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with the

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BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater of Operations
APO 887

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Foreword

This compilation constitutes an index-digest of the holdings, reviews and opinions of the Boards of Review in the Branch Office of The Judge Advocate General with the European Theater of Operations rendered from the establishment of the Branch Office in 1942 to 1 June 1945. It may be cited as Dig Op ETO. While every effort has been made to have the digests complete and accurate, they do not always reflect all of the facts involved in the cases concerned.

Section numbers correspond to those of the Digest of Opinions of The Judge Advocate General, 1912-40, and the Bulletin of The Judge Advocate General. To compensate for the lack of a descriptive-word index numerous references have been introduced, particularly in sections 395 (A.W. 38) and 428 (A.W. 70). The initial compilation is stapled in two volumes for convenience of distribution. Supplemental material for insertion will be distributed from time to time. It may be inserted properly by removing the staples and binding the volumes with metal fasteners.

The compilation has been prepared by Captain John M. Wiegel, JAGD, Chief of the Index-Digest Section of the Military Justice Division of this office. He is responsible for the form and accuracy of the digests.

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Brigadier General, United States Army
Assistant Judge Advocate General

ARTICLES OF WAR*

*Numerical index and alphabetical index of cases digested will be found at rear.

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ARTICIES OF WAR

(2a) Conscientious Objector
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(9) Civilian Employees

359(2a-9)

359 (AW 2) Persons Subject to Military Law:

(a) Army Personnel

(2a) Conscientious Objector:

Cross References: 433(2) 4820 Skovan (AW 75 charge)
(See also 3380 Silberschmidt (not digested)
An AW 28-58 case)

(6a) Unlawfully Inducted:

Cross References: 451(64) 4685 Mitchell (Sodomist)

(d) Camp Retainers and Persons Serving with Armies of U.S.

(9) Civilian Employees: Accused civilian employee originally worked as a federal employee in the United States. He subsequently came to the European Theater of Operations as a civil service technician with the U.S. Army, and worked in the shipping department of an Army Air Force station. He had now been convicted before a general court-martial for Article of War offenses. HELD: (1) Jurisdiction "over the person of accused may be claimed by military courts under the clause of the 2nd Article of War declaring that: 'all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States' are subject to military law regardless of the existence of a state of war or not. Accused, an immediate employee of the Government, was also within the subsequent clause of the article which specifies that: 'in time of war all * * * persons accompanying or serving with the armies * * * in the field both within and without the territorial jurisdiction of the United States' shall be subject to the jurisdiction of courts-martial and the Articles of War. Beyond doubt he was 'serving with the armies in the field.'" (2) Judicial notice could be taken by both the court and the Board of Review "of the fact that between 1 August 1943 and 30 October 1943 (the time of accused's offenses) the United States was engaged in war against the Axis power * * *; that within the United Kingdom the United States maintained military establishments; that AAF Station * * * was one of their establishments; and that military personnel were on duty at said station (MCM, 1928, par.125, pp.134, 135)." (CM ETO 1191 Acosta 1944)

(13a) Merchant Seamen:

Cross References: 451(2) 4059 Bosnich

(e) Persons Under Court-Martial Sentence:

Cross References: 419(2) 4029 Hopkins (General Prisoner; desertion and AWOL.)

(15) A general prisoner in confinement and previously dishonorably discharged remains subject to court-martial trial for offenses committed while a soldier and prior to his dishonorable discharge. (CM ETO 960 Fazio et al 1944.)

Accused soldier had been sentenced to confinement for 20 years and to be dishonorably discharged the service. One week later, and before either approval of the sentence or promulgation of the general court-martial order, he escaped from the guardhouse in which he had been confined. Thereafter, accused's sentence was approved, and then promulgated by general court-martial order. In subsequent weeks, accused committed a number of other crimes. He was eventually apprehended. He was found guilty of having escaped in violation of AW 69, and also of some of his other later crimes. HELD: Accused was subject to court-martial jurisdiction both for his escape and for the later crimes. At the time of his escape, which was also an act of desertion, he was clearly in the military service, as the general court-martial order was not promulgated until a subsequent date. He was likewise subject to its jurisdiction subsequent to its promulgation, because he was then in the status of a general prisoner. He remained amenable to military jurisdiction while under sentence of a general court-martial, regardless of whether or not his dishonorable discharge had been executed. (MCM, 1928, par.10, p.8) (CM ETO 1737 Mosser 1944) Also see 416(3) for further digest of this case.

Charges were preferred against accused on 18 December 1943. The evidence showed that he was a private, confined in a guardhouse on 14 November 1943. However, his status in the guardhouse did not appear. HELD: "An examination of the records of this office disclosed that accused was sentenced by General Court Martial on 9 November 1943 to dishonorable discharge, total forfeitures and confinement at hard labor for three years. The approved sentence suspending the dishonorable discharge * * * was promulgated * * * 28 December 1943. The Board of Review may take judicial notice of the foregoing data upon appellate review of the present case. * * * No question as to accused's amenability to trial by General Court Martial can arise in the instant case inasmuch as the dishonorable discharge on the prior conviction was suspended." (CM ETO 1981 Fraley 1944)

Accused general prisoner was charged with various court-martial offenses. Although he was wearing "blue fatigues with a white 'P'" at the time of trial, there was no direct evidence of his status as general prisoner as alleged. HELD: By reference to the files of the Branch Office, The Judge Advocate General court-martial sentences, with the dishonorable discharge suspended. "The Board of Review may take judicial notice of the foregoing data upon appellate review * * *." Records of this office fail to indicate that accused has been released. "A condition having been shown to have existed at one time, the general presumption arises, in the absence of any indication to the contrary, that such condition continues." (MCM, 1928, par.112a, p.110.) (CM ETO 2194 Henderson 1944)

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361 (AF 4) Who May Serve on Courts-Martial:

Cross References: 433(2) 4565 Woods (Junior Officers; Minimum Number; Members)

365 (AW 8) General Courts-Martial; Appointment:

Cross References: United Kingdom Base as successor to Southern Base Section 403 (AW 46)
395(45) See Generally
450(1) 3649 Mitchell (1st Ind) (Designation of President.)
433(2) 3948 Paulerico (Asst A.G. who referred case for CG sat as court member.)
433(2) 4095 Delre (Membership)
454(7) 4235 Bartholomew (Record failed to show presence or absence of Asst TJA.)
443(3) 4443 Dick (Record failed to show presence or absence of Asst TJA and Asst Defense Counsel.)
454(44a) 7901 Barfield (Merger of commands; refer to trial

Appointment

(1) In General: Accused were found guilty of involuntary manslaughter in violation of AW 93. An examination of the Charge Sheet with respect to A shows that the case was referred to trial on 8 February to the trial judge advocate of the general court-martial appointed by par.6, S.O.42, Headquarters X Command, 11 February. It was provided in the latter orders that all cases "heretofore referred for trial by general court-martial appointed by par.6, S.O.42, this headquarters, 11 February, on which arraignments have not been had are referred to this court-martial for trial." The same situation exists with respect to the charges against B. As appears from the general court-martial orders, A and B were tried by the court appointed by S.O. 55, 24 February. HELD: The record is legally sufficient to support the findings and sentence. The irregularities were not material inasmuch as it has been previously decided that, if a case is tried by a court to which it was not referred, the reviewing authority may ratify the court's action in so doing and act upon the sentence (CM 198108, Dig.Op.JAG 1912-40, sec.397(5) (AW 40), p.243). (CM ETO 393 Caton, Fikes, 1943)

"The order appointing the court * * *, otherwise in proper form, is captioned 'HEADQUARTERS NORTHERN IRELAND BASE SECTION APO 813.' The Board of Review may take judicial notice that the incompletely designated command is an official geographical and administrative subdivision of the Services of Supply, European Theater of Operations, U.S. Army. Furthermore, the clerical omission from the designation was ratified by the subsequent action of the reviewing authority * * * approving the sentence. * * * The Board of Review is therefore of the opinion that the irregularity is not fatal." (CM ETO 1982 Tankard 1944.)

365(1) (1) In General

"The first indorsement on the charge sheet shows that the case was referred for trial to a court appointed by paragraph 70, Special Orders No. 192, Headquarters Southern Base Section, Communications Zone, dated 10 July 1944. No reference is shown to the court which tried the case and which was appointed by paragraph 50, Special Orders No. 225, Headquarters Southern Base Section, Communications Zone, dated 12 August 1944. No prejudice resulted to accused because of this irregularity. It has been held that, where a case is tried by a court other than that to which it was originally referred and the reviewing authority approves the sentence, the absence of an order referring the case to the trial court is not fatal. (CM ETO 3897 Dixon 1944.)

The commanding general of Base Section No. 2, Communications Zone, ETO, had general court-martial jurisdiction. Thereafter, on 5 September 1944, that Base Section was "redesignated" Loire Section, Communications Zone, ETO. On 19 September 1944, the commanding general of Base Section No. 2 was appointed commanding general of the Loire Section. The general appointed a general court martial for Loire Base Section on 27 September 1944. On 29 September 1944, he was specifically empowered to appoint a general court martial. HELD: THE COURT APPOINTED BY HIM on 27 September 1944 HAD JURISDICTION. When Base Section No. 2 was "redesignated" Loire Section, it was merely renamed. The commanding general of Base Section No. 2 already had power to appoint general courts-martial, "and this power remained operative and unimpaired notwithstanding the change in name of jurisdiction." Consequently, when he appointed the court, he was "exercising the authority theretofore conferred upon him by previous grant." The appointment was proper. The subsequent grant of general court-martial jurisdiction to the commanding general of Loire Section "did not in any respect impair the previous grant of authority. It was requested in order to simplify administration." "It neither lessened nor increased the original authority held by" him. (CM ETO 4249 Little 1944.)

Law Member

Cross References: 447 804 Ogletree (Failure to designate JAGD member as)
450(2) 506 Bryson (Transferred from command)
433(2) 5004 Scheck (Membership)
433(2) 5179 Hamlin (Asst Defense Counsel not present)
395(46) 3828 Carpenter
433(2) 4565 Woods (2nd Lt as Law Member)
395(47) 5855 Herholtz (disqualified)
395(47) 5458 Bennett (disqualified)
454(36a)8679 Barbin (previous ministerial duty)

(9) Detail or Designation: An order appointing a general court martial should specifically designate the law member. (MCM, 1928, par.39) (Ind. CM ETO 799 Booker 1943)

A member of the JAGD was not designated as law member on a general court-martial. HELD: The question of availability of a JAGD officer for designation "as law member of the court was a matter for the exclusive determination of the convening authority. The provision of" AW 8 "is not a mandatory direction to the convening authority, but vests in him the discretion of determining the availability of a judge advocate. His designation of an officer from another branch of the service indicates his decision that a judge advocate was not available." (CM ETO 1631 Pepper 1944)

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(10) Law Member; Absence: "Ten members of the court named in the appointing order, including the law member, were absent from the first session of the court, which was held on 15 August 1944. The reason stated for the absence of the law member is 'Excused, V.O.C.G.' Although the practice of showing the law member as excused by verbal orders of the Commanding General, without stating a valid reason for his absence, is not approved * * *, it does not appear that accused's substantial rights were injuriously affected by the irregularity * * *." (2) Reconvene after Adjournment; Members: "After adjournment pursuant to a continuance of the trial granted upon motion of the defense, the court reconvened on 12 October 1944. Two of the six members who were present at the first session were excused, one at his own suggestion and the other upon peremptory challenge by the defense. This left only two of the original members present at the second session. Accused was accorded full rights to challenge all members of the court and after the granting of the challenge mentioned, stated that he was satisfied to be tried by the court as then constituted. The record of the proceedings of 15 August 1944 was thereupon read to the new members, and

it may be assumed that the original members' recollection was refreshed by such reading. Under the circumstances, it does not appear that any substantial rights of accused were injuriously affected * * *."
(3) Reference to Trial; Members: One officer, by command of the division commander, referred the case to the Trial Judge Advocate for trial. That officer was thereafter duly appointed and sat as a member of the court herein at both sessions. "In the absence of challenge and of indication of injury to any of accused's substantial rights, this may be regarded as harmless." (CM ETO 4619 Traub 1944)

"The record shows that the law member was absent, having been killed in action. Under these circumstances there was no law member, the court was not properly constitut'd and all of its actions were void (AW 8; CM 199337, Dig Op JAG 1912-1940, sec 365(9). You should issue another general court-martial order reciting that the proceedings * * * are null and void and of no effect because the court was not properly constituted, having no law member. Such an order will not prevent subsequent trial of the accused for the same offenses as he has not been placed in jeopardy." (Ltr, AJAG, CM ETO 4342 Edwards 1944, to be found in file of CM ETO 4091 Hobcroft.)

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368 (AW 11) Appointment of Trial Judge Advocates and Counsel:

(1) Trial Judge Advocate and Assistant

Cross Reference: 365 (AW 8) (Presence or Absence)
395(55) See generally, re improper action.

(2) Defense Counsel

Cross References: 365 (AW 8) Presence or Absence
374 4619 Traub (Accused acts as own Counsel)
450(1) 438 Smith (Surprise, or "entrapment" of counsel)
454(81a) 7245 Barnum (defense counsel briefs)

"In the instant case the personnel officer of accused's organization * * * was the regularly appointed defense counsel. Since morning reports and other official documents signed by regimental personnel officers are frequently involved in courts-martial proceedings, the detail of such officers to serve on courts-martial unnecessarily raises legal questions and causes anomalous trial situations * * *. In the appointment of future courts-martial it would be advisable to detail officers who are not directly involved, even in administrative capacities, in the preliminaries to trial." (1st Ind: CM ETO 9302 Waters 1945)

368(1-2)

371 (AW 14) Summary Courts-Martial; Jurisdiction:

(1) Jurisdiction:

Cross References: 454(22) 2550 Tallent

371(1)

374 (AW 17) Trial Judge Advocate to Prosecute; Counsel to Defend:

Cross References: 364 (AW 8) Presence or Absence
433(2) 4564 Woods (Inadequate defense counsel)
443(1) 6684 Murtaugh (Adequacy of defense. Special counsel; availability)
454(81a)7245 Barnum (Defense counsel brief; rights)

Defense Counsel: "At the opening of the trial, accused introduced the officer who investigated the charges against him as his individual counsel. The trial judge advocate immediately announced in open court that that officer would be called as a witness for the prosecution (and he was so called) and asked accused if he still wished him to act as his individual counsel, whereupon the accused again stated that he did desire him to act as counsel. The Board of Review finds this procedure legal and proper." (CM ETO 1100 Simmons 1944)

"There is no prohibition against accused acting as his own defense counsel, even without the assistance of personnel detailed as defense counsel by the appointing authority. It clearly appeared that accused understood his situation and was competent to conduct his own defense and to safeguard his own rights." No violation of the 6th Amendment to the Federal Constitution resulted. (CM ETO 4619 Traub 1944)

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375 (AW 18) Challenges:

Cross References:
447 804 Ogletree (Law Member)
447 804 Ogletree (For cause, with remaining peremptory challenge)
433(2) 2471 McDermott (Misbehavior before enemy case)
454(01) 3475 Blackwell (Fail to specially advise accused re rights)
450(4) 3740 Sanders et al (peremptory--joint and common trial)
433(2) 3828 Carpenter (Waiver of objection to court member)
433(2) 3948 Paulerico (Waiver of objection to court member)
450(4) 4589 Powell et al (Peremptory--joint and common trial)
365 4619 Traub (After continuance)
395(33) 6407 Ivey (common trial)
395(47) See generally, re disqualification of members.
454(18a)8234 Young, et al (To array; see generally.)
395(46)10079 Martinez (record of trial, re)

(1) In General: Defense counsel challenged two court-martial members for cause at the same time. The two challenges were considered in closed court at the same time, and it was probable that both of the challenged members were present. HELD: (1) "The presence of challenged officers at the deliberations on the challenges by the Court in closed session is not prohibited, either by law or regulation. There is nothing disclosed by the record of trial herein to indicate that the presence of the challenged members, if they were present during the closed session of the court, affected the validity of the trial or prejudiced any substantial right of the accused." (2) Consideration of the two challenges at one time was in direct violation of the directory provisions of AW 18. However, no prejudice to accused resulted. (CM ETO 515 Edwards 1943)

During his voir dire examination of court members in a rape case, the trial judge advocate asked whether any member believed that a forcible rape was impossible without the aid of an accomplice, He explained that the purpose of the question was so that he might challenge such a member for cause. HELD: (1) While the colloquy was harmless to accused, it is not to be approved. "It assumes that there may be members of the court who are unwilling to follow the mandates of the law and is a gratuitous assumption carrying aspersions which are unfair and unauthorized." (2) "On the voir dire of the court the trial judge advocate failed to comply with par. 1d (2), Military Justice Circular No 1, 1 January 1944 BOTJAG, ETOUSA, with respect to preliminary notice to court members concerning conscientious scruples against imposition of death sentence. The right of challenge for cause thereby implemented is valuable and legitimate and should not be destroyed through faulty presentation." (Ind to B/R holding CM ETO 2203 Bolds 1944)

376(AW 19) Oaths:

(1) Members of Court-Martial:

Cross References:
- 433(2) 4565 Woods (Minimum Number; Junior Grade)
- 395(63a) Witnesses; Oaths--in general
- 428(7) Charge Sheet Oaths--in general
- 472 Authority to Administer Oaths
- 438 9573 Konick (presume oath to be administered at former trial)

377 (AW 20) Continuances:

Cross References:

433(2)	1663 Ison (To inquire into mental capacity)
428(15)	(Trial in less than 5 days)
365	4619 Traub (Court membership after)
451(64)	4685 Mitchell (Continuance to show unlawful induction--sodomist)
443(1)	6684 Murtaugh
450(4)	8451 Skipper

"The granting or denying of a motion for continuance is within the sound judicial discretion of the court and its action in denying a motion for continuance will not be disturbed upon appellate review in the absence of a showing of abuse of that discretion." (CM ETO 895, Fred A. Davis, et al) (CM ETO 1249 Marchetti 1944; mimeographed opinion mailed out)

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378 (AW 21) Refusal or Failure to Plead:

Not Digested:
3004 Nelson (No need for evidence)
3056 Walker
6523 Knapp (guilty plea; additional evidence)
8474 Andoscia (as waiver of objections)

Cross References:

451(64)	612	Suckow (Effect of Guilty Plea)
453(20a)	1266	Shipman (Effect of Guilty Plea)
450(1)	438	Smith (Explanation of Rights)
450(2)	506	Bryson (Lesser offenses; reserved rulings)
451(2)	3280	Boyce (Plea of guilty to lesser offense; inference of intent therefrom)
454(64a)	3507	Goldstein (Plea of guilty; law member fails to explain maximum punishment)
419(1)	5359	Young (Plea as waiver of defects)
395(35b)		See generally, re admitting identity
	5510	Lynch
454(13)	10967	Harris (guilty plea under misconception; construed as not guilty plea)

(3) Inconsistent Statements After Plea of Guilty:

Accused pleaded guilty. Thereafter he made statements in court which were at first inconsistent with his plea. HELD: Accused's testimony, confused and unconvincing though it was, was sufficiently at variance with his plea of guilty to have required the president to make, or direct the law member to make, an explanation to him in which the inconsistencies were pointed out; and, in the absence of accused's voluntary withdrawal of his inconsistent testimony, to require the court to proceed to trial and judgment as if he had pleaded not guilty. (MCM, 1928, par 70, pp 54-55) However, accused's subsequent testimony and his pre-trial statement to the investigating officer, together with other evidence, amply showed that he was guilty. In the circumstances, the court's error was not fatal. (CM ETO 1670 Torres 1944)

Accused was found guilty of an absence without leave with intent to avoid hazardous duty (AW 58-28). HELD: LEGALLY SUFFICIENT. "After resting his case and before the court closed for the findings, defense counsel made the following closing argument: 'We wish to point out * * * that the accused has had a long service with this division and this is his first offense, and we do not think it a 50-year offense'. This statement in effect conceded the guilt of accused even before the court closed to deliberate and vote on the findings. In view of accused's plea of not guilty, the concession was highly improper * * *. There is nothing in the law, in the record of trial, or in any known policy on sentences which renders intelligible defense counsel's assertion * * *." However, no prejudice resulted because accused's guilt was clearly established. (CM ETO 5080 Pugliano 1945)

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(4) Plea of Guilty; Explanation of; and Further Evidence 378(4)

(4) Plea of Guilty; Explanation of, and Further Evidence: After accused's plea of guilty, he was found guilty without any evidence having been introduced. HELD: "The effect in law of the plea of guilty is that of a confession of the offenses charged. The record shows accused was represented by counsel and understood the effect of his plea of guilty." "The more recent practice of both our civil and military courts clearly inclines towards requiring some evidence to be produced in explanation of the circumstances of the commission of the offense that the court, the reviewing and the clemency authorities may each intelligently function * * *. While it is self-evident that both good practice and an intelligent consideration of the elements involved in a plea of guilty requires some evidence * * *, which evidence was denied to the court herein", numerous papers contained in the record which has come to the Board of Review supply sufficient information regarding accused's offense to meet the needs of the reviewing and the clemency authorities. (CM ETO 839 Nelson 1943)

"The effect in law of the plea of guilty is that of a confession of the offense charged * * *. The trial record fails to show affirmatively that the consequences of accused's plea of guilty were fully explained to him. However, his election to appear as a witness in his own behalf for the purpose of offering evidence in mitigation which was in truth a further admission of guilt shows that the plea was advisedly made. Failure to explain the plea of guilty was not fatal as it may be rightfully assumed that defense counsel performed his duty." (CM ETO 1588 Moseff 1944)

After accused pleaded guilty, some evidence of his offense was introduced. However, its sufficiency in certain respects was questionable. HELD: "There is no requirement of law that evidence must be taken upon a plea of guilty. The purpose of such evidence is to assist the court in fixing the punishment, and the reviewing authority in his consideration of the case. The finding of guilty may be based solely on the plea of guilty, which is no less than a judicial confession that the accused committed the offense charged." (CM ETO 2194 Henderson 1944)

"The effect in law of a plea of guilty is that of a confession of the offense as charged. It is desirable that some evidence of the circumstances be shown so that the reviewing and clemency authorities may each intelligently function * * *." (CM ETO 2776 Kuest 1944)

REFUSAL OR FAILURE TO PLEAD

378(4)

381 (AW 24) Compulsory Self-Incrimination Prohibited:

Cross References:

450(4)	2002 Bellot (Disrobing of accused)
395(36a)	1284 Davis et al (Seating arrangement in court; identification)
422(5)	1057 Redmond (Warning of Rights)
433(2)	1663 Ison (Warning of Rights)
451(2)	2297 Johnson & Loper (Witness for Prosecution - the Accused)
454(37a)	1107 Shuttleworth (Accused stands)
395(35b)	(Identity of accused; proof; in general)
395(10)	(Confessions; in general)
453(18)	2777 Woodson (False official statements during official inquiry; no explanation of AW 24 rights)
451(50)	3362 Shackleford (Make accused stand up in open court)
451(50)	3931 Marquez (Preliminary proof; warning; confession.) Accused cr-ex. beyond scope of prel.
450(4)	3859 Watson (Make accused show dog-tags in open court)
395(10)	4055 Ackerman (Accused testifies re how his confession was taken)
433(2)	4820 Skovan (TJA points out accused)
433(2)	4565 Woods (5th Am--due process)
395(3)	(See Admissions in general)
450(4)	5584 Yancy (No warning of rights)
385	4701 Minnetto (no warning of rights)
395(01)	See cases re due process herein
395(10)	See generally.
451(36a)	9128 Houchins (Re confessions)

"It is not necessary to consider the question as to whether accused's immunity against being a witness against himself under the Fifth Amendment to the Federal Constitution was infringed by these proceedings inasmuch as it is self-evident that he personally and voluntarily waived same * * *." (1 Wharton's Criminal Evidence, 11th Ed, sec.382, p.607, footnote 16.) (CM ETO 1360 Poe 1944)

By independent evidence, accused had been identified as one of his victim's assailants. The victim himself was able to make a positive identification of him only after accused had voluntarily spoken in the court room. HELD: Accused personally and voluntarily waived his immunity under the Fifth Amendment to the Federal Constitution when he spoke. Moreover, and at the request of defense counsel, accused exhibited himself before the court in order to demonstrate inaccuracies in the testimony of the victim. No irregularity could have resulted, because the procedure was self-invited by the defense. (CM ETO 1413 Longoria 1944)

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* * * * Accused was fully cognizant of his rights under the 24th Article of War not to be compelled to incriminate himself and * * * knew that inculpatory statements made by him might be used against him upon trial. * * * The giving of the warning would therefore have been an idle formality. There is no requirement of law that a suspect must receive the formal warning as to his rights when he asserts them and makes known to his interrogator that he has full knowledge of them. In fact, proof of a formal warning under any circumstances is not a condition precedent to the admission in evidence of a confession. While it may be an expedient and salutary practice, it is not a necessity." (See also ETO 397, 1057) (CM ETO 3080 Holliday 1944)

(Also see 1107 Shuttleworth, 2397 Shaffer and 2368 Lybrand, and individual topics)

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382 (AW 25) Depositions; When Admissible:

Cross References:

433(2)	1693	Mathisen (Capital case, AW 75)
454(67b)	567	Radloff (Depositions of persons not within court's jurisdiction; foreign country)
451(8)	3927	Fleming (Rehearing; Testimony taken at previous trial)
416(9)	6260	Calderon (Deposition in capital case)

DEPOSITIONS; WHEN ADMISSIBLE

385 (AW 28) Certain Acts to Constitute Desertion:

Not Digested:

1400 Johnston
1403 Kimmerle
1405 Oliff
1790 Lain
2368 Lybrand
3380 Silberschmidt (Conscientious Objector)
3473 Ayllon
3641 Roth
4239 Lowe
4382 Long
4742 Gotschall
4931 Bartoloni
4987 Brucker, Jr
4988 Fulton
5079 Bowers
5287 Pemberton
5291 Piantedosi
5292 Wood
5304 Lawson
5341 Hicks (med. treat.)
5392 Quinn
5393 Leach
5396 Nursement
5565 Fendorak (Death sent.; comp. 5559 Slovik)
5568 Robertson
5642 Ostberg
5643 Harris, et al
5803 Alexander
5952 Goldsmith
6406 Way (comb. fatigue)
6457 Zacoi
6468 Pancake
6549 Festa
6564 West
6622 Box
6623 Milner
6625 Anderson
6840 Stolte
6946 Payne
6955 Slonaker
7032 Barker
7086 Amora
7148 Giombetti (Se jud. not. and red. of sentence)
7308 Loya
7500 Metcalf
7687 Jurbala
7760 Vincent
7868 Kramer (Manner and place, term. not alleged)
8161 Fiorentino
8162 Yochum
8181 Andrewski
8185 Stachura
8453 Caiazzo (AW 61 les.)
8485 Beard (part, lesser, AW 61)
9419 Hawthorne
9796 Emerson (notice)
8706 Twist (Also see AW 69.)
7439 Conley, et al
8171 Russo
8242 Bradley
9290 Grijalva
10003 Rentzel
10968 Schiavone
7606 Parker (Companion to 6934 Carlson)
8452 Kaufman
8610 Blake (radio operator, Inf. Bn)
8769 Wojtkowicz
9469 Alvarez
9878 Scheier
11402 Diedrickson
11468 Daggett
10197 Thomley (AW 61 as lesser)
8801 McLaughlin

CERTAIN ACTS TO CONSTITUTE DESERTION

385

Avoid Hazardous Duty and Shirk Important Service

Cross References:

378	5080	Pugliano (Defense counsel comments, after NG plea)
416(9)	3062	Ostler (AW 58 charge; no pleading of AW 28 facts, yet permissible to prove them)
	4490	Brothers (AW 58 charge; no pleading of AW 28 facts, yet permissible to prove them)
	5117	de Frank (AW 58 charge; no pleading of AW 28 facts, yet permissible to prove them)
416(14)	5774	Schiavello
422(5)	6809	Reed (with willful disobedience)
433(1)	6177	Transeao (with AW 75)
433(2)	4740	Courtney (lesser AWOL)
450(2)	3162	Hughes (lesser under AW 61)
	3197	Colson (lesser under AW 61)
433	11503	Trostle Jr (with AW 75)58)

Accused went AWOL from a Port of Embarkation in continental United States. At the time, he admittedly knew that his battery was leaving the United States very soon. His "B" bag was already packed and had gone to the rail-head. His "A" bag was packed and on his bunk ready to be taken downstairs. He had helped police up the barracks, and had received his pay a day in advance of the regular pay-day. He knew he was restricted to the post area. He was a soldier of four or five years of service and experience. He admitted that he had absented himself without leave, and explained that he "didn't think much about it". He was found guilty of desertion in violation of AW 58, in that he had, with intent to shirk important service, to wit: embarkation for duty beyond the continental limits of the United States, gone AWOL (AW 28). HELD: LEGALLY SUFFICIENT. The "hazardous duty" or "important service" referred to in AW 28 may include such service as embarkation for foreign duty or duty beyond the continental limits of the United States. However, "mere absence without leave * * * is not in all cases prima facie evidence * * * of intent to desert * * * and evidence must be introduced from which the intent in desertion can be inferred * * *." (MCM, 1928, sec. 130, p.144.) "There is no claim that accused was intoxicated before leaving. Any testimony by accused that he did not intend to shirk hazardous duty is not compelling as the court may believe or reject such testimony in whole or obligations and duties as a soldier that the court was justified in concluding therefore sufficient evidence before the court from which it could properly infer" the requisite intent. (CM ETO 105 Fowler 1942)

In 1943, accused soldier, newly arrived in the United Kingdom, received a rather large amount of pay. Two days later, he went AWOL. He remained in London for 14 days, but finally surrendered himself to military police when his funds were exhausted. During his absence, accused's unit moved to a destination not disclosed by the record. At the time of his AWOL, accused had been issued some extra equipment, but nothing out of the ordinary. He admittedly knew the unit was going to change its station, but explained that he had not anticipated the movement so soon. There was no evidence that any notice of an alert had been given him, nor any proof that the future duty of the unit would be hazardous. He was found guilty of desertion in violation of AW 58, in that he had gone AWOL with intent to avoid hazardous duty (AW 28). HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. Where desertion is premised on an intent to avoid hazardous duty (AW 28), proof of accused's intent to avoid hazardous duty must be proved. One of the necessary elements of the proof is that accused has either been notified or otherwise informed, or has reason to believe, that his unit is about to be transferred for "overseas" service or other hazardous duty. Proof that accused's unit has been notified of prospective movement, without additional proof that accused was actually present when such announcements were made, does not suffice. (CM 230826, McGrath.) Nor does proof of knowledge by accused that his unit was stationed at an embarkation camp and that eventually it would depart for "overseas" meet the requirements of proof. (CM 231163, Sinclair.) Another element necessary to sustain the instant charge of desertion was proof that accused's unit "was under orders or anticipated orders involving * * * hazardous duty," which accused sought to evade. (MCM, 1921, par.408, p.344.) There can be no presumption that accused's unit has departed to engage in such duty, nor can judicial notice be taken of its whereabouts. (CM ETO 455 Nigg 1943)

Accused's unit was stationed at a replacement depot in England in 1943. It had been restricted, baggage had been packed, and passes were no longer issued. During this period, accused went AWOL for a few hours in order to ask a girl in a nearby town to marry him. Returning voluntarily on foot to his station shortly after his unit had left, accused explained his proposal to the girl. He further stated that he had previously arranged his baggage so that he could move out in ten minutes time, and that he had been told that the unit wouldnot move for a day or two. He was found guilty of desertion in violation of AW 58, in that he had gone AWOL with intent to avoid hazardous duty (AW 28). HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. (1) Intent: It was necessary for the prosecution's evidence to establish that accused intended to avoid hazardous duty. It failed to do so. (2) Defense's not guilty motion, made at the conclusion of the prosecution's evidence, was properly denied because it had then already been sufficiently established that accused could have been guilty of the lesser included offense of AWOL. (MCM, 1928, par.71d, p.56) But even assuming that an AWOL had not then been shown, the defense thereafter sufficiently established the AWOL by its own testimony. In any event, "error in denying a motion for dismissal or non-suit, made at the close of the state's case, is waived where accused proceeds with trial by presenting his evidence, and does not, at the close of the whole case, renew his motion * * *." (23 C.J.S., sec.1149d, pp.681-682.) (3) Court Membership: The order appointing the court listed one officer as the senior member. In the transcript of trial, another officer of the same grade was shown as the president. Further informal inquiry revealed that the latter officer had been recent promoted, and hence was the proper president. "The fact that the record does not disclose these facts does not affect the validity of the proceedings." (CM ETO 564 Neville 1943)

After having been informed by his platoon commander at a formation of his organization that they were about to go into combat, accused obtained his fatigue clothes and toilet articles, and left. Actual combat followed. Accused rejoined the unit 8 days later. He was found guilty of desertion in violation of AW 58, in that he had gone AWOL with intent to avoid hazardous duty (AW 28). HELD: LEGALLY SUFFICIENT. Accused's AWOL was sufficiently established both by a morning report extract and by direct evidence. His necessary specific intent to avoid hazardous duty, i.e. action against the enemy, within the meaning of AW 28, was also adequately established. (CM ETO 1406 Pettapiece 1944)

Accused was a runner between his company and battalion headquarters. It was generally known among the men that their unit was about to relieve the British and to go into the attack. Accused had assisted in unloading trucks which carried the men's rolls, and in placing them in a company pile in accordance with standard practice for units about to attack. The enemy was possibly less than two miles away. At that time, accused left. He was apprehended five months later. He was found guilty of desertion in

violation of AW 58, in that he went AWOL with intent to avoid hazardous duty, to wit: combat with enemy forces (AW 28). HELD: LEGALLY SUFFICIENT. The above evidence sufficiently established accused's desertion with intent to avoid hazardous duty. As a runner between his company and battalion headquarters, "it may properly be inferred that he would learn of all matters that were of common knowledge in the organization." "Accused stated in his sworn statement that he ran away from the company * * *. He does not deny that he left his organization for the purpose of avoiding combat with the enemy." (CM ETO 1432 Good 1944)

Accused had been informed and knew that his platoon was about to engage in hazardous duty against the enemy. The company had previously engaged in battle training, had been issued ammunition, and had made a forward movement toward the enemy. Accused left his unit without authorization on the same day. Actual combat followed. He was found guilty of desertion in violation of AW 58, in that he went AWOL with intent to avoid hazardous duty, to wit: action against the enemy (AW 28). HELD: LEGALLY SUFFICIENT. (1) Accused's AWOL was sufficiently established by a morning report extract and by direct evidence. (2) Accused's intent to avoid hazardous duty was sufficiently established by the above evidence. (CM ETO 1589 Heppding 1944)

On or immediately prior to 31 July, accused had been informed and knew that his platoon was about to engage in hazardous duty against the enemy. The company had already made a forward movement toward the enemy, and had been issued ammunition. On the above date, he deliberately left the company without proper authorization. He surrendered himself several days later. He was found guilty of desertion in violation of AW 58, in that he went AWOL with intent to avoid hazardous duty, to wit: action against the enemy. HELD: LEGALLY SUFFICIENT. (1) Accused's AWOL was sufficiently established by a morning report extract and by direct evidence. (2) His intent to avoid hazardous duty was sufficiently established by the above evidence. Although he was found not guilty of a further charge that he had unlawfully cast away ammunition, testimony that he had in some manner disposed of a box of ammunition intrusted to him was further evidence of specific intent to avoid hazardous duty. (3) Sanity: "The evidence of the defense with respect to accused's physical and mental condition is directed to the period commencing on 3 August and concluding on 5 August -- a period subsequent to his desertion on 31 July." Hence, it was irrelevant. (CM ETO 1664 Wilson 1944)

Accused had been warned that his unit was alerted for action, and to be prepared to move out. He also had personal knowledge. On the same day, he left without proper authorization. That afternoon after his departure, the company began an engagement with the enemy. Accused returned two days later -- one day after the engagement had been completed. He was found guilty of desertion in violation of AW 58, in that he went AWOL with intent to avoid

hazardous duty, to wit: action against the enemy. HELD: LEGALLY SUFFICIENT. "This evidence justified the court in finding that the necessary elements of the offense were present * * * and supports the finding of the necessary specific intent * * *." (CM ETO 1685 Dixon 1944)

Accused's unit was stationed at a staging area. The battalion commander, at an undisclosed time, informed the battalion, of which accused's company was evidently a component, that they "were going somewhere" soon. Accused went AWOL, but was apprehended a week later. During his absence, the organization did in fact move, and did engage in active combat with the enemy. Accused was found guilty of desertion in violation of AW 58, in that he had gone AWOL with intent to avoid hazardous duty, to wit: action against the enemy (AW 28). HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. In addition to his AWOL, the following elements were necessary to establish accused's guilt of deserting with intent to avoid hazardous duty: "(1) that accused or his organization 'was under orders or anticipated orders involving * * * hazardous duty', and (2) that accused was notified, or otherwise informed, or had reason to believe, that his organization was about to engage in hazardous duty, and (3) that his absence was with intent to avoid such duty." (1) Hazardous Duty Orders: The above evidence provided adequate ground for legitimate inference that accused's organization was under orders or anticipated orders involving hazardous duty. (2) Knowledge of Accused: "The only evidence that accused * * * knew or had reason to believe that his organization was about to engage in such duty, consists of opinions and conclusions of the executive officer of his company as to 'indications' and 'common knowledge' of impending combat in the company, and the personal understanding of the first sergeant of the company, based upon the above mentioned information given to the battalion * * *." There was "no proof in the record with respect to accused's presence in his unit either at the time of the 'common knowledge' or 'conversation' * * *." Judicial notice may not be taken of the facts necessary to raise the inculpatory inference that accused had knowledge. In the absence thereof, the evidence was insufficient to show that he violated AW 58. (3) Reports: Defense's objection to the introduction in evidence of a military police report of accused's apprehension and release should not have been overruled. The report was hearsay. However, other evidence in the record prevented prejudice from arising. (CM ETO 1921 King 1944)

Accused's unit had been alerted for continental invasion service. Notice to him thereof had come when a letter was read to the unit. Among other things, that letter stated that the impending ove seas movement would be both hazardous duty and important service as defined by AW 28, and that any subsequent AWOL would therefore be deemed to be desertion. The next day, while with a searching party in a nearby wooded area and dressed in fatigues, accused went AWOL. Two days later, he was apprehended by a civilian policeman in the same countryside. In the interim, he had attempted to steal some food. He had not taken any clothes with him, and was still dressed in his fatigues at the time of apprehension. He also needed a shave. His unit had not moved out while he was away. He was found guilty of desertion in violation of AW 58, in that he had gone AWOL with intent to avoid hazardous duty (AW 28).

HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. (1) Necessary elements of proof herein were (a) that accused was absent without leave; (b) that his unit "was under orders or anticipated orders involving either (a) hazardous duty or (b) some important service"; (c) that notice of such order was actually brought home to accused and that he had received due and timely notice of probable results of unauthorized absence of military personnel at that time; and (d) that at the time he absented himself from his command he entertained the specific intent to avoid hazardous duty or to shirk important service. (2) Accused's intent to avoid hazardous duty was not proved in the instant case. Rather, the inference is to the contrary. (3) Judicial notice of the "top secret" alert order, not produced in court because of its classification, could not be taken. (CM ETO 2396 Pennington 1944)

Accused's unit had been alerted for overseas invasion service. Accused was personally informed of the alert when a letter was read to his unit which additionally stated that the impending overseas movement would be both hazardous duty and important service as defined by AW 28, and that any subsequent AWOL would be deemed desertion. Thereafter, accused told friends that he was going to take 2 or 3 days off, but would come back. Two days after the alert, and at a time when another member of the unit owed him a large sum of money, accused went AWOL. After an absence of 4 days, accused returned voluntarily. His unit had not yet moved. He was found guilty of desertion in violation of AW 58, in that he had gone AWOL with intent to avoid hazardous duty and to shirk important service (AW 28). HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. (1) Specification: Accused was properly charged in a single specification with AWOL both with intent (a) to avoid hazardous duty and (b) to shirk important service. (2) The prosecution sufficiently proved that accused's unit was under orders or anticipated orders involving either hazardous duty or important service, and that notice thereof had been brought home to accused. (3) Intent: However, there was a fatal failure to prove that accused had intended to avoid hazardous duty or shirk important service when he went AWOL. That intent could not be inferred from the alert for invasion service in the indefinite future, after which accused went AWOL. Rather, his intent had to be proved as any other fact. While such intent may be discovered from relevant and material circumstances and legitimate inferences therefrom, this necessity was not met. Instead, accused adduced evidence which made any inference of intent on his part inconsistent therewith. (4) In this opinion, the Board of Review has "scrupulously observed the restriction upon its powers which prohibits it from judging the credibility of witnesses, weighing evidence or resolving conflicts in evidence". Nonetheless, it is also "its duty to sustain a finding of guilty." (CM ETO 2432 Durie 1944) (Mimeographed full opinion mailed out.)

The personnel of accused's unit had been engaged in loading combat trucks and moving them to another point where they had been stowed on boats in preparation for the Italian movement. It had turned in extra supplies; and drawn combat equipment; had been attached to another division. The company had been alerted, although 25 percent of the personnel were allowed passes each night. At a time when accused was present, the personnel had been told that they were to move out, and that AWOLs would be dropped as deserters. Accused failed to return from his over-night pass. The time of his return was uncertain. His unit left Africa enroute to the Italian invasion. He was found guilty of desertion in violation of AW 58, in that he had been AWOL with intent to avoid hazardous duty, to wit: an overseas operation against the enemy. HELD: LEGALLY SUFFICIENT. The first three elements of the charged offenses were adequately established, i.e. that "(1) accused absented himself without leave, (2) at a time when his company was bivouacked in a combat staging area and was under orders or anticipated orders involving hazardous duty, and (3) prior to his absence he was notified, both by activities in his company and by direct announcement by his company commander at a formation at which he was present, that preparations were being made for the company's imminent departure on a hazardous mission." The fourth element of the offense-"that accused intended when he absented himself, to avoid hazardous duty within the meaning of AW 28"--was also adequately established by the evidence. (Distinguish other cases in which the necessary intent was held to be absent: Although the units therein had been alerted and were under anticipated orders for continued invasion, there had been no preparations for the forward movement. The time therefore was uncertain. The accused got back in time to participate in the hazardous duty. Specific evidence negatived any inference of their intent to avoid hazardous duty.) (See 416(6a) re proof of desertion in this case, p. 33) (CM ETO 2473 Cantwell 1944) (Mimeographed opinion mailed out in full)

Accused's unit had been placed under invasion orders, and had been alerted for such service. Thereafter, he went AWOL. Six days later, he was apprehended during daylight hours, dressed in uniform, on the street of the small town in which his unit was stationed. At all times, he had remained within six miles of his post. He had been under the influence of liquor. After his apprehension, he had an opportunity to escape but did not avail himself of it. His unit had not moved out during his absence. He was charged with desertion in violation of AW 58, in that he had gone AWOL with the double intent both to avoid hazardous duty and shirk important service. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. (1) Specification: Accused was properly charged in a single specification with AWOL both with intent (a) to avoid hazardous duty and (b) to shirk important service. "The prosecution was free to prove either or both of the specific intents alleged. (2) The Offense: (a) Accused's AWOL was both established and admitted. (b) It is assumed that a headquarters letter read to the personnel of accused's unit, sufficiently showed that that unit was under orders or anticipated orders involving either hazardous duty or some important service. (MCM, 1921, par. 409, p. 344). (c) Notice to accused was sufficiently proved by an extract

copy of his unit's morning report which stated that the headquarters letter was read to him at a company formation. The morning report entry was made in obedience to the commanding general's command. "It was therefore in the 'regular course of * * * business' of the battery. It was a record of an 'act, transaction, occurrence, or event' of the battery * * *." The entry was admissible in evidence (AR 345-400, sec. III, 7 May 1943, 27, 30; 49 Fed. Stats. 1561, 28 USC Supp. sec. 695.) (d) Accused's intent to avoid hazardous duty or to shirk important service, however, was not proved. The recited evidence insufficiently showed such an intent. Mere proof of absence is not enough. While "accused's unit was under invasion orders and was alerted for such purpose * * * it remained at its station during accused's absence and accused did not miss any engagement or important duty. The record does not indicate any preparations for forward movements which put the accused on notice that it was imminent and the time of such movements remained indefinite and uncertain. The relevancy of these facts cannot be ignored in searching for accused's intent." (Distinguish other named cases. "These cases are 'battle line' cases arising out of the campaigns in North Africa and Sicily. Each accused was guilty of mis conduct during actual and not anticipated military campains. The units of each accused either engaged in actual combat or performed highly important tactical missions during his absence. Such fact is highly adverse to an accused in determining the intent which motivated his absence. Contrawise, the fact that there was no performance of hazardous duties or important service by his unit during the period of his absence must necessarily weigh in an accused's favor on the issue of his intent." (CM ETO 2481 Newton 1944) (Mimeographed full opinion mailed out) (But see 395(18) Memo; TJAG; 30 Mar 1945, Washington, re 49 Stat. 1561)

Accused was charged with a violation of AW 28, in that he deserted the service by going absent without leave with intent to avoid hazardous duty and to shirk important service. He was found guilty of the lesser offense of absence without leave, in violation of AW 61. HELD: LEGALLY SUFFICIENT. (1) The Charge: Accused should have been charged with a violation of AW 58 rather than a violation of AW 28. The "latter article merely provides in effect that certain acts shall constitute the offender a deserter. The offense of desertion actually violates and is punished under the 58th Article of War." (2) Designation of wrong AW: "The designation of the wrong article is not material, however * * *, particularly where, as here, accused is found guilty of a lesser included offense within that charged in the specifications." (CM ETO 3118 Prophet 1944)

Accused was found guilty of a violation of AW 58, in that he did desert the service by his absence without leave in England, with intent to avoid hazardous duty and to shirk important service, to wit: participation in the overseas invation of enemy-occupied Europe. HELD: LEGALLY SUFFICIENT ONLY FOR ABSENCE WITHOUT LEAVE IN VIOLATION OF AW 61. (1) Pleading: It was proper to charge accused with intent to both avoid hazaroud duty and shirk important service. This permitted the prosecution to prove either or both of the intents alleged. (2) Accused's AWOL from 15-18 June 1944, terminated by apprehension, was adequately proved. (3) The other three elements of the

offense were: (a) that accused's unit was under orders or anticipated orders involving either hazardous duty or some important service; (b) that notice of such orders and of imminent hazardous duty or important service was actually brought home to him, and (c) that at the time he absented himself he entertained the specific intent to avoid hazardous duty or shirk important service (CM ETO 2368). The first two elements were sufficiently established. Accused's battalion had been notified of the "dead line" on 31 May. Moreover, the "declaration contained in the 'Desertion Letter' * * * is adequate proof that his unit was on 15 June 'under orders or anticipated orders' * * *." (ETO 2481, 2396, 2432). The element of notification was admitted by accused. The defects in proof noted in CM ETO 455 Nigg are not present in the instant case. (4) Intent: However, the necessary element of intent on accused's part was not proved. "The Board of Review has rejected the proposition that such specific intent may be inferred from evidence, without more, that accused was absent without leave after his unit had been alerted for overseas service and he had received the warning notice contained in the letter * * *." (CM ETO 2396, 2432, 2481.) Facts appearing herein "are that accused spent the night of * * * 14 June in the dispensary undergoing treatment for a throat affliction, that he spent the next night * *,* in the dispensary, and without authority on the morning of 16 June, leaving his blankets, mess-kit and toilet articles at the dispensary, went to /a/ * * * nearby town * * * where * * * he commenced drinking and met a girl with whom he passed two days and two nights * * *. He testified that he saw members of his organization on each of these days. Although three-day passes were not issued by his organization, daily passes" for the evenings "and passes valid for all day Sunday were being freely issued to members thereof who were cautioned to leave information as to their whereabouts and to remain in the proximity of the camp so that they could be assembled readily. He was recognized by a member of his battalion" on a nearby hill on 18 June, "and was thereupon apprehended by military police but did not attempt to escape nor was his behavior otherwise unusual. He accompanied his unit to France on 19 June. The acting first sergeant of the unit testified that, en route to France, accused told him that, if he had seen the military police in time, he would have eluded them but they 'closed in' too rapidly. Accused's version of this statement was that if he wanted to get away from them he would have done so because they were unarmed and he saw them before they saw him." "The foregoing evidence has no value for the purpose of proving that accused intended to avoid the hazardous duty or to shirk the important service of participation in the imminent oversea invasion of Europe (CM ETO 2481). * * * Accused was in daily contact with members of his organization. He did not conceal himself and was in the immediate proximity of his place of duty throughout the whole period of his absence. His conduct upon apprehension betrayed no evasive or otherwise improper intent on his part." Even assuming the truth of the acting first sergeant's statement, this "proves no more than that he was not yet ready to return to his camp at the time of his apprehension and wished to remain absent longer, albeit without leave. * * * The mere fact that accused had no pass, in view of the foregoing circumstances, constituted merely additional evidence that his absence was without leave but fell far short of proving that he intended to evade duty with his organization. The prosecution's proof failed on the vital element of accused's

specific intent either to avoid hazardous duty or to shirk important service." Accused was guilty only of the lesser offense of absence without leave in violation of AW 61. (1st Ind: Accused was sentenced to confinement for 25 years. "The average period of confinement imposed for absence from actual combat on conviction under the 75th or 58-28th Articles of War is 20 years. This offense is less serious and I suggest a reduction to ten years confinement" in the Disciplinary Training Center, with the dishonorable discharge suspended. (CM ETO 3234 Gray 1944)

Accused were members of a group of about 200 released military prisoners who had been recently brought from the United States to England, assembled into a "package" and assigned to a Replacement Company. They were processed for shipment to the French battle zones. Articles of War 28 and 58 were read and explained to personnel of the "package", and all of the accused were present on the occasion. It was common knowledge among the members "that they were to be shipped to the Continent of Europe for assignment to a combat unit." They had innoculations, inspections, issues of clothing and equipment. They received military training. However, they were discovered to be missing on the day of departure. Four days later, a nearby "hide-out" was found. It consisted of two bivouacs, supplied with stolen government property. Some of the accused were captured at or in the proximity of the "hide-out". Four more were located 24 miles away. Each accused was found to be guilty of desertion in violation of AW 58, in that he had absented himself without proper leave with intent to avoid hazardous duty and to shirk important service, to wit: transportation to the Continent of Europe and assignment to a combat zone organization. HELD: LEGALLY SUFFICIENT. (1) PLEADING: The specification charged each accused with intent to both avoid hazardous duty and to shirk important service. "The pleading of both specific intents in one specification was proper and the findings of guilty may be sustained upon proof of both or either * * *." (2) Evidence: The 4-day absence of each accused was established. It was also proved that their organization (a "package") was under orders or anticipated orders involving either hazardous duty or some important service. "Combat service in France involves both hazardous duty and important service." Both notice and the necessary specific intent were shown. "The evidence, taken as a whole, excludes every fair and rational hypothesis except the guilt of accused * * *. The court was fully justified in evaluating the circumstances", and its findings of guilt will not be disturbed. (Discuss evidence at length.) (CM ETO 4054 Carey et al 1944) (Also see 403(AW 46) re United Kingdom Base jurisdiction.)

While returning from an unusually severe flying mission over Germany, and subsequently that same day, accused top-turret gunner and flight engineer stated to various members of the crew that he intended to quit flying, that he had never liked flying and had never wanted to fly, and that the present mission would be his last one. The next day, he absented himself without leave, but returned voluntarily six days later. Just before he left, he told the co-pilot, "I will see you in a couple of weeks in the

guardhouse,maybe. I am taking a vacation." After his return, he repeated his determination not to fly again. Among other things, accused was found guilty of desertion in violation of AW 58, in that he had absented himself without proper leave from his organization in England, with intent to avoid hazardous duty and to shirk important service, to wit, flying as member of a combat crew on combat missions. HELD: LEGALLY SUFFICIENT. (1) The elements of the offense charged against accused are: "(1) that accused absented himself from his organization without proper leave; (2) that the organization was under orders or anticipated orders involving either hazardous duty or important service; (3) that accused received actual notice of such orders; and (4) that at the time he absented himself without leave accused entertained the specific intent to avoid hazardous duty or to shirk important service." (2) The Facts: "(1) Absence without leave was adequately proved. (2) A crew which was in a combat operational status at a base from which sorties were being continually made against the enemy while the invasion of the continent was in full progress may properly be considered as being under anticipated orders to fly on combat missions at any time while it remained in that status. (3) Since accused was a member of such a crew at the time he absented himself without leave, and had been a member for a period of many weeks, the inference could be drawn * * * that he knew that he, with the rest of his crew, was in a combat operational status, and was under anticipated orders to fly in combat missions at any time." "Flying as a member of a combat crew on combat missions to targets in territory on the continent occupied by the enemy, constitutes both hazardous duty and important service. The dangers attendant upon the performance of such duty * * * are so commonly known that judicial notice may be taken of them." (4) The specific intent to avoid flying with his crew on combat missions was adequately shown by the facts. As an experienced member of this crew, he must have known that he would miss flying on a combat mission during his absence. In the interim while he was away, "his crew engaged in a combat mission to Belgium which was then under enemy occupation. Such fact may be considered by the court in determining the intent which motivated his absence * * *. The fact that accused voluntarily returned * * *, while material in extenuation, is no defense * * *." (CM ETO 4138 Urban 1944)

Shortly before his machine-gun squad was scheduled to attack the enemy, accused obtained permission from his squad leader to go back to an aid station between 2500 yards and 5 miles to the rear. Some hours later, still dressed in his uniform but without a weapon, accused was apprehended by military police about 15 miles back of the front line. Although it kept complete records, the first aid station failed to have any entry to show that accused had reported to it. During his absence, accused's squad was subjected to enemy fire, and on the following day it attacked. Accused was found guilty of desertion in violation of AW 58, in that he had quit his organization with intent to avoid hazardous duty, to wit, combat with the enemy. HELD: LEGALLY SUFFICIENT. (1) The evidence fully supported the court's finding of accused's guilt. It was undisputed that he, "clearly without authority, went many miles beyond the aid station in a direction away from the front line. Even if it be assumed that accused had valid permission to go to the aid station, he absented himself without proper

leave the moment he left the station to proceed still farther to the rear. The evidence fully warranted a finding that * * * accused * * * did so with the intent to avoid joining in the attack against the enemy." Moreover, the court could have believed "that the section leader was induced to grant accused permission to go to the aid station by his deliberately false, material representation that he was ill." "Then the permission so obtained, even if otherwise valid, was inoperative and accused's act in absenting himself pursuant thereto was without proper leave." "Any testimony by accused that he did not intent to avoid hazardous duty is not compelling as the court might believe or reject such testimony in whole or in part." (2) Mental Capacity: Accused testified that he had sinus trouble which deprived him of his memory during its attacks; that he could not recall what had happened from the time he left his company until his return to the regimental command post. However, he could remember being picked up by the military police. He further stated that, preceding the attack, he could not sleep and "shook like a leaf", and that he had undergone the same experience during several previous battles. The squad leader testified that he had observed no indication that accused suffered from loss of memory, nor had he noted that accused was other than mentally normal; that accused had never complained to him of any mental disturbance. A psychiatrist who examined accused testified that he was responsible for his actions and not mentally diseased; that it was possible for a man to be mentally ill for a few hours and have no trace of it afterwards; that loss of memory for a month would disable a soldier; that one suffering from amnesia could not form an intent. He doubted that accused could have had periods of amnesia without being aware of his condition. "Whether accused was suffering from amnesia at the time of the alleged offense was a question of fact for the court * * *." (3) Not Guilty Motion: Failure of the defense to renew its motion for a finding of not guilty at the conclusion of the trial constituted a waiver of its rights in that regard. (CM ETO 4165 Fecica 1944)

(1st Ind, CM ETO 4165 Fecica 1944: The neuropsychiatrist who examined accused 18 days after the commission of the offense found him sane, responsible for his actions, and not mentally diseased at the time of the examination. He did not express an opinion concerning accused's mental condition at the time of the offense. "A medical report * * * should meet the requirements of" MCM, 1928, pars. 35c and 78a, pp 26 and 63.

Accused was found guilty of desertion in violation of AW 58 (AW 28 circumstances alleged). He was also found guilty of a misbehavior in violation of AW 75, with certain exceptions and substitutions. HELD: LEGALLY SUFFICIENT. (1) Condonation; AW 58-28: After his absence, out of which the instant AW 58-28 charges arose, it would appear that "accused was returned to duty upon rejoining his unit since, two days thereafter, he was sent out as one member of a twelve-man reconnaissance patrol. An unconditional restoration to duty without trial by an authority competent to order trial may of course be pleaded in bar of trial for the desertion to which such restoration relates (MCM, 1928, par 69b, p 54). However, where a deserter is restored to duty by a superior not authorized to order trial such restoration does

not constitute a bar to a subsequent trial (CM NATO 2139, Grabowski; Dig. Op. JAG 1912, p 415). * * * In the instant case, the manner in which accused was restored to duty is not clearly brought out by the record. * ** It is difficult to determine with any certainty in what manner accused was selected for the patrol but it seems probable that he was detailed for this duty by the company commander of Company F pursuant to a request for men from Battalion Headquarters, Further, it seems rather improbable that in the short time which elapsed from accused's return * * * there had been 'an administrative act to effect removal of /a/ charge of desertion and a consequent restoration to duty * * * by an officer exercising general court-martial jurisdiction'. In any event, defense counsel entered no special plea in bar of trial based upon constructive condonation and it may be presumed that he fully performed his duty to the accused and that had any defense of this nature been available such defense would have been raised (Cf: CM ETO 531, McLurkin; CM ETO 139, McDaniels; CM 231504, Bull. JAG, Vol. III, No. 2, Feb 1944, sec 396(1), p. 56). It must be concluded that there was no condonation herein. (2) Misbehavior; AW 75: It was charged that accused misbehaved himself at * * * before the enemy "by failing to move out with his patrol, after he had been ordered to do so by Captain * * *, to engage with the German forces, which forces, the said patrol was then opposing." The Court, by exception and substitution and as modified by the Reviewing Authority, found that accused "did, at a place not shown, on or about * * *, misbehave himself before the enemy by abandoning his patrol which was engaged with the German forces". Accused's violation of AW 75 was adequately established. "The variance above noted is not fatal and did not prejudice the substantial rights of the accused." (CM ETO 1663 Ison 1945). (CM ETO 4489 Ward 1945).

Accused was originally charged with misbehavior before the enemy in violation of AW 75, in that he shamefully abandoned his organization about 11 September, and failed to rejoin it until about 24 September. After the charge had been investigated and returned, the Staff Judge Advocate changed the charge over to one of desertion with intent to avoid hazardous duty on the same date, in violation of AW 58 (AW 28). The new charge was not verified. Accused was found guilty. HELD: LEGALLY SUFFICIENT. (1) Theater Directive: By letter of 5 October 1944, received by the Staff Judge Advocate herein, it was stated: "The Theater Commander directs that I acquaint you with his desire that, where the expected evidence in any case establishes prima facie guilt by any member of the forces under his command of such misbehavior before the enemy as constitutes desertion, consideration be given to charging the offense as a violation of AW 58." "Pursuant to the directive of the Theater Judge Advocate * * *, accused was charged with the offense of 'short desertion' under the 28th and 58th Articles of War * * *. 'Misbehavior before the enemy' (AW 75) and 'desertion' in time of war (AW 58) are both capital offenses. With respect to the latter, the Commanding General, European Theater of Operations, may confirm and order executed a sentence of death, (AW 48); with respect to the former, he may confirm a sentence of death, but may not confirm the same without commuting the sentence to a less severe punishment (AW 50). Only the President of the United States is authorized to confirm and order executed a sentence of death imposed for a violation

of the 75th Article of War (AW 48). As to accused's civil status and rights, conviction of the offense of desertion produces serious consequences not resultant upon a conviction under the 75th Article of War. In the event the penalty of death is not imposed an accused forfeits all rights under his National Service Life Insurance contract * * *, and he loses his nationality as an American citizen * * *. (The loss of Federal citizenship is subject to restoration as provided by Act Jan 20, 1944, Public Law 221). In addition, his rights of citizenship in the state of his residence may be seriously affected or impaired dependent upon the constitutional and legislative provisions of such state * * *. It is therefore manifest that the action of the Staff Judge Advocate in changing the charge * * * had the effect of raising the Charge to one which (death penalty being absent) carried heavier and more drastic penalties than the original Charge. (2) Two Separate Offenses: "Authorities support the conclusion that it was legally competent for Congress to denounce accused's conduct as constituting two separate and distinct offenses. "The offense of abandoning his platoon while the accused and his organization are before the enemy is complete when the accused leaves the place with his unit where duty requires him to be. * * * His act must be a voluntary, conscious act but only the general criminal intent is necessary * * *. A specific intent to avoid hazardous duty need not be proved when the overt act of abandoning his organization is shown * * *. Oppositely, the specific intent to avoid hazardous duty is aprimary element of the offense with which accused, in the instant case, was charged and of which he was found guilty." The prosecuting authority could elect to proceed on whatever charge he thought to be consistent with the facts. "His election * * * to cause accused to be prosecuted for the offense denounced by Articles of War 58-28, was binding upon all concerned." "The Board of Review does not believe the Commanding General, European Theater of Operations, entered an area forbidden him by law or regulation in expressing his 'desire' /by the 5 October letter/. Whether the policy indicated by the letter of 5 October 1944, is wise or unwise, whether it is necessary or unnecessary or whether it is simply an expedient to eliminate the necessity for confirmation of sentences of death by the President * * *, the Board of Review will not inquire. * * * The Board of Review is concerned only with the question of the legality of the practice followed in the instant case. It concludes that when the Commanding General, * * * Division, referred for trial the charge upon which accused was arraigned and tried he signified his election that the accused be tried on said charge; that in making such election he was acting within the ambit of the discretion vested in him by Congress and that such discretion was not limited or repressed by the expressed 'desire' of the Commanding General, European Theater of Operations." (3) Re-Charge; Verification: After the charge was changed from AW 75 to AW 58-28 subsequent to the AW 70 investigation, "the charge sheet was not re-signed and was not re-verified by the accused and no further investigation was made of the new charge. It has been established that the investigation of the charge is an administrative process intended primarily for the benefit of the appointing authority and is not jurisdictional * * *." Assuming that, had accused known of the irregularity, he would have objected, it must still be concluded that no prejudice resulted. "Had such objection been made and sustained what would it have yielded him? Such objection is in the nature of a plea in abatement, which upon being sustained only delays the trial; it does not terminate it. If the objection had been upheld then

an application for a continuance would have been in order. It is obvious that a denial of the application would not have injured accused's substantial rights * * *. The substituted Charge and Specification, although unsworn fully informed accused of the nature of the charge against him. The addition of an oath to the charge would not have changed or altered the issues in any degree. The trial proceedings based on sworn charges would not differ from those based on unsworn charges. The trial would have been as fair and just on one as on the other. All the accused would have suffered was injuria sine damno, a technical wrong which could have done him no harm * * *. The purpose of the requirement that the charges be sworn to by the accuser was to protect an accused from frivolous or malicious prosecution * * *. There was no thwarting of such purpose * * * herein. The irregularity involved in the prosecution's arraigning and trying accused upon an unsworn charge, although not condoned, was a harmless error, within the provisions of the 37th Article of War." (4) The evidence supported the finding of guilty. (CM ETO 4570 Hawkins 1945)

(1st Ind, CM ETO 4570 Hawkins 1945: "While the practice followed in this case has been upheld as legal, it is not approved as correct. The provisions of AW 70 and the MCM, even though held directory and not jurisdictional, are intended to be followed. When charges are changed in a substantial way and particularly where severer penalties attach on conviction, it is not necessary to have a re-investigation if the complete facts are already disclosed, but the new charges should be re-verified by the accuser or another. The adherence to established practices produces better trials, insures justice and eliminates serious legal questions, which may be reached later by habeas corpus with the outcome uncertain."

Accused was found guilty of desertion with intent to avoid hazardous duty, in violation of AW 58 (AW 28). He was also found guilty of knowingly and willfully applying an Army 2½ ton truck to his own use and benefit, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The desertion was adequately established. (2) Confession; Statements: (a) It apparent that accused was not warned of his rights before or duing the time he was questioned or prior to his signing of his 20 April 1944 statement, which was introduced in evidence. However, "it did not appear that any promises were made to him or that force or threats were used to induce him to talk or sign the statement. When G*** discovered that accused, with whom he had spoken much Italian, was not a civilian as he had pretended, but an American soldier, he experienced considerable chagrin and felt, as he expressed it, like 'punching him in the nose'. However, it was evident that this threat resulted from a desire to get over with accused for deceiving him, not to induce him to talk or sign a statement." (b) "That part of the statement in which accused alluded to himself as a deserter could not properly be considered by the court as a confession that he absented himself without leave with intent to

avoid hazardous duty as alleged. Rather it was an indication that he did not intend to return to the service, which in view of the offense as charged was no more than an admission that he was absent without leave. Regardless of the light in which the court considered his description of himself as a deserter no substantial right of accused was injuriously affected thereby since it was clearly shown by the evidence that he did absent himself from his organization with intent to avoid hazardous duty as alleged." (c) "The Board of Review has repeatedly held that the fact that an accused was not warned of his rights under the 24th Article of War does not render the confession involuntary * * *. The evidence disclosed that at the time accused was apprehended the American military police in * * * were concerned with the activities of certain black market operators. The questioning of accused while he was dressed as a civilian and spoke Italian brought out the fact that he was an American soldier." No threats or promises were shown to have been made. "The voluntariness of the confession was a question of fact for the court * * *." (d) Another statement, taken 25 April 1944, was signed on 5 May 1944. In this regard, defense witnesses "indicated that promises were made to /accused/ that they would enter pleas for clemency for him at a subsequent trial in return for his services in aiding in the apprehension of black market violators. It was further indicated that he gave the statement as a direct result of such promises and under the circumstances shown, the court should have sustained the defense objection to its receipt in evidence. * * * However, no extended discussion * * * is necessary * * * as, excluding its contents, there was substantial and compelling evidence of the guilt of accused as charged. An error in receiving in evidence an extrajudicial confession not voluntarily made, is not fatal if the evidence of accused's guilt, outside of the confession, is compelling * * *." (3) Wrongful Use of Vehicle: AW 96: The evidence sustained the finding of accused's guilt of wrongful application of an Army vehicle to his own use--"an offense similar to larceny and for which the same punishment may be imposed * * *. While it was permissible to charge accused under AW 96, the circumstances * * * showed that accused and those associated with him in the offense came into its possession unlawfully and had no intention of returning the vehicle. Such proof would have warranted convicting accused of a violation of AW 94 * * *. Although the prosecution did not establish the value of the vehicle, this was not necessary since the court, without such evidence, could properly find it had a value in excess of $50. (CM ETO 4701 Minnetto 1945)

(1st Ind. CM ETO 4701 Minnetto 1945) In view of the promises of clemency, consideration of reduction of the sentence should be made.

Accused was found guilty of desertion with intent to avoid hazardous duty, in violation of AW 58 (AW 28--terminated by surrender). HELD: LEGALLY SUFFICIENT. "The accused suffered superficial minor wounds which were pronounced nondisabling. He legitimately appeared at the aid station for treatment. With full knowledge that his unit was engaged in an attack on the enemy, he availed himself of the opportunity thus afforded him to avoid further hazards of battle. For three days he remained in comparative safety while his fellow soldiers faced the greatest of battle dangers. When the attack was over he conveniently returned to his command. The charge against him was fully sustained." It was for the trial court to decide whether accused was so physically disabled as to be unable to perform his duties--a defense herein which was resolved against accused. That finding is binding upon appellate review. (CM ETO 4702 Petruso 1945)

(1st Ind; CM ETO 4702 Petruso 1945: "The accused has been twice wounded. On the day of his absence he was treated for lacerated wounds of the shoulder and back. He was told by the doctor to return to his company but instead he went to a nearby battalion command post where he remained three days and then reported to his company. The question of whether he had asacroiliac ailment is left in doubt. A sentence of life imprisonment does not appear justified in this case."

The company of accused 19-year old rifleman was holding a defensive position 300-800 yards from the enemy. Accused's mission was to watch enemy outpost lines. There was a small amount of intermittent artillery fire. Accused's squad leader established security outposts for the night, and assigned accused and another to a foxhole for the period 1900-2100 hours. The two were also to guard a nearby machine gun. "No fixed place was designated as the guard post since the elements of the squad were situated so close to one another that a guard could observe his post without leaving his foxhole." Accused and his comrade went absent without leave from their foxhole "post", and were away for eight days. Accused was charged with a violation of AW 58, in that he had deserted under AW 28 circumstances. He pleaded guilty to the lesser offense of AWOL, and was found guilty of the lesser offense of AWOL only. HELD: LEGALLY SUFFICIENT. The circumstances under which accused went AWOL "add to the gravity of his dereliction. It appears * * * however, that there was an almost complete lack of supervision over the guards. In an area as compact as that occupied by the squad in this case it is difficult to see how the absence of accused from his post, and of the guards who were to relieve him, could have remained unnoticed from 1900 hours * * * until 0430 hours the following morning. The extreme relaxation of controls evolved from experience for the effective maintenance of security measures may have tended to minimize the importance of guard duty to a soldier as youthful as accused. It may explain in part the existence of the state of mind which permitted him to commit the offense under such aggravating circumstances as are disclosed by the evidence." (CM ETO 4986 Rubino 1944)

(1st Ind CM ETO 4986 Rubino 1944: "The offense of which /accused/ was found guilty was * * * absence without leave." In view of the surrounding circumstances, "it is believed that he should not be separated from military service and freed from the hazards and dangers of combat by incarceration, until all possibilities of salvaging his value as a soldier have been exhausted. The Government should preserve the right to use his services in a combat area * * *." This accused was given a life sentence, with the U.S. Disciplinary Barracks, Ft. Leavenworth, Kansas, as the place of confinement. (a) The place of confinement should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir 210, WD, 14 Sep 1943, sec VI, as am by Cir 311, WD, 26 Nov 1943, sec VI and Cir 321, WD, 11 Dec 1943, sec II, par 1). "This may be done in the published order directing execution of the sentence." (b) However, "in view of the prevailing policy in this theater of conserving manpower, I recommend that consideration be given to a substantial reduction in the period of confinement, the designation of an appropriate disciplinary training center as the place of confinement, with suspension of the dishonorable discharge until the soldier's release from confinement."

Each of the two accused herein was originally separately charged with misbehavior before the enemy in violation of AW 75, in that he ran away from his platoon while it was engaged with the enemy. After investigation, the charges were changed to allege a violation of AW 58-28 on the same facts. Accused were each found to be guilty, and sentenced to be shot to death by musketry. HELD: LEGALLY SUFFICIENT. (1) The action of the approving authority in directing that "'pursuant to AW 50½ the order directing execution of the sentence is withheld and the record of trial forwarded for action by the confirming authority' did not follow the prescribed formula with respect to sentences which must be confirmed by the Commanding General, European Theater of Operations. The approving authority's action should simply have directed that the record of trial be forwarded for action under the provisions of AW 48. It is obvious, however, that the action did in fact comply with the substance of the statutory requirements (AW 50½) and that the sentence * * * was confirmed by the Commanding General, European Theater of Operations. The failure to use the prescribed formula was * * * a harmless discrepancy * * *." (2) Time of Trial: Only one day elapsed between service of the charges and the trial. However, consent to trial was given by defense counsel after he believed himself to be fully prepared to defend the case. No prejudice resulted. (3) Pre-trial Practice: It appears the original AW 75 charge was changed over to an AW 58-28 charge after the original investigation; that the new charge was not re-verified, and that no further investigation was had. It further appears that the change in charges was made pursuant to a policy letter of 5 October 1944 from Headquarters, European Theater of Operations. No prejudice resulted. (Cf: CM ETO 4570 Hawkins 1945) (CM ETO 5155 Carroll et al 1945)

1st Ind CM ETO 5155 Carroll et al 1945: This Indorsement discusses the background of accuseds' offenses, together with the pre-trial procedure. It is pointed out: "Some of the Federal courts have extended the function of the writ of habeas corpus in the review of sentences imposed by military courts to include an examination of the record of trial to determine whether an accused has been afforded 'due process of law' as that term is applied under the Federal Constitution. There can be no denial that the tendency of the Federal civil courts is to exercise greater appellate control over the Federal military courts. Under such condition, the question whether the requirements of AW 70 were met in a given case will probably be of vital concern." It is recommended that the death sentences be commuted to punishments of less severity.

