E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 2452

CM ETO 3153

VOLS. 7-8

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Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 7 B.R. (ETO)

including

CM ETO 2452 - CM ETO 2765

(1944)

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Washington : 1945

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Branch Office of The Judge Advocate General (1)
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 2

16 AUG 1944

ETO 2452

U N I T E D S T A T E S)	XV CORPS UNITED STATES ARMY
)	
v.)	Trial by GCM, convened at Dungannon, Tyrone County, North Ireland, 4 May 1944. Sentence: Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for ten years. The 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.
Private GEORGE N. BRISCOE (19056900), 495th Medical Collecting Company.)	

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings in part. The record has now been examined by the Board of Review, and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office.

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Private George N. Briscoe, 495th Medical Collecting Company, did without proper leave, absent himself from his camp at or near Dungannon, Tyrone County, Northern Ireland, from about 0700 4 February 1944 to about 2100 4 April 1944.

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

Specification 1. In that * * * did at Dungannon, Northern Ireland, on or about 10 January 1944, with intent to defraud, wrongfully make and

(2)

utter to The Dungannon Branch, Northern Bank Limited, a certain check in words and figures as follows to wit:

Jan. 10, 1944

Pay to Northern Bank Limited
Two hundred and No/100 Dollars

Commerce National Bank
Hollis, Okla. U.S.A.

Pvt. Geo. N. Briscoe
55 Med. Bn. 19056900

and by means thereof did obtain from the said Dungannon Branch, Northern Bank Limited, the sum of £49-10-11 ($200.00), he, the said Private George N. Briscoe then well knowing that he did not have and not intending that he should have sufficient funds in the Commerce National Bank, Hollis Oklahoma, to pay the said check.

Specification 2. In that * * * did at Dungannon, Northern Ireland, on or about 11 January 1944, with intent to defraud, wrongfully make and utter to the Dungannon Branch, Northern Bank Limited, a certain check in words and figures as follows to wit:

Jan. 11, 1944

Pay to Northern Bank Limited
Eighty and No/100 $80.00 Dollars

Pvt. Geo. N. Briscoe
19056900

Commerce Natl' Bank
Hollis Okla, U.S.A.

and by means thereof did obtain from the said Dungannon Branch, Northern Bank Limited, the sum of £19-16-5 ($80.00), he, the said Private George N. Briscoe then well knowing that he did not have and not intending that he should have sufficient funds in the Commerce National Bank, Hollis, Oklahoma, to pay the said check.

He pleaded guilty to the Charge and its Specification, not guilty to the Additional Charge and Specifications 1 and 2 thereunder. He was found guilty of all charges and specifications. Evidence was introduced of two previous convictions by summary court for absence without leave for one and two days, respectively, in violation of Article of War 61. He was sentenced to be dishonorably discharged the ser-

vice, to forfeit allpay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Orders No. 10, Headquarters XV Corps, United States Army, APO 436, dated 15 May 1944.

3. The only question requiring consideration is the legal sufficiency of the evidence - all of which is uncontradicted - to establish the worthlessness, when drawn, of the checks described in Specifications 1 and 2, Additional Charge, and accused's knowledge thereof. The evidence relevant to this issue shows that on 10 January 1944, accused reported to Captain Robert W. Hahs, his company commander, the receipt "of a letter from his folks stating that his mother was dead", at the same time requesting and receiving Captain Hahs' permission to go to the bank and secure money to send home (R10). At the Dungannon Branch of the Northern Bank, Limited, County Tyrone, Northern Ireland, accused requested George Rogers Porter, the cashier, to cash his (accused's) personal check, stating that he had $5,000 at home (R24). Having been sent to obtain Captain Hahs' signature by way of indorsement, as a prerequisite to the bank's compliance with his request, accused presented to Captain Hahs a check which "was not made out with the exception of his (accused's) signature", whereupon Captain Hahs, at accused's solicitation, indorsed it (R10,13,26). Accused returned to the bank. The blank check indorsed by Captain Hahs was completed to constitute it a draft drawn by accused on "Commerce Natl Bank of Hollis Oklahoma U.S.A." for $200.00, and the Dungannon Bank cashed it (R24,26,28,31; Ex.A).

The next day - 11 January 1944 - accused reappeared at the bank, "said he had lost £35 of the previous day's drawing and as he had made arrangements to go to London on holiday and required £20 for that holiday, he would like to have another draw." (R24-25,32). The bank thereupon cashed accused's check for $80.00 drawn on "Commerce National Bank of Hollis, Oklahoma, U.S.A." (Ex.F). As a matter of fact, accused had no furlough at that time and had made no request for one when he secured Captain Hahs' indorsement on 10 January (R12).

On 21 January 1944 accused returned to the bank and cashed another check on the same drawee for $200.00 and another for $100.00 on 24 January 1944. With reference to this latter the cashier testified, "He wished to draw another 100 dollars for his mother had died. On that occasion he told us he had £900 coming". He made further applications to the bank for money but these were refused (R25; Exs.G,H).

(4)

On 4 February 1944 accused went absent without leave, remaining in that status until apprehended at Belfast, 4 April 1944 (R7-8, 16-17,19-20; Exs.C,D). He was returned to his organization 6 April 1944 and placed in arrest in quarters (R16). About a week later the checks drawn by accused on 10 and 11 January for $200.00 and $80.00, respectively, (the two described in Specifications 1 and 2, Additional Charge) were returned unpaid. Attached to each was a statutory notice of protest duly executed by a notary public under his seal of office reciting presentation and non-payment, "the reason for non-payment being: No Account" (R11-12,23; Exs.B,F).

On 13 April 1944 the $200.00 check of 10 January 1944, with notice of protest attached, was brought to Captain Hahs by the manager of the Dungannon Branch of the Northern Bank (R11-12; Ex.B). Accused told Captain Hahs, in the ensuing conversation, that his step-father "back in the States" was handling the account and making deposits in it as far as he knew. The amount he expected his step-father to deposit was approximately $400.00 (R14,27). Captain Hahs further testified:

> "On the date that I told him about the check coming back and asked him how much money he had in the bank, he told me that his step-father owed him something like 400 dollars which he thought had been deposited in the bank at Hollis, Oklahoma" (R28).

Accused also told Captain Hahs, with reference to his unpaid checks, that "if he could contact his folks he thought they could make them good" (R32-33).

> "He spoke of cabling for funds that day", Captain Hahs testified. "I told him he could cable for funds if he liked to. * * * Nothing was done about it" (R34).

Later the checks for $200.00 and $100.00 cashed by accused on 21 and 24 January, respectively, were returned unpaid with notice of protest attached to each, similar to the notice attached to each of the two checks described in Specifications 1 and 2, Additional Charge (R23-24,35; Exs.G,H).

4. The defense introduced two witnesses, Captain Hahs, recalled after he had testified for the prosecution, and William Desmond Sides, Bank Accountant, Northern Bank, Dungannon. The relevant evidence adduced from these witnesses has been included in the foregoing summary. The accused did not testify (R27-35).

5. Specifications 1 and 2, Additional Charge, allege that accused, with intent to defraud, wrongfully made and uttered to the Dungannon Branch, Northern Bank Limited, the checks described in the respective specifications, and by means thereof did obtain from said bank the amounts for which said checks were drawn, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank to pay them.

> "That which must be proved as the corpus delicti, of course, varies in different crimes. * * * in false pretenses, the falsity of the representations by which the money or thing was procured * * * must be proved" (Wharton's Criminal Evidence, sec.875, pp.1511,1515,1517).

The evidence shows that on 10 January accused told his company commander that he had received a letter from home advising him that his mother was dead. At the same time, he requested and obtained permission to go to the bank to get some money to send home. At the bank, he said nothing about his mother's death or his purpose in drawing cash abroad from a bank "at home" - where, he told the banker, he had about $5,000.00. If he had actually had money deposited in a bank "at home", there would have been no point in his drawing it out in Ireland in British currency for transmission to his "folks" in Oklahoma, unless he intended to purchase a cable money order with the proceeds. But the following day, as the basis for a request to "have another draw", accused told the cashier at the Dungannon Bank that he had lost £35 of the previous day's drawing and required £20 to finance his arrangements, already made, for a London holiday. As a matter of fact, he neither had nor had he applied for a furlough, at that time; and he remained thenceforth continuously at his camp near Dungannon until he went absent without leave on 4 February 1944. On 21 January he cashed another check at the Dungannon Bank for $200.00. Three days later - 24 January - as an excuse, no doubt, for cashing another so soon, accused told the banker that "he wished to draw another 100 dollars for his mother had died". To an Irishman, this explanation may have involved no obvious non-sequitur. On the same occasion, accused also represented that he had "£900 coming". On 4 February accused went absent without leave, remaining in that status until apprehended two months later. On 13 April he was confronted by the two checks which he had drawn on 10 and 11 January, both returned unpaid with notice of protest attached, showing the reason given by the drawee bank to the notary for non-payment upon presentation to be "No Account". Then it was that accused told Captain Hahs, who had indorsed his first check for $200.00, that his step-father "back in the States" owed him $400.00 and he had expected his step-father to deposit approximately that amount in the bank at Hollis, Oklahoma. The inadequacy of the deposit, if made, to cover the four checks drawn by accused on 10, 11, 21 and 24 January, respectively, together with the established falsity of his previous representation, conclusively under-

mines any hypothesis of good faith or trustworthiness to which his proffered explanation was otherwise entitled. But even if it was worthy of belief, it presents a mere hope and expectation that accused's step-father would have discharged his claimed indebtedness to accused by depositing approximately $400.00 to accused's credit in the drawee bank, as the basis for accused's drawing checks for $580.00 against an account which he had no assurance existed.

> "The falsity of the pretense need not be proved by direct evidence, but may be established by circumstantial evidence; it is sufficient if the evidence establish such facts as tend legitimately to show its falsity; and since accused is usually in a position to know the truth or falsity of the representation, slight evidence of its falsity is sufficient for a conviction in the absence of countervailing evidence of its truth" (35 C.J.S. sec.52c, pp.719-720).

> "As a general rule any evidence which has a legitimate tendency to prove or disprove that accused knew his representations to be false is admissible, and the same is true of any evidence which tends to prove or to disprove a guilty intent. Evidence of acts and conduct of accused before the crime is, in general, admissible to show guilty intent; and evidence of his acts and conduct at and after the commission of the crime is admissible as bearing on intent" (Ibid, par. 51c, pp.711-712).

> "Successive acts of passing or uttering forged instruments or counterfeit money may be shown upon the theory that the presumption of mistake lessens with every repetition of the act. Hence, evidence of such repetition bears directly and materially upon the issue before the jury. * * * Upon the same broad principles, similar offenses may be shown in prosecutions for * * * obtaining goods or money by false and fraudulent representations * * *" (20 Am.Jur., par.315, pp.297-298).

Applying the rules and principles announced in the cited authorities, it appears that the evidence of accused's statements to his company commander and to the bank cashier prior to and in connection with his

cashing of the worthless checks, his statements to his company commander after notice of protest had been received, and his absence without leave terminated by apprehension, is competent not only to support but to compel an inference of the worthlessness of the checks when drawn and of the requisite criminal knowledge and intent on the part of accused in issuing and cashing them.

The question remains whether there is sufficient corroboration of accused's admissions to support his conviction.

> "It is practically universally held that the corpus delicti of a crime cannot be proved by an extra judicial confession standing alone, but must be proved independently of it. * * * The overwhelming weight of authority, however, recognizes that such a confession or admission may be considered in connection with other evidence to establish the corpus delicti, and that it is not necessary to prove it by evidence which entirely excludes a consideration of the confession" (Wharton's Criminal Evidence, sec.640, pp.1069,1072).

In holding a record of trial legally insufficient to support findings of guilty of similar specifications, where the evidence showed that accused cashed in Nevada, checks drawn on a Kansas bank, which checks were introduced as exhibits with documents attached issued by a Nevada bank to show that they were returned "NSF", a Washington Board of Review, in a recent opinion, approved by The Judge Advocate General, held that:

> "There was no competent proof that the checks were not paid. The documents attached to the checks, being issued by the Nevada bank, were incompetent to show the condition of the account in the Kansas bank. Neither the fact that a check bears the notation 'protested for non-payment', nor the fact that the check was not paid, nor both together, will constitute evidence that the check was worthless when drawn. (CM 124572 (1919), Dig.Op.JAG 1912-40, sec.453 (A.W. 95) (23). CM 242967 (1943)." (Bull.JAG Vol.III, No. 3, March 1944, sec. 453 (23), p.101).

According to a still more recent holding,

> "It was incumbent upon the prosecution to establish that accused did not have sufficient funds or credits in the respective

(8)

> banks uponwhich the checks were drawn, to pay the checks when presented. The mere statement of the witnesses who cashed the checks that they were returned because of 'no account' or 'not sufficient funds' cannot be considered adequate proof of this fact. Notations such as 'Not Sufficient Funds' and 'No Account' on returned checks or on slips attached to the checks are not competent to prove that the maker of the checks had insufficient funds or had no account in the bank to meet the checks (Dig.Op.JAG 1912-40, sec.395(16). CM 243091 (1944)." (Ibid, No. 4, April 1944, sec.454(67), p.151).

In these last two cases the point at issue appears to be the legal sufficiency of the evidence discussed to support the convictions involved, in the absence of extrajudicial confessions or admissions; not its competency to show such a probability that the offense was committed as to furnish legal corroboration of incriminating admissions, rendering the latter admissible for consideration as a factor in the establishment of the corpus delicti (MCM, 1928, sec.114a, p.115).

> "The courts are not in accord as to the quantum of proof necessary to establish the corpus delicti of a crime independently of an extrajudicial confession, but it is generally accepted that it is not necessary that such evidence alone establish the fact beyond a reasonable doubt, but that it is sufficient if, when considered in connection with the confession, it satisfies the jury beyond a reasonable doubt that the offense was committed and that the defendant committed it. It has been said that the corroboration of an extrajudicial confession is met if the additional evidence is sufficient to convince the jury that the crime charged is real, and not imaginary; and again, that it is sufficient if the independent evidence establishes the corpus delicti to a probability. In the last analysis, however, the sufficiency of a corroboration of a confession must depend on the circumstances of each case, always having in view that the essentials of the crime must be established beyond a reasonable doubt" (Wharton's Criminal Evidence, sec.641, pp.1072-1073). (Underscoring supplied).

Under the circumstances of the case under consideration, the possession by the bank and indorser, respectively, at the time of the trial, of the checks described in the specifications, and their introduction in evidence (regardless of the admissibility of the notice of protest

attached, which it is unnecessary here to consider), while not sufficient if standing alone to support findings of guilty under the law as announced in CM 242967 and CM 243091, supra, is certainly sufficient to corroborate the admissions of accused and, together with such admissions, to support the findings of guilty in this case.

6. The charge sheet shows that accused is 29 years five months of age. With no prior service, he enlisted at Fort MacArthur, California, 17 April 1941 for a service period governed by the Service Extension Act of 1941.

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

8. Confinement in the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, is authorized (Cir.72, ETOUSA, 9 Sep 1943, sec.II, par.8c).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2460

-3 JUN 1944

U N I T E D S T A T E S)	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private HOMER D. WILLIAMS (39308944), Company "D", 707th Military Police Battalion.)	Trial by G.C.M., convened at Taunton, Somersetshire, England, 3 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 12 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 69th Article of War.
Specification: In that Private Homer D. Williams, Company "D", 707th Military Police Battalion, having been duly placed in confinement in the Garrioch Camp Detention Barracks, Glasgow, Lanarkshire, Scotland, on or about 13 February, 1944, did, at Glasgow, Lanarkshire, Scotland, on or about 4 March 1944, escape from said confinement before he was set at liberty by proper authority.

CHARGE II: Violation of the 58th Article of War.
Specification: In that * * *, did, at Glasgow, Lanarkshire, Scotland on or about 4 March 1944, desert the service of the United States and did remain in desertion until he was apprehended at Glasgow, Lanarkshire, Scotland, on or about 14 March 1944.

2460

CHARGE III: Violation of the 61st Article of War.
Specification: In that * * *, did, without proper leave, absent himself from his station at Marchand Camp, Devizes, Wiltshire, England from about 30 September 1943, to about 14 February 1944.

He pleaded not guilty to all charges and specifications and was found guilty of Charge I and its Specification, of the Specification, Charge II, guilty except the words "desert the service of the United States" and "remain in desertion", substituting therefor respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words, guilty, of Charge II, not guilty of the 58th Article of War, but guilty of the 61st Article of War, of the specification, Charge III, guilty, except the words "30 September" substituting therefor the words "1 October", of the excepted words, not guilty and of the substituted words, guilty, of Charge III, guilty. Evidence of two previous convictions by summary court was introduced: one for absences without leave for 6½ hours, and 1 day and 4½ hours, and one for absence without leave for two days, in violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 12 years. The reviewing authority approved the sentence, designated Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The findings of the court with respect to Charge III (R20) indicate a clerical misprision. The findings on the charge are transposed to the specification and vice versa. However, the intention of the court is clearly manifest. Such irregularity in the record is harmless (AW 37).

4. (a) Escape and desertion (Charges I and II). The evidence shows that on 4 March 1944 accused was confined in a cell at Garriocn Camp. Detention Barracks, Glasgow, Scotland. He escaped through a latrine window before he was set at liberty by proper authority. Both the escape and absence without leave as found by the court were fully established (CM ETO 2098, Taylor).

(b) Absence without leave (Charge III). Accused's absence for 4½ months terminated by apprehension (R8) is fully sustained by the evidence (CM ETO 364, Howe; CM ETO 1991, Pierson; CM ETO 2098, Taylor). The evidence would have sustained a charge of desertion (CM ETO 1737, Mosser and authorities therein cited).

5. The charge sheet shows that accused is 34 years old. He was inducted on 12 May 1942 at Portland, Oregon, to serve for the duration of the war plus six months. He had no prior service.

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

7. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42, Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

(14)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 3 JUN 1944 TO: Commanding General, Southern Base Section, SOS, ETOUSA, APO 519, U.S.Army.

1. In the case of Private HOMER D. WILLIAMS (39308944), Company "D", 707th Military Police Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty by exceptions and substitutions and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2460. For convenience of reference please place that number in brackets at the end of the order: (ETO 2460).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

31 MAY 1944

ETO 2465

U N I T E D S T A T E S	4TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Newton Abbot, Devonshire, England, 12 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JAMES E. KILLINGSWORTH (14008214), Battery B, 65th Armored Field Artillery Battalion.	

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

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

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

CHARGE: Violation of the 61st Article of War.
Specification: In that Private James E. Killingsworth, Battery B, 65th Armored Field Artillery Battalion did, at Casablanca, North Africa, on or about February 26, 1943, absent himself without leave from the service of the United States and did remain absent without leave until he was apprehended at Casablanca, North Africa, on or about May 8, 1943.

ADDITIONAL
CHARGE I: Violation of the 61st Article of War.
(Disapproved by Reviewing Authority).
Specification: (Disapproved by Reviewing Authority).

ADDITIONAL
CHARGE II: Violation of the 96th Article of War.
(Finding of Not Guilty).
Specification: (Finding of Not Guilty).

(16)

He pleaded not guilty to all charges and specifications. He was found guilty of the Charge and its Specification and guilty of the Specification of Additional Charge I, except the words "until he was apprehended by the military police at Mateur, Tunisia, at about 1930 hours on or about 17 November 1943" substituting therefor the words "for an indeterminate period, returning to military control on or about 17 November 1943", of the excepted words not guilty, of the substituted words guilty and guilty of Additional Charge I and not guilty of Additional Charge II and its Specification. Evidence was introduced of five previous convictions for absence without leave, breach of restriction, drunk and disorderly in a public place, drunk in uniform, entering an off-limits area and being on streets of town at 0200 hours contrary to regulations, in violation of Articles of War 61 and 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority disapproved the findings of guilty of Additional Charge I and its Specification, approved only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement, but directed that pending further orders the accused will be held at the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The proof of previous convictions included evidence of convictions of offenses committed after October 14, 1943, the date of the offense alleged in the Specification of Additional Charge I. These post convictions were: SCM 1322, for being drunk in uniform and entering an off-limits area on 22 Dec 1943, and SCM 1342 for absence without leave, breaking restriction and for being on streets of town at 2:00 a.m. on 3 Jan 1944. It was error to admit such evidence, but inasmuch as there was no objection to same the irregularity was waived. (MCM, 1928, par.79c, p.66).

4. The charge sheet shows that the accused is 35 years eight months of age, that he enlisted at Fort Jackson, South Carolina, 18 November 1940 for the duration plus six months. No prior service is shown.

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

6. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement, is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 31 MAY 1944 TO: Commanding General, 4th Infantry Division, APO 4, U.S. Army.

1. In the case of Private JAMES E. KILLINGSWORTH (14008214), Battery B, 65th Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2465. For convenience of reference please place that number in brackets at the end of the order: (ETO 2465).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW NO. 1

16 SEP 1944

CM ETO 2469

U N I T E D S T A T E S v. Private (formerly Technical Sergeant) CARL F. TIBI (33267007), 578th Bombardment Squadron (H), 392nd Bombardment Group (H).	2D BOMBARDMENT DIVISION. Trial by GCM, convened at AAF Station 115, 12 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by BOARD OF REVIEW NO. 1
RITER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE I: Violation of the 64th Article of War.
Specification: In that Private Carl F. Tibi, then Technical Sergeant, 578th Bombardment Squadron (H), 392nd Bombardment Group (H), having received a lawful order from 1st Lt. George H. Taylor, Squadron Operations Officer, his superior officer, to fly on a combat mission over enemy territory as an Engineer, did, at AAF Station 118, APO 634, on or about 26 February 1944, wilfully disobey the same.

CHARGE II: Violation of the 75th Article of War.
(Nolle Prosequi).
Specification: (Nolle Prosequi).

He pleaded not guilty to the charges and specifications. Pursuant to the direction of the appointing authority and the holding of the Board of Review in CM ETO 1226, Muir, the prosecution withdrew Charge II and its Specification. Accused was found guilty of Charge I and its Specification,

all members of the court present at the time the vote was taken concurring. No evidence of previous convictions was introduced. He was sentenced to be shot to death with musketry, all members of the court present at the time the vote was taken concurring. The reviewing authority, the Commanding General, 2d Bombardment Division, approved the sentence and forwarded the record of trial for action under Article of War 48. Thereafter, the reviewing authority recommended that, in his opinion, the ends of justice would best be served by a commutation of the sentence to dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but, owing to special circumstances in the case and in view of the recommendation for clemency by the convening authority, commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 25 years, designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½. The action of the confirming authority in commuting the sentence was taken under the provisions of Article of War 50.

3. Evidence for the prosecution was as follows:

First Lieutenant George H. Taylor testified that during February 1944 he was assistant operations officer of the 578th Bombardment Squadron, 392nd Bombardment Group, and that his primary duties as such were to carry out the orders of the squadron commander concerning the flying of the combat crews, to direct them as to combat missions, to assign them to fly, to issue passes to them and to perform similar duties.

On 26 February the squadron was alerted by the group operations officer and ordered to furnish a certain number of ships to fly on a combat mission. Lieutenant Sooy's crew, of which accused was a regular assigned member, was one of those alerted. After attending the briefing that morning, Lieutenant Sooy informed Lieutenant Taylor that Tibi had refused to fly and that he (Taylor) would be obliged to obtain a replacement (R8). Lieutenant Taylor then interviewed accused and informed him that he was assistant operations officer (R10), that it was accused's duty to fly and that he was needed. Accused shook his head and said, "No, I can't do it." Witness explained to him the consequences of his refusal to fly, but accused declared he would not fly. The assistant operations officer reviewed the whole procedure of alerting the flying personnel and explained to accused the reasons he should fly and what would happen if he did not fly (R8). Tibi reaffirmed his refusal to fly. Witness then stated to him that as assistant operations officer, "and in the absence of Colonel Polking or Captain Edwards," it was his duty to order accused to fly (R9,10), and then gave him a direct order to fly. Accused "refused the direct order." Lieutenant Taylor, desiring only that accused should fly, endeavored to persuade him to go on the mission, and again advised him of the seriousness of the matter and that such misbehavior might lead to unfortunate consequences. They discussed the matter further, but accused persisted in his refusal. Thereupon witness gave him another direct order, saying: "'You are ordered to fly as engineer.'" When he again refused witness arrested him and caused him to be confined in the guardhouse.

Lieutenant Taylor testified that he did not recall whether he asked accused if he were sick and that it was not his responsibility to determine whether the men were sick. Many times they were nauseated and sick in the morning before flying, "but they still go ahead and fly anyway." Tibi did not appear to be sick; "he appeared to be all right."

There were two reasons why witness did not comply with Lieutenant Sooy's request to secure another man instead of trying to convince accused that he should go: one was that accused "was already down there and ready to fly," and the other was that witness wished to persuade him to fly because of the seriousness of the offense. "I knew that it was a serious offense for him not to fly and I wanted to give him a chance to change his mind and reconsider his actions." Witness replaced him with another man. Lieutenant Sooy was "missing in action" at the time of trial (R9,10).

The prosecution objected to the question by the defense upon cross-examination: "Was there a mission flown that morning?", on the ground that it was incompetent, immaterial and irrelevant whether or not there was a mission that morning. The defense contended that "if the order was given to fly a mission and no mission was flown, there would have been no order." The law member sustained the objection and the question was not answered (R10).

Major Robert N. Holland testified that he was flight surgeon in the 392nd Bombardment Group and station surgeon at Station 118, and had known accused about three or four months. He examined accused on 28 February 1944, knew of no reason physically or mentally why accused could not fly on a mission on 26 February, and felt that accused was in a fit physical condition at that time to fly a mission (R10,11).

4. No evidence was introduced for the defense. After his rights were explained to him, accused made an unsworn statement, in part as follows:

> "'The morning I was to fly I did refuse to fly. There is no question about that. I have no definite memory of a direct order to me. * * * I felt pretty sick that morning and I was sick. I didn't think I would be able to last out the mission. We had been on a mission the day before and it was a hard mission. I got up that morning and when I left the breakfast room I vomited a couple of times. When I was ordered over to the guardhouse I felt pretty bad and I went over and laid down for a few hours and then I felt a little better, but was still a little sick. * * * I still want to fly and * * * go back with my crew. I was busted from Tech Sergeant to Private over that incident. * * * but * * * I never refused to fly * * * that morning I was sick * * * and the reason I didn't report to sick call * * * I at that time didn't realize how serious the charge was'" (R11-12).

5. The elements of proof of the offense of willful disobedience of the lawful command of a superior officer in violation of Article of War 64 are:

> "(a) That the accused received a certain command from a certain officer as alleged;
> (b) That such officer was the accused's superior officer; and
> (c) That the accused willfully disobeyed such command." (MCM, 1928, par.134b, p.149; CM ETO 1057, Redmond).

There is competent substantial evidence that accused received a direct verbal order "to fly as engineer" on a scheduled combat mission from one he knew was his superior officer. That the mission which was the subject of the order was to be executed by flying "over enemy territory" was a proper subject of judicial notice (MCM, 1928, par.125, p.135; CM ETO 2212, Coldiron). The first two elements of proof were thus established.

As to the third element, the evidence shows that accused, when ordered to fly on the mission, unequivocally refused to do so. The willful character of his refusal is clearly evidenced by his knowledge that his crew was alerted and had been briefed, his statement to Lieutenant Taylor, "No, I can't do it", the unqualified and persistent reiteration of his resistance to superior authority and his own unsworn statement, "I did refuse to fly. There is no question about that," but that the reason for his refusal was that he was sick (CM ETO 2212, Coldiron). There was competent substantial evidence that accused was not physically incapable of flying at the time in question in that he failed to complain of sickness when ordered to fly, that "he appeared to be all right" to Lieutenant Taylor and that he did not report to sick call on 26 February. The court was justified in according more weight to this evidence than to accused's unsworn statement, which afforded at best a mere inference of actual physical incapacity at the time of the refusal. The defense was at liberty to introduce such evidence as was available upon this point but failed to do so.

The question arises whether there is in the record substantial evidence of accused's disobedience of Lieutenant Taylor's order as alleged. Practical considerations of the exigencies of the situation lead to the conclusion that the order "to fly as engineer" on a combat mission over enemy territory, embodied as an implied integral part thereof a direction to accused to take all such steps as were customarily necessary fully to prepare himself for his part in the mission. The order was given at a time accused's crew was alerted and, as it was undoubtedly understood by both Lieutenant Taylor and accused, required accused to manifest his intention of accompanying the mission, to secure appropriate equipment therefor, to place himself in complete readiness for the execution thereof, to attend promptly all formations and "briefings," and generally to perform all such incidental duties as were customarily required by the situation. Accused "was already down there and ready to fly." The order was not simply an

order "to fly", which would imply merely a direction that accused should physically place himself in the airplane, but it encompassed the performance of all preparatory acts necessary to enable him not only to fly but also to fly as engineer of the combat crew. To construe the order otherwise would be to give to accused the period up to the actual moment of departure of his crew upon its mission within which to make his final decision whether or not to fly. Such construction would seriously hamper those responsible for the selection and preparation of crews in the discharge of their duties. They would be unable to determine reasonably in advance of a mission the final composition of crews, and at the same time effectively control crew members who, although unwilling or recalcitrant, were vitally needed for the mission. It would altogether ignore the factual situation. When the order is construed as embodying the requirement to take all customarily necessary steps preparatory to engaging in the actual flight, it is evident that accused's repeated unequivocal refusal necessarily involved his disobedience of the order. He not only failed to take the preparatory steps required, but by his refusal, the seriousness and effect of which Lieutenant Taylor explained to him, deliberately made himself liable to arrest and confinement pending court-martial charges. Thus through his own wrong, he rendered impossible any compliance with the order. Impossibility of compliance induced by his own misconduct should not afford him a defense. So construed, the order was clearly disobeyed by accused whether the mission which he was ordered to accompany was ever actually flown or not. Defense counsel's question intended to elicit evidence as to whether the flight was actually flown was thus immaterial. The ruling of the law member sustaining the prosecution's objection thereto was proper. Accused's guilt of a violation of the 64th Article of War was complete when he refused to obey his superior officer's direct order. His guilt did not depend upon the occurrence of subsequent events (CM ETO 3046, C. H. Brown). The non-execution of the mission did not cancel or mitigate his guilt.

The foregoing conclusion is not at variance with the principle that where an order is operative in futuro, "a mere refusal to obey such an order before the time set for its execution" "is an offense chargeable not in general under this (the 64th) Article, but under the general article (AW 96)" (MCM, 1921, par.415, p.355; MCM, 1928, par.134b, p.148; 250.4, 17 July 1918, Op.JAG, 1918, Vol.2, p.566, at p.588). Here the order, reasonably construed as above indicated, required accused immediately to take all steps preparatory to accompanying his crew upon the scheduled mission. This he willfully refused to do and thereby jeopardized his ability to comply with the order in any degree. The evidence establishes all the elements of the violation of the 64th Article of War charged (Cf: CM ETO 3080, Holliday).

6. The record fails to record or account for the absence from the court of Major Elisha B. Daughtrey. Such failure, while improper (MCM, 1928, App.6, p.261), could not have injuriously affected accused's substantial rights (Dig.Op.JAG, 1912-1940, sec.395(46), pp.230-231).

(24)

7. The charge sheet shows that accused is 28 years seven months of age and was inducted 18 May 1942 at Pittsburg, Pennsylvania, to serve for the duration of the war plus six months. He had no prior service.

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

9. The penalty for willful disobedience of the lawful command of a superior officer in time of war is death or such other punishment as the court-martial may direct (AW 64). Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep 1942, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 SEP 1944 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private (formerly Technical Sergeant) CARL F. TIBI (33267007), 578th Bombardment Squadron (H), 392nd Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 2469. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 2469).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence as commuted ordered executed. GCMO 71, ETO, 23 Sep 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2470

8 JUN 1944

U N I T E D S T A T E S	)	3D BOMBARDMENT DIVISION
	)	
v.	)	Trial by G.C.M., convened at AAF
	)	Station 153, APO 559, U.S.Army,
Second Lieutenant PERCIVAL	)	27 April 1944. Sentence: Dismissal,
T. TUCKER (O-747922), 569th	)	total forfeitures and confinement
Bombardment Squadron (H),	)	at hard labor for one year. Eastern
390th Bombardment Group (H).	)	Branch, United States Disciplinary
	)	Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification 1: In that Second Lieutenant Percival T. Tucker, 569th Bombardment Squadron (H), 390th Bombardment Group (H), did, without proper leave absent himself from his station at the 231st Station Hospital, APO 551, U. S. Army, from about 14 February 1944 to about 16 February 1944.
Specification 2: In that * * *, did, without proper leave absent himself from his station at AAF Station 102, APO 639, U. S. Army, from about 26 February 1944 to about 4 March 1944.
Specification 3: In that * * *, did, without proper leave absent himself from his station at AAF Station 153, APO 559, U. S. Army, from about 9 March 1944 to about 24 March 1944.

CHARGE II: Violation of the 95th Article of War.
(Disapproved by confirming authority)
Specification 1: (Disapproved by confirming authority)
Specification 2: (Finding of Not Guilty)
Specification 3: (Disapproved by confirming authority)

He pleaded not guilty to both charges and to the specifications under each, and was found guilty of Charge I and its specifications, guilty of Specifications 1 and 3, Charge II and Charge II and not guilty of Specification 2, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, 3d Bombardment Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Oper ations, disapproved the findings of guilty of Specifications 1 and 3, Charge II and Charge II, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution concerning the offenses under Charge I was substantially as follows:

(a) With reference to Specification 1, (absence without leave from the 231st Station Hospital from about 14 February to about 16 February), the evidence shows that accused was attached to the Detachment of Patients at the hospital on 4 February (R7; Pros.Ex.4), and was discharged on 16 February (R7-8,11; Pros. Ex.5). First Lieutenant Oliver M. Zeiher, Medical Administration Corps, commanding officer of the Detachment of Patients at the hospital, testified that patients leaving on pass signed the "Sign-in-and Sign-out book". Passes were issued from 1 p.m. - 5.30 p.m. for the purpose of visiting small villages in the vicinity, and 24 hour passes were issued to enable patients to visit bases for the conduct of necessary business (R8). If accused left on pass at 1600 hours, 12 February, he was due back at 1600 hours 13 February unless the duration of his pass was extended (R9). The "Sign-in-and-sign-out book" was admitted in evidence and showed that accused left the hospital at 1600 hours 12 February. No "Sign-in" entry appears thereafter. (R8; Pros.Ex.6). Second Lieutenant Patricia E. Loechner, Army Nurse Corps, a nurse on duty in Ward 59 where accused was a patient, identified her "report book" and an entry therein which she made concerning accused. The entry, under the heading of 15 February recites that he returned at 0630 hours. She testified that a nurse on duty from 7 p.m. - 7 a.m. (15 February) would use "that part of the book marked the 15th", that the entry concerning 0630 hours signified that accused actually returned at that hour on 16 February. She saw accused at that time and asked him what he was doing "back at the hospital that time in the morning". He replied that he had been waiting for transportation from his base. The report book was admitted in evidence (R11-14; Pros.Ex.7). Accused returned from the hospital to duty with his own squadron (stationed at Framlingham) (R21).

(b) With reference to Specification 2, (absence without leave from AAF Station 102 from about 26 February to about 4 March 1944), the prosecution requested the court to take judicial notice of par.21, SO No.53, Hq., 3d Bombardment Division, 22 Feb 1944 which provided that accused was to proceed from his own station, AAF Station 153, to the 482nd Bombardment Group (stationed at AAF Station 102 at Alconbury) where he was to be on detached service for an indefinite period. A copy of the order is attached to the record of trial (R15). Admitted in evidence was the morning report of accused's organization containing an entry to the effect that pursuant to the foregoing orders he departed from his station at 1530 hours on 25 February (R5,20;Pros.Ex.1). Captain John H. Sheetz, executive officer of the 813th Bombardment Squadron, 482nd Bombardment Group, identified a copy of par.7,SO No.47, Headquarters AAF Station 102, 4 March 1944 which was admitted in evidence, and which provided that accused, having reported to that station, was attached to the 813th Bombardment Squadron (P) for quarters, rations and training for the duration of his temporary duty. Captain Sheetz also identified a morning report of that organization which was admitted in evidence and which contained the entry that one officer from the 3d Bombardment Division was attached for rations, quarters and training on 4 March (R15-16; Pros.Exs.8-9). Witness testified that although this morning report did not refer to accused by name, it did show that he was from the 3d Bombardment Division and that par.7 SO 47 (Ex.9) showed that accused was the officer concerned (R17).

(c) With reference to Specification 3, (absence without leave from AAF Station 153 from about 9 March to about 24 March 1944), the prosecution requested the court to take judicial notice of par.3 SO No.70, Headquarters 3d Bombardment Division, 10 March 1944, which provided that accused was relieved from detached service with the 482nd Bombardment Group and ordered to proceed to his proper station. A copy of the order is attached to the record of trial (R15). Pros.Ex.8 (morning report of the 813th Bombardment Squadron, 482nd Bombardment Group, with which accused was on detached service) contains an entry to the effect that one officer attached from the 3rd Bombardment Division was, on 6 March, relieved from attachment for rations, quarters and training. Admitted in evidence, over the objection of the defense (R5-6,20-21), were the morning reports of accused's own organization, 569th Bombardment Squadron, for 14 and 25 March respectively, containing the following entries as to accused:

"Fr DS 482nd Bomb Gp (P) to AWOL
as of 0800 9 Mar 44" (Pros.Ex.2)

"fr AWOL to arr in qrs 1430, 24
Mar 44" (Pros.Ex.3).

First Lieutenant Charles B. Brame Jr., executive officer of accused's organization (R20) who signed the morning reports, testified that the entry

from duty to absence without leave (Pros.Ex.2) was the result of a letter from the commanding officer of the 482nd Bombardment Group stating that accused was returned to his own organization "by verbal orders of the Commanding Officer" (R22). Accused's squadron commander saw accused in the squadron area on 24 March (R5-6). Corporal Walter D. English, 482nd Bombardment Group, on the afternoon of 9 March started to drive accused from AAF Station 102 (Alconbury) to his own station in Framlingham. Accused did not complete the trip as he left the vehicle in Cambridge and instructed English "to bring his baggage on over". English then went as far as Stowmarket and left the baggage at a supply base (R19).

The prosecution was authorized by the court to substitute certified copies of all "official records" introduced in evidence (R26-27).

4. For the defense, First Lieutenant Walter S. Jenkins, Air Corps, 390th Bombardment Group, 568th Bombardment Squadron, testified that he was a patient in Ward 96 at the 231st Station Hospital from 4-16 February, and had known accused for about five months. He could not testify that accused was at the hospital on 14 February but he did see him there on the morning of 15 February when he came to witness' ward and said that he (accused) "was going back to the base". Lieutenant Jenkins recalled the conversation because he (Jenkins) left the hospital the following day (Specification 1, Charge I). Witness further testified that accused's character was considered "very good" among his associates and friends (R25-26).

Accused, after being advised of his rights, elected to make an unsworn statement with reference to Specifications 1 and 2 only, and to remain silent as to Specification 3. He stated that he was not absent from the hospital "at that time" (Specification 1), but that he was "on that station, as the witness following (Lieutenant Jenkins) will show". With respect to Specification 2, he left his own station in the afternoon of 26 February, arrived in London that night and went directly to the "RTO" office to inquire about connections to Huntingdon, which was five miles from Alconbury. He found that he had to go to another railroad station, and that it was "too late to make it that night". The following morning (27 February) he boarded a train which he thought was going to Huntingdon, and first realized he was not going in the right direction when he arrived at Stratford, about 150 miles from London. He spent the night in Stratford as there was no return train which would enable him to make connections that night in London for Huntingdon. On 28 February he returned to London and arrived four minutes too late for the train to Huntingdon. After spending the night in London he went to Huntingdon on 29 February, and arrived that night. He went by truck to the 482nd Bomber Group station at Alconbury and arrived about 12.30 a.m. 1 March. Accused slept until 11 a.m. because he had been up until 2 a.m., he was in a room by himself, and no one "called him or said anything". On the evening of 1 March he went to the adjutant of the organization for instructions, was told to secure his billet from the charge of quarters, and that he would receive instructions later. At 9 a.m. 2 March he was told by Lieutenant Bush to report to Lieutenant Colonel Hand. He tried to that afternoon, found that

Colonel Hand was flying and was told that he (accused) would be called when he returned. He received no message, and about 1.30 p.m. the following day (3 March) he learned that Lieutenant Bush had called him because he wanted accused "to fly back to this station to get some luggage". They did not leave that night because "it was too late to get back in time". He attended ground school and flew with Bush on 4 March (R23-24).

5. The evidence is legally sufficient to support the findings of guilty of Specification 1, Charge I. The entry in the hospital "Sign-in-and-Sign-out book" was properly admitted in evidence (MCM, 1928, par.117a, p.121), and the testimony of Lieutenant Loechner concerning her conversation with accused upon his return on the early morning of 16 February, and her personal entry in the "report book" was also admissible in evidence. There was no proof that the duration of accused's pass was extended nor was there any evidence that he "signed in" during the period of absence alleged. The court apparently placed no credence in the testimony of Lieutenant Jenkins that he saw accused at the hospital on the morning of 15 February, and in any event such testimony pertained to but a portion of the period of absence involved.

The evidence is also legally sufficient to support the findings of guilty of Specification 2, Charge I. The evidence shows that accused left his own station on the afternoon of 25 February for detached service at AAF Station 102 with the 482nd Bombardment Group. On 4 March he was attached to the 813th Bombardment Squadron of that organization for rations, quarters and training. The only other evidence as to the date of his arrival at AAF Station 102 was accused's own unsworn statement that he arrived about 12.30 a.m. 1 March. It is evident that the court disbelieved his unsworn statement concerning his movements from 25 February-1 March and the events at AAF Station 102 between 1-4 March, and relied on the morning report of the 813th Bombardment Squadron and the entry therein pertaining to accused as of 4 March. In view of the evidence the Board of Review will not disturb the findings of the court.

With reference to Specification 3, Charge I, the undisputed evidence shows that on 9 March accused left AAF Station 102 by vehicle to return to his own organization. He left the car in Cambridge and told the driver to take his baggage to his (accused's) station. Accused did not report to his own station until 24 March. He remained silent with respect to the circumstances surrounding his absence of 15 days and no evidence with respect thereto was offered by the defense. The evidence is legally sufficient to support the findings of guilty of the offense alleged.

6. At the close of the case for the prosecution, the defense moved for a finding of not guilty of Specifications 1 and 2 on two grounds: (1) that the evidence was insufficient to prove the offense alleged in Specification 1, and that "the confusion that exists in the records at Alconbury are not sufficient for finding him guilty of absence from that base" (Specification 2); (2) that accused was returned unconditionally to duty after the alleged periods of absence without leave and that the offenses were therefore condoned.

The court denied the motion which was not renewed at the conclusion of the evidence (R22-23). Under the rule of CM ETO 564, Neville and CM ETO 1414, Elia, error, if any, in denying the motion was thereby waived.

7. The charge sheet shows that accused was 22 years of age, that he served as an enlisted man from 12 September 1939 to 22 June 1943, and that he was commissioned a second lieutenant, Army of the United States on 22 June 1943. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of dismissal, total forfeitures and confinement at hard labor for one year is authorized upon conviction of an officer of a violation of Article of War 61. The designation by the confirming authority of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 8 JUN 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Second Lieutenant PERCIVAL T. TUCKER (O-747922), 569th Bombardment Squadron (H), 390th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2470. For convenience of reference please place that number in brackets at the end of the order: (ETO 2470).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 40, ETO, 13 Jun 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2471

10 JUN 1944

U N I T E D S T A T E S)	1ST INFANTRY DIVISION.
)	
v.)	Trial by G.C.M., convened at Dorchester, Dorsetshire, England 21 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
)	
Private FRANCIS J. McDERMOTT (7071471), Company "E", 18th Infantry.)	

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

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

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

CHARGE I: Violation of the 75th Article of War.
Specification: In that Francis J. McDermott, Private, Company "E" 18th Infantry, did, at Gela, Sicily, on or about July 11, 1943 misbehave himself before the enemy by failing to advance with his command which had then been ordered forward by Lt. Col. Ben Sternberg, 18th Infantry, to engage with enemy forces, which forces the said command was then opposing, and did not return to military control until December 22, 1943.

CHARGE II: Violation of the 61st Article of War.
SPECIFICATION: In that * * *, did, without proper leave, absent himself from his place of confinement at 2nd Battalion Stockade, Broadmayne, Dorset, England, from about April 4, 1944, to about April 9, 1944.

(36)

CHARGE III: Violation of the 69th Article of War.
SPECIFICATION: In that * * *, having been duly placed in confinement in 2nd Battalion Stockade, Broadmayne, Dorset, England, on or about 22 March 1944, did, at 2nd Battalion Stockade, Broadmayne, Dorset, England, on or about 4 April 1944, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be shot to death with musketry, all members of the court concurring. The reviewing authority, the Commanding General, 1st Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but because of unusual circumstances in the case commuted it to dishonorable discharged from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the natural life of the accused, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½. The action of the confirming authority in commuting the sentence was taken under the provisions of Article of War 50.

3. Evidence for the prosecution summarizes as follows:

Charge I and Specification: Accused's company, Company "E", 18th Infantry, landed near Gela, Sicily, immediately before 10 July 1943. On the morning of 11 July the regiment was subjected to an armored attack. The battalion received orders from its commander, Lieutenant Colonel (Ben) Sternberg (18th Infantry), to attack the enemy on the night of 11-12 July (R7). The orders were relayed to subordinate units of the command that night. Accused was present when his platoon leader informed his men of the impending attack (R7-8,10). Accused's absence was first observed at about 10 (p.m.) on 11 July after a ten-minute break during a hike from Gela to Porte Olivio airport, the object of the attack (R9,10). Accused did not have permission to be absent. The attack was made about 5 a.m., 12 July (R8,9). A soldier in accused's platoon saw him in Gela on 12 July. Accused told the soldier "he had been with the Engineers and had come back to Gela with some prisoners." The soldier told accused that the company at this time was four or five miles from Gela, near the Gela airport (R8, 12). It was stipulated that accused returned to military control by surrendering himself to the military police in Naples, Italy on 22 December 1943 (R20).

Charges II and III and Specifications: On 22 March 1944, accused was confined in the 2nd Battalion Stockade at Westlake near Broadmayne, Dorsetshire, England pursuant to a confinement order signed by the executive officer of his company (R14,18;Pros.Ex.B). He was present in his cell

block at midnight 3-4 April. He was not set at liberty but was absent, without permission, at 6 a.m. on 4 April. An insecure bar was missing from the window of the guardhouse (R14,15,16). Early on the morning of 9 April he was apprehended at a boarding house in Weymouth (R20).

4. No evidence was introduced for the defense. After his rights were explained to him accused elected to remain silent (R21).

5. (a) - With respect to Charge I and its Specification, 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 the 75th Article of War (CM ETO 1404, Stack; CM ETO 1659, Lee; CM ETO 1663, Ison; CM ETO 1685, Dixon; and authorities there cited). The evidence that accused failed to surrender himself to military control until more than five months after his departure "makes the evidence of accused's guilt of the offense charged the more complete and compelling" (CM ETO 1693, Allen; CM ETO 2205, LaFountain).

(b) - Although the record contains some inadmissible hearsay and opinion evidence, the competent evidence is legally sufficient to support the findings of guilty of Charge II and its Specification (absence without leave) (CM ETO 1360, Poe; CM ETO 1543, Woody) and Charge III and its Specification (escape from confinement) (MCM, 1928, par.139b, p.154; CM ETO 1645, Gregory).

6. (a) - The Specification of Charge I alleges that accused's command "had then been ordered forward by Lt. Col. Ben Sternberg, 18th Infantry, to engage with enemy forces". The evidence shows that that officer was in command of the battalion of which accused's company was a component part and on the afternoon of 11 July, "took the Company Commanders to the 26th Infantry CP. The Battalion was attached to the 26th for an attack, which was to be made during the night of July 11 and early morning of the 12th". The orders received from the Battalion Commander were relayed to subordinate officers in the evening before accused's absence (R7). The platoon leader of accused's platoon informed his men, including accused, of the impending attack upon the enemy (R10).

Lieutenant Colonel Sternberg was detailed as senior member and sat as president of the court (R3), but was not challenged by either side either for cause or peremptorily. When the members were requested to state any facts believed to be a ground for challenge by either side against any member, he remained silent (R4). There is no indication that he was not competent or not eligible 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. His only connection with the case, so far as the record discloses,

was the fact that as Battalion Commander of accused's battalion he relayed orders received from his superior to his subordinate officers, which orders directed the forward movement towards the enemy during which accused departed from his organization without authority. There is no indication that he had any actual contact with accused prior to accused's absence or that he had any knowledge whatever of accused's dereliction prior to the convening of the court at the trial. The record does not disclose the existence of any grounds for challenge for cause specified in the Manual for Courts-Martial, 1928 (par.58g, p.45). The Board of Review is therefore of the opinion that his presence on the court and his functioning as president thereof did not prejudice accused's substantial rights, regardless of the impropriety of Lieutenant Colonel Sternberg's conduct.

(b) - Captain Russell G. Spinney, 18th Infantry in his capacity as Summary Court, administered the oath to accused upon an affidavit verified 23 March 1944, submitted in the course of the official investigation of the charges and stating that accused voluntarily surrendered himself to the Military Police on 22 December 1943 in Naples, Italy. Captain Spinney was detailed and sat as a member of the court (R3). As in the case of Lieutenant Colonel Sternberg, he was not challenged by either side, and did not disclose any grounds for challenge and the record does not disclose the existence of any grounds for challenge for cause. The impression gained by him from the affidavit, assuming that he read it, that accused was absent without leave prior to 22 December 1943, was not sufficient to disqualify Captain Spinney as a member of the court, as there was no such necessary relationship between such absence and accused's misbehavior before the enemy as would render Captain Spinney's presence on the court dangerous to accused's substantial rights. It is noted that the alleged absence without leave for which accused was tried occurred 4-9 April 1944 and was consequently unrelated to that involved in the affidavit.

7. The charge sheet shows that accused is 25 years of age and enlisted at 39 Whitehall Street, New York City, New York, 14 June 1940 to serve three years. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty and the sentence. The punishment for misbehavior before the enemy is death or such other punishment as the court may direct (AW 75). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.3).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 JUN 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Private FRANCIS J. McDERMOTT (7071471), Company "E", 18th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The president of the court, Lieutenant Colonel Ben Sternberg, was battalion commander of accused's battalion and was named in the Specification of Charge I as the officer who had ordered accused's command forward when he failed to advance therewith. Although, as indicated in the Board's holding, it may not be said that accused's substantial rights were injuriously affected, the status of the president, under the circumstances, at least raises a question as to the impartiality of the trial. The impropriety of Lieutenant Colonel Sternberg's remaining on the court under the circumstances noted by the Board of Review in its holding, is obvious.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2471. For convenience of reference please place that number in brackets at the end of the order:

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence as commuted ordered executed. GCMO 42, ETO, 16 Jun 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

(41)

BOARD OF REVIEW

24 JUN 1944

ETO 2472

U N I T E D S T A T E S)	3D BOMBARDMENT DIVISION.
)	
v.)	
)	Trial by G.C.M., convened at AAF
Second Lieutenant ARTHUR C.)	Station 155, APO 559, 29-31 March
BLEVINS, JR., (O-813838),)	1944. Sentence: Dismissal, total
550th Bombardment Squadron)	forfeitures and confinement at
(H), 385th Bombardment)	hard labor for ten years. Federal
Group (H).)	Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that 2nd Lt. Arthur C. Blevins, Jr., 550th Bombardment Squadron (H), 385th Bombardment Group (H), did, at AAF Station 155, APO 634, on or about 5 March 1944, forcibly and feloniously, against her will, have carnal knowledge of 2nd Lt. Irene O'Malley, ANC, 65th General Hospital, APO 551, U.S.Army.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life, three-fourths of the members of the court concurring. The reviewing authority, the Commanding General, 3d Bombardment Division, approved the sentence,

recommended that the sentence of confinement be commuted to confinement at hard labor for seven years, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, reduced the period of confinement to ten years owing to special circumstances and the unanimous recommendation of the court and the recommendation of the reviewing authority for clemency, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

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

Second Lieutenant Irene P. O'Malley, Army Nurse Corps, stationed at the 65th General Hospital (England), testified that on 5 March 1944 she and five other nurses went by ambulance to attend a dance at the officers' club at Great Ashfield (R15). Lieutenant O'Malley is 26 years of age (R23), five feet two inches in height and weighs 105 pounds (R17). She arrived about 5:30 p.m. and between that time and 8:15 p.m. had two drinks of rum and coca-cola at the club bar, ate dinner and danced with an officer who was a "little inebriated". About 8:15 p.m. accused, whom she then met for the first time, asked her to dance after which they returned to the bar where she had her third drink. After dancing with another officer she again returned to the bar and engaged in conversation with accused, who remarked that English girls were easier "to get" than American girls. She replied "I get what you mean" (R15-16,27-31). She believed that she consumed two more drinks of "rum and coke" after dinner and before 10:00 p.m. About 10:00 p.m. wearing his overcoat over her shoulders, she went outside with accused upon his suggestion that they get "some air" (R17,31,33). Accused had his arm around her and after walking around for a short while, they stopped by a building where he kissed her and placed his hands on her hips as she leaned against the wall. She did not object to his kisses but when he placed his hands on her hips she bit him on the lip and said "that is what he would get for trying to get fresh". He made no comment and they returned to the club at her suggestion. They had been outside for about five to ten minutes (R17,32-33).

After they talked for about 15 minutes in the bar accused suggested they go out again. He took his coat and they left the building about 10:30 p.m. (R18,35-36). Each carried a drink which accused had secured and as they walked along he had his arm around her (R18,35-37). After passing some buildings he said "Let us walk over here". She replied "'I do not want to go over there'" but finally consented when he said "Oh, come on". They walked across some uneven ground and crossed a field, sipping their drinks. As they crossed the field he kissed her once, and then sat down under a tree about four or five hundred yards away from the buildings. She remained standing about a yard away with her back to him, wearing his overcoat over her shoulders (R18-19,38-41). She gave accused her drink as she did not want it and he finished it for her. He then asked her to sit down, and when she asked "What for", he replied "I want to kiss you". When she asked "Are you sure that is all?" he said "No". She testified she did not

think by his reply that he wanted to have relations with her but thought "he might want to touch me or something like that". She answered "Oh no," and as she turned and came toward him he seized her hand and pulled her down to a sitting position beside him (R19,41-42,60). He leaned over, put his left arm around the front of her waist, and his right hand around her shoulders. When he started to kiss her they both "half turned" and eased to the ground so that she was lying full length on her back by his right side. Her left arm was under his left arm which was across her waist, and her other arm was under his shoulder. The upper part of his body was on top of hers, the right lower part of his body was on the ground and the left lower part was resting on her leg. He used no force against her will when they went down in this position and she made no effort to get up. For about five minutes they remained in this position during which he kissed her with no objection on her part (R19,43-44). While he was kissing her he removed his arm from around her waist and tried to push up her skirt. She bit him on the lip and told him not to try it again. He "seemed to get rather angry" but stopped. She did not attempt to get up and accused kissed her again three or four times with her consent (R19,45-46). He then pushed up her skirt a second time, put his hand up between her legs and "tried to get up my step-ins". She believed that "his privates" were exposed because she thought she "felt it" against her leg. She said "Don't do that," pushed him away, rolled to her right and started to get up. She had one foot on the ground and was on one knee when accused arose and stood over her. When she said "Please leave me alone" he seized her shoulders and started to push her back to the ground (R19-20,46-48,50-51). She seized one of his hands to steady herself and said "Leave me alone". He did not reply but tried to push her down. She then screamed "Help" as loudly as she could, whereupon he struck her hard on the left ear with his fist. She "felt kind of stunned". She then screamed three times and was struck by accused on the left side of her head after each scream (R20-21,48-49). He then "stifled" her by putting his thumb over her nose and the palm of his hand over her mouth and under her chin. During this time accused was standing over her and she was half kneeling. She pulled his hand away and started to say the "Act of Contrition," a Catholic prayer. While she was praying he seized her around the waist from behind and she tried to pull his hands away. He then "stifled" her again and she fell back on the ground. She remembered nothing further until she found accused between her legs and "his organ was just entering my vagina". It entered "about half an inch or so" and she tried to tighten up her muscles "so that he could not get in". She felt completely limp, and could not raise her hands or cross her feet. After ten or fifteen seconds she could not "hold out any longer; I just lapsed into unconsciousness" (R21-22,49-51).

Lieutenant O'Malley next remembered crying and knocking on the door of a farm house, but did not recall how she got there. A woman appeared at an upper window and the witness asked her to "send sombody" to take her home. A civilian later appeared and took her to the camp orderly room, where she cried, put her head on a soldier's shoulder and said "An American boy did this to me". She was taken to the dispensary and then driven in an ambulance to her own station where she remained in bed for six days. She

further testified that she was a virgin, had never indulged in sexual relations prior to the incident, and did not consent to intercourse with accused on the evening in question (R22-24,51). She identified the blouse, skirt, tie, shirt, garter belt and "step-ins" which she wore that night (R24-27; Pros.Exs.4-9), and also identified accused (R27).

Lieutenant O'Malley further testified that on 6 March she made a statement to a Lieutenant Sullivan, and a later statement to the investigating officer, Major Anderson, which statements were almost identical. When interrogated by Sullivan she was excited and upset and had a pain in her head. When she made the statement to Sullivan she believed it to be true. If there was any variance between the statement and her testimony at the trial it was because she had since recalled certain facts, or because questions addressed to her at the trial developed those facts (R53-54,58-59). The pertinent portion of the statement is as follows:

> "When we got about half way across the field we stopped and he started to kiss me. I made no objection to his kissing me. Then Lieut. Blevins put his hand down underneath my skirt and I bit him. He then sat on the ground and pulled me down beside him. I tried to push him off and get up. I got half way up about up to a sitting position and he pushed me back. I then began to scream. I screamed as loud as I could. I yelled 'Help'. Lieut. Blevins then struck me on the face and head with his fist. I screamed four or five times and every time I screamed he would hit me with his fist, and tell me to shut up. At that time Lieut. Blevins was laying on top of me and his legs were in between mine. Before I became unconscious I felt something being inserted into my vagina. I cannot say how far it was inserted. Lieut. Blevins then placed his hand over my face and nose so I couldn't breathe. I then lapsed into unconsciousness. At the time that I became unconscious Lieut. Blevins was on top of me, between my legs, my dress was up and I felt something being inserted into my vagina. Just prior to my becoming unconscious I was still trying to get away and I scratched his hand that was over my mouth and nose, and tried to pull his hand away. I can remember Lieut. Blevins hitting me on the left ear with his fist and he seemed to be hitting me as hard as he could. Every time a blow struck it would stun me" (R54).

Harold W. Royal, Darsham Farm, Wetherden, lived about two or three hundred yards away from the camp where the dance was held. Shortly after

he arrived home about 12:15 a.m. 6 March, he went to the back door and there found a girl dressed in an American uniform. She smelled strongly of alcohol, her hair was "all over her face," and it appeared that she had a black eye. Her face was "black and blue, with blood on it" and one of her ears appeared to be "mangled". He brought her to the camp and on the way she was leaning against him (R60-62). About midnight Technical Sergeant Charles D. Guffey, 550th Bombardment Squadron heard "some crying" outside his barracks, went out and found an American nurse and a civilian. She was sobbing somewhat hysterically and said "They beat hell out of me". After Guffey twice asked her "Who?", she finally replied "Lieut. Blevins". She was taken to the orderly room where Staff Sergeant Rex V. Lee, 550th Bombardment Squadron, telephoned for an ambulance. Lee testified that her breath smelled of alcohol but that she was not drunk. Guffey testified that Pros.Ex.1 was a picture of the nurse in question and that Pros.Ex.2 was a fair representation of her appearance that evening. She made no statement to the effect that she had been raped (R75-80).

Second Lieutenant Margaret I. Gallant, Army Nurse Corps, who accompanied Lieutenant O'Malley to the dance, talked with both her and accused for about 10 minutes at 10:00 p.m. that evening. Both talked coherently and in her opinion neither was intoxicated at that time (R82,88). She passed them just outside the door of the club about 10:30 p.m. and they did not then seem to be intoxicated (R82,90-91). O'Malley did not appear when the dance ended about 11:00 p.m. (R91-92) and Gallant did not see her again until about 1:00 a.m. 6 March, when she was called to the dispensary by a Captain Huff. O'Malley then appeared dazed, spoke slowly and said that accused beat her (R83). When Captain Huff left the room she said to Gallant "What if I get pregnant?", and replied in the affirmative when Gallant asked if accused raped her. Gallant left her and immediately informed Captain Huff of this fact (R84,92-93).

About 12:30 a.m. 6 March, O'Malley was examined at station sick quarters by Captain William A. Huff, Medical Corps, who found that she was "in a rather dazed mental state". Her face and both eyes, especially her left eye, were swollen, her left ear was bleeding and the side of her face was markedly black and blue (R96-97). Upon his inquiry she said that she had been beaten by accused. When Huff asked if she had been "propositioned" by accused before the beating she answered "No" (R101). As the result of information subsequently received from Lieutenant Gallant he made a further examination and found that both of the victim's thighs were smeared with blood. She was bleeding profusely from the vagina which was torn, and her hymen "was no longer intact". In Captain Huff's opinion the hymen had been ruptured within the last three or four hours (R97-98). Her clothes were "certainly mussed and dirty" and she "definitely had an alcoholic breath". However, it was difficult to determine whether or not she was under the influence of liquor as she "had been beaten to a point where all her symptoms could be said to have come from the beating". In the witness' opinion, alcohol could not have accounted for more than a very small proportion of her dazed condition (R98,102). About 1:30 a.m. she was sent in an ambulance to the 65th General Hospital (R98).

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About 1:30 a.m. 6 March, accused was awakened in his quarters by First Lieutenant Ralph E. Robinson, 1249th Military Police Company, and taken to the station sick quarters (R106-107) where he was examined by Captain Huff. His clothes were dirty and there was blood on the fly of his trousers and on his underwear. His penis was smeared with blood, there was a lesion on the posterior surface of the frenulum and a freshly bleeding artery on the proximal border of that lesion. There was also a fresh lesion on his lip (R100,104). In Huff's opinion accused was not then under the influence of alcohol (R105).

Admitted in evidence were pictures of O'Malley and accused taken at the 65th General Hospital on 6 March (R12-14; Pros.Exs.1,2,3). Also admitted in evidence were accused's overcoat, blouse, pink trousers and long woolen underwear which were taken from his possession by Lieutenant Robinson who identified them at the trial (R111-113; Pros.Exs.10-13, incl.).

James Davidson, Director of the Metropolitan Police Laboratory at Hendon, examined the clothing of both accused and O'Malley. (It was stipulated by the prosecution and defense that the blood of both accused and the girl belonged to group "O" (R154)). Accused's overcoat, blouse, trousers and long woolen underwear were stained with blood belonging to group "O". Seminal staining was also found on the blouse and trousers (R120-122; Pros. Exs. 10-13, incl.). Lieutenant O'Malley's blouse, skirt and suspender belt were bloodstained and the skirt also bore evidence of seminal staining (R123-124; Pros.Exs.4,5,8). Her khaki tie and shirt were stained with blood belonging to group "O" (R122-123; Pros.Exs.6,7), and her "pantees" were saturated with blood belonging to group "O", mixed with seminal staining (R124; Pros.Ex.9).

On 8 March Major Walter L. Thomas, Medical Corps, examined O'Malley gynaecologically and found a laceration at the entrance to the vagina, minute abrasions just above the entrance and three lacerations on the hymen which was ruptured. The fact that the hymen was ruptured indicated a penetration of the vagina. The internal genitalia were normal. Slight bleeding of the laceration at the bottom of the entrance to the vagina and the recent character of the ruptures of the hymen indicated that the penetration occurred within the week previous to the examination. The lacerations further indicated that some force had been used (R69-70). In Major Thomas' experience of 14 years as a gynaecologist and obstetrician he had never seen "quite as much superficial trauma" of the genitalia in the case of a woman who had consented to an act of intercourse, nor had he ever "found a picture of the abrasions that were around this woman's genitalia in his examinations of women who had b een married quite a short time". "If I saw this patient and she had been married I would say that she had not consented, from my examination, due to the abrasions there, unless she was exceptionally unusual" (R70,73). He could not give an opinion, based upon his examination, as to whether or not the victim consented in this particular case (R71).

On the afternoon of 6 March, Second Lieutenant Bart E. Sullivan,

Corps of Military Police, 15th Military Police Company, warned accused as to his rights, after which accused took Sullivan to the place where he said the incident occurred. A second lieutenant's bar was found at the spot and accused acknowledged the ownership thereof. It was identified by Sullivan and admitted in evidence (R125-126; Pros.Ex.14). Photographs of the scene were taken in accused's presence (R127). Accused was again warned of his rights by Sullivan who then interrogated him and wrote down his answers. After accused was warned that the statement could be used against him he read and signed it after making a few corrections. The statement was admitted over the objection of the defense (R127-128; Pros.Ex.15). On 7 March, Sullivan again warned accused as to his rights and took a short statement which was then read and signed by accused. The second statement was also admitted in evidence over the objection of the defense (R129-130; Pros.Ex. 16).

On 9 March First Lieutenant David L. Oakley, 548th Bombardment Squadron, 385th Bombardment Group, Courts and Boards Officer of Station 155, interviewed accused with a Major Anderson who was appointed investigating officer. After being warned of his rights and told that Anderson and Oakley were investigating the charges that had been preferred against him, accused was given copies of the two statements which he previously made to Lieutenant Sullivan and asked if he wished to make any changes. Oakley told him that in his opinion "the original statement he had made might successfully be objected to, and that he was under no obligation to make a supplemental statement." He was further advised that "he could make a different statement if he saw fit, but that if he wished to use this statement there was no objection." Accused read the copies of both statements, said that it was his statement, that he wished to sign it, and did so. The two statements were practically identical with the two earlier statements given to Sullivan, and were admitted in evidence over the objection of the defense (R147-151; Pros.Exs.17,18).

As accused testified fully in his own defense it is deemed necessary to set forth only the following pertinent portions of Pros.Exs.15-18:

> "I do not know whether she sat down on the ground or whether I pushed her down. I remember being on top of her and striking her. I remember her starting to scream and I remember putting my hand over her mouth. I remember striking her twice on the side of her head with my right fist. I remember Miss O'Malley biting me on the lip and although I am not sure I believe I hit her after she bit me. When I went out that time with Miss O'Malley I had the idea in mind of having sexual intercourse with her.
> I remember unzipping my pants. I do not remember raising her dress. I do remember my penis being in the person of Miss O'Malley. I remember having an emission but I do not remember whether or not my penis was inside of her when the emission

occurred. I do not know whether or not I was striking her when I had my penis inside of her.
I remember getting up from being on top of Miss O'Malley and I remember pulling her dress down. I remember pushing her legs together. At that time I did not say anything to her and she did not say anything to me. At some time during the course of the occurence I remember Miss O'Malley mumbling but I don't know just when that was. I remember leaving the girl lying there and starting out for the Officers Club." (Pros. Exs.15,17).

