Mr. Fred O. Deal, and the subject of the alleged larceny, nor is there any evidence that Mr. Fred O. Deal's Ford coupe was ever reported stolen by him or by anyone else to the local police. Mr. Jervey expressly states that he did not check or compare the motor numbers of the reported stolen car with the numbers on the motor of the Ford coupe owned by Fred O. Deal. In the last analysis, Mr. Jervey's testimony is, at most, his personal conclusion that the wrecked Ford coupe and the stolen car are one and the same. This is evidently a mere assumption based on no tangible fact of ownership disclosed by this record. There is a strong probability of guilt and the suggested inference of the same identity of the two cars is based on a very plausible suspicion. However, when the evidence raises only a mere suspicion of the guilt of accused or leaves it uncertain or dependent

upon a conjecture, it is insufficient to warrant a conviction (State v. Rounds, 104 Vt. 442, 160 A. 249). This evidence on which the conviction may be said entirely to rest is as consistent with innocence as with guilt and is insufficient to sustain a conviction.

5. It is also noted that there is not a word of evidence in the entire record as to the market value or any other value of the alleged stolen car.

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



, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

1st Ind.
JUN 5 1941

War Department, J.A.G.O., - To the Commanding General, Eighth Division, Fort Jackson, South Carolina.

1. In the case of Privates Harvey W. Frye (14000735) and Archie B. Smith (14000766), both Company B, 13th Infantry, I concur in the foregoing holding by the Board of Review and, for the reasons therein stated, recommend that the findings of guilty and the sentence be vacated.

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

(CM 216425).

Allen W. Gullion,
Major General,
The Judge Advocate General.

1 Incl.
Record of trial.

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

(107)

September 8, 1941.

Board of Review
CM 217703

U N I T E D S T A T E S	)	36TH DIVISION
	)	
v.	)	Trial by G. C. M., convened at
	)	Camp Bowie, Texas, June 17, 1941.
Private WILLIS A. DAVENPORT	)	Dishonorable discharge and con-
(20810154), Service Company,	)	finement for six (6) months.
144th Infantry.	)	Camp Bowie, Texas.

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and SCHAAF, Judge Advocates.

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1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found to be legally sufficient to support only the findings of guilty of Specification 2 of Charge I, and of Charge I.

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

CHARGE I: Violation of the 65th Article of War.

Specification 1: In that Willis Davenport, Private, Service Co., 144th Infantry, did, at Camp Bowie, Texas, on or about April 30, 1941, threaten to strike Sergeant Grady M. Crawford, Company K, 143rd Infantry, a non-commissioned officer, with a chair, while said Sergeant Crawford was in the execution of his office.

Specification 2: In that Willis Davenport, Private, Service Co., 144th Infantry, did, at Camp Bowie, Texas, on or about April 30, 1941, behave in an insubordinate and disrespectful manner toward Sergeant Grady M. Crawford, Company K, 143rd Infantry, a non-commissioned officer who was then in the execution of his office, by saying, "I don't have to do a damned thing you tell me to do, you damned bastard", or words to that effect.

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

Specification: In that Willis Davenport, Private, Service Co., 144th Infantry, did, at Camp Bowie, Texas, on or about April 30, 1941, feloniously take, steal, and carry away the following articles, to-wit, one pair of trousers valued at about $3.68, one pair of trousers valued at about $1.65, one shirt valued at about $3.81, two waist belts valued at about 36¢, property of the United States Government, furnished and intended for the military use thereof.

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

Specification: In that Willis Davenport, Private, Service Co., 144th Infantry, did, at Camp Bowie, Texas, on or about April 30, 1941, take, steal and carry away one watch valued at about $1.00, and one flashlight valued at about 80¢, the personal property of Private Lupe D. Martinez, Company H, 143rd Infantry.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge and confinement at hard labor for six months. No forfeitures were adjudged. The reviewing authority approved the sentence, designated Camp Bowie, Texas, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. With respect to Specification 1, Charge I, it is not established by competent evidence that the accused, at the time and place alleged, threatened to strike Sergeant Crawford with a chair or to assault him in any manner. There is positive testimony, however, that after having been himself assaulted, viz., slapped with an open hand, by Sergeant Crawford, the accused picked up or "raised" (R. 22) a swivel chair that was behind him (R. 18-19, 21-22). This action on the part of the accused is not inconsistent with an assumption of a strictly defensive attitude with relation to the Sergeant, and does not constitute an offense of threatening to assault the latter (CM 123562, Duvall). The presumption of innocence in favor of the accused is not overcome by competent evidence.

The accused was charged in the Specification of Charge II with the larceny of two pairs of trousers, one shirt, and two waist belts, property of the United States, furnished and intended for the military use thereof, in violation of Article of War 94, and was found guilty of the Specification and of the Charge. Of this property only one article, a pair of serge slacks (R. 10), was even remotely connected with the accused. There is testimony in the record to the effect that another soldier lost a second pair of trousers or breeches but none whatever to establish their theft by the accused. No reference is made in the testimony offered by the prosecution to the shirt or the two waist belts alleged in this Specification, nor is there any evidence to establish the fact that any one of these articles was the property of the United States, or was furnished or intended for the military service thereof as charged. Finally, there is no evidence in the record of the value of any of these articles and none of them was introduced in evidence before the court. Since there is nothing upon which to base an inference that any article alleged in the Specification was Government property, the failure to prove ownership as charged was fatal to the conviction (CM 192952, Scoles; CM 215881, Madrid).

With respect to Charge III and its Specification, Private Luke D. Martinez testified that one night, about the first of May, his $1.00 watch was taken while he slept. He stated he had not seen the watch since that time and that he could not identify it if he were to see it (R. 27-28, 30). The only testimony offered by the prosecution to connect the accused with the larceny of this watch as alleged disclosed that a watch was found in his shoe when he was searched on the morning of May 1 (R. 25), but it was not shown to be Martinez' watch, nor is there any competent evidence that the watch did not belong to the accused himself. There is a complete failure of proof of the alleged larceny. Moreover, there is no evidence in the record to establish the corpus delicti in the case of the flashlight included in the same Specification. The evidence, therefore, is clearly insufficient to support the findings of guilty of Charge III and its Specification.

4. For the reasons herein stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specification 2 of Charge I, and of Charge I, but legally insufficient to support the findings of guilty of Specification 1 of Charge I, of Charge II and its Specification, and of Charge III

and its Specification. The Board of Review further holds the record of trial legally sufficient to support only so much of the sentence as involves confinement at hard labor for two months.

L. M. Smith, Judge Advocate

William A. Rounds, Judge Advocate

H. H. Schaaf, Judge Advocate

1st Ind.

War Department, J.A.G.O., Sep 11 1941 - To the Commanding General, 36th Division, Camp Bowie, Texas.

1. In the case of Private Willis A. Davenport (20810154), Service Company, 144th Infantry, I concur in the foregoing holding by the Board of Review and, for the reasons therein stated, recommend that the findings of guilty of Specification 1, Charge I, and of Charges II and III and their specifications, be disapproved; and that only so much of the sentence be approved as involves confinement at hard labor for two months. Thereupon you will have authority to order the execution of the sentence as thus modified.

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

CM 217703).

(s) E. C. McNeil
E. C. McNeil,
Colonel, J.A.G.D.,
Acting The Judge Advocate General.

1 Incl.
Record of Trial.

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

Board of Review
CM 218183

NOV 18 1941

U N I T E D S T A T E S	)	SIXTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Sheridan, Illinois, August
Captain SYLVESTER M. WELSH	)	19 and 20, 1941. Suspension
(O-258995), Medical Corps	)	from promotion for one (1) year.
(WMA).	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

1. The record of trial in the case of Captain Sylvester M. Welsh, M.C., which has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Sylvester M. Welsh, Medical Corps, did, on or about July 16, 1941, incapacitate himself for the full performance of military duty due to intemperate use of intoxicating liquor.

Specification 2: In that Captain Sylvester M. Welsh, Medical Corps, did, on or about July 18, 1941, incapacitate himself for the full performance of military duty due to intemperate use of intoxicating liquor.

Specification 3: In that Captain Sylvester M. Welsh, Medical Corps, was on or about July 18, 1941, at Highwood, Illinois, drunk in uniform in a public place, to the prejudice of good order and military discipline.

The accused pleaded not guilty to all Specifications and the Charge. He was found, of Specifications 1 and 2 of the Charge:

> "Guilty, except the words 'intemperate use of intoxicating liquor'; substituting therefor the words 'use of drugs or intoxicating liquor, or both'; of the excepted words: Not Guilty, of the substituted words: Guilty.",

of Specification 3 of the Charge, "Not Guilty"; and of the Charge, "Guilty". He was sentenced to be suspended from promotion for a period of one year after his promotion would otherwise be due. The reviewing authority approved only so much of the findings of guilty of Specifications 1 and 2 of the Charge as involved a finding that the accused did on or about July 16, 1941, and July 18, 1941, respectively, incapacitate himself for the full performance of military duty due to use of intoxicating liquor, approved the sentence, and ordered its execution. The result of the trial was published in General Court-Martial Order No. 186, Headquarters Sixth Corps Area, September 8, 1941.

3. The only question requiring consideration is the legality of the findings of the court as approved by the reviewing authority.

a. The court excepted from its finding of guilty of each Specification the words "intemperate use of intoxicating liquor" and substituted therefor the words, "use of drugs or intoxicating liquor, or both".

Winthrop in his Military Law and Precedents (2d ed.), page 378, states:

> "THE FINDINGS MUST BE CERTAIN. That is to say they must have no uncertain meaning, but must be intelligible and exact. This will be illustrated in treating presently of the various allowable forms of finding."

The Manual for Courts-Martial, 1928, provides in paragraph 78 c in part:

> "The finding should be consistent with itself.
>
> * * *
>
> * * *

"Exceptions and Substitutions. - One or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. * * *." (Underscoring supplied.)

"It is elementary that one accused of a crime must be definitely apprised of the offenses charged against him and what he must be prepared to meet * * *. An accused, therefore, cannot be legally convicted of an offense of which he has had no notice and with which he is not charged. In this, military procedure follows the rule of the criminal courts: * * *." (CM 120948, Garcia; CM 120949, Espinosa.)

b. With respect to alternative pleading in a specification, the Manual for Courts-Martial provides:

"One specification should not allege more than one offense either conjunctively or in the alternative. Thus a specification should not allege that the accused 'lost and destroyed' or that he 'lost or destroyed' certain property." (Par. 29 b, M.C.M., 1928.)

The Judge Advocate General has held:

"A charge or specification should not be expressed in the alternative - as that the accused 'did sell or through neglect lose,' etc. The selling, through neglect losing, and through neglect spoiling are distinct offenses and should be so charged. * * *

"Such a charge is irregular and defective and upon motion may be stricken out or required to be amended * * *." (Dig. Ops. JAG 1912, Discipline, II D 11 d, p. 487.)

"An allegation that the accused did '(a) take, or (b) otherwise secure certain photographs of a character likely to be of service to the enemy,' violates the rule against alternative pleading and is defective. (a) States an offense. (b) Does not. It is impossible to say whether

the accused has been convicted of an offense. Conviction is disapproved. (CM 121586, France, Sept. 21, 1918.)" (Dig. Ops. JAG 1918, p. 270.)

The principles above stated are equally as applicable to a finding as to a specification. The finding must state an offense.

The findings of the Specifications upon which, by exception and substitution, the accused was found guilty, both allege that the accused did incapacitate himself for the full performance of military duty due to "use of drugs or intoxicating liquor, or both". The findings are in the alternative, and are uncertain in that they state that the incapacity was due to one of three causes, the use of (1) drugs, or (2) intoxicating liquor, or (3) drugs and intoxicating liquor. It is not possible to state the offense of which the court found accused guilty.

c. The reviewing authority has attempted to correct the erroneous action taken by the court in its findings, by approving only so much of each finding as involves a finding that accused did on each date alleged, incapacitate himself for the full performance of military duty due to use of intoxicating liquor. The reviewing authority endeavored to make certain the alternative, indefinite, and uncertain findings by selecting one of the three alternative findings for approval. If the court in the findings had inserted the words "and drugs" so that the findings read "due to use of intoxicating liquor and drugs", the reviewing authority could properly have disapproved so much of the findings as read "and drugs". The reviewing authority is empowered, however, only to approve a finding, or a lesser included offense thereof, or to disapprove the finding. He has no authority by his action to make definite an alternative, indefinite, and uncertain finding of the court, and thereby to find accused guilty of an offense of which the court did not find accused guilty.

4. The Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the findings of guilty and to support the sentence.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., NOV 30 1941 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (Pub. No. 325, 75th Cong.), is the record of trial in the case of Captain Sylvester M. Welsh (O-258995), Medical Corps (WMA), together with the foregoing opinion of the Board of Review.

2. I concur in said opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed herewith is a form of action designed to carry into effect the recommendation hereinabove made should it meet with your approval.

Allen W. Gullion,
Major General,
The Judge Advocate General.

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

(Findings and sentence vacated. G.C.M.O. 37, 29 Dec 1941)

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

Board of Review
CM 219028

DEC 30 1941

U N I T E D S T A T E S	)	SOUTHEAST AIR CORPS TRAINING CENTER
v.	)	Trial by G.C.M., convened at Maxwell Field, Alabama, November 6, 1941. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private ELDON H. SMITH (14040423), Temporary Maxwell Field Recruit Detachment, Maxwell Field, Alabama.	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

2. The reviewing authority in his action disapproved the finding under Specification 2, Charge II, to the effect that the accused had been imprisoned under sentence of a civil court. After the exclusion of those words, the Specification failed to allege any offense cognizable by military or civil law.

3. The Board of Review, accordingly, holds the record of trial legally insufficient to support the finding of guilty of Specification 2, Charge II, but legally sufficient to support the findings of guilty of Charge I and its Specification, and Specification 1, Charge II, and Charge II, and legally sufficient to support the sentence.

Judge Advocate.

Judge Advocate.

Judge Advocate.

(Specification 2, Charge II, involved fraudulent enlistment by willful concealment of imprisonment under sentence of civil court, under Article of War 54.)

1st Ind.

War Department, J.A.G.O., JAN 8 1942 To the Commanding General, Southeast Air Corps Training Center, Maxwell Field, Alabama.

1. In the case of Private Eldon H. Smith (14040423), Temporary Maxwell Field Recruit Detachment, Maxwell Field, Alabama, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge II, but legally sufficient to support the findings of guilty of Charge I and its Specification, and Specification 1, Charge II, and Charge II, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

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

(CM 219028).

Myron C. Cramer.

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

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

Board of Review
CM 219089

DEC 2 3 1941

U N I T E D S T A T E S	)	ALASKA DEFENSE COMMAND
	)	
v.	)	Trial by G.C. M., convened at Fort Richardson, Alaska, November 18, 1941. Dishonorable discharge and confinement for six (6) months. No place of confinement designated.
	)	
Private BRUCE C. NICHOLSON (6937694), 24th Air Base Squadron, 23d Air Base Group (Reinforced).	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

2. The reviewing authority in his action disapproved the finding of guilty of the Specification, Charge II, but did not disapprove the finding of guilty of Charge II. Upon the disapproval of the finding of guilty of the single Specification of Charge II, nothing remained to support the finding of guilty of Charge II.

3. The Board of Review, accordingly, holds the record of trial legally insufficient to support the finding of guilty of Charge II, but legally sufficient to support the finding of guilty of Charge I and its Specification, and legally sufficient to support the sentence.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 3 1942 To the Commanding General, Alaska Defense Command, Fort Richardson, Alaska.

1. In the case of Private Bruce C. Nicholson (6937694), 24th Air Base Squadron, 23d Air Base Group (Reinforced), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Charge II, but legally sufficient to support the finding of guilty of Charge I and its Specification, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. Your action in this case failed to designate a place of confinement. Confinement is authorized in a place other than a penitentiary, or Federal correctional institution or reformatory.

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

(CM 219089).

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

W. D. J. A. G. O. Form No. 84
(Revised July 1, 1940)

WAR DEPARTMENT

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

Board of Review

CM 220093

MAR 4 1942

U N I T E D S T A T E S v. Private WILLIAM J. UNCKEL (33025061), 1st Veterinary Company (Separate).	1st CAVALRY DIVISION Trial by G.C.M., convened at Fort Bliss, Texas, January 29, 1942. Dishonorable discharge and confinement for one (1) year and three (3) months. Reformatory.

HOLDING by the BOARD OF REVIEW

HILL, CRESSON and TAPPY, Judge Advocates.

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

..... , Judge Advocate.

Chas. L. Cresson, Judge Advocate.

Thomas M. Tappy, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. MAR 8 1942 To the Commanding General, 1st Cavalry Division, Fort Bliss, Texas.

1. In the case of Private William J. Unckel (33025061), 1st Veterinary Company (Separate),

16—81163 U. S. GOVERNMENT PRINTING OFFICE

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 50½, you now have authority to order the execution of the sentence, provided a place other than a penitentiary, Federal correctional institution or reformatory is designated as the place of confinement.

Confinement in a Federal correctional institution or reformatory is not authorized under the letter dated February 26, 1941 (AG 253 (2-6-41)E), from The Adjutant General to all Commanding Generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law. Confinement in a penitentiary is not authorized by law unless the period of confinement exceeds one year, and unless the offense involved is recognized as an offense of a civil nature and made 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 (18 U.S.C. 468), or by the law of the District of Columbia whether statutory or common. Confinement in a penitentiary is not so authorized for any offense of which accused was found guilty in this case.

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

(CM 220093).

Myron C. Cramer

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

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

SPJGK
CM 221019

APR 30 1942

U N I T E D S T A T E S	4TH MOTORIZED DIVISION
v.	Trial by G. C. M., convened at Camp Gordon, Georgia, March 31, 1942. Goodman: Dishonorable discharge and confinement for ten (10) years. McBryant: Dishonorable discharge and confinement for five (5) years. Each: Penitentiary.
Privates PAUL GOODMAN (14043724), Company D, 4th Engineer Battalion (Combat), and JOHNNIE W. McBRYANT (14024542), Company C, 4th Engineer Battalion (Combat).	

HOLDING by the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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

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

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

Specification 1: In that Private Paul Goodman, Company "D", 4th Engineer Battalion (Combat), and Private Johnnie W. McBryant, Company "C", 4th Engineer Battalion (Combat), acting jointly and in pursuance of a common intent, did, at Augusta, Georgia, on or about March 1, 1942, feloniously take, steal and carry away one (1) 1936 Buick Sedan, value about three hundred and twenty-five dollars ($325), the property of R. N. Reese.

Specification 2: In that Private Paul Goodman, Company "D", 4th Engineer Battalion (Combat), and Private Johnnie W. McBryant, Company "C", 4th Engineer Battalion (Combat), acting jointly and in pursuance of a common intent, did, at 3-Point Service Station, in the vicinity of

Lincolnton, Georgia, on or about March 1, 1942, by force and violence, and by putting him in fear, feloniously attempt to take, steal and carry away from the presence of Lee Goldman, gasoline of some value less than twenty dollars ($20.00), the property of said Lee Goldman.

"Additional Charges Against Paul Goodman"

ADDITIONAL CHARGE I: Violation of the 94th Article of War. (Disapproved by reviewing authority)

Specification: (Disapproved by reviewing authority)

ADDITIONAL CHARGE II: Violation of the 58th Article of War. (Disapproved by reviewing authority)

Specification: (Disapproved by reviewing authority)

"Additional Charge Against Johnnie W. McBryant"

ADDITIONAL CHARGE I: Violation of the 58th Article of War. (Disapproved by reviewing authority)

Specification: (Disapproved by reviewing authority)

Each accused pleaded not guilty to the Charges and Specifications pertaining to him. Goodman was found:

"Of all Specifications and Charges: 'GUILTY', except the word 'WASHINGTON' in Specification 1 of Additional Charge II, substituting therefor the words 'A point 3 miles West of Lincolnton', of the excepted word 'NOT GUILTY', of the substituted words 'GUILTY'".

McBryant was found:

"Of all Specifications and Charges: 'GUILTY', except the word 'WASHINGTON', in Specification 1 of Additional Charge I, substituting therefor the words 'a point 3 miles West of Lincolnton', of the excepted

word 'NOT GUILTY', of the substituted words 'GUILTY'".

Evidence of two previous convictions of Goodman, one by summary court-martial for absence without leave, in violation of Article of War 61, and one by general court-martial for using provoking speech, being found drunk on duty, "committing a felony", and impersonating a noncommissioned officer, in violation of Articles of War 90, 85, 94 and 96, respectively, was introduced. Evidence of one previous conviction of McBryant by special court-martial for absence without leave, in violation of Article of War 61, was introduced. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Goodman for eighteen years, and McBryant for seventeen years and six months. The reviewing authority disapproved the findings of guilty of the Additional Charges I and II and their Specifications pertaining to Goodman, and disapproved the findings of guilty of the Additional Charge I and its Specification pertaining to McBryant, approved the remaining findings of guilty, approved the sentence in each case but reduced the term of confinement to ten years in the case of Goodman and to five years in the case of McBryant, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement in each case, and forwarded the record of trial for action under Article of War 50½.

2. The evidence relating to Charge I and its Specifications, the only Charge and Specifications of which findings of guilty were approved, is substantially as follows:

Accused were found to be absent without leave from their organizations at Camp Gordon, Georgia, at reveille on March 1, 1942 (R. 17, 18, 20). At about 1:30 a.m., Sunday, March 1, 1942, while Mr. R. N. Reese was sitting in a restaurant in the "1500 block, Walton Way" (place not otherwise specified), his automobile, a 1936 Buick Sedan, value about $325, which had been parked in front of the restaurant, was taken and driven away by someone without the consent of Reese (R. 9-11). At the time "there was a girl in the car passed out in the back seat" (R. 11). At about 2:30 a.m., March 1, this car (R. 19) was driven to a service station about two and one-half miles from Lincolnton, Georgia (about 50 miles from Augusta, Georgia). An occupant of the car, one of the accused (not otherwise identified), came to the back of the station and asked the proprietor, Mr. Lee Goldman, "to let him have" three or four gallons of gasoline (R. 12, 13, 15). Goldman said he was ill and accused left. He returned in

a short time, however, and stated that he was "J. B. Brown, from Atlanta, Georgia". Goldman then admitted this accused to the service station and saw that he had a pistol in his left hand. The accused "said to let him have some gas" (R. 12) - "a full tank of gas" (R. 13). Accused lifted the pistol "up to his hip" and "placed it close" to the proprietor who was standing by his side. He did not offer money in payment for the gasoline (R. 12-15). His face was "very red and flushed" (R. 23). Another man was present during the occurrence described but Goldman testified that he did not recognize him - "the only look I got at him was when they were both on the same side of the car" (R. 14). A woman came into the service station, said she was in trouble and asked for help. Goldman's wife started to telephone at about this time and the two men went away, abandoning the car (R. 12, 19). Reese later recovered the car (R. 19).

The two accused were apprehended by a civil police officer in a "nigger house" (date and hour not specified) about two and one-half miles from the service station described. When the police officer entered the building they remarked that they supposed the officer was "looking" for them. The officer replied that if they were the two "boys that stole a car" he was looking for them, whereupon "they said we are the ones" (R. 15). One of the accused had in his possession a .45 caliber pistol (R. 15, 16) which had been wrongfully taken from a footlocker of a Private Tipton of Goodman's company at Camp Gordon, Georgia (R. 7, 8). Accused were returned to Camp Gordon about March 3 (R. 18, 20).

The investigating officer testified that after each accused had been warned that anything he said might be used against him (R. 25), each stated that on "Saturday afternoon", about February 28, 1942, after considerable drinking, the two "went to town" and "later on down town they saw a car and got into it and drove off". After proceeding two or three blocks,

> "A woman raised up in the back seat of the car. That was the first time they noticed her, they said. They then told me that they drove off near Lincolnton, Georgia, and stopped at a Service Station and called the operator out."

One of accused said he had carried a pistol (R. 24).

Each accused declined to testify or make an unsworn statement.

4. The evidence is legally sufficient to support the findings of guilty of Charge I and Specification 1 thereunder as to each accused. The exact place of the commission of the larceny charged was not shown but it fairly appears that it occurred in the general vicinity of Augusta, Georgia. The failure of proof is not material.

Specification 2, Charge I, alleging an attempt to commit robbery, is erroneously laid under Article of War 93. It alleges an offense in violation of Article of War 96. With respect to this Specification there is some evidence that both accused went to the vicinity of the service station operated by Mr. Lee Goldman and that one of them twice asked for gasoline and finally entered the service station and presented a pistol in an apparent effort to get the gasoline. Whether this accused intended to steal the gasoline or pay for it does not appear. The circumstances in evidence are consistent with a theory that he merely attempted by displaying the pistol to coerce Goldman into making a sale which, on account of the late hour, he was reluctant to make.

But even if the evidence be accepted as showing that an attempt at robbery was committed by someone, there is no proof as to which accused made the attempt or that the attempt was a joint venture by the two accused. Goldman testified that he did not see the second man at his service station except when that man was standing outside the building. But one accused was inside the building when the pistol was displayed. There is no evidence that the second man acted as a lookout or that he assisted or participated in the transaction in any other way. The mere presence of a person at the scene of a crime by another, in the absence of evidence of preconcert or attempt to participate, is not a sufficient basis for an inference of participation in the crime (Hicks v. United States, 150 U.S. 442; CM 186947, Bopp and Aldrich). The two accused had been jointly engaged in taking and driving away the automobile and it is not unreasonable to infer from this circumstance that the two joined in a plan to buy or otherwise legitimately obtain for their return journey the small amount of gasoline first requested. There is no substantial proof that the subsequent show of force was the outcome of a preconceived plan between the two.

The evidence is legally insufficient to support the finding of guilty of Specification 2, Charge I, as to each accused.

5. The United States Penitentiary, Atlanta, Georgia, was designated as the place of confinement. Inasmuch as each accused is under 31 years of age and is properly sentenced to a term of confinement less than 10 years, a Federal reformatory or correctional institution or other place, in lieu of a penitentiary, should be designated as the place of confinement. See paragraph 2 a of letter from The Adjutant General to commanding generals, dated February 26, 1941, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution."

6. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and Specification 1 thereunder, but legally insufficient to support the finding of guilty of Specification 2, Charge I, and legally sufficient to support only so much of the sentence in each case as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years in a Federal reformatory or correctional institution or in another place other than a penitentiary.

_____, Judge Advocate.

_____, Judge Advocate.

(On Leave) _____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., May 6 1942 - To the Commanding General, 4th Motorized Division, Camp Gordon, Georgia.

1. In the case of Privates Paul Goodman (14043724), Company D, 4th Engineer Battalion (Combat), and Johnnie W. McBryant (14024542), Company C, 4th Engineer Battalion (Combat), 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 of Charge I and Specification 1 thereunder, legally insufficient to support the finding of guilty of Specification 2, Charge I, and legally sufficient to support only so much of the sentence in each case as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a Federal reformatory or correctional institution or in another place other than a penitentiary, which holding is hereby approved. Upon vacation of the finding of guilty of Specification 2 of the Charge, vacation of so much of the sentence to confinement in the case of accused Goodman as is in excess of five years, and designation of a Federal reformatory or correctional institution or another place other than a penitentiary as the place of confinement in each case you will have authority to order the execution of the sentences.

2. As noted, the record of trial has been held legally sufficient to support the findings of guilty of Charge I and Specification 1 thereunder alleging joint larceny by accused of an automobile. In determining the legal sufficiency of records of trial of this kind to support the sentences adjudged neither The Judge Advocate General nor the Board of Review weighs the evidence. Applying this rule, sufficient evidence was found in this case to satisfy the legal requirements of proof. I am not, however, convinced that accused actually intended permanently to deprive the owner of his automobile or that their offense with respect to the property amounted to more than that commonly known as "joy riding". Under the authority of the last note on page 216 of the Manual for Courts-Martial I accordingly recommend that only so much of the findings of guilty of Charge I and Specification 1 be approved as involves findings that the two accused, acting jointly and in pursuance of a common intent, did at the place and time alleged wrongfully and without the consent of the owner take and carry away one Buick Sedan, value about $325, the property of R. N. Reese, in violation of Article of War 96, and that in each case the execution of the dishonorable discharge adjudged be suspended, the

term of confinement be materially reduced, and the place of confinement be changed to the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or to a military post, camp or station. In making this recommendation consideration has been given to the previous convictions of accused.

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

(CM 221019).

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

1 Incl.
Record of trial.

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

SPJGK
CM 221215

MAY 4 1942

U N I T E D S T A T E S)	CAMP ROBERTS
)	
V.)	Trial by G.C.M., convened at
)	Camp Roberts, California, Febru-
Private DONALD K. GROFF)	ary 20, 1942. Dishonorable dis-
(39078302), Service Battery,)	charge and confinement for five
1st Battalion, 40th Field)	(5) years. Federal Correctional
Artillery.)	Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

2. The only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement.

Confinement in a Federal reformatory or correctional institution is not authorized under letter dated February 26, 1941 (AG 253 (2-6-41)E), from The Adjutant General to all commanding generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized under Article of War 42 for peace-time desertion nor for willful disobedience of a lawful command of a superior officer, the offenses of which the accused was found guilty.

3. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years in a place other than a penitentiary, Federal reformatory or correctional institution.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

MAY 8 1942

War Department, J.A.G.O. - To the Commanding General, Headquarters, Camp Roberts, California.

1. In the case of Private Donald K. Groff (39078302), Service Battery, 1st Battalion, 40th Field Artillery, Camp Roberts, California, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years in a place other than a penitentiary, Federal reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution, you will have authority to order the execution of the sentence.

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

(CM 221215).

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

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

SPJGH
CM 221399

JUL 9 1942

U N I T E D S T A T E S	SECOND ARMY
V.	Trial by G.C.M., convened at Fort Leonard Wood, Missouri, April 10, 1942. Dismissal.
Captain CECIL L. HAY (O-322315), 119th Field Artillery.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

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

Specification 1: (Not guilty).

Specification 2: In that Captain Cecil L. Hay, 119th Field Artillery did at Fort Leonard Wood, Missouri on or about January 18, 1942, with intent to do bodily harm, commit an assault upon Edna I. Bain, Second Lieutenant, Army Nurse Corps, by striking her in the face and head with his hand.

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

Specification 1: In that Captain Cecil L. Hay, 119th Field Artillery, did, at Fort Leonard Wood, Missouri on or about January 18, 1942, commit an assault upon Edna I Bain, Second Lieutenant, Army Nurse Corps, by wrongfully, forcibly and in an indecent manner, attempting to fondle and caress her, without her consent and against her vigorous protest.

Specification 2: (Not guilty).

The accused stood mute. The court entered a plea of not guilty to all Charges and Specifications. He was found not guilty of Specification 1, Charge I, guilty of Specification 2, Charge I except the words "with intent to do bodily harm"; of Charge I, not guilty of violation of the 93rd Article of War but guilty of violation of the 96th Article of War; guilty of Specification 1, Charge II; not guilty of Specification 2, Charge II, and guilty of Charge II. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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

Second Lieutenant Edna I. Bain, Army Nurse Corps, Station Hospital, Fort Leonard Wood, Missouri, first met the accused on the evening of Saturday, January 17, 1942, when accused and Captain Case called at the nurses' quarters and escorted Lieutenant Bain and another nurse in the car of the accused to an informal dance at the 119th Field Artillery Club, Fort Leonard Wood. During the evening Lieutenant Bain had not more than three drinks of bourbon and Coca Cola, which had no effect on her. She did not know how much the accused drank. She left the dance once with the accused and went to the 119th Officers' Mess, where they ate some celery and radishes. On the way back to the club they kissed each other once (R. 13, 35-39).

Miss Bain and accused left the club in the car of accused between 1:00 and 1:30 a.m., Sunday morning. She intended to go home and took it for granted that they were going there. When she saw that they were not headed for the hospital area, she suggested that they were not on the right road and that she wanted to go home. The accused made no reply to her request to be driven home, but drove by the Military Police Inspection Station on Highway 17, down that highway several miles to a side road, where he turned right and then into a lane which led to a school house. After shutting off the engine and the lights, accused immediately began making improper advances. He placed one arm around her shoulders and brought his free arm toward her. Miss Bain immediately tried to protect herself and to pull his arms and hands away. Accused grasped her arms roughly and her knees very forcibly notwithstanding her resistance with all of her power and strength. He made no response to her continued requests to be taken home. When she scared the accused by saying that someone was looking in the window, the accused started the car (R. 13-17).

The accused drove across the highway up a road a short distance to a lane, parked the car, shut off the lights and started his improper advances all over again. He was very rough, placed his hands on her thighs, trying to separate her knees, scrambled around over her, forced his knee between her knees, pinned her down on the seat and held her hands back. As she felt that she was nearly overcome in spite of her

struggle and could not hold out much longer and because accused was so close in such a compromising position, she bit him on the cheek. He immediately struck her across the side of her head and face, jarring her whole body, making her head ache, and causing a swelling and abnormal redness. After the accused struck her, he said "You nurses are all alike. When someone touches you you think they are going to make you". Miss Bain then got out of the car with the accused right behind, pulling and dragging her. Just after they were out, the accused took hold of her and offered, for the first time, to take her home if she would get in the car. When she reentered the car, the accused backed the car out of the lane, drove up the side road to Highway 17 and then started in the direction of the post (R. 17-22).

After driving a short distance on Highway 17 the accused stopped the car on the side of the road. When Lieutenant Bain got out of the car, accused chased her around the car several times. She saw the lights of a car coming from the direction of the post and tried to get in the middle of the road to stop it, but the accused pulled her back. She freed herself and screamed for help. When the car stopped she got in it between two soldiers. The accused tried to pull her out of the car and said that he would take her home. After her refusal, the accused started toward the post and the soldiers drove her to the next town south, Cabool, where the soldiers bought her a bus ticket to the post (R. 22-27).

The soldiers' car stopped because of the screams of a lady for help. Miss Bain ran to the car, got in, and asked them to take her with them. The other car parked on the side of the road was then backed down to them. Miss Bain was crying, frightened, hysterical, and her hair was all mussed up. She refused to get out and go with the captain. When the captain took hold of her arm, one of the soldiers told him to let her stay with them. Within a few minutes she made a brief explanation to the soldiers; that she had been fighting with the captain; that he had almost and probably would have overpowered her if the soldiers had not come along; and probably would have been if she had not been so strong. Lieutenant Bain "conducted herself like a lady" and was not intoxicated. The soldiers took her to Cabool where she caught a bus to the camp (R. 56-63).

Miss Bain suffered pain in her face from the blow, had bruises on her arms and thighs above the knees, and was extremely upset and nervous (R. 28-29). Her stockings were torn and had runners in them down by the ankles, her shoes were very scuffed and her fur coat torn in the back (R. 28, 29, 34).

At about 8 o'clock on the morning of January 18, Miss Bain telephonedto Lieutenant Nola E. Quinn, A.N.C., who lived across the hall, but who had gone on duty at 7 o'clock, that she was home. When Lieutenant Quinn entered the room of Lieutenant Bain at 2:15 o'clock that afternoon, she found her nervous and crying, with bruises on her arms, about her shoulders, around her knees, and her right cheek swollen. The gist of their conversation was about an unpleasant experience. The bruises were of a moderate degree and were evident for several days (R. 63-67).

4. The evidence for the defense is substantially as follows:

The accused testified that on the evening of the informal party celebrating the opening of the 119th Field Artillery Club, he was asked if he would escort a nurse to the party. Accused and Captain Case agreed to escort two nurses, the accused to escort the taller and Captain Case the shorter. They went to the nurses' quarters, were introduced to two nurses, and the accused became Miss Bain's escort. Upon arrival at the club, Captain Case treated them to a drink from a bottle which he purchased and kept in the bar. During the evening accused and Captain Case treated alternately, usually serving bourbon whiskey with Coca Cola. Included with the waltzes and fox trots were vigorous modern dances and he "imagined" the shoes got damaged. About 12:30 a.m. accused and Miss Bain walked over to the Officers' Mess and had some celery and olives from the ice box. On the way back they stopped in a little room and kissed each other. Miss Bain seemed to enjoy it and cooperated very fully. When accused and Miss Bain left the club about 1:00 a.m. and went to his car, he asked if she would like to take a little ride. She replied that the next day was her day off. Accused kissed her before he drove out of the parking lot (R. 70-74).

Without any fixed place in mind, he drove to the Military Police station on Highway 17, and when passed by the sentry, drove slowly down that highway. About ten miles away he pulled into a driveway and started back on the same road. Upon reaching the deserted village of Bloodland, he desired to relieve himself, pulled off to the side of the road, put on parking lights, walked behind a building and relieved himself. When he got back to the car they "began to do some necking". He kissed her, and she seemed to kiss back and enjoy it. The hugging and kissing with conversation mixed in lasted for over an hour. The car was getting fairly warm from the heater. Miss Bain, in her fur coat, began to talk loudly and in a little more animated manner, and then bit him fairly sharply on the cheek for no apparent reason. He then slapped her in a "normal brief way" with an open hand. She seemed to resent it very highly, got out of the car, hailed

an approaching coupe and entered it. Accused backed his car, walked to the coupe and saw her sitting on the seat with two soldiers. He told her that they had better go home, but she replied that she was not going home with him. He had hold of her arm and thought that with a little urging she would come along. After talking with one of the enlisted men, he tried to pull her out, but she would not be urged. He then asked the soldier to take her to her quarters, but the soldier declined his offer to pay for that trouble. The soldiers left with Miss Bain and the accused then drove back to his quarters (R. 74-78).

The accused stated that he did not leave Highway 17 except to turn around. When he put his arms around Miss Bain she likewise put her arms around him. They sat in the car on Highway 17 near Bloodland for at least an hour, during which time there was a lot of kissing, hugging, and embracing, which was mutual. She had given no indication that she objected to the hugging and kissing up to the time of the bite. He had his arms around her until the bite. He slapped her with his open hand because of the sharp twinge of pain from the bite. He denied that he forced her back against the seat or held her shoulders back; that he attempted to force his knee between hers and to force her legs apart; that there had been any quarrel of any kind up to the time she bit him; that he attempted to rape her; that he got out of the car and wrestled with her before the car came over the hill; that he pulled and hauled her around on the road; that he tried to force her out of the enlisted man's car; that he attempted to keep her in the car when she got out; or that he chased her when she got out of the car (R. 78-82).

Accused stated that he did nothing to Miss Bain that he should not have done with the exception of the slap. He apologized to her by telephone and letter for failing to get her back to her quarters and for the slapping. He received a letter from Miss Bain, which was not exactly a friendly letter, and from which he could not tell whether she accepted his apology or not, because it was not worded clearly on that point (R. 88-90).

Upon cross-examination the accused identified two letters which he wrote to Miss Bain. The first, dated January 20, 1942, was received in evidence as Exhibit A (R. 96), and the second, undated, was received in evidence as Exhibit B (R. 98).

Exhibit A reads as follows:

"I desire to tender my sincere and unreserved apology for my conduct in your company early last Sunday morning.

"I realize that it will be hard for you to forgive me

even in any small degree; and any consideration you do give to my plea that I had consumed too many drinks will be highly appreciated.

"Please believe that I am truly sorry, and desire to make up in what small way I can by repaying any expenses you were caused. Will you please drop me a line & let me know the expenses so that I may reimburse you? This would make me feel better about it.

"If you write, perhaps the enclosed envelope will be of assistance."

Exhibit B reads as follows:

"Since Sunday night I've been very busy and meant to drop a line sooner as I spoke of then, but you know how, Time, our enemy, flits past.

"Believe me, it made me very happy to hear you say you'd try & co-operate with me.

"Here is what I propose to do - with your permission to try & write each week a brief letter letting you know my progress with the struggle against the Mr. Hyde part of my nature & especially the arch-enemy of my good nature & good judgment - liquor.

"All last week 4 bottles beer - so far this week 2 beers. None today. No dates. Have written to my Dad once & to my brother Ted, who is a bomber pilot, once.

"Do you wonder why I want to write & report? Because as a matter of personal honour, as well as clearing up the shame I have cast on my regiment, I must, by no matter how long & difficult an effort:

"(1) make you over from an enemy to a friend.

"(2) Secure your forgiveness.

"(3) Leave liquor alone from now on.

"No. (3) is really tough for me, numbers (1) and (2) may take years.

"This may sound like bunk to you & merely a good line to get out of a scrape, but really it's not as only time can prove.

"So please try & take it seriously & help me work my way down the list from #1 "wolf" to lower & lower spots until perhaps some day I can again rate a remark I may tell you about in the next report, if you will permit another one."

Upon examination by the court, the accused stated that he did not observe Miss Bain breaking into tears at any time; did not notice anything unusual about her until just before the biting, just prior to the arrival of the car with the soldiers; the biting, slapping, and getting out of the car all occurred within a very short period of time; all unpleasantness started approximately five minutes before she left him; she was excited - might call it hysterical - when he tried to get her out of the soldier's car; he had no conversation with Miss Bain which would have given her any knowledge of the school house after the right turn at Bloodland; he did not turn off at Bloodland on the trip south; and he knew of no reason why a serious charge should be brought out of a minor incident, or why Miss Bain should testify as she did, except that there was kidding in his regiment and in the nurses' quarters that he was a wolf, which put the accused in a very bad light (R. 89-94).

The two soldiers who served at the bar stated that accused was sober and acted natural; that approximately four drinks of liquor were served to the party of four with soda or Coca Cola; and that there was about two inches left in the joint quart bottle belonging to Captain Case and accused (R. 98-104). The fireman who was in the kitchen of the 119th Field Artillery mess on the night of the party saw accused come into the kitchen around 12:30 o'clock with a lady; he was sober (R. 105-106).

Three officers of the 119th Field Artillery, Lieutenant Colonel John H. Nussdorfer, Major James C. Wood, 1st Battalion, and Captain George A. Culp, Regimental Adjutant, testified that accused was not drunk on the night of the party; that they had known accused in the regiment at least eight years; that his reputation as a soldier was good, dependable, sober, and industrious. Captain Culp testified that he had been out with accused socially in the company of ladies when accused was drinking, and that the conduct of accused on such occasions had been normal and that of a gentleman. None of them knew anything about the reputation of accused with respect to his dealings with women (R. 108-114).

Second Lieutenant Hildegarde B. Barthell, A.N.C., testified that she had known accused since July 1941; that she had attended social functions with accused when other ladies were present, had been alone with him; and that he had always acted like a gentleman toward her (R. 106-107).

5. With respect to Specification 2, Charge II, alleging an assault by striking Miss Bain in the face and head with his hand, the testimony of Miss Bain and the accused, the only persons present, agree that accused hit her with his hand after she had bitten him on the cheek. Miss Bain stated that she bit him because she was not able to hold out in her struggle to protect herself against accused who was so close to her in such a compromising position. The accused, on the other hand, stated that the blow with his open hand was a reflex action from her bite after about an hour of mutual kissing and hugging. The blow jarred her body, made her head ache, and caused a swelling which was evident the following afternoon.

6. With respect to Specification 1, Charge II, alleging an indecent assault, there is a sharp conflict between the testimony of Miss Bain and that of accused.

Miss Bain stated that accused drove down the highway in spite of her repeated requests to be taken home. He made three stops with the car. The first was in the lane at Bloodland when he shut off the engine and lights, began making improper advances to her with one arm around her and the free arm moving toward her, grasping her roughly and forcibly by the arms and the knees, notwithstanding her protests and resistance with all of her power and strength until she scared him into moving the car by saying that someone was looking in the window. The second stop was in a lane leading from a road across Highway 17 where accused again parked the car, shut off the lights and started his advances all over again, roughly placing his hands on her thighs, scrambling over her, forcing his knee between her knees, pinning her down on the seat, and holding her hands back, until she felt unable to continue the struggle and bit accused; after she got out and then reentered the car upon his offer to take her home, the accused drove a short distance back on Highway 17 until he stopped, for the third time, on the side of the road. Miss Bain immediately got out, and in spite of pulling and hauling on the part of accused, succeeded in stopping a car with the soldiers and securing a ride with them to a bus station.

The accused stated that he stopped the car but once, by the side of the road at Bloodland, because he desired to relieve himself. When he came back to the car there was mutual kissing, hugging, and conversation for about an hour. Miss Bain then began to talk loudly and in a more animated manner and then, for no apparent reason, bit him fairly sharply on the cheek. After he slapped her face, she got out of the car, hailed an approaching coupe occupied by two soldiers,

and although he urged her to come with him, she drove down the road with the soldiers.

The recital of the circumstances by Miss Bain is corroborated by the testimony of the soldiers as to her condition when she got into the soldier's car - crying, frightened, hysterical, and hair all mussed up; by her statement a few minutes later to the soldiers of her experience with the accused - properly admissible as a part of the res gestae; by her complaint to Lieutenant Quinn, A.N.C., the next afternoon; and the testimony of Miss Quinn that Miss Bain was then nervous and crying, had a swollen right cheek, bruises on her arms, about her shoulders, and around her knees, of a moderate degree but which were evident for several days; and the statements of accused in the two letters which he sent Miss Bain. In weighing the evidence it would tax the credulity of the Board to believe that her condition when she was rescued by the soldiers, the bruises upon her body, and the torn stockings and scuffed shoes resulted from, and the statements in the letter of accused were in explanation of, a mutual hugging and kissing party as described by accused. The Board is of the opinion that the testimony of Miss Bain is clear and convincing, and that the direct and circumstantial evidence of record corroborate her testimony and sustain the finding of guilty of an indecent assault.

7. The accused is 33 years of age. The records of the Office of The Adjutant General show his service as follows:

Federally recognized as second lieutenant, Battery F. 119th Field Artillery, Michigan National Guard, January 6, 1934; appointed second lieutenant, Field Artillery, National Guard of the United States, April 4, 1934; appointed first lieutenant, Field Artillery, National Guard of the United States, May 10, 1939; appointed captain, Field Artillery, National Guard of the United States, April 7, 1941; active duty April 7, 1941, pursuant to order of the President, January 14, 1941.

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

violation of the 95th Article of War and is authorized upon conviction of violation of the 96th Article of War.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUL 10 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Cecil L. May (O-322315), 119th Field Artillery.

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

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence and directing that it be carried into execution.

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 69, 26 Aug 1942)

- COPY -

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

(145)

SPJGK
CM 221884

Jun 9 1942

U N I T E D S T A T E S	)	IV ARMY CORPS
	)	
v.	)	Trial by G. C. M., convened at Camp Claiborne, Louisiana, May 1-2, 1942. Dismissal.
	)	
First Lieutenant POINCARE RABUN (O-341006), 367th Infantry.	)	

OPINION of the BOARD OF REVIEW
HOOVER, RITER and VAN BENSCHOTEN, Judge Advocates.

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

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

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

Specification: In that First Lieutenant Poincare Rabun, 367th Infantry, was at Camp Claiborne, Louisiana, on or about March 21, 1942, found drunk while on duty as Officer of the Day.

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

Specification: In that First Lieutenant Poincare Rabun, 367th Infantry, was, at Camp Claiborne, Louisiana, on or about March 21, 1942, disorderly in Camp.

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

3. The evidence shows that accused became regimental officer of the day, 367th Infantry, at Camp Claiborne, Louisiana, at 6 p.m., March

21 1942, having been detailed for a tour of duty of 24 hours (Ex. A). At about 7 p.m., accused, accompanied by his wife, went to the bar of the Officers' Club and purchased a quart bottle of Glenmore whisky and had the bartender open it, place it on the bar and serve drinks from it (R. 6). The bottle was placed "in front of" (R. 7) accused, his wife and several other officers (R. 7, 8). Accused asked the bartender to "fix a highball" (R. 8). The bartender and one of the officer companions of accused testified that they did not see accused drink any liquor (R. 6, 12). One officer testified that he saw a glass in accused's hand at one time during the evening (R. 19). Both accused and his wife played slot machines while in the club (R. 16). Accused and his party left the bar at about 11 p.m. At this time about one-fourth or one-third of the quart of whisky remained in the bottle (R. 8).

Upon his departure, while he was on the porch of the Officers' Club, accused was heard to say to his wife, in an angry and loud manner (R. 13, 20), "If you go back in there I'll beat (or shoot) your brains out" (R. 10, 19). Accused and his wife then went to their car which was parked nearby. A "scream" was heard from the direction of the car (R. 11, 13, 17) and First Lieutenant Robert S. Swayze, 367th Infantry, and Second Lieutenant Walter M. Rogers, 367th Infantry, both of whom had seen accused in the club (R. 14, 16), went to the car. Lieutenant Swayze testified:

> "We opened the door. He said something about taking his wife home. I asked him not to, I reminded him that he was Officer of the Day and I thought he should not leave camp. He would not pay any attention to my telling him this though. He finally seemed to get a little angry about it and jumped out of the car and went after me, started hitting at me. I jumped out of his way but he finally got me. I struck at him but wasn't successful. But after a few seconds he quit." (R. 11).

This testimony was corroborated in substance by Lieutenant Rogers (R. 17). Lieutenant Swayze did succeed in striking accused a "glancing blow on the chin" (R. 15, 17). Lieutenant Rogers intervened (R. 18). After the exchange of blows accused and Lieutenant Swayze apologized to each other, and accused requested Lieutenant Swayze to ask Mrs. Rabun, who had returned to the porch of the club, to "come on and go with him". Shortly

afterwards Mrs. Rabun started to drive the car away. Accused jumped on the running board, entered the car and left with her (R. 11, 18). Lieutenant Swayze testified that at the time of the occurrences described he believed accused was "normal" (R. 13), though angry, but was not in a proper condition to perform his duties (R. 13, 14). He declined to express an opinion as to whether accused was drunk but stated:

> "It could have been anger. I could not smell liquor or the odor on his breath and at the time I imagined he was drunk, I did then. *** That night he looked like he had been in the bar and he came out acting in the manner and for just no other reason I just thought he must have been drinking and drank too much. As far as his walk and talk, I never noticed anything wrong with him. I could not reason with him and asked him several times not to leave the camp" (R. 14).

Lieutenant Rogers testified that accused's actions were abnormal, but that he did not detect the odor of liquor on his breath (R. 18-20) and did not know the cause of his condition (R. 19).

At about 11:45 p.m., two corporals of a guard of the 758th Tank Battalion went to a place near the battalion motor pool in Camp Claiborne to investigate what they described as repeated screams of a woman (R. 22, 26, 27). They found Mrs. Rabun on the ground, prone, with accused on his knees, astride her body (R. 22, 27). One of the guards testified that accused was "beating" her (R. 22). The two non-commissioned officers, with drawn pistols, ordered accused to get up. One of them testified that accused

> "got up. Then he told me to put our guns away that he was a Lt. and we did not do it and he drew a pearl handled knife. I stepped back and told Corporal Johnson to hit him and then he put the knife away and then he offered to buy us some drinks but we refused" (R. 23).

Mrs. Rabun's hand was "bleeding badly". Accused had the odor of whisky on his breath (R. 32, 33). The two corporals and a sergeant of the guard who had also come to the scene testified that they believed accused was drunk (R. 23, 28) or under the influence of liquor (R. 27, 35). Each

testified that accused's speech was abnormal (R. 23, 27, 35) and two testified that he staggered when he walked (R. 27, 35). The three soldiers accompanied accused, in his car, a short distance to the dispensary of the tank battalion (R. 23, 40). Accused insisted on driving (R. 24). En route he drove "recklessly", running his car into some stumps (R. 29, 35, 40). At one point he stopped and ordered the soldiers from the car, but, at the sergeant's order, proceeded to the dispensary (R. 31).

At the dispensary accused cursed the sergeant of the guard and said, "I will get even with you later Big Boy" (R. 37). A soldier who gave accused first aid testified that accused was "scratched and bleeding", that he "smelled of alcohol", used profane language and appeared to have been drinking (R. 43). Mrs. Rabun's eyes were "black and blue, and swollen". Both she and accused declared she had injured her hand by striking the car (R. 46). Captain Dudley D. Warner, adjutant of the tank battalion, who came to the dispensary and interviewed accused, testified that while he was talking to the officer of the guard, with witness' back to accused, accused said, "I want to see your damned face when you are talking", and that accused

> "attempted several times to butt in, but was quieted and attempted again but was quieted by Mrs. Rabun. He made this statement 'We're not Nigger lovers', his tone was nasty and his speech was thick and he staggered. When I noticed his eyes he had trouble focusing them." (R. 48)

Captain Warner noted the odor of liquor about accused and believed he was drunk (R. 47, 48). Upon request accused handed to Captain Warner "a white handled pocket knife commonly known as a fishermans knife. It had redish smears as if a bloody hand had touched it" (R. 47).

At about 1 a.m., March 22, the field officer of the day went to accused's quarters in camp and found him in bed. He shook accused "thoroughly" (R. 51) but accused only uttered an "unintelligible murmer" (R. 53) and did not awaken. From accused's appearance and a strong alcoholic odor about him (R. 51), the field officer of the day decided that he "had been drinking a great deal", was not capable of exercising all his faculties, and "was in such a condition that he was unable to do duty". As a result, he relieved accused as officer of the day (R. 52, 53).