Accused was found guilty of desertion in violation of AW 58, in that he absented himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat with the enemy--and did remain absent in desertion for 54 days. HELD: LEGALLY SUFFICIENT. Accused admitted his prolonged absence. Accused and his company had been engaged in active, vigorous and continued combat with the enemy prior to his instant dereliction. "The company had temporarily halted in order to reorganize. The inference is definite and almost beyond denial that the halt was but a temporary one made for the purpose of preparing to go forward in further combat. These are facts of which accused had knowledge. His statement, 'I left because I just couldn't take the shelling any more. I do not believe I could go up and take it again', fully supports this conclusion. With this situation prevailing, accused * * * accompanied Lieutenant * * * on the patrol and in the course thereof encountered enemy fire. * * * He broke * * *. He disregarded his obligations as a soldier and absented himself without leave. * * * The court was justified in inferring that his departure was prompted not only by an urge to avoid the immediate perils of the patrol but also by the even greater desire to avoid further battle combat with his company, which he knew was to follow in a few days. * * * Had the avoidance only of this immediate hazard been the motivating force behind his conduct it would naturally be expected that he would return to his company. He did not do that. Instead he continued absent from his organization for 54 days. The length of this absence emphasized the conclusion that accused intended to avoid further action with his company when it resumed its offense. The patrol hazard was but an acute experience which activated his fear of further combat and his determination to avoid its perils and hazards." (NOTE that this case adequately established a misbehavior in violation of AW 75. "Had the charge been so laid it would have been easily proved and complicated legal questions could have thus been avoided." (CM ETO 5293 Killen 1944)

Accused was found guilty of desertion in violation of AW 58 (AW 28), and of willful disobedience in violation of AW 64. HELD: LEGALLY SUFFICIENT. "There is missing from the record proof of the place of accused's dereliction. However, his statement indicates that it occurred when his company crossed the M*** River and hence the proof of geographical location of the offense was unnecessary." (CM ETO 5318 Bender 1945)

Accused was found guilty of desertion in violation of AW 58, by quitting his organization with intent to avoid hazardous duty, to wit: combat with the enemy. HELD: LEGALLY SUFFICIENT. (1) Evidence: Accused had been put on a detail to obtain rations. He "absented himself without leave, by exceeding the limited authority of going to the ration point with his platoon, securing rations and immediately returning * * *." However, "the record does not indicate at what time or place after the detail left the company on the ration mission, accused left it. But the record shows * * * that the detail normally consisted of all available privates in the platoon and also, inferentially, that noncommissioned personnel accompanied the men; (* * * that at some time either before or after reaching the rations point or at that point, accused without authority left the group and arrived a day or two later at the company kitchen, where he spent the night;.and * * * that he left the kitchen and remained absent without leave until" more than a month later. "For accused, when his unauthorized absence began, his organization was the detail with which he was required to remain and which he was required to assist at all times and places * * *. It was in reality a detachment or portion of the company. * * * By so absenting himself he quit his organization. The detail returned to the company in about two hours. His concurrent intent to avoid the hazardous duty of combat cannot be disputed. * * * It is noted that if the Specification had used the words 'place of duty' instead of, or in addition to, the word 'organization', as authorized by AW 28 and as indicated in Form 14, Forms for Specifications (MCM, 1928, App.9, p.240), the problem considered herein would not have arisen." (2) Morning Report Extract: Certain extracts of Morning Reports used herein "each contain a certificate signed by the personnel officer, * * * Regiment, stating that the 'foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said company' relating to accused. The copy, however, does not show any signature or initials and it thus does not appear that the original was authenticated by the proper officer, as required by par. 42a, AR 345-400, 1 May 1944. It was pointed out in CM ETO 4756, Carmisciano, that the presumption that the personnel officer would have included such signature or initials if they appeared on the original and the presumption that the original was properly authenticated lead to contradictory factual conclusions and hence are of no assistance in determining the facts. But in the instant case the first mentioned presumption is negatived by the testimony of the personnel officer himself identifying each * * * as 'an extract copy of the morning report for * * *. The unequivocal and unqualified testimony by the official custodian of the morning

report that certain documents are extract copies thereof carries with it the clear implication of authenticity of the original morning report and aids the presumption in its favor, at the same time rebutting the contrary presumption arising from the qualifying words concerning signatures and initials in the personnel officer's certificates on the extract copies. The defense stated there was no objection to the exhibits and as no evidence was introduced to rebut the presumption of proper authentication of the original, the copies were properly received in evidence (CM ETO 5234, Stubinski)." (CM ETO 5437 Rosenberg 1945)

Accused was found guilty of two desertions in violation of AW 58 (AW 28), to wit: (a) Absence without leave with intent to avoid hazardous duty and to shirk important service against the enemy, terminated by delivery from Canadian to U.S. Military authorities more than a month later; (b) A similar type of desertion four days later, terminated by surrender the next day. As approved, he was sentenced to be shot to death with musketry (first sentence of this kind for this offense in over 80 years--none in World War I). HELD: LEGALLY SUFFICIENT. (1) Specifications: As originally drawn, the first specification did not include the phrase, "and to shirk important service". Moreover, it contained a statement that the desertion had been terminated by surrender. After the AW 70 investigation the staff judge advocate amended the specification to add "and to shirk important service", and also to show that the desertion was terminated by delivery of the prisoner to the United States by the Canadians, as finally alleged. He also amended the second specification, to add "and to shirk important service", which phrase had been omitted from the original specification. No error resulted. "It added nothing that was not fairly inferable from the specifications as a whole as originally drafted * * *. As the offense of desertion is complete when the person absents himself without authority from his place of service with the requisite intent, * * *, and since the maximum punishment for desertion however terminated is now death * * *, the manner of termination is not material * * *. In view of the foregoing it is concluded that the redraft involved no substantial change and did not include any offense or matter not fairly included in the charges as received. The pleading of both specific intents" in a single specification "was proper and left the prosecution free to prove either or both of the intents alleged * * *, and in any event, * * * it seems clear that the hazardous duty alleged, to wit: action against the enemy, necessarily involved important service." (2) The Evidence: (a) 1st Specification: "Accused was a member of a group of replacements which had come together from the U.S., through England, to France and there to a replacement depot, where they were assigned to the * * * Division. At division headquarters accused and the other members of the group heard an orientation lecture and were issued ammunition. En route to the company to which accused and the others were assigned they saw no current enemy action but saw the unmistakable effects of past enemy action - 'some damage, some burned out vehicles and shelled places'. The group, including accused, stopped and left their packs at a

rest area and continued on to the vicinity of the company to which they had been assigned, where they 'dug in'. Then the group, which according to some prosecution testimony still included accused, proceeded to join Company G, there were 'a lot of troop movements and shelling'. In accused's confession he stated 'They were shilling the town' when the group 'dug in' and again the following morning. Notice of the orders and anticipated orders involving the hazardous duty and important service * * * could hardly have been more forcefully brought home to accused, who obviously knew what was in store for him * * * and who, according to his own statement, 'was so scared nerves and trembling that at the time the other Replacements moved out', he 'couldn't move'." Likewise in his confession (printed by him), he further admitted "Desertion of the United States Army", and that he told his commanding officer "that if I had to go out their again Id run away." "His company commander testified that when accused came to the company on 8 October he asked if he could be tried by court-martial for absence without leave." "The fact that the record does not show clearly that accused was physically present with his company at the time he absented himself does not constitute an essential variance from the allegation that he absented himself without leave from his organization as he was under military control of dividional or regimental officers and under orders to join his company * * *. He was not effectively returned to military control until his delivery to the U.S. Military authorities * * *. The lack of proof of the allegation that accused was delivered 'at or near * * *', is immaterial as is also the lack of specific proof that this occurred on or about 4 October * * *."
(b) 2nd Specification: Proof herein was also sufficiently established. "Shortly after coming to Company G on 8 October, accused asked if he could be tried for absence without leave. * * * After being placed in arrest by his company commander, accused asked him, 'If I leave now will it be desertion' and received an affirmative answer, after which he left the company, wrote out and signed his confession and surrendered the following day to the Military Government Detachment * * *. Coincidentally with his surrender he delivered his confession to military authorities and later affirmed and signed the statement in the presence thereof. In the confession accused stated that he told his commanding officer his story and 'said that if I had to go out their again I'd run away. He said their was nothing he could do for me so I ran away agains and Ill run away again if I have to go out their'." (CM ETO 5555 Slovik 1945)

Accused was found guilty of desertion in violation of AW 58, in that he went absent without leave with intent to avoid hazardous duty (AW 28), to wit, combat with the enemy, on or about 23 November 1944. HELD: LEGALLY SUFFICIENT. Accused's absence, commencing on 25 November, was adequately proved. "In addition, the prosecution showed conditions of active combat including attack and counter-attack accompanied by heavy enemy fire, for the nights of 22 and 23 November. The record is silent as to specific combat conditions on 25 November, except for evidence that accused's command was still in the same general territory on 25 November and was separated from the enemy by only 250 to 300 yards. The language

of the specification: 'on or about 23 November' was sufficiently broad to include the commission of this offense on 25 November (Dig. Op. JAG, sec. 451(39) p. 325, CM 173620 (1926). It is the opinion of the Board of Review that the general situation on 25 November, the date on which accused was proved to have been absent from his command, was shown to have been fraught with potential hazard so as to support the finding of the court that 'on or about 23 November' accused absented himself from his command to avoid hazardous duty:- combat with the enemy." (CM ETO 5953 Myers 1945)

Charged separately but tried at a common trial, accused were found guilty of respective violations of AW 58 (AW 28), in that each deserted by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: active combat duty against the enemy, and remained absent in desertion until surrender more than a month later. HELD: LEGALLY SUFFICIENT ONLY FOR AWOLS IN VIOLATION OF AW 61. (1) Evidence: Testimony of a general character merely showed thatevery member of accused's unit knew that future operations would be towards * * * with the Third Army and that they were going to the front some time in the future. "There was not the slightest evidence, however, that any officer or enlisted man in the unit knew when or exactly where the unit was to move." Men of the unit were occupying a rest period and were permitted to absent themselves from the area in order to visit friends in neighboring units. "The foregoing evidence demonstrates that the prosecution failed in the proof * * * that notice of the anticipated orders involving the hazardous duty of active combat with the enemy was brought home to accused. It also failed to prove that such duty was imminent at the time accused departed without authority. Even proof that their unit had been notified of imminent prospective movement does not suffice as to this element in the absence of proof that accused were actually notified thereof * * *; but the instant case also lacks the element of imminence." Hence, there was a failure of proof that accused intended to avoid hazardous duty (Distinguish cases). "There is no evidence as to how long after accuseds' departure, Company A came into contact with the enemy. Evidence that their unit landed on the continent of Europe, proceeded inland some 400 miles, and was expected at some indefinite future time to move forward to a place where it would eventually engage in tactical operations against the enemy is not * * * per se probative of an intent on their part, concurrent with their absenting themselves without authority, to avoid the hazardous duty of active combat duty against the enemy." (2) Desertion vs. AWOL: Although the evidence might otherwise have shown a desertion in violation of AW 58, as distinguished from one in violation of AW 58-28, accused herein may only be found to have been guilty of the lesser offense of absence without leave in violation of AW 61. "The MCM, 1921, recognizing the possibility that an absentee might for the first time entertain the intent not to return to the military service after the inception of his unauthorized absence, provided that such a state of facts would constitute desertion * * * but did not apply the principle to the * * * portion of AW 28 whose provisions were unambiguous to the effect that the intent to avoid hazardous duty or shirk important service must concur in point of time with the quitting of

accused's organization or place of duty. Nevertheless, the following provision appears in MCM, 1928, as one of the elements of proof of desertion: 'That he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such place, or to avoid hazardous duty, or to shirk important service as alleged' (MCM, 1928, par.130a, p.143) * * *. To the extent that this provision attempts to extend or amplify the unambiguous provisions of AW 28 it is unauthorized administrative legislation * * *. Well established principles governing the elements of the offense of desertion under AW 28 indicate that the requisite intent must be entertained by the absentee at the time he quits his organization or place of duty in order to be guilty of a violation of that Article * * *. It is noted further that the Specification /herein/ alleges the intent to avoid hazardous duty as concurring with accuseds' absenting themselves without leave from their organization." (3) Specification Requirements: "If the Specification had charged desertion generally without alleging any specific intent whatever, following the model specification appearing on page 238, MCM, 1928, App.4, the evidence would have supported the findings of guilty, the prosecution being free, in the absence of a direct attack upon the Specification because of the vagueness or indefiniteness, to prove absence without leave accompanied by any or all of the specific intents (1) not to return, (2) to avoid hazardous duty or (3) to shirk important service * * *. The evidence in the instant case shows the existence of the first intent but * * * not of the other two. Although desertion may properly be charged without an allegation of specific intent, nevertheless when a certain specific intent is alleged it must be proved. * * * The necessity for holding the record * * * herein legally insufficient * * * would have been avoided had the Specification charged desertion generally without alleging any specific intent. Where the expected evidence indicates the likelihood that accused entertained more than one of the mentioned interests or raises doubt as to which of them he entertained, the specification should allege desertion generally without limitation to only one specific intent, particularly when the absence is prolonged." (4) Time of Trial: No prejudice resulted from trial three days after service of the charges. Accused consented. (5) Accused; Statement: At the conclusion of one accused's testimony on behalf of both accused, the law member advised the other accused that he could still make a sworn statement in his behalf, but if he did so he could be questioned on anything that is in the Specification. "The ruling of the law member in accordance" with MCM, 1928, par.121b, p.127, as above outlined, was proper. (CM ETO 5958 Perry et al, 1945)

Accused were found guilty of desertion in violation of AW 58, in that they had gone absent without leave on 22 October with intent to avoid hazardous duty (AW 28), to wit, an engagement with the enemy, and had remained absent until surrender in Paris on 6 November 1944. HELD: LEGALLY SUFFICIENT. Pursuant to regimental policy to rotate units between the line and rest areas, accused's unit, first, had been fighting, but had then been placed in a rest area. "Although the tactical situation at the front was static at the time and the platoon was occupying a defensive position, some 20 casualties had been suffered in the company from mortar and artillery fire during the preceding 3 weeks * * *." Accused's outfit was about to move up to the front again. The platoon sergeant and guide had been told to inform the men, pursuant to usual custom.

One of the accused actually told a third member to get ready. The above facts "being true, and in view of the smallness of the unit, the physical proximity of the members thereof to one another, and the fact that at least two of the members of the squad (* * *) knew of the order, the court might well have been justified in inferring that the accuseds unit was under orders or anticipated orders involving hazardous duty but also to show that notice thereof and of the imminent hazardous duty was actually brought home to the accused." "There is no direct evidence * * * showing * * * that at the time the accused absented themselves from their unit they entertained the specific intent to avoid hazardous duty. However, since they absented themselves under the above circumstances, the court was justified in inferring that their departure was prompted by a desire to avoid the hazards attendant upon their imminent return to the front line." (CM ETO 5983 Myhand et al 1945)

Accused was found guilty of desertion in violation of AW 58 (AW 28, in that he went absent without leave with intent to avoid hazardous duty, to wit: participation with the enemy. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. The absence without leave was sufficiently established. But "there is no evidence * * * that at the time accused left the regimental headquarters on 10 October, he intented to avoid hazardous duty * * *. There is no evidence as to the location or activity of his unit at that time or thereafter. His unauthorized absence for 25 days alone is not probative of the intent charged, however it may aggravate the lesser included offense * * *. On the contrary, the record as a whole strongly tends to negative the inference of an intent to avoid hazardous duty. It is uncontroverted that when accused left regimental headquarters he was on his way back, voluntarily, to his unit following the completion of his assigned mission. He had discharged his share of the burden of combat prior to his absence, he voluntarily surrendered at the end thereof and was immediately restored to his own squad, with which he performed creditably in further extensive combat operations. Accused's denial of an intention to avoid hazardous duty is consistent with the evidence." (Distinguish CM ETO 5437, 7304. Compare CM ETO 5958, 5234.) (CM ETO 6039 Brown 1945)

Accused was found guilty of two violations of AW 58 (AW 28), each alleging that he absented himself without leave from his organization with intent to avoid hazardous duty. HELD: LEGALLY SUFFICIENT. "Accused initially absented himself from his organization at a time when it was occupying a secondary position on the Anzio beachhead some 1,000 yards from the front lines. Numerous casualties were being suffered * * * as the result of continuous and heavy shelling. He remained absent until he was 'picked up' approximately one month later. When questioned * * * he stated that he had left because 'he couldn't take it any more'. Shortly after * * * he again absented himself * * *. Although his unit was in a 'rest area' at this time, it appears that such area was a rest area more in name than in fact. The area was on the Anzio beachhead, was subjected to

occasional shelling and was separated from the enemy lines by a distance of only a mile and a half at the closest point, and the enemy lines were nowhere more than ten miles distance." About 3½ months later, he surrendered himself "only after his unit had broken out of the beachhead and had gone on to participate in the campaign in France." The evidence sufficiently supported the findings of guilt. Nonetheless, it must be noted that the record is far from satisfactory. "Accused's duty assignment within his company is not shown; testimony as to the various movements of his unit and the time when those movements took place is vague and in some instances completely lacking; no mention is made of the past activities or record of the accused or the exact circumstances existing at the time he absented himself; no evidence as to his mental condition appears in the record proper; there is no indication of the reason why accused was twice hospitalized; and the record generally is deficient in the precise development of relevant facts. An accused is entitled to have all the evidence both for and against him duly presented to the court in order that it may make intelligent findings and so that, if accused is found guilty, a just sentence may be imposed. A full development of the facts is also desirable so that the appropriate authorities will be furnished a basis for the exercise of clemency, if warranted." (CM ETO 6079 Marchetti 1945)

Accused was found guilty of desertion (3 October - 20 November 1944) in violation of AW 58 under AW 28 circumstances, in that he absented himself without proper leave from his place of duty with intent to avoid hazardous duty, to wit: Combat with the enemy; and remained away until apprehension more than 1½ months later. HELD: LEGALLY SUFFICIENT. (1) Evidence: "Apart from accused's statement, received in evidence by stipulation, the only other evidence as to his alleged absence without leave with intent to avoid hazardous duty was that on 3 October he said to the clerk of the Service Company, *** Infantry, 'he was coming back out of the hospital and returning to the company', that the clerk told him 'the company was up on the line at the present time', that the acting first sergeant of Company *** did not know accused but did send a message to W*** regarding him and 'no one bearing the name of accused reported to the company', which on 3 and 4 October and for a time after that was engaged in combat. The foregoing facts presented sufficient evidence to warrant a finding by the court that accused was absent from his organization or place of duty without leave (CM ETO 527, Astrella)." (MCM, 1928, par 114, p 115.) "The full statement of accused to the investigating officer contains his confession to the offense alleged and shows that he did absent himself from his place of duty (then the shortest practicable route to his company which was at the time engaged in combat) with intent to avoid hazardous duty. Since his absence without leave was shown by evidence outside of his confession and constitutes the corpus delicti of the offense charged * * *, his confession was properly admitted in evidence and all the elements of the offense charged were thus supplied and fully supported the court's findings of guilty." (CM ETO 6221 Rodriguez 1945)

Accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. "The evidence **** shows that *** accused absented himself without leave from his organization when it was close to the enemy, was alerted and was momentarily expecting to take an advanced position to resist the enemy counter attack. The proof rather indicates that the motive * * * was not fear. Rather it appears that he went off to indulge his appetite for liquor, or that his conduct resulted from his having theretofore overindulged to the extent that he lost all sense of responsibility for the performance of essential duty at a crucial time. Accused had a known and grave propensity for drink. The evidence indicated that at 3 p.m., 18 December /date of offense/, he was in a state of intoxication. But his condition was voluntary. His willingness to put himself hors de combat through drink necessarily involved an intent to shirk his duty, hazardous duty at that particular time and known by him to be such. * * * When a man has a known duty to perform, a deliberate engagement by him in conduct which he knows will render impossible performance by him of his duty certainly carries with it, legally, an intent not to perform his duty. And if as a consequence of his misconduct, involving such intention to flout duty, he separates himself from his command, he can properly be said to have intentionally absented himself. * * * AW 28 does not condemn such conduct only when it is inspired by fear. It is probably far worse for a man to keep out of combat through laziness or through preference for a few hours sleep than it is for a youngster who is so afraid that his feet won't move. The language of AW 28 is certainly susceptible of this conclusion." (CM ETO 6626 Lipscomb 1945)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances, and of absence without leave in violation of AW 61. HELD: LEGALLY SUFFICIENT. (1) Condonation: "The evidence shows that following accused's return to military control on 9 December 1944 he was ordered by his company commander to be sent to his platoon which he did. The MCM provides that an unconditional restoration to duty without trial by an authority competent to order trial may be pleaded in bar of trial for the desertion to which such restoration relates (MCM, 1928, par.69b, p.54 * * *). Although the facts herein tend to show a restoration to duty the evidence does not conclusively establish that condition nor was accused ordered to rejoin his unit by any person with authority competent to order trial. He remained with his unit only 3 days and was then placed in confinement awaiting trial. AR 615-300, par.16(b) provides that 'The authority to remove an administrative charge of desertion * * * is specifically delegated to all officers exercising general or special court-martial jurisdiction'. There is no showing herein that any administrative action was taken by any person co,petent to remove the charge and accordingly there is no condonation of the offense * * *." (CM ETO 6766 Annino 1945)

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Accused was found guilty of desertion in violation of AW 58 (AW 28), after his absence without leave for more than 7 months with alleged intent to avoid hazardous duty, to wit, combat with the enemy. He was sentenced to be shot to death by musketry. HELD: LEGALLY SUFFICIENT. (1) Court Membership: Lt *** "was not the accuser, did not investigate the case and was not called as a witness at the trial. His only connection with the case was the fact that he had in the course of his duties seen prima facie evidence of accused's absence without leave." His acts of signing the extract copy of the morning report and a letter to similar effect were purely administrative and, in the absence of indication of injury to any of accused's substantial rights, any irregularity involved in his sitting as a member of the court may be regarded as harmless (ETO 2471, 4967). (2) Stipulation: "The record does not expressly state that accused assented to the stipulation as to the testimony of Lt *** concerning the taking of accused's statement, which, it will be assumed, * * *, amounts to a confession." However, defense counsel agreed to its admission. The stipulation was signed by accused as well as by the defense counsel and the trial judge advocate. "It is not essential that the record show accused's verbal assent to the stipulation * * * and the assertions of defense counsel in accused's presence, coupled with the fact that the subject matter of the stipulation and statement were uncontroverted and that accused signed both, warranted the court in concluding that there was no doubt 'as to the accused's understanding of what is involved' in the stipulation." (3) Confession: Defense counsel "specifically stated that there was no objection to the admission * * * of the statement so made by accused. There is no indication that it was otherwise than voluntarily made. The corpus delicti of the offense, absence without leave * * * was established * * *." "The stipulation * * concerned testimony as to the taking of accused's confession, which was a separate document, signed and verified by him. Such stipulation is to be distinguished from one which in itself 'practically amounts to a confession'". (See MCM, 1928, pp.136-7) "But, although it was far from a stipulation of ultimate guilt, it merited close scrutiny * * * before acceptance in this highly serious case. Likewise, the Board of Review * * * should carefully scrutinize stipulations." However, no prejudicial irregularity appeared herein. (4) Accused's mental capacity was sufficiently established. (CM ETO 6810 Shambaugh 1945)

(1st Ind, CM ETO 6810 Shambaugh 1945) Accused had practically no education, and is virtually illiterate. He had neither previous convictions nor bad time. His present company commander had no knowledge of his character or efficiency. "Although accused's absence endured over seven months, the evidence * * * fails to show a deliberate design to secure incarceration in order to avoid the perils and hazards of combat (as in CM ETO 5555, Slovik, and CM ETO 5565, Fendorak), and points to cowardice on accused's part rather than criminality." It is indicated that the death penalty herein is severe.

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances, to wit: that he absented himself without leave on or about 5 December from his place of duty with intent to avoid hazardous duty--"engage in combat with the enemy in his capacity as rifleman and did remain absent * * * until he surrendered" on or about 23 December. HELD: LEGALLY SUFFICIENT. (1) Evidence: Accused's organization was in almost continuous combat from 3 December to 22 December 1944. "Early in the morning on 5 December, accused, who on 3 and 4 December had been treated for diarrhea at the regimental aid station, again secured permission to go on sick call. While the company crossed the Saar, he reported to the aid station and there received treatment for his ailment, which was moderately severe but not incapacitating. Although he was marked 'returned to duty' after receiving treatment on 3 and 4 December, the regimental surgeon * * * may have told him that he need not rejoin his company for 'a day or two'. However, the surgeon was positive that if he did so inform the accused he did not grant him permission to 'stay away' for more than two days." Instead, accused rejoined a rear-echelon kitchen, and did not return to his organization until 23 December after it had withdrawn to a rest area. In passing upon whether accused was guilty of an AW 58-28 desertion, "the case of CM ETO 4702, Petruso, is of interest. In that case, accused was wounded while advancing with his company during an attack whereupon he left the line of advance and reported to the battalion aid station. The medical officer in charge of the aid station treated his wounds, which he pronounced non-disabling, and directed him to return to his company for duty. Accused instead went to a battalion headquarters where he remained for three days after which he reported to his unit. In the interim the company engaged in severe fighting." Accused was found to be guilty therein. "The instant case presents the same general pattern as that presented by the above case, with two exceptions. There accused was directed to return to his company immediately upon receiving treatment and instead went to battalion headquarters. Here the accused probably was told after receiving treatment that he need not rejoin his unit for 'a day or two', and, although he did not return to that portion of his company which was engaged in combat across the river, he did return to a rear echelon detachment of his own company. These differences * * * do not affect the * * * principle involved. Although accused may have been told he need not rejoin his company for a day or two, he was under a duty to return at the expiration of this period and, since he was a rifleman, this duty involved returning to his platoon, not to the kitchen. Instead, he took advantage of the opportunity offorded him by his legitimate presence at the aid station and the limited grant of authority given him by the regimental surgeon to avoid further hazards of battle. * * * He remained in comparative safety for a period of approximately two weeks * * * and returned to his unit only after it withdrew to a rest area. By failing to return to his proper place of duty at least by the evening of 7 December he absented himself without leave * * *, and the court was warranted to finding that the absence was motivated by intent to avoid hazardous duty. (2) Variance: "The proof showed that he initially absented himself from his place of duty rather than his organization (and the court so found by exception and substitution) and that such initial absence

took place on 7 December rather than 5 December. However, the words of the specification 'absenting himself * * * from his organization with intent to avoid * * * /engaging/ * * * in combat with the enemy in his capacity as rifleman' were designed and are broad enough to cover the specific kind of conduct here shown, i.e. failure to return to his place of duty after receiving treatment at the aid station. The words of the Specification 'on or about 5 December 1944' were sufficiently broad to permit proof of the occurrence of this offense on 7 December 1944 (Cf: CM ETO 5953, Myers.". There was no real or substantial variance. (CM ETO 6842 Clifton 1945)

Accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1) The Evidence: "Some time after 1 December the company of which accused was a member was in a rest area in * * *, France, whence it moved southwest approximately 20 miles to * * *. Thereafter, and prior to 20 December, it moved about 60 or 70 miles northwest to the vicinity of * * *, Luxembourg. On 20 December, during a change of position near * * * /Luxembourg/, accused was found to be missing but was located on the morning of the 21st and ordered to return to his company which he did. However, later that same day, he again absented himself without leave. On 21 December von Rundstedt's offensive was in its fifth day and accused's company was only about ten miles from the southern flank of 'the bulge'. According to the first sergeant /sole witness/ the company had been 'getting ready to fight the Germans' during the northward movement and during accused's absence, ten miles southeast of Bastogne. Accused did not return until 29 December after his company withdrew for reorganization. In view of the gravity of the situation existing at the time, the obvious and widely known necessity for prompt counter measures to stem the advance, the previous movement in the direction of the southern flank of the salient and the proximity of the company to the enemy, the court was justified in inferring that at the time accused absented himself he had knowledge of the facts which would reasonably lead him to believe he would shortly be engaged in hazardous duty. Under the circumstances here shown, the court was also warranted in concluding that he absented himself to avoid such duty." The finding of guilt was supported. (2) General Comment: "The instant record * * * is unsatisfactory in that it fails to show with completness and precision the facts and circumstances leading up to and surrounding the commission of the offense charged. Among other things the prosecution did not in all instances show the precise dates upon which accused's company effected the various movements concerning which the first sergeant testified and the evidence of record bearing upon the tactical and geographical relation of the company to the enemy on the day accused absented himself is extremely meager. The members of the court * * * were undoubtedly generally familiar with these facts and for that reason it may have been thought unnecessary to bring them to their attention. Yet it should be remembered that those who review the record are not necessarily possessed of similar knowledge but must, in the main, gather their knowledge of the case from the record itself. Failure to develop fully all relevant facts is especially subject to valid criticism where, as here, it appears that such facts were readily and easily susceptible of proof. While it is the opinion of the Board of

Review that the record of trial is legally sufficient despite these deficiencies, this is true only because of the background of accused's actions in the instant case - von Rundstedt's winter offensive which started on 17 December 1944 and succeeded initially in curring a wide salient through northern Luxembourg and eastern Belgium - was of sufficient importance, moment and notoriety that the Board of Review may take judicial notice thereof." "When the testimony * * * is supplemented by reference to the map and read in the light of events which the Board judicially knows", it must be concluded that the finding of guilt was supported. (CM ETO 6934 Carlson 1945)

Accused were first charged with violations of AW 75. The charges were subsequently changed to show violations of AW 58 under AW 28 circumstances. Both accused were found to be guilty of the latter charges. HELD: LEGALLY SUFFICIENT. (1) Pre-Trial Practice: "The papers accompanying the record of trial and the charge sheets disclose that the original charges preferred against accused were laid under the 75th Article. The date on each charge sheet - 7 January 1945 - is the same as the date of each original verification by Captain * * *, the accuser, The charges were referred to 1st Lt *** for investigation under AW 70 on 9 January 1945. The investigating officer completed his investigation and made his report * * * on 11 January 1945. Thereafter on 13 January 1945 the charges were forwarded * * * with recommendations that the accused be tried for 'the offense committed and charged against them under the 75th Article of War.'" The battalion commander recommended re-investigation, and trial under AW 58. "Accompanying the indorsement was a certificate of the original investigating officer" stating that a reinvestigation under a new AW 58 charge was made; that accused neither wanted to cross-examine any witness nor make a statement. "Over the original charge on each charge sheet there has been stapled a piece of paper which bears the charges as set forth" under AW 58-28. "Each of these stapled pieces of paper bears in red ink the initials 'ABM', which are doubtless those of Major ***, the trial judge advocate of the court before which the accused was arraigned and tried. There is no evidence that the accuser, Captain ***, was afforded the opportunity of either withdrawing as accuser or reverifying the charges after they had been changed from the 75th Article of War to the 58th Article of War. The inference, therefore, is reasonable that this alteration of matter above his signature was made without his knowledge or consent. Although not shown as one of the documents accompanying the record of trial, the implication is indisputable that the shifting of the charges * * * after the original charges were signed and verified by the accuser was prompted by the letter of 5 October 1944 (signed by the Theater Judge Advocate) from Hq, ETO, which is" set forth intenso in CM ETO 4570 Hawkins. Upon the holdings /in CM ETO 4570 and 5155/, it is now concluded that the pre-trial practice herein did not injure or impair the substantial rights of either accused or affect the jurisdiction of the court before which accused were arraigned. However, the practice was highly irregular. (CM ETO 6997 Jennings 1945)

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Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. Accused's two absences without leave as charged were shown. "At the time of his first absence, his organization had moved to an assembly area and reformed preparatory to joining the ***th Infantry Division in an attack against the enemy * * *. Their position was then being shelled 'continuously' and the company suffered casualties. At the time accused absented himself on the second occasion, his company was again preparing to move out in attack against the enemy. This time the movement was towards ***, France, when the company 'ran into' heavy fire from enemy" weapons. "As a result of this engagement accused's company commander was wounded and the company considerably disorganized. Prior to each of these engagements accused was present with his company but absent therefrom during and subsequent to the battles." The finding of guilt was supported. (CM ETO 7153 Seitz 1945)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances, and of willful disobedience in violation of AW 64. HELD: LEGALLY SUFFICIENT. (1) AW 58-28: At the time of accused's initial absence, accused's company "was entrenched in a defensive position in the front line and being subjected to enemy artillery and mortar fire." Accused admittedly left because "he was in 'mortal terror' and that he 'fled' from his front line position with only the thought of getting away from enemy shellfire." The AW 58-28 offense was established. (2) The Willful Disobedience was likewise established. Accused was given a direct order by his superior officer "to return to his company in the front lines and * * * he willfully disobeyed this command. Accused was given several opportunities to obey yet he repeatedly refused, stating on several occasions that he could not stand combat and could not take it anymore. His refusal was deliberate and willful and continuous." Accused's guilt hereunder was established. (CM ETO 7230 Magnanti 1945)

Accused was found guilty of absence without leave in violation of AW 61; and of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1) The initial AWOL was adequately shown. (2) The second desertion offense occurred at a time when "accused and his unit were before the enemy and that he 'escaped' from his confinement in an unlocked cellar without a guard, pending trial for" his earlier absence. He "went to the rear without authority for the admitted purpose of avoiding enemy artillery fire which was being received when he left, and remained absent until he surrendered some distance away more than a month later. The sole important question is whether accused could have commenced an AW 28-58 desertion from a status of restraint. "There was no mandatory requirement that accused be restrained pending trial and the restraint imposed was required to be only the minimum necessary under the circumstances (MCM, 1928, par.19, p.13). His status of temporary restraing pending trial for his prior absence was wholly different from that of a garrison or general prisoner in confinement

directed by a court-martial sentence, in that it was not punishment in any sense but merely a matter of administrative convenience unrelated to his guilt of any offense, which was not then established. He was presumed innocent until proved guilty and accordingly could not be punished as a convicted soldier * * *. Although one incident of his status was that he might not bear arms (AR 600-355, 17 July 1942, par.7c), nevertheless, he was available for the performance of routine duties (CM 127903 (1918), Dig.Op.JAG, 1912-1940, sec.427(2), p.290), which under the circumstances shown, might well be hazardous. Moreover, his restraint might at any time be directly terminated (* * * Dig.Op.JAG, 1912-1940, sec.427(1), p.289-290), or constructively terminated by an order to perform military duty or duties, hazardous or otherwise, inconsistent with his restraint (* * * III Bull JAG 380 * * *). The termination of his restraint was a matter resting in the judgment of his commanding officer * * *. Should the necessity arise, as it well might, that officer could immediately order accused into active duty of a hazardous nature directly or indirectly related to action against the enemy. It was accused's duty to remain in the cellar which was a hazardous place at the time. When he left he escaped existing hazards and perils of battle. * * * For soldiers in and near the front line of battle where manpower is always a vital and prime necessity, hazardous duty is ever present or imminent, regardless of the fact that they may be temporarily relieved from active participation in combat for a wide variety of reasons. It is reasonable to infer that accused knew this and that this knowledge, at least in part, motivated his departure. His duty was to remain in the cellar pending his trial and pending the assignment to him of any duty his commanding officer might see fit at any time to impose upon him. * * * Hazardous duty and important service involved in action against the enemy were, to accused's knowledge, reasonably imminent for him * * *". The finding of AW 28-58 guilt was supported. (CM ETO 6810, Shambaugh; 5437 Rosenberg). (CM ETO 7339 Conklin 1945)

Accused member of an Infantry Division was found guilty of desertion in violation of AW 58 under AW 28 circumstances in that, on or about 24 December 1944, in the vicinity of * * *, Luxembourg, he went absent without leave with intent to avoid hazardous duty, to wit: participation against the enemy." HELD: LEGALLY SUFFICIENT. "This is a typical 'battle line' desertion case and of a pattern familiar to the Board of Review. The evidence is definite and positive that on the morning of 24 December 1944 accused's organization was in active combat with the enemy. The Board of Review may take judicial notice of the fact that at this time the American military forces were resisting to the utmost the advance of the Germans into Luxembourg and that it was one of the most critical periods in the German offense of December 1944 (CM ETO 7148 Giambetti ***). At this moment accused left his company and place of duty without authority and was absent for 18 days. There is evidence that accused was actually present with his company on the early morning of 24 December. The court was therefore justified in inferring from this evidence that he possessed knowledge of his company's tactical position and knew that it was engaged or about to be engaged in sharp combat with the enemy. In the absence of an

explanation from him the court was authorized to conclude that he deliberately and willfully absented himself to avoid the hazards and perils of the immediate operations against the enemy invading forces. The record is legally sufficient to support the findings of guilty." (CM ETO Cases: 4570, Hawkins; 4701 Minnetto; 4783 Duff; 5293 Killen; 6623 Milner.) (CM ETO 7413 Gogol 1945)

Accused was charged with two desertions in violation of AW 58 under AW 28 circumstances. On the first specification, he was found guilty of the lesser offense of AWOL in violation of AW 61. On the second specification, he was found guilty as charged. HELD: LEGALLY INSUFFICIENT ON THE SECOND SPECIFICATION FOR MORE THAN AWOL IN VIOLATION OF AW 61. "When a specification alleges desertion with intent to avoid hazardous duty, this intentment must be proved, and the burden is on the prosecution to establish it***. This burden is not discharged by a mere showing that accused's organization was in combat during his absence. In order to sustain findings of guilty, it is necessary that substantial evidence reasonably support the conclusion that accused initially absented himself without leave (1) with knowledge of the hazardous duty required of him; and (2) with intent to avoid its performance. Intent may be inferred from the fact that accused's absence without leave effected - or was initiated under circumstances reasonably calculated to effect - avoidance of the specific hazardous duty of which he had knowledge at the time of his departure. In the case under consideration, with reference to Specification 2 * * *, the only evidence having any bearing whatsoever on the tactical situation of accused's company on 8 November is the first sergeant's testimony that 'in the middle of October, we were in a defensive position in the vicinity of N** and in the month of November we were in the attack until the first week of December', further that on 8 November 1944 the organization was again at N**, France. There is no evidence of notice to or knowledge on the part of the accused of any specific hazardous duty facing him as a member of his company on or about the date of his initial absence /8 November/. To infer such knowledge from the meager, vague and general testimony quoted above, and to use the inference thus arrived at as the basis of a further inference of intent, exceeds even the broad limits of judicial discretion accorded courts-martial in determining such necessarily inferential issues of fact. Accused pleaded not guilty of desertion with intent to avoid hazardous duty, and the legal presumption of innocence until proved guilty has not been overcome by any substantial evidence capable of supporting the necessary inference of intent. The evidence therefore sustains only so much of the findings of guilty of Specification 2 as involves the lesser included offense of absence without leave in violation of AW 61." (CM ETO 7532 Ramirez 1945)

(1st Ind; ETO 7532 Ramirez): "The trouble with this case is that the charges were not proper and it was poorly tried. AWOL from 8 November 1944 to 3 January 1945 is so prolonged that intent to desert could be inferred from the absence alone had ordinary desertion been alleged.

But the specification alleged special desertion with intent to avoid hazardous duty, which therefore, had to be proved. There is no testimony at all as to November 8. The only witness, the company first sergeant, was on leave in Paris on the 8th and 9th and testified that he did not see accused during the month of November. Therefore the conviction of desertion must fail."

Accused was found guilty of desertion in violation of AW 58 (AW 28 circumstances). HELD: LEGALLY SUFFICIENT. Testimony established that accused's unit had been attacking, and then went to * * * for reorganization and training; that 9 days later "the company moved out approximately one mile north of * * * under security", at which time accused was missing. After a consultation with the dictionary definition of "security", it is held: "It thus may be seen that in Army terminology ***'s testimony indicated that the unit was on the aforementioned dates either in contact or imminent contact with the enemy." Accused left his company when it "was moving forward after a few days of rest and reorganization. * * * The court fairly inferred that accused at the time of his departure knew the perils and hazards confronting his unit and he absented himself with the intent to avoid them." (CM ETO 7688 Buchanan 1945)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. "Accused with knowledge of the fact that he was ordered to depart on a reconnaissance patrol which in all probability would encounter the enemy and thereby become involved in combat with him, deliberately left his command without authority. His departure was prompted by one motive alone, viz, the desire to avoid the hazards and perils of patrol duty." He was guilty of a violation of AW 58-28. The question of his mental responsibility was one for the trial court. (Note that accused stated that he had previously asked to be relieved for a couple of days because he "couldn't take any more", but that his request had been refused.) (CM ETO 8028 Burtis 1945)

Accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. Accused's company, part of the battalion reserve, moved out of H*** shortly before noon on 23 November. Its mission was to relieve the tank units then located near St *** (approximately $3\frac{1}{2}$ miles distant) which it did on 24 November. It engaged the enemy near that village and captured a town northeast of it. After a short pause it advanced to the Saar River, crossed the Saar and B*** rivers and attacked into Germany. The Board of Review takes judicial notice of the fact that such movement was the commencement of a major military operation." "Prosecution's evidence is clear and convincing that accused without authority left his organization immediately prior to an advance movement directed

against the enemy. By his own admission * * *, the company on 23 November was 'getting ready to move * * * up to the front' when 'he took off and went to H***, France'. The facts proved by the testimony of the first sergeant coupled with accused's incriminating admission", permitted the court to infer that accused, "with full knowledge that his organization was about to advance to an attack upon the enemy, which was located but a few miles distant, deliberately absented himself without authority in order to avoid the battle perils and hazards which he knew were facing him. His guilt was proved beyond all doubt." (CM ETO 8083 Cubley 1945)

After his respective absences for eight, eight, two and three days during December 1944 and January 1945, accused was found guilty of four desertions in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY INSUFFICIENT TO SUPPORT THE FIRST "DESERTION. LEGALLY SUFFICIENT TO SUPPORT THE LAST THREE DESERTIONS. (1) First Absence; Evidence: "The evidence shows that throughout the period of his unauthorized absences accused's company was continuously engaged in operations against the enemy and, with respect to Specification 1, that on the day before the first absence (17-25 December 1944) the company, located in a rest area where it had been for an undisclosed period, was alerted to move on three hours notice. There is not the slightest evidence, however, as to accused's situation or his connection with his company or that he knew of this alert. The evidence shows only that he was reported absent without leave at reveille at 0430 hours 17 December and that his absence was later confirmed. It may have been that accused departed because of the alert, but this may not be inferred from proof of his absence alone. In order to support the findings of guilty of the offense charged, the record must contain substantial evidence of the notification to accused of imminent hazardous duty * * *. Such proof is not supplied by evidence merely of absence without authority * * * or by evidence of accused's knowledge that he was absent without authority * * *. This case is distinguishable from those in which the evidence showed that the accused was present with his organization and engaged in active operations against the enemy at the time he absented himself without authority. In such cases notice to the accused of existence and imminence of combat and its hazards is inherent in the situation * * *. Accused's statement that the reason he absented himself without leave was that he wished to obtain further insurance is not in itself probative of an intent to avoid hazardous duty." The findings on the first Specification were insufficiently supported for more than an AWOL in violation of AW 61. (2) Last Three Absences: Testimony in regard to these absences shows that "the company was engaged in direct and immediate operations against the enemy in the vicinity of ***, ***, ***, Luxembourg. Accused was required to be present with his company. The inherent tactical situation was notice to him of the existence and imminence of battle hazards and perils * * *. In each instance when accused left without authority, he was in arrest of quarters * * *. The fact that accused was in a status of restraint pending trial did not render him immune from the hazardous duty of participation in operations against the enemy (CM ETO 7339, Conklin). Before each absence he was present with his company, which was continually moving forward and attacking the enemy, and he was available,

although in temporary arrest of quarters, for any duty, hazardous or otherwise, which his commanding officer might see fit at any time to impose upon him. That he knew this and that such knowledge motivated his successive unauthorized departures is, under the circumstances * * *, an inescapable conclusion." (CM ETO 8300 Paxson 1945)

Accused was found guilty of desertion under AW 58, involving AW 28 circumstances which occurred 17 September 1944. He was also found guilty of misbehavior before the enemy in violation of AW 75, by running away from his place of duty on 27 September 1944. HELD: LEGALLY SUFFICIENT. (1) AW 28-58: Accused, with a long and honorable service, had been transferred from a medical battalion to duty with an infantry battalion. Reporting at the medical aid station, he was told to wait until transportation would be available to take him to his place of duty. His new outfit was then in combat--a matter of general knowledge. Later, accused could not be found. He surrendered three days later. "The Board of Review may take judicial notice of the landing of the Seventh Army and the 3rd Infantry Division as a unit thereof on the southern coast of France on 15 August 1944; the Army's rapid northern advance and junction with the Third Army near Chaumont, France, 14 September 1944, and of the Seventh Army's capture of the City of Epinal, France, 24 September * * *. These events were described in the press throughout the world as they occurred, and in communiques issued by the high command. Reference to any authentic map reveals the following pertinent facts: Lure, France, the proven location of the * * * Battalion in combat 17 September 1944 is 335 miles from the Mediterranean, representing an advance of that distance in 33 days; Vy les Lure, the location of the regimental aid station's site at the time accused surrendered there 20 September 1944, is 11½ miles north of Lure; and Rupt-sur-Moselle, the scene of accused's alleged offense in the action there on 27 September is 7½ miles northeast of Faucogney. Epinal is about 35 miles north of Lure. Under such circumstances, there can be no reasonable doubt of accused's knowledge on 17 September 1944 that the regiment was in combat as testified. During combat, that there will be certain unmistakable battle activity in and around regimental installations is so self-evident as to be axiomatic within the military knowledge of line officers, of which the court was composed. 'Some matters of judicial knowledge are so self evident as to be ever present in the mind, so that they naturally enter into a decision of any point to which they have application.' (31 C.J.Sec., sec. 13c, p 522.) There had been the continued rapid movement of the campaign. There is also to be considered the fact that accused was then at an aid station within four miles of the front lines, where he could hardly have failed to see and hear friendly and enemy cannon and to observe the tenseness, the excitement of men, and the rush of traffic. They are the inevitable accompaniments of battle which at a regimental installation could not have been unobserved or misunderstood. Accused received notice of his assignment to a battalion section, which, as he must have known from experience, meant duties as a company aid man or litter bearer in close proximity to the front lines * * *. Hazardous duty related to combat, of which he had knowledge and

experience, was therefore imminent, and it may be inferred that he left with the specific intent to avoid it * * *." (2) AW 75: "Accused was found two and a half miles from his company, after being present with it as an aid man for two days. The company was then engaged with the enemy. He said he could not take it and refused to return. The evidence sustains the finding of guilty * * *." (CM ETO 6637 Pittala 1945)

Separately charged but tried together, both accused herein were found guilty of desertion in violation of AW 58 under AW 28 circumstances, after their AWOL in France on 20 November 1944, terminated by surrender on 2 December. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. "The evidence shows that on the morning of the day before accused absented themselves without authority, the first sergeant and platoon leaders of accuseds' company, located near S**, France, were notified by the company commander that the company was not in a rest area but was in corps reserve and could expect to be called forward at any moment. It was the general understanding that the company was on the alert. The day after accused absented themselves * * * the company moved out and was engaged in combat throughout their absence. There is not the slightest evidence in the record as to the activity of the company, tactical or otherwise, or of either accused on 19 November or prior thereto, or that either of accused knew of the alert. * * * The evidence that they went to H** with another member of their company without authority and of their continued unauthorized absence for 13 days is not alone probative of * * * notification or of an intent to avoid action against the enemy. Nor is such intent to be inferred from their knowledge that they were absent without authority. * * * It does not follow that because a soldier absents himself without leave at the front he is ipso facto guilty of desertion of the type herein alleged. The uncontroverted testimony of accused B** was to the effect that commencing on the day after their departure they attempted to locate their organization, but that its movement prevented their success. Their absence was terminated by surrender. Such explanation is inconsistent with the alleged intent and supports the conclusion that accused were merely absent without leave." (CM ETO 6751 Burns, et al 1945)

Accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. "The court was justified in finding factually that accused's platoon while in combat with the enemy started withdrawing, on the run, back to a ridge; and that accused although present with his organization immediately prior to the withdrawal was not seen thereafter for nine days, at which time he rejoined his company at a town, about five miles back (as appears from official map) when it was reorganizing. From the evidence, the court had a right to believe that the platoon in question withdrew as a unit and took up a defensive position on a ridge n ot far to the rear. And in the absence of proof to the contrary, or explanation by the accused, the court had every right to infer that during this withdrawal and the establishment of a new position accused abandoned his organization, and that his intent * * * was to avoid further

hazardous duty. The prosecution made out a prima facie case. The rule of law applicable is that while the ultimate burden is on the prosecution of proving guilt beyond a reasonable doubt, when there is sufficient evidence to raise a strong presumption of guilt, accused is required to go forward with the evidence--the 'burden of explanation'--or risk a finding of guilt * * *. Accused offered no proof by way of rebuttal and failed to explain his conduct. (CM ETO 6937 Craft 1945)

Accused was charged with desertion in violation of AW 58 under AW 28 circumstances, after his absence from about 22 October 1944 to about 4 January 1945. He was found guilt. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. (1) Absence Without Leave: (a) Morning Reports: Two morning reports, both signed by the personnel officer-one dated 31 October 1944 and the other dated 5 January 1945--were admitted in evidence to establish that accused's AWOL commenced as of 22 October. "Prior to 12 December 1944 there was no express authority in the ETO for a personnel officer to sign an original morning report, the only persons so authorized being the commanding officer of the reporting unit, or 'the officer acting in command' (AR 345-400, 1 May 1944, par. 42)." The 31 October morning report was incompetent to prove the matters stated therein, and was not rendered competent by the failure of the defense to object. "Under date of 12 December 1944 the Commanding General, ETO, issued a directive providing: 'Morning reports of units in the theater will be signed either by the commanding officer of the reporting unit, or in his absence, the officer acting in command * * * or by the unit personnel officer * * *' (Cir 119, ETOUSA, 12 December 1944, sec. IV). Under date of 3 January 1945, the Army Regulations * * * were revised, with the following provision: 'Morning reports will be signed by the commanding officer of the reporting unit, or by an officer designated by the commanding officer' (AR 345-400, 3 January 1945, par 43a). In the present case, therefore, the morning report dated 5 January 1945 was properly signed by the personnel officer. It is not competent, however, to prove events occuring prior to the time the duty was placed upon the personnel officer to know the facts stated. Consequently, this report cannot be held to prove that the accused initially absented himself on 22 October 1944; but it is competent to show that on 4 January 1945 the accused changed from a status of being absent without leave to arrest in quarters." (b) Other AWOL Evidence: A witness testified that accused "was AWOL since 22 October 1944"; that he, the witness, had been present with the company for duty since 22 October 1944, but did not remember seeing the accused in the company for 'about two months at least'; and that he saw the accused when the latter 'came back to the company after he had been AWOL' about the last of December. Although the testimony * * * that accused's absence was without leave constituted hearsay knowledge or a mere conclusion or both * * *, it was competent evidence that accused was in fact absent * * * for a period of about two months beginning 22 October. This evidence together with the admissible portion of the morning report of 5 January 1945 * * * sufficiently establishes a prima facie case of absence without leave for the period alleged and found." (2) Intent to Avoid Hazardous Duty: For an AW 28 violation, "the requisite intent must be

proven to have been entertained by the accused at the time he quit his organization or place of duty." "The evidence shows and the court found that accused absented himself on 22 October 1944, but it fails to show what the situation of the accused's organization or place of duty was on or before that date, from which situation might be inferred an intent to avoid hazardous duty." The sole witness on this point referred to events about 8 November, and 7 and 19 December 1944. The evidence failed to show the necessary intent to avoid hazardous duty. (CM ETO 6951 Rogers 1945)**

Accused was found guilty of desertion in England in violation of AW 58 under AW 28 circumstances, to wit: intent to avoid hazardous duty and shirk important service of participation in the oversea invasion of the enemy-occupied European continent. He was also found guilty of a subsequent AWOL in violation of AW 61. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61, ON THE AW 58-28 CHARGE. (1) Intent: The prosecution failed to prove the necessary intent. "Proof that he absented himself without leave on 2 May /1944/ after he received notice from the reading of the letter dated 21 April that his organization was under orders to participate at some indefinite future time in the invasion of the continent, was alerted for that operation, and that the operation would constitute hazardous duty and important service, does not, without more, furnish the necessary probative basis from which may be inferred the ultimate fact of intent to avoid such duty or service * * *. In his extrajudicial statement, accused admitted that he absented himself without leave but stated that he did so to avoid being sent to a mental hospital for treatment and gave a factual basis for believing he was about to be sent to such hospital. This was introduced by the prosecution and was neither inherently improbable nor refuted * * *. (2) Specification: "The evidence would clearly have supported a finding that accused absented himself without authority from his organization and place of duty with intent not to return thereto * * *. If the specification had charged desertion generally without alleging any specific intent whatever, the prosecution would have been free to prove that accused absented himself without leave with intent at the time he absented himself, or at some time during his absence, to remain away permanently or that he quitted his organization or place of duty with intent at the time he absented himself to avoid hazardous duty or to shirk important service * * *. There, however, the specification, as in the instant case, alleges a certain specific intent, the existence of that intent must be proved * * *." (3) Explanation of Rights to Accused: "No explanation was made to accused of the meaning and effect of his plea of guilty to Charge II * * *, nor was any explanation made to him of his right to remain silent, to testify as a witness, or to make an unsworn statement. Although it does not appear that any substantial right of accused was injuriously affected * * *, it is the better practice to explain an accused's rights as a witness in all cases and the meaning and effect of a plea of guilty in every case where such plea is entered * * *." (CM ETO 7397 De Carlo, Jr 1945)

**Subsequent note attached to Rogers case states that portion of opinion referring to prior facts in the 5 January 1945 morning report is "dicta not to be followed".

Accused were found guilty of desertion in violation of AW 58 under AW 28 circumstances, after their absences without leave from about 28 October 1944 until 13 January 1945. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. (1) Morning Reports: (a) Historical Data: Morning Reports introduced in Exhibits A to H inclusive contain matters which "are obviously * * * of historical relevance. They include descriptive matter of combat action in which the company was engaged on the dates and at the places indicated." With the support of previous cases, and Sec IV, AR 345-400, 1 May 1944 (Pars 33, 36, 38), and by manifest logic, it is concluded that the historical entries consisted of proper material to be entered on the company morning reports. (b) Signatures: Exhibits A to F and H were signed by a chief warrant officer as assistant personnel officer. Therefore,"none of these morning reports was signed by 'the commanding officer of the reporting unit or, in his absence by the officer acting in command', as required by AR 345-400, 1 May 1944, section VI, par 42. The presumption of regularity, viz. that the morning report was signed by the authorized officer * * * cannot arise * * * because it affirmatively appears that the morning reports were signed by an officer * * * not authorized by the ARs to sign the same. The said morning reports were * * * not admissible in evidence. They possessed no efficacy as official writings * * *. Attention is particularly invited to the fact that paragraph 43, AR 345-400, 3 January 1945 was not in effect on dates of these morning reports. In CM ETO 4691 Knorr, the Board of Review held that although the morning report there involved was signed by the assistant personnel officer the original thereof was admissible in evidence as a writing or record made in the regular course of business as provided in the Federal 'shop book rule' statute (28USCA Sup., sec. 695) and it was for the court to consider its weight and evidential value. Reference is made to the statements contained in the opinion of The Judge Advocate General, SPJGN 1945/3492 'Documentary Evidence; Morning Reports' set forth in the Memorandum of The Judge Advocate General, 30 March 1945. Resultant upon the comments made therein and in deference to superior authority the Board of Review (sitting in the ETO) will not apply the principles of the Knorr case to the instant situation. However, the Knorr case is not overruled as the Board of Review believes that the Federal 'Shop book rule' statute was correctly applied to the facts involved in said case and that the principles therein announced may be applied in other cases which present similar circumstances and conditions." (c) Morning Reports After 3 January 1945: Exhibits I and J, dated 13 and 15 January 1945, respectively, were signed by Captain ***, Personnel Officer. Par 43a, AR 345-400, 3 January 1945 was in effect on those dates. "By virtue thereof morning reports will be signed by the commanding officer of the reporting unit, or, in his absence, the officer acting in command, or by the unit personnel officer (Cir 119, ETO, 12 Dec 1944, sec IV). It is therefore obvious that /these/ morning reports were signed by an authorized officer. The fact that they were 'late entries', viz. entries made a considerable time after the occurrence of the events reported therein affect their weight and credibility and not their admissibility." (2) AWOL: The admissible evidence proved only AWOLs, in violation of AW 61. (CM ETO 7686 Maggie 1945)

Accused was found guilty of a violation of AW 96, in that he broke his restriction by leaving the area of his gun section on 15 January 1945; and of desertion in violation of AW 58 under AW 28 circumstances on the same date, remaining absent until about 29 January 1945. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61, ON THE AW 58 CHARGE. "It was necessary in this case to prove (a) that accused absented himself without leave, as alleged and (b) that he intended at the time to avoid hazardous duty. While accused was a member of a gun crew stationed to give air protection as well as ground support to certain infantry units, the record is devoid of any indication of enemy action, of any troop movements or anything other than the inference of being in a position to furnish security and support if needed. Accused was relieved of any duties with the gun section and was charged solely with the duty of cooking. At mealtime, their food was not prepared and accused's absence was then discovered. The burden is on the prosecution to establish the intent alleged and is not discharged by a mere general showing that accused's organization engaged in some combat activities during the month in which the absence occurred. The evidence therefore is sufficient to sustain only so much of the findings of guilty * * * as involves the lesser included offense" of AWOL in violation of AW 61. (CM ETO 8104 Shearer 1945)

Accused was found guilty of desertions in violation of AW 58 under AW 28 circumstances, (a) occurring in Germany on or about 14 December 1944, terminated by surrender about 21 January 1945; and (b) occurring in Belgium about 24 January and terminating by apprehension about 4 February. He was also found guilty of willful disobedience about 8 February 1945, in violation of AW 64. HELD: LEGALLY INSUFFICIENT AS TO THE FIRST DESERTION. (1) First Desertion: Accused's absence without leave was proved, but the evidence insufficiently shows his intent to avoid hazardous duty. There had to be evidence that accused knew that hazardous duty was impending. "Moreover, the intent * * * must concur in time with the quitting of accused's organization or place of duty. * * * The evidence is obscure as to accused's relations with his company during the period between its return to P** on 12 December 1944 and his alleged absence on 14 December 1944. * * * The prosecution's case lacks substantial evidence of accused's actual physical whereabouts in relation to the company and of his participation in the company activities" during these two days, "and is indefinite as to the exact time of his departure. * * * The prosecution apparently sought to charge accused with knowledge of imminent hazardous duty by reason of the issuance of equipment and ammunition and the 'common knowledge' that the company would not remain long in P**. In the face of the positive testimony * * * that no one knew, at least before noon, 14 December 1944, whether or when the company would leave P** or whether it was scheduled to return to the front, these circumstances are meager as a basis for the inference that the company members knew of impending hazardous duty. Whether or not they are sufficient for this purpose as far as those to whom they were known are concerned, however, need not be decided in this case, inasmuch as there is insufficient proof that accused as an individual was aware of them. Accused's statement * * * that he attempted to rejoin his company after he discovered its departure, but

abandoned such efforts when he became nervous and shaky and decided he 'couldn't take it', does not supply the missing evidence of intent. Assuming that such statement can be construed as an admission of an intent to avoid hazardous duty, there is no evidence that such intent existed concurrently with the commencement of the unauthorized absence as alleged and proved." Accused was guilty only of the lesser offense of AWOL in violation of AW 61. (2) Second Desertion: This offense was adequately proved. "Accused was advised that he was to be returned to his company although its exact location was not disclosed to him. The company was in combat at the time and accused admitted in his statement" that "he understood he was to be returned to it and sent back to the front lines, and 'couldn't take it'". (3) AW 64: This offense of willful disobedience was proved. Accused's "defense that he was too ill and nervous to comply raises a factual question which was within the court's province to determine." (CM ETO 8700 Straub 1945)

Accused were found guilty of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. Although the charge against each accused contained no allegation of termination of his absence, it was not defective. "The offense of desertion is complete when the person absents himself without authority from his place of service with the requisite intent (MCM, 1928, par 67, p 52, par 130a, p 142), and proof of the duration of the absence is not essential to sustain a conviction of the offense (CM ETO 2473 Cantwell). (CM ETO 9975 Athens, et al, 1945)

Each accused herein was found guilty of desertion in violation of AW 58, under AW 28 circumstances from 20 November 1944 to 8 December 1944. HELD: LEGALLY INSUFFICIENT. The sufficiency of the findings of guilt is "wholly dependent upon the facts supplied by * * * the morning reports * * *. The original morning reports were introduced in evidence and then withdrawn and extract copies substituted. The problems involved are simplified by this approved practice. We deal only with questions pertaining to the original reports. Authenticated extract copies are not involved. Pros. Ex. A was signed by the assistant personnel officer and Pros. Exs. B and C were signed by the regimental personnel officer. Therefore, none * * * was signed by 'the commanding officer of the reporting unit, or, in his absence by the officer acting in command', as required by AR 345-400, 1 May 1944, sec VI, par 42. The presumption of regularity * * * cannot arise * * * in this case because it affirmatively appears that the morning reports were signed by officers * * * not authorized to sign the same" at the time they were made. "The said morning reports were therefore not admissible * * *. They possessed no efficacy as official writings * * *. Par 43, AR 345-400, 3 January 1945 was not in effect on the dates of these morning reports. Likewise, the directive of the Commanding General, ETO, contained in Cir 119 ETO 12 Dec 1944, sec 4, was not in effect." In deference to superior authority of TJAG, SPJGN, 1945/3492, Memo TJAG, 30 March 1945, Washington, the official writing or "shop book rule" basis for

introducing morning reports will not be applied, despite ETO 4691 Knorr. However, the Knorr case is not overruled, because the "shop book rule" did apply to the facts therein, and may apply to similar facts hereinafter. (CM ETO 6107 Cottam, et al 1945)

Accused was found guilty of desertion in violation of AW 58, in that he absented himself without proper leave with intent to avoid hazardous duty, to wit: to take up a defensive position as infantry under enemy shell fire. HELD: LEGALLY INSUFFICIENT. (1) Confession or Admission: "Viewed realistically and in their entirety, and having regard to the manner in which /accused's/ statements were elicited, such statements, although separately made in response to questioning, amounted in sum to an acknowledgment of guilt * * *." They must therefore be considered as confessions. (2) Voluntary Nature: "Here, accused's statements were not only made to a military superior but were made to such superior after accused was examined 'pretty severely' and at some length in the presence of other military superiors. This being true, further inquiry into the circumstances was required and it became incumbent upon the prosecution to show that the statements were voluntarily made * * *. The captain as an attribute of command had a perfect right to question his men as to where they were, but he could not repeat their statements in court without showing that certain legal requirements were met. Evidence that accused was advised prior to making his confession that any statements he might make could be used against him and that he need not make any statement which might tend to incriminate him, which is always competent evidence tending to show that any confession made subsequent thereto was voluntary, is lacking * * *. Rather, the record affirmatively shows that no such warning was given. Aside from the company commander's statement that he informed the accused that he was confronted with 'a serious thing' and his unsupported expression of opinion to the effect that he thought accused understood 'that he didn't have to make any statement which incriminated himself', the record is bare of any evidence tending to show that the statements of accused were not induced by hope of benefit or fear of punishment * * *. "The prosecution failed to sustain its burden herein to show the confession to have been voluntary. (3) Other Evidence: It now becomes necessary to determine "whether the evidence here of record, aside from accused's confession, is of sufficient probative force as virtually to compel a finding that the accused voluntarily absented himself from his squad with intent to avoid hazardous duty." After a detailed consideration, it is concluded: "When the confession is excluded, the remaining evidence by no means excludes the very real possibility that, in the disorganization resultant upon the dispersion of the men due to enemy fire and the orders of the company commander, accused became separated from his squad, was therefore unable to locate it, remained lost during the hours of darkness, and reported to his unit upon locating it the following morning." (4) The findings of guilty must be disapproved. (CM ETO 6302 Souza 1945.

Accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. "Accused's company, which had been in reserve with the 1st Battalion, * * *th Infantry, while the 2nd and 3rd Battalions were in battle, attacked the enemy shortly after 0800, 12 December 1944. It was the company's first action. At some undisclosed time, the men had been informed that they were to attack. The morning report introduced in evidence contains the following entry: 'Fr dy to AWOL 0800 as of 12 Dec 44'. Accused was discovered to be absent when the attack began. He surrendered in * * *, Germany, 14 December. The morning report entry makes a prima facie showing that the accused was present for duty at a time immediately prior to the attack. Presence with first battle so imminent, after having been in regimental reserve, could hardly have been without knowledge that battle was impending. There was substantial evidence * * * from which the court could reasonably infer that his absence without leave was with the intent to avoid hazardous duty * * *." (CM ETO 7312 Andrew 1945)

Accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. Accused's "defense is that by direction of higher authority, replacements who had not fired the individual weapon with which they are armed should not be accepted, and he claims he informed them that he had had no infantry training when he was assigned as a rifleman. The evidence also shows that accused has been in the army since 1939 and must of necessity have learned the duties of a soldier. The communications by which he attempts to excuse himself" (from CG, First U.S. Army, to the effect that Division Commanders will not accept replacements who have not fired the individual weapon with which they are armed, and also a letter dated 27 December 1944 to the same effect) "were apparently made in the latter part of December while accused's first offense occurred on the 4th of December. The prosecution's evidence is that he never made any statement of lack of training with a rifle until his return to his unit on 24 January 1945 after two unauthorized absences, one of a month and a half and both under circumstances that compellingly indicate a purpose to avoid the hazardous duty of combat with the enemy. The directive to the division commanders could in no way excuse accused from his assigned duty under the circumstances shown * * *" (See Winthrop, Reprint 1920, pp 571-2) "The accused produced no evidence in support of the defense inference that he was psychologically or physically unfit or unable to do or perform the task assigned * * *. The evidence fully supports the court's findings of guilty." (CM ETO 10402 Wolf 1945)

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Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. "The evidence shows that accused after having been wounded and evacuated to a hospital was discharged from the hospital and returned to his regiment for duty. At a town in Belgium, where his regiment had its headquarters, he was billeted over night preparatory to leaving for his company the following morning. The next morning he absented himself from the area without authority, was not present when the transportation went forward, and did not thereafter join his company. His absence was terminated by arrest on 4 February. Between 16 and 18 January, inclusive, accused's company was in actual combat with the enemy. The court was fully justified by this evidence in believing that accused left his organization with intent to avoid hazardous duty, as alleged in violation of AW 58 * * *." (CM ETO 11006 Mazzeo 1945)

Among other things, accused was found guilty of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. The evidence established that accused's company at the time of his departure "had been engaged in combat operations against the German army and that further duty of the same hazardous character not only impended but actually occurred throughout the entire period of absence. Although the company was in a 'rest area' when accused absented himself it was there for purposes of reequipment and maintenance and continued on patrol duty throughout. The area, moreover, was within 400-500 yards of a point reached by enemy artillery fire and hence could not have been far distant from the zone of active combat operations. It was a matter of general knowledge in the company that it would be in the area only a few days before jumping off again and that accused had such knowledge may reasonably be inferred from his presence with the company as late as 21 August 1944. Under these circumstances the court was justified in its finding that he was aware of impending hazardous duty and that he absented himself with the design of avoiding it." (CM ETO 11404 Holmes 1945)

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388 (A.W. 31) Method of Voting:

Cross References: 450(1) Rulings on interlocutory questions by president instead of law member. (ETO 438, Smith)

450(4) 4194 Scott (Interlocutory questions--sanity. Also see AW 38--395(36)--mental capacity of accused.)

450(4) 4608 Murray (Law member rules on evidence.)

451(2) 4059 Bosnich (Motion to strike; law member, also President.)

4004 Best (Not Digested. Law Member rules on evidence--not President.)
5745 Allen (Not Digested. Law Member rules on evidence--not President.)

METHOD OF VOTING

390 (A.W. 33) Records: General Courts-Martial: 390

Cross References: 450(1) Mis-spell court member's name (ETO 292, Mickles.

(1) In General: In the instant record, an additional sheet had been added to the charge sheet. It purported to repeat the charges and specifications, but actually omitted one vital phrase of one specification. A notation to the original charge sheet stated that the additional sheet had been attached in order to make it easier reading. In quoting the charges and specifications, the transcript of the trial omitted the same vital phrase. HELD: (1) The Board of Review is not bound by the specifications as they appear in the transcribed proceedings of trial. Rather, it may resort to the original charge sheet to ascertain the exact charges upon which accused was brought to trial. (2) Rules: "The charge is the 'formal written accusation of an accused and is the original and only pleading in a general court-martial practice." (MCM, 1928, pars. 24, 29). "It must specify the material facts necessary to constitute the alleged offense * * *. A charge defective in respect to the statement of the facts constituting an offense is a nullity and may be stricken out." (MCM, 1928, par. 71c, p. 56). "The transcription of the trial proceedings should contain a verbatim copy of the charges and specifications, but the original charge sheet must accompany and be attached to the transcribed record (MCM, 1928, par. 85b, p. 71; Appendix 6, p. 263), inasmuch as it is part of the record of trial and may be considered upon appellate review * * *." "A defective or erroneous copying of the charges and specifications into the transcript of proceedings may be corrected either by reassembling the court and formally correcting the record, or if such proceeding is impracticable or inconvenient a certificate of correction executed by the officers authenticating the record (transcript) of trial may be obtained. * * * However, upon appellate review by the Board of Review such corrective procedure is unnecessary if the charge sheet accompanies the record (transcript) of trial and it may be considered by the Board of Review as the original and effective pleading. The above practice is supported in principle by the 37th Article of War which contemplates an 'examination of the entire proceedings' to the end that justice may be done" (CM ETO 1704, Renfrow, 1944).

(2) Authentication: The record herein showed that accused had received his copy of the transcript; that the reporter, court members, and prosecution had been sworn; and that the record was signed by the president and the trial judge advocate, as well as by the law member, with specific indication that the last two had examined it. However, the defense counsel did not sign or initial the record. Instead the law member substituted for him because he was on detached service. In lieu of the defense counsel, the law member appended his signature to the following statement: "I have examined a copy of the record of trial before it was authenticated and have no comment to make." HELD: One of the duties of defense counsel is: "He will examine the record * * * before it is authenticated" (MCM, 1928, par. 45b, p. 35). "Nowhere is the provision made for the discharge of this duty by anyone other than accused's counsel or his assistant (see MCM, 1928, par. 44, p. 34). The Board of Review is of the opinion that the above quoted provision, like provisions prescribing other duties of defense counsel and similar provisions, is directory

rather than mandatory, procedural rather than jurisdictional, and that unless 'after an examination of the entire proceedings, it shall appear that the error * * * has injuriously affected the substantial rights of' accused, the proceedings shall 'not be held invalid, nor the findings or sentence disapproved' (AW 37; see MCM, 1928, par. 87b, p. 74)." In view of the circumstances herein, no prejudicial irregularity appears (CM ETO 2205, LeFountain, 1944).

Cross References:

416(9)	5595	Carbonaro (incomplete record; missing exhibits--morning reports)
450(2)	506	Bryson (Defense counsel authentication; waiver of cross examination irregularity thereby)
395(46)	10079	Martinez (Presence of court members; action on challenges)
395(33)	6407	Ivey, et al (joint and common trials)

394 (A.W. 37) Irregularities; Effect of:

(1) In General

Cross References:

395(7) 3811 Morgan (Prejudice)
3212 Robillard (Prejudice)

450(4) 2625 Pridgen (Prejudice--Use accused's statements (not shown to have been voluntary) to impeach him.)

451(58) 3628 Mason (Leave out words "at hard labor" from sentence.)

451(36a) 1201 Pheil (Improper confession.)

433(2) 4564 Woods (AW 75; massed errors)
1693 Allen (Deposition; capital case; no prejudice).

419(2) 5633 Gibson (Prejudicial hearsay; MR-AWOL)

416(9) 5740 Gowins (Prejudicial hearsay; desertion

365(9) 5458 Bennett (Law Member; JA Advice.)

416(9) 4756 Carmisciano (cumulative)

454(18a) 5032 Brown (Prejudicial hearsay.)

