E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 1543
CM ETO 2444

VOLS. 5-6

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 6 B.R. (ETD)

CM ETO 1921 - CM ETO 2444

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

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 6 B.R. (ETO)

including

CM ETO 1921 - CM ETO 2444

(1944)

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

BOARD OF REVIEW

ETO 1921

U N I T E D S T A T E S	9TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Cefalu, Sicily, 22 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. NATOUSA Disciplinary Training Center, Casablanca, French Morocco.
Private GARRETT KING (15054073), Company "A", 39th Infantry.	

OPINION 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 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 which submits this, its opinion, 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 58th Article of War.
Specification: In that Private Garrett King, Company "A", 39th Infantry, did, at French North Africa, on or about July 8, 1943, desert the military service of the United States by absenting himself without proper authority from his organization located 5 miles west of Bizerte, French North Africa, with intent to avoid hazardous duty, to wit: "Action against the enemy", and did remain absent in desertion until he was apprehended at Setif, French North Africa by the 299th M.P.Company, on or about July 15, 1943.

He pleaded not guilty to and was found guilty of the Charge and 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. 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 findings of guilty of the Specification of the Charge and the Charge as involved a finding of guilty of desertion at the time and place and under the circumstances as alleged and terminated in a manner not proven at the time and place alleged, approved the sentence, remitted ten years of the confinement imposed, ordered the sentence executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated NATOUSA Disciplinary Training Center, Casablanca, French Morocco, as the place of confinement.

The result of trial was promulgated in General Court-Martial Orders No. 75, Headquarters 9th Infantry Division, APO 9 dated 28 March 1944.

3. Evidence for the prosecution is substantially as follows:

First Lieutenant Ralph G. Edgar testified that immediately prior to 8 July 1943 he was executive officer of Company "A", 39th Infantry. Accused was a member of said company (R7) which was stationed at a staging area near Bizerte (French North Africa). "Indications pointed that we would soon be in combat again," and that it was a matter of common knowledge in the company. After accused "was reported absent at the reveille report of July 8th," a search was made of the area and it was revealed that he had taken his "O.D.'s," and toilet articles, but had left his combat equipment behind. So far as witness knew, accused did not have permission to be absent from his organization, which after 8 July went from Bizerte to Licata, Sicily without him, and engaged in combat in the Sicilian campaign. At no time during this combat was accused present with his organization. Witness next saw him about 15 August after the combat was completed (R8).

First Sergeant James H. George testified that on or about 8 July he was First Sergeant of Company "A", 39th Infantry, which, in the early part of July was stationed at Bizerte because "it was a port of embarkation," and that his understanding was that "we were going some place, * * * combat duty." "One evening" after retreat, the Battalion Commander had the whole battalion together, and informed them that "we were going somewhere -- he didn't know where, but it would be soon." It was a matter of common knowledge and conversation among the members of the company that they were preparing to move into combat. Witness received a report from the platoon sergeant of accused's absence without leave from reveille on 8 July. A search of the area failed to reveal his presence. George identified an authenticated extract copy of the morning report for Company "A", received in evidence without objection by the defense, containing the following entries:

" July 8, 1943
Pvt. King, fr duty to A.W.O.L. 0600 RBM

July 12, 1943
Pvt. King, fr. A.W.O.L. to des. RBM

August 17, 1943
Pvt. King, erroneously carried fr. AWOL to des. Correct status AWOL. Fr. AWOL to abs hands military authorities Setif, FNA as of July 16/43 to arrest in qrs. RBM "
(R6; Ex.I).

The organization went from Bizerte to Sicily after 8 July and engaged in combat with the enemy. Accused was not present with the company at these times although permission was not given to him to be absent (R7).

First Lieutenant Ross B. Manley testified that on 10 July he was Company Commander of Company "A", 39th Infantry, then stationed at Bizerte. Accused was carried AWOL when he assumed command and he never saw him until after the fighting at Randazzo (Sicily). So far as he knew, accused was not present with his company at any time during the Sicilian campaign. Witness identified a written Military Police report of accused's apprehension. The law member, overruling an objection by the defense on the ground of the absence of the person who made the entry, admitted the document in evidence (R9). The document, addressed to "Commanding Officer, 9th Div. 39th Inf. Co. 'A'" and signed "For the PROVOST MARSHAL Edward F. Todd, 1st Lt. 299th M.P.Co.," recited that accused "was arrested by Military Police at 1720 hours 15 July 1943 Constantine for being A.W.O.L. 7 days - apprehended in Setif Witnesses Sgt. Alvin G. Bush - 299th M.P. Co. Disposition: released to 30th Repl. Center." (Ex.II).

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

"I was not apprehended in Setif. I turned in myself. * * * The M.P. came by and talked to us, and we told him we were AWOL and wanted to go back to our outfit. He said that he could not furnish us transportation to Constantine. He said it would be better for us to hitch-hike to Constantine. He said it would be more bother for him if he had to pick us up and turn us in. The following day * * * he told us to get out of town or he would have to pick us up and take us to Constantine * * *. The (next) following day * * * we went up and tried to get a ride * * *. We told him we could not get a ride out; we were going with him. We got in a

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jeep, and he said, 'All right,' and hauled us over to the M.P. Headquarters. * * * They took us to Constantine the following morning about ten o'clock." (R10)

5. (a) Accused's absence without leave from his organization was established prima facie by the extract copy of the morning report of his organization for the period in question and by testimony of those having personal knowledge, and was confirmed by his own unsworn statement. The question for determination is whether the evidence in the record is legally sufficient to support the finding that he absented himself with the intent to avoid hazardous duty, within the meaning of Article of War 28. The necessary elements of proof of the offense in addition to proof of unauthorized absence are: (1) that accused or his organization "was under orders or anticipated orders involving * * * hazardous duty", and (2) that accused was notified, or otherwise informed, or had reason to believe, that his organization was about to engage in hazardous duty, and (3) that his absence was with the intent to avoid such duty (MCM, 1921, par.409, p.344; CM ETO 455, Nigg; CM ETO 564, Neville; CM ETO 2432, Durie).

(b) The first element, (1) above, was established by evidence that accused's organization on and immediately prior to 8 July 1943 was stationed in the Bizerte staging area; that the Battalion Commander at an unstated time informed the battalion (of which accused's company evidently was a component) that they "were going somewhere" soon and that the organization did in fact move from Bizerte to Sicily sometime in July after the 8th and thereafter engaged in combat with the enemy in the Sicilian campaign. The foregoing facts support the legitimate inference that accused's organization on 8 July 1943 "was under orders or anticipated orders involving * * * hazardous duty".