"In regard to the events that took place on the evening of March 5, 1944, I do recall the following things happening.
At the time when I had my penis in the person of Miss O'Malley she was struggling. She was fighting with me. I do not know whether she was trying to push me off or whether she was fighting my hands. I did receive a finger nail scratch on the inside of my left wrist.
I recall getting up from being on top of Miss O'Malley after I had an emission. When I got up Miss O'Malley was lying still and seemed to be mumbling.

* * * * * * * *

I weigh about 180 pounds and am about 5 feet 8 inches tall" (Pros.Exs.16,18).

4. The evidence for the defense was as follows:

The pictures taken of the scene of the incident in the presence of accused were admitted in evidence by stipulation (R153; Def.Exs.1,2,3). It was also stipulated that an examination of a vaginal smear (taken from Lieutenant O'Malley on 6 March (R63,66-67)), disclosed no evidence "of seminal fluid as identified by spermatoza" (R153; Def.Ex.D). It was also stipulated that the blood of both O'Malley and accused belonged to group "O" (R153), that the weather officer at Station 155, if present, would testify that the temperature at the station at 11:00 p.m. 5 March, and midnight 5-6 March, was 33 degrees (R154), and that O'Malley "has had her regular menstrual periods since the time of this occurrence" (R168). Admitted in evidence by stipulation was the statement signed and sworn to by O'Malley which she made to Lieutenant Sullivan on 6 March (R209-210; Def.Ex.E).

Mrs. Agnes Royal, Darshams Farm, Wetherden, testified that she lived in the house shown in Def.Ex.A, and that just after midnight on the

morning of 6 March a young lady knocked on the door. Mrs. Royal, who went to bed about 11:15 p.m. with her windows closed and the blackout drawn and had not been asleep very long, looked out of the window of her son's bedroom on the second floor which was about six feet above the girl's head. The witness "got a distinct smell of alcohol of some kind". The girl asked if Mrs. Royal would take her home and Mrs. Royal's son who had just returned, took her to the camp. The house was about 50-70 yards away from the spot shown in the picture admitted as Def.Ex.A, but the witness did not hear any screams that evening. The following morning in the area shown on Def.Ex.A, she found two glasses which in her opinion smelled of rum, "the same as the young lady smelt" (R154-157).

Major Leo Alexander, Medical Corps, testified that he gave accused a neuro-psychiatric examination on 13,14 and 15 March (R158-159). The witness defined a constitutional psychopath as one whose life and conduct is ruled more by his emotions than by mature deliberation, and whose restraining forces and intellectual control are less than in the average person (R162). It was Major Alexander's opinion that although accused was in a constitutional psychopathic state (R163), he was sane on 5-6 March "disregarding his use of alcohol" (R162), and "without the use of alcohol", he was capable of determining right from wrong and of adhering to the right (R163).

Accused testified in pertinent part as follows:

All the drinks he had during the evening were "double shots" and he estimated that he had about four drinks before he met Lieutenant O'Malley about 8:15 p.m. (R170). He believed that he bought three drinks for her and three for himself up until they went outside on the first occasion (R173-187). He intended to get "good and soaked" that evening because he planned not to drink while he was "putting in" his combat missions (R187). When they went out the first time at his suggestion he put his arm around the girl's waist and kissed her as she leaned against the wall of the building. Because she seemed "very agreeable" he thought he would see if he could go any further, put his hands on her buttocks and drew her up to him. She made no objection and he began to lift her dress. She slipped it back again with her hand because, as he imagined, people were walking about, and when he lifted his hands to her waist and kissed her, she bit him on the lip. They then returned to the club at his suggestion to get another drink (R173-174,189).

After they secured two more drinks they went out again at the suggestion of accused who then had the idea that she would be willing to have intercourse with him. He based this opinion on her general actions, the fact that she "seemed to know pretty well what the score was", and appeared to be out for a good time. He had told her a couple of "more or less dirty jokes" and when he remarked that English girls "were easier to work with" than American girls, "she laughed and said she knew what he meant". She put her arms around him and gave him an "open mouthed" and seemingly passionate kiss when they were out the first time, did not mind kissing him on such short acquaintance, and readily consented to go outside

on the second occasion. He believed, therefore, that "she pretty well knew what I wanted to go out for" and that if they found a quiet spot she would be willing to have intercourse (R176-177,188-191). He felt that he was intoxicated but he and the girl walked without difficulty and had no trouble with their speech (R191-192). As they walked along with his arm about her waist he suggested that they go over and sit on the grass, and she replied "All right" (R177). After he finished his drink, he drank half of hers and she finished it after he returned the glass to her (R178,192). He kissed her twice, "unzipped his trousers" and then both sat down under a tree. After they kissed again they leaned backward and stretched out on the ground. She had his overcoat around her, the upper part of his body was on hers and the lower part was leaning against her side. While they were "kissing pretty steadily" he worked his way over so that he would be on top of her, and eventually he got his right leg between her legs. When he attempted to get the rest of his body over her she "wanted to get up a minute". They both sat up and smoked cigarettes (R179-180,192). With his trousers still "unzipped" they then resumed the same position on the ground, he got his legs between hers without resistance on her part and they "kept on kissing". He could feel that her skirt was up and as she was not resisting he "figured she was willing to have intercourse * * * so I went right ahead" (R181-182). He inserted his penis without difficulty and used no particular force. She made no complaint but he heard her "gasp a little bit" (R181-182,192-193). They "kept right on kissing" (R182,193).

Suddenly she started to squirm and bit his lip. He pulled his head back but she held on and although he lifted her head off the ground he could not free himself. He struck her hard on the left side of the head with his fist and "she let loose and * * * started to holler". He put his left hand over her mouth and hit her again. He remembered striking her twice only but testified that judging from her pictures and her appearance when he saw her at the hospital he must have hit her more than twice (R183,193-195). She then relaxed and accused arose believing she had "passed out" in a drunken stupor. She did not move and seemed to be mumbling. Her dress was raised and her legs were apart. He pulled down her dress, put her legs together, pulled on his coat and left because he "was disgusted with her and wanted to get away from her" (R183-184,194-196). He returned to the officers' club, saw blood on his hand and washed his hands in the latrine. When he returned everyone was leaving. He remembered nothing further until he was removing his trousers in the barracks. He next recalled being awakened about 2:00 a.m. by Lieutenant Robinson who told him to dress (R184,197).

Accused further testified that when he gave the statement to Lieutenant Sullivan, he stated the events of that evening as he remembered them at the time. His condition was such that he could not tell the whole story or even remember it. He had had only two or three hours sleep, had been out all day, had a "terrific hangover", and was tired and nervous. It was 7:00 p.m. and he had had no dinner (R200-201). Lieutenant Oakley later told him that the statement made to Lieutenant Sullivan

"might not hold up in court". Accused thought that the subsequent statement made to Major Anderson was identical with that made to Sullivan, and that if the former statement was "no good" the one made to Anderson would also be "no good" and, therefore, that he could not be harmed by making a subsequent statement (R186-187,203). He testified that if he had had a defense counsel at the time, he would not have made any statement whatsoever but the facts stated therein were true "at that time" (R207).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent.

* * * * * * * *

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

* * * * * * * *

Proof.- (a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent." (MCM, 1928, par.148b, p.165).

The undisputed evidence shows that at the time and place alleged accused had sexual intercourse with Lieutenant O'Malley and that penetration occurred. The only question presented was purely one of fact, namely, whether or not the girl consented to the act of intercourse. The testimony of O'Malley and accused is in sharp conflict in this respect. She testified that after he pushed up her skirt a second time and "tried to get up my step-ins", she rolled away and started to get up. He arose, came over to her and then administered a brutal beating during which she screamed several times. He then "stifled" her. She pulled his hand away and began to pray When he seized her from behind she tried to pull his hands away. He then stifled her again, she fell to the ground and remembered nothing further until she found accused between her legs and his penis entering her vagina. After a brief period during which she endeavored to tighten her muscles "so that he could not get in", she became unconscious, and next recalled knocking on the door of the farmhouse. On the other hand accused testified that he got his legs between hers without any resistance, that the act of penetration was accomplished without difficulty or force, and that she offered no complaint whatever. He heard her "gasp a little bit". They continued to kiss after penetration occurred and suddenly she bit him severely on the lip. He could not free himself and then struck her hard on the left side of the face. When she began to "holler" he put his left hand over her mouth and hit her again. He remembered striking her twice only.

The testimony of the victim to the effect that penetration was effected without her consent, is especially corroborated by her statement to Lieutenant Gallant the same evening that accused raped her, and the unusually severe lacerations of her vagina and hymen. In the opinion of Major Thomas who gave her a gynaecological examination, some force had been

used and in his 14 years experience as a gynaecologist and obstetrician he had never observed "quite as much superficial trauma" of the genitalia in the case of a woman who consented to an act of intercourse. The victim's testimony with reference to non-consent and the use of force was further corroborated by the fact that accused's penis was found to be torn and that there was a freshly bleeding artery in the vicinity of the injury.

The question as to whether the victim consented to the act of intercourse or whether it was committed by accused by force and violence and against her will, was a question of fact within the exclusive province of the court. As the finding of non-consent is supported by competent substantial evidence it will not be disturbed by the Board of Review on appellate review (CM ETO 1402, Willison and cases cited therein).

6. Attached to the record of trial is a memorandum on behalf of accused signed by defense counsel, wherein several assignments of error are set forth. Only two assignments require notice by the Board of Review.

(a) The defense objected to the admission in evidence of accused's statements, Pros.Exs.15,16, because they were not voluntary in character, and to the admission of Pros.Exs.17 and 18 because they were identical with Pros.Exs.15,16 and a "free, complete and impartial investigation" was therefore, not conducted. Accused was thoroughly warned of his rights by Lieutenant Sullivan both before he made the first statement (Pros.Ex.17), and before he read and signed it. He made a few corrections before he signed the document. The following day he was again properly warned and indicated his willingness to make a second statement (Pros.Ex.16). He also read this document before affixing his signature thereto. Two days later he was interviewed by both Major Anderson, the investigating officer, and Lieutenant Oakley, who said that they were investigating the charges preferred against him, and fully informed him with respect to his rights. He was shown two copies of Pros.Exs.15,16, asked if he wished to make any changes, told that he could make a different statement if he desired or could use those statements, and that he was under no obligation to make a supplemental statement. Lieutenant Oakley hazarded the opinion that a successful objection might be made to the original statement made to Sullivan. After receiving the foregoing information accused read and willingly signed Pros.Exs.17 and 18 which were practically identical with the two statements made to Sullivan. Except to correct his statement that he was married, the changes he made were merely typographical in character. The contention of the defense was without merit.

(b) The objection by the defense to the conduct of the trial judge advocate when cross-examining accused and to the trial judge advocate's closing argument have been commented upon in the review of the staff judge advocate, 3rd Bombardment Division, and further consideration thereof is deemed unnecessary. The trial judge advocate apologized in open court for the remarks made during the course of his argument, and the error, if any, was thereby condoned (Dunlop v. U.S., 165 U.S. 486,498, 41 L.Ed.,799,803; U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150,242, 84 L.Ed., 1129,1178). The

defense counsel in open court expressed satisfaction with the apology. Moreover, in view of the competent substantial evidence which convincingly established accused's guilt of the offense alleged, the conduct in question of the trial judge advocate, if considered to be improper, was not of a seriously prejudicial character.

7. Attached to the record of trial is a petition for clemency addressed to the Commanding General, 3rd Bombardment Division, signed by all members of the court who participated in the trial, wherein it is recommended in substance that because of the circumstances of the case, that portion of the sentence relating to confinement at hard labor be reduced to ten years. The reviewing authority recommended that it be reduced to seven years.

8. The charge sheet shows that accused is 20 years four months of ag and that his service is as follows: "11 Mos as EM in AAF, 10½ mos as A/C in AAF. Commissioned 2nd Lt. AUS AC on October 1 1943 at Turner Field, Ga., for the duration plus 6 months!" No prior service is shown.

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the crime of rape (AW 42; secs.278 and 330, Federal Criminal Code (18 U.S.C.A., secs.457,567); sec.335 Federal Criminal Code (18 U.S.C.A. 541); Act June 14, 1941, c.204, 55 Stat. 252 (18 U.S.C.A. 753f); Cf: U.S. v. Sloan, 31 Fed. Sup.327). The designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir.291, WD, 10 Nov 1943, sec.V, pars.3a and b).

_____ Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 24 JUN 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Second Lieutenant ARTHUR C. BLEVINS, JR., (O-813838), 550th Bombardment Squadron (H), 385th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2472. For convenience of reference please place that number in brackets at the end of the order: (ETO 2472).

E. C. McNEIL
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 48, ETO, 1 Jul 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

-6 JUN 1944

ETO 2473

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by G.C.M., convened at Pencalenick, Cornwall, England 23 February, 19 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CHARLES H. CANTWELL (31118472), Company "E", 531st Engineer Shore Regiment.	

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

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Charles H. Cantwell, Company "E", 531st Engineer Shore Regiment, did, at Damesme, Algeria, on or about 31 August 1943, desert the service of the United States by absenting himself without proper leave from his company with intent to avoid hazardous duty, to wit: an overseas operation against the enemy, namely the invasion of Italy; and did remain absent in desertion until he surrendered himself at Oran, Algeria, on or about 12 September 1943.

He pleaded not guilty to the Charge and Specification and was found guilty of the Specification, except the words "he surrendered himself at Oran, Algeria, on or about 12 September 1943", substituting therefor the words "after his unit was committed to active operations against the enemy", of the excepted words not guilty, and of the substituted words guilty, and guilty of the Charge. No evidence of previous convictions was introduced.

He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved only that portion of the findings of guilty as involved a finding of guilty of the Specification of the Charge as read: "In that Private Charles H. Cantell (sic), Company "E", 531st Engineer Shore Regiment, did, at Damesme, Algeria, on or about 31 August 1943, desert the service of the United States by absenting himself without proper leave from his company with intent to avoid hazardous duty, to wit: an overseas operation against the enemy, namely the invasion of Italy," and of the Charge, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The record contains competent substantial evidence 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 first three elements of the offense charged were thus established.

With respect to the fourth element of the prosecution's case, viz: that accused absented himself with intent to avoid hazardous duty to-wit: "an over-sea operation against the enemy, namely the invasion of Italy", the evidence shows that accused's company on and for about five days prior to 31 August 1943 was bivouacked at Damesme, Algeria, and was engaged in loading combat trucks and moving them to Mers el Kebir where they were stowed on boats in preparation for movement into Italy. The unit had "turned in" extra supplies and had drawn combat equipment. The company was attached to the 36th Division and had replaced the 344th Engineers. It was alerted about 27 or 28 August 1943. The company commander assembled the company on one or the other of the said dates and announced that 25% of the men would be allowed passes each evening; that the time being limited he desired that every man have the benefit of a pass, and that the company "just about had enough time at that percentage to let them all get out". He further "stipulated that if any man got into trouble in town every man and the organization would loose their privileges" (R6). He further informed the company that it was on the alert and "were moving out" (R7). He declared "that when we pulled out any man that was absent and not on official duty would be dropped as a deserter" (R6). Accused was present at this formation (R6,7). On the night of 3 September the company left Damesme and moved about 30 miles to the port of Mers el Kebir and boarded ship on 4 September (R7).

Accused was given a pass on or about 28 August after the commander's announcement to the company. He did not return, and was reported absent on the company's morning report of 31 August. He did not sail with his unit at

Mers el Kebir on the night of 5 September (R7), and was not with his company during its campaign in Italy. He was not seen by his company commander between 31 August 1943 and 16 January 1944 (R6,9).

The foregoing evidence is legally sufficient to warrant the court's inference of the fourth element of the offense, namely, that accused intended, when he absented himself, to avoid hazardous duty within the meaning of Article of War 28 (CM ETO 1400, Johnston; CM ETO 1405, Oliff; CM ETO 1406, Pettapiece; CM ETO 1589, Hepnding.

The distinctions between the instant case and CM ETO 2432, Durie and CM ETO 2481, Newton are apparent.

(1) In the Durie and Newton cases, while the accuseds' units had been alerted and were under orders or anticipated orders to participate in the invasion of continental Europe, there were no preparations for the forward movement which put the accused on notice that it was imminent or immediate and the time of such movement remained indefinite and uncertain. In the instant case the preparations for active combat were being made, the same were obvious to accused, and they spoke only of an immediate forward movement.

(2) In the Durie and Newton cases neither accused missed hazardous duty nor important service with their respective units, which remained at their stations during the periods of absence of the accused. In the instant case accused was absent from his company during its Italian campaign.

(3) In the Durie and Newton cases there was uncontradicted, unexplained evidence for the defense which was totally inconsistent with an intention on the part of each accused to avoid hazardous duty or important service when he absented himself without leave and which rendered unreasonable any inference of such intention from the evidence of the first three elements of the offense, viz: absence without leave, orders or anticipated orders involving hazardous duty or important service and notice thereof to accused. In the instant case evidence of such character is completely absent.

The instant case is of the same pattern as the Johnston, Oliff, Pettapiece and Hepnding cases, supra, which were expressly distinguished in the Durie and Newton cases.

4. The court failed to make a finding as to the manner or exact date of termination of accused's unauthorized absence, but found that accused did remain absent until "after his unit was committed to active operations against the enemy". The reviewing authority in his action disapproved so much of the findings of guilty as involved a finding that accused's absence endured for the specified period. 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.130a, p.142), proof of the duration of the absence is not essential to sustain a conviction of the offense . The element of proof "that his absence was of a duration

and terminated as alleged" (MCM, 1928, par.130a, p.143, Proof (c)), was formerly essential only when the legality of the sentence imposed was dependent upon such duration, under the Table of Maximum Punishments (MCM, 1928, par.104c, p.97). Since the suspension of limitations upon punishments for wartime desertion (E.O.9048, 3 Feb 1942, sec.IV, Bull.6, WD, 9 Feb 1942), the maximum punishment for which in all cases is now death (AW 58), the 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. It is clearly not an essential element of the offense and its removal from the case was thus immaterial.

5. The record of proceedings of the court on reconvening after adjournment reads in part as follows:

> "The court met, pursuant to adjournment, * * *, all the personnel of the court, prosecution, and defense who were present at the close of the previous session in this case being present, except: /a new member of the court/" (R5).

No mention is made of the presence of either the reporter or accused.

> "The record is itself evidence of the presence of the reporter" (CM 123492 (1918), Dig.Op. JAG, 1912-1940, sec.395(31), pp.221-222).

As to accused, it may be assumed that he was not intended to be included in the word "defense" as among those present. The trial judge advocate asked if "the accused" had "any special pleas or motions to make", to which defense counsel replied "The Defense has not" (R5). The accused then evidenced his presence in court by pleading "not guilty" to the Specification and the Charge. The record further states that after the findings

> "the trial judge advocate stated, in the presence of the accused and his counsel, that he had no evidence of previous convictions to submit".

and that the charge sheet data, read by the trial judge advocate thereafter, was "verified by the accused in open court" (R11). There is no statement in the record either that accused was not present during the proceedings or that he entered the court-room at any point therein. Under the circumstances it may properly be assumed that he was present throughout the proceedings (CM 118099 (1918); CM 123492 (1918); CM 125262 (1919), Dig.Op.JAG, 1912-1940, sec.395(31), pp.221-222).

6. The charge sheet shows that accused is 33 years five months of age and was inducted 28 April 1942 for the duration of the war plus six months. He had no prior service.

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

8. The punishment for desertion committed in time of war is death or such other punishment as the court may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par. 2).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(60)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 6 JUN 1944 TO: Commanding General, First United States Army, APO 230, U.S. Army.

1. In the case of Private CHARLES H. CANTWELL (31118472), Company "E", 531st Engineer Shore Regiment, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2473. For convenience of reference please place that number in brackets at the end of the order: (ETO 2473).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

29 MAY 1944

ETO 2474

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by G.C.M., convened at Headquarters, First United States Army, Bristol, England, 27 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WILLIAM S. RIDEN (20525038), Company B, 300th Engineer Combat Battalion.	

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private William S. Riden, Company B, 300th Engineer Combat Battalion, did, without proper leave, absent himself from his camp at Mapledurham, Oxfordshire, England from about 0600, 20 February, 1944 to about 1145, 20 February 1944.

CHARGE II: Violation of the 94th Article of War.
Specification: In that * * *, did, at Devizes, Wiltshire, England, on or about 20 February 1944, knowingly and wilfully misappropriate eleven and one-half (11-1/2) gallons of gasoline of the value of about four dollars ($4.00), property of the United States intended for the military service thereof.

(62

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * *, did, at Mapledurham, Oxfordshire, England, on or about 20 February 1944, wrongfully and unlawfully take, use and operate without proper authority a motor vehicle of the value of about nine hundred and fifty dollars ($950.00), property of the United States.

ADDITIONAL CHARGE I: Violation of the 61st Article of War. (Nolle prosequi).
Specification: (Nolle prosequi).

ADDITIONAL CHARGE II: Violation of the 69th Article of War. (Finding of Not Guilty).
Specification: (Finding of Not Guilty).

After arraignment and before pleas were entered by accused, the prosecution, by direction of the reviewing authority, entered a nolle prosequi as to Additional Charge I and, its specification. The accused pleaded not guilty to all charges and specifications. He was found not guilty of Additional Charge II and its Specification, and guilty of all remaining charges and specifications. Evidence was introduced of one previous conviction by special court-martial for breach of restriction and drunkenness in uniform in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for eight years at such place as the reviewing authority may direct. The reviewing authority approved the sentence but remitted three years of the confinement imposed, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The charge sheets show that the accused is 21 years of age, that he enlisted in the Kentucky National Guard 30 December 1940 and that his service period is governed by the Service Extension Act of 1941. No prior service is shown.

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

5. The designation of Eastern Branch, United States Disciplinary

Barracks, Greenhaven, New York as the place of confinement, is authorized (AW42; Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2).

Judge Advocate

Judge Advocate

Judge Advocate

(64)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 MAY 1944 TO: Commanding General, First United States Army, APO 230.

1. In the case of Private WILLIAM S. RIDEN (20525038), Company B, 300th Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2474. For convenience of reference please place that number in brackets at the end of the order: (ETO 2474).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

15 JUN 1944

ETO 2481

U N I T E D S T A T E S)	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private LAWRENCE A. NEWTON (14062782), Battery "B", 15th Field Artillery Battalion, 2nd Infantry Division.)	Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 19 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Lawrence A. Newton, Battery "B", Fifteenth Field Artillery Battalion, Porthcawl, County Glamorgan, South Wales, did, without proper leave, absent himself from his command at Battery "B", Fifteenth Field Artillery Battalion, Porthcawl, County Glamorgan, South Wales from about 0700 hours, 22 April 1944 to about 0100 hours, 1 May 1944.

CHARGE II: Violation of the 69th Article of War.
(Nolle Prosequi)
Specification: (Nolle Prosequi)

CHARGE III: Violation of the 93rd Article of War.
(Nolle Prosequi)
Specification 1: (Nolle Prosequi)
Specification 2: (Nolle Prosequi)
Specification 3: (Nolle Prosequi)

CHARGE IV: Violation of the 58th Article of War.
Specification: In that * * * did, at Porthcawl, County Glamorgan, South Wales, on or about 2 May 1944, desert the service of the United States by quitting and absenting himself without proper leave from his organization and place of duty, with intent to avoid hazardous duty and shirk, important service, to Wit: participation in the oversea invasion of the enemy occupied European continent, and did remain absent in desertion until he was apprehended at Porthcawl, County Glamorgan, South Wales, on or about 8 May 1944.

He pleaded guilty to Charge I and its Specification, not guilty to Charge IV and its Specification, and was found guilty of both charges and their respective specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 42 days in violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct for life. The reviewing authority approved the sentence, reduced the period of confinement to 30 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution summarizes as follows:

(a) Extract copy of the morning report of Battery B, 15th Field Artillery Battalion for 23 April 1944 and 1 May 1944 (R7, Pros.Ex.1) containing the following entries:

"23 April 1944
14062782 Newton Pvt.
Dy to AWOL 0700 hours
the 22

- - - - - -

1 May 1944
14062782 Newton Pvt.
AWOL to dy 0100 hrs"

(b) Extract copy of the morning report of Battery B, 15th Field Artillery Battalion for 1 May 1944 (R7,Pros.Ex.2) containing the following entries:

" 1 May 1944
14062782 Newton Pvt.
AWOL to dy 0100 hrs
RECORD OF EVENTS
May 1, Porthcawl South Wales
ALERTED FOR DEPARTURE.
Paragraphs 1 a and b of letter Headquarters V Corp, subject "Desertion" dated 21 April 1944 were read to Pvt Lawrence A. Newton present at a formation of the company at 0925 May 1, 1944."

(c) Extract copy of the morning report of Battery B, 15th Field Artillery Battalion for 2 May 1944 and 8 May 1944 (R8,Pros.Ex.3) containing the following entries:

" 2 May 1944
14062782 Newton Pvt.
Dy to AWOL 0630 hrs.
8 May 1944
14062782 Newton Pvt.
AWOL to apprehended in hands of Mil Auth,2145 hrs. Awaiting trial.
Apprehended at Porthcawl, South Wales."

(d) Original letter from Headquarters V Corps dated 21 April 1944 "Subject: Desertion" containing the following excerpts (pars.1a and b) to which reference is made in Pros.Ex.2 (R19,Pros.Ex.4):

"1. a. Desertion Facts.
(1) Any person who 'deserts' or 'attempts to desert' the service of the United States in time of war shall suffer 'death' or such other punishment as a court-martial may direct. (AW 58).
* * * * * * * * *
(3) Any person who quits his organization or place of duty 'with intent to avoid hazardous duty' or 'to shirk important service' shall be deemed a deserter. (AW 28).
(4) For desertion committed in time of war there is no limit to the time when the deserter may be brought to trial. (AW 39).
(5) Confinement in a United States Penitentiary is authorized for desertion committed in time of war. (AW 42).
(6) Anyone dishonorably discharged or dismissed for deserting the military service

of the United States in time of war forfeits his United States citizenship. (Section 401g, Nationality Act of 1940, as amended by Public Law 221, 20 January 1944).

b. Each and every one of you is hereby notified:

(1) That your organization is now under orders to participate in the oversea invasion of the enemy occupied European continent.

(2) That your organization is now alerted for this operation and that the operation is imminent.

(3) That this operation will be both hazardous duty and important service within the meaning of the provisions of AW 28 as above stated.

(4) That a careful morning report will be kept showing the fact of the presence of each of you at this time and of the fact that the foregoing information was revealed to you

(5) That any absence without leave by any of you from now on will be deemed desertion to avoid this duty and will subject you to being tried by general court-martial as a deserter.

(6) That proof of your unauthorized absence together with morning report proof of the foregoing information being given you, in connection with further proof of the fact that your organization is now under orders and alerted for participation in the imminent oversea invasion operation against the enemy, will authorize a court-martial to infer that your unauthorized absence was with intent to avoid such duty and therefore to find you guilty of such desertion.

(7) Court-martial sentences adjudging, in such desertion cases, along with dishonorable discharge and total forfeitures either the death penalty or confinement at hard labor for the natural term of life or for some definite period of time up to fifty (50) years will not be deemed inappropriate. Where death is not adjudged it is contemplated that confinement will be served by imprisonment in a designated United States penitentiary.

(e) Henry Kraft, Staff Sergeant, Headquarters Battery, 15th Field Artillery Battalion, testified that accused was a private in Battery B, 15th Field Artillery Battalion. On 8 May 1944 witness was placed on a special detail to apprehend accused who was absent from his organization. Pursuant to certain information received by the officers of the battalion accused was apprehended at Porthcawl, South Wales, at approximately 9 p.m. as he was walking along the street. He offered no resistance when taken

into custody by an officer, another sergeant and witness (R9).

4. The accused elected to appear as a witness on his own behalf and testified as follows:

On 1 May he was in Porthcawl or Bridgend, which are about six miles apart. He remained in those two places while absent. He returned to his battery area and was in his room at a hotel at 0100 hours 1 May 1944. There were three formations of the battery on 2 May. He was present at the 8 a.m. formation but was absent at the 9 a.m. formation because he had teeth inspection. He did not stand the afternoon formation for the reason he was required to report to the Battalion Commander at 1:30 p.m. (R19). Sometime during the morning he was taken before the Battery Commander who read him the "articles * * * on the Fifth Corps paper" which referred to the 28th and 58th Articles of War. He stood formation at 8 a.m. when the "chiefs of sections reported to the First Sergeant". No article or paper was read at this formation, which continued for seven or eight minutes. Immediately after formation the battery went on a "hike" which consumed one hour's time. From 0800 hours to 0900 hours accused was in formation and on a "hike" (R11). Upon return from the "hike" accused "went up stairs and started working on mop-handles". After working for about 30 minutes he was taken before the Battalion Commander and civilian police. This meeting continued until around ten-thirty (R12). On 2 May 1944 he was on fatigue detail but not under guard (R19). He obtained whisky from a near-by bar room and became intoxicated. When he left the station he was drunk and had no memory of succeeding events (R13). Accused had been a member of Battery B for about thirty days prior to May 8th but had experienced no difficulties. When he "sobered up" he was in Bridgend (R13). He was under the influence of liquor from 2 May until 8 May but was never more than six miles away from his battery. He intended to stay away for ten days but thought he would "stay a few more days" (R17). He knew his unit was going into hazardous duty but he "did not look for them to move for quite a while". He "figured that if they moved they'd move at the last of the month" (R19), and did not think it would move while he was away after May first. During the period of his absence from 2 May to 8 May he was about the public streets in day time but encountered no members from his unit (R18).

Accused's unit moved from one station to another station sometime after 8 May. He accompanied it. At destination he was confined by civil authorities but was released, was taken to his unit which was in a hotel and for three or three and a half hours he was not under guard and was at liberty to leave if he had desired (R15,16).

5. Accused pleaded guilty to the charge of absence without leave from 22 April 1944 to 1 May 1944 (Charge I). The record is legally sufficient to sustain the findings of guilty.

6. (a) Accused was charged (Charge IV) with absence without leave with intent (a) - to avoid hazardous duty and (b) - to shirk important

service, viz: participation in oversea invasion of the enemy occupied European continent. There is no objection to the inclusion in the one specification of allegations of the two separate intents one of which must be entertained by an accused in order to constitute the offense of desertion laid under Articles of War 58 and 28. Such form of pleading is not duplicitous. The prosecution was free to prove either or both of the specific intents alleged (CM ETO 2432, Durie).

(b) Accused's absence without leave from his command at Porthcawl from 2 May 1944 to 8 May 1944 is clearly established and is admitted by accused in his testimony. He was apprehended at Porthcawl and was returned to his unit on 8 May (Charge IV).

It will be assumed for the purpose of this holding that the declaration (par.1b(1), (2)) contained in the "Desertion Letter" dated 21 April 1944 (Pros.Ex.4) from Headquarters V Corps is adequate proof that accused's unit was on 2 May 1944 "under orders or anticipated orders involving either (a) hazardous duty or (b) some important service" (MCM, 1921, par.409, p.344) in the nature of an "oversea invasion of the enemy occupied European continent". This was the second element of the charges against accused which the prosecution had the burden of sustaining.

Proof of the third element of the offense with which accused was charged required evidence that notice of such order was actually brought home to accused and that he received due and timely notice of probable results of unauthorized absence of military personnel at that time. The prosecution met this burden by introducing in evidence (a) Extract copy of morning report of the battery for 1 May which recited that

> "Paragraphs 1a and b of letter Headquarters V Corps, subject 'Desertion' dated 21 April 1944 were read to Pvt Lawrence A. Newton present at a formation of the company at 0925 May 1, 1944" (Pros.Ex.2),

and (b) copy of the letter from Headquarters V Corps dated 21 April 1944 mentioned in the extract from the morning report (Pros.Ex.4).

The question arises as to whether the morning report may be used for the purpose intended in this case. The following excerpts from AR 345-400, sec.III, 7 May 1943 on "Morning Report" are relevant:

> "27. Record of Events. Record of events consists of basic data from which the history of the organization is compiled. * * *.
>
> 30. Miscellaneous All reconnaissances, marches, maneuvers, places, and distances marched or traveled, modes of travel, organizational duties or attachments, and everything of interest

relating to the discipline, efficiency, or service of the organization will be noted" (Underscoring supplied).

It would seem that the record of formation of a company for the express purpose of giving it notice of an alert and intended hazardous duty or important service of the unit would clearly be included within "everything of interest relating to the discipline, efficiency or service" of the battery and therefore the minute contained in Pros.Ex.2 is authorized by the Army Regulations. If there is any doubt as to legality of the use of the battery morning report for the purpose intended it is entirely eliminated by reference to the following Federal statute:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event if it shall appear that it was made in the regular course of any business; and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind. (June 20, 1936, c. 640, sec.1, 49 Stat. 1561)" (28 U.S.C., Supp., sec.695).

The morning report entry was made in obedience to the command of the Commanding General, V Corps (Pros.Ex.4, par.2a). 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, and the activity of the battery was certainly a "business" within the purview of the statute. The extract copy of the morning report (Pros.Ex.2) and the "Desertion Letter" from Headquarters V Corps (Pros.Ex.2) were clearly admissible in evidence. The prosecution therefore sustained the burden of proving the third element of the offense, viz: that accused when he absented himself without leave knew or had reason to know that his unit was about to engage in hazardous duty or important service.

Although accused denied he was present at the 0925 formation of his battery on 1 May 1944, on which occasion the "Desertion Letter" from

Headquarters V Corps was read to the battery members, he also testified that his Battery Commander during the morning of 1 May read him the "Articles * * * on the Fifth Corps paper" which referred to the 28th and 58th Articles of War. This was an inculpatory admission that he had actual notice of the contents of the V Corps letter of 21 April 1944 (Pros.Ex.4) independent of prosecution's proof of such fact. Therefore the defects in proof considered by the Board of Review in its holding in CM ETO 455, Nigg do not arise in the instant case.

There remains for consideration the question as to whether the prosecution proved the fourth element of its case, to wit: that accused at the time he absented himself on 2 May entertained either of the specific intents to (a) avoid hazardous duty or (b) shirk important service. The prosecution's proof in this respect is based solely upon argumentative inference and may be stated thus: inasmuch as accused's unit was under orders and was alerted for hazardous duty and important service, to wit, invasion service and accused had received actual notice of the status of his unit, and had then absented himself without authority for six days commencing on the day following the giving of said notice, there may be inferred from the foregoing facts the specific intents on the part of accused to avoid hazardous duty or shirk important service. The same proposition was presented in CM ETO 2432, Durie. Commenting upon same the Board of Review said:

> "Accused's intent was a fact which must be proved as any other fact and for such purpose evidence of relevant and material circumstances is cogent and proper. From such circumstances and reasonable and legitimate inferences therefrom, the intent may be discovered. There must however, be in the record of trial proof of such circumstances and herein lies the defect in the prosecution's case. Proof that accused went absent without leave when his battery was on an alert status after he received notice that at some indefinite future time it was intended that it should participate in a continental European invasion, without more, does not furnish the required probative basis from which may be inferred the ultimate fact of intent - an element of equal quality and necessity to sustain the charge of desertion with that of unauthorized absence, the alert and notice thereof to accused".

From the foregoing it is manifest that the Board of Review has heretofore rejected the proposition on which the prosecution based its case, and it becomes necessary to seek elsewhere in the record of trial for evidence of specific intent.

The only evidence submitted by the prosecution in addition to Pros. Exs.2,3 and 4 (par.3b,c,d supra) was the testimony of Staff Sergeant Kraft

that accused was apprehended in Porthcawl on the sixth day of his absence. There is neither proof nor inference in the record that accused's battery during his absence did in fact move from its station in execution of its orders for the invasion of Europe. Appositely, accused's testimony, which is uncontradicted, strongly implies that subsequent to his return to his unit, it moved to a new station in the United Kingdom (R14,15,16). It may therefore be concluded that the battery remained at its station in Porthcawl during accused's absence.

While the major portion of accused's testimony was directed to the issue of his lack of notice of the battery's orders and its alert status, he was examined at length concerning his absence and the reason for the same. His testimony, which the prosecution did not rebut, was that on 2 May he secured whiskey from a bar located near the hotel in which he was billeted; that he became intoxicated and was drunk when he left his unit; that he was drunk during the six days of absence but was on the public streets each day; that he saw a young woman in Porthcawl during his absence; that he was never further than six miles from his battery at any time during his absence; that he had no difficulties in his battery prior to his absence; that he intended to return at the expiration of ten days absence, and that when his battery moved after his apprehension he was given liberties which would have allowed him to leave had he desired. There is no suggestion in the record that accused was out of uniform during his absence from his unit.

It is the duty of the Board of Review to determine whether there is substantial evidence in the record to sustain the findings that accused was guilty of desertion (CM ETO 2432, Durie). In the instant case such duty compels it to determine whether the foregoing evidence and all legitimate and reasonable inferences therefrom support the conclusion that accused at the time of his absence on 2 May 1944 entertained the specific intent to avoid hazardous duty or shirk important service. In the performance of such duty the Board of Review has carefully studied and analyzed the entire evidence in the record and it is forced to the conclusion that it is wholly inadequate to prove the required specific intent which would convert accused's absence into desertion under Articles of War 28 and 58 (CM 224765 (1942), CM 226374 (1942), Bull.JAG, Vol.I, No.6, Nov 1942, sec.385, pp.322-323; CM 231163 (1943), Bull.JAG, Vol.II, No.4, Apr 1943, sec.385, pp.139-140)).

6. The Board of Review refers to its recent holdings in CM ETO 1400, Johnston; CM ETO 1403, Kummerle; CM ETO 1405, Oliff; CM ETO 1406, Pettapiece; CM ETO 1432, Good; CM ETO 1589, Heppding; CM ETO 1664, Wilson; CM ETO 1685, Dixon and CM ETO 2473, Cantwell. These cases are "battle line" cases arising out of the campaigns in North Africa and Sicily. Each accused was guilty of misconduct during actual and not anticipated military campaigns. 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.

In the instant case the accused's unit was under invasion orders and was alerted for such purpose, but 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.

For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge IV and its Specification as involves findings that the accused did, at the time and place alleged, absent himself without leave until he was apprehended at the time and place alleged in violation of Article of War 61.

7. The charge sheet shows accused to be 20 years of age and that he enlisted 24 February 1942 to serve for the duration of the war plus six months.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial except as herein specifically noted. The Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence.

9. Penitentiary confinement is not authorized by AW 42 for the offense of absence without leave (CM ETO 2432, Durie). Confinement should be in a place other than a penitentiary, Federal correctional institution or reformatory.

Judge Advocate

Judge Advocate

Judge Advocate

(75)

1st Ind.

15 JUN 1944

WD, Branch Office TJAG., with ETOUSA. TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private LAWRENCE A. NEWTON (14062782), Battery "B", 15th Field Artillery Battalion, 2nd Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and only so much of the findings of guilty of Charge IV and its Specification as involves findings that accused did at the time and place alleged absent himself without leave until he was apprehended at the time and place alleged in violation of Article of War 61, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The theory of the prosecution, and of the V Corps letter introduced as Pros.Ex.4, is that after a unit has been alerted and a soldier has been informed that the unit is going on hazardous duty, "any absence without leave by any of you from now on will be deemed desertion to avoid this duty and will subject you to being tried by general court-martial as a deserter." But by Article of War 28, the Congress has provided that:

> " Any person subject to military law who quits his organization or place of duty with intent to avoid hazardous duty or to shirk important service shall be deemed a deserter."

Proof of the required intent is an essential element of the crime as defined by Congress. In this case accused was arrested during daylight hours dressed in uniform on the street of the small town in which his unit was stationed. There is no proof of concealment, attempt to leave the vicinity or other circumstance tending to prove the required intent. Mere proof of absence is not enough.

3. The designated place of confinement should be changed to a place other than a penitentiary, Federal correctional institution or reformatory. This may be done in the published general court-martial order.

4. In view of the reduction of the grade of the offense under Charge IV and its Specification (desertion to absence without leave), I believe there should be a reduction in the period of confinement and I so recommend. The normal sentence for absence from actual combat on conviction under the 75th or 58-28 Articles of War is 20 years. This offense is less serious. I suggest 10 years. I further suggest that the accused be confined in Disciplinary Training Center #2912, and that his dishonorable discharge be suspended until the soldier's release from confinement.

5. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2481. For convenience of reference please place that number in brackets at the end of the order: (ETO 2481).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2484

- 6 JUL 1944

U N I T E D S T A T E S	9TH INFANTRY DIVISION.
v.	Trial by GCM, convened at Winchester, Hampshire, England 4 April 1944.
Private PHILLIP E. MORGAN (14141502), Company B, 47th Infantry.	Sentence: Dishonorable discharge, suspended, total forfeitures and confinement at hard labor for ten years. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.

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

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1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and sentence in part. The record has been examined by the Board of Review which submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE: Violation of the 64th Article of War.
Specification: In that Private Phillip E. Morgan, Company B, 47th Infantry, did, at Winchester, Hampshire, England, on or about 21 December 1943, strike Second Lieutenant JOHN A. HALLER, 47th Infantry, his superior officer, who was then in the execution of his office, on the lip with his fist.

He pleaded not guilty to and, two-thirds of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for entering an "off limits" area, and for being drunk in uniform in a public place, in violation of the 96th Article of War. Two-thirds of the members of the court present when the vote was taken concurring, he was sentenced

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to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somersetshire, England as the place of confinement.

3. There is undisputed evidence that at the place and time alleged, accused struck Second Lieutenant John A. Haller, 47th Infantry, his superior officer, who was then in the execution of his office, on the lip with his fist (R6,7,9). The only question for consideration is whether accused knew Lieutenant Haller to be his superior officer at the time he struck him.

> "By 'superior officer' is meant * * * any * * * commissioned officer of rank superior to that of the accused. That the accused did not know the officer to be his superior is available as a defense." (MCM 1928, par 134a, p 147).

The evidence bearing upon this issue is as follows:

For the prosecution, Second Lieutenant Boardman F. Lockwood, 47th Infantry, testified that on the evening of 21 December 1943 he was duty officer in charge of a convoy which brought enlisted personnel into Winchester, England from the 1st Battalion, 47th Infantry. At about 10:30 p m witness and Lieutenant Haller noticed several groups of enlisted men near the place where vehicles were parked preparatory to returning to the Battalion Area. Because of the intolerable obscenity of the language used by members of one or more of the groups, the two lieutenants approached one group and ordered that the objectionable language cease. Witness believed he said "cut out the profanity". As they "came up" to the group Lieutenant Haller was hit on the left corner of his lip by a member of the group. Witness "saw the blow struck. I saw the man move away. He left the group and I went after him." " * * * it developed that it was Private Morgan." (R6-8). At that time the night "was rather more gray than anything else", due to the overcast; it was not black. As he approached the group witness was unable to distinguish the features of the four or five men who composed it, but he testified definitely that he ascertained the individual who struck the blow (R7). He knew that the men waiting to return in the convoy were enlisted personnel. The lieutenants, who had flashlights, identified the men as such by the texture of their coats and by the presence of chevrons (R8).

At the time the blow was struck the assailant was standing approximately two and one-half feet from Lieutenant Haller. The latter was dressed in officer's uniform: officer's beaver coat, pink trousers and overseas hat with appropriate insignia. Witness could not testify whether any insignia were on the coat (R7).

Staff Sergeant Joseph Paskowich testified that he was a member of Company B, 47th Infantry (accused's company), and that on the night of 21 December, after he and accused had drunk "some beer and scotch", they were talking in a group near the (convoy) trucks "when somebody spoke from the top of the hill. He said something I couldn't make out" (R8,9). Accused asked, "Who said that?" (R10).

> "Private Morgan walked up there. I didn't pay any more attention to him. Finally, I turned around and I walked up there towards him. I couldn't identify if it was an officer or not. Finally one of the officers said he struck an officer and Private Morgan said I am sorry I hit an officer" (R9).

Witness was standing about two feet from accused and did not observe or recognize the two persons who approached as officers or hear any order given by them. He discovered that they were officers after the incident, when one of them directed a flashlight upon himself.

4. (a) For the defense, Staff Sergeant Joseph Taubaner testified that he was a member of Company B, that on the night in question "it was pretty dark" and that he could recognize a man at a distance of about ten yards, but that "it would be pretty hard" to identify him at that distance. He "could make out the features of a man" - "just the general outline of the man". He did not identify the person who gave the order to "cut out that language" as he was not paying much attention, and did not recognize any officers during the incident (R10,11).

(b) Following a statement by the defense that accused's rights had been explained to him, accused testified on his own behalf that on the night of 21 December he spent two and a half or three hours drinking in a "pub".

> "I drank quite a bit of alcholic drink * * * and I remember up until the time we left the pub. I remember leaving there and then, about * * * ten minutes after we left the pub, [at about 9:45 p.m.] I don't remember anything more until about two o'clock the next morning when one of the men in my squad awaken me" (R12,13).

5. Recalled for the court, Lieutenant Lockwood testified that accused was under the influence of intoxicating drink and "pretty well intoxicated" - "pretty close to drunk", but was able to stand up and move about without assistance and without "wobbling" or staggering. "He was just moving away * * * He was just putting distance between himself and the scene of the incident". He made a remark to this effect: "go ahead and court-martial me I have been court-martialed before and got out of it alright" (R13-14).

Recalled for the court, Staff Sergeant Paskowich testified he did

not hear an order but did hear something which "sounded like someone just shouting words towards a group of men". He thought it came from "one of the boys" standing in a group on the hill. They continued talking with the members of their group. Accused walked without assistance to the place where the trucks were parked (R15).

6. Winthrop comments upon the question under consideration as follows:

> "To warrant a conviction, it should appear that the accused was aware that the person assailed by him was his superior officer. If the latter was an officer of the same company, regiment or garrison, or if he wore a uniform indicating his rank, the accused may in general be presumed to have known or believed that he was such superior. If the officer was not thus readily recognizable, as * * * where the offence was committed in the night time, it will depend upon all the circumstances, as they appear in the testimony, whether the accused shall be deemed to have had the knowledge or belief requisite. In an encounter with an aggressive subordinate at night, or under circumstances in which he is not likely to be recognized, the superior will properly at once announce who he is, with his rank, &c., and the fact that he did so will be material evidence, as part of the res gestae." (Winthrop's Military Law & Precedents - Reprint - pp 570-571) (Underscoring supplied).

Whether or not accused had knowledge that the person he struck was a commissioned officer was a pure question of fact to be determined by the court from a consideration of all relevant circumstances revealed by the record.

> "Knowledge * * * of particular matters, by its very nature, is not susceptible to direct proof, but must be determined by inference from indicative conduct or from the inherent quality of the occurrences or circumstances by which it was acquired" (Equitable Life Assur.Soc. v. Saftlas (D.C.,E.D.Pa.,1941) 38 Fed.Supp.708, 712, affirmed (CCA-3rd Cir,1942) 129 Fed (2d) 326).

Whether or not Lieutenant Haller identified himself as a commissioned officer to accused, either specifically or generally as a member of the group, was only one of the circumstances to be considered by the court in its determination. That determination, upon the total evidence in the record, was peculiarly within the province of the court, and if there was competent substantial evidence in support thereof, it is entitled to the full benefit of the presumption that it is true and correct and will not be disturbed upon

appeal by the Board of Review (CM ETO 1954, Lovato, and authorities there cited).

The evidence that Lieutenants Haller and Lockwood each gave an order to refrain from using profane language; that Lieutenant Haller was a member of accused's regiment, was dressed in an officer's uniform; and was but two and one-half feet from accused when the blow was struck; that according to one witness the night was not black but gray; and that another witness could recognize the general outline of a man at a distance of about ten yards, in the opinion of the Board of Review, constitutes substantial evidence which justified the court's inference that accused recognized Lieutenant Haller to be a commissioned officer at the time he struck him.

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 (CM ETO 339, Gage), 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 2007, Harris, and authorities there cited). Substantial evidence justified the court in the instant case in concluding, as shown by its findings of guilty, contrary to accused's unconvincing testimony, that he was not intoxicated to such a degree as to be unable either to recognize his superior officer or to realize what he was doing.

7. The charge sheet shows that accused is 26 years four months of age and enlisted at Fort McPherson, Georgia 6 November 1942 to serve for the duration of the war plus six months. No prior service is shown.

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

9. The penalty for striking a superior officer is death or such other punishment as the court may direct (AW 64). The designation of the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England as the place of confinement is authorized (Ltr, Hq ETOUSA, 11 May 1944, AG 252 OPGA, par 2a).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2492

31 MAY 1944

U N I T E D S T A T E S)	FIRST UNITED STATES ARMY.
)	
v.)	Trial by G.C.M., convened at Headquarters, First United States Army, APO 230, Bristol, England, 1 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for six years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WADDELL COOPER (34113012), 619th Ordnance Ammunition Company, 100th Ordnance Ammunition Battalion.)	

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

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

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

CHARGE I: Violation of the 64th Article of War.
Specification: In that Private Waddell (No middle initial) Cooper, Six Nineteenth Ordnance Ammunition Company, One Hundredth Ordnance Ammunition Battalion, having received a lawful command from CAPTAIN EDWARD J. POHIMANN, JUNIOR, Six Nineteenth Ordnance Ammunition Company, One Hundredth Ordnance Ammunition Battalion, his superior officer, to come to attention, did, at Shillingstone, Dorset, England, on or about 8 March 1944, willfully disobey the same.

(84)

CHARGE II: Violation of the 63rd Article of War.
Specification: In that * * *, did, at Shillingstone, Dorset, England, on or about 8 March 1944, behave himself with disrespect toward First Lieutenant SHARON S. ULREY, Six Hundred Nineteenth Ordnance Ammunition Company, One Hundredth Ordnance Ammunition Battalion, his superior officer, by saying to the said First Lieutenant Ulrey, "I don't give a God damn what you tell me to do," or words to that effect.

He pleaded not guilty to and was found guilty of both charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for six years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The charge sheet shows that the accused is 23 years five months of age and that he was inducted at Fort Bragg, North Caroline, 24 May 1941 for the duration of the war plus six months. No prior service is shown.

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

5. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized by AW 42 and Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2.

B. Franklin Riter Judge Advocate

Judge Advocate

Edward V. Sargent Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 31 MAY 1944 TO: Commanding General, First United States Army, APO 230.

1. In the case of Private WADDELL COOPER (34113012), 619th Ordnance Ammunition Company, 100th Ordnance Ammunition Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2492. For convenience of reference please place that number in brackets at the end of the order: (ETO 2492).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2500

31 MAY 1944

U N I T E D S T A T E S)	FIFTH INFANTRY DIVISION.
)	
v.)	Trial by G.C.M., convened at Camp
)	Mount Panther, County Down, North-
Private THOMAS BUSH)	ern Ireland, 11 May 1944. Sentence:
(35152781) Headquarters)	Dishonorable discharge, total for-
Battery, 21st Field)	feitures and confinement at hard
Artillery Battalion.)	labor for eight years. Federal
)	Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93d Article of War.
Specification: In that Private Thomas Bush, Headquarters Battery, 21st Field Artillery Battalion, did, at Ardglass, County Down, Northern Ireland, on or about 28 March 1944, with intent to commit a felony, viz, rape, commit an assault upon Miss Ita Fitzpatrick, by willfully and feloniously throwing the said Miss Ita Fitzpatrick to the ground, choking her, and striking her in the face with his fists.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for eight years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

(88)

3. On the night of 28 March 1944 within a few minutes after 11 p.m. Miss Kathleen Ita Fitzpatrick, a school teacher, was proceeding on a public highway from Killough in the direction of Ardglass in County Down, Northern Ireland. She rode a bicycle. Accused in company with a fellow soldier, Hout, were walking on the same highway from Ardglass towards Killough. They encountered Miss Fitzpatrick at a point about one fourth of a mile from Ardglass. Accused knocked Miss Fitzpatrick from her bicycle to the ground. He then laid on top of her. She struggled to free herself. Accused struck her violent blows with his fists inflicting superficial injuries on her face. He also strangled her with his hands for the purpose of quieting her cries for help. He accompanied his battery upon her person by expressions of his desire for sexual intercourse and the threat to kill her if she did not comply with his will. He made definite effort to disrobe his victim and succeeded in pulling down her underclothing. The approach of other persons caused accused to desist from his purpose. He and his companion then fled from the scene.

(a) There is substantial evidence to prove that accused entertained the specific intent to rape Miss Fitzpatrick when he committed the assault and battery upon her (CM ETO 1673, Denny; CM ETO 1743, Penson; CM ETO 1954, Lovato and authorities cited in said holdings).

(b) The accused denied that he was the soldier who committed the assault upon Miss Fitzpatrick and attempted to establish an alibi. The evidence identifying him as the culprit is substantial and convincing. His testimony in denial of his complicity created an issue of fact, and the findings of the court adverse to him are conclusive upon appellate review (CM ETO 1673, Denny and authorities therein cited).

4. The charge sheet shows that accused is 25 years of age, and that he was inducted into military service on 1 February 1941 for the duration of the war plus six months. He had no prior service.

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

6. Confinement in a United States penitentiary is authorized for the crime of assault with intent to commit rape by AW 42 and Sec.276 Federal Criminal Code (18 U.S.C. 455). The designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement is authorized (Cir.291, WD, 10 Nov 1943 sec.V, par.3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 31 MAY 1944 TO: Commanding General, 5th Infantry Division, APO 5, U.S. Army.

1. In the case of Private THOMAS BUSH (35152781), Headquarters Battery, 21st Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2500. For convenience of reference please place that number in brackets at the end of the order: (ETO 2500).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

15 JUL 1944

ETO 2506

U N I T E D S T A T E S)	CENTRAL BASE SECTION, SERVICES OF SUPPLY, now designated CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Second Lieutenant CHARLES E. GIBNEY (O-684111), 36th Bombardment Squadron (H), 482nd Bombardment Group (P), (attached 41st Station Complement Squadron).)	Trial by GCM, convened at London, England 17-18 April 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for two years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
RITER, SARGENT and HEPBURN, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that 2nd Lieutenant Charles E. Gibney, 36th Bombardment Squadron (H), 482nd Bombardment Group (P), Army Air Force Station 102, Army Post Office 634, United States Army, did, without proper leave, absent himself from his station at Army Air Force Station 102, Army Post Office 634, from about 17 January 1944, to about 14 February 1944.

(92)

CHARGE II: Violation of the 96th Article of War.
(Finding of Not Guilty).
Specification 1: (Nolle Prosequi).
Specification 2: (Finding of Not Guilty).

CHARGE III: Violation of the 94th Article of War.
Specification 1: (Finding of not guilty).
Specification 2: In that * * *, did, at London, England, on or about 18 January 1944, wrongfully and feloniously present for payment a claim against the United States by presenting to the Finance Officer at the Central Disbursing Office, Headquarters SOS, ETOUSA, said Finance Officer being then and there an officer of the United States duly authorized to pay such claim, a signed voucher in the amount of one hundred dollars ($100.00) for services alleged to have been rendered to the United States by said 2nd Lieutenant Charles E. Gibney, which claim was false in that said claim for payment exceeded the amount then due and payable and which claim was then known by the said 2nd Lieutenant Charles E. Gibney to be false.
Specification 3: In that * * *, did, at London, England, on or about 11 February 1944, wrongfully and feloniously present for payment a claim against the United States by presenting to the Finance Officer at the Central Disbursing Office, Headquarters SOS, ETOUSA, said Finance Officer being then and there an officer of the United States duly authorized to pay such claim, a signed voucher in the amount of Sixty dollars ($60.00) for services alleged to have been rendered to the United States by said 2nd Lieutenant Charles E. Gibney, which claim was false in that said claim for payment exceeded the amount then due and payable and which claim was then known by the said 2nd Lieutenant Charles E. Gibney to be false.

ADDITIONAL CHARGE I: Violation of the 58th Article of War.
Specification: In that 2nd Lieutenant Charles E. Gibney, 36th Bombardment Squadron (H), Army Air Force Station 376, presently attached to the 41st Station Complement Squadron, Army Air Force Station 102, Army Post Office 639, United States Army, did, at Army Air Force Station 102, Army Post Office 634, on or about 20 February 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 27 February 1944.

ADDITIONAL CHARGE II: Violation of the 69th Article of War.
Specification: In that * * *, having been duly placed in arrest in quarters at Army Air Force Station 102, Army Post Office 634, on or about 15 February 1944, did, at Army Air Force Station 102, Army Post Office 634, on or about 20 February 1944, break his said arrest before he was set at liberty by proper authority.

ADDITIONAL CHARGE III: Violation of the 96th Article of War.
Specification 1: In that * * *, did, at London, England, on or about 12 February 1944, wrongfully and unlawfully make and utter to Grosvenor House (Park Lane) Limited, a certain check, in words and figures as follows, to wit:

X

No. H 156525 Grosvenor House, Park Lane, London, W.1. 6736
742 Feb. 12, 1944
465 Westminster Bank Ltd. Park Lane Branch.-Pay Grosvenor House or Order, the sum of Twenty six pounds 3 6d.- £26.3.6d
/s/ Charles E. Gibney

and by means thereof did fraudulently obtain credit on the account of 2nd Lieutenant Charles E. Gibney, in the amount of twenty-six pounds, three shillings and sixpence (£26.3.6d), value of approximately one hundred and five dollars forty-eight cents ($105.48), the said 2nd Lieutenant Charles E. Gibney, then well knowing that he did not have and not intending that he should have sufficient funds in the Westminster Bank Limited, Park Lane Branch, London, England, for the payment of said check.

Specification 2: In that * * *, did, at London, England, on or about 19 February 1944, wrongfully and unlawfully make and utter to the Embassy Club, London, England, a certain check, in words and figures as follows to wit:

X

No. H 156530 Grosvenor House, Park Lane, London, W.1. 6736
742 Feb. 19, 1944
465 Westminster Bank Ltd. Park Lane Branch. - Pay cash or Order, the sum of Seven and $^{00}/_{00}$ - £7.0.0d.
/s/ Charles E. Gibney

and by means thereof did fraudulently obtain goods, services and money in the amount of seven pounds (£7.0.0d), value of approximately twenty-eight dollars ($28.00), the said 2nd Lieutenant Charles E. Gibney, then well knowing that he did not have and not intending that he should have sufficient funds in the Westminster Bank Limited Park Lane Branch, London, England, for the payment of said check.

(94)

Specification 3: In that * * *, did, at London, England, on or about 21 February 1944, wrongfully and unlawfully make and utter to Les Ambassadeurs Club, London, England, a certain check, in words and figures as follows to wit:

X

No. H 156531 Grosvenor House, Park Lane, London,W.1. 6736
742 Feb. 21, 1944
465 Westminster Bank Ltd. Park Lane Branch. - Pay Cash, or Order, the sum of Ten pounds only - £10.0.0d.

/s/ Charles E.Gibney

and by means thereof did fraudulently obtain goods, services and money in the amount of Ten pounds (£10.0.0d), value of approximately forty dollars ($40.00), the said 2nd Lieutenant Charles E. Gibney, then well knowing that he did not have and not intending that he should have sufficient funds in the Westminster Bank Limited, Park Lane Branch, London, England, for the payment of said check.

Specification 4: In that * * *, did, at London, England, on or about 22 February 1944, wrongfully and unlawfully make and utter to Les Ambassadeurs Club, London, England, a certain check, in words and figures as follows to wit:

X

No. H 156532 Grosvenor House, Park Lane, London,W.1. 6736
742 Feb. 22, 1944.
465 Westminster Bank Ltd. Park Lane Branch. - Pay Cash, or Order, the sum of Ten pounds - £10.0.0d.

/s/ Charles E. Gibney

and by means thereof did fraudulently obtain goods, services and money in the amount of ten pounds (£10.0.0d), value of approximately forty dollars ($40.00), the said 2nd Lieutenant Charles E. Gibney, then well knowing that he did not have and not intending that he should have sufficient funds in the Westminster Bank Limited, Park Lane Branch, London, England, for the payment of said check.

Specification 5: In that * * *, did, at London, England, on or about 22 February 1944, wrongfully and unlawfully make and utter to Les Ambassadeurs Club, London, England, a certain check, in words and figures as follows to wit:

X

No. H 156535 Grosvenor House, Park Lane, London, W.1. 6736
742 Feb. 22, 1944.
465 Westminster Bank Ltd. Park Lane Branch.- Pay Cash, or Order the sum of Ten pounds only - £10. 0. 0d

/s/ Charles E. Gibney

and by means thereof did fraudulently obtain goods, services and money in the amount of ten pounds (£10.0.0d), value of approximately forty dollars ($40.00), the said 2nd Lieutenant Charles E. Gibney, then well knowing that he did not have and not intending that he should have sufficient funds in the Westminster Bank Limited, Park Lane Branch, London, England, for the payment of said check.

Specification 6: In that * * *, did, at London, England, on or about 22 February 1944, wrongfully and unlawfully make and utter to Les Ambassadeurs Club, London, England, a certain check, in words and figures as follows to wit:

X

No. H. 156537 Grosvenor House, Park Lane, London, W.1. 6736
742 Feb. 22, 1944.
465 Westminster Bank Ltd. Park Lane Branch. - Pay Cash, or Order the sum of Ten pounds only - £10. 0. 0d

/s/ Charles E. Gibney

and by means thereof did fraudulently obtain goods, services and money in the amount of ten pounds (£10.0.0d), value of approximately forty dollars ($40.00), the said 2nd Lieutenant Charles E. Gibney, then well knowing that he did not have and not intending that he should have sufficient funds in the Westminster Bank Limited, Park Lane Branch, London, England, for the payment of said check.

(96)

Specification 7: In that * * *, did, at London, England, on or about 22 February 1944, wrongfully and unlawfully make and utter to The Berkeley Hotel, London, England, a certain check, in words and figures as follows to wit:

X

No. H 156538 Grosvenor House, Park Lane, London, W.1 6736
742 Feb. 22, 1944.
465 Westminster Bank Ltd. Park Lane Branch. - Pay Cash, or Order the sum of Five pounds only - £5. 0. 0d.
/s/ Charles E. Gibney

and by means thereof did fraudulently obtain goods, services and money in the amount of five pounds (£5. 0. 0d), value of approximately twenty dollars ($20.00), the said 2nd Lieutenant Charles E. Gibney, then well knowing that he did not have and not intending that he should have sufficient funds in the Westminster Bank Limited, Park Lane Branch, London, England, for the payment of said check.

Specification 8: In that * * *, did, at London, England, on or about 24 February 1944, wrongfully and unlawfully make and utter to The Berkeley Hotel, London, England, a certain check, in words and figures as follows to wit:

Date
Feb. 24, 1944 Messrs. Westminster Bank Ltd. Park Lane Branch.
Pay The Berkeley Hotel Company Ltd. or Order Seven pounds only
£7. 0. 0d. /s/ Charles E. Gibney

and by means thereof did fraudulently obtain goods, services and money in the amount of seven pounds (£7. 0. 0d), value of approximately twenty-eight dollars ($28.00), the said 2nd Lieutenant Charles E. Gibney, then well knowing that he did not have and not intending that he should have sufficient funds in the Westminster Bank Limited, Park Lane Branch, London, England, for the payment of said check.

Specification 9: In that * * *, having become indebted to Grosvenor House (Park Lane) Limited, London, England, in the sum of ninety-one pounds, fourteen shillings and eleven pence (£91. 14. 11d), value of approximately three hundred and sixty-seven dollars ($367.00), for goods and services, which amount became due and payable on or about 15 February 1944, did, at London, England from about 15 February 1944 to about 7 March 1944, dishonorably and wrongfully fail and neglect to pay said debt.

He pleaded not guilty to all charges and specifications. Two-thirds of the members of the court present when the vote was taken concurring, he was found not guilty of Charge II and Specification 2 thereof and of Specification 1, Charge III, guilty of the Specification of Additional Charge I except the words "desert" and "in desertion" substituting therefor respectively the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty and not guilty of Additional Charge I, but guilty of a violation of the 61st Article of War; guilty of Charge I and its Specification, Charge III and Specifications 2 and 3 thereof, Additional Charges II and III and their respective specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority, the Commanding General, Central Base Section, Services of Supply, European Theater of Operations, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The following facts were established by substantial uncontradicted evidence introduced by the prosecution:

(a) CHARGE I. Specification:

The accused, a second lieutenant (bombardier), member of a combat crew (R13), on 17 January 1944 absented himself without leave from his organization and remained absent until 14 February 1944, as evidenced by the Morning Report of his organization (Pros.Ex.A) and the testimony of his commanding officer (R12). On 15 January 1944 he had been given a 24-hour pass which was extended to 48 hours by his commanding officer by reason of his absence. Having failed to return he was, on 17 January, carried as AWOL (R13). On 14 February 1944 the accused was arrested by military police of the Central Base Section and taken by train to the location of his organization and delivered to the military police there (R14,15).

(b) CHARGE III, Specifications 1, 2, and 3:

By stipulation (Pros.Ex.F) it was agreed that the monthly pay of the accused as a second lieutenant, including overseas pay, subsistance allowance and flying pay, totaled $268.50, from which there was to be deducted monthly allotments of $56.50, leaving a net balance due the accused monthly of $212.00. It was further agreed in the same stipulation that flying pay was due the accused in the amount of $82.50 per month (included in the foregoing total monthly income) for the months of November and December 1943 but not thereafter, so that for the months

of January and February, 1944, if earned, the accused would be entitled to receive a monthly net amount of $129.50.

It was further stipulated and agreed (Pros.Ex.G) that after the accused had received $30.00 from the Finance Officer on 6 January 1944 there remained to his credit with the United States Government the sum of $41.15 on that date. It was further stipulated (Pros.Ex.H) that accused made and signed the following pay vouchers:

On 10 January 1944 voucher No.28699,(R28 & 29,Pros.Ex.I)	$115.00
On 18 January 1944 voucher No.29507,(R29, Pros. Ex. J)	100.00
On 31 January 1944 voucher No.30488,(R29, Pros. Ex. K)	75.00
On 11 February 1944 voucher No.34981(R30, Pros. Ex. L)	60.00
Total	$350.00

The foregoing vouchers were presented by the accused to the Central Disbursing Office, European Theater of Operations, London, England and were paid by an officer of the United States duly authorized to pay claims (R36). The Finance Officer of that station testified that in view of the absence without leave of the accused during the period 17 January to 14 February 1944 the accused had collected, by means of vouchers, from the United States the total sum of $363.80 on 11 February 1944 in excess of that which was due him. On each of the foregoing occasions on which he drew a partial payment the amount drawn exceeded the amount which was due him at the time (R37). It was further shown that the Finance Office will make partial or full payment to any officer properly identified for his services to the date of his request upon his submitting a voucher setting forth the amount he claims to be due together with his pay data card. The responsibility for the correctness of the voucher rests upon the officer submitting the voucher (R28). During the 30 days from 10 January 1944 to 11 February 1944, the accused collected from the United States by means of the vouchers referred to above the total sum of $350.00 when his net pay for such period was $129.50, without taking into consideration any absence without leave (R24,26).