416(9) 5595 Carbonaro (incomplete record)

452(21) 6268 Maddox (accused's written statement excluded, but oral testimony in regard thereto admitted)

385 6302 Souza (Improper confession)

428(4a) 882 Biondi-White (Improper specification; joint charge)

(2) Charging under Wrong A. W.

Cross References:

385 3118 Prophet (Designate AW 28 instead of AW 58.)

454(18a) 5032 Brown (AW 83 instead of AW 84.)

444(3) 5255 Duncan
5466 Strickland (AW 86-96)

452(21) 6268 Maddox (AW 96-94)

452(21) 9421 Steele (AW 63-94)

454(18a) 9987 Pipes (AW 96-94, black market)

395 (AW 38) President May Prescribe Rules:

IN GENERAL

(1a) Aid and Abet:

Cross References:	450(1)	1453	Fowler (murder)
		1922	Forrester (murder)
		4294	Davis (murder)
		5166	Clark (murder)
	450(4)	3740	Sanders et al (rape)
		3859	Watson (rape)
		4444	Hudson (rape)
		4589	Powell (rape)
		4775	Teton
		5068	Rape (rape)
		5362	Cooper (rape)
		6193	Parrott (rape)
		9083	Berger (rape)
	451(01)	3475	Blackwell (AW 93 assaults; arson)
	451(5)	942	Shooten (assault during robbery)
	451(9)	6522	Caldwell (assault, dangerous weapon)
	451(32)	4071	Marks (AW 93 assault to rape)
	454(36a)	8690	Barbin (make false orders)

(1b) Alibi of Accused:

Cross References:	450(1)	559	Monsalve (murder)
		1673	Denny (assault to rape)

395(1c-d-e) (1c) In General; Burden of Accused to go Forward With Evidence
(1d) In General; Due Process of Law
(1e) Evidence Weight; Burden of Proof; Reasonable Doubt

(1c) Burden of Accused to go Forward with Evidence:

Cross References:

385	6937	Craft (AW 58-28)
	7413	Gogol (AW 58-28; "buldge")
416(9)	1629	O'Donnell (desertion)
	6093	Ingersoll (desertion)
	7663	Williams (desertion)
419(2)	527	Astrella (AWOL)
444	2131	Maguire (sentinel)
451(17)	1302	Splain (embezzlement)
	2766	Jared (embezzlement)
451(27)	451	Sherman (forgery)
451(40)	2840	Benson (possession; recently stolen property)
451(50)	1317	Bentley (involuntary manslaughter)
452(18)	1631	Pepper (misappropriation)

(1d) Due Process of Law:

Cross References:

381	1360	Poe (AW 24--waiver)
	1413	Longoria (AW 24--waiver)
385	4570	Hawkins
	5155	Carroll
416(9)	4756	Carmisciano
433(2)	4564	Wood
	5445	Dann
451(36a)	9128	Houchins (confessions)

(1e) Evidence Weight; Burden of Proof: Reasonable Doubt:

Cross References:

385	105	Fowler (may believe or reject evidence)
408(2)	In General	
450(2)	82	McKenzie (reasonable doubt--then convict of lesser offense)
450(1)	4581	Rose (burden of proof)

(1f) Injuries; Resulting:

Cross References: 451(50) 2788 Coats-Garcia

(1g) Leading Questions:

Cross References: 419(2) 5633 Gibson
433(2) 4995 Vinson

(1h) Physical Objects; Lethal Weapons; Etc:

Cross References: 450(1) 739 Maxwell (bullet)
3042 Guy Jr (beer bottle glass)
5747 Harrison Jr (clothing of deceased and accused)
5765 Mack (cartridge cases)
450(4) 611 Porter (soil)
3859 Watson (cartridge cases; gun; etc)
450(50) 2926 Norman (tire marks on street)
9745 Adams (guns)
454(82) 1161 Waters (pistol)

(1i) Surrounding Facts & Circumstances:

Cross References: 454(18a) 8234 Young (black market)

395(1j-k-l) (1j) In General: Re-enact Crime
(1k) In General: Threats; Prior
(1l) In General: Variance

(1j) Re-enact Crime:

Cross References: 450(1) 9424 Smith Jr.

(1k) Threats; Prior:

Cross References: 450(2) 3957 Barneclo (murder-manslaughter)

(1l) Variance: (Also see 428AW70), subsecs 10-12)

Cross References:

385	4489	Ward (AW 75--manner of violation
	6842	Clifton (AW 28-58--manner of violation)
395(18)	800	Ungard (between morning report entries and specification)
416(6a)	2473	Cantwell (desertion; proof of termination)
416(9)	5593	Jarvis (desertion--words "company" and "organization".)
	9257	Schewe (desertion; place of)
416(14)	5774	Schiavello (desertion--dates)
419(2a)	1249	Marchetti (AWOL--proof of termination)
419(3)	2829	Newton (AWOL--dates)
422(5)	2747	Kratzman (AW 64--language of order)
	2921	Span (AW 64--language of order)
	6809	Reed (AW 64--language of order)
433(2)	1404	Stack (AW 75)
	1663	Isen (AW 75)
	1693	Allen (AW 75)
	5445	Dann (AW 75--change words, re plundering and pillaging)
433(4)	6767	Reimiller (AW 75--situs)
433(4)	9259	Black (AW 75 order)
450(1)	5764	Lilly (fine of AWOLs)
450(2)	3614	Davis (morder-manslaughter; use of fist rather than weapon)
451(4),	6227	White (AW 93 assault; manner of)
451(5)	942	Shooten (AW 93 assault; who struck blow during robbery)

(I1) Variance: (Also see 428(AW70), subsecs 10-12) (continued):

Cross Reference:

451(6)	4606	Geckler (AW 93 assault; manner of)
451(9)	.764	Copeland (AW 93 assault; phrase, "by threatening")
	6522	Caldwell (AW 93 assault; which of two accused held knife)
451(58)	78	Watts (AW 93 robbery; manner of taking)
452(3)	1538	Rhodes (date of embezzlement--two days difference)
452(9)	7258	Street (larceny; ownership)
453(18)	2777	Woodson (date--two days difference)
453(20a)	9542	Isenberg ("on or about"; time variance; mail censorship)
454(18a)	5032	Brown (value variance)
	5659	Maze Jr (ownership; AW 96 black market; Army Exchange)
	8234	Young, et al (type & extent of conspiracy)
454(64a)	3292	Pilat (whether mailed package was
454(65a)	1872	Sadlon (mailed violation)
454(95)	902	Barreto (situs of narcotic violation)

10196 Gaffney ("on or about"--not digested)

395(1m-2-3) (1m) In General: Victim Does Not Testify
(2) Evidence; Incompetent in General
(3) Admissions--Statements; by Accused

(1m) Victim Does Not Testify:

Cross References: 450(4) 5805 Lewis (rape)

EVIDENCE

(2) Evidence; Incompetent in General:

Cross References: 447 804 Ogletree (Effect of crime on community; no prejudice)
1052 Geddies (Self-serving; no prejudice)

(3) Admissions--Statements; by Accused:

Not Digested:

3141 Whitfield

Cross References:

385	6302 Souza
416(9)	2343 Welbes Jr
424	3803 Gaddis
433(2)	4004 Best
	4691 Knorr (in psychiatry report)
444(1)	5531 Davis (vs confessions)
447	804 Ogletree
450(1)	292 Mickles
	3649 Mitchell
450(2)	506 Bryson
	4945 Montoya
450(4)	611 Porter
	969 Davis
	1202 Ramsey (identity)
	2625 Pridgen (impeachment--AW 24)
	3933 Ferguson
	5584 Yancy (best evidence rule; introduce confessions in entirety)

(3) Admissions--Statements; by Accused: (continued)

Cross References:

450(4)	6148	Dear (impeachment, with)
451(17)	1302	Splain (to Inspector General; some undue pressure; not considered)
451(50)	2926	Norman, et al
452(21)	6268	Maddox (written admission excluded. Oral testimony thereof improperly admitted)
454(81a)	1161	Waters
416(9)	8055	Costigan (Oral testimony of written admission; waiver)

Accused's pre-trial written statement did not amount to a confession, because it did not accept ultimate legal guilt of the crime with which he was charged. "Consequently the statement was admissible without proof of its voluntary nature and without the establishment of the corpus delicti by independent evidence." (MCM, 1928, par 114a,b) (CM ETO 2535 Utermoehlen 1944)

395(4-7) (4) Admissions--Statements; By One of Conspirators or Joint Accused
(7) Character of Accused or Other Offenses

(4) Admissions--Statements; By One of Conspirators or Joint Accused:

Not Digested:

7252 Pearson

Cross References:

424	3803	Gaddis
447	1052	Geddies
450(4)	1212	Ramsey
	6193	Parrott
451(2)	2297	Johnson et al (as witness for prosecution)

(7) Character of Accused or Other Offenses:

Cross References:

395(62a)	515	Edwards (previous derelictions; impeachment)
416(9)	2901	Childrey (other offenses--larceny while in desertion)
422(5)	7549	Ondi (AW 64; other preceding offenses)
433(2)	4820	Skovan (two AW 75 offenses)
450(1)	9424	Smith Jr (previous convictions; possible prior offenses-invited by defense, re insanity pleas)
450(2)	4043	Collins (accused's general reputation)
450(4)	5584	Yancy (prior criminal record included in Medical Report)
451(64)	24	White (specific character testimony; other related offenses)

The defense placed a letter in the record which vouched for accused's good character. Over objection, the prosecution subsequently introduced evidence regarding a former reprimand which had been administered accused under AW 104 for having had women in his hotel room, and for a false official statement in connection therewith. HELD: In view of the overwhelming evidence of accused's guilt, no prejudice from any error committed by the court when it permitted introduction of evidence regarding the punishment under AW 104. (CM ETO 548 Tabb 1943)

A superior officer testified that he was positive he knew accused because he had previously court-martialed him once or twice. HELD: "Such statement was highly improper. (Of: Dig. op. JAG 1912-1940, sec 395(7), pp 200-203). The evidence of accused's guilt, however, is of a sufficiently convincing quality as to render the statement harmless under AW 37 despite its impropriety * * *." (CM ETO 2644 Pointer 1944)

Accused was found guilty of larceny in violation of AW 93; guilty of breach of restriction in violation of AW 96; and guilty of making a false affidavit, in violation of AW 96. HELD: LEGALLY INSUFFICIENT. The prosecution put an officer on the stand who testified that accused was a poor soldier who almost burlesqued military courtesy; did not respond promptly to orders; did not keep his area clean; and acted in a surly manner toward his non-commissioned officers. "Accused * * * did not put his character in issue. Moreover, since evidence of collateral offenses 'is irrelevant where it has no tendency to prove some material fact in connection with the crime charged or where it merely' * * * * 'tends to show that the accused is a criminal' * * * generally' * * *", the above testimony was inadmissible for the further reason that it amounted to a blanket indictment of accused for enumerated types of unsoldierly conduct. "Though it be conceded that the preponderance of the evidence tends to establish accused's guilt, it cannot be denied, without wholly discrediting accused's testimony, that substantial evidence was introduced, which, if believed, would have at least raised such reasonable doubts as to have precluded his proper conviction." "The substantial rights of accused were injuriously affected by the erroneous admission of" the above evidence. (ETO 1201 Pheil) (CM ETO 3213 Robillard 1944)

395(7) (7) Character of Accused or Other Offenses

Accused were found guilty of misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. One witness, while testifying that accused had failed to advance with the command, stated that, "Although I have never been able to prove it before, these men have been in similar incidents about two or three times * * *. However, I cannot prove that. That is the reason I have not brought charges against them before." Although the defense did not object to the above testimony, its admission was highly objectionable. The testimony was hearsay and opinion at best, as evidence by the witness's own statement that he had "never been able to prove it before". While he further stated that he had never brought previous charges against them because of an inability of proof, this qualification did not nullify the potential damaging effect of the testimony. "Rather, it may well have impressed the members of the court with the essential fair-mindedness of the witness, thereby involving the danger that they might substitute his opinion and conclusion for their own." However, no prejudice resulted from the above erroneous admission of testimony, because the record elsewhere contains convincing proof of accuseds' guilt. (CM ETO 3811 Morgan 1944)

(8a) Character of Victim. 395(8a-9)
(8b) Prisoners of War; Enemy Property; Enemy Nationals.
(9) Circumstantial.

(8a) Character of Victim:

Cross References:

395(8b)		See generally; prisoners of war; enemy property.
422	5546 Roscher	(Drunken officer; assault, violation of AW64)
450(1)	2007 Harris	(Moral degenerate)
	4294 Davis	
450(2)	506 Bryson	
450(4)	4589 Powell	(Prostitute)
451(2)	4122 Blevins	

(8b) Prisoners of War; Enemy Property; Enemy Nationals:

Cross References:

433(2)	5445 Dann	(Plunder; pillage; also, 5446 Hoffman)
450(1)	4581 Ross	(Murder; prisoner of war)
450(4)	9083 Berger	(Rape enemy national)
450(4)	9611 Prairiechief	(Rape enemy national)
451(2)	9064 Simms	(Assault; sodomy; witness credibility)
454(13)	10967 Harris	(Rape; fraternization; German girl)
454(56b)	10501 Liner	(Rape; fraternization; German girl)
454(56b)		See generally re fraternization.

(9) Circumstantial:

Cross References: (See specific titles also)

447	1052 Geddies
450(1)	7518 Bailey
450(2)	6397 Butler

395(10) (10) Confession; Validity

Cross References: (continued)

451(362)	1201	Pheil	(larceny; inadmissible; prejudice)
	1486	MacDonald	(larceny)
	2098	Taylor	(larceny)
	9128	Houchins	(accused not permitted to testify solely re confession; presumption of voluntarieness)
451(50)	3931	Marquez	(accused takes stand re obtaining of confession; TJA cross-examines, re truth of confession)
452(7)	1042	Collette	(false claim against U.S.)
452(21)	6268	Maddox	(written statements excluded; oral testimony thereof improperly admitted)
453(01)	4184	Heil	
454(18)	1729	Reynolds	(bigamy)
454(18a)	8234	Young, et al	(black market)
454(36a)	8690	Barbin	(oral testimony; best evidence rule; failure to object)

(10) Confession; Validity:

Cross References:

378(4)	839	Nelson (plea of guilty as)
	1588	Moseff (plea of guilty as)
	2194	Henderson (plea of guilty as)
	2776	Kuest (plea of guilty as)
385	4701	Minnetto (promise clemency; no warning of rights; AW 58-28)
	5555	Slovik (AW 28-58)
	6302	Souza (voluntary; warning of rights; commanding officer powers)
	6810	Shambaugh (stipulation re background; separate paper; corpus delicti)
395(3)	--	Admissions; see generally
416(9)	2343	Welbes, Jr (voluntary nature of)
419(2)	4915	Magee (AWOL)
424	3803	Gaddis
433(2)	4074	Olsen (AW 75)
444(1)	5531	Davis (vs admissions)
447	4804	Ogletree (vs admissions)
450(1)	292	Mickles (transcript; questions and answers; vs. admissions)
	438	Smith (signed, but not written by accused)
	559	Monsalve (voluntary nature of)
	739	Maxwell (introduce oral; then written)
	3649	Mitchell
	4294	Davis, et al
	5156	Clark
	5747	Harrison Jr (AW 92)
	5765	Nack (oral v written; best evidence rule)
	7518	Bailey (taken at scene of crime)
450(2)	72	Jacobs (indefinite promises; inducement)
	506	Bryson
	3639	McAbee
	3957	Barneclo
450(4)	611	Porter (denial of guilt; admissions)
	1202	Ramsey (co-accused--also see 395(12))
	2625	Pridgen (use of, to impeach accused -- no proof of voluntary nature)
	3933	Ferguson
	5584	Yancy (oral v written; best evidence rule; statements to medical board; introduce in entirety)
	5804	Lewis
451(2)	9064	Simms (involuntary)
451(8)	3927	Fleming

395(10) (10) Confession; Validity

"There is no requirement of law that a suspect or accused shall be informed as to the penalty or penalties which might be imposed upon him as condition precedent to rendering his confession admissible in evidence in the event he is brought to trial for the commission of an offense indigenous to the facts disclosed by the confession." (CM ETO 397 Shaffer 1943)

"The fact that the confession was reduced to writing by one other than accused does not militate against its admissibility." (CM ETO 2007 Harris 1944)

After the prosecution had laid a foundation for the introduction of accused's confession, the law member asked that accused be put on the stand to testify as to the manner in which it had been taken. He informed accused that it would be voluntary on his part as to whether he wished to relate these circumstances. After accused replied that he had no objection, he was sworn, and testified on the point. HELD: The procedure of the law member was irregular, and might easily have infringed accused's rights under the 5th Admendment and AW 24 (CM ETO 2297). However, no prejudice resulted because accused's testimony was favorable to himself, and put in issue the propriety of the admission of his confession. (CM ETO 4055 Ackerman 1944)

"One of the military police who apprehended accused admitted on the stand that he slapped /accused/ because of his resentment at accused's previous attempt to reach for his gun and because of his dislike for accused's general attitude. The use of force for either of these reasons is unlawful and reprehensible. Close scrutiny of the evidence, however, discloses that the treatment accorded to accused by the military police did not affect the voluntary nature of his oral and written statements. The violations of AW 61 and 58 as alleged * * * are clearly established by the evidence." (CM ETO 4526 Archuletta 1945)

"Objection was made to the statements made by the accused to the investigating officer. He was fully informed as to his rights. He stated he did not care to make a statement but he did answer questions. There is no indication that he was imposed on. The rules of evidence governing the admission of confessions are designed to insure their truth and dependability and to exclude those induced by improper influence. Measured by these rules, the statements of accused were not secured by illegal means and were admissible." (1st Ind., CM ETO 6631 Gisondi 1945) (Note that there was dissent to the short-holding rendered herein).

(11) Confessions; Corpus Delicti:

Not Digested: 9062 Boyer

Cross References:

385	6221	Rodriquez	(AW 28-58; AWOL as corpus)
	6810	Shambaugh	(AW 28-58; AWOL as corpus)
416(9)	10331	Jones	(state rule in detail)
416(14)	5774	Schiavello	
419(2)	4915	Magee	(AWOL)
450(2)	3957	Barneclo	
450(4)	5805	Lewis	(rape)
451(8)	3927	Fleming	
451(36a)	2098	Taylor	(proof by hearsay)
452(7)	1042	Collette	(false claim against U.S.)
452(9)	2185	Nelson	(official letter from commanding officer of airplane, re loss of property)
452(21)	9751	Whatley	(insufficient, re gasoline sale)
454(18)	1729	Reynolds	(testimony of accused; bigamy)
454(18a)	8234	Young, et al	(black market; conspiracy, etc)
454(22b)	9345	Haug	(engage in private business)
454(105)	3686	Morgan	(corpus delicti proved by stipulation)

(12) Confessions; By One of Conspirators or Joint Accused:

Cross References:

424	895	Davis
450(1)	7518	Bailey
450(4)	1212	Ramsey
	5805	Lewis
451(36a)	1486	MacDonald
454(22b)	9345	Haug (engage in private business)

"The court was not cautioned that the respective confessions of accused were admissible in evidence only against the offender making same." However, in view of guilty pleas by each of them, and the victims' testimony, this irregularity could not have been prejudicial. (CM ETO 1764 Jones-Mundy 1944)

(12a) Cross Examination:

Cross References:

495(62a)	Impeachment	-- see generally.
450(2)	506 Bryson	(waiver; assumed; where defense counsel authenticates record)
450(4)	611 Porter	(non-prejudicial; denial of right to)
450(4)	6148 Dear	(impeachment)
451(50)	3931 Marquez	(TJA cross-examines accused re truth of confession)

(12b) Documents; In General:

Cross References:

385	1921	King	(Military Police report)
	10402	Wolf	(directive re training, as excuse for refusing to fight)
395(18)	Memo; TJAG 30 March 1945, Washington, re 49 Stat 1561 and morning reports--"Shop book rule".		
415	8164	Brunner	(parol re a receipt)
416(9)	1645	Gregory	(Military Police report)
	2343	Welbes	(Police dept. entry; written civilian statement)
	5740	Gowins	(Delinquency report)
433(2)	3828	Carpenter	(G-3 Journal of division)
	4004	Best	(Medical report; copy)
	4691	Knorr	(Psychiatry report; confidential communication)
433(2)	8474	Andascia	(psychiatry report)
450(1)	292	Mickles	(Post Mortem report of death)
	438	Smith	(Surgeon's report; Report of loss; letter)
450(2)	5584	Yancy	(Answers at medical board; as confession; prior criminal record)
450(4)	5805	Lewis	(Psychiatrist Report)
452(9)	2185	Nelson	(Official commanding officer letter, re loss of money on airplane; for corpus delicti)
453(18)	765	Claros	(Prepared written statement of Post Exchange price lists; also summarization by witness of bulky books)
453(23)	2581	Rambo	(Bank statements; additional evidence)
454(22)	2663	Bell	(English birth certificate)
454(47a)	1631	Pepper	(Board of officers proceedings; photostatic copies; sales slips)
454(82)	1161	Waters	(Medical report)
438	9573	Konick	(Former record of trial; partial introduction)

A hospital's "Sign-in-and-Sign-out book" is properly admissible in evidence in an AWOL case. So also is a nurse's personal entry in a "report book" re accused's return. (CM ETO 2470 Tucker 1944) (See also 395(18) Memo TJAG 30 March 1945, Washington, re "shop book rule"; 49 Stat 1561.)

(16) Documentary; Certificates 395(16-17)
(17) Documentary; Copies of Records

(16) Documentary; Certificates:

Cross References:

395(18) Memo TJAG 30 Mar 1945, Washington, re 49 Stat 1561 and morning reports--"shop book rule".
416(9) 2343 Welbes (Written statement, civilian)
454(22) 2663 Bell (Federal law; English birth certificate)
454(56a) 4119 Willis (Federal law; English birth certifiate)

(17) Documentary: Copies of Records:

Cross References:

395(18) Memo; TJAG 30 March 1945, Washington, re 49 Stat 1561 and morning reports--"shop book rule".
433(2) 4004 Best (Medical report; copy)
450(1) 3649 Mitchell (copy; impeachment)
454(22) 2663 Bell (English birth certificate; authentication)
454(56a) 4119 Willis (English birth certificate; authentication)

395(17a-17b) (17a) Documentary; Maps
(17b) Documentary; Photographs

(17a) Documentary; Maps:

Cross References:

385	6637	Pittala	(Reference to, by Board of Review)
	6934	Carlson	(Reference to, by Board of Review)
442(3)	6767	Raimiller	(Reference to, by Board of Review)
447	804	Ogletree	(No authentication)
450(2)	506	Bryson	(Introduce sketch without authentication)
450(4)	611	Porter	(Use without introducing in evidence)

(17b) Documentary; Photographs:

Cross References:

450(1)	438	Smith	(identification of)
	3200	Price	(dead man)
	4747	Harrison Jr	(dead girl; rape)
	9424	Smith, Jr	(of deceased--also re-enact crime)
450(4)	5584	Yancy	(murder; rape)
454(47a)	1631	Pepper	(photostatic copies; records)

(18) Documentary; Morning Reports:

Cross References:

419(2)	527 Astrella	Company personnel officer may not authenticate extract, notwithstanding his statement that he is official custodian. Failure of defense counsel to object does not make it legal evidence. "Such document could be admitted by stipulation of the parties or by express consent of defense counsel after an explanation of his right to object.
395(18)	800 Ungard	Variance between Morning Report entries and Specification, re certain descriptions, not fatal. No objection.
385	2481 Newton	Morning Report entry showed reading of letter advising accused of impending hazardous duty. Admissible to show notice. Was made in regular course of business. Was record of "act, transaction, occurrence, or event". (AR 345-400, sec III, 7 May 1943, 27, 30; 49 Fed stat 1561, 28 USC Supp. sec 695.) (But see Memo TJAG 30 Mar 45 Washington, re 49 Stat. 1561).
433(2)	4074 Olsen	AW 75 offense; Arrest
433(2)	4564 Woods	AW 75 offense
416(9)	4756 Carmisciano	Assistant personnel officer authenticated extract. In absence of objection, irregularity is waived, unless there is an accumulation of error in the record. Where authentication states that the extract includes any signature or initials appearing on the original, and extract fails to include signature or initials, presumption of regularity will not hold in face of proper objection. Where there is an accumulation of error in the record, it will be assumed that proper objection was made despite the absence thereof. Questionable whether a Morning Report original entry, made two days after charges were preferred, and relating back four days to the date of AW 75 offense, is admissible.

395(18) (18) Documentary; Morning Reports

4914 Solomon Hearsay re desertion. (Not digested).

416(9) 5234 Stubinski Assistant personnel officer authenticated extract. In absence of objection, irregularity was waived.

Extract did not include signature or initials of man who signed original. Held: Where authentication merely states that it is "a true copy", it is presumed to be regular, and may be admitted.

416(9) 5406 Aldinger Signer of original Morning Report failed to show the capacity in which he acted. Assumed that he acted as commanding officer.

395(18) 5414 White Assistant personnel officer authenticated extract. Improper, but waived by failure to object.

Signer of original Morning Report failed to show the capacity in which he acted. Assumed that he acted as commanding officer.

385 5437 Rosenberg Authentication stated that the extract included any signature or initials appearing on the original. Extract failed to include any signature or initials. However, personnel officer took stand and identified each document as an extract of the Morning Report. In absence of objection or contrary testimony, the extracts were admissible.

416(9) 5593 Jarvis Authentication of extract by assistant personnel officer--November 1944. Error waived by failure to object.

Authentication of extract on November 1944 Morning Report. Officer who authenticated failed to show his capacity. Held: Waiver by failure to object.

419(2) 5633 Gibson Personnel officer witness testified that

419(2) 5633 Gibson Personnel officer witness testified that Morning Report entry was based on telephone call in due course of business. Not admissible.

419(2) 6342 Smith, J.E. Replacement Depots: Morning Report records of predecessor merged into successor. Official custodian of successor becomes official custodian of predecessor's Morning Reports, and competent to certify extracts.

419(2) 6342 Smith, J.E. (continued) Morning Report proper to show AWOL status, despite attack that it is not best evidence--in absence of attack on its verity.

Morning Report entry showing accused's status change from AWOL to confinement is admissible.

433(2) 4740 Courtney Extract for 3 October referred to an event of an earlier date. No objection. Proof of authenticity and genuineness of extract. In view of testimony and waiver of objection, extract was properly admitted (Act June 20, 1936, c. 640, sec. 1; 49 Stat 1561; 28 USCA 695; CM ETO 2185 Nelson.) Distinguish CM 254182 (1944) (Bull JAG, Aug 1944, Vol. III, No. 8, sec. 395 (18), p. 337). Lack of personal knowledge of the facts by the Personnel Officer did not bar admission of the extract herein. There was nothing to impeach the verity of the entry. Its evidential value was for the court. (But see 395(18) Memo; TJAG, 30 Mar 1945).

433(2) 4691 Knorr: Original M/R prepared in unit personnel section. Extract authenticated by assistant personnel officer. M/R is a writing or record made in the regular course of business. Act of June 20, 1936, c. 640, sec. 1, 49 Stat. 1561, 28 USCA 695 applies. The original M/R herein was made by an assistant personnel officer in the course of the discharge of the responsibility of the personnel officer of recording the day-by-day acts, occurrences and events of units served by the personnel section. It was kept in the personnel office, and became part of the administrative records of the organization. The personnel officer, as official custodian, testified that it was the M/R of Co. * * * and that "it was based on the battle casualty morning report that the company sent down to the office". The original M/R was admissible as a writing or record made in the regular course of business. The extract copy was properly received, since its defective authentication as a true copy was waived. (But see 395(18) Memo; TJAG; 30 March 1945); also see 7686 Maggie, supra).

Cir 119, Hq ETOUSA, 12 Dec 44: "IV -- AUTHENTICATION OF MORNING REPORTS (WD, AGO, Form No 1). Morning reports of units in the theater will be signed either by the commanding officer of the reporting unit, or, in his absence, the officer acting in command (Par 42a, AR 345-400, 1 May 1944), or by the unit personnel officer (Par 8, AR 345-5, 5 Aug 1944). (AG 330.33 X)."

395(18) (18) Documentary; Morning Reports

AR 345-400, 3 Jan 1945, Sec VI:

"43. Authentication. -- a. Morning reports will be signed by the commanding officer of the reporting unit, or by an officer designated by the commanding officer. The name, grade, and arm or service will be typed or otherwise printed in the boxes provided. The full name of authenticating officer, first name, middle initial, and last name will be signed in ink or indelible pencil in the proper box. If more than one set of forms is required, only the first set of forms will bear a signature or carbon impression thereof.

"b. Extract copies of the morning report may be prepared from the first original, duplicate original, or triplicate original of the morning report, Instructions for authenticating extract copies of morning reports intended to be introduced as evidence before courts-martial are contained in paragraph 116a, Manual for Courts-Martial, U.S. Army 1928. See WD AGO Form 44 (Extract copy of Morning Report) and paragraph 7a(2), AR 615-300."

416(9) 7381 Hrabik

Morning Reports are admissible either as official statements or as records made in the regular course of business (Act June 20 1936, ch 640, sec I, 49 Stat 1561, 28 USCA sec 695). The morning report herein corrected previous entries made more than 9 months previously. In view of lack of explanation of delay of correction, or of sources of information, such morning report is inadmissible to show accused's absence. (But see 395(18) Memo TJAG; 30 Mar 1945; Wash.)

Entry showing change of status from AWOL to confinement is inadmissible herein, since it was obviously not within the personal knowledge of the entrant.

Entry showing change from one place of confinement to another is without effect, re proving absence.

Entry showing return to military control, in absence of other competent evidence, cannot alone sustain a conviction for desertion or AWOL.

416(9) 7381 Hrabik (continued)
A disciplinary training center morning report herein is without value, since it merely relates to changes of status as between arrest and confinement.

433(2) 4995 Vinson AWOL shown by morning report extract signed by personnel officer. He identified it as a true extract of the actual morning report, and testified that he was designated by competent authority as the official custodian. Personnel officer is authorized to authenticate such extracts, and they were properly admissible.

395(18) Memo for the JAG; 30 Mar 1945; Washington, D.C. "Although Title 28, USC sec 695 (Act of 20 June 1936, 49 Stat. 1561), has liberalized the rule pertaining to the proof of entries in books of account and entries in the regular course of business, that statute is inapplicable to modify or affect the admissibility of instruments which the MCM specifically makes admissible only as 'official writings', such as the morning report.

Because a morning report is admissible as an official writing, "it is not necessary that the entry be made contemporaneously with the happening of the event recorded. This principle permits the delayed entry in a morning report * * * of the unauthorized absence of an accused which occurred prior to the date of actual entry."

"Responsibility for the entries in a morning report cannot ordinarily be delegated but * * * the manual and clerical task of preparing the morning report may be delegated and need not be performed by the officer responsible therefor."

385 6951 Rogers Original of 31 October 1944 morning report was signed by personnel officer. Inadmissible, as he was not an authorized officer.

Original of 5 January 1945 morning report was signed by personnel officer. Valid, to prove facts occurring subsequent to time duty was placed on personnel officer to know the facts, but not as to prior facts. Discuss Par 43a, AR 345-400, 3 January 1945, and Sec IV, Cir 119, ETO 12 December 1944. (As to prior facts referred to above, subsequent note states that this is "dicta not to be followed.")

395(18) (18) Documentary; Morning Reports

385 7686 Maggie Morning report historical data entries admissible.

Morning reports signed prior to 3 January 1945 by a chief warrant officer as assistant personnel officer are inadmissible. Presumption of regularity does not apply. Discuss AR 345-400, prior and subsequent to 3 January 1945.

In deference to superior authority of TJAG, SPJGN 1945/3492, Memo, TJAG, 30 March 1945, Washington, official writing or "shop book rule" basis for introducing morning reports is not used despite ETO 4691 Knorr. However, Knorr case is not overruled, on basis of reasoning that "shop book rule" applied to facts therein, and may apply to similar facts hereinafter.

The lateness of entries goes only to weight and credibility, but not to admissibility.

416(9) 7663 Williams Morning report used to show that accused was released from a replacement company, for return to a division.

416(9) 8631 Hamilton Morning report entries not within personal knowledge of officer making them. Possible objection is cured by direct testimony on matter contained therein.

419(2) 9271 Cockerham (1st Ind) Morning report originals signed by "warrant officer, Personnel Officer". Not commanding officer, and not authorized to sign.

427 8706 Twist Only evidence that accused was placed in arrest of quarters on 5 January 1945 "is the morning report entry of that date. Since this was admitted without objection, it is deemed competent to show the status alleged at the time accused absented himself from his organization on the 5th."

416(9) 5595 Carbonaro Carbon extract copy of morning report dated subsequent to date of trial. Held: Could not have been the morning report introduced at the trial. Hence, record of trial is incomplete.

385 6107 Cottam, et al — One morning report signed by assistant personnel officer and another by regimental personnel officer, prior to AR 345-400, 3 January 1945. Held: Inadmissible. Presumption of regularity does not apply. In deference to superior authority to TJAG, SPJGN 1945/3492, Memo TJAG, 30 March 1945, Washington, official writing, or "shop book rule" basis for introducing morning reports is not used despite ETO 4691 Knorr. However, Knorr case is not overruled, on basis of reasoning that "shop book rule" applied to facts therein, and may apply to similar facts hereinafter.

416(9) 10331 Jones — Morning report entry dated 31 January 1945 not admissible to show AWOL status as of 7 June 1944. Could not have been made from personal knowledge. Was not reasonably contemporaneous.

385 7312 Andrew — Attack began 12 Dec 1944. Morning report had this entry re accused: "Fr dy to AWOL 0800 as of 12 Dec 44". Held: Morning report entry makes a prima facie showing that accused was present for duty at a time immediately prior to the attack.

395(18) (18) Documentary; Morning Reports

The specification against accused alleged that he was a member of * * * Engineer Battalion, whereas the Morning Report, introduced in evidence to show his AWOL, referred to it as * * * Engineers. Likewise, there was a slight variance between the specification and the Morning Report in the spelling of the location of his unit. HELD: Neither variance affected accused's substantial rights. Nor did he make any objection in court. (CM ETO 800 Ungard 1943)

In this desertion case, "the certified extract copy of the Morning Report of accused's organization, which was received in evidence without objection, purports to be authenticated by the assistant personnel officer, * * * Infantry. Such officer was not the official custodian of the original and was thus unauthorized to authenticate a copy thereof. The improper authentication, however, was waived by failure to object thereto (CM ETO 5234 Stubinski). The extract also indicates that the original was signed by * * *, who failed to indicate in what capacity he acted in placing his signature on the instrument. Since no question was raised by the defense, it could properly be assumed by the court that he acted in his capacity of commanding officer of the company (CM ETO 5406 Aldinger)." (CM ETO 5414 White 1945)

(Memorandum for the Judge Advocate General; 30 March 1945; Washington)

"1. SPJGN 1945/3492 (Documentary Evidence; Morning Reports).

"Opinion of the Judge Advocate General.

"Article of War 38 authorizes the President of promulgate 'modes of proof in cases before courts-martial.' Pursuant to this authority the President, through the Manual for Courts-Martial, has prescribed that morning reports shall be admissible in evidence as 'official writings.' The Manual states that:

> "An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is, where an official duty exists to know and to make one or more records of certain facts and events, each such record including a permanent record compiled from mere notes or memoranda, is competent (i.e., prima facie) evidence of such facts and events, without calling to the stand the officer or other person who made it. For instance, the originals of /a/ * * * morning report are competent evidence of the facts recited in them, except as to entries obviously not based on personal knowledge.' (MCM, 1928, par. 117a)

395(18) (18) Documentary; Morning Reports

"The theory under which the morning report is admissible in evidence is important, and controls, in part, its evidentiary usefulness. The Manual distinctly states that a morning report is admissible in evidence as an 'official writing' and distinguishes it from entries in the regular course of business. Paragraph 116 of the Manual refers to '* * * a company morning report.' Likewise, paragraph 117a quoted above is devoted to a discussion of the admissibility in evidence of 'official writings' including 'morning reports.' On the other hand, paragraph 118a sets forth the rules of evidence relative to books of account and entries in the regular course of business, and provides that:

> "Entries in books of account, where such books are proven to have been kept in the regular course of business, and the entrant is dead, insane, out of the jurisdiction of the court, or otherwise unavailable to testify, are admissible in evidence.'

"Although Title 28, U.S.C., sec. 695 (act of 20 June 1936, 49 Stat. 1561), has liberalized the rule pertaining to the proof of entries in books of account and entries in the regular course of business, that statute is inapplicable to modify or affect the admissibility of instruments which the Manual for Courts-Martial specifically makes admissible only as 'official writings,' such as the morning report.

"An entry in the regular course of business gains its trustworthiness because it is made regularly and in the ordinary course of business. Necessarily, therefore, the entry must be made contemporaneously or reasonably contemporaneously with the occurrence of the events recorded. On the other hand, documents which may correctly be terms 'official writings' gain admissibility in evidence because of an official duty upon the entrant to record the true facts. It is not necessary that the entry be made contemporaneously with the happening of the event recorded. This principle permits the delayed entry in a morning report to be received in evidence as proof of the unauthorized absence of an accused which occurred prior to the date of actual entry.

"The decisions of this office have interpreted the provisions of paragraph 117 of the Manual for Courts-Martial as requiring the officer responsible for the morning report to have personal knowledge of the entries made therein. This is the principal safeguard provided by law to assure the veracity and accuracy of such entries. Although such personal knowledge need not be shown as a prerequisite to the introduction of the morning report into evidence, lack of such personal knowledge may be shown by the defense for the purpose of impeaching the entries. In this particular it should be observed that the morning report, when properly authenticated, is 'prima facie' evidence of the truth of the matters contained therein unless such entries are 'obviously not based on personal knowledge' (MCM, 1928, par. 117a). The lack of such personal knowledge may appear on the face of the instrument or may be established by extrinsic evidence. It should further

be observed that responsibility for the entries in a morning report cannot ordinarily be delegated but that the manual and clerical task of preparing the morning report may be delegated and need not be performed by the officer responsible therefor." (Memo for the JAG; 30 March 1945; Washington, D.C.) (See IV Bull JAG p 86-88)

395(18)

(18) Documentary; Morning Reports

(21) Hearsay; In General:

Cross References:

385	6951 Rogers (AWOL)
	1921 King (military police report)
395(13-18)	See Generally--documents.
395(35b)	See generally, re identification parades.
416(9)	1645 Gregory (military police report)
	5740 Cowins (prejudicial; desertion case)
419(2)	5633 Gibson (morning report, AWOL; prejudicial)
422(5)	5607 Baskin (telephone conversation)
424	895 Davis (co-accused)
433(2)	4004 Best (medical report; scope of entries; hearsay)
450(1)	3649 Mitchell (dying declaration; standing order contents)
	5765 Mack (test firing)
450(4)	5805 Lewis (in psychiatrist letter)
451(36a)	2093 Taylor (proof of corpus delicti by)
452(7)	1042 Collette (hearsay re dependent; conclusion of law)
454(18)	1729 Reynolds (bigamy; collaboration)
454(18a)	5032 Brown (prejudice)
	7506 Hardin (described headquarters letters, re impeding war effort)
	8234 Young (black market)

Not Digested

8474 Andoscia (psychiatry report)

AW 38 PRESIDENT MAY PRESCRIBE RULES

395(21)

(22) Hearsay; Res Gestae:

Cross References: (see specific titles)

450(1)	739	Maxwell
	7518	Bailey
450(2)	506	Bryson
	4043	Collins
450(4)	709	Lakas
	969	Davis
	4608	Murray
	6193	Parrott (coaccused)
450(5)	1600	Asher
454(63a)	3869	Marcum

(23) Conclusion; In General:

Cross References: (see specific titles)

385	6951	Rogers (AWOL)
395(7)	3811	Morgan
395(13-18)	See generally--documents	
395(21)	See generally--hearsay	
433	4995	Vinson
452(7)	1042	Collette (hearsay re dependent; conclusion of law)

(26) Privileged Communications:

Cross References:

433(2)	4691	Knorr (physician-patient; psychiatry report)

(27) Property Seized Without Warrant:

"When evidence is secured by law enforcement officers without warrant or authority but the search is conducted in the presence of accused and with his full knowledge and consent he waives his Constitutional rights and incriminating evidence thus secured is admissible against him. The search and seizure under such circumstances is not 'unreasonable' within the purview of the Fourth Amendment." "As to certain other letters found at the time of a second search, "the search of these letters, being made by order of the commanding officer of the public quarters occupied by accused situate at a military station, was * * * not obnoxious to the Fourth Amendment of the Federal Constitution. The letters were admissible in evidence.* * *." (CM ETO 1191 Acosta 1944)

After he had been ordered to search accused's possessions, a corporal removed certain receipts and memorandum. These items were introduced in evidence as exhibits. HELD: (1) Authority: In the absence of a showing of the source of the corporal's order to conduct the search or a showing of its legality, it will be assumed that the order was legal and that it emanated from proper authority. (MCM, 1928, Par 112; Winthrop, Reprint, p. 575, fn 27). (2) Lawfulness of Search: "The record is uncertain as to whether they were discovered in the absence of accused and without his knowledge or consent upon search of his quarters or, of his clothing when he was disrobed." They were inadmissible if they were obtained in violation of the Federal Constitution and its 4th and 5th Amendments. "If the exhibits were obtained as a result of a search of accused's person after he was taken into custody the evidence was admissible * * *. The law does not distinguish between documents and other property found on accused. * * * On the other hand, if the exhibits were discovered and seized during a search of accused's public quarters under the" order given the corporal, "such search is not 'unreasonable' and the seized documents were admissible in evidence." (CM ETO 2535 Utermoehlen 1944)

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(28) Stipulations:

Cross References:

385	6221	Rodriguez (admit accused's AW 28-58 statement)
	6819	Shambaugh (no open-court consent by accused; stipulate to confession)
419(2)	527	Astrella (stipulation re morning report)
433(2)	4564	Woods (AW 75; facts contrary to stipulation)
450(1)	739	Maxwell (no specific assent in court by accused)
	5765	Mack (no specific assent in court by accused)
450(4)	8451	Skipper
454(18a)	6226	Ealy (re judicial notice)
454(22b)	9345	Haug (contents of letter; opinion)
454(36a)	8690	Barbin (manner of making)
454(37a)	1107	Shuttleworth (refuse to admit)
454(105)	3686	Morgan (stipulation to prove corpus delicti for confession. Vehicle value)

The record failed to show that accused had specifically consented in open court to the use of a certain stipulation. HELD: "The failure to obtain such consent, while improper (see MCM, 1928, Par 126b, pp 136-137), did not injuriously affect accused's substantial rights, in view of other clear evidence of his guilt." (CM ETO 2951 Pedigo 1944)

(28a) Value:

Cross References:

385 4701 Minnetto (vehicle).
395(29a) See generally--judicial notice
433(2) 5445 Dann (bonds in enemy safe; public property)
451(9) 7000 Skinner (vehicle)
451(32) 4300 Kondrik (silk stockings; watch)
451(42) 4058 McConnell (owner testimony)
6217 Barkus (French franc exchange rate; radio in France)
875 Fazio
887 Van Horn
1453 Fowler
2158 Huckabay (ring)
2840 Benson
8187 Chappell(French franc value; German mark value; purchasing power
452(18) 128 Rindfleisch (vehicle)
5666 Bowles (vehicles, etc)
452(21) 6268 Haddox (gasoline and jerricans in ETO)
453(01) 4184 Heil (vehicle)
454(18a) 5032 Brown (wheel and tire)
5539 Hufendick (AW 96; black market; gasoline value)
8234 Young, et al (proof unnecessary in black market conspiracy and impeding war effort)
9987 Pipes (not element, AW 96 black market. AW 94)
454(22b) 9345 Haug (French champagne; official prices)
454(64a) 3292 Pilat (garments)

(29a) Judicial Notice in General:

Not Digested:
11173 Jenkins (location of military posts where AWOL could have reported)

Cross References:

359(9)	1191	Acosta (State of War; U.S. Military Establishments)
359(15)	1981	Fraley (General prisoner status; B/R looks to date in Branch Office)
365(1)	1981	Fraley (Army geographical and administrative subd.)
385	455	Nigg Jr (departure for hazardous duty)
	1921	King (AW 28; facts re; knowledge)
	2396	Pennington (top secret order)
	4054	Carey et al (orders and directives)
	4138	Urban (AW 2[illegible] hazardous duty; important service)
	6637	Pittala (movement of a division in France; landings etc.; general; battlefront conditions; reference to map. Board of Review)
	6934	Carlson (bulge offense, Dec 1944; reference to map by Board of Review)
	7413	Gogol (bulge; December 1944)
	8083	Cubley (Saar; 24 Nov 1944; major military operation
416(9)	1567	Spicocchi (location of military camps; return of deserter to military control)
	1629	O'Donnell (military conditions in United Kingdom)
419(2)	6342	Smith (replacement depot; transitory nature of)
422(5)	2921	Span (scientific methods)
433(2)	2212	Coldiron (enemy-occupied territory)
442(3)	6767	Reimiller (reference to map by Board of Review)
443	4339	Kizinski (offense committed in wartime)
443(1)	9423	Carr (bulge in Belgium)
450(1)	3649	Mitchell (ETO standing order re 3" knife blade; EM charged with notice)
451(9)	7000	Skinner ((value; jeep; price lists)
451(31)	4300	Kondrik (QM price list; stockings)
451(36)	1671	Matthews (training regulations; English currency va
451(42)	6217	Barkus (French franc exchange value)
	8187	Chappell (French franc exchange value; German mark purchasing power)
451(50)	1554	Pritchard (Army regulations; safety precautions)
452(3)	2788	Coats-Garcia (ETO regulation re motor vehicle; EM charged with notice)
452(3)	1538	Rhodes (Various orders, etc. of higher headquarters Board of Review also takes judicial notice)

395(29a) (29a) Judicial Notice; In General

(cont)

452(21) 6268 Maddox (value of gasoline and jerricans)
452(22) 5666 Bowles (price lists; military property; truck)
453(20a) 9542 Isenberg (ETO circulars; mail censorship)
453(26a) 6881 Hege (Base Section circular; officer presumed to know)
454(18) 3456 Neff (ETO cricular re marrying; accused charged with notice)
454(18a) 5539 Hufendick (gasoline; price lists; OM)
7506 Hardin (described hq letters re impeding war effort)
6226 Ealy (gasoline for ETO vehicles; use of vehicles; stipulation effect)
9987 Pipes (black market; impede war effort)
11216 Andrews (accused officer charged with notice of circulars and directives of his command)
454(22b) 9345 Haug (French laws of 1942; French official)
454(36a) 7553 Besdine (Administrative Memorandum, SHAEF and 9th U.S. Army; discussion of powers of promulgation; date of effectiveness)
454(56b) 6203 Mistretta (Belgium status; First Army)
454(63a) 571 Leach (Laws of England)
454(65a) 1872 Sadlon (Army regulations; mail censorship)
2273 Sherman (post mail in civilian box as violation)
454(67b) 2273 Sherman (ETO circulars; marriage; censorship; accused charged with notice)
454(95) 902 Barreto (marijuana as narcotic)

(cont)

Although the trial judge advocate requested that the court take judicial notice of certain matters, the record was silent on what the court did. HELD: It may be presumed that the court did in fact take judicial notice of those matters. (CM ETO 952 Mosser 1943)

A number of papers in the instant record contained the headings "Northern Ireland District * * *", and "Northern Ireland Base Section * * *." HELD: "The court may take judicial notice that the area covered by each designation was the geographical limit of Northern Ireland. It was in fact at all times one single operating and existing command and the standing orders or details to duty would remain effective until changed by the new Commanding General * * *." (CM ETO 970 McCartney 1943)

"The court was authorized to take judicial notice that the exchange value of an English pound was $4.035." (CM ETO 2358 Pheil 1944)

"Facts which need not be proved because the court may recognize their existence without proof are summarized in MCM, 1928, Par 125, p 134. The matters therein enumerated are well known facts or are contained in published documents. The only military orders included are general orders. If the order to which the prosecution referred was so secret that it could not be shown to the court it must necessarily follow that the court did not know of the terms or details of the order * * *. The theory and basis of judicial notice is that the fact sought to be proved is so well known that it has become common knowledge and it is therefore not necessary to prove it. * * * It, therefore, follows that the court was not authorized to take judicial notice of the so-called 'secret order'." (CM ETO 2396 Pennington 1944)

"The court and the Board of Review may take judicial notice of the historic fact that the first increment of American troops landed on the shores of Southern France between Marseille and Nice on 15 August 1944 (MCM, 1928, Par 125, p 134) * * *." (CM ETO 7148 Giombetti 1945) (Also see 8171 Russo, not digested.)

(30a) Presumptions:

Cross References:

385 455 Nigg (none, re hazardous duty and departure)
5437 Rosenberg (morning report)
6107 Cottam (morning report; regularity)
6937 Craft (of guilt)
7339 Conklin (innocence)
7532 Ramirez (innocence)
7686 Maggio (morning report; regularity)

395(29a) See generally--knowledge of accused, re matters of judicial knowledge
952 Mosser (presume that judicial notice was taken)

395(35a) 139 McDaniels (regularity)
1786 Hambright (defense counsel performed duty)
1943 McLurkin (explain accused's rights)

416(2a) 6524 Torgerson(defense counsel presumed to do duty. Constructive condonation not presumed. Note that presumption re defense counsel was rebutted in Carmisciano case, herein)

416(9) 4756 Carmisciano (morning report; contradictory; defense)
5196 Ford (pre-trial regularity)
5234 Stubinski (morning report)
5593 Jarvis (morning report; presume regularity)

422(5) 3046 Brown (legality of order)

433(2) 4564 Woods (presumption--before the enemy; "on or about"; against waiver of fundamental rights)

450(1) 255 Cobb (AW 92 murder; presume recognition of officer of day
4581 Ross (AW 92 homicide; prevent escape of prisoner of war)

451(2) 492 Lewis (presume consequences of act)

451(9) 7000 Skinner (presume consequences of act)

451(36a) 9128 Houchins (confessions; unexplained possession of stolen goods)

453(10) 10362 Hindmarch (presume assumption of command)

453(18) 2777 Woodson (presumption; consequences of falsehoods)

454(22b) 9345 Haug (French laws of 1942; French officials)

438 9573 Konick (that witness oath was administered at former trial

PROCEDURE

(31) Accused; Absence from Trial:

Cross References:
450(01) 3475 Blackwell (presence of accused, when court reconvenes)

The record failed to affirmatively show that, after an adjournment, th accused and the reporter were present when the court reconvened. HELD: (1) The record itself is evidence that the reporter was present. (2) Although it was stated that the "defense" was present, it is assumed that it was not intended to include accused therein. However, accused's presence may be assumed, because the record shows that he participated in the proceedings subsequent to the reconvening of the court. (CM ETO 2473 Cantwel (Mimeographed full opinion mailed out)

(33) Accused; Common Trial:

Cross References:
395(49) See motion to sever, herein
416(9) 1549 Copprue
424 3147 Cayles et al
450(1) 5764 Lilly
450(4) 3740 Sanders et al
4589 Powell, et al
6148 Dear (lengthy discussion, joint and common trials)
451(01) 3475 Blackwell
451(2) 2297 Johnson
454(91a) 2005 Wilkins

"The record of trial shows that defense was accorded but one peremptory challenge for both accused. Failure to exercise the one constituted a waiver of accuseds' clear right to a second, or one for each accused. Wher as here, accused are tried together at a common trial, the record of trial should show (a) the direction of the appointing authority that accused be tried together; (b) preferably, their consent to a common trial affirmative expressed (although failure to object has been held in certain cases to co stitute a sufficient waiver); and (c) opportunity accorded each accused to exercise one peremptory challenge." No prejudice resulted herein. (1st Ind CM ETO 6407 Ivey et al, 1945)

(33a) Accused; Credibility of:

Cross References:
395(62a) Impeachment--in general
451(17) 1302 Splain (weight of unsworn statements)
451(50) 2926 Norman (exculpatory statements)
452(9) 9342 Weils (fantastic explanation of larceny)

(35) Accused; Entrapment:

Not Digested
11681 Henning

"'When the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute', such conduct on the part of the officials amounts to entrapment and may constitute a defense (Sorrells v U.S., 287 U.S. 435, 77 L. Ed. 413). Where, however, the criminal intent originates in the mind of accused, the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense, does not defeat the prosecution (Grimm v U.S., 156 U.S. 604, 39 L. Ed. 550). In the instant case the evidence clearly established that the criminal designs originated in the minds of accused, and that the offenses were not instigated by the agents of the Criminal Investigation Division who merely afforded opportunities and facilities for their commission in order to detect and apprehend persons engaged in a criminal enterprise. There was, therefore, no entrapment. (CM ETO 8619 Lippie 1945)

(35a) Accused; Explanation of Rights:

Cross References:

378(4)	Guilty plea; explanation of--in general
385	5958 Perry (two accused; one takes stand
	7397 De Carlo
415	8164 Brunner

"While the record of trial fails to show that accused was given the opportunity to be sworn as a witness or was informed of his right to make a statement to the court or that the trial judge advocate and defense counsel presented arguments, it is presumed that the usual and normal trial procedure was followed and that counsel fully performed their duty to the accused." (CM ETO 139 McDaniels 1942)

"The record is silent as to the explanation to accused of his rights to remain silent, testify under oath or to make an unsworn statement. Accused did not appear as a witness on his own behalf." HELD: "While this is an irregularity it is not fatal. It will be presumed that defense counsel performed his duty towards accused in this respect." (CM ETO 1786 Hambright 1944)

"The accused did not take the stand as a witness in his own behalf nor did he make an unsworn statement. The record is silent as to whether his rights were explained to him as provided in MCM, 1928, par 75, p 59 and par 86, p 61. In the absence of evidence in the record that accused was denied any of his rights and privileges it will be presumed that defense counsel made proper explanation to accused of his rights, and that the usual and ordinary procedure of court was followed." (MCM, 1928, par 45b, p 35.) (CM ETO 531 McLurkin 1943)

395(35b) (35b) Accused; Identity of

(35b) Accused; Identity of

Not Digested
5362 Cooper
5464 Hendry
6428 Bostic

Cross References:

365	3897 Dixon
381	See in general - AW 24
433(2)	4820 Skovan (TJA points out accused)
	4995 Vinson (No proof re rank, organization or duty status)
	5004 Scheck (No proof re name, rank, organization)
450(1)	438 Smith (Various descriptions of name)
	3200 Price
	4292 Hendricks
450(4)	1202 Ramsey (rape)
	2002 Bellot
	3740 Sanders, et al
	3837 Smith (identification parade--but see other cases herein)
	3859 Watson (dog-tags; self-incrimination)
	4589 Powell, et al
	5584 Yancy (murder-rape)
	6554 Hill (identification parade--but see other cases herein)
	7209 Williams (identification parade; also see other cases her 8451 Skipper
	9246 Jacob (identification parade; also see other cases herein
	9611 Prairiechief (rape)
451(2)	1673 Denny (assault)
451(3)	3927 Fleming
451(50)	3362 Shackleford (make accused stand in court)
451(58)	3628 Mason
451(64)	3964 Lawrence (identification parade; see other cases herein)

(35b) Accused; Identity of 395(35b)

"Except by inference the testimony fails to identify the accused as such and the evidence, other than accused's unsworn statement, does not directly show that accused is in the military service of the United States. However his plea to the general issue and his statement disclosing his army service, plus the charge sheet, which is part of the record of trial (CM ETO 1704, Renfrow), supplied the deficiencies indicated (Winthrop's Military Law and Precedents, Reprint, 1920, p 276; MCM, 1928, par 64a, p 50)." (CM ETO 5510 Lynch 1945)

(35c) Accused; Intoxication of:

Cross References:

385	6626	Lipscomb (as cause of AW 28-58 desertion)
419(2)	4303	Houston (assault)
421(2)	3801	Smith (disrespect)
422(1)	2484	Morgan (AW 64 assault)
	5546	Roscher (officer accused assaulted was drunk)
422(5)	817	Young (AW 64 disobedience)
	9162	Wilbourn (too drunk to entertain AW 64 intent)
433(1)	1109	Armstrong (AW 75 misbehavior)
	3081	Smith
433(2)	3091	Murphy
	3301	Stohlmann
	3937	Bigrow
443(1)	1065	Stratton (AW 85 drunk on duty)
	1267	Bailes
	3577	Teufel
	4339	Kizinski
	5010	Clover
	5453	Day
	6684	Murtaugh
	9423	Carr
443(2)	1065	Stratton
444(5)	7925	Butler (AW 86 drunk on post)
450(1)	2007	Harris (murder)
	3932	Kluxdal
	5747	Harrison
	6229	Creech
	6265	Thurman
	7380	Himmelmann
450(2)	82	McKenzie (murder-manslaughter)
	835	Davis
	3957	Marneclo
	4993	Key
	6397	Butler (murder-manslaughter; wrongful vehicle use)
450(4)	3859	Watson (rape)
	9083	Berger
	9611	Prairiechief
451(2)	2672	Brooks (assault)
	3280	Boyce
	4059	Bosnich
	4386	Green
451(9)	3812	Harshner (assault)
	7000	Skinner
451(32)	3679	Roehrborn (various AW 93 offenses)
451(50)	6235	Leonard (with AW 93 manslaughter; driving while drunk)
451(64)	339	Gage (sodomy)
453(01)	4184	Heil (AW 85 drunk on duty; additional guilt of offenses which required specific intent)
453(7a)	339	Cage

453(10) (cont)
439 Nicholson
3303 Croucher
3966 Buck
5465 McBride
7585 Manning (additional finding of guilt of offense requiring specific intent
453(11) 580 Gorman
1197 Carr
454(7) 4607 Gardner (AW 96 assault)
454(18) 1729 Reynolds (bigamy)
454(20a) 5741 Kennedy (with breach of peace)
454(37a) 1107 Shuttleworth (AW 96 offenses; with drunken driving)
1366 English (drunken driving)
454(38a) 1368 Madden
454(40a) 4352 Schroeppel (drunk; endanger safety of command; AW 96--similar to AW 75 offense)
454(37a) 2157 Cheek (drunken driving)

AW 38

(395(35c)

PRESIDENT MAY PRESCRIBE RULES

(36) Accused; Mental Capacity:

Not Digested
3455 McManamom
3482 Martin
5646 Sorola (marijuana)
6840 Stolte (Low mental)
8474 Andoscia

Cross Examination:

385	1664	Wilson (AW 28-58; sanity subsequent to desertion)
	4165	Fecica (amnesia)
	6810	Shambaugh
	8028	Burtis
395(35c)		Intoxication--see generally
335	10402	Wolf (defence inference)
422(5)	4453	Boller (AW 64; epilepsy; anxiety complex)
	4622	Tripi (disliked wounds and blood)
	5566	Carter (battle-line)
433(2)	1404	Stack (AW 75)
	1663	Ison Jr (continuance, to inquire re combat anxiety)
	4004	Best (nervous and scared; procedure)
	4074	Olsen (neuropsychosis; recommendation)
	4095	Delre (combat anxiety
	4783	Duff (dazed officer)
442(3)	6767	Reimiller (aw 75-65)
443(1)	6684	Murtaugh (AW 85; drunk)
450(1)	739	Maxwell
	5747	Harrison Jr (murder-rape; psychotic v. psychopath)
	5765	Mack (murder-rape)
	6380	Himmelmann (murder-drinking)
	7815	Gutierrez (murder-drinking)
	9424	Smith Jr
450(4)	4194	Scott (procedure)
	9611	Prairiechief (drunken Indian; finding of sanity included in general finding)
451(64)	612	Suckow (sodomy)
	4219	Price (sodomy--psychopathic v psychopotic; deny motion for medical board examination)
454(69aa)	5609	Blizard (narcotic; alcohol; psychopath)
451(2)	9064	Simms (sodomist; low mental age)

395(36) (36) Accused; Mental Capacity

After the prosecution had completed its case, defense counsel put accused on the stand and stated that both his demeanor in court and the testimony already adduced might raise a question concerning his sanity. The court closed, and then reopened--at which latter time the trial was continued in order that accused's sanity could be investigated by a Board of Officers. When the court subsequently convened, the report of the Board of Officers was admitted in evidence, by stipulation, and two members of the Board testified. The court then closed. Upon reopening, it was announced that, all members concurring in the vote, it had been concluded that accused was sane. HELD: (1) "The question of accused's mental responsibility for the offense charged was placed in issue in a timely and proper manner by defense counsel. The court's response and action was in keeping with expeditious and prompt administration of justice." Accused's mental responsibility was adequately established. (2) The subsequent written recommendation of five members of the court, stating that they believed accused's mentality to be such that he should be attached to a labor battalion rather than to a combat team, does not alter the above conclusion. (CM ETO 314 Mason 1943)

"The question as to accused's legal responsibility for his acts was one of fact for determination by the court. There was substantial evidence that accused was sane at the times of the commission of the offenses charged * * *. The general finding of guilty suffices to cover the issue of insanity and all of its elements. No interlocutory finding * * * was necessary." (CM ETO 2023 Corcoran 1944)

After his absence without leave for more than six months, accused was found guilty of desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. "At the arraignment, defense counsel moved that an inquiry be made into the sanity of the accused. The motion was denied. In making the motion, the defense counsel did not assert either that accused was mentally irresponsible at the time of the commission of the alleged offense or that he had insufficient mental capacity to understand the nature of the proceedings or intelligently to conduct or to co-operate in his defense. Rather, he merely stated that, in his opinion, accused was 'a psycho case' and that he should have a psycho expert to determine his condition'. The court was empowered to constitute itself the judge of the extent to which the burden of inquiring into the mental condition of the accused had been imposed upon it by the representation of defense counsel (CM 193543, Kazmaier). Insofar as can be gathered from the record, accused made his unsworn statement in an intelligent manner and the court, in addition, had the opportunity of observing the actions and demeanor of the accused at the trial." The question of his sanity was for the trial court, and no error resulted from the denial of the motion. (CM ETO 3963 Nelson Jr 1944)

"A mere showing that an accused is of low intelligence does not relieve him from legal responsibility for his offense unless such mental deficiencies are so pronounced to render him unable to distinguish right from wrong and to adhere to the right (MCM, 1928, Par 78a, p 63; CM ETO 739; Cf: CM 221640, Loper 1942, 13 BR 195). There was no showing that accused was not legally responsible for the offenses committed." (Case involved rape, housebreaking, and night entry with intent to rape.) (CM ETO 6685 Burton 1945)

"In view of the belief of defense counsel (asserted at the trial and repeated in his report of interview of accused which accompanies the review of the staff judge advocate) that the accused is suffering from some type of mental disorder, I suggest that he be examined by a board of medical officers as provided by paragraph 35c, of the MCM, 1928, before he is returned to the United States. A copy of the report should be returned to this office for attachment to the record of trial." (1st Ind, CM ETO 8501 Wilson 1945)

395(36a) (36a) Accused; Seating Arrangement in Court
(36b) Accused; As Witness; Oath

(36a) Accused; Seating Arrangement in Court:

Cross References: 447 ; 804 Ogletree (Seated at direction of President

Immediately following the arraignment of several joint accused, defense counsel requested that their seating arrangement be altered, stating, "This case is primarily one of identification, and it is obviously too simple to pick out the accused when you have all the accused sitting in the front row." His motion was denied. HELD: "The president of the court properly denied this request 'for reasons of security and normal procedure'. The Manual provides that 'the accused will be seated as the president directs', vesting the president with full discretionary authority in this particular matter with one specific exception, having no application to the point at issue; viz: 'that the accused will be permitted to be near his counsel' (MCM, 1928, par 54, p 42)." (CM ETO 1284 Davis et al 1944)

(36b) Accused; As Witness; Oath:

"Although defense counsel stated that accused desired to take the stand as a sworn witness, the record of trial fails to recite that he was sworn before speaking in his own behalf. However, since his statements follow the heading "TESTIMONY OF ACCUSED - WARREN R. DIEDRICKSON" and there was brief cross-examination * * *, it may be assumed that his request that he be sworn was complied with. In the event he was not sworn, no substantial right of accused was injuriously affected since his representations wholly failed to explain either his alleged initial absence without leave or its extension for a period of over four months." (CM ETO 11402 Diedrickson 1945)

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(37) Court; Correction of Action:

Cross References: 399(1) 1704 Renfrow

"Records of trial before general courts-martial cannot be impeached b extraneous evidence in the form of certificates and affidavits." (MCM, 19 sec 87b), p 75provides methods for correction of erroneous or defective records of trial. These are exclusive. (CM ETO 2002 Bellot 1944)

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(41) Court; Place of Meeting:

Cross References:
450(1) 7518 Bailey (Confession at scene of crime)
450(2) 3162 Hughes
450(4) 611 Porter (scene of offense; testimony at)

Almost at the conclusion of the trial, the court members; the personnel of the prosecution, the accused and his counsel, the reporter, and three witnesses, visited the premises where the offense was alleged to have occurred. At various points there, the three witnesses were interrogated in detail. HELD: The above practice of interrogating witnesses at the scene of an offense is improper. However in the instant case, eliminating the testimony thus obtained from consideration, there was still substantial and competent evidence to sustain the findings of accused's guilt. No prejudice resulted. (CM ETO 1262 Moulton 1944)

After the court had convened, the trial judge advocate announced his intention to call an elderly victim of accuseds' offenses as its first witness, and stated that her physical condition made it impossible for her to be present in court. He requested that the court move to her home. Defense stated it had no objection. The court then assembled at the victim's home. At that situs, the trial judge advocate asked that the court note certain features of the premises. Defense stated it had no objection. "Thereupon the trial judge advocate called the court's attention to various objects, features and conditions at the place. Pursuant to the special orders appointing the court, the president thereof could fix the time and place for the court to assemble. In view of the reason advanced by the trial judge advocate, it was not an abuse of discretion for the president to reconvene the court at Mrs. **'s bedside. Her home, however, was also the scene of the crimes, and the court, though it did not convene there for that purpose, was asked 'to view the premises' and thereafter to receive Mrs. **'s testimony. The Board of Review has heretofore disapproved of the practice of receiving testimony at a 'view of the premises'.* * * However, in the instant case, the court properly re-assembled to take testimony at Mrs. **'s home in deference to her infirmities and undoubtedly also motivated by a desire to ascertain all the facts of the case. In so doing it could not escape viewing and observing the situs of the crimes. Defense counsel consented to the practice followed, and it clearly appears from the record of trial that none of the substantial rights of accused were injured thereby. The Board of Review concludes that it was not error for the court to receive Mrs. **'s testimony under the circumstances related nor to 'view the premises' as an incident of its presence in the victim's home." (CM ETO 7202 Hewitt 1945)

(42a) Court Martial Orders:

Cross References:
416 3062 Osther
419 4029 Hopkins (general prisoner status; reference to)

(43) Court Martial Orders; Publication:

In an AW 50½ case, the use of a "so-called 'tentative' general court-martial order in the effort to give publicity among the troops of the sentence in this case is without authority and is objectionable. The order must be of the date the reviewing authority takes final action (MCM, 1928, par 87d, p 79). Inasmuch as the sentence cannot be ordered executed prior to the examination of the record of trial and approval of sentence by the Board of Review and myself (AW 50½, par 3), the 'tentative' order possesses no legal efficacy." (1st Ind, CM ETO 2433 Meyer 1944)

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(44) Inconsistent Findings:

Cross References:

395(1j) Variance--see generally
424 895 Davis (mutiny; commit riot)
428(5) Multiplicity--see generally
450(1) 1453 Fowler (robbery-murder)
454(81a) 7245 Barnum (AW 95 and 96. Same charge of secrecy violation)
454(56b) ~~Fraternization--~~see generally

FINDINGS

(45) Findings: Lesser Included Offenses:

AW 28	385	455	Nigg	(AW 61 as lesser)	
		564	Neville	(AW 61 as lesser)	
		1921	King	(AW 61 as lesser)	
		2396	Pennington	(AW 61 as lesser)	
		2432	Durie	(AW 61 as lesser)	
		2481	Newton	(AW 61 as lesser)	
		3118	Prophet	(AW 61 as lesser)	
		3162	Hughes	(AW 61 as lesser)	Under 450(2)
		3234	Gray	(AW 61 as lesser)	
		4740	Courtney	(AW 61 as lesser)	Under 433(2)
		4986	Rubino	(AW 61 as lesser)	
		5958	Perry-Allen	(AW 61 as lesser)	AW 58 not lesser)
		6039	Brown	(AW 61 as lesser)	
		6751	Straub	(AW 61 as lesser)	
		6951	Robers	(AW 61 as lesser)	
		7397	DeCarlo	(AW 61 as lesser)	
		7532	Ramirez	(AW 61 as lesser)	AW 58 not lesser)
		7686	Maggie	(AW 61 as lesser)	
		8194	Shearer	(AW 61 as lesser)	
		8300	Paxson	(AW 61 as lesser)	
		8700	Straub	(AW 61 as lesser)	

AW 38 PRESIDENT MAY PRESCRIBE RULES

395(45) (45) Findings: Lesser Included Offenses

AW 58	416	1395	Saunders	(AW 61 as lesser)
		1567	Spicocchi	(AW 61 as lesser)
		5234	Stubinski	(AW 61 as lesser)
		5593	Jarvis	(AW 61 as lesser)
		5740	Gowins	(AW 61 as lesser)
		6497	Gary Jr	(AW 61 as lesser)
AW 63	421	106	Orbon	(AW 63-64 discussion) Under 422
AW 64	422	106	Orbon	(AW 63-64 discussion)
		1057	Roamona	(AW 96 failure to obey as lesser)
		4102	Savage	(AW 96 failure to obey as lesser)
		4376	Jarvis	(AW 96 failure to obey as lesser)
		4453	Boller	(AW 96 failure to obey as lesser)
		4750	Horton	(AW 96 insubordinate conduct not lesser)
		5546	Roscher	(AW 96 assault lesser to AW 64 assault)
		5607	Baskin	(AW 96 failure to obey as lesser)
		7584	Emery	(AW 96 failure to obey as lesser)
		8455	McCoy	(AW 96 failure to obey as lesser)
		9162	Wilbourn	(AW 96 failing to obey as lesser; no intent; drunk AW 96 assault & battery as lesser; no intent; drunk)

AW 69	427	5032 Brown	(AW 96 as lesser--not digested)
AW 75	433	1663 Ison	(Variance)
		2212 Coldiron	(AW 96--except words "before the enemy")
		4512 Gault Jr	(AW 61 as lesser, but not AW 96 AWOL)
		4565 Woods	(AW 61 as lesser)
		4691 Knorr	(AW 61 as lesser)
		4740 Courtney	(AW 61 as lesser)
		4995 Vinson	(AW 61 as lesser)
		5114 Acers	(AW 61 as lesser)
		5445 Dann	(AW 96 plunder & pillage not lesser in circumstances)
AW 83	441	5032 Brown	(AW 84 as lesser) Under 454(18a)

AW 38 PRESIDENT MAY PRESCRIBE RULES

395(45) (45) Findings: Lesser Included Offenses

AW 86	444	4443 Dick	(Sleep on post; AW 96 asleep while on duty as sentinel not lesser herein. Also, re variance)
		5255 Duncan	(Leave post--not fully proved. AW 96 as lesser)
		5466 Strickland	(Leave post--not fully proved. AW 96 as lesser)
		5848 Kay	(Sleep on post; AW 96 asleep while on duty as sentinel not lesser, where accused had left post)

AW 92 450 — Murder

62 Jacobs	(To manslaughter)
82 McKenzie	(To manslaughter)
506 Bryson	(To manslaughter)
835 Davis	(To manslaughter)
1725 Warner	(To manslaughter)
3162 Hughes	(To manslaughter)
3614 Davis	(To manslaughter)
3639 McAbee	(To manslaughter)

AW 92 450 -- Murder (continued)

3162	Hughes	(To manslaughter)
3614	Davis	(To manslaughter)
3639	McAbee	(To manslaughter)
3957	Barenclo	(To manslaughter)
4043	Collins	(To manslaughter)
4581	Rose	(Manslaughter not lesser)
4945	Montoya	(To manslaughter)
4993	Key	(To manslaughter)
6015	McDowell	(To manslaughter)
6397	Butler	(To manslaughter; insufficient evidence)

AW 92 450 -- Rape

1600	Asher	(AW 96 attempt as lesser)
4119	Willis	(Statutory rape not lesser herein, but fornication under AW 96 is (Under 454(56a)
4616	Molier	(Assault with intent to commit -- confirming authority). (Under 405)

AW 92 451(2) 9064 Simms (AW 93 assault sodomy; lesser, AW 96 assault)

AW 93 451(3)

1725	Warner	(AW 93 Assault to manslaughter, lesser to assault to murder)
4059	Bosnich	(AW 93 Assault to manslaughter, lesser to assault to murder)
6288	Falise	(AW 93 assault to do bodily harm, not lesser to assault rape. AW 96 assault to battery is lesser).