A soldier testified for the defense that he came to the scene where accused had been found by the two noncommissioned officers of the tank battalion guard, that the "guards were cursing" in the presence of accused and his wife, and that witness did not see any signs of drunkenness (R. 65-67). An officer testified that he saw accused leaving the dispensary of the 758th Tank Battalion on the night of March 21, spoke to him and accompanied him to the vicinity of accused's quarters. Witness did not detect the odor of liquor. He testified that accused did not stagger and did not appear to be drunk (R. 60-64). A medical officer, a neuropsychiatrist, testified that he observed accused while treating him on March 22, and that accused was "rather depressed", possibly from overwork, unusual environment, or family troubles, but appeared to be sane (R. 54-58).

Accused declined to testify or make an unsworn statement.

4. The evidence shows that at the place and time alleged in the Specification, Charge I, while accused was on duty as regimental officer of the day, he was found asleep in such a condition and under such circumstances that the field officer of the day concluded that, on account of his drinking, he was unfit for continuance of his duties and forthwith relieved him as officer of the day. Although there is some negative testimony to the contrary, the evidence on the whole leaves no reasonable doubt that accused was drunk, as found by the court. During his tour of duty he had the odor of liquor on his breath, he staggered when he walked, and his speech and behavior were abnormal. Officers and enlisted men who observed him believed he was drunk. The finding that accused was drunk on duty as officer of the day, in violation of Article of War 85, was fully justified.

The evidence also shows beyond reasonable doubt that accused was disorderly in camp, as charged in the Specification, Charge II. There is uncontradicted testimony that he publicly threatened his wife, started and engaged in a fist fight with a fellow officer, viciously assaulted his wife, drew a knife on enlisted members of a guard who interfered with the assault, cursed a member of the guard and behaved with disrespect toward a senior officer who was investigating his conduct. Regardless of any possible provocation for mistreatment of his wife, his indecorum and lawlessness were of a disgracefully aggravated and conspicuous nature and, in the opinion of the Board of Review, demonstrate his moral unfitness to continue as an officer. His conduct was unbecoming an officer and a gentleman within the meaning of Article of War 95.

5. The review of the record of trial by the Staff Judge Advocate, addressed to the reviewing authority, contains a statement that the records of the 367th Infantry show that about May 12, 1941, accused was reprimanded under Article of War 104 for being drunk and disorderly, for misapplication of a Government motor vehicle and for carrying a concealed weapon.

6. War Department records show that accused is 28 years of age. He attended the Louisiana State University but did not graduate. He was appointed a second lieutenant of Infantry, Reserve, on May 21, 1936, and was promoted to first lieutenant on June 17, 1939. He served as a subaltern of the Civilian Conservation Corps for a period not shown except that such service was terminated when he was ordered into active military service on March 20, 1941.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 85.

(Signed) Herbert D. Hoover, Judge Advocate.

(Signed) Benjamin F. Riter, Judge Advocate.

(Signed) (On Leave), Judge Advocate.

- COPY -

1st Ind.

War Department, J.A.G.O., Jun 13 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Poincare Rabun (O-341006), 367th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Accused was drunk on duty while officer of the day and was conspicuously disorderly in camp. I recommend that the sentence be confirmed and carried into execution.

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

(Signed) Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of letter for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 56, 29 Jul 1942)

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

SPJGH
CM 221992

U N I T E D S T A T E S	)	GULF COAST AIR CORPS TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Kelly Field, Texas, April 28, 1942. Dismissal and confinement for three (3) years. Federal Reformatory, El Reno, Oklahoma.
	)	
Second Lieutenant HENRY C. MOORE (O-402687), Air Corps Reserve.	)	
	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at Brooks Field, Texas, on or about February 14, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Brooks Field Officers' Mess, a certain check, in words and figures as follows, to wit:

CORSICANA, TEXAS, Feb 14 1942 No._____
THE FIRST NATIONAL BANK
of Corsicana
PAY TO Brooks Field Officers Mess or order $10.00
Ten ..... Dollars
HENRY C. MOORE Lt A.C.

and by means thereof, did fraudulent obtain from Brooks Field Officers' Mess, the sum of $10.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that

he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check

Specification 2: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at Brooks Field, Texas, on or about February 14, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Brooks Field Officers' Mess, a certain check, in words and figures as follows, to wit:

CORSICANA, TEXAS, Feb 14 1942 No._____
THE FIRST NATIONAL BANK
of Corsicana
PAY TO Brooks Field Off Mess or order $10.00
Ten ..... Dollars
HENRY C. MOORE Lt A.C.

and by means thereof, did fraudulently obtain from Brooks Field Officers' Mess, the sum of $10.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 3: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at Brooks Field, Texas, on or about February 16, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Brooks Field Post Exchange, a certain check, in words and figures as follows, to wit:

CORSICANA, TEXAS, Feb 16 1942 No._____
THE FIRST NATIONAL BANK
of Corsicana
PAY TO Brooks Field P.X. or order $20.00
Twenty ..... Dollars
HENRY C. MOORE Lt A.C.

and by means thereof, did fraudulently obtain from Brooks Field Post Exchange, the sum of $20.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 4: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at Brooks Field, Texas, on or about February 16, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Brooks Field Post Exchange, a certain check, in words and figures as follows, to wit:

CORSICANA, TEXAS, Feb 16 1942 No._____

THE FIRST NATIONAL BANK
of Corsicana

PAY TO Brooks Field Post Ex. or order $40.00
forty ..... Dollars.

HENRY C. MOORE Lt A.C.

and by means thereof, did fraudulently obtain from Brooks Field Post Exchange, the sum of $40.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 5: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at San Antonio, Texas, on or about January 14, 1942, with intent to defraud, wrongfully and unlawfully make and utter to The St. Anthony Hotel, San Antonio, Texas, a certain check, in words and figures as follows, to wit:

THE ST. ANTHONY HOTEL
San Antonio, Texas, Jan 14 1942

PAY TO THE ORDER OF THE ST. ANTHONY HOTEL $10.00
Ten ..... Dollars

I have the above amount to my credit with drawee free of any claims and have authority to make this draft. Through this representation I have obtained the above amount in cash from the St. Anthony Hotel.

Velue received and charge to account of

TO First National Bank HENRY C. MOORE
of Corsicana, Texas Kelly Field, Texas

and by means thereof, did fraudulently obtain from The St. Anthony Hotel, San Antonio, Texas, the sum of $10.00, he, the Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 6: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at San Antonio, Texas, on or about January 14, 1942, with intent to defraud, wrongfully and unlawfully make and utter to The St. Anthony Hotel, San Antonio, Texas, a certain check, in words and figures as follows, to wit:

THE ST. ANTHONY HOTEL
San Antonio, Texas, Jan 16 1942
PAY TO THE ORDER OF THE ST. ANTHONY HOTEL $10.00
Ten .....Dollars

I have the above amount to my credit with drawee free of any claims and have authority to make this draft. Through this representation I have obtained the above amount in cash from the St. Anthony Hotel.
Value received and charge to account of
TO First National Bank HENRY C. MOORE
of Corsicana, Texas Kelly Field Lt.

and by means thereof, did fraudulently obtain from The St. Anthony Hotel, San Antonio, Texas, the sum of $10.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 7: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at San Antonio, Texas, on or about January 15, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Plaza Hotel, San Antonio, Texas, a certain check, in words and figures as follows, to wit:

OFFICIAL DRAFT TEXAS HOTEL ASSOCIATION
San Antonio, Texas, Date Jan 14, 1942
ON DEMAND
PAY TO THE ORDER OF: PLAZA HOTEL $10.00
Ten ..... Dollars
As maker and/or endorser I hereby agree in case this check is returned from the bank unpaid, to pay protest fees, if any, and a reasonable investigation charge, and in addition, if placed in attorney's hands for collection, to pay a reasonable attorney's fee, all exemption laws of the state of Texas being hereby waived in

the enforcement of the above obligation this check being payable where the owner and holder of same reside.

TO First National Bank
Corsicana, Texas

HENRY C. MOORE
Kelly Field

and by means thereof, did fraudulently obtain from the Plaza Hotel, San Antonio, Texas, the sum of $10.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 8: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, being indebted to the National Bank of Fort Sam Houston, San Antonio, Texas, in the sum of $80.00 for a loan, represented by two promissory notes, which notes became due and payable on or about April 3, 1941 and May 4, 1941, respectively, did, from April 3, 1941 to February 27, 1942, dishonorably fail and neglect to pay said debt.

Specification 9: (Disapproved by reviewing authority).

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

Specification 1: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at Brooks Field, Texas, on or about February 17, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Brooks Field Post Exchange, a certain check, in words and figures as follows; to wit:

CORSICANA, TEXAS, Feb 17 1942 No. 23

THE FIRST NATIONAL BANK
of Corsicana

PAY TO Brooks Field Post Ex. or order $50.00
Fifty ..... Dollars

HENRY C. MOORE Lt A.C.

and by means thereof, did fraudulently obtain from the Brooks Field Post Exchange, the sum of $50.00, he, the said Second Lieutenant Henry C. Moore, then well knowing

that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 2: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at Brooks Field, Texas, on or about February 17, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Brooks Field Officers' Mess, a certain check, in words and figures as follows, to wit:

CORSICANA, TEXAS, Feb 17 1942 No. _____
THE FIRST NATIONAL BANK
of Corsicana
PAY TO Brooks Field Off Mess or order $20.00
Twenty ..... Dollars
HENRY C. MOORE Lt A.C.

and by means thereof, did fraudulently obtain from the Brooks Field Officers' Mess, the sum of $20.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 3: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at Brooks Field, Texas, on or about February 16, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Brooks Field Officers' Mess, a certain check, in words and figures as follows, to wit:

CORSICANA, TEXAS, Feb 16 1942 No. _____
THE FIRST NATIONAL BANK
of Corsicana
PAY TO Brooks Field Off Mess or order $12.00
Twelve ..... Dollars
HENRY C. MOORE Lt A.C.

and by means thereof, did fraudulently obtain from the Brooks Field Officers' Mess, the sum of $12.00, he, the said Second Lieutenant Henry C. Moore, then well knowing

that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 4: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at Brooks Field, Texas, on or about February 16, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Brooks Field Officers' Club, a certain check, in words and figures as follows, to wit:

CORSICANA, TEXAS, Feb 16 1942 No. _____
THE FIRST NATIONAL BANK
of Corsicana
PAY TO Brooks Field Off Club or order $15.00
Fifteen ..... Dollars
HENRY C. MOORE Lt. A.C.

and by means thereof, did fraudulent obtain from the Brooks Field Officers' Club, the sum of $15.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 5: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at Brooks Field, Texas, on or about February 15, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Brooks Field Officers' Mess, a certain check, in words and figures as follows, to wit:

CORSICANA, TEXAS, Feb 15 1942 No. _____
THE FIRST NATIONAL BANK
of Corsicana
PAY TO Brooks Field Officers Mess or order $15.00
Fifteen ..... Dollars
HENRY C. MOORE Lt. A.C.

and by means thereof, did fraudulently obtain from the Brooks Field Officers Mess, the sum of $15.00, he, the said Second Lieutenant Henry C. Moore, then well knowing

that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 6: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at San Antonio, Texas, on or about January 14, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Gunter Hotel, San Antonio, Texas, a certain check, in words and figures as follows, to wit:

GUNTER HOTEL
San Antonio, Texas Jan 14 1942

PAY TO THE
ORDER OF GUNTER HOTEL $10.00
Ten ..... Dollars

I have the above amount to my credit with Drawee free of any claims and have Authority to make this Draft. Through this representation I have obtained the above amount in cash from the Gunter Hotel Value received and charge to account of

TO First National Bank
of Corsicana, Texas

HENRY C. MOORE
2 Lt AC
Kelly Field, Texas

and by means thereof, did fraudulently obtain from the Gunter Hotel, San Antonio, Texas, the sum of $10.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 7: In that Second Lieutenant Henry C. Moore, Air Corps, Kelly Field, Texas, did, at San Antonio, Texas, on or about January 8, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Gunter Hotel, San Antonio, Texas, a certain check, in words and figures as follows, to wit:

GUNTER HOTEL
San Antonio, Texas Jan 8 1942

PAY TO THE
ORDER OF GUNTER HOTEL $10.00
Ten ..... Dollars

I have the above amount to my credit with Drawee free of any claims and have Authority to make this Draft. Through this representation I have obtained

the above amount in cash from the Gunter Hotel Value received and charge to account of

TO First National Bank of Corsicana, Texas

HENRY C. MOORE
2 Lt AC
Kelly Field, Tex.

and by means thereof, did fraudulently obtain from the Gunter Hotel, San Antonio, Texas, the sum of $10.00, he, the said Second Lieutenant Henry C. Moore, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check.

Specification 8: (Disapproved by reviewing authority).

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the findings "except as to Specification 9 of the Charge and Specification 8 of the Additional Charge", approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial for action under Article of War 50½. The record has been acted upon by the Board of Review under the provisions of Article of War 48.

3a. The evidence for the prosecution concerning Specifications 1 to 7, inclusive, of the Charge, and Specifications 1 to 7, inclusive, of Additional Charge shows that the accused, during January and February 1942, drew fourteen checks on the First National Bank of Corsicana, Corsicana, Texas, which were all dishonored and returned to the payee without payment. The Charge, the Specification number, the date, the amount, and the payee of each check is as follows:

Charge	Spec.	Date	Amount	Payee	References
Add.	7	Jan. 8, 1942	$10	Gunter Hotel	R. 34-35, Ex.7
Add	6	Jan. 14, 1942	$10	Gunter Hotel	R. 32-33, Ex.8
Chg.	6	Jan. 14, 1942	$10	St. Anthony Hotel	R. 38-39, Ex. 9
Chg.	7	Jan. 14, 1942	$10	Plaza Hotel	R. 44-45, Ex. 11
Chg.	6	Jan. 16, 1942	$10	St. Anthony Hotel	R. 40-41, Ex. 10

Charge	Spec.	Date	Amount	Payee	References
Chg.	1	Feb. 14, 1942	$10	Brooks Field Officers' Mess	R. 18-19, Ex. 12
Chg.	2	Feb. 14, 1942	$10	Brooks Field Officers' Mess	R. 19-20, Ex. 13
Add.	5	Feb. 15, 1942	$15	Brooks Field Officers' Mess	R. 24-25, Ex. 18
Chg.	3	Feb. 16, 1942	$20	Brooks Field Post Exchange	R. 27-28, Ex. 15
Chg.	4	Feb. 16, 1942	$40	Brooks Field Post Exchange	R. 28-29, Ex. 14
Add.	4	Feb. 16, 1942	$15	Brooks Field Officers' Club	R. 23-24, Ex. 19
Add.	3	Feb. 16, 1942	$12	Brooks Field Officers' Mess	R. 22-23, Ex. 20
Add.	1	Feb. 17, 1942	$50	Brooks Field Post Exchange	R. 30-31, Ex. 17
Add.	2	Feb. 17, 1942	$20	Brooks Field Officers' Mess.	R. 21-22, Ex. 16.

Each check was deposited in the usual course of business, and payment thereof refused by the payee bank, The First National Bank of Corsicana, Corsicana, Texas.

The accused admitted that he uttered each check and that at the time of utterance knew that he did not have sufficient funds on deposit to pay the check (Exs. 23, 24). The ledger sheet showing the new balance of the account of the accused with the First National Bank of Corsicana, Corsicana, Texas, for the month of January 1942, is as follows:

January 8, 1942	$ 4.45
January 9, 1942	3.95
January 10, 1942	3.70
January 12, 1942	3.20
January 13, 1942	77.45
January 13, 1942	55.90
January 14, 1942	2.20
January 15, 1942	1.20
January 16, 1942	.95
January 20. 1942	.45
January 21, 1942	.20
January 22, 1942	.00 (Exs. 1, 22).

On January 22, 1942, the account was closed by the assessment of a handling

charge of 20¢ for the rejection of a dishonored check (Ex. 22).

b. The accused testified that at the time each check was written he intended to make a deposit to provide for its payment, and that he did not at any time intend to close his checking account with the First National Bank of Corsicana, Corsicana, Texas (R. 111). The accused admitted, however, that he had no source of income other than his salary as an officer and that when his dishonored checks were given, his income for January and February had been allocated to the payment of outstanding bills. The accused admitted further that he intended to gamble with the money obtained from these checks and in turn to win money with which to pay off the checks (R. 116). After the accused realized that he could not meet his obligations in this way, he quit writing checks (R. 117).

c. Specifications 1 to 7, inclusive, of the Charge, and Specifications 1 to 7, inclusive, of the Additional Charge, each alleges that the accused "* * * did * * * with intent to defraud, wrongfully and unlawfully make and utter * * *", a check, "* * * and by means thereof, did fraudulently obtain * * *" the stated amount "* * * well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Corsicana, Corsicana, Texas, for the payment of said check". The Specifications under the Charge are alleged as violations of the 95th Article of War, whereas the Specifications under the Additional Charge are alleged as violations of the 96th Article of War.

The undisputed evidence, including the testimony of the accused, shows that each check was uttered, that the accused obtained the proceeds thereof, and that each check was in turn dishonored. The only question requiring determination, therefore, is whether the checks were uttered by the accused with an intent to defraud. On this point the uncontroverted evidence shows that the accused knew, at the time each check was uttered, that he did not have sufficient funds on deposit to pay the checks. The evidence also shows that the accused was heavily indebted and that all his income for January and February was allocated to the payment of his past due obligations. These factors, together with the circumstances that fourteen dishonored checks were uttered between January 8 and February 17, 1942, lead logically to the conclusion that the accused uttered the checks in disregard of his knowledge that he had no funds in the bank to meet them.

In CM 207212, Thompson, the Board of Review stated:

"There is nothing in the record suggestive of any

reasonable expectation on his part that the check could be made good when presented in usual course * * *. The circumstances of the two transactions, brought to light, refute the assertions by accused of his lack of dishonest motive and intent, and furnish convincing proof of the deceitful and fraudulent intent alleged in the specifications under discussion."

In CM 219428, Williams, the Board of Review stated:

"* * * but the course of conduct of accused in writing a large number of checks within a comparatively short period of time, and his failure to exercise ordinary care with respect to the condition of his bank account at the time these checks were negotiated, reflects more than inadvertance, indifference or carelessness. Such repeated wrongful and unlawful acts lead to but one conclusion, viz., that accused made and uttered the checks specified, with knowledge and intent [to defraud] as alleged. * * *."

In the opinion of the Board of Review the acts of accused proven under Specifications 1 to 7, inclusive, of the Charge, and Specifications 1 to 7, inclusive, of the Additional Charge fall below the standards of honesty and probity to be expected of an officer, and amount to conduct unbecoming an officer and a gentleman within the meaning of the 95th Article of War.

4 a. The evidence concerning Specification 8 of the Charge shows that the accused, on January 6, 1941, executed two notes, as part of a series of notes, payable to the National Bank of Fort Sam Houston, San Antonio, Texas, in the sum of $40 each which were due and payable, respectively, on April 3, 1941, and on May 3, 1941 (R. 74-75; Ex. 28, 29). These notes were not paid upon the dates when they became due, and in fact, had not been paid at the date of trial (R. 75). On December 22, 1941, Mr. Edward W. Conley, vice-president of the National Bank of Fort Sam Houston, had a long distance telephone conversation with the accused who was then stationed at Corsicana, Texas (R. 76, 95). In this conversation Mr. Conley asked the accused what he intended to do about his past due indebtedness to the bank. In response to this inquiry the accused stated that he did not intend to do anything about the matter and that Mr. Conley could do whatever he "damned pleased about it"; the accused stated further that Mr. Conley might report the matter to whoever he pleased (R. 74-76, 79). Mr. Conley testified that since the telephone

conversation the accused had never had further contact with him or offered to make any arrangement about the debt (R. 79, 80).

b. The testimony of the accused as well as his statement before the trial (Ex. 23) shows that he was graduated, prior to his twenty-first birthday, from the advanced flying school at Kelly Field on December 20, 1940. On January 4, 1941, his twenty-first birthday, he was sworn in as a second lieutenant. Due to an error in first oath, he was required to take a second oath on January 17, 1941, and his income as an officer began on that date (Ex. 23).

When the accused began his duties as an officer he was over $1900 in debt. He owed $450 for money he had borrowed as a cadet; $250 for money borrowed during the first five weeks in which he received no pay; $1100 which he owed on an automobile; $396 which he had borrowed for the down payment on his automobile; and $200 which he owed for clothing and equipment as an officer (Ex. 23).

In March 1941, the father of the accused died, leaving his mother and two younger brothers partially dependent upon the accused for support (R. 101, 102). In the following months the accused contributed an average sum of $25 a month to his mother's support. In view of his obligations and the destruction of his car in an accident, through which he lost $150, the value of the car not covered by insurance, the accused realized that he faced a hopeless situation. In view of this conclusion, the accused requested to be relieved from active duty or to be permitted to resign (R. B). This request was refused and in lieu thereof one of his superior officers arranged a schedule of payments with his creditors on a percentage basis whereby $107 was to be divided among his creditors each month. This arrangement left the accused $60 a month for living expenses and $25 a month for his dependents. This plan was followed from June to December 1941 (R. 104-105; Ex. 13).

In December 1941, the accused had been without money except for his living expenses for six months. He wanted an automobile to go back and forth between his quarters and the air field. He also wanted to increase his contribution to his mother (R. 105, 106). Accordingly, he sent a letter to his creditors explaining his intention of suspending payments on his debts for the months of December 1941, and January 1942, and a part of February, and requested their indulgence (Ex. A). He stated that he mailed a copy of this letter to the National Bank of Fort Sam Houston (R. 87). In this connection it should be observed that the evidence shows that the original in-

debtedness to the National Bank of Fort Sam Houston was $600, which was divided into notes of $40 each (R. 85, 86). According to the arrangement previously described, the accused was to pay $34 a month on these notes. It was in December 1941, following the suspension of these payments that Mr. Conley called the accused by long distance telephone (Ex. 23).

In connection with the purchase of his automobile and the suspension of his payments to the National Bank of Fort Sam Houston, the accused testified that he expected to be promoted early in January 1942, and to increase his payments with the increase of his income. On December 27, 1941, the accused was transferred from Corsicana back to Kelly Field. He did not receive his promotion in January and became further involved in debt by the giving of the checks described in paragraph 3 above. The accused admitted telling Mr. Conley of the bank that he could do whatever he "damned pleased" about his debts but said he made the statement because he was angry (R. 74, 76).

c. Specification 8 of the Charge alleges that the accused, "* * * being indebted to the National Bank of Fort Sam Houston, * * * in the sum of $80.00 * * * did * * * dishonorably fail and neglect to pay said debt".

The uncontradicted evidence establishes the existence of this debt and the failure of the accused to pay it. The only issue requiring determination is, therefore, whether the default of the accused was "dishonorable". On the question as to what type of default may be legally characterized as "dishonorable", the Board of Review has held as follows:

> "* * * The mere failure by an officer to keep his promise to pay a debt is not dishonorable unless the promise is made with a false or deceitful purpose, or unless the failure to pay is characterized by a fraudulent design to evade payment (CM 207212, Thompson; CM 217636, Nichols; sec. 453 (14) (15), Dig. Op. JAG, 1912-1940; Winthrop's Military Law and Precedents (Reprint), p. 715)." (CM 220760, Fanning)

In CM 218970, Hendrickson, in considering the type of cases in which neglect to discharge pecuniary obligations is regarded as a military offense, the Board of Review quoted with approval Winthrop's Military Law and Precedent (Reprint, p. 715), as follows:

"In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, &c., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and dishonorable circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law. * * *."

There is no evidence showing that this debt was not honorably assumed. The default in its payment appears to be due to the several factors, viz., the heavy indebtedness of the accused, his purchase of an automobile to use in going back and forth from his quarters to the air field, and his desire to increase his contributions to his mother. Although the accused stated to the vice-president of the National Bank of Fort Sam Houston that he could do whatever he "damned pleased" about his debt, this statement, being made after the accused had written to the bank requesting a moratorium on his debt for two months, is not considered a sufficient factor to support the conclusion that the failure to pay the debt was "dishonorable". In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty under Specification 8 of the Charge.

5. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Flying cadet, Air Corps, May 14, 1940; appointed second lieutenant, Air Corps Reserve, January 4, 1941; extended active duty January 24, 1941.

Two efficiency reports have been rendered on accused, one covering the period July 1, 1941, to December 25, 1941, with a general rating of satisfactory; and one covering the period February 8, 1941, to June 26, 1941, with a general rating of very satisfactory.

6. The Board of Review has given careful consideration to an oral statement made before the Board by the Honorable Harley M. Kilgore, United States Senate.

7. The Commanding Officer, Navigation School, Kelly Field, Texas, has reported that the accused escaped from confinement and absented himself without leave on June 22, 1942, and was dropped as a deserter on June 29, 1942.

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 insufficient to support the findings of guilty of Specification 8 of the Charge; legally sufficient to support the findings of guilty of Specifications 1 to 7, inclusive, of the Charge, and of the Charge; legally sufficient to support the findings of guilty of Specifications 1 to 7, inclusive, of the Additional Charge, and of the Additional Charge; and legally sufficient to support the sentence, and warrants confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War, and is authorized upon a conviction of a violation of the 96th Article of War. Confinement in a penitentiary is authorized by Article of War 42 for the offense involved in Specification 1, Additional Charge, obtaining money in the sum of $50 by false pretenses with intent to defraud, recognized as an offense of a civil nature and so punishable by confinement in a penitentiary by Section 22-1301 of the Code of the District of Columbia (1940).

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and opinion of the Board of Review in the case of Second Lieutenant Henry C. Moore (0-402687), Air Corps.

2. I concur in the opinion of the Board of Review that the record is legally insufficient to support the findings of guilty of Specification 8 of the Charge; legally sufficient to support the findings of guilty of Specifications 1 to 7, inclusive, of the Charge, and of the Charge; legally sufficient to support the findings of guilty of Specifications 1 to 7, inclusive, of the Additional Charge, and of the Additional Charge; and legally sufficient to support the sentence and warrant confirmation of the sentence.

The sentence is severe. The usual sentence approved in the case of an officer convicted of uttering checks knowing that he did not have and not intending to have sufficient funds in the bank for the payment thereof, has not extended beyond dismissal and has not included confinement. The accused escaped from confinement at Kelly Field, Texas, on June 22, 1942, subsequent to his trial, and was dropped as a deserter on June 29, 1942. He has not been apprehended nor heard from since that date. Upon the confirmation of the sentence of dismissal he will cease to be an officer of the Army and will not be subject to trial and punishment for his escape from confinement and desertion. I believe that clemency to the extent of remission of the confinement and total forfeiture is not warranted in view of his escape and desertion. I recommend that the sentence as adjudged - dismissal, total forfeitures, and confinement at hard labor for three years, be confirmed and ordered executed.

3. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Flying cadet, Air Corps, May 14, 1940; appointed second lieutenant, Air Corps Reserve, January 4, 1941; extended active duty January 24, 1941.

Two efficiency reports have been rendered on accused, one covering the period July 1, 1941, to December 25, 1941, with a general rating of satisfactory; and one covering the period February 8, 1941, to June 26, 1941, with a general rating of very satisfactory.

4. Inclosed herewith are the draft of a letter for your signature,

transmitting the record to the President for his action, and a form of Executive action confirming the sentence and directing that it be carried into execution.

Myron C. Cramer

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

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

(Finding of guilty of Specification 8 of Charge disapproved. Sentence confirmed. G.C.M.O. 88, 7 Oct 1942)

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

(171)

SPJGH
CM 222173

U N I T E D S T A T E S V. Sergeant ALFRED V. COSTA (6565681), Seventh Signal Company.	7th MOTORIZED DIVISION Trial by G.C.M., convened at San Jose, California, April 7, 1942. Dishonorable discharge and confinement for two (2) years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 only question requiring consideration is the designation of a Federal correctional institution as the place of confinement.

Confinement in a Federal correctional institution or reformatory is not authorized under the letter dated February 26, 1941 (AG 253 (2-6-41)E), from The Adjutant General to all Commanding Generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized under Article of War 42 for wrongfully disposing of subsistence stores of the United States furnished or intended for the military service thereof, the offense of which accused was found guilty.

3. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal correctional institution or reformatory.

Judge Advocate.

Judge Advocate.

Judge Advocate.

SPJGH
CM 222173

War Department, J.A.G.O., JUN 11 1942 - To the Commanding General, 7th Motorized Division, Camp San Luis Obispo, California.

1. In the case of Sergeant Alfred V. Costa (6565681), Seventh Signal Company, San Jose, California, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence to confinement as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal correctional institution or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory, you will have authority to order the execution of the sentence.

2. In view of the nature of the offenses and in order that accused may be held in the Army for further possible military service, it is recommended that the execution of that portion of the sentence adjudging dishonorable discharge be suspended.

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

(CM 222173).

Myron C. Cramer

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

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

(173)

SPJGK
CM 222205

JUN 2 6 1942

U N I T E D S T A T E S	2ND AIR FORCE
v.	Trial by G. C. M., convened at Davis-Monthan Field, Tucson, Arizona, May 18, 1942. Dismissal.
First Lieutenant JOHN RANSOM (O-339852), Air Corps, 65th Materiel Squadron.	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and IDE, Judge Advocates.

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

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

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

Specification: In that 1st Lt. John Ransom, Air Corps, 65th Materiel Squadron, did, at Tucson, Arizona, on or about January 16, 1942, in the presence of officers and enlisted men of the United States Army, shamefully misbehave himself by throwing himself on the ground and shouting, "No! No!", or words to that effect, after having been commanded by Colonel H. V. Hopkins, Air Corps, his Commanding Officer, to board a troop train.

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

3. The Charge and Specification upon which accused was tried on rehearing was included within the charges of which he was found guilty

upon the original trial. No member of the court who participated in the rehearing was a member of the court which first heard the case. Upon the original trial accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. Testimony of certain witnesses at the original trial was read in evidence, with the consent of the defense, at the rehearing, the witnesses being more than 100 miles distant from the place of the rehearing (R. 16).

4. The evidence shows that about January 12 or 13, 1942, while on duty as a member of the staff of the commanding officer of the Air Base Corps, Davis-Monthan Field, Tucson, Arizona (R. 16, 19), accused asked his commanding officer to assign him as post exchange officer in addition to his other duties, and, in response to a question as to whether he was "trying to anchor" himself "to station duties", replied in the affirmative. The commanding officer, Colonel Hubert V. Hopkins, Air Corps, denied the request and assigned accused to "squadron duties" (R. 19).

At about 6 p.m., January 15, accused was advised by Colonel Hopkins that accused and 8 other officers and 199 enlisted men had been chosen as members of a detachment with orders to proceed about January 21, 1942, from Davis-Monthan Field to the "port of embarkation, New York City" (R. 16, 20, 28). Later in the evening accused, with the other officers, was instructed to be on the post prepared for entrainment at 7 a.m., January 16, and was told that the detachment would depart at 8 a.m. (R. 17, 20, 28). At about 6 a.m., January 16, Colonel Hopkins went to a building where the officers of the detachment were sheltered and found all there except accused. Shortly afterward Colonel Hopkins received a report that accused had stated that he was ill, whereupon Colonel Hopkins sent the Air Base surgeon, Major Ehrling L. Bergquist, Medical Corps, to accused's quarters (R. 17). The medical officer found accused in bed. Accused said he had been ill but was not sick at the time of the interview. He said that he "just did not want to go on this trip" or leave his wife and family and refused to leave his quarters (R. 23). Upon learning that accused refused to leave his quarters Colonel Hopkins sent two officers, including his provost marshal, to accused's quarters with instructions to persuade accused to come or forcibly bring him to the Air Base (R. 12, 14, 17). Accused at first refused to accompany these officers, stating that he was "not a soldier" and could not leave his wife and family (R. 12, 14). After some discussion and a threat of arrest, however, accused went with the officers to the Air Base and reported to Colonel Hopkins in the vicinity of the troop train, arriving

at about 8:30 a.m. (R. 14, 20). Several officers attempted to persuade accused to take his place on the train (R. 15, 20). Colonel Hopkins testified:

> "I approached Lieut. Ransom. I again went out of my way to see whether he fully understood his orders. I attempted to ask him what the trouble was, why he could not carry out his orders, and whether there was anything I could do to help him, and so forth, and gradually impressed upon him that I was his commanding officer, and that he was an officer in my command, and he had been given an order and I expected him to carry it out." (R. 18)

Accused made no movement to comply and repeatedly said, "No, no, I can't, I won't, I can't leave". He finally got out of the car and "sat" on the ground. He attempted to scratch Colonel Hopkins, tried to run away and resisted all efforts to get him to the train (R. 13, 18, 21). Officers and enlisted men were present (R. 11, 13, 18, 21). One officer testified that accused "was on the ground" at one time (R. 8). Another testified that accused

> "was shrieking and carrying on, falling to the ground several times, making statements to the effect that he didn't belong in the Army, and that all he wanted to do was spend the rest of his time at home with his family, and that he didn't want to leave." (R. 10)

At length, in compliance with an order by Colonel Hopkins, several officers forcibly overpowered accused, picked him up and put him on the floor of a waiting ambulance, took him to the train and there escorted him to his compartment (R. 8, 10, 13, 15, 21, 24).

The medical officer who had gone to accused's home and who later observed his behavior in the vicinity of the troop train testified:

> "I think he was afraid, childish, immature, showed no sense of responsibility. I can give no reason for it except his personality. That is the way he is made." (R. 24)

He also testified that accused was "very much hysterical" (R. 26).

One of the officers who helped place accused in the ambulance testified that accused "resisted more in the form of a man in a stupor, one that didn't know what was expected of him" (R. 27), and that, on the train, accused

> "was crying, and I sat down beside him and asked him what the trouble was, and he said, 'I can't leave my wife and babies'. He said he had no business in the Army as he was not militarily inclined, and that he entered the Army through the persuasion of his brother Harry who was very militarily inclined. He said that he wanted nothing but a home in the country and his painting where he could enjoy the company of his wife and children. He said he had contemplated the probability of receiving orders for foreign duty and that he had decided that he would prefer to stand court-martial charges than leave his wife and children. I asked him if he realized the penalties for refusing to obey such an order, and he said he hadn't thought much about it, but that he thought he would be confined for a year or more and lose his commission." (R. 28)

Accused testified that for some time prior to January 15 his wife, who was pregnant, and their two children, 3 years and 9 months old, respectively, had been quite ill and under the care of physicians (R. 31, 35). When his wife learned, at about 10:30 p.m., January 15, that accused was under orders to leave the next morning, she "broke down" and became hysterical. Accused "spent the rest of the night trying to calm her". He had been worrying previously and by the morning of January 16 he had become "nervously ill". When he left his home he fully intended to board the train and report for duty (R. 31). When he reached Colonel Hopkins he felt very "sick. My legs were shaking and the muscles in my arms were shaking". He did not clearly recall what occurred at the train, but remembered being placed in the ambulance and aboard the train. He testified:

> "I remember trying to vomit. I remember sitting on the running board of some car, or the ambulance, and I remember being knocked down and being shoved around." (R. 32)

A civilian physician and a civilian nurse corroborated the testimony of accused as to the illness of his wife and children (R. 36-38).

Dr. John L. Donahue, of Tucson, Arizona, a psychiatrist, testified for the defense that he had examined accused and had observed him over periods approximating seven hours, on May 13, 15 and 17, 1942, and had formed the opinion that

> "At the present he is suffering from a case of phychoneurosis, and from my examination I arrived at my conclusions from history of childhood. He was suffering from emotional upset on January 15th or 16th, and I believe he was under severe nervous strain caused by illness in his family. He developed a serious mental state worrying about the illness of his family.
> * * * * * *
> In this condition one loses control of practically the entire emotional field and instead of having logical reasoning and sound judgment they know what is going on around them but are unable to control their will and mind. They haven't the proper judgment. They are more or less confused. The condition may last for a few minutes or an hour. They just go to pieces. There is confusion. There is poor judgment. There is very definite poor reasoning. Partial loss of memory is sometimes present. They remember some things very clearly and some things they just remember partly. They can't control their legs and arms." (R. 39, 40)

In witness' opinion accused was not responsible for his acts (R. 41, 42).

Lieutenant Colonel J. J. Hornisher, Medical Corps, Chief of the Neuropsychiatric Section of the William Beaumont General Hospital, El Paso, Texas, testified, in rebuttal, that accused was in hospital under witness' observation from January 16 to February 5, 1942 (R. 43). Witness found no mental defect or psychosis in accused and was of the opinion that accused was mentally responsible for his acts. He was capable of distinguishing between right and wrong and of adhering to the right "but did not desire to adhere to the right because in not adhering to the right he was able to escapte in an infantile way from complying with the orders." (R. 44) Accused was an "emotional type of constitutional psychotic" (R. 44). One in such a state does not suffer from a disease but from a "character defect" (R. 45).

5. The evidence fully supports the findings that at the place and time alleged and in the presence of officers and enlisted men accused shamefully misbehaved himself by throwing himself on the ground and shouting protests to the command given by his commanding officer to board a troop train. The accompanying circumstances demonstrate that his conduct was disgraceful and wholly unbecoming an officer and a gentleman within the meaning of Article of War 95. Upon all the evidence, including the testimony of Colonel Hornisher, a skilled psychiatrist who observed accused for an extended period soon after his offense, there can be no doubt that accused, though suffering from emotional disturbances, was mentally responsible for his acts.

6. At the beginning of the trial, upon direction of the court, the trial judge advocate made an announcement, for the benefit of accused, of the "various causes for challenge". The grounds for challenge stated by the trial judge advocate were incomplete, but it is apparent from subsequent action by the defense in challenging members of the court for cause and peremptorily that the defense was fully acquainted with its rights in the premises.

7. There are attached to the record of trial three letters by accused, dated February 22, March 6 and April 4, 1942, stating his desire for foreign service and requesting further opportunity to demonstrate his fitness to serve as an officer of the Army. Letters from three physicians verifying the illness of the wife and children of accused prior to his offense are attached to the record. Four letters are also attached, including one from Honorable Ernest W. McFarland, United States Senate, dated April 1, 1942, attesting to the good character and reputation of accused prior to his offense and requesting that he be given further opportunity to serve as an officer.

8. War Department records show that accused is 28 years of age. He graduated from the University of Arizona in 1937, with the degree of Bachelor of Arts. He was commissioned a second lieutenant, Cavalry Reserve, on May 27, 1936, and was promoted to first lieutenant on June 24, 1939. He entered upon active military service on July 15, 1941.

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

and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of violation of the 95th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., AUG 14 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant John Ransom (O-339852), Air Corps, 65th Materiel Squadron.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. There was, in the illness of accused's wife and children, some explanation of accused's reluctance to depart for service overseas, but his conduct was of such disgraceful character that I find no adequate basis for clemency by way of commutation or suspension of the sentence. I accordingly recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to correspondence requesting clemency, referred to in the opinion of the Board of Review, including a letter from the Honorable Ernest W. McFarland, United States Senate, dated April 1, 1942, asking that accused be permitted to continue in active military service. This correspondence is attached to the record of trial.

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

Myron C. Cramer

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of letter for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 66, 18 Aug 1942)

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

(181)

SPJGK
CM 222276

JUN 20 1942

UNITED STATES)	CAMP WHEELER, GEORGIA.
)	
v.)	Trial by G. C. M., convened at
)	Camp Wheeler, Georgia, May 25,
Private JAMES B. GRIER)	1942. Dishonorable discharge
(34066624), Company F,)	and confinement for life.
16th Training Battalion.)	Penitentiary.

REVIEW by the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and IDE, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James B. Grier, Company F, Sixteenth Training Battalion, Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia, on or about May 7, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Monroe H. Lyles, a human being, by stabbing him with a knife.

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

3. The evidence shows that on May 7, 1942, accused and the deceased, Private Monroe H. Lyles, were both members of Company F, 16th Training

Battalion (colored), stationed at Camp Wheeler, Georgia (R. 2, 9, 17, 28, 35), and quartered in the second story of a temporary barracks building, front elevation, side elevation and arrangement of upper floor of which are shown on a plat attached to the record (Ex. P-1). Lyles weighed about 170 pounds and was larger and heavier than accused (R. 16, 33). Accused stabbed and mortally wounded Lyles with a pocket knife, in their quarters, on the evening of May 7, under these circumstances:

Accused was sitting or lying on his bunk (R. 18, 41) reading "one of the message center blanks" and discussing "questions" appearing thereon with Private Charlie Daniels of accused's company when Lyles came upstairs, asked accused if the paper belonged to Lyles and if accused "had been in" Lyles' trunk (R. 18, 31, 41). Lyles appeared to be very angry, said he "had the 'ass bad'" (R. 24), called accused a "son-of-a-bitch" and remarked "I'm tired of all this shit" (R. 32). He went to the bunk where accused was and "snatched the paper out of his hand" (R. 41). Private Charles R. Hankerson, Company F, 16th Training Battalion, who had just cut another soldier's hair in the barracks room, using Lyles' locker on top of accused's locker as an improvised barber chair, testified:

> "At the beginning of the stabbing, I was cutting hair, and I got finished, and I was beginning to take my tools in and get them up, and Lyles was walking up, he was walking up the aisle, and Grier was sitting on the bed. Grier had his back to him. Lyles walked up and glanced at Grier on the bed - 'Hadn't you been in my locker, that looks like my paper?'. Grier was sitting on the bed and he looked up and said, 'this is my paper.' Then Lyles said, 'this is my paper, I told you about going in my locker' - and Grier said, 'no, this is my paper'. Lyles then stepped between the two beds, which Grier was sitting on one side - between beds #5 and #6, and he glanced at the paper and he reached down and grabbed it. He came out on the aisle, and tore the paper in two, and he threw it on the floor. Grier then got off the bed, and walked out in the aisle and said, 'why did you tear that paper, I told you it was my paper?' Again he asked him, 'why did you tear my paper?' and Lyles was walking back and forth talking about the paper. Lyles said, 'I tore it up,

what are you going to do about it?' Finally Lyles started down stairs and Grier slowly walked behind him." (R. 18-19)

Hankerson also testified that Lyles walked toward the door at the end of the room and accused followed with his hands in his pockets whereupon Lyles told him to take his hands out of his pockets. Lyles also said he knew accused had a knife and "I don't care anything about your knife". Accused removed his hands from his pockets, dropped them to his side and said to Lyles, repeatedly, "go back to your locker and see if your paper is in the locker" (R. 19, 43).

Lyles returned and opened the lid of his locker, with accused and Hankerson standing close by (R. 19). Accused was to the right of Lyles, with his "hand dropped to the side". While Lyles was bent over the locker with his left arm extended and with his right hand on his knee (R. 20, 22) accused suddenly, with an underhand movement, struck him in the right chest (R. 20, 29, 41). Hankerson seized accused by the right wrist. Accused had in his right hand a "regular knife, switch blade", with a three to six inch blade (R. 20, 21, 29, 37). Grier broke away from Hankerson. Lyles "backed up" to or turned and went to a bunk considerable distance away, got a bayonet and came toward accused who in the meantime had started to leave. Lyles dropped the bayonet at the head of the stairs and pursued the accused down the stairs (R. 20, 29, 43).

Accused ran out of the barracks with the knife in his hand and with Lyles pursuing at some five paces distance. Accused ran to a coal bin at the rear of the barracks and Lyles quit the pursuit. A noncommissioned officer then tried to induce accused to give him the knife but accused refused, closed the knife and put it in his pocket (R. 36). Accused then remarked that he was "going over the hill" and started to run away. The noncommissioned officer seized him whereupon accused pulled away and drew the knife from his pocket. This prevented further interference and accused fled (R. 37, 44). He returned to the company on the morning of May 9 (R. 15).

Lyles was found lying on the ground in the company street in front of the barracks, a large patch of blood visible over his right chest (R. 14). He was removed to the camp hospital where he died at 1:35 a.m., May 8, 1942 (R. 7). Death was caused by "a stab wound" in the heart, inflicted by a knife or other sharp instrument which

had entered the "right thorax" below the second rib and slightly to the right of the "mid line" (R. 9, 10).

Accused testified that during the altercation in barracks Lyles called accused a "damn liar" and "was cursing all the way". When Lyles found his paper accused asked why he had not looked in the locker in the first place and Lyles said "he had the ass bad, and that nobody should fool with him" (R. 47), and "I will stamp you to the floor". He also said, "You're a Mother Fucker", and "I'll get this bayonet and swap hell out of you". At this moment Lyles "was reaching for his bayonet, and made a step". Accused feared that Lyles was about to assault him with the bayonet, and, to prevent such an attack (R. 48, 53, 55) accused reached in his "pocket and got the knife and when he went across me, I just hit him" (R. 48). Accused was not angry, did not hear Lyles accuse him of having a knife (R. 51) and stabbed Lyles as he "was walking, he was reaching for his bayonet" (R. 53). Accused did not try to run away (R. 54). He ran from Lyles later but did not draw the knife on the noncommissioned officer who attempted to stop him outside the barracks (R. 54). He went home after the trouble. His mother returned him to camp (R. 50).

4. It is undisputed that at the place and time alleged accused, without legal justification, killed Private Monroe H. Lyles, Company F, 16th Training Battalion, a human being, by stabbing him with a knife.

Lyles provoked the quarrel preceding the assault by snatching away the paper accused had in his hand, by suggesting that the paper had been taken from Lyles' locker and by addressing abusive remarks and obscene epithets to accused. There was in these acts, however, no adequate provocation or excuse for the killing, within the law of homicide (par. 149a, M.C.M.).

Accused testified that he stabbed Lyles in self-defense when the latter threatened to use a bayonet and made a movement in that direction. The evidence on the whole excludes any reasonable claim that prior to the time at which accused struck Lyles there was any appearance of danger to the accused or that accused had any reasonable ground to believe himself in serious peril. There was no claim by accused that he retreated or attempted to retreat before stabbing Lyles, although it is obvious he could have safely withdrawn from the scene at any time. There is in the record no reasonable basis for a conclusion that accused acted in self-defense.

The facts amply support the conclusion of the court that accused unlawfully killed Lyles with malice aforethought.

5. When the prosecution rested the defense requested that the court require the prosecution to put certain witnesses on the stand and suggested that failure to do so amounted to conscious suppression of evidence favorable to the accused. The court denied the request (R. 39). The witnesses in question subsequently testified for the defense. There was no semblance of suppression by the prosecution of evidence favorable to accused. The request was properly denied.

6. The court was legally constituted and had jurisdiction of the person and offense involved. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the offense of murder, denounced by section 452, Title 18, United States Code.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGH
CM 222739

(187)

JUL 28 1942

U N I T E D S T A T E S	TRINIDAD BASE COMMAND
v.	Trial by G.C.M., convened at Trinidad, British West Indies, June 4, 1942. Dismissal.
Major JOSEPH W. SEEMES (O-143769), Infantry.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

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

CHARGE: Violation of the 85th Article of War.

Specification: In that Major Joseph W. Seemes, Infantry, Force Aruba, was at Camp Savaneta, Aruba, Netherlands West Indies, on or about April 19, 1942, found drunk while on duty as Executive Officer of Force Aruba.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that on April 19, 1942, the accused was Executive Officer of Force Aruba, Aruba, Netherlands West Indies. Lieutenant Colonel Charles R. Jones, Infantry, was in command of Force Aruba, which force was in turn under the command of Colonel Peter C. Bullard, Engineers, the Commanding Officer of Force Curacao, Curacao. At about 2:55 a.m. on that day a submarine, thought to be German or Italian, fired six or seven shells at gasoline tanks on the

Island of Curacao, which island is about 49 miles from the Island of Aruba. The firing ceased within from about one to three minutes (Ex. 1).

The Commanding Officer, Force Aruba, received at about 4:45 a.m. notice by radio of that attack. All units of the Aruba Force were then notified and were given orders to be especially alert. The normal pass privileges to allow 15 percent of the command to be absent daily until 11 p.m. were terminated as of 6 p.m. No special instructions were given as to duty hours on April 19th. The normal duty hours for personnel on desk work or other administrative duties were from 7:30 a.m. to 4:30 p.m. In addition, alert formations or stand-to's were held from 5:30 to 6:15 a.m. and from 6 to 6:45 p.m. These duty hours were no different from those on any other day around that date. An officer was on duty at Force Headquarters at all times. Those orders were issued in accordance with instructions from higher headquarters (Ex. 2).

In reply to the question whether as the result of the information he had received of hostile action against Curacao, Netherlands West Indies, he had issued any instructions to the officers and men of his command "relative to number of hours per day each would be or would be considered on duty" Colonel Jones stated in his deposition:

> "Relative to the answer given to sixth interrogatory no special instructions concerning duty hours on April 19, 1942, were given. However in view of the fact that all members of this command were required to be present at their post, camp or organization area by orders, it was assumed by me they were on duty and available to be called out immediately in case of an alarm regarding any anticipated enemy action" (Ex. 2).

At 6 p.m., April 19th, the Adjutant of Force Aruba, Captain Erwin D. K. Hoehne, Quartermaster Corps, gave orders to the force to man their posts. The troops were at their post until 6:45 p.m., when they were released to their quarters or barracks. Up to 8 p.m. the troops were on a stand-to status, and after that time were on an alert status. The only difference then, as to troops, from any ordinary evening was that pass privileges were not in effect and the men were in barracks. Although the Adjutant knew of no orders to that effect, all officers of the staff were present at headquarters that evening. The accused was at his desk at headquarters at 6:30 p.m. Shortly after he left the camp with Force S-3 and returned in about 30 minutes. During the next 30 minutes or hour all of the staff officers were in the office. The Adjutant, Captain Hoehne, stated that the officers were released from

their posts but not from duty at approximately 8 p.m., when Colonel Jones rose from his desk and said in substance "I think everything is quiet now, we can go". Colonel Jones then left the office and the others followed at their leisure (R. 7-9, 13-17).

At about 10:30 p.m., April 19th, Captain Lester L. Weissmiller, Medical Corps, Force surgeon, and Captain Irving M. Riffin, Medical Corps, at the request of Colonel Chalmers, went to the room of accused. Captain Weissmiller found accused in a drunken condition, lying on his bed, and moaning loudly. When roused the accused stopped moaning. He reported to Colonel Chalmers that there was nothing physically wrong with accused and left the room. Captain Riffin found accused in a semistuperous condition, his breath definitely alcoholic, and his speech slurred, incoherent, and choppy. Captain Riffin examined accused, found no visible signs of violence, normal temperature, pupils small, and his chest, abdomen, and extremities negative (R. 18; Ex. 3).

At about 10:50 p.m. Captain Hoehne was awakened by the noise of coughing and vomiting. On his way to the latrine he heard moaning and groaning. He located the sounds coming from the room of accused and heard accused saying "God damn your guns, God damn your guns", in a semi-stupor, followed by a loud shout "Whee", which could be heard all over the area. Captain Hoehne then met Colonel Jones and under his instructions entered, at 10:50 p.m., the room of accused, accompanied by Captain Weissmiller, Captain Riffin, and Lieutenant Raymond F. Kuhlmann, Medical Corps (R. 9-10).

The four officers found accused lying in a stuperous condition on top of a blanket in his underwear, with vomitus on the bed and floor. The odor of alcohol was detected immediately upon entering the room. The eyes of accused were glassy and staring, his breath was alcoholic, his speech slurred, mumbled, and incoherent, and he was unable fully to understand questions asked of him or to respond coherently. Lieutenant Kuhlmann, upon examination of accused, found no evidence of physical disease which would have caused his symptoms. He administered two teaspoonsful of chloralhydrate and two capsules of amytal to depress the sensorium of accused, eliminate his deep groaning, and to induce sleep (R. 11, 18; Exs. 3,4).

The three medical officers expressed their opinions of accused as follows: Captain Weissmiller that accused was drunk (R. 18); Captain Riffin that he was definitely inebriated (Ex. 3); and Lieutenant Kuhlmann that he was intoxicated (Ex. 4).

4. The accused testified for the defense that he had received no instructions on April 19, 1942, relative to any additional alert or any instructions as to a change from normal hours after stand-to was over, other than the cancellation of passes. The normal practice of a stand-to in the morning and again at night was changed about two weeks previous to April 19th to having a stand-to in the evening only. His duty during a stand-to was at his station in headquarters. On the evening of April 19th he was at his station, his desk in headquarters (R. 21-23).

Upon cross-examination, accused testified that the alert was sounded on the night of April 19th because of receipt of information relative to firing on the Island of Curacao. It was customary for members of the staff to be present at headquarters in the evening as late as 7 o'clock. As Executive Officer he usually stayed there until 8 or 8:30 p.m. On April 19th all members of the staff, the Commanding Officer, S-1, S-2, S-3, and the Executive Officer were present. He had "no particular occasion" for being present "than any other night during the stand-to". He issued no orders as Executive Officer as a result of information as to firing on Curacao. The Commanding Officer, around 3 p.m., gave out information as to that attack, instructions that everybody be on the alert and cancelled passes. There had been an alert once, on the night of February 16th, predicated on shelling of the Island of Aruba by a submarine. He left headquarters April 19th at about 8 p.m., stopped at the Officers' Club and had four cans of beer, left the club between 9 and 9:30 p.m., walked to his quarters, undressed himself, went to bed in his shorts, and covered himself with a sheet (R. 21-27).