(c) ADDITIONAL CHARGE I, and ADDITIONAL CHARGE II and Specifications:

When the accused was returned by the military police to his Station 102 on 15 February 1944, he was placed under arrest in quarters by order of his commanding officer, Colonel Moore. The arrest was effected by reading to him by the Adjutant, Lt. R.M. Colgrove, the order of Colonel Moore.

On 20 February 1944 Major J. A. Smith, who had been appointed as Investigating Officer in the accused's case, called at the quarters to which the accused had been restricted and found that he was absent. A search followed throughout the base by this officer and others and the accused could not be found (R17,18). As a result, the accused on 21 February 1944 was entered in the Morning Report as absent without leave (Pros. Ex.C, R19).

The morning report of accused's station on 3 March 1944 carried the following entry:

> "O-684111 Gibney (Atchd) 2nd Lt
> Fr AWOL to ar in Conf Sta Guard House
> as of 2120, 1 March 1944"(Pros.Ex.D, R19).

On 4 March 1944 the morning report at the same station showed:

> "O-684111 Gibney (Atchd) 2nd Lt
> remark of 3 Mar 44 pertinent to the
> above officer is deleted and substi-
> tuted therefore: Fr desertion to ar in
> conf Sta Guard House asof 2120 hours
> 1 Mar 44" (Pros.Ex.D, R19).

The accused was apprehended in London on 1 March 1944 by a member of the Provost Marshal's Office who observed him walking on one of the city streets. At that time the accused stated he was on his way back to his station (R21). This officer delivered the accused to another member of the military police who conducted the accused back to his station. Accused had in his possession a return ticket from London to his station (R23). The order for the accused's arrest of 15 February 1944 had not been rescinded and was still in effect on 20 February 1944 (R23).

(d) ADDITIONAL CHARGE III and Specifications:

On 26 January 1944 the accused opened an account at the Westminster Bank, Park Lane Branch, Grosvenor House, London. The account was closed on 16 March 1944. During the existence of the account he deposited a total of £225. On 10 February 1944 the balance in his account was £1.12.0. He made no further deposits in that account after that date (R38,41). On or about 11 February 1944 he received a letter from the bank to the effect that a check had been presented there for an amount in excess of the balance on hand. On that date he went to the bank and provided it with sufficient funds to meet the check (R40). On 12 February 1944 the accused made and delivered to the Grosvenor House his check for £26.3.6 (Pros.Ex.N) drawn on the Westminster Bank, Park Lane Branch, Grosvenor House, London, in partial payment of his hotel bill from 6 February to 8 February 1944 (R47). At the time he owed the hotel a bill of £58.18.6 thereby leaving a balance of £32.15 (R47). The accused continued to reside at the hotel until 15 February 1944 but made no further payments. As of 15 February 1944 he owed the hotel £65.11.5 for his hotel bill and the amount of the check referred to above, making a total of £91.14.11. This sum had not been paid at the time of the trial (R47,48). The accused's check was presented for payment at the bank on which it was drawn and payment was refused for the reason that there was not sufficient funds to the credit of the accused to make payment (R47).

(100)

The accused issued and negotiated the following checks drawn on Westminster Bank Park Lane Branch:

Date of check	Amount	Payee	Cashed by
19 Feb 1944	£7	Cash	Embassy Club (R50-51,Pros.Ex.O)
21 Feb 1944	£10	Cash	Les Ambassadeurs Club (R52,Pros.Ex.P)
22 Feb 1944	£10)		
22 Feb 1944	£10)	Cash	Les Ambassadeurs Club
22 Feb 1944	£10)		(R56,Pros.Exs.Q,R,S)
22 Feb 1944	£5	Cash	Berkeley Hotel (R57,Pros.Ex.T)
24 Feb 1944	£7	The Berkeley Hotel Co.	The Berkeley Hotel Co. (R60,Pros.Ex.U)

All of the foregoing checks were presented to the drawee bank by the respective owners and indorsees thereof and in each instance payment was refused because of insufficient funds or credit.

It was stipulated that all of the checks referred to above were signed by the accused (R61,Pros.Ex.V).

4. The accused having been advised of his rights elected to testify under oath. His testimony may be summarized as follows:

He is 24 years of age, unmarried and was never on trial before in any court (R72). In civil life he had never been regularly employed but lived with his father who provided him with money whenever he needed it (R73). He came to England in November 1943 and at that time had five or six hundred dollars in his possession. After completing a 10-day course of instruction after his arrival, he was given frequent leaves of absence and passes during which he came to London and stayed at the Grosvenor House (R74-75).

About 4 January 1944 he was transferred to the 36th Bombardment Squadron at Station 102. On or about the 16th of January, 1944, he was given a 48-hour pass and went to London. He was due back on Monday. 17 January but for no reason he did not go back. He was drinking considerably and did not think clearly (R76). He remained absent for 23 days during which time he drank heavily and to excess. He incurred obligations which were larger than he had anticipated but believed his father would send him the money with which to pay them (R77). His father refused. The accused did not advise his father of the serious nature of his present difficulties. He claimed he had no intention to defraud anyone. He was willing but presently unable to take care of his obligations. He owned a piece of real estate valued at $5,000 which he was willing to convert for that purpose (R79). When he drew partial payments from the

Finance Office. He did not realize that he was drawing more than that which was due him. He thought that flying pay could be collected before it was earned (R79).

He admitted that he broke the terms of his arrest on 20 February 1944 and went to London. He blamed his action upon his intoxicated condition as a result of consuming an excessive amount of liquor offered by transient combat crews (R80-81). On 27 February 1944 he purchased a ticket to return to his station from London, missed his train and was walking about London waiting for the next train when picked up by the military police (R82).

On cross examination, he admitted that he was indebted to the Grosvenor House and, although he made no arrangement personally to make payment, he did ask a fellow officer to telephone to the manager of the hotel that he would take care of it as soon as possible (R85). He further admitted that he executed and presented the pay vouchers (Pros. Exs.J,L), and received the amounts appearing thereon; and that he signed the checks (Pros.Exs.N-U incl.) and received value for them knowing at the time that there was not sufficient funds in the drawee bank to cover them (R86-87).

The defense called two officers as witnesses who testified as to accused's indulgence in intoxicants while confined to his quarters under arrest on 20 February 1944 (R62,64). A floor waitress of the Grosvenor House testified that the accused drank whiskey excessively and continually while occupying a room in that hotel (R66). Mr. Norman A. Myers, a technician of the United States Navy, testified as to the excessive drinking indulged in by the accused in London during both of his visits and that on 27 February 1944, the accused informed him that he was going to return to his post on that day (R67-68). Lt. Bardin C. Wallace testified that the accused telephoned him on 27 February 1944 and stated that he was returning to his base, and that he had not taken anything to drink that day (R70).

5. (a) The prosecution proved beyond all doubt and the accused has admitted under oath all of the facts in support of the findings of guilty of absence without leave as averred in the specifications of Charge I and Additional Charge I; that he deliberately breached his arrest in quarters as charged in Additional Charge II; that he presented the two false claims by means of the vouchers (Pros.Exs.J,L) to the Finance Officer in London and procured the money from the United States on the dates and in the amounts averred in the Specifications 2 and 3, Charge III; that he issued and negotiated the eight checks (Pros.Exs.N-U incl.) in the amounts, on the dates and to the persons as averred in Specifications 1 to 8 inclusive of Additional Charge III and did thereby procure the money, credit or goods set forth therein at a time when he knew that he did not have sufficient funds on deposit with the drawee bank to make payment of the checks; and that he occupied quarters at the Grosvenor House in London during one of his unauthorized absences and incurred an indebtedness to that hotel which

totalled on 15 February 1944 the sum of £91.14.11, which sum is still owing and unpaid, as averred in the Specification 9, Additional Charge III. There were no issues of fact raised. The defense of intoxication and excessive drinking was in extenuation and did not constitute a denial of any of the offenses of which the accused was found guilty.

The defense denied the existence of fraud in connection with the issuance of the checks and dishonesty with reference to the indebtedness to the Grosvenor House. In view of the court's finding of fraud and dishonesty these offenses, all under Additional Charge III, warrant discussion.

(b) The gravamen of the offense of issuance of bank checks without sufficient funds or credit to insure payment thereof is the intent to defraud. In order to sustain a conviction the burden was on the prosecution to prove beyond a reasonable doubt that accused not only signed and uttered the checks particularly described without a sufficient credit balance or without a credit arrangement at his bank to secure their prompt payment, but also that he uttered them with a fraudulent intent. Proof of merely "over drafting" of one's bank account and nothing more does not prove a criminal offense (Burnham v Commonwealth, 228 Ky. 410, 15 SW (2nd) 256; People v Humphries, 226 App.Div.500, 234 NY Supp. 688; State v Felman, 50 SW (2nd) (Mo.App.) 683; People v Becker, 137 Cal. App.349, 30 Pac.(2d) 562; Seaboard Oil Co. v Cunningham, 51 Fed.(2d) 321, Cert.denied 284 US 657; 76 L.Ed., 557).

> "The gist of the statutory offense of drawing, with intent to defraud, a check or draft upon a bank, with knowledge at the time of such drawing of the insufficiency of funds in or credit with such bank to meet it upon presentation, is such fraudulent intent and knowledge, and it is essential that the drawer should have not only knowledge of the insufficiency of his funds or credit, but an intent to defraud.
>
> * * * * * *
>
> By reason of either the express provision of the statute, or judicial construction thereof to that effect, the gravamen of the offense denounced by 'bad check' statutes is the intent to defraud, which is an indispensable element of the crime" (95 ALR, Annotation, p.489).

Fraud may properly be inferred from evidence that accused, knowing that he had no funds or credit arrangement at his bank, procured money by means of his own worthless checks drawn on that bank, repeatedly and in the course of a systematic utterance of the checks (Paine v United States, 7 Fed.(2d) 263,264; 1 Wharton's Criminal Evidence, 11th Ed., sec.232,p.275).

It was well within the province of the court in the instant case to find that the accused intended to defraud those to whom he gave his worthless checks in exchange for money, services or goods. Not only were the recipients of the checks defrauded but the entire military service was discredited and its reputation affected by the accused's conduct. The utterance of worthless checks under such circumstances whether in exchange for value or in payment of a debt past due has properly been held to constitute a violation of the 96th Article of War (CM 236069 Herdfelter; CM 236509 Veal; CM 245721 Justus; CM 249006 Vergara; CM 253638 Kent; CM ETO 1803, G.Wright; CM ETO 2581, Rambo).

(c) With reference to finding that the accused dishonorably failed and neglected to pay his hotel bill as averred in Specification 9, Additional Charge III, the mere failure of an officer to pay a debt is not a dishonorable act in violation of Article of War 96 unless the failure to pay the same is characterized by fraudulent design to evade payment or the debt was incurred deceitfully or fraudulently under facts and circumstances which would bring discredit upon the military service (CM 233182 (1943), Bull.JAG, Aug.1943, Vol.II, No.8, sec.454(47), p.313; CM ETO 2581, Rambo, supra).

In the instant case it was dishonest for the accused to incur an obligation of the amount involved ($367.00), which included large charges for liquor, when he had drawn on his military pay in excess of amount due him, had no funds to his credit at his bank or visible liquid assets nor other means of income than his pay as an officer, and had outstanding numerous worthless checks. To remain at a hotel and procure lodging, liquor and food thereat and then finally to give the hotel a worthless check on account in order to procure further credit was dishonest and deceitful and was conduct such as to bring discredit upon the military service in violation of Article of War 96.

6. The Charge Sheet shows the accused to be 24 years six months of age. He enlisted in the service at Springfield, Massachusetts, on 7 July 1941 and served until 24 June 1943 when he was commissioned a second lieutenant.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal of an officer and confinement are authorized upon conviction of a violation of Article of War 61, 94, 69 or 96.

(104)

8. The designation by the reviewing authority of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement is authorized (Cir.210, WD, 14 Sep.1943, sec.VI, as amended; AW 42).

_____ Judge Advocate

_____ Judge Advocate

(ABSENT ON DETACHED SERVICE) Judge Advocate

CONFIDENTIAL

(105)

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 18 JUL 1944 TO: Commanding General, ETOUSA, APO 887, US Army.

1. In the case of Second Lieutenant CHARLES E. GIBNEY (O-684111), 36th Bombardment Squadron (H), 482nd Bombardment Group (P), (attached 41st Station Complement Squadron), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2506. For convenience of reference please place that number in brackets at the end of the order: (ETO 2506).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 57, ETO, 27 Jul 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2507

15 JUN 1944

U N I T E D S T A T E S	5TH INFANTRY DIVISION.
v.	
Captain SHELBY D. FOOTE (O-1165017), 50th Field Artillery Battalion.	Trial by G.C.M., convened at Mourne Park Camp, County Down, Northern Ireland, 22 April 1944. Sentence: Dismissal.

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Captain Shelby D. Foote, 50th Field Artillery Battalion, did, without proper leave, absent himself from his station at Mourne Park, County Down, Northern Ireland, from about 0001 hours 26 March 1944, to about 2300 hours 26 March 1944.

CHARGE II: Violation of the 94th Article of War.
(Finding of Not Guilty)
Specification: (Finding of Not Guilty)

CHARGE III: Violation of the 95th Article of War.
Specification 1: (Finding of Not Guilty)
Specification 2: In that * * *, did, at Mourne Park, County Down, Northern Ireland, on or about 25 March 1944, with intent to deceive Lieutenant Colonel W. R. Calhoun, 50th Field Artillery Battalion, officially enter under the heading "vehicle released at" on a trip ticket turned in to the said Lieutenant Colonel Calhoun, the nota-

tion "2400", when he well knew said notation to be false.

Specification 3: In that * * *, did, at Mourne Park, County Down, Northern Ireland, on or about 25 March 1944, with intent to deceive Lieutenant Colonel W. R. Calhoun, 50th Field Artillery Battalion, alter a trip ticket, being an official record of Battery C, 50th Field Artillery Battalion, turned in to the said Lieutenant Colonel Calhoun, by changing on said record the notation "0435" to read "2400", he, the said Captain Foote well knowing at the time of the alteration the original entry to be approximately correct, and the later entry to be false.

Specification 4: In that * * *, did, at Mourne Park, County Down, Northern Ireland, on or about 25 March 1944, with intent to deceive Lieutenant Colonel W. R. Calhoun, 50th Field Artillery Battalion, alter a daily dispatching record, being an official record of Battery C, 50th Field Artillery Battalion, turned in to the said Lieutenant Colonel Calhoun, by changing on said record the notation "0435" to read "2400", he, the said Captain Foote well knowing at the time of the alteration the original entry to be approximately correct, and the later entry to be false.

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

Specification: In that * * *, did, at Mourne Park Camp, County Down, Northern Ireland, on or about 24 March 1944, after having obtained the dispatching of a U.S.Government motor vehicle for the express purpose of transporting enlisted men to a hospital to visit one of their fellow soldiers, did fail to report to his commanding officer a subsequent development that no enlisted men would make the trip, and did devote the said vehicle to his personal use.

He pleaded not guilty to all charges and specifications and was found guilty of Charge I and its Specification, Charge III and Specifications 2,3 and 4 thereof, Charge IV and its Specification except the words "and did devote the said vehicle to his personal use," of the excepted words, not guilty; not guilty of Charge II and its Specification and not guilty of Specification 1, Charge III. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 5th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but remitted that portion thereof adjudging forfeiture of all pay and allowances due or to become due and withheld the order directing the execution

of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence against the accused was in substance as follows:

Accused was on 26 March 1944 and for several months previous thereto, the commanding officer of Battery "C", 50th Field Artillery Battalion, stationed at Mourne Park, County Down, Northern Ireland, some 50 miles from Belfast (R19). On the evening of 23rd March, accused asked his 1st sergeant, Albert R. Dail to find out if any men in the battery wanted to go to the 79th General Hospital near Belfast to see Sergeant Head of their organization confined there (R56-57). No men were able to go (R58) and the sergeant sent Technician 5th Grade Geno E. Ferri, a driver, down to the "quarters" on the evening of 24 March to tell accused the men were not going to Belfast (R37). Accused had previously requested from Major Bernard B. Blank, battalion executive of the 50th Field Artillery, and been given authority to take a vehicle for the particular purpose of taking the men on the visit to the hospital providing an officer accompanied it (R8,22). Accused took the vehicle without informing Major Blank that the purpose of the trip had ceased and with Ferri as driver and Captain John S. Twist, also a battery commander of the same organization as a passenger, (R74) left for Belfast about 7:30 p.m. 24 March (R37,43), proceeding directly to the home of accused's girl in Belfast, after leaving Captain Twist in town. The driver then took the vehicle to the motor park. They did not go to the hospital (R38,43). The vehicle trip ticket for the trip to the hospital was admitted in evidence as Pros.Ex. A (R9). Ferri filled in the trip ticket on arrival and delivered it to the military police at the car park. At 11:30 p.m. he returned to pick up the car (R38-39) and signed for the trip ticket and it was returned to him. He entered the car and waited for accused who, with his girl arrived at about 2:30 a.m., 25 March, Ferri then drove the accused and his girl to her home and waited outside possibly an hour when accused came out and they drove back to camp (R40). At approximately 4:40 a.m. on the morning of 25 March Montague M. Lacy, Warrant Officer of accused's unit who slept in the same hut with accused was awakened by someone entering the hut. His flash-light showed accused fully dressed (R63). Accused then undressed and went to bed. Ferri's watch "said 4:35" when they arrived at camp but at that time it had run down and stopped (R46). Ferri put "time in 4:35" on the ticket as the time of their return (R38). Accused did not sign the trip ticket that night (R47). Corporal Richard E. Rudnicki who slept in the same hut with Ferri was awakened by Ferri coming in around five o'clock. He was fully dressed and was filling out a trip ticket when Rudnicki went back to sleep (R65). Ferri went to bed leaving the trip ticket by his bunk (R39,40). The motor sergeant (Haddix) took the ticket from Ferri the next morning (R41) and turned it into the orderly room about 7:35 (R52). At that time it had "4:35" on it but when Pros.Ex.A. was shown to and identified by Ferri in court, his writing had been scratched out and "2400" substituted (R33,38,41,53,86-87). The destination shown on it was 79th General Hospital (R19). It was signed by accused (R9,10). The motor sergeant, Elmer Haddix of the same unit, was battery dispatcher (R52) and kept the daily dispatch record (R53). He put on it among other entries, "time in 0435" (R53,59) but it had since been "blurred up". He then laid the daily dispatch record with the trip ticket for the day stapled to it,

on the battery commander's (accused) desk for his signature (R52,54,59). Accused came in about 7:30 a.m. and the papers were sent to the battalion executive about eight o'clock (a.m.) (R59-60). Apparently the figures on both the dispatch record and trip ticket had been changed by some one (R54). Pros.Ex.A and B appeared at the time of trial identical with their appearances when turned over to the battalion executive. The drivers turn in the trip tickets to the motor sergeant who consolidates them on the dispatch record. The battery commander then looks them over and from there they go to battalion headquarters usually to the battalion executive (R84). Both were signed by accused (R9-10,24).

4. Passes for battery commanders of accused's organization were granted either by Major Blank or by Lieutenant Colonel William R. Calhoun, the commanding officer (R7). On 25 March accused requested of Major Blank, the use of a vehicle to accompany Chaplain Wright of the Division Artillery, to conduct an investigation relative to his (accused's) request to marry a Belfast girl. He was specifically asked if the proceedings would necessitate their staying late at night or perhaps overnight and accused stated definitely that it would not, that he "would be back some time early that night". On this basis the request was granted (R11). Although he had said "sometime early that night", he should have been in by either 2400 hours or 0100 hours the following morning. It was well understood he had no permission to be gone after midnight (R23). Chaplain William W. Wright testified they left camp about 1:30 in the afternoon. They made the trip to Belfast and he made the investigation, left the girl's home about 4:30 in the afternoon and returned to camp in accused's car. He left accused at the girl's home (R11,69-70). Accused was not seen in camp on the next day, Sunday, 26 March and his bed had apparently not been slept in the night of the 25th March (R12,62,67). Accused did not attend an officers' meeting called for seven o'clock Sunday night. Warrant Officer Montague M. Lacy testified that he slept in the same hut with accused and was in the hut most of 26th March and that accused was not there up to ten o'clock when he went to bed but was there in bed the next (Monday) morning (R62-63). Captain Albert Sumner of accused's unit, who slept in the hut with accused, testified that accused was not seen on 26th March up to 11:00 when he retired but was in his bed at 6:30 the next morning (R67). Permission would have to be obtained before a battery commander could be absent from one o'clock Sunday morning until midnight Sunday (R49-50).

5. Accused remained silent. In a "request for clemency" signed by accused and attached to the record of trial at his request contained therein, he bases his request on some alleged irregularities not materially affecting his rights and the further plea that

> "The nature of the offenses charged in the specifications under the 95th Article of War, even if properly proven-- misrepresentation of 'time in' on a recreational trip ticket and its accompanying dispatch record-- is not of such gravity as to justify arraignment under said article, and would have been charged more properly under an article permitting a lesser sentence than dismissal. In support of this claim, I point out that the

offense is not unusual, and has recently been punished in this battalion under the 104th Article of War by verbal reprimand and withdrawal of recreational transportation privileges for a limited time." (Par.2a Clemency letter).

6. When the court in its findings by exceptions, acquitted accused of devoting the truck to his personal use, it in effect found him not guilty of Charge IV and its Specification. No offense remained. The dereliction charged to accused was the misapplication of the vehicle, designated to be used only to transport members of the battery to the hospital on a visit and not used by accused for that purpose but diverted to his own use.

7. Charge I and its Specification are clearly proved by uncontroverted evidence. Accused's guilt of Charge III and Specifications 2,3 and 4 thereof is convincingly shown by circumstantial evidence. The trial court's findings except as to Charge IV and its Specification are based on material probative evidence and will not be disturbed on appellate review. (CM ETO 2358, Pheil, and authorities therein cited).

8. The charge sheet shows accused to be 27 years four months of age. He attended Officer Candidate School 22 January to 14 April 1942, was commissioned a Second Lieutenant 15 April 1942, promoted to First Lieutenant 22 May 1942 and to Captain 10 February 1943. No prior service is shown.

9. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge III and Specifications 2,3 and 4 thereof only and to support the sentence. Dismissal is mandatory upon conviction of an officer of a violation of Article of War 95 and is authorized upon a conviction of a violation of Article of War 61.

B. Franklin Peters, Judge Advocate

Rhydan Burchsted, Judge Advocate

Edward H. Sargent, Judge Advocate

(112)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 15 JUN 1944 To: Commanding General, ETOUSA, APO 887, U.S.Army.

1. In the case of Captain SHELBY D. FOOTE (O-1165017), 50th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and of Charge III and Specifications 2,3 and 4 thereof only and to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2507. For convenience of reference please place that number in brackets at the end of the orders (ETO 2507).

E. C. McNEIL,
Brigadier General, United States Army
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 46, ETO, 24 Jun 1944)

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Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2533

10 JUN 1944

UNITED STATES	5TH ARMORED DIVISION.
v.	Trial by G.C.M., convened at Ogbourne, St. George, Wiltshire, England, 19 April 1944. Sentence: To be dismissed the service (suspended).
First Lieutenant FRANCIS G. MOFFIT (O-1016954), Service Company, 47th Armored Infantry Battalion.	

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

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

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

CHARGE I Violation of the 96th Article of War.
Specification: In that 1st Lt. FRANCIS G. MOFFIT, Service Company, 47th Armored Infantry Battalion, was, at Wroughton, Wiltshire, U.K., on or about 20 March, 1944, in a public place, to wit, Three Tuns Inn, drunk while in uniform.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority, the Commanding General, 5th Armored Division, approved the findings but only so much of the sentence as provides for dismissal from the service and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as approved, but owing to special circumstances in this case, suspended the execution thereof. The proceedings were published in General Court-Martial Orders

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No. 34, Headquarters European Theater of Operations dated 20 May 1944.

3. The evidence shows that accused and Second Lieutenant Raymond E. Rousseau of accused's unit went to the Three Tuns Inn at Wroughton, England with two ladies (R8) on the evening of 20 March 1944 (R30) and drank there in a room used also by civilians and soldiers (R34). Private Alton C. Parrott, Military Police Platoon, 5th Armored Division, was on duty in Wroughton that night with Private Edward Janicke, also of the Military Police (R7). The "pubs" closed at ten o'clock, 2200 hours. They stopped at the Three Tuns Inn at about 10:20 p.m. and were requested by the proprietor to help him clear "the Yanks out of the inn." In a lounge they found accused, another Lieutenant (Rousseau) and two ladies (R8). Accused was half seated, half lying in a chair, drunk. His blouse was not buttoned, his hair was "messed up" and his uniform disarranged (R9). Parrott assisted him to his feet to take him out and Lieutenant Rousseau slapped him at least three times across the face. As accused was unable to walk Parrott carried him out over his shoulder. He left him outside on the side-walk in the care of Janicke and went to telephone for transportation (R10). On his return he found accused had fallen (R11) and cut his right eye (R41). A jeep arrived and it was necessary to lift accused into the vehicle (R11). Lieutenant Rousseau secured a cab and as the military policemen said they would look after accused, he took the two ladies home (R32). Accused was taken to the military police station in Swindon where his condition was noted. He had a gash over his eye, his clothing and tie were disarranged, his fly was "unzipped" and he smelled strongly of liquor. First aid was administered at a nearby dispensary. Accused first refused to give his name, rank, organization or serial number but finally produced his War Department identification card. He was sent to the 130th Station Hospital (R25,27). Accused kept pulling off the dressing which was put on his eye (R21,26-27). The military police officer was told at the hospital to allow accused "to go home and sober up - that the cut on his eye was not of a serious nature" (R28).

4. For the defense, Lieutenant Rousseau testified that when the military police came in and said, "Its time to leave," he got up and accused seemed "kinda sick and I believe he threw up or something, and I told him I would help him outside. He was sick; he wasn't drunk." However, Parrott (R9), Janicke (R40-41), Private First Class Schlegel, the military policeman who drove the jeep (R19), Staff Sergeant Robert Prudhoe, in charge of the jeep (R22), Second Lieutenant Peter J. O'Neil, in charge of the military police in the Swindon area (R28) and the officer at the hospital all were of the opinion that accused was drunk. He was in uniform when found drunk in the lounge of the public house. Accused did not testify (R35).

5. The charge sheet shows that accused is 30 years of age. He enlisted 30 September 1937, was appointed a Warrant Officer, junior grade on 10 March 1942 and was commissioned on 20 March 1943.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 JUN 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of First Lieutenant FRANCIS J. MOFFIT (O-1016954) Service Company, 47th Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. Copies of the published order No.34, Headquarters, European Theater of Operations, 20 May 1944, were received in this office on 27 May 1944 with the record of trial.

3. Copy of original holding and this indorsement should be returned to this office.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2535

9 JUN 1944

U N I T E D S T A T E S	4TH ARMORED DIVISION.
v.	Trial by G.C.M., convened at Chippenham, Wiltshire, England, 12 May 1944.
Private MARTIN C. UTERMOEHLEN (39683275), Headquarters Company, 10th Armored Infantry Battalion.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Martin C. Utermoehlen, Headquarters Company, 10th Armored Infantry Battalion, did, at Chippenham, Wiltshire, on or about 1 March 1944, feloniously embezzle by fraudulently converting to his own use about £ 30, 19 shillings and 7 pence, coin and notes of the Bank of England, of the value of about one hundred and twenty-five dollars ($125.00), the property of Technical Sergeant Joseph E. Schmidt, entrusted to him by the said Technical Sergeant Joseph E. Schmidt for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 2: In that * * *, did, at Chippenham, Wiltshire, on or about 6 March 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN," to a receipt in the following words and figures, to wit:

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War Department
Finance Department
Form No. 38
Approved Nov.24,1930
£ s d
30-19-7
$125.00

WAR DEPARTMENT
Finance Department
RECEIPT FOR MISCELLANEOUS COLLECTIONS
10th Armd Inf Bn. APO 254,
c/o PM. N.Y 6 Mar 1944

Received in cash of from) Tech Sgt Joseph E. Schmidt 32132732, Hqs Co 10th Armd Inf B.
One Hundred & twenty five Dollars and no/100 Cents,
For transmittal to: Mrs Margaret, Schmidt, 4045 Lake Ave. Rochester (12) N.y.
Trust Funds. 218912 -

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA, Pers. Off.

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 3: In that * * *, did, at Chippenham, Wiltshire, on or about 31 January 1944, feloniously embezzle by fraudulently converting to his own use about £ 25 in notes of the Bank of England, of the value of about one hundred dollars and eighty-eight cents ($100.88), the property of Technical Sergeant Charles O. Graham, entrusted to him by the said Technical Sergeant Charles O. Graham for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 4: In that * * *, did, at Chippenham, Wiltshire, on or about 31 January 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures, to wit:

WAR DEPARTMENT WAR DEPARTMENT P.T.A.
FINANCE DEPT. FINANCE DEPT
FORM NO. 38 RECEIPT FOR MISCELLANEOUS COLLECTIONS
Apvd.Nov.24,1930
$100.00 Org. Hqs Co 10th Armd Inf Bn. APO 254 Date 31 January 1944
Received in cash of Charles O. Graham (NAME) Tech Sgt (RANK) 15057420 (ASN)
25 Pounds Dollars and no/100 Cent
for transmittal to: Miss. Jane Lee Bannister. (NAME) (ADDRESS)
(City and State) Thurmond, West Virginia.
App: Trust Fund 218912 PA
/s/ Murray J. Kern (Personnel Officer)

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 5: In that * * *, did, at Chippenham, Wiltshire, on or about 1 February 1944, feloniously embezzle by fraudulently converting to his own use about £ 49, 11 shillings and 4 pence, coin and notes of the Bank of England, of the value of about two hundred dollars ($200.00),

the property of Staff Sergeant Jack W. Medford, entrusted to him by the said Staff Sergeant Jack W. Medford for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 6: In that * * *, did, at Chippenham, Wiltshire, on or about 5 February 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures, to wit:

WAR DEPARTMENT — WAR DEPARTMENT — PTA.
FINANCE DEPARTMENT — FINANCE DEPARTMENT
Form No.38 — RECEIPT FOR MISCELLANEOUS COLLECTIONS
Approved Nov.24,1930 — APO 254 c/o PM. N.Y., N.Y.
£ s d — 5 February 1944
49-17-4
$200.00 Received in cash of from) Jack W. Medford, 6925860, 10th Armd Inf Bn.
Two Hundred ------ Dollars and 00/100 Cents.
For transmittal to: Mrs Marjorie E. Medford Box 917 Rt # 2 Tucson, Arizona.
APP. Trust Funds 218912

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA, Personnel Officer

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification: 7: In that * * *, did, at Chippenham, Wiltshire, on or about 29 February 1944, feloniously embezzle by fraudulently converting to his own use about £ 44, 12 shillings and 2 pence, coin and notes of the Bank of England, of the value of about one hundred eighty dollars ($180.00), and about twenty dollars ($20.00) United States money, of a total value of about two hundred dollars ($200.00), the property of Staff Sergeant Alexander Slamka, entrusted to him by First Sergeant Donald F. Darnell for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification: 8: In that * * *, did, at Chippenham, Wiltshire, on or about 2 March 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures, to wit:

WAR DEPARTMENT — WAR DEPARTMENT
FINANCE DEPARTMENT — FINANCE DEPARTMENT
Form No. 38 — RECEIPT FOR MISCELLANEOUS COLLECTIONS
Approved Nov.24,1930 — 10th Armd Inf Bn. APO 254,
£ s d — c/o PM. N.Y. 2 Mar 1944
49-11-4
$200.00 Received in cash of from) S/Sgt. Alexander, Slamka, 35123798. Hqs Co 10th Armd Inf Bn.
Two Hundred --------- Dollars and no/100 Cents.

For transmittal To: Mr. Charles Connor, 2902 Fleming Road
Middletown, Ohio
APP. Trust Funds. 218912

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA Pers. Off.

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 9: In that * * *, did, at Chippenham, Wiltshire, on or about 2 March 1944, feloniously embezzle by fraudulently converting to his own use about £ 25 in notes of the Bank of England, of the value of about one hundred dollars and eighty-eight cents ($100.88), the property of Staff Sergeant Dallas C. Spray, entrusted to him by the said Staff Sergeant Dallas C. Spray for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 10: In that * * *, did, at Chippenham, Wiltshire, on or about 2 March 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures, to wit:

WAR DEPARTMENT — WAR DEPARTMENT
FINANCE DEPARTMENT — FINANCE DEPARTMENT
Form No.38 — RECEIPT FOR MISCELLANEOUS COLLECTIONS
Approved Nov.24,1930

£ s d — 10th Armd Inf Bn. APO 254,
24.15 8 — c/o PM. N.Y., 2 Mar 1944
$100.00 Received in cash of from) S/Sgt Dallas C. Spray,
35100873, Hqs Co 10th Armd Inf Bn.
One Hundred ------- Dollars and no/100 Cents.
For transmittal To: Mrs Dallas C. Spray, RFD #1
Ewing, Indiana.
APP. Trust Funds 218912

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA Pers. Off.

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 11: In that * * *, did, at Chippenham, Wiltshire, on or about 1 February 1944, feloniously embezzle by fraudulently converting to his own use about £ 25 in notes of the Bank of England, of the value of about one hundred dollars and eighty-eight cents ($100.88), the property of Sergeant Loren D. Collins, entrusted to him by the said Sergeant Loren D. Collins for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 12: In that * * *, did, at Chippenham, Wiltshire, on or about 4 February 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures, to wit:

WAR DEPARTMENT
FINANCE DEPARTMENT
Form No.38
Approved Nov.24,1930

WAR DEPARTMENT
FINANCE DEPARTMENT
RECEIPT FOR MISCELLANEOUS COLLECTIONS

£ s d
24-15-8
$100.00

APO 254, c/o PM. New York, N.Y.
4 Feb 1944

Received in cash of from) Loren D. Collins, 33277509, 10th Armd Inf Bn.
one Hundred --------- Dollars and no/100 Cents,
For transmittal to: Mrs. Wilma K. Collins, 427 W. Franklin St. Hagerstown, Maryland.
APP. Trust Funds 218912

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA, Personnel Officer

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 13: In that * * *, did, at Chippenham, Wiltshire, on or about 31 January 1944, feloniously embezzle by fraudulently converting to his own use about £ 5 in notes of the Bank of England, of the value of about twenty dollars and eighteen cents ($20.18), and about eighty dollars ($80.00) United States money, of a total value of about one hundred dollars and eighteen cents ($100.18), the property of Technician 4th Grade Theodore H. Behney, entrusted to him by the said Technician 4th Grade Theodore H. Behney for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 14: In that * * *, did, at Chippenham, Wiltshire, on or about 31 January 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures, to wit:

WAR DEPARTMENT
FINANCE DEPT.
FORM NO. 38
Apvd.Nov.24,1930

WAR DEPARTMENT
FINANCE DEPT
RECEIPT FOR MISCELLANEOUS COLLECTIONS

P.T.A.

$ 25 Pounds Org. Hqs Co 10th Armd Inf Bn APO 254 Date 31 January 1944

Received in cash of Theodore H. Behney (NAME) T/4 (RANK) 33012969 (ASN)

one Hundred Dollars and no/100 Cents

for transmittal to: Mrs. Maggie Behney (NAME) Rt #1 (ADDRESS)

(City and State) Bethel, Pa.

App: Trust Funds 218912 PA

/s/ Murray J. Kern
/t/ MURRAY J. KERN
(Personnel OfficerP

(122)

/rubber stamp/ (MURRAY J. KERN
(WOJG-USA
(Personnel Officer

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 15: In that * * *, did, at Chippenham, Wiltshire, on or about 31 January 1944, feloniously embezzle by fraudulently converting to his own use about £ 17, 16 shillings and 11 pence, coin and notes of the Bank of England, of the value of about seventy-two dollars ($72.00), and about fifty-five dollars ($55.00) United States money, of a total value of about one hundred twenty-seven dollars ($127.00), the property of Technician 4th Grade Phillip Bellanca, entrusted to him by the said Technician 4th Grade Phillip Bellanca for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 16: In that * * *, did, at Chippenham, Wiltshire, on or about 31 January 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures, to wit:

WAR DEPARTMENT WAR DEPARTMENT P.T.A.
FINANCE DEPT. FINANCE DEPT
FORM NO. 38
Apvd.Nov.24,1930 RECEIPT FOR MISCELLANEOUS COLLECTIONS
$ 31 Pds 12 shilling Org. Hqs Co 10th Armd Inf Bn APO 254
Date 31 January 1944
Received in cash of Phillip Bellanca (NAME) T/4 (RANK) 33075528 (ASN)
One hundred & twenty seven Dollars and no/100 Cents
for transmittal to: Mrs. Phillip Bellanca (NAME) 865 N. 8th St. (ADDRESS)
(City and State) Reading, Pa.
App: Trust Funds 218912 PA
/s/ Murray J. Kern
(Personnel OfficerP
(MURRAY J. KERN
/rubber stamp/ (WOJG-USA,
(Personnel Officer

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 17: In that * * *, did, at Chippenham, Wiltshire, on or about 2 February 1944, feloniously embezzle by fraudulently converting to his own use about £ 10 in notes of the Bank of England, of the value of about forty dollars and thirty-five cents ($40.35), the property of Technician 5th Grade William Carmen, entrusted to him by the said Technician 5th Grade William Carmen for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 18: In that * * *, did, at Chippenham, Wiltshire, on or about 9 February 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to two receipts in the following words and figures, to wit:

WAR DEPARTMENT
FINANCE DEPARTMENT
Form No.38
Approved Nov.24,1930
$ 32.00

WAR DEPARTMENT
FINANCE DEPARTMENT
RECEIPT FOR MISCELLANEOUS COLLECTIONS

APO 254, c/o PM. New York, N.Y.
9 February 1944

Received in cash of from) William Carmen Hqs Co 10th Armd Inf Bn.

Thirty two ------ Dollars and no/100 Cents,

Transmitted to: Mrs. Rose Weber, 21 East St.
Brownbrook, N.J.

APP. Trust Funds 218912

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA,
Personnel Officer.

WAR DEPARTMENT
FINANCE DEPARTMENT
Form No. 38
Approved Nov.24,1930
$ 8.00

WAR DEPARTMENT
FINANCE DEPARTMENT
RECEIPT FOR MISCELLANEOUS COLLECTIONS

APO 254, c/o PM. New York, N.Y.
9 February 1944

Received in cash of from) William Carmen Hqs Co 10th Armd Inf Bn.

Eight ---------- Dollars and no/100 Cents,

Transmitted to Miss Junita Booten, Box #63
Nolan W. Virginia.

APP. Trust Funds 218912

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA,
Personnel Officer.

which said receipts were writings of a private nature, which might operate to the prejudice of another.

Specification 19: In that * * *, did, at Chippenham, Wiltshire, on or about 2 March 1944, feloniously embezzle by fraudulently converting to his own use about £ 15 in notes of the Bank of England, of the value of about sixty dollars ($60.00), the property of Technician 5th Grade John W. Sidles, entrusted to him by the said Technician 5th Grade John W. Sidles for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 20: In that * * *, did, at Chippenham, Wiltshire, on or about 6 March 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures to wit:

WAR DEPARTMENT
FINANCE DEPARTMENT
Form No. 38
Approved Nov.24,1930
£ s d
14-7-5
$ 60.00

WAR DEPARTMENT
FINANCE DEPARTMENT
RECEIPT FOR MISCELLANEOUS COLLECTIONS

10th Armd Inf Bn. APO 254,
c/o PM. N.Y. 6 Mar 1944

Received in cash of from) T/5 John W. Sidles, 3512374, Hqs 10th Armd Inf Bn.
Sixty ---------- Dollars and no/100 Cents,
Transmittal To: Miss Agnes Fritz, RFD # 3.
Paris, Kentucky
APP. Trust Funds 218912

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA Pers. Off.

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 21: In that * * *, did, at Chippenham, Wiltshire, on or about 2 February 1944, feloniously embezzle by fraudulently converting to his own use about £ 20 in notes of the Bank of England, of the value of about eighty dollars and seventy cents ($80.70), the property of Private First Class Jack Pope, entrusted to him by the said Private First Class Jack Pope for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 22: In that * * *, did, at Chippenham, Wiltshire, on or about 2 February 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures, to wit:

WAR DEPARTMENT
FINANCE DEPARTMENT
Form No. 38
Approved Nov.24,1930
PTA
$80.00

WAR DEPARTMENT
FINANCE DEPARTMENT
RECEIPT FOR MISCELLANEOUS COLLECTIONS
APO #254, c/o PM. New York, N.Y. 2 Feb 1944

Received in cash of from) Jack Pope Pfc 38079635
eighty --------- Dollars and no/100 Cents,
Transmittal to: Mrs. W.E. Pope 132 W. Hackberry St.
Enid, Okla.
APP. Trust Funds 218912

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA, Personnel Officer.

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 23: In that * * *, did, at Chippenham, Wiltshire, on or about 29 February 1944, feloniously embezzle by fraudulently converting to his own use about £ 7 and 10 shillings, coin and notes of the Bank of England, of the value of about thirty dollars and twenty-five cents ($30.25), the property of Private First Class Edward J. Powers, entrusted to him by the said Private First Class Edward J. Powers for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

Specification 24: In that * * *, did, at Chippenham, Wiltshire, on or about 6 March 1944, with intent to defraud, and without authority, sign the name "MURRAY J. KERN" to a receipt in the following words and figures, to wit:

WAR DEPARTMENT
FINANCE DEPARTMENT
Form No. 38
Approved Nov.24,1930

WAR DEPARTMENT
FINANCE DEPARTMENT
RECEIPT FOR MISCELLANEOUS COLLECTIONS

£ s d
7 8 8
$ 30.00

10th Armd Inf Bn. APO 254, c/o PM. N.Y.
6 Mar 1944

Received in cash of from) Pfc Edward J. Powers, 31015677,
Hqs Co 10th Armd Inf Bn.
Thirty -------- Dollars and no/100 Cents,
For transmittal to: Miss Bridie, Powers, 14 Hurlcroft Ave.
Medford Mass.
APP. Trust Fund 218 912

/s/ Murray J. Kern
/t/ MURRAY J. KERN
WOJG*USA, Pers. Off.

which said receipt was a writing of a private nature, which might operate to the prejudice of another.

Specification 25: In that * * *, did, at Chippenham, Wiltshire, on or about 2 February 1944, feloniously embezzle by fraudulently converting to his own use about £29, 14 shillings and 10 pence, coin and notes of the Bank of England, of the value of about one hundred and twenty dollars ($120.00), the property of Technician 3rd Grade Louis R. Ceriani, entrusted to him by Technician 3rd Grade Joseph Vecchio for delivery to WOJG MURRAY J. KERN, Personnel Officer, 10th Armored Infantry Battalion.

He pleaded not guilty to and was found guilty of the Charge and all specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. The reviewing

authority approved the sentence, reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, directed that pending further orders the accused be confined at Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The following facts are proved by substantial uncontradicted evidence introduced by the prosecution:

Warrant Officer (Junior Grade) Murray J. Kern, 10th Armored Infantry Battalion, was personnel officer of his organization during the months of January, February and March 1944. One of his duties was to receive funds from the personnel of his battalion for transmittal to persons designated by them in the United States. The money was collected from the men in each company, a representative of which brought the money to Warrant Officer Kern who accepted it and issued individual receipts on WD, Finance Department, Form No. 38, approved Nov 24, 1930, in the name of each sender. The receipts were issued in triplicate and it was necessary that each copy be signed by Mr. Kern personally. One copy was delivered to the remitter, one was transmitted to the office of Chief of Finance and the third copy was retained by Mr. Kern as evidence of the transaction. He then caused the funds to be transmitted to the United States. The practice and procedure was governed by Circular Letter No. 49, Office of the Chief Finance Officer, Headquarters, ETOUSA, 17 July 1942 (R30).

During this same period of time accused was a company clerk who worked in the same room where Mr. Kern maintained his office. Accused had access to the receipt forms (Form 38) and on occasions completed blank spaces in same on the typewriter for the signature of Mr. Kern. It was impossible to transmit these private funds to the United States unless the transfers were executed through Mr. Kern (R30). At no time did he authorize accused to sign his name to receipts (Form 38) for these funds (R31). He did not receive from accused the several separate sums of money set forth in Specifications 1,3,5,7,9,11,13,15,17,19,21,23 and 25 (R31-34).

Technical Sergeant Schmidt (Specification 1; R12), Technical Sergeant Graham (Specification 3; R14), Staff Sergeant Medford (Specification 5; R15), Staff Sergeant Spray (Specification 9; R18), Sergeant Collins (Specification 11; R20), Technician Fourth Grade Behney (Specification 13; R22), Technician Fourth Grade Bellanca (Specification 15; R23), Technician Fifth Grade Carmen (Specification 17; R24), Technician Fifth Grade Sidles (Specification 19; R26), Private First Class Pope (Specification 21; R26) and Private First Class Powers (Specification 23; R27) each delivered to accused personally at the times and places alleged the respective sums of money alleged in said specifications for transmittal to specified persons in the United States.

Staff Sergeant Slamka delivered the funds described in Specification 7 to First Sergeant Darnell (R17) who delivered same to accused with

directions for transmittal to Charles Connor of Middletown, Ohio. The receipt for said funds was delivered by accused to Darnell who in turn delivered it to Slamka (R16,17).

Technician Third Grade Ceriani delivered the funds described in Specification 25 to Technician Third Grade Vecchio (R28) who paid the same to accused with instructions to transmit same to Ceriani's mother in New York (R28,29). No receipt therefor was delivered by accused (R29).

Captain John H. Shea, 10th Armored Infantry Battalion in his capacity as investigating officer, interviewed accused, who was fully informed of his right to remain silent. After the charge and specifications were read to him accused freely and voluntarily stated that he "didn't know why he did it, couldn't stand the temptation." He admitted he had taken the sums of money alleged in Specifications 1,3,5,7,9,11,13,15,17,19,21,23 and 25, and verified the amounts after making minor corrections. He said he spent the money by visiting "expensive places in London". He also admitted that he signed Mr. Kern's name to the receipts on Form 38 (Pros.Exs.1-13; R35) (Specifications 2,4,6,8,10,12,14,16,18,20,22 and 24).

4. The accused elected to remain silent and introduced no evidence in defense.

5. (a) Pros.Exs.14-27 were taken from accused's clothing by Corporal John Chan, Headquarters Company, 10th Armored Infantry Battalion, on or about 31 March 1944 when Chan was ordered to search accused's possessions (R33,34). These particular exhibits are copies of the receipts involved in Specifications 2,4,8,10,14,16,20,22,24 and 25; private memorandum of the funds described in Specifications 1,7 and 9; memoranda and receipts referring to persons not involved in this case and scraps of paper bearing the names and addresses of the transferees named in receipts involved in Specifications 8,10 and 24. The record does not indicate the source of the orders under which Chan operated, but in the absence of a showing that the officer giving same was not authorized to issue it or that the order was otherwise illegal it will be presumed that Chan was acting under legal orders emanating from proper authority when he searched accused's clothing (20 Am.Jur., sec.226, p.221; Underhill's Criminal Evidence, sec.45, p.57, fn.61; MCM, 1928, par.112, p.110; Winthrop's Military Law & Precedents - Reprint - p.575, fn.27).

The record is uncertain as to whether the exhibits were taken from accused's person or 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. The situation provokes the question as to whether the exhibits were obtained by a procedure in violation of accused's rights under the Fourth and Fifth Amendments to the Federal Constitution. If so, they were inadmissible.

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 (20 Am.

Jur., sec.401, p.361; Browne v. United States, 290 Fed. 870,875). The law does not distinguish between documents and other property found on accused (United States v. Kirschenblatt 16 Fed (2nd) 202, 51 A.L.R. 416).

On the other hand, if the exhibits were discovered and seized during a search of accused's public quarters under the order given Chan, such search is not "unreasonable" and the seized documents were admissible in evidence (CM ETO 1191, Acosta).

(b) The proof that it was accused who affixed Mr. Kern's signature to the receipts (Pros.Exs.1-14) is dependent solely upon accused's statement to Captain Shea, the investigating officer that it was he who signed Mr. Kern's name to the receipts. Such statement was a highly inculpatory admission against interest, but it was not a confession as it did not accept ultimate legal guilt of the crime of forgery (2 Wharton's Criminal Evidence, 11th Ed., sec.647, p.1083; CM ETO 292, Mickles; CM ETO 422, Green; CM ETO 895, Davis et al). 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 and b, pp.115,116).

6. (a) With respect to the charges of embezzlement contained in Specifications 1,3,5,7,9,11,13,15,17,19,21,23 and 25, there is positive uncontradicted evidence that the thirteen soldiers named in the said specifications severally and separately entrusted to accused, either directly or indirectly, the several sums of money owned by them and set forth in the specifications for the particular purpose of securing a transmittal of same to designated payees in the United States. Accused accepted possession of said funds charged with the duty and trust of delivering them to Mr. Kern, the personnel officer. In the battalion, Mr. Kern alone possessed the power and authority to forward said funds in the process of transfer to the United States in accordance with the requirements of Circular Letter No. 49 17 July 1942 of the Chief Finance Officer, European Theater of Operations. He did not receive said funds or any part of same from accused who admitted that he had abused his trust and converted the several sums of money to his own use and purpose. The prosecution established beyond reasonable doubt all of the elements of the crime of embezzlement (CM ETO 1302, Splain; CM ETO 1588, Moseff; CM ETO 1538, Rhodes; CM ETO 1991, Pierson).

(b) Specifications 2,4,6,8,10,12,14,16,18,20,22 and 24 charge that accused signed the name of Mr. Kern, the battalion personnel officer without authority to 12 several receipts (Pros.Exs.1-14), particularly described. These receipts were given by accused upon receipt of the several sums of money from 12 of the soldiers which were embezzled by him (supra). The evidence is clear and satisfactory that Mr. Kern did not authorize accused to sign his (Kern's) name on the receipts and that the latter had no knowledge on the several dates thereof of accused's acts. Accused admitted that he was the person who actually signed the personnel officer's name on the documents. The following well established legal principles govern this case:

"Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice. (Clark.)

* * * * * * * * *

The writing must be false- must purport to be what it is not. Thus, signing another's name to a check with intent to defraud is forgery as the instrument purports on its face to be what it is not. But where, after the false signature of such person is added the word 'by' with the signature of the person making the check thus indicating the authority to sign, the offense is not forgery, even if no such authority exists, as the check on its face is what it purports to be.

* * * * * * * * *

To constitute a forgery the instrument must on its face appear to be enforceable at law, for example, a check or note; or one which might operate to the prejudice of another, for example, a receipt. The fraudulent making of an instrument affirmatively invalid on its face is not a forgery. However, the fraudulent making of a signature on a check is forgery even if there be no resemblance to the genuine signature, and the name is misspelled." (MCM, 1928, par.149j, pp.175,176).

"In the absence of a statute to the contrary, the knowledge of the falsity of the instrument and the intent to defraud are of the very essence of the crime of forgery. * * *. The intent to defraud is not limited to obtaining money or property; it is sufficient if the forged instrument is to the prejudice of the rights of some person." (37 C.J.S., sec.4, pp.35,36).

"The essence of the offense is the making of a false writing with the intent that it shall be received as the act of another than the party signing it." (26 C.J., sec.5, p.898).

"* * * any writing in such form as to be the means of defrauding another may be the subject of forgery, * * *. Forgery may be committed of any writing which if genuine would operate as the foundation of another man's liability or the evidence of his right.

> To be the subject of forgery the writing need not be * * * such as, if genuine, would be valid and actionable. It is sufficient if the instrument forged, supposing it to be genuine, might have been prejudicial. * * *. The forged instrument need not be perfect in its resemblance to the kind it was intended to represent; it is sufficient if it is calculated to deceive, * * *. Nor is it requisite that the writing should bear any resemblance to that of the person whose writing it purported to be, * * *." (26 C.J., sec.24, pp.907,908).

> "The general rules above stated have been applied to acquittances, receipts, and due bills. A receipt is the subject of forgery, provided it would operate as the foundation of another's liability or be prejudicial to his rights if genuine." (26 C.J., sec.36, p.915).

Accused's intent to defraud the twelve soldiers is manifest upon a cursory reading of the evidence. It must be conclusively assumed that he knew that Mr. Kern had sole authority to sign these receipts. While he may have acted as a clerk in preparing similar receipts for Mr. Kern's signature on other prior occasions there is not even a suggestion in the evidence that he was authorized to execute the receipts involved in this case in Mr. Kern's name. When he affixed the personnel officer's name to the receipts, such action had but one purpose and that was to lull the twelve depositors into the belief that they had placed their funds in process of transmittal to their respective payees. Accused's fraudulent intent is established beyond all peradventure.

The receipts in this instance if genuine would have charged Mr. Kern with the responsibility for the several sums of money specified therein. They were obviously documents which were the subject of forgery.

The evidence is entirely silent as to whether Mr. Kern's purported signatures on the receipts were simulated or resembled his genuine signature. However, it is an immaterial question because it was proved without qualification or contradiction that the signatures were not those of Mr. Kern, that he never authorized his name to be signed to the receipts and that accused did in fact affix Mr. Kern's signature to the receipts as part and parcel of his scheme to defraud the twelve soldier depositors. The record fully establishes the fact that accused committed twelve separate and distinct forgeries (CM ETO 2216, Gallagher; CM ETO 2273, Sherman; CM ETO 2293, Mills; CM ETO 2444, Warner).

7. The charge sheets show that accused is 24 years of age, and that he was inducted at Fort Douglas, Utah, 14 March 1942. He had no prior service.

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

9. Confinement in a penitentiary is authorized for the offense of forgery by AW 42 and Secs.22-1401 (6:86) and 24-401 (6:401), District of Columbia Code and for the offense of embezzlement by AW 42 and Sec.22-1202 (6:76), District of Columbia Code. The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is authorized (Cir. 291, WD, 10 Nov 1943, sec.V, par.3a and b).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 9 JUN 19[illegible] TO: Commanding General, 4th Armored Division, APO 254, U.S. Army.

1. In the case of Private MARTIN C. UTERMOEHLEN (39683275), Headquarters Company, 10th Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2535. For convenience of reference please place that number in brackets at the end of the order: (ETO 2535).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2546

14 JUL 1944

U N I T E D S T A T E S)	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private JAMES D. EASTWOOD (35267805), Company A, 819th Engineer Aviation Battalion.)	Trial by G.C.M., convened at London, England, 4 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private (then Private First Class) James D. Eastwood, Company A, 819th Engineer Aviation Battalion, ETOUSA, did, at Honington, Suffolk, England, on or about 7 August 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Graves End, Kent, England, on or about 25 March 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification 1. In that Private James D. Eastwood, Company A, 819th Engineer Aviation Battalion, ETOUSA, did, at Ilford, England, on or about 21 December 1943, feloniously take, steal, and carry away one (1) silver wristlet watch, of the value of about twelve dollars ($12.00), the property of Mrs. Gladys Irene Shipham, 30 Woodlands Road, Ilford, Essex.

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Specification 2. In that * * *, did, at Ilford, England, on or about 1 November 1943, feloniously take, steal, and carry away one (1) Gentlemen's Chromium plated wristlet watch, with illuminated dial and leather strap attached, and two (2) packets of Player's cigarettes, ten (10) to each packet, of the value of approximately four dollars ($4.00), the property of Albert Edward Mayes, 170 Uphall Road, Ilford, Essex.

Specification 3. In that * * *, did, at Ilford, England, on or about 14 December 1943, feloniously take, steal and carry away from Mrs. Sarah Ann Moakson, 204 Sherrard Road, Forest Gate, E. 7., one (1) black leather handbag, containing (£0-9-6) in English money, of the value of about two dollars ($2.00), one (1) ration book, one (1) identity card, one (1) brown wallet, one (1) door key, a number of photographs and correspondence, of the value of about three dollars ($3.00).

Specification 4. In that * * *, did, at Ilford, England, on or about 16 December 1943, by force and violence and by putting her in fear, feloniously take, steal and carry away from Miss Eva Maud Creighton, 26 Belmont Road, Ilford, England, one (1) shopping bag, containing one (1) brown leather handbag, one (1) small red case containing twelve pounds (£12-0-0) in English money, of the value of about forty-eight dollars ($48.00), one (1) Red Cross Permit, one (1) pair of spectacles, one (1) brown leather purse containing (£0-12-6) in English money, of the value of about two dollars and fifty cents, one (1) silver powder compact, one (1) ration book, of the total value of sixty-four dollars ($64.00).

He pleaded to the Specification, Charge I, guilty, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave"; of the excepted words, not guilty; of the substituted words, guilty; to Charge I, not guilty, but guilty of a violation of the 61st Article of War; to all remaining charges and specifications, guilty. Two-thirds of the members of the court present when the vote was taken concurring, he was found guilty of all charges and specifications except the words "by force and violence and by putting her in fear", in Specification 4, Charge II. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence but reduced the period of

confinement to ten years, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Accused admittedly decided not to return to his unit when his furlough expired 7 August 1943 (R14; Pros.Ex.3), and remained absent without leave until apprehended by members of the British Constabulary more than seven and a half months later (R6-7; Pros.Ex.2). A portion of the interim he spent as a guest in two hospitable British homes from which he stole the property described in Specifications 1 and 2, Charge II (R7-11). He also snatched the handbags described from the owners named in Specifications 3 and 4, Charge II, stealing both bags and contents (R11-14). The accused was duly advised of his rights as a witness and elected to testify under oath that at no time did he actually intend to desert, but was kept from returning to his organization only by "fear of the consequences". He freely admitted committing the felonies as charged, expressing relief to "get this over with" (R15-16).

4. The charge sheet shows that accused is 37 years and seven months of age. He was inducted 20 February 1942 at Fort Thomas, Kentucky, for the duration plus six months. No prior service is shown.

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

6. Confinement in a penitentiary is authorized for the offense of desertion in time of war and for larceny of $50.00 or more (AW 42; 18 USCA 466).

Judge Advocate

Judge Advocate

Judge Advocate

(136)

1st Ind

WD, Branch Office TJAG, with ETOUSA. 14 JUL 1944 TO: Commanding General, Central Base Section, Communications Zone, ETOUSA, APO 887, U S Army.

1. In the case of Private JAMES D. EASTWOOD (35267805), Company A, 819th Engineer Aviation Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2546. For convenience of reference please place that number in brackets at the end of the order: (ETO 2546).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2547

14 JUL 1944

UNITED STATES)	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private ANDREW J. ROUSSEAU (6903105), Company H, 3rd Battalion, 18th Infantry Regiment.)	Trial by G.C.M., convened at London, England, 13 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Andrew J. Rousseau, Company H, 3rd Battalion, 18th Infantry Regiment, ETOUSA, did, at Tidworth, England, on or about 6 September 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 23 April 1944.

He pleaded guilty to the Specification of the Charge, except the words "desert" and "in desertion" substituting therefor, respectively, the words "absent himself without leave from" and "without leave", to the excepted words, not guilty, to the substituted words, guilty; to the Charge not guilty, but guilty of violation of the 61st Article of War. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of the offense as charged. Evidence of two previous convictions by special courts-martial for absence without leave for 41 days and 26 days, respectively, in violation ofArticle of War 61, was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and

to be confined at hard labor, at such place as the reviewing authority may direct for 30 years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeitures of all pay and allowances due or to become due, and confinement at hard labor for 15 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The absence of accused was shown by a properly certified extract copy of the morning report of Company H, 18th Infantry, as of 6 September 1942 (R5) as well as by other competent evidence (R7). By his signed confession given after proper explanation of his rights, accused admitted his prolonged absence during which time he lived in London with, and had a baby by, a British girl. He lived on her earnings and by begging from American soldiers (Pros.Ex.2). He was arrested in uniform in London by military police and returned to military control on 23 April 1944 (R9). His absence was for 19½ months.

4. "Desertion is absence without leave accompanied by the intention not to return" (MCM 1928, par.130a, p.142). Absence without leave is usually proved, prima facie, by entries in the morning report and if 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 (MCM 1928, par.130a, p. 143; CM ETO 1519, BARTEL; CM ETO 1543, Woody; CM ETO 1577, LeVan, Jr).

5. The charge sheet shows that accused is 31 years and three months of age. He enlisted 15 October 1936 at Fort Jay, New York, for three years, discharged 14 October 1939, re-enlisted 20 October 1939 at Fort Jay, New York, for three years. Service governed by service extension act.

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

7. Confinement in a United States Penitentiary is authorized for the offense of desertion in time of war (AW 42).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 14 JUL 1944 TO: Commanding General, Central Base Section, Communications Zone, ETOUSA, APO 887, U.S. Army.

1. In the case of Private ANDREW J. ROUSSEAU (6903105), Company H, 3rd Battalion, 18th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2547. For convenience of reference please place that number in brackets at the end of the order: (ETO 2547).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

22 JUL 1944

ETO 2550

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated, SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private MELVIN C. TALLENT (34390236), 60th Chemical Depot Company.	Trial by GCM, convened at Shepton Mallet, Somerset, England, 25 April 1944. Sentence: Confinement at hard labor for four months (suspended) and forfeiture of $15.00 per month for a like period.

OPINION of the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings. The record has now been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

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

CHARGE: Violation of the 96th Article of War.
Specification: In that Private Melvin C. Tallent, 60th Chemical Depot Company, did, at Shepton Mallet, Somerset, England, on or about 3 February 1944, unlawfully and feloniously have carnal knowledge of Ruby Phyllis Doreen Veale, a female under sixteen years of age.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced except one by the defense in support of its plea in bar discussed infra. He was sentenced to be confined at hard labor, at such place as the reviewing authority may direct, for a period of four months and to forfeit fifteen dollars ($15.00) per month for a like period. The reviewing authority approved the sentence but suspended the execution of that portion thereof imposing confinement at hard labor.

The result of the trial was promulgated in General Court-Martial Orders No. 154, Headquarters, Southern Base Section, SOS, ETOUSA, dated 14 May 1944.

3. Before pleading to the general issue, defense counsel submitted a special plea in bar of trial based on former jeopardy involved in accused's alleged previous conviction of the same offense by summary court 24 February 1944. The charge sheet in the former proceeding was introduced in evidence and shows that on 24 February 1944 accused was tried, convicted and sentenced to be restricted to the limits of his camp for 30 days, by summary court at Shepton Mallet upon the following Charge and Specification:

> CHARGE: Violation of the 96th Article of War.
> Specification: In that Pvt. Melvin C. Tallent, 60th Chemical Depot Company, did at Shepton Mallet, Somerset, England, on or about 3 February 1944 have carnal knowledge with her consent of Ruby Phyllis Doreen Veale, Jubilee House, Stean Bow, West Pennard, Somerset, the said Ruby Phyllis Doreen Veale being under the age of consent.

On the same date the sentence was duly approved and suspended by Captain Woodrow W. Crank, Commanding Officer Chemical Depot C-905, and the conviction was entered on accused's service record (R5; Def. Ex. "1").

4. With reference to the plea in bar, the evidence for the prosecution shows that by letter written by order of the Commanding Officer, Southern Base Section, 10 March 1944, Captain Crank was

(a) informed that the specification in question upon which accused was tried and convicted by summary court, failed to allege "any violation of the Articles of War, and hence all proceedings taken thereunder are null and void"; and

(b) instructed so to declare such proceedings through the medium of special orders (R5; Pros.Ex.A).

Special Orders No. 12, Headquarters, Chemical Depot C-905, 16 March 1944, include the following:

> "4. Summary Court-martial proceedings against Privates Rolland C. Evenson, 39608354, James K. Ross, 37431833, Melvin C. Tallent, 34390236, all of 60th Cml Dep Co., (Case numbers 6, 7 &

8, this headquarters), for which sentences were adjudged, 24 February 1944, are declared null and void. (AUTH: Ltr, AG 201, Hq, SBS, subject, Trial by summary court martial, dated 10 March 1944.)" (Pros. Ex.B).

5. The Specification under the summary court charge alleges statutory rape, a crime denounced in 18 U.S. Code, Ann., sec.458, and also alleges conduct of a nature to bring discredit upon the military service in violation of Article of War 96 (CM 211420, McDonald; Dig. Op.JAG, 1912-1940, sec. 454(88), p.364; ETO 2620, Tolbert & Jackson). It is certainly complete enough to inform accused of the nature and identity of the offense charged and also to identify it as the same offense alleged in the specification of which he was subsequently found guilty by general court-martial in the case under consideration. It is true that "Any intent expressly made an essential element of the offense by the Articles of War should be alleged; for example, a false muster should be alleged as 'knowingly' made" (MCM 1928, par. 29, p.18); but the offense for which accused was tried and convicted by summary court is statutory rape, wherein the accused's intent is wholly immaterial. The act is malum prohibitum. All that it is necessary to allege and prove is the act of intercourse, and that the girl was under 16 years of age. The words "unlawfully and feloniously" in the otherwise identical specification on which he was subsequently tried by general court are conclusions of the pleader and, as such, mere surplusage. The intercourse described - at the time and place alleged - and under the circumstances proved, - being viewed by a policeman, constituted conduct of a nature to reflect discredit upon the military service.

> "Summary courts-martial shall have power to try any person subject to military law" (with certain inapplicable exceptions) "for any crime or offense not capital * * * made punishable by the Articles of War" (AW 14; MCM 1928, par. 16, p.11).

The offense of which accused was tried and convicted is not a capital one.

> "No person shall, without his consent, be tried a second time for the same offense". (AW 40).

The summary court trial was complete when Captain Crank, theappointing and reviewing authority, took final action on the case, as Defense Ex-

hibit "1" shows that he did on 24 February 1944 (AW 40; MCM, 1928, pars. 86 and 87a, pp.72-73).

The record clearly discloses, by the interposition of the plea in bar of trial in his behalf, that accused did not consent to the second trial, but was forced to submit to it under protest. The court erred in overruling accused's plea in bar of trial on the basis of the former jeopardy alleged and proved. The record affirmatively shows that such error injuriously affected the very substantial right of accused, accorded to him by Article of War 40, not to be tried a second time for the same offense. Although the commanding officer was directed not to try cases of statutory rape by inferior court-martial, such direction could not deprive the summary court-martial of the jurisdiction conferred by statute.

6. The charge sheet shows that accused is 22 years, seven months of age. He was inducted at Fort McClellan, Alabama, 5 September 1942 for a service period governed by the Service Extension Act of 1941. He had no prior service.

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

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

(145

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 22 JUL 1944 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by Act 20 August 1937 (50 Stat.724; 10 USCA 1522) and as further amended by Act 1 August 1942 (56 Stat.732; 10 USCA 1522), is the record of trial in the case of Private MELVIN C. TALLENT (34390236), 60th Chemical Depot Company.

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

3. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

3 Incls:
Incl 1. Record of Trial.
Incl 2. Form of action.
Incl 3. Draft GCMO.

(Findings and sentence vacated. GCMO 65, ETO, 1 Aug 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

(147)

BOARD OF REVIEW

ETO 2553

7 JUN 1944

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by G.C.M., convened at Headquarters, First United States Army, Bristol, England, 26 April 1944.
Private JOE HAMMIETT (34053705), 428th Quartermaster Troop Transport Company.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Joe (NMI) Hammiett, Four Hundred Twenty-eighth Quartermaster Troop Transport Company, did without proper leave absent himself from his command at Charleton Park, Wiltshire, England, from about 1130 hours 11 March 1944 to about 1630 hours 12 March 1944.