AW 93 (451(4)

4825	Gray	(AW 93 assault to do bodily harm, not lesser to assault to rape)
6227	White	(AW 96 assault and battery, lesser to assault to rape herein)

395(45) (45) Findings: Lesser Included Offenses

AW 93	451(6)	1177 Combess	(AW 96 assault and battery, lesser to assault to do bodily harm)
		1690 Armijo	(AW 96 assault and battery, lesser to assault to do bodily harm)
		4071 Marks	(AW 96 assault and battery, lesser to assault to do bodily harm. Under 451(32).)
		8189 Ritts	(Aw 96 assault and battery, lesser)
AW 93	451(9)	5420 Smith	(AW 96 assault and battery, lesser to assault to do bodily harm with dangerous weapon--no intent. Under 454(8).)
		8163 Davison	(AW 96 assault and battery, lesser to assault to do bodily harm with dangerous weapon. Under 423(1).)
AW 93	451(12)	764 Copeland	(Phraseology--dangerous weapon.)
AW 93	451(14a)	4300 Kondrick	(AW 93 housebreaking, lesser to burglary. Under 451(32).)
AW 93	451(17)	3454 Thurber	(AW 93 embezzlement; omit intent.)
AW 93	451(32	4300 Kondrick	(AW 93 housebreaking, lesser to burglary)
		4071 Marks	(AW 96 assault lesser to AW 93)
AW 93	451(35)	533 Brown	(AW 93 larceny, lesser to robbery. Under 451(58).)
AW 93	451(50)	2788 Coats-Garcia	(AW 96 negligent operation of vehicle, lesser to AW 93 manslaughter)
AW 93	451(58)	533 Brown	(AW 93 larceny, lesser to robbery.

AW 93	451(64)	945 Garrison	(AW 96 solicitation, lesser to sodomy. Under 454(15b).)
		1638 LaBorde	(AW 96 attempt, lesser to sodomy. Under 454(15a).)
AW 94	452(21)	8565 Flanagan	(AW 96 attempt, lesser to AW 94 manslaughter)
AW 95	453(7a)	1388 Maddon	(Demfmatory statement; lesser under AW 96. Under 454(38).)
AW 95	453(9)	6235 Leonard	(AW 96 drink with EM, as lesser. Under 451(50).)
	453(9)	7246 Walker	(AW 96 drink with EM, as lesser. Under 453(18).)
AW 95	453(10)	439 Nicholson	(AW 96 Drunkenness as lesser)
		1388 Madden	(AW 96 drunkenness as lesser. Under 454(38).)
		4607 Gardner	(AW 96 drunkenness as lesser. Under 454(7).)
		5465 McBride Jr	(AW 96 drunkenness as lesser)
AW 95	453(18)	1953 Lewis	(AW 96, as lesser--false official statements)
		3454 Thurber Jr	(AW 96, as lesser--false official statements--no intent. Under 451(17).)
AW 95	453(25a)	7245 Barnum	(AW 96 secrecy violations, as lesser. Under 454(81a).)

395(45) (45) Findings: Lesser Included Offenses

AW 96	454(8)	5420	Smith	(Assault with dangerous weapon; no intent, as lesser).
AW 96	454(15a)	1638	LaBorde	(AW 96 attempt sodomy, as lesser)
AW 96	454(15b)	945	Garrison	(AW 96 solicit sodomy, as lesser)
AW 96	454(21)	5032	Brown	(AW 96 breach restraint, lesser to AW 69. Not Digested.)
		8565	Flanagan	(Attempted misapplication. Under 452(21).)
AW 96	454(27)	1388	Madden	(AW 96 defamations, lesser to AW 95. Under 454(38).)
AW 96	454(37)	6235	Leonard	(AW 96 drink with EM, lesser to AW 95. Under 451(50).)
AW 96	454(49)	3454	Thurber Jr	(AW 96 false official statement; no intent, lesser to AW 95. Under 451(17).)
AW 96	454(59a)	4443	Dick	(AW 96 guard duty derelictions, as lesser to AW 86. Under 444)
		5255	Duncan	(AW 96 guard duty derelictions, as lesser to AW 86. Under 444)
		5466	Strickland	(AW 96 guard duty derelictions, as lesser to AW 86. Under 444)
		5844	Kay	(AW 96 guard duty derelictions, as lesser to AW 86. Under 444)
AW 96	454(63a)	4028	Moreno	(AW 96 assault, as lesser to AW 96 indecent assault)
AW 96	454(63b)	4750	Horton	(AW 96 insubordinate conduct, not lesser to AW 64 herein. Under 422 (6).)
AW 96	454(69b)	2788	Coats-Garcia	(AW 96 negligent operation of vehicle, lesser to AW 93 manslaughter. Under 451(50).)
AW 96	454(72b)	5445	Dann	(AW 96 not lesser to AW 75 plunder and pillage. Under 433(2).)
AW 96	454(81a)	7245	Barnum	(AW 96 secrecy violation, as lesser to AW 95)

(46) Members; Absence or Relief from Duty:

Cross References:
365 See appointment in general.
433(2) 1693 Allen (Excused by President)

A court member was absent the first day of trial, but appeared on the second day. He was then excused by the President, and left the court room. HELD: Accused's rights were not prejudiced by the above action. "Neither the President or the court have general authority to excuse members * * *, but 'where a member * * * has been absent during the taking of evidence in the progress of trial * * *, it is proper for the court to excuse such member from further participation * * *'". The action of the President in the instant case "was not only free from error, but also avoided the intrusion into the trial proceedings of an awkward and serious legal question." (CM ETO 1249 Marchetti 1944) (Mimeographed full opinion mailed.)

"Major M * * *, a member of the court, is shown as absent at the time the court met * * *. However, the fact that he was then present is made certain by the question directed to him personally by the prosecution at the opening of the trial as to whether or not he had any inhibitions toward the imposition of the death penalty in the event of a finding of guilty. Major M * * * answered 'None'. It is therefore obvious that the indication in the record that he was absent when the court met is incorrect and that his name should have been included with the members of the court listed as present. The record further recites: 'Note: Major M * * * was then excused after challenge and before the court was sworn'. Who instituted the challenge, what action was taken upon it by the court and whether or not Major M * * * then withdrew after being excused does not appear * * *. Further obscurity is added by the showing * * * that after such challenge both the prosecution and the defense indicated they had no challenges either for cause or peremptorily. Regardless of the circumstances concerning the challenge, it may properly be presumed that Major M * * * then withdrew upon being 'then excused after challenge' and no substantial right of accused was injuriously affected by the irregularities above noted." (CM ETO 10079 Martinez 1945)

(46a) Membership:

Cross References:

365	See Appointment, in general.
385	564 Neville (Promotion of member not shown)
395(46-47)	See generally.
450(2)	506 Bryson (Law member transferred from command)

The order appointing the members of a general court-martial should not specifically designate the President. The senior in rank is President and presiding officer. However, it should designate the Law Member. (MCM, 1928, par. 39). (1st Ind, CM ETO 799 Booker 1943)

MEMBERS OF COURTS-MARTIAL

(47) Court Members; Disqualification:

Cross References:

365(8)	Membership generally; Presence of parties.	
375	See generally, re AW 17 challanges.	
385	6810 Shambaugh	(Member previously signed extract of M/R and related letter)
433(a)	2471 McDermott	
433(2)	3828 Carpenter	(Officer who referred charges for investigation recommended GCM, and forwarded them to division commander--member of court-martial)
453(10)	10362 Hindmarch	(Officer who referred case to trial, as court member)
450(4)	8451 Skipper	(Officer who referred case to trial; administrative act)
454(18a)	8234 Young	(Member sat on previous similar court-martial. Knew corups delicti; challenge array)
454(36a)	8690 Barbin	(Previous ministerial act)

395(47) (47) Court Members; Disqualification

Accused was charged with absence without leave in violation of AW 61; the wrongful use of an army vehicle in violation of AW 96; and sodomy, and assault with attempt to commit sodomy, in violation of AW 93. He was found guilty, with certain exceptions. HELD:LEGALLY INSUFFICIENT. Law Member: Major Smith "was appointed law member of the court which tried accused * * *. Subsequently, he sat as such member, during the trial of accused by that court, and participated in the hearing and determination of the case. Prior to the trial * * *, acting on the charges in this case, Major Smith had prepared and signed the advice of the staff judge advocate, the instrument in which is embodied the advice given by the staff judge advocate to the appointed authority pursuant to AW 70." At the trial, upon question of the defense counsel, the law member stated that he drafted the advice sheet for the signature of the staff judge advocate, and added that he was not prejudiced and had not formed nor expressed an opinion on accused's guilt or innocence. Thereafter, the defense peremptorily challenged another member, but made no objection to the above law member sitting on the court. Accused pleaded not guilty. "Major Smith was disqualified from sitting as a member of the court within the letter and certainly within the spirit of" the MCM, 1920 (Par 58e, pp 45, 46, par 58f, p 46 quoted). "First, it cannot be denied that he personally investigated the offense (Ibid., par. 58e, Sixth). Whether an investigation is first hand or through the agency of others is a matter of degree of relationship with which the spirit of this section of the Manual is not conerned. Second, while action as reviewing authority as staff judge advocate after the trial is specifically mentioned as a disqualifying function (Ibid., Eighth), there is certainly no degree of differance in the evil thus foreseen and specifically anticipated and that evil resulting as a result of a similar functioning before the trial. Third, certainly this member of the court 'submitted a written statement on the investigation of the charges', specifically mentioned as a disqualifying duty (Ibid., Ninth). And fourth, in his 'advice' statement, Major Smith wrote: 'In my opinion, the charges are appropriate to the evidence, are sustained thereby and trial thereon by court martial is warranted'. This expressed opinion would seem to be disqualifying (Ibid., Seventh)." Although defense counsel did not challenge the law member, "it does not appear * * * that the defense was aware that the pre-trial advice of the staff judge advocate carried with it an expression of opinion that the charges were sustained by the evidence." In fact, the contrary affirmatively appears. Prejudicial error resulted. (CM ETO 5458 Bennett 1945)

Accused was found guilty of embezzlement, in violation of AW 93. HELD: LEGALLY INSUFFICIENT. Prior to reference of the instant case to general court-martial, advice of the staff judge advocate was submitted to the appointing authority pursuant to AW 70. This advice was prepared and signed by an assistant staff judge advocate, who later prosecuted the case as the trial judge advocate. The Acting Staff Judge Advocate,

Lt. Col. * * * wrote "I concur" beneath the signature of the assistant staff judge advocate on the advice, and signed the same. Thereafter, that Act Staff Judge Advocate * * * sat on the court which tried accused as Law Member. He advised the court of this circumstance, and further stated that he had neither expressed an opinion, nor then had an opinion, in regard to accused's guilt or innocence. The defense counsel made no issue, and neither exercised peremptory challenge or challenge for cause. That defense counsel was also an assistant in the office of the same Staff Judge Advocate. CM ETO 5458 Bennett is controlling herein. The only difference "is that here the Acting Staff Judge advocate who sat as law member * * * did not initially prepare the instrument in question but rather concurred in the opinion therein expressed." Nonetheless, and as in the Bennett case, it must be concluded that prejudice resulted from the above practice" The record is legally insufficient to support the conviction. (CM ETO 5855 Herholtz 1945)

"* * * The personnel officer of accused's organization was a member of the court. Since morning reports and other official documents signed by regimental officers are frequently involved in courts-martial proceedings, the detail of such officers to serve on courts-martial unnecessarily raises legal questions, as in the instance case where the extract copy of morning report was certified by a member of the court. In the appointment of future courts-martial it would be advisable to detail officers who are not directly involved, even in administrative capacities, in the preliminaries to trial." (1st Ind. CM ETO 10008 Elko 1945)

395(48-48a) (48) Members; Improper Action
(48a) Motion for Finding of Not Guilty

(48) Members; Improper Action:

Cross References:
450(4) 8451 Skipper (Court member describes a wound. Not sworn as a witness).

"When accused's rights as a witness had been explained to him, the law member inquired if there were any questions by either of the colored members of the court. In response thereto a member of the court volunteered his professional opinion (professional psychologist) as to accused's mental capability to understand his rights under AW 24. This was irregular, but if it was at all harmful, the prosecution and not accused was prejudiced." (CM ETO 9461 Bryant 1945)

(48a) Motion for Finding of Not Guilty:

Cross References:
385 564 Neville (Failure to renew at trial's conclusion; defense's evidence)
4165 Fecicia (Failure to renew motion)

At the conclusion of the prosecution's evidence, defense counsel moved for a finding of not guilty. The motion was denied. The defense then presented its evidence, but did not again renew the motion. HELD: -A prima facie case had been made out by the prosecution, so the denial of the motion for a finding of not guilty was proper. Moreover, the defense waived the question of the correctness of its denial by failing to renew the motion at the close of its own testimony. (CM ETO 1249 Marchetti 1944 (Mimeographed full opinion mailed out)

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(49) Motion for Severance:

Cross References:

385	564 Neville (renewal of)
395(33)	Common trial -- see generally.
424	895 Davis (AW 66 mutiny)
	3147 Gayles et al
450(1)	4294 Davis et al
450(1)	5764 Lilly
450(2)	506 Bryson (renewal of)
450(4)	6148 Dear (common and joint trials)
454(18a)	8234 Young, et al (black market)

(49a) Motion to Amend:

Cross References:

451(50)	1554 Pritchard

(49b) Motion to Continue:

Cross References:

377	See generally.
450(4)	8451 Skipper (Law member rules on)

(49c) Motion to Elect:

Cross References:

451(2)	492 Lewis (Allege one assault; prove another. No motion)

(49d) Motion to Quash:

Cross References:

453(01)	4184 Heil

395(49e-51a)

(49e) Motion to Strike
(49f) Nolle Prosequi
(49g) Plea in Bar
(50) Plea to Jurisdiction
(51a) Cure of Error by Ratification

(49e) Motion to Strike:

Cross References:
451(2) 4059 Bosnich (Granted by Law Member)

(49f) Nolle Prosequi:

Cross References:
416(9) 5234 Stubinski (subsequent ratification)
451(8) 3927 Fleming (one of joint accused; co-accused still tried)
452(9) 7248 Street (not double jeopardy)

(49g) Plea in Bar:

Cross References:

454(7) 3209 Palmer

(50) Plea to Jurisdiction:

Cross References:
359 See generally.
451(64) 4685 Mitchell (sodomist -- unlawful induction)

(51a) Cure of Error by Ratification:

Cross References:

416(9) 5234 Stubinski (ratification)

(53) Staff Judge Advocate; Improper Action:

Accused officer was found guilty of an offense in violation of AW 75. "In announcing the sentence imposed, the court erroneously used the words 'to be dishonorably discharged the service' instead of 'to be dismissed the service', which incorrect terminology was immediately called to the court's attention by the trial judge advocate. The court thereupon declared a recess, during which the law member and the defense counsel 'contacted the division staff judge advocate * * *'. The court then reconvened and again announced the sentence including therein the appropriate words 'to be dismissed the service' * * *. The procedure adopted was not improper under the circumstances and no substantial right of accused was thereby injuriously affected (MCM, 1928, par 51g, p 40)." (CM ETO 6961 Risley Jr 1945)

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(54) Trial Judge Advocate and Assistant; Absence from Trial:

Cross References:

See 365(8) herein, generally.

(55) Trial Judge Advocate and Assistant; Improper Action:

Cross References:
422(1) 5546 Roscher (see 1st Ind.)
454(81a) 2885 Nuttmann (improper statements to court)

395(55a-58)

(55a) Court Member as Witness
(55b) Prosecutrix Does Not Take Stand
(56) Credibility
(57) Competency; Accomplice or Co-Conspirator
(58) Competency; Children

(55a) Court Member as Witness:

Cross References:

450(4) 8451 Skipper (describes a wound; not sworn)

(55b) Prosecutrix Does Not Take Stand:

Cross References:

450(4) 5805 Lewis (rape)

(56) Credibility:

Cross References:

395(33a) Credibility of accused.
395(62a) Impeachment.
422(5) 817 Yount (Question for court)

(57) Competency; Accomplice or Co-Conspirator:

Cross References:

451(2) 2297 Johnson Jr (Assault to commit felony)

(58) Competency; Children:

Not Digested: 3644 Nelson

Cross References:

450(1) 9410 Loran (failure to swear as witness)
451(9) 6522 Caldwell (failure to swear as witness)
451(64) 2701 Webb (6-year child; sodomy; one falsehood)
454(22), 2759 Davis
454(63a) 2195 Shorter
3869 Marcun
4028 Moreno

(60) Competency; Interpreter:

Cross References:

450(1) 292 Mickles (3rd person form; substance of testimony)
450(4) 6554 Hill (Ineffective interpreter)

(62a) Impeachment:

Cross References:

415 8164 Brunner (previous AW 104; general reputation)
447 1052 Geddies (credibility)
450(1) 438 Smith (surprise; proof of)
739 Maxwell
3649 Mitchell (murder)
450(4) 1069 Bell (character evidence, where witness not impeached)
2625 Pridgen (rape; accused; extrajudicial statement; no AW 24 warning)
3197 Colson (error not to admit inconsistent statements)
6148 Dear (accused; prior written statement; oral testimony; best evidence rule)
451(2) 4122 Blevins

Over objection, the prosecution cross-examined accused concerning both his prior discharges from the United States Navy and other derelictions for which he had been previously court-martialed. HELD: "If the accused takes the stand as a witness, his reputation for truth and veracity may be shown'. (MCM, 1928, par. 112b, p 112). 'Generally speaking the same rules are applicable in this regard as apply in the case of other witnesses'. * * * Impeachment for general lack of veracity of a witness must be limited to evidence of general reputation for truth or veracity in the community in which accused lives or pursues his ordinary business. (MCM, 1928, par 124b, p 133 * * *). Subject to exceptions not applicable to this case, the basic rule is that the prosecution may not cross-examine the witness as to particular former acts of misconduct not relevant to the issue or involved in the principal controversy or brought out on direct examination * * *." While error resulted in the instant case, the prejudice extended only to the severity of the punishment. Since the confirming authority mitigated the sentence, correction has already resulted. (CM ETO 515 Edwards 1943)

AW 38 PRESIDENT MAY PRESCRIBE RULES

395(63a-66)

(63a) Oath
(65) Refresh Memory
(66) Waiver of Cross-Examination

(63a) Oath:

Cross References:

395(36b)	11402	Diedrickson (accused)
450(1)	9410	Loran (failure to swear 8-year old witness)
450(4)	8451	Skipper (court member describes a wound; not sworn)
451(9)	6522	Caldwell (failure to swear 12-year old witness)

(65) Refresh Memory:

Cross References:

450(1)	292	Mickles (Verbatim transcript; not authenticated)
	739	Maxwell
	3200	Price
450(2)	506	Bryson
453(18)	765	Claros

(66) Waiver of Cross-Examination:

Cross References:

450(2)	506	Bryson

396 (AW 39) Limitations Upon Prosecutions as to Time: 396

Cross References: 454(19) Accused in service less than 2 years; assume that statute has not run (ETO 2972) Collins

408(5) Right to prompt trial; rehearing; former jeopardy (ETO 1673) Denny

454(63a) 7570 Ritner (where time is not alleged.)

LIMITATIONS UPON PROSECUTION AS TO TIME

397 (A.W.40) Limitations upon Prosecutions; As to Number:

Former Jeopardy

438 9573 Konick (AW 80 offense)

Cross References: 422 (6) Former AW 104 Punishment (ETO 110) Bartlett
454 (7) 3209 Palmer (Former AW 104 Punishment)
454 (88) Statutory rape: Inclusion of words "unlawfully and feloniously" in subsequent specification. (ETO 2550) Tallent
419 (2) 4303 Houston (Former AW 104 Punishment)
365 (9) 4342 Edwards, 1 Ind. (law member dead)
452 (9) 7248 Street (earlier nolle prosequi)
450(2) 6397 Butler (murder; drunkenness--see 1st Ind)

(1) 453(10) 10362 Hindmarch (indefinite drunkenness charge; possibility of future question)

(3a) Condonation: (See 416 (AW 58), sec. 2a.)

Reconsideration

Cross References: 408 (AW 50½) Rehearings

(5)

AW 40 LIMITATIONS UPON PROSECUTIONS; AS TO NUMBER

397

398(A.W. 41) Cruel and Unusual Punishments Prohibited: 398

Cross References: 422(6) Bread and water; dungeon confinement (ETO 110) Bartlett

399 (AW 42) Places of Confinement; When Lawful:

Cross References:

454 (11)	571	Leach	Indecent Assault
454 (22)	3044	Mullaney	Designate Place; fail to
451 (50)	3362	Shackleford	Manslaughter (1st Ind)
454 (01)	3475	Blackwell	Arson; assault with intent to do do bodily harm, dangerous weapon USDB
454 (64a)	3507	Goldstein	Abstract from Mails; no penitentiary.
454 (105)	3686	Morgan	Two or more offenses; one punishable in penitentiary. Larceny Wrongful taking, Red Cross vehicle
451 (32)	3707	Manning	Housebreaking; penitentiary.
454 (63a)	3717	Farrington	Sodomy
424	3803	Caddis	Mutiny
433 (2)	3885	O'Brien	Misbehavior before enemy; AW 75
454 (13)	3926	Manez	Attempt to have carnal knowledge
454 (13)	3930	Perez	Attempt to have carnal knowledge
433 (2)	4074	Olsen	Designate DTC in France; 20 yrs, DD not suspended.
422 (5)	4622	Tripi	Designate wrong DTC.
450 (4)	3740	Sanders et al	Aid & abet rape; AW 96; Penitentiary.
419 (2)	5569	Keele	AWOL and false cl. ag. US; not over $20; Penitentiary not authorized.
422 (5)	7549	Ondi	AW 64; Penitentiary.
454 (105)	6383	Wilkinson	Wr. take & use govt. vehicle. (Also see 8338 Row)
451 (50)	6015	McDowell	Penitentiary for entire sentence, where penitentiary for part is OK.
451 (2)	9888	Baxter	Recommend penitentiary; assault to rape; moral turpitude)
452 (21)	10282	Vaudiver	Sale of rations; AW 84 guilt)
454(18a)	7506	Hardin	Gasoline sale; AW 84 guilt)
454(103b)	10563	Inzeo	Wrongful printing of pass forms.
454(18a)	8234	Young	Black market conspiracy

399

Confinement in a penitentiary is not authorized for the offense of sleeping on post because it is not recognized as an offense of a civil nature and 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. (1st Ind. CM ETO 980 Coughlin 1944.)

Confinement in a penitentiary is not authorized for the offense of AWOL in violation of AW 61. (CM ETO 2829 Newton 1944.) (CM ETO 2210 Lavelle 1944.)

Confinement in a penitentiary is not authorized for the offense of a larceny not over $50.00, because sentence over 1 year therefor is improper. (CM ETO 2829 Newton 1944.) (CM ETO 2210 Lavelle 1944.)

Confinement in a penitentiary is not authorized for the offense of wrongfully and unlawfully resisting lawful arrest in violation of AW 96. (CM ETO 1284 Davis, et al 1944.)

Confinement in a penitentiary is not authorized for the offense of taking indecent liberties with minor children. (CM ETO 2195 Shorter 1944.)

Confinement in a penitentiary is not authorized for the military offenses of escape from confinement, breach of restriction, and absence without leave. (CM ETO 1395 Saunders 1944.)

Confinement in a penitentiary is authorized for participation in an unlawful meeting of military personnel for insubordinate purposes (CM ETO 2005 Wilkins 1944.)

Confinement in a penitentiary is authorized for the crime of embezzlement under the District of Columbia Code, where the sentence is for more than one year. (CM ETO 1302 Splain 1944.)

Confinement in a penitentiary is authorized for the crime of larceny of Government property furnished and intended for the military use thereof. This is an offense under the Federal Penal Code. (CM ETO 1764 Jones-Mundy 1944.)

Confinement in a penitentiary is authorized for the offense of knowingly making and uttering a forged enlisted man's pass, in violation of AW 96. CM ETO 2210 Lavelle 1944.)

Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape. (CM ETO 2652 Jackson 1944.)

Confinement in a penitentiary is authorized for the crime of assault with intent to murder. Sec. 276 Federal Criminal Code (18 USCA 455). (CM ETO 2297 Johnson 1944). (CM ETO 2321 Moody 1944)

Confinement in a penitentiary is authorized for the crime of assault with a dangerous weapon with intent to do bodily harm. (CM ETO 2707 Womack 1944) (CM ETO 2744 Henry 1944.)

Confinement in a penitentiary is authorized for the crime of assault with intent to do bodily harm. (CM ETO 2414 Mason 1944.)

Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape. (CM ETO 2414 Mason 1944.)

Confinement in a penitentiary is authorized for the offense of desertion in time of war. (CM ETO 2842 Flowers 1944.)

Confinement in a penitentiary is authorized for the offense of taking and using without the consent of the owner a motor vehicle, for the profit, use or purpose of the taker. Sec. 6.62, District of Columbia Code. (CM ETO 2753 Setzer 1944.)

Confinement in a penitentiary is authorized for the offense of robbery. (CM ETO 2744 Henry 1944.)

Confinement in a penitentiary is authorized for the offense of forgery. (CM ETO 2535 Utermoehlen 1944.)

Confinement in a penitentiary is authorized for the offense of embezzlement. (CM ETO 2535 Utermoehlen 1944.)

Confinement in a penitentiary is authorized for the offense of voluntary manslaughter. (CM ETO 2103 Kern 1944.)

Confinement in a penitentiary is authorized for the crime of rape. (CM ETO 2203 Bolds 1944) (CM ETO 2472 Blevins 1944)

Confinement in a penitentiary is authorized for the crime of sodomy. (CM ETO 2380 Rappold 1944.)

Confinement in a penitentiary is authorized for the crime of murder. (CM ETO 1922 Forester 1944.)

Confinement in a penitentiary is authorized for the crime of housebreaking. (CM ETO 2302 Hopkins 1944.)

Confinement in a penitentiary is authorized for the offense of larceny of property of over $50.00 value. (CM ETO 2409 Cummings 1944.)

Violations of AW 75 constitute military offenses. Hence, confinement therefor in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is proper. (CM ETO 1249 Marchetti 1944) (Mimeographed full opinion mailed).

Confinement in a reformatory is authorized only when confinement in a penitentiary is authorized. (CM ETO 2329 Newton 1944.) (CM ETO 1411 Riess 1944.)

"Confinement in a disciplinary training center in the United Kingdom in execution of a ten-year sentence upon conviction of a heinous offense, while not in harmony with the policy announced in paragraph II, 7b, Circular 72, ETOUSA, 9 September 1943, is legally authorized by paragraph II, 8c thereof, at the discretion of the officer exercising general court-martial jurisdiction." (CM ETO 996 Burkhart 1943.)

Accused was found guilty of assault with intent to murder, in violation of AW 93. The reviewing authority reduced his guilt to manslaughter, suspended his dishonorable discharge, and designated the "Federal Correctional Institution, Danbury, Connecticut, U.S.A. HELD: THE WRONG PLACE OF CONFINEMENT WAS DESIGNATED. At this time (2 October 1944), "the Federal Correctional Institution, Danbury, Connecticut, is not * * * available for the confinement of military prisoners sentenced to confinement in a Federal institution (Cir. 229, WD, 8 June 1944, sec. II). Moreover, while places of confinement in the United States may be designated for general prisoners under sentence of dishonorable discharge not suspended Cir 72, Hq ETOUSA, 9 Sept 1943), there is no authority in the European Theater of Operations for their designation in cases of suspension of the dishonorable discharge." (CM ETO 3583 Odom 1944)

Ordinarily the * * * Disciplinary Training Center in France "should not be designated as a place of confinement for persons whose dishonorable discharge is not suspended. If the dishonorable discharge is suspended in this case, the same should be accomplished in a supplemental action by the reviewing authority to be returned to this office for attachment to the record of trial. In the event the dishonorable discharge is not suspended and the prisoner is returned to the United States, Eastern Branch, U.S. Disciplinary Barracks, Greenhaven, New York, should be designated as the place of confinement (Cir. 210, WD, 14 Sept 1943, sec. VI as amended). This may be done in the published court-martial order direction execution of the sentence." (1st Ind, 5 Dec 1944, CMETO 4569 Rubin 1944)

"Confinement in a penitentiary is not authorized in this case for the reason that the offense of sleeping on post is not 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. AW 42. Confinement in a reformatory is authorized only when confinement in a penitentiary is authorized by law." (Ltr, 26 Nov 1943, re CM ETO 980 Coughlin 1943)

"Cir 25, War Department, 22 January 1945, directs that a Federal correctional institution or reformatory shall be designated as the place of confinement only for prisoners 25 years of age and younger and with sentences of not more than 10 years. The accused is 27 years, 11 months of age, hence the U.S. Penitentiary, * * *, should be designated as the place of confinement. This may be done in published court-martial order." (1st Ind, CM ETO 7742 Saylor, 1945)

"Penitentiary confinement is not authorized upon conviction by court-martial of an attempt to commit sodomy (CM 212056, Smith; CM ETO 2717 Quann)." (CM ETO 8333 Cook, Jr 1945)

"Confinement in a penitentiary is authorized upon conviction of larceny of property of the U.S. furnished or to be used for the military service, and of the offense of unlawful sale of such property by AW 42 and sec.36, Fed Crim C (18 USCA 87), and of the offense of conspiring to commit an offense against the U.S. by AW 42 and sec. 37, Fed Crim Code (18 USCA 88)." (CM ETO 8619 Lippie 1945)

"Confinement in a penitentiary is authorized for the offense of stealing property furnished or to be used for the military service (sec. 36, Fed Crim Code (18 USCA 87), as amended by Public Law 188, 78th Congress, Act 22 November 1943, Bull. No. 23, WD, 11 Dec 1943), where the value exceeds $50 (AW 42; MCM, 1928, par 104c, p 100.)" (CM ETO 8713 Porter et al 1945)

"Confinement in a penitentiary is authorized for the offense of wrongfully disposing of property furnished or to be used for the military service (sec. 36, Fed Crim Code (18 USCA 87), as amended by Public Law 188, 78th Congress, act 22 November 1943, Bull. No. 23, WD, 11 Dec. 1943), where the value exceeds $50.00 * * *." (CM ETO 8714 Rolley 1945)

"Attention is invited to the provisions of par. 90a, MCM, 1928***, concerning the policy of the War Department respecting places of confinement for general prisoners. As the accused were here convicted of robbery, which is punishable by penitentiary confinement by AW 42 and sec. 284, Fed Crim. Code (18 USCA 463), and were sentenced to conf. at hard labor for 30 years, it is recommended that the place of confinement be changed to the Federal Penitentiary * * *." (1 Ind, CM ETO 9171 Hodo, et al 1945).

"Confinement in a penitentiary is authorized upon conviction of offering and giving a bribe to any person acting in any official function with intent to influence him to collude in, allow or make opportunity for the commission of any fraud, by AW 42 and section 22.701 (6:134), District of Columbia Code." (CM ETO 8565 Flanagan 1945)

Accused was sentenced to confinement in a U.S. Disciplinary Barracks, after he was found guilty of desertion. "Attention is invited to the provisions of Par 90a, MCM, 1928, p 81, concerning the policy of the War Department respecting places of confinement for general prisoners. It appears that accused's admitted activities during the period of his war-time desertion were of a character to render it probable that holding him in association during confinement with misdemeanants and military offenders would be to their detriment. As confinement in a penitentiary is authorized by AW 42 for desertion in time of war, it is recommended that the place of confinement be changed to the U. S. Penitentiary * * *. This may be done in the published court-martial order (MCM, 1928, par. 87b, p 78; CM ETO 8714, Rolley)." (CM ETO 9652 Ryan 1945; 1st Ind.) (See also, 1st Ind, CM ETO 9561 Gallotto 1945, for similar type of recommendation.)

400 (A.W. 43 Death Sentence; When Lawful:

3585 Pygate (Not Digested. Death by Musketry; Shooting another soldier.)

Cross References: 444(3) 5255 Duncan (Not authorized for AWOL, or Leave guardpost before being regularly relieved --AW 96.)

By Musketry

3585 Pygate (see above)
5565 Fendorak (Not Digested; AW 28-58)

Cross References: 385 5555 Slovik (AW 28-58)

Concurrence of Members in Sentence

Cross References: 408(5) Sentence over 10 years by 2/3rds vote; rehearing (ETO 1673) Denny

Accused was found guilty of violating AW 75, and was sentenced to confinement for 15 years by a 2/3rds vote of the members of the court present at the time the vote was taken. HELD: The above 15-year sentence by a 2/3rds vote was not authorized. The confinement must be reduced to ten years. (CM ETO 2602 Picoulas 1944).

Accused was sentenced to a 20-year term of confinement by a 2/3rds vote of the members of the court. The reviewing authority reduced the confinement to 10 years. HELD: The original sentence of confinement was in excess of the court's power under AW 43, but reduction thereof to ten years rendered the sentence legal. (CM ETO 2842 Flowers 1944.)

Death by Musketry

Accused was found guilty of the murder of his first sergeant, in violation of AW 92. The sentence provided that he be shot to death with musketry. HELD: "The penalty for murder is death or life imprisonment as the court- martial may direct (AW 92). The sentence that accused be shot to death with musketry is legal (MCM, 1928, par.103a,p.93.) (CM ETO 1901 Miranda 1944.)

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(1) Specific Sentences:
Cross References:

454 (22)	2663	Bell	Statutory rape-carnal knowledge; 1st Ind)
451 (50)	2788	Coats,Garcia	Negligent operation of motor vehicle; driver; responsible party other than driver; violation of military duty.
450 (3)	268	Ricks	Life sentence under AW 92, accompanied by dishonorable discharge and total forfeitures. Overruled by CM ETO 709 Lakas (450(4)).
450 (1)	292	Mickles	Death sentence under AW 92, accompanied by dishonorable discharge and total forfeitures.
450 (1)	422	Green	Life sentence under AW 92, accompanied by total forfeitures.
450 (4)	709	Lakas	Life sentence under AW 92, accompanied by dishonorable discharge and total forfeitures.
450 (13)	2905	Chapman	Sodomy Multiplicity of charges; base punishment on crime in its most serious aspect. Attempt to have carnal knowledge.
450 (2)	3197	Colson	Retrial; sentence on
450 (1)	3200	Price	Murder during brawl; policy; (1st Ind)
454 (7)	3209	Palmer	Assault and battery; brawl; officer 6 mos.
385	3234	Gray	Desertion; AW 28-58; suggested maximum
451 (2)	3255	Dove	Assault with intent to rape; to do bodily harm with dangerous weapon.
454 (22)	3044	Mullaney	Statutory rape-carnal knowledge. See broad discussion of applicability of federal law, etc.
451 (2)	3280	Boyce	Assault to rape.
451 (50)	3362	Shackleford	Manslaughter, Voluntary
451 (17)	3379	Gross	Mail orderly; impropriеties.
454 (63a)	3436	Paquette	Assault and battery by fondling boy's penis; indecent exposure by masturbating Multiplicity of charges; base punishment on crime in its most important aspect.
454 (01)	3475	Blackwell	Arson Assault with intent to do bodily harm with dangerous weapon.
454 (64a)	3507	Goldstein	Mails; abstract from U.S. mail Guilty plea; failure to explain maximum punishment.
450 (2)	3614	Davis	Manslaughter, involuntary
451 (58)	3628	Mason	Robbery (Omit words "at hard labor")
454(105)	3686	Morgan	AWOL Larceny Wrongful taking, Red Cross vehicle over $50.
454 (63a)	3717	Farrington	Sodomy
421 (2)	3801	Smith	AW 63--maximum punishment AW 96--related conduct; no max. Threatening and insulting language and insubordination.

402(1) (1) Specific Sentences

Cross References: (contd)

424	3803	Gaddis	Mutiny; begin.
454 (13)	3926	Manus	Attempt to have carnal knowledge
454 (13)	3930	Perez	Attempt to have carnal knowledge
454 (13)	3947	Whitehead	Attempt to rape
454 (7)	4235	Bartholomew	Assault and battery; aggravated and indecent.
385	4986	Rubino	Misbehavior before enemy; suspend DD; policy.
444 (3)	5255	Duncan	Guard duty--analogy to AWOL
4550	Moore et al		(Not digested. 50-yr sentence; AW 63,6465 violations; policy.)
405	4616	Molier	Rape Assault with intent to rape Reduced by Conf. Auth., ETO
450 (2)	4993	Key	Voluntary Manslaughter
450 (4)	3740	Sanders et al	Aid and abet a rape--AW 96 Also: 4234 Lasker
385	5555	Slovik	Desertion. Death
454 (82)	5107	Nelson	False statement; endanger co.; life
454 (56a)	4119	Willis	Fornication; unmarried female; 6 mos.
451 (2)	4386	Green (Ind.)	Aggravated Assault
385	4702	Petruso	AW 58-28; policy; life.
385	4701	Minnetto	AW 58-28; promise leniency.
385	6079	Marchetti	Weak case; Clemency determination.
416 (9)	5234	Stubinski	Reduce AW 58 to AW 61, offense.
433 (2)	6376	King	AW 75; policy
422 (6)	4750	Horton	False official statement--one month.
451 (2)	6227	White	Assault and battery
454 (20a)	5741	Kennedy	Breach peace; wrongfully enter house in search for girl -- 10 years
454 (105)	6383	Wilkinson	Wrongfully take and use govt vehicle
385	6810	Shambaugh	AW 58-28; death; policy.
451 (50)	6015	McDowell	Manslaughter; Attempted larceny of govt property Attempts in general
452 (21)	6232	Lynch	False official statement at Inv. of case
452 (9)	7248	Street	Officers; black market; no maximum
454 (63a)	4028	Moreno	Indecent liberties; minors.
419(2a)	1249	Marchetti	Maximum lifted on AWOL
422(5)	1057	Redmond	Failure to report, re restriction
443(3)	1065	Stratton	AW 85 drunk on duty; officer
447	1286	Davis	AW 96 resist lawful arrest
450(4)	709	Lakas	Assault to do bodily harm with dangerous weapon
451(6)	2157	Cheek	Assault to do bodily harm with vehicle
454(63a)	571	Leach	Indecent assault
454(63a)	2195	Shorter	Indecent assault
454(35)	1920	Horton	Disrespectful and insubordinate conduct
454(91a)	2566	Turner	Riotous assembly; AW 96; death sentence may not be imposed for violation of that article
454(103a)	2831	Kaplan	Unlawful printing of pass forms
454(105)	2157	Cheek	Wrongful taking and using of government property

Cross References: (contd)

454(64a)	3507	Goldstein	Plea of guilty; law member fails to explain maximum
433(2)	5445	Dann	Destruction of public property; larceny under $20.00.
451(3)	6288	Falise	Assault and battery under AW 96.
454(18a)	6226	Ealy	Black market
	8234	Young	Black market; conspiracy; impede war effort; theft from railroad cars; policy, re cumulation of periods of confinement
	5538	Hufendick	Black market; wrongful gasoline sale
452(21)	6268	Maddox	Wrongful sales, AW 94
			Carry a concealed weapon
454(38)	9304	Suitt Jr	Dismissal of officer for AW 96 guilt
454(69b)	7913	Smithey	Reckless driving; injuries
			Unfit self for duty by drinking
			Failure to obey
444(3)	5466	Strickland	Absent self from guard; AW 96
454(103)	5942	Williams	Wrongful possession of Army Exchange Service property
454(91)	11636	Pellacore	Self-inflicted injuries
450(4)	5068	Rape	Aid and abet AW 92 rape

MAXIMUM LIMITS OF PUNISHMENT

402(1)

Specific Sentences

402 (A.W. 45) Maximum Limits of Punishment: 402

In General

(1) Limits Prescribed by President: An attempt not separately listed in the Table of Maximum Punishments may be subject to the same punishment as the offense itself, if listed. This applies to the offense of attempting to commit sodomy. (CM ETO 991 Gugliotta, Harrington 1943.) (Also see 6015 McDowell (451 (50) herein.)

(5a) Previous Convictions
(3118 Prophet (Not digested - erroneous admission not harmful.)

Cross References: 451(58) 3628 Mason (erroneous admission not harmful.)
416(2) 8631 Hamilton

A general prisoner was on trial. At the time his personal data was read to the court, the previous convictions whereby he had become a general prisoner was not read, but three previous convictions prior to that time were read. HELD: The only previous convictions admissible during the trial of a general prisoner are those which occurred during his status as a general prisoner. No previous convictions should have been admitted herein. However, the defense did not object, and the adjudged sentence was far below the maximum which might have been imposed. No prejudice resulted. (CM ETO 1981 Fraley 1944.)

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The certificate of accused's previous convictions did not contain the date of the commission of one of his previous offenses. HELD: "The defense did not object to the receipt of the evidence. Such an omission did not injuriously affect the substantial rights of accused * * *." (CM ETO 1017 McCutcheon 1943.)

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Accused was a general prisoner. "The evidence of one previous conviction, introduced after the court arrived at its findings, was inadmissible because the offense involved was not committed during accused's status as a general prisoner (MCM, 1928, par. 79c, p.66). There is, however, no affirmative showing in the record that the reviewing authority abused his discretion in weighing this particular error in the light of all the facts shown by the record and in finding that no substantial rights of accused were injuriously affected thereby (AW 37; MCM, 1928, par. 87b, p.74). Furthermore, no objection was asserted to the evidence of previous conviction introduced. With reference to such evidence, the Manual for Courts Martial expressly provides that 'any objection not asserted may be regarded as waived"(MCM, 1928, par. 79c, p.66). (CM ETO 2962 McBee 1944)

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"Evidence was admitted which showed that accused had been convicted by a summary court on * * * for absence without leave * * * in violation of" AW 61. "The offense and conviction occurred after the offense involved in the instant case but before the trial thereof. The evidence of this conviction was improperly admitted * * *. The error did not influence the findings of guilt but only the sentence. A reconsideration of the sentence by the Reviewing Authority is thus indicated." (CM ETO 6468 Pancake 1945)

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One accused herein was sentenced to life. The other was sentenced to 30 years confinement. "The difference in the two sentences is not understood. Both soldiers are about the same age, their offenses were identical, and each had joined as a reinforcement ten days before. Evidence of previous convictions is not intended as a mechanism to increase the severity of sentences; its purpose is primarily to show the character of the soldier and indicate what kind of punishment would be appropriate and to determine whether accused should be retained in the military service. The life confinement included in K***'s sentence is difficult to defend although he had suffered three previous convictions and L*** none. I suggest that consideration be given to reducing K***'s period of confinement. In view of the policy of conserving manpower, I believe like action would be appropriate." (1st Ind, CM ETO 8227 Knox, Lenter, 1945)

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(7) Dismissal: Dismissal of an officer is mandatory upon conviction of a violation of AW 95, and is authorized upon conviction of a violation of AW 96. (CM ETO 2581 Rambo 1944)

Dismissal of an officer is authorized upon conviction of violations of AW 93 and AW 96. (CM ETO 1991 Pierson 1944)

(7a) Dismissal and Total Forfeitures: Accused officer was found guilty of violating both AW 95 and AW 96. He was sentenced to dismissal and total forfeitures. HELD: The sentence is legal. However, "an examination of cases of conviction by court-martial of officers in the United States wherein the President has acted as the confirming authority, discloses that that part of a sentence which imposes total forfeitures has almost uniformly been remitted. Such a remission would afford the officer involved the means with which to pay his obligations which are outstanding at the termination of his service, as well as the cost of transportation to his home. If such a policy has virtue in the United States, there is even stronger reason for it here in a foreign land distant from home." (1st Ind. CM ETO 1197 Carr 1944.)

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(7b) Officers; In General:

"The table of maximum punishments is not applicable to officers * * *. Dismissal, total forfeitures and confinement at hard labor are authorized upon conviction of an officer of an offense under the 94th Article of War * * *. The imposition of a fine in addition to total forfeitures in adjudging the punishment of an officer is also authorized by the 94th Article of War." (CM ETO 11072 Copperman 1945)

AW 45

402(7b)

MAXIMUM LIMITS OF PUNISHMENT

(10a) Hard Labor With Confinement (10a)402

(10a) Hard Labor with Confinement: Accused officer was sentenced to dismissal, total forfeitures, and confinement at hard labor for seven years. The reviewing authority reduced the confinement to five years, but omitted the words "at hard labor". The confirming authority reduced the confinement to one year. HELD: The Table of Maximum Punishments (MCM, 1928, par 194c, p 97) provided for confinement at hard labor for the offense of which accused was convicted. While that Table "does not apply to sentences of commissioned officers, hard labor is authorized for officers as well as for enlisted men. Military law does not contemplate punishment by confinement without hard labor (MCM, 1928, par 103i, p 95). A fair and reasonable interpretation of the actions by both the reviewing and confirming authorities is that each of them intended to reduce the time or period of confinement without altering the remainder of the sentence of the court. But in any event, hard labor may be required" pursuant to the provisions of AW 37. (CM ETO 515 Edwards 1943)

(10b) Policy in Regard to Sentences:

Cross References: (See individual titles.)
402(5a) 8227 Knox (previous convictions, etc.)
428(3a) 10935 Gutierrez (dilatory bringing of charge)
422(1) 5546 Roscher (Equalize sentences between officers and enlisted men.)

"A reduction of a life sentence to 50 years is not really a reduction. A federal prisoner is eligible for parole after serving one third of his sentence, and for this purpose, lifers are eligible after serving 15 years." (1st Ind, CM ETO 7148 Ciombetti 1945)

"This man has the mental and physical qualities to make a useful soldier. His selection for OCS and his service as first sergeant demonstrate this. He has not made the most of his abilities, but his previous convictions, except one, are minor, and the current offenses, except desertion, are not very serious. The proof of desertion, while sufficient, leaves some doubt as to his reason for being in civilian clothes. The absence alone was not sufficiently prolonged under the circumstances shown, to warrant a findingeof desertion. It is believed he is a type who deserves an attempt at rehabilitation and, accordingly, it is recommended that the execution of the dishonorable discharge be suspended." (1st Ind, 6746 Hayle 1945)

"This accused was convicted of absence without leave for 1½ hours, wrongfully discharging a sub-machine gune and wrongfully taking and using the truck assigned to him on a trip for his own pleasure. A sentence of ten years means that 5½ years must be supported by the absence without leave for 1½ hours. It is recommended that the term of confinement be reduced to six years. (1st Ind, CM ETO 7726 Williams 1945)

"Of the approved sentence of ten years confinement, nine years must be supported by the conviction of absence without leave for about one day. While it is evident he should be separated from the service, it is alsoobvious that such a sentence is not warranted. It is recommended that it be reduced to three years." (1st Ind, CM ETO 8357 Turner 1945)

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403 (AW 46) Action by Convening Authority: (In General) 403

3912 Lane (U.K. Base Juris.)
3921 Byers
3928 Davis
3964 Lawrence
4054 Carey
4055 Ackerman
4854 Williams

Cross References:

416(9)	8055	Costigan (AWOL; change identity via divisio
405(1)	339	Gage
451(2)	4122	Blevins (UK Base juris.)
416(9)	3062	Osther (Remission
451(5)	3362	Shackleford (1 Ind) Correction of GCMO
450(1)	7815	Guiterrez (Reduce life to 10 yrs, for murder
453(10)	10362	Hindmarch (Action sheet signed by Chief of Staff; assumption of command presumed.)
450(2)	6074	Howard (Reduce AW 92 sentence--1 Ind)

On 20 August 1944, Southern Base Section, Communications Zone, European Theater of Operations, authorized to exercise general court-martial jurisdiction, duly appointed a general court-martial. On 23 August, the charges upon which accused herein were tried were referred to that court by the Commanding General. At 0001 hours 1 September 1944 Southern Base Section was dissolved. United Kingdom Base, its successor in command, came into existence at the same time, but was not authorized to exercise general court-martial jurisdiction until 10 September 1944. The trial of accused was commenced at 1015 hours 1 September, and was concluded the same day. Accused were found guilty of desertion in violation of AW 58. Sentences were approved and ordered executed by the Commanding General of United Kingdom Base. HELD: LEGALLY SUFFICIENT. (1) Judicial Notice: The Board of Review may take judicial notice of orders and directives of the War Department, the European Theater of Operations and the Communication Zone of the European Theater of Operations. As a result thereof, the above facts present a serious question involving the legal existence and jurisdiction of the court which tried accused. (2) Jurisdiction: Reference to the various orders which made the above changes among the Base Sections show that the Commanding General of United Kingdom Base succeeded the Commanding Officer of Southern Base Section in all of his duties, responsibilities, rights and privileges. There was no hiatus in this succession. The former's powers and functions came into existence eo instante with the dissolution of the powers and functions of his predecessor. "A logical corollary * * * is that the discontinuance of Southern Base Section was affected by 'including it in another command', viz, United Kingdom Base, and therefore the Commanding General of the latter was the 'officer commanding for the time being' under the 46th Article of War.

By virtue of said article the power of approval of the sentence of the court was vested in him * * *. At no time was the court which tried the instant case without its approving authority." "The court, although appointed by the Commanding General of Southern Base Section * * *, was not dissolved or discontinued because he ceased to exist or function, * * *. The court was an instrumentality of Southern Base Section which was 'included' in United Kingdom Base and it retained all of its original judicial power and authority." (Note that Commanding General of United Kingdom Base had no power to appoint a new court between 1 September and 10 September, but that this power under A.W. 8 was something separate and apart from his powers under A.W. 46 as "officer commanding for the time being.") (CM ETO 4054 Carey 1944) (See 385 (AW 28) for further digest of this case.)

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(6) Execution of Sentence:

Cross References: 408 (3) 3570 Chestnut

(1st Ind CM ETO 5596 Reynolds 1945): "You stated in your indorsement returning the record to the court that there was a 'possibility of his rehabilitation'. If the dishonorable discharge is executed, he cannot be returned to duty except upon his own request; if it is suspended, the Government may restore him to duty at its option."

(1st Ind CM ETO 5352 Kelley 1945): "Execution of a sentence to dishonorable discharge will be ordered only when accused has been convicted of an offense which renders his retention in the service undesirable or when he has been sentenced to a term of not less than three years' confinement (Par II, 8b, Cir 72, ETO, 9 Sept 1943). The reviewing authority, in approving the sentence adjudged by the court, remitted all confinement in excess of one year. The offense of which accused was convicted is not of a type ordinarily regarded in itself as rendering his retention in the service undesirable. The only evidence of incorrigibility appearing in the record of trial or allied papers is the report of the medical observation and psychiatric examination of the accused which is necessarily based on accused's uncorroborated account of his own personal history. Execution of the dishonorable discharge is authorized if you are convinced that accused is an incorrigible within the purview of C-1, AR 600,395; 30 October 1944. Otherwise, the dishonorable discharge should be suspended and the place of confinement changed" to a disciplinary training center.

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405 (A.W. 48) Confirmation; When Required: 405

6809 Reed (Not digested)

Cross References:

385 4570 Hawkins (Confirmation AW 58-28 death sentence, but not AW 75 death.)
385 5155 Carroll (Same)

(1) In General: An officer was sentenced to dismissal. The reviewing authority approved the sentence. Prior to the Theater Commander's action thereon, he referred the record to the Assistant Judge Advocate General in the Theater under AW 46. OPINION: "In order to expedite final action in the case, and more especially to insure to the accused the independent and impartial examination of the record of trial by the Board of Review, in accord with the provisions and in keeping with the spirit of Articles of War 48 and 50½, under the provisions of the latter article and, before examination by me, I referred the record to the Board of Review for its examination and opinion. Normally, pursuant to instructions of The Judge Advocate General, action by the confirming authority (other than the President) is required, under the provisions of the third paragraph of Article of War 50½, before the record is referred to the Board of Review and myself for review as to its legal sufficiency. However, your reference of the record to me, prior to your action thereon, under the provisions of Article of War 46, which expressly authorizes such reference, since I, as an Assistant Judge Advocate General in charge of the branch of the office of The Judge Advocate General for this Theater, have, under the provisions of the last paragraph of Article of War 50½, with respect to this case, like powers and duties as The Judge Advocate General, changes the normal situation indicated above. Under such circumstances, should I pass on the record under Article of War 46, in lieu of and as your staff judge advocate, an return the record for your action prior to its examination by the Board of Review, it would then be necessary, after your action, for the Board of Review and myself, in my capacity in charge of this branch office, to examine the record to determine its legal sufficiency. Such a procedure would deny the accused the independent review of the record by the Board of Review, provided by Article of War 50½, since the report of my examination and my recommendation under Article of War 46 would be a part of the file of the case when it reached the Board of Review. It would also place me in the anomalous position of acting as staff judge advocate under Article of War 46 before the review of the Board of Review and as Judge Advocate General for this theater after such review under Article of War 48 and 50½. In my opinion, to follow such a procedure would deny the accused a substantial right given him by Articles of War 48 and 50½. On the other hand, following the procedure I have adopted denies the accused nothing, but fully protects his rights. I am convinced this is the procedure The Judge Advocate General would follow on a reference to him, under Article of War 46, for the reason that, in such event, he would occupy the dual role of staff judge advocate and The Judge Advocate General, as he does when the President is the confirming authority and

would follow the procedure prescribed for the latter class of cases. In my opinion the full protection of the rights of the accused vouchsafed to him under the Articles of War requires this procedure." (Ind. CM ETO 339 Gage 1943.)

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Accused was found guilty of an absence without leave for two hours in violation of AW 61; escape from confinement in violation of AW 69; wrongfully and willfully discharging a service carbine in violation of AW 96; and rape in violation of AW 92. He was sentenced to death. The local reviewing authority approved the sentence, and forwarded the record of trial for action pursuant to AW 48. "The confirming authority, the Commanding General, European Theater of Operations, vacated so much of the findings of guilty of * * * /rape/ as involved findings of guilty of an offense by accused other than assault with intent to commit rape * * * in violation of AW 93; 'commuted' the sentence to" dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years, and designated a United States penitentiary as the place of confinement. HELD: LEGALLY SUFFICIENT. (1) Power of confirming authority to find a lesser offense: "The confirming authority was authorized to confirm a sentence of death imposed as punishment for the crime of rape committed in time of war" (AW 48). "The crime of assault with intent to commit rape is a lesser included offense of the crime of rape (MCM 1928, par 148b, p.165)." Pursuant to AW 49, "the confirming authority in the instant case was authorized by Congress to vacate so much of the findings of guilty of the crime of rape as involved findings of guilty of an offense by accused other than an assault with intent to commit rape * * *." (2) Sentence: "Death is not an authorized sentence for the crime of assault with intent to commit rape (AW 43; AW 93; MCM 1928, par 14, p 10, par 103, p 92)." The maximum punishment which may be imposed for said crime is dishonorable discharge, total forfeitures and confinement at hard labor for 20 years (MCM 1928, par 104c, p 99). (3) Procedure to Reduce Sentence: "Upon the vacation of the findings of accused's guilt of the crime of rape the sentence imposed by the court as approved by the reviewing authority as punishment for that offense was entirely nullified and ceased to exist." The next question which arises is who, in the circumstances, may now impose a sentence which is legally appropriate. Here, the confirming authority himself imposed the 20-year sentence. AW 50 provides: "The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence." It must be concluded that, in applying this paragraph of AW 50 to the "commanding general of the army in the field" in the exercise of his authority under Articles of War 48,49 and 50, the word "mitigate" should be given a plenary meaning, to wit: that it includes both the power to "'mitigate' (to reduce in quantity or quality the same species of punishment) and the power to 'commute' (to substitute a different species of punishment)." "The above interpretation of 'mitigate' is wholly consistent with and receives substantial support from the over-all authority granted by Congress to 'the commanding general of the army in the field' in time of war." "This extraordinary authority virtually substitutes the 'commanding general of the Army in the field' for the President in time of war within the general's theater of operations.

(1) In General 405(1)

In the exercise by the commanding general of the power thus granted him by Congress, (when authorized by the President) to commute sentences to sentences of lesser severity in all cases where the death penalty may be imposed, he exercises a discretionary power of determining new (commuted) sentences." "Regardless of the language used by the confirming authority in his action in the instant case his purpose and intention are clear. The fact that he declared he 'commuted' the sentence when he in fact 'mitigated' the sentence under the authority of the first paragraph of AW 49 is entirely immaterial. Such refinement of language is neither expected nor is it necessary when intention is otherwise manifest." (CM ETO 4616 Molier 1944)

AW 48

405(1)

CONFIRMATION; WHEN REQUIRED

(406 (AW 49) Powers Incident to Power to Confirm:

Cross References: 405 4616 Molier (AW 48 actions by conf.auth.)

AW 49

406

POWERS INCIDENT TO POWER TO CONFIRM

407 (AW 50) Litigation or Remission of Sentences:

Cross References: 405 4616 Holier (AW 48 actions; confirming auth
433(2)4004 Best
385 4570 Hawkins (Confirmation,death,AW 58-28;
but 5155 Carroll (to President for death,AW 75.

408 (A.W. 50½) Review: Rehearing: 408

Functions of Branch Office, The Judge Advocate General, (sitting in the European Theater of Operations).

"War Department Letter (AG 321.4 (4-26-43) OB-S, 28 April 1943: 'Subject: Operation of the Branch Office of The Judge Advocate General, addressed to the Commanding General, European Theater of Operations contains the following orders and directions:

'The Branch Office being an adjunct of the office of The Judge Advocate General the latter officer exercises direct and exclusive jurisdiction over all prescribed activities pertaining to it including the assignment of personnel thereto. The Assistant Judge Advocate General is one of the assistants of The Judge Advocate General and as such is not under the control or supervision of the commander of the forces with which he is serving insofar as concerns the performance of his duties under Article of War 50½.'

'The appellate review and judicial powers incident thereto pertaining to the Assistant Judge Advocate General, the Board of Review and other elements of his Branch Office involve the judicial power generally of holding records of trial legally sufficient or legally insufficient to support findings of guilty and sentences. They include the power of passing upon the legal sufficiency of sentences approved or confirmed by the Commanding General, European Theater of Operations, or confirmed by any other confirming authority in cases in which the records of trial are properly referred to the Branch Office. These judicial powers cannot be appropriately performed in conformity with the governing statute (Article of War 50½) unless all elements of and separated from the command or commands which the Branch Office serves. The Assistant Judge Advocate General will not therefore perform the duties of staff judge advocate of any reviewing or confirming authority in any case which may reach his office for appellate review, except as he may give advice to a reviewing or confirming authority in his capacity as Assistant Judge Advocate General under Article of War 46 and paragraph 87b (page 75) of the Manual for Courts-Martial.'

'In any case in which a record of trial by general court-martial is referred to the Assistant Judge Advocate General for advice under Article of War 46 and paragraph 87b of the Manual for Courts-Martial, the Assistant Judge Advocate General will be furnished a copy of the review of the record by the staff judge advocate of the officer seeking the advice. The Assistant Judge Advocate General will not formally refer such record of trial to the Board of Review in his office for appellate review until the reviewing authority has approved and, if confirmation of the sentence be required, until the confirming authority has confirmed a sentence requiring appellate review by the Board of Review.'

The Judge Advocate General and the Board of Review(sitting in Washington) in his office in the appellate review of cases requiring confirmation by the President have power to weigh the evidence, judge the credibility of witnesses and reach their own conclusions on controverted questions of fact (CM 153479 (1922) and opinion 210.81, April 24, 1933(Dig.Op.JAG, 1912-1940, sec.408(1), p.258).

408 Functions of Branch Office, The Judge Advocate General, (sitting in the European Theater of Operations) contd-

It is manifest from the War Department's administrative interpretation of Article of War 50½ above quoted that the jurisdiction of the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations and of the Board of Review in his office with respect to those cases wherein the sentences must be confirmed by the Commanding General, European Theater of Operations, under the provisions of the 48th Article of War, is restricted and limited and is not identical with that of The Judge Advocate General and the Board of Review in his office. Their authority upon appellate review of the records of such cases is the same as the authority of The Judge Advocate General and Board of Review in cases not requiring the confirmation of the President." (CM ETO 1631 Pepper 1944.)

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(2) Action Where President Not Confirming Authority 40?(2)

(2) In General:

Not Digested:

1663 Ison (B/R may change place of confinement.)
3042 Guy, Jr. (B/R may change place of confinement.)
5353 Chaplinski
5464 Hendry

Cross References:

451 (4) 612 Suckow	Accused's letter and certificates of fact, attached to record.
405 (1) 339 Gage	Dismissal of an officer.
447 1052 Geddies	
451 (17)1302 Splain	"Dismissal" of a warrant officer.
451 (50)1554 Pritchard	Theory of case on appeal, Board of Review Powers.
395 (43)2433 Meyer	Premature publication of order.
385 2432 Durie	Avoid hazardous duty; evidence weight.
454(81a)2885 Nuttmann	(Defense counsel does not object.)
451 (50)2788 Coats, [illegible]	(B/R can interpret specs.)
450 (4) 3740 Sanders et al	(B/R can interpret specs.)
424 3803 Gaddis	(B/R can interpret specs.)
451 (1) 4155 Broadus	
450 (1) 4581 Rose	
433 (2) 4512 Cault	(B/R can change AW 96 finding of AWOL to AW 96 finding.)
454 (7) 4235 Bartholomew	(B/R can interpret specs.)
444 (3) 5255 Duncan	(B/R can interpret specs.)
385 6637 Pittala	(Reference to map by B/R)
385 7532 Ramirez	
394	See AW 37 generally
454(36a)7553 Besdine	(B/R can interpret specs.; draughtsman not aware of full violation)

(2) In General; B/R Powers on Appeal:

(1st Ind; CM ETO 4386 Green, et al, 1945): "The Board of Review and myself are bound by certain rules which have been stated, as follows:

'Conviction by court-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 [illegible] springing from such experience' (CM 223336 (1942, Bull JAG, Aug. 1942, Vol. I, No. 3, sec. 422, pp 159, 162).

'In the exercise of its judicial power of appellate review, under AW 50½, the Board of Review treats the findings below as presumptively correct, and attentively examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustration of justice' (CM 192609, Hulme, 2 B.R. 19, 30).

'The weighing of the evidence and the determining of its sufficiency, the judging of credibility of witnesses, the resolving of conflicts in the evidence and the determination of the ultimate facts were functions committed to the court as a fact-finding tribunal. Its conclusions are final and conclusively binding on the Board of Review where the same are supported by substantial competent evidence' (CM ETO 895, Davis, et al)

"The reviewing authority, however, has a broader power. He is permitted to weigh the evidence and it is his duty to do so and to consider all other aspects of the case, in order that justice may be done."

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(3) Execution of Sentence:

Cross References: 422(5) 3046 Brown ("Dismissal" of Warrant Officer)
385 4570 Hawkins (Confirmations; AW 58-28; AW 75)
385 5155 Carroll (Same)
395 (53) 6961 Risley (Dismissal--DD of officer)

Accused pleaded guilty to an AW 61 charge against him, but not guilty to AW 65 and 96 charges. He was found guilty of all charges. The sentence, including a dishonorable discharge, was executed. HELD: LEGALLY SUFFICIENT, BUT PUBLICATION OF THE GENERAL COURT-MARTIAL ORDER EXECUTING THE SENTENCE WAS PREMATURE. "The sentence to dishonorable discharge was not * * * based solely 'upon findings of guilty of a charge or charges and a specification or specifications to which accused has pleaded guilty.' As the reviewing authority in his action did not suspend execution of that portion of the sentence adjudging dishonorable discharge until accused's release from confinement, the sentence could not be ordered executed prior to the holding of the Board of Review and the approval of The Judge Advocate General required by paragraph 3 of Article of War 50½. The general court-martial order, therefore, possessed no legal efficacy." (CM ETO 3570 Chestnut 1944)

The reviewing authority herein approved a general court-martial sentence, ordered it executed, and then withheld the order directing the execution of the sentence pursuant to Article of War 50½. HELD: "Although under the circumstances of the present case the sentence should not have been 'ordered executed' until the provisions of Article of War 50½ had been fully complied with, it is apparent that these words were inserted through error as the reviewing authority directed that the order directing the execution of the sentence be withheld pursuant to the provisions of that Article. Accordingly, the Board of Review has treated the record of trial as though such words were not included in the action." (CM ETO 823 Poteet 1943.)

"The separation of a warrant officer from the service by sentence of a court-martial is effected by dishonorable discharge, not dismissal. Although the use of a sentence of dismissal is inappropriate, it has the same effect as one of dishonorable discharge." (CM ETO 1447 Scholbe 1944).

408(3) (3) Execution ofSentence

(4) Plea of Guilty:

Excepting the words that "he was apprehended at * * *, Zechoslovakia", accused pleaded guilty to an AWOL violation of AW 61. He was found guilty as charged. The general court-martial order was published. HELD: LEGALLY SUFFICIENT. (1) AW 50½ Procedure: "The record of trial was not transmitted pursuant to par 3, AW 50½, to the Assistant Judge Advocate General in charge of the Branch Office of the Judge Advocate General with the ETO for examination by the Board of Review in his office, but without such examination the approved sentence was promulgated" by general court-martial order. Par 3, AW 50½, re cases in which there have been pleas of guilty does not apply. Accused by his plea specifically excepted the allegation re apprehension, "and thereby left the burden upon the prosecution to prove such excepted allegation beyond reasonable doubt." "By military usage and tradition a voluntary termination of a period of absence without leave by a recalcitrant soldier is viewed with favor. Contrawise his return to military control involuntarily and under compulsion works to his detriment before a court-martial. Consequently, the findings of guilty were not 'based solely upon findings of guilty of a * * * specification * * * to which the accused has pleaded guilty'. The issue of the general court-martial order was premature and wholly void. It should be nullified and recalled." (CM ETO 11619 Thompson 1945)

Cross References:
378 See generally--AW 21

(5) In General:

Cross References: 450 (2) 3162 Hughes (Guilty of lesser offense at first trial.)

451 (8) 3927 Fleming

452 (9) 7248 Street (Earlier Nolle Prosequi)

On a first trial, accused was sentenced to be confined for 20 years by a 2/3rds vote of the court. The sentence was disapproved, and a rehearing before another court was ordered. On the rehearing, accused was again found guilty and was sentenced to be confined for 17 years. The reviewing authority reduced the confinement to ten years. HELD: LEGALLY SUFFICIENT. (1) Accused's former jeopardy plea at the time of the rehearing was correctly overruled. A rehearing pursuant to AW 50½ is a continuation of the original trial, and is an integral part of the whole process of adjudication of a case. Until the reviewing or confirming authority has finally acted upon a record, a trial is not completed. (2) The Sentence: At the first trial, the sentence of confinement for 20 years by a 2/3rds vote was erroneous. Only ten years thereof was proper. The sentence could not be increased upon the rehearing, so it is now concluded that the maximum sentence which could be imposed upon the rehearing herein was ten years. The reviewing authority correctly reduced this sentence. (3) Delay pending trial: The first trial occurred on 27 November 1943. The staff judge advocate received the record on 9 January 1944. The sentence was disapproved, and a rehearing directed, on 21 January 1944. The charges were referred for trial on 7 February 1944, and the rehearing was had on 17 February 1944. No right of accused to a prompt trial pursuant to AW 70 was violated. This right is necessarily relative. Moreover, AW 39 fixes the period of limitation which may be pleaded in bar before courts-martial. Neither the Constitution nor AW 70 undertakes to exempt persons charged with the commission of criminal offenses from liability for trial within the applicable periods of limitation prescribed. (CM ETO 1673 Denny 1944)

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409 (AW 51) Suspension of Sentences of Dismissal or Death: 409

Cross References: 402 See also AW 45, as well as specific offenses under specific AWs.

Dismissal

An officer was found guilty of being drunk while on duty in violation of AW 85, and was dismissed the service. OPINION: "A study of War Department court-martial orders indicates rather clearly that the President would suspend execution of the sentence to dismissal - the prior record of the officer is excellent, the drunkenness was not extreme and the duty was not one which depended solely on the accused for its performance but was merely to accompany his superior officer to an informal conference." (1st Ind CM ETO 1065 Stratton 1943)

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410 (A.W. 52) Suspension of Sentences in General: 410

Suspension of Sentence

Cross References: 402 Also see AW 45, as well as specific offenses under specific AWs.

(1) In General; Dishonorable Dicharge: Accused was found guilty of being AWOL for 19 hours, and of disobedience of a superior officer. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. The reviewing authority reduced the confinement to five years, but permitted the dishonorable discharge to stand. OPINION: The dishonorable discharge should have been suspended. "While this accused has sustained five previous convictions none of them involved moral turpitude. He appears to be a recalcitrant, unruly soldier in need of severe discipline. I do not believe he should be relieved from war services until all possibilities of his value as a soldier have been exhausted." This viewpoint is in accord with the theater's policy to conserve manpower. (1st Ind CM ETO 2644 Pointer 1944)

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415 (AW 57) False Returns--Omission to Render Returns:

Accused officer was found guilty of embezzlement in violation of AW 93; of making a false return in violation of AW 57; and of making a false official report (same as charged under AW 57), in violation of AW 95. HELD: LEGALLY SUFFICIENT. (1) The AW 93 offense was adequately proved. Accused custodian of a squadron fund converted or appropriated a portion thereof to his own use. It is immaterial whether he intended ultimate repayment. "Similarly immaterial is the question whether he had 'custody' or 'possession' of the funds since nothing more is necessary to constitute embezzlement than that the party charged have control or care of the money." (2) AW 57 False Return: This offense was alleged "to have consisted of the entries in the council book showing application of the entire proceeds of the * * * Field check to proper expenditures of the squadron. There is no question that such entries were false and that accused knew it. It is true that he was not shown to have been aware that the signature of the post exchange officer on various of the vouchers was forged, or that the expenditures shown on such vouchers bore no accurate relationship to actual purchases by the squadron. However, he was most definitely aware that the entries certified by him as correct were false and fraudulent in that they accounted for the legitimate expenditure of the entire amount of the check, whereas in fact the fund had never received the greater part of such amount since he himself had embezzled it. * * * Fund custodians are required both by Army Regulations and, in the instant case, by local rule, to keep account of the funds with which they are entrusted * * *. That accused was well aware of this purpose of the council book is shown by the very fact that the preparation of the entries and his certification thereof were occasioned by * * * an inspection and were undoubtedly designed to forestall further criticism by superior authority. Such certification constituted a false return * * *." (3) AW 95: "The charge under AW 95 was essentially the same as that laid under AW 57 * * *. There is of course no impropriety in making the same transaction the subject of charges both under AW 95 and some other applicable article * * *. Moreover, the MCM specifically provides that the deliberate making of a false official statement constitutes conduct" in violation of AW 95. "The statements made by accused were known by him to be false and were designed to deceive superior authority." They were made in the course of an official report. (4) Impeachment: On cross-examination, a prosecution witness was cross-examined re his previous AW 104 punishment. Thereafter, and over objection, the prosecution introduced witnesses who testified re his good reputation for truth and veracity. "Although punishment under AW 104 falls short of a conviction of crime and hence evidence thereof is not ordinarily admissible for impeachment purposes", it was so used herein. The defense therefore "placed the witness's character in issue from the point of view of truth and veracity and thereby opened the door for rebutting evidence * * *. In any event, no prejudice resulted. (5) Parol Evidence re a receipt was admitted. However, the matter was collateral to the real issues. The parol evidence was merely to show its delivery to accused and to explain certain points. No error resulted. (6) Warning of Rights: Although accused was not warned of his rights, it appears that he was represented by competent defense counsel, and was also an experienced

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officer and graduate of West Point. In the circumstances, "it is not legally required that the court explain his rights, although it is of course always the better practice to do so." (CM ETO 8164 Brunner 1945)

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416 (AW 58) Desertion: 416

Not Digested

740 Lane
800 Ungard
823 Potcet
875 Fazio
913 Pierno
1017 McCutcheon
1103 Burns
1165 Vittitoe
1259 Rusniaczyk
1400 Johnston
1403 Kimmerle
1412 Medeiros
1515 Smith
1519 Bartel
1543 Woody
1603 Haggard
1674 Russo. Jr.
1691 Artwell
1816 Taylor
1856 Swartz
1926 Hollifield
1957 Ward
1965 Lemishow
1981 Fraley
2114 Couch
2194 Henderson
2216 Callagher
2289 Crimes
2293 Mills
2410 McLaren
2444 Warner
2460 Williams
2506 Gibney
2546 Eastwood
2547 Rousseau
2587 Trorice
2651 Burdette
2780 Woolsey
2806 Torpey
2828 Kulaca
2842 Flowers
2911 Arndt
3004 Nelson
3056 Walker
3210 Miller, Jr.
3642 Colluro
(guilty of AW 61 as lesser offense)
3920 Hannah
3921 Byers
3963 Nelson
4121 Torrachone
4337 Winslow
4914 Solomon
5596 Reynolds
5966 Whidbee
(77 days--AW 28 elements present but not alleged)
4526 Archuletta
5414 White (Dig. re M/R)
6435 Noe
6948 Damron
6857 Dougan
7378 Fisher (physical disablement)
7489 Rigsby
7735 Bledsoe
7764 Del Rio
7814 Hardigan
10741 Smith
11173 Jenkins
8632 Golding (29 days; other circumstances)
10354 Bear
10713 Clark

416 (AW 58) Desertion:

Cross References:

385 AW 28--see generally; avoid hazardous duty; shirk important service
4570 Hawkins (Effect on citizenship)
5958 Perry (Intent; allegations; proof--AW 58 not lesser to AW 58-28)
7532 Ramirez (AW 58 not lesser to AW 58-28)
395(10) See generally, re confinement
395(36) 3963 Nelson (Mental capacity)
399 2842 Flowers (Penitentiary confinement authorized)
416 (9) 5196 Ford (Proof of AW 28 details; not alleged)
419 AW 61--absence without leave; see generally
4029 Hopkins (by general prisoner; AW 61)
450(2) 4163 Hughes (Lesser AW 61 offense)

(2a) Citizenship:

Cross Reference: 385 4570 Hawkins

"Public Law 221, 78th Congress, approved by the President 20 January 1944, amended the statute relating to loss of nationality or citizenship as a result of conviction by court-martial of desertion in time of war (54 Stat.1169; 8 U.S.C. 801(g)), so as to limit its application to persons who are dishonorably discharged or dismissed from the service as a result of such conviction. The amendment provides for restoration of nationality or citizenship lost by desertion in time of war, or re-enlisted or re-inducted in time of war with permission of competent military or naval authority. The amendment, however, does not obviate the necessity of relieving, by appropriate order of restoration, the jeopardy in which accused's citizenship has been placed by his illegal conviction of desertion and the sentence of dishonorable discharge based thereon, despite its suspension by the reviewing authority." (CM ETO 1567 Spicocchi 1944) (Mimeographed full opinion mailed.)