Upon examination by the court he stated that he understood his duties as Executive Officer were to coordinate the mission of other members of the staff and to assist the Commanding Officer. He was told of the attack on Curacao. Mess on the night of April 19th was at 5 p.m. Immediately after mess he went to his room, secured his helmet, belt, and pistol, and arrived at headquarters at little before 6 p.m. He understood that on a stand-to everybody was on duty, while on an alert 50 percent of the command was on duty; that the command was on a stand-to, in other words on duty, status prior to 8 p.m. on the evening of April 19th; that the stand-to was over when he left the office; that after 8 p.m. the command was to remain in camp, were subject to call and on "I would say duty status"; "I did not regard myself as being on duty after 8:00 P.M., after I left Headquarters". He did not know whether he was in proper shape at 10:50 p.m. for duty, or to assist the Commanding Officer, because he went to bed prior to that time and went to sleep. Colonel Jones had never told accused to consider himself available for duty at all times (R. 28-31).

5. The evidence shows that Colonel Charles R. Jones was, on April 19, 1942, the Commanding Officer of the Force Aruba, Island of Aruba, Netherlands West Indies, and that accused was the Executive Officer. Colonel Jones had been informed by radio of an attack at about 2:55 a.m., on the Island of Curacao, about 49 miles from Aruba, during which a hostile submarine fired six or seven shells at gasoline tanks on Curacao. Colonel Jones notified all units of his force, gave orders to be especially alert, and terminated the normal pass privileges as of 6 p.m. of that day.

The normal duty hours for personnel on desk or administrative duty was from 7:30 a.m. to 4:30.p.m. In addition, alert formations or stand-to's were held from 5:30 to 6:15 a.m. and from 6 to 6:45 p.m. One officer was on duty at Force Headquarters at all times. On April 19th at 6 p.m. the troops were ordered to man their posts and at 6:45 p.m. were released to their quarters or barracks. They were on a stand-to status until 8 p.m. and after that time were on an alert status. The issuance of passes was not resumed.

All of the officers of the staff, including the accused, were present at headquarters that evening. The Adjutant, Captain Hoehne, stated that the officers were released from their posts, but not from duty, at approximately 8 p.m., when Colonel Jones said "I think everything is quiet now, we may go". Colonel Jones then left the office and was followed by other officers at their leisure. Colonel Jones stated that in view of the fact that all members of his command were required by orders to be present at their organization area, he assumed that they were on duty and available to be called out immediately in case of an alarm regarding any anticipated enemy action.

The accused testified that he left headquarters at about 8 p.m., stopped at the Officers' Club, had four cans of beer, left the club between 9 and 9:30 p.m., walked to his quarters, and went to bed in his shorts. He understood that the stand-to was over when he left the office, and that the command was to remain in camp, subject to call, on "I would say duty status", but that he did not consider himself as being on duty after he left the office.

The record shows clearly that the accused was drunk in his quarters at 10:50 p.m. on April 19th. The accused was in a semistuperous condition, his breath definitely alcoholic, his eyes glassy and staring, and his speech slurred and incoherent. Two medical officers examined him in his room and found nothing physically wrong with him which would have caused his symptoms. The three medical officers and Captain Hoehne expressed the opinion that accused was intoxicated.

6. Certain officers, such as a commanding officer of a post or in the field, by reason of the peculiar nature of their duty, have long been considered to be continuously on duty and thus at all times amenable to charges under the 38th (now the 85th) Article of War.

> "Again, in time of war, and especially in the field before the enemy, the status of being on duty, in the sense of this (38th) Article, may be uninterrupted for very considerable periods. As remarked by the reviewing authority, in approving a conviction of an officer under the Article early in the late war - 'an officer, when his regiment is in front of the enemy, is at all times on duty' * * *" (Winthrop Military Law, 2nd Ed., p. 614).

> "In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this (85th) article" (par. 145, M.C.M., 1928).

The duty embraced by the article may, moreover, be of an anticipatory nature, such as "an awaiting by a medical officer of a possible call for his services" (par. 145, M.C.M., 1928).

The accused was Executive Officer of the Force Aruba stationed in time of war on an island which had been about two months before shelled by a submarine, and when the Island of Curacao, about 50 miles distant, had been shelled by a hostile submarine early on the day he was found drunk. His command had been directed to be especially alert. All passes had been cancelled. When released from the stand-to that evening, the troops had been released from their posts but not from duty, and were required to be present in their organization area, in order that they might be available to be called out immediately in case of anticipated enemy action. It may be added that the post of Executive Officer is one of great responsibility in a command so situated.

It is the opinion of the Board of Review that accused was drunk on April 19, 1942, and, in view of all of the circumstances, that he was on duty when he was found drunk in his room, and thus amenable under the 85th Article of War.

7. The accused is 48 years of age. The records of the Office of The Adjutant General show his service as follows:

Enlisted Company G, 303rd Infantry, September 22, 1917; appointed second lieutenant, Infantry, the United States Army, August 26, 1918; discharged September 11, 1918; appointed second lieutenant, Infantry Section Officers Reserve Corps, November 1, 1918; reappointed October 1, 1924; Federally recognized as first lieutenant, Infantry, Kentucky National Guard, July 29, 1929; appointed first lieutenant, Infantry, Army of the United States, October 29, 1929; appointed captain, Infantry, Army of the United States, June 28, 1932; appointed major, Infantry, National Guard of the United States, September 24, 1935; inducted into Federal service, January 17, 1941.

Three efficiency reports have been rendered on the accused. The first covering the period September 21, 1917 to August 26, 1918, gave him a numerical rating of 63; the second covering the period November 11, 1940 to February 7, 1941, as a student, Infantry School, gave him a general rating of very satisfactory; and the third covering the period January 1, 1941 to June 30, 1941, as a student, Infantry School, and as a regimental plans and training officer, gave him a general rating of satisfactory.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 85th Article of War committed in time of war.

/S/ Lester S. Hill, Jr., Judge Advocate.

/S/ Chas. C. Cresson, Judge Advocate.

/S/ Abner E. Lipscomb, Judge Advocate.

1st Ind.
Jul 31 1942

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major Joseph W. Seemes (O-143769), Infantry.

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

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action confirming the sentence and directing that the sentence be carried into execution.

/s/ MYRON C. CRAMER

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

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

(Sentence confirmed. G.C.M.O. 70, 3 Sep 1942)

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

SPJGK
CM 223336

Aug 6 1942

U N I T E D S T A T E S)	UNITED STATES ARMY FORCES IN ASCENSION ISLAND
v.)	Trial by G. C. M., convened at Georgetown, Ascension Island, May 25, 1942. Dishonorable discharge and confinement for ten (10) years. Place of confinement not designated.
Private JAMES M. WILLS (13017848), Medical Detachment, 175th Station Hospital, Ascension Island.)	

HOLDING by the BOARD OF REVIEW
HOOVER, BAUGH and SIMPSON, Judge Advocates.

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

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

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

Specification: In that Private James M. Wills, Medical Detachment, 175th Station Hospital, having received a lawful command from Captain Wilfred W. Wilcox, Medical Corps, his superior officer, to "Keep quiet" and to "Go to your tent", or words to that effect, did at Georgetown, Ascension Island, in the Zymodic Building, on or about 8 May 1942 willfully disobey the same.

CHARGE II: Violation of the 65th Article of War.

Specification: In that Private James M. Wills, Medical Detachment, 175th Station Hospital, having received a lawful order from Staff Sergeant Douglas T. Sexton, a noncommissioned officer who was then in the execution of his office, to "Go to your tent", or words to that effect, did at Georgetown, Ascension Island, in the Zymodic Building, on or about 8 May 1942, willfully disobey the same.

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

Specification: In that Private James M. Wills, Medical Detachment, 175th Station Hospital, was, at Georgetown, Ascension Island, in the Zymodic Building, on or about 8 May 1942, found drunk while on duty as a laborer.

He pleaded not guilty to Charges I and II and their Specifications and guilty to Charge III and its Specification. He was found guilty of the Charges and Specifications. Evidence of two previous convictions, one by summary court-martial for absence without leave in violation of Article of War 61, and one by special court-martial for larceny in violation of Article of War 93, and for disrespect toward a noncommissioned officer in violation of Article of War 65, was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½. In lieu of designating a place of confinement he stated:

"The place of confinement is designated as 'such place as may be directed by the Judge Advocate General of the Army'".

3. The evidence shows that accused was a member of a labor detail assisting carpenters at work on a building on Green Mountain, Ascension Island, on the morning of May 8, 1942 (R. 7, 13). In the course of the forenoon another member of the detail, Private 1st Class Girard Croxton, Medical Detachment, 175th Station Hospital, observed accused and a companion under the building, drinking ethyl alcohol (R. 5). Questioned as to the quantity consumed by accused Croxton testified, "I saw two 16 oz. bottles between two men" (R. 11). With other members of the detail accused left the building site at about 11:15 a.m., in an ambulance driven by Corporal Thomas E. Paisley of the medical detachment, and arrived in the vicinity of the detachment headquarters at about 12 noon (R. 6, 7). After the arrival of accused Staff Sergeant Lawrence J. Genova of the detachment saw accused and asked him, because of his condition, to go to his tent. Accused apparently started to comply but turned about and went to Staff Sergeant Douglas T. Sexton, acting first sergeant of the detachment, and said, "I'm drunk. Are you going to turn me in?".

Sexton ordered accused to go to his tent but accused did not move to comply and said, "If you are going to turn me in, then turn me in now" (R. 7). Sexton then took accused to Secton's office in an effort to "get him quiet" (R. 8). A scuffle between the two ensued (R. 8, 11, 12). Captain Wilfred W. Wilcox, Medical Corps, commanding officer of the Medical Detachment, 175th Station Hospital, having heard the commotion, went to Sexton's office. Accused was "standing on his feet and cussing Sergeant Sexton and he would not go to his tent". He was "waving" his arms. Captain Wilcox ordered accused to be quiet and go to his tent but accused did not obey the order (R. 9).

Croxton and Paisley each testified that he had observed accused while the latter was in the ambulance and that accused appeared to be drunk (R. 5, 6). Paisley testified that "Price and Wills were the last two to get on the ambulance and Wills started to run and Wills was just about able to run" (R. 6). Sexton and Captain Wilcox each testified that accused was drunk during the occurrences at the detachment headquarters (R. 7, 9). Lieutenant Colonel William K. Rogers, Medical Corps, commanding officer of the 175th Station Hospital, testified that he was present when accused refused to obey the orders given by Sexton and Captain Wilcox and that accused "was acting inconsistent, uncontrolled", that he talked incoherently and that he was "not sober" (R. 10). Genova testified that he saw accused at the time of and just prior to the latter's altercation with Sexton and that accused staggered and was "weaving around and talking too much". Witness believed accused was drunk, that "obviously he was out of control" (R. 11).

Accused testified that he and his companion, while under the building on Green Mountain, drank an entire bottle of ethyl alcohol and started to drink another and that he remembered nothing of what occurred after they started on the second bottle (R. 13).

4. Following presentation of the evidence the trial judge advocate, in his opening argument, read to the court, among other things, the subparagraph entitled "Drunkenness" from paragraph 126a of the Manual for Courts-Martial. After the defense counsel had thereafter argued that accused did not, on account of his drunkenness, have the mental capacity to entertain an intent to disobey the orders given him (R. 14) the trial judge advocate, in closing argument, stated:

> "the crimes with which the accused is charged under the first two charges are crimes of commission and

do not require a specific intent as a necessary element of the crime.

"The word 'willful' used in the specifications is, to my mind, used with the same meaning as 'wrongful', and is not used to mean, 'with malice aforethought', with consideration, nor with intention.

"I would like also to bring to the attention of the court the fact that drunkenness is no defense. A drunken man equally with a sober man is presumed to be responsible for his actions" (R. 14-15).

5. The evidence shows that at the place and time alleged in the Specifications, Charges I and II, accused received orders from Captain Wilcox and Staff Sergeant Sexton in substance as alleged and that accused did not obey the orders. Accused was drunk.

The gravamen of the offenses alleged by these Specifications was willful disobedience or "intentional defiance of authority", a deliberate refusal or omission to do what was ordered. Mere wrongful omission or neglect to obey is not willful disobedience. Manifestly, a conscious, rational mental process is involved in willful disobedience, else the design and purpose which, according to authoritative definitions, characterize an intentional act, would be absent (pars. 134b, 135a, M.C.M.). It follows that the willfullness or intentional and deliberate defiance involved in the alleged offenses constituted an element of specific intent within the purview of paragraph 126a of the Manual for Courts-Martial, which, in material part, provides:

"In certain offenses *** a specific intent is a necessary element. In such a case the specific intent must be established either by independent evidence, as, for example, words proved to have been used by the offender or by inference from the act itself.

* * * * *

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

It may be assumed that in reaching its findings the court did not accept the theory advanced by the trial judge advocate in his argument as to the essential elements of proof required, but took cognizance of the governing rule of the Manual with respect to the necessity of proof of specific intent as well as the rule regarding drunkenness as affecting mental capacity. Was the court legally justified in concluding that accused, in his drunken condition, was capable of entertaining the specific intent willfully and diliberately to disboey the orders?

The uncontradicted evidence shows that at the time the orders were given accused had been drinking to great excess and was very drunk. The commanding officer of the station hospital testified that accused's acts were "inconsistent" and uncontrolled", and another competent witness testified that accused was obviously "out of control". These were the only witnesses who testified upon the particular issue of mental capacity and their testimony was, in substance, that accused had lost control of his mental faculties. No witness testified that accused appeared to have the mental capacity to understand the orders or their significance. Such circumstances as are in evidence, considered in their entirety, negative the possibility that accused had the mental capacity willfully and intentionally to disobey the orders. It will ordinarily be presumed that a person intends the natural and probable consequences of his acts, but this is a rebuttable presumption and falls before evidence to the contrary (par. 112a, M.C.M.). The presumption may not be indulged in the face of the evidence in this case.

In his act in going to the acting first sergeant of his detachment with a proposal, in substance, that his drunkenness be reported to higher authority, there is some indication that accused recognized the noncommissioned officer. On the other hand, accused's actions in this regard and the tenor of his proposal, viewed in the light of all the circumstances, were irrational and indicative of complete loss by accused of a normal sense of the obligations of discipline owing by a soldier to his military superior. Accused was able to stand upon his feet, to move about and to resist, to come extent, the acting first sergeant. He was also able to articulate. His physical ability to stand, move and speak is not alone sufficient to justify an inference of mental capacity.

Convictions by courts-martial may rest on inferences but may not be based on conjecture. A scintilla of evidence - the "slightest particle or trace", is not enough. There must be sufficient proof of every element of an offense to satisfy a reasonable man when guided by normal human experience and common sense springing from such experience. The following from an approved holding by the Board of Review is pertinent:

> "The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the functions of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference (CM 150828, Robles; CM 150100, Bruch; CM 150298, Johnson; CM 151502, Gage; CM 152797, Viens; 154854, Wilson; CM 156009, Green; CM 206522, Young; CM 207591, Nash, et al.). The following has been quoted, with approval, by the Board of Review (CM 197408, McCrimon; CM 206522, Young; CM 207591, Nash, et al.):
>
> > 'We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen' (Buntain v. State, 15 Tex. Appeals, 490)". (CM 212505, Tipton)

There is no evidence in the record of trial from which an inference might properly be drawn that accused, at the time of his acts,

had mental capacity to understand the orders or that he was capable of entertaining the specific intent willfully and intentionally to disobey them. As noted, there is proof of neglects or omissions by accused to comply with the orders. Such neglects or failures to obey did not involve any specific mental processes or specific intent. The essence of the failures to obey lay wholly in the breaches of discipline. As stated in Winthrop's Military Law and Precedents:

> "A mere neglect to comply with an order, through heedlessness, remissness, or forgetfulness, is an offense chargeable, not in general under this Article (64th), but under the 62d (96th). And so of a neglect on the part of a subordinate when in a condition of drunkenness." (p. 573, Reprint) (Underscoring supplied).

The record is legally sufficient to support only so much of the findings of guilty of Charges I and II and their Specifications as involves findings of guilty of failures to obey the orders, in violation of Article of War 96.

The findings of guilty of Charge III and its Specification are fully supported by the pleas of guilty and the evidence. The maximum sentence authorized by paragraph 104c of the Manual for Courts-Martial for the offenses of which accused was properly found guilty under Charges I and II and their Specifications and for the offense involved in Charge III and its Specification, to wit, failure to obey the lawful command of a superior officer, and failure to obey the lawful order of a noncommissioned officer then in the execution of his office, in violation of Article of War 96, and being found drunk on routine duty, in violation of Article of War 85, is dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 9 months and 20 days.

6. For the reasons stated the Board of Review holds that record of trial legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings that accused did, at the place and time alleged, fail to obey the command given by his superior officer, as alleged, in violation of Article of War 96, legally sufficient to support only so much of the findings of guilty of Charge II and its Specification as involves findings that accused did, at the place and time alleged, fail to obey the order given by the noncommissioned officer then in the execution of his office, as alleged, in violation of Article of War 96, legally sufficient

to support the findings of guilty of Charge III and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 9 months and 20 days.

/s/ Hubert D. Hoover, Judge Advocate.

/s/ James H. Baugh, Judge Advocate.

/s/ Gordon Simpson, Judge Advocate.

1st Ind.
Aug 11 1942

War Department, J.A.G.O., - To the Commanding Officer, United States Army Forces in Ascension Island, APO #877, c/o Postmaster, New York, N. Y.

1. In the case of Private James M. Wills (13017848), Medical Detachment, 175th Station Hospital, Ascension Island, attention is invited to the foregoing holding by the Board of Review, which holding is hereby approved. Upon approval of only so much of the findings of guilty of Charge I and its Specification as involves findings that accused did, at the place and time alleged, fail to obey the command given by his superior officer, as alleged, in violation of Article of War 96, of only so much of the findings of guilty of Charge II and its Specification as involves findings that accused did, at the place and time alleged, fail to obey the order given by the noncommissioned officer then in the execution of his office, as alleged, in violation of Article of War 96, and of only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 9 months and 20 days, you will have authority to order the execution of the sentence,

2. In view of the nature of the offenses and in order that accused may be held in the Army for further possible military service, it is recommended that the execution of that portion of the sentence adjudging dishonorable discharge be suspended. It is also recommended that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement. Your order suspending the execution of the dishonorable discharge and the designation of the place of confinement should be included in your supplementary action upon the record of trial and should be included in the general court-martial order promulgating the proceedings.

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

/s/ MYRON C. CRAMER

(CM 223336).

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

1 Incl.
Record of trial.

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

(205)

SPJGK
CM 224959

SEP 15 1942

UNITED STATES	GULF COAST ARMY AIR FORCES TRAINING CENTER
v.	Trial by G. C. M., convened at Brooks Field, Texas, August 3, 4 and 5, 1942. Dishonorable discharge and confinement for life. Penitentiary.
Private JAMES BROOKS (36162996), 839th Quartermaster Company (Truck), less Detachment Headquarters & 2nd Platoon.	

REVIEW by the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private JAMES BROOKS, 839th. Quartermaster Company (Trk), Less Detachment Headquarters and 2d Platoon, did, at Brooks Field, Texas, on or about June 17, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Cal. P. Boswell, a human being by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor, at such place as the reviewing authority might direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that about 12:30 a.m., June 17, 1942, at Brooks Field, Texas, accused, Private Cal P. Boswell and Private Calvin Jarmon, members of the 839th Quartermaster Company (Truck), Private Lonnie Venson, Medical Detachment, Station Hospital, Brooks Field, and another soldier, all stationed at Brooks Field, participated in a dice game in a latrine in the colored tent area (R. 26, 31). Accused lost all his money (R. 27; Ex. J). He asked Jarmon to give him "a shot" - to loan him 10¢ to make a bet. Jarmon gave accused the 10¢ but Boswell, who was apparently winning, refused to accept accused's bet (R. 27, 33). Accused became angry (R. 33) and a dispute between him and Boswell resulted. A "few curse words" were used (R. 28). Boswell, who had been sitting on a "commode" (R. 32), arose and approached accused who had also risen to his feet. Boswell struck accused with his fist on the mouth or nose (R. 28, 29, 33). Accused fell to his knees (R. 29) with an arm in the "urinator". Boswell put his arms about accused and "carried him around there". Accused's mouth commenced to bleed and Boswell asked accused to "let me wash your face" (R. 33). Boswell led accused by one hand to a hydrant and attempted to wash his face while holding him (R. 31, 33, 51, 64). A scuffle ensued (R. 27, 29) and accused kicked Boswell (R. 34). The two then started to hold each other or fight (R. 29, 34, 64) but were forcibly separated (R. 34, 52, 64). A noncommissioned officer came to the latrine, warned them to be quiet and threatened to call the military police. Boswell asked Venson to pick up Boswell's money. Venson did so and Boswell then left the latrine (R. 34).

Private William Edward Marshall, 839th Quartermaster Company, who had come to the scene, told accused to go to his tent and suggested that accused was apt to be confined for causing the disturbance. Marshall pushed accused from the latrine and went with him to accused's tent (R. 52). On arriving at the tent accused was told to go to bed. Boswell appeared in the company street at about this time (R. 53), went to Venson's tent and obtained the money Venson had secured (R. 35, 53) and then entered his own tent (R. 35). Accused, whose tent was across the street from Boswell's tent (R. 54) followed Boswell into the latter's tent (R. 53, 54). A second "fight" inside and outside the tent followed (R. 54, 66), each striking "heavy blows" with their fists (R. 54). Marshall seized accused and another soldier, Private Artis Ross, 839th Quartermaster Company, seized Boswell (R. 55). While accused was being taken to his own tent he

threw a Coca Cola bottle at Boswell but did not strike him (R. 56, 66, 67). Accused was about five feet, eight inches tall and weighed about 168 pounds (R. 134). Boswell was about two inches taller and weighed about 175 pounds (R. 149).

Marshall pushed accused into his tent and told him to lie down, and Ross entered the tent, told accused to lie down and pushed him onto his bunk. Ross then took off accused's shoes and clothes. Marshall went to his own tent to "make a quick change" of clothes (R. 56), saying to accused, "I am going to stay up all night. I am going to change clothes and stay up all night to keep you out of trouble" (R. 81). Ross stood in the doorway of the tent (R. 68). In the meantime Boswell "went up the company street" (R. 56). A witness testified:

> "*** Boswell came back from up toward the orderly room and he had a stick in his hand. Artis Ross came up then and told him to go on off, said because, 'You mess around and you will get in the guard house and if you do you can say we told you not to', and he turns around and goes on back up toward the orderly tent and he stays a few minutes and comes back. So when he come back he walked inside his tent and then he laid down on the bed ***" (R. 119).

Accused arose and sat at the entrance to his tent (R. 85). While accused was lying on his bunk and while sitting at the entrance to his tent he cried or sniffled and at one point said, "Anybody that misuses me *** I will kill him" (R. 78, 86).

After Boswell returned to his tent accused called to him and said, "Boswell, I want to apologize with you" (R. 38, 57, 68, 78, 82, 86). Boswell replied, "Leave it go until in the morning" (R. 69, 82, 86, 120). Accused then left his tent and started toward Boswell. Boswell came toward accused. Accused proceeded at a walk, with his arms swinging (R. 69, 121, 122). Private John Jordan, 839th Quartermaster Company, who was standing in the doorway of his tent at the time the accused and Boswell were approaching each other (R. 119, 120), testified:

> "*** and then I seen them go together and Boswell had come up like he was going to knock off a lick and Brooks came over and struck all of a sudden" (R. 120).

Boswell's hands came up as if he were going to block accused's blow (R. 124). His right hand started from his side near his hip pocket (R. 128, 130) but witness did not see anything in his hand (R. 122). Accused struck Boswell with his right hand "along in his chest like, close to his heart". As the blow fell Boswell "was making a step backward" (R. 120, 121). Witness did not see a knife in the hand of accused (R. 128). After the blow Boswell said, "Catch him, he has cut me". Boswell held his hand "to his breast and made a turn and goes across the street and then back and fell" in the company street (R. 123). Boswell was wounded in the chest and there was considerable flow of blood (R. 71). A mess kit knife (R. 71; Ex. C) was lying in a "pool of blood" close to his body (R. 93, 129). Immediately after Boswell fell a group of soldiers gathered around him (R. 79, 123). Sergeant Johnnie W. Miller, 839th Quartermaster Company, acting charge of quarters (R. 92) asked, "Who did it?" Accused replied, "I did it, Corporal Miller, and I would kill my mother if she do me wrong" (R. 72, 93).

Venson testified that he had left in a pocket of a pair of trousers he had borrowed from and recently returned to Boswell, a red handled clasp knife with a blade about three inches in length (R. 44; Ex. C). This knife was lying in the company street approximately twelve feet from Boswell (R. 96). When found the knife was closed (R. 95). There was no blood on it (R. 102). Venson demonstrated in court that the knife could be closed with one hand (R. 48).

Boswell was taken to the station hospital, Brooks Field (R. 108) where the medical officer of the day examined him shortly after 2:15 a.m., and found him dead, apparently from a stab wound in the left chest (R. 144-146). An autopsy was subsequently performed at the station hospital, Fort Sam Houston, Texas (R. 146). The medical officer under whose supervision the autopsy was performed testified that in his opinion:

> "death had been due to a stab wound entering through the anterior portion of the chest and penetrating the great vessels and a portion of the heart" (R. 149).

There was a wound of entrance about one and one-half centimeters in length and about half a centimeter in width over the left portion of the breast bone, apparently caused by a knife-like, sharp edged

instrument. The instrument had passed through the breast bone and had penetrated to a depth of two or three inches (R. 149, 150). This medical officer testified that "since the instrument used passed through the breast bone it must have required a considerable force (R. 151).

Accused was questioned by the post provost marshal at about 2:30 a.m., June 17, 1942. After having been warned, in substance, that he was not required to say anything and that whatever he might say could be used against him (R. 140), he signed a written statement that during the evening of June 16 he drank three or four bottles of beer and some whiskey. He entered the dice game and finally "started arguing" with Boswell. Boswell struck accused and accused struck back. After accused returned to his tent accused called Boswell and started to apologize but Boswell said he did not want to talk to accused. Accused,

> "kept arguing with him, because we had been frineds, and Boswell told me to go ahead on. Boswell and I got into an argument and he drew a knife on me and then they separated us again. I went back to my tent and got my mess kit out from under my cot and got my mess knife out of my mess kit, and when Boswell came back down the road I went back out in the road in front of the tent and told Boswell I was tired of him hitting me. Boswell said for me to do something about it, and then he cut at me with his knife, and I cut Boswell with my knife and Boswell said: 'Brooks, you done cut me,' then he turned around and walked a step and fell in the road" (Ex. I).

On July 3, 1942, upon investigation of the charges, accused was warned by the investigating officer, as before, and signed a second written statement (R. 139, 140). He stated that he drank four bottles of beer and four or five drinks of whiskey during the evening of June 16, and upon his return to Brooks Field at about 11 p.m., was "not drunk but my head was dizzy. I knew what I was doing". Following some remarks, back and forth, at the scene of the dice game, Boswell struck accused in the face and then seized accused and took him to a trough where he washed the blood from accused's face. Accused struggled to get away

but did not strike Boswell. Later, accused exchanged fist blows with Boswell in front of the latter's tent. During this fight Boswell "had a knife in his right hand and cut at me with it". The knife was open. Accused did not recall throwing the bottle at Boswell. Accused stated further:

"I was in my tent a few minutes later and I remember scuffling with Private Ross. I took my pants off and I think Private Ross took my shoes off. I lay down on the bed. I don't know just how long I lay there, but it wasn't very long. Just before I got up I reached under my bed where my mess kit was on the floor. The lid was off my mess kit and the knife was in it. I picked up the knife in my hand, got out of bed and sat down in the door of my tent. I saw Boswell come down the opposite side of the street from the direction of the Orderly Room. I called to him and asked if that was Boswell and he said 'Yes'. Some one of the boys was standing near me and said 'I don't see what you are fighting for, why don't you go over and apologize and make up?', so I called out to Boswell saying 'I want to apologize with you'. Then I walked over toward Boswell. He had been in front of his tent and he walked toward me. He took about four or five steps toward me and I took six or seven toward him and we met there in the Company street.

"Boswell started backing up as I approached him. He hit at me with his left hand, at the same time reaching into his right hip pocket with his right hand and I just figured he was getting a knife. Then he struck at me with his right hand and I saw a blade of a knife which he was holding in his right hand. I cannot identify that knife. His knife did not touch me. As he struck I just stopped, and that is why he missed me.

"I had been carrying the G. I. mess kit knife in my right hand with the blade toward my thumb; both my hands were at my side. When he struck at me I shifted the knife in my right hand so that the blade was toward my little finger. When Private Boswell missed me I stepped forward, raising my right hand about head high

and stabbed him with the knife.

* * * * * *

"When I cut at Private Boswell I intended to injure him; I knew what I was doing.

"After I stabbed him, Private Boswell walked to the side of the street and then walked back across the street twoard the Orderly Room and fell. I still had my knife in my hand. I walked over and stood beside where Boswell was lying for a few minutes and dropped the knife on the ground there" (Ex. J).

Accused declined to testify or make an unsworn statement (R. 179).

Major Roy E. Page, Air Corps, post provost marshal, testified for the defense that he examined accused in the early morning of June 17, 1942, and found that he was not under the influence of intoxicating liquor or drugs (R. 153-156). Major Robert W. Lowrey, Medical Corps, testified for the defense that the negro race is, generally, more emotional and less stable emotionally than the white race (R. 159). He also testified that "crying or sobbing" is an emotional manifestation (R. 160), and that a state of emotional instability brought about by a blow on the face would ordinarily disappear within a few minutes (R. 164). Upon being shown the red handled clasp knife belonging to Venson and found in the vicinity of the homicide, this witness testified that a fatal wound might be inflicted with it (R. 161). Witness also testified that in his opinion a person who had received a blow such as Boswell received would have the strength, for a short period, to close a knife (R. 163).

4. It is undisputed that at the place and time alleged accused killed Private Cal P. Boswell, a human being, by stabbing him with a knife, as charged. Accused admitted that he struck the fatal blow with intent to injure. It is manifest that the blow was delivered with great physical force. The assault followed a quarrel and some physical encounters in the course of which accused had suffered some humiliating treatment and had been struck on the face at least once. Accused became angry, exhibited his emotions by crying, armed himself with a knife and uttered threats to kill. After an appreciable period he gave voice to a peaceful overture but on reaching Boswell stabbed him.

The evidence thus indicates that the homicide was committed in passion with some degree of provocation. Accused may have felt a sense of humiliation from Boswell's conduct at the dice game and from his action in washing accused's face and accused was no doubt angered by the blows he had received from Boswell's fists, but there was nothing in Boswell's conduct, judged by ordinary human standards, to excuse the homicide. Whatever provocation occurred was wholly inadequate, in the eyes of the law, to excite uncontrollable passion in the mind of a reasonable man, and was insufficient to remove the homicide from the category of murder (par. 149a, M.C.M.).

Even assuming serious provocation by Boswell, the evidence shows that there was a very considerable cooling time between the mistreatment suffered by accused and the stabbing. Accused was, through persuasion and force, kept in his tent by other soldiers. He so far recovered his composure that he was able to conceive and use the stratagem of an offer to apologize, and thus to approach close enough to his intended victim to use the knife with which he had equipped himself. Under these circumstances it would be unreasonable to conclude that the stabbing was committed in such heat of sudden passion as to reduce the degree of the homicide. See paragraph 148a of the Manual for Courts-Martial.

Nor is a theory of self-defense tenable. In his statement accused asserted that Boswell had assaulted him with a knife and that accused stabbed Boswell to prevent the latter bringing his knife into play. No eyewitness to the events that preceded the final collision testified that he saw a knife in Boswell's hand and there is ample evidence that Boswell used only his arms or his fists in his previous fights with accused. The Board of Review finds no support in the evidence for accused's statements suggestive of Boswell's aggressive use of a knife in the final affray. An eyewitness testified that at about the instant of the stabbing Boswell made a motion as if drawing a knife from his pocket and that he lifted his hand simultaneously with the stabbing by accused. The fact that the red handled knife shown to have been in the possession of Boswell was found at the scene of the assault supports a conclusion that Boswell did, in fact, draw the knife from his pocket when he saw that he was about to be attacked by accused. This knife was closed when found and under all the circumstances it cannot be assumed that it had been open at any time during the assault. A reasonable deduction, one that the court was fully justified in making, is that accused was the aggressor in this phase of the altercation and that Boswell drew his knife only in self-defense and as a last resort to repel the attack by accused.

The evidence amply shows that accused, prompted by resentment and a spirit of revenge, and without legal justification or excuse, planned the attack upon Boswell and carried it out with malice and deliberate intent to kill, and that the homicide was accomplished with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, as alleged in the Specification. This was murder in violation of Article of War 92.

5. The first sergeant of accused's company testified as a witness for the prosecution as to the identity and military status of Boswell and accused. Upon cross-examination the witness was asked whether accused had been a good soldier. An objection to the question was sustained by the law member (R. 12, 13). The character of accused not having been the subject of the direct examination, the action of the law member was not erroneous. See paragraph 121b of the Manual for Courts-Martial.

Upon cross-examination of another prosecution witness, the law member sustained an objection to a question by the defense as to the nature of the conduct of accused while confined in the guardhouse awaiting trial. The proffered testimony, not relating to the reputation of accused, was not competent to prove his good character and was immaterial for any other purpose. It did not relate to the subject matter of the direct examination. The objection was properly sustained.

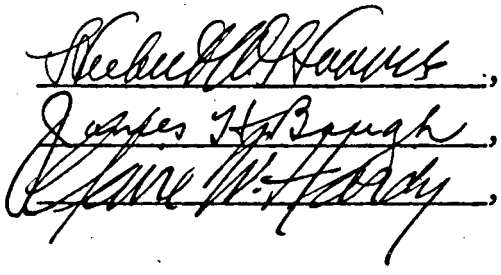
Neither of these witnesses was recalled as a defense witness and other than indicated above the defense did not offer any evidence of the previous good character of accused.

6. After reaching its findings of guilty the court was opened and received data as to previous convictions (none) and as to accused's previous service. The court was closed and upon being reopened the president announced that the members had been unable to reach a decision as to the sentence. The president directed the trial judge advocate, in collaboration with the defense counsel, to prepare for the court's perusal a list of "cases such as this in which the life sentence and in which the death sentence was imposed and commutation to manslaughter so that the court may read them". The court thereupon adjourned to meet the following day (R. 184). Upon reconvening of the court on the following day the president announced that the court would not receive or consider the matter

previously called for. The defense then made a motion that the charges be dismissed upon the ground that through the action of the court in adjourning after findings had been reached and before adjudging a sentence accused had been placed in jeopardy (R. 185). This motion was denied and the sentence was then adjudged.

The court did not err in adjourning and reconvening for consideration of its sentence. See Winthrop's Military Law and Precedents (Reprint), page 394.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence. Death or imprisonment for life is mandatory upon conviction of violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by sections 452 and 454, title 18 of the Criminal Code of the United States.



, Judge Advocate.

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

(215)

SPJGK
CM 225822

OCT 6 1942

U N I T E D S T A T E S	)	IX CORPS
v.	)	Trial by G. C. M., convened at Fort Lewis, Washington, September 2, 1942. Dishonorable discharge and confinement for one (1) year. Federal Correctional Institution, Englewood, Colorado.
Private MACK PARISH (34057182), Company E, 26th Quartermaster Regiment.	)	

HOLDING by the BOARD OF REVIEW
HOOVER, BAUGH and HARDY, 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 only question requiring consideration is the propriety of the designation of a Federal correctional institution as the place of confinement. Paragraph 90b, Manual for Courts-Martial, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a Federal correctional institution only when confinement in a penitentiary is authorized by law. (CM 220093, Unckel) Penitentiary confinement is not authorized in this case by Article of War 42 inasmuch as the period of confinement adjudged is not more than one year (A.W. 42; sec. 399 (5), Dig. Op. J.A.G. 1912-1940; par. 90, M.C.M.)

3. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allow-

ances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal correctional institution or reformatory.

[signature], Judge Advocate

[signature], Judge Advocate.

[signature], Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 9 - 1942 - To the Commanding General, IX Corps, Fort Lewis, Washington.

1. In the case of Private Mack Parish (34057182), Company E, 26th Quartermaster Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year in a place other than a penitentiary, Federal correctional institution or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory you will have authority to order the execution of the sentence.

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

(CM 225822).

[signature]

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

C
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Y

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

(217)

SPJGK
CM 226374

Nov 4 1942

U N I T E D S T A T E S	)	SECOND SERVICE COMMAND SERVICES OF SUPPLY
v.	)	
Private ROBERT M COLLINS (32183120), Air Force Section, Task Force Replacement Pool.	)	Trial by G.C.M., convened at Fort Dix, New Jersey, July 20, 1942. Dishonorable discharge and confinement for five (5) years. Suspended.

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OPINION of the BOARD OF REVIEW
HOOVER, COPP and HARDY, Judge Advocates.

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

1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Pvt Robert M Collins, Air Force Section, Task Force Replacement Pool, Fort Dix NJ then Pvt Robert M Collins, 743rd QM Co, Fort Dix NJ, did, at Fort Dix, N. J. on or about June 2, 1942, desert the service of the United States by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: embarkation for duty at an unknown foreign destination, and did remain absent in desertion until he surrendered himself at Fort Dix, N. J. on or about June 8, 1942.

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

Specification: In that Pvt Robert M Collins, Air Force Section, Task Force Replacement Pool, Fort Dix, N. J. did, without proper leave absent himself from his organization at Fort Dix NJ from about June 25, 1942, to about June 29, 1942.

He pleaded guilty to the Specification, Charge I, except the words,

> "'desert', 'by absenting himself without proper leave from his organization, with intent to shirk important service, to wit: embarkation for duty at an unknown foreign destination', and 'in desertion'".

substituting therefor, respectively, the words, "'absent himself without leave from' and 'without leave'", to the excepted words not guilty, to the substituted words guilty, not guilty to Charge I but guilty of violation of Article of War 61, and guilty to Charge II and its Specification. He was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence and suspended the execution thereof. The proceedings were published in General Court-Martial Order No. 586, Headquarters Second Service Command, October 11, 1942.

3. The record is legally sufficient to support the findings of guilty of Charge II and its Specification.

4. The evidence relating to Charge I and its Specification shows that the 743rd Quartermaster Company, of which accused was a member, arrived at Fort Dix, New Jersey, on May 21, 1942, and was thereafter placed in a staging area and given a task force number. It left Fort Dix on June 3, 1942, and embarked and sailed from the New York Port of Embarkation on June 4, 1942. (R. 9) Accused absented himself without leave at 6 a.m., June 2, 1942, and remained absent until he surrendered at Fort Dix, in uniform, on June 8, 1942 (R. 8; Ex. 1).

Accused testified that before absenting himself without leave on June 2 he requested a pass for the purpose of visiting his grandmother who, according to a letter received by accused from his mother, was ill (R. 11). The pass was refused but nothing was said as to the reasons for refusing it (R. 11, 15). Accused did not know that he was a member of a task force, did not know that his company had been given a task force number, did not know that he was in a staging area or what a staging area was, and did not know anything of an impending movement by his company to an overseas destination or elsewhere (R. 12, 13). When he absented himself he visited his grandmother in Washington, D. C., and, upon hearing from his mother that a

telegram had been received directing his return, started back to Camp Dix, via New York City, as soon as he could obtain the necessary funds (R 11, 14).

4. The evidence thus shows that accused absented himself without leave on June 2, 1942, as alleged in the Specification, Charge I, and that at the time he so absented himself his company was in a staging area awaiting shipment overseas. The company left the staging area on June 3 and embarked and departed for overseas duty on June 4. Accused surrendered at Fort Dix on June 8. As a result of his absence he did not participate in the important service of embarkation for a foreign destination. The salient question to be determined is whether he intended to shirk that service.

Intention by a soldier to shirk a specific service may of course be proved by circumstantial evidence, that is, may be inferred from other facts. It is a matter of common knowledge, of which judicial notice may be taken, that while an organization is in a staging area certain routine dispositions are made preparatory to departure overseas. Accused's company having been in the staging area for a considerable period it may be inferred, therefore, that by such routine dispositions knowledge of some prospective overseas movement was brought home to accused. Judicial notice could not be taken, nor can it be inferred from the facts in evidence, however, that accused was informed of the normally secret detailed plans and orders for the movement. There is nothing in the facts of which judicial notice may be taken or in the evidence from which it may reasonably be inferred that accused knew that the movement of his company was imminent or that his absence would result in avoidance of the movement. In so far as appears accused intended no more than to absent himself without leave from his routine duties. The evidence is not legally sufficient to support the finding that accused intended to shirk the important service described.

The record is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings of guilty of absence without leave between the dates alleged, in violation of Article of War 61, and only so much of the sentence as is authorized by paragraph 104c of the Manual for Courts-Martial for the two periods of absence without leave involved in Charges I and II and their Specifications.

5. 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 involves findings that accused did, at the place and time alleged, absent himself without leave from his organization and did remain absent without leave until he surrendered at the place and time alleged, in violation of Article of War 61, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for 30 days and forfeiture of $33.33 of his pay.

Signed Hubert D. Hoover, Judge Advocate.

Signed Andrew J. Copp, Jr., Judge Advocate.

Signed Claire W. Hardy, Judge Advocate.

1st Ind.

War Department, J.A.G.O, Nov. 9, 1942 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Robert M. Collins (32183120), Air Force Section, Task Force Replacement Pool.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that so much of the findings of guilty of Charge I and its Specification be vacated as involves findings of guilty of an offense by accused other than absence without leave, at the place and time alleged, terminated by surrender, at the place and time alleged, in violation of Article of War 61, that so much of the sentence be vacated as is in excess of confinement at hard labor for 30 days and forfeiture of $33.33 of accused's pay, and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated be restored.

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

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

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

(So much of findings of guilty of Charge I and its Specification vacated as involves findings of guilty of an offense other than absence without leave in violation of Article of War 61, and so much of sentence vacated as in excess of confinement for 30 days and forfeiture of $33.33 of accused's pay. G.C.M.O. 106, 25 Nov 1942)

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

SPJGH
CM 226611

OCT 23 1942

U N I T E D S T A T E S	93rd INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, September 17 and 22, 1942. Dishonorable discharge and confinement for two (2) years. Federal Correctional Institution, Englewood, Colorado.
Private ROBERT SMITH (35003454), Company L, 368th Infantry.	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, 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 found guilty of escape from confinement in violation of Article of War 69 (Charge I), and of assault with intent to "commit bodily harm" in violation of Article of War 93 (Charge II). He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. The reviewing authority approved the sentence, designated the Federal Correctional Institution at Englewood, Colorado, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. Confinement in a Federal correctional institution is not authorized in this case. Paragraph 90 b, Manual for Courts-Martial, 1928, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject "Instructions to reviewing authorities regarding the designation

of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorized confinement in a Federal reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel).

Penitentiary confinement is not authorized by Article of War 42 for assault with intent to do bodily harm nor for escape from confinement. Neither offense is punishable by confinement in a penitentiary 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 law of the District of Columbia.

4. The maximum limit of punishment prescribed by paragraph 104 c, Manual for Courts-Martial, 1928, for the offense of escape from confinement is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The same punishment is authorized for assault with intent to do bodily harm, making an aggregate confinement for two years in this case.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal correctional institution, or reformatory.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

SPJGH
CM 226611 1st Ind.

War Department, J.A.G.O., OCT 29 1942 - To the Commanding General, Headquarters 93rd Infantry Division, Fort Huachuca, Arizona.

1. In the case of Private Robert Smith (35003454), Company L, 368th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years in a place other than a penitentiary, Federal correctional institution, or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution, or reformatory you will have authority to order the execution of the sentence.

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

(CM 226611)

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

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

SPJGH
CM 226800

OCT 30 1942

U N I T E D S T A T E S	)	THIRTY-SIXTH DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Blanding, Florida, June
Private GILMER H. POLLARD	)	30, 1942. Dishonorable dis-
(6968998), Battery B, First	)	charge and confinement for one
Field Artillery Observation	)	and one-half (1½) years. Fed-
Battalion.	)	eral Reformatory, Chillicothe,
	)	Ohio.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates.

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

2. The only question requiring consideration is the designation of a Federal reformatory as the place of confinement.

Confinement in a Federal reformatory or correctional institution is not authorized under the letter dated February 26, 1941 (AG 253 (2-6-41)E) from The Adjutant General to all commanding generals, "Subject: Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). This accused deserted on July 15, 1940. Confinement in a penitentiary is not authorized under Article of War 42 for the offense of desertion in time of peace, in violation of Article of War 58, of which accused was found guilty.

3. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one and

one-half years in a place other than a penitentiary, Federal correctional institution or reformatory.

Lester S. Hill Jr, Judge Advocate.

Chas. C. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

1st Ind.

War Department, J.A.G.O., OCT 30 1942 - To the Commanding General, Thirty-Sixth Division, Camp Edwards, Massachusetts.

1. In the case of Private Gilmer H. Pollard (6968998), Battery B, First Field Artillery Observation Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one and one-half years in a place other than a penitentiary, Federal correctional institution or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution or reformatory you will have have authority to order the execution of the sentence.

2. In view of the fact that the offense of which accused was convicted is a military offense, and in order that he may be held in the Army for possible further military service, it is recommended that the execution of that portion of the sentence adjudging dishonorable discharge be suspended.

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

(CM 226800).

Myron C. Cramer

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

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

(231)

~~CONFIDENTIAL~~

24 No 145
Auth TJAG Stmd

SPJGK
CM 227651

DEC 21 1942

UNITED STATES v. First Lieutenant WALTER C. HESS (0-373076), Army Air Forces, 51st Fighter Squadron (TE), 32nd Fighter Group (TE).	SIXTH AIR FORCE Trial by G.C.M., convened at France Field, Canal Zone, October 5, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, COPP and SARGENT, Judge Advocates.

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

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

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

Specification 1: In that First Lieutenant Walter C. Hess, Army Air Forces, 51st Fighter Squadron (TE), 32nd Fighter Group (TE), was, at Colon, Republic of Panama, on or about August 30, 1942, in a public place, to wit, Kresch's Bar, drunk while in uniform.

Specification 2: In that First Lieutenant Walter C. Hess, Army Air Forces, 51st Fighter Squadron (TE), 32nd Fighter Group (TE), was, at Cristobal, Canal Zone, to wit in the Military Police Guardhouse, on or about August 30, 1942, disorderly while in uniform.

Specification 3: In that First Lieutenant Walter C. Hess, Army Air Forces, 51st Fighter Squadron (TE), 32nd Fighter Group (TE), was, at Colon,

Republic of Panama, on or about August 30, 1942, in a public place, to wit, Rialto Bar, drunk and disorderly while in uniform.

CHARGE II: Violation of the 96th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty.)

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

3. The uncontradicted evidence shows that about 8 p.m., August 30, 1942, accused was in the Rialto Bar, a public place in Colon, Republic of Panama (R. 5, 7, 8). Both military personnel and civilians were present (R. 6, 8). Accused was in uniform but had no cap. He "had his pants down pulling on his shirt tail to pull it down" (R. 6). When advised by an enlisted man of the military police that he should go to the rest room to adjust his clothing, accused told him to leave him alone (R. 7). An officer present offered to take accused home in an official car. At first accused refused to leave (R. 8). Two military policemen, with the aid of the officer, finally escorted accused from the building. Once outside, accused refused to enter the car. During the ensuing conversation, accused stood directly before the swinging door leading into the bar, thus, in effect, barring the way. A sailor entered the bar and the door struck accused in the back. When the sailor came out the door again struck accused. An argument resulted during which the sailor seized accused by the collar. The men were separated. Accused was then placed in a taxi by the military police and the driver was ordered not to let him out of the car until he reached France Field (R. 6, 8). (Specification 3, Charge I)

At about 8:20 p.m. on the same evening accused was observed at Kresch's Bar, a public place in Colon (R. 9, 10). He had been arguing with a sailor. "There was a lot of muffling and struggling around" (R. 13), and the two men were forcibly separated by a Panamanian policeman who requested that accused be removed from the town. About six soldiers and sailors had joined the argument (R. 12, 14). When requested by the military police to accompany them outside, accused made no move to do so (R. 10). However, accused subsequently allowed himself to be escorted from the building and offered no resistance (R. 11, 13). He was then taken to the guardhouse at Cristobal (R. 12, 17). (Specification 1, Charge I)

When accused arrived at the guardhouse at Cristobal he "was telling all the military policemen that were in his way that they could not do this to him and he demanded to see the Officer in Charge" (R. 21). When questioned by Captain Lewis, Officer of the Day, accused refused to show his identification card or tags. When asked if he had been in a fight with a sailor he denied having been in a fight with anyone, and refused to answer questions or to talk. Accused was then placed in solitary confinement. (R. 16, 17, 20, 21, 23). While in confinement he kept saying "You can't do this to me". When told by the guard to be quiet, accused replied "Who are you that you should be telling me what to do?" adding "I'll pin you God-damned ears back" (R. 21). About two hours later Captain Lewis again interrogated accused who entered the room "with one shoe in his hand and his shirt unbuttoned, sleeves unbuttoned and in a very disheveled condition" (R. 25). Asked again about the alleged fight with a sailor, accused called Captain Lewis a "God-damned liar" (R. 16, 18, 19, 21, 23, 25). He lifted his hand as if to strike that officer who then seized accused's left hand (R. 23, 25). Accused grasped Captain Lewis' shirt, tearing off his badge and brassard. A tussle ensued and accused landed on the floor where he remained for a few minutes with his arms about Captain Lewis' leg, insisting that he wished to fight him and repeating several times that Captain Lewis was a liar.

> "*** the Lieutenant called the Officer of the Day who was Captain Lewis, a damned liar, and insisted that he wanted to fight with the Captain. He grabbed the Captain and just shoved the Captain across the floor. The Captain asked the Lieutenant to turn loose and he didn't. There was some struggle and the Lieutenant was put on the floor. After got on the floor the Lieutenant still insisted that he wanted to fight with the Captain and that the Captain was a liar. ***" (R. 18).

Accused was then returned to solitary confinement (R. 18, 19, 21, 23, 25). At 2 a.m. the following day accused asked the guard for a drink of water. "He seemed quite sane and wanted to know what had happened" (R. 18). (Specification 2, Charge I)

With reference to the occasion at the Rialto Bar (Specification 3, Charge I), Private First Class Lucian Hopkins, 344th Military Police Escort Guard Company, testified that he believed accused was "very drunk". "Just like any fellow who is intoxicated. I could hardly make out what he was saying, and he was trying to get into an argument with me while I was trying to get him out of the place" (R. 6, 7).

Private First Class Charles J. Mathers, 344th Military Police Escort Guard Company, testified that he believed accused was "very drunk" (R. 8), that his speech was "long and drawn out" (R. 9). He did not stagger much (R. 9).

With respect to events at Kresch's Bar (Specification 1, Charge I), Corporal George A. Macon, 344th Military Police Escort Guard Company, testified that accused was "acting pretty drunk" and that his breath smelled of alcohol (R. 10). The only evidence of disorderly conduct by accused was that "he was arguing and had his sleeves rolled up". He "could walk" (R. 11). Private First Class William J. Paulauskas, 344th Military Police Escort Guard Company, stated that accused "had his sleeves rolled up, his shirt tail out in back, and his tie was unfastened" (R. 12, 14). He was staggering and, in Paulauskas' opinion, "very drunk" (R. 14). Private First Class William E. Ryals, Company D, 760th Military Police Battalion, testified that when accused was taken from Kresch's Bar to the guardhouse at Cristobal, he entered the car without assistance, and witness did not observe that he staggered or did anything of a disorderly nature (R. 16, 17). Sergeant Lee R. Patrick, Company D, 760th Military Police Battalion, Sergeant of the Guard, who was summoned to take accused from Kresch's Bar to the guardhouse at Cristobal, testified that when he arrived accused, accompanied by two military policemen, was standing on the street before the bar. Witness believed he was intoxicated (R. 18, 19). His necktie was loose, his sleeves rolled and he

> "could not stand up good at all. He had trouble with talking and looked like he wanted to fight pretty well. His speech was awfully thick and he had difficulty in talking, so that we could hardly understand him" (R. 19).

As for the disturbance at the guardhouse (Specification 2, Charge I), Private First Class J. L. Hall, Jr., Company D, 760th Military Police Battalion, testified that when accused was brought to the guardhouse "His sleeves were rolled up, he did not have a hat on; he was staggering around and he was muttering and muffeling everything he said". He was very drunk, disagreeable, belligerent, and from all indications "looking for a fight". The following morning he was "very sober" (R. 20). Corporal Raymond E. Archer, Company D, 760th Military Police Batalion, stated that in his opinion accused was drunk. "His sleeves were rolled up, his tie was off, his shirt tail was out. He wouldn't obey any order, and would do only what he wanted to" (R. 22). Captain Paul L. Lewis, 760th Military Police Battalion, testified that accused "wasn't so drunk that he couldn't stand up but he was drunk". The following morning he was "very sober and very nice" (R. 23). Accused was not in proper uniform in that he did not have his tie on or his sleeves rolled down (R. 24). Captain Willis A. Melcher, Medical Corps, who was also present in the guardhouse, stated that he believed

accused was intoxicated. He was disheveled, his speech was rambling and incoherent, his face flushed and his pupils dilated (R. 25).