CHARGE II: Violation of the 96th Article of War.
Specification: In that * * *, did at or near Charleton Park, Wiltshire, England, on or about 11 March 1944 wrongfully and unlawfully take and use without permission or authority a motor vehicle property of the United States, value $950.

(148)

He pleaded not guilty to and was found guilty of both charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved only so much of the findings of guilty of the specification of Charge I and of Charge I as involves a finding of guilty of absence without leave from about 1830 hours 11 March 1944 to about 1300 hours 12 March 1944, approved the sentence and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The charge sheet shows that the accused is 29 years five months of age and that he was inducted at Jacksonville, Florida, 11 June 1941 for the duration of the war plus six months. No prior service is shown.

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

5. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized by AW 42 and Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

1st Ind. (149)

WD, Branch Office TJAG., with ETOUSA. -7 JUN 1944 TO: Commanding General, First United States Army, APO 230.

1. In the case of Private JOE HAMMIETT (34053705), 428th Quartermaster Troop Transport Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2553. For convenience of reference please place that number in brackets at the end of the order: (ETO 2553).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

15 JUL 1944

ETO 2566

U N I T E D S T A T E S v. Private JACK TURNER (32745965), Private WILBUR WASHINGTON (34560056), Private RICHARD ~~WILLIAMS~~ (32868971), Staff Sergeant LAMAR H. ZEIGLER (34560605), all of 647th Ordnance Company (Am), and Private SAMUEL L. SMITH (33182969), Private First Class CARL E.L.WILLIAMS (34534740), Private SYLVESTER WADE (34064839), Private First Class WALTER GALES (34563952), and Private L.C. LYONS (34628165), all of 4176th Quartermaster Service Company.	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Ashchurch, Gloucestershire, England, 21-22 April 1944. Sentences: Dishonorable discharge, total forfeitures and confinement at hard labor: Turner and Wade each for eight years, Gales, Washington and Smith each for six years, Zeigler and Richard Williams each for four years, and Lyons and Carl E.L. Williams each for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
RITER, SARGENT, and HEPBURN, Judge Advocates

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

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

CHARGE I: Violation of the 66th Article of War.
(Findings of not guilty as to each accused)
Specification: (Findings of not guilty as to each accused)

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CHARGE II: Violation of the 96th Article of War.
Specification: In that Private Jack (NMI) Turner, 647th Ordnance Company (Amm), Private Samuel L. Smith, 4176th Quartermaster Service Company, Private First Class Carl E.L.Williams, 4176th Quartermaster Service Company, Private Wilbur (NMI) Washington, 647th Ordnance Company (Amm), Private Richard (NMI) Williams, 647th Ordnance Company (Amm), Private Huntley D. Williams, 647th Ordnance Company (Amm), Private Sylvester (NMI) Wade, 4176th Quartermaster Service Company, Private First Class Walter (NMI)Gales, 4176th Quartermaster Service Company, Staff Sergeant Lamar H. Zeigler, 647th Ordnance Company (Amm), and Private L. C. Lyons, 4176th Quartermaster Service Company, acting jointly, and in pursuance of a common intent, did, at Hook Norton, Oxon, England, on or about 8 April 1944, unlawfully and wrongfully engage in, and become part of, a disorderly and riotous assembly of soldiers.

The trial judge advocate announced that by direction of the appointing authority the charges and specifications as to Private Huntley D. Williams, 647th Ordnance Company (Am) were withdrawn. Each accused pleaded not guilty, and was found not guilty of Charge I and its Specification and guilty of Charge II and its Specification. Evidence was introduced of two previous convictions of accused Wade by summary court: one for leaving proper place of duty for two days without proper leave in violation of Article of War 61, and the other for absence without leave for two days and disobedience of orders of superiors in violation of Articles of War 61 and 96. No evidence of previous convictions of the other accused was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct: Turner and Wade each for eight years, Gales, Washington and Smith each for six years, Zeigler and Richard Williams each for four years, and Lyons and Carl E.L. Williams each for three years. The reviewing authority approved each of the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. With reference to the offense of which accused were found guilty, namely, wrongfully engaging in and becoming part of a disorderly and riotous assembly of soldiers in violation of Article of War 96 (Charge II and Specification), the undisputed evidence for the prosecution was substantially as follows: On the evening of 8 April 1944 about 150-200 soldiers from five different organizations attended a dance in a hall at Hook Norton, England. Two truck loads of members of the 647th Ordnance

Company and about 60 soldiers of the 4176th Quartermaster Service Company, the organizations of accused, were taken to the dance in trucks which were parked in a lot about two blocks from the dance hall. Officers from each of the two organizations were in town for the purposes of supervision (R4-5,11,21,23,41). After 10:00 p.m. a rumor began to circulate in the dance hall that a colored military policeman named Jenkins, a member of the 4176th Quartermaster Service Company, had been killed by white "MPs" in Chipping Norton, about six miles away. The men in the hall began to form in small groups and to mumble. They looked angrily at the only white military policeman on duty in the hall, a soldier named Hoemke, who for his own safety was taken from the hall by other military policemen and put in a truck (R15,17). First Lieutenant Noel G. Griffiths, commanding officer of the 4176th Quartermaster Service Company, drove into town about 10:15 p.m. and noticed about 12 men walking hurriedly toward the car park, and other groups outside the dance hall. When he learned the reason he had one of his officers announce over the public address system that Griffiths had just been to Chipping Norton and that there was no truth to the rumor. Griffiths tried to make as many announcements as possible and attempted to disperse the groups gathered outside the hall but they would then gather in smaller groups which he was forced to disperse again. The announcement quieted the men to some extent (R5,15). He overheard some talk about taking a truck and going to Chipping Norton, and drove to the motor park where he saw about 50 men who were also informed that there was nothing to the rumor that Jenkins had been killed as Griffiths had just come from Chipping Norton. Some of the groups were gathered about the trucks. He ordered them away from the trucks and the order was obeyed, but the men then started back to the trucks, made loud noises and belligerent remarks and continued to talk of taking the trucks and going to Chipping Norton. One man said "I'd rather spend twenty years in England to kill one of the bastards" (R5-6,9,16). One officer ordered the men not to take any of the trucks (R37,65) and Griffiths ordered the men to be quiet and on several occasions ordered the groups to disperse. "They would break it up and then form again" (R10,18). The men continued to walk back and forth arguing among themselves, talking loudly, cursing, threatening to take the trucks to Chipping Norton and "cleaning them out". Several acts of disrespect to officers were observed and some of the swearing was directed at one officer. Attempts were made to enter the trucks. Griffiths ordered the men to return to the dance, have a good time and forget about the rumor, but the men "would break up and form again". (R6,36-38,59-62,64-65). One group started to walk in the direction of Chipping Norton and the remark was made "We're walking by God". Griffiths ordered them back and they complied (R6,62). Another group formed near a truck and one soldier began to crank the vehicle. A jeep was placed in front of the truck but the truck, containing men, backed up and went off in another direction. An officer jumped on the running board and ordered the driver to stop. The driver opened the door and forced the officer to step off the running board (R6,23-24,27-28,38). The men at the car park then left and went to the dance hall where the truck stopped (R6,38,66).

The men in the truck joined and were lost in a crowd of soldiers in front of the hall. The crowd acted in a belligerent manner, there was loud talking and all was in an uproar. The crowd milled around and the men argued amongst themselves about Jenkins. Remarks were heard such as "We been pushed from town to town, now something has to be done about it," and "they cut our men in a fight". There were several suggestions that the men go to Chipping Norton to find out who killed Jenkins, queries as to whether he was still alive, and discussions about a stabbing incident in that town which occurred three days before (R6-7,19,29-30,33,38-39,44-45, 48,64). Griffiths and other officers gave several orders "to break it up" and to go into the dance hall but the groups merely continued to reform (R6, 21,52-53). One soldier came to the gate of the dance hall yard, said he wanted to "go out of there," shoved aside an officer who said something to him about staying in the yard, and left (R50). Two of the military policemen were told to get out of town (R46). Griffiths told the crowd that he would go to Chipping Norton "and check up again as they did not seem to be satisfied with my first statement that everything was alright in Chipping Norton" (R7). Technical Sergeant Frederick A. Myers, Headquarters, Advance Section, Communications Zone, attached to the military police detachment for special duty, told one group that he saw Jenkins at 7:30 p.m. reading a "Yank" magazine, that he was all right at that time, that there was no trouble in Chipping Norton and that he would produce Jenkins if they desired. Corporal Lee Harris, 4176th Quartermaster Service Company, told Myers that he (Harris) would blow his whistle and send the men back to the dance if Myers would produce Jenkins. Harris considered it necessary to make the agreement "as the arguing was still going on". Harris blew his whistle, announced that Jenkins would be produced and the men became quiet and returned to the dance hall. Not all the soldiers could re-enter the hall for it was "too full" (R35,38-39,44-45,53-54). When the dance was about to end at midnight, remarks were heard to the effect that the men would not return to camp until Jenkins was "brought over here" (R19-20). Jenkins was finally brought to the scene. The men seemed to be satisfied, entered the trucks and the disturbance ended. One soldier said "we'll get you white bastards yet" (R20,45).

Witnesses estimated that at various times there were between 20 and 150 men at the parking lot (R5,18,22,24,36,59,64-65), and between 75 and 125 in front of the hall (R31,42). Griffiths testified that the men did not directly disobey his orders to disperse but obeyed them hesitantly and "then they would reform again" (R11,14). Second Lieutenant Howard W. Springer, then of the 647th Ordnance Company, testified that "There was no riot or anything like that" at the parking lot (R26), and that there were no soldiers who did not promptly obey any orders he gave that evening (R27-28). First Lieutenant Harlan P. Porter, 647th Ordnance Ammunition Company, and Second Lieutenant John L. Stroup, 4176th Quartermaster Service Company, testified that the situation at the dance hall was not out of hand (R34,43), and First Sergeant Edward S. Snelling, 4176th Quartermaster Service Company, testified that he "just saw the groups together discussing the man who had been killed", that he did not observe any leader trying to arouse or incite the group, and that "There was no man on a soap box" (R31). However, in

the opinions of Corporal Harris and Staff Sergeant Lee J. Farrell, Provost Marshal's office, Headquarters, Southern Base Section, the men were not under control (R37,50) and Sergeant Myers testified that the crowd in front of the dance hall was definitely disturbed (R55-56).

The evidence with reference to the participation of each of the nine accused in the incident was as follows:

TURNER: was in a group of about 15-20 men, "doing extensive talking of a belligerent nature", and encouraging the men to go to Chipping Norton "to clean them up". Griffiths ordered him to be quiet, to "cut out the loud talking" and to return to the dance. Accused became quiet "for a second" and started to talk again. Griffiths ordered him to "cut it out", to "stand at attention", but Turner kept saying "'Yea'" and "'Huh'" to the officer's comments. He then gave his name on request and was turned over to his company commander (R7,60). The actions of the crowd in which Turner was present indicated that they were going to take a truck and go to Chipping Norton, and the men were talking loudly and making various threats and remarks. They were milling around, slowly obeyed commands to disperse and then grouped together again (R8). Lieutenant Springer of accused's organization observed Lieutenant Griffiths talking to accused who was speaking in a loud but not angry tone of voice, and ordered accused to return to the dance. Accused, who was sober, immediately left (R23,66-68), and he was seen in front of the dance hall (R35).

WADE: was observed by Griffiths in a group at the parking lot talking considerably in a belligerent manner and encouraging the men to take the trucks to Chipping Norton. This was after Griffiths gave the order to disperse. Griffiths gave an order to "break it up" and accused promptly obeyed (R10,60-61). Another witness observed Wade at the parking lot in a group which was near the trucks and in which there was talk about taking a truck and going to Chipping Norton "about what happened over there" (R36-37,39). In front of the dance hall Lieutenant Stroup heard Wade talking loudly "because of some MP being just killed off somewhere". Accused said "something about they bring us over here to be killed". Stroup called him by name and ordered him to be quiet, but he paid no attention to the order until he was called three times by the officer and "someone mentioned it to him", whereupon he obeyed. Stroup did not believe accused heard him the first time. Stroup did not see Wade encouraging any action or the disobedience of any orders. Accused "was just talking" (R42-44).

GALES: After Griffiths ordered the men to disperse at the parking lot, he heard accused say "We are black and they put white officers over us". Griffiths ordered him to be quiet and to return to the dance, whereupon accused walked away and joined another group. Griffiths then ordered Gales to get in a jeep, to stay there and go home with him. The officer left and when he returned accused had disappeared. He next saw him in front of the dance hall (R8,60). Accused was heard to say "Let's go to Chipping Norton" as Griffiths ordered the men to move away from the trucks, and he was seen in a crowd which moved toward the vehicles (R18,20-22,36).

In front of the dance hall Harris heard Gales say in an unfriendly manner to a white military policeman "go on ahead and get out of town" (R39-40).

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Farrell asked accused what the trouble was and he replied that Jenkins was his friend and asked "why he had been killed". He also said, in answer to a question by Farrell, that he intended to go to Chipping Norton if the rest of the men went there. When Farrell said he might be killed if he went, Gales replied that he "would rather go and get his throat cut than be pushed around". In Farrell's opinion accused was "pretty drunk" (R49-50,52).

WASHINGTON: at the car park was in the same talkative and loud group of men as Richard Williams and Turner, but was not heard to speak. The group was ordered by Griffiths to disperse. With Turner, accused was ordered by Springer to return to the dance hall and accused left immediately (R8-9,23,26,61,66,68). He was also in front of the dance hall with a group of soldiers when the military police returned with the news that the rumor of Jenkins' death was false. Lieutenant Porter heard Washington say to a white military policeman in a normal tone of voice "How can I believe you, you are a white MP?". The man standing beside accused told him to be quiet. Lieutenant Porter thought it was a normal question and "At that time I didn't attach much significance to it as being out of order" (R32-33). Accused was the man doing all the talking to Sergeant Myers and plied him with questions about Jenkins. The other men were crowding around Myers and accused "seemed to bring out all the questions of the men". He said to the sergeant "We can't take your word for it and you are white and we are black". Accused mentioned to the sergeant that one of his boys "had been cut up" and Myers told him about the action which was being taken concerning the incident. Washington replied "What kind of action taken". When Myers tried to tell accused Jenkins was safe, attempted to pacify him and get him back to the dance, accused told him to "shut up". As accused was not satisfied that Jenkins was safe, Myers sent one of his men to fetch Jenkins (R45-46,55).

SMITH: Griffiths observed accused talking to two or three soldiers in front of the dance hall and asked him what was the trouble. Smith replied that "they were run out of town and something had to happen". The reply was not made "in an angered tone". Later, Griffiths saw accused talking but he took no active part in collecting a crowd. He then appeared "quite disturbed; quite angered" (R10,60). At the parking lot, after an officer announced that no trucks were to leave the park and ordered the men to return to the dance hall, Harris heard Smith say to himself "We ought to take the trucks and go on down there". Other men were in the vicinity at the time (R37,39-41,64).

STAFF SERGEANT ZEIGLER: In the dance hall accused met Private Milton M. Goldson, 586th Ordnance Ammunition Company, who was on military police duty, and asked if the rumor about Jenkins was true. When Goldson replied that he did not think so, that he had heard nothing but that a soldier had informed him of the rumor, Zeigler replied "Go and see", whereupon Goldson said that he would do so (R17-18). Accused was seen outside the dance hall and told Farrell, the "CID" agent who was dressed

in civilian clothes, "I am a Staff Sergeant; I know you" (R19,35). As accused passed by Farrell the latter took him by the arm about 45 feet to one side and asked what the trouble was, whereupon accused replied that the men wanted to know whether or not Jenkins was alive. Farrell then told Zeigler that he was not accusing him of anything and discussed with him the matter of the men taking the law in their own hands. Farrell said that if Jenkins was dead the men would not have to handle it but "the law" would take care of the matter. He did not hear Zeigler's reply (R48). Farrell further testified that he did not see accused disobey any orders given him or encourage anyone else, and that he displayed a belligerent attitude against "this procedure", but not toward the witness. When Farrell first talked to accused the latter "had no intention" of going to Chipping Norton, but after his conversation with accused, Farrell "got the impression from him that he intended to go". Zeigler did not appear to have any animosity against Farrell because the latter was white (R51). Accused was also in a group of men who were formed around Sergeant Myers, the non-commissioned officer on special duty with the military police detachment, and who had dispatched a soldier to fetch Jenkins. Accused asked in an ordinary tone of voice "Where's Moore?". Another soldier then repeated the question. Moore was an auxiliary military policeman on duty that night in Chipping Norton. Zeigler appeared to be simply requesting information. Before he asked the question the talking of the crowd "sounded rather angry". Myers did not see accused trying to quiet the men (R54,56).

RICHARD WILLIAMS: was in a group at the parking lot with Turner and Washington and was mumbling in a belligerent manner. Griffiths ordered the group to "break it up" and go back to the dance, and the order was "eventually" obeyed "but the group reformed again" (R8-9). Williams was observed by another witness in a group which was ordered by Griffiths to move away from the trucks. Accused said "Let's go to Chipping Norton", and was one of a group which moved toward the trucks (R18,20-22). Williams was also seen "milling around" in the crowd in front of the dance hall (R35,45,48). Farrell asked him what was the trouble and accused "wanted to know about Jenkins as he said he was a friend of Jenkins too". When Farrell asked accused if he was going to Chipping Norton he said "he thought he would go if the rest went" (R48-49,52).

LYONS: was one of a group which was "Lingering and messing around the trucks" and which Griffiths ordered to disperse, return to the dance, and not to walk home but to go home on the trucks. Someone then remarked "We're walking by God", and this group started to walk toward Chipping Norton. Lyons was with these men. When the group had walked about 30 feet Griffiths stopped them. They said they were going home, whereupon Griffiths replied "Not in that direction" and ordered them to go back. They obeyed the order. Chipping Norton was in a direction opposite to the dance hall. Griffiths testified that Lyons was not doing any talking and that when he dispersed this group he said to accused "L.C., I am surprised at you" (R10-11,60,62).

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CARL E.L.WILLIAMS: was observed by Griffiths in groups both at the parking lot and at the dance hall. When in the group at the parking lot he was belligerent, disturbed, appeared angry, and was talking but not too loudly (R9-10,61).

4. Having been advised of his rights, each of the nine accused elected to remain silent (R68-69).

5. Accused were found guilty of, acting jointly and in pursuance of a common intent, unlawfully engaging in and becoming part of a disorderly and riotous assembly of soldiers in violation of Article of War 96.

The word "disorderly" is

> "A general, commonly understood word, which is almost self-explanatory as ordinarily used, and, in a legal sense, has a well-understood meaning relative to the public peace and good order. The term implies contumacy or the like, includes a wide variety of acts and may be applied to all persons who violate the peace and good order of society. In its ordinary or primary sense it has been defined as meaning * * * inclined to break loose from restraint, violating or disposed to violate law and good order; * * * not observing order or amenable to restraint, * * * unruly" (27 C.J.S., pp.275-276).

> "RIOTOUSLY. A technical word, properly used in indictments for riot. It of itself implies force and violence. 2 Chit.Crim.Law,489" (Black's Law Dictionary, 3d Ed., p.1563).

> "Riotous * * * Involving, or engaging in, a riot; * * * b Of the nature of a riot * * *; tumultuous" (Webster's Collegiate Dictionary, 5th Ed., p.860).

Winthrop lists as a violation of Article of War 62 (now AW 96)

> "Any insubordinate * * * or disorderly conduct, * * * non performance or evasion of duty, * * * and not specifically made punishable in some other Article of War" (Winthrop's Military Law and Precedents, 2d Ed., Reprint 1920, p.732).

The assembly of soldiers was certainly disorderly both at the parking lot and in front of the dance hall. At both places, orders by

officers to disperse were hesitantly obeyed and then the groups reassembled. There were frequent instances of cursing, belligerent and inflammatory remarks, loud talking, disrespect shown to officers and threats to drive the trucks to Chipping Norton and "to clean them out". Groups of soldiers formed around the trucks at the parking lot, and after reluctantly obeying orders to disperse, the men again drifted back to the vicinity of the vehicles. One truck was driven to the dance hall in open defiance of orders that the trucks were not to be removed. An officer who attempted to stop the truck was forced to jump from the running board. One group, contrary to orders, started to walk to Chipping Norton. It was considered necessary not only to make a public announcement at both the hall and parking lot that Jenkins was not dead, but finally to bring him to the scene in order to convince the men that he was unharmed. After the rumor about Jenkins began to circulate, one white military policeman was taken from the dance hall because of the attitude of the men. Other white military policemen were surrounded by soldiers who argued with them about Jenkins and told them that they could not be believed. One white military policeman was told to "shut up" and another told to "get out of town".

Although such conduct on the part of the soldiers was undoubtedly disorderly, it is doubtful that their conduct was "riotous" within the ordinary meaning of the word. However, the gist of the offense alleged and the sentences imposed are not affected by the questionable insertion of the word "riotous" in the Specification. Its use was merely descriptive.

With respect to accused Turner, Wade, Gales, Washington, Smith, Richard Williams, Lyons and C.E.L. Williams the Board of Review is of the opinion that their active, positive participation in the disturbance was established by competent substantial evidence, legally sufficient to support the findings of guilty (CM ETO 804, Ogletree et al; CM ETO 895, Fred A. Davis et al).

The only evidence with reference to Zeigler was that he asked a military policeman at the dance hall to find out the truth of the rumor as to Jenkins, and that he told Farrell, when called aside and questioned by the latter as to the cause of the trouble, that the men wanted to know whether Jenkins was alive. Farrell testified that Zeigler had a belligerent attitude against "this procedure" but displayed no animosity toward Farrell himself, and that he "got the impression" that Zeigler, after their conversation, intended to go to Chipping Norton, although he did not believe accused had any intention of doing so when they were talking together. Zeigler was in a group of men who "sounded rather angry" and who were formed around Sergeant Myers. Accused inquired as to the whereabouts of a soldier named Moore, an auxiliary military policeman on duty that night in Chipping Norton. Another soldier then made a similar inquiry. Zeigler appeared to be simply requesting information. Myers did not see accused trying to quiet the men and Farrell did not

observe him disobeying any orders or encouraging any of the soldiers. The Board of Review is of the opinion that the foregoing evidence fails to establish any active participation by Zeigler in the disturbance. The testimony of Farrell concerning accused's attitude and intentions was decidedly vague and their private conversation occurred about 45 feet away from other persons. The question about Moore, addressed to Myers in the presence of other soldiers, was perhaps an unwise one under the circumstances but there is no evidence that it was asked with any wrongful purpose in mind or that it caused any inflammatory results. There was no evidence whatsoever that this accused disobeyed orders, flouted authority or encouraged others to do so. The Board of Review is of the opinion that the evidence is legally insufficient to support the findings of guilty and the sentence as to Zeigler (Cf: CM ETO 804, Ogletree et al, as to Wise's conduct in that case).

The question remaining for consideration with reference to accused Turner, Wade, Gales, Washington, Smith, Richard Williams, Lyons and C.E.L. Williams is whether the evidence is legally sufficient to support the sentences as to these eight accused. Particular reference is made to the disturbance at the parking lot. There, the conduct of the men was distinctly not of the ordinary type of disorderly conduct, but was of a particularly aggravated character and involved a disorder most highly prejudicial to good order and military discipline. Repeated orders by officers to disperse, at first hesitantly obeyed, were later ignored as the various groups reassembled. Their orders were openly flouted as the men continued to group in the vicinity of the trucks, when one truck was driven away and when one group started to walk to Chipping Norton. Highly inflammatory and angry discussions occurred. There were repeated threats to go to Chipping Norton and to "clean them out". The evidence established beyond all reasonable doubt the fact that the men were assembled at the car park for the express purpose of taking the trucks, going to Chipping Norton, investigating the supposed death of Jenkins and avenging it by force, violence and brutality. Each of the eight aforementioned accused were at the parking lot and there each took an active, positive participation in the disturbance. Such conduct far exceeded the ordinary type of disorderly conduct for which the maximum punishment imposable is confinement at hard labor for four months and forfeiture of two-thirds' pay per month for a like period. The offense committed by the eight accused most closely resembled that of unlawful assembly.

> "UNLAWFUL ASSEMBLY IS AN ASSEMBLY THREATENING A TUMULTUOUS DISTURBANCE OF PUBLIC PEACE. An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood of such assembly to fear on reasonable grounds that the persons so

assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously. * * *

"Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose; and this has been held to be the case with disorder got up suddenly, though concertedly, at a town meeting, and at a social assembly for dancing. * * *." (2 Wharton's Criminal Law, sec.1858, pp.2186-87, 2189-90).

"5. In order to constitute the offense of unlawful assembly at common law, it must appear that there is a common intent of the persons assembled to attain a purpose, whether lawful or unlawful, by the commission of such acts of intimidation and disorder as are likely to produce danger to the tranquillity and peace of the neighborhood, and have a natural tendency to inspire rational, firm, and courageous persons in the neighborhood with well-grounded fear of serious breaches of the peace." (State of New Jersey v. John C. Butterworth et al, __ N.J.L. __, 142 Atl. 57, 58 A.L.R. 744).

Certainly the conduct of the assembly of the soldiers at the car park, viewed in its entirety, was such as to cause the officers reasonable fear of serious breaches of the peace at Hook Norton and especially at Chipping Norton, and that the men intended to effect their purpose by the commission of such acts of intimidation and disorder as were likely "to produce danger to the tranquillity and peace" of those neighborhoods. The offense of unlawful assembly is not listed in the Table of Maximum Punishments in the Manual for Courts-Martial, nor is it made punishable by any statute of the United States. An unlawful assembly of the character herein involved is not made punishable by the law of the District of Columbia. However, the maximum punishment of death cannot be imposed in the instant case, inasmuch as it involves a conviction under the 96th Article of War (AW 43). The Board of Review is, therefore, of the opinion that the record of trial is legally sufficient to support the sentences as to accused Turner, Wade, Gales, Washington, Smith, Richard Williams, Lyons and C.E.L. Williams (CM ETO 2212, Coldiron; CM ETO 1920, Horton).

6. The charge sheets show the following data as to accused:

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Turner is 21 years of age and was inducted 1 February 1943 at Albany, New York.

Wade is 21 years three months of age and was inducted 18 October 1941 at Fort Benning, Georgia.

Gales is 27 years nine months of age and was inducted at Fort Benning, Georgia, 30 December 1942.

Washington is 21 years of age and was inducted 7 December 1942 at Fort Benning, Georgia.

Smith is 20 years six months of age and was inducted at Fort George G. Meade, Maryland, 20 April 1942.

Zeigler is 21 years of age and was inducted on 10 December 1942 at Fort Benning, Georgia.

Richard Williams is 21 years of age and was inducted 20 March 1943 at Armed Forces Induction Station, Grand Central Palace, New York City, New York.

Lyons is 23 years 11 months of age and was inducted at Camp Shelby, Mississippi, 6 April 1943.

Carl E. L. Williams is 24 years six months of age and was inducted at Camp Blanding, Florida, 8 December 1942.

All were inducted to serve for the duration of the war plus six months. None had any prior service.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of any of accused were committed during the trial, except as herein noted. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences as to accused Turner, Wade, Gales, Washington, Smith, Richard Williams, Lyons and Carl E. L. Williams. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as to accused Zeigler. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

B. Franklin Pitts Judge Advocate

Elwood H. Vorgus Judge Advocate

(ABSENT ON DETACHED SERVICE) Judge Advocate

1st Ind.

WD, Branch Office, TJAG, with ETOUSA. 22 JUL 1944 TO: Commanding General, Southern Base Section, Communications Zone, ETOUSA, APO 519, U. S. Army.

1. In the case of Private JACK TURNER (32745965), Private WILBUR WASHINGTON (34560056), Private RICHARD WILLIAMS (32868971), Staff Sergeant LAMAR H. ZEIGLER (34560605), all of 647th Ordnance Company (Am), and Private SAMUEL L. SMITH (33182969), Private First Class CARL E. L. WILLIAMS (34534740), Private SYLVESTER WADE (34064839), Private First Class WALTER GALES (34563952), and Private L. C. LYONS (34628165), all of 4176th Quartermaster Service Company, attention is invited to the foregoing holding of the Board of Review, that the record of trial is legally sufficient to support the findings of guilty and the sentences as to accused Turner, Wade, Gales, Washington, Smith, Richard Williams, Lyons and Carl E. L. Williams, and legally insufficient to support the findings of guilty and the sentence as to accused Zeigler, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. Evidence of previous convictions was introduced as to Wade only, and neither of the two previous convictions of this accused was for an offense involving moral turpitude. Although the conduct of the several accused was certainly disorderly and insubordinate, it did not reach the stage where actual force and violence were used. There was not any great degree of viciousness indicated in the conduct of any of the accused. I do not believe that they should be separated from military service until all possibilities of their values as soldiers have been exhausted. The Government should preserve the right to use their services in a combat area. In view of the prevailing policy in this theater of conserving manpower, I recommend that consideration be given to appropriate reductions of the sentences, that the execution of the dishonorable discharges be suspended until the soldiers' releases from confinement and that the place of confinement be changed to Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England. Supplemental actions should be forwarded to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2566. For convenience of reference please place that number in brackets at the end of the order: (ETO 2566).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2569

- 7 JUL 1944

U N I T E D S T A T E S)	4TH INFANTRY DIVISION.
)	
v.)	Trial by GCM, convened at APO 4, United States Army 23 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The Federal Reformatory, Chillicothe, Ohio.
Private LOYD C. DAVIS (7041523), Headquarters Battery, 4th Division Artillery.)	

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

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

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

CHARGE I: Violation of the 63rd Article of War.
Specification: In that Private Loyd C Davis, Headquarters Battery, 4th Infantry Division Artillery did at Cullompton, Devon, on or about 14 May 1944 behave himself with disrespect toward First Lieutenant Orville E. Peterson, his superior officer, by flipping a lighted cigarette at his face.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that * * * did at Cullompton, Devon, on or about 14 May 1944, with intent to do him bodily harm, committ an assualt upon Technician 4th Grade Obee O. Thayer Battery "B", 20th Field Artillery Battalion, by willfully and feloniously striking the said Technician 4th Grade Obee O. Thayer on the head with a dangerous weapon, to wit: an iron bar.

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CHARGE III: Violation of the 64th Article of War.
Specification: In that Private Loyd C. Davis, Headquarters Battery, 4th Division Artillery, having received a lawful command from First Lieutenant Orville E. Peterson, Battery B, 20th Field Artillery Battalion, his superior officer, to march to the guard house, did at Cullompton, Devon, on or about 14 May 1944, willfully disobey the same.

He pleaded not guilty to and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of all the charges and specifications. Evidence was introduced of one previous conviction stated to be by summary court for behaving with disrespect to and approaching a superior officer with the intent to strike him in violation of Articles of War 63 and 64. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved only so much of the sentence as involved dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, but directed that pending further orders accused be confined at the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, (England) and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Private First Class Russell L. Wilcoxon (17041751), Headquarters Battery, 4th Division Artillery was charged with willful disobedience of a lawful command of First Lieutenant Orville E. Peterson, Battery B, 20th Field Artillery Battalion, his superior officer, to march to the guardhouse, in violation of Article of War 64, and committing an assault with intent to do bodily harm upon Technician Fourth Grade Obee O. Thayer, Battery B, 20th Field Artillery Battalion, by kicking him in the face, in violation of Article of War 93. The convening authority consolidated the charges against Davis and Wilcoxon for trial, and each accused stated in open court that there was no objection thereto. Wilcoxon was found guilty of both charges against him and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority approved only so much of the sentence as involved dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years, suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, ordered executed the sentence as thus modified and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, (England) as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 26, Headquarters 4th Infantry Division, APO 4, US Army, dated 24 May 1944.

4. The evidence for the prosecution showed that the accused Davis, on the evening of 14 May 1944, while in the Kings Head Tavern, Cullompton, England, engaged in a free-for-all fight in the hallway. The fight ceased and accused re-appeared with an iron bar. This was taken away from him but he secured another iron bar and started to swing it. At that moment Sergeant Thayer, who was billeted above, came downstairs to investigate, entered the door leading into the hall and was accidentally struck by the swinging bar which was in accused's hand, and was knocked unconscious (R7, 9-10). Part of a motorcar axle and "two other iron bars which were blood-stained", were found on the floor by the entrance door to the lounge (R12). The three articles were admitted in evidence (R17; Pros.Exs.A,B,C). There were 15 to 20 men in the hallway at the time (R8,11). Thayer sustained a "depressed fracture of the left temporal bone and cerebral contusion with motor athasia" which will result in partial or permanent disability (R18; Ex.D).

First Lieutenant Orville E. Peterson, 20th Field Artillery Battalion, Officer of the Day for Batteries B and C, went to the scene to investigate the disturbance which had been reported to him. While standing outside of the dispensary where Sergeant Thayer was taken, accused and Wilcoxon passed nearby without caps and with their field jackets open. They were pointed out as two of the men involved in the disturbance in Kings Head tavern. The lieutenant approached them and said "'You are under arrest'". Wilcoxon said "'What for, we haven't done anything - just walking home'". Peterson replied "'You are under arrest for investigation of a fight down the street'". Accused Davis said "'Hell no. We didn't do anything and I am not going anywhere'". He then flipped a cigarette at the lieutenant which struck him "just below the face" (R15-16). Lieutenant Peterson's testimony continued:

> "I backed up and Davis said, 'You can pull your gun if you want to, but I am not going anywhere.' About that time Sergeant Dively came up. He saw me there having trouble on the street and said, 'Let me take them Lieutenant, they are my boys.' I said, 'No, they are going with me to the guard house, you see if you can take them up there.' He didn't have any success, so I called approximately five men of mine who were across the street and told them take the man, one on each side, to the guard house. They wouldn't move until there was a man on each of their arms. I had given them both a direct order to march to the guard house.
> Q. Did they obey that order?
> A. They did not.
> Q. You are certain they understood that order?
> A. I know they did because they said they wouldn't go." (R16).

Sergeant Roy F. Addison, Battery B, 20th Field Artillery Battalion, testified that when Lieutenant Peterson told Davis and Wilcoxon that they were under arrest and "to go on down the street", accused Davis replied "'Hell no' they weren't going" and flipped a cigarette in the lieutenant's face (R17). There was evidence that although accused had been drinking he spoke coherently, walked without staggering or need for support, and appeared to know what he was doing (R8,11,16).

5. For the defense, Sergeant Arthur Dively, Headquarters Battery, 4th Division Artillery, testified that he observed accused and Wilcoxon talking to Lieutenant Peterson and, sensing trouble, ran over to them. He did not see accused flip a cigarette at the officer and knew that accused did not have one in his possession at the time. Davis' companion Wilcoxon never used tobacco. In his opinion Davis was drunk and did not know what he was doing. "He was in those last stages * * * running at the mouth" and was enraged as well as drunk. He spoke coherently and walked without staggering or need of support. Witness was the section chief of both men and in his opinion "On duty, there are no better men in the army." (R19-21).

Accused made an unsworn statement to the effect that he was so drunk the night of the occurrence that he did not remember anything that occurred from the time he entered the Kings Head Tavern until about 2:00 a.m. the following morning (R22).

6. The findings of guilty of disrespect to a superior officer, in violation of Article of War 63 (Charge I and Specification), and willful disobedience of the order of a superior officer, in violation of Article of War 64 (Charge III and Specification), are supported by competent, substantial evidence. The evidence is also legally sufficient to support the findings of guilty of assault with intent to do bodily harm with a dangerous weapon. When he struck Thayer, accused was swinging the iron bar while engaged in a free-for-all fight. There was evidence from which it could be reasonably inferred that the blow was accidental as Thayer had just stepped into the hall and had not been a participant in the fracas. This fact makes no difference as to accused's guilt of the offense alleged (CM ETO 422, Green and authorities cited therein). There can be no question that the iron bar was used in such a manner as to constitute it a dangerous weapon. Accused wielded the weapon in such a manner that serious bodily harm was likely to result, and the character of Thayer's injury was serious.

> "A dangerous or deadly weapon, within the meaning of a statute punishing assaults with weapons of such character, is a weapon which, in the manner in which it is used, or attempted to be used, may endanger life or inflict great bodily harm, or, as it is otherwise described, one which is likely to produce death or great bodily injury" (6 CJS, sec 77c, p 934).

7. The charge sheet shows the accused is 22 years three months of age and enlisted on 24 June 1940 at Fort Knox, Kentucky to serve for three years. He had no prior service.

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

9. Confinement in a United States penitentiary is authorized for the crime of assault with intent to do bodily harm with a dangerous weapon (AW 42; sec 276, Federal Criminal Code (18 USCA 455); sec 335, Federal Criminal Code (18 USCA 541); Act June 14, 1941, c 204, 55 Stat 252 (18 USCA 753f); Cf: US v Sloan, 31 Fed Sup 327). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir 229, WD, 8 Jun 1944, sec II, pars 1a(1), 3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

(170)

1st Ind

WD, Branch Office TJAG, with ETOUSA. - 7 JUL 1944 TO: Commanding General, 4th Infantry Division, APO 4, US Army.

1. In the case of Private LOYD C. DAVIS (7041523), Headquarters Battery, 4th Division Artillery, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2569. For convenience of reference please place that number in brackets at the end of the order: (ETO 2569).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

13 JUN 1944

ETO 2581

U N I T E D S T A T E S	)	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	)	
Captain LAWRENCE M. RAMBO (O-885432), Corps of Engineers, Supply Division, Engineer Service.	)	Trial by G.C.M., convened at Central Base Section, London, England 3 May 1944. Sentence: Dismissal.

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

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

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

CHARGE I: Violation of the 95th Article of War.
Specification 1: In that Captain Lawrence M. Rambo, Headquarters, Engineer Service, E.T.O., did, at London, England, on or about 24 January 1944, with intent to defraud, wrongfully and unlawfully make and utter to The American Red Cross, a certain check, in words and figures as follows, to wit:

"

2547

No. 2/C.102550 London, Jan. 24 1944

Barclays Bank Limited (2d)
451, Oxford Street, W.1. (Stamp)

Pay Cash _____ or Order
the sum of Ten Pounds _____
M £10-0-0 L. M. Rambo"

and by means thereof, did fraudulently obtain from the American Red Cross the sum of ten pounds (£10), exchange value $40.35, he, the said Captain Lawrence M. Rambo well knowing

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that he did not have sufficient funds in Barclays Bank Limited for the payment of said check, and not intending that he should have.

Specification 2: In that * * *, did, at London, England, on or about 15 January 1944, with intent to defraud, wrongfully and unlawfully make and utter to the American Red Cross Great Britain, a certain check, in words and figures as follows, to wit:

"

2673

No.2/C.238700 London, Jan 15 1944

Barclays Bank Limited, (2D)

451, Oxford Street, W.1. (Stamp)

Pay American Red Cross, Great Britain or Order the sum of Ten Pounds only

M £10-0-0 L. M. Rambo

US. RECD A/C

O-885432 "

and by means thereof did fraudulently obtain from the aforesaid American Red Cross Great Britain, the sum of ten pounds (£10), exchange value $40.35, he the said Captain Lawrence M. Rambo, well knowing that he did not have sufficient funds in Barclays Bank Limited for the payment of said check and not intending that he should have.

Specification 3: In that * * *, did, at London, England, on or about 17 January 1944, with intent to defraud, wrongfully and unlawfully make and utter to the American Red Cross a certain check, in words and figures as follows, to wit:

"

2673

No. 2/C.229718 London, Jan 17 1944

Barclays Bank Limited, (2D)

451, Oxford Street, W.1. (Stamp)

Pay American Red Cross or Order the sum of Ten Pounds only

M £10-0-0 L. M. Rambo

U.S.RECD A/C"

and by means thereof did fraudulently obtain from the aforesaid American Red Cross, the sum of ten pounds (£10), exchange value $40.35, he the said Captain Lawrence M. Rambo, well knowing that he did not have sufficient funds in Barclays Bank Limited for the payment of said check and not intending that he should have.

Specification 4: In that * * *, did, at London, England, on or about 18 January 1944, with intent to defraud, wrongfully and unlawfully make and utter to the American Red Cross, a certain check, in words and figures as follows, to wit:

" 2673

No. 2/C.229719 London, Jan 18 1944

Barclays Bank Limited, (2D)

451, Oxford Street, W.1. (Stamp)

Pay American Red Cross _____or order the sum of Eight Pounds only _____

M £8-0-0 L. M. Rambo

U.S.RECD A/C "

and by means thereof did fraudulently obtain from the aforesaid American Red Cross the sum of eight pounds (£8), exchange value $32.28, he the said Captain Lawrence M. Rambo, well knowing that he did not have sufficient funds in Barclays Bank Limited for the payment of said check and not intending that he should have.

Specification 5: In that * * *, did at London, England, on or about 21 January 1944, with intend (sic) to defraud, wrongfully and unlawfully make and utter to the American Red Cross Great Britain, a certain check, in words and figures as follows, to wit:

" 2673

No. 2/C.240972 London, 21st Jan.1944

Barclays Bank Limited, (2D)

451, Oxford Street, W.1. (Stamp)

Pay American Red Cross; Great Britain___or Order the sum of Ten Pounds only _____

M £10-0-0 L. M. Rambo

APO 887 0885432 U.S.RECD A/C "

and by means thereof did fraudulently obtain from the aforesaid American Red Cross, Great Britain, the sum of ten pounds (£10), exchange value $40.35, he the said Captain Lawrence M. Rambo well knowing that he did not have sufficient funds in Barclays Bank Limited for the payment of said check and not intending that he shold have.

Specification 6: In that * * *, did, at London, England, on or about 31 January 1944, with intent to defraud, wrongfully and unlawfully make and utter to the American Red Cross, Rainbow Corner, a certain check, in words and figures as follows, to wit:

(174)

" 30024
S No.307886 Jan 31 1944
Lloyds Bank Limited (2D)
Woolwich Branch, (Stamp)
20, Green's End, S.E. 18.
Pay American Red Cross Rainbow Corner___or Order
Five Pounds only _____
£5-0-0 L.M.Rambo"

and by means thereof, did fraudulently obtain from the aforesaid American Red Cross the sum of five pounds (£5), exchange value $20.175, he the said Captain Lawrence M. Rambo, well knowing that he did not have an account at Lloyds Bank Limited, Woolwich Branch, for the payment of said check and not intending that he should have.

Specification 7: In that * * *, did, at London, England, on or about 3 February 1944, with intent to defraud, wrongfully and unlawfully make and utter to the American Red Cross Great Britain, a certain check, in words and figures as follows, to wit:

" 30024
S No.307887 Feb 3 1944
Lloyds Bank Limited (2D)
Woolwich Branch, (Stamp)
20, Green's End, S.E.18
Pay American Red Cross in Great Britain__or Order
Five Pounds only _____
£5-0-0 L.M.Rambo Capt
APO 887 -0885432 "

and by means thereof did fraudulently obtain from the aforesaid American Red Cross in Great Britain the sum of five pounds (£5), exchange value $20.175, he the said Captain Lawrence M. Rambo well knowing that he did not have an account at Lloyds Bank Limited, Woolwich Branch, for the payment of said check and not intending that he should have.

Specification 8: In that * * *, did, at London, England, on or about 4 February 1944, with intent to defraud, wrongfully and unlawfully make and utter to the American Red Cross in Great Britain, a certain check, in words and figures as follows, to wit:

" 30024
S No.307888 Feb 4 1944
Lloyds Bank Limited (2D)
Woolwich Branch, (Stamp)
20, Green's End, S.E.18
Pay American Red Cross in Great Britain__or Order
Five Pounds only _____
£5-0-0 L.M.Rambo
APO 887 ASN 0885432"

and by means thereof did fraudulently obtain from the aforesaid American Red Cross in Great Britain the sum of five pounds (£5), exchange value $20.175, he the said Captain Lawrence M. Rambo well knowing that he did not have an account at Lloyds Bank Limited, Woolwich Branch, for the payment of said check and not intending that he should have.

Specification 9: In that * * *, did, at London, England, on or about 7 February 1944, with intent to defraud, wrongfully and unlawfully make and utter to the American Red Cross, Rainbow Corner, a certain check in words and figures as follows, to wit:

"

30024

S No.307890 Feb 7 1944

Lloyds Bank Limited
Woolwich Branch, (2D)
20, Green's End, S.E.18 (Stamp)

Pay American Red Cross Rainbow Corner or Order
Ten Pounds only _____
£10-0-0 L.M.Rambo Capt.
0885432 APO 887 "

and by means thereof, did fraudulently obtain from the aforesaid American Red Cross the sum of ten pounds (£10), exchange value $40.35, he the said Captain Lawrence M. Rambo, well knowing that he did not have an account at Lloyds Bank Limited, Woolwich Branch, for the payment of said check, and not intending that he should have.

Specification 10: In that * * *, did, at London, England, on or about 14 February 1944, with intent to defraud, wrongfully and unlawfully make and utter to the American Red Cross in Great Britain, a certain check, in words and figures as follows, to wit:

"

30024

S No.307913 Feb 14 1944

Lloyds Bank Limited
Woolwich Branch, (2D)
20, Green's End, S.E.18 (Stamp)

Pay American Red Cross in Great Britain or Order
Ten Pounds only _____
£10-0-0 L.M.Rambo CE.
ASN 0885432 APO 887 "

and by means thereof, did fraudulently obtain from the aforesaid American Red Cross in Great Britain the sum of ten pounds (£10), exchange value $40.35, he the said Captain Lawrence M. Rambo, well knowing that he did not have an account at Lloyds Bank Limited, Woolwich Branch, for the payment of said check, and not intending that he should have.

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Specification 11: In that * * *, did at London, England, on or about 19 February 1944, with intent to defraud, wrongfully and unlawfully make and utter to The American Red Cross a certain check in words and figures as follows, to wit:

"

30024

S No.307897 Feb 19 1944

Lloyds Bank Limited (2D)

Woolwich Branch, (Stamp)

20 Green's End, S.E.18

Pay Cash _____ or Order

Ten Pounds only _____

£10-0-0 L.M.Rambo

0885432 CAPT CE APO 887"

and by means thereof, did fraudulently obtain from the American Red Cross the sum of ten pounds (£10) exchange value $40.35, he the said Captain Lawrence M. Rambo, well knowing that he did not have an account at Lloyds Bank Limited, Woolwich Branch, for the payment of said check and not intending that he should have.

Specification 12: In that * * *, did, at London, England, on or about 22 February 1944, with intent to defraud wrongfully and unlawfully make and utter to The American Red Cross a certain check in words and figures as follows, to wit:

"

30024

S No.307898 Feb 22 1944

Lloyds Bank Limited

Woolwich Branch, (2D)

20, Green's End, S.E.18 (Stamp)

Pay Cash (Self) _____ or Order

Ten Pounds only _____

£10-0-0 L.M.Rambo"

and by means thereof did fraudulently obtain from the American Red Cross the sum of ten pounds (£10), exchange value $40.35, he the said Captain Lawrence M. Rambo, well knowing that he did not have an account at Lloyds Bank Limited, Woolwich Branch, for the payment of said check, and not intending that he should have.

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

Specification 1: In that * * *, being indebted to Marsh and Parsons, London, England in the sum of eight pounds seven shillings (£8-7-0), exchange value $33.6922, for dilapidations and gas account in connection with furnished flat rented through the aforesaid Marsh and Parsons, which amount became

due and payable about October 1943, did, at London, England, from 30 October 1943 to 1 March 1944, dishonorably fail and neglect to pay said debt.

Specification 2: In that * * *, being indebted to Mrs.H.M.Campion, London, England, in the sum of five pounds, eight shillings, six pence (£5-8-6), exchange value $21.889, for electricity, gas and laundrey in connection with a certain flat rented thrqugh Swain and Company, her agents, which amount became due and payable on or about 1 January 1944, did from 1 January 1944 to 1 March 1944 dishonorably fail and neglect to pay said debt.

Specification 3: In that * * *, being indebted to Kettners Restaurant, London, England, in the sum of five pounds, sixteen shillings, six pence (£5-16-6) exchange value $23.50, for a meal and entertainment, which amount became due and payable on or about 15 February 1944, did from the 15 February 1944 to 1 March 1944 dishonorably fail and neglect to pay said debt.

As accused refused to plead to the charges and specifications the court entered on his behalf pleas of not guilty to both charges and to all specifications under each. He was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Central Base Section, Services of Supply, European Theater of Operations, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, stated that it was wholly inadequate to the findings of guilty, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The undisputed evidence for the prosecution shows that between 15 January and 22 February 1944 at the times and places alleged, accused signed and negotiated the checks alleged in the 12 specifications of Charge I. The total amount of the checks was 103 pounds. The checks described in specifications 1-5 inclusive were drawn on Barclays Bank Limited, 451 Oxford Street, and those alleged in specifications 6-12 inclusive were drawn on Lloyds Bank Limited, Woolwich Branch, both banks being in London, England. Accused negotiated the checks at various American Red Cross Clubs in London and received in cash the amounts for which the checks were drawn. Witnesses having personal knowledge of such facts identified each check admitted in evidence as having been negotiated by accused. These witnesses further testified that the checks were not honored by the drawee bank when presented for payment. The checks drawn on Barclays Bank were returned because of an

insufficiency of funds ("Refer to drawer"), and those drawn on Lloyds Bank were returned marked "No account".

The evidence relating to the negotiation of the 12 checks and the pertinent exhibits involved, are found on the following pages of the record of trial: (R15-16, Pros.Ex.1 (Spec.1); R17-19, Pros.Exs.2,6,7,20 (Specs.2, 5,10); R20-21, Pros.Exs.3-4 (Spec.3); R21-22, Pros.Ex.5 (Spec.4); R31-33, Pros.Exs.10-13 incl., (Specs.6,7,9); R33-34, Pros.Ex.14 (Spec.8); R35-37, Pros.Exs.15-17 incl., (Specs.11-12).

Mr. Charles M. Murray, assistant to the Director of Accounting of the American Red Cross in Britain, identified the 12 checks which were sent to him from the various clubs at which they were cashed after they were returned unpaid. Unpaid checks were forwarded to American Red Cross Headquarters if they were over ten days old and no "contact" had been received from the drawer. A letter was written to accused concerning two of the checks which Mr. Murray had at the time but no reply was received. On 21 February Murray conferred with accused concerning some of the checks which had then been returned. Accused said he would "straighten them out" with money he was planning to obtain from the United States. A three day grace period was agreed upon. About 24 February he explained to Murray that he had "another source" and would have the money on the following morning. At the time of trial (May 3) the 12 checks were still unpaid (R40-43).

Mr. Percy Rogerson, manager of Lloyds Bank, Woolwich Branch, identified the seven checks drawn on that bank (Pros.Exs.7,11-15,17; Specs.6-12 incl.). He testified that these checks were "taken from a book issued to a customer who was then named Miss Boyle, and we understand she married. Her name then became Rambo". The signature "L.M.Rambo" on the checks was unknown at the bank and there was no account in the bank under that name. He also identified and gave similar testimony with reference to Pros.Exs. 18-19 (dishonored checks given by accused in payment of bills alleged in Specifications 1 and 3, Charge II, hereinafter discussed) (R45-46).

Mr. Frederick E. Wigmore, manager of Barclays Bank, 451 Oxford Street, London, identified the five checks drawn on that bank and the signature of accused thereon with which he was familiar (Pros.Exs.1,2,4,5, 6; Specs.1-5 incl.). The checks were marked "Refer to drawer" which signified that they were dishonored because of a lack of funds. He also identified a true copy of accused's account with the bank which he personally compared with the original, and which was admitted in evidence. The account was started 16 March 1943 and was still "open". At the time of trial accused owed the bank a balance of about 31 pounds (R23; Pros.Ex.8).

An examination of Pros.Ex.8 shows that from 16 March 1943 to the date of the last entry (17 Feb 1944) the highest credit balance ever maintained by accused was about 59 pounds (31 Mar 1943) and the highest overdraft was about 96 pounds (29 June 1943). On 19 June 1943 a check for $200, drawn on the Edison Bank (United States) was returned unpaid. This

increased the overdrawn status of the account from about 39 to about 89 pounds. During the whole period the account was overdrawn in about 57 instances, and there were but 21 instances of a credit balance. It was continually in an overdrawn status from 4 May 1943 to 1 November 1943 in amounts varying from about 11 pounds to about 96 pounds. On 1 November 1943 a deposit converted the account from an overdrawn status of about 24 pounds to a credit balance of a little over 31 pounds but this credit balance was exhausted on 4 November. From 4 November to and including 17 February 1944, the date of the last entry, the account was overdrawn in 12 instances. The only credit balance during this period was one of about 10 pounds on 30 November 1943. During the period 15-24 January 1944 during which accused negotiated the checks drawn on Barclays Bank in the total amount of 48 pounds (Specifications 1-5 incl.), his account was overdrawn about 21 pounds. Most of the substantial deposits were derived from accused's Army pay (Pros.Ex.8).

Mr. Wigmore further testified that he was constantly in touch with accused by means of personal interviews, telephone calls and letters (R24), and was continually "pressing" him to repay the money he owed the bank (R26). Accused repeatedly promised to pay the overdraft and up to a certain date in 1943 his army pay was sent directly to the bank by the finance officer. He promised never to revoke this procedure but "the check ceased to come in". The last pay check received from the finance officer was on 30 November 1943 (R27). The overdraft dated from a time in 1943 when a check drawn by accused on the Edison Bank in the United States was returned to the bank marked "No account." (However, Pros.Ex. 8 shows that there were several overdrafts in the account prior to 19 June 1943 when a check drawn on the Edison Bank for $200 was returned unpaid). The bank had honored "over fifty" overdrafts during a ten-month period (R26). Mr. Wigmore testified as follows on cross-examination:

"Q. So the bank then had made rather a practice of lending money to the accused by honoring his overdrafts?
A. We had continued to lend him a sum of money which had been occasioned by an unpaid check drawn on the United States of America.
Q. So as he drew these overdraft checks the bank honored them?
A. Yes.
Q. And the man therefore had reason to assume that they would be honored?
A. Not to an unlimited extent.
Q. But to a limited extent you would concede?
A. To a limited extent" (R26-27).

Accused last made a deposit on 15 February 1944 on which date he brought to Mr. Wigmore 9 pounds 18 shillings 4 pence to cover a check for ten pounds which the latter cashed the previous day because accused's need for the money was urgent and he promised to repay it (R27-28). Admitted in

evidence was a copy of a letter written to accused by Wigmore dated 18 January 1944 in which it was stated in substance that accused was issuing a number of checks, payment of which were refused because of a lack of funds. It was further stated therein that if "this procedure" continued accused would be requested to close the account (R29-30; Pros.Ex.9a). Wigmore also identified three checks dated 16 April, 3 May and 26 October 1943, totalling a little over ten pounds, drawn by accused on Barclays Bank, all of which were honored. An examination of the three checks which were admitted in evidence, discloses that they were checks bearing the name of Lloyds Bank as the drawee bank, which name was deleted and that of the Barclay Bank substituted therefor (R30-31; Def.Exs.1-3 incl.).

4. With reference to Charge II and its specifications, the undisputed evidence for the prosecution shows that accused rented a furnished flat from the firm of Marsh and Parsons, London. The period of the tenancy was from 10 July 1943 to 8 July 1944 but either party could "determine" the tenancy by giving the other party one month's notice. The tenancy was terminated 16 October 1943. Accused owed a total bill of 8 pounds 7 shillings which was comprised of two items: a claim for "delapidations" in the amount of 4 pounds 15 shillings which became due upon termination of the tenancy and for which "a schedule was served" on 25 October 1943, and a gas bill in the amount of 3 pounds 12 shillings which was sent to accused on 2 December 1943. Letters were mailed to him 2 November, 2 December and upon two other occasions, and "his secretary" was spoken to a number of times. No reply was received. Accused finally visited the lessor firm 15 February 1944 and gave a check drawn on Lloyds Bank for the total bill. The check was returned marked "No account". The lessor firm did not communicate with him again and the indebtedness remained unpaid at the time of the trial (R37-39; Pros.Ex.18) (Specification 1, Charge II).

On 4 November 1943 accused rented a flat from the agent of Mrs. Hilda M. Campion, 106 Inverness Terrace, London, for a period of 12 weeks, which expired 22 February 1944. Mrs. Campion testified that accused paid "all his bills the day he left up to the day he left". About "five or six days" after he vacated the flat, "about the 4th or 5th March-somewhere about that date" there became due an indebtedness of about 5 pounds 8 shillings for electric light and fire, telephone and cleaning. These services were furnished during the last five weeks of his occupancy. Mrs. Campion telephoned accused's wife, told her that the bills had "come in" and wrote her one or two letters. The debt remained unpaid at the time of trial (R39-40) (Specification 2, Charge II).

On 15 February 1944 accused gave to the head waiter at Kettners Restaurant, London a check drawn on Lloyds Bank in the sum of 5 pounds 16 shillings 6 pence as payment for food and drink. The check was presented for payment the following day and was returned bearing the notation "No account". The indebtedness remained unpaid at the time of trial (R43-45; Pros.Ex.19) (Specification 3, Charge II).

5. Accused, upon being advised of his rights elected to make a sworn written statement to the court and to testify under oath. The statement which was admitted in evidence (R50; Def.Ex.4), was substantially as follows:

"The facts which have been alleged against me in this case are true, unfortunately, and I do not now, nor have I ever made any attempt to deny the facts." He admitted the execution and negotiation of the checks alleged and stated that he "was desperately hard pressed for money" and "knew that what I was doing was wrong". It was not his intention, however, at any time to defraud anyone. He intended to repay the money in full and still intended to do so when he was able. When he left the United States and came to England with the Canadian Army in December 1940 he had about $2000 in the bank. "Living was tense in those days and I fell to drinking more than was good for me." He did not make enough money to cover his expenditures and obtained money from his family at home. In October 1942 he transferred to the United States Army and became a first lieutenant. In October 1943, "having gotten married, and having accumulated considerable debts", he cashed three checks totalling about $1200 with the finance officer, Colonel C.C.Nealey. The checks were drawn on his account in the Bank of Edison, Georgia. As far as he knew he still had the account "and there ought to be funds in that account, for I had not checked on the account, which was the residue of my mother's estate". The three checks were returned unpaid in December 1943 and accused began to try to pay the finance office in instalments. Medical and hospital expenses for his wife and baby added to his difficulties. He had "never been a particularly good manager of money matters" and weakened "under the strain of three years of living under conditions of excessive drinking, domestic and money troubles". He began to default on debts and it was then that he cashed the checks alleged. "Although I could not see at the time how I could pay the checks immediately, I convinced myself that I would cover the checks somehow, but the situation simply became desperate * * * under the constant harrassment of debt and shortage of personal funds, and, always with the hope that I would somehow be able to straighten out my difficulties, I gave these checks".

As evidence that he did not intend to defraud anyone, accused further stated that he was Acting Purchasing and Contracting Officer, and Class A Finance Officer for the Procurement Branch, Supply Division, Office of Chief Engineer, European Theater of Operations. He had $500 cash in his care and was authorized to make contracts up to $25,000. It would have been "quite easy" by means of collusive contracts "to have arranged any amount of thefts" had he desired to procure funds by fraud (R48-50; Def.Ex. 4).

In addition to his written statement accused testified that he saw Mr. Wigmore frequently over a year's period and that the latter agreed to lend him small amounts by honoring overdrafts. When the three checks totalling $1200 and drawn on the Edison Bank were returned, he agreed to

pay the finance officer, Colonel Nealey, $200 a month from his pay. He repaid $800 and "Then we had a baby and expenses. I hold no brief for myself because during that time I was married and I drank to excess, and that cost quite a bit of money". When his brother died "there was the residue of an estate" when accused left the United States. The three checks were drawn on this account but he made no effort to determine its status. His sister had a power of attorney to draw against the account and accused knew of this fact, but understood that he was entitled to or could plan on part of the fund. His correspondence with his family since he left the United States three years ago "was not kept up to date". There were no means by which he could check his cash when he was in the Canadian Army, so he wired home and obtained a considerable amount of money during his service. He wired his family for funds with which to pay the checks alleged and was certain that he could make restitution within a very short time. He had made up his mind to "swallow" his pride and to write or wire "today" to various relatives who would lend him the money "if my sisters fall down" (R50-52).

Mrs. Margaret J. Rambo, accused's wife, testified that she met accused on 25 December 1942, that she later became pregnant and they were married in October 1943. The child was born 28 December 1943. He was in financial difficulties at the time of their marriage, and medical and hospital bills added to the difficulty. She had no money of her own. She knew that his financial troubles worried accused because he did not sleep, drank to excess, was restless and nervous and "seemed to be a different man from what I thought he was". He also talked to her about the situation (R52-53).

6. It is alleged in each of the 12 specifications of Charge I that accused, with intent to defraud, unlawfully made and uttered the check in question then knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment thereof. The gist of the offenses alleged is the intent to defraud (CM 228500, Bigelow; CM 228480, Smith; CM ETO 1803, Wright).

> " The gist of the statutory offense of drawing, with intent to defraud, a check or draft upon a bank, with knowledge at the time of such drawing of the insufficiency of funds in * * * such bank to meet it upon presentation, is such fraudulent intent and knowledge, and it is essential that the drawer should have not only knowledge of the insufficiency of his funds * * *, but an intent to defraud" (95 A.L.R., Annotation, p.489).
>
> " By reason either of the express provision of the statute, or judicial construction thereof to that effect, the gravamen of the offense denounced by 'bad check' statutes is

> the intent to defraud, which is an indispensable element of the crime" (Ibid.).

Accused executed and negotiated seven checks totalling 55 pounds which were drawn on Lloyds Bank but had no account at the drawee bank to provide for their payment. There was evidence that the checks used actually came from a book once issued to his wife when she was single. He executed and negotiated the five checks drawn on Barclays Bank, totalling 48 pounds, when his account at that bank was already overdrawn about 21 pounds. The 12 checks remained unpaid at the time of trial despite demands for payment of some of the checks by a representative of the American Red Cross and notwithstanding accused's promises to make restitution. He admitted that he "was desperately hard pressed for money" when he negotiated the 12 checks and that he knew that "what I was doing was wrong". When he cashed the checks "I could not see at the time how I could pay the checks immediately, I convinced myself that I could cover the checks somehow, but the situation became desperate". (Underscoring supplied).

Special consideration is deemed necessary of the evidence that over fifty of accused's overdrafts had previously been honored by Barclays Bank, and the contention by the defense that the bank was thus lending money to accused by honoring these overdrafts and that accused was warranted in assuming, therefore, that the five checks drawn on that bank would similarly be paid instead of dishonored. Wigmore testified that he was constantly in touch with accused and continually pressed him to repay the money he owed the bank. Accused never fulfilled his repeated promises to liquidate his indebtedness. Although he promised Wigmore never to revoke the procedure of having his pay directly deposited to his account by the finance office, he failed to keep his promise as his pay for December 1943 was not so deposited, and the five checks were drawn during the ensuing month of January 1944. Wigmore also testified that accused was not warranted in assuming that his checks would be honored to an unlimited extent, but to a limited extent only. It is significant that the total of the five checks dishonored by Barclays Bank, exceeded by 27 pounds the amount of the overdraft which existed when the checks were negotiated. The admission in evidence of Wigmore's testimony to show the true status of the account on the dates in question was proper despite the introduction in evidence of the bank statement itself (CM ETO 1803, Wright).

> "A custom of a bank to permit a depositor to overdraw may be discontinued by the bank at any time in the absence of reliance thereon by a third person" (7 C.J., sec.403, p.680). (Underscoring supplied).

In view of the foregoing facts the contention by the defense is without merit.

The uttering of seven checks drawn on a non-existent account, the negotiation of five other checks drawn on another account in a total amount

substantially in excess of an already existing overdraft, after he had been constantly pressed for payment of the overdraft, together with accused's own admission that he knew that what he was doing was wrong, and could not see at the time how he could pay the checks immediately, fully warranted the findings of the court as to the requisite element of the intent to defraud. The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of Charge I and its specifications (CM ETO 1803, Wright).

7. It was also clearly established by the evidence that accused dishonorably failed and neglected to pay the debts to Marsh and Parsons and Kettners Restaurant (Specifications 1 and 3, Charge II). That accused's failure to pay these debts was dishonorable in character is further evidenced by the facts that in each instance he gave a check therefor drawn upon a non-existent account in Lloyds Bank, which checks were dishonored. The bills were unpaid at the time of trial. The dishonorable failure of an officer to pay a private indebtedness may be charged under either AW 95 or AW 96, as the circumstances may warrant (MCM, 1928, par.152b, p.188).

8. It is alleged in Specification 2, Charge II that the amount of the alleged indebtedness to Mrs. Campion became due on or about 1 January 1944 and that accused dishonorably failed and neglected to pay said debt from that date to 1 March 1944. Mrs. Campion testified that when accused left the flat he paid all bills which were then due, that the indebtedness alleged was for certain utility services and cleaning which were furnished during the last five weeks of his occupancy. The tenancy expired 22 February 1944 but there was no evidence as to the date on which accused vacated the flat. She further testified, however, that these bills actually became due "about five or six days" after accused vacated the flat, "about the 4th or 5th March - somewhere about that date". It is apparent therefore that although the bills were incurred during accused's occupancy, they did not become due and payable until they were received from the companies which furnished the services. They did not become due, according to Mrs. Campion's somewhat vague testimony, until about 27 February - 5 March. Charges were preferred 3 March. Therefore, it can hardly be maintained in the absence of any other evidence that accused dishonorably failed and neglected to pay the debt involved during the period alleged, namely, 1 January to 1 March 1944. The debts might actually have become due after charges were preferred.

> "The failure of an officer to pay a pecuniary obligation * * * is not a military offense unless characterized by dishonorable conduct, such as deceit or a fraudulent design to evade payment. CM 221833 (1942)" (Bull.JAG, Vol.I, No.2, Jul 1942, sec.453(13), p.106).

> "Unless failure or neglect to pay a debt involves evasion or indifference to just obligations, there is no offense cognizable under the Articles of War. CM 240754 (1943)" (Bull. JAG, Vol.III, No.1, Jan 1944, sec.378(3), p.7).

In view of the foregoing evidence and authorities, the Board of Review is of the opinion that the evidence is legally insufficient to support the findings of guilty of Specification 2, Charge II.

9. The charge sheet shows that accused is 30 years of age, that he was commissioned a first lieutenant, Army of the United States, 25 October 1942, promoted to captain 2 August 1943, was assigned to the Engineer Service, E.T.O., APO 887, 27 October 1942, and has been on duty with that service since that date. No prior service is shown.

10. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge II, legally sufficient to support the findings of guilty of Charge I and the specifications thereunder, Specifications 1 and 3, Charge II, and Charge II, and legally sufficient to support the sentence. Dismissal of an officer is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 13 JUN 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Captain LAWRENCE M. RAMBO (O-885432), Corps of Engineers, Supply Division, Engineer Service, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge II, legally sufficient to support the findings of guilty of Charge I and the specifications thereunder, Specifications 1 and 3, Charge II, and Charge II, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2581. For convenience of reference please place that number in brackets at the end of the order: (ETO 2581).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Findings disapproved in part in accordance with recommendation of the Assistant Judge Advocate General. Sentence ordered executed. GCMO 45, ETO, 22 Jun 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2582

7 JUN 1944

U N I T E D S T A T E S)	82D AIRBORNE DIVISION.
)	
v.)	Trial by G.C.M., convened at Division
)	Headquarters, 82d Airborne Division,
Private REGINALD E. KEYES)	APO 469, 27 May 1944. Sentence: Dis-
(6916276), Headquarters)	honorable discharge, total forfeitures
Company, 3d Battalion,)	and confinement at hard labor for 20
504th Parachute Infantry.)	years. Eastern Branch, United States
)	Disciplinary Barracks, Greenhaven, New
)	York.

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private Reginald E. Keyes, Headquarters Company, Third Battalion, 504th Parachute Infantry, did, at Anzio Beachhead, Italy, on or about February 10, 1944, run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, ordered accused confined in 2912th Disciplinary Training

Center, Shepton Mallet, Somerset, England pending his transfer to the designated place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Competent, substantial, uncontradicted evidence shows that at the place and time alleged while accused and his company were engaged with the enemy, he absented himself from his company without permission. This evidence supports the findings of guilty (CM ETO 1663, Ison, and authorities there cited).

4. The charge sheet shows that accused is 23 years 11 months of age and that he enlisted 24 November 1939 to serve three years; changed to serve for the duration of the war plus six months. He had no prior service.

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

6. The penalty for misbehavior before the enemy is death or such other punishment as the court may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Training Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. -7 JUN 1944 TO: Commanding General, 82d Airborne Division, APO 469, U.S.Army.

1. In the case of Private REGINALD E. KEYES (6916276), Headquarters Company, 3d Battalion, 504th Parachute Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2582. For convenience of reference please place that number in brackets at the end of the order: (ETO 2582).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2587

14 JUL 1944.

U N I T E D S T A T E S	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private HAROLD F. TRERICE (11010925), 367th Bombardment Squadron, 306th Bombardment Group.	Trial by G.C.M., convened at London, England 4 May 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Harold F. Trerice, 367th Bombardment Squadron, 306th Bombardment Group, ETOUSA, did, at Thurleigh, England, on or about 22 June 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 4 April 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification 1. (Disapproved).
Specification 2. In that * * *, did, at London, England, on or about 3 January 1944, feloniously take, steal, and carry away seven pounds (£7-0-0) in English money, of the value of about twenty-eight dollars ($28.00), one (1) brown leather wallet, of the value of about five dollars ($5.00), the property of Private First Class Billie Cowan, Company C, 70th Tank Battalion, ETOUSA.

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Specification 3. In that * * *, did, at London, England, on or about 11 February 1944, feloniously take, steal, and carry away twenty pounds (£20-0-0) in English money, of the value of about eighty dollars ($80.00), one (1) five dollar bill, money of the United States Government, one (1) brown leather wallet of the value of about three dollars ($3.00), the property of Corporal Ottis Hannah, Headquarters Company, FirstBattalion, 32nd Armored Regiment, ETOUSA.

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * *, did, at London, England, on or about 4 April 1944, wrongfully and without proper authority impersonate a non commissioned officer by wearing sergeant's chevrons.

He pleaded as follows: to the Specification, Charge I, guilty, except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave"; of the excepted words, not guilty, of the substituted words, guilty; to Charge I, not guilty, but guilty of a violation of the 61st Article of War; and guilty to Charges II and III and their specifications. (When the prosecution rested its case, the accused requested and the court allowed him to change his plea of guilty to Charge II and its specifications to not guilty). Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of all charges and specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority disapproved the finding of guilty of Specification 1, Charge II, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. After making his original pleas to all charges and specifications, the effect of such pleas of guilty was explained in detail to the accused by the law member of the court, after which the accused confirmed his desire to let the pleas stand as made (R5).

An extract copy of the morning report of accused's unit, for 26 June 1943, admitted in evidence as Pros.Ex.2, shows accused absent without leave as of 22 June 1943 (R6).

Accused was stopped by the military police on Curzon Street in London around three o'clock in the morning of 4 April 1944 and taken into custody when he failed to produce a pass, dog tag or any other identification. One of the arresting military police testified that accused we-

then "wearing the regular O.D. uniform, with T/4 stripes on it, with garrison cap, service cap, and civilian shoes, and I think he had an English officer's jacket, an English officer's coat, on his arm" (R7).

Two soldiers testified to losing their wallets while staying at service men's Red Cross clubs in London. Corporal Billie Cowan, Company C, 750th Tank Battalion, stayed in room 810 of the Columbia Red Cross Club in London on the night of the 2-3 January 1944. When he got up in the morning his wallet containing seven one-pound notes, some passes and other personal papers, was missing. He valued the wallet at $5.00. The loss was reported (R11). Corporal Ottis Hannah, Headquarters Company, 1st Battalion, 32nd Armored Regiment, stayed in room 350 of the Hans Crescent Hotel in February 1944 and while there lost his leather wallet containing about £18 or £20 (R12), an American $5.00 bill and some personal papers. He valued the wallet at $4 or $5. When he retired near midnight, he put the wallet in his pillow case and the next morning, 11 February, it was missing. He searched the bed and room and failed to find it (R13). After being first advised of his rights, on 4 April 1944 accused gave investigators from the Provost Marshal's office a written statement. Because of indicated objection of defense counsel, the statement was not offered in evidence but with the expressed consent of defense counsel, Technician Fifth Grade Alan W. Stevenson, Criminal Investigation Detachment, Provost Marshal's Office, Central Base Section, who took the statement from accused, testified that accused gave him a story of his activities since he left his organization. It was in substance that he left his unit on a 24-hour pass on 21 June 1943, to visit Bedford and there decided to come to London to visit his girl friend (R14). He then decided not to return to his unit when his pass was up. On 3 January 1944 he went to the Columbia Red Cross Club and in room 810 he took a wallet containing £7 from a pair of trousers. On 11 February in room 350 of the Hans Crescent Red Cross Club, he stole a wallet containing £21 from a pillow on the floor. Stevenson testified that though a search was made, neither the wallets nor any of their contents were found (R15).

4. Accused, at his own request became the only defense witness and testified in substance as follows: He enlisted 7 July 1941 and was trained as an airplane mechanic. In December 1942 he was put on airdrome defense, requiring approximately six hours of duty, followed by crew alert, and then 24 hours off. While on duty, "you were just sitting with your gun, watching the sky". He stated his father died 9 May 1943, and he heard that members of his family were trying to get property which rightfully should come to him as his father's only heir (R19). This worried him a great deal and so much spare time gave him more time to worry so he left, hoping to be transferred to some other more active job, preferably combat service (R20). During his absence he had not communicated with his people at home (R21). He admitted his absence from 22 June 1943 to 4 April 1944 (R22).

5. "Desertion is absence without leave accompanied by the intention not to return" (MCM,1928,par.130a,p.142). Absence without leave is usually

proved, prima facie, by entries on the morning report and if 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 (MCM,1928,par.130,p.143; CM ETO 1519, Bartel; CM ETO 1543, Woody; CM ETO 1577, LeVan Jr.). The unauthorized absence of accused extended over a period of nine and one-half months.

Accused admitted committing larcenies at the times, places and in the amounts charged in Specifications 2 and 3 of Charge II, which larcenies were also described by the victims thereof.

The evidence is uncontroverted that accused was wearing sergeant chevrons when arrested.

6. The charge sheet shows that accused is 22 years and five months of age. He enlisted 7 July 1941, at Hartford, Connecticut; his service period is governed by service extension act. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A conviction under Article of War 58 may be punished by death or such other punishment as a court-martial may direct (AW 58). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 14 JUL 1944 TO: Commanding General, Central Base Section, Communications Zone, ETOUSA, APO 887, U. S. Army.

1. In the case of Private HAROLD F. TRERICE (11010925), 367th Bombardment Squadron, 306th Bombardment Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2587. For convenience of reference please place that number in brackets at the end of the order: (ETO 2587).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

21 JUN 1944

ETO 2602

U N I T E D S T A T E S)	2ND BOMBARDMENT DIVISION.
)	
v.)	Trial by G.C.M., convened at AAF
)	Station 123, APO 558, 9 May 1944.
Private (then Sergeant) JOHN)	Sentence: Dishonorable discharge,
PICOULAS (32706558), 754th)	total forfeitures and confinement
Bombardment Squadron (H),)	at hard labor for 15 years. Eastern
458th Bombardment Group (H).)	Branch, United States Disciplinary
)	Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private John (NMI) Picoulas, 754th Bombardment Squadron (H), 458th Bombardment Group (H), then Sergeant, 754th Bombardment Squadron (H), 458th Bombardment Group (H), did, over Germany, on or about 8 April 1944, while before the enemy, by his misconduct endanger the safety of his airplane and crew which it was his duty to defend in that he failed to man the guns in the ball turret of his airplane while it was engaged in an operational mission.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence, designated Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions

of Article of War 50½.

3. The prosecution's evidence summarizes as follows:

On 8 April 1944 the crew of Plane No. 366, 754th Bombardment Squadron (H), 458th Bombardment Group (H), 2nd Bombardment Division, consisted of the following personnel:

POSITION	NAME	RANK
Pilot	V. R. Woodward	Capt.
Co-pilot	P. A. Zenas	2nd Lt.
Navigator	A. J. DeGennaro	2nd Lt.
Bombardier	Bill Cain	2nd Lt.
Radio Operator	Juskiewicz	S/Sgt.
Engineer and Top Turret Gunner	Snyder	S/Sgt.
Tail Turret Gunner	Dalton	S/Sgt.
Nose Gunner	LaMar	Sgt.
Right Waist Gunner	Taylor	Sgt.
Ball Turret Gunner	Picoulas	Sgt.

(R28).

The accused was not only ball turret gunner but was also armorer of the crew (R7). The regular personnel of the crew included but one waist gunner, who was Taylor. He manned the right waist gun. The radio operator, Juskiewicz, stood by to operate the left waist gun. Usually the ball turret gunner (accused) if he were not in the ball turret, stood by also to man the left waist gun (R23). On the afternoon of the above stated date, the crew flew their plane on a combat operational mission to Brunswick, Germany, in enemy territory (R7,18,22). It was the lead "ship" of the second section. At a point 30 or 40 miles from the air fields at Brunswick, which were the target for the mission (R8,13,22), the formation flying ahead of Plane No. 366 was attacked by enemy fighters (R7,13,23). Captain Woodward on observing the attack, ordered the ball turret to be lowered into combat position (R7,8,22). Accused in charge of the turret responded "Roger", a term in common use by combat crews meaning "procedure OK" or indicating an "affirmative answer" (R7, 8). Later Captain Woodward directed his co-pilot, Lieutenant Zenas, to "check the ball turret" (R8,22). The co-pilot, acting pursuant to Captain Woodward's order, called the turret by interphone and ordered accused to lower the ball turret. Accused made a satisfactory response (R13,22). Two "oxygen checks" were conducted. Accused in each instance reported that "everything was all right" (R8). During the flight into the target and out of it various "checks" were also made by the co-pilot with reference to enemy fighters flying underneath Plane No. 366. In several instances he received the reply "Roger" from accused. In response to other inquiries his replies were, "Everything is all right". In one specific instance Lieutenant Zenas observed enemy fighters approaching under Plane No. 366 and he called accused and asked him "to keep the ball moving". Accused answered, "Everything on ball OK" (R13). The order "to keep the ball moving" referred to the "only turret on the ship known as the 'ball' and moved in such a

manner" (R15). The ball turret cannot be "kept moving" without a man in it. When the ball turret was "stowed" it could be moved "around a little" but it was necessary that the turret gunner actually enter it in order to "keep the guns moving" (R20,21).

The order to lower the ball turret definitely implied that accused was to enter it (R14,20,21,24,25). "We wouldn't put it down unless we wanted him to man it" (R14). The only reason the order was given to lower the ball turret was because Plane No. 366 was under threatened enemy fighter attack. The plane was "too hard to fly with it down to order it down for any other reason" (R8,14). There were prior occasions when the ball turret was lowered without the turret gunner entering it, but that was for the purpose of scaring the enemy, when it was at a distance. In such event there was an affirmative statement of the purpose of the lowering the turret. If nothing were indicated of such nature the gunner ordinarily was required to enter the lowered turret (R20).

Both Captain Woodward (R11,12) and Lieutenant Zenas (R15) believed that pursuant to their orders accused had lowered the ball turret, had entered it and had manned the guns therein. Enemy fighters could not be seen by accused if and when they passed under Plane No. 366 if he were not in the ball turret (R15). Further, it was necessary for accused to be in the ball turret in order to point the guns in all directions (R14,21). Failure to man the ball turret when lowered might easily have endangered the plane and its crew had there been an attack (R9,22,23).

The ball turret was not lowered and accused did not enter it during the run into the target on this mission. He remained at the left waist gun (R17,18,22,23,24,25,28). After leaving the target and on the return journey to the home base accused lowered the turret, but did not enter it. He again returned to the left waist gun (R19,21). Prior to reaching the target accused inspected the turret and reported to Taylor, the right waist gunner, that one of the guns therein was inoperative (R19,20).

On the evening of 8 April 1944, accused called on Captain Woodward, who related that accused

> "wanted to tell me that he wasn't going to fly anymore, that it scared him and that he wasn't any good to the crew in the condition he was in. He wanted to tell me first." (R9).

During the course of this conversation accused declared that on the mission of 8 April 1944 "he put the turret down, but didn't mount * * * that he never manned the turret" (R9,10).

Major Estle P. Henson, 754th Bombardment Squadron, 458th Bombardment Group (H), testified that the Operations Officer gave accused a form to sign requesting that he be relieved from flying combat missions. On 9 April 1944 Major Henson discussed such request with accused. In that conversation accused stated that on the mission of 8 April 1944, he was so scared that he

"couldn't get in the ball turret and man the guns in it." He stated the co-pilot ordered the ball turret lowered and that he lowered it but did not enter it because he was scared (R26,27).

4. Accused appeared as a witness in his own behalf. He testified in pertinent part as follows:

On the trip to the target of the mission of 8 April 1944, while over the English Channel, he tested the ball turret guns and found that the left gun did not work because the feed way was jammed (R29). For this work he lowered the turret a few inches and was in it about half an hour (R35). He did not report the condition of the gun to the pilot or co-pilot because previously while flying with "another Captain" the latter instructed him not to call him over the interphone "unless there is something serious wrong" (R30). Captain Woodward also instructed him in a like manner (R34). Enroute to the target the pilot did not give an order to lower the ball turret. "He said better get the ball down because enemy fighters were attacking." It was after the bombs were dropped on the target that this order was given (R30,33,36).

> "I went over there and lowered the turret, but what was the use of getting into it? The other times we had dropped it before was to scare the enemy." (R30).

He did not enter the turret because

> "I figured what was the use of getting into it. My gun was out and I could man the gun at the waist. At that time I felt that I could do just as much with the waist gun as with the ball turret gun." (R30).

After he had lowered the turret he went back to man the left waist gun (R32). He admitted that when the order to lower the turret was given it was his duty to enter it, but he did not because he was afraid and also knew "the guns were no good." He knew a second gun in the turret could have been operated (R33,34). He also admitted that when the co-pilot said: "Picoulas, you had better lower the ball, the group in front is being attacked," it was his duty to enter the turret (R34). Accused had about 17 hours training as a ball turret gunner; became such about 1 July 1943, and had made five missions in that capacity. During said missions he had never entered the ball turret. While in training at Tonopah, Nevada he was in a turret for about 15 minutes (R31).

5. Upon rebuttal, Taylor, the right waist gunner, testified that at no time during the mission did accused enter the turret. "He turned it up so that he could get at it but he didn't get into the ball" (R37,39). Dalton, the tail gunner, testified also in rebuttal that he did not remember that the ball turret gun was fired during the mission (R41).

6. The 75th Article of War, graphically visualized, provides as follows:

"		(1) misbehaves himself				
		(2) runs away				
		or				
Any officer	before	(3) shamefully abandons		any fort		which it is
		or		post		
or	the	(4) delivers up		camp		his duty
		or		guard		
soldier	enemy	(5) by any		or		to
		(a) misconduct	endangers	other		
who		(b) disobedience	the	command		defend,
		(c) neglect	safety of			

* * * shall suffer death or such other punishment as a court-martial may direct."

Accused was tried upon a specification laid under the foregoing article, which in diagrammatic form alleged the following facts:

	over Germany on 8 April 1944 while engaged in an operational mission	which was before the enemy	misconduct himself in that he failed to man the guns in the ball turret of his airplane	and thereby endangered the safety of his	airplane and crew	which it was his duty to defend.
Accused did						

Before the findings of accused's guilt may be sustained, there must be affirmative answer to four fundamental questions presented by the record of trial:

(a) Was the accused before the enemy at the time of his alleged misconduct? If so,
(b) Was his failure to man the ball turret guns at the time and place alleged misconduct of the nature denounced by the 75th Article of War? And if so,
(c) Did it endanger the safety of his airplane and crew? And finally, if the answers to all of the foregoing questions be in the affirmative,
(d) Was it the duty of accused to defend his airplane and crew?

(a) Enemy airfields at or near Brunswick, Germany, composed the target and were the objects of attack of Bomber No. 366 on its mission of 8 April 1944. On the flight into the target at a point about 40 miles from Brunswick an order was given to accused by the pilot, the first in command of the crew, to lower the ball turret. Accused understood that such command re-

quired him not only to lower the turret into combat position, but also to enter the turret and man the guns therein. The occasion for the pilot's order was the fact that the enemy had attacked the formation flying ahead of Plane No. 366.

The Board of Review, in its holding in CM ETO 1226, Muir, discussed at length the application of the 75th Article of War to personnel of the United States Air Force now stationed in the United Kingdom, who are engaged in combat missions over Germany and the enemy occupied countries of Europe. The Board in its holding said, in considering the status of such personnel, under said Article:

> " * * * two extreme situations appear. The first is presented by the picture of a bomber which has flown to the confines of enemy territory and is the object of attack by enemy aircraft and enemy anti-aircraft from the ground. There are none who will deny that in such situation a bomber crew is 'before the enemy'. At the opposite pole is a bomber crew which may or may not have been engaged in combat with the enemy but which at the relevant time is in barracks at an airfield. It has not been alerted nor placed under orders to perform a mission and the crews are not required to remain at their station. Such situation also assumes that enemy aircraft are not in immediate proximity. There appears to be no difficulty in reaching the conclusion that under such situation a bomber crew is not 'before the enemy'. Within these two extremes, delicate and complicated problems arise in defining the phrase 'before the enemy' - problems produced by the great variety of conditions and circumstances under which aerial warfare is presently being conducted by the United States Army Air Force based on the British Isles. Under such circumstances it appears to be highly inadvisable to formalize for general application in such operations a definition of the phrase 'before the enemy'. While past experiences and practices may suggest a fairly substantial basis upon which to construct a formula, there is no assurance that revolutionary changes may not occur which would render a fixed and positive declaration difficult to apply or embarrassing to explain. An open-minded analysis of the problem compels the conclusion that any attempt to state an overall definition of the phrase when applied to the air forces would serve to obscure rather than illuminate the subject.

> Notwithstanding the difficulties and circumstances which argue against the announcing of a dogmatic formula or definition it is most desirable to discover a safe and reasonable standard of measuring an accused's status under the article. The Manual for Courts-Martial, 1928 declares:
>
> 'Whether a person is "before the enemy" is not a question of definite distance, but one of tactical relation' (par.141a, p.156).
>
> Such statement possesses the merit of being specific and positive in its declaration of a legal principle without being inflexible in its application. It is therefore a particularly practical and helpful guide in the instant case."

The Board concluded that

> "a bomber crew, based on an airfield 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."

The principle announced by the Muir case received confirmation by CM ETO 2212, Coldiron.

The facts of the instant case beyond peradventure embrace the first of the situations envisioned by the Board of Review in the foregoing quotation where

> "a bomber which has flown to the confines of enemy territory and is the object of attack by enemy aircraft."

While Bomber No. 366 was not at the instant the pilot first gave his order to lower the turret, the specific object of immediate attack by enemy fighters, there was a subsequent time during the flight into the target when enemy fighters were observed approaching the bomber at a lower level and threatened it with direct attack from underneath. It is also true that, as events transpired during this mission, Plane No. 366 was not specifically attacked by the enemy. It would be a superfine distinction and wholly devoid of recognition of practical aspects of the art of aerial warfare to attempt to measure the exact tactical relationship of bomber No. 366 to the enemy fighters then in proximity or the probability of suffering direct attack from the enemy. The test prescribed in the Manual for Courts-Martial, and approved in the Muir and Coldiron cases, requires no such refinement. 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 the 75th Article of War.

(b) Accused did not lower the ball turret nor did he enter it and man the guns during the flight into the target. He admitted such fact to Major Henson, and his testimony on the stand shows he clearly understood he received such order at that time and comprehended its import. His attempt to convert the co-pilot's direction from an order into a suggestion or request is not worthy of consideration. He deliberately violated orders of his superior officer.

> "Misbehavior before the enemy. This offence may consist in: -- * * *. Such acts by <u>any</u> * * * <u>soldier</u>, as * * * refusing to do duty or to perform some particular service when before the enemy. * * * cowardice is simply one form of the offence * * *. An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offence as if he had deliberately proved recreant. * * *. The act or acts, in the doing, not doing, or allowing of which consists the offence, must be conscious and voluntary on the part of the offender * * *." (Winthrop's Military Law & Precedents - Reprint, pp.622-623).

Accused's testimony as his own witness exhibited an attitude of mind wholly at war with the fundamental tenets of military discipline. Notwithstanding a direct order by the officer who was responsible for the operation of the bomber and in whom was vested plenary authority of direction and control of the crew, the accused substituted his judgment as to the necessity of lowering the turret and manning of the guns:

> "At that time I felt that I could do just as much with the waist gun as with the ball turret gun."

His refusal to comply with the pilot's order was conscious, deliberate and voluntary. He refused to perform a duty of the highest importance. It was not within his prerogative and authority to judge of its necessity or expediency. It was his duty to obey the order. When he refused compliance it was an act of disobedience within the purview of the 75th Article of War.

(c) The evidence proves without contradiction that the "lead" section of the expedition against the airfields at Brunswick was subject to direct attack by enemy fighters at the time Captain Woodward ordered the ball turret to be lowered and its guns manned. At a subsequent time bomber No. 366 was itself <u>threatened</u> by direct enemy fighter attack from below. Enemy fighters could not have been seen if and when they flew under the

bomber unless the turret was lowered and the gunner entered the turret. In the judgment of the pilot precautionary measures were necessary in order to protect the bomber and its crew. The failure to lower the turret and man the guns therein might easily have endangered the safety of the plane and its crew had there been an attack. Although one of the turret guns was disabled, accused, himself admitted that a second gun in the turret could have been operated. The question as to whether accused's non-feasance endangered the safety of his plane and crew was essentially one of fact for the court. The court by its findings resolved such issue against accused, and inasmuch as there is competent substantial evidence which supports such findings the Board of Review, upon appellate review, will not disturb the same. (CM ETO 1621, Leatherberry and authorities therein cited).

(d) The Board of Review in the Muir case, supra, summarized the legislative history of the present 75th Article of War. Reference is made to said discussion. The progenitors of the present Article were Articles of War 41 and 42 of the Code of 1874. With respect to the present Article, Brigadier General Enoch H. Crowder, before the sub-committee on Military Affairs, United States Senate, 64th Cong. 1st Sess, on the hearing of S.3191, being a project for the revision of the Articles of War, stated:

> "Where the phrase of limitation 'which he is commanded to defend' operates to restrict so much of article 42 as relates to the abandonment of posts and positions, I have substituted the phrase 'which it is his duty to defend,' making the article applicable whether the officer is 'commanded' to defend a place or not.
>
> New article 75, which substitutes articles 41 and 42, has been further broadened so as to include any kind of command, instead of the particular commands 'fort, post, or guard,' which we find mentioned in the existing law." (Calendar No.122, Senate, 64th Cong. 1st Sess, Report No.130, Appendix, p.78).

The cogent question presented in the instant case is whether accused's bomber plane and crew constituted a "command" within the meaning of the clause of the Article denouncing disobedience which "endangers the safety of any fort, post, camp, guard or other command which it is his duty to defend."

A most casual reading of the clause makes it obvious that there is described specifically four

> "point/s/or position/s/ whether fortified or not, which a detachment may be ordered to occupy, or which it may be its duty to defend." (Winthrop's Military Law & Precedents, Reprint, p.625).

Stated otherwise, this clause of the Article relates to definitely defined areas, points and positions as contradistinguished from tactical units or tactical situations. It refers to things or objects:

The words "or other command" are subjoined to these objective words. General Crowder explained that they were added

> "so as to include any kind of command instead of the particular commands 'fort, post, or guard'."

The rule of "Ejusdem Generis" is particularly applicable (CM ETO 567, Radloff, Bull.JAG, Vol.II, No.11, Nov 1943, sec.454(67b), p.429):

> "* * * where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated, and this rule has been held especially applicable to penal statutes." (59 C.J., sec.581, pp.981-982).

The conclusion is therefore logical that "or other command" must refer to things or objects of the same general nature as "fort, post, camp, guard".

In its discussion of the 75th Article of War in the Muir case the Board of Review, in commenting upon relevant dissertations interpreting the Article, stated:

> "Manifestly they were written prior to the advent of modern aerial warfare. Literally they encompass combat activities on land and it is only by implication and inference that they become pertinent to present consideration."

The 75th Article of War itself is subject to the same conception of warfare - warfare conducted on land. However, it is a well established canon of statutory construction that

> "where a statute deals with a genus, and the thing which afterward comes into existence is a species thereof, the language of the statute will generally be extended to the new species, although it was not known and could not have been contemplated by the legislature when the act was passed; * * *." (59 C.J., sec.575, pp.973-974).

The above rule clearly supports the construction of the words "other command" as including bombers engaged in combat flight. In popular parlance they are known as "flying fortresses" which term accurately describes their legal status with respect to the question now under consideration. While Congress in enacting the Article probably did not contemplate aerial warfare as now conducted, there is no violence done to its intention by the interpretation here adopted. A bomber is a "fort" and the fact that it is in motion does not mitigate against the fact that it is a "point or position" within Winthrop's and Crowder's explanations of the technique of the relevant clause of the Article.

Accused was a member of the combat crew of Plane No. 366 with definitely defined duties. Manifestly the over-all duty of each and all of the crew personnel was to defend the instrumentality upon which depended the success of the mission and the safety of their own lives. Accused was therefore under a positive duty to defend the safety of the bomber at the time and place alleged. Inasmuch as accused was under duty to defend the bomber under the circumstances proved and alleged, it necessarily follows that it was also his duty to defend the crew of which he was a member and which manned the bomber.

The Board of Review is of the opinion that the court was legally authorized to find accused guilty of violation of the 75th Article of War at the time and place and in the manner alleged.

7. The record of trial recites that the court

> "upon secret written ballot, <u>two thirds of the members present</u> at the time the vote was taken concurring, sentences the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor * * * <u>for fifteen years</u>" (R44) (Underscoring supplied).

The 43rd Article of War in part provides:

> "No person shall * * * be * * * sentenced to life imprisonment, nor to <u>confinement for more than ten years</u>, except by the concurrence of <u>three-fourths</u> of all of the members present at the time the vote is taken." (Underscoring supplied).

The sentence, which included <u>fifteen years</u> confinement at hard labor was therefore not authorized by the two-thirds concurrence of the members of the court present when the vote was taken. However, a sentence to confinement for ten years is valid. Accordingly, the period of confinement in the instant sentence should be reduced to ten years. (CM 157144 (1923); CM 185899 (1929), Bull.JAG, Vol.II, No.10, Oct 1943, sec.400, pp.378-379).

8. The charge sheet shows that accused is 21 years six months of age, and that he was inducted into military service on 5 January 1943 at Fort Dix, New Jersey, for the duration of the war plus six months. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for ten years.

10. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized by AW 42 and Cir. 210, WD, 14 Sep 1942, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 21 JUN 1944 TO: Commanding General, 2nd Bombardment Division, APO 558, U.S. Army.

1. In the case of Private (then Sergeant) JOHN PICOULAS (32706558), 754th Bombardment Squadron (H), 458th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for ten years, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence modified as hereinafter set-forth.

2. I particularly invite your attention to the fact that the period of confinement included in the approved sentence is excessive. By virtue of the mandate of the 43rd Article of War, the concurrence of three-fourths of the members of the court present when the vote was taken was necessary to sustain the sentence which includes confinement at hard labor for fifteen years. The record of trial recites that only two-thirds of the members of the court present when the vote was taken concurred in the sentence. However, confinement for the period of ten years is authorized. Accordingly, by additional action you should reduce the period of confinement to the authorized period. Such additional action should be forwarded to this office for attachment to the record. The general court-martial order should, of course, recite the reduction of the sentence to ten years.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2602. For convenience of reference please place that number in brackets at the end of the order: (ETO 2602).

E. C. McNEIL.
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2608

31 JUL 1944

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by GCM, convened at the Headquarters of the First United States Army at Bristol, England 13 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private CASSELL T. HUGHES (35118340), 3914th Quartermaster Gasoline Supply Company.	

HOLDING by the BOARD OF REVIEW
RITER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE I: Violation of the 64th Article of War.
Specification 1: In that Private Cassell T. Hughes, Thirty-nine Hundred Fourteenth Quartermaster Gasoline Supply Company, having received a lawful command from First Lieutenant L. D. Giddings, Seven Hundred Sixty-ninth Military Police Battalion, his superior officer, to leave the scene near the Uttoxeter Town Hall where a crowd of soldiers had gathered, did, at Uttoxeter, Staffordshire, England, on or about 12 February 1944 wilfully disobey the same.
Specification 2: (Finding of Not Guilty).

(212)

CHARGE II: Violation of the 96th Article of War.
Specification 1: In that * * * did, at Uttoxeter, Staffordshire, England, on or about 12 February 1944, attempt to create a riot among a group of colored soldiers of the United States Army who had gathered near the Uttoxeter Town Hall by urging the members of said group concertedly to defy and disregard the lawful orders of Captain John E. McIntire, Infantry, and First Lieutenant L. D. Giddings, Seven Hundred Sixty-ninth Military Police Battalion, both of whom were in the execution of their office, to disperse and return to their trucks and by saying, "By God, we are going to get this thing straightened out before we go back, they can't discriminate against us," or words to that effect.
Specification 2: In that * * * did, at Uttoxeter, Staffordshire, England, on or about 12 February 1944, act in wilful defiance of military authority by seizing two colored soldiers of the United States Army who had received a lawful command from First Lieutenant L. D. Giddings, Seven Hundred Sixty-ninth Military Police Battalion, who was then in the execution of his office, to leave the scene near the Uttoxeter Town Hall where a group of colored soldiers had gathered, and by saying to the said two soldiers, "Don't go, stay and stand up for your rights," or words to that effect.

He pleaded not guilty to both charges and their specifications. He was found not guilty of Specification 2, Charge I and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of Charge I and Specification 1 thereof and of Charge II and its specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 18 days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The prosecution's evidence summarizes as follows:

Accused was stationed on or about 12 February 1944 at Loxley Hall camp near the town of Uttoxeter (R48). Trucks brought members of accused's unit to town on the evening of that date (R6). About ten o'clock that night accused was seen, sober, at the Whitchief public house in the town. He left that place with other soldiers about closing time and went to the Uttoxeter town hall where a dance was in progress (R7). He had spent the evening in the town's public houses. (Accused testified that upon arrival at the town hall he attempted to purchase a ticket to go into the dance but was refused (R48-49)). At the time of accused's arrival no more tickets were being sold as the hall was filled (R11). Colored American soldiers joined accused in front of the hall and the crowd rapidly augmented because of the closing of the public houses (R24). Upon discovering that they could not enter the hall the soldiers became very argumentative (R24). They crowded about a detachment of military police, which was in front of the hall, who explained to them that the doors of the hall were closed as all the tickets were sold. The soldiers pushed the military police against a wall which stood on the side of the road opposite the town hall (R24). One of the soldiers yelled "Shoot them" and there was shouting accompanying this movement (R25). Later the soldiers broke up into three or four groups. Accused spoke to each group, and appeared to be trying to incite them to cause trouble (R24-26).

Company D,

First Lieutenant Lyle D. Giddings, 769th Military Police Battalion, arrived at the town hall about 10.15 p.m. (R10) after 50 to 100 colored soldiers had assembled in front of it. He stood on the steps of the hall and informed them that there were no more tickets to be sold and directed them to disperse (R8,10,11,18-19). Most of the men showed signs of alcoholic indulgence (R22). Lieutenant Giddings further ordered the crowd "to clear out around the stoop there as they were blocking the entrance"(R11). At this time he saw accused in the crowd (R10) and heard him say,"'Don't go. Stay here and stick up for your rights and get this thing settled'" (R11,33). The officer left the scene, telephoned the unit of the soldiers involved and asked that officers and transportation be sent to Uttoxeter. When he returned to the hall he saw two colored soldiers standing near its entrance. He informed them that their convoy would shortly arrive and ordered them to go to the parking lot (R11). The spotlight from a jeep shone partially on these two men (R15). He then saw accused approach them and grasp them by their arms, and heard accused say to them "to stay there and stick up for their rights"(R11). The two soldiers returned to the town hall area which they had been ordered to leave (R14). Lieutenant Giddings at this time said to accused, "'Soldier, go to the parking lot as your convoy will be pulling in in a few minutes'". He repeated the order, but accused did not obey it and ignored it (R12,29).

The military police, numbering about eight, continued their efforts to prevent the colored soldiers from entering the dance hall. There was increased excitement and commotion accompanied by loud criticism of the police because of the exclusion of the soldiers from the hall.

The colored men apparently believed the police were responsible for the situation (R12). Accused stood in front of one of the policemen on the steps of the hall. This policeman was struck by an unidentified colored soldier (R21). Lieutenant Giddings saw the colored soldiers form a "sort of semi-circle" around the police and heard the remark uttered by one of the group of which accused was a member that "'they only have one pistol among them, let's get them'". As the police started across the street, Corporal Lloyd L. Miller, Company D, 769th Military Police Battalion, who was in charge of the detail of military police, drew his pistol and told the crowd not to advance farther. The colored men then stopped (R12).

Captain Fred M. Garner, 3914th Quartermaster Gasoline Supply Company, commanding officer of accused, arrived at the scene about 10.30 p.m.(R34). He noticed accused "almost immediately" walking on the inside of the semi-circle between the military police and the group of soldiers. He testified that he heard accused say "he wasn't going out of town; that he was going to get this settled now and not wait until he got back to the States". Accused told Captain Garner, "'It's the same old shit we had back in the States and we are having it again here and we are going to get it settled now'"(R35). Captain Garner ordered accused "to go back to camp immediately" and accused left in the direction of camp but he was in the crowd again 15 or 20 minutes later. He was among the last of the colored soldiers to leave (R12,13,16,30,33,35,37).

Lieutenant Giddings was positive in his identification of accused (R10,17) as were Miller (R18,20) and Sergeant Peter B. Harvey of the Staffordshire County Police (R23).

In the midst of the disorder Captain John E. McIntire, General Depot G-18, arrived and went into the center of the crowd where there were about ten colored soldiers who were shouting and cursing and were very disorderly. He took hold of the arms of accused and another soldier and directed them "to get most of the disorderly ones out of there and get them dispersed". Accused told him "'Take your hands off me'". "'Don't touch me. We are going to get this goddam thing settled once for all. They can't discriminate against us'" (R28). He walked away and said to the soldiers "'Don't go. They can't run us out of town'". Other soldiers were coming up to him and he appeared to be the ringleader (R29).

4. Accused, sworn as a witness in his own behalf, testified he went to town about 6.30 in the evening, visited the "pubs" until about 10.15 and then went to the town hall intending to go to the dance but he could not buy a ticket (R48). With others, he was ordered by Captain Garner to get on the truck, which they did, and returned to camp (R49). He denied seeing either Lieutenant Giddings or Captain McIntire at the town hall and also denied making any statements as alleged in the specifications (R50,52,54). He claimed he obeyed the order of Captain Garner (R51).

5. Charge I and Specification: Evidence clearly shows that Lieutenant Giddings while in front of the town hall at Uttoxeter gave accused the following specific and direct oral order, "Soldier, go to the parking lot as your convoy will be pulling in in a few minutes". He repeated the order but accused did not obey it. He wholly ignored it. The record contains substantial evidence that accused heard the order, knew that it was given by Lieutenant Giddings, and also knew that Lieutenand Giddings was his superior officer. All of the elements of the offense of willful disobedience of the command of a superior officer denounced by the 64th Article of War were fully proved. The record is legally sufficient to sustain the findings of accused's guilt of such offense (CM ETO 314, Mason; CM ETO 817, Yount; CM ETO 2005, Wilkins and Williams and authorities therein cited).

6. (a) Specification 1, Charge II in abbreviated form alleges that accused did

> "attempt to create a riot among a group of colored soldiers * * * who had gathered near the * * * Town Hall by urging the members of said group concertedly to defy and disregard the lawful orders * * * to disperse and return to their trucks" (Underscoring supplied).

The foregoing allegations do not charge the offense of attempting to commit the substantive crime denounced by the 89th Article of War by the phraseology of "any person * * * who commits any kind of * * * riot shall be punished". The usual and ordinary phraseology of charging such offense is

> "that X did attempt to commit a riot in that he together with certain other soldiers to the number of about --- did, with force and arms unlawfully and riotously, etc. " (Cf: CM 233630, King and Armfield, 20 B.R. 45) (Underscoring supplied).

The instant specification alleges that accused "attempted to create a riot among a group of colored soldiers * * * by urging the members of said group * * * to defy, etc." The phrase "among a group" and the participle "urging" do not connote action by the group of colored soldiers acting in conjunction with accused. Rather they indicate that accused acting alone endeavored to influence the actions and conduct of the group for the purpose of producing a riotous condition at the time and place alleged. This allegation is obviously equivalent to a charge that accused incited a riot:

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"Inciting to riot. The gist of this offense is its tending to provoke a breach of the peace, even though the parties may have assembled in the first instance for an innocent purpose, and it is an offense at common law" (54 CJ sec.1, p.829).

"It is an indictable offense at common law to incite others to tumult and riot; and the indictment need not aver that tumult and riot were thereby excited" (54 CJ sec. 21, p.836).

Unlike the offense of attempting to "commit a riot" which requires the joint action of three or more persons (2 Wharton's Criminal Law - 12th Ed. sec.1859, p.2191) the offense of "inciting a riot" may be commited by one individual. The specification therefore charges accused, a soldier, with the common law offense of inciting a riot among other soldiers which without doubt is a disorder to the prejudice of good order and military discipline denounced by the 96th Article of War (Winthrop's Military Law and Precedents - Reprint - p.722).

The proof of the accused's guilt is clear and incisive. After Lieutenant Giddings had ordered the assembled colored soldiers to disperse, accused within their hearing and sight said, "'Don't go. Stay here and stick up for your rights and get this thing settled'". When Captain McIntire grasped the arms of accused and another soldier and ordered them "to get most of the disorderly ones out of there and get them dispersed", accused replied, "'Take your hands off of me'". "'Don't touch me. We are going to get this goddam thing settled once for all. They can't discriminate against us'". Accused was seen going from group to group of the soldiers talking to them. His speech and attitude were such as to support the inference that he was inciting and urging them to disobedience and disorder. The overall evidence is substantial and convincing that accused on this occasion was a malevolent agitator: that he defiantly flouted the authority of his superior officers and persistently endeavored to arouse and excite his fellow soldiers to acts of violence and breaches of the public peace. There was a group of 50 to 100 colored soldiers present during accused's malefactions. They harbored disappointment as a result of being refused admission to the dance hall and soon became recalcitrant under the illusion of an imaginary discrimination which accused actively fostered and encouraged. They were the tinder that starts the fires of riot. Accused was rapidly blowing the embers into flame and only the discreet handling of the situation by the officers prevented a serious disorder from arising. The record is legally sufficient to support the finding of accused's guilt of the offense alleged in Specification 1, Charge II.

(b) Specification 2, Charge II alleges that accused did in "act/wilful defiance of military authority by seizing two colored soldiers * * * who had received a lawful command from First Lieutenant L. D. Giddings, * * * who was then in the execution of his office, to leave the scene * * * and by saying to the said two soldiers, 'Don't go, stay and stand up for your rights,' or words to that effect".

The prosecution's proof is positive and specific that accused did the act as charged. It was not denied. Such conduct constitutes a disorder to the prejudice of good order and military discipline under the 96th Article of War (Winthrop's Military Law and Precedents - Reprint - p.722).

7. The charge sheet shows that accused is 30 years five months of age. He enlisted 18 February 1941 to serve for the duration of the war plus six months. No prior service is shown.

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

9. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations, [illegible] JUL 1944 To: Commanding General, First United States Army, APO 230 (First Echelon), U.S.Army.

1. In the case of Private CASSELL T. HUGHES (35118340), 3914th Quartermaster Gasoline Supply Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2608. For convenience of reference please place that number in brackets at the end of the order: (ETO 2608).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2620

14 JUL 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, redesignated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private First Class PERCY W. TOLBERT (34743584), and Sergeant HERBERT L. JACKSON (38418782), both of Company E, 1313th Engineer General Service Regiment.	Trial by GCM convened at Tavistock, Devonshire, England, 20 April 1944. Sentence (Both Accused): Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. The United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

Tolbert

CHARGE: Violation of the 96th Article of War.
Specification: In that Private First Class Percy W. Tolbert, Company E, 1313th Engineer General Service Regiment, did, at Honicombe, St. Ann's Chapel, East Cornwall, England, on or about 3 March 1944, unlawfully and feloniously have carnal knowledge of one Alfreda May Searle, a female under sixteen years of age.

Jackson

CHARGE: Violation of the 96th Article of War.
Specification: In that Sergeant Herbert L. Jackson, Company E, 1313th Engineer General Service Regiment, did, at Honicombe, St Ann's Chapel,

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East Cornwall, England, on or about 3 March 1944, unlawfully and feloniously have carnal knowledge of one Alfreda May Searle, a female under sixteen years of age.

Each of accused stated in open court that he did not object to a common trial. Each pleaded not guilty to and was found guilty of his respective Charge and Specification. No evidence of previous convictions was introduced as to either of accused. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of 18 years. The reviewing authority approved only so much of each of the sentences as provides for the soldier to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of 15 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution was substantially as follows: The two accused were identified as soldiers of excellent character (R4) stationed at Honicombe Camp, Gunnislake, Cornwall (R8). Alfreda May Searle, a school girl, 12 years 11 months and six days of age, on the day of trial identified both accused and testified that she had seen them before inthe guard hut at Honicombe Camp about 28 February 1944. She was sitting on the bed and the two accused, with others, were in there. Some of them left, then Tolbert took her in his arms and then got on top of her (R5) and had intercourse with her. Then later Sergeant Jackson came in and he took her on his knee and put a blanket around her. He then put her on the bed and got on top of her and had intercourse with her. Her mother, as a witness, produced the girl's birth certificate, admitted as Prosecution's Exhibit "A" (R6). Detailed signed statements of the occurrences were given by each of accused, after due explanation of their rights in connection therewith, to Criminal Investigation Department agents of the United States Army and were read to the court and admitted in evidence as Prosecution's Exhibit "B" (Jackson) (R8) and Prosecution's Exhibit "C" (Tolbert) (R9). These statements were complete confessions in each case of the offense charged. Jackson stated "I thought her to be about 14 years of age" (R7), and Tolbert stated that "in my judgement this girl seemed to be about fifteen years old" (R8). Each claimed that penetration was slight because she was too small and that in each case it was done with her consent if not at her solicitation.

The defense produced no witnesses and each accused elected to remain silent (R9).

4. The 96th Article of War reads:

"General Article. - Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military dis-

cipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense and punished at the discretion of such court."

Winthrop in his Military Law and Precedents, pages 720-723, states that a similar provision has appeared in our Articles of War since our first code, its evident purpose being to provide for the trial and punishment of any and all military offenses not expressly made cognizable by courts-martial in the other and more specific Articles, and thus to prevent the possibility of a failure of justice in the Army. As employed herein, the term "crimes" refers to crimes, felonies other than capital, and misdemeanors, created or made punishable by the common law or the statute law of the United States. These civil crimes, provided they are committed under circumstances rendering them prejudicial not only to good order but also to military discipline, the Article constitutes military offenses and authorizes their trial and punishment by military courts. Unlawful carnal knowledge of a female under 16 years of age is a felony denounced by Federal statute (sec.279 Federal Criminal Code, 18 USCA 458; 35 Stat.1143; D.C.Code 22-2801 (6:32), p.536).

The Board of Review is of the opinion that the offenses committed by the accused herein are within the purview of those denounced by said Article of War. Accused were soldiers in the military service of the United States in time of war, stationed at a camp in an allied country and among a friendly people. A school girl of the community, of less than 13 years of age, was allowed in the camp and in one of the soldier's living quarters where she became common property and was defiled by each of them in turn (CM 211420, McDonald).

5. The charge sheet shows accused Tolbert to be 21 years of age; he was inducted 9 March 1943 into the Army of the United States for the duration of the war plus six months. Accused Jackson is 20 years of age, and was inducted 16 March 1943 into the Army of the United States for the duration of the war plus six months. Neither accused had prior service.

6. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences. Confinement for 15 years is authorized on conviction of the offense alleged (sec.279 Federal Criminal Code, 18 USCA 458; D.C.Code 22-2801 (6:32), p.536). The

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designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir. 229, WD, 8 Jun 1944, sec.II, pars.1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 14 JUL 1944 TO: Commanding General, Southern Base Section, Communications Zone, ETOUSA, APO 519, U. S. Army.

1. In the case of Private First Class PERCY W. TOLBERT (34743584) and Sergeant HERBERT L. JACKSON (34818782), both of Company E, 1313th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. The sentences are the most severe adjudged in this Theater for statutory rape. The average sentence is less than five years. In the interest of uniformity, the sentences should be reduced to five years. It is not believed that the accused should be returned to the United States, but that their dishonorable discharges should be suspended and the 2912th Disciplinary Training Center designated as the place of confinement so that they may be available for service under combat conditions on the continent.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2620. For convenience of reference please place that number in brackets at the end of the order: (ETO 2620).

E. C. McNEIL,
Brigadier General, United States Army.
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2625

15 JUL 1944

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, now designated WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private First Class JOHNNIE PRIDGEN (14007802), 1st Base Post Office.	Trial by GCM, convened at Lichfield, Staffordshire, England 8 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, SARGENT and HEPBURN, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Johnnie NMI Pridgen, Private First Class, first Base Post Office, Sutton Coldfield, Warwickshire, England, did at Sutton Coldfield, Warwickshire, England, at about 2400 hours 20 April 1944 forcibly and feloniously, against her will have carnal knowledge of Margery Catherine Adkins of 43 Wheelwright Road, Erdington, Warwickshire, England.

He pleaded not guilty to and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and its Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for seven days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be

confined at hard labor, at such place as the reviewing authority may direct, for life. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record for action pursuant to Article of War 50½.

3. The alleged victim, Miss Margery C. Adkins, age 19, testified that about ten o'clock on the night of 20 April 1944 she left a moving picture theater in Erdington, England to return to her home. She passed a cafe from which two American soldiers emerged (one of whom was the accused). Upon seeing her one said, "'Hello good looking, where are you off to?'" She said she was going home. Each took hold of one of her arms and urged her to accompany them to secure coffee at their barracks. They showed evidence of alcoholic indulgence. She accompanied them reluctantly rather than precipitate a scene on a public street. They placed their arms around her waist as they proceeded, and engaged in conversation with her and each other (R6). The three stopped at the entrance gate of the camp. Accused went into a barracks and returned with a cup of coffee. She drank a small quantity of it and threw away the remainder. The other soldier said good-night and went into the camp. Pridgen remained with Miss Adkins and said to her, "Lets go home." They walked along the road leading from the camp. It was bordered by fields. After advancing about 400 yards he suggested that they sit down and eat some candy which he had with him. She said that she wanted to go home. He said "'Come on * * * 'sit down'" and pulled her on the grass. He opened the candy and was "very nice" to her and talked to her about America and different places where he had been. After they had been sitting there awhile, he said "'its silly of me'" and spread his mackintosh, or raincoat, on the grass and asked her to sit on it, which she did. He smoked a cigarette and then, after he had "dashed his cigarette" he put his hand inside of her jumper upon her bare breast. She said, "'I'm sorry but you picked up with the wrong kind of a girl'" and started to walk away. He went after her and pulled her on the grass and "that is when he said he wasn't going away /he had previously stated that he was alerted to leave the next day/ without having a good time." He continued to talk about going away and said that he wanted to have a good time before doing so. She understood what he meant and became frightened and started to scream. He threatened to "knock me out or something worse, I don't remember" (R7). Her examination as a prosecution's witness continued as follows:

> " Then he got me down on my back and he put his hand over my mouth, and while he was doing that with one hand, he had his other hand free. I was kicking at him and he had his hand under my knickers.
>
> * * * * * * * * *
>
> Q. What happened, if anything, after that?
> A. Well he didn't exactly remove my knickers, he pulled them down in the front, but he couldn't get the back down because I was laying on them.

Q. At that time did he still have his hand over your mouth?
A. Yes.
Q. State to the court what happened, if anything, at that time.
A. Well he let go of my mouth, you see there were people passing up and down and when they had all gone by he let me go and I started to scream. He undid his trousers in the front and got on top of me and I was still screaming, and then he got on top of me and I couldn't do anything. He was too strong, and with his hand he was forcing my legs open and then had connections with me.

* * * * * * * *

Q. Will you go ahead and state what happened, if anything, after you had connections at that time?
A. When he got his private into mine it lasted about twenty minutes. He kept moving up and down and I couldn't scream, and it lasted about twenty minutes. Well after awhile I didn't know what happened to him, he pulled away from me and I started to scream and he threatened me to shut up or he'd knock me out, and with that he hit me across the face.
I was crying and I was sort of screaming in a dream, I don't know whether I was screaming very loud. Anyway he heard some American soldiers come down and I was screaming, and he said, 'Shut up or I'll knock you out.' When the soldiers passed he had connections with me.
Q. On this second occasion that you just testified about, did he have connections with your consent?
A. Oh my no, I didn't give him any consent at all.

* * * * * * * *

Q. On this second occasion, state whether or not his private entered yours?

* * * * * * * *

A. No, only his hand.

* * * * * * * *

Q. To get this clear, I believe you said you had connections a second time, is that correct?
A. No not with his private this time, but later on I had connections three times with him.

Q. Go ahead and tell what happened after the first time.

A. After about twenty minutes he had connections with me, this is the first time, and after he had finished after that he heard some Americans coming down, and he let them go by and I was trying to make him understand that I couldn't breathe and he took his hand away from my mouth, and I started to scream again and that is when he hit me across the mouth.

Q. Then what happened?

A. I struggled away from him then and he was getting rather mad because I screamed.

Q. Did he make any statements to you at that time?

A. No, the only thing he said was he was going to knock me out or something worse.

Q. Then what happened after that?

A. Then I stood screaming and we heard some soldiers coming down and he put his hand over my mouth and said, 'You'd better lay still else you know what you're going to get.' After the Americans had gone by, I think they were Americans, had gone by, he didn't have his private in me at that time, and then he put his private back into mine after awhile and I began to scream more, and the time should be about a quarter to eleven.

A boy came down, he must have heard me screaming, and he was watching, and he said, 'Get away Mac or I shall bash your brains.'

Q. Who made that statement?

A. The one who was having relations with me.

Q. Was he on top of you when he made that statement?

A. He was still having connections with me when this boy came up. He just stood there, this boy, and after awhile I managed to get away from him and I ran towards Mac and I put my arms around him and I said, 'Please take me away' and he said, 'Get away Mac or I'll bash your brains in.'
Then Johnnie caught hold of me and threw me on the grass, and before he threw me on the floor he shook me very much, and all my hair fell down in the front, and that was the last time he had connections with me.

Q. This second time did you scream during that occasion?

A. I don't know, I was too amazed to see this fellow walk away; He put his lips over mine and bit me very badly, and he had connections with me again. After awhile, it seemed about a half hour had gone past, I heard someone walking about, and I tried to speak, but I couldn't speak to him, and I made him understand I wanted to tell him something and he pulled his lips off me, and I said, 'I think theres someone walking about'. He swore and said, 'It must be Mac.' He left me and started running after Mac, and Mac ran away, and I left my handbag and ran the other way towards home. He must have thought I was running away, and he came after me and he said, 'Come on I'll take you home now, but you aren't going without your gloves', and I said I wasn't fussy.

He went back and got his mackintosh, and I didn't want him to go home with me but I thought it might be a good idea. After he got everything we both walked off the grass and there we met a lot of Americans, and they were all saying goodbye with this fellow because he was going abroad.

Q. Did he then go on home with you?

A. We started walking home then. We got up towards the tram, and he said he'd fetch a jeep, and I said I didn't want to, I wanted to walk. So wewalked home. As we were walking home we were very near a churchyard, and he made me promise that if he took me home, I'd promise to do it again. I said I would, not because I wanted to, but I wanted to get him home, and I said I know just the spot, and he said I'd have to promise to have connections with him again, and I did.

Q. Did you have connections with him or not?

A. No. We got to this churchyard and I was scared stiff, and I said, 'Look, if you'll walk home we could go to the field up there' and he said, 'I know you're telling the truth because I made you.'

He asked me about the field, but of course there wasn't a field there, there were a lot of houses with allotments and I said we weren't supposed to go, but we could and nobody would see us.

I was very worried about home and then the sirens went and I began to run because I knew Mom and Dad would be worried about me because I never stayed out that late. He ran after me and said, 'Look here you made a promise.' We walked home, I didn't live very far from six ways and I walked home with him, and he was telling me about the experiences he had in a blitz one night. Anyway we were walking along and we came to my road, and we turned and we were walking down and he still had his arms around me, and when we got outside my home, nearly outside, I made an excuse and said, 'My shoelace is undone' and when he let go of me I ran up the steps. I went up the steps screaming for Mother, and all I know was Mother yelled for Dad and Dad went up the street.

* * * * * * * * *

Q. Will you explain to the court just what you mean by the use of the word 'connections?'
A. Well the only thing I know is that he had his private in mine and once he mentioned about a 'rubber', I didn't know what he meant until I asked Mother. But I don't think he trusted me and I didn't know what he was going to do with me.
Q. Over this entire period of time and including the entire three acts about which you testified, state to the court whether or not you at any time ever consented to any acts of intercourse with this man?
A. No I didn't give him any consent to do anything with me.
Q. Did you use all of your power that you had to resist him?
A. Yes, I used every ounce I got to resist him."

Upon cross-examination the prosecutrix corrected or changed her story regarding the use by the accused of his finger and stated that before any one of the three sexual connections occurred accused inserted his fingers in her privates (R15).

The day following the occurrence she signed two statements for the local police. The defense offered one of the statements and it was admitted in evidence (Pros.Ex.A; R18). In the statement the prosecutrix explained that the reason the accused spread his mackintosh on the ground was because the grass was wet. She described the manner in which they met and reached the place of the alleged attack substantially as she stated

in her testimony. Accused's actions after he and the young woman were seated upon the mackintosh, are related by Miss Adkins in her statement as follows:

"He talked a little while about America and then suddenly put his hand under my jumper onto my bare breast. I immediately got up and told him off about it. He pulled me down again saying that he was sorry. But then in a little while he put his hand up under my knicker. He put his finger right into me. I screamed a little bit and jumped to my feet.

He said, 'Oh you're old fashioned. You don't know the thrill of it

Johnnie became very rough then. I tried to move away I started to scream but my voice felt weak, like my legs do in a dream when I try to run. Johnnie pinned my arms behind me. I resisted to the best of my strength. He pulled my knickers down. His trousers were unbuttoned and he laid on top of me. He kept his lips pressed on me to keep me quiet. He then had connections with me. He kept me there for about fifteen minutes and while I continued to struggle he slapped me across the face and bit my lip.

I thought I heard someone coming then. My lips were free and I screamed. I could see someone coming over toward us from the path. He must have seen us as we were lying there. When he reached us Johnnie got to his feet. I got to mine and threw my arms around the newcomer who was an American soldier. I said 'Please take me away from here.'

Johnnie pulled me away from the soldier and said 'Beat it Mac! or I'll bash your brains in.

Mac acted very scared and walked away

I felt stunned when the other soldier walked away. I was still screaming. Johnnie pulled me down onto the ground again. He punched me in the stomach four times. He threatened to do even worse. I felt winded and weak then. He said something about a rubber. He then had connections with me again. I had kept screaming until he put his hand across my mouth. We were on the ground a long time this time. I heard several soldiers walk by during this time but Johnnie kept his hand over my mouth all the time.

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Many times I could hardly breathe. After awhile I felt rather than saw that someone was watching. When Johnnie saw that I wanted to tell him something he took his hand off my mouth.

I said: 'Some one is standing over there' -- and pointed. Johnnie said: 'I expect it is Mac.' and started off after him. While Johnnie went after Mac I went the other way. I heard Johnnie shouting at Mac.

Johnnie then came after me and brought me back. I told him it was late and pleaded to go home. He promised then to take me home."

Miss Adkins' mother testified that her daughter Margery, whom she called "Betty", arrived at their home, located at 43 Wheelwright Road, Erdington, about a quarter to one in the morning. She first heard her footsteps coming down the lane and then saw her dart up the steps and "almost collapsed in my arms. She said, 'Get the American, he has knocked me about.'" The mother called the father, who went up the road after the American. The daughter then told the mother that the accused had done some terrible things to her. When asked what she meant, she said "'You're married and you know what I might mean, well he has done that.'" Her daughter's hair was down and she was in a "most distressed condition." She started to be hysterical but pulled herself together and cried. The mother did not observe anything wrong with her clothing (R22-23).

Miss Adkins' father testified that it was about 12:30 the night of 20-21 April 1944 when his daughter Betty arrived home. At the request of Mrs. Adkins he ran out of the house and caught up to the accused and asked him "'Did you just bring a girl home?'" and the accused said "'Yes.'" He then asked him to come back to the house and explain the reason for bringing his daughter home in a state of collapse. The accused said "'O.K.'" and returned with him (R25).

Professor James M. Webster, director of the Government Criminal Laboratory in Birmingham and engaged in crime pathology since 1929, testified that at 4:30 on the morning of 21 April 1944 he examined Miss Adkins. The girl at the time was not very distressed. She had a swollen upper lip and, upon turning the lip back, the lining on the inside of the lip was torn. This condition was consistent with either pressure of the lip against the teeth or a blow in that region of the mouth.

In answer to the question of what he found when he examined the girl's privates, he stated as follows:

"A. I found gentlemen, first of all, that there was blood on the hair around her privates, that the lips of the privates were swollen but not bruised. On separating the lips I found that there was a

split in the lining of the entrance to the privates which was recent and which was still bleeding. I found moreover that there was bruising of the maidenhead or hymen, and that there was a recent incomplete rupture of the maidenhead or hymen with blood still on the edges. I withdrew fluid from her vagina and examined that. There was none of the male elements, sperms, in it at all. This, however, was not blood-stained and confirmed one part of the examination. Namely that she was not menstruating; that the blood which I found on her clothing and diaper, she was wearing, was not menstral blood but had come from the tear, the splitting, in the entrance of the hymen.

Q. In your opinion, based on your examination, had this girl been tampered with?

A. This girl had been interferred with whether by the male organ or by the finger I am unable definitely to state.

Q. Will you give the court your opinion as to whether or not it was a finger or male organ?

A. Whilst I cannot completely rule out the possibility of the splitting at the entrance being due to a finger, on the other hand it was a longitudinal split, it was more consistent with the introduction of the male organ, and I should have expected more tearing of the hymen had it been done with the nails, and less bruising as though it was something bulkier and blunter than the finger."

He found no evidence of any antecedent penetration. He also examined the clothing of both parties. The girl's knickers and underslip were blood-stained. The underslip was not damaged. The knickers had two small tears; one in the right leg and near the elastic, and one in the crotch near to the top of the right leg "which looked recent to me." He found "nothing of importance" on the accused's clothing. The knees of the trousers were mud-stained and the inside of the fly had a seminal stain (R20-22).

At 12:55 a.m. the accused was placed under arrest by Detective Constable John Cameron, Birmingham City Police. At that time the accused was sober and did not smell of any liquor. There was mud on both knees of his trousers and on the back of his mackintosh (R26).

Detective Sergeant Percy Thomas Morgan, Warwickshire Constabulary of Sutton Coldfield examined the scene of the alleged offense the following day

and observed that the grass had been trampled down and marks of heels, feet and knees. He found in that place three hairpins, a broken hatpin, an empty cigarette package and one or two pence in cash. He took photographs of the location (Pros.Exs.2,3,4,5) and testified that it was 31 feet from the roadway and approximately 400 yards from the entrance of the Army camp. The photographs show a well traveled, smooth macadam or gravel winding highway, bordered by fields. A short distance beyond the scene of the alleged attack the highway runs into Penns Lane, upon which numerous houses are easily visible. There is, however, a fence and a parallel hedge alongside the fence that runs perpendicular to the highway which would block the view of the houses from the scene of the occurrence. The same witness also testified that the home of the prosecutrix was approximately a mile from the moving picture theater in Erdington; that it is approximately a ten-minute walk, or roughly a quarter of a mile, from that theater to the cafe where Miss Adkins first met the accused. The Army camp, however, is in a different direction from the cafe and the home of the prosecutrix, and is located about a mile and a quarter from the theater (R28-29).

Private H. D. Jaggers, First Base Post Office testified that he was on guard on the night of 20-21 April 1944 at the First Base Post Office, which was the name of the camp in question, between the hours of eleven and two o'clock. About 11:30 o'clock he heard a scream. It sounded like a woman who said "'Please don't'". She repeated "'Please don't'" three or four times. He could hear it plainly and it seemed to come from the spot where on the following day he was shown the alleged attack took place. A few minutes after he heard the screams or cries he saw matches being lighted at that place. Private C. A. Heller (a defense witness) came through the gate and told him where the cries had come from. The locality is all open country and he had no difficulty in seeing and hearing. The witness knew the accused personally and had seen him leave the camp about eleven o'clock (R30-32).

4. On behalf of the defense, Private C. A. Heller, First Base Post Office testified that he was walking along the road to the camp about 11:30 the night of 20 April 1944 when he heard a "couple of calls for help" coming from the side of the road. He walked over to investigate and observed a couple arise from either a sitting or prone position. When he was 3 or 4 feet away he stood in front of them and asked what was going on. The couple stood together. The man had his arm around the girl's shoulder. The girl did nothing nor did she speak. The man told him to "get the hell out of here". He remained a minute or two and then walked back to the road but returned and stood on the side of the road opposite where he had seen the couple. Within a minute or two the couple came out of the field to the road and walked up the road toward Penns Lane so he left and went to the camp. The sentry at the gate (Prosecution's witness, Private H.D.Jaggers) asked him if he had heard any cries for help. He said he had and thereupon related what he had seen and heard (R32-34).

Sergeant M.G. Williams, First Base Post Office testified that he knew the accused and that about 10 minutes after midnight of 20 April 1944

he saw him walking along Holly Lane across from the "pub" between Six Ways and Penns Lane. He stopped and talked with him and shook hands goodbye. There was a girl with him who, as they walked along, had her right arm around the accused (R36).

Corporal Gus Michaels, First Base Post Office testified as to the good character of the accused (R37).

Having been advised by the court of his rights, the accused elected to testify under oath. He was a Private First Class assigned as a cook to First Base Post Office. He related the manner in which he and his companion met Miss Adkins; described their trip to camp and his procurement of the coffee for her. Such testimony does not seriously conflict with that of the young woman (R38,39). Accused and Miss Adkins then left the camp and proceeded along the road that leads to Penns Lane. When they came to the hedges (see photo, Pros.Ex.3) she suggested that they sit down and eat the candy that he had brought with them. He laid his raincoat on the grass and they both sat down on it. He smoked a cigarette. They ate candy and talked and

> "then we got to loving up which two people will do. I started messing with her breast, kissing her; she didn't care, she didn't say anything, so I said to myself, if that's the way it is I'll try. I tried with my hand, and that's as far as I got. She screamed twice and thats when this American came over to us, and we were up on our feet" (R40).

> "Q. Did you put your finger up into her person?
> A. Yes, I did, sir." (R40).

He told the soldier whom he did not know to go away. The soldier left but must have immediately returned for she called his attention to the fact that the same soldier was standing across the street. They both went toward the soldier who departed toward the camp. They then returned to where they had been. He struck a few matches to find her pocketbook and gloves, and picked them up with his raincoat. He then walked home with her and tried to persuade her to have relations with him in a churchyard nearby. She said that she knew of a "better place". As they reached her house someone called her. She reached down as if to tie her shoe and then went into the house. He waited a while and as she did not return he started back to camp. He had gone but only a short distance when three men ran up to him and asked if he had taken a girl to her home. He said he had. One of the men was the girl's father. He went back to the house with them where he was shortly thereafter placed under arrest. He denied that he had had any sexual relations with the girl either by force or otherwise (R40-42).

On cross-examination the prosecution for the sole purpose of impeaching the testimony given by the accused and not for its probative value as evidence secured from the accused an admission, in spite of objection by

defense counsel, that he signed a written statement the night following the alleged offense in which he confessed that he had unbuttoned his trousers while lying beside Miss Adkins and "tried to force my penis into her private parts"; that before they left the field he asked her if he could "have intercourse with her again"; and that he had put his hand over her mouth to keep her from "hollering" (R42-43). Upon conclusion of the cross-examination of accused the following relevant proceedings are shown:

REDIRECT EXAMINATION

"Questions by the defense:
Q. Private Pridgen, you made two signed statements before different authorities?
A. Yes, sir.
Q. The first statement was made where and when, will you tell the court?
A. The first statement was down in the Red Cross building.
Q. What time of the day and which day was that made about to the best of your knowledge?
A. That was on the 21st I believe.
Q. Who was present when you made that statement?
A. The First Lieutenant, another guy I don't know, but these two civilian guys they were the ones questioning me.
Q. How long a period?
A. They questioned me for a night and a day.
Q. You mean two American civilians questioned you?
A. Yes, sir.
Prosecution: I submit that this is irrelevant. We have made no effort to introduce any confession. All we have used his statement for was if he made those statements and he said they were correct. I am not attempting to introduce any statement.
Defense: As to whether or not the witness stated here today that his previous statements were correct, I take issue.
Prosecution: The prosecution did not offer and does not offer any portion of the statement of the accused for the evidentiary contents thereof. It used these statements merely for the purpose of laying a predicate to impeach this witness who has taken the stand and is hence subject to cross examination and impeachment like any other witness. However, since the witness admitted that he had made these statements, and according to the prosecution, the interpretation of the prosecution, admitted that these were correct facts, we wish

to offer no part of the statement, and object to the attempt by the defense of showing that the statement was involuntary if such was his purpose, because it is immaterial and irrelevant since we intended to offer no part of the statement except for impeachment purposes.

Law Member: Sustained.