As to the second element, however, the only evidence that accused when he absented himself knew or had reason to believe that his organization was about to engage in such duty, consists of opinions and conclusions of the executive officer of his company as to "indications" and "common knowledge" of impending combat in the company, and the personal understanding of the first sergeant of the company based upon the above mentioned information given to the battalion together with his conclusions as to "common knowledge" and "conversation" in the company as to preparation for combat. The latter testimony refers to "the early part of July." The extract copy of the morning report (Ex.I) records accused as absent without leave at 0600 hours 8 July. There is therefore no proof in the record with respect to accused's presence in his unit either at the time of the "common knowledge" or "conversation" in regard to prospective combat or at the time the battalion commander informed his command it "was going somewhere". Such vital facts in the prosecution's case are left to the imagination or at best to speculative inferences which are as exculpatory as they are inculpatory. Judicial notice may not be taken of the facts necessary to raise the inculpatory inference (CM ETO 455, Nigg), nor is the Board of Review at liberty

to supply omissions in the prosecution's case, however obvious they may appear or however desirable it may be to sustain accused's conviction. Neither does the record show when the unit embarked for Sicily. It may well have been after the return of accused to military control.

(c) "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. * * * Mere suspicions, probabilities, or suppositions do not warrant a conviction. The circumstances must be sufficient to show guilt beyond a reasonable doubt" (2 Wharton's Criminal Evidence, sec.922, pp.1603-1605).

"If the circumstances tending to show his guilt are as consistent with the defendant's innocence as with his guilt, they are insufficent" (ibid., p.1609).

"Where circumstantial evidence is relied on, the circumstances must be proved and not themselves be presumed or rest in conjecture." (32 C.J.S., sec.1039, pp.1103-1104) (See also 2 Wharton's Criminal Evidence, sec.922, p.1611).

"No inference of fact or of law is reliably drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. * * * Nowhere is the presumption held to be a substitute for proof of an independent and material fact." (United States v. Ross, 92 U.S. 281,283, 23 L. Ed., 707,708) (CM ETO 455, Nigg).

The following comment is particularly applicable to the instant case:

"Proof that accused's unit had been notified of prospective movement without additional proof that accused was actually present when such announcements were made does not suffice. (CM 230826, McGrath). Nor does proof of knowledge by accused that his unit was stationed at an embarkation camp and that eventually his unit would depart for 'over-seas' meet the requirement of proof. (CM 231163, Sinclair). In the

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> instant case the evidence, characterized by hearsay and opinion testimony, is far short of establishing the vital fact that accused was informed or advised of prospective movements of his unit, or that he otherwise knew his organization was about to depart * * * for duty beyond the seas and that he absented himself for the purpose of avoiding accompanying the same. * * *. Such evidence considered alone or in conjunction with the other evidence submitted is not legally sufficient to permit the inference that * * * accused was given notice that his unit immediately was to engage in hazardous duty. Whether there is evidence in the record legally sufficient to support such inference is a question within the province of the Board of Review (Bull.JAG, Aug.1942, par.422, p.162). The proof of the Charge therefore, fails on this item." (CM ETO 455, Nigg).

In view of the foregoing, the Board of Review is of the opinion that the record lacks competent substantial evidence that accused when he absented himself had reason to believe his organization was about to engage in hazardous duty and could therefor have intended to avoid such duty.

(d) The law member overruled an objection by the defense to the admission in evidence of the report of accused's apprehension and release by Military Police (R9; Ex.II). The ruling was improper in view of the hearsay character of the evidence (SPJGJ 250.46, May 26, 1942, Bull.JAG, Aug 1942, Vol.I, No.3, sec.395(22a), pp.158-159; CM 236914 (1943), Bull.JAG, July 1943, Vol.II, No.7, sec.416(7), pp.270-271). In view of accused's unsworn statement that he was not apprehended but turned himself in, the ruling may well have prejudiced his substantial rights. The Board of Review cannot, and indeed may not properly, measure the extent to which this incompetent evidence influenced the court in its determination (CM ETO 1201, Pheil). In view of the state of the record, however, further discussion of the effect of the error is unnecessary.

6. The reviewing authority executed the following actions herein:

> " * * * 7 October 1943
> In the foregoing case of Private GARRETT KING, 15054073, Company 'A', 39th Infantry, only so much of the findings of guilty of the Specification of the Charge, and the Charge, as involves a finding of guilty of desertion at the time and place and under the circumstances as alleged, and terminated in a manner not proven at the time and place alleged, is

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that accused did, at the time and place alleged, absent himself without proper authority from his organization and did remain so absent for the period alleged, in violation of Article of War 61, and legally sufficient to support the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 31 MAY 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 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private GARRETT KING (15054073), Company "A", 39th Infantry.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof as involves findings of guilty of absence without leave in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of that portion of the findings, viz: conviction of desertion in time of war, so vacated, be restored.

3. The legal insufficiency of the record to support the findings, except so much thereof as involves absence without leave, was apparently due to the inadequacy of the testimony adduced for the prosecution rather than the unavailability of sufficient evidence. A few appropriately worded questions by the trial judge advocate with reference to the time of the notification to accused's organization of impending combat in relation to the commencement of accused's unauthorized absence would very probably have elicited enough evidence to support the court's findings. As there is now no way to remedy the defect in the record, the action taken by the Board of Review and myself is necessary.

4. 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 vacated in part in accordance with recommendation of the Assistant Judge Advocate General. GCMO 39, ETO, 9 Jun 1944)

(11)

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

BOARD OF REVIEW

ETO 1922

20 JUN 1944

UNITED STATES v. Private WILLIAM C. FORESTER (34686405) and Private TRACEY BRYANT (34686280), both of 425th Military Police Escort Guard Company.	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Whittington Barracks, Lichfield, Staffordshire, England, 17,18 March 1944. Sentence: Each accused, dishonorable discharge, total forfeitures and confinement at hard labor for life. 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 soldiers named above has been examined by the Board of Review.

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

CHARGE: Violation of the 92nd Article of War.
Specification: (As amended at trial before arraignment):
In that Private William C. Forester, 425th Military Police Escort Guard Company, Rugeley, Staffordshire, England, Private Tracey (NMI) Bryant, 425th Military Police Escort Guard Company, Rugeley, Staffordshire, England, acting jointly and in pursuance of a common intent, did, at Rugeley, Staffordshire, England, on or about 4 March 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation, kill one Technician Fifth Grade Robert Stafford, Company D, 390th Engineer Regiment (General Service), Rugeley, Staffordshire, England, a human being, by striking him with their hands, kicking him with their feet, by strangling him, and abandoning him.

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The accused were originally charged jointly with Private Drewey F. Joyce, Private Dennis N. Branch and Private Ira F. Hall, all of 425th Military Police Escort Guard Company, Rugeley, Staffordshire, England with the murder of Stafford. Upon motions on behalf of the three soldiers last above named the court severed their trials, and amended the Specification by striking their names and unit designations therefrom. The trial then proceeded as to accused Forester and Bryant upon the Charge and Specification as amended.

Each accused pleaded not guilty to and was found guilty of the Charge and amended Specification. No evidence of previous convictions was introduced as to accused Forester. Evidence was introduced of one previous conviction of accused Bryant by special court-martial for absence without leave for 13 days in violation of the 61st Article of War. 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 for the term of his natural life at such place as the reviewing authority may direct. The reviewing authority approved each of the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused 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 and prior to 4 March 1944 there was located a prisoner of war camp about one and one-half miles south westerly from the town of Rugeley, Staffordshire, England. A public road connecting Rugeley and Hednesford, a town in Staffordshire, passed immediately in front of the camp and afforded access to it (R12).