(2b) Condonation:

Cross References:
385 4489 Ward
416(9) 5196 Ford
385 6039 Brown (restoration, as evidence of no intent to desert)
385 6766 Annino
433(2) 2212 Coldiron (Not applicable in AW 75 misbehavior cases)

"The evidence shows that accused was returned to duty upon rejoining his unit. An unconditional restoration to duty without trial by an authority competent to order trial may of course be pleaded in bar of trial for the desertion to which such restoration relates (MCM, 1928, par.69b, p.54***). The evidence in this case does not show by what authority accused was restored to duty. However, it is presumed that defense counsel performed his full duty toward accused and, since he entered no plea in bar of trial based upon constructive condonation, it is presumed that accused's restoration to duty was not effected by an authority competent to order trial for desertion * * *. It thus appears that the instant trial was not barred because of constructive condonation of the offense. (CM ETO 6524 Torgerson 1945)

(3) In General: Accused had been sentenced to confinement for 20 years and dishonorably discharged from the service. One week later, and before either approval of the sentence or promulgation of the general court-martial order, he escaped from the guardhouse in which he had been confined. Thereafter, his sentence was approved, and then promulgated by general court-martial order. In subsequent weeks accused committed a number of other crimes. He was apprehended several months later. Among other things, he was found guilty of desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. Accused argued that he could not have deserted the military service when he escaped, because he had already been dishonorably discharged. This argument is unsound. At the time of his escape, which was also an act of desertion, he was clearly in the military service, as the general court-martial order promulgating his sentence had not yet been issued. (See 359(15) herein, for further discussion of this case.) (CM ETO 1737 Nosser 1944)

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(5) Specification; Desertion:

Cross References: 416(9) 3062 Osther
416(9 4490 Brothers
385 3118 Prophet (charged under AW 28.)

Accused was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. "It is an approved principle that in the absence of a direct attack upon a specification, which alleges desertion based upon an absence without leave with intent not to return, because of its vagueness or indefiniteness, the prosecution may prove an act of desertion under AW 28 which includes absences without leave from an accused's organization or place of duty with intent to avoid hazardous duty or to shirk important service * * *." (III Bull JAG, April 1944, sec. 416 p.142) AW 28 elements were presented herein. "Proof of accused's guilt of the offense of absenting himself from his company at the times and places alleged with intent to avoid hazardous duty is complete * * *." (CM ETO 5117 DeFrank 1944)

(6a) Proof; Date of Termination 416(6a-9)
(9) Proof of Intent; --
Unauthorized Absence.

(6a) Proof; Date of Termination:

"Duration of the unauthorized absence is material only in extenuation or aggravation of the offense or, combined with other evidence, to show the requisite intent." "As the offense of desertion is complete when the person absents himself without authority from his place of service with the requisite intent (MCM, 1928, par. 67, p. 52, par. 13a, p. 142), proof of the duration of the offense is not essential to sustain a conviction of the offense." In peacetime desertion, the element of time was essential in determing the punishment. But it is not essential in wartime desertion, because the maximum punishment in all desertion cases is now death. (See 385(A.W. 28) re avoiding hazardous duty in this case.) (CM ETO 2473 Cantwell 1944) (Mimeographed full opinion mailed out.)

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(9) Proof of Intent; Unauthorized Absence:

Accused left his organization without proper authorization. After an absence of 33 days, he was apprehended. During the interim, he was frequently in the vicinity of military installations, but did not surrender himself to military authorities. He lived on the earnings of prostitutes, on money received from a girl acquaintance, by "panhandling" from American soldiers. He committed the crime of robbery. At the time of his apprehension, he produced a pass issued in the name of another and was reluctant to reveal his true identity. He was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. His intent to desert was adequately established. (CM ETO 952 Mosser 1943.)

Two accused escaped from confinement. They were apprehended six days later. Each used a false name while absent. There was evidence that they had desired to leave the country. Among other things, they were found guilty of desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. The trial court was the sole judge of the disputed facts. Its findings will not be disturbed, because they were supported by competent substantial evidence. (CM ETO 960 Fazio, et al 1943)

416(9) (9) Proof of Intent; Unauthorized Absence

Accused left his organization without proper authorization. After an absence of eight days, he was apprehended at a place 20 miles from his station. He was sober at the time, but he was dressed in civilian clothing, and falsely represented that he was a member of the American merchant marine. He told conflicting stories regarding how he had obtained the civilian clothing, and did not disclose that he was in the military service until after he had been taken into custody. Although he stated that he was about to surrender when he was apprehended, he was actually headed in the wrong direction. He was found guilty of desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. (CM ETO 1036 Harris 1944)

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After his battery had been informed that it was to move to an unknown overseas destination and that no passes would be issued, accused left without proper authorization. Five days later, he was returned to a military guardhouse at another location. The next day, on 5 November, he escaped. On 16 November, he surrendered himself in uniform at the place from which he had escaped eleven days earlier. He was found guilty of deserting the service on 5 November, in violation of AW 58. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. "In view of the short absence of eleven days, terminated by surrender in uniform at the same station, and in the absence of any other evidence from which a court might reasonably infer that accused intended not to return to the military service," it is concluded that desertion was not proved. (CM ETO 1395 Saunders 1944) (Mimeographed full opinion mailed.)

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Two accused left their organization without proper authorization. They remained away for more than three months. During their absence they falsified their names, and despite their presence near military installations made no attempt to surrender themselves. At a consolidated trial, they were found guilty of desertion in violation of AW 58. HELD: LEGALLY SUFFICIENT. (1) Intent to desert was sufficiently shown. (2) The consolidated trial was proper. Each accused consented thereto. No prejudice to either one resulted. (CM ETO 1549 Copprue, Ernest 1944)

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(9) Proof of Intent; Unauthorized Absence 416(9)

Accused did not return from his furlough. Twenty-two days later he was apprehended in London--which city he had originally been authorized to visit,but which was several hundred miles away from his unit's location. At the time of his apprehension he readily admitted his identity, and produced his identification card and tags. He had no clothes other than his uniform. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. "While it is true, as the court judicially noticed, that there are numerous military camps and stations where accused could have returned to military control, a period of unauthorized absence as short as the one in this case, together with the circumstance of his apprehension, are insufficient to justify the inference of an intention to desert the service in the absence of some other significant factor. * * * The terms of his furlough eliminate such significance as the factor of distance might otherwise have possessed." (CM ETO 1567 Spicocchi 1944) (Mimeographed full opinion mailed.)

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Accused was admittedly absent without leave for 99 days. His absence was terminated by apprehension in London, about 80 miles from his post. He was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. It was proper for the court to infer accused's intent to desert from the length of his absence from duty, his activities during his absence, his continued proximity to military establishments, and his final apprehension. (CM ETO 1577 Le Van 1944)

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Accused was stationed in England, and had only been a member of his unit for a month. After the expiration of a pass, he remained absent without authorization for 37 days. At the end of this period, he returned to military control voluntarily, dressed in his uniform. He was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. Accused's absence was unexplained. He could have turned himself in at any number of military installations. He had no reason to assume that his unit would remain at any one station in England except on a day-to-day basis. "The offense occurred in an active theater of operation in an allied foreign country, subject to intermittent attack from air, sea and land, and was, in its compact entirety, at that time, the base and starting point of American and allied military operations of the greatest magnitude and of supreme importance." "The fact that he surrendered in uniform, and possibly wore it throughout his absence, ..

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is without significance as it is well known that a man of military age is safer from inquiry by the police if in uniform than if he wore civilian clothes. 'A prompt repentance and return, while material in extenuation, is no defense' (MCM, 1928, par.130a, p.142). Under the circumstances above, the accused's 'repentance and return' are not entitled to be characterized as 'prompt'. The fact is not wholly without significance that, when he went absent without leave, accused had been a member of his organization for only a month, and the period of his unauthorized absence appreciably exceeded his length of service with his company. The court properly took judicial notice of prevailing conditions in the United Kingdom insofar as they affected the armed forces of the United States. * * * When there was submitted competent proof of a substantial nature that accused was absent without leave for 37 days from his organization in England under existing conditions, the burden was cast upon him to go forward with the proof--the 'burden of explanation'--and to show that * * * he intended to return to the service." Although accused took the stand under oath, he failed to explain his absence. His desertion was sufficiently established. (CM ETO 1629 O'Donnell 1944)

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Accused had loitered on his guardpost. Thereafter, he escaped from confinement but was apprehended 27 miles away about two hours later. Placed in confinement, he again escaped. Seven days later, he was apprehanded. At this latter time, he was wearing a sailor's uniform. He denied his identity. He excused his lack of "dog-tags" by explaining that they had been lost. He expressed reluctance to return to his organization. He was now found guilty of (a) AWOL for the two-hour period in violation of AW 61, (b) desertion for the seven-day period in violation of AW 58, (c) escape from confinement on the two occasions mentioned in violation of AW 69, and (d) loitering on a post as a sentinel in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) AWOL: This offense was sufficiently established by "uncontradicted evidence that three and a half hours after his escape from confinement * * *, the accused was found 27 miles away * * * in the custody of military police. While the evidence of his original apprehension by * * * military authorities was hearsay and inadmissible, competent testimony showing (1) the prompt notifications of the * * * military police of the fact of accused's escape, (2) his delivery by the * * * military police to the detail of his own organization, dispatched to * * * for the express purpose of returning him, and (3) his subsequent escape a few days later, so strongly supports the inference of apprehension as to render patently harmless the admission of the hearsay (MCM, 1928, par. 87b, p.74)."(2) The desertion was sufficiently established by the evidence previously related. (3) The escape from confinement were established. (4) The charge of loitering on post was also established. "Webster's definition of the intransitive verb loiter is 'to

be slow in moving' * * *. The offense charges is recognized * * * as a violation of Article of War 96 (MCM, 1928, App.4, Spec. 156, p.256). * * * The dereliction, though a minor one, was the commencement of a series of events which resulted in the commission of the serious offenses of which accused was found guilty. In this sense it serves to explain the circumstances of the more serious offenses, and may be regarded as not improperly included in the charges. (MCM, 1928, par.27, p.17)." (CM ETO 1645 Gregory 1944)

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Accused was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. "The accused's intent not to return was inferentially but most effectively established by competent, uncontradicted evidence showing that he was apprehended after an admitted unauthorized absence of more than four months in a foreign theater in wartime; that he was wearing civilian clothes and that he falsely identified himself as a merchant seaman who had left his credentials aboard ship." (CM ETO 1726 Green 1944)

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Accused remained absent without leave for 86 days. At the end of this period, he was apprehended in a city where he was living in a privat residence. During his absence he forged several checks and committed frauds involving $675. While in the city, he appeared in civilian clothes. He was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. (CM ETO 2216 Gallagher 1944)

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Accused remained absent without leave from his organization for 161 consecutive days. His absence was terminated by apprehension, after his whereabouts had been discovered by a fellow soldier. During the period, he lived under assumed names with a woman who masqueraded as his wife. He discarded his uniform, and wore civilian clothes. He secured employment as a British civilian, using a fictitious name and a British identification card issued in that name. He travelled about the country, but was at all times in the proximity of American military installations. He was found guilty of desertion, in violation of AW 58. HELD: LEGALLY

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SUFFICIENT. (1) The evidence adequately established accused's desertion. (2) A civilian's written statement, given to a British constable, was admitted in evidence. This was erroneous, because the statement was hearsay. Although no objection was made by the defense, the court should have excluded the statement on its own motion. However, no prejudice resulted. (3) Written entries contained in a police department "lost and found property book" in regard to the finding of an American military uniform were admissible. (Act June 20, 1936, c.640, sec.1; 49 Stat.1561; 28 USCA supp. sec.695.) (4) Accused's statement to an investigating officer was admitted without proof that he had been warned of his rights. The statement was admissible. MCM, 1928, par.114a provides: "A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made." (CM ETO 2343 Welbes 1944) (See 395 (18) Memo;TJAG, 30 Mar '45; Washington,D.C.; re 49 Stat. 1561)

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Accused remained absent without leave for 106 days, after which period he surrendered. His confession indicated that during his absence he entertained the specific intent to remain absent in the hope of being ultimately court-martialed and tranferred to another unit. He was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. "Court-martial proceedings might never have been instituted against accused and had such proceedings followed there was no certainty that 'his transfer to another outfit' would result. Therefore, his prolonged absence coupled with such declaration is substantial evidence from which the court was justified in inferring his specific intent to absent himself permanently from the military service." (MCM, 1928, par.130a, p.142) (CM ETO 2433 Meyer 1944)

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On 12 March accused was in a guardhouse under general court-martial sentence. The order promulgating the sentence, however, was not issued until twelve days later. On 12 March, accused escaped. He remained absent for 23 days, at which latter time he was apprehended. He was masquerading in the uniform of an officer. He had eluded arrest on two previous occasions, and had feloniously assaulted a military policeman who was attempting to apprehend him. He was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. The evidence adequately established the desertion. Accused was capable of committing the offense on 12 March. (CM ETO 2723 Copprue 1944).

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(9) Intent: Among other things, accused were found guilty of desertion, in violation of AW 58. While they were at large, they committed numerous offenses, including larceny. HELD: LEGALLY SUFFICIENT. "The additional offenses * * * proved, involved numerous larcenies of cash and other property worth hundreds of dollars, escape from confinement while awaiting trial on charges, impersonation of both a commissioned and a non-commissioned officer, the wrongful wearing of aviation insignia and decorations, and the carrying by accused Childrey of a .45 automatic pistol concealed on his person. In determining whether accused absented themselves with intent to desert the service, the court was entitled to regard the additional offenses and all the attendant implications. These included substantial periods of absence during war in an active theater of operations, a long series of larcenies responsibility for which might well be discovered and punishment exacted if accused returned to military control, their escape from confinement conclusively inconsistent with their stated intent to return to service, and the further fact that each absence was terminated, involuntarily, by apprehension." "Theft committed by a soldier while absent without leave is generally to aid and perpetuate such absence. The willful commission of a serious civil offense by such a soldier is most persuasive that he has intended to depart permanently from the military establishment, its constructive influences and its punitive policies." (CM ETO 2901 Childrey 1944)

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Accused was found guilty of a violation of AW 58, in that he had deserted the service in England and had remained away until his surrender 33 days later. HELD: LEGALLY SUFFICIENT. (1) Intent: "In view of the clear and obvious purpose, spirit and intent of" AW 28, accused' attempt to enlist in the Norwegian Merchant Marine, while undischarged as a soldier in the U.S. Army—at the same time presenting a fictitious certificate of discharge--would appear to be sufficient to support the inference of requisite intent to remain permanently absent. "When there is taken into consideration his escape from confinement, his wearing civilian clothes contrary to regulations in wartime, his forgery of a discharge certificate, and attempted fraudulent deception by the use of it and his testimony in explanation of his plans, intention and attitud with reference to his service in the U.S. Army, no doubt remains * * *. (2) Action; Modification: By action dated 4 July 1944, the reviewing authority approved the sentence but remitted so much thereof as adjudge confinement at hard labor. By subsequent action dated 24 July 1944, he approved the sentence without any remission whatsoever. Each action recites that 'Pursuant to AW 50½ * * * the execution of the sentence is withheld'. * * * The record discloses that the first action was never published and there is no showing that accused was duly notified. It would be unusual to so notify him. In the absence of affirmative showing of due notification, it will be presumed that the first action was duly recalled and modified. (3) Since no place of confinement was

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designated in the second action, a designation must be made. (CM ETO 3062 Osther 1944)

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Accused was found guilty of a 28-day desertion terminated by surrender, in violation of AW 58. HELD: LEGALLY SUFFICIENT. "The evidence clearly shows that accused left his organization on the eve of a heavy engagement, which resulted in a break-through of the enemy lines during which action his unit suffered severely; and that the break-through was followed by a continuous advance deep into France during which time various areas of resistance were encountered. Accused knew something of the contemplated attack and of the progress of his organization for the month following but made no effort to return during this time. He says he left to get a drink intending to immediately return but got drunk. He did not remain drunk for the entire month. * * * The conclusion is inescapable that he absented himself and remained absent without leave, as alleged, intending at the time to avoid hazardous duty just ahead; and that his absence was for the time alleged and covered the period of his unit's important and dangerous advance. From his absence for a month under the circumstances shown, the court could infer the necessary intent." (Note that AW elements were not set forth in the specification.) (CM ETO 4490 Brothers 1944)

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Accused was found guilty of desertion from 27 May to 9 October 1944, in violation of AW 58. He was also found guilty of misbehavior before the enemy on 18 October 1944, in violation of AW 75. Held: LEGALLY INSUFFICIENT, (1) Error in General: It appears that charges were served on accused at 1505 hours the day of trial. "It is not shown that any time intervened between the service * * * and the commencement of the trial, or that defense counsel had any opportunity to prepare for trial. Accused was 19 years of age and a 'little slow witted'. He was charged with two capital offenses arising out of two distinct transactions. The over-all time consumed in the trial of accused on both charges was 35 minutes. In the course of this hurried trial, defense counsel displayed his lack of preparation by failing to assert accused's rights in" many enumerated instances. It must be concluded "that accused was deprived of a reasonable opportunity to prepare for trial and of the effective assistance of counsel in the preparation and conduct of his defense * * *. That his substantial rights were injuriously affected thereby is demonstrated by considering the legal sufficiency of the record of trial after eliminating the evidence which should have been excluded if proper objection had been made, and the stipulation to which defense counsel improperly agreed." (2) Specific Errors: (a) Morning Report Extract; "Prosecution Exhibit 1 was a duly

authenticated extract copy of the morning reports * * *. In his certificate of authentication the personnel officer states that the extract is a true and complete copy 'including any signature or initials appearing thereon' of that part of the morning report which relates to accused. No signature or initials are shown on the extract copy. It is to be presumed that, in accordance with his statement, the personnel officer would have included such signatures or initials if they appeared on the originals. There is likewise a presumption that the original morning reports were authenticated by the commanding officer of the reporting unit or, in his absence, by the officer acting in command - the only persons who were authorized to authenticate original morning reports * * *. Where the application of the same presumption leads to the purported existence of two contradictory facts, the presumption is of no assistance in determining the actual existence of either fact. On this state of the evidence * * *, it was impossible for the court to determine * * * that any of the original morning reports were authenticated by any person. Therefore, upon proper objection, Prosecution Exhibit 1 should have been excluded. Defense counsel, however, not only failed to object but stated that there was no objection." (b) Stipulation: In the circumstances, defense counsel should not have stipulated that accused returned to military control on o about 9 October 1944. Other information indicated a first return on 1 June 1944, and again on 9 September 1944. (c) Failure to Object: Defense counsel erred in failing to object to two questions, "the first of which was clearly objectionable because flagrantly leading and calling for a conclusion and the second obviously leading. The answers to both question were presumably intended to supply directly one of the essential elements of a violation of AW 75, namely, that accused's company was before the enemy." "As to these questions, failure to object did not amount to a waiver of the objections (MCM, 1928, par.126c, p 137)." (d) A Second Morning Report (Exhibit No. 2) was objectionable for the same reason noted in 2a above. "In addition thereto, it appeared on the fact * * * that the copy was authenticated by the assistant personnel officer, who was not the official custodian despite his assertion in the certificate of authentication that he was. The personnel officer himself is the official custodian of one of the three originals * * * and the assistant personnel officer is not the proper person to certify copies thereof * * *. * * * Apparently no notice was taken by defense counsel or any member of the court of the fact that the original entry * * * was made two days after the charges were preferred and related back four days to the date of the alleged violation of AW 75. Even if admissible, this entry, unaided by any other evidence, was insufficient to show that accused was physically present with his company or that it was before the enemy or that he ran away." (3) Waiver by Failure to Object: "The rule is that an objection to preferred evidence of the contents of a public record based on the ground that it does not appear that a purported copy thereof is duly authenticate may be regarded as waived if not asserted when the proffer is made (MCM, 1928, par 116a, p 120). Likewise failure to object to a preferred document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection (Ibid., par. 116b, p 120). Under the circumstances of this case, neither of these rules may be applied to the prejudice of accused. He had a right to assume that defense counsel would exercise reasonable diligence in safeguarding his interests. The presump-

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tion is that defense counsel did perform his full military duty in this regard * * *. But this presumption is rebuttable and disappears when the fact is shown to be otherwise * * *. In this case it plainly appears from the record of trial that defense counsel did not perform his duties properly and that accused's substantial rights were prejudiced thereby." (4) Due Process: Accused was deprived of due process of law herein. (CM ETO 4756 Carmisciano 1945)

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Accused was first charged solely with a willful disobedience in violation of AW 64. Thereafter, and subsequent to investigation, a new piece of paper was pasted over the original charge, to include two further specifications in violation of AW 58, as well as the original AW 64 offense (now listed as Charge II). Accused was found guilty of all charges and specifications. HELD: LEGALLY SUFFICIENT. (1) Pre-Trial; AW 70: Examination of the pre-trial papers, the charge sheet and the procedure adopted in preparing and affixing the charges and specifications, leads to the conclusion that the AW 58 charge and specifications, "each alleging an offense for which the maximum punishment is death, were in fact not signed or sworn to as required by AW 70,* *. The circumstances surrounding the preparation of the charges overcome the presumption, that ordinarily may be indulged, of regularity in the performance of their duties by the officers responsible for their fulfillment (MCM, 1928, par 112a, p 110). However, no substantial right of accused was thereby injuriously affected as it has been held that the requirements * * * are directory only and failure to comply with them does not affect the legality of the proceedings * * *. It was plainly intended by Congress that these provisions of AW 70 should be strictly and carefully observed and the foregoing language is not to be construed as in any manner approving this improper violation of its mandatory requirements * * *. The pasting of corrected or redrafted charges and specifications over the original charges so that the latter may not be read is improper." In spite of the various impropriétes herein, however, the Board of Review is, "under the adjudicated authorities, compelled to conclude that inasmuch as AW 70 is an administrative directive, intended primarily for the benefit of the referring authority, the foregoing deficiencies in the pre-trial procedure did not prejudice the substantial rights of the accused." (2) Plea in Bar; Condonation: The first desertion was charged to have occurred 18 May - 16 June 1944. The second was 8 October - 10 November 1944. The evidence showed that accused was actually returned to duty on 13 June 1944. However, the record failed to show that this return to duty "resulted from action of any authority competent to order trial." The rule in regard to restoration to duty as a bar to future trial (MCM, 1928, par 69b, p 54) "contemplates removal of the charge of desertion and the consequent restoration to duty through an administrative act by an authority competent to order trial for desertion. As trial for wartime desertion may be ordered only by an officer exercising general court-martial jurisdiction, there was here no evidence of such constructive condonation and as accused's burden of supporting the plea in bar by a preponderance of proof (MCM, 1928, par 64a, p 51) was not met, the plea was properly overruled by the court***."

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(3)Specification; Desertion: Although perhaps vague or indefinite, the specification was adequate in the absence of objection. The evidence supported the conviction. "It is an approved principle that in the absence of direct attack upon such a specification /under AW 58/ because of its vagueness or indefiniteness, the prosecution may prove an act of desertion under the 28th Article of War which includes absence without leave from an accused's organization or place of duty with intent to avoid hazardous duty or to shirk important service * * *." (Form used: No 13, App 4, MCM, 1928, p 240). (CM ETO 5196 Ford 1945)

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Accused was found guilty of two desertions in violation of AW 58, to wit: 8 October - 28 October 1944, and 4 November - 14 November, 1944. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL, IN VIOLATION OF AW 61. (1) Morning Reports: (a) Authentication; Extract: Proof of the absences without leave was solely by an extract copy of morning report entries. The extracts failed to show either signature or initials of the commanding officer at the time of the original entry. The extract was certified to be "a true copy" by an Assistant Personnel Officer. (Note that certification did not state that it included all signatures and initials. "As a general rule, the original of a writing must be introduced in evidence to prove its contents (MCM, 1928, par 116a, p 118)." However, an exception is made in regard to public records, to permit the introduction of duly authenticated extracts (MCM, 1928, par 116a pp 119-120). "A morning report is a 'public record' within the meaning of" the above sections of the MCM. "The third triplicate original copy of the company morning report, when initialed by the unit 'personnel officer or other officer designated', becomes a record of the unit personnel section (AR 345-400, 1 May 1944, sec. I, par 6c(1)). Thus the unit personnel officer is one of the official custodians of the original morning report, and as such is authorized to certify an extract copy thereof for introduction in evidence before a court-martial * * *. As a general proposition, officers having custody of, and the duty of safeguarding, original documents are deemed to have implied authority to make certified copies thereof. The manner in which copies of documents, particularly public records, are to be authenticated is normally prescribed by statute and in such cases the prescribed mode must appear to have been followed in order to make the copy admissible. In the case of a record the copy must be certified by the official custodian thereof." It is a question of law whether the instant assistant unit personnel officer could authenticate the above extract, "and neither the presumption of regularity of official acts nor his own declaration can make an officer who purports to authenticate a copy the custodian of the original document. (Cite AR 345-5; 345-400.) "It may be inferred from the provisions * * * as a whole * * * that the only officer in the unit personnel section who is the official custodian of such original copy is the personnel

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officer himself and not some other officer, who may be completely unfamiliar with the functions of the personnel section * * *. It follows that the personnel officer and not the assistant personnel officer is the proper person to certify copies of such original copy and that the purported authentication" on the extract herein was improper. However, no prejudice resulted. Defense counsel expressly stated that he had no objection. There was no real dispute regarding the correctness or authenticity of the document. "The improper authentication * * * was waived by failure to object thereto." (b) Initials or Signatures on Entry: "The extract copy * * * does not show the signature of the commanding officer * * *, or of the officer acting in command, or any other signature." (AR 345-400 cited.) "Patently, the document is not a complete copy * * *, but a copy of only so much thereof as pertains to accused." However, it would appear "that the authenticating officer may not necessarily have intended to show whether or not the original morning report was signed, but may have intended to authenticate merely the entries themselves as correctly copied. Moreover, the entries may have appeared on the first unsigned page of a series of pages * * *, in which case the omission of an authenticating signature would be understandable. It thus cannot be assumed that the document offered in evidence was a copy of an unsigned original morning report. The most that can be said is that the copy fails to show affirmatively whether the original morning report was signed by an authorized officer, by an unauthorized officer or by any one at all. This question, however, is resolved by the presumption, in the absence of evidence to the contrary, that entries in a morning report were made by the proper officer * * *, which is but an application of the familiar presumption that official acts and duties have been properly performed * * *. * * *The failure of the defense to exercise its privilege of introducing evidence that the original report was either signed by an unauthorized officer or not signed at all, left in full force and effect the presumption" that the original was duly signed, and therefore properly authenticated. (2) Desertion v. AWOL: Accused's first "desertion" allegedly lasted for 20 days. The second lasted for 10 days. "The only other evidence bearing upon accused's guilt of desertion is the fact that after the termination of his second absence he indicated to his first sergeant that he did not wish to rejoin his organization. While such a statement might, under some circumstances, be probative of an intention not to return to military service, such an inference is negatived in this case by the fact that he did in fact return voluntarily at the end of each absence. The duration of his absences alone is insufficient, in view of the fact that each was terminated by such voluntary return, to justify an inference of an intention to remain away permanently." (Distinguish ETO 1629, O'Donnell.) The evidence sufficiently supported the finding of the lesser offense of AWOL in violation of AW 61 only. (3) Nolle Prosequi: A still further charge herein was eliminated by nolle prosequi. "There is no indication * * * that the nolle prosequi herein was directed by the appointing authority. It is not apparent whether the appointing authority did not direct the entry of a nolle prosequi or whether, on the other hand, he did so but his direction merely does not appear. In either event the irregularity was ratified and cured by the subsequent action of the Reviewing AUTHORITY (who was the same officer as the Appointing Authority), approving the sentence * * *, and thus approving the proceedings upon which it was based * * *. It is to be noted in this connection that a nolle prosequi may legally be entered after the taking of testimony. (CM ETO 5234 Stubinski 1945)

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(1st Ind, CM ETO 5234 Stubinski 1945): Recommends substantial reduction in the instant life sentence. Points out that "in order to convict of desertion, the specific intent must be proved. It is not enough to prove only that accused was absent and even that his organization participated in battle while he was gone. Evidence sufficient to justify the inference of the necessary specific intent may have existed in this case, but the record of trial is utterly devoid thereof.")

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Accused was found guilty of desertion, in violation of AW 58. HELD: LEGALLY SUFFICIENT. "Each of the three extract copies of Morning Reports which were received without objection were signed by *** who failed to indicate in what capacity he acted in placing his signature on each instrument. Since no question was raised by the defense, it could properly be assumed by the court that he acted in the capacity of commanding officer of the *** " unit of which accused was a member. (MCM 1928, par 116b, p 120). (2) "The absence of accused without leave for a period of more than four months in an active theater of operations was evidence from which the court was fully warranted in finding him guilty of desertion * * *." (CM ETO 5406 Aldinger 1945)

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Accused was found guilty of two desertions in violation of AW 58, and of willful disobedience in violation of AW 64. HELD: LEGALLY SUFFICIENT ON THE AW 64 CHARGE; LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61, RE THE DESERTIONS. (1) Morning Reports: "The improper authentication of the extract copy of the Morning Reports for 4 and 6 November 1944 by the assistant personnel officer was waived by the failure of the defense to object thereto and the document was properly admitted in evidence * * *. The authentication of the extract copy of the Morning Reports for 16 and 22 November 1944 does not disclose the capacity of the officer who signed the same. It is unnecessary to decide whether the presumption of regularity of this signature was rebutted by the evidence that such officer was the assistant personnel officer at the time he certified the other extract or whether the certificate by the Division Adjutant General stating that such officer was assistant and acting personnel officer at the time he certified the extract of the reports for 16 and 22 November may properly be considered as part of the records of trial. In any event all objections to the authentication of the copy were waived by failure to assert the same and it was therefore properly admitted." (2) Desertion:

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Accused's absences during the periods charged in each of the two desertion specifications were proved by the Morning Reports. The first absence was for 6 days. The second was for 13 days. "The record contains no evidence that at either time accused absented himself without leave he intended to avoid hazardous duty, to shirk important service or not to return, nor is there any evidence that at any time during either absence he intended not to return. Neither the location, tactical situation nor activity of his company is shown. The duration of the absence is not in itself probative of any of the necessary intents nor is accused's refusal, at the end of the second absence, to return to his organization evidence thereof. * * * There is no evidence of the manner of termination of either absence. The record * * * is legally sufficient to support only findings of guilty of absence without leave for the periods alleged." (3) Willful Disobedience: Accused's superior officer "lawfully ordered accused to return to his organization and *** the latter at the time and place alleged willfully disobeyed the order by refusing and failing to return to his organization. The variance between the word 'company' as alleged and the word 'organization' as proven is immaterial. The evidence supports the findings of guilty." (CM ETO 5593 Jarvis 1945)

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Accused was found guilty of desertion in violation of AW 58. HELD: LEGALLY INSUFFICIENT. The evidence showed that accused left his organization near Paris on 11 September; got drunk; visited Paris. It was stipulated that he was returned to military control at Paris 20 October 1944. The company commander visited a Paris stockade around the 1st of November, where accused came up and reported to him. The company commander "also testified that he examined the records at the stockade and observed the delinquency report of accused's apprehension 'on the 20th'. He was not present in Paris on 20 October 1944 and had no personal knowledge of what occurred on that date regarding the accused." In his unsworn statement, accused stated that he turned himself in to the MPs, which is not inconsistent with the stipulation phrase that he was returned to military control ("an expression customarily used to denote termination of absence without leave when the manner is not known or cannot be proved"). The commanding officer's "hearsay testimony as to the contents of the delinquency report was inadmissible to show apprehension and was highly prejudicial. The admissible evidence approximates the minimum of competent, substantial evidence heretofore held, in the absence of prejudicial errors or irregularities, legally sufficient to support the inference of intent not to return in a desertion case (CM ETO 1629 O'Donnell). It is certainly not compelling; and Captain * * * erroneously admitted testimony of apprehension was of a character to preclude the possibility of the court's giving any credence whatsoever to the explanation involved in the accused's unsworn statement." (Included matters re hospitalization, gonorrhea, etc.) "The record, fairly regarded, raises a bona fide issue as to accused's intent, in view of which the hearsay evidence of apprehension cannot in reason be presumed not to have

injuriously affected the substantial rights of the accused (CM ETO 3212, Robillard)." Only an absence without leave was shown. (CM ETO 5740 Gowins 1945)

After his absence of 70 days, accused was found guilty of desertion in violation of AW 58 (no AW 28 circumstances alleged). HELD: LEGALLY SUFFICIENT. Accused had been with his company for five months. The unit had participated with the enemy and was presumable in pursuit of it, when accused took off. "It may be fairly inferred that under these circumstances of continuous combat as a member of the unit, accused was familiar with the tactical situation and aware not only of the hazards and perils of battle just passed but also of those that were yet imminent. Instead of contributing his all to the impending advance accused departed and remained in unauthorized absence for 70 days. With this status of prosecution's evidence it was incumbent on accused to meet 'the burden of explanation' and go forward with proof to show that he intended to return. This he failed to do. The duration of accused's unauthorized absence from his place of duty with an organization in a combat zone and engaged in continuous battle, coupled with the complete failure of defense to discharge the burden of explanation which the prosecution's evidence placed upon it, justify the inference that accused went absent without leave accompanied by the intention not to return." (ETO 1629, 4490). (CM ETO 6093 Ingersoll 1945)

After his absence of 28 days in England, accused officer was found guilty of desertion in violation of AW 58. He was also found guilty of forging false orders and an identification card in violation of AW 96, and of embezzlement of PX funds in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1)"Desertion is absence without leave accompanied by the intention not to return to his place of service. If the absence is much prolonged or is not satisfactorily explained, the court is justified in inferring from that alone an intent to remain permanently absent. Such inferences may also be drawn from such circumstances (present here) as his arrest at a considerable distance from his station; that he attempted to secure passage on a ship /to N. Ireland from_____/; that while absent he was in the neighborhood of military posts and did not surrender or that just previous to absenting himself he took without authority money or other property that would assist him in getting away * * *. All of these circumstances were

416(9) (9) Proof of Intent; Unauthorized Absence

present in the case of accused together with his admission of such facts and his statement that he was trying to get as far away from his command as he could." He was guilty of desertion. (2)"Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another * * *. Accused was charged with uttering two false instruments. The evidence shows that accused was apprehended on presenting an admittedly self-prepared false order for the purpose of assisting himself to secure passage by ship to * * *, Northern Ireland * * * and while at the same time presenting a wrongfully altered AGO card, signed with a fictitious name, all done with the intent to avoid being apprehended and to secure services and travel for himself that would have been denied him under his own name * * *." (3) "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come * * *. Accused as post exchange officer, had control of the exchange and was responsible for its management and its accounting and custodian of its property and funds (AR 210-65). The evidence clearly shows and accused admits failure to account for the exchange property and funds and he admits wrongfully taking at least £300 from the office safe of the post exchange and appropriating it to his own use. An inventory of the post exchange showed a shortage of 1865 pounds." (CM ETO 6195 Odhner 1945)

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Accused was found guilty of desertion in violation of AW 58, after his absence without leave for 57 days. The Reviewing Authority reduced the finding to one of AWOL for 24 days of the period, but permitted the finding of desertion to stand. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. "Mere unauthorized absence for 24 days does not, of itself alone, constitute a substantial basis, nor is any other circumstance shown to support an inference of the requisite intent to establish desertion.(CM ETO 6497 Gary, Jr 1945)

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(9) Proof of Intent; Unauthorized Absence 416(9)

(9) Intent: Among other things, accused were found guilty of desertion, in violation of AW 58. While they were at large, they committed numerous offenses, including larceny. HELD: LEGALLY SUFFICIENT. "The additional offenses * * * proved, involved numerous larcenies of cash and other property worth hundreds of dollars, escape from confinement while awaiting trial on charges, impersonation of both a commissioned and a non-commissioned officer, the wrongful wearing of aviation insignia and decorations, and the carrying by accused Childrey of a .45 automatic pistol concealed on his person. In determining whether accused absented themselves with intent to desert the service, the court was entitled to regard the additional offenses and all the attendant implications. These included substantial periods of absence during war in an active theater of operations, a long series of larcenies responsibility for which might well be discovered and punishment exacted if accused returned to military control, their escape from confinement conclusively inconsistent with their stated intent to return to service, and the further fact that each absence was terminated, involuntarily, by apprehension." "Theft committed by a soldier while absent without leave is generally to aid and perpetuate such absence. The willful commission of a serious civil offense by such a soldier is most persuasive that he has intended to depart permanently from the military establishment, its constructive influences and its punitive policies." (CM ETO 2901 Childrey 1944)

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Accused was found guilty of a violation of AW 58, in that he had deserted the service in England and had remained away until his surrender 33 days later. HELD: LEGALLY SUFFICIENT. (1) Intent: "In view of the clear and obvious purpose, spirit and intent of" AW 28, accused' attempt to enlist in the Norwegian Merchant Marine, while undischarged as a soldier in the U.S. Army--at the same time presenting a fictitious certificate of discharge--would appear to be sufficient to support the inference of requisite intent to remain permanently absent. "When there is taken into consideration his escape from confinement, his wearing civilian clothes contrary to regulations in wartime, his forgery of a discharge certificate, and attempted fraudulent deception by the use of it and his testimony in explanation of his plans, intention and attitude with reference to his service in the U.S. Army, no doubt remains * * *. (2) Action; Modification: By action dated 4 July 1944, the reviewing authority approved the sentence but remitted so much thereof as adjudged confinement at hard labor. By subsequent action dated 24 July 1944, he approved the sentence without any remission whatsoever. Each action recites that 'Pursuant to AW 50½ * * * the execution of the sentence is withheld'. * * * The record discloses that the first action was never published and there is no showing that accused was duly notified. It would be unusual to so notify him. In the absence of affirmative showing of due notification, it will be presumed that the first action was duly recalled and modified. (3) Since no place of confinement was

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designated in the second action, a designation must be made. (CM ETO 3062 Osther 1944)

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Accused was found guilty of a 28-day desertion terminated by surrender, in violation of AW 58. HELD: LEGALLY SUFFICIENT. "The evidence clearly shows that accused left his organization on the eve of a heavy engagement, which resulted in a break-through of the enemy lines during which action his unit suffered severely; and that the break-through was followed by a continuous advance deep into France during which time various areas of resistance were encountered. Accused knew something of the contemplated attack and of the progress of his organization for the month following but made no effort to return during this time. He says he left to get a drink intending to immediately return but got drunk. He did not remain drunk for the entire month. * * * The conclusion is inescapable that he absented himself and remained absent without leave, as alleged, intending at the time to avoid hazardous duty just ahead; and that his absence was for the time alleged and covered the period of his unit's important and dangerous advance. From his absence for a month under the circumstances shown, the court could infer the necessary intent." (Note that AW elements were not set forth in the specification.) (CM ETO 4490 Brothers 1944)

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Accused was found guilty of desertion from 27 May to 9 October 1944, in violation of AW 58. He was also found guilty of misbehavior before the enemy on 18 October 1944, in violation of AW 75. Held: LEGALLY INSUFFICIENT, (1) Error in General: It appears that charges were served on accused at 1505 hours the day of trial. "It is not shown that any time intervened between the service * * * and the commencement of the trial, or that defense counsel had any opportunity to prepare for trial. Accused was 19 years of age and a 'little slow witted'. He was charged with two capital offenses arising out of two distinct transactions. The over-all time consumed in the trial of accused on both charges was 35 minutes. In the course of this hurried trial, defense counsel displayed his lack of preparation by failing to assert accused's rights in" many enumerated instances. It must be concluded "that accused was deprived of a reasonable opportunity to prepare for trial and of the effective assistance of counsel in the preparation and conduct of his defense * * *. That his substantial rights were injuriously affected thereby is demonstrated by considering the legal sufficiency of the record of trial after eliminating the evidence which should have been excluded if proper objection had been made, and the stipulation to which defense counsel improperly agreed." (2) Specific Errors: (a) Morning Report Extract; "Prosecution Exhibit 1 was a duly

cumstances apparently relied on * * * consist of the fact that accused at the time of his departure had just been sentenced to six months' confinement, that during his absence he was in the vicinity of various military establishments and did not turn himself in, that he was apprehended, and that at the time of apprehension he was wearing a field jacket with the shoulder insignia of a second lieutenant." These various facts were admissible. (a) The 6-months' sentence, however, had been reduced by the approving authority, so as to eliminate the confinement the day before accused's departure. Accused was not in confinement when he departed. It is reasonable to suppose that accused knew that there was to be no confinement. (b) As for the failure of accused to turn himself in and the fact that his absence was terminated by apprehension, it has been held that these factors are insufficient in the case of an absence of approximately this duration to justify the inference of intent to desert". Accused was picked up only a short distance from the place of his departure. (c) "Nor does the fact that accused at the time of apprehension was wearing lieutenant's bars justify the finding of guilty of desertion", in the absence of additional factors. "Here, the evidence fails to show any effective attempt to impersonate an officer, and on the contrary, reveals that shortly before, accused, dressed in a sweater, was in the military police headquarters talking to a lieutenant. These circumstances scarcely warrant an inference that he was attempting to conceal his identity, and hence his wearing of officer's insignia had little bearing on the issue of intent to desert." (3) Previous Convictions: Evidence of a previous conviction for an offense committed after the date of the instant charged offense was improperly admitted. It is immaterial that it occurred "during the present absence without leave, since the latter was not a continuing offense and was committed on the day the absence commenced * * *. The error in admitting evidence of this prior conviction could not have influenced the findings of guilty, but only the sentence, reconsideration of which is necessary in any event in view of the inadequacy of the record to sustain the finding of guilty of desertion." (CM ETO 8631 Hamilton, 1945)

Accused officer was found guilty of desertion under a general specification in violation of AW 58, after his absence without leave from 20 October to 25 December 1944. HELD: LEGALLY SUFFICIENT. (1) Accused's absence without leave was sufficiently shown. He pleaded guilty to this lesser offense. The absence was shown. "It may be inferred from the evidence of the tactical situation of accused's unit, the length of his absence and the lack of evidence of permission, that the absence was without leave. (2) Intent: Likewise, the record sufficiently permits the inference that accused did not intend to return to duty, despite his testimony to the contrary. "His unsatisfactorily explained absence without leave for over two months from his organization in a combat zone, during which he was in constant proximity to military installations, terminated by apprehension, was legally sufficient evidence in itself to support such inference * * *. His dissatisfaction with his

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assignment as platoon leader, his sense of incompetence to discharge the duties of such position in combat and his consequent desire to be relieved thereof, also support such inference. His testimony that he intended to return, believed his status throughout his absence to be absence without leave and that he would merely be fined and reprimanded as punishment therefor is not convincing and the court was not obliged to give it credence. Although no movement orders were issued before accused departed, the court was warranted in inferring that he had notice that such orders were a matter of imminent anticipation. The battalion had just moved from a rest area, where it had remained about five days following contact with the enemy, into a temporary bivouac area. He testified he knew the unit would return to combat and thought the movement would occur on that evening or the next morning. * * * The court could properly infer * * * that, even consistent with accused's testimony that his motive was to promote the welfare of members of his platoon and others by removing himself from his command, his intention was to avoid the hazardous duty and shirk the important service of performing the functions of that command in combat. (3) Variance: The specification alleged that the desertion occurred in one place in France, whereas the proof showed that it occurred at another place therein. "As the place of desertion is not of the essence of the offense, the variance is immaterial within the contemplation of AW 37" (CM ETO 5565, Fendorak). (CM ETO 9257 Schewe 1945)

Accused was found guilty of desertion in violation of AW 58, after his absence without leave from 3 November to 21 November 1944. HELD: LEGALLY INSUFFICIENT. (1) Record of Trial: AW 33: "A question vital to the legal sufficiency of the record of trial to sustain the findings of guilty and the sentence arises from the fact that the document attached to the record, purportedly as Prosecution's Exhibit 1 * * *, consists of an unmarked carbon copy of purported extracts from morning reports of accused's organization for 4 and 21 November 1944, upon an original morning report form * * *, bearing the date 15 December 1944. The trial took place on 29 November 1944 and the action of the reviewing authority is dated 13 December. The chronology sheet * * * indicates that between 3 December and 13 December the record was 'lost during change of stations'. * * * It is apparent that the document * * * could not be the exhibit which was received in evidence at the trial held 16 days before its date. There is no indication in the record or accompanying papers as to what disposition was made of the exhibit actually received at the trial, and it would appear that the other document was annexed to the record on or after 15 December." Independent inquiry has failed to reveal just what did happen. "It is manifest * * * that the original exhibit offered at the trial does not accompany the record and there is absolutely no evidence available that the document actually annexed thereto is a true copy of such original. Consequently the Board of Review must * * * assume that the record of trial is incomplete in that an exhibit constituting a vital and material part thereof is missing therefrom." (AW 33; MCM, 1928, par 85a,b, p 71.) (2) The Evidence: The only competent evidence to prove the offense "consists of the

testimony of the assistant adjutant that accused was brought to him by military police, stated in response to inquiry that he could not return to his company and refused to return thereto, and accused's unsworn statement through counsel at the trial that 'he left the organization' because he desired a transfer." (3) The incompleteness of the record makes it impossible for the Board of Review to reach a determination as to whether the missing evidence was properly admitted or whether, in view of the lack of compelling and convincing evidence of absence without leave, the rights of accused were adversely affected by such admission, and thus denies to accused a right of such highly substantial character as to be fatally injurious within the contemplation of AW 37." (CM ETO 5595 Carbonaro 1945)

Accused enlisted men were found guilty of (a) desertion in violation of AW 58, from 22 August to 7 November 1944; and (b) the wrongful taking of an Army truck, and officers' clothes, in violation of AW 96. Accused Kelly was additionally found guilty of wrongfully and unlawfully representing himself to be a Captain, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Deposition in Capital Case: A deposition was improperly admitted in this capital case. However, no prejudice resulted. "Every material fact in the deposition was confessed by the accused; Substantial competent evidence, including sworn testimony of the accused, excluded 'any fair and rational hypothesis except that of guilt' * * *, and furnished compelling basis for conviction." (2) The Evidence: "Both accused were absent without authority from their organization until their apprehension 2½ months later. Posing as an American officer and his driver on patrol, they had settled down to a comfortable life in S** while their Division was pursuing the enemy across France * * *. Though each previously professed the intention of rejoining his organization, the evidence clearly shows that neither made any real effort to return to military service at any time, despite several opportunities to do so. These facts form a substantial basis from which the court was justified in concluding that accused absented themselves from the military service with the intent of permanently abandoning it * * *.". (CM ETO 6260 Calderon et al, 1945)

Accused was found guilty of two desertions in violation of AW 58, the first from about 11 December 1944, terminated by apprehension on 2 January 1945; and the second from about 3 January, terminated by apprehension about 9 January 1945. He was also found guilty of a failure to obey, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) Evidence: Both of accused's absences were unauthorized, the second arising when he failed to obey an order to rejoin his own command. "The first absence was for 22 days and the second lasted one week. Ordinarily absence for such brief periods, if satisfactorily explained, will not support charges of desertion * * *. However, there are additional circumstances in the present case which justified the court in finding that each absence was the result of an intent to desert. Accused did not testify or offer anything to rebut

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the natural inference growing out of these circumstances. His first absence was terminated by arrest. His return to military control was involuntary and his absence might well have lasted indefinitely, save for his arrest. This latter conclusion is almost inescapable in view of his second offense of absence without leave which was committed immediately, at the first opportunity, after his arrest. This second absence throws a most unfavorable light on the intent, which motivated his first absence. Particularly is this true in view of the fact that his second absence occurred when he was under direct order to rejoin his command. The court was justified in believing with respect to the second absence that it too was characterized by the same intent as that which inspired the first. * * * The evidence shows further that during these absences accused separated himself from his command by a substantial distance. (CM ETO 7379 Keiser 1945)

Accused was found guilty of desertion in violation of AW 58, after his AWOL commencing in Italy about 18 August 1944 and terminating in France about 22 January 1945. HELD: LEGALLY SUFFICIENT. (1) Evidence: "Competent uncontradicted evidence establishes that accused was admitted to an Army hospital on 5 August 1944. Thereafter his name appears on the morning report of the *** Replacement Company as being released therefrom for return to the *** Infantry Division on 18 August 1945. Accused was number 317 of a list of men dropped from rations and quarters at the Replacement Depot and under orders to return to the *** Division. He did not rejoin his organization at this time as directed by orders, but was returned to his company on 22 January 1945 by a member of the military police. He had no permission or authority to be absent from his company except for the purpose of going to the hospital and, by reasonable implication, of remaining there for such time as reasonably necessary to receive needed medical aid or treatment. The fact that he was carried on the morning report of the replacement depot on 18 August 1944 indicates that he had been released from the hospital and was being returned through channels to his organization. It is evident that accused was absent without authority from 18 August 1944 until 22 January 1945. (2) Intent: Further, the record justifies the conclusion that his AWOL amounted to desertion. "Where the condition of absence without leave is much prolonged, 'and there is no satisfactory explanation of it' the court will be justified in inferring from that alone an intent to remain permanently absent." (CM ETO 7663 Williams 1945)

Accused was found guilty of an AWOL in violation of AW 61, and of a desertion, occurring about two weeks later, in violation of AW 58. HELD: LEGALLY SUFFICIENT. (1) Charges: "Accused has been charged with AWOL from 15 December 1944 * * * and with desertion based upon a period extending from 11 January 1945 to 31 January 1945 * * *. Presumably the time during which he was absent from his company was divided into these two periods for purposes of the charges and specifications because of his sojourn in a military hospital between 30 December 1944 and 11 January 1945. Whether this constituted a return to military control in a sense necessitating the division of the period of absence thus effected is problematical * * *. However, inasmuch

as the specifications have been framed in this manner, the Board of Review need consider only whether accused has been properly found guilty as charged." (2) The AWOL was adequately proved. (3) Intent to desertwas also properly found. "The absence charged was of 20 days' duration, a period not in itself sufficient to support such an inference * * *. The evidence, however, shows various other factual elements from which the necessary intent may properly be inferred." Accused knowingly absented himself from his company while it was on the line. He made no effort to return. Rather, two weeks after his initial absence, he obtained treatment at a military hospital, and thereafter hitchhiked to Paris, some 300 miles away. He made no effort to turn himself in, despite the proximity of numerous military installations. Rather, he was apprehended in Paris. "Although the two absences were separately charged, it is apparent that as far as accused was concerned, his sojourn at the hospital represented a mere interruption of what he obviously intended as a permanent absence from his company." (CM ETO 9333 Odom 1945)

Among other things, accused was found guilty of desertions in violation of AW 58, (a) from 18 September to 13 October 1944, and (b) from 13 October 1944 to 17 February 1945. HELD: LEGALLY SUFFICIENT. Accused was continuously absent from his company from 18 September to 17 February 1945, a period of approximately five months. "This absence was without authority but was interrupted momentarily on 13 October 1944 by a return to military control when accused was picked up for being without a pass. There is no indication that he revealed his true status to the military police at this point, nor does the evidence show that he was detained by them for any material length of time. On the contrary he appears to have been immediately released with a direct order to return to his organization. Instead of doing so, he continued his AWOL for another four months. Because of this brief return to military control, two charges of desertion were brought, one consisting of the first period * * *, and the other of the second". The second absence was of sufficient duration in itself to show a desertion. "As to the first desertion, the duration of the absence (25 days) is not in itself sufficient to raise such inference * * *. However, as far as accused was concerned, it is apparent that the return to military control on 13 October 1944 represented a mere interruption of what he clearly intended as a permanent absence from his company. He had ample opportunity to surrender to military authority throughout the five months comprising the first and second periods of absence and not only failed to do so but actually disobeyed a direct order to return * * *." Both desertions were established. (CM ETO 9957 Robinson 1945)

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Accused was found guilty of the following desertions in violation of AW 58: (a) from 7 June to 4 September 1944; (b) 21 September to 24 September 1944; (c) 1 October-30 November 1944; and (d) 2 December 1944-14 January 1945. He was also found guilty of the larceny of a Government jeep in violation of AW 94. HELD: LEGALLY SUFFICIENT, as to the last three alleged desertions. (1) First Desertion: The evidence supported the finding of guilt as to the first alleged desertion. However, it is to be noted that "the morning report entry dated 31 January 1945, purporting to show accused's status as AWOL as of 0001 on 7 June 1944 was not admissible to prove the inception of such absence * * *. It appears certain that the information as to accused's status, recorded over seven months after the time thereof, could not have been within the personal knowledge of the entrant and hence the entry was not competent evidence of the facts therein stated. The other evidence, however, constitutes sufficient proof of the corpus delicti" upon which accused's confession was admitted. (2) Last Three Desertions: Convictions herein were based on a confession. It has been held that proof of the corpus delicti need not be beyond reasonable doubt, nor even by a reponderance, but rather that "some evidence corroborative of the confession" be introduced touching upon the corpus delicti. Forte v U.S., 94 F(2nd) at p 240 should be followed, wherein it is stated that it is the weight of authority

> "that there can be no conviction of an accused in a criminal case upon an uncorroborated confession and the further rule * * * that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delicti and the whole thereof. We do not rule that such corroborating evidence must, independent of the confession, establish the corpus delicti beyond a reasonable doubt. It is sufficient * * * if, there being, independent of the confession, substantial evidence of the corpus delicti and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith".

In the instant case, the corpus delicti of the last three confessions was inadequately proved. It consisted only of a first sergeant's testimony that "accused was absent from his battery without permission from 7 June 1944 to 14 January 1945 and that on 13 November 1944 he was living in a hotel in * * *, France, stole an Army jeep and on 15 November drove it away * * *." The morning report entries were incompetent, both (a) because they were not reasonably contemporaneous with the event, and (b) they were obviously not made on personal knowledge of the entrant. The first sergeant's testimony "was competent to prove accused's absence without leave from his battery at or near Rome from 7 June 1944 to 14 January 1945 or to such time as the evidence might prove." It was adequate on the first charged desertion, but inadequate as to the last three. "In view of his return to military control on 4 September 1944, he was

necessarily attached, albeit on confinement, to some military organization other than his battery, from which he must necessarily have absented himself without leave * * *. There is absolutely no proof, aliunde the confession, that he did so absent himself as alleged, or as to the duration or manner or place of termination of any of said absence. The evidence that he was living at a hotel at * * * on * * * and was in that town on * * * is far from probative in any degree * * *." "It may be argued * * * that the whole is equal to the sum of all its parts, that the greater includes the lesser and that therefore evidence of an overall absence without leave necessarily includes evidence as to any separate absences * * * within such overall period. Such argument * * * ignores the rule that such separate unauthorized absences are entirely separate and distict offenses from the overall unauthorized absence." (3) The AW 94 larceny was supported. Testimony permitted the inference that the jeep was valued at $800. (4) Time of Trial: No objection was made to trial two days after service of the charges. No prejudice resulted. No error was committed. (CM ETO 10331 Jones 1945)

Accused was found guilty of desertion in violation of AW 58 under AW 28 circumstances, and of an AWOL in violation of AW 61. HELD: LEGALLY SUFFICIENT IN PART. (1) "Accused's voluntary pre-trial statement was evidently reduced to writing, but the official investigating officer was permitted to testify as to its contents. The failure of the defense to object on the ground that the oral testimony was not the best evidence could properly be regarded by the court as a waiver of the objection." (2) Divided Period of Absence: "The reviewing authority in his action divided the period of absence in desertion alleged (30 September 1944 to 8 February 1945) into two separate periods (30 September 1944 to 4 December 1944 and 20 December 1944 to 4 January 1945), thereby attempting to create an additional offense not alleged, to wit: desertion with the intent charged commencing 20 December 1944 and terminating 4 January 1945. This attempt to change the identity of the offense charged, which by the court would have been nugatory (MCM, 1928, par. 78c, p 65), was likewise of no effect when made by the reviewing authority, and only so much of the findings of guilty as approved by the reviewing authority as involves findings of guilty of desertion as charged from 30 September 1944 to 4 December 1944 is supported by the record * * *." (CM ETO 8055 Costigan 1945)

416(9) (9) Proof of Intent; Unauthorized Absence

(14) Variance, Charge and Finding 416(14)

Cross References:

395(11) See in General
416 (9) 5593 Jarvis

(14) Variance, Charge and Finding: Accused was found guilty of two absences without leave in violation of AW 61; a breach of parole in violation of AW 96; and of two desertions in violation of AW 58--absent from 7 to 13 October; and from 26 September to 6 October, with intent to avoid hazardous duty (AW 28). HELD: LEGALLY SUFFICIENT. "The only question as to the legal sufficiency of the evidence to support the findings of guilty arises in connection with that portion of Specification 2, Charge II, which alleges that, having deserted 7 October 1944, accused remained absent in desertion until apprehended at * * * on or about 13 October 1944. Lt. Upham testified that, having seen accused at * * * on 6 October, he returned two days later (viz. 8 October), took accused back to * * * Corps Headquarters Rear and turned him over to Corps military police. A military police corporal of the * * * Division testified that he picked up accused at 'Corps' in * * * 7 October and that subsequently, on the same date, accused broke his parole and escaped. The only evidence, other than Upham's apparently contradictory testimony, of the time, place and manner of the termination of the desertion thus accomplished is accused's confession to the investigating officer that he was apprehended by the military police at * * *, 13 October 1944. However, a reasonable construction of the evidence, meager as it is with reference to this particular specification, permits a fair reconciliation of the apparent discrepancies noted, on the basis that either Upham or the * * * Division military police corporal erred by at least one day in testifying as to either the date on which accused was returned to corps headquarters by Upham or the date on which the corporal took him into custody." "The evidence * * * exclusive of the confession, narrowly fulfills the legal requirements to render consideration of the confession admissible for establishing the particulars of the offense alleged * * *." (CM ETO 5774 Schiavello 1945)

DESERTION

416(14) (14) Variance, Charge and Finding

419 (AW 61) Absence Without Leave 419

Not Digested:

364 Howe
515 Edwards
548 Tabb
839 Nelson
885 Van Horn
942 Shooten
947 Yeomans
960 Fazio
1100 Simmons
1262 Moulton
1360 Poe
1413 Longoria
1415 Cochran
1543 Woody
1606 Sayre
1671 Matthews
1704 Renfrow
1844 Sharp
1904 Mayes
2023 Corcoran
2044 Landeros
2072 Douglass
2098 Taylor
2158 Huckabay
2160 Prince
2210 Lavelle
2302 Hopkins
2368 Lybrand
2414 Mason
2452 Briscoe
2460 Williams
2465 Killingsworth
2470 Tucker
2474 Riden
2506 Gibney
2507 Foote
2553 Hammlett
2632 Johnson
2681 Scarborough
2682 Shadle
2755 Hart, 2nd Lt
2766 Jared
2779 Ely
2780 Woolsey
2827 Schecter
2908 Graham
2951 Pedigo
2965 White, Jr.
2966 Fomby
3056 Walker
3153 Van Breemen
3169 Leonard
3250 Ritter
3305 Nichelli
3416 Conyer, Jr.
3450 Willhide
3455 McManamom
3469 Green
3482 Martin
3570 Chestnut
3575 Hart
3643 Boyles
3860 Johnson
3862 Matthews
3880 Clark
3911 Engle
3920 Hannah
3929 Sarcinelli et al
3947 Whitehead
3974 Brown
3991 Valdez
3993 Johnson
4030 Elser
4055 Ackerman
4178 Phipps
4233 Washington
4245 Catalano
4262 Hoppes
4275 Crawford et al
4337 Winslow
4338 Edwards
4349 Morneau
4452 Treviso
4526 Archuletta(See 395(1)re conf)
4774 Ruess (Lt)
5032 Brown et al
5053 Campbell (Lt)
5137 Baldwin
5170 Rudesal et al
5456 Winfield (officer)
5641 Houston
5741 Kennedy et al
6383 Wilkinson
6857 Dougan
7086 Amura
7269 Van Houten (Lt from command)
7735 Bledsoe
8453 Caiazzo (lesser to AW 58-28)
8457 Porter (Capt from Command)
8485 Beard (partially lesser to AW 58-28)
8731 Sirois
8732 Weiss
9062 Boyer
7553 Besdine
8632 Golding
9878 Scheier
11468 Daggett
11619 Thompson
8189 Ritts,et al

419(AW 61) Absence Without Leave (contd) 419

Cross References:

385 (AW 28) AW 61 as lesser to AW 28-58:

455 Nigg
564 Neville
1921 King
2396 Pennington
2432 Durie
2481 Newton
3118 Prophet
3234 Gray
4163 Hughes (See 450(2))
4740 Courtney (See 433(2))
4986 Rubino
5958 Perry-Allen
6039 Brown
7532 Ramirez
8300 Paxson
8194 Shearer
6951 Rogers

416 (AW 58) AW 61 as lesser to AW 58:

1395 Saunders
1567 Spicocchi
5740 Gowins
5234 Stubinski
5593 Jarvis
6497 Garry Jr.
8631 Hamilton

433 (AW 75) AW 61 as lesser to AW 75:

4565 Woods
4691 Knorr
4740 Courtney (also lesser to AW 28-58)
5114 Acers

450 (2) AW 61 is lesser to AW 28-58:

8162 Hughes (AW 28-58 case)

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385 6766 Annino (with AW 58-28).
7399 Conklin (with AW 58-28)
395(18) 800 Ungard (variance between morning report and specification)
395(47) 5458 Bennett
399 2829 Newton(Penitentiary confinement not authorized)
405 4616 Molier
408(50½)3570 Chestnut
422 (1) 2904 Smith
422 (5) 7584 Emery (fail to repair; omit time and place of duties)
422(5) 9162 Wilbourn
454(18a)11216 Andrews (Officer; flight from Continent to UK)
408(4) 11619 Thompson (partial guilty plea; termination; review)

419 419(AW 61) Absence Without Leave

Cross References:

433 (2) 4691 Knorr (lesser to AW 75; termination not alleged but assumed)
450 (1) 3648 Mitchell
451 (56) 3754 Gillenwaters
453 (01) 4184 Neil (Also charged under AW 95)
454(18a) 5659 Maze, Jr. (in conjunction with black market offense)
454(56b) 6203 Mistretta (in conjunction with fraternization)
454 (67) 8832 Graves (also AW 94 and 96 offenses)
454(105) 3686 Morgan
454(56c) 8458 Penick
416(9) 9333 Odom (One AWOL; one desertion--separated by time in an Army hospital)
450(1) 4765 Lilly

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(2) Proof: Accused was AWOL for forty days. He was found guilty of desertion, in violation of AW 58. The reviewing authority concluded that he had only been absent without leave, and reduced his guilt to that of AW 61.HELD:LEGALLY SUFFICIENT.(1) Morning Report: In support of the charge of AWOL, the prosecution introduced an extract copy of a morning report which had been executed by a captain as the personnel officer and official custodian of the morning reports "of said company". This extract should not have been admitted.The company commander--not the personnel adjutant--was the official custodian of the morning reports. The certification by the company personnel officer was insufficient, notwithstanding the latter's statement in his certificate that he was the official custodian. (Note that such a document may be admitted by stipulation, or with the express consent of the accused after an explanation of his right to object.) (MCM, 1928, par.126c, p.137) (2) Proof: "The burden rested upon the prosecution to prove beyond a reasonable doubt the ultimate fact that accused was absent * * * without proper permission. The prosecution effected proof of such ultimate fact by establishing certain probative facts - facts which are uncontroverted". An AWOL may be proved by circumstantial evidence. Although the burden of proof never shifts in a criminal case, the prosecution's prima facie case did shift the burden of going forward to the defense. Accused offered no defense. "The burden of adducing evidence excusatory of his prolonged absence - the 'burden of explanation' - was on (accused) and his right to remain silent did not relieve him of such burden of going forward with the proof." (Note that "there is a manifest distinction between the burden of proof and the burden of adducing evidence, also known as the burden of explanation, and, while the burden of proof never shifts, the burden of adducing evidence may shift from side to side according to the testimony.'" (22 Corpus Juris Secundum, sec.573, p.887) (CM ETO 527 Astrella 1943)

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"Limitations of punishment for absence without official leave under the 61st Article of War as to offenses committed after 1 December 1942 were suspended by Executive Order 9267, 9 November 1942. Consequently the length of time accused was absent from his command was an immaterial matter in considering his guilt of such offense." (CM ETO 1249 Marchetti 1944.) (Mimeographed full opinion mailed.)

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Accused admittedly escaped from a locked Army hospital ward, and remained absent until discovered at a London army billet ten days later. Various items of army issue clothing were missed by soldiers from billets in London during the time the same billets were occupied by accused. Some of this clothing was found in his possession. Accused pleaded guilty to charges of AWOL in violation of AW 61, and escape from confinement in violation of AW 69, and not guilty to specifications of larceny of army property in violation of AW 94. He was found guilty of all charges (with minor exceptions as to one specification under AW 94). HELD: LEGALLY INSUFFICIENT FOR ABSENCE WITHOUT LEAVE; LEGALLY SUFFICIENT OTHERWISE. The records of this office show that at the time of accused's escape he was under sentence by general court-martial, which included confinement for eight years and a dishonorable discharge. The sentence was ordered executed by general court-martial order issued almost a month prior to his escape. "To warrant a finding of guilty upon trial of a general prisoner for desertion or absence without leave, it is incumbent upon the prosecution to establish as a necessary element of proof that the dishonorable discharge has not been executed and that he is still a soldier." After that general court-martial order, accused had been transferred to a disciplinary training center, and should have been discharged prior to the date of his escape. "But in any event, the record contains no evidence that he was still a soldier. He is described as a general prisoner, and a general prisoner cannot commit the military offense of absence without leave." The offenses of which accused was properly found to be guilty will support a sentence of only two years. (CM ETO 4029 Hopkins 1944)

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Accused was found guilty of a 20-day absence without leave, in violation of AW 61. HELD: LEGALLY SUFFICIENT. Since accused was "absent without leave at the time he claims he was seized by the 'FFI', this self-serving statement of involuntary restraint, even if true, does not, under the circumstances, constitute a legal defense to the offense charged." (CM ETO 4171 McKinnon 1944)

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Accused was found guilty of two absences without leave in violation of AW 61; of disrespect to an officer and insulting language to a non-commissioned officer in violation of AW 65; of assault with intent to murder with a hand-axe and assault with a dangerous weapon with intent to do bodily harm, in violation of AW 93; and of wrongfully taking and using a motor vehicle in violation of AW 96. HELD: LEGALLY SUFFICIENT.