Accused did not testify or make an unsworn statement.

4. The foregoing evidence shows that accused was, at the place and time alleged in Specification 3, Charge I, drunk and disorderly in uniform in a public place, to wit, the Rialto Bar, where both military personnel and civilians were present. Witnesses testified that he was "very drunk" and that his speech was difficult to understand. His trousers were lowered and he was publicly engaged in pulling his shirt tail down. At first he refused to leave the premises and tried to enter into an argument with members of the military police as he was being taken outside. He refused to be driven home in an official car placed at his disposal, and then engaged in an argument with a sailor as the result of which the two men were forcibly separated.

The evidence also shows that accused was, at the place and time alleged in Specification 1, Charge I, drunk in uniform in a public place, to wit, Kresch's Bar, where several soldiers and sailors were present. There he argued with another sailor and a half dozen soldiers and sailors joined the quarrel. A Panamanian policeman, who forcibly separated accused and a sailor, requested that he be removed from the town. Witnesses testified that accused was "very drunk", that his speech was thick and hard to understand, and that he had difficulty in standing. His sleeves were rolled up, his shirt was hanging outside his trousers, and his tie was unfastened.

It was further established that later the same evening at the place and time alleged in Specification 2, Charge I, accused was disorderly in uniform at the military police guardhouse in Cristobal. When asked by the officer of the day, his superior officer, to produce his identification card and tag, accused refused to do so, and refused to answer other questions. He was placed in solitary confinement and told a guard, who had asked him to be quiet, that he would "pin his God-damned ears back". When again questioned by the officer of the day, a superior officer, accused called him a "God-damned liar", grasped his shirt and tore off his badge and brassard. When thrown to the floor, accused held the officer's legs, insisting that he would fight him and repeatedly asserted that the officer was a liar. Accused's sleeves were rolled, his shirt was out and he did not have his tie or hat. Witnesses testified that he was "very drunk" and that he was "staggering around and he was muttering and muffeling everything he said". He was in a disheveled condition. His speech was rambling and incoherent, his face flushed and his pupils dilated.

Question arises as to whether the behavior alleged in the specifications of which accused was found guilty was of such an aggravated nature as to amount to conduct unbecoming an officer and a gentleman

within the meaning of Article of War 95. In Winthrop's Military Law and Precedents it is stated that the word "unbecoming" as used in Article of War 95 "*** is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety *** but morally unbefitting and unworthy" (Reprint, 711). The conduct contemplated by Article of War 95

> "***must offend so seriously against law, justice, morality or decorum as to expose, to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents" (Reprint, 711, 712).

In paragraph 151 of the Manual for Courts-Martial the offense of "being grossly drunk and conspicuously disorderly in a public place" is listed as an example of a violation of Article of War 95. It is further stated therein that the Article contemplates conduct by an officer which, taking all the circumstances into consideration, shows that he is morally unfit to be an officer and to be considered a gentleman.

The Board of Review believes the drunkenness of accused at the Kresch's and Rialto Bars (Specifications 1 and 3, Charge I) was undoubtedly discreditable but that the proof falls short of demonstrating that it was of such aggravated degree as to justify a characterization of gross. The disorderly conduct of accused at the Rialto Bar, though discreditable, was hardly of a conspicuous character. His subsequent disorderly conduct at the guardhouse was more serious, involving, as it did, an assault upon a superior officer and other highly reprehensible acts and language. Accused was drunk but his disorders at the guardhouse indicated that his standards of behavior were below the standards to be expected of an officer and a gentleman. The Board of Review is of the opinion that with respect to Specifications 1 and 3 the evidence is legally sufficient to support only so much of the findings of guilty under Charge I as involves violation of Article of War 96, and that with respect to Specification 2 the evidence is legally sufficient to support the finding of guilty under this charge of violation of Article of War 95.

Attached to the record of trial is a communication signed by all members of the court participating in the findings and sentence, recommending that the sentence to dismissal "be commuted and that the maximum punishment imposable under the 96th Article of War be approved as the sentence of the court". It is stated, among other things, that "the actions of the accused should not be considered gross drunkenness or conspicuous disorderly conduct within the meaning of Article of War 95". The communication as a whole indicates that if the court had been

fully cognizant of the legal principles governing the scope of Article of War 95 it might not have found violations of that article. The recommendation for clemency is not, however, a part of the record of trial and does not legally vitiate the findings of guilty though apparently inconsistent therewith in part (34 Atty. Gen. 5, 8, 9). It may be considered by the confirming authority in his action upon the record of trial.

5. The review of the staff judge advocate recites that on August 6, 1942, prior to the commission of the offenses herein alleged, accused's commanding officer initiated proceedings for his reclassification because of unsatisfactory performance of duties resulting from excessive indulgence in intoxicants. The proceedings were returned by the Commanding General, Sixth Air Force, with the statement that inasmuch as accused's unsatisfactory performance of duties was due to his own wilful neglect and misconduct he was not a proper subject for reclassification proceedings. The review of the staff judge advocate states that on August 30, 1942, the date of the offenses alleged herein, accused was awaiting disciplinary action under Article of War 104 for being drunk and disorderly in and around a noncommissioned officers' club on August 1, 1942.

6. War Department records show that accused is 25 years of age. He was graduated from high school and Gettysburg College. He was commissioned a second lieutenant of Infantry, Army of the United States, December 7, 1938, and entered his current tour of active duty October 1, 1940. He was promoted to first lieutenant February 1, 1942. A recommendation for his promotion, signed by his group commander, contains the following:

> "*** Lieutenant Hess is doing an excellent job in this position. Lieutenant Hess is honest, loyal, thorough, and sincere. He has excellent executive abilities and has imagination and initiative".

7. The court was legally consituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1 and 3, Charge I, as involves findings of guilty of those Specifications, in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 26 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Walter C. Hess (O-373076), Army Air Forces, 51st Fighter Squadron (TE), 32nd Fighter Group (TE).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of Specifications 1 and 3, Charge I, as involves findings of guilty of those Specifications in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Accused was drunk in public bars in Colon, Republic of Panama (two specifications), and was somewhat disorderly in one of the bars. Later, in a military guardhouse, while still drunk, he became quite disorderly. He was sentenced to dismissal. The members of the court recommended clemency, stating, among other things, that they did not consider accused's drunkenness gross or his disorderly conduct conspicuous. The officer has previously been in some difficulties because of his drinking and disorderly conduct. In view of the recommendation and statements of the members of the court as indicated and in the light of all the circumstances of the case, I recommend that only so much of the findings of guilty of Charge I and each of its Specifications be approved as involves findings of guilty of the Specifications in violation of Article of War 96, and that the sentence be confirmed but suspended during the pleasure of the President.

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

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

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 37, 16 Mar 1943)

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

NOV 26 1942

SPJGH
CM 227915

U N I T E D S T A T E S	)	101st AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Bragg, North Carolina,
Private CARL WRIGHT (14008942),	)	November 2, 1942. Dishonor-
Headquarters Company, 1st	)	able discharge and confine-
Battalion, 502nd Parachute	)	ment for ten (10) years.
Infantry, Fort Bragg, North	)	Federal Reformatory, El Reno,
Carolina.	)	Oklahoma.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and LIPSCOMB, Judge Advocates

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

2. The accused was found guilty of willful disobedience of the lawful command of a superior officer, in violation of Article of War 64. Evidence of one previous conviction for absence without leave for twenty-nine days, in violation of Article of War 61, and of disobeying a lawful order of a superior officer, in violation of Article of War 96, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. Confinement in a Federal reformatory is not authorized in this case. Paragraph 90 b, Manual for Courts-Martial, 1928, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or military post, station, or camp, will

be designated as the place of confinement in cases where a penitentiary is not designated".

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorized confinement in a Federal reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel).

Penitentiary confinement is not authorized by Article of War 42 for the offense of which accused was found guilty. Willful disobedience of the lawful command of a superior officer is not punishable by confinement in a penitentiary 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 law of the District of Columbia.

4. There is no maximum limit of punishment stated in the Executive order for willful disobedience of the lawful command of a superior officer committed in time of war.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, in a place other than a penitentiary, Federal correctional institution, or reformatory.

Judge Advocate.

Judge Advocate.

Judge Advocate.

SPJGH
CM 227915 1st Ind.

War Department, J.A.G.O., NOV 27 1942 - To the Commanding General, Headquarters 101st Airborne Division, Fort Bragg, North Carolina.

1. In the case of Private Carl Wright (14008942), Headquarters Company, 1st Battalion, 502nd Parachute Infantry, Fort Bragg, North Carolina, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years in a place other than a penitentiary, Federal correctional institution, or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution, or reformatory, you will have authority to order the execution of the sentence.

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

(CM 227915).

Myron C. Cramer

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

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

(243)

SPJGH
CM 228510

FEB 13 1943

U N I T E D S T A T E S	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Barksdale Field, Louisiana,
Private JAMES P. KELLEY	)	November 17, 1942. Dishonor-
(6871049), 722nd Ordnance	)	able discharge and confinement
Company.	)	for ten (10) years. Federal
		Reformatory, El Reno, Oklahoma.

HOLDING by the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

2. The only question requiring consideration is whether the record of trial is legally sufficient to support the finding of guilty of Charge II, in violation of the 64th Article of War.

3. The Specification alleges that, having received a certain lawful order of his superior officer, the accused did "fail to obey the same". Article of War 64 provides, in so far as is pertinent here, that "Any person subject to military law who, * * * willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment * * *". This Specification does not purport to allege willful disobedience but in clear language alleges a failure to obey. The Specification should have been alleged in violation of Article of War 96 (See form 139, p. 255, App. 4, M.C.M., 1928).

4. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of Charge II as involves a finding of guilty in violation of the 96th Article of War, and legally sufficient to support the sentence.

, Judge Advocate.

, Judge Advocate.

Judge Advocate.

SPJGH
CM 228510 1st Ind.

War Department, J.A.G.O., FEB 17 1943 - To the Commanding General, Third Air Force, Tampa, Florida.

1. In the case of Private James P. Kelley (6871049), 722nd Ordnance Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Charge II as involves a finding of guilty in violation of the 96th Article of War, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order the execution of the sentence.

2. Although confinement in a penitentiary is authorized for war time desertion, it is not customary in normal cases to confine a deserter in a penitentiary, Federal reformatory, or correctional institution. It is recommended that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement in lieu of the Federal Reformatory, El Reno, Oklahoma.

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

(CM 228510).

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

WAR DEPARTMENT
Services of Supply
IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

Board of Review

CM 228955

JAN 25 1943

U N I T E D S T A T E S v. Private ANGEL LUIS CRUZ-GERENA (30402563), Company D, 295th Infantry (R).	PUERTO RICAN DEPARTMENT Trial by G.C.M., convened at APO 846, c/o Postmaster, New York, New York, November 25 and 27, 1942. Dishonorable discharge and confinement for eight (8) years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW

CRESSON, SNAPP and LIPSCOMB, Judge Advocates.

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

Charles Cresson, Judge Advocate.
Lorraine D. Snapp, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.

1st Indorsement

War Department, J.A.G.O. JAN 27 1943 To the Commanding General, Headquarters Puerto Rican Department, San Juan, Puerto Rico.

1. In the case of Private Angel Luis Cruz-Gerena (30402563), Company D, 295th Infantry (R),

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 50½, you now have authority to order the execution of the sentence.

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

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

MEMORANDUM for The Judge Advocate General

SUBJECT: Trial by general court-martial of Private Angel Luis Cruz-Gerena (30402563), Company D, 295th Infantry.

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

CHARGE I: Violation of the 86th Article of War.

Specification: In that Private Angel Luis Cruz-Gerena, Company "D", 295th Infantry, being on guard and posted as sentinel at Training Area, APO 851-1, on or about August 24, 1942, did leave his post before he was regularly releived.

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

Specification: In that Private Angel Luis Cruz-Gerena, Company "D", 295th Infantry, did, at Training Area, APO 851-1, on or about August 24, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, attempt to kill one, Sergeant Jose Monroig, by shooting at the cot where he thought the said Sergeant Monroig was sleeping, with a pistol.

The accused pleaded not guilty to and was found guilty of the Charges and Specifications thereunder. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for eight years. The reviewing authority approved the findings of guilty and the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

2. The only problem in this case requiring discussion arises from the unusual facts presented in support of the Specification under Charge II.

3. The facts show that on the morning prior to the shooting, which occurred after midnight, the accused had inspected the tent where Sergeant Jose Monroig usually slept so that he might know exactly where Sergeant Monroig's cot was located in the tent. The day following the shooting, the accused made the following admission:

"*** I went to the side of the tent where Sergeant Monroig slept and about fifteen paces away from the tent, and then I fired toward the cot. My intentions were to kill him".

The admissions of the accused are corroborated by a strong chain of circumstances. The accused was arrested on the day following the shooting with a pistol in his possession which showed that it had been recently fired. On the outside of Sergeant Monroig's tent six or seven empty cartridges were found. The tent flap of Sergeant Monroig's tent which was down, was perforated with six or seven bullet holes, and the cot which Sergeant Monroig usually occupied was likewise perforated with six or seven bullet holes. In view of the admissions of the accused, and the facts showing that the shooting occurred at night and that the tent was perforated with bullet holes, the court was justified in concluding that the accused shot into the cot of Sergeant Monroig both with a malicious, premeditated intent to kill Sergeant Monroig and with the belief that Sergeant Monroig was on the cot and that he would thereby be killed. Fortunately, neither Sergeant Monroig nor anyone else was in the tent at this time.

4. The determination of whether these facts, or any given set of facts constitute a crime, must be made in the light of the orthodox concept that every crime consists of three elements, namely, an intent, an act, and a third element which is the result of the first two elements, and which for want of a better term has traditionally been called the corpus delicti. In our present case the premeditated and malicious intent of the accused to kill Sergeant Monroig is clearly shown. Likewise the facts show that the accused committed a violent act by shooting into the cot usually occupied by Sergeant Monroig. With these two elements clearly established, and with the realization that they would have been exactly the same had Sergeant Monroig been killed, our attention must be directed primarily to an examination of the third element, the so called corpus delicti of the alleged crime. In completed crimes such as murder, the orthodox definition of the corpus delicti involves a comparatively simple concept requiring proof of the dead body of the person who is alleged to have been killed. This rule was designed to prevent the conviction of a person for a death that had never occurred and requires proof, independent of the proof of the act and the intent which may have resulted in the alleged death (Wigmore on Evidence, (2nd Ed.) sec. 2072). In other words, the corpus delicti of the completed crime involves a complete infringement of a legally protected right.

5. On the other hand, in attempted crimes, the corpus delicti is more elusive, and the degree of its clarity depends upon the extent to which a legally protected right is infringed. As a result of a scholarly study of the present problem, the statement has been made that the corpus delicti of the criminal attempt in contrast to the corpus delicti of a completed crime is,

> "*** a substantial but imcomplete impairment of some interest protected by the particular prohibition against the complete crime or an impairment of some related but lesser interest protected by the prohibition against such an attempt" (Strahorn, Jr., The Effect of Impossibility on Criminal Attempts, 78 University of Penn. Law Review, 962-998).

6. The following cases illustrate how several courts have accepted proof of a substantial but incomplete impairment of some legally protected interest as the corpus delicti of the alleged crime.

a. In State v. Wilson (30 Conn., 500) in reply to the argument that there must be a present ability to perpetrate a theft in order to make possible a legally attempted theft, the court stated:

> "*** But it is not true that the thing intended to be taken must be where the thief supposes it to be, or that there must be in fact property where he supposes there is. It is sufficient if he supposes there is property in the pocket, trunk, or other receptacle, and attempts by some act adapted to the purpose to obtain it feloniously ***. The only safe rule is that the attempt is complete and punishable when an act is done with intent to commit the crime which is adapted to the perpetration of it, whether the purpose falls by reason of interruption or for other extrinsic cause, or because there was nothing in the pocket".

In this connection we should observe that although in 1864 an English court held that the object of the theft must really exist in order for an attempted theft to be legally possible, both the present English rule and the majority rule in this country are in accord with the Connecticut case cited above (Wharton's Criminal Law, (13th Ed.) Sec. 225).

b. In the case of People v. Lee Kong (95 Cal. 666, 30 Pac. 800, 29 Am. State Reports, 165), an assasin shot at a hole in the roof of a building in the belief that a policeman was peeping through the hole and with the intent to kill the policeman. The intended victim was, however, at another place on the roof and was placed in no real danger by the shooting. The court held that a criminal attempt to murder was completed and stated that -

> "The fact, of itself, that the policeman was two feet or ten feet from the spot where the fire was directed, or that he was at the right hand or at the left hand or behind the defendant at the time the shot was fired, is immaterial upon this question. That element of the case does not go the question of present ability, but pertains to the unlawful attempt".

c. In the case of State v. Mitchell (172 Mo. 633, 71 S.W. 175), a case very closely resembling our present one, the principal of the Lee Kong case is extended a step further. The would-be assasin shot into his intended victim's bed with the intent to kill him, but the intended victim was in another part of the house, and no one was in the bed or in the room into which the shots were fired. The court in sustaining a conviction of a criminal attempt to murder stated:

> "*** by the firing into the bedroom with a deadly weapon, accompanied by a present capacity in defendant to murder Warren if he were in the room, and the failure to do so only because Warren happily retired upstairs instead of in the bed into which defendant fired, made out a perfect case of an attempt within the meaning of the statute, and the information is sufficient. The evidence conclusively supported the information. It discloses a deliberate and dastardly attempt at assassination, which was only averted by the intended victim's going upstairs to bed that night".

7. In contrast to the facts presented in the foregoing cases are the facts presented in the hypothetical textbook cases in which a would-be assasin shoots at a stump believing it to be his enemy or attacks a beautiful dummy with the intent to ravish. In discussing these moot cases, the commentators have maintained that they do not constitute criminal attempts. In these cases regardless of whether the mistake of fact was a reasonable or an unreasonable one no substantial right or legal interest against murder or rape was impaired nor has the life or security of any person been endangered. Such interest in life and security as may have been threatened by the would-be criminal is clearly too remote and too small to warrant recognition by the law.

8. In the present case, however, as in the actual cases cited, the act of the accused at midnight in shooting with premeditated malice into the tent usually occupied by Sergeant Monroig with intent to kill him is of such a character as to constitute a substantial infringement of the law against murder and establishes beyond a reasonable doubt the corpus delicti of the crime alleged.

Chas. L. Cresson, Judge Advocate.

Dorrance D. Snapp, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

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

SPJGK
CM 231452

APR 27 1943

U N I T E D S T A T E S	)	PANAMA MOBILE FORCE
	)	
v.	)	Trial by G. C. M., convened at Fort Clayton, Canal Zone, January 21 and 22, 1943. Dishonorable discharge and confinement for life. Penitentiary.
	)	
Private First Class JESSE O. RILEY (6366405), Company K, 14th Infantry.	)	

REVIEW by the BOARD OF REVIEW
COPP, HILL and ANDREWS, 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 I: Violation of the 92nd Article of War.

Specification: In that Private First Class Jesse O. Riley, Company "K", Fourteenth Infantry, did, at Outpost 206, Canal Zone, on or about December 10, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one First Sergeant Chester N. Wiley, Company "K", Fourteenth Infantry, a human being by shooting him with a rifle.

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

3. The evidence shows that on December 10, 1942, Company K, 14th Infantry, was on outpost duty at Outpost No. 206, Cativa, on Transisthmian Highway, three hundred yards beyond Naval Station Hospital, Canal Zone (R. 27). At 5 o'clock p.m. on that date accused, who was a private first class in Company "K", with a record of twelve years prior military service (R. 154) created a disturbance in the Company Mess Hall by spilling food on the table and by boisterous and disorderly conduct. Under orders of one of the company officers he was obliged to leave the Mess Hall. He complied begrudgingly only when threatened by the mess sergeant with forcible eviction (R. 115).

As disciplinary punishment for this minor offense, three-quarters of an hour later, Second Lieutenant H. T. Marks, Post Exchange Officer, of Company "K", ordered the Post Exchange Sergeant, Sergeant P. D. Sutton, to refrain from selling beer to accused (R. 115-118). Accused went to the post exchange a few minutes later (R. 61, 63). Sergeant Sutton testified respecting accused's conduct while there:

"A To the best of my knowledge, sir, Private Riley came in the Post Exchange and he seated himself on one of the table seats, and he sat there for a little while and then came up to the bar near where First Sergeant Wiley was standing, and Private Riley then stood there, talking to me, saying that if I was ever caught in the beer garden at Fort Davis — and he also says either Private Tarrant, who was my assistant — if we was caught in the beer garden at Fort Davis, he would have two men use a knife on us — he didn't say who those two men were, or anything like that, sir. Then he went back to where the band was, and he was talking to one of the members of the band. From there, he came back up to the bar, and he laid a dime on the counter and asked for a beer, and I told Private Riley that I couldn't sell him any beer, because Lieutenant Marks, who was Post Exchange Officer, had given me an order to not sell him any beer.

"Q Then what happened?

"A Private Riley then stated, 'That's all I wanted to know.' Before that, he says, 'Did he mean me individually or alone?' I says, 'No, Lieutenant Marks gave me an order to not sell you and two or three other men' — one of them was a Medical man, and another was someone out of Headquarters that was attached to the company — 'to not sell you any beer.' Then Private Riley says, 'That's all I wanted to know. I'm going straight to the company commander.' * * *" (R. 61, 62, 183)

Accused, bent on obtaining a revocation of Lieutenant Marks' order, at about 6 o'clock p.m. went directly from the post exchange to the orderly room that was located in the southerly portion of the same building in which the post exchange was located (Ex. "B") and asked permission of Sergeant Jones, the telephone orderly in charge at the time, to see the company commander (R. 28). On being advised that the company commander was not in, accused made the remark, "That's why that bald headed son-of-a-bitch (referring to Sergeant Sutton (R. 35-37-88)) is sounding off " (R. 28) and he "mentioned something about he was going to get him, a bald headed son-of-a-bitch that night." (R. 85, 35, 172). Staff Sergeant A. J. Kozak, who was in the orderly room at the time of this incident, testified that accused "looked as though he had an argument with somebody--he looked as though he was mad at somebody" (R. 32). Mess Sergeant Robert E. Lee, who was also in the orderly room at the

time, testified that accused, "was more or less mad, the way I took it" (R. 170).

Private First Class Petra, another person present in the orderly room at the time, testified,

> "he (accused) looked like he was mad.
> "Q What makes you think that he looked like he was mad?
> "A Well the way his face looked. He didn't look like he ordinarily did--he had a kind of a mad frown."

Accused went directly to the quarters of First Lieutenant Carl W. Byas of Company "K". Lieutenant Byas testified:

> "He came to my quarters about 6:00 o'clock and asked to speak to me. I told him to come in, and he entered, saluted, and remained standing at attention until I gave him 'Rest!' I then asked him what he wanted, and he told me that Sergeant Sutton, who ran the PX, wouldn't sell him any beer, and he wanted me to change the order. I told him I couldn't change the order, and that he could see the company commander the next morning. That was all, and he left. I didn't see him any more then until about 6:45." (R. 67)

A few minutes later (R. 78) accused again appeared at the post exchange with a knife in his hand, his fist clenched out in front of him with the thumb and first finger upward (R. 180), and was met at the entrance door by First Sergeant Chester N. Wiley of Company K (R. 78, 83, 177, 179, 180), who barred his entrance to the post exchange (R. 78, 83). Accused called out "Hey, Shorty!" (R. 184). The appellation "Shorty" might well have been intended to apply to the post exchange sergeant, Sergeant Sutton, as his height was only five feet six and three-fourths inches. (R. 186) Private First Class Petra described the knife:

> "It was a home-made knife; it had been made for some kind of work. I would say it had a tape handle on it and the blade was about six inches long. I don't know whether it was sharpened on both edges or not. It looked sort of like a dagger to me" (R. 179, 183).

The first sergeant said, "Give me that knife" (R. 179), grabbed accused's hand (R. 78), took the knife away from him and ordered him to go to bed (R. 64, 78, 86, 177, 180, 185). As accused made no move to obey, the first sergeant said, "Somebody get me a guard truck, and I'll stop some of this trouble" (R. 78, 180). Accused then turned and ran in the direction of his quarters (R. 78, 85, 180).

First Lieutenant Byas testified further:

"As far as that went he (First Sergeant Wiley) was perfectly within his rights in ejecting anybody from the PX that became noisy or created a disturbance of any kind in there". (R. 153)

Accused proceeded on a trot or fast walk (R. 35) along a walk running from the post exchange to his barracks (R. 75) and was overheard muttering threats: "I'm going to kill that no-good son-of-a-bitch, he can't do that to me! I'll kill that no-good son-of-a-bitch". (R. 28, 73, 74, 75, 155, 156, 159). He went directly to his barracks (R. 49, 73, 180) and went inside. Sergeant Louis D. Udvari, Company "K", was lying on his bunk in the same barracks, reading a book when accused came in. (R. 73) He testified:

"When I heard him, I was laying in my bunk, reading a book, when I first heard Private Riley come from the direction of the PX, cursing somebody in these words: 'I'm going to kill that no-good son of a bitch!' He said it a few times, so I got up to see what was going on. Then I saw Private Riley coming up the walk from toward the PX, going into his barracks. Then he quit cursing, went over to his bunk -- he slept in the front end of the barracks -- and picked his rifle up, facing me at an angle of about 150 degrees, and he loaded his rifle. I immediately ran outside and hollered for the lieutenants -- I thought there was more than one up there -- I hollered, 'Lieutenant! Lieutenant! Riley's going to shoot somebody!' At this time, Riley came out of his quarters -- out of the front end of his barracks -- and went down the steps. He started down, and fell down the steps, but immediately picked himself up and started at double-time toward the orderly room. About this time I looked up, and I saw Lieutenant Marks come out of his quarters, putting his raincoat on, and about this time I heard what sounded like four shots in rapid succession, and immediately Lieutenant Byas and I -- I don't just recall how fast we went down there, but it was pretty fast --, we went on down toward the PX, got down around there, and I looked off toward the orderly room and I saw a white foot sticking out of a drain that I knew immediately was First Sergeant Wiley's -- he had a pair of sneakers on. To make sure, I moved up a little closer and saw that he had a first sergeant's chevrons on. Only one man was there when Lieutenant Byas and I got there. * * *" (R. 73, 76, 155, 156, 157, 158, 159, 160)

When recalled as a witness the witness restated accused's conduct while in the barracks in greater detail. He testified:

"* * * When I first saw him, he bent down. His back was toward me then, but when he started loading, he faced me at an angle of about 150 degrees, and then I saw him unlock the piece, pulling the bolt back taking the clip and loading that rifle and ramming the bolt home, * * * there was no fumbling on that, at all; the cartridge clip went

home just as easily as anything." (R. 160)

Five shots were heard by many witnesses in the vicinity. (R. 9, 29, 47, 62, 65, 67, 74, 79, 81, 86, 95, 102, 166, 168, 176, 178, 179). There were two shots followed by a pause, then three shots in rapid succession. Staff Sergeant Anthony J. Kozak, Company K, (R. 27) was at the time of the shooting sergeant of the guard, and his relief was on guard at that time (R. 27) Sergeant Kozak testified:

> "It was about 6:00 o'clock, I would say, more or less * * * when I started out of the orderly room and started to go to my barracks and I went out the orderly room door, and I happened to turn toward the left toward the power plant, and I took about ten steps down at the bottom of the steps, and I happened to see Private Riley running down the sidewalk with a rifle in his hands, dressed in shorts. About that time, he brought his rifle up, and at the same time, unlocked the piece and stepped off the sidewalk between two barracks, about the same time, I stepped in behind a building, and I heard four or five shots in rapid succession. Hearing the shots, I got pretty scared, and I started to take cover. When I came back around, I seen Sergeant Wiley laying on the ground — he was shot — and Lieutenant Byas and Sergeant Wyman and three or four other fellows was around there." (R. 29)

Staff Sergeant Don L. Wyman, Supply Sergeant of Company K was the first person to reach the victim of the shooting and was one of the eyewitnesses to two or three of the shots fired. (R. 10, 167). He testified:

> "Q. What was the accused doing when you first saw him?
> "A. He was firing the rifle, sir.
> "Q. How many shots did you see fired?
> "A. At least two, sir.
> "Q. What was the accused's appearance as regards whether he was excited, or mad, or calm?
> "A. He seemed calm, sir.
> "Q. Calm?
> "A. Yes, sir, he was deliberate, and seemed to know exactly what he was doing.
> "Q. Was he firing from the shoulder or the hip?
> "A. From the shoulder, sir.
> "Q. Did you see him at the instant he stopped firing?
> "A. Yes, sir, I saw him bring the rifle down from his shoulder.
> "Q. Then where did he go?
> "A. He lowered the rifle to his right side, sir, and ran off into the jungle — off to his right into the jungle." (R. 167)

He testified that accused ran without staggering and looked and ran as if he was sober. (R. 167)

Private First Class William E. Petra, of Company K, another witness

to the shooting, testified:

"When I heard the shots I jumped off the porch on the sidewalk and looked in the direction of the orderly room. I saw Private Riley on the yon side of the walk with a rifle in his hand. I seen a man laying in the drain, and he was kicking, and then I saw Riley fire two or three more shots rapid fire, and then I saw him turn and run into the jungle — in the direction of the jungle (R. 79). * * *

"Q. What was the attitude of Private Riley when you saw him firing the shots? Was he calm, mad, excited, or what?

"A. Sir, he looked like he was mad" (R. 178).

The witness testified further that accused fired the three witnessed shots at a body, lying in the drain (R. 179).

The shooting occurred at 6:25 p.m. At its conclusion and before anyone reached the body of the victim, accused "lowered his rifle from his shoulder and ran off toward the right toward the jungle, over a little embankment there" (R. 10, 39, 79, 81, 166, 167). Accused was then wearing only athletic shorts, shoes, and belt (R. 16, 33, 65, 69, 81, 87, 151, 156, 162) and was carrying his rifle (R. 30, 49, 37). When accused escaped it was dusk (R. 14), after dark (R. 65), and raining (R. 158). About fifteen, twenty, thirty, or forty-five minutes later (R. 70, 175) accused returned from the jungle dressed only in shorts and without his shoes, belt, or rifle (R. 87, 88, 174, 161). Sergeant Robert E. Lee made the arrest. He testified:

"A Well, some time later, I was standing guard in front of my barracks with an M-1 rifle — I was in the doorway, like —, and I heard someone holler for Sergeant Soto, and I answered up 'Yes' — just like that, 'Yes.' I looked back to the fellows that was in the barracks. There was some of them sitting down, and I told them to get out of the way, that I thought it was Private Riley coming out, and he might come out shooting; so about that time I saw him emerge from the bushes — the jungles, like — and come up the hill. When he came up, I saw he wasn't armed, and I told him to keep walking. He came up to within about five yards of my barracks, where I was standing, and I raised up my rifle — he was within about five paces of me — and I told him to stop. He stopped, and I told him to put up his hands. He hesitated for a minute, and then I said, 'If you don't put up your hands, so help me God, I'll blow you half in two!' Then I took the slack out of my trigger, and he put up his hands then.

"Q Who was the 'he' that you are talking about?

"A Private Riley.

"Q What did you do then?

"A Well, I hollered for some of the fellows to cut the lights on in the barracks and in the barracks across from me — which is the orderly room —, and another sergeant — I think it was Sergeant Flynn — came up with his rifle. By

that time, there was three or four more fellows there with their rifles, so we marched him to the orderly room and took him on inside the orderly room." (R. 86, 87)

Staff Sergeant Kozak, acting under orders of First Lieutenant Byas, on December 10, 1942, located five empty cartridges near the scene of the shooting between two buildings, two of them on one side of the walk and the other three across the walk on the other side (R. 30). He entered the jungle and found the rifle, identified as the one that had been fired by accused (R. 30, 36, 37, 39, 43, 49-50, 41), sticking in the mud, muzzle first and sling up, about fifty feet down an embankment in a ravine (R. 30, 37, 49). Beside the rifle witness found one of accused's shoes and two or three feet farther away the other shoe (R. 30), and about fifteen or twenty feet from that shoe accused's rifle belt (R. 30). The rifle was still loaded, had the odor of having recently been fired, and was muddy where it had been dropped (R. 40). Accused was taken under guard to the guardhouse at Fort Davis (R. 68).

Staff Sergeant Don L. Wyman testified respecting the victim of the shooting:

"* * * As soon as I got down at the foot of the steps, I saw the body of First Sergeant Wiley laying in a drain there close to the building. I immediately ran over to his body and examined him. At that time, several members of the company came up, including Lieutenant Byas, and we examined the body. I was the first man there, and I made an inspection as soon as I could. I noticed wounds on his chest -- there were two large wounds on his chest, and there was one through the groin, and I am not sure whether there was one or two on the legs. I asked Lieutenant Byas if he wanted to examine him, and he asked me what I thought about the man, and I said that as far as I could make out, there was no indication of life whatsoever: he wasn't bleeding from those wounds, he had no heartbeat at all, and no pulse. At that time, we had Sergeant Jones telephone Fort Gulick for the ambulance -- " (R. 10)

First Lieutenant Byas testified:

"* * * I ran down the steps, joined Sergeant Udvari, who was on the sidewalk below my quarters, and ran around in the direction of the orderly room, where it sounded like the shots came from. Upon arriving there, I saw Sergeant Wiley lying on the sidewalk near the orderly room. There were several men present -- Sergeant Wyman was one of them. I stepped up to the orderly room and told Sergeant Jones, who was sergeant of the guard at the time, to call an ambulance. I then went back to examine Sergeant Wiley, to see if there was anything I could do in the nature of first-aid. I noticed he had two wounds in his right breast, and he was bloody around the pelvis, as if he had been shot in the pelvis also -- he still had his pants on, but he was very bloody. I felt for a

heartbeat, and I couldn't detect any signs of life whatsoever. * * *", (R. 67, 68)

Sergeant Udvari testified:

"When I first noticed him, his leg was bleeding pretty bad, and after we moved him out on the sidewalk, we laid him down on a white sheet, and on his leg I saw blood, and I saw through his crotch where his penis was hanging out, where a shot had come through between his crotch." (R. 73, 74).

Decedent's body was placed on a mattress, loaded on a truck and taken to the receiving hospital at Fort Gulick (R. 11, 68), five miles from Outpost 206 (R. 16).

Captain Edward Siegal, Medical Corps, was surgical officer of the day of the 210th General Hospital, Fort Gulick, Canal Zone, on December 10, 1942, when decedent's body was brought in (R. 17). He testified:

"When I first saw the body, the man was dead. He had not been dead very long. It is my opinion that he died in the short time while he was coming over in the truck, and evidently he had suffered multiple gunshot wounds. * * *

"* * * I found a large irregular, jagged wound in the right chest, and a lacerated scrotum, and also a compound comminuted fracture of the left leg. * * *

* * *

"Q What was the cause of death?

"A Well, from the examination I made, sir, I would imagine it was from loss of blood — from hemorrhage.

"Q Caused by what?

"A By multiple gunshot wounds."

* * * *

"A * * * I filled out the death certificate, and on the death certificate I put down ' multiple gunshot wounds of the body in various locations.'" (R. 18, 19)

Decedent's body was next taken by ambulance to the Colon Morgue and laid on a slab. Major Robert L. Cavenaugh, Medical Corps, performed examinations of tissues removed surgically (R. 21). Major Cavenaugh testified:

"* * * By inference, based on the assumption that circular, clean-cut wounds were wounds of entrance of bullets, I calculate that there were six bullets traversing all or a part of the body. One wound of entrance entered the back of the right shoulder in the region just behind the armpit, passed forward through the muscles, apparently caused a fracture of the third right rib — an incomplete fracture --, and emerged through the chest muscles. Another wound of entrance

was found on the lateral side of the middle third of the right upper arm, and the missile passed through the upper arm, broke the humerus, emerged on the inner side, and then appeared to have coursed along the front of the chest, fracturing numerous ribs on the right side of the thorax, Another wound appeared to have entered the back approximately one inch to the right of the midline at the level of the eleventh rib -- which is on the lower portion of the thorax: there are 12 ribs in the thorax --, passed through the lower edge of the right lung, and then, perforating the diaphragm, passed through the center of the liver with terrific bursting force -- the liver was divided into two parts almost completely. Another wound appeared to have entered the abdomen at the left of the fourth lumbar vertebrae -- they are the lower vertebrae of the vertebral column, and there are five, so it was at the lower edge of the abdomen --, passed through the fourth lumbar vertebra, the left lateral side of it, and after passing through the large and small intestines several times, appeared to have passed downward through the muscles of the anterior wall of the abdomen and out through the scrotum. There was a gaping wound medial or inner aspect of the right buttock, just approximately at the level of the crotch, and on the left side opposite this was a superficial abrasion. Just to the left of the midline of the left leg, above the left ankle bone, a wound of entrance appeared to be present, and the missile causing this appeared to have gone upward and to the right, tearing three large openings in the remainder of the left leg, two on the inner surface and one on the outer surface, these latter openings apparently being due to flying fragments of bone. A jagged wound, approximately one inch in diameter, was present on the inner side of the upper portion of the left thigh. The track from this wound passed through the left femur, causing a complete fracture, and led to a point on the outer side of the left thigh, where there were two openings, separated by a narrow vertical strip, the two together totaling approximately one inch in diameter. Immediately behind these two openings, on the outer side, examination revealed a shiny object, and a slight pressure forced out of these openings a bullet, which I measured and weighed and described. It was slightly bent at its center, as though it had impinged with force against a solid object such as a bone. There was a superficial laceration, about one inch long and one-eighth inch broad, in a vertical direction, on the inner aspect of the left thigh, just above the jagged opening I mentioned before. There was an extensive extravazation of blood in the right chest cavity -- approximately 1,000 ccs of hemorrhage. That was the extent of the significant injuries I found." (R. 22-24)

He testified further that an examination of the blood and urine revealed no alcohol (R. 25). The witness added that in his opinion only one of the wounds was caused by a bullet fired at the decedent while he was facing his assailant; all others were inflicted while decedent's back or side was exposed to the fire (R. 26).

Jack F. Morris, Sergeant of Zone Police, qualified as an expert witness on ballistics. He testified that he had examined under a microscope (R. 59) the rifle, identified by other witnesses as the one used in the homicide, the five shells found at the scene of the shooting, and the bullet surgically removed from the body of the deceased (R. 59) and had test-fired the gun. He testified that the five shells compared exactly with the rest of the fired shells and that the bullet taken from decedent's body had been shot from the gun in evidence (R. 59).

Captain Leo P. O'Donnell, Medical Corps, 210th General Hospital, Fort Gulick, Canal Zone, chief of the neuropsychiatric service section, testified that his duties were to examine people who were considered to be mentally ill (R. 89). He testified that he conducted an examination of the accused at the hospital for mental observation between December 12, 1942, and December 31, 1942 (R. 90). He testified that his examination revealed that accused was able to know the nature and quality of his acts and classified him as "constitutional psychopathic state, emotional instability" (R. 91). He testified further that liquor would have a tendency to increase that instability and excitability and lessen his judgment (R. 91); that he would be considered sane at that time, December 10, 1942, and during the period afterwards.

> "He had this emotional instability -- I mean, from examination of his life history and what he told me, and everything, he was an emotionally unstable individual, but he would be considered sane in that he was able to know the nature and quality of his acts and legally, he would be considered sane" (R. 92).

4. Accused introduced various witnesses for the defense, who testified that accused started drinking liquor early in the morning of December 10, 1942.

Sergeant Estevan Soto, Company K, testified that one-half pint was consumed by accused and two or three people during that morning, and at about 6:30 p.m. that evening at the post exchange, about 10 minutes before the shooting, accused was sober, and was not heard by the witness to express any ill feeling toward anybody in the company (R. 94, 95, 98). He knew of no trouble that had ever existed between accused and decedent.

Private First Class Jimmie W. Bittle, Company K, testified that he was with the accused from about 1 p.m. to about 4 p.m. December 10, 1942, and during that time was drinking anisette and rum with the accused. Accused had about 3 quarts of liquor and drank 2 pints while the two were together and had drunk additional liquor both before and after the time they were together (R. 97). The witness testified that he himself was drunk. He testified that the accused held his liquor well and acted all right while they were together on that date (R. 96).

Sergeant Louis Gorombey, Company K, testified that the accused spent most of the afternoon of December 10, 1942, lying on his bunk and drinking liquor, anisette (R. 100). The witness and Sergeant Kozak saw accused running in front of the orderly room building with a rifle in his hand

and then heard some firing (R. 100). At 5 o'clock that afternoon there was a disturbance with loud talking and laughing in the mess hall. At that time accused appeared to be sober (R. 101). As accused lay on his bunk that afternoon he did not appear to be drunk. Witness testified that accused "didn't like Sergeant Sutton because he had that PX job, and most of the time while he was in the company, as I recall it, he didn't do straight duty; so for that reason he didn't like Sergeant Sutton" (R. 102).

Sergeant Nolan L. Farmer, Company L, 14th Infantry, testified that he had known the accused about 13 years, and had served with him at Fort Benning, Georgia, and Schofield Barracks, Hawaii. Accused was athletically-inclined, played some baseball, basket ball, and did some boxing (R. 103). "His soldiering qualities seemed to be OK" (R. 104). The witness testified further - "Only in the last eight or ten months, or possibly a year, it seemed as though he was more or less impulsive; that is, he was impulsive here where he wasn't at Schofield Barracks, Hawaii, and that impulsiveness seemed to cause him to have something on his mind all the time, and that has been more prominent in the last eight or ten months than ever before." (R. 104, 105) He testified that he had never seen accused "pass out" drunk (R. 106).

First Sergeant General G. Cosby, Company L, testified that he had known accused for about 3½ years, and that "from what I know about the accused he's a very efficient soldier, and he is not the type of man to drink very much -- what time I knew him. As far as anything else, I don't know anything else about him. He was a very efficient man as a soldier and drank very little" (R. 107). He was "a very quiet man and very sociable" (R. 108). Witness testified that he knew of no trouble between accused and decedent, in fact, the accused always liked decedent. "He /accused/ always stated that he /decedent/ was a very efficient soldier and was one of the best soldiers that K Company had. That was before Sergeant Wiley was promoted to first sergeant" (R. 108). Witness testified that when decedent was under consideration for appointment to first sergeant of Company K accused remarked, "He's the most efficient man in the organization, and the man that deserves it" (R. 109).

First Lieutenant Andrew J. Bass, 14th Infantry, testified that he had known accused for a period of 15 months and knew that "his character was excellent; his efficiency as a soldier was also excellent" (R. 110). Accused had been promoted to take over the mess sergeant's job, but became dissatisfied with the work of the mess sergeant, and was relieved from that detail and demoted (R. 110). This demotion was at his own request (R. 111).

Captain Charles C. Guy, company commander of Company K, testified that accused's character was excellent, and his efficiency very satisfactory, and he had been recommended for Officers' Candidate School (R. 112).

Second Lieutenant Harold G. Marks, 14th Infantry, testified that at about 4:30 on the afternoon of December 10, 1942, accused created a disturbance in the mess hall (R. 115), and that at about 20 minutes before 6 o'clock the same evening the witness gave an order to Sergeant Sutton, the PX sergeant, not to sell any beer to Private Riley as disciplinary punishment for his

disorderly conduct in the mess hall (R. 115). At the time of that misconduct accused had been drinking, he was boisterous, and was spilling his food on the table. Witness was of the opinion that accused was then drunk (R. 115), although "he could have performed his duty as a doldier at that time" (R. 117). When he walked out of the mess hall on that occasion he walked normally (R. 117). Witness testified that he suspected that liquor had been taken into the barracks because "a truck had turned over down the road from the company position the day before, and it was loaded with rum, and quite a few of the boys went down and got some" (R. 119).

First Sergeant General G. Cosby when recalled testified that decedent was a married man and did not associate with single men very much and usually went home when his work was through, while the single men usually wandered off together (R. 120).

Sergeant Louis D. Udvari testified that prior to December 10 accused and decedent were "mighty good friends * * * they never had anything against each other" (R. 121). He testified that the decedent was "one of the swellest men I ever knew -- one of the best friends I ever had. Private Riley was another good friend of mine" (R. 122). Accused was an athlete and always cooperative. He testified that Sergeant Sutton was a small man and decedent was six feet in height (R. 122). He had never heard of any trouble between Sergeant Sutton and the accused; that Sergeant Sutton's nickname was "Flash" and not "Shorty" (R. 123).

Sergeant Anthony J. Kozak testified that the accused and decedent were good friends and so far as he had ever heard, had never had any difficulties between them.

The accused was sworn and testified that when he came off guard on December 9 at 10 o'clock he received from Staff Sergeant Bushman a quart of gin. He, Sergeant Bushman, and Sergeant Soto then went to the overturned truck which with the load was in charge of Private Supuk. Accused received from Private Supuk two quarts of rum seco, one quart of dry gin and one quart of anisette. Accused and his companions returned to the barracks about 11 o'clock and they started drinking out of one of the bottles until 2:30 or 3 o'clock, when they lay down and went to bed (R. 126). The next morning accused resumed drinking before going on patrol and returned from patrol duty at about 9 o'clock or 9:30. Accused and two others were given permission by Lieutenant Marks, who was in command of the patrol, to go to the saloon in Cativa in the Republic of Panama to get a beer. Two bottles of beer were drunk by accused. After returning to camp at about 10 o'clock accused bathed, put on a pair of white shorts, lay on his bunk and began drinking anisette and was joined by several of his comrades. Accused testified that he had no recollection of what he ate at "chow", stayed only a few minutes and resumed his drinking with others, in the course of which accused lost consciousness completely and woke up about 3 or 4 o'clock in the morning in the Fort Davis Guardhouse in solitary confinement with nothing but a pair of khaki shorts

on and barefooted (R. 127). Finding himself cold, he asked the sergeant of the guard for a blanket and was refused. He remained there until 9 o'clock, was then taken to headquarters, informed by Lieutenant Colonel Wooten of the nature of the charges, and then taken to Colonel Lyon's office. He was then taken before the investigating officer, Major Blandford, and returned to the guardhouse and subsequently taken to the hospital (R. 128). He denied knowing anyone by the nickname of "Shorty". He testified that he had known decedent since 1939, and had never had any trouble with him (R. 128). Accused testified that he was drunk. He had consumed nearly three quarts; that he hardly ever drank, always tried to stay away from it (R. 130). He realized that he was misconducting himself by bringing liquor into his quarters and consuming it there (R. 130). He testified that American whiskey did not bother him nearly as much as the native liquor, that the latter "seems to paralyze you more" (R. 135). He stated that he had become drunk only once before and at that time on American whiskey in April, 1942, and this time it was on native liquor (R. 135); that he had started depositing money with the Finance Department April 1, 1942, and in that manner had accumulated $350 and had purchased four bonds at $37.50 each during that time (R. 136). He was prompted to drink on this occasion because he had been "recommended to go back to the Officers' Candidate School, and Sergeant Soto had been recommended for a commission in the MPs, and we were sort of celebrating, and we started drinking and just continued on" (R. 136). He stated that he drank on December 9 until 2:30 on the morning of December 10, and did not have any sleep from that hour until reveille on December 10, when he was called to outpost patrol duty (R. 136). He was born in Florence, Alabama, and raised at Nashville, Tennessee, and had finished the eighth grade.

Second Lieutenant Harold G. Marks, commander of the outpost reconnaissance patrol on the morning of December 10, 1942, described the course taken by accused and by others in the patrol detail, and testified that he had given permission to accused and others to buy beer at a saloon in Cativa while waiting for the truck transportation back to camp (R. 139). At that time accused was sober (R. 139).

Sergeant Louis Gorombey testified that he was on the reconnaissance patrol trip and with accused and others drank beer at Cativa on the morning of December 10, 1942. At that time accused was sober (R. 142), and he was sober after his return to camp and all day long, and after supper at about 5 o'clock that evening accused approached witness in the barracks and obtained a loan of $1 with which to buy some beer for the orchestra. At that time accused was sober (R. 143). About two seconds before the shots were fired witness saw accused running with his rifle toward the orderly room (R. 144). The loan had not been repaid (R. 145). Witness testified that while he and accused were on the reconnaissance trip on the morning of December 10, 1942, accused had made some "wisecracks" based upon accused's dislike of Sergeant Sutton, as "Sergeant Sutton had never pulled much straight duty -- more or less things like laundry clerk, and when we was out in Cativa, he was in charge of the PX and he was a sergeant. For that reason, Private Riley didn't like him very much" (R. 148).

In rebuttal of testimony introduced for the defense to the effect that accused was intoxicated when he shot and killed decedent, the prosecution introduced a number of witnesses who testified that at various times during the day and evening of December 10, 1942, accused was sober. These witnesses included First Lieutenant Carl W. Byas (R. 150), who testified that accused was sober at 6 p.m. when he called at the witness' office and asked to have the order prohibiting him from buying beer at the post exchange revoked (R. 151, 152).

Sergeant Udvari testified that when accused came from the post exchange to his barracks, obtained and loaded his gun, and left a few seconds before he fired the shots that killed decedent, accused was not drunk (R. 155).

Staff Sergeant Don L. Wyman, an eye witness of the shooting, testified that at that time accused looked sober when he was firing the shots (R. 166, 167, 168).

Sergeant Robert E. Lee testified that on the late afternoon and evening of December 10, 1942, he could not say that accused was sober and he could not say that accused was drunk, but would say that he did not stagger and did not act as if he were drunk, but acted as if he were mad (R. 170, 171); that after the shooting when accused came out of the jungle "he acted to me like he was perfectly sober — as if he had full control of himself, in his mind and everything" (R. 171).

Private First Class William E. Petra testified respecting accused's condition as to sobriety in the mess hall at 5 p.m., December 10, 1942: "He was high; I wouldn't say he was drunk. He was under the influence of intoxicating drinks. * * * he looked sober to me"; that at the time of the shooting "he ran like a calm man" (R. 176). When accused ran into the jungle he ran normally as he usually did (R. 179).

Sergeant Paul D. Sutton testified that when accused was in the post exchange about 6 p.m. December 10, 1942, he appeared sober, as he usually did.

5. The competent evidence established without doubt or conflict that accused did at the time and place alleged shoot to death with gunfire First Sergeant Chester N. Wiley and that death occurred as the result of the wounds inflicted almost instantaneously. Accused's sole defense was that he was too drunk at the time of the shooting to entertain the specific intent. To establish this defense he testified that from the excessive consumption of anisette, rum and other alcoholic liquor on the day before and the day of the homicide he lost consciousness at about 3 p.m. December 10, 1942, and did not regain it until about 3 a.m. the next day when he found himself in solitary confinement in the guardhouse. Corroborative of his own testimony accused relied upon the testimony of Second Lieutenant Harold G. Marks, who expressed the opinion that in the mess hall at 5 p.m. accused was drunk, with the qualification that he was sufficiently capable of handling his faculties so that he was fit to go into combat. In rebuttal the prosecution produced a formidable array of witnesses who had observed accused on the afternoon and evening of

December 10, 1942. They all testified that in their opinion accused was sober at the time of observation. These witnesses included: Staff Sergeant Don L. Wyman, Staff Sergeant Anthony J. Kozak, Sergeant Paul D. Sutton, First Lieutenant Carl W. Byas, Sergeant Louis D. Udvari, Private First Class William E. Petra, Sergeant Robert E. Lee, Sergeant Estevan Soto, Private First Class Jimmie W. Pittle, and Sergeant Louis Gorombey. The court was warranted in finding that accused's drunkenness, if any, was not sufficient to affect his mental capacity to entertain the specific intent to kill (par. 126a MCM).

The killing was without legal justification, provocation, or excuse. At the time of its occurrence accused was not in the proper performance of a legal duty; in fact he was off duty, and under orders of his first sergeant to "go to bed".

The homicide was committed by accused with malice aforethought. He manifested an intention to kill. First in the post exchange thirty minutes before the homicide, when denied a service of beer, he said to Sergeant Sutton that he would have two men use a knife on either Sergeant Sutton or Private Tarrant if they were ever in the beer garden at Fort Davis. In the orderly room twenty-five minutes before the homicide when informed of the absence of the company commander from whom he expected to obtain a revocation of Lieutenant Marks' order denying him the right to buy beer at the post exchange, he said "he was going to get him a bald-headed son-of-a-bitch that night". Next he appeared at the entrance to the post exchange with a dangerous weapon, a home-made knife, with a blade six inches in length, which he was carrying in a threatening manner, and when that was forcibly taken away from him by the decedent he ran to his quarters muttering repeatedly "I'm going to kill that no good son-of-a-bitch". With deliberation he went to his bunk, picked up his rifle, unlocked the piece, pulled the bolt back, took the clip, loaded the rifle, rammed the bolt home. "There was no fumbling on that at all; that cartridge clip went just as easily as anything". In his planning and executing the homicide he was angry, with a mad frown on his face but deliberate and calm, with his faculties controlled and normal. He had ample time to cool off after conceiving the crime and before its commission. The killing was both deliberate and premeditated. There is ample support for the findings of guilty of the Charge and Specification.