Technician Fifth Grade Robert Stafford and Technician Fifth Grade William H. Walton, colored soldiers, both of Company D, 390th Engineer Regiment, stationed at the prisoner of war camp, went on proper pass into the town of Rugeley on the evening of 4 March 1944. They arrived in the town about 8 p.m. and visited several public houses and a carnival. They left Rugeley between 10 p.m. and 10:15 p.m. on their return to their camp by way of the aforesaid public road (R13,16). There had been a fall of snow that evening and while it was dark there was a certain degree of luminosity (R16). Stafford and Walton passed two groups of soldiers which were proceeding on the highway in the same direction as they traveled (R13,42). After passing the second group one of its members shouted to Walton and Stafford "Hey, wait". The two colored men did not halt. Shortly afterwards another voice from the soldier group called, "Hey, wait. I am talking to you". Stafford replied,

> "We haven't got time. We are on our way to camp. We haven't time to stand here in the cold and fool with you. You had better wake up" (R13).

Walton and Stafford resumed their course and again the voice called,

> "O.K. Whether you wait or not, you black son-

of-a-bitch, we'll get you" (R13).

The two colored soldiers ignored the response. They were joined by an English sailor and the three proceeded in the direction of the camp (R14). A few moments later the sailor and Walton and Stafford were overtaken by two of the white soldiers. A conversation ensued. Stafford and Walton then resumed their walk towards camp. The former looked back and said,

"Lets go, fellows; it looks like they're going to start something; lets go" (R14).

The colored men commenced to run, but were again overtaken by two white American soldiers. One of them expressed the desire to fight. The two colored men retreated. Stafford stated to the two white men that they were making a mistake and declared he did not know "what it was about". One of them attempted to strike Stafford, but such action met the objection of his white companion (R14). In the course of the argument which followed Stafford protested,

"Don't hit me, don't hit me. Let me talk to you" (R15).

Two sailors arrived at the scene and attempted to stop the fight (R15). Walton freed himself and ran to the prisoner of war camp. He reported the incident to his company duty officer, First Lieutenant Maxwell T. Hasty (R15,32).

On the night of 4 March 1944, Privates Lawrence L. Moss, Drewey F.Joyce, Dennis N. Branch, Foster M. Coats, Ira F. Hall and both accused all of 425th Military Police Escort Guard Company, then stationed at the prisoner of war camp, were at a public house at or near Rugeley (R20,21, 42). At about 10:00 p.m. the named soldiers left the public house and proceeded in the direction of the prisoner of war camp on the public road above described (R20,21,42). Bryant and Hall, accompanied by some girls walked in advance followed by Forester, Joyce and Branch (R42). Coats walked by himself (R20) and Moss followed in company with an English girl in uniform (R21). About half way to the prisoner of war camp, Bryant and Hall engaged in an argument with a colored American soldier. Forester "ran into the three" and the colored soldier was knocked to the ground (R42). Joyce intervened in an apparent effort to stop the disturbance but he was held by eitherForester or Bryant (R42). Both Forester and Bryant beat and kicked the prostrate colored soldier, who protested, "Let me alone" and "Don't mess with me" (R43).

Charles Albert Martin, Naval Air Fitter, Harold Arthur Thompson, Air Mechanic Second Class, Arthur James Pyatt, Air Mechanic, all of the Royal Naval Air Service and a fourth unnamed member of that Service were in Rugeley attending a dance on the night of 4 March 1944 (R23,25,28). Martin and the unnamed rating left the dance at about 10:30 p.m. and proceeded on foot on the Rugeley - Hednesford road in the direction of Hednesford. Thompson and Pyatt departed from the dance a few minutes later and followed on the Rugeley - Hednesford road. The latter two, at

a point about 400 yards from the prisoner of war camp gate heard a "bit of scuffling" (R23,25,27,28). They waited until Thompson and Pyatt joined them and the four men proceeded together until two white American soldiers, who said that they were under restrictions, asked them to stop a fight between "two black Americans and four white ones" (R24,26,28). Proceeding further the Englishmen discovered a

> "black man lying on the ground on the left hand side of the road, and two white Americans with another black one, dragging him across the road, and he was asking them if he might ask a question; he was saying 'Wait a minute, fellows, let me ask a question'" (R23).

The ratings intervened and tried to stop the disorder. A white American soldier addressed the Englishmen thus:

> "You go on your way. We don't want any trouble with the English sailors" (R23,26,28).

The sailors, being also "under restrictions", then left the scene and went to the prisoner of war camp gate and reported the affair to the Corporal of the Guard. As the four men left the disturbance Martin, Thompson and Pyatt saw a white soldier jump from the grass verge on the side of the road and "land with his feet"on the back of the prostrate black soldier (R23,24,26,27,28). At this poirt in the affair Thompson and Pyatt heard one of the white soldiers say, "Lets kill this f---- black bastard" (R26, 28).

Evan John Savage, a British civilian, residing at 76 Cannock Road, Rugeley, his wife, his brother-in-law, Brynmore Owen and sister-in-law Annie Owen, the latter two of 21 Moreton Street, Chadsmoor, Staffordshire, on the evening of 4 March 1944 attended a wedding in Rugeley. They left that town about 10 p.m. and walked in the direction of Hednesford on the aforesaid road. As they proceeded along the road at about 11 p.m. they heard the noise of a disturbance ahead of them (R29,30,31). Upon proceeding further they saw a colored soldier lying on the road with his head towards Rugeley (R29,30). Two white Americans approached Savage and said to him:

> "Clear off, if you don't want no trouble" (R29)

Savage replied:

> "I don't want no trouble, but you can't leave a man in the road" (R29).

One of the soldiers answered:

> "Leave him alone. I put him (this damn nigger) in the middle of the road for the goddam truck to run over him as he is no good. He has been

> out with a white girl, and out in the States we don't have anything to do with them. We treat them like dogs. The girls are lower than them for to go out with them" (R19,30).

Savage's response was:

> "Well, you can't do that. Put him on the bank out of the way of the traffic" (R29,30).

The white soldier then picked up the colored soldier and placed him on the bank. Mr. and Mrs. Savage and Mr. and Mrs. Owen then walked to the prison camp gate and reported the incident to the guard. The two white soldiers followed them and passed through the gate whistling while the Savages and Owens stood at the camp gate (R29,30).

After Walton had informed Lieutenant Hasty of the incident they went to the place on the highway where the disturbance had occurred and after some difficulty found Stafford on the ground. Lieutenant Hasty could not feel Stafford's heart beat. Stafford was placed in a truck and was taken to the 312th Station Hospital (R15,32).