Defense: The defense desires to further examine this witness, first of all to clarify his statements and his testimony. That is to say whether his testimony is to the effect that he acknowledges the statements read by the trial judge advocate to be true or not, and to further examine this witness with a view to show that these statements were not voluntarily made, and that he afterwards made statements not consistent therewith.

* * * * * * * * *

Q. Now, when you were arrested, where were you taken?

A. I was taken down to the civilian police.

Q. That was on the early morning of the 21st?

A. Yes, sir.

Q. How long did you stay at that place?

A. From the time I got down there I sat there until three o'clock until anybody spoke to me, and they called me in a little room and this Lieutenant told me what I did. He took my pass, name, serial number, and told me what I did. The M.P. was sitting there and he told me I couldn't say anything, so I just stood there. Then they brought me back into the office and I sat there until four something.

Prosecution: I object to this line of testimony, it serves no use to the point . . . . .

Defense: (interposing) Lieutenant Weatherly has questioned this witness regarding a statement that he made before two C.I.D. authorities. It is the contention of this accused and of the defense that those statements were not voluntarily made; that they were made only after prolonged hours of questioning and more or less threatening on the part of the people who took them, and therefore they are involuntary and he has a right to show their involuntary character to explain his previous testimony.

Q. Will you state what happened in as few words

as you can from the time you were arrested until you signed your first statement sometimes during the night of the 21-22 of April, 1944?

A. Well during that time they took me to a Doctor and brought me back. They hauled me in a 'jeep', and I sat there until about ten o'clock that night. It was three that afternoon that I came in. This big tall guy, plainclothes guy, got to questioning me and he told me I was telling lies. This guy told me that this witness said this, and that witness said that, and he said that some of my leavings was inside of her. I kept saying I was not guilty and they kept on telling me I was lying, and they kept shoving stuff on me. O. K., I said finally, I did the act, and they were well pleased with that and so the guy sat there and wrote it down.

Q. Were you telling the truth when you said you did the act?

A. No, sir, I was not.

Q. You made another statement to Lieutenant Brogan who investigated this case, did you then say that you did the act?

A. I didn't say I did the act, I did not.

Defense: No further questions.

RECROSS EXAMINATION

Questions by the prosecution:

Q. You never did say in your first statement that you did the act.

A. I think I did where I said I unbuttoned my britches in the first statement. I'm pretty sure its there.

Q. You said 'tried.'

A. Well, tried.

Q. This second statement that Lieutenant Brogan took, is that correct in all of its parts?

A. Thats correct sir.

Q. You told everything that you knew about the facts and actually what happened, in this second statement?

A. Yes, sir.

Q. Everything that you told the court today, is that correct?

A. Yes, sir.

Q. Why is it that in this statement and in the preceding statement you didn't mention that you inserted your hands. Why didn't you say

it at that time? You don't see it in the statement, do you? (showing witness statement).

A. No, I don't see it.

Q. Today's the first time that you ever put that in a statement isn't it, after Professor Webster told his story about this girl's inner parts being torn, that is the first time you mentioned that fact?

A. No, sir. I didn't say that statement because the Lieutenant never asked me.

Prosecution: No further questions.

REDIRECT EXAMINATION

Questions by the defense:

Q. In your statement to Lieutenant Brogan who investigated this case, you did say the following, is it not true?

'We started making love then and I started feeling of her. I kissed her a few times and feeling of her legs. She made no resistance so I went a little further. I started to feel her privates. Then she started hollering.'

A. Yes, sir." (R43-45).

5. At the threshold of the case the Board of Review is confronted with a most serious question arising out of the prosecution's use, upon cross-examination of accused, of several incriminating admissions contained in a prior extra-judicial statement made by him. In order that the issue might be presented with fairness to the prosecution and accused, there has been set forth above the exact record of the relevant proceedings.

The prosecution not only declared that it had no intention of introducing accused's statement given by him on the night of 21-22 April 1944, but also it confirmed such intention by not offering the same. Further, it did not introduce any evidence in support of the voluntary nature of the statement. It also failed to contradict in any respect accused's testimony as to the circumstances under which the statement was obtained from him. While accused's testimony on this point may not be of sufficient weight or substance to permit a condemnation of the statement as being involuntary, the refusal of the prosecution to use this document strongly tends to confirm the inference arising from accused's testimony quoted above that it was obtained by the use of improper influences.

If accused's extra-judicial statement from which the trial judge advocate extracted inculpatory declarations for purpose of cross examination of accused contained only a recital of facts from which accused's guilt might or might not be inferred and was not of such nature that no

other inference than the guilt of accused might be drawn therefrom, it was an admission against interest and was admissible in evidence without proof that it was freely and voluntarily given (MCM, 1928, par.114b, pp. 116,117). If such was the nature of the statement the prosecution was authorized to use it as a basis of cross-examination of the accused for impeachment purposes without first proving it was a voluntary one (3 Wharton's Criminal Evidence - 11th Ed., sec.1384, p.2269).

Since accused's statement was not introduced in evidence by the prosecution and is not a part of the record of trial, the Board of Review has only the benefit of those parts of same included in the impeaching questions of the trial judge advocate. The practice in this instance should have been for the trial judge advocate to secure from the court permission to reserve further cross-examination of accused until evidence had been presented that satisfied the court that the statement was either (1) an admission against interest or (2) that it was a free and voluntary statement by accused if it were a confession of guilt. Accused then could have been recalled to the witness stand and questioned with respect to the alleged conflicting declarations in the statement in the same manner as in the case of any other conflicting statement, and if he made denial, the trial judge advocate would be free to prove that he did make such declarations by resort to the statement. It must, of course, be borne in mind that if the statement were a confession, before the trial judge advocate could use it for any purposes, the court should allow the defense the opportunity of showing that it was not freely and voluntarily made.

Allowing full value to all that appears in the record of trial and likewise giving due consideration to omissions of necessary evidence with respect to accused's statement, the Board of Review has no alternative except to assume that the statement was in legal effect a confession of the crime of rape or of a lesser included offense and that it was secured through improper influences. This assumption is but fair to the accused inasmuch as the prosecution deliberately elected to allow the court and the reviewing authorities to remain ignorant of the nature of the statement and then sought to gain an advantage by selecting certain inculpatory declarations therein as the basis of the cross-examination of accused. Any other treatment of the record in the instant case would give approval to an intolerable practice in conflict with an established rule of law relative to impeachment of witnesses. Cross-examination for the purposes of laying the foundation for impeachment of a witness cannot be extended to an inquiry as to statements which are not proper to be shown for impeachment.

> "it is obviously improper for the cross-examining party to question the witness as to statements for the purpose of getting into evidence, under the guise of laying a foundation, matter which is inadmissible directly" (70 C.J., sec.1274, p.1080).

If accused's statement is a confession illegally obtained, obviously it would not be admissible in evidence. Consequently the practice pursued by the trial judge advocate in the instant case gave the prosecution an unfair advantage. If accused admitted he made the prior conflicting declarations (as he did) the prosecution was not compelled to go further and show the nature of the statement containing same. It thereby succeeded in its e ffort to weaken the credibility of accused's testimony. On the other hand if accused had denied the making of the alleged prior declarations the prosecution in order to impeach accused would have been compelled to resort to the statement which was possibly inadmissible. Had the prosecution followed the simple practice hereinbefore set forth this complicated result would have been avoided and there could have been no suggestion of unfairness towards accused. The treatment hereby accorded accused's statement by the Board of Review is simply a recognition of the wellknown legal maxim "Quando aliquid prohibetur ex directo, prohibetur et per obliquum" (That which is forbidden to be done directly cannot lawfully be done by indirection).

The Board of Review in its consideration of the situation involved in this case has taken cognizance of the attitude of the United States Supreme Court toward extra-judicial statements of an accused as indicated by recent decisions. Two quotations from same will be illuminative.

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgement. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic" (McNabb v. United States, 318 U.S. 332,343; 87 L.Ed., 819,825-826).

> "In reaching our conclusion as to the validity of * * * /the/ * * * confession we do not resolve any of the disputed questions of fact relating to the details of what transpired within the confession chamber of the jail * * *. Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime * * *" (Ashcroft v. State of Tennessee - U.S. -; 64 Sup.Ct.Rep.921, Adv.Sheet 15 May 1944).

On the foregoing premise the problem presented for solution may be stated thus:

> May the prosecution, for purpose of impeachment, cross-examine an accused, who has voluntarily become a witness on his own behalf, as to contradictory declarations made by him which are extracted from a prior extra-judicial statement, amounting to a confession of guilt, without first showing that the extra-judicial statement was voluntary?

The relevant legal principles involved in the instant problem are stated as follows:

> "While there is a conflict of opinion upon the question of the right to use a confession improperly obtained for the purpose of impeachment, the great weight of authority seems to support the rule that a defendant in a criminal prosecution who is a witness in his own behalf cannot be compelled, on cross-examination, to testify to statements made by him out of court which amount to a confession of the crime unless it is first shown that the confession was voluntary, notwithstanding the evidence is offered by the prosecution not as a confession, but merely as a contradictory statement, for the purpose of impeachment. Accordingly, it has been held that a confession inadmissible as evidence on behalf of the prosecution because not obtained properly cannot be be used for the purpose of impeachment. The reason for the rule has been said to be that a witness cannot be cross-examined and contradicted in respect of matters not admissible in evidence as part of the case" (2 Wharton's Criminal Evidence - 11th Ed., sec.605, pp.1010-1011).

> "Furthermore, an involuntary confession cannot be used as a basis for, or admitted as part of, the cross-examination of the defendant, and he may not be cross-examined thereon, even for the purpose of impeachment" (3 Wharton's Criminal Evidence - 11th Ed., sec.1328, pp.2206,2207) (Underscoring supplied).

> "where a person accused of crime testifies in his own behalf he cannot be impeached by showing that he has made statements admitting his guilt, where such statements were not made under

such circumstances as to be admissible as a confession." (70 C.J., sec.1256, p.1068).

"If the statements drawn from the accused, while in custody, by the flattery of hope, or by threats, are entitled to no credit as being truthful statements of what occurred, by the same parity of reasoning such statements can have no force as contradictions of the testimony of the plaintiff in error on the witness stand. The same reasons which forbid their admissibility in the one instance would make them incompetent in the other. It would certainly be unjust to impeach a witness by testimony which had been wrongfully obtained, * * * it would be most cruel to say that the witness is discredited and that he is not entitled to be believed because of the confession made by him under such circumstances." (Cross v. State, ____ Tenn. ____, 221 SW 489, 9 ALR 1354-1356).

"The privilege granted to an accused person of testifying on his own behalf would be a poor and useless one indeed if he could exercise it only on condition that every incompetent confession induced by the promises, or wrung from him by the unlawful secret inquisitions and criminating suggestions of arresting or holding officers, should become evidence against him. * * * Involuntary confessions of accused persons are inadmissible to impeach them as witnesses on the same ground that hearsay and all other incompetent evidence is inadmissible to impeach other witnesses, because they are unworthy of belief." (Harrold v. Territory of Oklahoma, 169 Fed. 47,50,51).

As confirmatory of the foregoing principle, reference is made to the authorities contained in the annotation found in 9 ALR 1358.

In the instant case accused's statement of 21-22 April 1944 had not been offered in evidence by the prosecution prior to his cross-examination on same by the trial judge advocate. For that reason it had not been rejected by the court. Consequently this case is unlike the Cross and Harrold cases cited above where the confessions had been previously rejected by the court because of their involuntary nature. However such difference is not vital. A rule which permits the use of confession for the purpose of impeachment of an accused without first showing its voluntary nature would defeat and nullify the rule prohibiting its use as original evidence

without similar preliminary proof. A prosecutor, knowing in advance that a confession would be rejected by the court because of its involuntary nature should he offer it as original evidence could, if the practice in the instant case is approved, refuse to introduce it as original evidence but bring before the court incriminatory statements contained therein by the simple expedient of asserting he was only using it for impeachment purposes. The attempt to distinguish between its use as original evidence and its use for purposes of impeachment without proving its voluntary nature wholly ignores the practical results. The fact that in both instances the court have before it accused's incriminatory admissions is obvious and it requires more than the artificial distinction herein attempted by the trial judge advocate to convince any reasonable person that its damaging effect upon the minds of the court would not be the same in both instances. Under such circumstances the rule denying the prosecution the use of an accused's incriminatory extra-judicial statement for purposes of impeachment of the accused when appearing as a witness in his own behalf without first laying the foundation for its use of proof of its voluntary nature is operative in this case. The Board of Review is of the opinion that the court committed serious prejudicial error in over-ruling the objection of the defense to the trial judge advocate's procedure.

6. A secondary question arises from the error above noted. The error was serious, but was it prejudicial to the substantial rights of the accused to the degree as to require the setting aside of the findings of guilty? The answer to this question will depend upon the force of the impact of the evidence erroneously brought before the court upon the total competent evidence of accused's guilt. An analysis of the competent evidence is required.

Rape is a most detestable crime and therefore the punishment is severe. Article of War 92 permits a death sentence. Courts in determining guilt are therefor most cautious in trials of offenses of this nature. (Experience has shown that the heinousness of the offense has often blinded the senses of the jury or other fact finding body to the falsity of the testimony of the victim.) It is for that reason that in many jurisdictions appellate courts have excepted rape cases from the generally accepted rule that where there is any evidence to support the verdict or finding, or where the evidence is conflicting, the court will not weigh the evidence but will permit the verdict to stand.

In Weston v. State, 138 P.2d; (Okla) 553 (1943) the court ably described the doctrine that has resulted:

> "The doctrine that one may be convicted on the uncorroborated testimony of the prosecutrix has an exception to the rule that is as well founded as the rule itself, and that is that where her testimony is <u>contradictory</u>, <u>uncertain</u>, <u>improbable</u> or she has been <u>impeached</u>, her testimony should then be corroborated. And this corroboration should be of

> such dignity as to give it weight with the jury upon the question that the actual crime has been committed. It should not be such slight circumstances as to leave the court and jury to guess or speculate that the crime has been committed and that the defendant is guilty. * * *. It is no pleasant task to reverse a rape case, and it is no pleasant memory to send a man to the penitentiary * * * when there is grave doubt of his guilt, and by evidence of one whom the laws require to be corroborated, and the corroboration is not sufficient. But our sworn duty demands that the law be followed, and that justice shall prevail" (Underscoring supplied).

Substantially the same doctrine has been approved in Ganzel v. State, 185 Wis. 589; State v. Ellison, 19 NM 428; Logan v. State, 66 Tex.Crim.Rep.506; Kidwell v. United States, 38 App. DC. 566; State v. Goodale, 210 Mo. 275. Reference is made to an annotation in 60 ALR at pages 1131-1134 sustaining the exception to the general rule that conviction of the crime of rape will not be upheld on the uncorroborated testimony of the prosecutrix, where her testimony is contradictory, uncertain, improbable or she has been impeached.

The Board of Review (sitting in Washington) has recently adopted such principle in the administration of military justice:

> "The Manual for Courts-Martial quotes Lord Hale's admonition concerning rape that 'it must be remembered that this is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent' (par.148b, p.165, MCM, 1928). Heeding this admonition, civilian courts in the numerous jurisdictions permitting conviction (as do courts-martial) upon the uncorroborated evidence of the prosecutrix, have sensibly qualified the rule by holding that, in such cases, the appellate court will closely scrutinize the testimony upon which the conviction was obtained, and if it appears contradictory on material issues, incredible, as too unsubstantial to support the conviction, will reverse it" (CM 243927, Strong, p.18).

The Board of Review (sitting in the European Theater of Operations) believes that such rule is not only fair and just to all concerned, but that its application to cases coming before it will prevent miscarriages of justice and will be consistent with the policies effective in the enforcement of

military discipline. The punishment of an innocent soldier is as injurious to discipline as is the failure to punish a guilty one.

(a) Miss Adkins' testimony reveals contradictions:

(1) In her written statement, made within a matter of hours after the occurrence, Miss Adkins claimed that the accused had sexual relations with her twice. Her testimony emphatically claims it was three times.

(2) In the same statement she claimed accused kept his mouth over hers while having sexual relations with her during one of the incidents. In her testimony she said it was his hand.

(3) In her direct examination she claimed that the insertion of accused's finger took place after the first alleged rape. On cross-examination she said it occurred first - before any other penetration.

(b) Miss Adkins' testimony reveals certain improbabilities:

(1) That she had sexual relations with accused for a period of twenty minutes during which time she could not scream or resist.

(2) That he had relations with her again for half an hour while she remained mute.

(3) That he did so a third time.

(4) That notwithstanding her contention that she exerted every effort to hold her assailant off there was not a bruise or a scratch on her body - only a swollen lip which could have been caused by either a blow or pressure against her own teeth. Such pressure could have been placed there by the lips of the accused as well as by his hand.

(5) That a man could copulate three times within a period of less than one hour and still be seeking further sexual relations.

(6) That notwithstanding all the copulation that she said took place not a seminal stain nor a trace of semen was found on her person or on her clothes, and that although both her knickers and underslip were blood-stained there was no evidence that any of accused's clothing was stained with blood.

(7) The conduct of the young woman and accused as they walked to her home together: she had her arm around him; accused bade goodbye to his friends whom they met; accused escorted her all of the way to her home; he tried to persuade her to have intercourse with him in a churchyard; accused did not flee nor attempt to conceal identity; he made no denial when asked by her father if he brought the girl home - all was inconsistent with the conduct of one who has raped a girl three times within the hour.

(8) That the alleged crime was committed 30 feet off a busy highway leading to a military camp 400 yards away, within easy hearing of those on the highway and those in the camp.

(c) Miss Adkins' testimony on certain points was contradicted:

(1) "Mac" (Private Heller) was actually present during a part of the occurrence. He approached them when he heard her call. The two stood in front of him within 3 or 4 feet. She made no move. She gave no

explanation. He denied that she spoke to him at all or that she threw her arms around him in the dramatic manner described by her. He also claimed that the two left the vicinity a few minutes later.

(2) Her testimony regarding the number of times she screamed, the sequence of events and the time element materially conflicts with Heller's and Jaggers' testimony. She claimed she screamed when accused first attacked her; that the intercourse continued for 20 minutes, and she screamed again. Then it was that Heller responded. To the contrary, these last screams were the first screams heard by Heller and apparently the first ones heard by Jaggers. After Heller walked away she claimed she screamed again when she was raped the second time and that this act required 30 minutes. Contrary to this statement neither Heller nor Jaggers heard any more screams because it was only a matter of minutes after Heller withdrew that he saw Miss Adkins and accused depart and Jaggers saw the lighted matches which, it was shown, were struck by the accused so as to pick up her gloves and bag in the dark immediately before their departure from the scene of the alleged crime.

(3) Sergeant Williams' testimony related the fact that she walked homeward with her arm around accused.

The foregoing analysis of Miss Adkins' testimony is made neither for the purpose of weighing it nor to determine its truth or falsity, but simply to demonstrate that it does contain certain inconsistencies and improbabilities, which affect its intrinsic truthfulness and reliability and that in crucial parts it possesses but tenuous quality. In some details it is also contradicted.

In applying the rule of proof applicable to rape cases above set forth it is now necessary to discover whether there exists in the record corroborative evidence of (a) penetration of Miss Adkins by a male organ and (b) if so that it occurred without her consent. The evidence bearing on the question of penetration was Professor Webster's opinion that the condition in which he found the young woman's vagina was such that he was "unable to definitely state" whether the partial rupture of the hymen was caused by a finger or a male organ - although he favored the latter conclusion. Both the accused and Miss Adkins testified that accused had inserted his finger in her vagina. There was also evidence of blood on Miss Adkins knickers and slip and seminal stains and mud stains on accused's trousers.

With reference to the question of consent, there were no substantial bruises or injuries on Miss Adkins person, except a lacerated lip. With respect to her cries for help or "Please, stop", Jaggers said it occurred three or four times. Heller said twice, and according to him when he responded to the calls, Miss Adkins neither did anything nor said anything to show that she really needed or wanted help. At the locus of the alleged crime, the grass was trampled and beaten down and there were indentations on the ground of heels, feet and knees.

With the weight, credibility or probative value of the corroborative evidence if it is of substance and not mere shadowy conjectures, the

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Board of Review ordinarily does not concern itself. It is proper however, in the present analysis to point out that the corroborative evidence is equivocal in the sense that in each instance it is capable of interpretation either for or against accused. The prosecution however will be allowed the full benefit of such corroborative evidence whatever may be its worth.

The case against accused, therefore consisted of Miss Adkins' testimony which contained inconsistencies and irregularities and which in some details was denied by other witnesses. The corroborative evidence was of a nature that permitted a court in its deliberations to find it either favorable or unfavorable to accused. It is unnecessary for the Board of Review to consider whether the prosecution met the burden of proof required of it by the rule hereinbefore set forth concerning the quality and quantity of legal proof required to sustain a conviction of the charge of rape. It suffices for present purposes to demonstrate that the competent evidence is not of that robust and convincing quality or quantity which standing alone would prove beyond reasonable doubt that accused was guilty. It was in aid and support of this evidence that the prosecution on cross-examination of accused erroneously injected into the case the inculpatory portions of accused's extra-judicial statement. The situation thus presented has been the subject of consideration and discussion by the Board of Review:

> "The rule governing such situation has been succinctly stated:
>
> ' It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C.M.127490 (1919)." (Underscoring supplied).
>
> ' The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and

reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C.M.130415 (1919).' (Dig.Op.JAG, 1912-30, sec.1284, p.634).

The foregoing principles were elaborated in the dissenting opinion of Colonel Archibald King in CM 211829, Parnell. Colonel King's opinion was approved by The Judge Advocate General and formed the basis of the subsequent action of the Secretary of War.

The fate of the accused in the instant case is not to be determined by the simple expedient of separating the legal evidence from the illegal evidence and then evaluating the legal evidence as to its sufficiency to sustain the findings. Such process would be an over simplification and would wholly ignore the actualities of the trial. The court had before it both legal and illegal evidence. It is an impossibility for the Board of Review to measure the influence of the illegal evidence upon the court and should it attempt to do so it would be usurping the functions of the court (CM ETO 132, Kelly and Hyde). A reviewer in considering the record of trial to determine whether the 'legal evidence of itself substantially compelled a conviction' cannot ignore the impact upon the mind of the court of the illegal evidence. For this reason the Board of Review in CM 127490 (supra) particularly qualified its pronouncement by the statement 'nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony has been excluded enough legal evidence remains to support a conviction'. (Underscoring supplied). An accused has not received a fair and impartial trial if his conviction is based upon a body of evidence part of which is legal and which standing alone possesses only sufficient weight to tip the scales in favor of its sufficiency but does not contain the robust quality of moral certainty and determinativeness, and part of which is illegal composed of confessions which are some of the 'strongest forms of proof known to law'. The Board of Review

undoubtedly had this situation in mind when it adopted the qualification last quoted in its holding CM 127490 (supra).

* * * * * * * * *

It was in support of this proof that the illegal confessions were introduced. Had the confessions been legally obtained they would have removed all reasonable doubt and the prosecution's case would have become invulnerable. The strength and power of the confessions would have produced a moral certainty of guilt which the minds of 'conscientious and reasonable men' would accept without mental equivocation or reservation. It is the repercussion of this illegal evidence, possessing inherent strength and power, upon the other, but nevertheless equivocal evidence of the prosecution that would influence the court in its weighing and consideration of the other evidence. It was this influence that substantially prejudiced the rights of the accused" (CM ETO 1201, Pheil, pp.14-17).

The Board of Review reaffirmed the doctrine of the Pheil case in CM ETO 1693, Allen.

No further argument is necessary to demonstrate the vulnerability of the findings of guilty in this case. The conclusion is unescapable that the error in permitting the trial judge advocate to cross-examine accused upon conflicting statements contained in his alleged confession without proof of its voluntary nature was fatal error requiring that the findings of guilty be set aside. The Board of Review is therefore of the opinion that the findings of guilty are not supported by substantial competent evidence.

7. The charge sheet shows that accused is 21 years and seven months of age and enlisted 27 September 1940 for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. For the reasons set forth, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

_____ Judge Advocate

_____ Judge Advocate

(ABSENT ON DETACHED SERVICE) _____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 JUL 1944 TO: Commanding Officer, Western Base Section, Communications Zone, European Theater of Operations United States Army, APO 515, U.S. Army.

1. In the case of Private JOHNNIE PRIDGEN (14007802), 1st Base Post Office, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence, in which holding I concur. The holding of the Board of Review and my concurrence therein automatically vacates the findings and sentence (AW 50½; CM 152122, Ind. by Hull, Acting, The Judge Advocate General to War Department, 20 July 1922).

2. Under Article of War 50½ the accused may again be brought to trial for the offense charged or for a lesser included offense. If a rehearing is directed it should be ordered in the final action disapproving the present sentence. However, the prosecution should avoid any reference to extra-judicial confessions of accused if the same were illegally secured and should be prepared to present corroborative evidence of Miss Adkins' testimony insofar as the same is obtainable.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2625. For convenience of reference please place that number in brackets at the end of the order: (ETO 2625). In the event there is a rehearing the order will not be published until after appellate review of the record of the second trial.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2632

14 JUL 1944

U N I T E D S T A T E S)	IX AIR FORCE SERVICE COMMAND.
)	
v.)	Trial by G.C.M., convened at
)	Rusholme, Manchester, England,
Private WALTER JOHNSON)	18 and 20 April 1944. Sentence:
(34206503), 1933rd Quarter-)	Dishonorable discharge, total
master Truck Company Aviation,)	forfeitures and confinement at
1513th Quartermaster Truck)	hard labor for ten years.
Battalion Aviation (Special),)	Federal Reformatory, El Reno,
1511th Quartermaster Truck)	Oklahoma.
Regiment Aviation (Special).)	

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
Specification 1: In that Private Walter (nmi) Johnson, 1933rd QM Trk Co (Avn), 1513th QM Trk Bn (sp) AAF 569, APO. 635, did, without proper leave absent himself from his Organization at AAF 569, APO. 635, from about 0600 hours 2 June, 1943, to about 0800 hours, 16 June, 1943.
Specification 2: In that * * *, did, without proper leave absent himself from his Organization at AAF 569, APO. 635, from about 0600 hours 25 June, 1943 to about 2350 hours 26 June, 1943.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * *, having been duly placed in confinement at Guard House, AAF 569, APO. 635 on or about 1000 hours 29 June, 1943, did, on or about July 1st, 1943 escape from said confinement before he was set at liberty by proper authority.

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on the door of his cell, and that an unbarred window in the adjoining room was broken (R31-33,37).

On 22 July 1943 accused was placed in arrest of quarters at AAF Station 569 by direct order of his company commander (R31,38-39,41). About 1:45 a.m. 23 July 1943 accused stole the car described, of the value alleged, from the owner named in the Specification, Additional Charge I, from in front of the police station at Chorley (R42-44). The civilian police were notified and, that same night, recovered the car after a desperate chase, culminating in a collision, immediately after which accused leaped from the stolen car and attempted to flee (R44-47). On 23 July 1943, while he was still in the custody of the civilian police, a check revealed his absence from AAF Station 569 (R41-42).

4. The only evidence for the defense was the testimony of the accused who, after his rights were explained to him, elected to be sworn as a witness in his own behalf (R52). He testified that on 25 June 1943 he left his post and went to Manchester by train but asserted that, although he had no pass, he did not consider that his trip to Manchester involved absence without leave, explaining that there were a lot of things the members of his organization were not supposed to do which they did notwithstanding (R61). He denied escaping from confinement from the guardhouse, AAF 569, insisting that he was confined in the guardhouse, AAF 590, from 1 June to 22 July 1943 under sentence imposed by Special Court-Martial 1 June 1943 (R55-58). The relevant Special Court-Martial Order, introduced in evidence by the defense, shows that the sentence involved forfeitures but no imprisonment (R56; Def.Ex.2). Accused denied stealing the automobile described in the Specification, Additional Charge 1, being chased by the civilian police or ever being in their custody (R54,60). He identified a photograph (further identified by a rebuttal witness for the prosecution) as a photograph of himself but disclaimed all knowledge of when or where it was made. He also disclaimed any recollection of being ordered to arrest in quarters by his company commander on 22 July 1943 (R62). His testimony was so replete with inaccuracies and contradictions as to eliminate any belief in its truth.

5. In rebuttal, the prosecution introduced in evidence the photograph which accused had identified as his own, together with evidence that it was an official police photograph of accused taken at the Chorley police station with accused's consent, at 1400 hours on 23 July 1943 while accused was still in custody of the civilian police who apprehended him when they recovered the stolen car described in the Specification, Additional Charge 1 (R64,65; Ex G-4).

6. The charge sheet shows that accused is 24 years of age and was inducted at Camp Blanding, Florida, 5 June 1942 for the duration and six months. No prior service is shown.

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

8. Confinement in a penitentiary is authorized for the offense of larceny of $50.00 or more (AW 42; sec.287 Federal Criminal Code (18 USCA 466)). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir.229, WD, 8 Jun 1944, sec.II, pars. 1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

2632

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 14 JUL 1944 TO: Commanding General, IX Air Force Service Command, APO 149, U. S. Army.

1. In the case of Private WALTER JOHNSON (34206503), 1933rd Quartermaster Truck Company, 1513th Quartermaster Truck Battalion Aviation (Special), 1511th Quartermaster Truck Regiment Aviation (Special), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The Federal Reformatory, Chillicothe, Ohio, as the appropriate institution nearest the port of debarkation, should be designated in place of the Federal Reformatory, El Reno, Oklahoma. This may be done in the published court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2632. For convenience of reference please place that number in brackets at the end of the order: (ETO 2632).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2642

27 JUN 1944

U N I T E D S T A T E S v. Private HERMAN U. GUMBS, JR. (32807722), Company F, 366th Engineer General Service Regiment.	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 3 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 64th Article of War.
Specification: In that Private Herman U. Gumbs, Jr., Company F, 366th Engineer General Service Regiment, Vauxhall Camp, Monmouth, Monmouthshire, South Wales, did, at Vauxhall Camp, Monmouth, Monmouthshire, South Wales, on or about 2230 hours, 27 March 1944, strike First Lieutenant Carlton A. Jordan, his superior officer, who was then in the execution of his office, on the arm and body with his fists.

He pleaded not guilty to and was found guilty of the Charge and Specification, two-thirds of the members of the court present at the time the vote was taken concurring. Evidence was introduced of one previous conviction by special court-martial for absence without leave of 22 days in violation of Article of War 61. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be

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confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The charge sheet shows that accused is 21 years of age and was inducted on 16 February 1943 at Camp Upton, New York, to serve for the duration of the war plus six months. He had no prior service.

4. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence (CM ETO 1360, Poe; CM ETO 1413, Longoria). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 Jun 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S.Army.

1. In the case of Private HERMAN U. GUMBS, JR. (32807722), Company F, 366th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. Captain Carlton A. Jordan, accused's commanding officer, testified that he received a report that accused had been absent from two formations, and that he sent the sergeant of the guard to direct him to report to the orderly room. The sergeant of the guard sent back word that accused refused to report. Captain Jordan, accompanied by a corporal of the guard, went personally to get accused because of this disobedience. He ordered accused to get his blankets but did not say where he was going. He told accused, whose manner was reluctant and disrespectful, to hurry. After they left the barracks accused began to mumble and refused to obey an order to stop talking. He was told by Captain Jordan that he was to spend the night in a certain hut in the area as company punishment, presumably for his refusal to report to the orderly room. The assault on Captain Jordan occurred after accused refused to enter the hut. After the altercation he was finally pushed into the hut.

Captain Jordan further testified that it was customary to put men in the hut overnight as punishment. The evidence does not show whether the overnight confinement of accused was under guard, but the statement of Technician Fifth Grade Lee A. Cole in the accompanying papers contains the assertion that "Pvt. John Douglas, who was standing as temporary Guard at the hut" informed Cole about 2330 hours that the lock on the door had been broken. Accused was confined about 2230 hours (R7).

Article of War 104 prescribes the disciplinary punishments imposable for minor offenses without the intervention of a court-martial. Confinement under guard as disciplinary punishment is expressly prohibited by the Article. Captain Jordan certainly had authority to confine accused temporarily, pending any further action, for his refusal to report to the orderly room, and for his recalcitrant conduct in general. If, however, overnight confinement under guard was imposed solely as disciplinary punishment under Article of War 104, as the testimony of Captain Jordan seemed to indicate, such confinement was, for the reason hereinbefore stated, unauthorized. The imposition of such confinement did not, of course, justify the assault upon the officer.

3. Although accused's prior service is characterized as poor, his one previous conviction was not for an offense involving moral turpitude. He does appear to be an unruly soldier in need of severe discipline. I do not

believe, however, that he should be separated from military service until all possibilities of his value as a soldier have been exhausted. The government should preserve for the present the right to use his services in a combat area. In view of the prevailing policy in this theater of conserving man power, I recommend that the execution of the dishonorable discharge be suspended until his release from confinement, and that the place of confinement be changed to Disciplinary Training Center No.2912, Shepton Mallet, Somersetshire, England. Supplemental action should be forwarded to this office for attachment to the record of trial.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2642. For convenience of reference please place that number in brackets at the end of the order: (ETO 2642).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2644

28 JUN 1944

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private DENNIS B. POINTER (33044188), Company E, 95th Engineer General Service Regiment.	Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 4 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Dennis B. Pointer, Company E, 95th Engineer General Service Regiment, did, without proper leave, absent himself from his station at Llanelwedd Summer Tented Camp, Radnorshire, Wales, from about 2100 hours 24 March 1944 to about 1945 hours 25 March 1944.

CHARGE II: Violation of the 64th Article of War.
Specification: In that * * * having received a lawful order from Lieutenant Colonel Aubrey N. Holmes, 95th Engineers, his superior officer, to get in a weapons carrier and return to camp with him, did, at Builty(sic) Wells, Radnorshire, Wales, on or about 2200 hours 24 March 1944, willfully disobey the same.

he pleaded guilty to Charge I and its Specification, not guilty to Charge II and its Specification and was found guilty of both charges and specifications, two-thirds of the members of the court present at the time the vote was taken concurring. Evidence was introduced of five previous convictions: four by summary courts, one for disobedience of a standing order requiring presence at bedcheck in violation of the 96th Article of War, two for breaking restriction in violation of the 96th Article of War and one for absence without leave for one day in violation of the 61st Article of War; and one by special court-martial for absence without leave for two and one-quarter hours in violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years, three-fourths of the members of the court present at the time the vote was taken concurring. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. (a) Accused's pleas of guilty to Charge I and its Specification (absence without leave 24-25 March 1944), supported by testimony of a witness having personal knowledge of his absence (R6), sustain the findings of guilty thereof (CM ETO 1606, Sayre and authorities there cited; CM ETO 2414, Mason).

(b) In support of the findings of guilty of Charge II and its Specification, there is substantial evidence that on the evening of 24 March 1944 accused was in the city of Builth Wells, Radnorshire, Wales, which was "off limits" to troops of his unit; that Lieutenant Colonel Aubrey N. Holmes, of accused's regiment, addressing accused by name, gave him a direct verbal order to "get on the truck /a weapons carrier/ and return to camp with me"; and that when the truck, still in motion, reached a point about a mile and one-half from the city of Builth Wells, and about a mile from the camp, accused willfully disobeyed the order by leaving the truck (R7-9,12) (MCM, 1928, par. 134b, pp.148-149). The slight variance in the proof from the allegation of place "at Builty (sic) Wells" in the Specification is immaterial under Article of War 37. The conflict in testimony as to whether or not the order included a specific direction to "return to camp" with the superior officer, created a clear issue of fact for the court, which it determined against accused. In view of the circumstances disclosed by the record, in the opinion of the Board of Review such determination was entirely proper.

(c) Lieutenant Colonel Holmes, in answer to a question propounded by the court whether accused knew him at the time he gave accused the order, stated in part, "Yes, I'm positive he did, because I know I have had to court-martial Pointer once or twice previously"(R9). Such statement was highly improper (Cf: 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 Article of War 37 despite its impropriety, within the rule illustrated in CM ETO 1201, Pheil and CM ETO 1693, Allen). Accused's denial that the order embodied a specific direction to "return to

camp" with Lieutenant Colonel Holmes does not detract from the substantial nature of both circumstantial and direct evidence to the contrary.

4. The charge sheet shows that accused is 29 years two months of age and was inducted 19 May 1941 to serve for one year. (His period of service is governed by the Service Extension Act of 1941). He had no prior service.

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

6. The penalty for willful disobedience of the order of a superior officer in wartime is death or such other punishment as the court may direct (AW 64). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, par.3a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 28 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U. S. Army.

1. In the case of Private DENNIS B. POINTER (33044188), Company E, 95th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 service until all possibilities of his value as a soldier have been exhausted. In view of the policy of conserving man power prevailing in this theater, I recommend that the dishonorable discharge be suspended until his release from confinement and the place of confinement be changed to Disciplinary Training Center No.2912, Shepton Mallet, Somersetshire, England. Supplemental action should be forwarded to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2644. For convenience of reference please place that number in brackets at the end of the order: (ETO 2644).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2651

18 JUL 1944

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at AAF Station 402, 19 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, Atlanta, Georgia.
Private THOMAS W. BURDETTE (35433205), 909th Signal Company, Depot, Aviation, 30th Air Depot Group.	

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Pvt. Thomas W. Burdette, 909th Signal Company, Depot, Aviation, did at AAF Station 158, on or about 17 August 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Black Heads Inn, High St., Tean, Stoke-on-Trent, Staffs, on or about 15 March 1944.

He pleaded to the Specification, guilty, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words, guilty, and not guilty to the Charge but guilty of a violation of Article of War 61. He was found guilty in accordance with his pleas. Evidence was introduced of two previous convictions, one by special court for absence without leave for 17 days, one by summary court for absence without leave for six days, both in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place

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as the reviewing authority may direct, for 20 years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for a period of ten years, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The evidence shows that accused went absent without leave from his organization, the 909th Signal Company Depot, at AAF Station 158, Sudbury, England, on 17 August 1943 (R6-9,22; Pros. Ex.A). About 19 or 20 August 1943, the 909th Signal Company Depot moved to AAF Station 169 at Stanstead, approximately 150 miles from Sudbury (R6, 22). Without having returned to his organization in the meantime, accused was apprehended wearing civilian coveralls, on or about 15 March 1944, at the Black Swan Public House in Tean, Staffordshire, where he admitted his identity to the military police sergeant who arrested him. He also stated that, in order to procure his livelihood, he sold his watch, rings "and so on"; that he was living "off and on" at the Checkley Cafe, near Tean; and that he always wore his uniform except when working on the automobile, belonging to Mrs. Sarah Annie Brown, the proprietress of the Checkley Cafe, which automobile accused drove to Tean and parked at the Black Swan just prior to his apprehension (R8,10-15; Pros.Ex.B). Mrs. Brown testified that from 17 August until Christmas 1943 she saw accused from time to time at the Checkley Cafe, where he lived from Christmas until the date of his apprehension, on which date he worked on her automobile at her request, donning coveralls for the purpose. He was never out of uniform at any other time. After he completed his work on her automobile, she asked him to drive it to fetch some meat for her from the butcher at Tean, where he was arrested (R15-17). To the investigating officer, accused admitted his absence without leave, explaining that, two or three days after its commencement, he learned that his organization had moved, became frightened and continued staying away, spending his time with Mrs. Brown at the Checkley Cafe and in neighboring towns near his old station, Sudbury. He always wore his uniform except on the day of his apprehension when he changed to coveralls before working on Mrs. Brown's car (R18-20).

4. No evidence was introduced by the defense and accused, after being properly advised of his rights, elected to remain silent. The evidence shows the unauthorized and unexplained absence of accused for seven months. He was apprehended some 150 miles from his station, wearing civilian clothing and under circumstances indicating an intent to remain away permanently. Proof amply sufficient to sustain a conviction of the charge of desertion is contained in the record of trial. He admits the offense of which he was found guilty.

5. The charge sheet shows accused is 30 years 11 months of age. He was inducted at Huntington, WestVirginia, 17 June 1942 to serve for the duration of the war and six months thereafter. He had no prior service.

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

7. Although Executive Order 9267, 9 November 1942, suspends the maximum limits of punishment for absence without leave, confinement in a penitentiary in punishment for a violation of Article of War 61 is still precluded by the provisions of Article 42 (CM 238707 (1943), Bull JAG, Vol II, No 8, August 1943, sec 419(4), p 308). Therefore, the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years in a place other than a penitentiary, federal correctional institution or reformatory.

8. The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (AW 42; Cir 210, WD, 14 Sep 1943, sec VI, par 2a, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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(270)

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 18 JUL 1944 TO: Commanding General, IX Air Force Service Station, APO 149, U. S. Army.

1. In the case of Private THOMAS W. BURDETTE (35433205), 909th Signal Company, Depot, Aviation, 30th Air Depot Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years in a place other than a penitentiary, federal correctional institution or reformatory. I approve such holding. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. As the offense of which the accused was convicted is not punishable by penitentiary confinement by either the Federal Criminal Code or the Code of the District of Columbia, penitentiary confinement would be illegal (AW 42). The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2651. For convenience of reference please place that number in brackets at the end of the order: (ETO 2651).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

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BOARD OF REVIEW

17 JUN 1944

ETO 2652

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
V.	Trial by G.C.M., convened at Headquarters, First United States Army, Bristol, England, 15 May 1944.
Private ANDREW JACKSON alias SCALES ANDREW JACKSON (34748755), 668th Ordnance Ammunition Company.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: 1. In that Private Andrew Jackson, 668th Ordnance Ammunition Company, did at Freeland House, Oxen, England, on or about 12 February 1944, with intent to commit a felony, viz, rape, commit an assault upon Miss Hannah Ward by willfully and feloniously throwing the said Miss Hannah Ward to the ground and tearing away her clothing.

Specification: 2. In that * * *, did at Lydbrook, Gloucestershire, England, on or about 13 February 1944, with intent to commit a felony, viz, rape, commit an assault upon Mrs. Lucy Bevan, by willfully and feloniously throwing the said Mrs. Lucy Bevan to the ground and striking her on the head with a bottle.

He pleaded not guilty to and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 40 years. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. With reference to Specification 1 of the Charge, the doctor who examined the victim Hannah Ward after the incident, found her "to be definitely below average intelligence" (Pros.Ex.1). Her testimony was rather vague, particularly with respect to the identity of the person who assaulted her. Although she identified accused as her assailant (R 14-15,18), her testimony in this regard was somewhat inconsistent (R 12-13, 15-17). However, in view of accused's own statement (Pros.Ex.11), the presence on the knees of his trousers of soil similar to the soil where the assault occurred, the medical and other evidence contained in the record of trial, the Board of Review is of the opinion that his guilt of the offense alleged was established beyond a reasonable doubt (CM ETO 2500, Bush; CM ETO 1673, Denny).

With reference to Specification 2 of the Charge: although the victim Mrs. Lucy Bevan was unable to identify her assailant (R32), the contents of accused's own statement (Pros.Ex.12), the testimony of Private Johnson and the presence of accused's finger print on the bottle which was used to strike the woman, sufficiently identified him as the man who made the assault. Although the woman testified that her assailant did not say a word when he attacked her with the bottle (R32), accused, in his statement, stated that he assaulted the woman because she refused to have intercourse with him. There was no provocation for the vicious assault made by accused in the blackout upon a strange woman. The evidence is legally sufficient to support the findings of guilty of Specification 2 of the Charge (CM 233183 (1943) Bull JAG., Vol.II, No.5, May 1943, sec.451(2), pp.188-189; CM ETO 1954, Lovato; CM ETO 1673, Denny).

4. The review of the assistant staff judge advocate, First United States Army, contains a discussion with respect to the denial by the court of certain motions made by the defense, and the admissibility in evidence of his two statements. Further comment is deemed unnecessary.

5. The charge sheet shows that accused is 20 years of age and that he was inducted 23 April 1943 at Fort Benning, Georgia to serve for the duration of the war plus six months. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a United States penitentiary is authorized for the crime of assault with intent to commit rape (AW 42; sec.276, Federal Criminal Code (18 U.S.C.A.455); sec.335 Federal Criminal Code (18 U.S.C.A.541); Act June 14, 1941, c.204, 55 Stat. 252 (18 U.S.C.A.753f); Cf. U.S. v. Sloan 31 Fed. Sup.327). The designa-

tion of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.291, WD, 10 Nov 1943, sec.V, par. 3b).

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office, TJAG., with ETOUSA. 17 JUN 1944 TO: Commanding General, First United States Army, APO 230, U.S. Army.

1. In the case of Private ANDREW JACKSON alias SCALES ANDREW JACKSON (34748755), 668th Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2652. For convenience of reference please place that number in brackets at the end of the order: (ETO 2652).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2663

29 JUL 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Technician Fifth Grade DAN A. BELL (34554662) and Private LORENZA KIMBER (34459898), both of Company A, 389th Engineer General Service Regiment.	Trial by GCM, convened at Tavistock, Devonshire, England 30 March 1944. Sentence: Each accused, dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITER, SARGENT and STEVENS, Judge Advocates

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

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

BELL

CHARGE: Violation of the 96th Article of War.
Specification: In that Technician Fifth Grade Dan A. Bell, Company A, 389th Engineer General Service Regiment, did, at or near Honicombe Camp, St. Ann's Chapel, Cornwall, England, on or about 28 February 1944, unlawfully and feloniously have carnal knowledge of Alfreda May Searle, a female under sixteen years of age.

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KIMBER

CHARGE: Violation of the 96th Article of War.
Specification: In that Private Lorenza (NMI) Kimber, Company A, 389th Engineer General Service Regiment, did, at or near Honicombe Camp, St. Ann's Chapel, Cornwall, England, on or about 3 March 1944, unlawfully and feloniously have carnal knowledge of Alfreda May Searle, a female under sixteen years of age.

The accused in open court consented to be tried together (R1). Each pleaded not guilty to and was found guilty of his respective Charge and Specification. No evidence was introduced of any previous convictions as to either accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of 20 years. The reviewing authority, as to each accused, approved the sentence but reduced the period of confinement to 15 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under the provisions of Article of War 50½.

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

The accused were members of Company A, 389th Engineer General Service Regiment stationed at or near Honicombe, St. Ann's Chapel, Cornwall, England (R5,7,9).

Alfreda Searle, a female born 1 May 1931 (therefore age 12 years and ten months) (R7; Pros.Ex.A) testified that on 3 March 1944 she visited one of the huts in the United States Army Camp at place alleged. While she was there, in company with some soldiers and two other girls, accused Kimber, who was "drunk", came into the hut. The girl left the hut, but returned to it later. Kimber pushed her on the bed, pulled down her knickers, inserted his penis in her and had intercourse (R6-7). This was related in a rather confused manner by the girl after she had first denied being in any tent (R6). Accused Kimber voluntarily signed a written statement (R10-11), in which he stated that he was "feeling high" from the effects of drinking beer in a "pub" and was scheduled to go on guard duty the night of 3 March 1944. He went into the hut in question which was the one from which he was to start his duty and lay on the floor. In the hut were two other soldiers one of whom had sexual relations with Alfreda Searle. The soldiers then left. Kimber asked Alfreda if he might have intercourse with her. She refused. Then he put his hand underneath her dress and touched her private parts. She pulled his hand away and said "Stop". He lay down on the bed and she "lay up" against his shoulder. A police officer then entered the hut. Accused judged the girl to be about 14 years of age.

Constable Edgar Brooker, stationed at Gunnislake, testified that he was patrolling the neighborhood of the U.S. Army camp on the evening of 3 March 1944 when he heard a female voice calling from one of the huts "Willie, come in". Upon investigating he found Alfreda Searle lying on the camp bed with Kimber. Her back was to Kimber. Both were fully clothed and their clothing was not disarranged. When asked what she was doing there, she answered, "Nothing, I am waiting for my brother". Kimber at the time stated that he was not doing anything wrong - that he had told the girl to go home but she refused (R9).

In a confusing and contradictory manner, Alfreda Searle testified that on 28 February 1944 she entered a hut and sat down on a bed. Accused Bell pushed her back in his arms, then pushed her down on the bed, pulled down her knickers, inserted his penis in her and had intercourse (R6-7). Bell voluntarily confessed in a written statement (R12) that on the evening in question he entered a hut at the camp and found Alfreda and two soldiers. He told her to go home and she refused to leave. He lay down on the bed and she came over, put her arms around him and kissed him. He pushed her dress up and she did not object. He then had intercourse with her after which she again refused to go home and he left her in the hut.

4. The defense produced no witnesses and each accused, after explanation of his rights, elected to remain silent.

5. In order to prove the age of Alfreda May Searle the prosecution called to the stand Inspector Reginald Tabb of the British police in Cornwall. He produced a document designated by the trial judge advocate as the "original birth certificate of Alfreda May Searle". When it was offered in evidence defense counsel stated, "No objection". The certificate was then admitted and withdrawn and a copy (R7,Pros.Ex.A), certified as a true copy by Inspector Tabb, was substituted therefor. The original certificate proved that the girl was born 1 May 1931 and bore an authentication of the Registrar of Births and Deaths of the Sub-District of Tavistock in the Counties of Devon and Cornwall, England to the effect that it "is a true copy of entry No. 158 in the Register Book of Births for said Sub-District."

Congress has specifically provided the form of certification and authentication of any document of record in a public office of a foreign country as follows:

> "A copy of any foreign document of record or on file in a public office of a foreign country, or political subdivision thereof, certified by the lawful custodian of such document, shall be admissible in evidence in any court of the United States when authenticated by a certificate of a consular officer of the United States

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> resident in such foreign country, under the seal of his office, certifying that the copy of such foreign document has been certified by the lawful custodian thereof. Nothing contained in this section shall be deemed to alter, amend, or repeal section 689 of this title" (Act June 20, 1936, c.640, sec.6: 49 Stat. 1563; 28 USCA sec.695e).

The phrase "any court of the United States" found in the foregoing statute includes courts-martial (Ex parte Mason, 104 U.S.696, 26 L.Ed.1213; Carter v. Roberts, 177 U.S.496, 44 L.Ed.861; Carter v. McClaughry, 183 U.S. 365, 46 L.Ed.236; Grafton v. United States, 206 U.S.333, 51 L.Ed.1084. Cf: United States v. Hiatt, 141 Fed.(2nd) 664).

The foregoing statute is particularly applicable to British birth certificates (New York Life Insurance Co. v. Aronson, 38 Fed.Supp,687,688). The certificate in the instant case was not authenticated in the manner directed by the foregoing statute inasmuch as it does not bear the required certificate of a United States consul. Upon timely objection it would have been the duty of the court to exclude it from evidence. However, the defense counsel, when it was offered in evidence, affirmatively indicated that he had no objection to its admission. Under these circumstances the irregularity was clearly waived.

> "An objection to proffered evidence of the contents of a document based on any of the following grounds may be regarded as waived if not asserted when the proffer is made: * * * it does not appear that a purported copy of a public record is duly authenticated" (MCM, 1928, par.116a, p.120).

Although the "public record" to which reference is made in the foregoing excerpt from the Manual for Courts-Martial undoubtedly refers to public records of the United States, its territories and possessions and of the States, the principle of waiver therein announced with reason and logic may be applied to the authentication of public records of a friendly foreign host country wherein Federal military courts are sitting. The Board of Review so concludes.

6. The record contains substantial evidence that each accused had sexual intercourse with the Searle girl at the times and places alleged, and that she was under the age of 16 years, to wit, of an age of 12 years and 10 months on the date of the offenses. Under the facts of this case it is not necessary to determine whether the rule established in CM 211420, McDonald, 10 B.R.61 with reference to Section 279, Federal Criminal Code,

(18 USCA 458) is applicable to the commission of the offense of carnal knowledge denounced by said statute when committed by United States military personnel while stationed within the territorial limits of a friendly foreign country with the consent of said country. Such question is specifically reserved. In the instant case each accused, American soldiers, while stationed in an English town and living among and associating with friendly inhabitants thereof, defiled and debauched an unfortunate English girl of an age less than 13 years who was allowed to frequent their camp. Four soldiers have been convicted of statutory rape with Alfreda Searle on the occasion in question (See CM ETO 2620, Tolbert and Jackson). Regardless of the child's proclivities or habits, the offenses violate the sense of decency of both American and English society. The evidence exhibits animalistic lust in its most degrading form. It is also of grave importance to the military service of the United States that these offenses were committed within the confines of a military camp with resultant injurious effect upon discipline and control of the soldiers. There is no difficulty in concluding that the conduct of each accused was a reflection not only upon the moral standards of the American people but was also directly prejudicial to good order and military discipline and constituted conduct of a nature to bring discredit upon the American military service - offenses under the 96th Article of War (CM ETO 1366, English; CM ETO 2620, Tolbert and Jackson).

7. The charge sheets show that accused Bell is 26 years of age and was inducted at Fort Benning, Georgia 11 November 1942 for the duration of the war plus six months, and that accused Kimber is 22 years of age and was inducted at Fort Bragg, North Carolina 30 October 1942 for the same period of time. Neither accused had prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences as to each accused. The Table of maximum punishments does not provide for the offenses of which accused were found guilty. They therefore remain punishable as authorized by statute or custom of the service (MCM, 1928, par.104c, p.96). Section 279, Federal Criminal Code, supra, authorizes confinement for the first offense for 15 years. By analogy the periods of confinement in the instant case are fully justified.

9. Confinement in a penitentiary is authorized on conviction of the offense alleged (AW 42; Sec.279, Federal Criminal Code, supra, D.C. Code 22-2801 (6:32), p.536). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir. 229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

B. Franklin Riley, Judge Advocate

Edward L. Stevens Jr., Judge Advocate

Edward L. Stevens Jr., Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 JUL 1944 TO: Commanding General, Southern Base Section, Communications Zone, European Theater of Operations United States Army, APO 519, U. S. Army.

1. In the case of Technician Fifth Grade DAN A BELL (34554662) and Private LORENZA KIMBER (34459898), both of Company A, 389th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. The sentences are the maximum and the most severe adjudged in this Theater for statutory rape. In the interest of uniformity, the sentences should be reduced to ten years, as was done in the related cases of Tolbert and Jackson (CM ETO 2620).

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2663. For convenience of reference please place that number in brackets at the end of the order: (ETO 2663).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2672

8 JUL 1944

U N I T E D S T A T E S)	ICELAND BASE COMMAND.
)	
v.)	
)	Trial by GCM, convened at Camp Herskola, Iceland, 31 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.
Private First Class EDWARD BROOKS (34248887), Battery A, 378th Antiaircraft Artillery Automatic Weapons Battalion.)	

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private First Class Edward (NMI) Brooks, Battery A, 378th Antiaircraft Artillery Automatic Weapons Battalion did, at Camp Garrity, Iceland on or about 16 May 1944, with intent to commit a felony, viz, murder, commit an assault upon 1st Lieutenant Charles R. Casey by willfully and feloniously pulling the trigger of a service rifle, loaded with an armor piercing cartridge, which rifle the said Private First Class Edward (NMI) Brooks held pointed at 1st Lieutenant Charles R. Casey.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio,

as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Clear, uncontradicted evidence shows the following: On the evening of Tuesday, 16 May 1944 a "beer party" was held at accused's station, Camp Garrity, Iceland, one of the four camps of his organization, Battery A, 378th Antiaircraft Artillery Automatic Weapons Battalion (R7). Accused, who had been drinking beer at intervals since the preceding Sunday evening, drank more beer at the party (R47). At about 2150 hours an air-raid "red" alert interrupted the party. First Lieutenant Charles R. Casey, Camp Commander of Camp Garrity, did not find accused at his assigned tactical position at the antiaircraft guns, but in the mess hall, the scene of the beer party. He asked him where his helmet and gas mask were and ordered him to "get out on the guns". Accused made no reply but complied with the order (R7). Following the alert, which continued until about 2245 hours (R16), Lieutenant Casey proceeded to his quarters, which were in a hut. At about 2300 hours accused entered the hut, opened the door of Casey's room, looked in and inquired if Casey was asleep. The latter replied, "'No, Brooks; come on in'" (R8). Accused had an M1 rifle slung under his arm, loaded with one .30 calibre armor-piercing cartridge in its chamber and five similar cartridges and two .30 calibre tracer cartridges in its magazine. However, "the bolt wasn't shoved home so the ejector would take hold" (R8,33; Pros. Exs.1,2,3). Casey ordered him to put down the rifle, whereupon accused said, "'You have been unfair to me'", immediately brought the rifle up and pointed it at Casey's stomach at a distance of about six inches. When Casey stepped towards him, accused pulled the trigger, and the gun's action "went off" without exploding the cartridge (R8,14). The primer cap of the cartridge was dented by the percussion of the firing pin upon it, but apparently due to the fact that "the bolt wasn't all the way home", such percussion was not sufficient to explode the cartridge and fire the rifle (R35; Pros.Ex.2). By accused's actions Casey was placed in fear of his life (R15). Accused did not appear to Casey to be drunk, although he had been drinking (R8). He appeared to be surprised when the rifle did not fire, and looked at the rifle, thereby giving Casey the opportunity, of which he took advantage, to grasp the rifle and strike him (R8,11). Casey asked accused if he knew what he was doing, to which he replied, looking Casey in the eye, "'Yes'" (R8). The two struggled and accused resisted so strongly that Casey was obliged to summon three noncommissioned officers to his quarters, who over-powered accused and took the rifle from him (R8,9,17,24, 27,28,33). Accused was taken to the mess hall where he stated that "he felt sorry for us if we had to go in combat with the M1 rifle" - that it was "no good" (R25,28,29). It was not customary to load rifles on the occasion of a "red" alert. Accused's rifle was loaded in the usual manner (R36,40).

Accused, a private first class, was a cook at Camp Garrity. Cooks at the other three camps held all of the noncommissioned ratings allowed by the battalion table of organization, so accused could be promoted to Technician Fifth Grade only through the acquisition of a power plant operator's rating, which, under a battalion rule, necessitated the passing of a written examination. Casey had informed him that if he would prepare himself for

the examination Casey would give it to him, and offered ~~him~~ help to him in the event he desired the same. Accused expressed the preference to prepare himself for the examination without assistance, and Casey promised "to let it go" pending developments with respect to the examination (R9). Accused was not satisfied with his situation as cook and had "said he would rather be outside" (R44). His battery commander made it a practice to visit all battery kitchens and to criticize all battery cooks, including accused, upon routine matters (R46). Casey, however, had never had any trouble with accused, who had made only routine complaints about kitchen problems (R9). Casey did not know of any reason why accused should bear him any ill-will or malice (R12-13).

4. The evidence establishes that accused, under the circumstances alleged in the Specification, pointed a loaded service rifle at Lieutenant Casey and pulled the trigger, failing to kill or injure him only because the bolt was not in such a position as to permit the explosion of the cartridge and firing of the weapon. The sole question for determination is whether at the time of the assault accused entertained the specific intent, with malice aforethought, and without justification or excuse, to take the life of Lieutenant Casey (CM ETO 1535, Cooper).

(a) The offense of assault with intent to murder is described as

> "an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats * * *. To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense. Where the intent to murder exists, the fact that for some reason unknown the actual consummation of the murder is impossible by the means employed does not prevent the person using them from being guilty of an assault with intent to commit murder where the means are apparently adapted to the end in view. Thus, where a soldier intending to murder another loads his rifle with what he believed to be a ball cartridge and aims and discharges his rifle at the other, it is no defense that he, by accident, got hold of a blank cartridge." (MCM 1928, par 149l, pp 178-179) (Underscoring supplied).

(b) The Board of Review in CM ETO 1289, Merriweather, held that the fact that the consummation of accused's intent to murder another soldier was

impossible by the means employed, because he failed to deflect the angle of aim so as to bring the other soldier within the line of fire, was wholly immaterial on the issue of specific intent to murder and that accused was properly found guilty of assault with such intent. See also State v Wilson, 30 Conn 500; People v Lee Kong, 95 Cal 666, 30 Pac 800, 29 Am St Rep 165; and State v Mitchell, 172 Mo 633, 71 SW 175, in all of which present ability to perpetrate the attempted crime was held not to be a necessary element of the criminal attempt and impossibility of consummation was held not to negative the criminality of the frustrated attempt. In the instant case, had the bolt of accused's rifle been in position for firing, as he evidently believed it to be, death or serious bodily harm to Lieutenant Casey would have been the inevitable result.

(c) "While a specific intent to kill is an essential ingredient of the offense of assault with intent to commit murder, * * * this requirement does not exact an intent, other than an intent which is inferable from the circumstances. The law presumes that one intended the natural and probable consequences of his act and the requisite intent to kill may be inferred from such acts. It may be inferred or presumed as a fact from the surrounding circumstances, such as the acts and conduct of accused, the nature of the instrument used in making the assault, the manner of its use, from an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result, or from a total or reckless disregard of human life. * * * The question of intent as dependant on the physical circumstances and the impression made by them on the mind of accused must be determined by the facts as they were perceived or understood by accused. * * * The requisite intent in an assault with intent to murder may be inferred or presumed from the unlawful use of a deadly weapon, provided it was used in such a manner as to indicate an intention to kill." (40 CJS, sec 79b(1)-(2), pp 943-944).

The evidence that accused, who was dissatisfied with his position in his unit and evidently believed that Lieutenant Casey had discriminated against him in not securing a promotion for him and whom Casey had shortly before ordered to perform the duty of taking a position at an antiaircraft gun during an air-raid "red" alert, sought out Casey in his quarters, accused him of unfairness, leveled his loaded rifle at Casey's stomach at a distance of about six inches, pulled the trigger, manifested surprise when the cartridge failed to fire, affirmed to Casey that he knew what he was doing, struggled with Casey and thereafter expressed dissatisfaction with the effectiveness of the M1 rifle,

indicates beyond reasonable doubt that accused intended to murder Casey at the time of the assault. The evidence negatives the possibility of reasonable provocation. The findings of guilty are supported by substantial evidence (CM 229638, Kehoe; CM ETO 78, Watts; CM ETO 503, Richmond; CM ETO 531, McLurkin; CM ETO 533, Brown; CM ETO 1052, Geddies et al; CM ETO 1289, Merriweather; CM ETO 1535, Cooper; CM ETO 2321, Moody; CM ETO 2297, Johnson and Loper; CM NATO 1123, McGee et al).

5. The conflict in the testimony as to whether accused's drunkenness at the time of the alleged assault was such as to destroy his mental capacity to entertain the specific intent to commit murder created an issue for determination by the court. The court's findings on this issue against accused are supported by substantial evidence (R8,9,11,23,31,33,42,43,45) and will not be disturbed upon appellate review (CM ETO 2484, Morgan, and authorities there cited; CM ETO 2672, Mason).

6. The charge sheet shows that accused is 30 years three months of age and was inducted at Camp Blanding, Florida, 24 August 1942, to serve for the duration of the war plus six months. He had no prior service.

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

8. Confinement in a United States penitentiary is authorized for the crime of assault with intent to commit murder (AW 42; sec 276, Federal Criminal Code (18 USCA 455); sec 335, Federal Criminal Code (18 USCA 541); Act June 14, 1941, c 204, 55 Stat 252 (18 USCA 753f); Cf: US v Sloan, 31 Fed Supp 327). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir 229, WD, 8 Jun 1944, sec II, pars 1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

(286)

1st Ind

WD, Branch Office TJAG., with ETOUSA. 8 JUL 1944 TO: Commanding General, Iceland Base Command, APO 860, U.S. Army.

1. In the case of Private First Class EDWARD BROOKS (34248887), Battery A, 378th Antiaircraft Artillery Automatic Weapons Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2672. For convenience of reference please place that number in brackets at the end of the order: (ETO 2672).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2681

7 JUL 1944

U N I T E D S T A T E S)	IX AIR FORCE SERVICE COMMAND.
)	
v.)	
)	
First Lieutenant SCARBOROUGH J. COPELAND (O-565092), 334th Service Squadron, 312th Service Group.)	Trial by GCM, convened at AAF Station 472, APO 149, on 31 March and 10 May 1944. Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 61st Article of War.
Specification: In that First Lieutenant Scarborough J. Copeland, 334th Service Squadron, 312th Service Group, did, without proper leave, absent himself from his station and duties at Army Air Force Station 454 from on or about 19 January 1944, to on or about 30 January 1944.

He pleaded guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, IX Air Force Service Command, approved the sentence and withheld the order directing execution of the sentence pursuant to Articles of War 48 and 50½. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that the accused, who was acting as adjutant of his unit on 19 January 1944, absented himself without

leave on that date and remained away until 30 January 1944. When he failed to appear for duty a search was made, but he could not be found in or near his post. He was carried as absent without leave on the morning report of his organization (R10-13, Ex G-1). It was stipulated that a Lieutenant Ferry, investigating officer, if present as a witness would testify that after being advised as to his rights accused made and signed a written statement, which statement was admitted in evidence without objection (R13-14). Accused stated in substance therein that on the afternoon of 19 January 1944 he went to the railway station upon official business and found he could catch an evening train to Bournemouth, spend about three hours there and return the same night. He bought a return ticket and went to Bournemouth. At the Red Cross Club there he saw several soldiers of the "fighting" branches of the Army. He became dejected and depressed as he compared himself and his position in the Army with that of these men whom he greatly admired. He would gladly change places with any of them, regardless of rank, in order to do "a little fighting" as he planned to do when he came in the Army. He "washed out" as an aviation cadet. He left the club thinking about how he could start over in the Army (R14). The only service for which he might be fitted that he could think of was aerial gunnery. This would necessitate losing his commission. Previously he had "read up" on reclassification and had asked the Squadron Surgeon about emotional instability as a basis. The Squadron Surgeon agreed to speak to "the Colonel" about initiating proceedings. Accused received a letter from his wife in which she expressed worry for his safety, sohe had asked the surgeon "to call it off". He decided to "work up a General Court" for himself "come hell or high water" so he went back to the Red Cross Club and stayed all night. The next morning, still in a depressed mood, he went to London where he stayed five nights. During this time he wanted to return and did come back as far as Bournemouth but he was afraid he had not been away long enough to be dismissed "from the commissioned ranks", so after staying two days in Bournemouth he returned to London for three more days. He then returned to his base (R15, Pros Ex G-2).

The court of its own motion adjourned for the purpose of inquiring into the mental condition of accused (R16). The Board of Medical Officers met, pursuant to proper orders, on 12 April 1944 to determine the sanity of the accused and after mature deliberation and careful consideration found that the accused was sane and responsible for his actions on 12 April and also on or about 19 January 1944.

The court reconvened on 10 May 1944, and by stipulation the above report of the Board of Medical Officers was admitted in evidence (R17, Ex G-3).

4. On behalf of the defense Major Foster R. Dickey, 312th Service Group, testified that he had known accused for a period of about three months, during which time he was in daily contact with the accused except during the period of his unauthorized absence. At some time after his return accused was placed on duty and in the witness' opinion the manner

in which he performed his military duties was excellent. Major Dickey was willing tohave the accused returned to his (the witness') organization (R15-16).

Major Clarence M. Condon testified that as Executive Officer of the 312th Service Group he was very well acquainted with the work of the accused and that if he were to give the accused a rating he would rate him as superior. "He has been outstanding in every way in his work". The witness based his opinion on accused's manner of performance of his duties while awaiting trial. Major Condon "felt very strongly"that accused "has the capability of being a good officer" (R18-19).