419(2) (2) Proof

(1) AWOL; AW 104 PUNISHMENT: Although accused argued that he had been subjected to AW 104 punishment for his first AWOL, "there was evidence in the record from which the court could find that any restriction imposed upon accused after his AWOL was an administrative restriction pending investigation and trial and was not imposed as punishment under AW 104." (2) Assault: With respect to the assault with a dangerous weapon with intent to do bodily harm, the evidence sufficiently showed the requisite intent and guilt. "While MCM, 1928, par 149n, p 180 indicates that an assault with intent to do bodily harm is an assault aggravated by the specific present intent to do bodily harm to the person assaulted, it also indicates inferentially that such intent, or its legal equivalent, may be inferred from conduct which is in reckless disregard of the safety of others." (CM ETO 2899, Reeves) The question of accused's drunkenness on the issue of intent was one of fact for the trial court. (CM ETO 4303 Houston 1944)

Among other things, accused was found guilty of absence without leave in violation of AW 61, in that he was away from 4 August to about 16 August. HELD: LEGALLY SUFFICIENT. The evidence in support of the charge of absence without leave and its specification "is somewhat meager but is sufficient to support the court's finding that accused was guilty of the offense charged. Accused was shown to have been at the American Red Cross sleeping quarters in * * * on the nights of 5, 6, 8, 10, 11, 13 and 15 August 1944. The stipulation that accused 'returned to military control' on 16 August supports the inference that his absence from his organization and his presence in * * * was unauthorized. There was thus sufficient proof of the corpus delicti to admit that portion of accused's confession in which he stated that he absented himself without leave from his organization at * * * during the period alleged (Cf: CM ETO 3686, Morgan)." (CM ETO 4915 Magee 1944)

Accused was found guilty of absence without leave from 2 September to 17 October 1944, in violation of AW 61. He was also found guilty of a violation of AW 94, in that he had presented a false claim against the U.S. for pay in which, among other things, he misrepresented his army status. HELD: LEGALLY INSUFFICIENT IN PART. (1) The AWOL: The evidence in regard to the absence without leave showed that accused was an "incoming casual" at APO 873, USA on 12 October. "Absence without leave is terminated upon return to military control." It was therefore incorrect for the court to have found that he returned on 17 October 1944. (2) The False Claim: In regard to the charged violation of AW 94, the evidence "failed to show the amount of money which accused fraudulently obtained from the U.S. without deciding that accused's service record was incompetent to prove the allegations in support of which it was offered and received in evidence, the entries therein, taken by themselves, were meaningless to show accused's debtor and creditor status." The evidence showed that accused was overpaid, but did not show the exact amount. As to accused's representation, "there is one material, false representation" in his application for back pay, i.e. he represented his grade on

12 October as 'T/Sgt', whereas he was only a private and had been a private at least since 2 September 1944. "This covered part of the period for which accused was asking the pay of a technical sergeant.The pay which accused received on or about 12 October 1944 was necessarily computed on the basis of that due a technical sergeant and accordingly he received a greater sum than he was entitled to receive as a private. Accused was thus proved to have defrauded the U.S. in violation of AW 94. The exact amount was not shown, however. There was no evidence that the amount of this fraud exceeded in value the sum of $20.00." (3) The findings must be modified, as above indicated. (4) Penitentiary confinement is not authorized for this combination of AWOL, and the obtaining of not in excess of $20 by fraudulent means, in violation of AW 94. (CM ETO 5569 Keele 1945)

Accused was found guilty of a violation of AW 61, in that he was absent without leave from 10 to 19 September 1944 in England, after having been alerted for Continental service. He was also found guilty of a violation of AW 93, of an assault with intent to do bodily harm by striking with a dangerous weapon, to wit: an iron bar; and of a violation of AW 96, of the wrongful carriage of a civilian in his military vehicle. HELD: LEGALLY INSUFFICIENT ON THE AWOL CHARGE.(1) AWOL: Accused's confession of his absence without leave was improperly introduced, because the corpus delicti was not established. Although a Morning Report entry to show the commencement date of the alleged absence without leave, a personnel officer testified over objection that it was based on official information which he had received "by a telephone call in due course of business", to the effect that accused had not reported to the new station to which he had been assigned. Likewise, certain other records were similarly founded. "There is no competent evidence that accused was absent without leave. The personnel officer's testimony and his entry deleting accused from the embarkation roster were inadmissible as hearsay and as based on hearsay respectively. Accused's arrest in * * * does not prove or tend to prove any element of the offense charged. Outside of the confession and the wholly inadmissible testimony above noted, the evidence * * * merely shows that on 9 September 1944 accused was transferred from the company from which he was charged with absenting himself without authority, and assigned to the advance headquarters of the replacement system; and that on 19 September 1944 he was arrested in * * * and - a mere generalization in response to a flagrantly leading question on direct examination - as the result of his arrest, returned to the U.S. military authorities. The civilian who testified in answer to this leading question was in no sense qualified or competent to testify that accused was returned to military control and by such testimony afford a proper basis for the implication flowing therefrom. This is neither evidence that the offense charged was committed or that it was probably committed. * * * Where * * * evidence relied on as a predicate for introducing the confession is as wholly without potency to show that the offense was committed, as is the evidence under consideration, the minimum burden of probable

proof has not been discharged. The evidence is therefore legally insufficient to support the findings of guilt" on the specification alleging absence without leave. (2) Sentence: However, the 11-year sentence herein is adequately supported by the proof of the other two offenses alleged to have been committed by accused. (CM ETO 5633 Gibson 1945)

Accused officer was found guilty of violations of AW 61, in that (a) he absented himself without leave from his station on two separate occasions, and (b) he failed to repair at the fixed time to the properly appointed place of assembly for briefing for a combat mission. He was found guilty of breaking restriction in violation of AW 96, and of breaking arrest in violation of AW 69. HELD: LEGALLY SUFFICIENT. (1) AWOL:-first absence: "Accused, absent on pass, failed to return to his station until about three hours after the expiration of his pass. This absence was unauthorized. Explanation was offered on the ground that accused missed the regular transportation service back to camp. But there was no evidence that if such were the fact it was not due to his own carelessness and neglect. * * *." (2) Fail to Repair. "This conduct was charged under AW 61, and is an offense when committed by a soldier 'through his own fault' (MCM, 1928, par.132, p. 145)." Accused had returned 3 hours late from a pass which expired at midnight; was notified at that time that breakfast would be at 0430 and a briefing session at 0530 hours. "For the purposes of a prosecution for failure to attend a briefing session, under AW 61 * * *, it is only fair to conclude that the officers subject to this duty had a right to rely upon being called and that their absence from such session would be excusable if they were not called. Accused was not in when the charge of quarters awakened the crews at 3:30 but he was told when he came in shortly thereafter. The purpose of the call was both to awaken the men and to notify them of the session. It is equally true that accused knew of the session. He was called again at 6:00 and found in bed asleep. He was chargeable with personal responsibility for being awake and attending the session. It was only proved that accused was not present at the roll call of the session. He stated he came in later. Whether or not he is believed, there is no doubt that he failed, and through his own fault, to be present 'at the fixed time' for the session. Such failure * * * is a violation of AW 61, as charged." (3) AWOL-second absence: Accused was absent from station herein from about midnight of 4 November until 1430 hours the next day, as alleged. "This absence was unauthorized. In the ordinary course of events, a pass for 48 hours would have been issued to accused as a result of his operational mission on 4 November, but the pass was not issued on this occasion. * * * Even though a certain degree of informality attended the issuance of passes at that post, the restriction imposed by the squadron commander the evening of 4 Nov was sufficient to put accused on notice that even had he been granted a pass it was automatically revoked by the subsequent restriction." (4) Break restriction: While at a dance, accused's squadron commander verbally told him he was restricted for a week, starting at midnight. "This communication was oral and not in writing. It was not intended as punishment (for accused's derelictions the day before) but was to insure accused's attendance at and presence on all opera-

tional missions." The restriction was valid. "Military courts have recognized the right of commanding officers to impose certain types of restriction when military necessity indicated the wisdom of such procedure in order to create and maintain efficiency." (Discuss in detail.) "The restriction having been legally imposed, accused's breach thereof was an offense in violation of AW 96 * * *." (5) Break Arrest: Accused was legally under "arrest at the time and restricted to his squadron site by the terms of the order of arrest." Nonetheless, he attended a moving picture in a building outside his squadron site. While he could leave his area of restriction to mess, and while it was also true that the motion picture was located in the mess building, his right to mess did not permit him to attend that picture. "What accused may have thought as to his right to remain in the building is immaterial to his guilt. Intention or motive is immaterial to the issue of guilt of breach of arrest, AW 69, 'though, of course, proof of inadvertence or bona fide mistake is admissible in extenuation' (MCM, 1928, par.139a, p.153)." (CM ETO 6236 Smith 1945)

Accused was found guilty of absence without leave in England from about 28 May to 7 October 1944, in violation of AW 61. HELD: LEGALLY SUFFICIENT. (1) Morning Report Entries: At the time of his absence without leave, accused had been a member of the 17th Replacement Depot. While he was away, it was transferred from England to the Continent. Prior to departure it transferred some men, in various status, to the 12th Replacement Depot. A lieutenant testified that he was personnel officer of his unit at Camp * * *, "and that in that capacity he received original official records pertaining to the men who were transferred." Among those records was a morning report showing accused's transfer from the 17th Depot to the 12th Depot in AWOL status. Likewise, there were two other morning reports which were introduced. (a) Replacement Depots; Morning Reports: "Though the trial record is not as explicit as it might be in reference to Lt * * *'s relation to the 17th Depot, the Board of Review will take judicial notice of the peculiar transitory nature of personnel and administration of necessity pravalent in Replacement Depots. It may thus fairly be inferred that the 12th Depot became the successor to the 17th Depot and as such records of both units merged into the common legal custody of the personnel officer of the succeeding unit. Thus Lt * * * became the official custodian of original records of both the 12th and 17th Depots. In that capacity he was competent to certify extract copies from original records of either unit." (b) Morning Report Authentication: "The Morning Report extract copy reciting accused's transfer in AWOL status was properly authenticated. Defense's objection was directed at the competency of the facts recited on the original morning report entry. Counsel asserted the entry was not the best evidence to prove the transfer in AWOL status. * * * There was no attack on the verity of the report but conversely it was corroborated by the testimony of * * *, the company commander, who testified that accused had never been physically present in the company since he had been commanding"(period subsequent to the initial AWOL). "The law

member did not err in overruling defense's objection to the admissibility of this exhibit." (c) Morning Report; Accused's Status: A third morning report entry was also properly admitted, which showed the change of accused's status from AWOL to confinement. "The Board of Review * * * recently ruled as admissible an extract copy of a morning report in which the entry, as in the instant case, reported accused's change of status from absent without leave to confinement." (CM ETO 4740 Courtney; 28 USC 695, sec 1; 49 Stat 1561) (CM ETO 6342 Smith, J.E. 1945)

"Notwithstanding accused's plea of guilty to * * *, alleging absence without leave from 5 November to 18 November 1944, the evidence only supports a finding of absence without leave from 5 November to 8 November 1944. The evidence clearly indicates that the period of unauthorized absence was temporarily interrupted 8 November 1944 when accused came under military control at the military police sub-station at * * * Paris * * *." (CM ETO 7474 Lofton 1945)

Accused officer was found guilty of a violation of AW 61 in that he did, from about 31 December 1944 to about 2 January 1945, in Belgium, without proper leave wrongfully deviate from his proper route of travel, in pursuit of his personal activities. He was also found guilty of a failure to obey and the wrongful use of a government vehicle in violation of AW 96, both offenses arising out of the same over-all situation. HELD: LEGALLY SUFFICIENT. (CM ETO 9260 Rosenbaum 1945)

"The extract copies of the morning reports show that the originals were signed by a warrant officer, Personnel Officer. He was not the commanding officer and had no authority to sign the company morning report. The evidence, however, shows that accused were living in a French town from about the time alleged at the beginning of the absence without leave where they were apprehended by the military police on the termination date. The entire evidence is inconsistent with a duty or authorized status, and both accused in voluntary signed statements admitted absence without leave for the period alleged." (1st Ind., CM ETO 9271 Cockerham 1945)

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(3) Variance, Charge and Finding:

Cross References: 395 (11) In General

Accused was charged with AWOL from 20 January 1944 to about 26 March 1944. He was found guilty of AWOL from 20 January to about 12 February 1944 and from about 1 March 1944 to about 26 March 1944, in violation of AW 61. HELD: The record is legally sufficient to support only the finding of guilty of AWOL from 20 January to 12 February 1944. A court-martial may not, by exception and substitution, change the nature or identity of any offense charged. (MCM, 1928, par.78c) (CM ETO 2829 Newton 1944)

419(3) (3) Variance, Charge and Finding

421 (AW 63) Disrespect Toward Superior Officer:

Cross References: 422(3) Carrying gun and threatening superior officer; lesser offense to AW 64 charge. 106 Orbon
422(6) Disrespect to officer; illegal order. 1661 Hass
422(5) 3988 O'Berry

Not Digested

194 Mack
1015 Branham
2569 Davis
2867 Cowan
2921 Span
3888 Burket
4053 Jordan
4238 Flack
4332 Sutton
4550 Moore et al
10098 Mooney
8189 Ritts,et al

(2) Proof: Accused officer was found guilty of a violation of AW 63, in that he did behave himself with disrespect towards his superior officer by contemptuously and sarcastically saying to him in a loud and disrespectful manner: "I don't have to and am not going to answer any of your damn questions and you don't have any authority over me and I am going to take this matter up with the Adjutant General"--or words to that effect. HELD: LEGALLY SUFFICIENT. (1) Evidence: The evidence sufficiently showed that accused "used the language alleged, 'or words to that effect', and it supports each allegation * * * except the words 'contemptuously and sarcastically' and the words 'in a loud and'. The language employed by accused toward * * * his superior officer, itself constituted disrespectful behavior, as alleged, in violation of AW 63. Accused's very physical attitude and manner were disrespectful. It was unnecessary to prove the excepted words in order to sustain this charge." (2) Right to silence: "By implication, accused attempted to inject as an issue of the trial his right to refuse to answer the question addressed to him by his commanding officer. His right to remain silent was not an issue. He was not on trial for his silence but for the disrespectful behavior found in the language he unnecessarily employed to exercise this claimed right. Disrespectful language used in refusing to obey an illegal order is no defense to a charge under AW 63 * * *." (CM ETO 2866 Woodson 1944)

Among other things, accused was (a) found guilty of behaving with disrespect toward his superior officer in violation of AW 63 by swearing at him on 6 August, and (b) found guilty of two AW 96 specifications alleging his threatening and insulting language against the same superior officer--"I'll get you yet * * *"; and "I'll get even with you yet"; and swearing at him. HELD: LEGALLY SUFFICIENT. (1) Multiplication: The court properly overruled accused's motion to strike the AW 96 specifications.

The motion was made on the ground that the alleged offenses constituted a part of the charge of a violation of AW 63, and therefore amounted to a multiplication of charges. (MCM, 1928, par.27, p.17; Winthrop's Reprint, p.152) "The evidence established that accused committed three separate and distinct offenses with respect to * * * his superior officer, as severally alleged"--using disrespectful language (AW 63), and using threatening and insulting language, and insubordination (AW 96). (MCM, 1928, par.133, pp.146-147; CM ETO 2921; CM ETO 106) "There were clear lapses of several hours between the first and second and between the second and third offenses. The separateness and distinctness of each of the three offenses is not affected by the fact that their commission indicated a continuing contumacious state of mind on accused's part." Moreover, the AW 96 offenses "involved not only disrespectful behavior toward a superior officer but also threatening language of an extremely insubordinate nature toward such officer, and were therefore far more serious in nature than the mere disrespectful behavior contemplated by AW 63, the maximum punishment for which is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months." (MCM, 1928, pars.104c, 133, pp.98, 146-147.) "Although threats may and sometimes do accompany or aggravate disrespectful behavior * * *, they may extend beyond the scope of AW 63 in seriousness * * *." (2) AWs 63, 64, 65: "Although AW 63 denounces only disrespectful behavior toward a superior officer and AW 64 denounces only the assaulting and willful disobedience of such officer, AW 65 denounces these offenses when committed against a warrant officer or a noncommissioned officer and also the use of threatening language and insubordinate behavior toward such officer. Neither Articles of War 63 or 64 denounce as such the use of threatening language or insubordinate behavior toward a superior commissioned officer. Consequently such conduct may also with propriety be charged as a violation of AW 96, under which there is no maximum punishment except that a sentence of death is unauthorized." (ETO 2212) In regard to AW 65, "it is apparent that the same offenses are denounced in Articles of War 63 and 64 on the one hand and AW 65 on the other only generally, in regard to the objects sought to be attained, and that one respect in which AW 64 is more inclusive in its scope is in the matter of threatened violence." The court below did not abuse its discretion in denying the motion to strike the AW 96 specifications. (3) Drunk: "Inasmuch as it was not necessary to prove a specific intent on the part of accused, his drunkenness could not minimize his offense." (ETO 106; 3937) (CM ETO 3801 Smith 1944)

AW 63 DISRESPECT TOWARD SUPERIOR OFFICER

421

422 (AW 64) Assaulting or Willfully Disobeying Superior Officer:

Not Digested:

108 Abrams (willfully disobey)
768 Dixon (draw weapon--cook's knife)
1015 Branham (willful disobedience)
1360 Poe (strike superior officer)
1361 Story (willful disobedience)
1413 Longoria (willful disobedience)
2005 Wilkins (willful disobedience)
2039 Wright (willful disobedience)
2414 Mason (willful disobedience; lift weapon)
2462 Gumbs (strike superior officer)
2492 Cooper (willful disobedience)
2569 Davis (willful disobedience)
2693 Comley (willful disobedience)
3078 [illegible] et al (collective willful disobedience of order to proceed to work; close to mutiny)
3080 Holliday (refusal to fly)
3118 Prophet (willfully disobey)
3300 Snyder (willfully disobey)
3699 Allison (willfully disobey; strike superior officer)
3827 McAdams (lesser offense, fail to obey--AW 96; also drunkenness. draw weapon)
3888 Burket (willfully disobey)
4053 Jordan (willfully disobey)
4238 Flack (willfully disobey; draw weapon)
4550 Moore et al (strike superior officer; lift weapon)
4988 Fulton (willfully disobey)
5051 Williams (willfully disobey (2d Lt))
5353 Charlinski (officer ordered not to go to Paris)
5396 Nursement
5558 Corsino
5642 Ostberg
5810 Lynch (willfully disobey; no proof of accused's mil. service)
5901 Taylor (in conjunction with AW 75; shattered nerves)
5966 Whipple (ordered to carry barracks bag)
6050 Guttman (in conjunction with AW 75; shattered nerves)
6210 Winant, Lt (refuse to fly)
6428 Bostic (strike officer)
6457 Zacci
6946 Fayne
7270 McDonald, Jr (2d Lt)
7687 Jurbala
10003 Rentzel (lift weapon; willfully disobey)
8492 Winters Jr (willfully disobey)
8189 Ritts, et al (strike officer)
11256 Nunez (willfully disobey

422

(1) Insulting Superior Officer 422(1)

Assaulting Superior Officer

Cross References: 422(3) 106 Orbon (Weapon and threats)
422(3) In general

(1) Proof:

Accused spent an evening at a "pub" drinking. Upon his departure, he joined a profane group of soldiers who were standing on the street. The night was gray-black. A superior officer approached the group, and ordered that the objectionable language cease. The officer was struck on the lip with a fist. Accused was found guilty of that assault on the officer, in violation of AW 64. HELD: LEGALLY SUFFICIENT. (1) Identity: The only important question herein is whether accused knew the person he struck to be his superior officer. While accused stated that he could remember nothing of the occurrence, it appeared that the officer was a member of accused's regiment; was dressed in an officer's uniform; and was but 2½ feet away from him. (2) Intoxication: "Although intoxication may be considered as affecting mental capacity to entertain a specific intent when such intent is a necessary element of the offense charged (MCM 1928, par 126a, p 136), and is a defense when it is such as to destroy such mental capacity * * *, the question of the degree and consequent effect of accused's intoxication is one of fact for the court's determination, which will not be disturbed by the Board of Review when it is supported by substantial evidence." (CM ETO 2484 Morgan 1944)

Lift Weapon: Accused was found guilty of lifting a weapon against his superior officer in violation of AW 64; of unlawfully bearing arms and assembling with intent to engage in combat with other American soldiers in violation of AW 96; and of various absences without leave in violation of AW 61. HELD: LEGALLY SUFFICIENT. (1) AW 64; Lift Weapon: Accused was charged with lifting a sub-machine gun against his superior officer, then in the execution of his office. AW 64 denounced "the lifting up by a soldier of a weapon against his superior officer 'on any pretense whatsoever.' While the last-quoted phrase does not exclude as a defense the fact that accused did not know the officer to be his superior, or that the lifting up was done in legitimate self-defense, or in the discharge of some duty such as the suppression of a mutiny or sedition", accused did not raise any of those defenses. (ETO 1953, Lewis.) (2) AW 96; Wrongful Assemblage, etc.: It was also alleged that accused, in conjunction with others, unlawfully bore arms and assembled "with wrongful common intent to engage in combat with other American soldiers, and, in pursuance thereof, evasion of sentry and departure from post * * *." The allegations were supported. "The con-

duct established by the evidence is accurately described in the specification and so clearly constitutes a violation of AW 96 * * *. If it does not, in itself, involve a consummated riot, it involves all of the elements of the common law offense of rout." (Wharton's Criminal Law, sec 1859, p 2191.) "Had the accused and his companions carried out the purpose of their unlawful assembly, pursuant to the preparatory steps already taken at the time they were forestalled, they would have committed a riot * * *. Moreover, the assembly and bearing of arms under the circumstances shown were both unlawful and prejudicial to good order and military discipline, as were the evasion of the sentry and the abortive march" on a nearby town-- "whether a purpose of rescue only or one of revenge as well, motivated the participants." (3) The AW 61 AWOLs were likewise sufficiently proved. (CM ETO 2904 Smith 1944)

Among other things, accused were found guilty of an assault upon Lt J**, then in the execution of his office, in violation of AW 64. HELD: LEGALLY SUFFICIENT ONLY FOR LESSER OFFENSE OF ASSAULT AND ASSAULT AND BATTERY IN VIOLATION OF AW 96. MCM, 1928, Par 134a, p 148, "is entitled to special emphasis where the offenses occurred in an active theater of operations and an officer is almost constantly on duty * * *. It does not, however, necessarily follow therefrom that an officer will be considered as acting 'in the execution of his office' at a time when he was under the influence of intoxicants to the degree that he received punishment under the 104th AW for drunken and disorderly conduct. Although Lt J** testified that he 'wasn't drunk but * * * was under the influence of alcohol', his acceptance of punishment under AW 104 and the competent evidence * * * leads unerringly to the conclusion that he was thoroughly intoxicated on the night in question." "The Board of Review is of the opinion that an officer so flagrantly unfit to perform his duties as was Lt J** on the night of 18 July was not 'in the execution of his office' within the meaning of AW 64, and the record of trial is legally insufficient to support the findings of guilty as to each accused in violation of said Article * * *. The record is legally sufficient to support findings of guilty of the lesser included offenses of assault and assault and battery upon Lt J**." (CM ETO 5546 Roscher et al 1945)

(1st Ind, CM ETO 5546 Roscher et al, 1945: "A careful study of the record of trial gives strong support to the inference that the fracas grew out of a drunken brawl between Lt J**'s party and accused. While both accused merit punishment and accused S**'s subsequent acts, which form the basis of the additional charges against him, furnish convincing testimony that he should be separated from the service, the relative 'whitewashing' given Lt J** is the type of inequality of treatment as to officers and enlisted personnel which may well serve to cast discredit upon military justice. Substantial evidence * * * shows that Lt J** should have been tried by court-martial. His flagrant disregard of his responsibilities as an officer in an active combat zone was a discredit to the service, and there seems little doubt that the offenses would not have been committed if Lt J** had been in fit condition to perform his duty and if his companion, Lt K**, had not been 'out cold' in the

jeep. I therefore recommend that the term of confinement of accused S** be reduced to five years.

"The conduct of the trial judge advocate was not calculated to reflect credit on the administration of military justice. The trial judge advocate is charged with a duty to the military service. Tactics which would have been discreditable in a civil criminal court cannot be considered as a proper pattern for a trial judge advocate to follow in a court-martial."

AW 64 ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR OFFICER

422(1)

(3) Willfully Disobeying; In General 422(3)

Willfully Disobeying Superior Officer

Cross References: 422(6) Legality of Order--In General
454(21) 1366 English (Improper AW 104 punishment)

(3) In General:

Accused was found guilty of the following offenses--all arising out of the same background: (a) Drawing a weapon against a superior officer in the execution of his duty, in violation of AW 64; (b) Willful disobedience of the lawful command of a second superior officer, in violation of AW 64; and (c) Disrespect toward the second superior officer by carrying a loaded pistol and threatening to shoot him on sight, in violation of AW 63. HELD: LEGALLY SUFFICIENT.

(a) Investigation and Affidavit: After investigation, another AW 64 charge was replaced with the AW 63 charged for which accused was tried. The AW 63 charge was not sworn to. Accused moved that the AW 63 charge be dismissed. The motion was properly denied. (i) "While the charges form the basis of the investigation it is the transaction or event which gave rise to the charges which is the true subject of investigation." (MCM, 1928, sec 34). The investigation required by AW 70 is intended to envelop an entire situation. "It may be that the charges are inappropriate to cover the offense or offenses revealed by the investigation. Hence, the convening authority is empowered to amend and adjust and should amend and adjust the charges to meet the facts * * * before referring the charges for trial. The only limitation * * * is that the 'redraft' does not include any substantial change or include any person, offense, or matter not fairly intended in the charges as received.' * * * It does not prevent the convening authority from re-drafting or re-stating the charges so as to make them allege an offense or offenses supported by the facts discovered and shown by the report of investigation." "The fundamental difference between an offense under AW 63 and AW 64 is found in the fact that under the former the accused can commit the offense out of the presence of the superior officer while under the latter the accused must commit the offense not only in the presence of the superior officer but also there must be an act or acts of violence physically attempted towards the superior officer." The two offenses are distinct, and an offense under AW 64 is not a lesser included offense under AW 63. It is "deductible that there was introduced

by the amendment of the charges a new offense 'not fairly included in the charges'" as originally drawn. However, no additional investigation under AW 70 was required. (ii) No prejudice resulted to accused because the additional charge and its specification were not sworn to. It has been held that AW 70 "requiring that the charges be supported by the oath of the accuser is procedural, and not jurisdictional, is for the benefit of the accused and may be waived by accused either explicitly or by failure to object to the irregularity." Although this accused did not waive the irregularity, he was neither surprised nor misled. He made no attempt to controvert the prosecution's evidence. Rather, he merely denied all knowledge on the ground that he had been intoxicated. A verification would have added nothing to his defense.

(b) Willful Disobedience: The evidence showed that accused had been drinking extensively during the two days preceding his offenses. There was also evidence that he had a head injury. However, there was also evidence in conflict with the above. The court's finding of fact that there had been a willful disobedience will not be disturbed. (Rule: A willful disobedience offense under AW 64 "requires the proof of a specific intent * * * to defy authority, deliberately and consciously. * * * Involved in the conscious refusal to obey the order is the ability of the accused to understand the order and to comprehend its nature and purpose and the formation of a mental design not to obey same. The accused must possess sufficient mental faculties to allow this process to come into play. Should accused's mental condition become paralyzed or is rendered inoperative to the degree that the formation of a willful purpose not to obey or to omit to obey a lawful order, then it is impossible for him to possess the specific intent of disobedience which is the gravamen of the offense.")

(c) Disrespect: The specification alleging disrespect under AW 63 was also sufficiently supported. "'It is * * * not essential that the disrespect be intentional: a failure to show a proper respect to the commander, through ignorance, carelessness, bad manners, or no manners, may, equally with a deliberate act, constitute an offense under the article'. (Winthrop's Military Law and Precedents, sec.875, p.567.) Inasmuch as it is not necessary to prove a specific intent on the part of accused, his claimed drunkenness could not minimize his offense." (CM ETO 106 Orbon 1942)

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(5) Proof;in General:

Cross References: 454(13) 2608 Hughes (willful disobedience; with attempt to create a riot, and urging soldiers to disobey)

(Eventual compl.) 424 3147 Gayles et al (in conjunction with "mutiny") Place of confinement

421(2) 3801 Smith (discuss AW 63,64,65,96)
433(2) 4004 Best (disapproved)
453(01) 4184 Neil (willful disobedience by officer; also drunkenness)
422(6) 5167 Caparatta
416(9) 5196 Ford (In conj. with AW 58)
416(9) 5593 Jarvis (with AWOL; Variance-Co. v. Org.)
433(2) 6694 Warnock (With AW 75 offense)

Accused's superior officer ordered him to go to his quarters under arrest. Accused immediately replied that he understood and knew what the officer meant, but that he was not yet ready to comply. The officer called the Officer of the Guard, and five or ten minutes later accused was taken to his quarters by the latter. Thereafter, he broke his arrest. He was found guilty of: (a) willful disobedience of his superior officer's command, in violation of AW 64, and (b) breach of arrest before being set at liberty, in violation of AW 69. HELD: LEGALLY SUFFICIENT. (1) The offense of willful disobedience in violation of AW 64 was adequately established. Although accused's defense was that he was drunk and did not intentionally commit either of his offenses, the court "was the sole judge of the credibility of the witnesses and the weight and sufficiency of the evidence * * *." (MCM, 1928, par.126a, p.135). (2) Accused likewise breached his arrest. "In breach of arrest under the 69th Article of War, 'the restraint is moral restraint imposed by the orders fixing the limits of arrest * * *. The offense of breach of arrest is committed when the person in arrest infringes the limits set by orders * * * and the intention or motive that actuated him is immaterial to the issue of guilt * * *." (MCM, 1928, 139a, pp.153-154) (CM ETO 817 Young 1943)

Because accused had breached a previous restriction, his superior officer imposed punishment under AW 104 upon him by (a) restricting him to the company area for one week and (b) requiring him to report once each half hour during the evenings of that week to the charge of quarters. Accused failed to report to the charge of quarters. He was found guilty of willfully disobeying his superior officer's order that he so report, in violation of AW 64. HELD: LEGALLY SUFFICIENT ONLY TO SUPPORT A FINDING OF FAILURE TO OBEY, IN VIOLATION OF AW 96.

(a) Legality of the Punishment under AW 64: (i) Nature of Punishment: "Punishments described in the article are not intented to be exclusive of all others, but a punishment not mentioned therein in order to be proper must be similar in nature to those specifically named." It was proper to

to give accused company punishment for his earlier breach of restriction, since the offense was a minor one. It was likewise proper to punish him with restriction for one week. No double punishment resulted because, in addition thereto, he was required to report every half hour during evening hours. This was only incidental to the real punishment of restriction, and was not an extra fatigue. (ii) Warning of Rights under AW 24: Before his superior officer imposed the company punishment upon accused, he asked him, without knowledge that he had violated his previous restriction, why he had not stood reveille that morning. He did not inform him of his rights under AW 24 at the time. However, accused's rights in regard to self-incrimination were not violated. "Considering accused's admission of his breach of restriction as a confession it was freely and voluntarily given and was free from compulsion or promise of leniency. The practice of informing an accused of his rights under the 24th Article of War prior to obtaining his confession is not mandatory in the sense that failure to give such warning forbids the admission of the confession in evidence. * * * If it is shown that the confession was the voluntary act of an accused, the test of its admissibility is met notwithstanding the fact that the 24th Article of War was not read or explained to accused." "The prohibition is clearly directed against 'the use of physical or moral compulsion to extort communications' from a witness before one of the named bodies or officers." (iii) Warning of Rights under AW 104: Accused's punishment under AW 104 had become effective only after he had read and signed the company punishment sheet which recorded his punishment. That sheet apprised him that he had the right to elect trial by court-martial, and was the best evidence that he had been so apprised. "His written acknowledgment of such notice and of his desire to take company punishment stands unimpeached." Although it does not appear that he was additionally notified of his right to appeal, no prejudice resulted from this omission because "there is no indication in the record that the punishment imposed was in fact unjust, disproportionate or otherwise improper or that an appeal if taken by accused as authorized would for any reason have been successful." (Distinguish CM ETO 1015 Branham and CM ETO 1366 English)

(b) Willful Disobedience under AW 64: Although the fact that the officer's order to accused, that he report to the charge of quarters each half hour during the evening, was to be executed in futuro "does not require that disobedience thereof be charged under the 96th rather than the 64th Article of War, neither does the mere fact that a specific order was given by a commissioned officer require that disobedience thereof be charged under the 64th Article." The instant order, however, was more of a direction for a "mere routine duty", insofar as AW 64 is concerned. When taken in conjunction the contemplation of that Article. "A simple offense cannot properly be charged as a capital offense under the 64th Article of War merely because a commissioned officer gave a specific order to report, which order accused willfully disobeyed. Nevertheless, accused's deliberate, contumacious failure to report to the Charge of Quarters even once was reprehensible and is punishable under Article of War 96." The evidence sufficiently supported only a finding of guilt for this lesser offense.

(c) Punishment for the Lesser Offense: The offense under AW 96 of which accused was guilty is most closely related to breach of restriction, for which the maximum punishment is confinement at hard labor for one month, and forfeiture of two-thirds pay for a like period. The sentence must be reduced accordingly. (MCM, 1928, par.104c, p.100) (CM ETO 1057 Redmond 1944)

Accused sergeant was a cook in his unit. His superior officer wished him to become the Mess Sergeant. Accused did not do so. He was found guilty of willfully disobeying the officer, in violation of AW 64. HELD: LEGALLY INSUFFICIENT. "The record of trial fails to disclose that accused was given 'an order of a specified character'. On the contrary the evidence shows that" the superior officer "had two discussions with accused during which he 'pointedly impressed upon him his 'wishes and views' and attempted to persuade him to assume the duties of mess sergeant instead of giving him a definite, express order to assume such duties. The captain's testimony that accused 'clearly understood' that he was to be mess sergeant was merely a conclusion by the witness, unsupported by the evidence * * *. Similarly, the evidence fails to show that accused was guilty of disobedience 'of a positive and deliberate character' exhibiting 'an intentional defiance of authority'. The evidence submitted by the prosecution fully justified accused's stated belief that he actually had a choice of becoming mess sergeant or being 'busted to private and put on general duty'." (Rules: "'Mere instructions would not in general fulfill the definition of an order or 'command' * * *; nor would a mere statement of his wishes and views by his superior, however pointedly impressed upon the inferior in his entering upon the duty.'" "'It is agreed by the authorities that the offense specified in this part of the Article is a disobedience of a positive and deliberate character. * * * The disobedience must be willful and intentional.'" (Winthrop's Military Law and Precedents, Reprint, p.573, 574.) (CM ETO 1096 Stringer 1944)

Accused flying officer was on flying status and was qualified to fly. Although not originally scheduled to fly a particular mission, he was ordered to fly that mission by a superior officer, as a replacement, after a previously assigned bombardier had become ill. He failed to do so. He was found guilty of willfully disobeying an order of his superior officer to report to his Squadron Commander for flying duty and to fly with his squadron on a scheduled combat operational mission, in violation of AW 64. HELD: LEGALLY SUFFICIENT. In his defense, accused claimed (a) that he was mentally unable to fly, and (b) that he had previously given notice that he was not going to fly, and hence could not be guilty of disobeying a subsequent order given for the sole purpose of increasing the penalty. The first issue was a question of fact for the court. The second issue was likewise one of fact. In that regard, it appeared that accused had not given any actual previous notice that he would not fly any more. Rather, he had merely stated that he did not want to fly any more. He had remained on flying status. (CM ETO 1232 Baxter 1944)

422(5) (5) Proof: In General

After his squadron and crew were alerted and briefed for a combat mission, accused technical sergeant, a member of that crew, announced his refusal to fly. The assistant operations officer of the squadron explained to him the seriousness of his refusal, and gave him a direct order to fly. Accused indicated that he would refuse to obey. The officer endeavored to persuade him, but accused persisted in his refusal. The officer then repeated his direct order "to fly as engineer". When accused again refused, he was arrested and confined. Although the question was asked at the time of trial whether a mission was flown on the morning of accused's refusal to fly, an objection thereto was sutained and the question went unanswered. There was evidence that accused was not physically incapable of flying at the time. He was found guilty of willfully disobeying the lawful order of his superior officer to fly on a combat mission over enemy territory as an engineer, in violation of AW 64. HELD: LEGALLY SUFFICIENT. Accused received a direct verbal order "to fly as engineer" on a scheduled combat mission, from one he knew to be his superior officer. The willful character of accused's refusal is clearly demonstrated. The order embodied, as an implied integral part thereof, a direction to accused to take all such steps as were customarily necessary to fully prepare himself for his part in the mission, including manifestation of intent to accompany the mission, to secure appropriate equipment therefor, to place himself in complete readiness for its execution; to attend promptly all formations and "briefings"; and to generally perform all such incidental duties as were customarily required by the situation to enable him not only to fly but also to fly as engineer of the combat crew. A different construction of the order would allow accused to postpone his decision to fly up to the actual moment of departure, and would prevent those responsible for the flight from determining, reasonably in advance of a mission, the final composition of crews. It would likewise reduce the effective control of unwilling or recalcitrant crew members. Accused not only refused to take the preparatory steps required by the order, but by his refusal, of the serious consequences of which he had notice, he deliberately made himself liable to arrest and confinement. Thus, through his own wrong, he rendered compliance with the order impossible. In view of this construction of the order, the question whether the mission was actually flown was immaterial, and the court's ruling sustaining the objection thereto was proper. Accused's guilt of the offense was complete when he refused to obey, and was not canceled or mitigated by the subsequent non-execution of the mission. The order was not operative merely in future. Rather, it required that accused immediately take steps preparatory to accompanying his crew on the scheduled mission. (CM ETO 2469 Tibi 1944)

Accused was ordered by his superior officer "to pack his equipment in the duffle bag". He failed to comply. He was found guilty of that superior officer's order "to entruck", in violation of AW 64. HELD: LEGALLY INSUFFICIENT. "When a person is ordered to 'entruck' he is ordered to go aboard a truck." The order actually given accused was distinctly different from the one which he allegedly disobeyed. There was, therefore, a fatal variance in proof. (CM ETO 2747 Kratzman 1944)

Accused's superior officer told him that he was going to place him in the guardhouse for an offense. He instructed accused to accompany him to that guardhouse, located about 75 yards away. After following the officer part of the way, accused stopped. When the officer ordered him to proceed, accused replied that "he wasn't coming" and that he was "going to see the Major". The officer then went to the guardhouse alone. Next, two non-commissioned officers--one an armed guard--appeared. Two to four minutes after the officer had left him, accused proceeded to the guardhouse and was bocked. Among other things, accused was found guilty of willfully disobeying the lawful command of his superior officer to report to the guardhouse, in violation of AW 64. HELD: LEGALLY INSUFFICIENT. It is immaterial whether accused went to the guardhouse under compulsion because of the presence of the armed guard, or because of advice from the other non-commissioned officer. "He did comply with the order. Therefore, the gist of the evidence against accused is that he did not accompany the officer to the guardhouse as promptly as the officer desired. Such conduct does not constitute willful disobedience of the command of a superior officer. * * * This case is clearly distinguishable from CM 238898 (1943) Bull JAG, Oct 1943, Vol II, No 10, sec.422(5), pp.380-381, where the accused instead of reporting to the supply office immediately as directed, went to a bank and then to his quarters where he was placed in arrest about an hour and a half later. In that case his 'unconscionable delay when ordered to report immediately involved all the elements of" willful disobedience in violation of AW 64. There was no showing that time was of the essence in the instant case. (CM ETO 2764 Huffine 1944)

Accused had been complaining of an urethal discharge. The superior officer who examined his penis ordered him to go to an adjacent room and secure an urethal "smear". He did not do so. He was found guilty of willfully disobeying the lawful command of the superior officer to submit to examination for venereal disease, in violation of AW 64. HELD: LEGALLY SUFFICIENT. "The specification alleges that the order was 'to submit to examination for venereal disease'. The proof shows that the order to accused was for him to secure a urethal 'smear'. The Board of Review may take judicial notice of the fact that by modern scientific methods a bacteriological examination is one of the fundamental methods of diagnosis." While the order alleged in the specification may possibly have been broader than an order "to secure a 'smear'", the formal language in this case was interchangeable with the language in this case was interchangeable with the language proved. Accused was not misled. "While there exists a technical variance * * *, it is not a fatal variance." (CM ETO 2921 Span 1944)

Accused was a warrant officer (jg). A request for the termination of his appointment had been submitted, and his superior officer, had through official correspondence, been directed to secure accused's statement as to whether he desired to re-enlist on the day following termination, should that action be taken. The reason for desiring this information was that,

if he intended to reenlist and was eligible to do so, it was possible that accused's warrant could be terminated in England (his then station), without the necessity of returning him to the United States. The superior officer personally ordered accused to make the statement. Although accused ultimately made it, he at first refused to do so. He was found guilty of willful disobedience in violation of AW 64. HELD: LEGALLY SUFFICIENT. (1) Legality of Order: The order given accused by his superior officer was a legal one. "Further, it was presumed to be legal and the defense offered no evidence whatsoever, let alone the 'clear and convincing evidence' described by Winthrop, to rebut this presumption. Accused contended that the order was unjust in that he wanted more time in which to make a decision, that he wanted to know the status of his request for a transfer, and whether such request was disapproved by 'higher headquarters'. * * * The fact that an order is unjust or unreasonable does not constitute a defense and accused was not permitted to question its propriety or feasibility, or to vary from its terms." (2) The disobedience: "Accused ultimately made the statement." But this was not necessarily the obedience required by the order. There was a lapse of several hours before he finally complied. "Accused had two interviews * * *. In the first, he was given a specific order to sign the statement and he definitely refused to do so. When /the superior officer/ thereafter said 'Sign the statement', accused said he had submitted a request for a transfer and that if such request was approved he would sign the statement, but that he would not sign it if his request was disapproved." The officer replied that he was in no position to bargain. Accused then "flatly refused" to sign, and was placed in arrest and sent to quarters. No extension of time was given at this first interview. After further conversations, the officer told accused that he could not have until the next morning to make up his mind as requested, but he "did finally extend the time to 8 p.m. that evening. Accused signed the statement and it was delivered to the regimental commander about 8 p.m." It thus appears "that during the first interview accused first definitely refused to obey a specific legal order and then offered to bargain with his superior officer", which offer was refused. Actually, by his earlier refusals to sign, accused accomplished one of his purposes in that he gained more time. He admittedly feared being court-martialed if he persisted in his refusal. The further extension of time until 8 p.m. did "not retroactively cancel or modify the legal efficacy of the previous orders, or the effect of accused's defiant, willful and flagrant disobedience thereof" (ETO 3147 Cayles) (3) Dismissal: Although it was erroneous for the court to sentence this warrant officer to a dismissal, the sentence had the same effect as if it correctly used the words "dishonorable discharge". (ETO 1447) (CM ETO 3046 Brown 1944)

Among other things, accused was found guilty of willfully disobeying his superior officer's lawful command that he return to his post, in violation of AW 64. HELD: LEGALLY SUFFICIENT. "Accused's willful disobedience of the lawful command * * * which command contemplated immediate obedience or the immediate taking of steps preparatory to obedience by accused, was established by the evidence (CM ETO 2469 Tibi)." (CM ETO 3988 O'Berry 1944)

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(5) Proof: In General 422(5)

Accused was charged with willfully disobeying a superior officer's order "to keep himself available for duty at all times and under no circumstances to leave the depot area", in violation of AW 64. He was found guilty of the lesser offense of failing to obey an order not to leave the depot area without proper authority, in violation of AW 96. HELD: LEGALLY SUFFICIENT. Accused "admitted being told that he should be available for duty 24 hours each day but contended he was not forbidden to leave the depot area but simply to notify someone if he left. The meaning of the order was in the sole province of the court to determine, which it has done. The order was reasonable and proper and apparently made to prevent a repetition of previous occurrences. Accused does not claim that he had permission to leave the area as was required, and it is clear that none was given." (CM ETO 4102 Savage 1944)

Although ordered to do so by his superior officer, accused officer refused to surrender possession of a German motorcycle. He was found guilty of willful disobedience, in violation of AW 64. HELD: LEGALLY SUFFICIENT. "The disobedience contemplated in AW 64 is a disobedience of a willful and deliberate character (Winthrop's Military Law and Precedents, 1920 Reprint, p.573). The form of the order is immaterial provided it amounts to a positive mandate (Winthrop, Ibid., p.574). Captain * * *, company commander and accused's superior officer, gave a direct order to accused which he refused to obey. The captain's testimony * * * is corroborated by the testimony of the accused. That such refusal was willful appears from accused's actions and his testimony in court. His note of apology shows it. The right and duty of Captain * * * as an officer to take possession of captured enemy property in the hands of his subordinates for the benefit of the military service is unquestioned (AW 80), and that his orders or attitude may have appeared arbitrary or unreasonable is no defense (Bull JAG, Oct 1942, pp. 273-274; Winthrop, Ibid., pp.576-577)." (CM ETO 4193 Green 1944)

Accused officer was on the battle line under small arms fire. He appeared to be jittery. Evidence showed that he failed to obey one order given him, and willfully disobeyed another. He explained that he "couldn't make it" to the places he had been told to go. He was found guilty of a failure to obey in violation of AW 96, and of a willful disobedience in violation of AW 64. HELD: LEGALLY SUFFICIENT. (1) Evidence: At the trial, the various elements of the offenses charged were not only present and clearly proved, but were "in fact rather defiantly admitted by accused while a witness at his trial, he in fact agreeing to accept trial by court-martial rather than to obey the orders." (2) Mental Capacity: The psychiatrist report concerning accused stated that: "It is felt, that this officer's story relative to epilepsy in family is being used primarily as a defense mechanism for his inability to stand up as an officer under combat conditions. It is further felt this officer is not insane, but is emotionally inadequate for combat duty. * * * Diagnosis: Constitutional inadequacy for front line duty. *** Recommendation: This officer should be considered for reclassification. He

is not a medical case." The psychiatrist "testified accused did not have the severe type of 'anxiety' but believed if exposed to combat, he would develop it and that in his opinion accused was not fit to be an officer but was a sane normal person * * *. He also testified that there were many men in the same mental condition as accused who are in the front lines but he was sure they were doing a pretty bad job. Epilepsy is hereditary 'but not in this case'". In the circumstances, it was within the trial court's province to find accused guilty as charged. (CM ETO 4453 Boller 1944)

Accused was found guilty of willfully disobeying a superior officer's lawful order to report to a company in the capacity of a company aid man, in violation of AW 64. HELD: LEGALLY SUFFICIENT. (1) "Competent evidence of record establishes the giving of the order in question and the disobedience of same, by accused, as alleged." (2) Mental Capacity: "Accused told his commanding officer that he 'couldn't be an aid man' because of the fear of facing wounds and blood. He had previously informed his unit sergeant that he was unable 'to do the job' because of the fear of the sight of blood. He refused to explain what he was afraid of other than he had 'a fear of the sight of blood'. However, the testimony reveals that for a period of several months, accused worked as a litter bearer evacuating wounded and injured men from combat areas. He unquestionably saw personal injuries, blood and physical suffering in connection with the duty he was then performing. The jobs were equally hazardous. Winthrop (Reprint, 1920, p.571, 572) states that 'obedience to orders is the vital principle of military life' and that the 'obligation to obey is one to be fulfilled without hesitation', adding that, 'nothing short of physical impossibility ordinarily excusing a complete performance' * * *" is an excuse. "The accused produced no evidence in support of the defense that he was psychologically or physically unfit or unable to do the work which the order directed him to perform. The record contains evidence to the contrary." (3) Place of Confinement: It was erroneous to designate the U.S. Disciplinary Barracks at Ft. Leavenworth, Kansas as the place of confinement. This must be changed to Eastern Branch, U.S. Disciplinary Barracks, Greenhaven, N.Y. (Cir 210, WD, 14 Sept 1943, sec.VI as amended). (CM ETO 4622 Tripii 1944)

Accused was found guilty of the following: (a) violation of AW 64, in that he willfully disobeyed the lawful order of his superior officer to surrender his carbine; (b) violation of AW 69, in that he breached his arrest; and (c) violation of AW 96, in that he did, through carelessness, discharge a carbine in his bivouac area. HELD: LEGALLY INSUFFICIENT TO SUPPORT THE AW 64 and AW 96 CHARGES; LEGALLY SUFFICIENT OTHERWISE. (1) AW 64: "The evidence shows that Lt. Hart twice requested accused to give him the carbine. In explanation of his failure to comply * * *, accused explained that 'it wasn't his gun'. Hart then gave accused a direct order to give him the carbine, whereupon accused requested Hart to wait 'just a minute', at the same time handing the carbine to Warner /its owner/, of

whom Hart immediately demanded and from whom he immediately received it--within 'a matter of seconds' * * *. * * * According to the guard, who testified for the prosecution, and according to accused, the latter was in the act of handing the carbine to Warner at the time he was ordered to give it to Hart, and, instead of desisting, merely completed the delivery which he had already begun. * * * Although accused's delivery of the gun to Warner instead of Hart was in contravention of Hart's order and thus constituted a disobedience of it, no such intentional defiance of authority is involved as is necessary to constitute accused's action a violation of AW 64. * * * Accused's conduct, however, in avoiding compliance in the express manner directed, involved the lesser included offense of failure to obey * * *", in violation of AW 96. (2) The AW 69 offense was sufficiently proved. (3) AW 96: The specification under AW 96 "alleges that accused carelessly discharged a carbine in the bivouac area. The record shows that the carbine was deliberately fired from a point 50 yards outside the bivouac area into a bank which was also outside. These are entirely different offenses, the gravamen of one being carelessness, the other violation of orders." The record in this regard insufficiently supports the charge. (4) The confinement must be reduced to 9 months. (CM ETO 4376 Jarvis 1945)

Accused was found guilty of a violation of AW 64, in that he willfully disobeyed the lawful command of his superior officer to return to his company, which was then engaged with the enemy. HELD: LEGALLY SUFFICIENT. "The evidence shows that accused received a lawful command from his superior officer and that he willfully disobeyed such command. Although it was shown that he was suffering on /on the next day/ from psychoneurosis, anxiety state, mild, and although he stated that he had become extremely nervous and 'could no longer continue', the rather meager evidence as to his mental condition does not indicate that such condition was sufficiently aggravated to constitute a legal defense to the offense alleged. The unsworn statement of accused admits the alleged offense." (CM ETO 5511 Carter 1945)

(1st Ind CM ETO 5511 Carter 1945) This 22-year old accused, in the Army for slightly over a year, and with this division less than three months, "was brought to trial for a capital offense, before a court composed of five officers--one major, one captain, one 1st lieutenant, and two 2nd lieutenants; seventeen members of the court were excused; one witness was heard who was not asked if he knew the accused, who did not rmember what accused said but was positive that he refused to obey the order and was thereupon sent to the stockade. On the next day accused was found to be suffering from 'Psychoneurosis, anxiety, mild'. He was sentenced to life imprisonment. The record contains no evidence showing aggravation, - the tactical situation is not described nor the conduct of the accused at the time he disobeyed the order. The sentence is more severe than is usually adjudged in like cases."

422(5) (5) Proof; In General

Charged with willful disobedience of an order from Lt Col * * * to go forward to a Regimental Command Post, accused 2nd lieutenant was found guilty of a disobedience in violation of AW 96. He was also found guilty of a violation of AW 75, in that he misbehaved before the enemy when, by his neglect, he endangered the safety of his platoon by leaving it without issuing any orders, and failed to return until the following day. HELD: LEGALLY SUFFICIENT. (1) The Disobedience: Considerable hearsay was introduced in regard to the AW 64 charge without objection--particularly as to the Lt Colonel's telephone conversation "regarding his order that accused report to the regimental command post. Defense counsel should have objected * * *. However", disregarding the hearsay, evidence elsewhere in the record sufficiently showed the order. Secondly, while the evidence of the prosecution did not clearly establish the disobedience, accused did not move for a finding of not guilty. And his own testimony "showed clearly that he did receive the order and never complied with it". Accused's rights had been explained to him. "It was apparent that the order was one to be obeyed immediately and" there was "at least an unpardonable and unwarranted delay in carrying out the order." (2) Surprise: The prosecution called two witnesses whose names were not listed on the charge sheet. No objection was made, although defense counsel requested that the record show "surprise". In the circumstances, no prejudice resulted. (Note that one of the unlisted witnesses was the commanding officer who transmitted the charge sheet.) (3) The Order: "It is immaterial that the order was not given to accused by * * * personally. A showing that the order emanated from him was sufficient * * *." (4) Lesser Offense: "It was within the province of the court to find him guilty * * * only of the lesser included offense of failing to obey the order in violation of AW 96. (5) Misbehavior in violation of AW 75 was also adequately shown. (CM ETO 5607 Baskin 1945)

Accused was found guilty of a violation of AW 64, in that he willfully disobeyed the lawful order of his superior officer to return to his unit, then in combat. HELD: LEGALLY SUFFICIENT. "The order which accused was charged with willfully disobeying related to a military duty and was a lawful command * * * under the circumstances * * *. Although prior combat experience in which the 19-year old accused had participated honorably since he joined the * * * Division on * * * Beachhead six months previously was undoubtedly a determining factor in his decision to permit his disinclination to participate in further combat to outweigh his obligation to perform his duty as a soldier, the record of trial contains substantial evidence" to support the finding of his guilt. (CM ETO 5766 Dominick 1945)

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(5) Proof; In General 422(5)

Accused was found guilty of a willful disobedience, in violation of AW 64. HELD: LEGALLY SUFFICIENT. "The evidence shows that accused verbally refused to obey Captain ***'s order to report to his company and that he made no effort to obey it. Sgt *** was ready to take him in a jeep. This testimony supports the inference that actually he did not obey it. The order related to a military duty and was one which *** was, under the circumstances, authorized to give the accused (MCM, 1928, par.134b, p.148). The latter's mere assertion of visual deficiency - which is all that is shown with reference thereto - was inadequate to relieve him of his obligation to obey (Winthrop's Military Law & Precedents, 1920 Reprint, p.572). His open and express refusal sufficiently established the willful and intentional character of his disobedience." (CM ETO 6194 Sulham 1945)

Accused was found guilty (a) of a willful disobedience in violation of AW 64, and (b) of desertion in violation of AW 58 under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. (1) Willful Disobedience: The evidence adduced in support of the charge of the AW 64 violation "shows that accused received a lawful command from his superior officer to report to Company F for duty as a company aid man. The slight variance between the order as alleged and as proved is not substantial * * *. Although accused did not verbally refuse to obey the order given, the willful disobedience contemplated by AW 64 may consist not only in 'an open and express refusal to do what is ordered' but also in 'a simple not doing it, or in a doing of the opposite' (Winthrop's Military Law and Precedents, Reprint, 1920, p.573). It is clear that accused did not report as ordered but instead absented himself without leave." The finding of his guilt was supported. (CM ETO 6809 Reed 1945)

Accused was found guilty of two violations of AW 64, to wit: (a) willful disobedience of an order of his superior officer to get out of his hole and get up to a named company, on or about 11 January 1945; and (b) willful disobedience of another similar order from another superior officer on or about 10 January. He was sentenced to confinement in a penitentiary for 75 years. HELD: LEGALLY SUFFICIENT. (1) The Evidence supported the conviction. (2) Relevant Similar Offenses: "During the course of presentation of prosecution's case, it was shown that * * * on the evening of 10 November accused committed two other offenses, viz., (a) disobedience of a direct order of Sergeant *** (AW 65) and (b) disobedience of a direct order of Lt *** (AW 64). Accused was not charged with these derelictions. The admission of this evidence was proper as it was entirely relevant to the offense charged. It served to inform the court as to the surrounding facts and circumstances of the offenses with which accused was charged." (Underhill, Crim Ev., 4th Ed., sec.184, pp.333-335; CM ETO 895 Robinson et al). (3) The Place of Confinement for this AW 64 military offense must be changed to the United States Disciplinary Barracks, since penitentiary confinement is not authorized. (CM ETO 7549 Ondi 1945)

422(5) (5) Proof: In General

(1st Ind CM ETO 7549 Ondi 1945): "The accused and his companion* * * committed a most flagrant military offense, in the immediate presence of the enemy, which they deliberately persisted in for several hours. It is difficult to imagine any offense more serious. Their conduct would have been more appropriately charged as misbehavior before the enemy in violation of AW 75. Conviction under the latter article brands one as a cowardly skulker, recreant to the primary duty of soldiers to fight the enemy. Disobedience of orders, whatever the circumstances, is generally regarded as an altercation between an officer and a soldier; and there is always an inclination to make allowances for the soldier. The sentence adjudged and approved is the equivalent of a life sentence, but is more vulnerable to public opinion, as unreasonably severe, unconsidered and imposed in a spirit of revenge rather than as an intelligent, reasoned, judicial judgment. The court-martial system is again on trial. The critics will not be judicial either but we should not make ammunition for them. A few bad practices, a dozen vulnerable cases held up to public view, will indict the whole system."

Accused officer was charged with willful disobedience in violation of AW 64, but was found guilty of the lesser offense of a failure to obey in violation of A" 96. He was also charged with failing to repair on a certain date at a certain place "at the fixed time to the properly appointed place", in violation of AW 61. He was found guilty as charged. HELD: LEGALLY SUFFICIENT. (1) Failure to Obey: "The evidence shows that accused received and understood a lawful order from his recognized commanding officer to report to him at his office immediately. Although he had only to dress and walk a distance of two blocks, he failed to obey within a full hour and when finally encountered by the colonel at his quarters, still apparently had no immediate intention of complying with the order. There is no doubt that under these circumstances, a failure to obey in violation of AW 96 existed. The order as given contemplated immediate compliance and in view of all the evidence, the court was justified in concluding that accused's delay in obeying it, assuming that he intended to obey it, was unreasonable and inexcusable * * *. In reaching the finding of guilty by exception and substitution, the court failed to include the phrase, 'the said - being in the execution of his office', found in the model specification contained in Appendix 4, MCM, 1928, page 255. This phrase, however, may be regarded as surplusage in a specification alleging failure to obey, such import as it ordinarily has being supplied by the allegation that the order given was a 'lawful command'. (2) AW 61; Failure to Repair: "The only question meriting discussion arises out of the absence of any allegation in the specification describing the nature, time and place of the duties to which accused is alleged to have failed to repair. This was a defect, but the defense raised no objection thereto and there is nothing in the record to indicate that accused was in any way misled or prejudiced in the preparation or presentation of his defense as a result of it. Hence, it need not be

regarded as requiring disapproval of the finding of guilty reached by the court." (3) The investigating officer herein "was appointed by the accuser. Such appointment was undoubtedly made as a matter of routine, the accuser in this instance being the group commander and commanding officer." No prejudice resulted. "The appointment is at most an irregularity not affecting the validity of the proceedings." (CM ETO 7584 Emery 1945)

Charged with willful disobedience in violation of AW 64, accused officer was found guilty of a failure to obey in violation of AW 96. Additionally, he was found to be drunk while on duty, in violation of AW 85. HELD: LEGALLY SUFFICIENT. Specification of Willful Disobedience: "Although the findings by exceptions and substitutions with respect to the specifications under Charge I, do not state offenses strictly following the form in the Manual for alleging failure to obey an order (MCM, 1928, Form No. 139, App 4, p 255), the words 'being in the execution of his office' being omitted, the findings were entirely proper, for the ordinary import of the phrase quoted is supplied by the allegation that the order given was a 'lawful command'." (CM ETO 8455 McCoy 1945)

Accused was found guilty of a violation of AW 64 in that, having received a lawful command from Lt S**, his superior officer, to get his equipment, get into a jeep, and return to his company, he willfully disobeyed the same. HELD: LEGALLY INSUFFICIENT. At a time when accused was already in the stockade, Lt. S** visited him. Before giving him the order alleged to have been willfully disobeyed, Lt S** "explained to accused that he was giving him a chance to go back; a chance also to redeem himself and escape trial by General Court-Martial, for the 'serious charge /then/ overhanging him'. Moreover, according to Lt S**, who was assistant regimental personnel officer, the mission specifically assigned to the witness on the occasion in question was to go out to the stockade to interview accused and other prisoners with reference to their coming back to their company. He was not sent to order them back and his description of his method of discharging the duty thus imposed upon him indicates that he actually undertook to reason with and persuade the prisoners to return rather than to order them from the stockade to their company. He discussed with accused the seriousness of the charge already hanging over him, but there is not a suggestion * * * that he even intimated to accused that his failure to take advantage of the proferred 'chance' would result in another charge--a capital one--being preferred against him for not doing so." " * * * The telling appears to have been merely an emphatic form of persuasion. No intentional defiance of authority is involved in refusing to be persuaded, no matter how pointedly the superior may have stated his views * * *." The record is insufficient to support the finding of guilt. (CM ETO 8950 Kombrinck 1945)

AW 64 ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR OFFICER

422(5) (5) Proof; In Feneral

Accused was found guilty of a violation of AW 64, in that (a) he struck a superior officer on the arm with his fist and (b) he willfully disobeyed that superior officer; of an escape from confinement in violation of AW 69, of an AWOL in violation of AW 61; and of being drunk and disorderly in the scene of military operations in occupied Germany, in violation of AW 96. HELD: LEGALLY INSUFFICIENT on the aw 64 specifications. (1) AW 64; Intent; Drunkenness: In both the offenses charged as violations of AW 64, "drunkenness constitutes a defense if it is of such a degree as to deprive accused, in the case of assault, of the ability to understand that the person assaulted was his superior officer * * *, and, in the case of insubordination, of the ability to entertain the specific intent willfully to disobey * * *. * * * The record * * * leaves no reasonable doubt that accused was in a state of intoxication sufficient to deprive him of such capacity. * * * Although there is some testimony that approximately half an hour after the incident * * *, he appeared to recognize a commissioned officer as such while in the custody of the military police, and although three witnesses testified that they were unable to state that he was drunk, this evidence * * * is equivocal and of slight probative value, whereas all of the circumstances shown, considered as a whole, lead to no other reasonable conclusions than that accused was irrational on the occasion and too drunk either to recognize Lt. * * * as an officer or to appreciate the significance and purport of his own actions." The record is insufficient to support the conviction on these specifications. "It is, however, legally sufficient to support findings of guilty of the lesser included offenses of assault and battery and failure to obey, both in violation of AW 96, drunkenness being no defense in either of such offenses." The sentence is supported by the proper findings of guilt on the other charges. (CM ETO 9162 Wilbourn 1945)

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(6) Proof of Legality of Order:

Cross References: 454(22) 1366 English (Improper punishment under AW 104)
422(5) 3046 Brown
422(5) 4193 Green
462(1) 1015 Branham

Accused's tardiness at reveille was reported by the sergeant to the commanding officer. The officer instructed the sergeant to order accused to push a concrete roller to level off a roadway. Accused refused, and his disobedience was reported to the officer. Thereafter, the officer gave accused a direct order to "push the roller". Accused again refused. He was found guilty of willfully disobeying the officer's order, in violation of AW 64. HELD: LEGALLY INSUFFICIENT. (1) Illegality of Order: The conclusion is inescapable that the officer "knew full well when he summoned accused before him and personally ordered him 'to push the roller' that accused had refused to obey the same order previously given him by the non-commissioned officer * * *, and that in view of accused's recalcitrance and incorrigibility (in certain other respects) * * * there was every probability that he would refuse to obey" this order. It is logical that the officer "gave the order to accused for the purpose of increasing the penalty for an offense 'which he expected the accused to commit' and therefore the order was unlawful and accused cannot be found guilty of violating AW 64." The officer's testimony was indefinite. The intrinsic nature of his order indicated that it was for purposes of punishment. It is to be noted that, in addition to being told to push the roller, accused was also given other work which had no relation to ordinary camp details. (It is pointed out that this opinion is to be limited to the immediate facts, and that not "every order given by an officer to a soldier after a like order has been given by a non-commissioned officer constitutes an order given with the intention of increasing the penalty * * *.") (2) Prior illegal Punishment: In support of his plea in bar to the present trial, accused attempted to establish that he had already been punished for the charged offense, in that he had been subjected to confinement for a period of four days on a bread and water diet in a "dungeon". In view of the holding on the merits herein, the plea in bar need not be considered. However, it is to be noted that such punishment is "not authorized under AW 104, and is in fact prohibited by the Articles of War. Even a court-martial cannot impose such a sentence after trial and a finding of guilty" (AW 41, MCM, 1928, sec.102, p.92) The earlier confinement was illegal. Likewise, in view of the holding on the merits, it need not be decided whether prior punishment under AW 104 will bar a subsequent court-martial proceeding, regardless of the seriousness of the offense. "Under the British law such a plea will bar trial regardless of the seriousness of the offense. * * * The question does not appear to have been passed upon in our practice since the enactment of AW 104. Prior to that time our practice appears to have been contrary to the British holdings." (CM ETO 110 Bartlett 1944)

Although told to do so by a non-commissioned officer, accused refused to continue his bayonet practice. Thereupon, he was ordered to continue that bayonet practice by his superior officer. He refused to do so. He was found guilty of willfully disobeying that superior officer, in violation of AW 64. HELD: LEGALLY SUFFICIENT. The order was given by accused's superior officer, and was legal. Accused knew that officer to be his superior. Although he understood the order, he deliberately refused to obey it. The facts "themselves refute the idea that the Lieutenant gave the order to accused in order to increase the punishment to which accused would subject himself for his misconduct. Rather, they display proper disciplinary control by the officer over a recalcitrant soldier." (Distinguish cases wherein it has been held that the subsequent order by an officer was given for the purpose of increasing the punishment which might otherwise be levied for the earlier disobedience of a similar order by a non-commissioned officer.) (CM ETO 314 Mason 1943)

Accused's platoon was to fall out dressed in swimming shorts or trunks, in order that its members might go for a swim. Accused appeared dressed in fatigues, apparently in order that he might wash them. The platoon sergeant ordered him to get into his "shorts". After accused twice refused to do so, the sergeant told him to "dig a latrine." Accused replied, "I'll be damned if I dig a latrine". The sergeant unsuccessfully repeated his order. Thereupon, the platoon commander came up and ordered accused to dig the latrine. Accused refused. He was found guilty of (a) disrespect to the sergeant, in violation of AW 64, (b) disrespect to the officer, in violation of AW 63, and (c) willful disobedience of his superior officer's order to dig the latrine, in violation of AW 64. HELD: LEGALLY INSUFFICIENT FOR THE VIOLATION OF AW 64; LEGALLY SUFFICIENT FOR THE VIOLATIONS OF AW 63 AND 65. (1) Willful Disobedience; Legality of Order: It clearly appears that the orders to dig the latrine, as given both by the sergeant and the platoon commander, were for the purpose of meting out company punishment. Neither of these men had any authority to administer company punishment. The platoon was not a "detachment" within the purview of AW 104. "Only the commanding officer of any detachment, company, or higher command' may impose disciplinary punishment for minor offenses upon persons of his command, and * * * such authority cannot be delegated * * *." But even assuming that the platoon commander had the authority to administer punishment under AW 104, the order was still illegal. Accused was neither informed of his right to demand a court-martial nor of his right to appeal. Those requisites of AW 104 are mandatory, and failure to comply with them renders an order of punishment under AW 104 illegal. (Distinguish cases in which there had been a partial compliance with the requirements of AW 104.) (2) Disrespect: (a) The evidence sufficiently showed a disrespect to the superior officer, in violation of AW 63. "The language addressed to the officer clearly constituted disrespectful behavior. It has been held that the fact that disrespectful language was used toward a superior officer by accused at a time when he was refusing to obey an illegal order given him by the officer is no defense." (b) The evidence also sufficiently showed a disrespect to the non-commissioned officer, in violation of AW 65. He was acting as company first sergeant and performing his military duties as such. He was in the execution of his office when he gave the order to accused. The latter, in addition to his disobedience thereof, addressed disrespectful language to him and waved his arms violently. (CM ETO 1661 Hass 1944)

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(6) Proof; Legality of Order 422(6)

By special court-martial sentence, accused was restricted at hard labor. In the process of executing this sentence, his superior officer ordered him to perform the "hard labor" of extra duty in the company kitchen. Accused refused. He was found guilty of willful disobedience of his superior officer, in violation of AW 64. HELD: LEGALLY SUFFICIENT. The order given accused was legal. Kitchen police has been held not to be within the class of military duties, the imposition of which is prohibited by MCM, 1928, par.102 for purposes of punishment. (CM ETO 1821 Velma 1944)

Four accused were members of a quartermaster service company which was engaged in digging graves and doing cemetery work. Three of them had been absent from their work during the daytime, so the company commander ordered them to work in some unfinished graves after supper. Wright, the fourth accused, was serving a week's extra duty legally imposed under AW 104 for a similar type of earlier absence. He too was ordered to work in some unfinished graves after supper. The four refused to obey. Charged separately but tried at a common trial, each accused was found guilty of willful disobedience in violation of AW 64. HELD: LEGALLY SUFFICIENT. Whether the commanding officer, Captain Malkus, "or any of the accused regarded the work * * * as company punishment is immaterial. Its performance was the principal military duty of accuseds' organization. Malkus, as commanding officer, was vested with authority to order any member to perform such duty at any time, as unhampered by considerations of maximum hours as of minimum wages. A quartermaster service company is a military organization. In this instance, although the performance of its prime function required the labor of its members, the purpose involved constituted their labor in this regard military service of the highest type. The commanding officer was no more circumscribed in ordering any man or men of his organization, whenever he saw fit, to dig graves deemed essential for the burial of the dead, than the commanding officer of a combat unit is circumscribed in ordering any man or men of his organization to dig trenches deemed essential for his unit's protection. It is of course recognized that military duties will not be degraded by imposing them as punishments and that, in Wright's case, Captain Malkus' obvious misconception of the prime military function of his service organization as 'extra fatigue' as well, rendered invalid his imposition of the performance of this function as company punishment. But he was still Wright's commanding officer, with full authority to order Wright or any other member of his organization, whenever he deemed it necessary, to perform the labor in question as a military duty; and the proof clearly shows that such labor was a military duty for all of the accused at the time the order to perform it was given. The fact that, in Wright's case, the duty assigned was regarded by Captain Malkus as company punishment did not render his order to Wright to perform it illegal, since the rule against assigning military duty as company punishment is not for the benefit of soldiers receiving company punishment, but for those performing military duties, to preserve from degradation their performance of their essential functions." (CM ETO 3468 Bonton et al 1944)

422(6) (6) Proof; Legality of Order

(1st Ind CM ETO 3468 Bonton et al 1944): The work ordered of accused was necessary and had to be completed promptly. "A company commander has the power and it is his duty to work all of his unit over time, or any part of it, when necessary to complete his mission. Extra work beyond normal hours should be apportioned fairly. Deficiencies in command are often responsible for rebellious conduct and refusals to OBEY". The order given Wright, who was serving a week's extra duty under AW 104, was legal. "The principle that military duty, such as drill and guard duty, should not be imposed as punishment, is founded on the idea of preserving the dignity of such military duties. It has no application here. This is war time. Decisions with respect to legal sufficiency must be based on reason, designed to support military authority when it is not exercised in an arbitrary, capricious, unfair manner resulting in injustice to the soldier. So regarded this conviction is legally sufficient."