Captain Morris Kleinerman, Medical Corps, examined Stafford when he reached the hospital at about 11:20 p.m. and pronounced him dead. There was a laceration at the outer side of his left eye-brow; a contused swollen area over the left cheekbone; and some dried blood on the left side of his nose (R33). Captain Kleinerman was of the opinion that Stafford had died within an hour prior to the examination (R34).

On 6 March 1944 Captain Samuel Kantor, Medical Corps, performed an autopsy on Stafford's body. Without objection the autopsy report (Pros. Ex.1) was received in evidence (R35). Pertinent excerpts from the report are as follows:

> "Upon removing the over-coat it is found that the neck tie is pulled to the left and is markedly tightened around the neck exerting extreme pressure on the tissues beneath * * *. The knot of the tie is so firm that it had to be cut in order to be removed.
>
> * * * * * *
>
> This negro American soldier, appearing about 30 years of age, was dead when he was brough (sic) to the hospital on 4 March 1944 at 2320 hours. About an hour previous to admission he was alleged to have been involved in a fight with a number of white American soldiers near Rugely about 300 yards from his camp. External examination of the body disclosed a number of abrasions, contusions, lacerations, and ecchymoses. His neck was markedly constricted just above the level of the hyoid bone by his

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neck-tie which was pulled tightly. The neck, especially on the left above and below this constriction, showed marked swelling of the tissues. That portion of the neck-tie around the neck measured 12 inches. The collar of the shirt that he wore was 16 inches. The circumference of the neck was 15½ inches. X-ray examination of the head, neck, face, and chest, as well as post-mortem examination disclosed no evidence of fracture of the skull, facial bones, cervial vertebrae, or thorcic (sic) cage. There was no gross evidence of damage to the brain or any of the thoracic or abdominal viscera. There were a number of petechiae noted in the conjunctivae and the buccal mucous membranes. There was marked congestion of both lungs. Post-mortem findings in this case are compatible with death due to strangulation." (Pros.Ex.1,pp.2,5).

Accused Bryant signed a written statement when interviewed by Harold J. Metzler, Agent, Criminal Investigation Department on 8 March 1944 (R44). The trial judge advocate, with the concurrence of defense counsel, cautioned the court that the statement should not be considered as evidence against accused Forester. The statement was admitted in evidence as Pros.Ex.4 (R45), with proper cautionary instructions from the law member. The material part of the statement is as follows:

"I was born on the 28th July 1923. I was inducted into the U.S. Army in February 1943. I have been overseas here in England since the latter part of January 1944.

On Saturday 4 March 1944, I left my camp without a legal pass. I knew I was going to be absant without official leave. I left the camp thru the fence instead of going out thru the gate. I was accompanied by Pvts. Hall, Joyce, Moss, Forrester, Branch and Coats, all members of my company. We left camp about 1930 hrs.

We went toward the town of Rugeley and stopped at the first pub on the right hand side of the road. We all had several drinks of beer and ale. I had about twelve pints of beer myself.

Around closing time of the pub, we all left. I knew it to be near closing time, because the operator of the Pub came around calling 'time'. When we got out on the street most of the boys started toward camp, but Hall and I lingered around a bit waiting for some WAAF's to come out of the 'Pub'. Hall & I then started up the road toward camp with the

WAAF's. When we got near about middle way to the camp, Hall & I and the WAAF's passed a bunch of American soldiers. Just as were (sic) were alongside of them I knew that Joyce, Branch and Forrester were part of the bunch of soldiers and the remaining two were colored boys. Hall asked what was going on and Joyce answered it was just a little argument. Hall decided to go on and said to me, 'Lets go, catch the girls'. I followed after him. I believe I walked about seventy-five yards just behind Hall and then Hall turned around and met me and said, 'Let's go back and help our buddies'. We never did catch up to the WAAF's. When Hall & I got back to the other fellows, namely Forrester, Branch and Joyce and the two colored boys, they were already fighting, however I only saw that one colored boy was left with Branch, Joyce and Forrester.
I remember seeing Joyce and Forrester punching the colored boy with their fists. The colored boy was pleading with them to leave him alone. Even though the colored boy was pleading with them to leave him alone, I decided to get in on the fight too. I hit the colored boy about two or three times in the face with my left fist. I think Forrester was hitting him at the same time I was and then the colored boy either fell down or was knocked down. I stumbled down on top of the colored boy and while I was on top of him I hit him again about three times in the face with my left fist. While I was down on top of the colored boy hitting him, Forrester was kicking him on the head, face and shoulder. Joyce ran toward me and hit me in the shoulder, while I was punching the colored boy down on the ground and told me to come one (sic) as a truck was coming. I jumped up off the colored boy and then ran away following Joyce, Hall and Branch. Forrester followed me. We went thru the fence of the camp and I went straight to my hut. When I jumped off the colored boy, I don't remember anyone picking him up. The last I saw of him he was laying on his back on the ground."

4. The prosecution specifically identified the accused, Forester and Bryant, as the immediate assailants of the deceased by means of the following evidence:

(a) - Court room identification by Walton, made during the course of his testimony, of both accused as two of the white American soldiers who participated in the altercation wherein Stafford was killed (R15).

(b) - Testimony of Captain Richard E. Lobuono, Assistant Provost Marshal, 10th Replacement Depot, that on the evening of 5 March 1944 Walton identified Joyce, Forester and Bryant as three of the participants in the fight on the road on the night of 4 March 1944. Walton selected the three men from a group of nine men on two separate occasions and from different arrangements of the nine men in the identification parades (R18,19).

(c) - Coats' and Moss' positive testimony that Forester and Bryant were in the group of white soldiers who departed from the public house in Rugeley about 10 p.m. on the night of 4 March 1944, proceeded towards the prisoner of war camp on the Rugeley-Hednesford road and who encountered two colored soldiers on the road and engaged in an argument with them (R20-22).

(d) - Partial identification by Annie Owen of Bryant as one of the white soldiers seen by her on the occasion on the night of 4 March 1944 when she saw the body of a soldier in the road (R31).

(e) - The evidence of Corporal Joseph Miko, 440th Military Police Prisoner of War Processing Company, that acting under orders at about 2300 hours, 4 March 1944 he searched all barracks of the prisoner of war camp and found Bryant on his back in a stupor evidencing intoxication with his clothes "tusseled up" and with mud on them, abrasions on one of his hands and on the top of his hand and stains on his leggings and trousers which looked like blood (R36,37).

(f) - Testimony of Major Bernard O'Neill, Prisoner of War Enclosure No. 2, that he observed accused Bryant about midnight 4-5 March 1944 and discovered blood on the buttons of Bryant's overcoat, blood on his leggings wnich was then moist and stains which appeared to be blood on his shoes. There was also a fresh bruise on the second knuckle of his left hand (R39).

(g) - Testimony of Captain Rudolph E. Warnecke, Medical Corps, who made examination of the hands of both accused on 7 March 1944. Forester's examination showed a quarter inch scratch on the fourth finger, dorsum of the left hand, over the medial phalanx. Bryant's examination revealed a scratch on the base of the ring finger, dorsum, left hand and also scratches on the distal end of the proximal phalanx and one on the distal end of the proximal phalanx of the fourth digit, all on the dorsum. The scratches had been inflicted more than 24 hours prior to the examination (R40).