Accused, having been advised of his right to testify on his own behalf, elected to remain silent (R19).

5. The specification alleges absence without leave from 19 January to 30 January 1944. The plea of guilty is corroborated by full and uncontradicted evidence, including the accused's own written confession.

6. The record shows the accused to be twenty-four years and one month of age. He enlisted 12 September 1941, was discharged 27 October 1942 and was appointed Second Lieutenant, Army of the United States, 28 October 1942. He was promoted to First Lieutenant in March 1943.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal of an officer is authorized upon conviction of a violation of Article of War 61.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(290)

1st Ind

WD, Branch Office TJAG, with ETOUSA. - 7 JUL 1944 TO: Commanding General, ETOUSA, APO 887, US Army.

1. In the case of First Lieutenant SCARBOROUGH J. COPELAND (0-565092), 334th Service Squadron, 312th Service Group, IX Air Force Service Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2681. For convenience of reference please place that number in brackets at the end of the order. (ETO 2681).

E. C. McNEIL
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 51, ETO, 13 Jul 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2682

14 JUL 1944

UNITED STATES)	2d BOMBARDMENT DIVISION.
)	
v.)	Trial by GCM, convened at AAF Station
)	115, 8 May 1944. Sentence: Dis-
Second Lieutenant DON C.)	missal, total forfeitures and confine-
SHADLE (O-744214), 68th)	ment at hard labor for five years.
Bombardment Squadron,)	Eastern Branch, United States Disci-
44th Bombardment Group (H).)	plinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.
Specification: In that 2nd Lieutenant Don C. Shadle, 68th Bombardment Squadron, 44th Bombardment Group (H) AAF, AAF Station 115, APO 558, did, without proper leave, absent himself from his station, at AAF Station 115, APO 558, from about 0830 hours, 9 March 1944 to about 1600 hours, 30 March 1944.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, 2d Bombardment Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States

Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The prosecution showed (by the testimony of Captain Harry A. Durham, Air Corps, Adjutant of the 68th Bombardment Squadron, 44th Bombardment Group, Army Air Force Station 115, of Major John N. Clark, attached to and Executive Officer of this squadron, of Sergeant Rollo A. Means, also of the 68th Bombardment Squadron, and by pertinent morning reports of this organization) that accused, a Second Lieutenant, Air Corps, attached to the 68th Bombardment Squadron, stationed at Army Air Force Station 115, APC 558, absented himself from his station, without leave, from 0830 hours, 9 March 1944, to 1600 hours, 30 March 1944 (R7-11; Ex C).

4. After his rights had been explained, accused elected to be sworn and to testify on his own behalf. He stated that when he departed for overseas service about 1 December 1943 he left behind a wife and a three-year old daughter, both ill. He learned on arrival that his allotment to his wife was invalid because it was excessive and that tnough he made a new allotment he never heard, until 29 March whether his allotment was being paid. As a result, he had been worried and under a nervous strain during this period. It had affected his sleep (R13-16). He had drawn no pay for the month of February and only partial payments "all the way through" (R17). On examination by the court, he said that he had sent his wife $500 when he first arrived in England, which was the last of January, after about two months spent in Africa (R18). In answer to a direct question, on re-cross examination, he asserted that it had taken him the entire 21 days of his (unauthorized) absence to straighten out his mental condition (R18).

5. That accused committed the offense charged was shown affirmatively by the prosecution. The plea of guilty and the admissions of accused on the stand substantiated the prosecution's case.

6. The charge sheet shows that accused is 26 years and six months of age. He was appointed Second Lieutenant AUS on 8 May 1943, and ordered to active duty at Carlsbad, New Mexico, for duration plus six months. Prior service is shown by attached papers from 21 May 1934 to 7 September 1936; 8 September 1936 to 28 December 1938; 17 July 1939 to 23 July 1940; and 25 February 1941 to 7 May 1943.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that therecord of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal and confinement are authorized under Article of War 61.

8. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is autnorized (AW 42; Cir 210, WD, 14 Sep 1943, sec VI, par 2a, as amended by Cir 331, WD, 21 Dec 1943, Sec II, par 2).

Judge Advocate

Judge Advocate

Judge Advocate

(294)

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 14 JUL 1944 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Second Lieutenant DON C. SHADLE (O-744214), 68th Bombardment Squadron, 44th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. It is noted that the period of confinement imposed by the sentence confirmed in this case is more severe than that usually given under similar circumstances in this theater.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2682. For convenience of reference please place that number in brackets at the end of the order: (ETO 2682).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 55, ETO, 20 Jul 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

13 JUL 1944

ETO 2686

U N I T E D S T A T E S)	SERVICES OF SUPPLY, redesignated COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Privates ELIGA BRINSON (34052175) and WILLIE SMITH (34565556), both of 4090th Quartermaster Service Company.)	Trial by GCM, convened at Cheltenham, England, 28-29 April 1944. Sentence as to each: To be hanged by the neck until dead.

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

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Willie Smith, 4090th Quartermaster Service Company, and Private Eliga Brinson, 4090th Quartermaster Service Company, acting jointly, and in pursuance of a common intent, did, at Bishops Cleeve, Gloucestershire, England, on or about 5 March 1944, forcibly and feloniously, against her will, have carnal knowledge of Dorothy Eileen Holmes, 1 Council House, Bishops Cleeve, Gloucestershire, England.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification, all members of the court present when the vote was taken concurring. Evidence was introduced of three previous convictions of accused Brinson: two by summary court for absence without leave for one

and six days respectively in violation of Article of War 61, and one by special court-martial for unlawfully carrying a concealed weapon, namely, a knife with a blade exceeding three inches in violation of Article of War 96. Evidence was introduced of two previous convictions of accused Smith by summary court for absence without leave for 21 and 6 days respectively in violation of Article of War 61. Each accused was sentenced to be hanged by the neck until dead, all members of the court present when the vote was taken concurring. The reviewing authority, the Commanding General, Services of Supply, European Theater of Operations, approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to each accused and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that about 11:40 p.m. 4 March 1944, Dorothy E. Holmes, 16 years of age, Council House, 3 Priory Road, Bishops Cleeve, Gloucestershire, England, left a dance at Bishops Cleeve with Private First Class Edward J. Heffernan, Headquarters Company, Headquarters Command, APO 871. After walking about a mile and a half they passed the Kings Head "pub" about 12:15 a.m. and Miss Holmes noticed two colored soldiers standing by the door, who started to follow them. The girl heard "footsteps coming up the road" which "sounded like hob-nailed boots". About 12:25 a.m. the girl and Heffernan arrived at Pecketts Piece Lane when they stopped to talk near a gate at the end of Brookside Lane (R17-19,23,34). Admitted in evidence by stipulation was a British Ordnance survey map of the Bishops Cleeve area (R18-19; Pros.Ex.1), and a picture of the gate and Brookside Lane (R19,61,66; Pros.Ex.2). At the trial Miss Holmes traced in red pencil the route taken that evening (R19). While the girl and Heffernan were talking two colored soldiers walked by and returned in a few minutes. One of them asked Heffernan what he was doing and struck him on the nose with something "shiny". Heffernan heard glass breaking and fell to the ground. The girl screamed and the other soldier put his hand on her throat and two fingers in her mouth. She kicked, tried to push him away and bit his fingers. The first soldier attempted to hit Heffernan again, but the latter arose and ran around the corner for help. The soldier pursued him for a very short distance (R19-20,25-26, 31-32,35). The two soldiers then pushed the girl over the gate and she screamed again and started to struggle. A hand was placed over her mouth, she was seized by the shoulders and dragged backwards down Brookside Lane. One then took her by the shoulders the other seized her feet, and they carried her across a brook and laid her on top of the bank in an allotment. She did not have the strength to scream at this time. Her knickers were removed and her other clothing pulled above her waist. Both soldiers forced her legs apart, and one held her by the shoulders while the other unbuttoned his trousers, exposed himself and got on top of her. He inserted his private part into hers and had intercourse with her. After he "did all he wanted to * * * the other did exactly the same" while the first man held her down. She struggled but could scream only "a little bit" as a hand was over her mouth (R20-21,27-30). When they "finished" they arose

and said "Which way shall we go now". They jumped over the brook and went towards Brookside House. The girl got up, crawled over some barbed wire, jumped the brook, and ran down the lane to the gate where she recovered her handbag and three oranges (R21-22,29). She was wearing two artificial roses in her hair that evening (R22).

Miss Holmes testified that the men who attacked her were "big built fellows. One was a big built fellow". She could not recall whether they wore overcoats (R108). Although there was snow on the ground which "made it lighter", she was not able to identify either of the two colored soldiers who attacked her (R22). She further testified that the two soldiers she noticed in front of the Kings Head "pub", whom she had never seen before, were the same two soldiers she heard following them up the lane because she "looked around". However, she was not certain that the two soldiers at the "pub" were the ones who attacked her. She had never seen the two accused before (R24-25). The assault occurred "just after midnight" (R23). Identified by Miss Holmes and admitted in evidence were the following articles of clothing which she wore that evening: coat, knickers, blouse, skirt, gloves, stockings and petticoat (R22-23; Pros.Exs.3-9).

When Heffernan went for help he ran to a house about 120 yards away where he told a man that he was hit, and that a girl was being attacked "down the road". He was told to go to the police station. He became lost on the way to the station, finally arrived and saw a policeman, but did not get help. He then went toward the girl's home, near which he saw her crying in the road (R32-33,39-40,42). About 20 minutes elapsed from the time he left the scene until he saw her at her home (R39,42). Following the directions of Miss Holmes, he later accompanied a British constable and a military police sergeant to the scene of the attack (R33,37). Heffernan was unable to identify accused at the trial and testified that he had never seen them before (R33,38-39). The soldiers who attacked him were six feet tall and slenderly built (R33). He was of the opinion but was not certain that the two soldiers who assaulted him were the two who passed the gate and then returned, because their "walk was the same and their caps were pointed" (R39-41). He also believed but was not sure that they wore overcoats (R37-38).

Between midnight and 1:00 a.m. Mrs. Harriet M. Holmes saw her daughter Dorothy alone running up the road to her home, screaming. Heffernan was just coming across the fields. Dorothy put her arms about her mother and said "Oh mother, the blacks have had me and they have knocked me about terrible". She further said that they removed her clothing and took her over the bank. She was nervous and hysterical and her clothing was "dirty and messed up terribly". The lower part of her body was covered with mud, her cheeks were swollen and her lips "were bit". She complained about her throat (R43-45).

About 1:00 a.m. Mabel L. Morehen, Sladmore, Woodmancote, Bishops Cleeve, a state registered nurse of 23 years' experience who knew Miss Holmes since the girl's birth, was called to the home and found the victim

in a "very distressed condition". Her lips were bruised and bloody, her face was muddy and there were superficial scratches on her legs above the knees. The nurse examined her private parts and found no bruising. "There was nothing abnormal to my mind" (R45-46).

Constable William G. Hale, stationed at Bishops Cleeve, testified that about 7:00 p.m. 4 March, a "fine snow began to fall". "After eleven the snow finished and then it was cold and then it froze." No snow fell after 11:00 p.m. (R47,54). Admitted in evidence were four photographs taken at the scene on 10 March by Technician Fifth Grade Raymond J. Smith, 255th Military Police Company (R61,66; Pros.Exs.2,10,11,12).

About 12:25 a.m. 5 March, Hale and Sergeant James O. Hall, 255th Military Police Company, went to the Holmes house where they found Heffernan suffering from a cut on the nose. They then went to Brookside Lane and found near the gate a broken mineral water bottle, the neck and stopper of which were intact, two combs, a pencil, an orange and a broken pipe, the stem of which was missing. Blood was discovered on the top of the gate, gatepost, and in the center of Pecketts Piece Lane. Snow was on the ground (R47-49,62-64). Several sets of footprints were observed in front of the gate, and one set differed from the others in that the prints appeared to be made by a person with studs attached to the heels of his shoes. Footprints were found "going down Peckett's Piece Lane past the gate and then they turned back to the gate". Hall indicated with a pen on the lower right part of Pros.Ex.1 the path of the tracks which passed and returned to the gate (R63-64). On the other side of the gate in Brookside Lane, there were marks in the snow "similar to a person having been pulled along with their feet in the ground". One set of footprints was on each side of these drag marks. The drag marks and footprints continued about 35 yards down Brookside Lane and turned to the right to a brook. Across the brook were signs of a struggle on the grade of an allotment. There were "scuffle marks" and the snow, dirt and mud were disturbed over an area about five yards square. A muddy pair of knickers, turned inside out, was found on a bush near a fence (Pros.Ex.4), and a "bobby pin" and a small spray of flowers were discovered on the ground (R49-50,64-66). The footprints were again discovered on the lane side of the brook, where they turned right and proceeded down Brookside Lane, over a stile, across a field about 50 yards long, over another stile and there disappeared as no snow was on the ground at this point. One set of the footprints leading to and from the scene appeared to be made by heels with hob-nails. As the nails were in an odd pattern it appeared that they had been driven into the heel by hand. The other set of prints "had a rubber pattern in the heel" (R50,67).

With reference to the time the footprints were made, Hale testified

> "There was no snow the night before. I could not tell you the period they were made, but the snow stopped at eleven o'clock, and had they been made before eleven, they would have been covered with snow. They were clean" (R56).

Later, after the snow melted, Hale was shown the imprint of a heel on the "crime side of the brook" (R52-53). As the snow "had been caked on it" he could not state when it was made (R56). The girl's footprints were not found. There were bushes and high grass on the left hand side of the lane leading back to the gate, and assuming that she returned to the gate on that side of the lane her footprints would not be visible (R56-57). No other prints were seen (R53). Two guards were posted, one in the lane to guard the footprints, and the other by the brook. Hale covered with cardboard a number of the prints, "Some with studs in the heel and some with the pattern in the heel" (R51). He marked the right side of Pros.Ex.1 with a red "P" to indicate the location of the police station and made a red cross to show the nearby house of the girl. He placed a red "O" to the lower left part of the map to indicate the "Old Elm Tree Pub House" (known as the "middle pub" (R78)), and a red cross on the left margin to indicate the Kings Head "pub" which "would be about one-quarter of an inch off the left side of the map" (R48). He placed four sets of red crosses on the upper right part of Pros.Ex.1 to show the location of the American camp where colored soldiers were quartered (R56). On the lower right part of the map he placed the following marks: the path of the brook in ink; a red square indicating the place across the brook where the knickers and signs of a struggle were discovered; a red "G" to indicate the gate at the head of Brookside Lane; and lead pencil marks to indicate the path of the two sets of footprints (R57). The nearest house was 20-25 yards away from the scene of the alleged assault and there were three or four houses at a distance of about sixty yards (R58-59). Hall identified Pros.Ex.2 as a picture of Brookside Lane in which he is shown directly opposite and pointing to the place where the knickers were found and where the snow "had been scuffled up". Pros.Exs.10 and 11 portrayed the field immediately adjacent to Brookside Lane where the struggle occurred and where the knickers and bobby pin were found. On Pros.Ex.12 Hall is shown pointing to the place where the drag marks began (R66).

After visiting the scene of the crime Hale and Hall went to headquarters of the organization of both accused at Bishops Cleeve and awakened the commanding officer at 3:26 a.m. A search of several tents was made for shoes with hob-nails similar in appearance to those found in the snow. Hall found two pairs in tent 21 with studs in the heels, marked them and took possession (R67). He returned to tent 21 and when the soldiers began to dress at 5:25 a.m., accused Smith could not find his shoes and said "somebody has my shoes". Hall informed him that he was a military policeman, asked him for his clothing, took him to the orderly room where he told Smith that he was investigating a serious crime, and warned him of his rights. When he asked Smith if "any of the shoes were his", accused selected a pair (Pros.Ex.13) and said that he knew the shoes were his by the size, shape, stud marks in the heels, and by the way they were worn. The shoes were damp and slightly muddy (R80). He later said that he drove the nails in the shoes at a lumber pile (R67-69). Identified by Hall and admitted in evidence were the shoes (Pros.Ex.13), the blouse and mud-stained trousers taken from accused Smith (Pros.Exs.15,16) and a handkerchief which was in the trousers (Pros.Ex.14) (R69-70,87). Accused admitted that he wore the shoes and trousers on the night of 4 March but denied wearing the blouse,

saying that he wore the blouse of a soldier named Spivy who, in accused's presence, said that Smith did not wear his (Spivy's) blouse (R70).

Shortly after noon on 5 March, Hall saw accused Brinson at the company orderly room where he was warned of his rights by a Staff Sergeant Bowen (R71,73). Hall secured clothing marked with Brinson's number. He obtained a pair of trousers which he found between the springs and mattress of this accused's bed, the knees of which were mud-marked. He also secured from Brinson's tent his coat and a pair of his shoes. After being warned of his rights Brinson admitted ownership of the clothing, and stated that he wore the shoes and the coat on the night of 4 March but denied wearing the trousers. He selected the pair of shoes (Pros.Ex.19) from several others and said that "he would know them anywhere by the size, shape and the way they were worn". The coat, trousers and shoes were identified by Hall and admitted in evidence (R72-74; Pros.Exs.17,18,19).

Shortly after 9:00 a.m. 5 March, Detective Constable Ernest W. Slade, stationed at Cheltenham, went to the junction of Peckett's Piece Lane and Brookside Lane. He observed two sets of footprints, one made by a rubber-soled shoe and one made by studded heels, proceeding along Peckett's Piece Lane for some distance and then returning. On the other side of the gate in Brookside Lane the two sets of prints continued toward Brookside Cottage and turned sharply to the right after proceeding 40 yards. The rubber-soled and studded heel prints were observed to run parallel to the brook. Slade examined eight or nine of the prints in Brookside Lane which were covered with cardboard and took plaster casts "of six of the best". The ground was covered with a thin surface of snow and the prints were sufficiently frozen "to pour the plaster on". Identified by Slade and admitted in evidence were three plaster casts, Pros.Exs.22,23,24. Pros.Ex.22 is the cast of a print pointing towards Brookside Lane, 24 yards before the prints turned to the right over the brook. Pros.Ex.23 is a cast of a heel print found in the mud on the opposite bank of the brook, after the footprints turned to the right. Pros.Ex.24 is the cast of a print "taken 55 yards past the gate where the tracks turned right" (R82-83). The soil above the cast taken on the allotment side of the brook (Pros.Ex. 23), was "very badly disturbed". This cast was taken at 12:30 p.m. 5 March, when the snow was melting, the sun shining brightly, and the ground muddy. Slade testified that he was unable to state when this print was made and further stated that it could have been made several days previously (R84).

Police Inspector Charles E. Walkeley, stationed at Cheltenham, went to the scene and about 9:00 a.m. 5 March, photographed two prints in the snow which were covered with cardboard. One print was half-way down Brookside Lane and the other was "toward the bottom of the lane". He developed the film and gave it to Sergeant Hall.

Hall was present shortly after 9:00 a.m. 5 March, when samples of soil were taken from the place where the knickers and bobby pin were discovered. Hall also took two samples of soil in the vicinity of the guard house at Teddington. One sample was taken 12 feet and the other 25 feet, from a pile of tin (R71).

On 5 March after being warned of his rights accused Smith made a statement to a Sergeant Bowen in Hall's presence. He was not informed as to the exact nature of the charge, but was told that a very serious crime was being investigated. On 6 March Brinson also made a statement to Bowen in Hall's presence. Smith's statement was admitted in evidence over objection by the defense to the effect that Smith was not fully advised as to the charge being investigated. Brinson's statement was admitted in evidence without objection (R74-78; Pros.Exs.20-21). The contents of the two statements, each of which contained a warning as to accused's rights, are not set forth herein as the testimony of each accused was substantially in conformance therewith.

Thereafter, First Lieutenant Jerome F. Kapp, 817th Ordnance Base Depot, appointed investigating officer, interviewed accused Smith, told him who he was and read and explained the Charge and Specification. He read and explained the "CID" investigation report and the statements of the various witnesses, and informed Smith of his right to cross-examine these witnesses and to call additional witnesses. He read Smith's previous statement and asked if he wished to make any changes therein. Accused replied that certain members of his company who said they saw him in the ("middle") "pub" in Bishops Cleeve actually were not there. He did not ask to cross-examine any witnesses (R14-15). Lieutenant Kapp also interviewed Brinson and followed the same procedure. Brinson remarked that he had nothing to say (R15). Kapp remained with each accused about 45 minutes, and made no investigation of his own other than to read the "CID" report (R16).

Several soldiers testified that they saw both accused in the "middle pub" (Old Elm Tree "pub") on the night of 4 March. They were seen in the "pub" about 8:00 p.m. (R98), about 9:30 p.m. (R97,99), and at 10:00 p.m. which was closing time (R103-104). Private William Lightfoot of accused's organization testified that about 8:15 p.m. 4 March, he and Brinson went to the "middle pub" where they had two drinks and then went to the Kings Head "pub". There they "had a drink" and after a short time returned to the "middle pub" where they "had two beers". They left and crossed the street to a place where some people were throwing snowballs. Lightfoot went back to the "pub" and when he returned to the street, Brinson had disappeared (R106-107).

Private First Class Harding H. Brooks, a member of the organization of the two accused, who was in the "pub" from shortly after 7:00 p.m. until 10:00 p.m., testified that he was not in a telephone booth in Bishops Cleeve at any time during the evening. He did not leave the "pub" at any time except to go to the latrine (R97-98). Hall testified that he examined the telephone booth at the Kings Head "pub" "the following Sunday night". The booth was "closed with glass in the door", and the glass was not "blacked out". There was no bulb in the light socket which was rusted and covered with cobwebs (R108) (See subsequent testimony of accused Smith).

A bed check was made at the camp between 11-11:45 p.m. on the night

of 4 March and both accused were absent (R99-100). Private Benjamin Wilkerson, 4090th Quartermaster Service Company, an occupant of accused Brinson's hut, testified that he (the witness) was in the hut on the night of 4 March from 7:30 to 11.15 p.m. when he went to the latrine. He returned and went to bed at 11:30 p.m. and Brinson was absent at that time (R101-102).

Dr. Edward B. Parks, Director of the Bristol Forensic Laboratory, received the shoes of Smith and Brinson (Pros.Exs.13,19), the casts of footprints made by Slade at the scene of the crime (Pros.Exs.22,23,24), and two negatives (of footprints made at the scene by Walkeley). Pros.Ex. 25 consisted of two actual size photographs made by Parks, one being of a cast made at the scene by Slade of a footprint (Pros.Ex.22), and the other of a cast made by Parks of accused Brinson's right shoe. Although the two photographs appear to be of the left shoe, they were actually of the right shoe as the negative was reversed. When he examined the photographs he found certain marks which "agreed to marks of the studs in the boot". He took the two photographs,

> "made outline traces to see that the general outline agreed, then I marked off the position and found that the studs coincided entirely. I also made a transparency which is just a print of negative material, and the position of these marks coincided".

The outline and shape of the prints were also the same. He examined several other pairs of shoes but there were only six studs in them and not seven as in the case of Brinson's shoes. In Parks' opinion the cast made at the scene of the crime was of a print made by Brinson's right boot (R86-89). He based his opinion mainly upon the position of the nail marks in the toe of the boot (R88).

Pros.Ex.26 consisted of two actual size photographs of the heel casts made by Slade at the scene of the crime (Pros.Exs.23,24), and below these, an actual size photograph of a cast made by Parks of the heel of Smith's left shoe. Parks testified

> "from the disposition of the marks and the fact that one of the studs is split in half, there is an indication on the two casts of a fault in the front of each of the boots which is repeated here. (Pointing to photograph). I submit there is no question at all that these two casts were taken of prints which were made by the boot of which I made the lower cast" (R88).

Pros.Ex.27 was a mount prepared by Parks from a negative (photograph by Walkeley of footprint in snow at scene of crime) and an actual

size photograph of a laboratory impression made by Parks of Smith's right boot. Because of the similarity in the location of the studs in the heel, marked in red ink on the exhibit, Parks was of the opinion that the print made in the snow was made by the shoe of accused Smith (R89). Parks was of the further opinion that the nails in the toe of Brinson's shoes were hand placed but he could not say that they were machine driven. The studs in the heels of Smith's shoe were, in his opinion, driven in by hand. There was no doubt in Parks' mind but that the two pairs of boots made the footprints at the scene of the crime.

> "With regard to Smith, I should say that it is nearing the realm of sheer impossibility for another heel to make the cast other than the heels of Smith * * *. Of Brinson, it is possible, but a very, very unlikely possibility" (R95).

Pros.Exs.25,26,27 were admitted in evidence (R89-90).

Dr. Parks found seminal staining on the girl's skirt and underskirt, on Brinson's coat and trousers, and on the handkerchief, coat and trousers of Smith. No seminal staining was discovered on the knickers. Human blood was found on the girl's coat and gloves, and mud was on her coat, blouse, skirt, gloves, stockings and underskirt. Human blood was found on Brinson's blouse and trousers and mud was found on his blouse and in large patches on both knees and below the knees of his trousers. "The patches on the knee were consistent with the wearer having knelt down in some wet mud". Mud was also discovered on the knee of Smith's trousers, on his blouse and handkerchief (R90-91). The mud stains on the clothing of the girl, Smith and Brinson were of the same general type and character. Dr. Parks had a sample of soil from the scene of the crime and also the two samples of soil taken from the vicinity of the guardhouse. He was able to remove sufficient soil from the girl's coat and Brinson's trousers to make a complete detailed analysis, and the removed soil "were entirely agreeable" with the samples taken from the scene of the crime. The samples of soil from the scene differed "very considerably" from the samples taken from the vicinity of the guardhouse, "not so much in the chemical analysis, but in the comparison of the shades scientifically". Dr. Parks put the samples of soil through various sieves to obtain corresponding sizes, and dried them for two hours just below boiling point. He then compared them grade by grade according to size and found "a very close agreement, as close as you could possibly expect soil from clothing that had not been contaminated in any way". He then ignited the soil and as a result all organic matter was consumed, leaving only mineral matter, iron and lime being the two principal remaining constituents. "You will find that soil even has that agreement in color until after they have been ignited. The percentage of iron and lime * * * will give you quite a difference in color". Admitted in evidence was Pros.Ex.28, a chart arrangement of the various samples. Column 1 was soil taken from Miss Holmes' coat; column 11 consisted of soil from Brinson's trousers; column 13 was soil taken from the scene of the crime, and columns 31 and 32 were samples of soil removed from the vicinity of the guardhouse.

Reading the chart horizontally the figures beside each line indicated that the soil "touch between two meshes * * * 90 indicates that the soil passed a 90 mesh". Also reading horizontally, the

> "soils 1 and 13 in the top column agree very considerably but disagree with 31 and 32. There is no sign of the mesh on number 11 which is to be expected on account of the fineness of the clothing. You could not expect the soil to stick to the fine material".

Dr. Parks further testified that

> "With the exception of the two, (the two samples taken from the vicinity of the guardhouse) the mud stains, as a whole, were of the same type as far as I could carry out my analysis. As far as I went, they agreed as being the same type".

It was possible for the mud on the clothing to come from another location and yet be similar to the mud from the scene of the crime (R91-94; Pros.Ex. 28).

4. The defense recalled Miss Holmes. She testified that she did not smell liquor on the breath of either colored soldier who assaulted her. "I could smell something but could not tell what it was". After the incident was over she ran up the lane to the gate and then home. She could not recall in what part of the lane she ran (R128-129).

Brinson testified that on 4 March he "came out" of the guardhouse, went to the company area and then went up to a lumber pile where he saw Smith. He then played poker with Lightfoot with whom he later went through the cemetery to the "middle pub" where he had some beer and cider. After going to the Kings Head "pub" where they d rank beer, they returned to the "middle pub" and had two quarts of cider and two of beer. They remained there "until they were fixing to close up". Lightfoot then gave Brinson a quart of cider and a quart of beer and the two men left the "pub" about 10:00 p.m. and went across the street to where some people were throwing snowballs. Accused told Lightfoot he was going back to camp and did so, returning through the cemetery. He was in bed before 11:00 p.m., arose and went to the latrine, and on his return met a soldier named Odell who came in with accused's overcoat, saying that he wore it by mistake. Brinson stated that he did not wear an overcoat on the night of 4 March. One could walk from the "middle pub" to camp in less than 10-15 minutes (R121-122,125-126). Accused identified Pros.Exs.17 and 19 as the blouse and shoes which he wore on the night of 4 March (R123,126) and identified Pros.Ex.18 as his trousers. He did not wear those trousers that night but left them under his mattress and wore a clean pair (R123). If his coat and trousers were stained with blood, the

blood came from a scar which he exhibited to the court (R124). He accounted for the presence of mud on the trousers by testifying that about three weeks before he left the guardhouse the provost marshal allowed him to paint the guardhouse. Wearing his "O.D's" he went to get a piece of tin, picked it up and leaned against it, and thereby got mud on the knees of the trousers (R124-125). Shown the map admitted as Pros.Ex.1, he denied that he was at the gate or in Brookside Lane the night of 4 March. He had never seen Miss Holmes prior to the day of trial, and did not see accused Smith after meeting him at the lumber pile on 4 March until the day of trial. The beer and cider given him by Lightfoot at the "pub" were in bottles which he took back to camp. He consumed part of the contents in his barracks, and drank the rest the following morning (R127-128).

Brinson further testified that the officer investigating the charges (Lieutenant Kapp) read the charge, read every statement "and asked me did I want to see any of the witnesses that was against me". Brinson replied in the negative. The officer did not explain that accused had the right to call the witnesses and to cross-examine them (R12-13).

Accused Smith testified that on 4 March he left camp without pass at 7:15 p.m., went through the cemetery to the "pub" where he had a few drinks of cider. He was not wearing an overcoat. He took a cab to Cheltenham and arrived at 8:20 p.m. at the Royal Oak "pub" where he remained about one and one-half hours. There, he asked a woman "for a date. She asked me if I could give her something". They left the "pub" and walked down High Street where he thought he met Brinson, but was not certain of this fact. He said "What do you say, Brinson?" The man passed, did not call him by name, but replied "Where are you going?" (R110-112,114).(Accused, in his statement made to Hall, Pros.Ex.20, said that he met Brinson between 9:30-9:45 p.m. and that Brinson called him by name. Accused denied telling Hall that Brinson called him by name (R114)). After visiting another "pub" before closing time, the woman took accused Smith "into some dark place" where he gave her one pound ten shillings and remained with her one and one-half hours. He then left her and walked back to the camp (R111). (In his statement to Hall, Pros.Ex.20, accused said that he left Cheltenham at 10:30 p.m. and that he walked the two and a half or three miles to camp in about an hour and a half). When he passed the Kings Head "pub" at Bishops Cleeve about 11:20 p.m., he noticed Harding Brooks "in the phone booth with the light on". Accused did not return through the graveyard but went around it, arrived in camp at 11:30 p.m. and went to bed (R111-112,116-118). The following morning he awakened at reveille in the presence of his company commander, Hall, and a guard, and could not find his shoes (R111,117).

Smith further testified that he had two pairs of shoes with hob-nails in them. He put hob-nails "In a circle" in one pair, and a soldier named Price put hob-nails into the other pair at the lumber pile, but accused could not remember the pattern of the nails. At the time of trial he did not have either pair of shoes and did not know what became of them. He did not know to whom belonged the shoes admitted as Pros.Ex.13. They were not his because they were size 10½, he wore a 10B shoe and could not

wear a pair that he had in the guardhouse which were size 10½C (R112-113, 117). Further, his own shoes were not muddy, were shined when he left camp, and were darker in appearance because of the application of oil. He did not, in Hall's presence, select his shoes from a group of shoes but merely went to look at them and was informed that they belonged to him (R114). He did not get mud on his clothing on the night of 4 March. He wore Spivy's blouse without the latter's knowledge because his own was old and there was a hole in it (R115). He had known Brinson for fourteen months but had never been out with him (R121).

When the investigating officer came to see him, he read all the statements and asked accused if he desired to change any of his own statements. Accused replied "No sir, let it stay as it is". The officer did not inform him that he had the right to call any of the witnesses and cross-examine them (R10-12).

5. " Rape is the unlawful carnal knowledge of a woman by force and without her consent.

* * * * * * * *

Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent.

* * * * * * * *

Proof.-(a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent." (MCM 1928, par.148b, p.165).

The fact that Miss Holmes was raped at the time and place alleged by two colored soldiers was established by direct evidence in the form of the victim's testimony. Corroborative evidence was adduced by the testimony of her mother that after midnight the girl ran home screaming and said "Oh mother, the blacks have had me". She was nervous and hysterical, her clothing was "Dirty and messed up terribly" and the lower part of her body was covered with mud. Her cheeks were swollen, her lips were bruised, and she "complained of her throat". The nurse, Mabel Morehen, similarly testified as to the victim's physical condition, stating in addition that scratches were found on the girl's legs, above her knees. Miss Holmes' knickers were found hanging on a bush at the scene of the crime where her artificial flowers and "bobby pin" were also discovered. Laboratory tests disclosed that various articles of her clothing were stained with human blood and semen, and also with soil similar in character to that found at the place where the attack was perpetrated.

Neither the girl nor Heffernan was able to identify the two colored soldiers concerned, and the evidence establishing the guilt of each accused of the offense alleged was entirely circumstantial.

"Where evidence is of sufficient probative force, a crime may be established by circumstantial evidence, * * * 'All that we should require of circumstantial evidence is that there shall be positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts'" (People v. Razezicz, 206 N.Y. 249; 99 N.E. 557,564).

"A few circumstances may be consistent with several solutions, but the whole context of circumstances can consist of but one truth. Moral certainty is a strong presumption, grounded on probable reasons, and which very seldom fails or deceives us" (Burrell on Circumstantial Evidence, p.199).

"Circumstantial evidence alone or when it is considered with all the evidence in arriving at a verdict, may justify a conviction. But when circumstantial evidence alone is relied upon, the facts and circumstances must form a complete chain, and point directly and unerringly to the accused's guilt. In other words, they must be of a conclusive character. Mere suspicions, probabilities, or suppositions do not warrant a conviction. The circumstances must be sufficient to show guilt beyond a reasonable doubt.

Circumstantial evidence is limited by, or rather should be tested by, the following rules, which, while they may be differently phrased, are fundamental rules in all jurisdictions: (1) It should be acted upon with caution; (2) all the essential facts must be consistent with the hypothesis of guilt, as that is to be compared with all the facts proved; (3) the facts must exclude every other reasonable theory or hypothesis except that of guilt; and (4) the facts must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that the accused is the one who committed the offense.

Circumstantial evidence need not be such that no possible theory other than guilt can stand, but the theory of guilt must be beyond a reasonable doubt, i.e., the circumstances

> must not be consistent with innocence within a reasonable doubt. They must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence.
>
> * * * * * * * * *
>
> Weight of circumstantial evidence is a question for the jury to determine" (Wharton's Criminal Evidence, Vol.2, 11th Ed., sec.922, pp.1603-1609,1611).

Miss Holmes testified that she was dragged backward down the lane, and drag marks with one set of foot-prints on each side of the marks were plainly visible in the snow. There was evidence that snow began to fall that evening about 7:00 p.m., that after 11:00 p.m. "the snow finished and then it was cold and then it froze". As the prints were not covered with snow but "were clean" and clearly detailed, it is reasonable to infer that they were made after 11:00 p.m. The girl was attacked about 12:30 a.m. 5 March. Dr. Parks, a man of seven years' experience in the scientific investigation of criminal matters and Director of the Bristol Forensic Laboratory, conducted several tests with respect to the shoes of each accused and the footprints found at the scene of the crime. It was his opinion that the footprints were made by the shoes of each accused, that "it is nearing the realm of sheer impossibility for another heel to make the cast other than the heels of Smith", and that it was "a very, very unlikely possibility" that the other set of prints were made by shoes other than those belonging to Brinson. His opinion as to the identity of Smith's prints was based upon a markedly irregular dispersion of ten hob-nails in the heels of Smith's boots, the fact that one of the studs was split in half and the presence of a fault in front of one of the boots. He based his opinion of the identity of Brinson's prints on the position of seven studs in the toe of the shoe and the similarity in outline and shape between the boot and print. At the trial Smith denied his ownership of the shoes admitted in evidence as Pros.Ex.13. However, during the early morning hours of 5 March, when Hall found the shoes at the camp, they were damp and slightly muddy. Later that morning Smith admitted to Hall that he wore the shoes the previous evening and that they belonged to him. The same admissions were contained in the statement he made to Hall. At the trial Brinson testified that the shoes admitted in evidence as Pros.Ex.19 were his and that he wore them on the evening of 4 March.

Dr. Parks also found human blood on clothing of the victim and of Brinson, seminal staining on their clothing and also on Smith's, and mud-stains, "all of the same general type" on the clothing of all three. Mud-stains were found on the knees of the trousers of each accused. Parks was able to make a more detailed analysis of the mud on Miss Holmes' coat and Brinson's trousers, and laboratory tests disclosed that the mud thereon was similar in every respect to the samples of soil taken from the scene of the crime, and dissimilar in character to the soil takenfrom the vicinity of the guardhouse where Brinson claimed he muddied his trousers by leaning against a piece of tin three weeks before leaving the guardhouse. Both Smith and

Brinson admitted wearing on that night certain articles of the stained clothing.

Although Brinson testified that he was in bed before 11:00 p.m., and Smith testified that he returned to camp at 11:30 p.m. and went to bed, both were absent when bed check was made between 11-11:45 p.m. Wilkerson testified that Brinson was not in his hut between 7:30-11:30 p.m. Heffernan heard the sound of breaking glass when he was struck by one of the soldiers and a broken bottle was later found near the gate. Brinson admitted that when he left the pub at Bishop's Cleeve at 10:00 p.m. he had a quart of beer and a quart of cider in bottles.

The foregoing chain of evidence, although circumstantial in character, identifies both accused beyond a reasonable doubt as the two colored soldiers who committed the offense alleged. Such evidence is not only "consistent with the hypothesis of guilt" but excludes "every other reasonable theory or hypothesis except that of guilt". The court, whose duty it was to weigh such circumstantial evidence and to resolve all questions of fact, found that the two colored soldiers who attacked the girl were the accused. As there was competent, substantial evidence to sustain the findings of guilty, such findings will not be disturbed on appellate review (CM ETO 2002, Bellot).

The purpose of the testimony of each accused was to establish an alibi, namely, that he was not in the vicinity of the scene of the crime when it was committed but was in bed at his camp. Insofar as the alibi evidence was in conflict with the prosecution's evidence, an issue of fact was created. It was the duty and function of the court to resolve the conflict, to weigh and evaluate the evidence and to judge the credibility of all witnesses. In view of the competent and substantial character of the evidence establishing the guilt of both accused of the commission of the offense alleged, the findings are, therefore, binding on the Board of Review (CM ETO 1621, Leatherberry and cases cited therein).

6. (a) At the close of the case for the prosecution the defense moved for a finding of not guilty on the ground that the prosecution "failed to produce enough evidence to support a verdict of guilty". The court denied the motion (R108-109). The motion was not renewed at the conclusion of the evidence, and error, if any, in denying the motion was thereby waived (CM ETO 564, Neville; CM ETO 1414, Elia).

(b) Before entering pleas of not guilty the defense entered "a plea to the jurisdiction of the court" on the ground that a thorough and impartial investigation of the charge was not made. The review of the Staff Judge Advocate, Services of Supply, European Theater of Operations, contains a discussion as to the merits of the contention by the defense and further discussion thereof is deemed unnecessary. The testimony of the investigating officer discloses that the requirements of Article of War 70 as to an investigation were fully observed. The provisions of this Article with reference to the investigation of charges before trial are, in any event, not jurisdictional (CM 229477, Floyd).

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(c) The defense objected to the admission in evidence of the statement made by Smith to Hall on the ground that accused was not fully advised of the charge "under which he was being investigated". Hall and Bowen, who were conducting an investigation of the crime a few hours after its commission and prior to the appointment of the investigating officer, told accused that a very serious crime was being investigated but did not inform him as to the exact nature of the charges. There is no requirement that under such circumstances the accused should be fully advised of the charge being investigated and the contention by the defense was without merit.

7. The charge sheets show that accused Brinson is 25 years of age and was inducted at Camp Blanding, Florida, 2 May 1941 to serve for the duration of the war plus six months. Accused Smith is 21 years of age and was inducted at Fort Benning, Georgia, 9 January 1943 to serve for the duration of the war plus six months. Neither accused had prior service.

8. The court was legally constituted and had jurisdiction of the persons and offense. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 1 3 JUL 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Privates ELIGA BRINSON (34052175) and WILLIE SMITH (34565556), both of 4090th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences, which holding is hereby approved.

2. Both the victim, Miss Dorothy E. Holmes, and her companion Private First Class Edward J. Heffernan testified that two colored soldiers were involved in the crime but neither was able to identify accused as the soldiers who committed the offense alleged. However, proof of the guilt of both accused was established by circumstantial evidence of the strongest and most convincing quality. Such positive evidence is often of a far more tangible value than casual personal identification of accused, which frequently may be deemed evidence of a rather frail nature, particularly when the identification of colored soldiers is involved.

3. The evidence for the prosecution was ably presented by the trial judge advocate, and accused were capably represented by defense counsel. The members of the court also performed their duties in a commendable manner. Special mention is made of the splendid efforts of Dr. Edward B. Parks, Director of the Bristol Forensic Laboratory, whose research and testimony materially resulted in the conviction of accused, and of the prompt and efficient investigation of the crime by Sergeant James O. Hall, 255th Military Police Company and Police Constable William G. Hale of the British constabulary, stationed at Bishops Cleeve.

4. Attached to the record of trial is a letter from Senator Claude Pepper of Florida dated 6 June 1944 addressed to The Judge Advocate General, wherein it is requested that The Judge Advocate General review the case before final action is taken and submit a report to the senator. By first indorsement dated 9 June 1944 the letter was referred to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, European Theater of Operations, wherein a report sufficiently detailed to serve as the basis of a reply to Senator Pepper was requested. Such information was furnished The Judge Advocate General by second indorsement dated 27 June 1944.

5. When copies of the published order are forwarded to this office, they should be accompanied by the record of trial, the foregoing holding and this indorsement. The file number of the record in this office is ETO 2686. For convenience of reference please place that number in brackets at the end of the order: (ETO 2686).

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6. Should the sentences as imposed by the court be carried into execution it is requested that a full copy of the proceedings be forwarded to this office in order that its files may be complete.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

1 Incl:
Record of Trial.

(Sentence as to each accused ordered executed. GCMO 62, ETO, 4 Aug 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2695

20 JUL 1944

UNITED STATES	3d BOMBARDMENT DIVISION
v.	Trial by GCM, convened at AAF Station 119, APO 559, U. S. Army, 31 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.
Private THEODORE WHITE, Jr. (37265024), 1285th Military Police Company (Aviation), 95th Bombardment Group (H).	

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Theodore White, Jr., 1285th Military Police Company (Aviation), 95th Bomb Group (H), did, without proper leave, absent himself from his station at AAF Station 119, APO 559, U. S. Army, from on or about 1800 hours, 3 May 1944 to on or about 0230 hours, 4 May 1944.

CHARGE II: Violation of the 92d Article of War.
Specification: In that * * * did, at or near Oakley, Suffolk, England, on or about 3 May 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Priscilla Lock, The Mill, Thorndon, Suffolk.

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CHARGE III: Violation of the 93rd Article of War.
Specification: In that * * * did, at or near Oakley, Suffolk, England, on or about 3 May 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Miss Priscilla Lock, The Mill, Thorndon, Suffolk.

He pleaded not guilty to the charges and specifications. Two-thirds of the members of the court present when the vote was taken concurring, he was found guilty of Charge I and its Specification; guilty of the Specification of Charge II, except the words "forcibly and feloniously, against her will, have carnal knowledge of Miss Priscilla Lock, The Mill, Thorndon, Suffolk", substituting therefor the words, "with intent to commit a felony, namely rape, commit an assault upon Miss Priscilla Lock, The Mill, Thorndon, Suffolk, by willfully and unlawfully striking her on the head with his hand, pointing a knife at her, and forcing her into a field", of the excepted words not guilty, of the substituted words guilty, not guilty of Charge II but guilty of violation of Article of War 93; and guilty of Charge III and its Specification. Evidence was introduced of one previous conviction by summary court-martial for absence without leave for seven days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that -

Accused was a private, 1285th Military Police Company (Aviation), Station 119, APO 559. On the night of 3-4 May 1944, from about 2330 until 0230 hours, accused was absent from his station without authorization from his commanding officer, and without a pass according to the pass book in which were made entries of all passes issued (R6, 8, 9, 33, 34, 44-53; Pros. Ex.1, 23).

Priscilla Lock, prosecutrix under Charges II and III, was 27 years old, weighed 159 pounds, was unmarried, and lived at Thorndon, Norfolk, England, on 3 May 1944 (R44,45,59,62,96; Def. Ex.A). At about 11:30 that night, she was cycling home from Thorpe Abbotts, where she had worked late as canteen assistant at the American Red Cross. She had reached a place called Oakley and was proceeding on the Lower Road, Oakley, when she heard a bicycle coming along behind her. Her sister, Mrs. Anna Butler, lived close by on this road, so she turned into her

sister's place, "around to the back of it" to "give this person a chance to go by". She remained there five or ten minutes, came out and proceeded on her way to Thorndon (R10, 44-46, 74, 75). She had gone about 300 yards when she again heard a noise behind her. She saw "the same fellow following". By the time she had covered another 300 yards, he passed and got off his bicycle three or four yards ahead. She dismounted, turned her bicycle around and tried to get away. But he dropped his bicycle, went after her and pulled her off her bicycle (R46). She positively identified accused as the person who followed and stopped her (R52, 53). She said to him, "What do you want?" Holding a knife with a blade about four inches long, about five inches from her throat, he replied, "Keep quite or I will slit your throat". She screamed, whereupon accused hit her twice on the left jaw and once on the temple with his closed fist, knocking her down each time. After the third blow, accused put his arms around her, and "took" her, "almost dragged" her into the "plantation * * * all leaves and grass * * * all grown up" about 12 or 15 yards off the road. There, he "threw" her, or released her so that she fell, to the ground. She was "dazed" from the blows. Accused then took off her knickers, pushed her down to the lower part of his body and said: "'You will have to suck me off'." Then, according to the prosecutrix, "he pushes me toward himself and puts his penis in my mouth", not just near her lips, "definitely in my mouth" (R47-50). She "refused to do it" (cooperate in this act). Accused thereupon helped her up and they moved about 25 yards back in the plantation (R50). At this spot accused, according to her testimony, had two acts of sexual intercourse with her (R51,52). She did not consent to either act of intercourse, nor to the unnatural act, but did not resist because she "was scared of him"(R57,58). After some conversation, which included a "date" for the following evening at the Oakley Green Man, they cycled back to the home of Miss Lock's sister, where accused left her at about 0230 hours (R53,54). Anna Louisa Butler and her husband, Andrew R. Butler, saw the prosecutrix when she came in their home "The early morning of" 4 May (R14) and "said she had been attacked by an American" with a knife. Her face was "swollen on the left jaw" and "her legs were grazed and cut on the knees" (R10-14, 18, 19). Staff Sergeant Darrell A. Lassiter, 336 Bombardment Squadron, Army Air Force Station 119, official photographer, took pictures "of the girl" on 4 May 1944. Exhibit 7, one of the pictures, showed the swollen condition of Miss Lock's jaw and Exhibit 8, the other photograph, the scratched condition of her limbs, at that time, according to Butler and also Dr. William J. Sheehan, a medical practitioner of 42 years' experience, who saw and examined her on 4 May 1944 and found her jaw partially dislocated (R16, 19, 26, 27).

4. The defense recalled, as its witness, Captain Robert W. Michels, commanding officer of accused's company, who had testified

for the prosecution. Captain Michels testified that accused is of excellent character. To the best of his "knowledge there is nothing which tends to be a discredit to his character" (R91). After explanation of his rights, accused elected to make an unsworn statement "with reference" to Charges II and III, and to remain silent as to Charge I (R92). He said that he was 21 years of age and that on the night of 3 May, about 11:30, he "caught up to" Miss Lock, the prosecutrix, while on the road on his bicycle. He said he rode up in front of her and stopped her; that she turned her bicycle and started to go up the road; and that he "again caught up and grabbed the handlebars". When he did this and pulled her to him, she dismounted. Accused put the "bike" on the side of the road and then took her by the hand. He did not remember whether she screamed. He "probably went out of" his "head", for he pulled her toward him and hit her three times, once with his fist. He related -

> "* * * She fell to the ground every time I hit her. * * * Then, the last time I hit her she got up -- I helped her up and don't know when I had the knife in my hand, but I didn't push the knife against her throat, just held it in my hand and never spoke a word." (R 93.)

According to accused, he then grabbed her with both his "arms" and they started walking and stepped over a low hedge. She was able to walk. Then he "dropped her". She told him to "put the knife away", that he didn't "need" it. A jeep went by. He said to her, "let's go up further". "She smiled then." He helped her up. She did not resist "or anything", although "the first time she held back". They walked a bit further. He said he "put her down again". Accused then described two acts of intercourse, in each of which his penis was "in". Accused told of conduct by the woman at this time, which indicated cooperation. He described an affectionate parting and told of making a tentative date to see her soon (R93,94). Accused denied specifically that he had put his "penis in her mouth" or tried to push her head down to his penis (R96).

5. The evidence is clear that accused was absent without leave from his station on the night of 3 and 4 May 1944, as alleged in the Specification of Charge I. The testimony of Miss Lock and the admission of accused contained in his unsworn statement shows that he was absent from at least 11:30 p.m., 3 May until 2:30 a.m., 4 May. The Specification alleges 6:00 p.m., as the beginning of the absence. The variance in proof on this point is immaterial. Accused's company commander testified that he had not authorized this absence. Moreover, the pass book in which the issuance of all passes was recorded failed

to show that a pass had been issued to accused for the period in question. The evidence was sufficient to support the findings of guilty of Charge I and its Specification, absence without leave in violation of Article of War 61.

Charge II and its Specification charges that accused raped Miss Lock, in violation of Article of War 92. The court found that accused assaulted the prosecutrix with intent to commit rape, in violation of Article of War 93. Such findings are fully supported by the testimony of Miss Lock, of Andrew and Anna Butler, by that of Dr. Sheehan, and by the evidence found in the photographs. In addition, there is the court room admission of accused. Prosecutrix told of a fistic assault by accused which occurred on a highway at 11:30 at night. She was struck in the face three times with such force as to knock her down each time and to dislocate her jaw. The photographs taken the next day were mute witnesses of the brutal character of the attack and the force employed. The physician and her sister and brother-in-law saw and described her swollen face and lacerated knees. After knocking Miss Lock down, accused exhibited a knife as a threat of the ultimate force he was prepared to employ. The purpose of the assault, the intent with which accused acted, is revealed in the swiftly moving sequences. No sooner had he rendered his victim dazed, too weak or too afraid to resist, than he took her off the road to a hidden spot where he proceeded to the first act of intercourse. The evidence of the prosecution and the judicial admissions of accused leave no doubt that accused assaulted the prosecutrix with his fist and with a knife with intent to accomplish intercourse with her by the use of such force as might be necessary. Had he believed her complacent, he need not have employed force. Thus, there was present in the evidence every element of the offense of which accused was charged as well as of the lesser offense of which the court found accused guilty, as that offense is defined in the Manual for Courts-Martial, 1928, by paragraph 149l, page 177, thereof. The reduction of the offense from that charged - rape - in violation of Article of War 92, to that of the lesser included offense of assault with intent to commit a felony, rape, is authorized.

> "Among the lesser offenses which may be included in that of rape, are assault with intent to commit rape, * * *." (MCM, 1928, par. 148b, p. 165.)

Charge III and its Specification, of which accused was found guilty, alleged sodomy "per os", in violation of Article of War 93. Accused in his statement denied this offense. However, the prosecutrix testified that accused put his penis in her mouth, not just near her

lips, "definitely" - was her expression - in her mouth. She also told of a statement he made, just before this act, which revealed his intent. The court, in this testimony, had substantial competent evidence on which to legally base its findings of guilty as charged.

6. A written statement signed by accused was offered in evidence by the prosecution "as a confession" (R79, 80). It was received in evidence over objection by the defense that the statement was involuntary (R80, 90; Pros. Ex. 23). It is unnecessary to determine whether the statement so received was voluntary. Accused in his statement to the court repeated, in substance, the contents of this exhibit. The facts stated by him to the court, as pointed out above, contained all the elements necessary for the court's findings of guilty of assault with intent to commit rape in violation of Article of War 93. In his pre-trial statement, not even by implication did accused admit sodomy as found under Charge III and its Specification. In any event, therefore, the admission of accused's pre-trial statement was not prejudicial error.

Accused was charged with sodomy per os, in violation of Article of War 93. Defense argued, in effect, that this offense was improperly laid under Article of War 93. The court overruled, and properly, this objection. Sodomy per os is condemned by Article of War 93 (CM ETO 24, White; CM ETO 339, Gage; CM ETO 612, Suckow; CM ETO 1743, Benson).

7. The charge sheet shows that accused is 21 years old and was inducted 25 September 1942 at Fort Cook, Nebraska. He is an Indian. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a Federal Reformatory is authorized (AW 42; sec. 276, Federal Criminal Code (18 USCA 455); Cir. 229, WD, 8 Jun 1944, sec. II, pars. 1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 20 JUL 1944 TO: Commanding General, 3d Bombardment Division, APO 559, U. S. Army.

1. In the case of Private THEODORE WHITE, Jr. (37265024), 1285th Military Police Company (Aviation), 95th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2695. For convenience of reference please place that number in brackets at the end of the order: (ETO 2695).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2698

27 JUN 1944

UNITED STATES v. Private SAMUEL H. CORLEY (34126483), Company A, 95th Engineer General Service Regiment.	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 12 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 61st Article of War.
(Nolle Prosequi)
Specification 1: (Nolle Prosequi)
Specification 2: (Nolle Prosequi)

CHARGE II: Violation of the 64th Article of War.
Specification 1: In that Private Samuel H. Corley, Company A, 95th Engineer General Service Regiment, having received a lawful order from 1st Lieutenant Francis J. Coughlin, 95th Engineers, his superior officer, to get into a weapons carrier and return to camp with him, did, at Builth Wells, Radnorshire, Wales, on or about 2040 hours 24 March 1944, willfully disobey the same.
Specification 2: In that * * *, having received a lawful order from Lieutenant Colonel Aubrey N. Holmes, 95th Engineers, his superior officer,

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to get into a weapons carrier and return to camp with him, did, at Builth Wells, Radnorshire, Wales, on or about 2200 hours 24 March 1944, willfully disobey the same.

CHARGE III: Violation of the 69th Article of War
(Nolle Prosequi)
Specification: (Nolle Prosequi)

He pleaded not guilty to and was found guilty of Charge II and the specifications thereunder, two-thirds of the members of the court present when the vote was taken concurring. Evidence was introduced of three previous convictions, one by summary court for absence without leave for five days in violation of Article of War 61, and two by special court-martial for absence without leave for six and one-half hours from an area to which he had been restricted, and for wilfully going beyond the limits of his company area, in violation of Articles of War 61 and 96, and also for breach of arrest and absence without leave for one and one-half hours in violation of Articles of War 96 and 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence but reduced the period of confinement to five years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The charge sheet shows that the accused is 25 years and 11 months of age and was inducted 2 July 1942, to serve for the duration of the war plus six months. He had no prior service.

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

5. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U. S. Army.

1. In the case of Private SAMUEL H. CORLEY (34126483), Company A, 95th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. While this accused has sustained three previous convictions none of them involved moral turpitude. While in need of disciplinary punishment, I do not think he should be relieved from war service until all possibilities of his value as a soldier have been exhausted. In view of the policy of conserving man power prevailing in this theater, I recommend that the dishonorable discharge be suspended until his release from confinement and the place of confinement be changed to Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England. Supplemental action should be forwarded to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2698. For convenience of reference please place that number in brackets at the end of the order: (ETO 2698).

E. C. McNEIL.
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2701

17 JUL 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private LEONARD M. WEBB (20364405), 360th Replacement Company, 72d Replacement Battalion.	Trial by GCM, convened at Yeovil, Somerset, England, 18 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Leonard M. Webb, 360th Replacement Company, 72d Replacement Battalion, did, without proper leave, absent himself from his station at Camp Houndstone, Somerset, England, from about 0745 hours, 15 April 1944, to about 2300 hours, 15 April 1944.

CHARGE II: Violation of the 93d Article of War.
Specification: In that * * *, did, at Chapel Terrace, Lower Odcombe, Somerset, England, on or about 15 April 1944, commit the crime of sodomy, by feloniously and against the order of nature have carnal connection per os with William John Milum ofChapel Terrace, Lower Odcombe, Somerset, England.

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence was introduced of three previous convictions, two by special court, one for breaking arrest, disobedience of an order and wearing improper uniform, the other for breaking arrest and disobedience of an order, both in violation of Articles of War 69 and 96; one by summary court for absence without leave for six hours, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Competent evidence, including a duly authenticated extract copy of his company's morning report, shows that accused was absent without leave from his station at the place and for the time alleged in the Specification, Charge I (R3-6,14; Pros.Exs.A,B).

David Middleditch, aged seven and a half, was sworn and demonstrated, upon preliminary questioning, apparent sense and understanding of the moral importance of telling the truth (R8). He testified that on the day the alleged offenses were committed he and his six-year-old second cousin, William John Milum, were playing outside the "pub" in Odcombe when accused came out and asked where the lavatory was. The two boys accompanied accused to Milum's house, where accused went in the lavatory and "came up again and he went behind Mr. Tucker's barn doors and he pulled his wee wee out and told me and John to touch it. I didn't and John did." Witness identified the "wee wee" as that part of the body which "you mustn't show." (R9).

Sidney Milum testified that he was the father of six-year-old William John Milum and that he first saw accused 15 April 1944 when accused requested a cup of tea from the witness, who was then in his garden. "We went up to the house and I gave him a cup of tea and he drank half of it and he was giving my boy a cup of tea." Accused "also said that he would have to make tracks after he had drank the tea. * * * So he left * * * and my boy got on his bike and followed him." A little while later David Middleditch informed witness that William John "was gone down to the shed with the American." Witness thereupon went to "Mr. Rickett's shed" where he found his boy and accused inside. Accused was sitting on a ladder and witness saw nothing unusual take place in the shed. (R7-8).

Six-year-old William John Milum, after being sworn as a witness, testified that he knew what it was to tell the truth and what it was to tell a lie. He replied in the affirmative to the trial judge advocate's question, "Now, John, if something happened and I asked you to tell me about it and you tell me the way it happened, is that the truth?" He testified that when people lied they went to the police station. On the day the alleged offense was committed, witness first saw accused "By the pub steps." Then "He took me to Tuckers", but, before that, "He came down in our yard and said if he could have a cup of tea and Daddy said

that if there was a cup in the pot he could have one. He got one and Daddy asked him if he wanted a piece of cake and he said yes. When Daddy went to the cupboard he pulled out his wee wee." At Tucker's, accused "took out his wee wee and then we came out and went down to Ricketts." At Rickett's accused "pulled out his wee wee again and tried to pull out mine." (R10). While accused was sitting on a ladder, holding witness, he "pulled out his wee wee and told me to open my mouth. He told me he was going to give me a sweet and I opened my mouth and he put his wee wee in." (R11). Accused told the boy he heard his father calling him. When the father arrived, accused and witness had separated. "He was sitting down and I was standing up." (R13). In response to questions by the court, the boy testified that David Middleditch was with them when accused "pulled out his wee wee" at Tucker's, but that David did not accompany them to Rickett's barn (R12).

Upon cross examination the six-year-old witness denied that anyone gave him any candy on the morning of the trial and, specifically, that the trial judge advocate gave him any. Upon redirect examination by the trial judge advocate he reiterated this denial, asserting that his interlocutor had asked him some questions that morning but had not given him anything (R11). Yet it was stipulated by the prosecution, defense and accused "that the TJA gave the witness, William John Milum, a bar of candy just before the court was called to order." (R13).

Accused's signed statement, made, after proper warning, to an agent of the Criminal Investigation Division on the day following the commission of the alleged offense, asserts that, after accused drank the tea Mr. Milum gave him, the little boy left with him on his tricycle. They entered a shed where accused put the child's hand on accused's erect penis. "He didn't do anything just took his hand away. I didn't say for the boy to open his mouth for a sweet. I didn't put my penis in his mouth. When the boy had hold of my penis I pulled him over on me and took out his penis. I put my hand on the boy's head and pulled it towards the top of my penis. I don't think that my penis went into his mouth" (Pros.Ex.B). (Underscoring supplied).

4. No evidence was introduced by the defense. Accused was fully advised of his rights and elected to remain silent.

5. "Sodomy consists * * * in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient * * *." (MCM, 1928, par.149k, p.177).

The findings of guilty of Charge I and its Specification are supported by competent uncontradicted testimony. The findings of guilty of Charge II and its Specification are based upon the direct testimony of a six-year-old boy whom accused admitted abusing indecently, and upon accused statement (Pros.Ex.B). Although the child witness was conclusively shown to

have untruthfully denied the trial judge advocate's admitted gift of a candy bar immediately prior to the commencement of the trial, the action of the court in receiving his testimony "will not be disturbed unless it appears that the court, in doing so, abused its discretion" (CM 141609 (1920); CM 174484 (1927); CM 192609 (1930); Dig.Op.JAG, 1912-1940, sec. 395(58), p.238). In view of the corroboration as to every significant detail except the actual penetration per os, particularly the equivocal and damningly inconclusive character of the denial embodied in accused's signed statement, it affirmatively appears that, in this case, the court did not abuse its discretion. The record supports the conviction of sodomy.

6. The charge sheet shows that accused is 27 years of age and enlisted at Altavista, Virginia, 14 October 1940, to serve for the duration of the war plus six months. He had no prior service.

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

8. Confinement in a penitentiary is authorized for the crime of sodomy (AW 42; MCM, 1928, sec.90a, p.81). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

17 JUL 1944

WD, Branch Office TJAG, with ETOUSA. TO: Commanding General, Southern Base Section, Communications Zone, ETOUSA, APO 519, U. S. Army.

1. In the case of Private LEONARD M. WEBB (20364405), 360th Replacement Company, 72d Replacement Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2701. For convenience of reference please place that number in brackets at the end of the order: (ETO 2701).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2707

28 JUN 1944

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private McKINLEY WOMACK (34487412), Company E, 95th Engineer General Service Regiment.	Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 22 May 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private McKinley Womack, Company E, 95th Engineer General Service Regiment, did, on the Rhayader - Builth Wells Road, Radnorshire, Wales, on or about 2230 hours 14 April 1944, with intent to do him bodily harm, commit an assault upon Private James Joseph Devereux, 160th OCTU, British Army, by cutting him on the face and thumb with a dangerous instrument to wit: a knife.

CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty)
Specification: (Finding of not guilty)

He pleaded not guilty and was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. Evidence was introduced of one previous conviction by summary court for being disorderly in uniform in a public place, in violation of Article of War 96. He was sentenced to

be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. On the night of 14 April 1944, Sergeant Willie Jenkins was in charge of a convoy from camp to the town of Rhayader, Wales, consisting of a truck and nine men (R9), including Jenkins and accused, all members of Company E, 95th Engineer General Service Regiment (R6, 10, 12,30,35,36). About a mile out of town while returning to camp between nine-thirty and ten o'clock (R9) they met a British convoy, passed the first truck and collided with the second. Jenkins gave a British officer information as to his name, rank and truck and then rode back to town with the British officer and called his organization about the accident. While Jenkins was in town with the British officer "one of the British soldiers came in and he was cut" (R7).

Private James Joseph Devereux, 160th O.C.T.U., British Army, testified that he was on duty as a truck driver the night of 14 April 1944. As he was approaching Rhayader, he noticed an American army lorry on the side of the road with its lights on and a British vehicle on the grass. He stopped and after finding that the driver of the British vehicle was not hurt, he went over to the American vehicle and asked the driver to dim his lights. He received no direct answer but six or seven men standing at one side of the American vehicle "adopted a threatening attitude". He walked away and they followed him to his own truck. He got into his truck and accused got in front of it preventing him from driving away.

> Accused then "edged around the side of the truck and when level with me made a blow at me with a knife in his right hand. I leaned away from him and kicked away at him with my right foot trying to ward off the blow, catching him in the chest. Before he could recover, I started the lorry in motion and drove away" (R21).

The witness exhibited a cut on the left side of his face and on the thumb of his right hand. He positively identified accused by his features, his height and a ring on his left hand as the man who cut him and testified that he did not lose sight of accused at any time (R22,24,29-30). Although it was a cloudy, rainy night (R9,11,22,24) he had a clear vision of accused "when he came to the front" of the truck. Devereux was in the truck with his hand on the steering wheel and his neck and hand were cut by the "one continual sweep". Just before Devereux was cut, accused told him, "I'll cut your throat" (R24-25).

Private First Class James Houston was a member of Jenkins' convoy the night of 14 April and was in the wreck. He testified that he was standing in back of the truck and "this vehicle drove up pretty soon and comes in behind us. Womack and this British soldier gets into an argu-

ment. Pretty soon Womack strikes this British soldier, and this British soldier said, 'I'm cut'. I said, 'Womack, don't do that, don't do that Womack' * * * I said that twice." (R31).

Captain Earnest J. Williams, Royal Army Medical Corps (British), testified he examined Devereux' injuries on 14 April at Rhayader at 10:45 p.m. and found him suffering from a wound on the left side of his neck about four to five inches in length and on his thumb, probably caused by a sharp knife (R26). The neck wound was not a severe wound and required three stitches. The wound on the thumb was deeper and involved the joint itself, and required two stitches. Neither wound will cause any permanent impairment but the wound on the neck will leave a scar (R28).

Inspector E. T.Williams, Rhayader Constabulary, saw accused at the Rhayader Police Station about "two-fifteen" on the morning of 15 April, at which time accused had in his possession a knife similar to one shown to the witness (R27), a government issue pocket knife, which was admitted in evidence without objection by the defense (R15; Prox.Ex.1).

On 15 April Devereux attended an identification parade of seven or eight colored soldiers, including accused, and picked out accused as the man who had done the cutting. Devereux also asked to see accused's hands and when asked why he did so, replied that it was to make sure accused had a ring on his finger. Accused wore a ring at the time of the parade (R30).

4. As a defense witness, Private Edgar Colbert, who was a member of Jenkins' convoy, testified that accused wore overcoat and gloves on the evening in question but as it was dark he did not know if accused wore them at the time of the accident (R35). Jenkins, recalled by the defense, testified that he had owned a knife similar to the government issue pocket knife admitted in evidence (R36). Accused, sworn as a witness at his own request, testified that after the accident he went to camp to notify his company commander and first sergeant so that they could send a truck and get the men, and that he volunteered to return to show the place of the accident. While they were examining the truck, he found a "G. I. knife". He knew Jenkins had a "G. I. knife", asked him if he had lost one and Jenkins replied in the affirmative. Accused showed him the knife he found, Jenkins said it was his and accused gave it to him.

5. Accused was found guilty of assaulting the British soldier with intent to do him bodily harm by cutting him on the face and thumb with a knife. The offense is defined as

> " * * * an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. * * *

Proof:-(a) That the accused assaulted a certain person as alleged; and (b) the facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person" (1928 M.C.M., par.149n,p.180).