6. The charge sheet shows that accused was at the time of the homicide 32 years and 7 months of age. He enlisted on June 28, 1941, to serve three years and had previously served four three-year enlistments in the Army commencing January 31, 1929.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a

civil nature and so punishable by penitentiary confinement for more than one year by sections 452-454, Title 18, United States Code and by sections 2401-2404, Title 22, District of Columbia Code.

Andrew S. Copp Jr., Judge Advocate

John Wannwell, Judge Advocate

Fletcher R. Andrews, Judge Advocate

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

SPJGH
CM 231926

MAR 9 1943

U N I T E D S T A T E S	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Barksdale Field, Louisiana,
Private WILLIAM W. LEGGETT	)	February 10, 1943. Dishonorable
(34155593), Company D,	)	discharge and confinement for
1st Infantry Training	)	twenty (20) years. Disciplinary
Battalion, Camp Wheeler, Ga.	)	Barracks.

REVIEW by the BOARD OF REVIEW
HILL, LYON and SARGENT, 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 58th Article of War.

Specification: In that Private William W. Leggett, Company D, 1st Infantry, Training Battalion, did, at Camp Wheeler, Georgia, on or about March 24, 1942, desert the service of the United States and did remain absent in desertion until he was returned to military control at Mansfield, Louisiana, on or about December 22, 1942.

The accused pleaded guilty to absence without leave, in violation of the 61st Article of War. He was found guilty of the Charge and its Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined

at hard labor for the term of his natural life. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows, in addition to the plea of guilty to absence without leave, that the accused absented himself from his organization and station at Camp Wheeler on March 24, 1942 (R. 4; Ex. A).

Chief Deputy Sheriff Bradford B. Powell, of Mansfield, Desota Parish, Louisiana, acting upon an order to pick up accused, arrested accused in uniform with sergeant's chevrons in a pasture about 5 miles southeast of Mansfield on December 22, 1942. The accused was trying to sell a cow, which had been mortgaged by his family, to the "F.S.A.", and left there when his family moved to a point about 25 miles away. The accused stated that he was away on pass, and showed a pass in his name from a unit of the California State Guard located in Riverside, California, upon which the expiration date was blotted and could not be read. The accused was turned over to an officer, and returned to Barksdale Field, Louisiana, on the same day, December 22, 1942 (R. 4-7; Ex. B).

4. The defense presented no testimony. The accused elected to remain silent.

5. The evidence shows that the accused absented himself from his organization at Camp Wheeler, Georgia, on March 24, 1942, and remained absent until he was arrested by the civil police near Mansfield, Louisiana, and there returned to military control on December 22, 1942. The absence for nine months, his apprehension (though not alleged) at a place some 600 miles distant from his station, his statement that he was on pass, and his exhibition of a pass purporting to be issued in his name by a unit of the California State Guard, warranted the court in inferring, as is shown by its findings, an intent to remain permanently absent.

6. The accused is 21 years of age and had 2½ months' service upon the date of his offense.

There is no maximum limit of punishment for desertion committed in time of war (A.W. 58; Ex. Order No. 9048, Feb. 3, 1942).

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

NOTE: Lieut. Col. Elwood W. Sargent signed the rough copy of this review (contained in file), but left for an overseas station before the review was retyped in final.

Lester S. Hill, Jr.,
Colonel, J.A.G.D.,
Chairman, Board of Review No. 1.

WAR DEPARTMENT

IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

Board of Review

CM 231998

March 20 1943

U N I T E D S T A T E S v. JACOB M. BERUE, a person serving with the Armies of the United States in the field.	Trial by G.C.M., convened at Casablanca, French Morocco, January 11, 1943. Confinement for two (2) years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
COPP, HILL AND ANDREWS, Judge Advocates.

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

/s/ Andrew J. Copp, Jr., Judge Advocate.

/s/ John Warren Hill, Judge Advocate.

/s/ Fletcher R. Andrews, Judge Advocate.

1st Indorsement
March 21 1943

War Department, J.A.G.O. To the Commanding General, I Armored Corps, APO 758, c/o Postmaster, New York City, New York.

1. In the case of Jacob M. Berue, a person serving with the Armies of the United States in the field,

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 50½, and Executive Order No. 9363, dated July 23, 1943, you now have authority to order the execution of the sentence .

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

/s/ MYRON C. CRAMER

Myron C. Cramer,
Major General
Assistant Judge Advocate General,
In Charge of Military Justice Matters.

U. S. GOVERNMENT PRINTING OFFICE 16—26450-2

SPJGK
CM 231998

March 20 1943

MEMORANDUM:

1. Jurisdiction.

a. The offenses alleged occurred on board ship on the high seas (R. 25, 35). The ship was owned by the Government of the United States, employed in the public service under the authority of the United States, acting by and through the Administrator, War Shipping Administration (Ex. 1), and operated by the Matson Navigation Company in the Army Transportation Service (R. 8, 18). Orders concerning the trip were sent to the master of the ship by the proper official of the Army Transportation Service (R. 9, 10). The ship carried a cargo including Army trucks, Navy barges, foodstuff, ammunition and coal (R. 8). The only Army personnel on board consisted of a first lieutenant, placed there by the Army Transportation Service as Cargo Security Officer (R. 9, 20, 22; Ex. 2). His duties related to the supervision of the "military supplies and impedimenta" (Ex. 3). The ship moved in a convoy with other vessels engaged in similar service (R. 11).

Accused was hired as a messman or mess steward, Merchant Marine (R. 11, 21, 24, 25, 38), under a procurement system whereby the particular labor union involved furnished the necessary help upon the request of the ship's master. Consequently, the crew, including accused, were union men (R. 16). Apparently accused was the delegate of his union and represented the stewards in bargaining with the master (R. 27, 30, 39, 43, 44).

b. In the opinion of the Board of Review accused was subject to the jurisdiction of the court under Article of War 2 (d). An extensive memorandum on this general subject appears in CM 228677, Outwater. As shown in that memorandum the constitutionality of the statute has been upheld by the Federal courts, and the statute is given a broad interpretation in order to afford the fullest protection to the nation. In two cases where cited, the Federal courts have interpreted the statute to embrace civilian personnel on Army transports (Ex parte Gerlach, 247 Fed. 616; Ex parte Falls, 251 Fed. 415). In neither case did it appear that troops were being carried. In the Falls case the court stated (p. 416):

> "Carrying supplies to equip and sustain the army is a very important military operation in time of war.

> The petitioner by a reasonable and natural interpretation of the second Article of War is a person 'serving with the armies of the United States in the field', and as such is in the same position with reference to trial by court-martial as any person belonging to one of the other classes enumerated in said article. Any other interpretation of the statute under all the facts would be unreasonable, illogical, and disastrous 'in time of war'. It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies, in the class, in time of war, of those 'persons accompanying or serving with the armies of the United States in the field'".

c. In the defense's plea to the jurisdiction counsel argued that since the offenses occurred on the high seas jurisdiction depended upon the law of admiralty. The argument is unsound. Since accused was subject to military jurisdiction the locale of the offenses became immaterial. In the Gerlach case the offense also took place on the high seas.

d. The military jurisdiction over accused was sufficient to embrace the offenses alleged. His conduct was prejudicial to good order and military discipline. Moreover, as will be shown subsequently, his assault upon the master violated a criminal statute of the United States and his other conduct contravened Army regulations. The master of an Army transport is "in supreme command of the ship and all persons on board who sign the ship's articles" (par. 1a, AR 55-325, Nov. 5, 1942). One of his duties is to "maintain and enforce strict discipline at all times" (id., par. 2a (2)). "Orders and instructions for the crew of an Army vessel will be issued by the master" (par. 4a, AR 55-330, Dec. 1, 1942). The chief steward "has charge of the *** mess rooms" (par. 2a, AR 55-345, Sept. 1, 1942), and is responsible for compliance by those under him with the rules and regulations affecting the ship's personnel (par. 1, AR 55-365, Aug. 31, 1942). Likewise, "every person will observe a respectful demeanor in word and act whenever he addresses or is addressed by his superior" (id., par. 2a), and "improper, profane, or boisterous language or conduct is strictly forbidden" (id., par. 2d). The labor unions themselves forbid subordinates on merchant vessels to use abusive and profane language when they receive an order (R. 28).

The court-martial had jurisdiction to try accused for the offenses alleged. The fact that accused may have been unaware of his subjection to military law is no defense. In neither the Gerlach nor the Falls case did it appear that accused knew that he was subject to such jurisdiction. It did not lie with accused to select the court which should try him for conduct which he must have realized was highly improper.

2. Place of confinement.

The reviewing authority designated the Federal Reformatory, Chillicoth, Ohio, as the place of confinement. By Article of War 42 confinement in a penitentiary is limited in part to conviction for an act or omission which 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 ***."

The Article of War also provides that the entire sentence of confinement may be executed in a penitentiary if any one of several offenses involved authorizes such confinement.

The article thus requires in the first place that the act be "recognized as an offense of a civil nature *** by some statute of the United States". Title 46, United States Code, section 701, makes it an offense for "any seaman who has been lawfully engaged" to assault any master. Section 713 of the same title reads as follows:

> "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

It is clear that a mess steward comes within the term "seaman" as defined above. The definition of "master" might be thought to limit the act of vessels belonging to a citizen of the United States and not to include a vessel owned by the Government as in the present case. If this were true, the word "seaman" might likewise be interpreted as applying only to vessels belonging to a citizen of the United States, for the definition of "seaman" includes the words "on board the same", which would naturally refer back to the words "any vessel belonging to any citizen of the United States". No such narrow construction has been imposed upon the act of the courts. In United States v. McArdle, Fed. Cas. No. 15,653, and United States v. Sullivan, 43 Fed. 602, the statute was interpreted to include seamen on foreign vessels within United States waters. In the latter case the court said that the statute

> "does not declare that the word 'seaman', as used in the statute, is confined to one employed on a vessel belonging to a citizen of the United States; but rather, and only, that every person employed on such a vessel shall be considered a 'seaman'".

It is to be noted that the definitions expressed in section 713 apply to "this chapter", not merely to section 701. Section 688, in the same chapter, permits recovery for the death of or personal injury to "any seaman" under certain conditions. This section has been held to exclude an officer on a submarine (Dobson v. United States, 27 F. (2d) 807). The chapter in question is entitled "Merchant Seamen" and obviously was not intended to include Navy personnel or Navy ships. However, section 688 does include seamen on a ship owned by the United States Shipping Board Merchant Fleet Corporation (Kunschman v. United States, 54 F. (2nd) 987) and on a ship owned by the United States and operated by the United States Shipping Board Emergency Fleet Corporation (U.S. Shipping Board Emergency Fleet Corporation v. O'Shea, 5 F. (2nd) 123). In the O'Shea case, in answer to the contention that the act applied only to merchant vessels not owned by the United States, the court declared,

> "***but we find no warrant in the letter or spirit of the act for such a limitation when the vessel is operated by others as in this case." (p. 124)

In the instant case the vessel was owned by the United States and operated by the Matson Navigation Company in the Army Transportation Service. Under the foregoing authorities, accused violated Title 46, United States Code, section 701.

Under Article of War 42 the Federal offense must also be punishable for more than one year. The offense of assaulting a master under section 701 is punishable by imprisonment for not more than two years.

The Article of War further requires that the Federal statute be "of general application within the continental United States". This phrase undoubtedly refers to place rather than to person. Formerly the statute permitted confinement in a penitentiary if such confinement were authorized by a statute of the United States or "of the State, Territory, or District" in which the offense was committed (sec. 1342, R.S., A.W. 97). The evident purpose of the change in phraseology was to achieve uniformity in the law relating to penitentiary confinement by avoiding a situation in which the same act might result in confinement in a penitentiary if committed in one state or territory and no such confinement if committed in another. Section 701 is "of general application within the continental United States", there being no limitation of place in its terms. That it also covers offenses committed on board United States ships on the high seas does not remove it from the scope of the quoted phrase.

Even if the words "general application" be regarded as referring to persons rather than place, Article of War 42 is complied with. To be "general" as to persons, a law need not embrace the whole population. The word "general" is deprived from "genus" and related to a whole "genus" or kind; in other words, to a whole class or order. Consequently, a law is "general" if it affects a class of persons (18 Words and Phrases 222, 240). In the present case the statute includes "any seaman".

For the foregoing reasons, the Board of Review is of the opinion that penitentiary confinement was authorized under Article of War 42.

/s/ Andrew J. Copp, Jr. , Judge Advocate.

/s/ John Warren Hill , Judge Advocate

/s/ Fletcher R. Andrews , Judge Advocate

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

SPJGN
CM 235528

JUN 1 - 1943

U N I T E D S T A T E S	)	96TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Yakima, Washington, April 28, 1943. Dishonorable discharge and confinement for ten (10) years. Federal Correctional Institution, Englewood, Colorado.
Private OLLY R. NEW (39156233), Service Battery, 362nd Field Artillery Battalion.	)	

HOLDING by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEMP, Judge Advocates

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

2. Paragraph 90b of the Manual for Courts-Martial provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41)E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a reformatory

only when confinement in a penitentiary is authorized by law (CM 220093, Unckel).

3. Confinement in a penitentiary is not authorized in this case for the reason that no offense of which accused was found guilty is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by any statute of the United States of general application within the continental United States or by the law of the District of Columbia. See Article of War 42.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years, in a place other than a penitentiary, Federal reformatory or correctional institution.

Chas. I. Jesson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 8 1943 - To the Commanding General, 96th Infantry Division, Fort Lewis, Washington.

1. In the case of Private Olly R. New (39156233), Service Battery, 362nd Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 10 years in a place other than a penitentiary, Federal reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution you will have authority to order the execution of the sentence.

2. The maximum confinement authorized for the offenses of which accused was convicted, other than absence without leave for fourteen hours (Chg. II and Spec.), is one year and seven months. Under the policy set forth in War Department letter dated March 5, 1943, (AG 250.4 (2-12-43)) from the Adjutant General to all officers exercising general court-martial jurisdiction within the continental limits of the United States, "Subject: Uniformity of sentences adjudged by general court-martial", confinement for absence without leave should not ordinarily exceed five years. In view of all the circumstances I recommend that the sentence to confinement be reduced to five years.

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

(CM 235528).

Myron C. Cramer

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

1 Incl
Record of trial

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

SPJGK
CM 238542

5 OCT 1943

U N I T E D S T A T E S	)	FOURTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
First Lieutenant JAMES S. CHAVES (O-1103563), Corps of Engineers.	)	Trial by G.C.M., convened at Camp McCain, Mississippi, 12 July 1943. Dismissal and confinement for two (2) years.

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

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

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

CHARGE I: (Finding of guilty disapproved by reviewing authority).

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

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

Specification 1: In that First Lieutenant James S. Chaves, Corps of Engineers, 203rd Engineer Combat Battalion, Camp McCain, Mississippi, did, at Camp McCain, Mississippi, on or about May 17, 1943, attempt to feloniously and against the order of nature have carnal connection per os with Private Milton M. Goldfarb, Headquarters and Service Company, 203rd Engineer Combat Battalion, by placing his hand inside of said Private Goldfarb's trousers and withdrawing therefrom his penis, which he, the said Lieutenant Chaves then and there endeavored to take into his mouth.

Specification 2: (Finding of guilty disapproved by reviewing authority).

He pleaded not guilty to the Charges and Specifications. He was found

guilty of Charge I and its Specification, guilty of Charge II and Specification 1 thereunder, and guilty of Specification 2, Charge II, except the words "and repeatedly". No evidence of previous convictions was introduced. He was sentenced to dismissal, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for two years. The reviewing authority disapproved the findings with relation to Charge I and its Specification and Specification 2, Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence: Specification 1, Charge II.

The sole witness for the prosecution was Private Milton M. Goldfarb, Headquarters and Service Company of accused's battalion. Accused was adjutant of the 203rd Engineer Combat Battalion (R. 6w). On 18 May 1943, about 7 p.m., accused and Goldfarb were in front of battalion headquarters. It was still light. Accused summoned Goldfarb and asked him whether he wanted to go out on reconnaissance with accused (R.6h,j,l). Since accused was a lieutenant, Goldfarb replied in the affirmative. Accused procured a jeep, and Goldfarb met him at a place designated by accused, which was 100 yards from the battalion area. They drove to a spot about four miles from the area, "a little off the road", - a spot indicated by accused (R.6i,l). While they were sitting there in the jeep, Goldfarb was in the driver's seat, and the steering wheel was nine inches or a foot away from his body. Without saying a word, accused started "fooling around". He opened Goldfarb's fly, took out Goldfarb's penis, and attempted to put it in his mouth. He had his lips "to it", when Goldfarb pushed him away. Witness did not resist sooner because he was "stunned". Goldfarb did not recall whether his penis was erect. After pushing accused away, Goldfarb started the car and they drove back to the area in silence. A "bunch of the boys" were in the "day room". Goldfarb did not discuss the affair or report it to anyone for six weeks (R.6i-6m).

For the defense there was evidence that at 7 p.m., 18 May 1943, a meeting was held of the officers of accused's battalion and others, but the witness so testifying did not know whether accused attended (R. 6s). However, the witness testified that attendance by an officer was compulsory unless the company commander excused him (R.6t).

First Lieutenant Irving Ichelbaum, 203rd Engineer Combat Battalion, testified that he roomed with accused and that accused's "conduct for morals and decency around" witness was good. He also testified that accused sometimes was severe in his punishment of enlisted men (R.6v).

Captain Robert A. Savitt, Medical Corps, Chief of the Neuropsychiatric Section, Station Complement, testified that accused had been under his observation in the hospital for 16 days and was not insane. Witness was

unable to say whether or not accused had homosexual tendencies. He stated that accused came to the hospital voluntarily (R.6t,u).

Accused denied the entire affair with Goldfarb and testified that he did not even know Goldfarb until 20 June 1943, although he may have seen him without knowing who he was (R.6x,6bb). He said that possibly Goldfarb had mistaken him for some other officer, and that he (accused) had sometimes been mistaken for another officer in the organization (R.6y). Accused "understood" that Goldfarb worked in "Battalion Supply", which was not in the same building with accused and with which accused did not have dealings (R.6cc). Accused never punished Goldfarb (R.6bb).

Accused stated that before his arrival at Camp McCain three months previously, he had worked for the Intelligence Department in foreign service and had been instrumental in sending a number of men to prison (R.6w,y,z). Finding his present organization poorly organized and low in morale, he resolved to correct the situation, and as a result of his activities and his reports to the battalion commander, numerous changes had occurred within the command. In addition, he furnished information about a number of men to the battalion S-2 (R.6y,6aa).

Accused contended that the present charges were the outgrowth of a conspiracy against him (R.6y). After the preferring of the charges, he asked a medical officer whether there was any conclusive way of determining insanity. Informed that there was, he arranged for an appointment with a medical corps captain, presumably Captain Savitt (R.6cc). He tendered his resignation as an officer of the Army, believing that an officer under such serious charges should resign (R.6dd).

In rebuttal the prosecution introduced Second Lieutenant George W. Conklin, S-2 of the battalion, who testified that accused gave him some information which was "not too valuable". Witness knew of one person in the battalion suspected of subversive activities and said that there were some such activities in the battalion but that they were not widespread (R.6ee).

Lieutenant Conklin testified also that although both he and accused wore glasses, he did not recall having been mistaken for accused at any time (R.6ee).

4. As noted, the reviewing authority disapproved the findings of guilty of the Specifications other than that relating to Goldfarb, and the Board of Review may not consider them unless the evidence introduced to prove them is competent to prove the Goldfarb Specification. The two Specifications disapproved concerned offenses of a like nature allegedly committed

within a day or so prior to the Goldfarb offense. It is a general rule of criminal law that evidence of other offenses is not admissible to prove the offense charged (McKelvey, Evidence, 4th ed., p. 200; 62 L.R.A. 194). But such evidence is admissible to prove criminal intent, motive, or guilty knowledge (M.C.M.,1928,p.112), which are not in issue in the present case. In sex crimes, including sodomy, evidence of prior acts with the same party is admissible to show the inclination of the parties for one another (State v. Badders, 141 Kan. 683,42 P. (2nd) 943; Peo. v. Swift, 172 Mich. 473,138 N.W. 662; State v. Reineke, 89 Ohio St. 390, 106 N.E. 52, L.R.A. 1915 A,138; State v. Young, 140 Oreg.228,13 P.(2nd) 604; State v. Oberg, 187 Wash. 429, 60 P. (2nd)66). By the great weight of authority, the exception is not extended to embrace sodomy committed with persons other than the victim involved in the case on trial (Peo. v. Singh, 121 Cal. App.107, 8 P.(2nd)898; Wentz v. State, 150 Atl. 278 (Md.); Peo. v. Dean, 253 Mich.434,235 N.W. 211; Peo. v. Rosenthal, 289 N.Y. 482, 46 N.E. (2nd) 895; Peo. v. Hall, 22 N.Y. Supp. (2nd) 634; State v. Start, 65 Oreg. 178, 132 Pac. 612, 46 L.R.A. (N.S.) 266; State v. McAllister, 67 Oreg. 480,136 Pac. 354; State v. Gregorious, 81 Utah 33, 16 P. (2nd) 893; 29 Mich. Law Rev. 473). As the court observed in People v. Dean, supra,

> "That the defendant committed similar offenses with other boys has no direct tendency to show that he committed that with which he is charged, which had no connection with them".

It has been forcibly contended that evidence of other acts of sodomy with different persons should be admitted to show accused's perverted moral nature (See the dissenting opinions in State v. Start, and State v. McAllister, supra). And one court has held the evidence admissible on the issue of identity of the culprit (Barnett v. State, 104 Ohio St. 298,135 N.E. 647, 27 A.L.R. 351).

In CM 196371 (Steenberg), the Board of Review followed the majority view, holding the evidence inadmissible. But in CM 220763, (Zack), the Assistant The Judge Advocate General expressed the opinion that such evidence is admissible, although in the particular case the prior acts were committed with the same pathic.

There is much to commend the view that the evidence should be held competent. While the commission of other offenses by a normal person does not tend to prove the commission of the offense charged, prior acts indicating sex perversion bear strongly upon the probability that accused has again given expression to his abnormal tendencies. Despite the force of this argument, however, the Board of Review is of the opinion that in

view of the serious nature of the offense of sodomy, and the grave consequences attendant upon conviction thereof, the majority and more conservative rule should be adopted. As a result, we hold that the evidence relating to the Specifications which were disapproved by the reviewing authority cannot be considered in determining the guilt of accused on the Goldfarb Specification.

5. Goldfarb's testimony is in direct conflict with that of accused. The court, which had the opportunity of observing the witnesses, believed Goldfarb. In our opinion the court was justified in doing so. There was nothing to indicate any reason why Goldfarb should lie about such a serious matter. The suggestion by accused that Goldfarb may have mistaken him for another officer was not followed by any testimony tending to prove such mistaken identity, and Goldfarb had no doubt whatsoever about the identity of accused. The failure of accused to prove his presence at the officers' meeting held on the night in question is significant. So is his effort to resign from the service. In the opinion of the Board of Review the evidence proves accused's guilt beyond a reasonable doubt.

6. War Department records show that accused is 24 years of age. He graduated from high school and attended the New Mexico Military Institute and the Arsuna School of Fine Arts, each for two years. He served as an enlisted man from 3 December 1940 until 16 September 1942, when, upon graduation from the Engineer Officers' Candidate School, Fort Belvoir, Virginia, he was appointed second lieutenant, Army of the United States. He was promoted to first lieutenant 1 February 1943.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____ Judge Advocate.

1st Ind.

War Department, J.A.G.O. 9 OCT 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant James S. Chaves (O-1103563), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the period of confinement be reduced to one year; that the sentence as thus modified be carried into execution; and that the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, be designated as the place of confinement.

3. Consideration has been given to the recommendation for clemency and written argument filed by the assistant defense counsel and attached hereto.

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

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Dft. of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Clemency ltr. 8/6/43.

(Resigned)

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

SPJGN
CM 239497

8 Sep 1943

U N I T E D S T A T E S	)	86TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Howze, Texas, 23 July 1943. Dishonorable discharge and confinement for four (4) years. Federal Reformatory, El Reno, Oklahoma.
	)	
Private RAYMOND R. GOGGAN (38050043), Headquarters Company, 343rd Infantry.	)	

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HOLDING by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates.

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1. The record of trial in the case of the soldier above named 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 Raymond R. Goggan, Headquarters Company, 343rd Infantry, did without proper leave, absent himself from his organization at Camp Howze, Texas from about 0530 June 1, 1943 to about June 10, 1943.

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

Specification: In that Private Raymond R. Goggan, Headquarters Company, 343rd Infantry, did, at Camp Howze, Texas, on or about June 1, 1943 feloniously take, steal, and carry away One Hundred Fourteen and no/100ths dollars ($114.00), lawful money of the United States, value about $114.00, the property of Private 1st Class Robert T. Williamson, Headquarters Company, 343rd Infantry.

He pleaded guilty to Charge I and its Specification, and not guilty to Charge II and its Specification. He was found guilty of both Charges and Specifications. Evidence of one previous conviction by summary court-martial for absence without leave in violation of Article of War 61 was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for four years. The reviewing authority approved the sentence designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement and forwarded the record for action under Article of War 50½.

3. As the trial was invalid by reason of the participation therein, as a member of the court, of First Lieutenant Frederick C. Wing, an officer not detailed thereon, the evidence is not discussed. The record discloses that:

> (1) On 8 May 1943, by paragraph 1, Special Orders 115, Headquarters 86th Infantry Division, a general court martial was appointed, of which, on 23 July 1943, by paragraph 4, Special Orders 185, Lieutenant Wing was detailed as a member.
>
> (2) On 9 July 1943, this case was referred to the above court for trial.
>
> (3) On 18 July 1943, by paragraph 4, Special Orders 180, another general court martial was appointed - on which Lieutenant Wing was never detailed as a member - to which were transferred "all unarraigned cases pending before a previously appointed G.C.M."
>
> (4) This case was tried by such subsequently appointed court-martial, and not by the previously appointed one, to which Lieutenant Wing had been detailed. Nevertheless, Lieutenant Wing sat, throughout the proceedings, as a member of such subsequently appointed court, to which he had never been detailed.

"An officer sat as a member of the court who was not detailed thereon. The proceedings were invalidated thereby. C.M. 131672 (1919)." (Par. 365 (1), page 170, Dig. Ops. J.A.G., 1912-1940).

In the light of the cited authority, it appears that Lieutenant Wing's unauthorized participation in the trial, as a member of the court, invalidated the proceedings, rendering the findings and sentence a nullity.

4. The accused is 26 years of age. He was inducted 19 November 1940 at Houston, Texas. His record shows no prior service.

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

(Signed) Chas. C. Cresson, Judge Advocate.

(Signed) Abner E. Lipscomb, Judge Advocate.

(Signed) Benjamin R. Sleeper, Judge Advocate.

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(292)

1st Ind.

War Department, J.A.G.O. 8 Sep 1943 - To the Commanding General, 86th Infantry Division, Camp Howze, Texas.

1. In the case of Private Raymond R. Goggan (38050043), Headquarters Company, 343rd Infantry, I concur in the foregoing holding by the Board of Review and for the reasons therein stated, recommend that the findings and sentence be vacated.

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

(CM 239497).

(Signed) Thomas H. Green

T. H. Green,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.
In Charge of Military Justice.

I Incl.
Record of trial.

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

(293)

SPJGN
CM 239555

16 SEP 1943

4TH AIR FORCE

UNITED STATES)
)
v.)
)
Private HENRY YOUNG)
(34481458), 1887th Engineer)
Aviation Battalion.)

Trial by G. C. M., convened at March Field, California, 3 August 1943. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates.

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

2. The only question requiring consideration is the propriety of the designation of a penitentiary as the place of confinement.

3. Confinement in a penitentiary, Federal reformatory or correctional institution is not authorized under letter dated February 26, 1941 (AG 253 (2-6-41)E), from The Adjutant General to all commanding generals, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", except in a case where confinement in a penitentiary is authorized by law (CM 220093, Unckel). Confinement in a penitentiary is not authorized under Article of War 42 for willful disobedience of the lawful command of a superior officer or for unlawful and riotous assembly with others, disturbing the peace of the garrison, the offenses of which accused was found guilty.

4. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty years in a place other than a penitentiary, Federal reformatory or correctional institution.

Glen A. Cresson, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.
Benjamin R. Sleeper, Judge Advocate.

1st Ind.

18 SEP 1943

War Department, J.A.G.O., - To the Commanding General, Fourth Air Force, San Francisco, California.

1. In the case of Private Henry Young (34481458), 1887th Engineer Aviation Battalion, I concur in the foregoing holding by the Board of Review and for the reasons therein stated recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty years in a place other than a penitentiary, Federal reformatory or correctional institution. Upon compliance with the foregoing recommendation you will have authority to order the execution of the sentence.

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

(CM 239555).

Myron C. Cramer

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

1 Incl.
Record of trial.

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

10 MAR 1944

SPJGH
CM 240646

U N I T E D S T A T E S v. Private WILLIE P. CAMPBELL (34204636), Company D, 611th Quartermaster Battalion.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Blanding, Florida, 2-6 August 1943. To be shot to death with musketry.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates.

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

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

CHARGE I: Violation of the 66th Article of War.

Specification 1 (As amended): In that Private, then Sergeant, Willie P. Campbell, Private First Class John S. Mims, Technician Grade V James H. Hall, Private Joseph Woodford, Private First Class Andrew Johnson, Private Abraham Lewis, Technician Grade V Esthmus T. Hutchings, Private James W. Bigbee, Private James H. Baity, Technician Grade V James H. Rogers, Private First Class Robert E. Buchanan, Technician Grade V Irvin L. Pankey, and Private Henry Rollins, all of Company D, 611th Quartermaster Battalion, did, at Camp Blanding, Florida, on or about 24 June 1943, voluntarily join in a mutiny which had begun at Camp Blanding, Florida, against the lawful military authority of the Military Police, and did, with the intent to usurp, subvert, and override, for the time being, said lawful military authority, in concert with sundry other members of said 611th Quartermaster Battalion, assemble in the vicinity of Service Club Number Four, take up arms and refuse to disperse.

Specification 2: In that Private, then Sergeant, Willie P. Campbell, Company D, 611th Quartermaster Battalion, did, at

Camp Blanding, Florida, on or about 24 June 1943, cause a mutiny in Camp Blanding, Florida, by unlawfully assuming control over about fifteen (15) soldiers of Company D, 611th Quartermaster Battalion, and in the execution of such control causing said soldiers concertedly to disregard and defy the lawful orders of the Military Police, with the intent to usurp, subvert, and override, for the time being, lawful military authority.

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

Specification: In that Private, then Sergeant, Willie P. Campbell, Private First Class John S. Mims, Technician Grade V James H. Hall, Private Joseph Woodford, Private First Class Andrew Johnson, Private Abraham Lewis, Technician Grade V Esthmus T. Hutchings, Private James W. Bigbee, Private James H. Baity, Technician Grade V James H. Rogers, Private First Class Robert E. Buchanan, Technician Grade V Irvin L. Pankey, and Private Henry Rollins, all of Company D, 611th Quartermaster Battalion, did, at Camp Blanding, Florida, on or about 24 June 1943, with intent to commit a felony, viz, murder, commit an assault upon Staff Sergeant George W. Simms, Corporal Fred Jones, Private Loucies McKenzie, Private Clifford Miller, Private Sol Cabell, Private Bobbie Scott, Private Robert Loveless, Private J. C. Johnson, and Private Josua Magwood, all Military Police, and Second Lieutenant Charles R. Jones, Company D, 559th Quartermaster Service Battalion, Corporal Robert Avery, 559th Quartermaster Service Battalion, Corporal Roy L. Barksdale, Company C, 559th Quartermaster Service Battalion, Private Cleophus Cox, Company C, 559th Quartermaster Service Battalion, Private Robert Lewis Flemming, Company C, 559th Quartermaster Service Battalion, Private Isaac Frinks, Company C, 559th Quartermaster Service Battalion, Private Ernest L. Dukes, 548th Engineers, Company L, Private James A. White, Company C, 559th Quartermaster Service Battalion, Edwina Brown, 1345 West 19th Street, Jacksonville, Florida, Celestine Howard, 1024 West Union Street, Jacksonville, Florida, Nellie Reid, 838 Venus Street, Jacksonville, Florida, by willfully and feloniously shooting at said persons with rifles.

(Charges III and IV and the Specifications thereunder involve only accused John S. Mims).

Accused Campbell pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be shot to death with musketry. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

The Board of Review has held the record of trial legally sufficient as to the following accused named in Specification 1, Charge I and the Specification, Charge II, and tried jointly with accused Campbell: Technician Fifth Grade James H. Hall (33223300), Private Joseph N. Woodford (13113741), Private First Class Andrew Johnson (13108770), Technician Fifth Grade Esthmus T. Hutchings (33320608), and Private James W. Bigbee (39273278), each sentenced to dishonorable discharge, total forfeitures and confinement for twenty years. As to Private Abraham Lewis (34204646), who was found guilty of Specification 1, Charge II, with exceptions, and of Charge II, and was sentenced to dishonorable discharge, total forfeitures and confinement for ten years, the Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The record of trial has also been examined in the Office of The Judge Advocate General and found legally sufficient as to accused Private First Class John S. Mims, who was sentenced to be confined at hard labor for six months and to forfeit sixteen dollars of his pay per month for a like period. This opinion pertains solely to accused Campbell, hereinafter for convenience designated as the accused.

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

On the night of 24 June 1943 a company of the 559th Quartermaster Battalion (colored) gave a dance in Service Club Number 4, Camp Blanding, Florida. The club is about sixty feet south of Jeanerette Street which is 21 feet wide and runs generally east and west. Theater No. 4 is located about 120 feet west of the service club. The block opposite the club on the northerly side of Jeanerette Street contains barracks and other buildings for the accommodation of two companies but on 24 June the company which had been quartered in the westerly half of the block had moved out and all the buildings were vacant. The easterly half of the block was then occupied by Company D, 611th Quartermaster Battalion (also colored), the organization of accused, hereinafter referred to as Company D. This company was quartered in two rows of barracks buildings in the northeasterly corner of the block, numbered T 12406 to 12418, inclusive, and the orderly room was in the most northerly of these buildings (T 12406) about 470 feet north of Jeanerette Street. The mess hall and day room were south of the barracks and still farther south were four baking tents set up in a row parallel to and approximately 80 feet north of Jeanerette Street. Eight colored military policemen in charge of Sergeant George Simms had been detailed to patrol the area around the service club and keep out all the men not authorized to attend the dance. The military policemen wore helmets and white leggins (R. 10, 97-100, 241; Ex. A, Ex. I).

At about 8:00 p.m. a considerable number of Company D men congregated on Jeanerette Street opposite the service club and the military police had some difficulty clearing the street. The men did not move back into their area until they had been told to do so several times by Sergeant Simms. A military policeman struck at one man, who had adopted a defiant attitude, missed him and struck another. The first sergeant of D Company, Daniel J. Foreman, who saw the incident, protested to Sergeant Simms. The military police and some of the members of Company D then engaged in a heated and apparently rather protracted argument as to whether or not the latter had the right to stand upon the shoulder of the road. When the striking of one of the men by a military policeman was reported to Second Lieutenant Edward Touber of Company D he talked with the "MP" and then ordered his men to "break it up" and leave the area immediately adjacent to Jeanerette Street. Sergeant Foreman and Lieutenant Touber left Jeanerette Street at about 10:05 to 10:10 and went in search of the company commander to report the difficulty to him. After visiting the orderly room they went to the company commander's quarters but he was not in and they talked for a "few minutes" with a lieutenant. At that time, while Sergeant Simms and three other military policemen were standing upon the front porch of the service club, they were fired upon by a number of persons from the vicinity of the bakery tents across the street in the area of Company D. A number of men of the company sponsoring the dance, together with their invited guests including civilian women, were in the service club. The firing was in considerable volume, there were two or three bursts, and numerous bullets struck and entered the building. (The next day two .30 caliber bullets were extracted from the interior woodwork). The military police in the vicinity of the club returned the fire with the .22 caliber guns which they carried. A bullet wounded Sergeant Simms in the foot. Second Lieutenant Charles R. Jones, six enlisted men and three civilian women, all in or about the service club at the time, also suffered gunshot wounds. None of the wounds proved to be fatal. All of the persons named in the Specification, Charge II, as the victims of the assault therein alleged, either were members of the military police detail of Sergeant Simms or were wounded by gunfire (R. 11, 14, 35, 40, 66, 71-72, 89-90, 232, 253, 259; Exs. F, J, K and I).

Company D had seventy-four .30 caliber rifles which had been issued "so many" to each platoon but had not been issued or charged to individual soldiers. The rifles were kept in racks in the barracks and ordinarily the racks were locked except when the rifles were in use. However, the supply sergeant in making a property check, had gathered up all the locks and taken them to the supply room at about noon on 24 June and from then until after the firing the racks remained unlocked. A

check made at 11:00 p.m. showed that eleven rifles were missing from the racks. Subsequently these rifles were found in various places in the company area and some of them were loaded with live ammunition. One rifle was found behind the baking tents, another under a barracks building and another hidden between the mattress and springs of Private Bigbee's bed. At about 12:30 a.m. on 25 June, a team of ordnance experts examined all of the rifles issued to Company D and found that fourteen of them had been fired within the past four or five hours. A similar check was made of all rifles belonging to or "in the hands of" the units adjacent to the area of Company D and none was found to have been fired (R. 40-52-53, 55, 74, 77, 79, 84-85, 94, 101-102, 105, 109, 120-121, 129, 136-137, 142).

After the firing on the night of 24 June and the following day about 40 rounds of live .30 caliber rifle ammunition and several cartridge cases were found in the area of Company D. Most of this ammunition was under or back of the barracks buildings and was concealed by a light covering of sand. On 18 June 1943 accused and other members of his company had gone through a course of firing on a special range known as the "Nazi Village" and 20 or 25 rounds of .30 caliber ammunition were issued to each man. It was a rapid fire course, the men alternately advanced and dropped down and fired at will and no check was made to ascertain whether the men had turned in all unexpended ammunition issued to them (R. 65, 68-70, 74-76, 109).

At about 10:00 p.m. on the night of 24 June accused, then a sergeant, and "quite a few" other men, were coming from the theater, along Jeanerette Street in front of the service club. Accused approached Private Clifford R. Miller, a military policeman, who was patrolling Jeanerette Street opposite the service club, and engaged him in conversation. Miller said "I think one of the boys slapped one of your boys" and accused "cursed" and remarked "These damned M.P.'s don't have any business slapping these boys, I will see about that". About thirty men were standing around in a group on the grass. When accused "started cursing" Miller "told them all to clear the road". Accused left "with a bunch of men" and went toward "his outfit". The area of Company D was "right across the street" from the place where Miller and accused conversed. Accused and the men who followed him went "up through the dark" into their company area. (There were street lights on Jeanerette Street and lights in the service club). Accused was then wearing a khaki uniform. Sergeant Mack Davis, Jr., who had seen the men arguing with the military police had not seen accused "there at that time". When asked on direct examination whether he heard the voice of accused he answered "Yes, sir, I heard it". He had known accused since "he came in our company" and thought he knew accused well enough to recognize his voice. When asked what accused said Davis replied "He said

'Let' s get the guns'". Davis stated that when accused made that remark accused had a number of men around him and was standing about 5 feet from Jeanerette Street in the company area opposite the service club. The group of men was broken up by Lieutenant Touber but Davis returned to his barracks and did not know where accused or the other men went. On cross-examination Davis stated that he "could not definitely recognize" the voice of accused. Under examination by the court he testified that at the time he heard the voice he was convinced that it was the voice of accused. On redirect examination after the prosecution had called to his attention a statement which he had made before a board of officers appointed to investigate the shooting Davis testified that shortly before the shooting he had overheard a conversation near the orderly room between Sergeant Dobson and accused in which the latter had said "We have taken this stuff long enough" and had mentioned a previous incident in which one of the members of Company D had been shot and killed. On recross examination Davis stated he did not see Dobson and the accused but he was "positive" that they were the two men who had engaged in the conversation which he had heard. On further questioning he stated that he recognized the voice of Sergeant Dobson and the voice of accused, he did not think he could be mistaken but "wouldn't say positively". When under examination by the court he was asked whether the voice he had heard outside of the orderly room was the same voice he had heard say, earlier, "Let's go get the guns" Davis answered in the affirmative (R. 13, 16, 29-30, 35, 157-161, 163-166, 169).

About 5 minutes before the first shots were fired, Private Miller, while standing on the corner of Jeanerette Street and the street that "makes a 'U' around the service club", to keep soldiers from "coming down between the * * * club and theater", heard somebody "hollering out" behind a tent in Company D area "Now, you mother-fuckers come over here now" and at the same time heard a noise "which sounded like putting a cartridge in the barrel of a rifle". Miller "recognized" the voice as that of the accused. Sergeant Simms stated that he heard substantially the same obscene remark but that he could not identify the voice (R. 12-13, 31, 38).

Before the firing started Private Claude D. Grice, Company D, saw accused in the "lower area" of the company "next to the service club". Accused had a rifle and was wearing fatigue clothes and a steel helmet. Accused asked Grice to hold his gun as he (accused) "wanted to go to the orderly room to tell them at the service club to tell the women to move out * * *". Accused then said that he would take the gun and "do it himself". Sergeant Willie M. Hover, who was charge of quarters and sergeant of the guard, was in the orderly room when Lieutenant Touber and Sergeant Foreman "came from down to the road", stayed about ten minutes and left. After they had gone accused came up dressed in fatigue clothes, called Hover out of the orderly room and asked him to call up the service

club as "it looked like there was going to be trouble over there" and "have Miss Childes to have the ladies out". Hover said "O.K." but Staff Sergeant Thomas M. Dobson, supply sergeant of Company D, who had been present during the conversation, said that there was not going to be any trouble because "we are going to sqush it" and Hover went back into the orderly room. Accused then went "down in the area" about fifteen feet from the orderly room where a number of men were standing and began talking to them. Dobson called him aside, asked him "what was going to take place" and accused replied that they were "going to get the M.P.'s" that night. Accused also made a statement to the effect that they were tired of taking "this stuff" from the military police and that one of the "boys" had already been killed by them. Dobson told accused to "forget it", called to the men to "break it up" and they dispersed. Dobson did not see anyone with a rifle. Accused left the orderly room about 5 minutes according to the testimony of Dobson and 10 or 15 minutes according to the testimony of Hover before the firing started (R. 109-111, 115-116, 164, 173-175, 297-298).

Staff Sergeant William A. Hampton, Company D, attended the first show at the theater a short distance southwest of the service club on the night of 24 June, and on his way back to the barracks noticed that there was a group of soldiers in the company area directly across Jeanerette Street from the service club engaged in an argument with the military police. Accused was in this group and was wearing "fatigues" and a fatigue hat. Later Hampton went to the barracks and then to the latrine. Just before the firing started and as he was washing clothes in the latrine, accused came in, turned on a faucet and proceeded to wash something which he held in the palms of his hands. Sergeant Hampton did not see what it was but it made a clicking, metallic sound "of shells". Because of his knowledge of "the sound of ammunition" Hampton was sure that accused had live ammunition in his hands (R. 282-285, 288).

After the last show at the theater and about two or three minutes before the firing started, Staff Sergeant Elliott Williams, Company D, saw accused in the vicinity of the guard tent, which stood back 27 feet from Jeanerette Street and near the easterly end of the row of baking tents. Accused called to Williams, inquired who he was and Williams walked up to accused and asked what was going on. Accused replied "Nothing". He was dressed in "fatigues", had either a helmet or helmet liner on his head and did not have anything in his hands (R. 221-222, 224-225).

On the night of 24 June as Private James J. Henry, Jr. of Company D was on his way to the latrine he passed within two or three feet

of accused who was standing between two barracks buildings dressed in fatigue clothes with a rifle in his hands and facing toward Jeanerette Street. Accused had something else in his hands which made a clicking sound. Henry asked accused what he was doing but he did not answer. Henry went on to the latrine and just as he reached the door the first shot was fired (R. 208-210).

Private Dave Roberson, Jr., of Company D, who was in bed in his barracks when the firing started, crawled underneath the bed and when it was over accused came by the barracks and asked "Are any rifles in here?" The lights were off and it was dark but Roberson knew the voice and recognized it as that of the accused. Sergeant Ben Thomas, also of Company D, was on his way from his barracks to the service club when the firing commenced and "wound up" in the guard tent. He saw two or three tracer bullets "go across the road" toward the service club. (The members of Company D had used tracer ammunition on the "Nazi Village" course). When the firing ceased Sergeant Thomas ran back to his barracks and upon looking out of a rear window saw accused walking rapidly around the day room toward the barracks. Accused was dressed in fatigue clothes, was wearing a helmet and had a rifle in his hands. The lights were off during the firing but had been turned on again (R. 213-214, 218, 227-232).

Private Clarence Merrill saw Technician Fifth Grade Hall, Private Woodford and Private First Class Johnson back of a barracks before the shooting and each of them had a rifle in his hands. When he was asked how much time passed after he saw the men carrying rifles until the firing started, Private Merrill answered "I don't know the time, I wasn't paying no attention". He was then requested to "estimate it" and stated that it was about twenty or twenty-five minutes (R. 236-237).

Several witnesses for the prosecution were interrogated on cross-examination as to their animus against the accused. Private Miller admitted that accused had started "going with" a girl he had been "going with" but in answer to the question whether they ever had any difficulty over this girl stated "No, sir, we have had a few words but that didn't amount to anything, it was all on a friendly basis. * * *". Sergeant Hampton denied that he had any difficulty with accused but admitted that for about 2 months he had owed accused a debt of $51 which he had not repaid. Private Henry testified that he had had "a lot of trouble" with accused. Accused had reported Henry on occasions when the latter had been absent from formation, Henry had been "broken" from private first class and thought that accused probably was responsible for his demotion, and Henry had brought snakes and small animals from the woods and kept them in his barracks, a practice to which accused objected. Henry admitted that he did not like accused but stated in effect that this dislike had not affected his testimony and that he was "telling the truth" (R. 33-34, 211-212, 289-290).

4. For the defense accused testified that at 7:30 or 7:45 p.m. on 24 June, after reporting to the orderly room concerning his Government insurance, he went over toward the service club. The girls had come in from Jacksonville and two sisters of his girl were there. He asked them if she had come and they said "no". He then went to the "movie", stayed until after the second show was over, and came out of the east exit of the theater past the service club to Jeanerette Street where he met a private and a sergeant of the "MPs". He patted the private on the back and said "What you say, pal", and the latter replied "We are having some trouble out of your boys". Accused asked what the trouble was and the private answered "We asked them to get back across the ditch and they didn't and one of the boys hit one". The sergeant then came up and said "Keep moving". Accused crossed "the ditch" and "Corporal Baker" came up and tried to tell him about it. Accused walked up to where Lieutenant Touber and Sergeant Foreman were discussing the matter with a group of men but just as he came up to them they said "Break it up and you boys go to your tents", and Lieutenant Touber and Sergeant Foreman went off toward the orderly room. Accused walked up "the ditch" by the guard tent, around by the kitchen and on up through the area to the orderly room. It was cloudy and very dark and on his way there he could not see "those boys" but could hear a bunch of men to the left of him talking. He reported to Sergeant Hover that he thought there was going to be some trouble at the service club and that "If I was you I would call and tell Miss Childes to get the girls out". Sergeant Dobson stepped to the door and said "Sergeant Campbell, you talk too much". Accused then went to his barracks and about the time he arrived the firing started. He went to his bed, took down his helmet and liner which were together in the top rack over the bed, put them on, got down by his cot and stayed there until after the first volley of shots had been discharged when he "changed clothes" and fell in for formation. By the time he reached the door there was another volley of shots, the lights were turned out again, the company commander came through and said to put the lights on, "we all" put the lights on, there was another volley of shots and "we all" put the lights out again. Accused was wearing "fatigues" at that time (R. 313-315).

In his testimony accused specifically denied that he had made any of the provocative or incriminating statements attributed to him by the witnesses for the prosecution. He testified that he had not seen Grice until "we were hunting rifles", he did not have a rifle at any time during the shooting, he had no ammunition in his possession that evening and there were no rifles in his barracks. He had been present during the firing at the "Nazi Village" but had fired all of the ammunition issued to him and had not brought any of it back from the range. He and Sergeant Davis had been friends but after the latter's return from bakery

school they had quarreled about a clothing stamp and in the course of the altercation Davis had said to accused "I will get even with you". Accused was not on friendly terms with Private Henry whom he had reported for being absent from formation and caused to be "busted". Also Henry would go into the woods, catch snakes and bring them into the barracks. Accused was afraid of snakes but could not make Henry get rid of them. Accused also had had trouble with Private Clarence Merrill over a girl in Jacksonville who had "passed him up" for accused. (Merrill testified to the effect that at about the time of the firing he heard a voice which sounded like the voice of accused say "Don't waste your bullets". The law member ruled that the testimony was inadmissible for the reason that the identification was not sufficiently positive and the testimony was excluded). The friendly relations which had previously existed between accused and Sergeant Hampton changed when Hampton borrowed money from accused and refused to pay it back after accused had repeatedly requested repayment. Private Grice who was in the stockade with accused had said that he (Grice) had talked too much trying to clear himself but it did no good and that if he could not get out he would, if possible, "stick every man that was in the stockade". When the lights came on in the barracks Privates George Prince and Bennie Williams were with accused (R. 315-318).

On cross-examination accused admitted that he had once made the remark "I wish every M.P. in the world was dead". On the "Nazi Village" course he had been assigned, with two other men, to issue ammunition. On the night of 24 June when he went to the movies he wore a khaki uniform and he was still wearing it when he went to the orderly room and talked with Sergeant Hover about getting the girls out of the service club. Accused had put on his helmet as a safety measure, as he had been taught to do (R. 318-320, 322).

On redirect examination accused stated that although he had assisted in issuing ammunition at the "Nazi Village" on the first two "rounds" he had gone through the course himself on the third "round", and that no unexpended ammunition had been turned in to him. The unused live ammunition had been brought back to camp in a truck in boxes, each closed with two screws (R. 322-323).

Upon examination by the court accused testified that the two sisters of his girl friend had attended the dance. The "MPs" were in front of the service club and at the back "putting the girls in the building" and the only way he could speak to the girls was "hollering at them". Upon being asked what he was so afraid of that he wanted to warn the girls to get out of the service club he replied that he had heard some men talking

but stated that he did not hear what they said. When pressed as to what information he had that would warrant so serious a step as the taking of women from a dance accused said "No information at all, sir". Accused was dressed in "khakies" when he went to his barracks just before the firing started but "after the shooting" changed into "fatigues" to save his "khaki" as it was the only suit he had to "meet retreat" every night. There were two or three volleys of shots and accused stayed under the bed or as far under as he could get, during the first volley. He took off his khaki uniform and put on fatigue clothes between the first and second volleys. The floor would not soil his uniform as it was mopped every day and was clean. In answer to the question "Where did you intend to go and what did you intend to do after you had changed into fatigues" accused stated "They turned lights on, I came out to find out what it was all about. By the time I changed and got out they started firing again so we turned the lights out again". He was then asked "Did you change your uniform in order to fall in this formation?" and he replied "I didn't know if there was going to be a formation or not. I just changed uniforms". Accused denied that he was in the latrine or near the guard tent just before the firing and stated that he was at his door "when the firing come off" (R. 323-328, 330-331).

5. The evidence for the prosecution shows that on the night of 24 June 1943 a detail of colored military police assigned to patrol the area of a colored service club where a dance was held had some difficulty keeping the members of the company of accused off the street between the club and the company area. A military policeman struck at one of the men but missed him and struck another. When accused, upon his return from a picture show, was told of this incident he remarked to a military policeman that the "damned MPs" had no business slapping "these boys" and that he would see about it. The policeman ordered the street cleared and accused, with a number of the men following him, went up into the company area. Subsequently accused appeared at the orderly room dressed in fatigue clothes, told the sergeant of the guard that it looked as if there would be trouble at the service club and urged the latter to call up the club and get the ladies out of the building. Accused then joined a group of men standing near the orderly room and began talking to them. When the supply sergeant called him aside and asked him what was going on accused stated that they were tired of taking "this stuff" from the military police, that one of the "boys" had been killed by them and that they were "going to get the M.Ps". A short time later several military policemen who were standing upon the porch of the service club were fired upon, the firing was in considerable volume, there were two or three bursts or volleys and the sergeant in charge of the military police detail six other soldiers, a second lieutenant and three civilian women, in or about the club, were wounded by the gunfire. The circumstances clearly

indicated that the shots were fired by members of the company of accused. The shots came from the vicinity of some baking tents in the company area. The rifle racks in the barracks were not locked that day and a check made within an hour after the firing disclosed that 11 rifles were missing from the racks. When these rifles were found in the company area some of them contained live ammunition, other ammunition was found hidden under and around the barracks and ordnance experts ascertained that fourteen rifles issued to the company had been fired that night. When the men were standing beside the street arguing with the military police a voice, identified by a witness as that of accused remarked "Let's go get the guns". A short time before the firing commenced a voice identified as that of accused by another witness called out from behind "a tent" in the company area, "Now you mother-fuckers come over here" and the remark was accompanied by a sound similar to that made by injecting a cartridge into the chamber of a rifle. Accused was seen immediately prior to the firing near the baking tents where it originated wearing fatigue clothes and a helmet and with a rifle in his hands. He was seen immediately after the firing had ended, carrying a rifle and walking toward his barracks from the direction of the baking tents.