(h) - Branch's testimony that Bryant and Forester engaged in an argument and altercation with a colored soldier about 10:30 p.m. to 10:45 p.m. on 4 March 1944 on the Rugeley-Hednesford road and that both Bryant and Forester beat and kicked the negro after he had been knocked to the ground (R42,43).

(i) - Evidence that Bryant's trousers (Pros.Ex.2) and leggings (Pros.Ex.3) were found to be blood stained (R38,39,45,46).

5. Each accused elected to remain silent.

The only testimony presented by the defense was that of Private George Kohnke, 440th Military Police Prisoner of War Processing Company, who stated that at the Prisoner of War camp gate between 10 p.m. and 12 midnight, 4 March 1944 there were several civilians who conversed as to a "scuffle" down the road from the gate (R48).

6. (a) - There is competent, substantial evidence in the record of trial identifying the accused, Forester and Bryant, as Stafford's principal assailants. Their presence at the scene of the homicide is established without contradiction. Branch's testimony that the two accused beat and kicked the deceased and otherwise mistreated him stands unimpeached and undisputed. Such direct and specific evidence in connection with the circumstances and events set forth in paragraphs three and four hereof proved beyond reasonable doubt that the two present accused are primarily responsible for Stafford's death. The findings of the court in this respect are fully supported by the evidence (CM ETO 78, Watts; CM ETO 492, Lewis; CM ETO 503, Richmond; CM ETO 531, McLurkin; CM ETO 885, Van Horn; CM ETO 1360, Poe; CM ETO 1621, Leatherberry; CM ETO 1671, Matthews; CM ETO 1673, Denny; CM ETO 2358, Pheil).

(b) - Beyond all doubt Stafford's necktie was tightened about his neck during the assault and battery on him committed by the group of white soldiers which included the two accused. The knot of the tie was so tight that the post mortem surgeon was compelled to cut it from his neck. The proximate cause of deceased's death was strangulation. The record fails to reveal whether it was Forester, Bryant or one of the other of Stafford's assailants who tightened the death noose about his throat.

The distinctions between principals, aiders and abetters have been abolished by Federal statute:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal" (35 Stat.1152; U.S.Criminal Code, sec.332, 18 USCA.sec.550).

In the administration of military justice the distinction between principals, aiders and abetters and accessories is not recognized (Winthrop's Military Law and Precedents - Reprint, p.108).

The above statute and the rules of law cognate thereto are applicable to this case. It was unnecessary for the prosecution to establish that Forester and Bryant personally fashioned Stafford's tie into a garrote and applied it as a death producing instrument. In the assault on Stafford and in the commission of the homicidal act which evolved therefrom, the two accused were active and violent participants. They were legally responsible not only for the individual acts committed by each, but also for the acts of each and every participant in the illegal and wholly inex-

cusable attack on the unoffending colored soldier. The Board of Review has heretofore considered and analyzed the principle of law here involved in CM ETO 72, Jacobs and Farley; CM ETO 393, Caton and Fikes; CM ETO 804, Ogletree et al; CM ETO 895, F.A.Davis, et al; CM ETO 1052, Geddies et al; CM ETO 1284, A.Davis et al; CM ETO 1453, Fowler. In view of the discussions contained in said holdings and the authorities therein cited, further presentation of authorities and argument are unnecessary to support the conclusion that both Forester and Bryant are responsible as principals for Stafford's death.

(c) - The deceased and his companion, Walton, were returning to their camp from Rugeley in a law abiding, peaceable manner. Forester and Bryant in company with Joyce, Branch and Hall overtook them on a public highway. In spite of the fact that the two colored soldiers on at least two occasions sought to evade conflict with them and retreated, Forester andBryant persisted in their evident purpose of provoking an altercation. There is neither evidence nor inferences in the record of trial that either Stafford or Walton was the aggressor; appositely the evidence is substantial that they were the victims of an unlawful, inexcusable interference by the accused and companions which interference developed into a cruel battery on the deceased resultant in his death. No question of self defense can arise from the evidence. Forester and Bryant were vicious aggressors from beginning to end.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.
>
> * * * * * * *
>
> Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention tokill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)
>
> Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by in-

difference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused" (MCM, 1928, par.148a,pp. 162-164).

"In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defence appears the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law" (Winthrop's Military Law and Precedents - Reprint, p.673).

"a deliberate intent to kill must exist at the moment when the act of killing is perpetrated to render the homicide murder. Such intent may be inferred under the rule that everyone is presumed to intend the natural consequences of his act" (1 Wharton's Criminal Law, 12th Ed. sec.420,p.633).

"Malice aforethought is either 'express' or 'implied'; express, where the intent, - as manifested by previous enmity, threats, the absence of any or of sufficient provocation, &c., - is to take the life of the particular person killed, or, since a specific purpose to kill is not essential to constitute murder, to inflict upon him some excessive bodily injury which may naturally result in death * * *" (Winthrop's Military Law and Precedents - Reprint, p.673) (Underscoring supplied).

Prior to and simultaneous with the assault on deceased, threats to kill him emanated from the group of white soldiers of which the two accused were members. Stafford was knocked to the ground and was then kicked and beaten. While helpless one of the attackers jumped from the verge of the road and landed with his feet on his prostrate form. After he had become unconscious he was either intentionally left in the road or was placed in such location thereon as to become almost a certain victim of passing vehicles. Only the intervention of British civilians prevented the consummation of such atrocious deed. The exact moment and the actual perpetrator of the act of strangulation are not definitely shown by the evidence, but there is substantial proof that the accused was strangled during the attack upon him in which the two accused were active, vicious participants. The

evidence, without doubt or qualification shows that the accused intended to inflict upon deceased "some excessive bodily injury which may naturally result in death". The motive of the attack, the purpose of the assault and the nature of the death producing act, constitute intrinsic proof of a most substantial nature that Forester and Bryant acted with malice aforethought when they caused Stafford's death. The evidence of the homicide fully supports the findings of murder (CM ETO 255, Cobb; CM ETO 422, Green; CM ETO 438, Smith; CM ETO 739, Maxwell; CM ETO 969, L. Davis; CM ETO 1901, Miranda; CM ETO 2007, Harris).

7. The charge sheet shows that Forester is 26 years, two months of age and Bryant is 20 years, seven months of age, and that each accused was inducted on 26 January 1943 at Fort McPherson, Georgia, and that their respective service periods are governed by the Service Extension Act of 1941. Neither accused had any prior service.

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

9. Confinement of the accused in a penitentiary is authorized by AW 42 and sec.275 and sec.330 of the Federal Criminal Code (18 USCA, secs.454 and 567) and the designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.291, WD, 10 Nov 1943, sec.V, pars.3a and b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 20 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S. Army.