"Under statutes of this character (punishing assault with intent to inflict great bodily harm) the intent to inflict an injury, of the kind described by the particular statute, is an essential element of the offense, and the absence of such intent cannot be supplied by the mere fact that the injury is inflicted, although an inference of the intent may be justified from the occasioning of the injury, or the character of the injury, or the implement employed, or the other circumstances attending the assault". (6 C.J.S., Assault and Battery,sec.79b,(2),pp.937-938; CM ETO 1177,Combess).

Accused followed Devereux when Devereux returned to his own truck after requesting that the lights of the American vehicle be dimmed. While Devereux sat in the driver's seat preparing to drive away accused struck at him saying he would cut his throat. The evidence shows that he did inflict a cut on Devereux' throat. Both the assault and the intent to do bodily harm were proven.

6. The charge sheet shows accused to be 24 years and six months of age. He was inducted 11 December 1942 to serve for the duration of the war plus six months. He had no prior service.

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

8. Confinement for five years in a United States penitentiary is authorized for the crime of assault with a dangerous weapon with intent to do bodily harm (AW 42; MCM, 1928, par.104c,p.99; Sec.276,Federal Criminal Code (18 USCA sec.455); sec.335,Federal Criminal Code (18 USCA 541); Act June 14,1941,c.204, 55 Stat.252 (18 USCA 753 f); Cf: US v. Sloan, 31 Fed.Sup.327). Designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir.291, WD, 10 Nov 1943, sec.V, par.3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA 28 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U. S. Army.

1. In the case of Private McKINLEY WOMACK (34487412), Company E, 95th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2707. For convenience of reference please place that number in brackets at the end of the order: (ETO 2707).

E. C. McNEIL.
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2717

14 JUL 1944

UNITED STATES	THIRD UNITED STATES ARMY
v.	Trial by G.C.M., convened at Crewe, Cheshire, England, 2 June 1944.
Private EDGAR R. QUANN (32682480), 3203 Quartermaster Service Company, APO 403.	Sentence: Dishonorable Discharge, total forfeitures and confinement at hard labor for five years. The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.
Specification: In that Private Edgar R. Quann, 3203rd Quartermaster Serv Company, did, at Golf Cottage, Haslington, Cheshire, England, on or about 4 May 1944, attempt to commit the crime of sodomy by feloniously and against the order of nature, attempting to have carnal connection per anum with Dennis Preece, a human being.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence of two previous convictions was introduced, one by special court-martial for wilful disobedience of lawful order by a non-commissioned officer in violation of Article of War 65, and one by summary court-martial for absence without leave for four days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks,

Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The offense alleged in the Specification was attempted sodomy. Evidence offered by the prosecution clearly showed acts and vocal solicitation by accused which constituted the overt act and proved the intent required to sustain the Specification. Dennis C. Preece, a fifteen-year old boy (R8,9), after examination by the court as to his competency as a witness, was sworn and testified for the prosecution (R9-12). Accused undid the boy's braces and lowered his trousers. After he "undone" the front of his own trousers, and while standing in the rear, accused "tried to shove his dickie up" the boy's "bottom", telling the boy to "open your legs". This occurred at the time and place alleged (R13-16). There was no question as to identity. Accused was seen with young Preece at the place and at about the time in question by an older witness, James Ray. Preece complained to Ray of accused's conduct almost immediately (R14,16,24-27). The evidence further shows that accused, after being warned of his rights, admitted the offense to the investigating officer (R28-33; Pros.Exs.1,2). The conduct thus specified and proved constitutes an attempt to commit sodomy and is chargeable as a violation of Article of War 96 (Dig.Op.JAG, 1912-40, sec.454 (15) p.349, CM 145266, 145155 (1921), CM 212056, Smith).

4. The charge sheet shows that accused is 26 years of age. He was inducted into the Army of the United States in the United States Army Induction Station, New York City, New York on 12 December 1942, to serve the duration of the war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement for five years, not in a penitentiary, is authorized for an attempt to commit sodomy (CM 209651, Palmer-Morrell; CM 212056, Smith; CM 230666, Buckler).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 14 JUL 1944 TO: Commanding General, Third United States Army, APO 403, U. S. Army.

1. In the case of Private EDGAR R. QUANN (32682480), 3203rd Quartermaster Service Company, APO 403, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2717. For convenience of reference please place that number in brackets at the end of the order: (ETO 2717).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2723

12 JUL 1944

U N I T E D S T A T E S)	CENTRAL BASE SECTION, SERVICES OF SUPPLY, redesignated CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
General Prisoner SAMUEL COPPRUE (34130220).)	Trial by GCM, convened at London, England 22 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that General Prisoner, formerly Private, Samuel Copprue, Service Company, 577th Quartermaster Battalion, ETOUSA, did, at Litchfield, England, on or about 12 March, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 4 April, 1944.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * *, having been duly placed in confinement at Litchfield, England, in or about the month of November, 1943, did, at Litchfield, England, on or about 12 March, 1944, escape from said confinement before he was set at liberty by proper authority.

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CHARGE III: Violation of the 93rd Article of War.
Specification: In that * * *, did, at London, England, on or about 4 April, 1944, with intent to do him bodily harm, commit an assault upon Corporal Henry M. Rizer, Junior, Company D, 787th Military Police Battalion, Central Base Section, Services of Supply, ETOUSA, by shooting him in the right side of his chest with a dangerous weapon, to wit: .45 Caliber Colt Automatic Pistol.

CHARGE IV: Violation of the 96th Article of War.
Specification: In that * * *, did at London, England, on or about 4 April 1944, without lawful authority, appear in a public place, to wit: Cable Street, Stepney and vicinity, in the uniform of a commissioned officer, and did then and there wrongfully represent himself to be an officer commissioned in the Army of the United States.

He pleaded guilty to the Specification of Charge I except the words "desert" and "in desertion" substituting therefor respectively the words "absent himself without leave from" and "without leave"; of the excepted words, not guilty; of the substituted words, guilty; not guilty of Charge I but guilty of a violation of the 61st Article of War; guilty to Charge II and Charge IV and their respective specifications, and not guilty to Charge III and its Specification. He was found guilty of all the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, reduced the confinement to 30 years, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Accused was confined in Western Base Section Guardhouse, Lichfield, England by lawful order (See CM ETO 1549, Copprue and Ernest). On 12 March 1944 he escaped from confinement before he was released by lawful authority (R38).

4. With respect to Charges III and IV, the competent evidence for the prosecution showed as follows:

During a routine check of passes by the military police in London on 4 April 1944 accused, dressed in the uniform of a second lieutenant, failed to produce his "A.G.O." card upon request, stating that he had left it in his room. When he was accompanied by the military police to his room he eluded them (R6). Accused was next seen at 9:15 p.m. that same evening in the West Indian Club, London. At that time he wore an officer's uniform

and bars of a second lieutenant (R12,15). Upon demand of the military police he did not exhibit his "A.G.O." card. Thereupon he was escorted from the club and placed under arrest by three military policemen (R8,13). On the side-walk in front of the club he resisted arrest. He pulled a knife from his pocket and succeeded in freeing himself from the physical control of the police. He then backed into the club (R9,11,14,17,29,30, 32).

Corporal Henry M. Rizer, Company D, 787th Military Police Battalion, saw accused in custody of the other military policemen on the side-walk in front of the club and informed him that since he could not show his identification card it was necessary for him to accompany the military policemen to the Provost Marshal's office. Rizer then entered the club in the performance of his duty of checking passes (R19). When he had completed his task he heard a shot and commotion outside the club. At that instant accused, having the appearance of a pursued person, entered the club and upon seeing Rizer turned and entered a latrine. Rizer followed him to investigate. When he reached the latrine door accused approached Rizer with knife in hand. Rizer drew his .45 calibre pistol. Before he had time to force a shell into the chamber of the pistol, accused attacked him with a knife. Rizer grabbed accused's hand which held the knife and struck him on the head with the revolver. In the struggle which followed the knife fell to the floor. Accused snatched Rizer's gun, jumped back and injected a shell into the chamber. Rizer took hold of the hand of accused which held the loaded pistol. Accused twisted free and struck Rizer on the head with the gun, exclaiming, "Get away from me", and then shot him. The bullet entered Rizer's right chest and passed through his body (R19-25,38). The wounded soldier had been confined in the hospital since his injury and had not been released at time of trial (R22).

Accused left the club by the front door with the revolver in his hand (R9,15,30). He encountered two British civilian police and three American military policemen. He succeeded in passing them and a running gun-battle ensued wherein both accused and the military police exchanged shots. Accused was finally captured in a nearby street after he had been wounded in the leg (R10,15,30,32,33).

5. The accused elected to testify. He admitted that he eluded the police on the two occasions above described (R42), and that he re-entered the West Indian Club after drawing his knife. He went into the latrine and was followed by Corporal Rizer. A struggle ensued during which the gun was discharged and Rizer was shot. Accused did not remember striking him on the head with the gun and denied pulling the trigger. He claimed that he took the gun frm Rizer after the shot was fired (R42).

6. (a) - Charge I and Specification: Accused's intent to remain permanently away from the military service was clearly established by proof of escape from confinement, absence of 23 days terminated by apprehension, the masquerading in the uniform of an officer, his eluding arrest on two occasions and finally by his felonious assault of a military policeman who

was attempting to apprehend and arrest him (CM ETO 1737, Mosser and authorities therein cited). On the date of accused's escape from confinement and departure from the guardhouse, viz. 12 March 1944, he was in the military service of the United States. The order promulgating his sentence in CM ETO 1549, Copprue and Ernest was not issued until 24 March 1944. He was therefore capable of committing the offense of desertion on 12 March 1944 (CM ETO 960, Fazio, Poteet and Nelson; CM ETO 1737, Mosser).

(b) - Charge II and Specification: Accused pleaded guilty to the charge of escape from confinement. Independent of the plea the evidence proves the offense (CM ETO 438, H.Smith; CM ETO 1737, Mosser).

(c) - Charge III and Specification: The evidence shows that accused shot Corporal Rizer. Accused's testimony insofar as it conflicted with that of the prosecution was resolved against him by the court and its findings will not be disturbed on appellate review (CM ETO 1621, Leatherberry and cases therein cited). The offense of assault with intent to do bodily harm with a dangerous weapon was proved by substantial evidence (CM ETO 422, Green; CM ETO 1585, Houseworth).

(d) - Charge IV and Specification: The unauthorized wearing of an officer's uniform by an enlisted man and representing himself to be a commissioned officer by an enlisted man is an offense under the 96th Article of War. Accused's commission of this offense was fully proved (CM ETO 1017, McCutcheon).

7. The charge sheet shows the accused is 20 years and ten months of age and enlisted 19 June 1941 at Camp Shelby, Mississippi, to serve for a period of one year, which was extended for the duration of the war plus six months by the provisions of the Selective Service Act. No prior service is shown.

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

9. Confinement in a penitentiary is authorized for the offense of desertion in a time of war by AW 42, and also for assault with intent to do bodily harm with a dangerous weapon by AW 42; sec.276, Federal Criminal Code (18 USCA 455); sec.335 Federal Criminal Code (18 USCA 541); Act June 14, 1941, c.204, 55 Stat.252 (18 USCA 753f); Cf: US v. Sloan, 31 Fed. Supp. 327.

10. As the sentence of confinement exceeds ten years the designation of the United States Penitentiary, Lewisburg, Pennsylvania is authorized (Cir.229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 12 JUL 1944 TO: Commanding General, Central Base Section, Communications Zone, ETOUSA, APO 887, U.S. Army.

1. In the case of General Prisoner SAMUEL COPPRUE (34130220), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2723. For convenience of reference please place that number in brackets at the end of the order: (ETO 2723).

E. C. McNEIL,
Brigadier General, United States Army
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2729

21 JUL 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
First Lieutenant PHILLIP R. McCURDY (O-527443), Corps of Chaplains, 1313th Engineer General Service Regiment	Trial by GCM, convened at Wilton, Wiltshire, England 2 May 1944. Sentence: Dismissal, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
RITER, SARGENT and STEVENS, Judge Advocates

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

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

CHARGE I: Violation of the 66th Article of War.

Specification 1: In that 1st Lieutenant Phillip R. McCurdy, Chaplain, 1313th Engineer General Service Regiment, did, at Mount Edgcumbe, East Cornwall, England, on or about 5 April 1944, wrongfully and feloniously, attempt to create and excite a mutiny in Company C, 1313th Engineer General Service Regiment, by urging the members of said Company C, 1313th Engineer General Service Regiment concertedly to disregard, defy, and refuse to obey the lawful orders of Captain Jack A. Mittendorf, their commanding officer, to be inspected for weapons before going on pass, by saying "No one has the right to search you when you go on pass and you

should not let them. You should be better men than to let them search you" or words to that effect, this with the intent to subvert and override, for the time being, lawful military authority.

Specification 2: In that * * *, did, at Mount Edgcumbe, East Cornwall, England, on or about 5 April 1944, wrongfully and feloniously, attempt to create and excite a mutiny in Company C, 1313th Engineer General Service Regiment, by urging the members of said Company C, 1313th Engineer General Service Regiment concertedly to disregard, defy, and refuse to obey the lawful orders of Captain Jack A. Mittendorf, their commanding officer, to work long hours and on Sundays, by saying "It is no use of your working long hard hours because you have to depend on British supplies and the British Commonwealth is the largest country in the world and they are taking it easy and are in no hurry so there is no reason for you to work long hours and on Sundays. They don't do it," or words to that effect, this with the intent to subvert and override, for the time being, lawful military authority.

Specification 3: In that * * *, did, at Mount Edgcumbe, East Cornwall, England, on or about 5 April 1944, wrongfully and feloniously, attempt to create and excite a mutiny in Company C, 1313th Engineer General Service Regiment, by urging the members of said Company C, 1313th Engineer General Service Regiment concertedly to disregard, defy, and refuse to obey the lawful orders of Captain Jack A. Mittendorf, their commanding officer, that passes would be granted only by the company commander to deserving men provided there is no undue interference of duties, by saying "The company commander won't give you passes on Sunday to go to church so just come and see me and I'll see that you get them. You should get passes when you want them" or words to that effect, this with the intent to subvert and override, for the time being, lawful military authority.

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

Specification 1: In that * * *, did, at Mount Edgcumbe, East Cornwall, England, on or about 5 April 1944, wrongfully and without authority address Company C, 1313th Engineer General Service Regiment and publicly make a statement to the members of said Company C, 1313th Engineer General Service Regiment as follows: "They talk about all this racial trouble with the British women over here. It is no trouble with the women, it is all being caused by these dam die-hard Southerners," or words to that effect, said statement being of a derogatory nature concerning the character of a group of United States troops, this to the prejudice of good order and military discipline.

Specification 2: In that * * *, did, at Mount Edgcumbe, East Cornwall, England, on or about 5 April 1944, wrongfully and without authority address Company C, 1313th Engineer General Service Regiment and publicly make a statement to the members of said Company C, 1313th Engineer General Service Regiment as follows: "Your company commander told you that if a white soldier hits you for you to leave the scene and get the nearest MP. Don't do that. Jump on him and beat the hell out of him" or words to that effect, this to the prejudice of good order and military discipline.

He pleaded not guilty to and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority, the Commanding General, Southern Base Section, Services of Supply, European Theater of Operations, approved the sentence, reduced the period of confinement to ten years and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as approved by the reviewing authority, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

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

The accused, a first lieutenant, Corps of Chaplains, Army of the United States, attached to 1313th Engineer General Service Regiment, on Wednesday, 5 April 1944, requested First Sergeant Curley B. Russell of Company C of that regiment, then stationed at Craft Hall, Cornwall, England, to form the company (R18). Accepting this request as an order the

sergeant formed the company and turned it over to the accused who began to speak to the men. The men of the company grouped themselves in a semi-circle around the accused for a period of time estimated to be from two to ten minutes (R5,6,7,16). He talked to the men in an excited tone of voice loud enough to be heard by all present and the company commander, who was in his tent about 100 feet away (R5,13,15,16,17,18). The number of soldiers present was estimated at 100 to 176 (R5,13,15,17, 18). Five witnesses testified that they heard the accused during the course of his address to the soldiers make substantially the following statements:

a. You should let no one search you before you go on pass. "You should be better men than to let them search you" (R4).

b. There is no order in the United States Army for men to be searched (R12).

c. No one has the right to search you when you go on pass. When you go out and get in trouble they can court-martial you but they have no right to search you (R15).

d. Don't let anyone search you when you go on pass (R16).

e. You are not supposed to be searched. If you go to town and get into a fight and use a weapon on a soldier, you should be court-martialed - that's what court-martials are for (R18).

f. All racial trouble between the men and the British women is not caused by the women but by the "dam die-hard Southerners" (R4).

g. All the racial trouble is caused by the damn die-hard Southerners (R15).

h. The racial trouble is caused by the damn die-hard Southerners (R16).

i. At a meeting of Chaplains in London the Assistant to the Senior Chaplain said that 99% of the trouble between the white and colored soldiers was caused by the Southern soldiers (R18).

j. The company commander has told you that if a white man hits you to go to the MP's. You jump on the white men and beat the hell out of them (R4).

k. Your company commander said that if a white man hits you to call the nearest MP. If a white man hits you, you are men enough to hit him back (R12).

l. Your company commander said that in case of a fight in town you should go to the nearest MP and not to fight back. In case of a fight if a white soldier hits one of you, you knock the hell out of him (R18).

m. "You want to jump on them and beat the hell out of them" (R15).

n. If your company commander won't give you a pass on Sundays to go to church, come and see me and I will see that you get them (R5).

o. You are supposed to have a pass to go to church. If you don't get a pass come and see me (R12,14).

p. There is no need for you to work long hours and on Sundays because "you have to depend on British supplies and the British Commonwealth is the largest country in the world and they are taking it easy and are in no hurry so there is no reason for you to work long hours and on Sundays because they don't do it" (R5).

q. The British are not working on Sunday and you should not work on Sundays (R13).

r. The English do not work on Sundays and there is no reason why you should, or work long hours (R16).

While the accused was speaking the soldiers were "yessing and noing" to his remarks "like in church the response to prayers" (R5,15,16). The company commander then walked over to the accused and asked him if he was trying to incite the company to mutiny. The accused answered that "the boys were a little mixed up and he was trying to straighten them out" (R5). After the company commander stopped the speech of accused he reported the matter to the battalion commander (R11).

The company commander made it a practice personally to search the men for weapons before permitting them to go on pass (R6,10). The practice commenced upon the arrival of the organization in the United Kingdom as a result of a regimental order requiring that "no men will carry knives at any time" and "to search for knives" (R10-11). About

1 April 1944 the company received Circular 34, Headquarters, ETOUSA, dated 28 March 1944 which provided in section 51 thereof "something * * * about per knives up to two and a half inches may be carried" and that no straight razors would be carried by soldiers on pass or furlough. An order to this effect was posted on the company bulletin board and such order was in effect 5 April (R6,8). Regimental orders required that passes should not be issued in excess of 15 per cent of the strength of the company at any one time. Passes were issued if the men "could be spared from their specific job". Such an order was in effect on 5 April (R6). No hours were set aside for religious worship (R8-9).

The accused did not request the authority of the company commander or of any other officer of the company to address the men (R6,10). On previous occasions when the accused had addressed the men he had first obtained permission of the company commander (R10).

4. On behalf of the defense three witnesses testified that they were present during the accused's address to the soldiers of Company C and that all they heard him say was:

> a. He just spoke to us about carrying knives and we weren't supposed to carry knives in our pockets (R23).
>
> b. I heard him say that if we could not get an off day to go to church to come to him and he would see what he could do about it (R24).
>
> c. He said that our job was not so important that we could not have Sundays off (R25).

One of these witnesses said that there were no other officers present during the accused's talk (R23), while another said that he didn't see any other officers present but that there might have been some there (R24).

After the rights of the accused as a witness were fully explained to him by the Law Member of the court, he elected to make an unsworn statement as follows:

> "About a week before this time, several of the men in the different companies of the regiment asked me about going to church They were scattered about three or four different places and I did not have any transportation, no personal transportation, at that time, and could not get around to give them church service. Some months ago a circular came from General Marshall stating that men who were not engaged in a task that was strictly essential to the military effort at the time should be permitted passes to go to church or at least to go to

the chaplain. On this morning that's what I told them. I said 'I have a circular from General Marshall which you probably have not seen that states that unless you are engaged in a task that is strictly essential to the military effort at the time you should be permitted in opportunity to go to church., and I may have mentioned several other things about passes and they should not be put in a dungeon when they were confined, and their passes to the little town of Malpark. I said 'I don't know for sure on this thing but I heard of an order about being searched before you went on pass'. That's an ETO order but I haven't seen it'. I also said something about 'If you go out without being searched and get into trouble and found with a weapon on you, you will be court-martialed. That's what court-martials are for'. Also, in the section where I lived as a boy, we could not go out at nights as policemen would stop us for being out after hours and search us and say that was their right as officers of the law but we did not like it and the next day we would complain to our parents but they told us they could do nothing about it. Of course, that is civil life and this is the army. Then I mentioned about if a soldier hits you not to take it The men thought the commanding officer had meant that if a white soldier hits you to go get an MP and I was trying to make them understand that any time a soldiers hits you it was prejudicial and there is an Army Regulation on that. That if a white soldier hit them they were supposed to report it to their commanding officer but it was up to them to do as they wanted. Speaking of long hours that they were working and not to be inferered (sic) with, the company commander or the regimental commander and the men were on a big job and were so busy at the time and I said if it was possible to get a pass and go to church as there was enough time to go if they wanted a pass to go to church they were to let me know what day it was possible for them to go and I would discuss it with the company commander. We had a very good record with white soldiers and the company commander wanted us to maintain it. I said that the Assistant to the Senior Chaplain told us at Cheltenham that 99% of the trouble we have is caused by some of our white soldiers who do not understand. That is all I had to say about that.

I would like to say further that it was consistent in the regiment to speak to the men with the 1st Sergeant's permission and I had no intention of angering the commanding officer in that respect. That my main purpose in speaking to them was not an attempt to incite a mutiny nor make any derogatory remarks but to straighten them out on some questions to the best of my ability and experience; to let them know that there was an order from the War Department to the effect that they would be permitted to get a pass to go to church once a week." (R26-27).

5. The court recalled First Sergeant Russell as a witness who testified that there was posted prior to 5 April 1944, and always kept on the bulletin board of the company, an order originating from regimental headquarters long before 5 April, which dealt with passes and provided among other things that every man going on pass had to be inspected "for lethal weapons" (R27-28). The court also called as a witness Major Richard B. Zahniser, 1313th Engineer General Service Regiment. He testified that on the morning of 5 April 1944, the company commander and another officer of C Company came to his battalion headquarters and he accompanied them to a tent from which the accused emerged. He asked the accused what had happened.

"He started to state that he was addressing the men and Captain Mittendorf at that time was a little upset and said that he was addressing the men in a manner which I didn't approve of and the chaplain, at that point, in defense of his own actions, spoke very clearly and said that he had not said anything that was out of the way and called to a group of men that were in formation and they broke from their formation and began to group around the officers. At that point I terminated the entire incident by telling the men to go back to their organization formation and told the chaplain to quiet down with his speaking and we broke up the entire incident."(R29).

The proper procedure to follow for one to address the troops is "to stop at battalion headquarters, next stop at the orderly room and would next notify the officer there that he wants to speak to the men." The accused was familiar with this practice (R29). Major Zahniser was also familiar with the regimental order covering passes. It provided among other things for "the inspection of men for lethal weapons of any type, to look for knives" and that it was the accused's duty to read the order (R29).

6. With reference to Charge I and its specifications, accused is therein charged with having attempted to create a mutiny by urging the members of Company C collectively to disregard and disobey the orders of their military superiors by his conduct and words. Five witnesses testified that he caused the troops to be assembled and then by words in effect urged them to refuse to be searched for weapons before going on pass, to refuse to work long hours and on Sundays, that they were supposed to have passes to go to church and to come to him for such passes if they were refused by the company commander. The three witnesses testifying for the defense did not deny that accused spoke the words with which he is charged but simply related all that each one of them had heard. Their testimony as far as it went varied only in some minor details from that of the prosecution's witnesses. It was clearly shown that that which he urged the troops to do was in direct conflict with standing orders of the organization. The finding of guilty resolved the issues of fact conclusively against the accused. The only question warranting discussion is whether his acts constituted an attempt to create a mutiny within the meaning of the 66th Article of War.

The separate remarks of accused which are charged in the three specifications were made during the course of his one speech to the colored enlisted men. They should have been alleged in one specification as facts constituting but one cause of action. The pleader attempted to split one offense into three several separate offenses by alleging that accused counseled and advised the breach by the men of three separate orders of the company commander by means of three separate remarks. The charge against accused was that he attempted to excite and create a mutiny. The counsel and advice to violate the three separate orders were the means used by accused to achieve his ultimate purpose, viz, excitation of a mutiny. The form of the specifications violates a fundamental rule of pleading, viz, that one cause of action shall not be split into several causes of action (Winthrop's Military Law and Precedents - Reprint - p.143; MCM, 1928, par. 27, p. 17; Dig. Op. JAG, 1912-1940, sec.428(5), pp. 294, 295). In view of the findings of the court, however, the Board of Review may treat the three specifications as one specification to the end that but one offense is charged- not three separate offenses.

The above remarks are equally applicable to Specification 2, Charge II. The alleged remarks of accused were of the same nature as those set forth in the specifications of Charge I. They counseled and advised the violation of the company commander's order with respect to conduct of colored soldiers in their contact with military police.

This specification and the evidence supporting same will be considered in connection with Charge I and its specifications.

The 66th Article of War provides in pertinent part:

> "Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny * * * in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct" (Underscoring supplied).

Mutiny is defined as

> "Concerted insubordination, or concerted opposition or resistance to, or defiance of, lawful military authority, by two or more persons subject to such authority, with the intent to usurp, subvert, or override such authority, or to neutralize it for the time being" (MCM, 1917, par. 417, p.213; MCM, 1928, par.136, p.150; Dig.Op.JAG, 1912, XXII A, p.123; Winthrop's Military Law & Precedents - Reprint-p.578).

> "The opposition or resistance need not be active or violent. It thus may consist simply in a persistent refusal or omission, (with the intent above specified,) to obey orders or do duty" (Winthrop's Military Law & Precedents - Reprint - p.581; Southern Steamship Co. v. National Labor Relations Board, 316 US 31, 40-41, 86 L.Ed., 1246, 1256).

> "The intent which distinguishes mutiny * * * is the intent to resist lawful authority in combination with others. The intent to create a mutiny * * * may be declared in words, or, as in all other cases, it may be inferred from acts done or from the

surrounding circumstances. A single individual may harbor an intent to create a mutiny and may commit some overt act tending to create a mutiny * * * and so be guilty of an attempt to create a mutiny * * * whether he was joined by others or not, or whether a mutiny * * * actually followed or not (MCM, 1928, par.136a,p.151) (Underscoring supplied).

The proof required to establish the offense of attempting to create a mutiny is:

"(a) An act or acts of accused which proximately tended to create a certain intended (or actual) collective insubordination; (b) a specific intent to create a certain intended (or actual) collective insubordination; and (c) that the insubordination occurred or was intended to occur in a company, party, post, camp, detachment, guard, or other command in the Army of the United States" (Ibid).

The only reasonable inference to be drawn from accused's conduct was an intent to stir up or "create" collective insubordination in the troops that he was addressing. The intent was clearly shown by his words alleged in the specifications of Charge I and Specification 2 of Charge II. The accused committed an overt act in his attempt when he had the sergeant assemble the company for him and addressed them in the manner in which he did. All of the elements of the offense, including the necessary specific intent, as described above, were clearly proven beyond any reasonable doubt. The record is therefore legally sufficient to support the findings of guilty of Charge I and its specifications. Fortunately no collective insubordination followed, but such a result need not be shown in order to uphold the findings of guilty.

7. With reference to Specification 1, Charge II, it was clearly shown and not controverted by any competent evidence that the accused in his address to the assembled personnel of Company C used inflammatory and incendiary language tending to stir up racial prejudice and incite violence when he referred to other soldiers of the army as "damn die-hard Southerners" who were the cause of racial troubles, and advised his listeners to "beat the hell" out of white soldiers if assaulted by them instead of leaving the scene and seeking the nearest military policeman. It is obvious that such conduct was prejudicial "to good order and military discipline" and punishable under the 96th Article of War.

The conduct of the accused constituted a most flagrant violation of these Articles of War. The accused was a Chaplain charged by Army Regulations (AR 60-5) and the very nature of his office to promote "morality, religion and good order". Contrary to all principles of morality, religion and good order he deliberately urged the colored soldiers to disregard the military orders of their superiors and to commit acts of violence. He attempted to undermine their discipline in regard to working on Sundays. 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.

8. The charge sheet shows that accused is 33 years of age and that he was appointed a first lieutenant, Corps of Chaplains, Army of the United States, 17 August 1943. He was assigned to the 1313th Engineer General Service Regiment 1 October 1943. He had no prior service.

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

10. Dismissal is authorized for a violation of Article of War 66 or Article of War 96. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized by Article of War 42 and Cir.210, WD, 14 Sep 1943, sec.VI as amended.

[signature] Judge Advocate

[signature] Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 22 JUL 1944 To: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of First Lieutenant PHILLIP R. McCURDY (O-527443), Corps of Chaplains, 1313th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2729. For convenience of reference please place that number in brackets at the end of the order: (ETO 2729).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 60, ETO, 28 Jul 1944)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2736

17 JUL 1944

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND.
v.	Trial by GCM, convened at AAF Station 472, 24 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.
Private EDWARD C. DAVIS (36041187), 495th Service Squadron, 32nd Service Group	

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Edward C. Davis, 495th Service Squadron, 32nd Service Group, did, at the American Red Cross Club, at Salisbury, Wilts, England, on or about 7 March 1944, feloniously take, steal and carry away 12 pounds English money, value about $48.42, property of Private Thomas S. Conley, 581st Quartermaster Sales Company; four pounds English money, value about $16.14, property of Private Daniel Soule, 609th Ordnance Bast Bn; eight pounds English money, value about $32.28, property of Private Chester E. Hamilton, 1296th Military Police Company; 12 pounds English money, value about $48.42, property of Private Martin Trulik, Headquarters Maintenance Bn, 2nd Armored Division; and four pounds English money, value about $16.14, property of Private J. T. McCollum, 296th Engineer Combat Bn; all property of the aggregate value of about $161.40.

(362)

He pleaded not guilty to and was found guilty of the Charge and Specification, "except the figures '$161.40', substituting therefore the figures '96.84', and excepting the words and figures '12 pounds English money, value about $48.42, property of Private Thomas S. Conley, 581st Quartermaster Sales Company', and 'and four pounds English money, value about $16.14, property of Private Q. T. McCollum, 296th Engineer Combat Bn', and inserting the word 'and' before the words and figures '12 pounds English money, value about $48.42, property of Private Martin Trulik, Headquarters Maintenance Bn, 2nd Armored Division', of the Excepted words and figures not guilty, of the substituted and inserted words and figures Guilty". Evidence was introduced of three previous convictions, one by special court for unlawfully carrying away and damaging a bicycle, while drunk, in violation of Article of War 96; two by summary court for failing to report for roll call and absence without leave for one day, respectively, both in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The uncontradicted evidence shows that, at the time and place alleged, accused stole four, eight and 12 pounds, respectively, from Privates Daniel Soule, Chester E. Hamilton and Martin Trulik, by removing said sums from the pockets of their clothes in the night-time while they were asleep in the dormitory at the American Red Cross Club at Salisbury (R5-6, 14-22). He was detected in the act by an employee of the Club. Questioning of accused and of his awakened victims revealed accused's guilt so clearly that he flung the stolen money to the floor and fled (R6-7,10-11,15,20). He was pursued and apprehended (R24). On the same day, after due warning, he signed a full confession (R25; Ex.G-1).

4. No evidence was introduced by the defense. Accused, after being advised of his rights as to testifying, elected to remain silent (R30).

5. Although the sums stolen belonged to different persons, the larceny was a single one. "Thus, where a thief * * * goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification." (MCM, 1928, 149g, p.171; Dig. Op. JAG, 1912-1940, sec.428(14), p.298). Accused's possession was complete and the transposition of the loot from his victims' pockets to his own involved sufficient movement to constitute the carrying away alleged in the Specification. The record sustains the court's findings of guilty.

6. The charge sheet shows that accused is 27 years of age. He was inducted at Fort Sheridan, Illinois, 15 July 1941, to serve for the duration of the war plus six months. He had no prior service.

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

8. Confinement in a penitentiary is authorized for the offense of larceny of $50.00 or more (AW 42; 18 USCA 466). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir. 229, WD, 8 June 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

(364)

1st Ind.

17 JUL 1944

WD, Branch Office TJAG, with ETOUSA. TO: Commanding General, IX Air Force Service Command, APO 149, U. S. Army.

1. In the case of Private EDWARD C. DAVIS (36041187), 495th Service Squadron, 32nd Service Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2736. For convenience of reference please place that number in brackets at the end of the order: (ETO 2736).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2744

26 JUN 1944

U N I T E D S T A T E S v. Private JOSEPH S. HENRY (36241570), Detachment "D", Casual Pool, 10th Replacement Depot.	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Newport, Monmouthshire, Wales, 15 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for seven years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Joseph S. Henry, Detachment D, Casual Pool, 10th Replacement Depot, did, at Bristol, Bristol, England, on or about 17 February, 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Private George L. White, 29th Infantry Division, the property of said Private White, a leather wallet containing about ten pounds (£10), lawful money of the United Kingdom, of an exchange value of about forty (40) dollars and thirty-five (35) cents.

Specification 2: In that * * *, did, at Bristol, Bristol, England, on or about 17 February, 1944, with intent to do him bodily harm, commit an assault upon Private George L. White, 29th Infantry Division, by cutting him about the face and head with a dangerous instrument, to-wit: a pocket knife.

He pleaded guilty to and was found guilty of the Charge and specifications. Evidence was introduced of two previous convictions by summary court for being drunk while on kitchen police duty and failing to repair for guard mount in violation of Articles of War 85 and 61 respectively. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence but reduced the period of confinement to seven years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Accused, weighing 205 pounds, waylaid and brutally assaulted an American infantryman weighing 130 pounds. The two were not acquainted but had engaged in a brief verbal bar-room argument about an hour before the attack. Accused, employing his pocket knife, inflicted 25 cuts on his victim's head and face, robbed him of his wallet containing £10, and left him bleeding and unconscious, by the side of the road (R8-10,16). Accused, who was an Indian, testified that in the course of their argument his victim called him a red-skinned son-of-a-bitch "which I thought was an insult to me". After the "pubs" closed the accused encountered his victim outside. The latter, resuming the argument, hit accused on the shoulder. The accused started hitting him back whereupon, being drunk his excitement overcame him and obliterated his memory. After he returned to his barracks, where he washed the blood from his hands, he discovered that he had some money for which he could not account (R15-16).

4. The charge sheet shows that accused is 25 years four months of age and that he was inducted at Milwaukee, Wisconsin, 20 May 1944, to serve for the duration of the war plus six months. No prior service is shown.

5. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence (As to robbery: CM ETO 78, Watts; as to assault with a dangerous weapon with intent to do bodily harm: CM ETO 804, Ogletree et al; CM ETO 531, McLurkin; CM ETO 1585, Houseworth).

6. Confinement in a penitentiary is authorized for the offenses of robbery and assault with a dangerous weapon with intent to do bodily harm (AW 42; secs.276,284,Federal Criminal Code (18 U.S.C.A. 455,463); sec.335, Federal Criminal Code (18 U.S.C.A. 541); Act June 14, 1941, c.204, 55 Stat. 252 (18 U.S.C.A. 753f); Cf: U.S. v. Sloan, 31 Fed. Sup.327). As accused is under 31 years of age and the sentence is not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir. 291, WD, 10 Nov 1943, sec.V, par.3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 26 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S. Army.

1. In the case of Private JOSEPH S. HENRY (36241570), Detachment "D", Casual Pool, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2744. For convenience of reference please place that number in brackets at the end of the order: (ETO 2744).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

30 JUN 1944

ETO 2747

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, redesignated WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private SAMUEL KRATZMAN (12039185), Company A, 834th Engineer Aviation Battalion.	Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 30 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 96th Article of War.
Specification: In that Private Samuel (NMI) Kratzman, Company A, 834th Engineer Aviation Battalion, having received a lawful order from Technician Fifth Grade James V. Villani Junior to report to the company supply tent for work, the said Technician Fifth Grade Villani being in the execution of his office, did, at USAAF Station 422, Great Barrington, Gloucestershire, England, United States Army, on or about 17 May 1944, fail to obey the same.

CHARGE II: Violation of the 64th Article of War.
Specification 1: In that * * *, having received a lawful command from First Lieutenant Samuel C. Carpenter, his superior officer, to draw individual equipment from the supply tent, to

pack his duffle bag and place it on the kitchen truck for movement, did, at USAAF Station 422, Great Barrington, Gloustershire (sic), England, United States Army, on or about 20 May 1944, willfully disobey the same.

Specification 2: In that * * *, having received a lawful command from First Lieutenant Samuel C. Carpenter, his superior officer, to entruck for movement to Marshalling Area, did, at USAAF Station 422, Great Barrington, Gloustershire (sic), England, United States Army, on or about 21 May 1944, willfully disobey the same.

He pleaded not guilty to Charge I and its Specification. He refused to plead to Charge II and its specifications and the court directed that pleas of not guilty thereto be entered. Three-fourths of the members of the court present when the vote was taken concurring, he was found guilty of all charges and specifications. Evidence was introduced of two previous convictions by special courts-martial: one for absence without leave for three and one-half hours and failure to obey the lawful orders of a non-commissioned officer and the company commander in violation of the 61st and 96th Articles of War, respectively, and one for absence without leave for one hour and forty-five minutes and unlawfully carrying concealed weapons, viz: two knives, in violation of the 61st and 96th Articles of War, respectively. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved the sentence, reduced the period of confinement to 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Specification 2, Charge II alleges that accused:

"having received a lawful command from First Lieutenant Samuel C. Carpenter, his superior officer, to entruck for movement to Marshalling Area, did, * * * on or about 21 May 1944 willfully disobey the same".

The proof of said specification was as follows:

First Lieutenant Samuel C. Carpenter, Marshalling Camp Number 71, 834th Engineer Aviation Battalion, testified:

"We were ordered to move about 8:00 o'clock. That was the original time to move. I thought I would check and see if the accused had his duffle bag packed and I found him out of his tent. However, at this time it was just

after breakfast and I thought him to be in the neighboring area because he had an hour to do this. I found him in the tent area S, company area, so I told him to go back to his tent and get his equipment packed ready to move. He replied, 'I am not going along.' However, he did go back to his tent. I again ordered him to pack his equipment. He refused to do so again. Seeing that he was not going to follow my orders, I instructed several of the men there to put him on the truck in case he did not go. I ordered him again in the presence of the men to pack his equipment in the duffle bag. He refused to do so. I had the men pack his bags and had them take them down to the truck. It was almost time to move out so I instructed the men to bring him by force if necessary and put him on the truck. This time they dragged him or forced him the first few yards, I'd say approximately ten yards, and after this he went on without further struggle. They lead him down to the truck after this." (R8-9).

Private George Sluko, Company A, 834th Engineer Aviation Battalion testified:

"Q. Calling your attention to the 21st of May 1944, did the accused come to your attention?
A. Yes sir.
Q. Will you explain under what circumstances?
A. I had been across the tent where Private Kratzman stayed and I heard the conversation of the Lieutenant going on. I looked over and heard Private Kratzman refusing a direct order from the Lieutenant.
Q. Will you state what that order was?
A. The Lieutenant told Private Kratzman to dress up, pack his duffle bag ready to go. Private Kratzman refused that order and the Lieutenant then told us to take him out and to get his stuff packed complete in the duffle bag ready for shipment. So with the boys who were over there, we took him out when he refused to go and after about 20 feet, he decided to go without struggling.
Q. You say 'we'. Who do you mean by 'we?'
A. I mean myself and three other soldiers.
Q. That was at the direction of Lieutenant Carpenter?
A. Yes sir.

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Q. Do you recall what words the accused used to the Lieutenant?
A. Private Kratzman said that he wouldn't soldier in this company or for Lieutenant Carpenter." (R13).

Accused is charged with willful disobedience of Lieutenant Carpenter's order "to entruck". The word "entruck" is not defined in Words and Phrases, Permanent Edition, Bouvier's Law Dictionary, Black's Law Dictionary or Webster's New International Dictionary, Second Edition. However, the word "entrain" is defined by Webster's Dictionary, supra as meaning

"To put or go aboard a railroad train" (p.854).

The word "entruck" is an adaptation of the word "entrain" and is applied to a motor vehicle commonly called a "truck". When a person is ordered to "entruck" he is ordered to go aboard a truck. It can have no other meaning in usual and ordinary parlance.

It is manifest that the order given by Lieutenant Carpenter to accused "to pack his equipment in the duffle bag", is an order distinctly different than the one alleged, viz: "to entruck". There is therefore a fatal variance in proof, (CM 134518, Stone; CM ETO 314, Mason; CM 120937, Dig.Op.JAG, 1912-1940, sec.422(5), p.285) and the record is legally insufficient to support the findings of guilty of Specification 2, Charge II.

4. Accused is 33 years 11 months of age. He enlisted 24 December 1941 at New York City, New York, for the duration of the war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial except as herein noted. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge II, legally sufficient to support the findings of guilty of Charge I and its Specification, Specification 1 of Charge II and Charge II, and legally sufficient to support the sentence.

6. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized by AW 42 and Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 30 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S. Army.

1. In the case of Private SAMUEL KRATZMAN (12039185), Company A, 834th Engineer Aviation Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2, Charge II, legally sufficient to support the findings of guilty of Charge I and its Specification, Specification 1, Charge II and Charge II, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The evidence shows that this accused is a recalcitrant, unruly soldier, who should be severely disciplined. However, there is nothing in the record of trial or accompanying papers that indicates that he possesses no salvage value. Neither the offenses in the instant case nor those upon which his previous convictions were based involve moral turpitude. I believe that the Government should preserve the right to insist that he perform military service instead of incarcerating him in the United States freed from the dangers and hardship of combat. The policies of this theater having for their purpose the conservation of man-power also require his retention in this theater where, after he has undergone disciplinary punishment, he will be available for service in combat zones. Accordingly, I recommend that the place of confinement be changed to Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England, and that the dishonorable discharge be suspended until the soldier's release from confinement. Supplemental action should be forwarded to this office to attach to the record of trial.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2747. For convenience of reference please place that number in brackets at the end of the order: (ETO 2747).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

- 1 JUL 1944

ETO 2753

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, redesignated WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private WILLIAM J. SETZER (35323619), Company A, 61st Medical Battalion, Motorized, and Private FRED SHORTRIDGE (35644305), 559th Quartermaster Railhead Company.	Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 30 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio. (EACH ACCUSED).

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

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

2. Accused, with their consent, were tried together upon the following charges and specifications:

SETZER

CHARGE I: Violation of the 69th Article of War.
Specification: In that Private William J. Setzer, Company A, 61st Medical Battalion, Mtz, having been duly placed in confinement in stockade, 5th Engineer Special Brigade, on or about 3 February 1944, did, at Camp Mynydd Lliw, Wales, on or about 5 April 1944 escape from said confinement before he was set at liberty by proper authority.

CHARGE II: Violation of the 96th Article of War.
Specification: In that * * *, did, in conjunction

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with Private Fred Shortridge, 559th Quartermaster Railhead Company, at Camp Mynydd, Lliw, Wales, on or about 5 April 1944, without authority, wrongfully take and carry away one Willys, ¼ ton truck 4x4, value about $850, property of the United States.

CHARGE III: Violation of the 94th Article of War.
Specification: In that * * *, did, at Camp Singleton Park, Wales, on or about 5 April 1944, feloniously take, steal, and carry away one pair trousers wool, OD, $4.35, one shirt, wool, OD, $4.22, one coat wool, serge, OD, $10.53, one cap, garrison, OD, .82¢, one belt, web, waist, .25¢ and one necktie mohair, OD, .30¢, total value of about $20.47, property of the United States furnished and intended for the military service thereof.

SHORTRIDGE

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Fred Shortridge, 559th Quartermaster Railhead Company, did, without proper leave, absent himself from his station at Camp Scurlage Castle, Wales, from about 15 March 1944 to about 17 March 1944.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * *, having been duly placed in confinement in stockade, 5th Engineer Special Brigade, on or about 18 March 1944, did, at Camp Mynydd Lliw, Wales, on or about 5 April 1944 escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * *, did, in conjunction with Private William J. Setzer, 61st Medical Battalion, (Mtz), at Camp Mynydd Lliw, Wales, on or about 5 April 1944, without authority, wrongfully take and carry away one Willys, ¼-ton truck 4x4, value about $850.00, property of the United States.

CHARGE IV: Violation of the 94th Article of War.
Specification: In that * * *, did, at Camp Singleton Park, Wales, on or about 5 April 1944, feloniously take, steal, and carry away one pair

trousers wool, OD, $4.35, one shirt, wool, OD, $4.22, one coat wool, serge, OD, $10.53, one cap, garrison, OD, .82¢, one belt, web, waist, .25¢ and one necktie mohair, OD, .30¢, total value of about $20.47, property of the United States furnished and intended for the military service thereof.

At the commencement of the trial, before the arraignment, the accused were asked if they objected to beingtried in common trial, to which each replied in the negative. Each pleaded guilty to and was found guilty of the charges and specifications against him. Evidence was introduced of two previous convictions of accused Setzer by special court-martial, one for absence without leave for 20 days in violation of Article of War 61 and one for insubordination to non-commissioned officers and breaking restriction in violation of Article of War 96; and of three previous convictions of accused Shortridge, one by summary court and two by special court-martial for absence without leave for 2, 45 and 50 days, respectively, in violation of Article of War 61. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, Setzer for 20 years and Shortridge for 25 years. The reviewing authority approved only so much of the sentence of Setzer as provides for dishonorable discharge, total forfeitures and confinement at hard labor for five years, approved the sentence as to Shortridge but reduced the period of confinement to five years, and designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement for each accused.

3. The evidence shows that accused Shortridge was absent without leave from his station from 15 to 17 March 1944 (R10,Ex.3). On 5 April 1944 both accused were confined at Camp Mynydd Lliw, Wales in a stockade as prisoners. On the evening of that date they were taken to a mess hall in company with other prisoners for supper. While in the mess hall they left the hall without authority. Outside of the hall they took a parked "jeep". Setzer acted as driver. They left camp through the main gate after the sentry failed to halt them, and drove to Swansea, South Wales, where they eluded a civil constable who attempted to intercept them. The "jeep" was abandoned by them at Town Hall, Swansea. They proceeded to Singleton Park, a United States Army installation, where they gained access by climbing a fence. Entering a tent, each accused took and carried away an army uniform and the accessories, described in specifications of Charge III, Setzer, and Charge IV, Shortridge. After securing the army uniforms they returned to Swansea, where they visited public houses and consumed intoxicating liquor. On the evening of 5 April they traveled by bus to Pontardulais but returned to Swansea on the morning of 6 April 1944, and that evening they were apprehended by the military police (R9, Pros.Exs.1,2).

After due explanation of their rights, accused Shortridge

elected to remain silent. Accused Setzer made an unsworn statement in which he expressed contrition for his admitted guilt of the charges against him, his willingness to take his punishment and desire to return to his organization, with the resolve to do his best if permitted to continue in the service and the hope that there was some way in which he could make restitution (R11).

4. The charge sheets show that Setzer is 20 years seven months of age and was inducted at Cleveland, Ohio 3 September 1942; that Shortridge is 19 years five months of age and was inducted at Huntington, West Virginia, 15 December 1942; both to serve for the duration of the war plus six months. No prior service of Setzer is shown; Shortridge had no prior service.

5. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences as approved by the reviewing authority.

6. 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, by Article of War 42, and sec.22-2204 (6;62), District of Columbia Code. As each accused is under 31 years of age and neither sentence is for more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio is authorized (Cir.291, WD, 10 Nov 1943, sec.V, par.3a).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 1 JUL 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S. Army.

1. In the case of Private WILLIAM J. SETZER (35323619), Company A, 61st Medical Battalion, Motorized, and Private FRED SHORTRIDGE (35644305), 559th Quartermaster Railhead Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as approved by the reviewing authority. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. The records of the accused indicate that their value to the military service has been small and that they are recalcitrant, irresponsible soldiers requiring severe disciplinary treatment. The offenses of which they have presently been found guilty, while of a serious nature, do not exhibit a high degree of criminality. I believe that the Government should not permit them to escape from the hazards and hardships of combat, which would result from their return to the United States and incarceration in the Federal Reformatory. Under the policy prevailing in this theater, having for its purpose the conservation of man power, I recommend as to each accused that the dishonorable discharge be suspended until his release from confinement and that the place of confinement be changed to Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England. Supplemental action should be returned to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2753. For convenience of reference please place that number in brackets at the end of the order: (ETO 2753).

E. C. McNEIL,
Brigadier General, United States Army.
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2755

14 JUL 1944

UNITED STATES)	XIX CORPS.
)	
v.)	Trial by G.C.M., convened at
)	Knook Camp, Wiltshire, England,
Second Lieutenant RICHARD W.)	25 May 1944. Sentence: Dis-
HART (0-1057092), Company "B",)	missal, suspended.
92nd Chemical Battalion.)	

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.
Specification: In that 2nd Lieutenant Richard W. Hart, Company "B", 92nd Chemical Battalion, did, without proper leave, absent himself from his post and duties at Camp Brockley, Somerset, England from about 1400 1 April 1944 to about 1900 20 April 1944.

ADDITIONAL CHARGE: Violation of the 95th Article of War.
Specification 1: (Finding of not guilty)
Specification 2: (Finding of not guilty)

He pleaded guilty to the Charge and its Specification but when the effect of said plea was explained to him, he changed his plea to one of not guilty. He pleaded not guilty to the Additional Charge and its specifications. He was found guilty of the Charge and its Specification and not guilty of the Additional Charge and its specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General XIX Corps, approved the sentence and forwarded the record of trial under

Article of War 48 with the recommendation that in view of this officer's excellent combat record, the execution of the sentence be suspended. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but ordered that owing to special circumstances in this case, the execution thereof be suspended.

The proceedings were published in General Court-Martial Orders No. 41, Headquarters European Theater of Operations, dated 13 June 1944.

3. The evidence against accused was in substance as follows: On 31 March 1944, accused was stationed at Camp Brockley (R7) about eight miles from Bristol (R20), as a platoon executive officer (R11,13). He informed his commanding officer that he planned to go to the 56th General Hospital to have an old injury looked at. Accused mentioned also the Orthopedic Hospital. On 1 April accused informed the same officer he was going to the 56th General Hospital to have some X-rays made of his arm and that he would probably be there for three or four days. Three morning reports of accused's unit were introduced in evidence, one for 1 April 1944 showing accused "Dy to Hosp LD (56th Gen Hosp)", one for 8 April showing entry "To correct MR remark of 1 Apr 44 should read Dy to AWOL 1000", and one for 20 April showing accused "Fr AWOL to arr in qrs 1910". Mail for accused accumulated and on 6 April an officer was sent to the hospital with the mail. A stipulation between accused, his counsel and the prosecution was introduced in evidence to the effect that accused did not report to the Orthopedic Clinic, 56th General Hospital, on 31 March or to the 56th General Hospital at any time on or between 1 April and 20 April 1944 (R11).

4. Accused was sworn as a defense witness. He stated that he asked for and was given permission to go to the hospital on 31 March but found his unit short of officers at the time so did not go. On 1 April he went to the hospital (R15). His driver left him in the center of Bristol (R16) and accused then went back out to the hospital to leave some mail for one of his unit's officers (R17), and from there he went to the railroad station. He had received some mail which he read enroute to the hospital. One letter, admitted in evidence as Defense Ex. "A" (R15) was from an officer stationed in London asking accused to come to London for an interview in reference to an assignment elsewhere. Accused proceeded to London (R15) and waited for news on this change of assignment. He did not intend to remain away. He made no attempt to get in touch with his organization between the period of 1 April and 20 April (R20). He went to the infirmary on his return to his station on 20 April and informed them that he was reporting back.

His absence without leave for the time charged is fully admitted by accused as well as clearly proven otherwise.

5. The charge sheet shows accused to be 26 years eight months of age. He enlisted at Chicago, Illinois, 15 September 1940. He was honorably discharged 7 July 1943 and commissioned in the Army of the United States 8 July 1943.

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG, with ETOUSA. 14 JUL 1944 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Second Lieutenant RICHARD W. HART (0-1057092), Company "B", 92nd Chemical Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Attached to the record of trial are copies of your GCMO No. 41, 13 June 1944, suspending execution of the sentence.

2. The original holding and my indorsement thereon should be returned to this office.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

19 JUL 1944

ETO 2759

U N I T E D S T A T E S)	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private First Class WILLIE W. DAVIS (33519795), 217th Port Company, 386th Port Battalion.)	Trial by GCM, convened at Raglan Barracks, Plymouth, Devonshire, England, 22 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the Ninety-Sixth Article of War.
Specification: In that Private First Class Willie W. Davis, 217th Port Company, 386th Port Battalion, did, at Carn Brea, Cornwall, England, during the month of April, 1944, unlawfully and feloniously have carnal knowledge of Hilda Margaret Rhodes, a female under sixteen (16) years of age.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence ofprevious convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for 20 years.

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The reviewing authority approved only so much of the sentence as provides for the soldier to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of 15 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence introduced by the prosecution showed that accused was a Private First Class, 217th Port Company, APO 150 (R7). Hilda Margaret Rhodes, shown by her mother to be nine years of age (R9), was sworn as a witness and afterwards was asked if she understood to take an oath such as she just had taken she would tell the truth and "must not break that promise". Answering in the affirmative, she proceeded to testify. She lived at Carn Brea, Cornwall. She knew accused. "He used to come to our house", she said. One day in April, "just a little before Good Friday" she and accused went to a field. He told her to sit down, to lay down; and he put her on her back and took down her knickers. Then he opened his trousers, took out his penis and got on top of her. He put it "into" her. She could feel it inside, but it did not hurt. She then pulled up her knickers, called the others, her little sister and a little colored girl who were in the vicinity, and went home. On cross-examination, she was "sure he had it inside" of her (R7-9).

4. The rights of accused having been explained to him, he elected to remain silent. He introduced no defense.

5. The testimony of the nine-year old child, uncorroborated but uncontradicted, showed an act of sexual intercourse between her and accused. Since the witness was below the age of consent, the charge being in the nature of statutory rape: intercourse with a female under an age arbitrarily fixed by statute, laid under Article of War 96, it was not required that the prosecution show lack of consent and the use of force. Carnal knowledge of a female under 16 years of age by a soldier in the military service of the United States is conduct discreditable to the service and, as such, is a violation of Article of War 96 (MCM, 1928, par. 152b, p. 188; CM 211420 McDonald; CM ETO 2620, Tolbert and Jackson). The conviction, as pointed out, rested solely on the testimony of a nine-year old child. This witness was sworn, after which the Trial Judge Advocate asked her, in effect, if she knew that her oath required that she tell the truth. The acceptance of her testimony by the court was a matter of discretion based upon her apparent understanding of the moral importance of telling the truth. This understanding may be determined without preliminary examination but by the coherence

and intelligence of the witness' testimony (MCM, 1928, par. 120, p. 124; Dig. Op. JAG 1912-1940, sec. 395(58), p. 238, CM 123055 (1918), CM 141609 (1920), CM 174484 (1927), CM 192609 (1930)). The record does not indicate that there was an abuse of discretion by the court in accepting the testimony of the child in this case.

6. The charge sheet shows accused is 28 years 11 months of age. He was inducted into the Army 17 December 1942. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement for 15 years is authorized on conviction of the offense of carnal knowledge of a female under 16 years of age (AW 42; sec. 279, Federal Criminal Code (18 USCA 458); D. C. Code, sec. 22-2801 (6:32), p. 536). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; Cir. 229, WD, 8 June 1944, sec. II, pars. 1b (4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG, with ETOUSA. 19 JUL 1944 TO: Commanding General, Southern Base Section, Communications Zone, ETOUSA, APO 519, U. S. Army.

1. In the case of Private First Class WILLIE W. DAVIS (33519795), 217th Port Company, 386th Port Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published orders are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2759. For convenience of reference please place that number in brackets at the end of the order: (ETO 2759).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2764

4 JUL 1944

U N I T E D S T A T E S)	FIRST UNITED STATES ARMY.
)	
v.)	Trial by GCM, convened at Bristol,
)	Gloucestershire, England, 31 May
Private ARTHUR B. HUFFINE)	1944. Sentence: Dishonorable dis-
(14056596), 432nd Quarter-)	charge, total forfeitures, and con-
master Troop Transport)	finement at hard labor for ten years.
Company.)	The Eastern Branch, United States
)	Disciplinary Barracks, Greenhaven,
)	New York.

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

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

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

CHARGE: Violation of the 64th Article of War.
Specification 1: In that Private Arthur B. Huffine, 432nd Quartermaster Troop Transport Company, having received a lawful command from 1st Lt., Clifton S. Crews, 432nd Quartermaster Troop Transport Company, his superior Officer, to report for Guard Duty, did at Somerford Common, Wiltshire, on or about 27 April 1944 willfully disobey the same.
Specification 2: In that * * *, having received a lawful command from 1st Lt. John L. Gaskill, 432nd Quartermaster Troop Transport Company, his superior Officer to report to the Camp Guardhouse did at Charlton Park, Wiltshire on or about 27 April 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by special court-martial for an assault with intent to do bodily harm and disobed-

ience of a lawful command of his superior officer in violation of the 93rd and 96th Articles of War. He was sentenced to be dishonorably the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The competent evidence for the prosecution showed that the accused on 27 April 1944 was a member of the 432nd Quartermaster Troop Transport Company on bivouac at Somerford Common, five miles from its station at Charlton Park, Wiltshire, England (R7). Accused had been on guard the night of the 26th of April acting as a runner, and he was designated for guard detail commencing at 6:30 p.m. on 27 April (R8,9,10). The corporal of the guard reported to Lieutenant Clifton S. Crews, acting company commander, that the accused refused to go on guard duty because he had been on guard during the preceding night (R8). About 6:30 or 7:00 p.m. Lieutenant Crews asked accused why he refused to go on guard. Accused informed him it was because he was a runner on the previous night and he did not think it right that he should be required to go on guard that night. Lieutenant Crews then ordered him to go on guard and explained that he was giving a direct order. Accused said he was not going on guard and he did not care what Crews did with him. The officer immediately placed him under arrest and directed First Sergeant Thomas Mason to take him back to Charlton Park and place him in the guardhouse (R9-11).

Sergeant Mason escorted accused to Charlton Park (R14), but on the way met Lieutenant John L. Gaskill, the company commander, who ordered the noncommissioned officer to "take him on in * * * but not to have him placed in the guard house" (R15-16). Sergeant Mason then proceeded with accused to Charlton Park Camp and placed accused in a barracks under guard of Technician Fourth Grade Walter Harper (R14,16). Lieutenant Gaskill returned to Charlton Park shortly thereafter and called the accused and his guard, Harper, outside of the barracks and informed accused that he was going to have him placed in arrest in the guardhouse (R17). The accused asked to "see the Major". The company commander refused the request and directed him "to come with me to the guard house" (R17). Accused repeated that "he was going to see the Major". The guardhouse was 75 yards distant. Lieutenant Gaskill then started to walk in the direction of the guardhouse and accused followed him to a point on the sidewalk near the barracks, where accused stopped (R18). Lieutenant Gaskill

> "* * * ordered him several times to come with me and he wouldn't budge off the walk. /R18/ * * * he said he wasn't coming, said he was going to see the Major" /R19/.

The officer walked across the road to the guardhouse. At this point Harper and Sergeant Bennett approached accused. Bennett informed accused he was "making a mistake" (R16). Accused arrived at the guardhouse between two and four minutes after the officer in company with Harper and Bennett (R15-19). He was then taken to the military police headquarters where he was "booked".

4. (a) - With respect to Specification 1, the evidence shows that accused was listed for guard duty and that his tour commenced at 6:30 p.m. on 27 April 1944. Between 6:30 and 7:00 p.m., Lieutenant Crews, his superior officer, gave him a direct and specific order to go on guard duty. Accused refused to obey the order. The offense was proved by substantial evidence (CM ETO 2644, Pointer; CM ETO 1096, Stringer; CM ETO 1232, Baxter).

(b) - Specification 2 charges that accused

> "having received a lawful command from 1st Lt. John L. Gaskill * * *, his superior Officer to report to the Camp Guardhouse did * * *, willfully disobey the same."

The evidence shows that Lieutenant Gaskill informed accused he was going to have him placed in arrest in the guardhouse and instructed him "to come with me to the guardhouse" which was located about 75 yards distant. The officer proceeded to the guardhouse followed part of the distance by accused who stopped and, although ordered several times to proceed, informed the officer "he wasn't coming" and said he was "going to see the Major". Lieutenant Gaskill walked across the road to the guardhouse. Accused finally did go to the guardhouse and arrived two to four minutes after Lieutenant Gaskill who then "proceeded to do business booking the prisoner". Whether accused went to the guardhouse under compulsion because of the presence of the armed guard, Harper, or because he accepted Bennett's advice is immaterial. 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.

> "The evidence most favorable to the prosecution shows merely that accused was 'slow' in his obedience although he did obey. It is conceivable that alacrity and promptness may, on occasion, be of the essence of a lawful command by a superior officer but in the situation here presented there was no necessity for haste in obedience to the order and however tardily accused acted in responding to the lawful command indeed it cannot be said that there was a willful dis-

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obedience contemplated by Article of War 64; indeed, under the facts, there was no willful failure to obey in any respect but a compliance with the order, however slowly and reluctantly performed" (CM 236888 (1943), Bull JAG, Aug 1943, Vol II, No 8, sec 422(5), p 308).

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".

The record is legally insufficient to support the findings of guilty of Specification 2 of the Charge.

5. The charge sheet shows that the accused is 21 years of age and enlisted at Fort McPherson, Georgia 30 May 1941 to serve for three years. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial except as herein noted. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 2, legally sufficient to support the findings of guilty of Specification 1 and the Charge and legally sufficient to support the sentence.

7. Designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement is authorized (AW 42; Cir 210, WD, 14 Sep 1943, sec VI, par 2a, as amended by Cir 331, WD, 21 Dec 1943, sec II, par 2).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind

WD, Branch Office TJAG, with ETOUSA. - 4 JUL 1944 TO: Commanding General, First United States Army, APO 230, U S Army.

1. In the case of Private ARTHUR B. HUFFINE (14056596), 432nd Quartermaster Troop Transport Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2, legally sufficient to support the findings of guilty of Specification 1 and the Charge and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I believe the ends of justice will be achieved and proper disciplinary action obtained by confinement of accused in Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England, with suspension of the dishonorable discharge until the soldier's release from confinement. I recommend such action. While his offense is not to be condoned, it is not of the type that requires return to the United States unless and until he has demonstrated, while in confinement, his further incorrigibility and lack of value to the service. The government should not, in my opinion, forego his services as a soldier and afford him immunity from combat hazards and risks, resultant upon his confinement in the United States. In the event you agree with this recommendation your supplemental action should be forwarded to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2764. For convenience of reference please place that number in brackets at the end of the order: (ETO 2764).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 2765

19 JUL 1944

UNITED STATES	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private ROBERT L. DeVOL (35412073), 187th Quartermaster Depot Company (Supply).	Trial by GCM, convened at Yeovil, Somerset, England, 2 June 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 18 months. The Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Robert L. DeVol, 187th Quartermaster Depot Company (Supply), did, at Cross Keys Camp, Taunton, Somerset, England, on or about 14 May 1944, feloniously take, steal and carry away about twenty-four (24) pounds, British currency, of the equivalent value of about ninety-six dollars, seventy-two cents ($96.72) the property of Joseph E. Wright.

He pleaded guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for a period of 18 months. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of

Article of War 50½.

3. The evidence for the prosecution shows that Private Joseph E. Wright, 187th Quartermaster Depot Company, had approximately 29 pounds (English currency) stolen from a wallet in his pants pocket at Depot G-50, Taunton, Somerset, on 14 May 1944, while he was asleep in barracks, between 0700 and 1520 hours. Wright had hung his trousers on the edge of his bed. He was awakened at the last mentioned hour and discovered his loss. He immediately reported the theft to Captain Hagen (R6,7). Captain Marvin E.Hagen, commanding officer of Wright's company, after talking to Wright about 3 o'clock the same day, went to the latter's barracks where he found accused with four others. A search of accused disclosed 27 pounds in his possession (R7,8). On the same day, accused stated to Technical Sergeant Jack H. Cohen, Criminal Investigation Department Agent, after the former's rights had been fully explained, that he (accused) had seen a wallet hanging out of a pair of trousers on a bed in the barracks where he had been doing some painting that day, and that he had taken all the bills he found in the wallet. He said he did not know how much he took but he had about three pounds of his own.

4. Accused did not testify and no evidence was introduced in his behalf.

5. Thus, in addition to accused's plea of guilty, it was shown that Private Wright had a sum amounting to nearly 29 pounds stolen at the time and place alleged in the Specification. At about the same time and at the place of the theft, 27 pounds were found on the person of accused who thereupon admitted that he had taken 24 pounds from awallet in the barracks in question. The Specification alleged the theft of 24 pounds in English currency, which is the equivalent of about ninety-six dollars seventy-two cents ($96.72) in American money.

6. The court fully explained to accused the effect of his plea of guilty and of his right to change his plea. Accused did not change his plea. 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 1266, Shipman; CM ETO 1588, Moseff; CM ETO 2776, Kuest).

7. The charge sheet shows that accused is 28 years old. He was inducted 30 July 1942 under the Selective Service Act.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Penitentiary confinement is authorized for larceny of over $50.00 (AW 42; sec.287, Federal Criminal Code (18 USCA 466); CM ETO 2409, Cummings). As accused

is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized. (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

WD, Branch Office TJAG, with ETOUSA. 19 JUL 1944 TO: Commanding General, Southern Base Section, Communications Zone, ETOUSA, APO 519, U. S. Army.

1. In the case of Private ROBERT L. DeVOL (35413073), 187th Quartermaster Depot Company (Supply), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Accused has served two years and has no previous convictions. The crime was one of impulse and was not planned. There is nothing in the record or accompanying papers to indicate that he is not rehabilitable. In view of the short sentence and the theater policy for salvage of manpower, this prisoner should not be returned to the United States unless found unfit for service after further study and a term of confinement at the Disciplinary Training Center. It is therefore recommended that the dishonorable discharge be suspended and Disciplinary Training Center 2912 be designated as the place of confinement. If this is done, the supplementary action should be forwarded for attachment to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2765. For convenience of reference please place that number in brackets at the end of the order: (ETO 2765).

E. C. McNEIL.
Brigadier General, United States Army,
Assistant Judge Advocate General.

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BY REGINALD C. MILLER, COL.
JAGC, EXEC. ON 26 FEB. 52