Accused denied that he had made any inflammatory or provocative remarks, that he had a rifle or any ammunition in his possession on the night of 24 June or that he had otherwise taken any part in the demonstration of violence against the military police. His account of his activities that night lacks corroboration, is inherently improbable in some respects and is squarely in conflict with the testimony of numerous witnesses. He was unable to explain with any show of plausibility two incidents which he admitted--his request made shortly before the firing commenced to the sergeant of the guard that the lady guests be warned to leave the service club and his change of clothing from khaki to fatigues. Accused testified that he thought there would be trouble because he saw some men in the company area when he walked up from the street past the guard tent to the orderly room but stated that he could not see what they were doing and did not hear what they said. Manifestly any trouble which he expected from these men would not endanger the guests inside the service club across the street unless the trouble involved gunfire. He did not explain how he knew, in advance, that the service club would be fired upon.

With reference to his change of clothing accused stated that he was in khaki uniform when he reached the door of his barracks and the firing started, that he then got down on the floor under the bed, and that after the first volley he arose, took off his khaki uniform and put on fatigue clothes to "save" his uniform which was the only one he had in which

to stand retreat. His statement that he changed his clothing in the barracks after the first burst of gunfire is contradicted by the testimony of Privates Grice, and Henry, and Sergeants Hover, Dobson, Hampton, Williams and Thomas, each of whom saw accused outside of his barracks dressed in fatigue clothes before the first shot was fired.

a. Specification 1, Charge I. This Specification as amended at the trial alleges that the accused voluntarily joined in a mutiny against the lawful authority of the military police and did, with intent to usurp, subvert and override for the time being such lawful military authority, in concert with other members of his battalion, assemble in the vicinity of the service club, take up arms and refuse to disperse. Mutiny is concerted insubordination or concerted opposition or resistance to or defiance of superior military authority by two or more persons subject to such authority with the deliberate intent to usurp, subvert or override the same at least for the time being (M.C.M., 1928, par. 136a; Dig. Op. JAG, 1912-40, par. 424; Winthrop's Military Law and Precedents, Reprint, 578).

The participating members of Company D acted in violent and flagrant defiance of superior military authority when they fired upon the military police detail and wounded the sergeant in charge. It would be difficult to imagine a manner in which a soldier could more directly and positively defy and override superior military authority than by shooting the person exercising such authority. Under the circumstances the concerted firing upon the military police clearly constituted mutiny and there remains for determination in so far as the Specification under consideration is concerned, only the question whether the accused joined in the mutiny.

One who voluntarily takes part in a mutiny at any stage of its progress, either by engaging actively in the execution of its purposes, or, being present, by stimulating and encouraging those who do, is guilty of joining in such mutiny (Winthrop's Military Law and Precedents, Reprint, 583).

The Board of Review is of the opinion that the evidence leads directly to the inference that accused was a party to the mutiny and sustains beyond reasonable doubt the finding of guilty of this Specification.

b. Specification 2, Charge I. This Specification presents a much more difficult question and will, therefore, be discussed at greater length. It alleges that accused caused a mutiny by unlawfully

assuming control over about 15 soldiers of his company and in the execution of such control caused them concertedly to disregard and defy the lawful orders of the military police with the intent to usurp, subvert and override, for the time being, lawful military authority. Considered in the light of the evidence adduced against the accused Specification 2 is not happily worded but when given that liberal construction which the 37th Article of War prescribes for military pleadings, it is not fatally at variance with the proof. It is not necessary that accused be shown to have assumed control over other soldiers of his company in the strict or formal sense, such as by assembling them in formation or by giving orders. It is sufficient if it appears that he assumed over them any measure of control which influenced their conduct and induced or incited them to commit acts of mutiny. As to the allegation that the accused caused the other soldiers to defy the "orders" of the military police the evidence shows that there was a violation of the spirit if not of the letter of such orders. In the execution of their assigned task of guarding the area of the service club during the dance the military police ordered the men of the company of accused to stay out of the area and to keep off of the adjacent street. When after reluctant outward obedience, the men armed themselves and fired across the street toward the service club they violated the spirit of the orders just as effectively as if they had gone in person into the forbidden area for the purpose of wounding and killing the military police. Specification 2 clearly was designed to charge accused with causing the same mutiny which he and others were charged with joining by Specification 1. The record shows that the Specifications were so regarded by the prosecution, the defense and the court throughout the trial and there is no indication that accused was misled by the wording of Specification 2.

The 66th Article of War contemplates two general classes of offenders--those who lead and those who follow. Causing a mutiny may include instances in which the offender takes no personal part in the riotous demonstration but only stimulates others to resist lawful military authority (Winthrop's Military Law and Precedents, Reprint, 582). Conversely, one may, of course, take part in a mutiny without causing it. Causing a mutiny and joining a mutiny are, accordingly, separate and distinct offenses and a person may be guilty of causing, joining or both causing and joining the same mutiny. Winthrop gives as examples of causing a mutiny (p. 583):

> "* * * Thus a mutiny may be excited and caused by an inflammatory harangue addressed to soldiers by one having influence or authority over them, as--especially--by an officer or non-commissioned officer; by his using, in

their presence, defiant language, or behaving otherwise defiantly, toward a common superior; by his openly setting at naught the orders of the commander or issuing orders counter to his; by his falsely representing to his inferiors that they are being or about to be oppressed by a superior, etc."

The principal incident from which the mutiny grew appears to have been the striking of a soldier of Company D by a military policeman. It was the only act of violence resorted to by either side prior to the shooting. It was followed by two hours of inconclusive bickering but no violent retaliatory measures were taken against the military police until accused returned to the company area from the theater. When Private Miller of the military police told him about the occurrence accused started cursing and said "These damned MP's don't have any business slapping these boys, I will see about that". Accused left, with a number of the men following him, and, in the words of Private Miller, "went up through the dark". Up through the dark away from the lighted street would be toward the company barracks in which the rifles were kept. Shortly before Lieutenant Touber ordered the men at the roadside to disperse, Sergeant Davis heard a voice which he identified as that of accused say "Let's go get the guns". Just before the first burst of gunfire a voice, identified by Private Miller as the voice of accused shouted out an obscene and insulting challenge to the military police. Accused appears to have assumed to act and speak for the mutineers when he went to the orderly room and urged that the ladies be warned to leave the service club. When asked by Sergeant Dobson what trouble he expected accused replied in effect that he and others in the company were tired of the treatment they had received at the hands of the military police and that they "were going to get" the military police that night. It should be remembered, in connection with the foregoing incidents that accused was a sergeant and the highest ranking soldier shown to have taken any part in the mutiny.

As might be expected in a case of this character it is not possible to reconcile in all respects the testimony of the prosecution's witnesses or to fix definitely the chronological relationship of the various incidents which they related. Several of them obviously were hostile witnesses and reluctant to testify against the accused. It does not appear just how long it was from the time the accused returned to the company area until the firing began but taking the evidence as a whole it convincingly shows that there was sufficient time for accused to be instrumental in causing the mutiny and that the mutiny did not begin until after his arrival.

Private Merrill testified that he saw three soldiers back of his barracks armed with rifles 20 or 25 minutes before the firing

commenced, it is true, but that was only a guess which he made after he had stated that he paid no attention to the time and did not know how much time had elapsed. Accused came out of the theater at approximately 10 p.m. Lieutenant Touber, according to his own testimony, left Jeanerette Street to report to the company commander at 10:05 to 10:10 and heard gunfire in the company area 5 or 10 minutes later. None of these time estimates in common with others made by various witnesses was shown to have been based upon contemporaneous observation of a time piece. Such estimates are peculiarly subject to substantial inaccuracies. The movements of Lieutenant Touber during the interval between his departure from Jeanerette Street and the firing indicate that the elapsed time was longer than his highest estimate. He walked with the first sergeant to the orderly room, a distance of almost 500 feet, where he remained for a time, estimated by Sergeant Hover as 10 minutes, then went to the quarters of the company commander (the location was not given) but not finding the latter in his room, stayed there and talked to a lieutenant a few minutes before he heard the first shots. Furthermore, the movements of accused are enlightening with reference to the time factor. It is not disputed that when he came out of the theater and talked with Private Miller he was wearing a khaki uniform. Accused must have gone to his barracks and changed his clothing before he appeared at the orderly room dressed in fatigues and the incident at the orderly room occurred about 5 minutes according to Sergeant Dobson and 10 to 15 minutes according to Sergeant Hover, before the firing started.

When consideration is given to the foregoing, the guess or estimate of Private Merrill that it was 20 to 25 minutes before the firing that he saw three armed men, does not warrant the conclusion that some of the men already had taken up arms and started the mutiny before the accused returned from the theater. It may be that accused was not the only person who had a part in causing the mutiny but in the opinion of the Board of Review it appears from the evidence beyond any reasonable doubt that his role was that of a leader and that he was in substantial measure instrumental in originating the mutiny by inciting and encouraging others to fire upon the military police.

c. Charge II. The Specification, Charge II, alleges that accused and other members of his company, with intent to murder, committed an assault upon certain individuals by shooting at them with rifles. The persons named as the victims of the assault were Sergeant Simms (who was wounded), the members of his detail of military police, and other military personnel and civilian women who were wounded by the gunfire. As stated above, the circumstances clearly indicated that the firing was done by members of the company of accused. The specific intent to murder which is an essential element of the offense charged may be

inferred from the fact that .30 caliber Army rifles were fired at close range at military policemen and toward a building in which a dance was in progress. Twelve persons suffered gunshot wounds, and it was a mere fortuitous circumstance that none of them was killed. It also appears that the assault was committed by a number of persons acting in pursuance of a common design. There is no proof that accused fired any of the shots but the evidence shows that he was a party to the unlawful enterprise and that he was present in the area where the crime was committed, aiding and abetting in the furtherance thereof. 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 (18 U.S.C. 550; Meyer v. United States, 67 F (2d) 223; United States v. Hodorowicz, 105 F (2d) 218). Where, as in the instant case, two or more persons by common design jointly engage in the same unlawful act, each is chargeable with liability, and is guilty of the offense committed to the same extent as if he were the sole offender (16 C.J. 128; 1 Wharton's Criminal Law 1144; Hicks v. State (Ala) 26 So. 337; Brown v. Commonwealth (Va) 107 SE 809; and see Annotation 16 A.L.R. 1043, 1047).

It is not alleged that the accused and the other soldiers charged with the commission of the assault acted jointly and in pursuance of a common intent, but when a Specification obviously is intended to allege a joint offense and fails to follow the prescribed form (See MCM, 1928, Appx. 4, p. 237) the irregularity is not fatal if the accused has not objected to a joint trial and has not been misled or otherwise injuriously affected in any of his substantial rights (CM 120543, Harmon and Gault).

In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty of Charge II and of the Specification thereunder.

6. The charge sheet shows that accused is 30 years of age and that he was inducted on 6 May 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The death penalty is authorized upon conviction of violation of Article of War 66.

Samuel M. Driver, Judge Advocate

Robert O. Hannon, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 31 MAR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private Willie P. Campbell (34204636), Company D, 611th Quartermaster Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused caused a mutiny by about fifteen enlisted men of his company (colored) against a detail of colored military police assigned to patrol the area of a colored service club during a dance (Spec. 2, Chg. I), joined in the same mutiny (Spec. 1, Chg. I) and as a part of the same transaction participated in an assault with intent to murder, committed by members of his company upon a number of military policemen and other persons by shooting at and wounding them with Army rifles (Spec., Chg.II). Although the evidence shows that accused was in some degree instrumental in causing the mutiny, it does not appear that he was the sole cause; the trouble between the men of the company of accused and the military police had been brewing for about two hours prior to the arrival of accused; and, fortunately, none of the injuries to the persons wounded were fatal. The past record of accused is excellent. The term of confinement imposed upon each of five other soldiers tried jointly with accused Campbell and found guilty of joining in the mutiny is twenty years. I recommend that the sentence that he be shot to death with musketry be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 25 years, that the sentence as thus modified be carried into execution, and that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. Attention is invited to the following letters requesting clemency on behalf of the accused: from Bathena Davis Deermont, Robinhood, Maine, dated 5 September 1943; from First Lieutenant Jackson B. Dove, Chaplain, Quartermaster Corps (with 3 inclosures) dated 16 September 1943; from Mr. A. Deermont, of Chipley, Florida (with 9 inclosures) dated 2 October 1943; from Honorable Charles O. Andrews, United States Senator (with 1 inclosure) directed to the President and dated 8 October 1943; from Honorable Bob Sykes, Member of Congress, dated 11 October 1943; from Honorable Spessard L. Holland, Governor of the State of Florida dated 15 October 1943; from Honorable Claude Pepper, United States Senator, dated 19 October 1943; and from Mr. Fletcher Collins, Jr., Burlington, North Carolina (with 13 inclosures) directed to Mrs. Franklin D. Roosevelt and dated 19 February 1944.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer

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

11 Incls.
Incl.1-Record of trial.
Incl.2-Drft. ltr. for sig. S/W.
Incl.3-Form of Action.
Incl.4-Ltr. fr. Bathena Deermont, 5 Sept. 43.
Incl.5-Ltr. fr. 1st Lt. Dove, w/2 incls., 16 Sept. 43.
Incl.6-Ltr. fr. Mr. Deermont, w/8 incls., 2 Oct. 43.
Incl.7-Ltr. fr. Sen. Andrews, w/1 incl., 8 Oct. 43.
Incl.8-Ltr. fr. Hon. Sykes, 11 Oct. 43.
Incl.9-Ltr. fr. Hon. Holland, 15 Oct. 43.
Incl.10-Ltr. fr. Sen. Pepper, 19 Oct. 43.
Incl.11-Ltr. fr. Mr. Collins, Jr., w/13 incls., 19 Feb. 44.

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures and confinement for 25 years. G.C.M.O. 218, 27 May 1944)

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

(315)

10 MAR 1944

SPJGH
CM 240646

U N I T E D S T A T E S v. Technicians Fifth Grade JAMES H. HALL (33223300) and ESTHMUS T. HUTCHINGS (33320608), Private First Class ANDREW JOHNSON (13108770), and Privates JOSEPH N. WOODFORD (13113741), ABRAHAM LEWIS (34204646) and JAMES W. BIGBEE (39273278), all of Company D, 611th Quartermaster Battalion.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Blanding, Florida, 2-6 August 1943. As to Hall, Woodford, Johnson, Hutchings and Bigbee: Dishonorable discharge and confinement for twenty (20) years. Penitentiary. As to Lewis: Dishonorable discharge and confinement for ten (10) years. Federal Reformatory.

HOLDING by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, 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 66th Article of War.

Specification 1 (as amended): In that Private, then Sergeant, Willie P. Campbell, Private First Class John S. Mims, Technician Grade V James H. Hall, Private Joseph Woodford, Private First Class Andrew Johnson, Private Abraham Lewis, Technician Grade V Esthmus T. Hutchings, Private James W. Bigbee, Private James H. Baity, Technician Grade V James H. Rogers, Private First Class Robert E. Buchanan, Technician Grade V Irvin L. Pankey, and Private Henry Rollins, all of Company D, 611th Quartermaster Battalion, did, at Camp Blanding, Florida, on or about 24 June 1943, voluntarily join in a mutiny which had begun at Camp Blanding, Florida, against the lawful military authority of the Military Police, and did, with the intent to usurp, subvert, and override, for the time being, said lawful military authority, in concert with sundry other members of said 611th Quartermaster Battalion, assemble in the vicinity of Service Club Number Four, take up arms and refuse to disperse.

Specification 2: (Involves only accused Willie P. Campbell).

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

Specification: In that Private, then Sergeant Willie P. Campbell, Private First Class John S. Mims, Technician Grade V James H. Hall, Private Joseph Woodford, Private First Class Andrew Johnson, Private Abraham Lewis, Technician Grade V Esthmus T. Hutchings, Private James W. Bigbee, Private James H. Baity, Technician Grade V James H. Rogers, Private First Class Robert E. Buchanan, Technician Grade V Irvin L. Pankey, and Private Henry Rollins, all of Company D, 611th Quartermaster Battalion, did, at Camp Blanding, Florida, on or about 24 June 1943, with intent to commit a felony, viz, murder, commit an assault upon Staff Sergeant George W. Simms, Corporal Fred Jones, Private Loucies McKenzie, Private Clifford Miller, Private Sol Cabell, Private Bobbie Scott, Private Robert Loveless, Private J. C. Johnson, and Private Josua Magwood, all Military Police, and Second Lieutenant Charles R. Jones, Company D, 559th Quartermaster Service Battalion, Corporal Robert Avery, 559th Quartermaster Service Battalion, Corporal Roy L. Barksdale, Company C, 559th Quartermaster Service Battalion, Private Cleophus Cox, Company C, 559th Quartermaster Service Battalion, Private Lewis Flemming, Company C, 559th Quartermaster Service Battalion, Private Isaac Frinks, Company C, 559th Quartermaster Service Battalion, Private Ernest L. Dukes, 548th Engineers, Company L, Private James A. White, Company C, 559th Quartermaster Service Battalion, Edwina Brown, 1345 West 19th Street, Jacksonville, Florida, Celestine Howard, 1024 West Union Street, Jacksonville, Florida, Nellie Reid, 838 Venus Street, Jacksonville, Florida, by willfully and feloniously shooting at said persons with rifles.

(Charges III and IV and the Specifications thereunder involve only accused John S. Mims).

Each of the accused pleaded not guilty to all of the Charges and Specifications. Accused Hall, Woodford, Johnson, Hutchings and Bigbee were found guilty of Specification 1, Charge I and of Charge I and of the Specification, Charge II and of Charge II. Accused Lewis was found guilty of Specification 1, Charge I, except the words "take up arms", guilty of Charge I, and not guilty of Charge II and of the Specification thereunder. Evidence of previous convictions of accused Lewis, for absence

without leave for 4 days and on another occasion for 1 day was introduced. Accused were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor as follows: accused Hall, Woodford, Johnson, Hutchings and Bigbee for twenty years and accused Lewis for 10 years. The reviewing authority approved the sentences and designated as the place of confinement the Federal Reformatory, Chillicothe, Ohio, as to accused Lewis and the United States Penitentiary, Atlanta, Georgia, as to all of the other accused. The record of trial was forwarded for action under Article of War 50½.

This holding does not cover the cases of accused Private, then Sergeant, Willie P. Campbell or Private First Class John S. Mims. Accused Campbell was sentenced to be shot to death with musketry, and as to him an opinion of the Board of Review has been written and action will be taken under the 48th Article of War. As to accused Mims (sentenced to be confined at hard labor for six months and to forfeit sixteen dollars of his pay per month for a like period) the record of trial has been examined in the Office of the Judge Advocate General and found legally sufficient.

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

On the night of 24 June 1943, Company C, 559th Quartermaster Battalion (colored) gave a dance in Service Club Number 4, Camp Blanding, Florida. The club is about sixty feet south of Jeanerette Street, which is 21 feet wide and runs generally east and west. Theater No. 4 is located about 120 feet west of the service club. The block opposite the club on the northerly side of Jeanerette Street contains barracks and other buildings for the accommodation of two companies but on 24 June the company which had been quartered in the westerly half of the block had moved out and all the buildings were vacant. The easterly half of the block was then occupied by Company D, 611th Quartermaster Battalion (also colored), the organization of accused, hereinafter referred to as Company D. This company was quartered in two rows of barracks buildings in the northeasterly corner of the block, numbered T 12406 to 12418 inclusive, and the orderly room was in the most northerly of these buildings (T 12406) about 470 feet north of Jeanerette Street. The mess hall and day room were south of the barracks and still farther south were four baking tents set up in a row parallel to and approximately 80 feet north of Jeanerette Street. Eight colored military policemen in charge of Sergeant George Simms had been detailed to patrol the area around the service club and keep out all the men not authorized to attend the dance. The military policemen wore helmets and white leggins (R. 10, 97-100, 241; Ex. A, Ex. I).

At about 8:00 p.m. a considerable number of Company D men congregated on Jeanerette Street opposite the service club and the military

police had some difficulty clearing the street. The men did not move back into their area until they had been told to do so several times by Sergeant Simms. A military policeman struck at accused Lewis, who had adopted a defiant attitude, missed him and struck another. The first sergeant of D Company, Daniel J. Foreman, who saw the incident, protested to Sergeant Simms. The military police and some of the members of Company D then engaged in a heated and apparently rather protracted argument as to whether or not the latter had the right to stand upon the shoulder of the road. When the striking of one of the men by a military policeman was reported to Second Lieutenant Edward Touber of Company D he talked with the "MP" and then ordered his men to "break it up" and leave the area immediately adjacent to Jeanerette Street. Sergeant Foreman and Lieutenant Touber left Jeanerette Street at about 10:05 to 10:10 and went in search of the company commander to report the difficulty to him. After visiting the orderly room they went to the company commander's quarters but he was not in and they talked for a "few minutes" with a lieutenant. At that time, while Sergeant Simms and three other military policemen were standing upon the front porch of the service club, they were fired upon by a number of persons from the vicinity of the bakery tents across the street in the area of Company D. A number of men of the company sponsoring the dance, together with their invited guests including civilian women, were in the service club. The firing was in considerable volume, there were two or three bursts, and numerous bullets struck and entered the building. (The next day two .30 caliber bullets were extracted from the interior woodwork). The military police in the vicinity of the club returned the fire with the .22 caliber guns which they carried. A bullet wounded Sergeant Simms in the foot. Second Lieutenant Charles R. Jones, six enlisted men and three civilian women, all in or about the service club at the time, also suffered gunshot wounds. None of the wounds proved to be fatal. All of the persons named in the Specification, Charge II, as the victims of the assault therein alleged, either were members of the military police detail of Sergeant Simms or were wounded by gunfire (R. 11, 14, 35, 40, 66, 71-72, 89-90, 232, 253, 259; Exs. F, J, K and I).

Company D had seventy-four .30 caliber rifles which had been issued "so many" to each platoon but had not been issued or charged to individual soldiers. The rifles were kept in racks in the barracks and ordinarily the racks were locked except when the rifles were in use. However, the supply sergeant in making a property check, had gathered up all the locks and taken them to the supply room at about noon on 24 June and from then until after the firing the racks remained unlocked. A check made at 11:00 p.m. showed that eleven rifles were missing from the racks. Subsequently these rifles were found in various places in the company area and some of them were loaded with live ammunition. One rifle was found behind the baking tents, another under a barracks building and another hidden between the mattress and springs of accused Bigbee's bed. At about 12:30 a.m. on 25 June, a team

of ordnance experts examined all of the rifles issued to Company D and found that fourteen of them had been fired within the past four or five hours. A similar check was made of all rifles belonging to or "in the hands of" the units adjacent to the area of Company D and none was found to have been fired (R. 40-52-53, 55, 74, 77, 79, 84-85, 94, 101-102, 105, 109, 120-121, 129, 136-137, 142).

Shortly after the firing on the night of 24 June the commanding officer of Company D assembled his men in the company street for roll call and they were kept in formation until 4 o'clock the next morning. In the meantime several officers and enlisted men were detailed to search the company area for ammunition. On the night of 24 June and the following day 40 rounds of live .30 caliber rifle ammunition and several cartridge cases were found in the area. Most of this ammunition was under or back of the barracks and was concealed by a light covering of sand. On 18 June accused Hall, Hutchings, Bigbee and Lewis and other members of the company had gone through a course of firing on a special range known as the "Nazi Village" and 20 or 25 rounds of .30 caliber ammunition had been issued to each man. It was a rapid fire course, the men alternately advanced and dropped down and fired at will and no check was made to ascertain whether the men had turned in all unexpended ammunition issued to them (R. 65, 68-70, 74-76, 100-101, 109).

a. Accused James H. Hall and Joseph N. Woodford: At about 2:00 a.m. on 25 June when military policeman Sergeant Willis R. Glass, Jr., looked through building T 12417 where accused Hall and Woodford were quartered he found a rifle with the bolt open, standing in a clothes rack in the center of the aisle. On Hall's bunk he also found some fatigue clothes with sand on them and gloves with the fingers "gripped". Hall's shoes were not placed under his bed and had mud and sand on them. The ground was damp that night. At an outside corner of the same barracks Sergeant Glass found a place where someone had crawled under the floor. The floor was about 18 inches above the ground and the view from that part of the building to the service club was obstructed. The tracks indicated that only one person had gone under the building and at the place where he had lain Sergeant Glass found three rifle cartridges and a half capsule of tear gas. He found another cartridge in front of the same barracks. When he was questioned by Colonel George M. Peek some time after the shooting accused Hall admitted that the fatigue clothes and shoes found on or near his bed belonged to him. He stated that when the firing started he had crawled up under the barracks "so the bullets wouldn't hit me". He pointed out where he had taken cover and it was the place where Sergeant Glass had found the three rounds of ammunition (R. 97, 123-127, 137-138).

As Private Clarence Merrill of Company D was standing in the back door of his barracks on the evening of 24 June he saw accused Hall, Woodford and Johnson back of the building each with a rifle in his hands. This was

before the shooting began but Merrill did not know how long before as he paid no attention to the time. He estimated that it was about twenty or twenty-five minutes. Private Dave Roberson, who was quartered in the same barracks as accused Hall and Woodford, took refuge under his bed when the firing started. As these two accused were lying on their beds after the firing was over Roberson heard Hall, who had something "rattling" in his pocket, say "What will I do with this", to which Woodford replied "get rid of it" and they then ran to the barracks door together. A short time before the firing Private Claude D. Grice saw accused Woodford near the "gas shanty" (about 75 feet back of the westerly end of the row of baking tents). Woodford had a rifle at that time (R. 215-217, 236-238, 301-302; Ex. I).

A board of officers appointed to investigate the disorder of 24 June convened on 19 July 1943 and several of the accused appeared before the board and made sworn statements after the 24th Article of War had been read and explained to them. The statement of accused Hall was substantially as follows: On the evening of 24 June he took a rifle from the barracks and went with it to the "North area * * * into the baking tents". He had five rounds of ammunition which he loaded into the rifle and he was "down there" when the first shot was fired. He ejected all of the cartridges except one which remained in the chamber and then, without firing it, took the rifle to his barracks where he left it standing against the wall. He had three other rounds of ammunition which he kept in his pocket. After crawling under the barracks where he soiled his fatigue clothes, he again entered his quarters where he gave the three cartridges to Woodford who threw them out the back door (R. 413, 415, 417).

b. Accused Andrew Johnson: When the argument started between the members of Company D and the military police in the vicinity of Jeanerette Street on the evening of 24 June, accused Johnson was present. Later when Lieutenant Touber appeared and investigated the difficulty Johnson remarked to several other men that he had some ammunition buried and that to get it he had to use a "map". As stated above, Private Merrill saw accused Johnson, with a rifle in his hands, behind one of the barracks a short time before the firing broke out. A few minutes after it had ceased he was seen carrying a rifle and walking toward his barracks. He stated before the board of investigating officers that he had dropped some ammunition through a knot hole in the floor near his bunk. As the result of this statement a search was made on 27 June and on the ground beneath the knot hole in the floor of the barracks (T. 12416) which accused Johnson had described, seven rifle cartridges and one cartridge case were found. Accused Johnson also stated before the investigating board that he had been on the range several times and had procured the ammunition there, that on the night of the disorders he brought out his ammunition and put it in his pocket but "got scared" and did not use it.

He admitted that he "had a rifle out" but claimed that he did not fire it and that he had taken it back and put it on another soldier's bed (R. 97, 150-157, 229, 231-236, 296, 298-299).

c. Accused Esthmus T. Hutchings: Private James Murray of Company D was in the latrine when the shooting started. After the lights went out accused Hutchings came in with something in his hand which Murray stated "could have been * * * a stick". Murray heard a clicking noise in the latrine that sounded like opening the bolt of a rifle. When the lights came on Hutchings was in the latrine but had nothing in his hands. A rifle was found in the latrine. Sergeant William A. Hampton, who also was in the latrine, saw accused Hutchings come in immediately after the firing had ceased, carrying a .30 caliber rifle. Hutchings placed the rifle behind the latrine door (R. 277-278, 281-282, 284, 287).

d. Accused James W. Bigbee: On 24 June after the firing was over and the company had been formed, Lieutenant Harry D. Shelley of Company D entered barracks T 12410 in which accused Bigbee was quartered and found a rifle concealed between the mattress and the springs of Bigbee's bed. Lieutenant Shelley delivered the rifle to Colonel George M. Peek who passed a cleaning patch through the barrel. After it had been removed the patch gave off a strong odor of gun powder. The rifle had mud on the butt. Colonel Peek sent for accused Bigbee, who was in formation, and when the latter arrived observed that he had the "imprint of mud" on his right shoulder. Colonel Peek then directed that Bigbee's shirt be taken off and bruises on the point and in the hollow of his shoulder were distinctly visible. When Colonel Peek pointed out to Bigbee that the bruises and mud marks on his shoulder indicated that he had fired the rifle and asked him how many times he had fired, Bigbee answered "once". He stated that while he was in the barracks writing a letter, the lights went out, and there was some firing. He went outside where he saw a rifle leaning up against the wall, "a boy" gave him a round of ammunition and he (Bigbee) put the cartridge into the gun and fired it "in the air". Bigbee further stated that he fired because the others were making a noise and he wanted to make some too and that he had concealed the rifle in his bed because he wanted to clean it before putting it back in the rack. He made substantially similar statements before the board of investigating officers. Major Leslie P. Herd, Medical Corps, examined accused Bigbee on the night of 24 June and found on his right shoulder bruises similar to those caused by firing a .30 caliber rifle. Major Herd stated that the firing of a rifle not properly held will cause such a mark but that if a rifle is properly held it will not cause any bruise unless it is fired over a long period of time (R. 97, 139-142, 144-149, 415).

e. Accused Abraham Lewis: As stated above, on the evening of 24 June after the military police repeatedly had ordered a number of the members of Company D to move back off of Jeanerette Street into their area,

accused Lewis stood at the edge of the road, folded his arms, and placed one foot out on the pavement. A military policeman struck at him but missed him and hit another soldier. Subsequently Lewis was seen in the group of men standing on the northern side of Jeanerette Street when the argument with the military police was in progress. Before the shooting began he went into a barracks other than his own and turned off the lights, but Sergeant Mack Davis, Jr. told him to turn them on again. Sergeant Davis testified that he did not know "specifically" at what time this incident occurred but thought that it was within an hour before the firing and stated that it must have been before 9:30 p.m. Lewis did not make any remark when he turned off the lights. After Company D had been assembled subsequent to the shooting at the direction of the commanding officer, accused Lewis broke formation, ran into his barracks, picked up a rifle from a bed and placed it against a small hanger in the center of the floor (R. 11, 16, 160-162, 235, 283, 286, 288-289).

4. The evidence for the defense: Accused Woodford testified that he went to the last show on the evening of 24 June and after it ended at about 10:00 p.m., returned to his barracks and immediately went to bed. He was awakened by the noise of the firing. He fell in with the rest of the men, took off his shirt, was examined by a "doctor" who was a Major, and was released but subsequently was placed in confinement. He denied that he had had a rifle during the evening of 24 June and stated that he did not have any ammunition in his possession with the exception of some which he picked up from the floor of his barracks after the shooting. "Somebody" had thrown it there while running through the barracks. Accused Hall, who was present when Woodford picked up the ammunition from the floor, had picked up some of it at the same time. Woodford threw the ammunition out of the barracks. During the firing there had been "plenty" of men running through the barracks with rifles, they had dropped something very heavy, and when the lights came on he noticed that the heavy objects were rifles. Somebody had come into the barracks and dropped a rifle in the middle of the floor and at the same time had dropped ammunition (R. 340-343, 345).

Accused Hutchings testified that at about 9:30 or 10:00 p.m. on 24 June, after he had returned to his barracks from an automobile ride around camp, he went to the latrine, where someone told him about the trouble with the military police "down by the road". He walked down there and just as he arrived Sergeant Foreman and Lieutenant Touber called the men together near a tree about twenty-five to fifty feet from Hutchings and talked to them. After they "broke up" and scattered about, Hutchings heard what seemed to be the sound of bolts opening. He started back up through the area and just as he was opposite the day

room the first shot was fired. He fell to the ground, crawled some distance, jumped up and ran to the latrine. After the "first shooting" a whistle blew, he started out but went back in when the shooting started again and stayed there until it was all over, when he "fell out in formation". He did not have a rifle or any ammunition that evening. He could not be sure that he saw a rifle in the latrine. As he was lying on the floor after the lights came on there was something back of the door but it could have been a broom. He did not pay particular attention to it (R. 252-254).

Accused Lewis testified that on the evening of 24 June at about the time the first show was over he was sitting on a bench with some other soldiers in front of the service club when the trouble developed between the members of his company and the military police. An "M.P." slapped "this Corporal by the name of Baker", some one summoned Lieutenant Touber and after some discussion the first sergeant ordered the men to "break it up". Lewis went back to the barracks and retired. It was then 9:30 or 10:00 p.m. After he had been in bed "maybe not quite an hour" he heard some firing and jumped up on the side of the bed, but lay back down again. He thought that there was another burst of gunfire during which he remained in bed. When the firing ceased he got up, turned on the lights in the front part of the barracks where he was sleeping, and went out to join the formation with "McLaughlin" and "Odith Spencer". Subsequently accused Lewis left the formation and went back into his barracks for his pocketbook. When he recovered it from the bed he saw a rifle against the wall beside his bed He picked up the rifle and placed it close to a cupboard in the middle of the room. He moved the rifle in order that he "wouldn't be involved in anything that occurred that night". He denied that he had entered Sergeant Davis' barracks and turned off the lights. He testified that after he had been in Sergeant Davis' platoon for 14 or 15 months, at his request "the lieutenant" got him out of it. Sergeant Davis asked accused Lewis why he left the platoon, Lewis "told him" and Davis said that Lewis "was going to be sorry" (R. 345-350).

Private Allen A. McLaughlin testified that he was quartered in the same barracks as accused Lewis on the night of 24 June. McLaughlin went to his barracks that night after the first show and Lewis came in later, about an hour before the shooting. McLaughlin saw Lewis on his bunk before the shooting and saw him getting up from his bunk, undressed, when the lights went on again after the firing ceased (R. 400-403).

Private Odith Spencer also testified that he lived in the same barracks as accused Lewis and that when he (Spencer) went to his barracks and retired on the evening of 24 June there was someone in Lewis' bed. Spencer went to sleep and was awakened by the firing. After it ended and the lights came on again, there were four other men in the barracks, Private McLaughlin, accused Lewis and two others. Lewis was dressed in

fatigue clothes and was standing beside his bed (R. 404-406).

Accused Hall, Johnson or Bigbee did not testify under oath or make an unsworn statement (R. 413).

5. a. Specification 1, Charge I.

This Specification as amended alleges that the accused voluntarily joined in a mutiny against the lawful authority of the military police and did, with intent to usurp, subvert and override for the time being such lawful military authority, in concert with other members of their battalion, assemble in the vicinity of the service club, take up arms and refuse to disperse. Mutiny is concerted insubordination, or concerted opposition or resistance to or defiance of superior military authority by two or more persons subject to such authority, with the deliberate intent to usurp, subvert or override the same at least for the time being (M.C.M., 1928, par. 136a; Dig. Op. JAG, 1912-1940, sec. 424; Winthrop's Military Law and Precedents, Reprint, 578). The evidence shows that on the evening of 24 June 1943 a dance was held in the colored service club and a detail of colored military police was assigned to patrol the adjacent area. When a number of enlisted men of Company D, 611th Quartermaster Battalion, congregated in the vicinity they were ordered by the military police to get off of a road or street between the club and the company area. They were reluctant to obey, it was necessary to repeat the order several times and a dispute arose as to whether or not they had the right to stand upon the shoulder of the road on the side next to their area. At about 8 p.m. a military policeman struck at accused Lewis, who was standing beside the road with his arms folded and with one foot out on the pavement, but missed him and hit another man. The men continued to congregate on their side of the street and the argument continued until about 10:00 p.m., when Lieutenant Touber came up with the first sergeant of Company D and after investigating the trouble ordered the men to "break it up". A short time later several military policemen who were standing upon the porch of the service club were fired upon, the firing was in considerable volume, and the sergeant in charge of the military police detail, six other soldiers, a second lieutenant and three civilian women were wounded by the gunfire. The shots were fired in the vicinity of some baking tents in Company D area. The rifle racks in the barracks were not locked that day and a check made within an hour after the firing disclosed that 11 rifles were missing from the racks. When these rifles were found in the company area some of them contained live ammunition, other ammunition was found hidden under and around the barracks, and ordnance experts ascertained that 14 rifles issued to the company had been fired that night.

The firing upon the military police detail and the wounding of the sergeant in charge by the concerted action of the participating

members of Company D was in direct, violent and flagrant opposition to and defiance of the authority of the military police, with the intent, inferable from the attendant circumstances, to override such authority. Clearly such conduct constituted mutiny and there remains for consideration, in so far as the mutiny charge is concerned, only the question whether the accused to whom this holding pertains joined in the mutiny.

One who voluntarily takes part in a mutiny at any stage of its progress, either by engaging actively in the execution of its purposes or, being present, by stimulating and encouraging those who do, is guilty of joining in such mutiny (Winthrop's Military Law and Precedents, Reprint 583). It appears from the evidence that before the firing started on the evening of 24 June accused Hall, Woodford and Johnson were seen in the company area back of one of the barracks, each with a rifle in his hands. Accused Woodford was seen carrying a rifle shortly before the firing began about 75 feet back of the baking tents where it originated. Accused Hutchings came into the latrine immediately after the firing carrying a rifle which he left behind the latrine door. A rifle was found after the disturbance concealed in the bed of accused Bigbee and an examination disclosed that the rifle had been fired recently. There was mud on the butt and Bigbee had a corresponding muddy imprint on his right shoulder. He also had on his right shoulder a bruise which a Medical Corps officer who examined him stated could have been caused by the firing of a .30 caliber rifle improperly held. Accused Bigbee admitted that he had fired one shot from the rifle but stated that he had fired it "in the air" after the shooting started just to make some noise. Fatigue clothes and shoes with sand and mud on them were found after the shooting on the bed of accused Hall. He stated that he had taken cover by crawling up under the floor of his barracks. At the place where he said that he had lain three rifle cartridges were found on the ground. In a voluntary statement made before a board of investigating officers Hall admitted that he was in the vicinity of the baking tents with a rifle loaded with 5 cartridges when the first shot was fired but denied that he had fired the rifle. In a similar statement before the board accused Johnson stated that on the night of 24 June he put into his pocket some ammunition which he previously had brought in from the rifle range, that he "had a rifle out" but "got scared" and did not fire it, and that he had brought back the rifle and put it on another soldier's bed. Johnson also told the board that he had dropped some ammunition through a knot hole in the floor near his bunk. A search resulted in the discovery of seven cartridges and one cartridge case on the ground under the barracks floor at the place indicated. Shortly before the firing started accused Johnson was heard to remark to a number of other enlisted men who had congregated on the northerly side of Jeanerette Street that he had buried some ammunition which he could find with the aid of a "map". The accused Hall, Woodford, Johnson, Hutchings and Bigbee are shown circumstantially to have participated in the mutiny against the military

police and in the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty of Specification 1, Charge I, as to each of them.

The court found accused Lewis guilty of the Specification under consideration except the words "take up arms". There are only three incidents which tend to connect him with the offense. When the difficulty with the military police first started at about 8 p.m. he stood at the side of Jeanerette Street opposite the service club and put his foot out on the pavement. A military policeman struck at him but missed him and hit another soldier. Subsequently and prior to the firing, Lewis entered a barracks other than his own and started to turn off the lights. After the company had been assembled following the disorders Lewis broke ranks, went back into his barracks, took a rifle off of his bed and put it against a rack in the center of the room. He testified that he went back into the barracks to get his pocketbook and that when he saw that some one had left a rifle near his bed, removed the rifle to avert unfounded suspicion from himself.

The first incident definitely and the second incident apparently happened before the mutiny started. The third incident occurred after it had ended. It was more than two hours after accused Lewis stuck his foot out on the pavement before the argument between the men of his company and the military police culminated in an outburst of mutinous violence. With reference to the second incident, while estimates of time not based upon observation of a time-piece are notoriously inaccurate, the only evidence as to when Lewis turned off the barracks lights/the testimony of Sergeant Davis that it was sometime prior to 9:30 p.m., about three-quarters of an hour before the first shot was fired. There is no evidence that anyone had armed himself or committed any overt act of mutiny by that time. Regardless of when it occurred, the act of turning out the lights would not of itself support a reasonable inference that accused participated in the mutiny. It may have been done for an innocent purpose so far as the record shows. The third incident has been robbed of whatever probative force it might otherwise have had by the exception in the finding of the court. Manifestly it may not properly be inferred from the fact that accused removed the gun from his bed that he used or carried the gun in connection with the mutiny in the face of the specific finding of the court that he did not "take up arms". In the opinion of the Board of Review the evidence is legally insufficient to support the findings of guilty of Charge I and of Specification 1 thereunder as to accused Lewis.

b. Charge II.

Each of the accused except Private Lewis was found guilty of Charge II and of the Specification thereunder. The Specification alleges

that the accused and other members of their company, with intent to murder, committed an assault upon certain individuals by shooting at them with rifles. The persons named as the victims of the assault were Sergeant Simms (who was wounded), the members of his detail of military police, and other military personnel and civilian women who were wounded by the gun fire. As stated above, the circumstances clearly indicate that the firing was done by members of the company of accused. The specific intent to murder, which is an essential element of the offense charged, may be inferred from the fact that .30 caliber Army rifles were fired at close range at military policemen and toward a building in which a dance was in progress. Twelve persons suffered gunshot wounds and it was a mere fortuitous circumstance that none of them was killed. It also appears that the assault was committed by a number of persons acting in pursuance of a common design. There is no direct proof that the accused found guilty of the assault fired any of the shots but the evidence shows that each of them was a party to the unlawful enterprise and was present in the area where the crime was committed, aiding and abetting in the furtherance thereof. 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 (18 U.S.C. 550; Meyer v. United States, 67 F (2d) 223; United States v. Hodorowicz, 105 F (2d) 218). Where, as in the instant case, two or more persons by common design jointly engage in the same unlawful act, each is chargeable with liability, and is guilty of the offense committed to the same extent as if he were the sole offender (16 C. J. 128; 1 Wharton's Criminal Law 1144; Hicks v. State (Ala) 26 So. 337; Brown v. Commonwealth (Va) 107 SE 809; and see Annotation 16 A.L.R. 1043, 1047).

It is not alleged that the accused and the other soldiers charged with the commission of the assault acted jointly and in pursuance of a common intent, but when a Specification obviously is intended to allege a joint offense and fails to follow the prescribed form (See MCM, 1928, Appx. 4, p. 237) the irregularity is not fatal if the accused has not objected to a joint trial and has not been misled or otherwise injuriously affected in any of his substantial rights (CM 120543, Harmon and Gault).

It is the opinion of the Board of Review that the evidence is legally sufficient to support the findings of guilty of Charge II and of the Specification thereunder as to accused Hall, Woodford, Johnson, Hutchings and Bigbee.

6. The charge sheet shows that accused Hall is 25 years of age and that he was inducted on 25 August 1942; that accused Woodford is 21 years of age and that he enlisted on 8 September 1942; that accused Johnson is 20 years of age and that he enlisted on 7 September 1942; that accused Hutchings

is 31 years of age and that he was inducted on 1 July 1942; and that accused Bigbee is 19 years of age and that he was inducted on 28 December 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence as to accused Lewis, and legally sufficient to support the findings of guilty and the sentence as to each of the other accused, Hall, Woodford, Johnson, Hutchings and Bigbee. Confinement in a penitentiary is authorized by Article of War 42 for the offense of mutiny.

Samuel M. Driver, Judge Advocate

[illegible], Judge Advocate

F J Lottichos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 31 MAR 1944 - To the Commanding General, ...th Service Command, Army Service Forces, Post Office Building, Atlanta, Georgia.

1. In the case of Technicians Fifth Grade James H. Hall (33223300) and Esthmus T. Hutchings (33320608), Private First Class Andrew Johnson (13108770) and Privates Joseph N. Woodford (13113741), Abraham Lewis (34204646) and James W. Bigbee (39273278), all of Company D, 611th Quartermaster Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to accused Lewis, and legally sufficient to support the findings of guilty and the sentences as to accused Hall, Woodford, Johnson, Hutchings and Bigbee, which holding is hereby approved. For the reasons therein stated, I recommend that the findings of guilty and the sentence as to accused Lewis be disapproved. Under the provisions of Article of War 50½ you now have authority to order the execution of the sentences of accused Technicians Fifth Grade James H. Hall and Esthmus T. Hutchings, Private First Class Andrew Johnson and Privates Joseph N. Woodford and James W. Bigbee.

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

(CM 240646).

Myron C. Cramer

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

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

(331)

17 NOV 1943

SPJGH
CM 240788

U N I T E D S T A T E S	)	FIRST SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
First Lieutenant CHARLES M. JOHNSON (O-1109385), Corps of Engineers.	)	Trial by G.C.M., convened at Camp Edwards, Massachusetts, 8 and 9 September 1943. Dismissal and confinement for three (3) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Charles M. Johnson, Company "B", 544th Engineer Boat and Shore Regiment, did, on or about 2 July 1943, at Camp Edwards, Massachusetts, unlawfully and wrongfully, in a lewd and lascivious manner, place his hand on the penis of T/4 Marvin K. Rister, and did thereby bring discredit on the military service.

Specification 2: In that First Lieutenant Charles M. Johnson, Company "B", 544th Engineer Boat and Shore Regiment, did, on or about 1 July 1943, at Camp Edwards, Massachusetts, unlawfully and wrongfully, in a lewd and lascivious manner, place his hand on the penis of T/4 Dale R. Jewell, and did thereby bring discredit on the military service.

Specification 3: In that First Lieutenant Charles M. Johnson, Company "B", 544th Engineer Boat and Shore Regiment, did, on

or about 15 July 1943, at Camp Edwards, Massachusetts, unlawfully and wrongfully, in a lewd and lascivious manner, place his hand on the penis of T/4 Dale R. Jewell, and did thereby bring discredit on the military service.

He pleaded not guilty to the Charge and all Specifications. He was found guilty of Specification 2, except the figure "1" and the word "July", substituting therefor the figure "15" and the word "June", and guilty of Specifications 1 and 3 and of the Charge. He was sentenced to be dismissed the service and to be confined at hard labor for three years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that for several months accused had been a company officer in Company B, 544th Engineer Boat and Shore Regiment, Camp Edwards, Massachusetts, and early in July became platoon leader of the First Platoon. It was his custom practically every night to visit the men of the company and especially the platoon in their tents. He was frequently in the tent occupied by Technician Fourth Grade Marvin K. Rister and others and the tent occupied by Technician Fourth Grade Dale R. Jewell and others. On these visits accused discussed with the men military matters, the training program, and personal problems and matters (R. 8-10, 16-18, 52-53, 57-58).

About 16 or 17 June at about 9:00 or 9:30 p.m. accused went to the tent of Sergeant Jewell. Several other men who were present went to bed after accused entered. Sergeant Jewell testified that after the others had gone to bed, he got in bed, under the covers, that accused sat on the edge of the bed and talked to him, and that accused then put his hand on Jewell's leg and moved it up and down on his leg. He testified further that accused moved his hand up to Jewell's penis and started moving his hand around. The hand of accused remained on top of the cover. Sergeant Jewell turned on his side, accused removed his hand, and in a few minutes left the tent (R. 53-54, 56, 58-60, 64-65, 71).

On the night of 1 July about ten o'clock, while Sergeant Rister was on "boat guard", accused invited him to have dinner in town with accused the following night to celebrate his birthday. When Rister stated that he had been restricted by another officer, accused, who was acting company commander at the time, advised him that he could not be restricted without the consent of accused and told him to get his pass. Sergeant Rister then accepted the invitation. At about 6:00 p.m., 2 July, they met

on the bridge, as accused felt that the rest of the company should not know about it, and went to town for dinner. There were two other soldiers in the taxi, and accused remarked "Sergeant, where are you going tonight all dressed up, are you stepping out". When they reached Falmouth, they had a drink with another officer, and when he left the cafe, accused and Sergeant Rister ordered and ate a lobster dinner. Afterward they went to a show. When the show was about half over, Rister, who had never eaten lobster before, became "very sick" and went to the latrine in the theater four or five times and vomited. He testified that accused held his (Rister's) hand during most of the show. Accused paid for the dinner, show and taxi. When they returned to camp about 11:30 or 12:00 o'clock, accused accompanied Rister to his tent, one of them lit a candle, and accused made the bed for Rister and sat on the edge of it after Rister got in bed. Several other men in the tent were apparently asleep. Rister was quite weak, felt "pretty bad", and tried to go to sleep. The candle was blown out, they talked about five minutes, accused placed his hand on Rister's forehead, asked if he had fever, and then lay down beside Rister. Almost immediately, according to Rister, he felt the hand of accused under the cover and on his (Rister's) stomach. He testified that accused then put his hand on his leg, "grabbed a hold" of his (Rister's) penis, and moved it up and down two or three times. The penis was not erected. Rister at once turned on his side and suggested that accused leave. Accused then handed Rister an open knife and stated, "Take this and use it on me, someone should have long ago". Rister closed the knife and returned it to accused, who on request left the tent (R. 10-14, 18-28, 39-45).

The next morning Sergeant Rister was called to the office of accused, who stated that the officer who had restricted Rister thought that he (Rister) was "on the carpet" about the pass. Accused then stated, "I am very sorry for what happened, I don't know what was wrong with me". Sergeant Rister saluted and left. A night or two later accused came to Sergeant Rister's tent, apologized again, said he was "very sorry for what had happened", that he did not know what was wrong, and that Rister could report him "for this". They shook hands and Sergeant Rister left (R. 14-15, 35-36, 44).

Sergeant Rister testified that accused was known as "Mother Johnson" in the company because he was so attentive to the men in the company or because there were a few men that he showed particular attention to. When asked whether accused had ever tried to fondle or caress him prior to 2 July, Rister stated that accused usually was in his tent until 10:30 or 11:00 o'clock and sometimes until 12:00 o'clock,

and that when the other men in the tent would go to sleep accused would talk to him and "would put his arm around me and hold my hand and sometimes put his hand on my leg". On cross-examination Sergeant Rister admitted that on preliminary examination he had stated that prior to 2 July there had been no indication of accused making any such advances to him or anyone else, but repeated that on prior occasions accused had put his arm around Rister's shoulders and held his hand. He testified that on 3 July he discussed the incident with "Sergeant Mobley" and later discussed it with other noncommissioned officers, but admitted that on preliminary examination he stated that it was three or four weeks before he said anything to anybody. He did not report it, but was called in by the first sergeant about it. One of the reasons he "reported this" was that the men in the company were laughing at him about accused visiting in his tent. Sergeant Rister had a "very high opinion" of accused as a company officer (R. 16, 18, 29-32, 34, 36-39,42).

Between 12 and 15 July, at about 8:00 p.m., while Sergeant Jewell was in bed writing a letter, accused came to the tent and sat on the bed. Three other noncommissioned officers who also occupied the tent were present. All of them talked for a while, at about nine o'clock the other men went to bed and apparently to sleep, and accused remained while Jewell finished his letter. When the letter was finished about ten o'clock, Sergeant Jewell went to sleep while accused was talking to him. Sergeant Jewell testified that later he waked up and found the hand of accused on his (Jewell's) penis under the cover. Accused was gripping the penis, which was erect, and moved his hand up and down for a few seconds. Sergeant Jewell moved immediately and accused removed his hand and left the tent. The next day accused sent for Jewell, said he was sorry "for what had happened", that he did not know what "got into him", and asked if Sergeant Jewell knew that he "could turn him in", or blackmail him (R. 54-56, 60-65, 69-73).

4. For the defense, Father Gerald F. Kellogg, a Catholic priest, who knew accused quite well from the fall of 1941 until he went into the Army, testified that his general reputation was excellent. Mr. Don A. Gribble of the United States Immigration and Naturalization Service, with whom accused had worked, and Mr. H. M. Wilson, principal of a high school where accused was basketball coach, also testified by stipulation, that the general reputation of accused was excellent. Colonel John R. Crume, commanding 544th Engineer Boat and Shore Regiment, was of the opinion that accused was an excellent officer. Accused had served under Major John B. Gibbons, Jr., commanding the first battalion of the regiment, since the activation of the organization in February. The

performance of duty by accused was either "excellent or superior at all times" and he was recognized as one of the outstanding young officers. Captain Frank G. Malone, commanding Company B, considered accused as the most ambitious, energetic and industrious officer in the company. Accused knew more about the men in his platoon than did any other officer, and it was the best platoon in the company. Captain Malone had not instructed his officers to visit the men in their tents, but would have no objection to it, and he encouraged the officers to "mix with the men particularly in the evening" (R. 46-51, 73-81, 109-110).