1. In the case of Privates WILLIAM C. FORESTER (34686405) and TRACEY BRYANT (34686280) both of 425th Military Police Escort Guard 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 1922. For convenience of reference please place that number in brackets at the end of the order: (ETO 1922).

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

(25)

BOARD OF REVIEW

ETO 1926

6 MAY 1944

U N I T E D S T A T E S	29TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at APO 29, U.S. Army, 23 February - 19 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania.
Private JAMES P. HOLLIFIELD (34171736), Company L, 175th 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 61st Article of War.
(Nolle Prosequi)
Specification: (Nolle Prosequi)

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

ADDITIONAL CHARGES

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

Specification: In that Pvt. James P. Hollifield, Company L, 175th Infantry, did, at Torquay, England, on or about 3 January, 1944, with intent to defraud Mrs. Agnes Mary Brown, unlawfully pretend to Mrs. Agnes Mary Brown that he was Johnana Thomas and was expecting £100 ($400.00) to be sent him from America, that he had to visit Andover to await its arrival and needed money with which to pay his fare and meet his expenses; well knowing that said pretenses were false and by means thereof did fraudently obtain from the said Mrs. Agnes Mary Brown the sum of £45 ($180.00).

(26)

CHARGE II: Violation of the 58th Article of War.
Specification: In that * * *, did, at Penzance, Cornwall, England, on or about 10 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Torquay, England on or about 4 February 1944.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by special court-martial for larceny of a bicycle in violation of the 93rd 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. The reviewing authority disapproved the findings of guilty of Charge II and its Specification (escape), 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 the provisions of Article of War 50½.

3. 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.

4. The charge sheet shows that accused was 21 years eight months of age, that he was inducted 9 October 1941 at Fort Bragg, North Carolina for the duration of the war plus six months. He had no prior service.

5. The punishment for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58) and confinement may be in a penitentiary (AW 42). Obtaining money under false pretences in the amount of $50.00 and upwards is a crime under the District of Columbia Code punishable by imprisonment in the penitentiary (District of Columbia Code, 22-1301 (6:85); 24-401 (6:401)). Accused is under the age of 31 years and the confinement is for ten years. The place of confinement should be changed from the United States Penitentiary, Lewisburg, Pennsylvania to the Federal Reformatory, Chillicothe, Ohio (Cir. 291, WD, 10 Nov 1943, sec.V, pars.3a and b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind. (27)

WD, Branch Office TJAG., with ETOUSA. 6 MAY 1944 TO: Commanding General, 29th Infantry Division, APO 29, U.S. Army.

1. In the case of Private JAMES P. HOLLIFIELD (34171736), Company L, 175th 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. Attention is invited to the designated place of confinement, which should be changed to the Federal Reformatory, Chillicothe, Ohio (Cir. 291, WD, 10 Nov 1943, sec.V, pars.3a and b). 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 1926. For convenience of reference please place that number in brackets at the end of the order: (ETO 1926).

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

3 JUN 1944

ETO 1941

U N I T E D S T A T E S)	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private HENRY O. BATTLES (32199498), Detachment C, 3197th Quartermaster Service Company.)	Trial by G.C.M., convened at Exeter, Devonshire, England 11-12 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. 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 Specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Henry O. Battles, Detachment C, 3197th Quartermaster Service Company, did, at Exeter, Devon, England, on or about 6 February 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ronald H. Schulz, a human being by stabbing him in the chest with a knife.

He pleaded not guilty to and was found guilty of the Charge and Specification, three-fourths of the members of the court concurring. Evidence was introduced of five previous convictions by summary court as follows: breach of arrest in violation of Article of War 69, drunkenness in quarters in violation of Article of War 96, absence without leave for two and three days respectively, and absence without leave "Mar 3, 1943" 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 the term of his natural life, three-fourths of the court concurring. The reviewing authority approved the sentence, 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:

On the evening of 6 February 1944, Electrician Third Class Garland G. Lynch, Jr., 29th Construction Battalion, United States Navy, left a train in a railroad station at Exeter, England. As he started up a stairway he heard someone call, turned, and saw that it was Ronald H. Schulz (the deceased, an American sailor) whom he had known for about 15 months and who was a member of his own "outfit." Schulz said "I'm having trouble with some jig". The term "jigs" signified colored men to Lynch, who testified "I looked around and I saw all the jigs there, so I figured it was just too many for two of us." He said "I'll see what we can do about it Schulz" and left to look for some of "the boys" of his organization who were on his train. He returned with four American sailors about five minutes later, but Schulz was not there. Two colored soldiers were then on the platform and some others were boarding a train. A few minutes later Lynch and his companions found Schulz lying on a bridge over the platform. He was unable to talk, was taken down stairs and laid on a small "push cart," and then removed to a hospital in a "jeep". Lynch did not strike or speak to anyone before he left to get the other sailors, nor did anyone strike at him (R28-34).

About 11:00 p.m. the same evening Schulz was brought to the Royal Devon and Exeter Hospital with a wound in the upper left side of his chest, and was immediately operated on by Dr. David Longridge, the resident surgical officer. Dr. Longridge enlarged the external wound in the chest, removed two ribs and found a wound at the apex of the left ventricle of the heart. He stitched the wound but Schulz died on the operating table about 11.25 p.m. (R8,10-11). Dr. Longridge did not notice any odor of alcohol on the patient's breath. Lieutenant Francis T. Kelly, Medical Corps, United States Naval Reserve, attached to the 29th Construction Battalion, who knew deceased (R19), performed a post-mortem on the body on 7 February (R21). An examination of contents of the stomach for alcohol revealed 7.5 milligrams per 100 cubic centimeters of extract content, which was insufficient in amount to cause a man to be under the influence of alcohol (R23). In the opinions of Lieutenant Kelly and Dr. Longridge, accused was stabbed once and the cause of death was a penetrating wound of the heart which was probably caused by a knife (R12,16-17,23-24,26). Dr. Longridge believed that the wound was inflicted shortly before 11:00 p.m. (R15). Lieutenant Kelly identified a naval "P. jacket", sweater, dress jumper and "schivvy" shirt, which were worn by deceased when on the operating table (R20-21). The articles were admitted in evidence (R13-15,21,136; Pros. Exs.1,2,3,4).

About noon 6 February 1944, accused arrived at Exeter, England, with five other soldiers, namely, Private First Class Archie L. Jackson and Privates Ortho V. Patrick, Frank Fisher, James Fisher and William Bell, all members of the 3197th Quartermaster Service Company. They drank beer, ate at a cafe, and then consumed some more beer. They also drank some "spirits". About 10:10 p.m. they arrived at the railroad station in Exeter to take a train to Taunton (R50-51,56-57,62-63). Jackson and Patrick got on the train together. Frank Fisher who was on the train said that someone had hit him. His eye was bleeding (R52-53,56,63). Patrick testified that as he and Jackson were looking out of the train window, two sailors approached and asked "Don't one of you wanted to get off and fight" (R63). Jackson testified that he heard a sailor say something about "bloody fellows" and "figured he was talking to all of us who was in the car" (R59-60). Accused left the train despite Jackson's request not to do so, and started toward a sailor who began to walk backwards across the platform. Accused said two or three times "What did you hit my buddy for," Jackson shouted "Battles, come back and get on the train". Accused did not answer but continued to walk toward the sailor who was backing away towards a stairway leading to the bridge (R51-55,61,63). Jackson and Patrick left the train and went after accused who swung at the sailor with an over-arm motion. The sailor made no effort to strike accused who was seized by Jackson and Patrick and taken toward the train. He pulled back saying "Turn me loose - he hit my buddy". He was then pushed aboard the train and held forcibly until the train left the station. Patrick testified that he did not believe accused succeeded in striking the sailor, and that there was nothing in accused's hand when they pushed him on the train (R51,55,63-66).