Accused was found guilty of a violation of AW 96 in that, with intent to deceive, he officially told a Captain that his name was other than what it really was. He was also found guilty of a violation of AW 64, in that, subsequent to the first offense, he willfully disobeyed the order of the same Captain, his superior officer, to dig a hole for a latrine. The reviewing authority concluded that he was not guilty of the AW 64 offense, and proceeded to find him guilty of the "lesser" offense of insubordination in violation of AW 96. HELD: LEGALLY INSUFFICIENT IN PART. (1) False Statement: The first charge of a false official statement by accused private was sufficiently proved, and will support a sentence of one month. (2) Willful Disobedience: "There can be no doubt that the order given accused was clearly intended as a punishment for the conduct of accused in giving a false name to his company commander." The making of a false official statement was a "minor offense" for which punishment could be imposed pursuant to AW 104. But here, "there was no evidence that accused was notified that disciplinary action under AW 104 was contemplated, that he could demand trial by court-martial in lieu of accepting the punishment, or that he was informed of his right to appeal to superior authority if he believed the punishment unjust. No advice whatever was given the soldier. The failure of the officer imposing the punishment to notify accused of his rights nullifies the order of punishment and renders it illegal." (3) Lesser Offense: The Reviewing Authority erred in reducing the AW 64 finding to one of insubordinate conduct in violation of AW 96. "This was not a lesser included offense. The most disrespectful statement made by accused was his statement to his company commander in refusing to obey the illegal order that 'he would not dig a latrine or a hole for me or anyone else'. The specification * * * contains no allegation of any acts of disrespect or insubordination by accused. Insubordination is not a necessary element in disobedience of orders. The Board's conclusions are not at variance with CM ETO 1366, English * * * wherein the restriction ordered by the company commander was within his inherent legal power, or with CM ETO 1057 Redmond, wherein the order to report periodically during restriction was likewise within his legal power and there was substantial compliance with the procedural requirements of AW 104." (Note, also, CM ETO 1015 Branham) (CM ETO 4750 Horton Jr. 1945)

(6) Proof; Legality of Order 422(6)

Accused was found guilty of a violation of AW 64, in that he willfully disobeyed an order of his superior officer to report for duty to his platoon, which was then engaged with the enemy. HELD: LEGALLY SUFFICIENT. (1) Legality of Order: "It is true that Lt. * * * expected the accused to disobey the order when given and that the disobedience of an order which is given for the sole purpose of increasing the penalty for an offense which it is expected that the accused may commit is not punishable under the Articles of War (MCM, 1928, par.134b, p.148). However, even though it was expected that the order would be disobeyed, such order was not given for the sole purpose of increasing the penalty for an offense which it was expected the accused would commit but as a necessary exercise of the function of command (Cf: CM ETO 314, Mason; CM ETO 3078,Bonds, et al; SPJGJ, CM 244537, Bull JAG, Vol.II, No.11, Nov 1943, sec.422(6), p.426). The fact that it was anticipated that the order would be disobeyed thus did not render the order illegal and the disobedience thereof constituted violations of AW 64." (2) Excuse: Accused stated that "night blindness" was his reason for his refusal to obey. However, even if his version of the incident be accepted, the mere fact that he deemed himself incapable of performing his full duty in the squad would not have been a legal justification for his refusal to obey the order, especially in view of the fact that he had been examined by a medical officer and returned to duty (Winthrop's Military Law & Precedents, Reprint, 1920, p.572). (CM ETO 5167 Caparatta 1945)

422(6) (6) Proof; Legality of Order

(7) Finding of Offense Not Included:

Cross References: 422(6) 4750 Horton (Insubordinate conduct under AW 96 not lesser)

AW 64 ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR OFFICER

422(7)

423 (AW 65) Insubordinate Conduct Toward Warrant or Noncommissioned Officer:

Cross References: 422(6) 1661 Hass (Disrespect)
421(2) 3801 Smith (Discuss AWs 63, 64, 65, 96)
419(2) 4303 Houston (Disrespect to superior officer; insulting language to NCO)
442(3) 6767 Reimiller

Not Digested
2368 Lybrand (Disobedience)
3570 Chestnut (Strike NCO)
3988 O'Berry (Also at 422(5) (Insults and insubordination to NCO)
3992 McKinnon (Insults and insubordination to NCO; disobey NCO)
4238 Flack (Draw weapon against, and strike, NCO)
4550 Moore et al (Disobey NCO)
10003 Rentzel (strike NCO)
10097 Rosas (Disobey NCO)

(1) Proof: Accused was found guilty of the following violations of AW 65: (a) using profane, insulting and insubordinate language to a noncommissioned officer, and (b) threatening to strike noncommissioned officer on the arm with his bayonet. HELD: LEGALLY INSUFFICIENT AS TO THE FIRST SPECIFICATION; LEGALLY SUFFICIENT AS TO THE SECOND SPECIFICATION. (1) Insulting Language: There was a material variance between the profane and insulting language alleged to have been used, and the profane and insulting language proven to have been used. The words were literally different. "No phrase or clause of the 'language charged' was proved". In substance and meaning the departure was even wider. This variance was fatal to the specification which concerned the insulting language. (2) Threat to Strike: The evidence sufficiently supported the finding of guilt under this specification. AW 65 covers both threatening and attempting to strike. "The former offense stops short of the overt act - a physical demonstration of force; the latter stops short of actually inflicting the battery upon the victim." AW 65 "creates an offense non-existent at common law by making it criminal for a soldier to threaten to strike a non-commissioned officer. Congress intended thereby to protect non-commissioned officers from threatened violence of a soldier which did not amount to an attempt. Mere application of profane or obscene epithets to a non-commissioned officer does not constitute a threat because the Article specifically and separately condemns the use of 'threatening or insulting language'. When the accused 'cursed' * * * and 'argued' with him he was not making a threat. He was using 'insulting language' but he is not charged with that offense. However, he did something more - he 'swung at'* * *. The record does not reveal whether accused used his fists or his rifle. From this aspect of the evidence it would appear that accused's conduct passed into the domain of an 'attempt'. However, the fact that accused also made an attempt to strike * * * does not deny the fact that the applying of profane or obscene language * * * plus the attempt to strike might easily constitute a most serious threat. While the dividing line between threats and attempts

is a fine one depending almost entirely upon the commission of an overt act by accused in order to constitute the latter offense, it does not by any means follow that because an attempt is proved that such proof erases evidence that might also prove a threat. * * * Proof of a threat only cannot sustain a conviction for an attempt. However, the proof of an attempt may include * * * evidence that will sustain a charge of making a threat." This is essentially a question of fact for the court. (CM ETO 314 Mason 1943)

Accused engaged in a brawl, during which he cut a victim with a knife. Thereafter, a non-commissioned officer ordered him to give him the knife. Accused refused, on the ground that the order was given without authority. Subsequently, however, and when he realized that he was about to be put in the guardhouse, accused gave the knife to the Sergeant of the Guard. He was found guilty of disobeying the first non-commissioned officer, in violation of AW 65. HELD: LEGALLY SUFFICIENT. Accused had no right to refuse to obey the first non-commissioned officer's order to give him the knife, and to take it upon himself to decide who was the proper authority to whom he should surrender it. "To hold that a soldier would have such a power of determination would constitute a blow of the greatest magnitude to military discipline." (CM ETO 1725 Warner 1944)

Attempted Assault; Warrant Officer: Accused was charged with (a) rape in violation of AW 92; (b) assault with intent to do bodily harm by shooting D*** with a pistol, in violation of AW 93; and (c) attempt to assault a warrant officer with a pistol, in violation of AW 65. He was found guilty, with substitutions and exceptions to be subsequently noted. HELD: LEGALLY SUFFICIENT. (1) Attempted Assault: "In addition to the rape, accused was found guilty by exception and substitution of a simple assault upon D***, in violation of AW 96, and was also found guilty of an attempted assault upon chief warrant officer L***, in violation of AW 65. The findings * * * are fully suported * * *. Furthermore, in the case of L***, the evidence clearly would have supported a charge of assault with the pistol rather than attempted assault, had such charge been made. While at common law there was no such offense as attempted assault, an assault in itself being but an attempted battery * * *, the offense exists in military law by virtue of the explicit provisions of AW 65. This Article was added in the 1916 revision of the Articles of War and its purpose was 'to enhance the respect of the private soldier for his non-commissioned officer' (see Report No.130, U.S. Senate, 64th Congress, Feb 9, 1916, p.73). According to the MCM, 1921, the part of the article relating to assaults covers any unlawful violence against a warrant or noncommissioned officer in the execution of his office whether such violence is merely threatened or is advanced in any degree toward application (see CM ETO 314, Mason). Presumably, therefore, an attempted assault within the meaning of the article includes any

offer of violence which falls somewhere between a mere threat and an assault as ordinarily defined in law." (2) Time of Trial: Although accused was served two days prior to trial, it also appears that defense witnesses were brought from a distant point, which journeys required 4 or 5 days. Defense stated that there was no objection to the time of trial. It would therefore appear that accused had sufficient time to prepare for his trial. (3) Date of Offense: Although the specification charging a violation of AW 65 did not originally include the date of the alleged offense, amendment to include the date was made upon motion of the prosecution without objection by the defense. The amendment was properly allowed. (CM ETO 8163 Davison 1945)

AW 65 INSUBORDINATE CONDUCT TOWARD WARRANT OR NONCOMMISSIONED OFFICER

423

424 (AW 66) Mutiny or Sedition: 424

Cross References: 454(91a) 2005 Wilkins, Williams (Unlawful meeting of military personnel for insubordinate purposes)
454(35) 1920 Horton (Insubordinate conduct to officer)
447 1052 Geddies (Join a mutiny)

Several accused were charged jointly with, and found guilty of, joining in a mutiny against their commanding officer and the military police in violation of AW 66 (Charge I), rioting in violation of AW 89 (Charge II), and wrongfully possessing and using Government property in violation of AW 96 (Charge III). Motions for severance were denied. HELD: LEGALLY SUFFICIENT. Each offense charged was of such nature as may be committed by two or more persons. Therefore a joint charge was entirely proper. The record of trial reveals that care and caution were exercised both by the law member and trial judge advocate in the presentation of the statements of certain accused. The court was strictly enjoined that a statement should be considered only as evidence against the accused making the same (Johnson v. United States, 82 F. 2d 500; cert. den. 298 U. S. 688). The primary ground of the motions, viz: the necessity of securing testimony of certain co-accused becomes idle in face of the fact that twenty-three of the thirty-five accused appeared as witnesses and each testified at length and was subjected to plenary cross-examination. Considering the record of trial as a whole and the peculiar nature of the offenses charged, the court did not proceed arbitrarily or capriciously in denying the several motions for separate trials (Olmstead v. United States, 19 F. 2d 842, 53 ALR. 1472; cert. den. 275 U.S. 557, 72 L. Ed. 424). It exercised sound judicial discretion and its decisions will not be disturbed on appelate review (CM 144367 (1921); Dig. Ops. JAG, 1912-1940, par. 395 (49), p.234; Annotation 131 ALR, sec.VI, p.926; United States v. Olmstead, supra).

On behalf of each and all accused a motion was made to strike Charge II and III and their respective specifications, for the reason that they were duplications of Charge I and its specifications and therefore multifarious. The motion was denied. There was no multiplication of charges. Joining in a mutiny and committing a riot are separate and distince offenses. A mutiny in military law is a revolt by two or more soldiers with or without armed resistance against the authority of their commanding officers (5 C.J., sec.168, p.352, footnote 2; CM 116735; CM 122535 (1918); Dig. Ops. JAG 1912-1940, par.424, p.288), and the offense of joining in a mutiny requires the performance of an overt act of insubordination by the person accused (MCM, 1928, par.136b, p.151). Committing a riot is the joining in a tumultous disturbance of the peace by three or more persons acting with a common intent either in executing a lawful private enterprise in a violent and turbulent manner to the terror of the people or in executing an unlawful enterprise in a violent and turbulent manner (54 C.J., sec.1, p.828; MCM, 1928, par.147c, pp.161,162). Proof of the facts constituting the offense alleged under Charge III and its Specification (violation of 96th Article of War) would not in and of themselves prove either the charge of joining in a mutiny or committing a riot. The latter offense obviously

contain elements not embraced in the charge under the general article, and conviction of the commission of both or either of said offenses would not be inconsistent with a finding of not guilty under the 96th Article of War. The accused may be found guilty of all the offenses charged without being placed in double jeopardy for the same offense (CM 230222 (1943), 2 Bull. JAG 96, March 1943).

Where the conduct of accused constitutes the violation of more than one article of war, separate charges may be made without subjecting the pleading to the criticism of multifariousness or duplicity. In fact, such practice is dictated by common prudence. In the instant case the charges were drafted in accordance with this practice and are therefore free from the asserted defects relied upon by defense counsel. In any event the granting or denying of the motion was a matter wholly within the judicial discretion of the court, and in its denial of the motion there was no such arbitrary action as would justify disturbing its ruling (Winthrop, 1920 Reprint, p.251).

On behalf of each and all accused motions were made separately to strike each of the specifications and charges on the ground that the allegations contained therein do not specifically allege the time, place, and specific acts as to each accused so as to sufficiently advise each accused of the offense charged against him. It is exceedingly doubtful that the motions to strike the specifications were procedurally proper inasmuch as such motions were founded upon alleged defects in the form of the specifications rather than defects in substance (Winthrop, 1920 Reprint, p.252). However, even if the motions performed the functions of a motion to make more definite and certain, or of a special demurrer (were such pleadings known in courts-martial practice) (31 C.J., sec.404, pp.819,820), they were without merit.

With respect to the specifications of Charges I and II, the motions are premised on the assumption that it is necessary to allege as to each accused his particular conduct which constitutes joining in a mutiny (Charge I) and committing a riot (Charge II). Such a contention entirely ignores the true nature of the offenses.

The gravamen of the offense of joining in a mutiny is: (1) there was a mutiny at a specific time and place begun against constituted authority, and (2) accused joined in it. Both specifications of Charge I are complete in this regard. The parts of the two specifications which set forth the means and methods pursued by the accused in "joining in the mutiny" are but descriptive, and taken alone would not have constituted a mutiny (CM 125432 (1919), Dig. Op. JAG, 1912-1940, sec.424, pp.288,289). Each accused was entitled to be informed as to where, when and against whom there was a mutiny and that he was charged with having joined in it. With such information he could prepare his defense or identify the offense as a basis for a plea of former jeopardy. Allegations describing generally the conduct of the several accused renders the charge of joining in a mutiny complete and intelligible, but allegations particularizing the actions of each accused are not necessary.

The constituent elements of the offense of rioting are: (1) an unlawful assembly consisting of three or more persons,(2)an intent mutually to assist against lawful authority, and (3) acts of violence (MCM, 1928, par. 147c; 54 C.J., sec.3, p.830; 2 Wharton, Criminal Law, 12th Ed., sec.1869). A specification alleging these three elements states facts constituting the offense. Allegations describing the acts of violence committed are essential averments inasmuch as it is from them that terror of the populace is inferred, but they may be general allegations (2 Wharton, Criminal Law, 12th Ed., sec.1869, p.2199). It is unnecessary to set forth the particularized acts of each rioter, and if the same are contained therein they are descriptive merely.(Commonwealth of Massachusetts v. Frishmen, 235 Mass. 449, 126 NE 838, 9 ALR, 549). The Specification of Charge II meets all of these requirements and fully informed accused as to the exact nature of the charge against them.

Upon request of the trial judge advocate, the law member instructed the court that each written and oral statement of certain accused, which had been admitted in evidence, was evidence only against the accused making the statement and must not be considered as evidence against any other of the accused. This was proper practice in this case. The statements themselves were devoid of incrimination of other accused and were simple in form. They could not possibly form an improper matrix of hearsay evidence. In instances where the statements are simple, or names of co-accused either do not appear or are deleted, the practice followed in this instance fully protects the rights of accused. (CM ETO 895 Davis et al, 1944)
Copied from III Bull JAG, pp.143-145 (1944).

Accused officer, a chaplain, had a sergeant assemble a negro company for him. He then addressed that company, urging its members to disregard, defy and refuse to obey the orders of their superior officer to be inspected for weapons before going on pass and to work on Sundays, and to come and see him in order to get passes to go to church on Sunday, should such passes be refused by the commanding officer. He was found guilty of three specifications charging the above acts, in violation of AW 66. HELD: LEGALLY SUFFICIENT. It may reasonably be inferred that accused's conduct was with intent to stir up or "create" collective insubordination among the troops he was addressing. He committed an overt act when he had the sergeant assemble the company for him, and when he addressed them in the manner described. All the necessary elements of the offense, including specific intent, appeared, It was immaterial that no actual collective insubordination resulted. Contrary to all principles of morality, religion and good order, accused chaplain deliberately urged the colored soldiers to disregard the military orders of their superiors. "Cloaked with some apparent authority and armed with rebellious and riotous ideas he disregarded the trust that his country had imposed in him and endeavored to foment class hatred, violence and mutiny." (CM ETO 2729 McCurdy 1944)

When a number of the enlisted personnel of a company refused to comply with the orders of their noncommissioned officers to fall out and go to work, they were told by a lieutenant to report to the recreation hall. There, the commanding officer invited complaints. After various criticisms were voiced by the enlisted men and a plain indication that they intended to persist in their refusal to work until certain demands had been met, the commanding officer ordered them "to get out of her and get on those trucks and go to work". Although they eventually complied, they made no overt act to show an intention to immediately comply. (a) Seven primary accused and 11 secondary (accused, whose dishonorable discharges were subsequently suspended) accused were jointly charged in whole or in part with willfully disobeying the lawful command of their superior officer to fall out and go to work, in violation of AW 64. (b) Two primary accused, together with four secondary accused, were charged jointly with beginning a mutiny with intent to subvert and override lawful military authority by concerted disobedience of the lawful orders of a noncommissioned officer who was then in the execution of his office, and of their commanding officer, to fall out and go to work, in violation of AW 66. (c) One primary accused, with four secondary accused, were charged jointly with beginning a mutiny with intent to subvert and override lawful military authority by concerted disobedience of the lawful orders of a noncommissioned officer, then in the execution of his office, and their company commander to fall out and go to work, in violation of AW 66. (d) Four primary accused and three secondary accused were charged jointly with joining in a mutiny which had been begun against the lawful military authority of the commanding officer of their company and, with intent to subvert and override lawful military authority, with concerted disobedience of the lawful command of that commanding officer to fall out and go to work, in violation of AW 66. The primary accused were found guilty as charged. Six of them were given 18-year sentences, and one was given a 15-year sentence. Their dishonorable discharges were not suspended. While the secondary accused received sentences after findings of guilt, their dishonorable discharges were suspended. Hence, only the records of the primary accused are before the Board of Review for consideration here. LEGALLY SUFFICIENT IN PART; LEGALLY INSUFFICIENT IN PART.

(A) JOINT TRIAL: All accused were jointly charged with a violation of AW 64. Two several groups were separately charged, jointly within each group, with beginning a mutiny, and a third separate group was charged jointly within itself with joining in a mutiny commenced by others--all in violation of AW 66. The allegations of each AW 66 specification directly connected the accused named therein with the offense charged in the AW 64 specification. The identical locus of the offenses and the same dates were alleged in all of the specifications. The commanding officer's orders "to fall out and go to work" were set forth as a basic premise of each offense. "There is therefore exhibited on the face of the pleading a community of action and common objectives of each and all of the accused and this is true notwithstanding the fact that each specification alleges a separate offense." "The reasonable conclusion * * * is that the offenses charged * * * although separately alleged were part and parcel of one transaction and the form of the charges and specifications" did not create a barrier to a joint trial. The motion for severance was properly denied.

(B) WILLFUL DISOBEDIENCE: Defense testimony to the effect that the commanding officer had merely "advised" the men to go to work created at most a conflict in the evidence. Although all of the accused eventually fell out and went to work, yet this was not the obedience contemplated and required by the order. The trucks for the men had to wait long past the normal time to entruck for work. The order called for immediate obedience. The soldiers indicated no immediate intention of obeying the order, and made no move to comply. (See below.)

(C) THE "MUTINY"--IN GENERAL: Accused and other soldiers, billeted in huts #3 and #17 refused on the morning of 6 March to "comply with orders of the accused who were billeted in the recreation hall had knowledge of the mutinous agreement * * * and proceeded to act under it, although they had not reached the point of defiance of the order of Sergeant Jackson at the time of the arrival in the hall of" the commanding officer and other officers. "Knowledge of this recalcitrancy came to the attention of Lt. Johnson, who thereupon gave orders that the company should report to the recreation hall. Captain Hinton impliedly approved Lt Johnson's action by his attendance at the meeting and participation therein. * * * These undisputed facts give rise to the inference that the soldiers entered the recreation hall meeting animated by the same spirit of defiance of authority that they had lately exhibited to their noncommissioned officers. *** With this condition confronting him Captain Hinton invited complaints from his men. These complaints considered separately and in solido unconsciously reveal not only a critical attitude of the men toward their officers but also that the men (including accused) intended to persist in their prior defiance of authority and refusal to go to work until their demands were granted. It was against this background that Captain Hinton gave his order 'to get out of her and get on those trucks and go to work'. There was no overt act by any of the soldiers which evidenced their intention to comply immediately with this command. Allowing the defense the full benefit of its contention that prompt compliance was rendered impossible by the intervention of Lts. Mikesell, Penninger and Withey, a considered and balanced analysis of the evidence reveals a much deeper and more incriminating meaning inherent in this situation than such interpretation of the evidence offers. The over-all evidence * * * supports the inference that the intervention * * * did not prevent the soldiers from complying with the order, but oppositely that they intervened because it was evident that the accused and fellow soldiers did not intend to obey the order and that the lieutenants' efforts were purposed to secure obedience * * *. * * * The ultimate performance by the men of the same acts as required by the order after having been bribed by the promises of a junior officer cannot retroactively cancel their offense nor ameliorate its enormity."

"The evidence * * * fully justified the court in concluding that some time between the Manigo meeting on 25 February 1944 held at the camp in * * * and the evening of 5 March when the company arrived at the * * * camp, the enlisted personnel of the * * * Company, nursing grievances which may or may not have possessed substance and merit, entered into an understanding or agreement among themselves to refuse to perform their usual and ordinary duties on the morning of the 6 March unless or until they secured

from their officers the promises of an investigation of company affairs by the Inspector General's Department. Members of the company billeted in huts #3 and #17 pursued the same general course of conduct and reacted identically to the orders of their superior noncommissioned officer 'to fall out and go to work'. These highly incriminating facts when supplemented by evidence of unrest and dissatisfaction in the company for several weeks prior to the events at the * * * Camp, and of the conduct of the men at the recreation hall meeting, coupled with the critical and subversive comments made there by certain of their number, is substantial evidence from which the court was authorized to infer the prior arrangement and understanding of the soldiers to subvert, override or neutralize superior authority until their demands were granted."

(D) BEGIN A MUTINY--Davis and Smith: It could be inferred that these men were parties to the subversive agreement. However, this factor, together with the fact that they possessed the necessary specific intent to override authority, did not suffice to complete the case against them. "It was necessary * * * in addition to prove that each of them among the first of accused committed some overt act that had for its purpose the accomplishment of the agreement. An overt act was both alleged and proved, viz: the disobedience of the command of Barnes, their superior noncommissioned officer. In view of the company procedure disobedience of this order was the first act of defiance and opposition which would affirmatively put the mutinous agreement into operation and thereby begin the mutiny." The subsequent disobedience of the lawful order of the commanding officer was superfluous to the question of their guilt of their AW 66 offense.

(E) BEGIN A MUTINY--Ballard: The noncommissioned officer told Ballard "to make haste, clean up and fall out". "The men proceeded to perform the order * * *, but before they could leave the hall and go to the trucks, Captain Hinton and the other officers entered the hall and the so-called meeting ensued. Performance of the part of the order to fall out and go to work was therefore rendered impossible. * * * Hence the prosecution's proof of the first alleged overt act of beginning a mutiny, viz: disobeying the commanding officer's subsequent order to go to work, the mutiny had previously begun upon the disobedience of the noncommissioned officer. "Those in the recreation hall did not begin a mutiny; they joined in a mutiny." "A mutiny existed. Captain Hinton sought to quell it by his order. When Ballard refused to obey the order it was not an overt act which related back to the prior time when the mutiny commenced coincident with the events in huts #3 and #17. Rather his overt act (disobedience of the Hinton order) was connected with the mutiny then in progress. The evidence would most probably have sustained a finding of Ballard's guilt of joining a mutiny, but he is not charged with that offense. The offense of beginning of mutiny is a distinct offense from that of joining a mutiny. Proof of the latter offense does not sustain allegations charging the former. * * * There is a fatal variance between the proof and the charge in the instant case.

(F) JOIN IN MUTINY--Gayles, James, Washington, Felders: "In considering the guilt of the four named accused of the offense of joining in a mutiny, two of the fundamental elements thereof must be taken as established beyond all doubt: (1) the existence of the mutinous agreement between a substantial number of the enlisted personnel of the company and (2) that the soldiers had acted under the agreement and had produced a condition whereby

military authority had been temporarily subverted, usurped and defied. A mutiny existed when Captain Hinton appeared before his men." "The evidence with respect to the actions and utterances of (the above-named accused) * * * at the meeting is highly convincing that each of them was fully cognizant of the agreement and was keenly conscious of the fact that temporarily the enlisted personnel had secured control of the command of the company. * * * There was therefore substantial evidence to support the finding of the court that the four accused acted with full knowledge that a mutiny existed and that the authority of the officers of the company had been temporarily subverted and set aside. The burden was also upon the prosecution to prove beyond a reasonable doubt that /these four/ * * * each 'joined in' the mutiny, and to support such fact proof was required that each of said accused committed one or more overt acts evidencing their adherence to and union with the mutineers. The overt act was alleged", to wit: the disobedience of the commanding officer's order to fall out and go to work. It was fully proved.

(G) PLACE OF CONFINEMENT: Inasmuch as Ballard has been found not to have been guilty of beginning a mutiny in violation of AW 66, but is still guilty of willful disobedience in violation of AW 64, his place of confinement must be changed from the U.S. Penitentiary, Lewisburg, Penn. to Eastern Branch, U.S. Disciplinary Barracks, Greenhaven, N.Y. (CM ETO 3147 Gayles et al 1944)

After obtaining permission from his superior to collect and impound weapons of his company, a company commander caused his company to assemble, and gave its personnel a clear and positive order to deposit their firearms and bayonets on a truck as their names were called. The ten accused herein were members of that company and were present at the time. Rather than complying, they protested by dissident mutterings and murmurings which finally ripened into active and overt disobedience. They then left the company formation. Ignoring a definite command from the officer to reform in military order, they moved to a distant area. Thereafter, although approached by the officer and warned by him as to the consequences of their disobedience, they persisted in their refusal to obey--explaining the presence of snipers and the enemy, although they had encountered neither. Finally, the officer applied force to obtain the weapons. Promiscuous and uncontrolled discharge of the firearms followed, resulting in the death of a fellow soldier. Accused ten soldiers were found guilty of a violation of AW 66, in that they had, while acting jointly and in pursuance of a common intent, caused a mutiny when they concertedly and willfully refused to obey the lawful order of their superior officer to turn in their rifles --their intent having been to usurp, subvert and override for the time being, lawful military authority. Their sentences included 40 years confinement each. HELD: LEGALLY SUFFICIENT. (1) The Evidence: Although accused argued that they had been given the alternative of going to the other end of the field in lieu of turning in their weapons, the court's determination against them in this regard is binding. While this case could have been properly handled as a willful disobedience in violation of AW 64, a violation of AW 66 was sufficiently proved. There was collective insubordination and specific intent by each accused to override and displace,

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in combination with his fellow accused, the powers of command and the authority of their commanding officer. Although the recalcitrancy and specific intent may have arisen spontaneously upon the giving of the order by the officer to the personnel to deliver their weapons, there is substantial evidence that a consolidation of purposes followed immediately. Consequently, when accused left the company formation, the existence of a conspiratorial agreement may legitimately and reasonably be inferred. That such agreement had for its purpose the retention of their weapons, in derogation of the officer's authority, is manifest by accuseds' conduct a few minutes later. They thereby succeeded in temporarily setting aside the power and authority of higher command. "The necessary overt act of beginning a mutiny was shown by their deliberate, willful and disobedient departure from the company formation carrying with them their firearms. All of the elements of the offense of beginning a mutiny therefore existed -- (a) a conspiratorial agreement, (b) specific intent to displace and override superior authority, and (c) the overt act of beginning a mutiny." Neither the necessity for nor wisdom of the order of the company commander is a matter of concern herein. (2) The Charge: Although it was alleged that accused had caused a mutiny, it was proved that they had begun a mutiny. Notwithstanding the discussion in Winthrop's Military Law and Precedents - Reprint, pp.578-583, which distinguishes between the two terms "(but is qualified by the statement 'the terms are not necessarily so closely construed'), it would seem that the verb 'cause' includes within its meaning the very 'begin'." The Board of Review in its appellate function may construe and interpret specifications. The instant specification is construed as having charged accused with beginning a mutiny. (3) Statements by the Accused: When the several statements of each of the ten accused were introduced in evidence, the court was instructed that "any statement in any of the written statements * * * which refers to any of the accused other than the man making that particular statement is inadmissible and irrelevant and will not be considered by the Court. * * * The statement made by each accused is admissible only against the particular person who made the statement." That cautionary instruction was adequate to protect the rights of each accused. Since the statements were only admissions against interest, they were admissible without proof of their voluntary nature and without the establishment of the corpus delicti by independent evidence. (4) Sentence and Confinement: "The punishment for violation of AW 66 is 'death or such other punishment as a court-martial may direct'. The Table of Maximum Punishments prescribes no maximum limit of confinement." The 40-year sentences herein are legal. "Confinement in a penitentiary is authorized upon conviction of the crime of mutiny in any of its aspects by AW 42 and Act 28 Jun 1940, c.439, Title I, sec.5; 54 Stat. 671; 18 USCA sec.13." (CM ETO 3803 Gaddis et al 1944)

Accused was found guilty of "exciting" a mutiny, in violation of AW 66. HELD: LEGALLY SUFFICIENT. "Accused appeared at one of the barracks of * * * on the night of 12 July 1944 and delivered an inflammatory language, wherein he sought to stimulate the men to resist the regularly established military author' v by not responding to the reveille call the next morning. That such al proximately caused the confederated and joint disobedience by t. oldiers on the next morning is an irrefragable inference from the evidence; no other reasonable conclusion is possible. The soldiers on the following day not only refused to stand reveille formation but also persisted in their defiant conduct by disobeying further orders of their superior officers. Throughout the day they deliberately pursued a course of recalcitrancy and revolt that was not only intended to usurp, subvert, set aside, and override military authority for the time being, but in fact, did succeed temporarily in its purpose. The conduct of the soldiers constitute a mutiny." "Accused's culpability is found in the fact that he excited the men to this insubordination and temporary overthrow of the superior military authority of the company officers. Acting singly and alone, he could and did commit this offense and the proof of his personal participation in the mutiny which followed was not necessary to convict him of the offense of 'exciting' a mutiny. It is highly significant that he wore T/4 stripes, wrongfully and without authority, when he made his demagogic appeal to the ignorance, passions and prejudices of his fellow soldiers." (CM ETO 3928 Davis 1944)

In General 426

Cross References: 454(72a) 7001 Guy (Officer fails to stop fight between EM; charged under AW 96)

450(1) 4949 Robbins, Jr. (murder ensues)

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(3) Breach of Arrest
Escape from Confinement

427 (AW 69) Arrest or Confinement:

Not Digested
1100 Simmons
1479 Shipley
1549 Corprue
1671 Artwell
1737 Mosser
1856 Swartz
1965 Lemishow
2023 Corcoran
2072 Douglass
2098 Taylor
2194 Henderson
2302 Hopkins
2368 Lybrand
2410 McLaren
2460 Williams
2506 Gibney
2632 Johnson
2723 Copprue
2753 Setzer
2789 Woolsey
2901 Childrey
3056 Walker
3305 Nichelli
3450 Willhide
3482 Martin
4030 Elser
6383 Wilkinson
8632 Golding
10098 Mooney
11468 Daggett

Cross References: 450(1) 438 Smith

Breach of Arrest

(3) Cross References: 422(5) 4376 Jarvis
422(5) 817 Yount (disobedience of officer; drunkenness)

Escape from Confinement

Cross References: 399(2) 1395 Saunders (Penitentiary confinement)
416(9) 1645 Gregory
454(105) 3686 Morgan
405 4616 Molier
422(5) 9162 Wilbourn

(6) Physical Restraint: After his apprehension following his AWOL, accused was placed in custody. Pursuant to orders, a sergeant who was a member of the military police was escorting him back to his home station. The sergeant had signed a receipt for him. While waiting at a railroad station between a change of trains, the sergeant permitted accused to go to the latrine unescorted. Accused escaped. Among other things, he was found guilty of escape from confinement, in violation of AW 69. HELD: LEGALLY SUFFICIENT. The sergeant's "ill-considered leniency, of which the accused took advantage to effect his escape, was not of a type to affect the essential

character of the custody imposed. 'Confinement imports some physical restraint (MCM, 1928, par.139a, p.153). /The sergeant/ was under a duty, known to both him and accused, to physically restrain accused while transporting him to his station and was armed for that purpose. His temporary relaxation, under a misapprehension, of the strictness of the restraint imposed in permitting his prisoner to proceed to the toilet unescorted, was in no sense an abrogation of his status of restrainer; and the fact that accused effected his escape by stealth rather than by force rendered the offense involved no less an escape from confinement within the meaning" of AW 69. (CM ETO 3153 Van Breeman 1944)

Among other things, accused was found guilty of breaking arrest, in violation of AW 69. HELD: LEGALLY SUFFICIENT. The only evidence of accused's being placed in arrest in quarters on 5 January "is the morning report entry of that date. Since this was admitted without objection, it is deemed competent to show the status alleged at the time accused absented himself from his organization on the 5th." However, in view of the serious nature of further desertion offenses charged against this accused, and the fact that the initial absence involved the identical act which constituted the breach of arrest, it would have been preferable to have omitted the latter charge. Its inclusion, however, did not prejudice accused's substantial rights. (CM ETO 8706 Twist 1945)

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428 (AW 70) Charges; Action Upon:

CHARGES

Cross References: 390(1) 1704 Renfrow (Original charge as part of record; discrepancy)

(1) Investigation:

Not Digested
10338 Lamb (perfunctory)

Cross References: (Also see CM 229477 Floyd, Washington B/R)
374 1100 Simmons (Investigating officer as defense counsel)
385 3113 Prophet (Designation of wrong Article of War)
4570 Hawkins (Change charge; reinvestigate)
5155 Carroll (Change charge; reinvestigate)
6997 Jennings (Change charge; reinvestigate)
394 In General--designation of wrong Article of War)
422(3) 106 Orbon (Amend after investigation)
422(5) 7584 Emery (Investigating officer appointed by accuser)
428(7) 255 Cobb (Power of subsequently-appointed investigating officer to take accuser's charge sheet oath)
433(2) 4564 Woods (Perfunctory)
443(1) 6684 Murtaugh (necessity for)
450(1) 559 Monsalve (right to counsel at)
450(4) 969 Davis (jurisdictional requirement)

428(1) (1) Investigation

Accused was originally charged with permitting a military vehicle to be damaged by negligent and reckless driving, in violation of AW 63; and with wrongfully and unlawfully taking a military vehicle, in violation of AW 96. After investigation by the investigating officer, a further charge alleging the manslaughter of a third party during the trip of the military vehicle, in violation of AW 93, was added. No additional investigation was subsequently had. HELD: Although no further investigation was held subsequent to the addition of the charge under AW 93, accused made no objection to his trial thereon. The latter offense was indicated by the facts disclosed in the original investigation. A further investigation would have been futile because it would have merely revealed the same set of facts. Accused's substantial rights were not affected. The failure to have an additional investigation was not prejudicial. (CM ETO 393 Caton,Fikes 1943)

"The papers accompanying the record of trial fail to disclose when the investigating officer herein was appointed but they do disclose that the report of his investigation is dated 30 January 1944 and that the charges were referred for trial on that same day. The record also shows that the Board of Officers were appointed to investigate the accounts of accused in May 1943 and had audited and checked accused's entire records. The facts involved had already been fully investigated prior to27 January 1944 on which date a court was appointed to try accused. A new investigation would yield the exact state of facts as did the prior investigation. It would be a futile effort which would delay the trial and not protect any rights of the accused * * *. The provisions of AW 70 are not jurisdictional and are for the benefit of the appointing authority." (CM ETO 1631 Pepper 1944)

Although the requirements of AW 70 as to an investigation were fully met in the instant case, "the provisions of this Article with reference to the investigation of charges before trial are, in any event, not jurisdictional (CM 229477, Floyd)." (CM ETO 2636 Brinson et al 1944)

(1a) Witnesses Listed on Charge Sheet:

Cross References:
422(5) 5607 Baskin (Not listed; "surprise")

(2a) Charge Sheet as Basic Instrument:

Cross References:
385 6997 Jennings (staple new, over original charge)
390(1,2) See AW 33 generally
416(9) 5196 Ford (paste over original charge)
433(2) 5004 Scheck (Entire record considered on appeal)
454(18a) 9987 Pipes (paste over original charge)

Not Digested
3859 Watson (as basic instrument before court)

(3) Investigation; Rights of Accused:

Accused argued that he was not given adequate opportunity to examine available witnesses at the time of the investigation of the charge agains him under AW 70. HELD: (1) "There is no authority for paying mileage or witness fees in such preliminary investigation." (2) "The right of cross-examination, made mandatory by statute, is dependent upon the availability of the witnesses at the investigation of the charges. If they are not available, the right of cross-examination does not exist. Th record of trial in this case clearly shows that the prosecution's witness were civilians, living * * * 60 miles distant from the accused's station and the headquarters of the officer ordering the investigation." Statements were obtained from these witnesses by a local constable, and copies thereof were forwarded. They were received three weeks prior to the trial. Accused and his counsel had "the time and opportunity to examine those witnesses, who would submit to examination, before the trial. The record shows that the accused did not object to proceeding * * *. The word 'available' means accessible or capable of being used to accomplish a purpose * * *. There is no method provided whereby these witnesses cou have been subpoenaed to appear before the investigating officer at the headquarters of the officer ordering the investigation, and there is no authority for the payment of witness fees and mileage of such witnesses. Under such circumstances, * * * these witnesses were not 'available' within the purview of AW 70 * * *." (CM ETO 25 Kenny 1942)

428(3a, 4a) (3a) Dilatory Filing of Charges
(4a) Joint or Separate Charges

(3a) Dilatory Filing of Charges:

"The offense of which accused was convicted, leaving post in violation of AW 96, happened on 18 September 1944. So far as appears, no steps were taken to bring him to trial for this offense, until his absence from 2 to 16 January 1945. The testimony as to all three offenses is conflicting and uncertain, and the court acquitted him of the latter two. The evidence is sufficient to sustain the findings of guilty" on the AW 96 charge, "but in view of the circumstances of the offense and the trial, I believe" the 30-year sentence should be reduced. (1st Ind,CM ETO 10935 Cutierrez 1945)

(4a) Joint or Separate Charges:

Cross References: (Also see individual cases)
424 895 Davis
450(1) 6265 Thurman
7518 Bailey (murder-rape)
450(4) 6148 Dear, et al
451(9) 3927 Fleming (Only one accused tried on a joint charge)

Accused X and Y were found guilty of assault with intent to commit rape, in violation of AW 93. HELD: LEGALLY INSUFFICIENT as to Y. (1) The Specification charged that X did, in conjunction with Y, with intent to commit rape, commit an assault upon the victim by willfully and feloniously throwing her upon the ground. The evidence clearly established that both X and Y took part in a joint assault upon the victim with the alleged intent. A serious question is presented in connection with the charge against accused Y. Eliminating from the specification all descriptive allegation, the same is as follows: "X * * *, did, in conjunction with Y * * * with intent to commit a felony, viz, rape, commit an assault upon * * * by willfully and feloniously dragging and throwing the said * * * upon the ground." With respect to the form of specification in charging a joint offense, the Manual for Courts-Martial (1928, appendix 4, par. f, p 237) provides as follows: "f. Form of specification in joint offense.--In the case of a joint offense each accused may be charged as if he alone was concerned or the specifications may be in accordance with the principles of the following examples, depending on the decision of the person preferring the charges as to how the persons concerned should be tried:

In that Private A, Company**, *** Infantry, and Private C, Company **, ***Infantry, acting jointly, and in pursuance of a common intent, did (here allege place, time and offense, as when charging one person).

In that Private A, Company**, ***Infantry, and Private B, Company **, ***Infantry, acting jointly and in pursuance of a common intent, did, in conjunction with Private C, Company**, ***Infantry (here allege place, time and offense).

In that Private C, Company**, ***Infantry, did, in conjunction with Private A, Company**, ***Infantry, and Private B, Company **, ***Infantry (here allege place, time and offense)."

It is manifest that the specification in the instant case is based on the third of the suggested forms above set forth. An analysis of the three forms will reveal their exact purpose: (a) The first form is intended for use when A and C are all of the joint perpetrators of a crime and it is intended that they should be charged jointly and shall be tried. (All of the joint perpetrators are charged together and are to be tried). (b) The second form is intended for use when A, B and C are the joint perpetrators of a crime, and it is intended that only A and B shall be charged jointly and shall be tried but that C, while joint actor is neither to be charged nor tried. (Two or more of the joint perpetrators are charged and are to be tried, but one or more are not to be charged and tried). (c) The third form is intended for use when A, B and C are the joint perpetrators of a crime and it is intended that only A shall be charged and tried but that B and C while joint actors are neither to be charged nor tried. (Only one of the joint perpetrators is charged and is to be tried, and one or more are not to be charged and tried). Certain fundamental principles of pleading must be observed in drafting specifications and the primary one is that a specification "must specify the material facts necessary to constitute the alleged offense". * * * "An indictment, information or complaint must be positive in respect to the charge that the person accused committed the crime which renders him amenable to the charge and must directly and positively allege every fact necessary to constitute the crime. Nothing can be charged by implication or intendment; nor is it sufficient to charge any material matter by way of argument, or as based on suspicion; the offense cannot be charged on information and belief, nor can the averments be aided by imagination or presumption. * * *" "The allegation of the indictment or information must be direct and certain as to the person charged. * * *" The words of action in the present specification are "did * * * commit an assault." It is X who is specifically connected with this verb phrase "X * * * did * * * commit an assault". The prepositional phrase "in connection with * * * Y" is descriptive only; it describes with whom X was associated in the commission of the assault. The prepositional phrase "with an intent to commit a felony" refers to X, not Y. The meaning of the specification becomes obvious: "X, in conjunction with Y, and with intent to commit a felony, did commit an assault, etc." There is, therefore, no allegation that Y committed any offense. The specification violates the funda-

mental principlesof pleading that the "indictment, information or complaint must be positive in respect to the charge that the person accused committed the crime which renders him amenable to the charge." The result is that the instant specification fails to allege a cause of action against Y. He was brought to trial upon a specification which was fatally defective as to him. Such defect was not waived by his plea to the general issue, nor by his failure to raise the question during trial. It was an organic defect which nullified the whole prosecution against Y. It may be considered by the Board of Review upon appellate review * * *. The provisions of AW 37 do not permit the Board of Review to ignore this situation. (MCM, 1928, par 87b, p 74.) The error in the specification as against Y is not a defective statement of facts constituting an offense. It wholly fails to allege that Y committed any offense. As a consequence the defect is not within the purview of the curative statute, and is fatal to these proceedings. As to accused Y, the record of trial is legally insufficient to support the findings of guilty and the sentence. (Digest taken from III Bul JAG p 59-61.) (CM ETO 882 Biondi-White 1944)

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(5) Multiplication of Charges Based on Single Act:

Not Digested
8474 Andoscia (AW 75)

Cross References:

395(44) See generally--inconsistent findings
421(2) 3801 Smith (AWs 63,64,65,96)
424 895 Davis (Joint mutiny; commit riot)
428(8) Alternative pleading; see generally
433(1) 1109 Armstrong (AW 75 drunkenness)
433(2) 4074 Olsen (AW 75, two specifications, one transaction)
6694 Warnock (AW 75, fatal to one specification)
415 8164 Brunne (AW 57 and 95; false returns)
450(1) 5764 Lilly (AW 93,96; murder; disorderliness)
450(4) 6193 Parrott (burglary-housebreaking)
451(6) 4606 Cockler (assault; disorder)
451(17) 3454 Thurber (embezzlements; false official reports)
451(35a) 952 Losser (AW 93 larceny; different items)
451(38) 2736 Davis (larceny)
452(9) 9784 Green (AW 94 larceny and wrongful disposition)
453(10) 10362 Hindmarch (AW 95 and 96 drunkenness)
453(10) 3303 Croucher (AW 95 drunk and disorderly officer; AW 96, officer strikes NCO)
453(11) 1197 Carr (AW 95-96)
453(20a) 9542 Isenberg (censorship violations; both under AW 95 and 96)
454(13) 2905 Chapman (statutory rape attempt; sodomy; contribute to minor's delinquency)
454(18a) 7506 Hardin (Black market under both AW 84 and 96)
454(81a) 7245 Barnum (AW 95 and 96 secrecy violation)

Accused was found guilty of both (a) assault with intent to commit murder, by striking two military policemen with his fist and a knife, in violation of AW 93; and (b) wrongfully interfering with those same two military policemen, then in the execution of their duty, in violation of AW 96. HELD: Even though it is obvious that part of the proof in support of the first charge was also necessary to support the second charge, yet no improper multiplication of charges resulted. The policy announced in MCM, 1928, par 27, p 17 was not violated. (CM ETO 503 Richmond 1943)

428(5a-7) (5a) Nolle Prosequi:
(6) Service on Accused
(7) Signature and Oath

(5a)

(5a) Nolle Prosequi:

Cross References: 395(49f) (See generally)

(6) Service on Accused:

Cross References:
428(15) Trial within five days--see generally
433(2) 3948 Paulerico (by TJA, before reference)
450(1) 422 Green (fail to serve)

(7) Signature and Oath:

Cross References:
385 4570 Hawkins (change charge after investigation; no re-swear)
5155 Carroll (same)
6997 Jennings (same)
416(9) 5196 Ford (same)
422(3) 106 Orbon (same)
433(2) 6694 Warnock (same)
454(10a) 9987 Pipes (same)

A duly appointed investigating officer administered the oath on the charge sheet to the accuser. "His official character is shown as 'Investigating Officer'". HELD: "Investigating officers, as such, have authority to administer oaths only with respect to matters in connection with investigations they are detailed to conduct (AW 114)." However, this investigating officer was not detailed to investigate the instant charge until the day after the oath was administered. Yet no objection was raised to this irregularity, and accused was not prejudiced. (CM ETO 255 Cobb 1943)

Defense did not object to the trial of the accused upon a charge and specification which were unsupported by the accuser's oath. HELD: No injury to accused's substantial rights resulted. (CM ETO 393 Caton-Fikes 1943)

An additional charge and specification herein were not sworn to . HELD: Although it appears that the additional charge and specification were added without the knowledge or approval of the accuser, they were duly investigated pursuant to AW 70, and were regularly referred to trial. A copy of the additional charge and specification was served on accused. The defense raised no objection. No prejudice resulted. (CM ETO 531 McLurkin 1943)

(7a) Withdrawal of Charges:

Cross References: 451(2) 4059 Bosnich (by court)

428(8-9) (8) Specifications; Sufficiency
(8a) Specifications; Alternative Pleading
(9) Specifications; Amendments

SPECIFICATIONS

(8) Specifications; Sufficiency in General:

Cross References:
416(9) 5196 Ford (vague and indefinite; no objection)
433(4) 9259 Black (construe generally)
450(4) 7078 Jones (several rapes proved, but only one charged; use first one)
451(2) 492 Lewis (Allege an assault; prove several motion to elect)

(8a) Alternative Pleading:

Cross References:
433(2) 4074 Olsen (AW 75)
443(1) 4443 Dick (AW 86--leave post; sleep on post)
451(01) 3475 Blackwell (arson)

(9) Amendments:

Cross References:
385 5555 Slovik (amend after investigation)
423(1) 8163 Davison (amend to include date)
428(7) See in general--failure to resign and reverify after)
451(50) 1554 Pritchard (deny defense's motion to amend)

It was charged that the alleged offenses occurred on 27 June and 1 July 1943. The proof showed the dates to be 23 July and 26 July 1943. Over objection, the specifications were amended to conform to the evidence. HELD: The amendment was legally permissible. The defense stated that a continuance was not desired. (MCM 1928, Par 73, p 57) (CM ETO 2188 Prince 1944)

(9) Specification; Amend
(10) Specification; Dates 428(9-10)

Accused was charged with embezzlement, in violation of AW 93. During the trial, an $18.75 item in the specification was amended, but the amendment did not change the total $226.50 value of the total property alleged to have been embezzled. HELD: "The amendment neither altered the nature nor increased the grade of the offense. It did not subject accused to liability for any greater punishment." "The court may during trial permit the appropriate amendment of a defective specification which originally was sufficient to apprise the accused fairly of the offense intended to be charged, provided it clearly appears that the accused has not been misled, and that a continuance is unnecessary for the protection of his substantial rights * * *. Had the original specification alleged embezzlement of $18.75 and no more, amendment by the court to meet the proof adduced would have been unauthorized as increasing the quantity of the offense originally alleged (MCM, 1928, par 104c, p 99). Had the amendment affected the corpus of the embezzlement, substituting bonds for money, for example, it would have been unauthorized. Such amendment would have changed the quality of the original offense, alleging in lieu thereof, one separate and distinct * * *. Since the amendment affected neither the quality nor the quantity of the offense originally alleged, the court properly permitted it * * *." (CM ETO 1991 Pierson 1944)

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(10) Specifications; Date:

Cross References: (See individual topics)

385	5953 Myers (AW 58-28)
	6842 Clifton (AW 58-28)
	9975 Athens (AWOL termination; proof)
416(6a)	2473 Cantwell (AWOL termination; proof)
395(11)	Variance--see in general
422(5)	7584 Emery (failure to repair)
433(2)	4565 Woods (AW 75)
	4691 Knorr (AWOL termination; not pleaded)
	4995 Vinson (AWOL termination; not pleaded)
450(1)	5764 Lilly ("on or about")
453(18)	2727 Woodson (date variance; two days)
453(20a)	9542 Isenberg (variance; "on or about")
454(63a)	7570 Ritner (wrongful fondling)

10196 Gaffney ("on or about"--not digested)

428(11-12a) (11) Specifications; Identity
(12) Specifications; Place
(12a) Specifications; Value

(11) Specifications; Identity:

Cross References:
395(11) Variance--see generally
433(2) 5004 Scheck (failure of proof)
450(1) 438 Smith (confusion, between papers)
452(18) 5666 Bowles (identity of stolen truck)
454(18a) 5032 Brown (ownership; AW 83-84)
454(56a) 4119 Willis (description of rape victim as "Miss")

(12) Specifications: Place:

Cross References:
385 5318 Bender (proof of)
395(11) Variance--see, in general
422(5) 7584 Emery (fail to repair; place and time omitted)
444(3) 9144 Warren (fail to prove place)
454(63a) 7570 Ritner (indecent fondling)

(12a) Specifications; Value:

Cross References:
395(26a) Value--see in general, re proof
454(18a) 5539 Hufendick (black market)

(12b) Specifications; Conclusions; AW 96:

Cross References: (see individual topics generally)
453(10) 10362 Hindmarch
454(18a) 9987 Pipes
454(22) 3044 Mullaney (see Washington letter, following digest)

(13) Specifications; Interpretation:

Cross References:
408 See in general
444(3) 5255 Duncan (by Board of Review)
450(4) 3740 Sanders (by Board of Review)
451(50) 2788 Coats-Garcia (by Board of Review)
454(7) 4235 Bartholomew (by Board of Review)
454(18) 3456 Neff (notice to accused)
454(36a) 7553 Besdine (by Board of Review; draughtsman not aware)

(13a) "Willfully, Unlawfully, Feloniously"--Omit One or More of Words:

Cross References:
450(1) 6262 Wesley (murder--leave out "unlawfully")
450(2) 4993 Key (murder-manslaughter; leave out "willfully")
451(50) 393 Caton-Fikes (manslaughter; omit "willfully")
454(18a) 9987 Pipes (black market offense)
454(37a) 1366 English (drunken driving charge)
454(88) 2550 Tallent (rape; omit one word at first trial double jeopardy)
454(92a) 4704 Milburn (throw hand grenade in bivuoac. Not alleged to have been wrongful or unlawful Insufficie

428(13b-15a) (13b) Specifications; Multifariousness
(14) Specifications; Several, Constituting Single Offense
(15) Trial Within Five Days
(15a) Advice; Staff Judge Advocate

(13b) Specifications; Multifariousness:

Cross References:
451(2) 492 Lewis (allege one assault; prove several)
450(4) 7078 Jones (allege one rape; prove several; use first)
433(2) 7391 Young (AW 75 case)

(14) Several Specifications Constituting Single Offense:

Cross References:
428(5) See multiplication of charges herein.

(15) Trial Within Five Days:

Not Digested
3178 Steele
4988 Fulton
5032 Brown
5359 Young
8083 Cubley
8732 Weiss
9235 Simmons
9393 Reed

Cross References:
385 5155 Carroll
5958 Perry
416(9) 4756 Camisciano
10331 Jones
423(1) 8163 Davison
433(2) 3937 Bigrow
3948 Paulerico
4095 Dolre
4564 Woods (lead. case)
4630 Shera
4820 Skovan
5004 Scheck
5114 Acers
5445 Dann
433(3) 5255 Duncan
444(3) 4443 Dick
450(1) 3649 Mitchell
454(01) 3475 Blackwell

(15a) Advice; Staff Judge Advocate:

Cross References:
395(47) Subsequently sits as law member

433 (AW 75) Misbehavior Before the Enemy:

Cross References: 399(5a) 1249 Marchetti (place of confinement; military offense)

(1) Specifications:

Cross References: 433(2) 1693 Allen
433(2) 3828 Carpenter
433(2) 4783 Duff
433(2) 4820 Skovan
433(2) 6694 Warnock
419(1) 5359 Young
433(2) 6376 King
433(2) 4564 Woods
433(2) 4740 Courtney
433(2) 3196 Puleio
433(2) 4074 Olsen
385 4570 Hawkins (28-58)
385 5155 Carroll (28-58)
433(2) 8474 Andoscia (multiplicity; two specs.)

Not Digested (In General)
212 Reale (abandon company)
1408 Saragena
1409 Micczkowski
1479 Shipley
3453 Kuykendoll
3722 Skamfer
3988 O'Berry (digested in part at 422(5))
3989 Folse
4005 Sumner
4285 Gentile
4967 Jones
4886 Turner
5770 Kieffer (2 Lt-50 yr sent)
5513 Sexton
5346 Hannigan (fail to adv)
5646 Sorola (ment. cap.; marijuana)
5901 Taylor (men.cap.)
6050 Guttman (ment. cap.)
5666 Bowles et al
6198 Beans
6961 Risley, Jr. (sentences)
8474 Andoscia (sanity)
8492 Winters Jr
8759 Lopez (fail to continue with patrol)

433(1) (1) Specifications

Accused was found guilty of misbehavior before the enemy in violation of AW 75, as described in two specifications thereunder. Both specifications covered the same general subject matter. The first alleged that, by his misconduct in becoming drunk and disorderly, he had endangered the safety of his Battery, which it was his duty to defend. The second alleged that, by his misconduct in becoming so drunk that he was unable to perform his duties as a cannoneer, he had endangered the safety of his Battery,which it was his duty to defend. HELD: LEGALLY SUFFICIENT. (1) Specifications: Since there was actually but a single offense herein, two specifications should not have been set forth by the pleader. "There was but one offense charged, viz: misbehavior before the enemy which consisted of becoming drunk and disorderly to the extent that (accused) was unable to perform his duties as cannoneer of the battery." The pleader undoubtedly used Form 48, App.4, p.244, MCM, 1928, to state offenses under the following portion of AW 75: "Any * * * soldier, who, before the enemy, * * * by any misconduct * * * endangers the safety of any * * * command which it is his duty to defend * * *." However, the pleader's intention did not confine the prosecution to proof of an offense under the above clause, because the specifications contain allegations of fact which constitute offenses under another provision of the Article of War. The phrase, "which it was his duty to defend", may be rejected as surplusage. There still remains allegations which "state facts sufficient to constitute an offense under the clause * * * which declares that 'any * * * soldier who, before the enemy, misbehaves himself' is guilty of an offense." "The specifications, as consolidated and reconstructed under the authority of the foregoing rules of law, therefore become one specification as follows: 'That accused, while before the enemy, did misbehave himself by becoming drunk and disorderly to such degree that he was unable to perform his duties as cannoneer." The evidence sufficiently sustains a finding of his guilt thereof. (2) Other Offenses: It is to be noted that uncontradicted evidence herein showed that accused was guilty of quitting his station for the purpose of plundering and pillaging, and engaging in those activities. "Accused should have been charged with such offense. It was easy to allege and easy to prove. Much time and effort would have been saved, and the complicated legal problems involved in this case under the present specifications would not have arisen." (CM ETO 1109 Armstrong 1944)

While his squad was engaged in active combat duty with the enemy, accused ammunition bearer deliberately left the line of advance without authority, and remained in a gully to the rear. He was found guilty of misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. (1) Specification: The gravamen of accused's offense was contained in the following: that he, "being present with his company while it was engaged with the enemy * * * did * * * shamefully abandon the said company, and seek safety in the rear." The specification followed the portion of AW 75 which relates to the abandonment of "any fort, post, camp, guard or command." Said portion of the Article of War may be diagramed as follows:

Any officer or soldier who	before the enemy	(1) misbehaves himself (2) runs away or (3) shamefully abandons or (4) delivers up or (5) by any	(a) misconduct (b) disobedience or (c) neglect	endangers the safety of	any fort post guard or other command	which it is his duty to defend	

Specifically, the allegation was designed to fall within that part of AW 75 which refers to "any * * * soldier who, before the enemy * * * shamefully abandons * * * any * * * command which it is his duty to defend". This conclusion remains, although the pleader did not include the relevant allegation, "which it is his duty to defend". The pleader stated that accused "did shamefully abandon the said company, and seek safety to the rear". This was equivalent to an allegation that he "did run away from his company." It is held that the specification "clearly alleged facts constituting an offense under the clause of the Article which denounces as an offense the act of a soldier who 'before the enemy runs away'". Secondly, "the specification fails to allege in the words of the statute that accused was 'before the enemy' when he ran away from his company. However, it does allege that he was 'present with his company while it was engaged with the enemy'." It was adequate in this regard. (2) "The evidence establishes beyond a reasonable doubt that accused was guilty of 'going to the rear or leaving the command when engaged with the enemy' and this constituted an offense" under Article of War 75. (CM ETO 1249 Marchetti 1944) (Mimeographed full opinion mailed.)

Accused was on 24-hour duty as surgical technician with an infantry medical detachment. He was located at the regimental aid station, before the enemy, 2-3,000 yards away. It was shown that he became drunk; that he deliberately removed the firing pin from a fragmentation hand grenade; caused its fuse to be ignited; and threw the grenade to a point where it exploded within six feet of two of the personnel of the aid station and in the immediate vicinity of two others; and that the explosion endangered the lives of these four soldiers, in addition to his own. Accused was found guilty of a violation of AW 75, in that he did, while before the enemy, by his misconduct, endanger the safety of a regimental aid station which it was his duty to safeguard, "in that he did become drunk and in the vicinity of personnel of the * * * Regimental Aid Station, did throw a live hand grenade". HELD: LEGALLY SUFFICIENT. (1) The Specification

herein followed Form 48 of the MCM verbatim, with this exception: Instead of using the phrase "which it was his duty to defend", it used, "which it was his duty to safeguard". No error resulted. AW 75 "is couched in broad phraseology for the evident purpose of encompassing various acts of misconduct too numerous and accompanied by too many varying types of circumstances to admit of specific enumeration. Its very title, "Misbehavior before the Enemy", corroborates the breadth of its scope * * *." The clause in this specification was proper, "despite the fact that 'defend' is a generic term which is more inclusive than 'safeguard'." (2) Aid Station: "Even if it be assumed that a regimental aid station is not strictly a 'fort, post, camp or guard' within the meaning of AW 75, yet it is clearly an 'other command' of the same general class as those enumerated." The instant specification sufficiently alleged an offense, when it alleged that accused endangered the safety of the regimental aid station. (3) Intoxication: "Misconduct, like running away, is but a particular form of misbehavior specifically made punishable by the article * * *. 'Misbehavior is not confined to acts of cowardice. It is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms * * * Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy' (MCM, 1928, par.141a, p.156). Misbehavior before the enemy is often charged as 'Cowardice;' but cowardice is simply one form of the offense, which, though not unfrequently the result of pusillanimity or fear, may also be induced by a treasonable, disloyal, or insubordinate spirit, or may be the result of negligence or inefficiency. An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offense as if he had deliberately proved recreant.' 'The act or acts, in the doing, not doing, or allowing of which consists the offense, must be conscious and voluntary on the part of the offender' (Winthrop's Military Law & Precedents - Reprint, p.623). 'Misbehavior before the enemy may be exhibited in the form of cowardice, or it may consist of a willful violation of orders, gross negligence or inefficiency' (Dig. Op. JAG, 1912, XLII A, p.128)." The instant case is similar to CM NATO 240 Stojak (1943). "The evidence is clear that, although accused was intoxicated, his acts were not only conscious and voluntary, but were done in a spirit of reckless insubordination and were of a gravely serious and dangerous character. * * * Accused was properly found guilty of 'misconduct' within the meaning of AW 75." (CM ETO 3081 Smith 1944)

Accused was found guilty of a violation of AW 75, in that he, "being present with his platoon, while it was engaged with the enemy, did, * * * shamefully abandon his platoon and seek safety in the rear, and did fail to rejoin it until the engagement was concluded." HELD: LEGALLY SUFFICIENT. In effect, the specification alleged that accused, "being present with his platoon, while it was before the enemy, did run away from his

platoon and did not return, etc." "The phrase 'engaged with the enemy' is properly construed as an allegation of place as well as time. It is identical in meaning with 'before the enemy'. The phrase 'shamefully abandon his platoon and seek safety in the rear' is equivalent to the allegation 'did run away from his platoon'." The specification was adequate. The portion thereof about accused's return was surplusage and wholly immaterial. It did not require proof. The evidence sufficiently supported the finding of guilt (CM ETO 5475 Wappes 1945)

Accused was found guilty of misbehavior before the enemy in violation of AW 75, "in that having received a lawful command from * * * his superior officer to get his radio ready and move up", he refused to obey the same. He was also found guilty of desertion in violation of AW 58, with AW 28 intent to avoid hazardous duty. HELD: LEGALLY SUFFICIENT. (1) AW 75: Although the specification under AW 75 as drawn "combines elements of the offense of willful disobedience of a lawful order of a superior officer in violation of AW 64, a charge of misbehavior before the enemy is properly alleged and fully sustained by the evidence adduced herein. Failing to advance in attack or to resist the enemy, when ordered or properly called upon to do so, constitutes an act of misbehavior before the enemy of a most grave and serious character." The specification was adequate, and was supported by the evidence. (2) The AW 28-58 charge was also supported. (CM ETO 6177 Transeau 1945)

433(1)

(2) Proof:

Cross References:

433(1)	3081	Smith (Drunkenness; specification)
395(7)	3811	Morgan
454(40a)	4352	Schroeppel (Drunkenness; misbehavior; charged under AW 96)
385	5293	Killen (Easier to prove than an AW 28-58 charge, on same facts)
419(1)	5359	Young
422(5)	5607	Baskin
416(9)	4756	Carmisciano (with AW 58-28; M/R)
422(5)	7549	Ondi (Charge under AW 64)
385	6997	Jennings (Switched to AW 58-28)

Not Digested:

5429 Cameron et al
6406 Way (Note combat fatigue)
6745 Atchison (Abandon outpost)

Accused was stationed in England, where he was a member of an airplane bomber crew of the Army Air Force. He was alerted for a high altitude flight mission over enemy territory the next morning. On that next morning he remained in bed despite the fact that he was called. He refused to participate in the flight, on the ground that he was inadequately equipped with electrically-heated clothing and other essentials. His bomber failed to take off. He was found guilty of misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY INSUFFICIENT. (1) Provisions of Article of War 75 govern the conduct of the Army Air Corps as well as the rest of the Army. (b) But accused was improperly found guilty of violating that Article because he was not before the enemy when he refused to fly. It is inadvisable to formally define the phrase "before the enemy" in AW 75 at the present time. However, applying principles set forth in MCM, 1928, par.141a, it is now concluded "that a bomber crew, based on an air-field in the United Kingdom, although alerted and under orders to perform a designated mission, is not 'before the enemy' when it has not departed from its base, and is not the immediate object of attack by the enemy." While accused's disobedience was partially responsible for the inability of his crew to participate in the mission, this consequence did not advance accused's status from one of preparation to one of actual combat with the enemy. (CM ETO 1226 Muir 1944). (Mimeographed full opinion mailed.)

(SPJGG 1945/1669, 29 January 1945 (IV Bull. JAG, pp.11-12) "A soldier is 'before the enemy' within the meaning of the provisions of AW 75 not only when he is in direct contact with the enemy but also when he is part of a tactical operation which will, in the normal course of events, lead to immediate uninterrupted contact with the enemy (CM 128019 (1919, Dig. Op.JAG 1912-40, sec.433(2)). When the tactical operation (as distinguished from the tactical plan) of a combat bomber or fighter mission is initiated,

the immediate objective is the enemy and such contact normally occurs unless the weather or the airplane itself prevents such contact. No opinion is expressed as to when the tactical operation of a particular combat air mission begins because the type of plane, the kind of mission, the geographical locality and the procedure followed by particular squadrons, groups, wings and air forces may vary in each instance. However, it is my opinion that when a combat crew member who has been duly ordered to participate in a combat mission wrongfully acts or neglects to act as to any matter vital to the immediate, normal course of the combat operation, he has, under the principles laid down by this office, misbehaved 'before the enemy' and may be properly charged with a violation of AW 75. While each case must be determined on its own facts, under the principles above set forth the legal reasoning of the opinion in CM ETO 1226 (1944 (3 Bull. JAG 342) is disapproved, and the conclusions reached in CM NATO 2893 (1944) are approved. (IV Bull JAG 10).