Accused testified that prior to his induction on 24 April 1942 he was employed by the United States Immigration and Naturalization Service, served as a scout master and coached a basketball team. He had never had any "difficulty with the law" and had never been accused or guilty of any immoral act. After receiving his basic training in the Army he went to Officer Candidate School, and graduated 20 January 1943. Subsequently he attended other Army schools. He stated that he was proud of his record in the Army, rising from private to first lieutenant in a comparatively short time, and that his family had had soldiers in every war this country has fought (R. 82-88).

For six weeks prior to the date of trial accused had sensed something wrong in the company and particularly in the men under his immediate command, had questioned some of the men about it, but had learned nothing. The charges were a mystery to him. He could not account for such charges against him, except that two sergeants, both absent from camp at the time of trial, were resentful against him and he understood they had been "sounding off" around the company regarding "this matter". Accused had given one of them, "Sergeant Botts", a "rather terrific bawling out" for kicking a man in ranks, and had reported it to the company commander. Botts had been accepted for Officer Candidate School at the time. Accused had given the other man, "Sergeant O'Connor" a "severe bawling out" on two occasions and preferred charges against O'Connor, of which he was found guilty. Accused visited the men often in their tents because of a pamphlet entitled "Company Commander" which had been given him as required reading when he first came to the command. This pamphlet urged frequent visits to the men in quarters and that these visits should not be of an official nature and not as a superior officer, but as a friendly call from an elder comrade (R. 86-89, 99).

Accused admitted taking Sergeant Rister to dinner on 2 July and going to his tent afterward. He considered Sergeant Rister one of the best "non-coms" in the company, and had told him that, but for his extreme

shyness, he was a fit candidate for "OCS". Accused took him to dinner in an effort to help him overcome his shyness, as accused thought it would give him a chance "to be himself in front of an officer". Accused did not hold Rister's hand in the theater, except that the second time Rister returned from the latrine accused had felt his pulse to see if he was all right. He denied placing his hand on the penis of Rister. As to the alleged offenses with Sergeant Jewell, accused admitted that he had been in Jewell's tent many times, but denied that he had made the indecent advances alleged (R. 89-91).

On cross-examination, accused recounted the events of 1 and 2 July in substantial accord with the testimony of Sergeant Rister, except as follows: In the theater accused, who had had some medical training, only felt the pulse of Rister to determine whether he should go to a doctor. When they returned to the tent, accused waited a few minutes after Rister went to bed to see whether lying down would make him sick again, placed his hand on Rister's forehead, and, when Rister said he felt all right, turned over on his side and went to sleep, accused blew out the candle and left. He did not touch Rister's body except his forehead. He had visited Rister's tent many times, and may have put his arm around Rister's shoulders on some occasions, but had never fondled or caressed him (R. 91-94).

On further cross-examination accused testified that he had visited in Sergeant Jewell's tent many times but did not remember whether he was there on the "17th or 18th of June" or 15 July. The only apology he ever made to Sergeant Jewell was once when accused told him he was sorry for "making a facetious remark about his lady friend when he showed me her picture". Although on occasion accused had corrected Rister and Jewell, he had never had to resort to company punishment or "anything like that". One reason that he thought Sergeants Botts and O'Connor might be the cause of the charges was that the first sergeant had testified at the investigation that for three months "the sergeants in his tent had been accusing me of indecent acts around the company". The only reason for such talk was that they "had something against me". Accused admitted that at times he had put his arm around the shoulders of some of the men. He stated that he did not have or own a pen knife (R. 94-99).

On examination by the court, accused went over the evidence of Sergeant Rister, and pointed out those statements which were not true. He denied holding the hand of Rister in the theater and stated that he merely "took his pulse". He denied that he handled Rister in any way at the tent. As to the conversation with Sergeant Rister the next day,

accused stated that he and "Lieutenant Dietrich" had an argument over the fact that accused had permitted Rister to go to town when Lieutenant Dietrich had restricted him. Dietrich did not like the idea "of that boy going over his head". Accused told Dietrich that he (accused) would call Rister in and tell him "that he had done wrong". As a result accused called Rister to his office, ostensibly to reprimand him, and stated to him that accused was sorry for what happened, "referring entirely to the lobster dinner that I had practically insisted that he try and from which he became violently sick". Accused could not account for Rister's "lying" about him and was completely "floored" by it when he heard it. Neither could he account for Sergeant Jewell's testimony. The testimony of Sergeant Rister with reference to the knife was false. Accused did not have a knife in his possession at that time. Accused had formerly owned a knife but loaned it to "Lieutenant Burke" in the latter part of June, and had not had it since (R, 99-109).

5. For the prosecution, in rebuttal, Second Lieutenant Julian Burke testified that he borrowed a small pen knife from accused between 5 and 12 July, and later left it on the company commander's desk for accused. He fixed the time by reason of the fact that he was then teaching a compass course which started on 5 July. Lieutenant Burke produced his own knife and by request left it on the reporter's desk. The knife he had borrowed from accused was twice as big as the one produced. He considered accused a capable officer who was "very conscientious" in his work. Staff Sergeant Robert S. Knight and Private Harold C. Davidson had seen accused whittling with a pen knife more than once, on unspecified dates. Sergeant Rister, recalled, stated that the knife on the reporter's desk was "exactly the same size" as the knife that accused had handed him on the night of 2 July. Sergeant Rister testified over objection that on two occasions, both prior to 2 July, he accepted invitations to the tent of accused for a drink of rum. On 3 July Rister reported the incident of 2 July to "Sergeant Mobley" and later discussed it with several others. About 2 September Mobley reported the matter to Sergeant Knight, who in turn reported it to the first sergeant (R. 154-159, 161-162, 166-167, 171, 174-178).

6. The court called as witnesses 12 enlisted men who had been tent mates with either Sergeant Rister or Sergeant Jewell. They had seen accused visit these tents many times, but had never observed any improper conduct or advances of accused. In one tent accused talked principally to Sergeant Rister and in the other he apparently came to see Sergeant Jewell. Lieutenant Colonel Frank A. Lindhal, who made a thorough search of the room and locker of accused during the trial, reported that he did not find a knife. Several officers called by the court testified to the

good reputation of accused and that he was a "superior" officer (R. 118-144, 146-153, 189-195).

Technician Fourth Grade Harold E. Mobley testified that Sergeant Rister had on 3 July reported to him the alleged offense of accused. Mobley discussed it with several other men, and on 2 September reported it to the first sergeant. The "boys involved" thought it best to report it. Sergeant Mobley was called in by the first sergeant after Mobley had discussed it with Sergeant Knight. Sergeant Jewell did not report the two incidents involving him, but discussed them with Sergeant Rister. Later Sergeant Mobley "came into the situation" and Jewell was called in by the first sergeant. On 30 August 1943, First Sergeant Murray S. Johnson first became aware of the alleged acts of accused when Sergeant Knight reported them. Sergeant Johnson questioned each man involved very thoroughly, and then reported to the company commander. Prior to 30 August Sergeant Johnson had not had a report of the alleged misconduct, but there had been insinuations by Sergeants Botts and O'Connor over a period of two or three months. Sergeant Johnson testified that the reputation of accused in the company for truth and veracity was "beyond reproach". He was also questioned as to the reputation of Sergeants Rister and Jewell for truth and veracity, and stated that both were "absolutely truthful". Accused was recalled by the court and asked his opinion as to the truth and veracity of Sergeants Rister and Jewell. He stated that he had considered that they were "good boys" and that they would not do or say anything that would not be the truth (R. 111-116, 180-188, 196-199).

7. The evidence shows that accused visited men of his organization in their tents, and discussed military and personal problems and matters with them, almost every night. He would at times place his arm around the shoulders of some of the men in talking to them, but none of the men except two observed any indecent acts or advances. Sergeant Jewell testified that on 16 or 17 June accused was in his tent for a visit, and that after the other men had gone to sleep and Jewell was in bed under the cover, accused sat on the bed, placed his hand over Jewell's penis on top of the cover, and moved his hand around. When Jewell turned over, accused removed his hand and left the tent. Sergeant Jewell testified also to substantially the same occurrence on a date between 12 and 15 July, except that he stated that this time accused placed his hand under the cover, gripped Jewell's penis, which was erect, and moved his hand up and down for a few seconds. Sergeant Rister testified that on 2 July after he had been out to dinner with accused, he became ill, they returned to his tent, and that when he was trying to go to sleep, accused

reached under the cover, "grabbed a hold" of Rister's penis, and moved it up and down two or three times.

Accused testified in substantial accord with Sergeants Jewell and Rister, except that he positively denied placing his hand on the penis of either of them and denied any improper conduct.

With respect to the incident of 2 July Sergeant Rister testified that immediately afterward accused handed him a pen knife and asked him to use it on accused. The testimony of accused was that he did not have a knife at the time, but had "loaned" his knife to another officer a few days before. According to a rebuttal witness for the prosecution, the date when accused had loaned the knife to the other officer was shortly after 2 July. In this situation the prosecution introduced testimony of two men that they had seen accused whittling with a knife, but on undesignated dates. Such testimony was erroneously considered, as it was consistent with the testimony of accused and yet might easily tend to influence the court to disbelieve his testimony that he did not possess a knife on 2 July. Sergeant Rister was erroneously permitted over objection, on rebuttal, to testify that on two occasions he had gone to the tent of accused by invitation to have a drink of rum. Such testimony was not relevant to any issue involved, and tended to show an offense not alleged. In the opinion of the Board, however, the admission of the evidence referred to did not, when considered alone, prejudice the substantial rights of accused.

The fundamental issue of fact at the trial was whether Sergeants Jewell and Rister, or accused, spoke the truth. In this situation, when the reputation of the two sergeants for truth and veracity had not been attacked, the court asked First Sergeant Johnson what their reputation for truth and veracity was, and he replied that both were "absolutely truthful". The court also recalled accused for further interrogation and requested his opinion as to their truth and veracity. He gave a favorable report of their truthfulness prior to their testimony and charges against him. The court appears to have been in doubt as to whether to accept the testimony of the two sergeants as true, or that of accused, inasmuch as the court itself asked for and received the opinion of the first sergeant as to the truthfulness of the two principal witnesses for the prosecution. The court went even further and recalled the accused to ascertain his opinion of their veracity. Such testimony of the good reputation of these two witnesses for truth and veracity, may well have led the court to accept their testimony as against that of accused. The admission of such evidence, when the witnesses have not been impeached on the ground that their reputation for truth and veracity is bad, is erroneous, and, in a case where there is a direct conflict of evidence,

injuriously affects the substantial rights of an accused (Dig. Op. JAG, 1912-40, sec. 395 (8); CM 190259, Sheffield; CM 195687, Stansbury; CM 196371, Steenberg). The examination of accused by the court as stated above was erroneous for another reason. In questioning an accused the court and its members must confine themselves to questions which would have been admissible on cross-examination of the accused by the prosecution (MCM, 1928, par. 121b). Contrary to this rule, the court in this case in effect made the accused a witness for the court.

The Board of Review is of the opinion that the admission of the evidence referred to above constituted substantial and prejudicial error, and that the competent evidence for the prosecution, is not of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty (Dig. Op. JAG, 1912-30, sec. 1284). The accused was entitled to have the judgment of the court, uninfluenced by the inadmissible evidence of the truthfulness of prosecution witnesses.

8. The accused is 30 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 24 April 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 20 January 1943; temporarily promoted to first lieutenant, Army of the United States, 1 June 1943.

9. The court was legally constituted. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Samuel W. Driver, Judge Advocate

J. J. Lotterhos, Judge Advocate

Norman D. Latting, Judge Advocate

1st Ind.

War Department, J.A.G.O., 5 JAN 1944 - To the Commanding General, First Service Command, Army Service Forces, Boston, Massachusetts.

1. In the case of First Lieutenant Charles M. Johnson (O-1109385), Corps of Engineers, I concur in the foregoing opinion of the Board of Review holding the record of trial not legally sufficient to support the findings of guilty and sentence, and, for the reasons therein stated, recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and The Judge Advocate General is taken under the provisions of Article of War 50½ and in accordance with note 4 following that article (M.C.M., 1928, p. 216), and that under the further provisions of that article the record of trial is herewith returned to you for a rehearing or such other action as you may deem proper.

2. When copies of the published order in this case are forwarded to this office together with the record of trial, they should be accompanied by the foregoing opinion and this indorsement, except that in the event a rehearing is directed the foregoing opinion and this indorsement should be returned alone and the disposition of the record of trial and the publication of the general court-martial order in the case shall follow the provisions of paragraph 89, Manual for Courts-Martial, 1928. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 240788).

Myron C. Cramer

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

1 Incl-
Record of trial.

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

(343)

15 MAR 1944

SPJGH
CM 240788

UNITED STATES	)	FIRST SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
First Lieutenant CHARLES M. JOHNSON (O-1109385), Corps of Engineers.	)	Trial by G.C.M., convened at Fort Devens, Massachusetts, 25 January and 7-8 February 1944. Dismissal.

OPINION of the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Charles M. Johnson, Company "B", 544th Engineer Boat And Shore Regiment, did, on or about 2 July 1943, at Camp Edwards, Massachusetts, unlawfully and wrongfully, in a lewd and lascivious manner, place his hand on the penis of T/4 Marvin K. Rister, and did thereby bring discredit on the military service.

Specification 2: In that First Lieutenant Charles M. Johnson, Company "B", 544th Engineer Boat and Shore Regiment, did, on or about 1 July 1943, at Camp Edwards, Massachusetts, unlawfully and wrongfully, in a lewd and lascivious manner, place his hand on the penis of T/4 Dale R. Jewell, and did thereby bring discredit on the military service.

Specification 3: In that First Lieutenant Charles M. Johnson, Company "B", 544th Engineer Boat And Shore Regiment, did, on or about 15 July 1943, at Camp Edwards, Massachusetts, unlawfully and wrongfully, in a lewd and lascivious manner, place his hand on the penis of T/4 Dale R. Jewell, and did thereby bring discredit on the military service.

He pleaded not guilty to the Charge and all Specifications. He was found guilty of Specification 2, except the figure "one (1)" and the word "July",

substituting therefor the figure "sixteen (16)" and the word "June", and guilty of Specifications 1 and 3 and of the Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that accused was an officer of Company B, 544th Engineer Boat and Shore Regiment, stationed on Washburn Island, Camp Edwards, Massachusetts, from about the last of May 1943, and that he was later made leader of the First Platoon. The men of the company lived in pyramidal tents, sixteen feet square, with five men to a tent. The five cots were arranged in each tent according to a standard plan. A floor plan, drawn to scale, was placed in evidence (Ex. 1). Technician Fourth Grade Marvin K. Rister and four other men occupied one of the tents, and Technician Fourth Grade Dale R. Jewell and four other men occupied another. It was the custom of accused to visit the men in their tents practically every night, and during June and July he was frequently in the tents occupied by Sergeants Rister and Jewell respectively. On such visits accused and the men talked about various things, such as, problems, home, military duties and future ambitions. Accused took a "lot of interest" in the men of the platoon (R. 10-12, 22-24, 34-35, 37-39, 75, 84-87, 97-99).

a. Specification 2: Sergeant Jewell testified that he was 19 years of age, and was a stock room clerk in civilian life. About 8:00 p.m. on 16 or 17 June, accused came to his tent and they talked as usual. Two or three other men in the tent went to bed, and about a half hour later Jewell went to bed. He occupied the cot at the left rear corner of the tent, as viewed from the entrance. Jewell was in his shorts and undershirt, and under his blanket. Accused sat on the edge of Jewell's bunk and talked to him. The tent was lighted by a candle. "Pretty soon", at about 9:30 or 9:45 p.m., accused put his hand on Jewell's leg and started moving it up and down on the leg. He then moved his hand "on top" of Jewell's "privates" and "just moved it around". The hand of accused was on "top" of the blanket. Jewell did not have an erection. At the time, accused was sitting on the left side of the bed, as "you stand at the head, facing the foot". When accused put his hand on Jewell's "privates", the latter, who had been lying on his back, turned away from accused, who "just sat there a few minutes" and then left the tent. Neither said anything to the other. On cross-examination, Jewell admitted that in September 1943 he testified under oath that accused, after putting his hand on his (Jewell's) leg, moved "his hand up to my abdomen on top of the covers", that he (Jewell) then moved, and that accused did not touch his "privates at all". He could not account for the difference, but reiterated that in fact accused placed his hand above his penis. Jewell stated that he was "terribly shocked", but said nothing. After the night of the incident, accused

continued to come to the tent as in the past (R. 87-90, 94, 99-109, 119).

b. Specification 1: Sergeant Rister testified that at about 10 p.m. on 1 July 1943, when he was on guard at pier No. 5, Washburn Island, accused "walked out there" and invited him to take dinner with him the following night, Friday, 2 July, to celebrate the birthday of accused. When Rister stated that "Lieutenant Deitrich" had restricted him for Thursday and Friday nights, accused, who was acting company commander at the time, stated that no one could restrict Rister without his consent, and directed Rister to get his pass. The next morning, they had a further conversation about going out to dinner, accused suggested that they go to the New Yorker Cafe in Falmouth, told Rister to meet him at 6:00 p.m. at the bridge, and added that it would be best that the rest of the company not know anything "about this". Rister went to the bridge about 6:15 p.m., accused, who was already there, entered a taxi, and Rister got in the same cab. Two or three other soldiers were in the taxi. Accused asked "Sergeant, where are you going to-night? Are you stepping out?" They left the cab in front of the City Hall, which is next to the New Yorker Cafe, in Falmouth. They separated there, as each had some purchases to make, and met again at the New Yorker. When Rister returned, accused was talking to "Lieutenant Pogogeff", and the three talked in front of the cafe. "Sergeant Sills" and his wife "came by" and stopped to talk. Accused, Lieutenant Pogogeff and Rister entered the cafe and each had one cocktail. When Lieutenant Pogogeff left, the other two ordered and ate lobster, which Rister had never eaten before. After dinner they went to a movie theater, where Rister became "very sick", and had to go to the latrine four or five times during the show to vomit. After the show, they returned to camp in a taxicab. Accused paid all the expenses of the evening, except that Rister paid his own taxi fare to town (R. 12-22).

When they reached the company area, about midnight, accused offered to turn in Rister's pass for him, accompanied Rister to his tent, and prepared his bed for him. One of them lit a candle. Rister's cot was in the left rear corner of the tent as viewed from the entrance. Rister removed his clothing, except his shirt and shorts, got in bed, and tried to go to sleep. Accused asked Rister how he felt, Rister replied that he was "a little weak", and accused sat down on the edge of the bunk. About that time the candle was blown out. Accused placed his hand on Rister's forehead and asked whether Rister had fever. They talked for four or five minutes. Accused lay down beside Rister and placed his hand under the blanket and "over" Rister's stomach. Immediately afterward, accused moved his hand onto Rister's right leg, reached inside his shorts, "grabbed hold" of his penis, and started moving it up and down. Rister turned over on his left side and said "Sir, it is time you were leaving". Accused removed his hand, sat up, shortly afterward handed Rister an open pen knife,

and stated "Here, Sergeant, take this and use it on me. Someone should have long ago". Rister was frightened, closed the knife and returned it, and again suggested that accused leave. Accused then left the tent. Rister was not asleep at any time while accused was in the tent (R. 22-27, 83).

The next morning, 3 July, Rister was told to report to accused in the orderly room. When he reported, accused, referring to Lieutenant Leitrich and a sergeant in the outer office, stated "those people think you are on the carpet here". "Actually, you are not". Rister understood that accused was referring to his taking his pass when he was supposed to be restricted. Accused then "bowed his head" and said "Sergeant, I am sorry about what happened last night. I don't know what was wrong with me". Rister made no reply, saluted and left. A night or two later, 4 or 5 July, accused came to Rister's tent, called him outside, again apologized, and said, "I am very sorry for what happened last night", that he did not know "why he did it" nor what was wrong with him, and "Sergeant, you know you can report me for this?" The only other conversation that Rister had with accused about the incident was on 2 or 3 September, the same day that Rister "reported to Captain Malone". Accused asked him where he had been all morning, Rister stated that "Sergeant Johnson" could explain, and accused asked "What is the matter? Are you boys gunning for me?" In June accused had visited Rister's tent practically every night except on weekends. For a week or a little longer after "the incident", he did not come there, but then resumed his visits, of which there were at least 15 in July (R. 27-35).

On cross-examination, Sergeant Rister testified that prior to his induction he had attended college three and a half years, and taught school for a year and a half. Accused had encouraged him to apply for officer candidate school, on account of his educational background, and had told him that it would be necessary to overcome his shyness. The point where he and accused met on 2 July was the main entrance of the camp and the principal taxi stand. The cafe to which they went is one of the principal eating places of Falmouth. When they returned to camp that night, Rister was feeling very bad as a result of his illness. When they reached his tent, the other four occupants were there, in their bunks. The head of Rister's cot was toward the corner of the tent, and the foot was toward the center. Other than the five cots, the only other furniture in the tent was a clothes rack, five and a half or six feet long and four to four and a half feet high. It was between Rister's bunk and the entrance and approximately perpendicular to the bunk. Rister reiterated that he was awake the whole time he and accused were in the tent. He admitted that at a previous stage of the case he had stated to "Major Godfrey" that he had "dozed off". Rister did not know whether accused

lay on or under the blanket, but knew that the hand of accused was under the blanket. He admitted that in September he testified before "Lieutenant Colonel Stevenson" that accused was "over the blanket". Rister made no outcry when accused placed his hand on Rister's "privates". He heard no noise from any of the other bunks. The knife that accused handed him was a small pen knife. Rister stated that a knife he had seen on the reporter's desk in previous proceedings was "very close" to the size of the knife accused handed him, and admitted that on the former occasion he had testified that it felt "like the same knife" and was "exactly the same knife". When accused started out of the tent, Rister turned from his left side to his right side, raised up on his elbow and arm, and saw the head and shoulders of accused, over the top of the clothes rack, as he went out. When accused called Rister out of his tent on 4 or 5 July, the latter said something to the effect that he "didn't blackmail anyone", and that he liked accused as a friend. They then shook hands. Accused continued to encourage him to prepare for officer training. The first official complaint Rister made about the incident was to "Sergeant Johnson", the first sergeant, on 1 September. He then made a complaint to "Captain Malone", the company commander, on 2 September. He did not initiate these complaints, but was "sent for" (R. 36-74).

c. Specification 3: Sergeant Jewell testified that at about 8:30 p.m. about 12 or 15 July 1943, accused came to his tent and talked to him and the others as usual. Jewell, who had on his shirt and shorts, was writing a letter. Accused sat on Jewell's bed. When Jewell finished his letter, he was lying down as accused talked, and then fell asleep about 9:30. After sleeping a while, Jewell was awakened by the hand of accused under the cover, inside his shorts, and on his "privates". Jewell had an erection at the time. He turned over and sat up. There was no light in the tent. Accused moved his hand, sat there on the edge of the bed a "second or so", and left the tent. Neither said anything. About the next day, accused asked Jewell to report to the orderly room. When he reported there, accused apologized, said he was sorry for what happened, and "You know, you can turn me in". "You know you can also blackmail me". About 1 September, Jewell was asked to report to the first sergeant, and as a result missed the morning formation. At noon accused came to his tent and asked where he had been. When Jewell told him he had reported to the first sergeant, accused stated "What is the matter? Are they gunning for me?" (R. 90-94, 123).

On cross-examination, Jewell testified that he and Sergeant Rister were friends, came up together from a southern camp for the trial, and had discussed the case. When accused came to the tent on the occasion in July, Jewell's tent mates were there. When the incident happened, Jewell made no outcry. His tent mates were "sleeping, or not up". Jewell admitted that in

September he had testified under oath that on the day after the incident, when he was called to the orderly room, accused apologized, said he was sorry and that he did not know "what got into him", but did not say anything else. He admitted that prior to the September testimony the first sergeant and "Captain Malone" had interviewed him, and his memory had been refreshed, but he could give no explanation of why he had not mentioned at that time that accused said he could "turn him in" or could "blackmail" him. Jewell was sure that after the July incident accused did not come to his tent any more. When a question and answer that accused did come to his tent again, were read, he stated that accused came there on 1 September, and that he did not remember whether or not he resumed his visits after the incident. Jewell never made any complaint to a superior officer about either incident (R. 95-99, 109-115).

4. Accused testified substantially as follows: He categorically denied that he was guilty of any of the offenses charged. He stated that he was born in Boston, Massachusetts, attended Harvard College for two years, Carnegie Institute of Technology for two and a half years, and Massachusetts Institute of Technology for one year. He then worked for the United States Immigration and Naturalization Service for four and a half years on border patrol, and for a year and a half on the inspection staff. He was then inducted on 24 April 1942. He was commissioned a second lieutenant on 20 January 1943, attended the Amphibian Company Officers School until 26 February 1943, and was then assigned to Company B, 544th Engineer Amphibian Regiment. When he reported to Company B, the men were undergoing basic training. Accused took further specialized training at Harvard and returned to the company on 23 May. The next day they moved to Washburn Island. The company was organized according to the tables of organization about 6 or 7 July, and accused was given command of the first platoon. When accused first came into the command he was given, as required reading, a pamphlet entitled "The Company Commander" written by a German officer. A portion of this pamphlet (Def. Ex. A) was introduced in evidence. The text of the exhibit stresses the value of casual tours of inspection through the quarters of the men, not as a superior officer but as an "elder comrade". It suggests that during such a "friendly call" the company commander should talk with "his boys" and study their personalities and characteristics. Accused read the pamphlet and attempted to apply the instructions given. As he knew that "Captain Malone" expected to make him a platoon commander, and as he had lost touch with the men during his absence of about five weeks at school, he proceeded to make visits among the tents of the company. His chief purpose was to learn the abilities of the men. He took an interest in Sergeant Rister because he had the highest "GCT" score in the company. He suggested to Sergeant Rister that he plan to apply for officer candidate school, but told him he would have to overcome his shyness. Accused was interested in Sergeant Jewell because he was a good coxswain and above the average in the platoon (R. 125-137).

As to the occurrences with respect to which Sergeant Rister testified (Spec. 1), accused was in substantial accord up to the time they returned to Rister's tent about midnight on 2 July. He denied that there was any intention of concealing from others in the taxicab the fact that he and Rister were together. They had dinner in the main dining room of one of the principal cafes of Falmouth. When they returned to camp, Rister was very weak as a result of his illness, accused helped him into bed, waited a few minutes to see whether lying down would cause him to vomit again, then blew out the candle and left. He did not notice whether the other occupants of the tent were asleep or not. Accused denied that he subjected Rister to any indecent treatment and that he placed his hand under the cover and touched Rister's "privates" in any way. Accused denied that he handed Rister a knife and asked him to use it. He stated that at that time he had lost his pocket knife, as he had loaned it to Second Lieutenant Julian Burke and had not received it back. The knife that he had owned was about four inches long. Accused testified that at a previous stage of the case Lieutenant Burke appeared as a witness, produced his own knife, about two inches long, and left it on the reporter's table. Later, when Sergeant Rister testified, he examined Lieutenant Burke's knife and stated it was "exactly the same size" as the knife accused had handed him on 2 July (R. 137-143, 158-163).

Accused stated that on 3 July he called Rister to the orderly room because of a discussion he (accused) had that morning with Lieutenant Deitrich about Rister's having gone out on pass the night before when Lieutenant Deitrich had restricted him. He testified that he told Rister at that time that he had an argument with Lieutenant Deitrich about it, that he (accused) was "sorry that it happened", that it was the fault of accused and that he had not shown very much tact. He also asked Rister how he was and told him he (accused) was sorry "about what had happened". Accused stated that in saying he was sorry, he referred to putting Rister "in a bad light" with Lieutenant Deitrich, and also to the "hard time of it" that Rister had at the movies. Accused denied that he said "I don't know what was wrong with me", that Rister could report him, or that he could "blackmail" him. Accused stated that his visits to Rister's tent continued after 2 July. Accused testified as to the dimensions and inside arrangement of Rister's tent, as shown by the floor plan (Ex. 1) and by a drawing of a cross section (Def.Ex. B). He claimed that Rister could not have seen him at the tent entrance, over the top of the clothes rack, when on the cot raised on his elbow (R. 143-157).

As to the events with respect to which Sergeant Jewell testified (Specs. 2 and 3), accused stated that he did not on either occasion place his hand on Jewell's penis, and denied that he ever apologized to Jewell, or had any conversation with him about "blackmail" or anybody "gunning for"

him. He stated that he had no recollection of anything "particularly" ever happening in Jewell's tent (R. 163-164).

On cross-examination, accused admitted that he may have told a few "off color" stories in Rister's tent, but denied telling any dirty stories. He admitted that he testified on a previous occasion that he had told one or two dirty stories to "the boys" in the tents. He admitted that it was his custom to visit the men in the evenings several times a week, and that he visited them more often than any other officer in the platoon. He denied that on 1 July he told Rister not to say anything about his invitation, and that on 2 July in the taxicab he asked Rister whether he was stepping out. Accused admitted that when Rister was ill in the theater, he took Rister's pulse. He admitted that before leaving the tent he may have sat on the bed for a minute, and that he placed his hand on Rister's forehead to find out whether he had fever. He denied lying down beside Rister, or touching him, other than on the forehead. Accused thought he loaned his knife to Lieutenant Burke about the latter part of June. He denied the conversation with Rister about the knife, and that Rister asked him to leave the tent. Accused called Rister to his office the next day because he had an argument with Lieutenant Deitrich about the pass, and told him he would talk to Rister. Accused admitted that he had visited in Sergeant Jewell's tent, but had no particular recollection of visiting there about 16 or 17 June or 12 or 15 July. He denied that he had ever put his hand over Jewell's "privates" or on his penis. Accused also denied calling Sergeant Jewell to his office, apologizing to him, or stating that he could "blackmail" accused, or turn him in. He denied asking either Rister or Jewell, about 1 September, "What are the boys trying to do? Are they gunning for me?" Accused did not remember whether he had ever sat on Jewell's bunk, talking, after the light was out, and would not say that he never had. He did not start visiting the men until they went to Washburn Island, and denied that he visited the tents of Rister and Jewell more than others. He admitted testifying on another occasion that nearly every night he was free he visited in either Rister's or Jewell's tent (R. 165-196, 201).

On examination by the court and on cross-examination, accused stated that when Rister told him that he was restricted, he (accused) did not consult Lieutenant Deitrich, because the latter did not have authority to restrict Rister. He stated that he asked the first sergeant whether anyone was restricted. The next day, 3 July, Lieutenant Deitrich approached him about Rister's restriction, as he had looked for Rister on the night of 2 July and discovered his absence. Accused admitted that he should have consulted Lieutenant Deitrich. Accused stated that Rister

did not mention his restriction until 2 July, but admitted that he may have testified on a previous occasion that Rister told him of the restriction on 1 July. He admitted that he had knowledge of the restriction, from Rister, prior to going to dinner with him on 2 July (R. 196-200, 202-210).

It was stipulated (Def. Ex. C) that Second Lieutenant Julian Burke if present would testify that, to the best of his recollection at sometime between 5 July and 12 July, he borrowed a small knife from accused and left it on the company commander's desk the next day. At the time accused was acting company commander, and the knife was about twice as long as "this one". It was also stipulated (Def. Ex. D) that another officer would testify that he was directed to search the quarters of accused for a knife, searched a room and trunk, and did not find a knife (R. 210-211).

Stipulations (Def. Exs. K, L, M, N and O) were introduced to the effect that four enlisted men who were tent mates of Sergeant Rister about 2 July, and one who was his tent mate for about two months prior to 8 September, if present, would testify that none of them saw any untoward or indecent advances made by accused to Sergeant Rister on or about 2 July. It was also stipulated (Def. Exs. P, Q, R, S and T) that five enlisted men who had been tent mates of Sergeant Jewell would testify that they did not see accused make any untoward or indecent advances to Sergeant Jewell, three of them referring to about 15 June or about 15 July, and two of them referring only to about 15 July (R. 213-217).

It was also stipulated (Def. Exs. H, I and J) that Father Gerald F. Kellogg, a Catholic priest, of Messina, New York, would testify about the work and good reputation of accused in the Church; that Mr. Don A. Gribble, assistant inspector, United States Immigration and Naturalization Service, would testify that accused worked under him for seven months, that he observed accused in his work and as a scout master, and that the reputation of accused was excellent; and that Mr. M. H. Wilson, a high school principal, would testify that he observed accused when the latter served as basketball coach for one season and that the general reputation of accused was excellent (R. 212-213).

A stipulation (Def. Ex. E) was introduced to the effect that Colonel John R. Crume, Corps of Engineers, would testify that he observed accused carefully as a prospective company commander, that accused was an excellent officer, but that he knew nothing about the morals of accused. It was stipulated (Def. Ex. F) that Major John B. Gibbons, Jr., Corps of Engineers, would testify that accused had been under his command since about February 1943, that he found accused an excellent or superior

officer at all times and one of the outstanding young officers of the organization, and that he had never heard any of the men of the organization speak about the reputation of accused as to morals. It was further stipulated (Def. Ex. G) that Captain Frank G. Malone, Corps of Engineers, would testify that he had shared quarters with accused, his second-in-command, that accused was the most ambitious, energetic and industrious officer in the company, that accused knew more about the men of his platoon than did any other officer, and that he had never heard the morals of accused discussed; also that he (Captain Malone) had encouraged his officers to mix with the men, particularly in the evening, to ascertain whether there were any personal problems, but that he would not encourage visiting in the late hours of the evening (R. 211-212).

The last stipulation (Def. Ex. U) was that accused was given a psychiatric examination about 16 September 1943 and that the findings were: (1) No evidence of psychosis or psychoneurosis and (2) responsible and acccuntable for his behavior (R. 218).

5. Sergeant Rister was recalled in rebuttal and testified that in May, June and July 1943, he had heard men in the company refer to accused as "Mother Johnson", and that prior to 1 July accused had invited him to dinner two or three times. He testified that on the night of 2 July, the clothes rack in his tent was not more than two and a half feet from the left side wall of the tent, that he saw it in that position, and that he knew of nothing between the clothes rack and the center of the tent. On cross-examination he testified that the rack was partly in his line of vision as he saw accused go out the door, and he had to look around the side of it. He did not remember whether he testified on the previous day that he saw accused over the top of the clothes rack. He admitted that he testified in September that the rack was away from the wall of the tent "about not more than four feet", and stated that both distances were estimates. On examination by the court Rister testified that he could plainly see around the end of the clothes rack when he raised up on his elbow (R. 218-239).

6. a. The evidence shows that about 23 May 1943 accused returned to his organization after taking a specialized training course. The next day the organization moved to Washburn Island, Camp Edwards, Massachusetts. The men of the company to which accused was assigned occupied pyramidal tents, sixteen feet square, with five men to a tent. From the time they moved to Washburn Island, through June and July, accused visited the men in their tents practically every evening. In the course of these visits he was frequently in the tent occupied by Technician Fourth Grade Marvin K. Rister and the tent occupied by Technician Fourth Grade Dale R. Jewell. The company commander encouraged his officers to mix with the men in the

evening, and accused was given, as required reading, a pamphlet which suggested the importance of friendly calls on the men.

b. Sergeant Jewell testified that at about 8 p.m. on 16 or 17 June accused came to his tent and they talked as usual. About a half hour after the two or three other men present went to bed, Jewell also went to bed. Accused sat on the edge of the bunk and talked to Jewell. At about 9:30 or 9:45 accused put his hand on Jewell's leg, moved his hand up and down there, then placed it "on top" of Jewell's "privates" and "just moved it around". Jewell was on his back under the blanket. and the hand of accused was on "top" of the blanket. Jewell turned away and shortly afterward accused left the tent. Nothing was said by either.

Accused testified that he had no particular recollection of visiting Jewell's tent about 16 or 17 June, and denied that he had ever placed his hand over Jewell's "privates" or on his penis.

c. At about 10 p.m. on 1 July accused talked to Sergeant Rister, then on guard duty, and invited him out to dinner the following night to celebrate the birthday of accused. When Rister advised him that he had been restricted by "Lieutenant Deitrich", accused, the acting company commander at the time, stated that no one could restrict him without the consent of accused, and directed him to get his pass the following night. Shortly after 6 p.m. on 2 July, accused and Sergeant Rister went to the city of Falmouth for dinner. They entered the New Yorker Cafe, had one drink with another officer of the company, and then ate lobster. Afterward they went to a movie. While there, Rister became very ill from the lobster, and had to go to the latrine four or five times to vomit. When they left the theater, they returned to camp and arrived there about midnight. Rister was very weak on account of his illness, and accused accompanied him to his tent. Accused prepared Rister's cot, the latter went to bed, and accused sat on the edge of the cot, placed his hand on Rister's forehead and asked how he felt. The other occupants of the tent were apparently asleep.

Sergeant Rister testified that about that time the candle was blown out, that after they talked for four or five minutes accused lay down beside him, and that accused placed his hand under the blanket and "over" Rister's stomach. Rister testified further that immediately afterward accused moved his hand onto Rister's right leg, reached inside his shorts, "grabbed hold" of his penis, and started moving it up and down. Rister turned on his side and asked accused to leave. Accused removed his hand, sat up, handed Rister an open pen knife, and stated, "Here, Sergeant, take this and use it on me. Someone should have long ago". Rister closed the knife, returned it, and again suggested that accused leave. Accused then left the tent.

Accused denied that these latter events happened, and testified to the following version: When Rister was in bed, accused remained in the tent a few minutes to see whether Rister would vomit again on lying down, then blew out the candle and left the tent. He denied that he (accused) lay down, that he touched Rister other than on the forehead, that he subjected Rister to any indecent treatment, that he handed Rister a knife, or asked him to use a knife.

The next day, 3 July, accused called Rister to the orderly room, referred to an argument with Lieutenant Deitrich with respect to Rister's going out while under restriction, and stated, with reference to Lieutenant Deitrich and a sergeant in the outer office, "those people think you are on the carpet here." "Actually you are not".

Sergeant Rister testified that during the interview accused "bowed his head" and said, "I am sorry about what happened last night. I don't know what was wrong with me". Accused denied saying "I don't know what was wrong with me", and testified that in saying he was sorry he referred to putting Rister "in a bad light" with Lieutenant Deitrich over the restriction, and to the illness of Rister in the theater.

Sergeant Rister testified that about 4 or 5 July accused again apologized and said, "I am sorry for what happened last night", that he did not know "why he did it" nor what was wrong with him, and "Sergeant, you know you can report me for this?" Rister stated that he "didn't blackmail anyone" and that he liked accused as a friend. They then shook hands. Accused denied saying that he did not know what was wrong with him, that Rister could report him, or that Rister could "blackmail" him.

Rister testified that about 2 September, after he had been interviewed by the company commander, accused asked him "What is the matter? Are you boys gunning for me?" Accused denied this conversation.

Sergeant Rister made no official complaint about the occurrence of 2 July until 1 and 2 September when he was interviewed by the first sergeant and the company commander, who had "sent for" him.

d. Sergeant Jewell testified that at about 8:30 p.m. about 12 or 15 July accused came to his tent and talked to him and the other occupants as usual. After Jewell finished writing a letter, he lay on his cot and talked with accused, who was sitting on the bed. The other men in the tent were "sleeping, or not up". Jewell fell asleep about 9:30, but was awakened a little later by the hand of accused under the cover, inside his shorts, and on his "privates". Jewell had an erection at

the time. There was no light in the tent. Jewell turned over and sat up when he awakened, accused moved his hand, sat on the edge of the bed a "se...." or so", and then left. Neither said anything.

Accused testified that he had no particular recollection of visiting Jewell's tent about 12 or 15 July, and denied that he had ever placed his hand over Jewell's "privates" or on his penis.

Jewell testified that the next day accused called him to the orderly room, apologized, said he was sorry for what happened, and "You know you can turn me in". "You know you can also blackmail me". Accused testified that this conversation did not occur.

Jewell testified that about 1 September after he was interviewed by the first sergeant, accused asked him "What is the matter? Are they gunning for me?" Accused denied this conversation.

Sergeant Jewell never made any complaint to a superior officer about the incidents of 16 or 17 June and 12 or 15 July, but was interviewed on the subject by the first sergeant about 1 September.

e. The testimony of Sergeant Rister and of accused is in direct conflict as to the offense alleged in Specification 1. The testimony of Sergeant Jewell and of accused is in direct conflict as to the offenses alleged in Specifications 2 and 3. If the testimony of Sergeants Rister and Jewell is believed, the accused was shown guilty beyond any reasonable doubt. If the testimony of accused is believed, he was not shown to be guilty. The sole question for solution, therefore, involves the credibility of these witnesses.

It was shown that in some particulars there was a slight variance between the testimony of Sergeants Rister and Jewell at the trial and on former occasions. However, the statements referred to related to what the Board considers relatively unimportant collateral facts. It must be remembered that the events occurred in June and July 1943, whereas the witnesses were testifying in February 1944. The same comment applies to the conflicting statements of accused with respect to the date on which Sergeant Rister told him he had been placed under restriction. As to the important details of the offenses alleged, both Rister and Jewell were positive and assured in their testimony. If the accused did what they testified he did, it would be inconceivable that they could be in doubt as to whether or not the events occurred. Therefore, they either willfully lied in order to destroy the reputation and career of accused, or they told the truth.

Although each Specification and the proof thereof is to be considered separately, yet it is clear that if the version of accused is

accepted both Rister and Jewell willfully perjured themselves. There is no hint in the record of any reason or motive for these two men, both above average intelligence and admittedly good friends of accused, to have conspired against him. The three witnesses under discussion testified at length and in great detail, both on direct and cross-examination, so that the court had an unusual opportunity to observe their demeanor under oath and to appraise their respective traits indicating credibility. The court was satisfied that the two sergeants spoke the truth, and accordingly found the accused guilty.

The Board attaches little importance to the fact that neither Rister nor Jewell made any official complaint about what had occurred until they were called in and interviewed about 1 September. They were friends of accused, respected him as a company officer, and not unnaturally preferred to forget the whole thing.

For the reasons stated the Board of Review is convinced that Sergeants Rister and Jewell told the truth, and therefore is of the opinion that the evidence shows beyond reasonable doubt that accused was guilty.

7. The accused is 30 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 24 April 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 20 January 1943; temporarily promoted to first lieutenant, Army of the United States, 1 June 1943.

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

Samuel M. Driver, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 25 MAR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Charles M. Johnson (O-1109385), Corps of Engineers.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused wrongfully placed his hand on the penis of one enlisted man on one occasion, and on the penis of another on two other occasions. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 221, 29 May 1944)

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

(359)

11 JAN 1944

SPJGH
CM 240812

U N I T E D S T A T E S	)	THIRD ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Van Dorn, Mississippi,
Private JAMES L. BROWN	)	16 and 17 July 1943. Dis-
(36171146), Company A,	)	honorable discharge and con-
364th Infantry.	)	finement for fifteen (15)
	)	years. Penitentiary.

HOLDING by the BOARD OF REVIEW
DRIVER, O'CONNOR and LOTTERHOS, 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 66th Article of War.

Specification: In that private James L. Brown, Company "A", 364th Infantry, did, at Camp Van Dorn, Mississippi, on or about 30 May 1943, voluntarily join in a mutiny which had been begun in the area of Company "A", 364th Infantry against the lawful military authority of Lieutenant Colonel Charles W. O'Bryant, Commanding Officer, First Battalion, 364th Infantry, and did, with intent to override such authority for the time being, in concert with sundry other members of said command assembled in the area of Company "A", 364th Infantry, refuse to disperse.

He pleaded not guilty to and was found guilty of the Specification and Charge He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifty years. The reviewing authority approved the sentence, reduced the period of confinement to fifteen years, and designated the United States Penitentiary, Atlanta, Georgia as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

Accused was tried jointly with six other accused against whom similar Charges and Specifications were preferred.

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

At about 4:00 p.m. on Sunday, 30 May 1943, there was a report at Camp Van Dorn, Mississippi that one of the men of the 364th Infantry had been shot in town. Shortly afterward a large crowd of men, including many from Company A, 364th Infantry, gathered in the area of that company. There were about 100 men present, and they were "milling around, doing a lot of talking". Comments were made to the effect that they were going to town and "get" the "joker" that had shot one of the men, that they were "going to have to do something about it", and that they were "going to take the matter into their own hands" and avenge the death of the soldier. At about five o'clock Captain Charles L. Ellis, Jr., commanding Company A, who had been informed of the situation, proceeded to the company area and attempted to calm the men and disperse the gathering. Captain Ellis tried to talk to them, but had "a pretty tough job of it because there were always two or three of them talking". The men would not pay attention to Captain Ellis (R. 21-22, 30-31, 39-42, 69-70, 85, 102).

Lieutenant Colonel Charles W. O'Bryant, commanding the First Battalion, 364th Infantry, learned of the trouble and proceeded to the place where Captain Ellis was talking to the men. They wanted to "get arms", go to town, and "do something" about the shooting of one of their number. Captain Ellis was "trying to talk them out of it". Colonel O'Bryant called for attention and the men immediately quieted down and listened. He told them that the authorities were not sure what had happened in town; that whatever had happened there was nothing the men could do about it; and to have confidence in "Colonel Goodman", the regimental commander, who was "already" investigating the incident. He then ordered them to return to their barracks and quiet down. The men started "breaking up and shuffling off in all directions". Captain Ellis observed that the "most pronounced movement" of the group was "over between" the buildings housing the supply rooms of Companies A and D. In going in that direction the men were moving directly away from the barracks. Colonel O'Bryant and Captain Ellis started to leave the area (R. 12-14, 17, 44-45, 57-58).

Shortly afterward, Captain Ellis heard a "lot of noise, a cracking noise" in the Company A supply room. He and several other officers, including Colonel O'Bryant, went to the supply room, which had been broken open. They found 10 or 20 men inside, including those "jammed" in the door. There were 75 or 100 men gathered outside of the supply room, talking and "milling around". The men on the inside had broken open a rifle rack, some of them had obtained weapons, and they were "very disturbed and worked up". After considerable effort, Captain Ellis and other officers present succeeded in clearing the supply room and dispersing the crowd (R. 15-16, 23, 25, 28, 33-36, 45-47, 50, 62-64, 67, 71-72).

One of the men found on the inside of the supply room was Private John W. Wharton, who had a rifle in his hands and refused to surrender it. Wharton finally gave the rifle up to someone (R. 34, 46, 64, 72, 80, 104, 110).

Accused was present when Captain Ellis and Colonel O'Bryant talked to the crowd of men in the area of Company A. He had gone there with Sergeant Glen Hendricks and arrived while Captain Ellis was talking to the men. When Colonel O'Bryant ordered the men to "break it up", Sergeant Hendricks told accused to go back to the barracks, and saw accused go to the barracks steps. There was no evidence that accused was present at or in the supply room, other than a statement (Ex. 7) which he made to First Lieutenant Eldon L. Ballinger, investigating officer, after being warned that he could remain silent and that the statement could be used against him. The statement of accused was in pertinent part as follows: He went to the company area with Sergeant Hendricks, heard Captain Ellis talking, walked out of the crowd, and sat on the barracks steps with several others. After Colonel O'Bryant ordered the men back to their barracks, accused saw a group going to the supply room. When someone told him that Private Wharton had a gun, accused "went around to take the gun away from him, because he was a friend of mine and I didn't want him to get in any trouble". When accused "got there" Wharton was just inside the supply room door, where 'Lt. Soulds had hold of the BAR he had". Accused told Lieutenant Soulds to let him handle it, took the gun away from Wharton, handed it to Lieutenant Soulds, "stayed and heard the speech" that Colonel Goodman made, and then returned to the barracks (R. 42-43, 50, 52, 59, 84-89, 95, 97, 120-121).

4. The defense offered no evidence in behalf of this accused.

Accused elected to remain silent (R. 127).

5. About 4:00 p.m. on 30 May 1943 there was a report at Camp Van Dorn, Mississippi, that one of the men of the 364th Infantry had been shot in town. Shortly afterward about 100 men, including many from Company A, 364th Infantry, gathered in the area of that company, and were "milling around" and discussing taking retaliatory action. The company commander of Company A attempted to calm and disperse them. Then the battalion commander, Lieutenant Colonel Charles W. O'Bryant, talked to the men and ordered them to return to their barracks and quiet down. The crowd left the area, but almost immediately a large number of the men proceeded to the supply room of Company A, broke into it, broke open a rifle rack, and began taking weapons. Several officers arrived at the supply room, and after considerable effort cleared the room and dispersed the crowd.

There was definitely a mutiny at the time and place stated, in that a large number of soldiers collectively disobeyed the order of Colonel O'Bryant to return to their barracks, by instead proceeding to the supply room, breaking in, and arming themselves with rifles.

Accused was in the group which Colonel O'Bryant ordered to return to the barracks, but it was not shown that he disobeyed the order. He went to the barracks steps. There was no proof that he was present at the supply room other than as shown in a voluntary statement which he made. Accused admitted in this statement that he went to the supply room, but at the same time gave as a reason for his presence there that he had been sitting on the barracks steps, observed the crowd going to the supply room, was advised that a friend of his, Private Wharton, had a rifle, proceeded to the supply room to disarm his friend and keep him out of trouble, and did disarm Wharton and give the rifle to an officer present. The explanation given by accused is corroborated by prosecution testimony that Wharton had a rifle, refused to surrender it, and was finally disarmed by someone not identified by any witness.

Although presence at the scene of mutiny is a necessary element of the offense of joining in a mutiny (MCM, 1928, par. 136b), it does not ordinarily, alone and without proof of some circumstance showing a participation in some overt act, sustain an inference of guilt. The mutiny alleged in this case is a concerted refusal to disperse, when Colonel O'Bryant ordered the men assembled in the company area to return to their barracks. After the order was given there was a "pronounced movement" of a large number of the men toward the supply room, which was in a direction directly away from the barracks. As to those men who were shown to be present at the supply room immediately afterward, with no proof that they had separated themselves from the mutinous group, the inference is clear that they joined in the concerted refusal to obey the order. The overt act involved was that of proceeding with the crowd to the supply room, instead of returning to the barracks. However, accused was affirmatively shown to have returned to the barracks after Colonel O'Bryant's order, so that he was not a party to the original mutiny which had its inception in the company area. In the opinion of the Board of Review, his mere presence at the supply room at a later time (shown only by his own admission, which at the same time stated a lawful reason for his presence) does not sustain an inference that he had gone there for the unlawful purpose of joining the mutiny from which he had separated himself at the time when it began.

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

Samuel M. Irvin, Judge Advocate

_____, Judge Advocate

J. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 25 MAR 1944 - To the Secretary of War.

1. In the case of Private James L. Brown (36171146), Company A, 364th Infantry, I concur in the foregoing holding of the Board of Review, and, for the reasons therein stated, recommend that the findings of guilty and the sentence be disapproved. A rehearing is not recommended. A form of action carrying this recommendation into effect is inclosed herewith for signature.

2. This case is submitted for the action of the Secretary of War in order to avoid the delay which would be involved in the return of the approved holding overseas to the reviewing authority for further action.

Myron C. Cramer

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

1 Incl.
Form of Action.

(Findings and sentence as to Private James L. Brown disapproved. Sentences as to Privates Richard G. Golden, John G. King, John W. Wharton and Solomon Smith, Jr., (see CM 240812, 26 B.R. 137) ordered executed. G.C.M.O. 149, 31 Mar 1944)

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

SPJGK
CM 241729

8 MAR 1944

U N I T E D S T A T E S	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Drew Field, Tampa, Florida,
Second Lieutenant RICHARD E. WELD (O-680974), Air Corps.	)	3 September 1943. Dismissal and total forfeitures.
	)	

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

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

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

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

Specification: In that 2nd Lt. Richard E. Weld, 56th Fighte Squadron, Bartow AAF, Bartow, Fla., did, on 18 August 1943 operate a P-51 military airplane in a reckless and careless manner, colliding in mid-air with a B-26 military airplane over an area approximately 15 miles Southeast of the City of Tampa, Florida, in violation of Par. 1, AAF Regulation No. 60-16, dated Sept. 9, 1942.

CHARGE II: Violation of the 83rd Article of War.

Specification 1: In that 2nd Lt. Richard E. Weld, 56th Fighter Squadron, Bartow AAF, Bartow, Florida, did, at a location approximately 15 miles Southeast of the City of Tampa, Florida, on August 18, 1943, through neglect suffer a P-51 military airplane of the value of $53,000.00, military property belonging to the United States, to be damaged by colliding same in mid-air with a B-26 military airplane.

Specification 2: In that 2nd Lt. Richard E. Weld, 56th Fighter Squadron, Bartow AAF, Bartow, Florida, did at a location approximately 15 miles Southeast of Tampa, Florida, on August 18, 1943, through neglect suffer a B-26 military airplane of the value of approximately $137,000.00, military property belonging to the United States, to be damaged by collision in mid-air

with a P-51 military airplane which he, the said 2nd Lt. Richard E. Weld, was piloting.

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

Specification 1: (Finding of not guilty).

Specification 2: (Finding of not guilty).

He pleaded not guilty to Charges I and III and the Specifications thereof, guilty to Charge II, and guilty to the Specifications of Charge II except the words "through neglect". He was found guilty of Charges I and II and their Specifications and not guilty of Charge III and its Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Summary of the evidence.