Mr. James V. Vince, carriage and wagon examiner, 18 Foxhayes Road, St. Thomas, Exeter, was examining the last vehicle of the train shortly after 10:30 p.m. when he noticed a sailor "backing out" of a compartment followed by a colored soldier who shouted "What did you hit my buddy for". The sailor did not reply but backed across the platform to the end of a bookstall by a stairway. The colored soldier continued to shout excitedly "What did you hit my buddy for - he ain't said nothing". The sailor replied "I didn't", whereupon the soldier shouted "You're a liar" and struck at the sailor with his left hand, striking him in the vicinity of the groin. A lighted torch fell to the platform. The soldier then hit the sailor fairly high in the chest with a right overhand blow but the sailor, who was the much larger of the two, made no attempt to defend himself. Vince then observed three colored soldiers leave the train. One of these soldiers, who was bleeding just above the left eye, remained by the train while the other two seized the first soldier and led him protesting to the train (R35-36,38,40).

On the evening in question, Mr. George Coles, 17 Clayton Road, Exeter, leading parcel porter at the station, saw a sailor with his back to the stairs with his right arm raised in defending position and a torch in his hand. Before him was a "dark" soldier who said "What did you hit

my father for" or words to that effect. When the sailor replied "if you dare hit me", the soldier struck him "somewhere below the face". The sailor did not attempt to strike the soldier or to defend himself (R42-44).

Miss Betty M. Ware, 9 Raleigh Road, Exeter, saw three American colored soldiers arguing with an American sailor at the foot of the stairs shortly before 11:00 p.m. on the evening in question. Two of the soldiers were pulling back the third soldier who was trying to get forward and who was saying "You hit my father" or "You had my wallet". She did not see any blows. As Miss Ware and the sailor walked up the stairs together, his head was down and his hand was approximately on a level with his heart. She said to him "How disgusting - Fancy fighting on the station. Are they drunk?" He replied "Yes, I think so". Miss Ware left the sailor behind. As she went across the bridge overhead she heard a groan "and a slipping of feet", turned, and saw the sailor lying face downward on the top of the steps (R46-47).

At the trial neither Vince nor Coles could identify the soldier who struck the sailor (R38,45). At some undetermined date after the occurrence Vince identified Frank Fisher as the soldier with the injury over the eye (R39). Lynch testified at the trial that he saw accused "before" but could not remember "whether it was him that night or not" (R32). Miss Ware testified that she later identified accused as one of the men who were holding back the "center colored soldier", and that she subsequently identified Frank Fisher as the second of the group of three soldiers. She could not describe the center soldier, was positive of her identification of accused, but was not certain about Fisher (R49).

Admitted in evidence by stipulation were four photographs of certain portions of St.David's railroad station at Exeter which showed the station platform, the stairway and the overhead bridge. The witnesses marked the photographs with various figures to indicate the position of the sailor when confronted by his assailant, and the place where the former was found lying on the bridge (R28,30,37,45,47-48; Pros.Exs.A,B,C,D).

About 10:25 p.m. on the evening concerned, Gerald H.J.Hooton, leading motor mechanic, Royal Navy, entered a compartment on the train to Taunton, together with a Royal Navy petty officer named Jones. The train was not lighted. Two American soldiers (Privates James Fisher and William Bell) entered the carriage and shortly thereafter there was a scuffle and shout on the platform, followed by commotion in the corridor of the train. A "rather excited" man, identified by Hooton as accused, was shoved into the carriage. The railroad guard switched on the light and Hooton saw several colored soldiers. Accused had a knife in his right hand and was shouting that he wanted to get at the "'goddam Yankee sailor'". He wanted to leave the train but was restrained from doing so. When an American lieutenant silenced the group, accused pointed to another colored soldier who had a cut over his eye and said "Look, Lieutenant, the goddam Yankee sailor has hit my father with a torch, over the eye." The lieutenant replied that "it

was done now, and he couldn't do anything else about it." Accused said "Yes, * * * but he shouldn't have done it - I'm going to get even with him", whereupon the officer replied "You keep quiet and keep in here or I'll prefer charges against you myself." When the lieutenant left the commotion started again. Accused shouted that he wanted to get out and the other soldiers held him back. He went through his pockets saying "I wish I had my 45". The train left the station and a civilian entered the compartment. An American major and the guard removed most of the colored soldiers and six people were left in the compartment, namely, accused, Hooton, Jones, the civilian and the two American soldiers who entered the train shortly after Hooton and Jones. Accused who was rather excited still held the knife in his hand. He said that as he and his father were descending the stairs a Yankee sailor told his father "Get out of my way, you black bastard" and hit him above the eye with a torch. Accused stated " * * * I wasn't going to have that, so I went for him with my knife. I went for his chest, but he dived out of the way and I hit him in the arm, in the left arm. * * * I was just unlucky, I couldn't finish him. * * *. With that my other boys came along and pushed me into this carriage." In order to quiet accused it was suggested that he sing spirituals, whereupon he replied "Boy, I love singing, but it is not singing in my heart tonight, its killing." He further stated that he "hated white Yankees, but he loved Englishmen". At another point in the general conversation accused remarked to the civilian "If you hit my buddy I would kill you, and I would have paid off my debt". When the civilian replied "If you did kill me you would die for it," accused answered "That makes no difference - I'd have paid off my debt." The civilian asked to see accused's knife and he gave it to him. He then requested that it be given back to him and put it in his right breast pocket. Hooton identified the knife at the trial and it was admitted in evidence, the defense stating that there was no objection thereto (R68-76; Pros.Ex.5).

About 11:30 p.m. that evening, Corporal Anthony J. Tolt, 707th Military Police Battalion, stationed at Exeter, as the result of information received, telephoned the military police at Taunton and directed that all army and navy personnel should be removed from the train when it arrived at Taunton (R77). Six colored soldiers, including accused, were taken from the train at Taunton and brought to the military police station. Five of the soldiers were searched by Technician Fifth Grade Barney B. Edmunds, Company A, 707th Military Police Battalion, who found a "small paring knife" on accused. His trousers were tucked in his socks and the knife was in the trousers down by his left sock. Edmunds identified Pros.Ex.5 as the knife in question, and testified that accused was normal and did not appear to be under the influence of intoxicating liquor. He did not find a knife on the person of any of the other four soldiers when he searched them, but testified that "they" found a knife on the sixth man (R78-79).