Accused's battalion was being held "in reserve" as a supporting unit to other battalions which were actually engaged in battling the enemy. Accused was granted permission to leave temporarily, in order that he might defecate. He failed to return to his platoon until after the engagement had been concluded. He was found guilty of running away from his company, which was then engaged with the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. (1) Specification: The specification herein used the phrase, "engaged with the enemy". This was equivalent to the phrase "before the enemy", which is contained in AW 75. It may be construed as an allegation of place as well as time. The specification further alleged that the offense occurred one day later than the time shown by the proof. This variance was not material. "The gravamen * * * is accused's act in running away from his company when it was before the enemy; the duration of his subsequent absence is immaterial. * * * The phrase 'on or about' fixed the time * * * with the necessary degree of accuracy to inform accused when he committed the offense with which he was charged and to enable him to identify the offense on a plea of double jeopardy in any subsequent proceeding." (2) Proof: Accused's unit was tactically "before the enemy" at the time of his offense. Actual engagement in combat was not an essential prerequisite. While accused's conduct had to be conscious and voluntary these elements, too, were sufficiently shown by the above evidence. (3) Mental Capacity: Accused's chief defense was that he was mentally ill at the time of the alleged misbehavior. This would have been a complete defense if proved. However, the adequacy of the proof herein was a question of fact for the court. "By his own testimony accused remained over two days in the area where he left his company without attempting to seek medical aid." (CM ETO 1404 Stack 1944)

Accused's unit was engaged with the enemy, and his duties called for him to be present with his platoon as it advanced. He failed to go forward with the platoon. Instead, he went back to the company kitchen, considerably in the rear, where he apparently remained for about a day and a half. He subsequently returned to the platoon. He was found guilty of running away from

his company, then engaged with the enemy, and not returning thereto until after the engagement, in violation of AW 75. HELD: LEGALLY SUFFICIENT. (1) Proof: "Accused's duties required him to be with his platoon as it advanced to meet the enemy. He had no authority to absent himself * * *. He ran away from his company when he failed, although duly notified of its proposed movements, to join his platoon * * * and go forward with it. The fact that he appeared at the company kitchen (where he remained for a day and one-half) does not alter this conclusion. The kitchen was a considerable distance in the rear of the company. While accused remained at the kitchen he was absent from his post of duty exactly as he would have been had he been distant from all elements of his company. He left his command and went to the rear when it was engaged with the enemy. His offense was then complete." (2) Specification: Although alleged that accused did not return until the engagement was concluded the proof failed to disclose when the engagement was concluded or that it had been ended when accused returned to his company. "However, the allegation with respect to the time of accused's return is wholly immaterial and did not require proof. It is the fact that accused departed from the place where duty required him to be when his unit was 'before the enemy' that constitutes the offense." (3) Accused's unit was before the enemy. It was actually under artillery fire, and its advance was directly against that enemy. (CM ETO 1659 Lee 1944)

Accused, whose place of duty was with his platoon as it advanced toward the enemy, remained behind at the company kitchen. He was charged with misbehavior before the enemy in violation of AW 75, in that he had run away from his company while it was engaged with the enemy and had not returned until after the engagement had been concluded. By exceptions and substitutions, he was found guilty of violating AW 75, in that he had failed to advance with his command after it had been ordered forward. HELD: LEGALLY SUFFICIENT. (1) Variance: "The essential nature of the offense charged was abandonment by accused of his company when it was 'engaged with the enemy', which phrase is synonymous with 'before the enemy' * * *. Such also is the essential nature of the offense of which he was found guilty. The distinction between the active abandonment involved in running away from his company as alleged, and the passive abandonment involved in failing to advance with his company as found, is one of verbiage and is technical rather than substantial. The conduct is equally reprehensible and its effect is the same in each case--his absence from his company where it was his duty to be. The time and place of the offense alleged and that of which accused was found guilty are identical." The latter offense constituted a violation of Article of War 75. It neither changed the nature or identity of the offense charged, nor increased the permissible punishment. Accused was adequately notified by the specification of the offense for which he was subsequently found guilty. He had a fair opportunity to defend himself (Rules: A variance is not fatal if the court's action does not "change the nature or identity" of the offense charged in the specification or increase the amount of permissible punishment. (MCM, 1928, par.78c, p.65). Likewise, a variance is not fatal unless "after an examination of the entire proceedings, it shall

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appear that the error complained of has injuriously affected the substantial rights of an accused." (AW 37)) (2) Evidence: Proof was not required in support of the allegation regarding accused's return. This was immaterial. Nor was it necessary to make a finding on this point. In the circumstances, accused's mere failure to advance with his command constituted his offense. He was supposed to advance. He did not do so. The fact that he had remained for a period of time at his company kitchen does not alter his guilt. (3) Statements: "The fact that accused made statements concerning his guilt * ** without having been warned of his rights does not render their admission in evidence prejudicial to his substantial rights in view of the absence of evidence that the statements were not freely and voluntarily made and of the full corroboration thereof by accused's own sworn testimony." (4) Combat Anxiety: Although some evidence indicated that accused had "combat anxiety", other evidence indicated that he appeared to be physically and mentally normal. His genuine and extreme illness or other disability at the time of the alleged misbehavior would have constituted a defense. However, this was a question of fact which the court determined adversely to accused. (5) Continuance: During the course of trial, accused moved for a continuance in order that there might be a determination of his mental capacity. The motion was denied. This denial was within its sound discretion. Accused had previously received a three-day continuance in order to prepare his case. The court evidently thought that, while "accused was apparently unstable at the time in question", he was not suffering under such disability as would afford him a defense, and that further outside examination would not establish any such disability. (CM ETO 1663 Ison 1944)

Accused's unit had been ordered forward to engage the enemy, and did engage it. During the attack, accused fell out to defecate. He failed to rejoin the command. He was found guilty of misbehavior before the enemy in violation of AW 75, in that he had failed to advance with his command, which had been ordered forward by the Battalion Commander to engage the enemy. HELD: LEGALLY SUFFICIENT. The facts sufficiently supported the court's finding of accused's guilt. "The court was justified in inferring that the 'orders' to move forward had been issued by the Battalion Commander or other competent authority. * * * Evidence of the specific source of the orders was not necessary to support the finding, in view of the evidence that accused's command had in fact been 'ordered forward to engage with the enemy.'" (CM ETO 1685 Dixon 1944)

Accused's battalion was under enemy fire in Africa. His own platoon, then present and serving, was to attack a certain hill. Accused was dispatched to the battalion command post as a messenger. When bombs fell, he failed to proceed. Likewise he failed to return to his platoon, although he had no permission to absent himself. Four days later, he was seen at the battalion kitchen's organization 2½ miles to the rear. Accused was found guilty of misbehavior before the enemy in violation of AW 75, in that, while his company was engaged with the enemy, he shamefully abandoned it,

sought safety in the rear, and failed to rejoin it until the engagement was concluded. HELD: LEGALLY SUFFICIENT. (1) Court Member: The action of the president of the court in excusing a member in order that he might serve as individual defense counsel was unauthorized. However, the irregularity was self-invited, and was not prejudicial. (MCM, 1928, par.5, p.4, par.36, p.27, par.45, p.34, and par.57, p.44). (2) Deposition; Capital Offense: The deposition of a witness was introduced in this capital case by the prosecution with the consent of defense counsel only. No personal consent by accused appeared. Assuming error, it must nonetheless be concluded that no prejudice resulted. Uncontroverted legal evidence, apart from the deposition, established accused's guilt. His duties clearly required him to return to and remain with his platoon after the delivery of the message. By failing to do so, he abandoned his organization. He obviously sought safety when he went to the kitchen area in the rear. Further testimony, that accused was not seen until after the engagement was concluded, while unnecessary, makes the evidence of guilt more compelling. The evidence was so complete that it excluded "any fair and rational hypothesis except that of guilt". (MCM, 1928, par.78a, p.63). "Consequently it may be said that the repercussion of the * * * deposition upon the other evidence would not 'influence the court in its weighing and consideration of the other evidence' and hence that its admission did not substantially prejudice accused's rights." (3) Variance: It was alleged that accused abandoned his "company". It was proved that he abandoned his "platoon". This variance was not fatal, because accused was fairly apprised of the charge against him. The word "company", in the circumstances, was substantially equivalent to "organization". (4) Combat Anxiety: Whether a defense to the charge (* * *), was essentially a question of fact for the determination of the court, which evidently declined to believe that accused's disability was genuine and extreme." (CM ETO 1693 Allen 1944)

Accused was found guilty of misbehavior before the enemy in violation of AW 75, in that, being present with his company while it was engaged with the enemy, he did shamefully abandon it and seek safety in the rear and did fail to return to military control until almost ten months later. HELD: LEGALLY SUFFICIENT. "Accused's confession was adequately corroborated by independent evidence which showed that his company was engaged with the enemy, (synonymous with 'before the enemy'), thus establishing the first element of the offense * * *, and that he abandoned his company and sought safety in the rear, thus establishing the second element of the offense * * *. The evidence that he failed to return to military control until his apprehension * * *, while unnecessary * * *, 'makes the evidence of accused's guilt of the offense charged the more complete and compelling'." (CM ETO 2205 LeFountain 1944)

Accused was stationed in the United Kingdom. He was scheduled to fly as a crew member in combat operational missions over enemy-occupied territory in Europe on both 1 and 5 December 1943. Stating that he was ill, he remained behind on both occasions. Subsequent events revealed that he had

not been ill. Thereafter, he participated in various similar flying missions, and received the Air Medal for his activities therein. However, he also refused to go on three other flights. Based on his failure to fly on 1 and 5 December 1943, he was brought to trial 23 March 1944 on a charge of misbehavior before the enemy in violation of AW 75, in that he had willfully failed to accompany and fly with his crew, then ordered to execute those combat operational missions by flying over enemy-occupied territory in Europe. He was found guilty. The appointing authority returned the case to the court, on the ground that guilt in violation of AW 75 had not been established because accused was not before the enemy when he failed to participate in the two flights at the takeoff in the United Kingdom. Upon reconvening, the court revoked its earlier findings. It then found accused guilty of the specifications, except for the words "before the enemy", and held that he was guilty of a lesser included offense in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The lesser offense: "When some other offense is necessarily included in the phraseology of a specification under the 75th Article of War, a conviction under the 96th Article of War (or some other cognate article) is proper." "The alleged willful failure of the instant accused, on two occasions, to accompany and fly with his crew, even though it was not 'before the enemy', constituted 'disorders and neglects to the prejudice of good order and military discipline', both as failure to obey lawful orders of a superior officer and as malingering." The procedural method, whereby the court reconvened and found accused guilty of the lesser offense, was proper. (2) The evidence sufficiently supported the finding of the court that accused willfully disobeyed orders to fly with his crew as scheduled. "That such missions were to be executed by flying 'over territory occupied by the enemy in Europe' was a proper subject of judicial notice." (MCM,1928, par.125). (3) Condonation: After accused was arraigned, he specially pleaded that a constructive condonation resulted because of his flight missions subsequent to 5 December, and his award of the Air Medal. Admittedly, restoration to duty without trial of one charged with desertion bars a subsequent trial for that desertion. However, it must be concluded that in the instant circumstances, no such condonation could have resulted. "Only a direct mandate from Congress or a direction from higher authority could produce such result." (MCM, 1928, par.64a). (4) Sentence: The 25-year sentence imposed by the court upon accused was legal. The offense of which he was found guilty, in violation of AW 96 are not included in the Table of Maximum Punishments. They are of a more serious quality than the mere failure to obey a lawful order in violation of AW 96. They more closely resemble a willful disobedience of a superior officer in time of war, in violation of AW 64. (Note that by 1st Ind it was recommended that the sentence be reduced.) (CM ETO 2212 Coldiron 1944) (Mimeographed full opinion mailed out)

Accused's unit landed in Sicily. It was ordered to attack the enemy on a specified date. Two days before the impending date, the platoon commander informed accused's unit. Accused was present. The next day--one day before the scheduled time--accused went AWOL. More than five months later, he surrendered to military authorities. Among other charges, accused was found

guilty of misbehavior before the enemy in violation of AW 75, in that he had failed to advance with his command which had been ordered forward by the battalion commander to engage with the enemy opposing them. HELD: LEGALLY SUFFICIENT. (1) Evidence: "There is competent substantial evidence that accused and his company had been ordered forward to attack the enemy and that while it was engaged in the forward movement, accused not only failed to advance with his company, but also departed from it without authority. Accused was 'before the enemy' and his conduct constituted 'misbehavior' within the purview of" Article of War 75. His delay of more than five months in returning to military authority makes the evidence of his guilt more compelling. (2) Court Membership: (a) The president of the court-martial was the battalion commander through whom the order to advance was relayed from a superior and eventually down to accused through the latter's platoon commander. This member was not challenged by either side, either for cause or peremptorily. Nor did he reveal this possible ground for disqualification. Since he was neither accuser, investigator or witness, however, he was not ineligible to sit on the court. Accused's substantial rights were not prejudiced, regardless of the impropriety which resulted from the battalion commander being a member of the court. He had merely relayed the order to advance. It does not appear that he either had actual contact with, or knowledge about, accused. (b) Another court member had previously taken accused's oath to a pre-trial statement in which he said that he had voluntarily surrendered himself to military authority. This member was not challenged. Even though he might have read this statement, yet he would not necessarily have been disqualified. There was insufficient relationship between accused's absence and his misbehavior before the enemy to have resulted in prejudice. (CM ETO 2471 McDermott 1944)

At a place and time while accused and his company were engaged with the enemy, he absented himself from his company without permission. He did not return thereto until after the engagement had been concluded. He was found guilty of misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. (CM ETO 2582 Keyes 1944)

Accused was ball turret gunner in a flying fortress. That plane was flying over Germany, and was within 40 miles of the target, at a point where enemy fighters were anticipated. The enemy attacked the formation in front. Over the interphone system, the co-pilot, at the instruction of the pilot, ordered accused to lower the ball turret. The latter made a satisfactory response, which carried the implication that he would man the turret. He failed to do so. After the flight had been completed, he told the pilot that he was not going to fly any more because he was afraid. He was found guilty of misbehavior before the enemy in violation of AW 75, in that, while over Germany and before the enemy, by his misconduct, he had endangered "the safety of his airplane and crew which it was his duty to defend" when he

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failed to man the guns in the ball turret of the airplane while it was engaged in an operational mission. HELD: LEGALLY SUFFICIENT. Accused was before the enemy at the time of his misconduct. "The plane and its crew were definitely engaged in a specified mission, to wit, an attack on an enemy target; they were over enemy territory; and they were part of an aerial expedition which was under attack by the enemy. These facts are adequate to place the plane, its crew and accused 'before the enemy' within the purview of Article of War 75. Accused's attempt "to convert the co-pilot's direction from an order into a suggestion or request is not worthy of consideration." The officer responsible for the operations of the bomber had plenary authority of direction and control of the crew." It was accused's duty to obey the order. His failure to man the ball turret guns at the time and place mentioned was misconduct denounced by AW 75. "The question as to whether accused's nonfeasance endangered the safety of his plane and crew was essentially one of fact for the court, and its finding will not be disturbed. The bomber plane and crew constituted a "command" within the meaning of AW 75, which denounces disobedience which "endangers the safety of any fort, post, camp, guard or other command which it is his duty to defend." A bomber is a "fort", despite the fact that it may be in motion. Accused was under a positive duty to defend the bomber and the crew of which he was a member. (CM ETO 2602 Picoulas 1944) (Mimeographed full opinion mailed)

Three accused were members of an engineer combat battalion which was in immediate support of a combat team situated in the front lines. They left their command post without permission, and entered the home of a French woman. They wandered through the rooms without her consent--all three drunk. She called a neighbor to aid in their eviction. Thereafter, accused followed this neighbor into his house, uninvited. They demanded and received cider from him. Two of the accused fired their rifles five or six times inside the house, causing property damage. The three then searched his house, looking for "various articles". They took the occupant's wallet (contained about 7,000 francs) and divided the money, and also took a case containing silverware. In the course of their activities, accused apparently broke several doors. They were apprehended by military policemen. They were found guilty of a violation of AW 75, in that, acting jointly in pursuance of a common intent, they did, while before the enemy, quit their post for the purpose of plundering and pillaging. HELD: LEGALLY SUFFICIENT. (1) Quit Post to Plunder and Pillage: Accused and their unit were before the enemy, by virtue of their tactical relation to the enemy. Their conduct justifies the inference of a common specific intent on the part of all three to engage in a wrongful venture, namely, plundering and pillaging. They were equally guilty of all acts done by each. In proving this crime, it had to be shown that accused quit their post with intent to pillage and plunder. The fact that property was taken was the strongest evidence that the offender left his station for the purpose of taking property. The words "quits his post" import any unauthorized leaving of the place where accused should be. The words

"pillage and plunder" may be paraphrased, "to seize and appropriate public or private property" (MCM, 1921, par.425, VII, pp.380-281). (2) Intoxication: "The question whether accused, or any of them, were intoxicated to such a degree as to be incapable of entertaining the specific intent, at the time they quit their post, to plunder and pillage, was resolved against each of them by the court * * *. In view of the whole record and particularly evidence of the deliberateness and willfulness of accuseds' conduct, such findings will not be disturbed upon appellate review." (ETO 3118 Prophet) (CM ETO 3091 Murphy et al 1944)

Accused was found guilty of shamefully abandoning his detachment while it was before the enemy and of seeking safety in the rear. On 1 July accused was a member of a medical detachment of an infantry regiment which was in the line near * * * France, charged with the mission of holding the high ground around that town. On 2 July accused was present with the medical detachment which had dug in about two days before in that area. The detachment's command post was about 1,000 yards from the front line. Accused was last seen with the detachment at about noon 2 July. In the afternoon of that day, litter bearers and first-aid men were needed and he could not be found either in his fox hole or elsewhere in the area. He was seen walking on a street in a town about ten miles from the front line and, when questioned by a military policeman, said he was afraid of "German 88's" and of being "up front, as he couldn't stand to hear the shells flying overhead", and "that he would give anything to be with an outfit behind the lines". He was returned to his unit on 3 July. In a written, sworn statement, made to the investigating officer on 5 July, accused stated that he left the front lines and that he would "not stay in front lines or near front lines where there is enemy fire. If I am returned to the unit on the front lines I will do the same thing again. When I left the unit on July 2, 1944 I had the intention of going to the beach and getting on a boat and returning to England or U.S." HELD: LEGALLY SUFFICIENT. The evidence leaves no doubt that accused was present with his detachment while it was before the enemy at the time and place alleged, and that he abandoned the detachment and sought safety in the rear. The evidence--that accused failed to rejoin his detachment until apprehended by a military policeman, while unnecessary, lends additional weight to the evidence of his guilt as charged. The specification alleges that accused did shamefully abandon his detachment while it was before the enemy and seek safety in the rear (following Form 45). These allegations are equivalent to the allegation "did run away from his company", and states an offense under that clause of A" 75 which denounces the act of a soldier who, "before the enemy runs away", and dispenses with the necessity of alleging and proving that it was his duty to defend the command which he shamefully abandoned (1249 Marchetti) (CM ETO 3196 Puleio 1944)

433(2) (2) Proof

Accused officer was found guilty of two specifications under AW 75, which alleged that he endangered the safety of his company, which it was his duty to defend, (a) by misconduct before the enemy in leaving his company for several hours, and (b) by his misconduct before the enemy in bringing intoxicating liquor into the company area and making it available to his men. He was also found guilty of a violation of AW 85, in that he was drunk while on duty as a company officer. HELD: LEGALLY SUFFICIENT: (1) Absence as Misbehavior: The tactical situation was such that accused was clearly before the enemy. The phrase "which it was his duty to defend" was surplusage, since the remaining allegations in the AW 75 specifications stated sufficient facts to constitute an offense under the AW 75 clause, "any officer or soldier who, before the enemy, misbehaves himself". In the circumstances, accused's absence from his company for a period of about four hours amounted to grossly negligent and inefficient conduct, and to a culpable failure on his part to do his whole duty while before the enemy. This was a species of misbehavior within the meaning of AW 75. (2) Intoxication: "The evidence shows that accused knowingly brought back into the platoon area liquor which he knew to be highly intoxicating, and that he had offered drinks to soldiers of his command. 'Quite a few' soldiers accepted his offer. The jug remained in the area for two or three hours and accused assisted in pouring the drinks. He drank with the soldiers; accused, a noncommissioned officer, and two other soldiers became seriously intoxicated. It may be inferred * * * that several more soldiers felt the effects of the liquor. This action by accused, considering the tactical situation and the proximity of the enemy, could easily have resulted in consequences of disastrous proportions not only to members of accused's platoon but also to others. The evidence showed that the whole company was in direct contact with the enemy, in a defensive position, and subjected to enemy fire. * * * An enemy attack would call for a maximum of coordinated, disciplined effort by accused's organization, and if directed against the company at a time when members of the weapons platoon were incapacitated by liquor, might well have resulted in not only a tactical loss but also in a serious loss of life. The same results were possible had a sudden attack on the enemy by accused's company become necessary. That accused endangered the safety of his company is obvious. This was a violation of AW 75. (3) AW 86 Drunkenness: The issue of drunkenness under AW 85 was one of fact for the sole determination of the court. The conclusion that accused was on duty when he became drunk was supported by direct evidence, and by evidence of the tactical situation of his unit. When his organization is in front of the enemy, an officer is on duty at all times (Winthrop's Military Law and Precedents, pp. 613-614). (Re AW 75 drunkenness, see ETO 3081, Smith; ETO 1109 Armstrong; NATO 240 Stojak). (CM ETO 3301 Stohlmann 1944)

After his plea of guilty and the introduction of independent evidence, accused was found guilty of a violation of AW 75, in that he did misbehave himself before the enemy by absenting himself without proper leave from his organization while it was engaged with the enemy, and did not return

until a week later. HELD: LEGALLY SUFFICIENT. (1) The allegation, that accused absented himself, was equivalent to an allegation that he ran away. (2) The evidence showed that accused was absent without leave from his organization at a time when it, an ordnance light maintenance company, was in direct support of an infantry division which was engaged in combat with the enemy. It was providing direct evacuation, maintenance support, and ordnance equipment supply to that division. Both accused and his company were before the enemy. That fact makes his offense punishable as a violation of AW 75, rather than only as an absence without leave in violation of AW 61. (3) "The admission in evidence of the 'G-3 Journal' of the * * * Infantry Division, showing combat activity, for the purpose of proving the division's contact with the enemy at the time in question was proper." (4) Court Membership: The Commanding Officer of Special Troops of the Division, "of which accused's company was a part, referred the charges for investigation, following which he forwarded them to the division commander, recommending trial by general court-martial." This same Commanding Officer was "detailed as senior member and sat as president of the court, and although his name was read as that of the officer who forwarded the charges, he was not challenged either for cause or peremptorily. When the members were requested to state any facts believed to be a ground for challenge for either side against any member, he remained silent. There is no indication that he was not competent or ineligible to serve on the court-martial. He was not the accuser, did not investigate the case and was not called as a witness at the trial. * * * The reference of the charges for investigation and the forwarding of them for trial may be considered as routine expressions of opinion that the charges were of a character proper for such action, and did not amount to an opinion as to accused's guilt." Although it is not good policy to place an accused's commanding officer on a court which is to try him, no prejudicial error resulted in the instant case. "Moreover, the failure of the defense to exercise its right of challenge operated as a waiver of such right * * *." (CM ETO 3828 Carpenter 1944)

Accused was found guilty of a violation of AW 75, in that he did misbehave himself before the enemy, by taking an overdosage of seconal, thereby rendering himself unfit for combat duty. He was sentenced to 25-years confinement, and a penitentiary was designated. HELD: LEGALLY SUFFICIENT--BUT PENITENTIARY CONFINEMENT IS NOT AUTHORIZED. (1) "The evidence supports the conclusion that accused deliberately and purposefully consumed an overdosage of a drug which he knew would produce a disabling effect upon him, at a time when he and his organization were before the enemy and about to encounter extremely trying circumstances. The reasonable and logical inference, which the court was justified in drawing * * * was that accused induced his disablement 'for the express purpose of evading' his assigned service and duty at a time the dangers and perils were great. * * * He was clearly proven guilty of such misbehavior, in the form of misconduct, as constitutes a violation of AW 75." (2) Penitentiary: "Penitentiary confinement is not authorized specifically by the Articles of War for the offense of which accused was convicted and it is not an offense of a civil nature and so punishable by penitentiary confinement by any statutue of

the United States of general application within the continental United States nor by the law of the District of Columbia." "Accordingly, the proper place of confinement of this accused is the Eastern Branch, U.S. Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, as amended)." (CM ETO 3885 O'Brien 1944)

Accused was found guilty of misbehavior before the enemy in violation of AW 75, in that he was drunk on duty as cannoneer in a tank, in the presence of the enemy. He was also found guilty of voluntary manslaughter, in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) Intoxication: "The findings that accused was so drunk as to be guilty of misbehavior, in the form of misconduct, before the enemy, in violation of AW 75 * * * were perfectly consistent with the implied finding that accused's drunkenness was not such as to negative the inference of the criminal intent necessary to sustain the conviction of" voluntary manslaughter occurring during the same period. "The misconduct contemplated by AW 75 may consist in negligence, inefficiency or a culpable failure by the soldier to do his whole duty before the enemy, which may result from a state of drunkenness far short of that sufficient to affect mental capacity to entertain the necessary intent * * *." (ETO 2672, Brooks; 3475 Blackwell.) (2) Time of Trial: Although trial occurred one day after accused was served with the charges, 30 days elapsed between the time of the offense and the trial. Accused had every opportunity to have counsel of his own choosing, and to prepare his defense. He did not object at the time of trial. No prejudice appears. (CM ETO 3937 Bigrow 1944)

After his plea of guilty and the taking of evidence, accused was found guilty of a violation of AW 75, in that, while before the enemy, he shamefully ran away from his company and did not return until apprehended. HELD: LEGALLY SUFFICIENT. (1) Procedure: The trial judge advocate was appointed on 23 August, on which day he served accused with a copy of the charges. However, they were not referred to him until the next day. "There is no mandatory requirement, either in AW 70 or MCM, 1928 (par 41e), p.32), that the service of charges upon an accused be accomplished by a trial judge advocate to whom the charges have previously been referred for trial. The irregularity was not jurisdictional and in fact operated in accused's favor in that it afforded him an additional day in which to prepare his defense." (2) Time of Trial: The trial took place two days after charges were served on accused. "In the absence of objection and of indication that any of accused's substantial rights were prejudiced, the irregularity, if any, was harmless." (ETO 4095 Delre) (3) Court Membership: An officer who was assistant adjutant general of the infantry division referred the case to the trial judge advocate for trial by command of the division commander. Thereafter, he was appointed, and sat as a member of the court. "This was an administrative act and in the absence of challenge and of indication of injury to any of accused's substantial rights, this irregularity may be regarded as harmless." (CM ETO 3948 Paulercio 1944)

Accused was found guilty of a violation of AW 75, in that, being present when his company was before the enemy, he did shamefully abandon it and seek safety in the rear. HELD: LEGALLY SUFFICIENT. (1) Disapproval by Confirming Authority: A finding of guilt, under a second charge which alleged accused's willful disobedience in violation of AW 64, was disapproved by the confirming authority. This action was proper. "Included in the power of the confirming authority under the provisions of AW 50 to confirm and commute the sentence of death imposed by the court (original sentence herein was death), authorized punishment for a violation of either AW 64 or 75, was the power to disapprove a finding of the court" (AW 49, par.a). (2) AW 75; Misbehavior: "The evidence, including his own admissions against interest, is full and clear that accused, who was sound in body and mind, * * * while his company was before the enemy, abandoned it and sought safety in the rear." (3) Mental Capacity: "There was evidence that prior to the time of the offense accused was nervous and 'scared' and that thereafter he was nervous, depressed and suffering slightly from shock. Whether or not he 'was suffering under a genuine and extreme illness or other disability'" was a question of fact for the court below. Objections by the defense to the calling of a medical witness, and to the introduction of a medical report, on the ground that accused's sanity was not in issue and that therefore the evidence might prejudice him, were overruled by the president and the law member. This was proper, although it was the function of the law member rather than the president to have made the ruling. "The evidence of accused's admissions against interest, to the effect that he would prefer trial by court-martial, and by intimation even the death sentence, to duty in the front lines, was certainly sufficient reason for the court to seek additional evidence with respect to his mental responsibility for the offense charged. The failure of the defense to object to the admission" of a copy of the witness's medical report, where it solely appeared from the bare statement of the trial judge advocate that the original was unavailable, operated as a waiver of objection. "As to subject matter, the report as admissible under the familitar exception to the hearsay rule respecting official statements in writing (MCM, 1928, par.117a, p.121) insofar as it stated the board's opinion as to accused's mental condition and the reasons therefor. Insofar as it related to accused's act of leaving his organization and contemplation thereof, it was hearsay, but in view of the convincing evidence of accused's guilt of the offense charged, the admission * * * of this portion of the report, even assuming the court considered it, cannot be deemed to have injuriously affected accused's substantial rights." (4005 Sumner) (CM ETO 4004 Best 1944) (See 395(18) Memo TJAG, 30 Mar 45, Washington, re 49 Stat 1561).

Accused was found guilty of two specifications charging violations of AW 75, in that he had while his company was engaged with the enemy, (a) shamefully abandoned it and sought safety in the rear on 4 August 1944, and (b) had failed to advance with his company to engage with the enemy on the same day. The offense occurred on the Continent of Europe. Accused was sentenced to confinement in a disciplinary training center in England for

competent, substantial evidence of accused's subsequent abandonment of his company, to-wit: his failure to return thereto from a point five miles from its position". In any event, the court could have refused to believe accused's testimony that he had been authorized to leave. (CM ETO 4093 Folse 1944)

Accused was found guilty of a violation of AW 75, in that, while before the enemy, he ran away from his company and sought safety in the rear. HELD: LEGALLY SUFFICIENT. (1) Time of Trial: Accused was tried one day after charges were served upon him. However, "in the absence of objection and of indication that any of accused's substantial rights were prejudiced, the irregularity, if such it were, may be regarded as harmless." (2) Court Membership: The officer who directed earlier corrective action in regard to the investigation herein subsequently referred the case to a trial judge advocate for trial by order of the dividion commander. Later, he himself sat as a member of the court which tried accused. In the absence of challenge and of indication of substantial injury, the irregularity was harmless. (3) Mental Capacity: Whether or not accused "'was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior', which would constitute a defense (Winthrop, Reprint, p.624) was essentially a question of fact for the determination of the court. In view of substantial, competent evidence that accused suffered from lack of self control and self discipline, albeit to an aggravated degree, in trying circumstances, rather than from illness or disability, the court's determination" against him will not be disturbed on appeal. (CM ETO 4095 Delre 1944)

Accused was originally found guilty of misbehavior before the enemy in violation of AW 75 by, on or about 10 July 1944, while before the enemy, shamefully running away, and not returning until apprehension. The confirming authority to whom the record had been forwarded under AW 48, returned the record for reconsideration. The court thereupon found accused not guilty of the original charge, but guilgy of a violation of AW 96, in that accused absented himself without leave about 20 July 1944, "under circumstances which constituted a neglect of duty to the prejudice of good order and military discipline, and conduct of a nature to bring discredit upon the military service, until apprehended * * *". HELD: LEGALLY SUFFICIENT. (1) Evidence: In view of the evidence, the substituted finding was proper. "Absence without leave may be a lesser included offense of an offense charged under the 75th AW when the specification thereof includes allegations of an unauthorized absence by accused from his organization or station * * *." The remaining part of the substituted finding alleging AW 96 circumstances "stated no fact but was obviously a legal conclusion, and was without legal effect. "Every absence without leave is in some degree prejudicial of good order and military discipline or is of a nature to bring discredit upon the military service, but such view of the offense

cannot convert it from" a violation of AW 61 to AW 96, "and a declaration of such legal conclusion in a specification or a finding does not effect such transmutation. The conclusion therefore is that the court by its substituted finding found accused guilty only of AWOL, an offense under the 61st AW." The findings are held legally insufficient only insofar as the finding an AWOL from organization in violation of AW 61. (CM ETO 4512 Gault, Jr 1945)

Accused was found guilty of a violation of AW 75, in that he did, on or about 5 October 1944, shamefully abandon his company and seek safety in the rear, and did fail to rejoin it until he was returned to military control on or about 11 October 1944. HELD: LEGALLY INSUFFICIENT.

(A) Merits of this AW 75 Charge: The prosecution established only the lesser offense of absence without leave. (1) A Morning Report extract, purporting to be signed by the personnel officer, showed accused to have been absent without leave as of 5 October, and of return to confinement on 12 October 1944. It was orally stipulated (no express consent by accused) that on or about 5 October the company was before the enemy in the vicinity of * * *, as part of a regimental reserve. Thereafter, accused took the stand and testified at length under oath. He was moved to a different unit, and "went up" to it some time about the 1st to the 5th of October. Although defense counsel had previously stated that the above stipulation had been agreed to by accused as well as himself, accused testified that the company was not before the enemy; that he hadn't fired a shot; that the company was not engaged with the enemy that night; that every so often they came back to the location where he joined them for hot meals. After he left, he went about 2,000 yards. He then met a military policeman, who advised him that, since he was AWOL, he might as well take 2 or 3 days more off. He did so; was apprehended in a town with some companions. Sent back, he was at first given the opportunity to join up with an organization. He was then asked whether he was one who had been at "division forward", and was of limited service. When he replied in the affirmative, he was rejected. Accused was not in limited service. He had intended to go back to his company for duty, but since he was not wanted there he preferred not to fight with it. "He told them he would rather be court-martialed than return to the same company. Accused could hear artillery fire when he was at the division forward command post before he rejoined * * * but did not remember hearing it when he was with the company." (2) "The allegation that accused being present with his company while it was engaged with the enemy shamefully abandoned the company and sought safety in the rear, is equivalent * * * to the allegation that accused ran away from his company when it was before the enemy. It was unnecessary * * * to allege or prove that it was his duty to defend the company." (3) "The stipulation which tended to concede the existence of one of the essential elements of the offense charged was not expressly assented to by accused himself * * *. If he assented at all he must have done so by implication. Ordinarily when defense counsel asserts in open court in the presence of accused that the latter agrees to a stant stipulation and accused remains silent, the court may conclude that accused understands the stipulation and assents to it. In this case, however, accused

later testified that his company was not before the enemy and was not engaged in combat. In the face of accused's sworn denial of the stipulated fact, defense counsel made no attempt to secure the withdrawal of the stipulation. Neither he, nor the * * * prosecution, nor any member of the court inquired into the truth of the stipulation. In view of his testimony, his youth, inexperience and limited education, /19 years old/, the court should have rejected the stipulation and required proof of the vital fact supposed to have been covered by the stipulation, continuing the trial, if need be, to enable the prosecution to produce the necessary evidence." (4) The Morning Report established the absence without leave as of 5 October. "Even if it be assumed that the stipulation was properly accepted by the court, it was an admission that the company was before the enemy on or about 5 October. There was no evidence which directly or inferentially fixed 5 October as the date when the company was before the enemy. It was thus left entirely to speculation whether the company was before the enemy on 5 October, or on another date reasonably encompassed by the words 'on or about'. That phrase 'cannot be said to cover any precise number of days or latitude in time' (MCM, 1928, App.4, Instructions, par.g, p.237). The mobility of troops and of the front lines in the present war is such that it would be improper, in the absence of a showing of surrounding circumstances, to indulge a presumption that a company which was before the enemy on or about 5 October was in fact before the enemy on 5 October. Proof that the company was before the enemy on 5 October * * * was essential to the prosecution's case under AW 75. The coexistence of the act of leaving and presence before the enemy must be shown. It is an elementary principle of criminal law that the burden is upon the prosecution to prove beyond a reasonable doubt every essential element ****." No guilt of a violation of AW 75 was shown herein. Rather, in the absence of other prejudicial errors, there would only have been proof of the lesser included offense of absence without leave.

(B) Procedural Defects of Trial: Accused was served with charges herein on 17 October. Trial commenced at 0910 hours the same day, and was completed 50 minutes later. It does not appear whether any time at all intervened between service of the charges and commencement of the trial. Nor does it appear anywhere in the record or attached papers that trial on the same day as service of the charges was required by any military necessity. (1) Notice of Trial: "Accused was entitled to a reasonable opportunity to prepare for trial and to the effective assistance of counsel in the preparation of his defense" (AW 11, 17, 70). Legislative and executive provisions in this regard (quoted) "are to be so construed and applied as to meet the requirements of due process of law under the Fifth Amendment to the Federal Constitution. (AW 24; ETO 2297, Johnson and Loper, stating: "The rights and immunities under the 24th Article of War of an accused on trial before a Federal military court are identical with rights and immunities of a defendant on trial before a Federal court.") "The right to a reasonable opportunity to prepare for trial is a fundamental right secured to accused by the guarantee of the Fifth Amendment * * * that 'no person shall * * * be deprived of life, liberty or property, without the process of law'. The guarantee of due process of law in the Fifth Amendment extends to persons on trial before Federal courts-martial." (U.S. v Hiatt, 141 Fed. 2d 664 (1944).) (Discuss various phases

of problem; cite other cases.) (2) Waiver: "The right to an opportunity to prepare for trial may be waived by an accused either expressly or by implication". Likewise, he may waive his constitutional right to assistance of counsel. But in the instant case, accused did not waive his right to a reasonable opportunity to prepare for trial. "Neither he nor his counsel made any statement which could be construed as an express waiver. Where accused has not already received a reasonable opportunity to prepare for trial his failure to object to trial or move for a continuance is evidence that he waived his right. Such evidence, however, is not conclusive * * *." "Every reasonable presumption will be indulged against the waiver of fundamental rights by one charged with crime * * *. The Board of Review takes a realistic view of accused's immature years, inexperience and limited education and recognizes the obvious fact, in the absence of any indication to the contrary, that he was ignorant of his fundamental right to a reasonable opportunity to prepare for trial and of the danger of goint to trial on a capital charge without a sufficient opportunity to prepare his defense with the assistance of counsel. Since he was unaware of this right he could not competently and intelligently waive it. Accused in this case was in fact denied a reasonable opportunity to prepare for trial and the effective assistance of counsel in the preparation of his defense." "The Board of Review is of the opinion that the opportunity for preparation contemplated by the Articles of War and the MCM and guaranteed by the due process clause of the Fifth Amendment to the Federal Constitution was denied to this accused. He was also denied the effective assistance of counsel secured to him by AW 17, and by Pars.43b and 45b, MCM, 1928, pp.34 and 35."

(C) Prejudicial Error: "The denial to accused in this case of a reasonable opportunity to prepare for trial and of the effective assistance of counsel injuriously affected his substantial rights." "In determining whether an accused suffered prejudice from the denial of a fundamental right, the Board of Review is not aided by facts brought out by any procedural device available to accused after trial by court-martial, such as a motion for a new trial and hearing thereon. The Staff Judge Advocate's Review in this case is not helpful since it entirely ignores the grave question * * *." The record of trial itself and accompanying papers indicates "that neither accused nor his counsel was prepared for trial. Counsel improperly joined in a stipulation as to the existence of an essential element of the capital offense * * * charged and made no attempt to withdraw it when accused showed by his testimony that he had no appreciation of what was involved in the stipulation. No attempt was made to present extenuating circumstances although accused's testimony alludes to their existence. The prosecution produced no witnesses but relied entirely on a certified extract copy of a Morning Report and on a highly improper stipulation. The investigation by the Investigating Officer, and the consideration given to the case by the Staff Judge Advocate before recommending trial /a mimeographed form/ were both perfunctory and inadequate. The case itself was perfunctorily, hastily and carelessly tried. Although accused was on trial for his life, the court was composed of the minimum number of officers, and all of them junior officers--two captains, one first lieutenant and two second lieutenants--in sidregard of the policy laid down in Article of War 4 that those officers should be detailed to courts-martial who in the opinion of the appointing authority 'are best qualified for the duty by

reason of age, training, experience and judicial temperament'. A second lieutenant was detailed and sat as law member. Ten members of the court were excused. Accused was only 19 years of age and presumably possessed the immaturity and improvidence which normally characterizes a youth of that age. His inexperience and limited education make it improbable that he could have appreciated, without adequate assistance, the questions involved in the preparation and presentation of his defense. The totality of these facts appraised in the light of the denial to accused of a reasonable opportunity to prepare for trial and of the effective assistance of counsel, shows that he was not given a fair trial." He was deprived of liberty and property without due process of law. The finding of guilt, and the sentence, are invalid, and must be vacated. (CM ETO 4565 Woods 1945)

Accused Staff Sergeant was found guilty of a violation of AW 75, in that he misbehaved before the enemy by refusing to lead his squad, which had then been ordered forward to engage with German forces. HELD: LEGALLY SUFFICIENT. (1) Misbehavior: "It was clearly shown by the prosecution's evidence, as well as by accused's testimony, that an attack order was given him, that he refused to carry it out and made it manifest to his company commander that instead he would 'stay with his men', that he 'ran out to' contact tanks to prevent their advancing to take part in the proposed attack and that while before the enemy, he refused to lead his squad as alleged. That an attack was not in fact made is not material * * *. The gravamen of his offense was his refusal to lead his squad * * *." (See facts stated in opinion herein, which present an explanation for accused's acts.) (2) Time of Trial: In view of explained military necessary and the defense's affirmative statement that it had no objection (accused personally confirmed), no prejudice resulted from trial the day after service of charges herein. (CM ETO 4630 Shera 1945)

Accused was found guilty of misbehavior before the enemy in violation of AW 75, in that on or about 2 October 1944 he ran away from his company, which was then engaged with the enemy, and did not return thereto. HELD: LEGALLY INSUFFICIENT FOR MORE THAN AWOL from 2 to 8 October 1944, in violation of AW 61. (1) AW 75; ENEMY: "There is no evidence * * * that at the time accused is alleged to have run away, or at any other time, either the * * * or Company * * *, one of its component companies, was 'engaged with the enemy' as alleged * * *." A paragraph in a psychiatry report, introduced as a defense exhibit, contains the statement, "he left his unit when he came under some light shelling". "If this statement was made to the division psychiatrist by accused and related to the offense alleged * * *, it constituted an admission against interest and was therefore admissible in evidence (MCM, 1928, par.114b, pp.116-117). Communications between a civilian physician and patient are not privileged, nor are statements made by an officer or soldier to a medical officer (MCM, 1928, par.123e, p.132). It does not appear, however, that the statement in question was made to the division psychiatrist by accused. * * * Since it is impossible to determine that the

statement was made by accused it would be highly improper to treat it as an admission." In the absence of other evidence, the finding of AW 75 guilt cannot be sustained. (2) AWOL: "The averment * * * that accused 'did * * * on or about 2 October 1944 run away from his company * * * and did not return thereto' necessarily implies that accused absented himself from his company without leave. In such case absence without leave under AW 61 may be a lesser included offense of an alleged violation of AW 75 * * *. The only evidence introduced to prove that accused absented himself from his company without leave was the extract copy of the morning report * * * for 11 October 1944. The extract copy was in fact signed by the assistant personnel officer, who is not an official custodian of the original * * *. The copy was not, therefore, duly authenticated. Failure by the defense to object to the admission of the copy on the specific ground that it did not appear it was duly authenticated could properly have been regarded by the court as a waiver of that objection * * *. It has been held by the Board of Review (sitting in the ETO) that the rule of evidence contained in the Federal Statute providing for the admissibility of writings and records made in the regular course of business (Act of June 20, 1936, Ch. 640, sec.1, 49 Stat.1561, 28 USCA 695) is applicable in cases before courts-martial * * *. The basis for the rule is the probability of the trustworthiness of records because they are the routine reflections of the day-to-day acts, transactions, occurrences, or events of an organization * * *. A morning report is a writing or record within the meaning of the statute cited * * *. At the time the morning report in question was made, it was the practice in numerous combat organizations operating under combat conditions to have their morning reports prepared in the unit personnel section. This practice had become the usual and normal procedure in recording facts constituting the daily history of the unit involved. The CG, ETO, recognized the military necessity for this practice (Ltr. AG 330.33 Op.JA, 2 Dec 1944) and issued a directive providing that morning reports of units in the Theater are to be signed either by the commanding officer of the reporting unit, or, in his absence, the officer acting in command, or by the unit personnel officer (Cir. 119, ETOUSA, 12 Dec 1944, sec.IV). The original morning report in the present case was made by the assistant personnel officer in the course of discharging the responsibility assumed by the personnel officer of recording the day-by-day acts, occurrences, and events of the units served by the personnel section. The document thus prepared was kept in the personnel office and became part of the administrative records of the organization concerned. The personnel officer, as official custodian of it, testified that it was the morning report of Company * * *, and that 'it was based on the battle casualty morning report that the company sent down to the office'. The Board of Review is of the opinion that the original morning report was admissible as a writing or record made in the regular course of business as provided in the Federal statute cited above. The extract copy was properly received, since its defective authentication as a true copy was waived. The entries were relevant and material to the issue of accused's absence without leave. It was for the court to say to what extent the circumstances surrounding the making of the record, including the lack of personal knowledge by the assistant personnel officer, affected the probative value of the entries. (3) Termination of the AWOL: The specification herein merely alleged that accused did not return to his organization. "This is equivalent to an allegation that at the time the Charge was preferred, namely 10 October 1944, accused's AWOL had not been

terminated. It was therefore proper to permit proof that his absence ended on 8 October - an earlier date of termination than was alleged." (4) Lesser Offense: "The Board of Review is of the opinion that the record of trial is sufficient to sustain a finding of guilty of the lesser included offense of absence without leave from 2 October 1944 to 8 October 1944 and the sentence" to confinement for 20 years. (CM ETO 4691 Knorr 1945)(But see 395(18) Memo; TJAG, 30 Mar 1945.)

(1st Ind. CM ETO 4691 Knorr 1945) "In view of the reduction in the grade of the offense of which accused is legally found guilty, it would be appropriate to make some reduction in the term of confinement."

Charged with desertion to avoid hazardous duty (AW 58-28), accused was found guilty of the lesser offense of absence without leave in violation of AW 61. He was also found guilty of two violations of AW 75, to wit: (a) that on 15 September 1944 he ran away from his company, then engaged with the enemy, and did not return until 20 September after the engagement had been concluded; and (b) that on 1 September he misbehaved before the enemy by refusing to follow the order of a lieutenant to leave his foxhole, and to go back with that lieutenant on a check of the platoon preparatory to continuing the attack. HELD: LEGALLY SUFFICIENT TO SUPPORT THE FINDING OF AW 61 GUILT; LEGALLY INSUFFICIENT TO SUPPORT THE FINDING OF AW 75 MISBEHAVIOR ARISING OUT OF THE 15-20 SEPTEMBER OFFENSES, BUT SUFFICIENT TO SHOW AW 61 AWOL BETWEEN THOSE DATES. (1) Evidence: Accused was on his way from a service company to join a unit when the alleged 15-20 September offense occurred. "The proof is positive that accused was not physically present with his company at the place it was undergoing enemy fire on 15 September. He was with the Regimental Service Co. until he started his journey to the company on ***'s truck. When the truck and its occupants came under enemy fire while en route to the company, they sought cover. Accused did not resume the journey * * * when the barrage lifted." The placement of the phrase "who before the enemy" in AW 75 is the result of the 1920 amendment effected by Congress. "The change in position of the phrase was for the purpose of clarifying the article and making certain that all of the specific acts denounced must be committed by the officer or soldier while he is 'before the enemy'. The provision of the Article in the Code of 1916 was ambiguous in this respect * * *. From the foregoing it is clear that both the accused and the organization with which he is under duty to serve must be 'before the enemy' at the time of his dereliction in order to make a case against him under the 75th AW where the specification charges his abandonment of his organization. It is obvious that accused at the time he went absent without leave had not physically rejoined his company although administratively and on paper he was a member of Co. A. He was under duty to proceed to his company from the field train, but he was not ordered to become a passenger on ***'s truck. He voluntarily sought transportation thereon. There was no compulsion on him to continue as passenger on the truck. In view of the fact that the road on which the truck proceeded was under enemy fire it may have been an act of prudence and

not of cowardice to discontinue the journey on it and to proceed to the company by other means and by other routes. It cannot be said that accused's presence on the truck placed him physically with his company. The truck was not the company: it was only a means by which accused could reach the company. * * * Inasmuch as accused did not physically 'run away from his company' for the reason that he had never joined it", there was a failure of proof on this specification, to show more than accused's absence without leave." (2) Morning Report: While it appeared that the company was before the enemy, "the burden was on the prosecution to prove * * * that the accused when he ran away was also before the enemy. For proof of this fact it is necessary to rely in part upon the extract copy of the morning report of the company for 3 October /referring to an event of an earlier date/ admitted in evidence * * *, the defense stating there was no objection. Proof of the authenticity and genuineness of this extract copy was clearly supplied by the testimony of" the commanding officer, a first sergeant and a personnel officer. "With such supporting testimony, and in view of the specific waiver of objection by the defense, it was properly admitted in evidence (Act June 20, 1936, c.640, sec.1; 49 Stat 1561; 28 USCA 695; CM ETO 2185 Nelson). It is the opinion of the Board of Review that the principle concerned in CM 254182 (1944) (Bull. JAG, Aug 1944, Vol.III, No.8, sec.395(18), p.337) is not in conflict with the conclusion herein reached. The evidential value of the entries as they pertained to accused was a matter for consideration by the court, and the lack of personal knowledge of the facts by the Personnel Officer did not bar the admission of the extract copy in evidence under the Act of Congress above cited. Unlike the situation which arose in CM 254182, supra, there is no evidence in the record of trial impeaching or impairing the verity of the entries. Oppositely, there is testimony * * * that on 12 September accused was transferred from the hospital and attached to the service company, and that he had been relieved from attachment to the service company before he went AWOL. Whether K** testified from his own knowledge or from information shown on the morning report is not indicated. In any event, his testimony tends to confirm the verity of the morning report and not deny or impeach it. Under such situation the Board of Review is of the opinion that the court was entitled to consider the information shown on the extract copy of the morning report and give it such value as it might decide." (CM ETO 4740 Courtney 1945) (But see Memo TJAG, 30 Mar 1945 (395(18)).

Accused officer, a platoon leader, was found guilty of a violation of AW 75 in that, at a time when his platoon had been ordered forward to engage the enemy at a place in Germany, he shamefully abandoned it and sought safety in the rear without permission. HELD: LEGALLY SUFFICIENT. (1) The evidence adequately supported accused's conviction. When artillery fire came during an attack, "accused joined his men in full retreat, issued no orders, made no attempt * * * to control his men who were in complete disorder, and later abandoned his command altogether and sought safety in the woods at the rear. Such shocking behavior which occurred after the attack started and after our position therefore became fully known to the enemy, directly endangered the lives of all who participated in the assault * * *." (2) The specification herein failed to allege that accused's misconduct occurred "before the enemy".

However, it did contain specific allegations as to the time and place with reference to the offense alleged. "It was further alleged that he was present with his platoon which had been ordered forward to engage with the enemy. These words clearly allege a service which was 'directed against the enemy' and which accused was required by his military obligation to perform." He was, therefore, "before the enemy". "The words 'shamefully abandon his platoon and seek safety in the rear without permission' further indicate the immediate presence of the enemy." The evidence clearly showed that he was before the enemy. The defense did not object to the specification, and it does not appear that accused was misled. The specification in this case was adequate. (3) Mental Capacity: There was some evidence that accused appeared dazed, was "not exactly right", "seemed as if he had had a shock", and that he told witnesses a shell "had just about knocked him out". Whether or not he was suffering under a genuine and extreme illness or other disability at the time of his alleged misbehavior, which would constitute a defense, was essentially a question of fact for the court's determination. In view of substantial, competent evidence that accused suffered from lack of self control and self discipline rather than from illness or disability, the court's determination of the issue against him will not be disturbed upon appellate review. (CM ETO 4783 Duff 1944)

Accused was found guilty of the following violations of AW 75: (a) While before the enemy en route to join his company as a replacement, he did, at * * *, Germany, wrongfully and unlawfully cast away his rifle, ammunition, and equipment; (b) He did shamefully run away from the Motor Pool of * * *, and did seek safety in the rear, and did not return until apprehended the next day; (c) He did misbehave by refusing to go forward from the command post of * * * to join his company. HELD: LEGALLY SUFFICIENT. (1) Specifications: (a) The first specification charged accused with casting away his rifle, ammunition and equipment. It followed the phraseology of Form 51, MCM, 1928, Appendix 4, p.245, and phrases of AW 75, stating a violation of the latter article. Language in Winthrop's Reprint, p.626 "indicates that 'casting away' may be the equivalent of 'wanton renunciation' or discarding 'whatever its inducement'. Accused, in discarding and abandoning his rifle, ammunition and equipment when he absented himself without leave, was guilty of 'casting away' these articles within the meaning of AW 75. His conduct was particularly aggravated by the facts (1) that the articles were abandoned near the front lines at a point where they were likely to fall into the hands of the enemy and (2) that he himself wantonly proceeded into enemy territory without the protection afforded by his rifle, ammunition and other equipment * * *, thereby endangering his own safety." The most likely explanation of his doing so was his "disaffection for killing and violence in any form, admitted and even urged by him in his own testimony. Such is clearly not a defense to the specification." (b) The second specification alleged that he shamefully ran away and sought safety in the rear. However, the "evidence indicates that accused proceeded at least eventually toward the enemy lines, albeit perhaps unintentionally." There was neither evidence, nor may it be inferred, that he went to the rear. However, this was immaterial. "The essence of accused's offense was his absence, under the

circumstances, from the place where it was his duty to be * * * caused * * * by his running away. The specification would have stated an offense in violation of AW 75 had it omitted all of the words: 'and did seek safety in the rear', * * *. Hence the failure of proof as to part of those words, to wit: 'in the rear', * * * was immaterial." (c) The third specification alleged accused's misbehavior by refusing to go forward from a command post to join his company. "The lack of allegation or proof that accused did in fact fail to go forward to join his company is immaterial in view of his deliberate avowal of intention not to go forward." The testimony in regard to his subsequent refusal to a commanding officer, "based upon the same reason as previously given, was admissible in evidence, although such refusal was not made the basis of a separate specification, for the purpose of proving the relevant factor of accused's state of mind at the time of his alleged refusal some two weeks before." The fact, that it may have tended to establish his commission of another offense not charged, did not make it inadmissible (MCM, 1928, par.112b, p.112; ETO 3811 Morgan et al). (2) Mental Capacity: Accused's defense "was that he was a conscientious objector, opposed to killing and any form of violence from his early Catholic school days up to and including the commission of the acts charged. There is no evidence contradicting accused's testimony in this respect. Rather, the fact that he repeated the claim to several different persons tends to corroborate his testimony. Unlike * * * CM ETO 3380, Silberschmidt, there is no evidence that accused herein acquired his status as 'conscientious objector' only after an unpleasant battlefield experience or that his claim was not at some time made in good faith." "Congress provided exemption from combatant and even noncombatant service for conscientious objectors who, 'by reason of religious training and belief', were opposed to participation in war in any form (Selective Training and Service Act of 1940 (sec.5g), Act of Sept 16, 1940, 54 Stat 889; 50 USCA, App.305)). The exemption under the cited Act is broader than that accorded by Congress in the Draft Act of 1917, which required a status of membership in a sect or organization whose religious convictions were against war. But the objection, in order to be a valid basis of exemption under the 1940 Act, must arise from 'a compelling voice of conscience, which we should regard as a religious impulse' rather than from convictions of a different character * * *. Accused admitted that he was never taught that a soldier in time of war should not kill, that his religious beliefs did not conflict with aiding the sick and wounded, that being with sick people affected him, especially if there was blood around, and that his disaffection with regard to such persons 'might be mental' rather than the result of religious training or belief. He also admitted that he refused on 12 October to go to the front for any type of duty. It is thus evident that his objections to 'participation in war in any form' were not based entirely upon 'religious training and belief' * * *. Accordingly, it appears that the failure of accused's draft board to classify him as a conscientious objector was not an error of law 'to be rectified by the courts' or otherwise, but rather the determination of a question of the weight of evidence, which was clearly within the draft board's province. 'The courts cannot act as appellate tribunals for the draft machinery' * * *. It is appropriate to

note that accused failed to pursue, and thereby waived, any remedies available to him to correct any error of law by the draft board, which included appeal to the appeal board and in the event of failure in that forum, habeas corpus proceedings * * *. Furthermore, the fact that he underwent extensive combat without renewing his claim tends to indicate an abandonment thereof." (It is to be noted herein that "it is not the intent * * * to imply that a soldier, regularly inducted * * * may in a military court defend a charge against him arising under the Articles of War on the ground that he was wrongfully inducted into the military service." Rather, the converse is true, and, "strictly speaking the court should have excluded all of the defense's evidence pertaining to accused's draft status as irrelevant * * *.") (3) Identity of accused: Error resulted when the trial judge advocate regularly pointed accused out in open court so witnesses before they identified him. However, no prejudice resulted because his identity was adequately proved elsewhere. (4) Time of Trial: In the absence of objection or indication of prejudice, no prejudicial error resulted when the trial took place four days after service of the charges upon accused. (CM ETO 4820 Skovan 1944)

Accused was found guilty of misbehavior before the enemy in violation of AW 75, in that he shamefully abandoned his company and sought safety in the rear. HELD: LEGALLY SUFFICIENT ONLY FOR AWOL IN VIOLATION OF AW 61. (1) Evidence: The only evidence of the tactical situation of the company came from two questions asking a witness (a) whether the company was engaged with the enemy and (b) whether they were tactically before the enemy, on or about the day of accused's alleged offense. The answer to each question was, "They were". "These questions were objectionable because they were leading and, because they incorporated a conclusion which called for an opinion (MCM, 1928, 112b, p.111). His answers left entirely to speculation, the details, circumstances and other essential facts, from which the court could reasonably form its own conclusion of the tactical situation, a question for its sole determination. The evidence fails to prove the duty of the accused, that he neglected to perform his work, that he was with his company, that he shamefully abandoned his organization, that he sought safety in the rear or any overt act or acts of a specific form of misbehavior before the enemy. The testimony of the only witness * * * fails to identify accused or to indicate his rank, organization, relation to his organization or duty status. The highly important fact that accused was present with his company while it was engaged with the enemy and that he did shamefully abandon the said company and seek safety in the rear is absent from the evidence." The evidence was insufficient to show a violation of AW 75. (2) Lesser Offense: The specification, however, "necessarily implies that accused absented himself from his company without leave", when it alleges that, being present with his company while it was engaged with the enemy, he shamefully abandoned it and sought safety in the rear. "In such a case AWOL under AW 61 may be a lesser included offense of an alleged violation of AW 75 * * *. "The only evidence introduced to prove accused absented himself from his company without leave was the extract copy of the morning report * * * signed by the personnel officer. He identified it as a true extract copy of the actual morning reports and testified that he was designated by competent authority as their official custodian. The personnel officer is authorized to

authenticate such extracts and they were properly received in evidence * * *. The entries were relevant and material and proved his AWOL on 30 Sept 1944 ((date of offense)). The Spec. *** does not allege a continuing absence as in CM ETO 4691 Knorr * * *. The principle of the Knorr case, therefore, does not apply, and this accused can be held for AWOL for only one day." He is guilty of the lesser offense of AWOL in violation of AW 61 for one day. (CM ETO 4995 Vinson 1945)

(1st Ind: "The legal insufficiency of the record to support the findings, except so much thereof as involves absence without leave, was apparently due to the failure of the prosecution to produce the necessary testimony rather than the unavailability of such evidence. A few appropriately worded questions by the TJA with reference to the tactical situation, the extent of enemy fire, the location of accused's organization in relation to the enemy and the conduct of the accused, directed to a witness who had knowledge thereof, would very probably have elicited enough evidence to support the court's findings. * * * In view of the reduction in the grade of the offense and the proven offense of AWOL for one day only, the term of confinement should be reduced to a term appropriate to that office."

Accused was found guilty of a violation of AW 75, in that he misbehaved himself before the enemy by refusing to return to duty with his company, which was then engaged with the enemy. HELD: LEGALLY SUFFICIENT. (1) Evidence: The sole witness herein was the commanding officer of a service company which was serving the fighting troops of the regiment and was a part thereof. The regiment was tactically before the enemy--two of its battalions on the line and one in reserve. The witness was in charge of kitchen trains and rear trains of the regiment, and of returning men to duty. Accused was one of a group returned by division military police to the witness's installation. When he told members of the group that they would be outfitted there and would return to their organization, one replied that he would not go forward because he was not an infantryman but a chemical mortar man. He then told those who were going forward to step to one side. The entire group, instead, stepped backward. He interpreted this movement as meaning that they refused to go. "The evidence shows a deliberate refusal by accused * * * to return to his organization as ordered. The testimony * * * fails to show accused's name, rank or organization. However, his pleas to the general issue admitted his identity * * *, and the charge sheet, which is part of the record of trial and may be considered upon appellate review * * *, together with the statement in the record describing accused at the opening of the trial, supplied the deficiencies, showing that his organization at the relevant time was Company * * *. The testimony showed that the entire regiment, inferentially including Company * * *, was engaged with the enemy at the time. It thus appears that accused's refusal to return to his organization from the regimental service company which was in support thereof constituted the accused before the enemy as alleged in violation of AW 75. * * *."

(2) Time of Trial: The trial took place six days after the offense and one day after service of the charges. However, no objection was made, and there is no indication that accused's substantial rights were injured. No prejudice resulted. (3) Court Membership: The personnel adjutant who subscribed to the affidavit on the charge sheet also sat as a member of the court. "His act was purely administrative and his presence on the court may not be regarded as having injuriously affected accused's substantial rights." (4) Comment: "Although the Board of Review is constrained to hold that the record of trial is technically legally sufficient to support the findings of guilty and the sentence, it is to be noted that the record is far from satisfactory in content and completeness. Its deficiencies in these respects are particularly deplorable in view of the gravity of accused's dereliction, for which the court saw fit to sentence him to life imprisonment. The testimony of the only witness at the trial fails to identify accused in any respect or to indicate his rank, organization, relation to his organization, or duty status. The highly important fact that accused was himself before the enemy is left to be inferred from evidence of his presence with a unit which was 'serving' the remainder of the regiment on the line. Likewise, the highly important fact that his company was then engaged with the enemy as alleged, is not adverted to but left entirely to inference from the evidence that the regiment as a whole was so engaged. There is no evidence in the record as to accused's physical and mental condition or as to possible reasons for his refusal to go forward to his organization. The defense asked no questions of the one witness and introduced no evidence. A soldier accused of the very serious offense of misbehavior before the enemy is entitled to have all the available evidence for and against him duly presented to the court so that it may impose a just sentence and so that appropriate authorities will be furnished a basis for the exercise of clemency, if warranted. It is hoped that more serious attention will be accorded these matters in the future." (CM ETO 5004 Scheck 1944)

Accused was found guilty of misbehavior before the enemy on two specifications. The first alleged that he ran away from his organization, then engaged with the enemy, and did not return until he was apprehended on a date five days later. The second alleged that he had refused to return to duty with his company, then engaged with the enemy. The reviewing authority reduced the finding of guilt on the first specification to absence without leave in violation of AW 61, but otherwise approved. HELD: LEGALLY SUFFICIENT. (1) The misbehavior as alleged in the second specification was adequately shown. (Facts are similar to ETO 5004, Scheck, and reference is made thereto.) (2) Lesser Offense of Absence Without Leave: "Absence without leave under AW 61 may be a lesser included offense of AW 75 when the specification, as in this case, is so drawn as sufficiently to allege an unauthorized absence * * *. Running away from his company on the part of a soldier necessarily comports and includes separation therefrom without authority * * *. Accused's plea of guilty, to the extent that it admits absence without leave between 2 and 7 November 1944, is supported by the

evidence." (See CM ETO 2212 Coldiron, p. 1 Bull JAG, Aug 1944, Vol.III, No. 7, sec.433, p.342). (3) Time of Trial: No prejudice resulted because the trial occurred three days after accused was served with charges. Neither objection nor prejudice appears. The irregularity was harmless. (Note that it "is better practice to ask accused if he is ready to go to trial". (CM ETO 5114 Acers 1944)

Accused officer was found guilty of misbehavior before the enemy in violation of AW 75 in that, while present with his platoon when it was engaged with the enemy in Germany, he did shamefully abandon it and seek safety in the rear, and failed to rejoin until the engagement was concluded. HELD: LEGALLY SUFFICIENT. (1) The evidence "leaves no doubt that /accused/ was with his platoon while it was engaged with the enemy at the time and place alleged and that he left the platoon and went to the rear. The only possible question * * * was whether or not his leaving was justified * * *. Accused attempted to justify his conduct on the ground that lack of available personnel and means of communications necessitated his going to the rear for medical aid for his unit. Such explanation is belied not only by reliable and persuasive testimony that personnel and means of communication were available but also by accused's own admission" that he had no experience leading his type of platoon, and that he suggested that it would be better if he should be sent back. He also told another officer that he wanted to be evacuated. "It thus appears that, using an alleged necessity as a pretext, he did shamefully abandon his platoon and seek safety in the rear, as alleged." (2) Time of Trial: No prejudice resulted from the fact that the trial took place one day after service of the charges upon accused. (3) Defense Counsel Services: Although the record shows that services of the assistant defense counsel were desired, he was absent. However, neither accused nor defense counsel pursued this matter further. It does not appear that substantial rights were affected. The irregularity was harmless. (CM ETO 5179 Hamlin 1944)

Accused was found guilty of a violation of AW 75, in that, while before the enemy, he quit his post for the purpose of plundering and pillaging. Second, he was found guilty of a violation of AW 89 in that he willfully and unlawfully, and without authority, opened by force, thereby damaging (originally charged that he did "destroy") a safe, property of a civilian valued at $56. Third, he was found guilty of the larceny of bonds, value not in excess of $20, in violation of AW 93. HELD: LEGALLY INSUFFICIENT IN PART. (1) AW 75--Quit Post; Plunder and Pillage: Under AW 75, "Any * * * soldier, who, before the enemy, * * * quits his post * * * to plunder or pillage, * * * shall suffer death or such other punishment as a court-martial may direct". "The Specification states an offense in violation of AW 75***." "The word 'quit' * * * means 'absent himself without authority'. It has the same meaning in AW 28 * * *. * * * The offense involves an actual abandonment of his post by the offender with the specified intention." "The evidence herein shows that on the day in question, accused's company was in battalion

reserve some 500 yards from the front line, which consisted of a dyke held by two other companies to move to the front upon an hour's notice. It is * * * beyond dispute that under these circumstances accused and his company were before the enemy * * *." "The only question for determination is whether there is in the record competent and substantial evidence that accused 'quit his post' and if so whether he did so with the specific intent, entertained at the time of quitting * * * to plunder and pillage, i.e., to seize and appropriate without authority public or private property. The breaking open of the safe and removing of the bonds and other contents thereof by accused were fully proved here, and from this court might infer his intent to plunder and pillage, but the burden was also on the prosecution to prove that accused without authority left the place where he should have been, permanently or temporarily * * *. This element may be inferred from circumstantial evidence * * *. The evidence is clear that accused was neither ordered, nor granted permission, to leave his post or place of duty in order to plunder and pillage. It is equally clear, however, that members of the company were given permission to leave the company area at certain times and it was common practice for men to go out to houses in the town to obtain food and common knowledge that men went into houses to obtain scuvenirs. Although permission to leave the company area was under the supervision of the platoon leaders, the leader of accused's platoon, when on the witness stand did not testify whether or not accused had permission to leave the company area. When Lt. * * * discovered accused he specifically informed him that 'getting food was permissible, but he was overstepping the bounds by taking person property'. He wished accused to return to his company area not because his absence was without leave but because he found him engaged in looting. Other members of his company were in the vicinity. Accused's testimony that his squad leader gave him permission to 'go down there' stands uncontroverted. The circumstances * * * are as consistent with authorized absence as with the contrary. They are thus insufficient to support the inference of unauthorized absence and thus of guilt * * *." Nor may the record be supported on the ground that there was plundering and pillaging in violation of AW 96. "The Specification did not allege plundering or pillaging but quitting his post for that purpose, an entirely separate and distinct offense * * *."

(2) AW 89--Destruction of Property: In regard to this AW 89 Specification, "the action of the court in substituting for the word 'destroy' the words 'open by force thereby damaging' is not materially inconsistent with, or more limited than, this evidence. However, the value evidence was insufficient. The owner testified that its condition was "perfectly all right", that he paid 375 guilders for it 25 or 26 years ago and that he sold an inferior safe in 1940 for 750 guilders. "There is no showing that the owner had expert knowledge of the value of safes, nor was the safe available for visual examination by the court." There was, therefore, a failure of proof that the safe had any value in excess of $20. "The Table of Maximum Punishments prescribes no maximum limit for offenses in violation of AW 89. * * * The most closely related offense for which a maximum limit is provided appears to be willfully destroying public property of a value of $20 or less, for which the maximum punishment is dishonorable discharge, total forfeitures and confinement at hard labor for six months." The punishment for the offense proved should not exceed that limit.

(3) AW 93--Bonds; Larceny; Value: "The court was warranted in inferring that the bonds had some 'value not in excess of $20.00'.""The maximum punishment for this offense includes confinement at hard labor for six months."

(4) Pre-Trial Practice: "The trial in this capital case commenced at 1030 hours on the same day on which the charges were served * * *. This fact necessitates careful consideration * * * of whether he was deprived of his right to a reasonable opportunity to prepare for trial or to the effective assistance of counsel and thereby deprived of due process of law under the Fifth Amendment to the Federal Constitution * * *. The right to a reasonable opportunity to prepare for trial may be waived by accused either expressly or impliedly, and it has been held that where, as here, accused did not object to going to trial and made no motion for a continuance, and there was no indication that his substantial rights were prejudiced, he waived his right to a longer period of preparation. The constitutional right to the effective assistance of counsel is a personal right which may be waived by accused * * *. Had the court believed in toto his testimony, which consisted of clear denials and confession and avoidance, it might well have energetically by defense counsel." It is concluded that "accused enjoyed the effective assistance of counsel and adequate time to prepare his defense and, by failing to objection to trial or to move for a continuance, effectively waived any right he may have had to a longer period of preparation for trial." The 5-year sentence must be reduced to conform to the holding herein. (CM ETO 5445 Dann 1945)
(CM ETO 5446 Hoffmann 1945 (companion to Dann case; not digested)

Accused was found guilty of misbehavior in violation of AW 75 in that, while before the enemy, he did by his disobedience endanger the safety of his squad position, which it was his duty to defend, in that he refused to stand his tour of guard. He was also found guilty of a failure to obey, in violation of AW 96. He was sentenced to life imprisonment. HELD: LEGALLY SUFFICIENT. "The evidence shows and accused admits that his platoon was located just across the street from the enemy by whom they were under fire. They were before the enemy * * *. There is a conflict between the story of accused and that of the other witnesses in part only. Accused denied he ever said he would not go on guard but the testimony of the other witnesses is that he did not get up, that he failed to obey the repeated orders given him and that finally he definitely refused to obey the order." "'The phrase 'which it was his duty to defend'' may be rejected as surplusage as the remaining allegations state facts sufficient to constitute an offense under the clause of the Article which declares that 'any * * * soldier who, before the enemy, misbehaves himself * * * by any misconduct, disobedience or neglect' is guilty of an offense." (CM ETO 6376 King 1945)

(1st Ind: CM ETO 6376 King 1945: "The accused was surly, disorderly and insubordinate. He was inexcusably slow in getting ready to go on post, but he did not refuse to go until Sergeant * * * struck him twice in the face. His offense and the proper punishment for it should be considered in the light of all the known facts." The life sentence "appears entirely too long.")

Accused officer was found guilty of the following offenses in violation of AW 75: (a) endangering the safety of his company by refusing to obey his superior officer's order to send a patrol to regain contact with an outpost of his platoon; and (b) on the same date endangering the safety of his company by failing and neglecting to send a patrol to regain contact with an outpost of his platoon after wire communication with the outpost had been broken. He was also found guilty of a violation of AW 64, in that he willfully disobeyed his superior officer's command to send a patrol to regain contact with an outpose of his platoon. HELD: LEGALLY SUFFICIENT ONLY TO SUPPORT THE FIRST AW 75 SPECIFICATION AND THE AW 64 SPECIFICATION; INSUFFICIENT FOR THE SECOND AW 75 SPECIFICATION. (1) Pre-Trial Practice: Accused was originally charged with a single AW 75 specification somewhat different in form than either of the above paraphrased two AW 75 specifications. After investigation, and without reverification, the charges and specifications were changed to their final form. Neither reverification nor further investigation followed. "It is exceedingly doubtful if a further investigation would have revealed any" important additional facts. Hence, "a supplemental investigation would have been an idle gesture." "Violations of the * * * 70th AW do not affect the jurisdiction of the court, and except under extraordinary or unusual circumstances do not constitute error prejudicial to the substantial rights of accused." (Discuss.) It is a matter of apprehension and concern for SJAs to insert new charges on a charge sheet without affording opportunity to the accuser of either confirming or disaffirming his signature and oath to the original charge sheet. * * *" However, no prejudice occurred herein. (2) AW 75; 1st Specification: In Specification 1 herein, the pleader intended to state accused's offense under the following portion of AW 75: "Any officer * * * who, before the enemy * * * by any * * * disobedience * * * endangers the safety of any * * * command which it is his duty to defend". The Specification herein stated: "In that * * * W * * * did * * * while before the enemy * * * refuse to obey an order given him by Captain * * * to send a patrol to regain contact with an outpost of * * * W***'s platoon." The above arrangement of the factual allegations eliminates the following clause of the Specification: "* * * by his disobedience endanger the safety to Co * * * which it was his duty to defend." "If this latter clause is entirely rejected as surplusage, as may be done * * *, allegations of fact remain in the Specification that clearly and positively aver that accused refused to obey Captain R's order 'to execute a movement or perform a service adverse, or with relation to, the enemy when in his front or neighborhood'. The order required accused 'to send a patrol to regain contact with an outpost' of his platoon. Telephone connection with the outpost had ceased; firing was heard in its direction, and the enemy was known to be in its proximity. The order was therefore obviously one to perform a service with relation to the enemy which was known to be in the platoon's neighborhood. Accused, as platoon commander, was under duty to obey the same regardless of its wisdom or necessity and his refusal to obey it constituted" AW 75 misbehavior "without proof of the consequences of his disobedience. It was his duty to obey and 'not to reason why'". Accused was guilty of the offense alleged in Specification 1. (Note that reasonable minds could well have differed re whether the above conduct endangered the safety of his company--hence the theory of the present decision. "Under the theory of the present holding, such highly debatable questions are eliminated inasmuch as the order which accused disobeyed had a direct tactical relationship

with the enemy which was active in the neighborhood of accused's platoon. Under such circumstances the refusal to obey the same constituted misbehavior irrespective of the consequences resultant upon such disobedience. Therefore all evidence pertaining to the imperilment of the company, including Captain R***'s assertion that the company had not been imperiled by accused's disobedience, should have been excluded as irrelevant." (3) AW 75; Specification 2: The evidence is clear that accused willfully and knowingly disobeyed Captain R***'s order. "The patrol was not dispatched by him for the reason he made a deliberate affirmative choice not to comply with the order. The element of willfulness characterized his entire conduct. The findings of guilty of Specification 1 therefore absorbed the elements of failure and neglect * * * which form the gravamen of Specification 2. The record is legally insufficient to support the findings of guilty of Specification 2." (4) The AW 64 disobedience was clearly shown. (CM ETO 6694 Warnock 1945)

(1st Ind, CM ETO 6694 Warnock 1945) "The conduct of accused in refusing obedience to the company commander's order to dispatch a patrol * * * is, as a matter of military discipline, indefensible. However, in the light of subsequent events, reasonably-minded persons may well conclude that accused's judgment * * * was sounder than that of his superiors. There exists a definite inference that his disobedience in all probability saved the lives of some of his soldiers without impairing or affecting the tactical position of his company. On this basis, the sentence is difficult to defend." Accused's record shows that he was diligent and competent. "All evidence indicates that accused is a brave, intelligent, and experienced officer whose services are of value to the Army." "I suggest that further consideration be given to the desirability of suspending the execution of accused's sentence." (Discuss other similar cases.)

Accused was found guilty of misbehavior before the enemy, in violation of AW 75. HELD: LEGALLY SUFFICIENT. (1) Specification: "It is noted that the Specification alleges misbehavior before the enemy on the part of accused 'by failing to advance with his command * * * to man a defensive position before German troops, which forces the said command was then opposing, and by stating to Captain ***, 'I will not go with the platoon' and 'I will not carry a rifle' or words to that effect * * *'. * * * Since both accused's departure from the truck and his subsequent avowal of intent not to join his platoon occurred within half an hour of each other and related to a failure to advance with his command in connection with the same movement or detail, it would seem the better view to regard the Specification as designed to set forth a single transaction * * *. Adopting this hypothesis, the Specification as framed is unobjectionable, the latter part thereof being at worst an unnecessary pleading of evidence. Even assuming, however, that the pleading was multifarious in that it alleged two different acts capable of being construed as separate offenses, it nevertheless satisfactorily alleged a violation of AW 75 constituting of a failure to advance. Accused, therefore, was fully acquainted with the offense charged against

him and was in no way hindered in the preparation of his defense. Hence the possible defect of multifariousness, in the absence of objection by defense, is not fatal." (2) Evidence: "The proof shows that accused was selected as a member of a group which was under orders to advance to man defensive positions some 2 or 2½ miles from his company's command post. The defensive positions were apparently about one mile from the main enemy line, but were located in an area which fell within the zone of activity of enemy patrols and in which hostilities actually occurred during the time the positions were manned by personnel of accused's company. Pursuant to his instructions, accused boarded the truck along with the other men * * * and then without permission left the vehicle. When found in the command post half an hour later, he was specifically ordered to get his equipment and prepare to go forward, but * * * he refused to comply. Under the circumstances, it is apparent that accused was 'before the enemy' * * *. Nor is there any doubt that he knew of the hazardous character of the mission and that his failure to advance was designed to avoid it." His acts constituted a violation of AW 75. (CM ETO 7391 Young 1945)

Accused Lt. was found guilty of a violation of AW 75 in that, being present with his company while it was engaged with the enemy, he shamefully abandoned it and sought safety in the rear. HELD: LEGALLY SUFFICIENT. (1) "The evidence, including accused's testimony, establishes that he and his company were actively engaged with the enemy at the time and place alleged and that his mission, of which he was fully aware, was to establish an all-around defense for the company, maintain contact between all units, which were in mutual support, and hold ground taken by remaining in occupation of assigned positions. Accused abandoned the position occupied by him and part of his platoon and, without notice to the remainder of the platoon or of the company, led his men away from enemy action, leaving remaining elements to continue the fight without his support." The evidence supported the court's conclusion that the abandonment was shameful and unjustified. "It is clear that accused and the group immediately under his command had not approached their last extremity. They had not run out of ammunition and had sustained no casualties, prospects of relief or succor had not been abandoned, and it did not appear certain that they must in any event presently succumb * * *. Neither accused nor his group had even been made the object of a full-scale direct assault by the enemy, nor was the danger * * * imminent. There was no immediate indication that the group were liable to be sacrified, needlessly or otherwise. Accused was content to assume the worst, to wit: that other elements of his platoon had been destroyed, and to act upon that assumption without determining the true" facts "by such reconnaissance as the situation would permit." (CM ETO 9989 Forchielli 1945)

(1st Ind CM ETO 9989 Forchielli 1945: All court members recommended clemency. Accused had a good record. "On the night in question, the situation was confused. The battalion had taken the town of * * * in the late afternoon and about dusk had withdrawn behind a canal and set up defensive position in a group of houses. The area was full of infiltrating Germans during the night. Communications with the battalion and company CPs and with adjoining units were cut. Accused's conduct in withdrawing his platoon appears to have been caused by inexperience, falty evaluation of the military situation and lack of leadership and military spirit. His actions do not appear to have been motivated by personal cowardice. Under the circumstances, it appears that the life sentence herein is excessive.

Accused was found guilty of misbehaving before the enemy in violation of AW 75, and of desertion in violation of AW 58, under AW 28 circumstances. HELD: LEGALLY SUFFICIENT. As to the AW 75 charge, "when accused reported back to his company 14 January 1945 south of * * *, Belgium, he was ordered by an officer to go to the front where elements of his unit were receiving small arms and artillery fire. He was told that the company was in direct contact with the enemy and in a defensive position. He refused to go forward, saying he could not 'take it'". His AW 75 offense was proved. (CM ETO 11503 Trostle Jr 1945)

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(3) Finding of Offense Included:

Cross References: 1663 Ison (Variance)
433(2) 2212 Coldiron (AW 96--misbehavior; except words "before the enemy")
4565 Woods (AW 61 lesser)
4512 Gault Jr (AW 61 lesser, but not AW 96 AWOL)
4740 Courtney (AW 61 lesser)
4995 Vinson (AW 61 lesser)
5114 Acers (AW 61 lesser)
5445 Dann (plunder and pillage; AW 96 plunder and pillage not lesser, in circumstances)
4691 Knorr (AW 61 lesser)

(4) Variance:

Cross References: 385. 4489 Ward
433(2) See, in general
395(11) See in general.

Accused was found guilty of violations of AW 75 and AW 65. HELD: LEGALLY SUFFICIENT. (1) The question of accused's mental capacity was for the trial court. No discretion abuse resulted when it resolved this question adversely to him, despite the fact that he had been in combat for approximately five months prior to his instant offenses. (2) Place of Offense: Variance: Both Specifications allege that the offense occurred at or near C**, Luxembourg. Proof showed that the first offense occurred at or near W**, Luxembourg, and that the second offense occurred at B**. The three towns "are all located in Luxembourg within ten miles of each other and they are probably the towns referred to in the record." This additional information has been obtained by reference to a map. "The specifications therefore are sufficiently accurate to apprise the accused of the offenses with which he was charged." (CM ETO 6767 Reimiller 1945)

Accused officer was found guilty of two specifications charging misbehavior before the enemy in violation of AW 75, in that he refused to obey described orders to report. HELD: LEGALLY INSUFFICIENT AS TO ONE SPECIFICATION. (1) First Specification: The misbehavior here charged was adequately proved. "There is no doubt that he was before the enemy, inasmuch as he and his organization were in the regimental area which the evidence shows was within range, under the fire of enemy artillery and the orders received involved the removal of our dead." (2) Second Specifiertion: The order alleged herein to have been violated was to report to * * *, at the Third Battalion Command post. "The proof did not show accused was given any order to report to * * *. The Specification can be construed liberally to allege that accused was ordered to 'Report * * * at the Third Battalion Command Post', but there is no testimony that he did not do so during the time in question, or within a reasonable time thereafter. In the contrary, the only testimony is that of the accused to the effect that he did report at the command post. The variance between the allegation and the proof of the remainder of the order given, and violated, is fatal." (CM ETO 9259 Black 1945)

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437 (AW 79) Captured Property to be Secured for Public Service:

Cross References:
438 9573 Konick (AW 80 offense)

AW 79 CAPTURED PROPERTY TO BE SECURED FOR PUBLIC SERVICE

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