Accused was a member of the 56th Fighter Squadron, 54th Fighter Group, Army Air Forces, Bartow Army Air Base, Bartow, Florida, under the command of Major William H. Merriam, Air Corps (R.31). Accused had flown about 80 or 90 hours at the time of the events hereinafter related (R.23).

On 18 August 1943, about 8 a.m., four P-51 fighter planes left the Bartow Air Base on a camera gunnery mission (R.5,9,11,12,18,33). The four pilots were Second Lieutenants Paul M. Buckles, Jacob I. Piatt, Wilbur A. Tapscott, and accused. Lieutenant Buckles was the flight leader. He and Lieutenant Piatt were in the first two-ship "element", and Lieutenant Tapscott and accused were in the second, the former leading the element (R.11-13,16-18,23,26,27). The planes were not all equipped with the same type of radio, and Lieutenant Buckles could not make contact by radio with any plane except that piloted by Lieutenant Piatt (R.14).

Without special authority, or prearrangement, pilots were not permitted to make simulated attacks, known as "passes", on bombers. Neither accused nor any of the other three pilots was authorized to make passes, and making passes was no part of the mission (R.13,32,33). Likewise, pilots were not permitted to fly closer than 500 feet from another plane (R.20). Although Lieutenant Piatt testified that prior to 18 August passes were frequently made (apparently without authority), Major Merriam knew of no such violations, and Lieutenant Buckles testified that he had not led or seen any such unauthorized attacks (R.15,16,22,33). A member of the crew of one of the bombers involved in the present case testified that he had been attacked by pursuit planes on previous occasions (R.7). Lieutenant Piatt

testified that on passes the fighter plane seldom comes within 300 yards of the ship attacked and that it is not safe to come too close (R.23).

Upon the return trip, after completion of the camera gunnery mission, Lieutenant Buckles' plane became "a little rough on control", whereupon he signaled to Lieutenant Piatt to take the lead, which the latter did (R.12,18). Running into a local thunder shower, Lieutenant Piatt made a "climbing turn" to avoid the storm, and came out of the turn following two B-26 bombers (R. 8,10,12,15,17,18,27). The bombers were flying "a 2-ship element" on a level course at about 7000 feet (R.5,6,8,9,17,18,27, 28). The bombers were not scheduled to have attacks made upon them by fighter planes, and received no communication on the subject from the fighters (R.6, 7,9,29).

The turn made by Lieutenant Piatt "strung out" the fighter formation. In a "string formation" of this nature, each plane is supposed to fly behind the preceding plane, and, accordingly, Lieutenant Buckles "dropped back a little" (R.16,21). Lieutenant Buckles called Lieutenant Piatt on the radio and told him to stay away from the bombers, but Lieutenant Piatt did not receive the call (R.12,19). Lieutenant Buckles started rocking his wings in order that the third and fourth planes would follow him and "rejoin the formation" (R.12,14). He did not know whether accused saw the signal (R.14).

Lieutenant Piatt made a diving pass at the bombers, but did not come within 300 yards of them (R.18,19,21). Then he climbed above them and "broke away" (R.19,21). As he passed the bombers on the way up, he noticed another fighter plane on the other side of them at about the same distance from them (R.19).

Accused made a pass from below the bombers, coming between 30 and 50 feet of the right wing of one of them. He went up to about 1000 feet above them, "rolled over", and made a diving pass toward them. According to Lieutenant Buckles, the pass made by accused followed one made by Lieutenant Tapscott, although Lieutenant Buckles "couldn't say how close" Lieutenant Tapscott came to the bombers, and the latter testified that he did not make a pass, as the bombers did not come within range. Accused's plane hit the left engine of one of the bombers (R.5,6,8,9,10,12,13,17,19,27). The collision occurred about 20 miles east of Tampa (R.5). Accused bailed out, as did four members of the bomber crew (R.6,7,9,13,28). Both the bomber and the fighter crashed and burned. They were completely destroyed (R.6, 10,11,13,28,33,34). The fighter was valued at $53,000, and the bomber at $137,000 (R.33,34). The pilot and tail gunner of the bomber were burned to death in the wreckage (R.28,30,31; Pros. Exs. B,C).

Without objection by the defense, there was admitted in evidence a written statement made by accused to the investigating officer (R.25; Pros. Ex. A). The latter official first warned accused that any statement

he made could be used against him; that he could either make a statement or remain silent; and that his remaining silent would not be used against him by the court (R.25). The material part of the statement is as follows: When the flight went into a string formation, accused believed that the intention was to make passes at the bombers from a distance of 750 to 1000 feet. He "knew" that bomber crews were always glad to have passes made at them for practice purposes. He followed the second ship on a right-hand pass and gained altitude for making a high pass from the right side. As he neared the bomber, he saw another ship coming in from the stern off his left wing. He tried to pull up and to the right, whereupon he "mushed" into the right wing of the bomber. He was traveling with "terrific velocity" at the time (Pros. Ex. A).

After his rights had been explained, accused took the stand as a witness (R.37). His testimony is as follows: Accused did not know that Lieutenant Buckles had "switched back to second place", and thought he was in first place (R.38). The first two ships made their passes at the bombers from below, and Lieutenant Tapscott and accused followed with their passes, although accused's maneuver was "not so much a pass as in order to get ahead of them to gain altitude" (R.37,38,40). At this time accused did not come within 500 feet of the bombers (R.40). When accused's attention was called to the prosecution's testimony concerning his distance from the bomber on the upward "pass", he stated that a pilot cannot judge distance in the air "in actual proximity at all unless they are looking through a gun sight" (R.40). After ascending, accused did not see the second ship or "the man ahead of" him (R.45). However, he thought that Lieutenant Piatt intended to make another pass (R.38). Accused rose to a point about 1000 to 1200 feet above the bombers and started down toward them (R.38,41). Asked how close he intended to come to the B-26 when he made the dive, accused answered, "not close enough to endanger either the B-26 or myself". Asked whether he intended to come to 100 feet of the bomber, he answered that he did not, and he gave the same answer when asked whether he intended to come to 200 feet. In response to the question, "Three hundred feet?", accused stated that he did not have "a definite intention about coming within any specific range", because he did not figure that he "would range close enough to predetermine coming out that close". He added that when he started his pass, he intended to get his sight on the bomber and still clear it "by a very comfortable margin". To the question, "What do you call a comfortable margin?", accused replied, "Say anything beyond 300 feet". Subsequently he was asked, "Tactically speaking, had this been an enemy bomber, to successfully make a pass and use your guns successfully, how close would you have gotten to him?". To this he replied, "750 feet", and he added, "That is the point of convergence on our guns" (R.44).

As accused came down, he noticed a fighter plane coming in from the rear and he believed that the ship was about to make a pass. Both fighters were "going at a pretty good rate"; in fact, accused estimated his speed

as about 300 miles an hour. Being uncertain as to what the other fighter would do, he hesitated in order to watch developments. He hesitated too long "making a serious breach of bad judgment". Deciding that if he followed through with his pass he would come too close to the bombers, he "started to pull up away from and to the right of the bombers". He did not think that his "mushing" would carry him into the bomber, but that was bad judgment on his part (R.38,39). His plane hit the left engine of the bomber (R.39).

Accused was familiar with the regulation against flying closer than 500 feet from another plane (R.40). He testified further that when he first joined the squadron, the commanding officer gave the same instruction and also told the pilots that they must not make passes at other planes. He stated that he was making passes at the B-26 immediately prior to the collision. Asked, "Well, did you have authority to do that?", he replied, "Well, not to my knowledge, no, sir". However, he indicated that his understanding was that passes should not be made at less than 500 feet (R.42,43).

Accused stated that on numerous occasions the regulations prohibiting such conduct had been broken by various pilots, including Lieutenant Buckles, and more than once, instructor pilots had led accused into unauthorized passes (R.38,41,42). Furthermore, B-26 pilots had told accused that they welcomed passes by fighters (R.43). Accused believed that the squadron commander may have known that his pilots often violated flying regulations, and on one occasion the squadron commander participated in a flight in which passes were made at other fighters at less than 500 feet, which fact the squadron commander knew (R.41,42). Asked whether he wished to leave the impression that prior violations of regulations by some of the flight leaders should be an excuse for violations by him, accused answered, "No, Sir". He stated further that his reference to prior violations was made "to bring out the fact" that he "had reason to assume that there was going to be a run on this bomber, that there was going to be more than one pass made on this bomber" (R.42). According to custom, he was following the flight leader. He had been reprimanded for not staying with the flight in making an attack (R.38,41,45). He had flown on missions where attacks were scheduled (R.44,45). In the present instance, he did not know whether to break formation or break a flying regulation (R.45). Later, he realized that he was wrong in violating regulations, but at the time he considered that he acted properly in following the formation (R.46). He blamed the accident on pilot error and bad judgment rather than "a flagrant violation of the order" (R.42,43). He stated that "not at any time during this testimony" was he "trying to condone" his actions, but that he was "merely trying to say there were extenuating circumstances", by reason of which he "felt partially justified" in doing what he did (R.46).

Captain Raymond P. Elledger, Air Corps, accused's flight commander,

testified that accused was a conscientious pilot and very good flying officer, who had carried out his missions to the satisfaction of the supervisory personnel. In the opinion of witness, accused would continue to be a good pilot if retained in the service. He described the accident as "just a little mistake that happened to" accused (R.34-35).

4. The evidence thus shows that at the place and time alleged, the fighter plane operated by accused collided with a bomber, as a result of which two lives were lost and both planes were totally destroyed. It was alleged in the Specification, Charge I, that accused operated the plane in a reckless and careless manner in violation of paragraph 1, Army Air Forces Regulation No. 60-16, 9 September 1942. That regulation provides that an "air force pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air * * *".

Army Air Forces Regulation No. 62-14, 26 May 1942, is entitled "Flying Safety: Reporting and Investigation of Aircraft Accidents". Part One, Section I, paragraph 2, of this regulation, entitled "Purpose of This Regulation", provides that the instructions contained in the regulation shall govern personnel in connection with reporting, investigating, and classifying accidents. Part Seven, Section I, paragraph 1, states that accidents are investigated for the purpose of establishing causes, in order that preventive action may be taken. Part Nine deals with accident classification, and Section II thereof is entitled "Cause". Paragraph 2b of that section lists "Pilot Error" as one of the casual classifications. The subheadings under "Pilot Error" are "Errors of Judgment, Errors of Technique, Disobedience of Orders, Carelessness, Negligence, and Miscellaneous". Paragraph 2b (1) (d) (1) reads as follows:

> "Carelessness for accident report purposes will be used when the accident is the result of inattention or lack of mental alertness."

Paragraph 4 of Part Ten, "Definitions", defines carelessness as "lack of mental alertness". Part Nine, Section II, paragraph 2b (1)(d)(1), concerning pilot error, states the following:

> "Negligence will be used only when there has been established beyond any reasonable doubt the existence of intent to deliberately misuse or destroy government equipment or to destroy or damage private property or to injure or otherwise abuse personnel, civilian or otherwise."

The paragraph then gives the following examples:

> "Failure to lower the landing gear on landing in an airplane is carelessness. Diving at a crowd on the ground, or a boat on

the water, etc., when the least failure of materiel or the slightest display of poor technique would result in the death or injury to personnel, is negligence."

Part Ten, paragraph 20, defines negligence as "willful neglect". Army Air Forces Regulation No. 60-16, already referred to, which, as noted, contains the prohibition against reckless or careless operation, provides in paragraph 49d for deviation from the regulations of 60-18 when necessary to carry out training directives.

It is worthy of note that the Army Air Forces regulations cited do not define the term "reckless". Reference to the definition of that term in the civil courts indicates some diversity of opinion, but the majority of courts appear to hold that it connotes conduct so negligent as to show an indifference to or disregard for the rights of others (36 Words and Phrases, 1940 ed., pp. 496-500). Negligence, as defined in Army Air Forces Regulation No. 62-14, is a narrower term than negligence at common law, and seems practically synonymous with the term "reckless", although possibly the latter word, as used in Regulation No. 60-16, is intended to convey a broader meaning. At any rate, when accused deliberately executed a pass, while ascending, followed by a diving pass from 1000 feet, both in comparatively close proximity to the bomber, his conduct was clearly reckless and negligent within the definitions and example of the latter term used in the regulation. Since his conduct had not been authorized by the proper authorities, he is not protected by the provision permitting deviations from regulations when necessary to carry out training directives. On the issue of negligence, the case is similar to, although not on all fours with, CM 233196, Bell, in which the accused, while intentionally flying at a low altitude above a "crash" boat in violation of regulations prescribing minimum altitudes of flight, was held guilty of negligence.

Accused is not protected by the fact that other pilots of his squadron may have been guilty of similar acts of recklessness. Nor is it a defense that his intention was to follow his flight leader, for it is obvious that he owed no duty to follow his leader in acts of unauthorized recklessness, and certainly he would not have been disciplined for failure to do so. Indeed, in his own testimony, accused reveals his subsequent realization of the wrongful nature of his actions. In the opinion of the Board of Review the evidence is legally sufficient to support the findings of guilty of Charge I and its Specification.

Charge II contains Specifications alleging that accused through neglect suffered the P-51 and the B-26 to be damaged by a collision in mid-air, in violation of Article of War 83. That Article of War is not limited to cases of neglect by omission to act, but includes cases of

malfeasance and misfeasance (MCM, 1928, par. 143; CM 233196, Bell). Thus, damage caused by reckless operation constitutes a "suffering through neglect" in violation of the Article of War. However, Article of War 83 is limited to property under the control of accused (Dig. Op. JAG, 1912-40, Sec. 441 (2)). The bomber was not under accused's control and consequently the finding of guilty of Specification 2, relating to the bomber, cannot be sustained, but the finding of guilty of Specification 1 is legal, since the P-51 was flown by accused.

5. War Department records show that accused is 24 years of age. He graduated from elementary school, but there is nothing to indicate that he attended high school. He served as an aviation cadet from 15 August 1942 until his appointment as a second lieutenant, Army of the United States, on 24 May 1943.

6. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted above, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge II, legally sufficient to support the findings of guilty of all other Specifications and of the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized under Articles of War 83 and 96.

Judge Advocate.

(Dissent), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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

SPJGK
CM 241729

8 MAR 1944

U N I T E D S T A T E S	)	THIRD AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at
	)	Drew Field, Tampa, Florida,
Second Lieutenant RICHARD E. WELD (0-680974), Air Corps.	)	3 September 1943. Dismissal and total forfeitures.
	)	

DISSENTING OPINION
of
JOHN WARREN HILL, Judge Advocate.

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1. I find myself unable to agree with the result reached in the majority opinion of the Board of Review in this case. This opinion finds accused properly convicted by general court-martial of (1) recklessly and carelessly operating a military airplane in violation of paragraph 1, Army Air Forces Regulation 60-16, dated September 9, 1942, in violation of Article of War 96, and of (2) suffering through neglect the damage of this military airplane in violation of Article of War 83.

The evidence is undisputed that accused while flying in No. 4 position in a formation of four P-51 airplanes made or started to "make a pass", a simulated attack, on a B-26 bomber and that while making the pass, or attempting to pull out of the pass so as not to hit an intervening airplane, he collided with the bomber, destroying it and his own plane.

Paragraph 1 of Army Air Forces Regulations 60-16 forbids the operation of aircraft in a reckless and careless manner. Paragraph 5h of these regulations 60-16A forbids flying closer than 500 feet to any other aircraft except as flown in authorized formation. However, both these provisions are qualified by succeeding paragraphs of the regulations (par. 64d of 60-16 and par. 5h of 60-16A), which provide that they may be disregarded when flying tactics or maneuvers otherwise forbidden are deemed necessary for training, by "commanding officers". In addition, Major Merriam, commander of accused's fighter squadron, had instructed accused and his class, when they had had only 10 or 15 hours training, about seven weeks before the collision in question, that they were not to make passes unless it had been prearranged.

If accused's act of passing at the bomber was authorized, he could not be guilty of recklessness or carelessness. Neither could he be guilty of negligence nor of suffering damage to military property through neglect.

Carelessness and negligence are lesser included evils of recklessness. In State v. Mills (181 N.C. 530, 106 S.E. 677) the word "reckless" is defined as an "intensive expression of the word 'careless'" and is stated to mean "rashly negligent, utterly careless".

The theory upon which the majority opinion reaches its conclusion is that there is recklessness inherent in one plane making a pass at another "in comparatively close proximity"; that the pass made by accused was unauthorized, and that it therefore violated the pertinent Army Air Forces Regulation and constituted neglect under Article of War 83 since it resulted in destruction of the plane flown by accused.

It is the opinion of the dissenting member:

a. That "passing" is not inherently reckless, and that the words "in comparatively close proximity" are too general and indefinite to stamp with recklessness conduct otherwise harmless. A pass may be executed in a manner fraught with no danger, viz., at a distance of over 500 feet, the standard set by the regulations. The weight of evidence shows that accused intended to pass at 750 feet, thereby violating no Army Air Forces Regulation. The conclusion of the majority opinion that passing in comparatively close proximity is reckless is inappropriate to the facts since it is not predicated upon proof that accused intended so to fly and is unwarranted and improper as a matter of law.

b. The instructions not to pass, originally given to accused by the commander of his fighter squadron, had not been unqualified. Passing was forbidden only unless prearranged. Since the giving of the instructions, seven weeks before, accused had been led into passes by pilot instructors and by the fighter squadron commander himself. Accused was justified in believing that he was being led into an authorized, "prearranged", pass on this occasion.

c. At the time accused made this pass he was flying in a formation, under authorized leadership. He followed the lead of the preceding planes. Under military law he was obligated to follow unquestioningly the tactics set by his flight leader and under the same law he is exempted from the consequences of his obedience to orders, at least before a military tribunal.

In this last connection it must be remembered that accused was not on a solo flight acting on his own responsibility, required to know himself whether it had been prearranged that he could pass. The case of CM 233196, Bell, cited by the majority opinion, is not in point. The accused in that case was "on his own", flying solo. On his own responsibility, he violated an Army Air Forces Regulation against low flying. Furthermore, the uncontradicted evidence clearly showed that Bell intended to dive within 50 feet

from the object which he "attacked", while in this case there is no evidence of any such intent.

2. Due to a possible difference of opinion as to the weight and importance to be attributed to portions of the testimony, the dissenting opinion presents its summary of the evidence:

The prosecution showed that accused is a second lieutenant, Air Corps, 56th Fighter Squadron, 54th Fighter Group, stationed at Bartow Army Air Field, Bartow, Florida (R.31). On 18 August 1943, accused was flying one of four P-51's engaged in a camera gunnery mission. Second Lieutenants Paul M. Buckles, flight leader and instructor pilot, Jacob I. Piatt and Wilber A. Tapscott, all of the Air Corps, were the other pilots on this mission. By around 9 o'clock the mission had been completed and the flight was headed back to Bartow. Lieutenant Buckles, in the lead, found his plane "a little rough on control" and motioned Lieutenant Piatt, the second man in the formation to take the lead. They ran into a local thunder shower. Lieutenant Piatt started a climbing turn, to clear the storm center, and came out following two B-26 bomber planes which were on approximately the same course. The climbing turn executed by Lieutenant Piatt "pulled the formation out into a string". Lieutenant Buckles made a turn to the right, just about parallel with the bombers and this threw the two ships in the second element, flown by Lieutenant Tapscott and accused, above and behind the bombers (R.11,12,35). Lieutenant Piatt testified that after taking the lead he started to climb up to get over the thunderstorm and at that time the two B-26's passed in front. On his climb he gained about 1500 feet. He then went into a dive to pick up speed and from about 1000 feet below he began making a climbing approach on the bombers, got within 300 yards, broke away down and to the left and then went about 500 feet above them. From there, he viewed the collision and saw the wreckage of a P-51 "turn away from the B-26" (R.19). First Lieutenant George D. Hughes and Second Lieutenant David R. Meredith, both of the Air Corps, were pilot and co-pilot respectively on one of the B-26's encountered by this flight of P-51's. These officers stated that their ship was part of a two ship formation on the left wing of the lead ship. About 20 miles east of the cement plant at Tampa, between 9 and 9:15, while they were flying at about 7000 feet, they saw the P-51 come "pretty close to the lead ship", about 50 feet from the B-26, and "pull up" about a thousand feet above the line of flight, roll over and make a "pass", an attack, on the two bombers. The P-51 "came almost perpendicularly down". About half way down "he turned approximately 180 degrees" and came at the bombers heading in the direction of their flight. When "he" reached the level "he" struck the lead B-26, "his" nose going directly into the left engine (R.5,6,7,8). After the collision the B-26 kept on a straight course and four of the crew of six proceeded to bail out. The B-26 was held in control until about 500 feet

from earth when it went into a flat spin, crashed, and burst into flames. Accused operated the P-51 which was in the collision. It went straight down, spinning and tumbling. The pilot parachuted out, and the ship hit the ground and immediately burst into flame (R.6,7,10,11,13). The P-51 was worth $53,000 and the B-26 was worth $137,000 (R.33,34).

On cross-examination, Lieutenant Piatt testified that he saw the bombers and that it occurred to him to make a pass at them; that when he first approached the bombers he made one pass and climbed back up to the left; that he was the first man to make a pass on the bombers. He "thought" the "other man may have mistaken" him for Lieutenant Buckles and have followed him. He explained "a stringed formation", saying it could be a very loose type of formation with not "too much distance" or "quite an interval" between the ships, depending upon what is anticipated; and that in any type of a string formation where there is liable to be combat involved, the formation should be very loose. He also testified on cross-examination that in practically every flight that they made, they made "passes" at other formations as a matter of customary practice. On direct examination, Lieutenant Piatt testified that there were no orders posted on the bulletin board "at Bartow" ordering pilots not to make passes at airplanes. He stated that there was one bulletin there that said "the minimum distance that an airplane can be flown from one another, that is, 500 feet" (R.20-22, 24). As stated, Lieutenant Buckles testified that when the flight ran into the thunderstorm the formation "strung out" and that he, and probably the other two, dropped back a little. He noticed Lieutenant Piatt, who had taken No. 1, start a climbing turn and he called him on the radio and told him to stay away from the bombers. He is not sure that Lieutenant Piatt received the orders. Lieutenant Buckles could not communicate by radio with accused since his radio was of a different type than that operated by the flight commander. Lieutenant Buckles saw Lieutenant Tapscott, who was flying No. 3, dive from above to down below the bombers. He then saw Lieutenant Weld, who was flying No. 4, do the same and collide (R.12-13). Lieutenant Tapscott testified that at the time of the accident he was leading the second element of the P-51's. Accused was flying on his wing. He stated that they "were circling the bombers traveling at a considerably higher rate of speed" than were the P-51's; that he was watching the formation leader, not the second airplane; that Lieutenant Piatt led the first element to the right of the bombers and he led his element to the left and when he looked back to see where his wing man was he saw evidences of a collision. He stated that this flight was in a loose formation at the time (R.26,27).

Major William M. Merriam, Air Corps, 56th Fighter Squadron, Bartow Field, testified that accused was a member of his command. He testified that "each student officer who comes into the squadron is required to read and understand * * * 60-16, 60-16A, 62-10,62-2 /Army Air Forces Regulations/, 54th Group Flying Regulations". He said the pilots of his

squadron had been instructed not to make passes unless it had been prearranged. With respect to the class of accused, he had gone "over that with them" when they first arrived and had had only 10 or 15 hours. Accused had been with the squadron since about 1 July (about 7 weeks until 18 August).

For the defense, Captain Raymond P. Elledger, 56th Fighter Squadron, Bartow Army Air Base, testified that he was the flight commander of accused, that this particular flight had been led by a pilot instructor. He said that accused had always been a conscientious pilot, conscientious in his work and in his squadron. He believed that accused would be a good pilot if retained in the service and he would be glad to have him in his flight. On cross-examination Captain Elledger testified, in answer to a direct question, that if accused was close enough to the bomber to hit it, evidently he was "inside" the 500 feet distance covered by a flying regulation and had broken a regulation unless "it happened some other way as an accident". This witness on cross-examination was further asked whether he personally believed "it" was an accident. He answered: "I personally believe it was an accident" (R.34-36).

Accused elected to testify in his own behalf. He said:

"On this morning, July 18th, we took off in four ship sections, elements of two, on the wing of the second element. We flew for Tampa Bay and broke up into string formation and fired a camera gunnery mission. After completion of the camera mission we retired in the same order we started off in, and on the way back we came across the B'26's, bombers, and they were not travelling in the same direction we were, and the first ship, as I saw it, immediately upon passing the bombers swerved around in the direction of the bombers and headed toward the bombers, and when we did that we all broke into a loose string formation, and the first two ships went in and made a pass on the bombers and then we chandelled to the left and the third ship, myself, we made a pass on the bombers, not so much a pass as in order to get ahead of them and gain altitude. It was in my opinion when we turned and headed towards the bombers due to the fact that we had to add throttle and had climbed to catch them, and they not going in any direction that would bother us going in that direction, that it was the purpose of the flight leader to make a pass on the bombers, it not being the first time that Lt. Buckles led a pass on some other ship, and on one other occasion, led by Lt. Buckles himself, we made a pass on a P-40. To the best of my knowledge I estimated that Lt. Buckles was in relative position and I had no radio contact with him and no way of knowing he had switched back to second place. Lt. Tapscott was, I really thought, and I was flying on the wing of Lt. Tapscott and therefore it was not likely I would notice the switch over any way. To the best of my knowledge Lt. Buckles was in first place. The

first two ships made their passes and went off to the left, and Lt. Tapscott and myself made our pass and cleared to the right. I went approximately 1,000 to 1200 feet above the bombers. I intended to make a high side approach. It was my intention and I thought at the time that Lt. Piatt had intended to make more than one pass, which he himself states he had. It was my idea there would be more than one pass made * * *. * * *

"* * * I followed the flight leader on this particular occasion because I had been reprimanded for not following before under similar circumstances. Anyway, to state what actually happened: I started the high side approach from approximately 1,000 to 1200 feet above the bombers slightly ahead and to the right which I considered my high side approach down then pull off to the left and reversing the direction and going to the right and following his trail and you follow through on the pass. As I started down and started my turn I noticed a ship coming in from the rear to make what I estimated would be a pass itself. Figuring the rate of closure between the two fighters, both going at a pretty good rate, I was not sure what he would do, and I hesitated to see what his action was going to be. So the time I hesitated, I hesitated too long making a serious breach of bad judgment. I decided that if I followed my pass through, it would bring me too close to the bombers. I was travelling about 300 miles an hour, and I started to pull up away from and to the right of the bombers. My speed being what it was, I didn't estimate my mushing to be as much as it turned out to be. As I started to turn away, I started my pull up, and I didn't have any idea my mushing would carry me into the bombers, that being bad judgment on my part. I tried to pull up and away to the right, and I continued to mush, and my speed being what it was, carried me into the left wing of the bomber. * * *"

On cross-examination accused said that when he first saw the bombers they were several hundred yards away, maybe a little above. The first pass he made was from the rear. It was not exactly a pass because at that time he was not particularly interested in making a pass and, he said, he did not come very close to them. Accused's attention was directed to the testimony of the officer who piloted the second B-26 to the effect that the accused made the pass coming up close to 35 feet. Accused's answer to that was:

"I would like to say right here now that it is a proven fact and I think it will hold in this instance there is not any pilot can claim to judge distance in the air in actual proximity at all unless they are looking through a gun sight, to judge distance."

He stated definitely that he did not come any closer to the B-26 than 500 feet. Accused stated that he was familiar with the Air Forces Regu-

lations which forbade an approach within 500 feet. On further questioning, accused stated that he made the pass in the first instance because the first ship had made a pass and because it was customary to follow a flight leader; that it is not customary to break flying regulations but that there are customs that are inconsistent with flying regulations and that there have been circumstances that led him to believe his squadron commander knew of the situation. He cited one particular instance when Major Merriam was out on a flight and when "several ships out of our own formation and the other squadron made passes at each other". He added that he had been led more than once by instructor pilots (evidently in making passes), that most of them were doing it and most of them helped to do it. He said that he had been on a regularly scheduled mission that simulated attacks on other planes, and so instructed. He testified that he had been flying a P-51 for approximately three months. He did not blame the weather. He blamed the accident on pilot error and bad judgment. Accused in effect stated that he understood the regulation (regarding making passes) to be that passes were not to be made at a distance closer than 500 feet. On examination by the court accused stated that when he made the dive he had intended "to come not close enough to endanger either the B-26 or himself", that he would not say that he "had a definite intention about coming within any specific range" - that he intended to get his sight on the bomber and still clear the bomber by a very comfortable margin. Asked what he called a comfortable margin, he replied, "Anything beyond 300 feet, sir". He was asked: "Tactically speaking, had this B-26 been an enemy bomber, to successfully make a pass and use your guns successfully, how close would you have gotten to him?" Accused answered: "750 feet. * * * That is the point of convergence on our guns; it is 750 feet, going between 275 and 280 miles an hour". Accused admitted having read Army Air Forces Regulations 60-16, 60-16A, 62-2, 62-10, 54th Group Flying Regulations. Accused asked permission to make a statement, and told to proceed, said:

> "I would like to say here and now that being a fighter pilot and flying a fighter airplane, in the very nature of flying, these events happen quite fast. Things happened so swiftly in my mind I couldn't stop and say whether I should break off the formation, or should I go ahead and break a flying regulation, because it is my intention to always follow the regulations. It is a situation where if you break formation, you are definitely wrong. Another thing, that not at any time during this testimony am I trying to condone my actions. I am merely trying to say there were extenuating circumstances, and I don't consider myself to be entirely innocent of ever having broken flying regulations under these circumstances, but the fact there were circumstances leading up to this that I felt that I felt partially justified in doing what I did. I am not trying to condone myself because I realize it was wrong, had I had time to think over it.

At the time I did it, I considered that I was then within my rights by following the formation." (R. 37-46)

3. From the evidence, it appears that during the homeward flight of four P-51's, the flight commander signaled the No. 2 plane to take the lead position, and that in order to pass over a storm there was a change of direction which strung out all of the planes in a rther loose, follow-the-leader formation on a course set by the leader. Accused was flying No. 4 in the formation. It further appears that the leader while climbing made a pass on a formation of two B-26's and that No. 3 and No. 4 planes (believing that the No. 2 plane was that of the flight commander) followed him or attempted to follow his course and the tactics which he initiated. Also, that the No. 2 plane after making his first pass from below flew above the bombers and turned in such manner as would under the circumstances reasonably indicate to the remainder of the flight that he was about to dive in for a second simulated attack on the bombers from above, and that thereafter accused, following Nos. 2 and 3, dove at the bombers, striking one and causing the total destruction of that bomber and his own ship, of the total value of $190,000.

From their testimony, considered alone, it is not entirely clear as to whether No. 2 and No. 3 actually made the second pass. However, they were both over the "enemy" under circumstances and under conditions which justified accused in the belief that they both had started down for the second pass before he started his downward attack. It is very probable that both No. 2 and No. 3 did make a second pass from above. Lieutenant Buckles said he saw No. 3 make this attack followed by No. 4. Lieutenant Piatt, the lead pilot, testified that he intentionally made the first pass from below. According to him he then continued up 500 feet over the bombers and from that position he came down level with the bombers and was there just prior to the collision. Accused stated that in view of the first pass and the upward course and the turn taken by the preceding planes, he was justified in his conclusion that the leader was making and directing a second pass. This point of view seems justified. It is realized that in the course of combat, simulated or otherwise, only the trend of the tactics can be gathered, and that it is impossible for the individual pilots to actually observe at all times the execution of, or variation from, an indicated program.

4. Based on the evidence, the following comments are pertinent.

a. Accused while flying in this formation was under the command and leadership of an instructor pilot.

b. Nos. 2 and 3 pilots made passes at the bomber ahead of accused (No. 1 having withdrawn from formation and signaled leadership to No. 2, unnoticed by accused). Lieutenant Piatt, No. 2, testified that he led in

the passing. Although Lieutenant Tapscott denied that he made the second pass, his reason was at variance with the facts. He said he was too far away. However the pilots ahead and behind him passed. Furthermore, the pilot instructor definitely testified that he saw Lieutenant Tapscott precede the accused in the fatal pass.

c. Army Air Forces Regulations themselves provided that the very restrictions with which we are concerned could be disregarded when deemed necessary by the "commanding officer" in the interest of training. The ambiguous rule against passing, announced by Major Merrian,was subject to the qualification: "Unless prearranged".

d. To accused, his pilot instructor was his "commanding officer" or the authorized representative of the latter. Accused had the right to assume that such pilot instructor had been a party to any necessary prearrangements. As a matter of fact, the rules had apparently been officially "disregarded", in accordance with the terms of the regulations, and passing also "prearranged", on a number of recent occasions before the eyes of accused when pilot instructors and Major Merriam himself had led in making passes. Strong evidence as to this was uncontradicted by the prosecution.

e. Accused, a most conscientious pilot according to his captain, acted in good faith in making his passes at the bomber. He never intended to violate the regulations or rules. He knew of them. But, as he rather awkwardly put it on cross-examination, he thought their violation was authorized, resulting in a "technical violation", because the instructors and Major Merriam by reason of their official positions ought to know what was authorized. When accused in the trial spoke of "violations" he was only echoing the language of his cross-examiner. He intended no admission of guilt. In this connection, I disagree with the majority opinion that accused admitted on cross-examination that he knew he was violating regulations when he made the pass. A careful reading of pages 41-43 of the Record, where this is recorded, shows quite the contrary. The nearest approach to any such admission is found in accused's rather confused "No, sir", given in answer to the following highly confusing and improper question: "Is it your intention to leave the impression with this court that the fact that some of your flying leaders had violated regulations before, that that should be an excuse for your violations?".

f. The accident occurred as a result of pilot error, when accused suddenly faced with an intervening factor, another plane unexpectedly looming in his path, had to make a quick decision and decided "wrong". This unexpected factor was undoubtedly the plane of the pilot instructor who had developed engine trouble, withdrawn from the formation and dropped behind, all unknown to accused.

g. Accused's proved intention when he started the second and fatal pass at the bomber was to clear it by 750 feet, the distance necessary to get the bomber within his gun sights

On cross-examination of accused, the following question was asked and answer given:

"Q. Tactically speaking, had this B-26 been an enemy bomber, to successfully make a pass and use your guns successfully, how close would you have gotten to him? (Underscoring supplied.)

"A. 750 feet. * * * That is the point of convergence on our guns * * *."

The above question was asked and answer given almost immediately after accused had said:

"I intended to get my sight on the bomber and still clear the bomber by a very comfortable margin". (Underscoring supplied.)

He had been asked if he intended to approach within 100 feet of the bomber. His answer was, "No". The distance was lifted to 200 feet. He gave the same answer. Asked with respect to 300 feet, he said he had no specific intention except to get his gun sights on the bomber. When given a change to explain what that meant in distance, he said, "750 feet". He was asked his opinion as to whether staying 300 feet away was a comfortable margin (accused had said very comfortable margin) and he replied, "anything beyond 300 feet". It does not seem that what accused said in this connection can be construed to mean an intent "to come not closer than 300 feet". That covered his opinion as to a comfortable margin. His intent as repeatedly stated was to get the bomber in his sights. That called for 750 feet (see R.44).

h. The evidence does not convince me beyond a reasonable doubt that in making his first pass at the bomber accused was closer to it than 500 feet. He testified he was not closer. The two pilots who testified that accused passed the bomber at from 30 to 50 feet were not on the bomber in question. Questioned as to the validity of this testimony, accused said no one could testify as to distance of this kind (in the air) unless he used his gunsights to measure. The pilot instructor himself who saw Lieutenant Tapscott pass the bomber going down said that he could not measure the distance. In any event, it is wrong to judge how closely accused intended to come to the bomber on his downward pass by the distance he approached it on the way up. A pilot might be willing to pass another plane within 30 or 50 feet on an ascent when he has gravity as a powerful breaking force, but unwilling to come closer than 500 feet on a descent when he has gravity working against him.

5. The finding of the majority opinion is that passing "in comparatively close proximity" is reckless (a violation of Army Air Forces Regulations) if unauthorized. Passing at another plane is not inherently reckless. Adding the qualifying words "in comparatively close proximity" is gratuitous as far as the evidence goes and by reason of its comfortable indefiniteness contributes nothing to the propriety of the finding as a proposition of law. Nowhere in the testimony is there any expert opinion on this subject. We must rely on our own experience and reasoning. The diving by one airplane at another from above may under some circumstances involve danger and recklessness. But when the diving plane is only 1000 feet over the object plane, at the start of the descent, the pilot would have to aim a great distance away from the target in order to miss it by anywhere from 500 to 750 feet. The angle formed by the perpendicular side and the hypotenuse of the triangle designed by this maneuver would be so large as to eliminate any danger. On the other hand, if the diving plane started from 10,000 feet above the object plane, intending to pass by a distance of only 500 to 750 feet the angle of divergence from the perpendicular might well be dangerously small. Suppose, even, that the higher plane is a thousand feet above the lower plane and the diving pilot plans to pass at a distance of 750 feet to the rear of the lower plane, as here, but loses control and goes straight down. In that case there would be no danger to the second plane involved in the operation. The lower plane would advance at the very least 600 feet while the falling plane drops 1000 feet. Every situation must be decided on all the attendant circumstances. The prosecution gave only the most fleeting picture of what was involved here. The result is that the majority opinion has been unable to define the important element of intent except in generalities.

It is felt that in the present case the court convicted accused of reckless and negligent operation of his plane because it believed that he violated a rule against passing. This was an erroneous application (as will be pointed out) of the civil rule of "recklessness per se" to a criminal prosecution for reckless driving or operation. While the majority opinion does not reflect the same mistake in so many words it clearly shows itself influenced by this same principle. Take the conclusion of law which we now discuss and subtract the meaningless words "comparatively close proximity", words which are so relative and uncertain as to fail to define, and you have stated as a proposition of law, "Passing if unauthorized (if it violates a Regulation) is then violative of a Regulation against reckless operation". In a criminal prosecution for reckless driving, it is error to hold that to violate a law against speeding is to be guilty of violation of a law against reckless driving. It is repeated that the words "comparatively close proximity" are meaningless and unhelpful. Relative to what? Everything in life and experience is relative, even safety and danger themselves. The word "comparatively" only adds to the confusion created by the words "close proximity". In a

prosecution for reckless driving, a holding that speeding on a congested highway would constitute guilt would be perfectly proper. A highway is generally 50 or 100 feet wide. There is a degree of factual certainty in that description. But to speak of "comparatively close proximity" when dealing with the wide spaces of the skies is not to limit, to define, or to distinguish. Such language does not describe a criminal or wrongful intent.

The obvious difficulty with the majority opinion is that it refused to believe accused's testimony that he intended to pass at 750 feet so that he could get the object plane in his gun sights. In the absence of, or with the rejection of, this testimony there is literally nothing in the prosecution's evidence which can be used as a factual basis for a definition of recklessness appropriate to this case.

It is essential in considering this case that we rid ourselves of any idea, entertained consciously or unconsciously, that on a prosecution for reckless driving, proof of the violation of another safety law establishes recklessness per se. That was the entire emphasis of the prosecution on the trial.

The weight of authority is that -

> "Where an act in connection with the operation of an automobile is, by statute, made a separate offense (making a pass as distinguished from reckless operation) for which punishment is provided, the general rule is that the act itself can not be punished as reckless driving" (86 A.L.R. 1274).

Thus in New York where there is a statute which prohibits reckless driving and another which forbids speeding, it has been held that "mere speed in itself in excess of that allowed by the Highway Law is not alone sufficient" to sustain a charge of reckless driving (People v. Grogan, 260 N.Y. 138, 83 N.E. 273; People v. Higgins, 2 N.Y.S. 2d 347). Also, in People v. Aldrich, 191 N.Y.S. 899, the court held that failure to run a motor truck to the right when signaled from the rear by one trying to pass did not constitute the offense of reckless driving where such failure constituted a distinct statutory offense. See also State v. McNabb (S.D., 246 N.W. 291), where the law condemned reckless driving and also condemned failure to pass another car on the right, and it was held that reckless driving and driving on the wrong side of the street were separate offenses and that while driving on the wrong side of the street might be reckless under certain circumstances, under other circumstances it might not be reckless driving. See to the same effect cases involving driving while intoxicated: People v. McGrath (Del., 271 p. 549); State v. Andrews (Conn., 142 Atl. 840), in which case it was held that one might violate

the law against driving while intoxicated and still not be guilty of reckless driving (see also 5 Am. Jur. 933).

As a general rule the question as to what constitutes reckless driving is to be determined from all the surrounding circumstances where the statute denouncing the offense does not specifically declare what particular acts shall constitute the offense (86 A.L.R. 1275). (See to the same effect 5 Am. Jur. p. 932; 42 C.,p. 1322)

The finding of the majority opinion as stated, does not show that it has taken into consideration all the circumstances, as required. On the contrary it avoids the proven facts, improperly holding, in effect, that violation of the rule against passing is a violation of the regulation against reckless operation. Merely throwing in a few words of no meaning is insufficient to save the holding from b eing improper as a matter of law.

6. The rule laid down by Major Merriam against passing was inoperative on this occasion so far as accused was concerned. Major Merriam forbade passing only when not prearranged. Had accused been solo flying the responsibility for such prearrangement would have been his. Flying in formation, under the command of an instructor pilot, accused had every right to assume that his instructor pilot knew what he was doing, that the instructor pilot had made the necessary arrangements. Accused and other pilots had followed instructor pilots many times in the past in making passes, had even followed Major Merriam, acting in good faith on this very assumption. Obedience to this leadership in the past had brought no reprimand. Accused had been reprimanded once when he did question such leadership. Since then he had believed he was under responsible leadership. This was the burden of accused's effort as a witness when he spoke of regulations and customs which on the surface conflicted.

It is not in the order of things military for prearrangements to be made and communicated all the way down the line. The first inkling the member of the squad receives is when he hears given the order of execution.

The rule against passing within 500 feet of another plane, found in Army Air Forces Regulations, could also be "lifted" in the interest of military training by the "commanding officer". Who was accused to question whether and how arrangements had been made to "lift" this regulation, or to question who was the "commanding officer" responsible for the program of the day.

7. Assuming, but not finding, that there was a rule or regulation which forbade accused to engage in simulated combat, it is a defense that he "attacked" the B-26's under the directions or orders of his flight commander,

his pilot instructor, or one placed in a position of leadership by the flight commander during maneuvers or training. Winthrop in his Military Law and Precedents, Second Edition, Reprint, states as a fundamental principle, page 571, "obedience to orders is the vital principle of the military life". On page 576 he says,

> "But while a military inferior may be justified in not obeying an order as being unlawful, he will assume to do so on his own personal responsibility and at his own risk. * * * the presumption being, as a rule, in favor of the legality of the order as an executive mandate, and the facts of the case and reasons for the action being often unknown in part at least to himself and in the possession only of the superior".

In the present case the Army Air Forces Regulations permit deviations from the regulations in the interests of training. Such being the fact, accused in following the course and the tactics of the flight leader had a right to believe that any deviation on that occasion from regulations was justifiable on the basis of instructions within the knowledge of the superior. Winthrop continues:

> "In the great majority of cases therefore it is found both safer and wiser for the inferior, instead of resisting an apparently arbitrary authority, to accept the alternative of obeying even to his own detriment, thus also placing himself in the most favorable position for obtaining redress in the future. On the other hand, should injury to a third person, or damage to the United States, result from the execution of an order by a subordinate, the plea that he acted simply in obedience to the mandate of his proper superior will be favored at military law, and a court-martial will almost invariably justify and protect an accused who has been exposed to prosecution by reason of his unquestioning fidelity to duty, holding the superior alone responsible. How far he will be protected by the civil tribunals, if sued or prosecuted on account of a cause of action or offense involved in his proceeding, will be considered in Part III of this treatise."

The civil courts have recognized and enforced the above principle in Neu v. McCarthy, decided by the Massachusetts Supreme Judicial Court (33 N.E. 2d 570), where it was held that a private who was driving a truck in an Army convoy could not be charged with contributory neglect in running through a red light at an intersection so as to bar recovery from a motorist with whom he collided, where the private was obeying an express order of the captain commanding the convoy, notwithstanding that order was illegal. The court held further that obedience to a military order is a justification for conduct which would otherwise give rise to civil or criminal liability

unless the order was so culpably unlawful that a reasonable man would perceive its unlawful qualities. This case cites many authorities for the principle which it applied, cogently stating the reason therefor:

> "Recognition of the peculiar necessity of discipline in the military service and of the position in which the subordinate may find himself through no fault of his own in the event that commands of his superiors clash with the civil authority has led courts in well considered cases to regard obedience to a military order as a justification for conduct which would otherwise give rise to civil or criminal liability * * *".

Thus we find military and civil law recognizing and supporting the principle that conduct otherwise wrong is excused when in response to the orders of a superior.

In view of the uncontradicted testimony in the case that accused was flying in formation, that he had formerly been reprimanded for breaking formation when in doubt as to his duty, in view of the fact that the rule against passing and the Air Forces Regulation could be, and in the past had been, lifted under the leadership of instructor pilots whose authority had never been questioned, it would seem unfair and contrary to law to hold this accused responsible for pilot error committed in his effort to obey what he justifiably believed to be a legal, authorized command. Such a holding would put a premium on military disobedience, offering excuse for exercise of individual judgment, even an escape for personal preferences, all to the prejudice of good order and military discipline. The plea of accused that he acted simply in obedience to the leadership of his instructor pilot and flight leader is a defense which the civil law generally and military law always will recognize.

8. The offense of suffering through neglect military property to be destroyed in violation of Article of War 83, embodied in Charge II, was not proved. There was no legal recklessness and, hence as pointed out in the beginning, no negligence. Furthermore, the story of accused is uncontradicted that the collision occurred as the result of an intervening cause.

As pointed out, CM 233196, Bell, is no authority for finding recklessness or negligence in the case under consideration. There the accused while on a solo flight was clearly shown to have intended to dive within 50 feet of the object with which he collided, a maneuver for which he assumed sole responsibility.

9. For the reasons stated, I am not convinced beyond a reasonable

doubt on the evidence that accused willfully violated any Air Forces Regulation or any rule, or that under the circumstances his conduct in making a pass at the bomber was unauthorized, or that his intent was to pass within 500 feet of the bomber, so as to support a charge of reckless and careless operation of an airplane and a charge of suffering its damage through neglect. In my opinion the record is legally insufficient to support the findings of guilty and the sentence.

John Womenhill, Judge Advocate.

1st Ind.

(389)

War Department, J.A.G.O., 8 APR 1944 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Richard E. Weld (O-680974), Air Corps.

2. I concur in the opinion of the Board of Review (one member dissenting) that the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge II, legally sufficient to support the findings of guilty of all other Specifications and of the Charges, and legally sufficient to support the sentence and to warrant confirmation thereof. Although accused was guilty of negligently operating an airplane in making unauthorized "passes", there was evidence tending to show that unauthorized passes had been made and apparently overlooked on previous flights and that on the occasion in question he was following his flight leader and one of the other pilots in the flight. His flight commander testified that accused was a conscientious pilot and a very good flying officer, and that he would continue to be a good pilot if retained in the service. In a letter dated 27 February 1944, attached hereto, the Commanding General, Army Air Forces recommends that the dismissal be confirmed and carried into execution. Careful consideration has been given to this recommendation. While I am in close sympathy with the general policy of the Commanding General, Army Air Forces, that the sentence to dismissal in these cases should be executed, nevertheless, in view of all the circumstances it is believed that the ends of justice will be met by the remission of the forfeitures and the suspension of the dismissal. Accordingly, I recommend that the finding of guilty of Specification 2, Charge II, be disapproved; that the sentence be confirmed, but the forfeitures remitted; and that the sentence as thus modified be suspended during good conduct.

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

Myron C. Cramer

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

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of ltr. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Ltr.fr. CG, AA Forces.

(Finding of guilty of Specification 2, Charge II, disapproved. Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 197, 25 May 1944)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General (391)
Washington, D.C.

SPJGH
CM 241788

2 NOV 1943

U N I T E D S T A T E S	)	ANTIAIRCRAFT ARTILLERY TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Camp Davis, North Carolina, 29 September 1943. Dismissal and confinement for three (3) years. Penitentiary.
	)	
Second Lieutenant ALEXANDER H. McLEOD, JR. (O-1054056), Coast Artillery Corps.	)	
	)	

OPINION of the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Alexander H. McLeod, Jr., Antiaircraft Artillery School, Camp Davis, North Carolina, did, at Wilmington, North Carolina, on or about 4 September 1943, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Billie Lewis.

He pleaded guilty to and was found guilty of the Specification and Charge and was sentenced to be dismissed the service and to be confined at hard labor for three years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that at about 10:00 p.m. on 4 September 1943, as Mr. J. T. Rich of the Wilmington North Carolina Police Department, accompanied by another police officer, was making a routine inspection of schools and churches he came upon accused, sitting on some steps, with a 17 year old boy named Billie Lewis standing in front of

him. With the aid of a flashlight, Mr. Rich saw that accused had the young man's penis in his mouth and "was sucking the boy off". Billie and accused were taken to the police station (accused was turned over to the "MP Department") and the former told the police "all about it". Accused was brought in and, in his presence, Billie stated that he and accused had met at the bus station, accused took him to supper, they walked to the schoolhouse, Billie took "a leak", accused did likewise, accused began to "play with him", Billie "raised a hard" and let the accused "go ahead and do what he wanted to". Accused then said that Billie had told the truth, that it was all his fault and that he did not want the boy to be punished (R. 6-9).

At Military Police Headquarters in Wilmington at about 10:15 to 10:30, after the 24th Article of War had been read to him and he had stated that he understood it, accused made a sworn statement (Ex. A) in which he related that after meeting Billie Lewis at the bus station and taking him to supper, they had walked to the schoolhouse where Billie began to urinate. When he had finished accused played with Billie's penis until the boy had an erection. They then sat on the schoolhouse steps and accused placed Billie's penis in his mouth, took his own penis out of his trousers and started to masturbate. Before either of them ejaculated they were apprehended by the police. Accused had known Billie for a "few weeks" and, on several occasions had discussed sex with him but had not discussed perversion. He knew that Billie was seventeen years old (R. 9-10).

4. For the defense Second Lieutenants Frank I. Gary, Gerald R. Hough and Captain Harold Tivey all of the Target Recognition Section, Antiaircraft Artillery School at Camp Davis, the section in which accused was an instructor, testified that accused was one of the most able and accomplished lecturers in the section, his work was outstanding, his associates held him in high esteem and he had an excellent reputation from a moral standpoint (R. 11-14).

Major Charles L. Langsam, Medical Corps, chief of the neuropsychiatric service, testified that accused had been admitted to the station hospital on 5 September 1943 at which time an examination disclosed that he was responsible for his acts and that his case was "constitutional psychopathic--sexual psychopathy (homosexuality)". The diagnosis of accused was specifically that of homosexuality, a mental aberration and a condition in which the sexual desires are different from those of the ordinary individual. The homosexual individual has no desire to have intercourse with members of the opposite sex but is attracted sexually by members of the same sex. It is an inherent abnormal trait that is present from childhood. As a general rule the trait cannot be cured by medical treatment. The homosexual desire cannot be controlled

any more than the desire for heterosexual relations can be controlled. To the homosexual individual his desire is a normal one. In the opinion of Major Langsam, despite the mental aberration of accused, he was not insane and was responsible for his acts (R. 14-17).

Accused testified that his educational background was the usual one in a small North Carolina town. He graduated from the University of North Carolina in 1936, took a master's degree in 1939, taught four years in college and did further graduate work at Johns-Hopkins where he taught until his induction into the Army in 1942. After basic training accused attended Officer Candidate School, transferring from the infantry to antiaircraft artillery, graduated in April 1943, and was assigned as instructor to the Target Recognition Section in which he had since served.

5. It is shown by the undisputed evidence, including a sworn pretrial statement made by accused to the military police, and admitted by the plea of guilty, that accused had carnal connection per os with Billie Lewis, a 17 year old boy, as alleged in the Specification of the Charge.

6. Honorable J. Bayard Clark, Member of Congress, made a personal appearance before the Board on 28 October 1943 in behalf of accused.

7. The accused is 28 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 27 July 1942; appointed temporary second lieutenant, Army of the United States, and active duty 1 April 1943.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Confinement in a penitentiary is authorized by the 42nd Article of War for the offense of sodomy, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 22-107 of the District of Columbia Code. Dismissal is authorized upon conviction of a violation of the 93rd Article of War.

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

Norman D. Lattin, Judge Advocate

1st Ind.

War Department, J.A.G.O., 6 NOV 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Alexander H. McLeod, Jr. (O-1054056), Coast Artillery Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The accused committed sodomy per os with a 17 year old male civilian. I recommend that the sentence to dismissal and confinement at hard labor for three years be confirmed and carried into execution.

3. Consideration has been given to a recommendation for clemency, attached to the record of trial, dated 1 October 1943, and signed by defense counsel, the trial judge advocate and six of the nine members of the court.

4. As the accused is under 31 years of age and his sentence to confinement is not more than 10 years he should be confined in a reformatory or correctional institution.

5. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

T. H. Green,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(Resigned)

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TITLE

DATE	BORROWER'S NAME	EXT.