On 8 February, after being warned of his rights, accused made a statement to Staff Sergeant George W. Russa, Criminal Investigation Division Detachment, Headquarters 19th District, which was reduced to writing and signed by accused after its contents had been read to him (R80-81).

It was admitted in evidence over objection by the defense (R82; Pros.Ex.E). The contents of the statement are not set forth herein except briefly as accused's testimony in his own defense was substantially in conformance therewith. Accused in pertinent part stated therein that he boarded the train after being told by a "big" American sailor to "get on that train". He then heard Frank Fisher, who was cut over the eye, ask a short, stout American sailor why he hit him. When he saw that Fisher had been hit, and "after what the big American had said to me," accused "got mad" at the "big" sailor, left the train and asked him why he hit his buddy. The sailor swung at him with a torch but accused dodged the blow. Holding a knife in his right hand he then jumped at the man who backed away

> "because I guess he saw the knife in my hand. * * *. When I hit him with the knife it was more to protect myself than because I had lost my temper. I figured he intended to hurt me by the way he swung at me * * *. I had hit him because after my buddy had got hit and after the big American had talked to me the way he had I went up to the big one and asked him why he had hit my buddy" (Underscoring supplied).

Accused further stated that he was searched at camp before going on pass, and that he then went back to his hut and obtained his knife. "We always go back and get out knives after we draw our passes." He carried the knife for self-protection only (R83; Pros.Ex.E).

4. For the defense, Private Frank Fisher testified that the party of six soldiers approached the train where two sailors were "standing staggering". When accused asked one of them "Pardon me, sailor, is this the train for Taunton", the man replied "Yes, and git on it." Accused did not answerm and walked on. When Fisher then remonstrated with one sailor for calling another man a "nigger" and kicking him, the other sailor hit him over the eye and then ran up the platform where there were other sailors. About five sailors then approached the train, "called us niggers and sons of bitches" and told them all to come out and fight (R89-90,92-93). Accused was on the train when Fisher boarded it and he did not see accused get off (R91-93).

Private James Fisher testified that he and Bell entered a compartment on the train and accused entered the compartment about four minutes later. A sailor appeared at the window of the train and said "The best man get off and fight." Fisher did not see accused leave the train but heard him say "Did you hit my buddy" both before and after accused entered the train. Witness was in the same compartment with accused on the way to Taunton and heard someone ask him to sing. Accused was not excited in any way but had in his hand the knife admitted in evidence as Pros.Ex.5. Witness fell asleep ten minutes after the train started and slept until

they arrived at Taunton (R96-97,99-100).

Patrick testified that when accused left the train he approached a sailor who was "large and low". When Lynch was brought into the courtroom, witness was not sure whether or not he saw him that evening (R110).

Accused testified that on the afternoon of 6 February the six soldiers ate and then went to a "pub" where they "had quite a number of drinks". They ate again, went to a show, had dinner and then went to a "pub" where they again had "quite a number of drinks". They then had supper and went to the station. When accused came to the bottom of the stairs a "big tall American sailor" shone a light in his face and said "Get on that train, nigger". Accused replied "Okay, buddy", got on the train and then heard Frank Fisher, outside the train say "Don't hit me - why should you hit me." Accused left the train, asked the sailor why he hit his "buddy". The sailor "only answered with a smashing blow of his torch" at accused, who jumped back "and cut underhanded with my knife, a little potatoe knife I had in my hand * * * If I hit him I would have got it on his leg or his hands * * *". The sailor then ran away. Accused further testified that the sailor he "cut at" with his knife was Lynch, whom he recognized one afternoon when the soldiers were later brought to Exeter to be identified by a group of sailors. Accused did not hit any other sailor (R116-118).

Corporal Elmer D. Moorhead, 707th Military Police Detachment, testified that when he arrived on the bridge where Schulz was found, the latter was unconscious and his breath smelled of liquor (R127).

Captain Charles L. Helms, commanding officer of accused's organization (R7), testified that he had known accused since about 20 July 1943 and had never known him to tell a lie. During a mobilization training test, accused acted as "runner" for the witness and "did a jam up job" (R113). Based on remarks of accused's non-commissioned officers, the witness believed his efficiency was "a little above the average" (R114).

5. There is competent substantial evidence that accused at the time and place alleged, stabbed Schulz with a knife and that Schulz died the same evening as a result of the injury received. The question presented for consideration is whether the evidence is legally sufficient to support the findings that accused was guilty of murder.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.
>
> * * * * * * * * * * *
>
> Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time

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before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark).

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony." (MCM, 1928, par.148a, pp.162,163-164) (Underscoring supplied).

"It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act. The use of a deadly weapon is not conclusive as to malice, but the inference of malice therefrom may be overcome, and where the facts and circumstances of the killing are in evidence, its existence of malice must be determined as a fact from all the evidence.

* * * * * * * * * * *

In order that an implication of malice may arise from the use of a deadly weapon it must appear that its use was willful or intentional, or deliberate. This, like other matters of intent, is to be gathered from the circumstances of the case, such as the fact that accused had the weapon prepared for use, or that it was used in such a manner that the natural, ordinary, and probable result would be to take life." (29 C.J., sec.74, pp.1099-1101) (Underscoring supplied).

The definition of the offense of voluntary manslaughter and its distinction from murder is as follows:

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought. The intent to kill being formed suddenly under the influence of violent passion or emotion which, for the time being, overwhelms the reason of the accused. It is * * * the uncontrollable passion, aroused by adequate provocation, which for the time being renders the accused incapable of reasoning and unable to control his actions." (1 Wharton's Criminal Law, sec.423, pp.640-642).

The elements of uncontrollable passion and adequate provocation are analyzed as follows:

"The passion thus aroused must be so violent as to dethrone the reason of the accused, for the time being; and prevent thought and reflection, and the formation of a deliberate purpose. The theory of the law is that malice and passion of this degree cannot coexist in the mind at the same time; and the grade of the offense is fixed by the preponderance of passion, or the legal presumption that the act was malicious and for motives of revenge. Mere anger, in and of itself, is not sufficient, but must be of such a character as to prevent the individual from cool reflection and a control of his actions." (1 Wharton's Criminal Law, sec.426, pp.646-647) (Underscoring supplied).

"Malice is not an ingredient of manslaughter. Malice being present, passion and anger, whatever their extent or degree, will not serve to reduce an unlawful killing to voluntary manslaughter." (ibid., sec.426, p.659) (Underscoring supplied).

"Deadly weapon used by the accused, the provocation must have been very great in order to reduce the crime in a homicide to that of voluntary manslaughter. Mere use of deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act. * * *. Mere fear, apprehension, or belief, though honestly entertained, when not justifiable, will not excuse or mitigate a killing where the danger was not urgent." (ibid., sec.426, pp.652-655).

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> "Heat of passion, alone, will not reduce a homicide to voluntary manslaughter; to do this there must have been an adequate provocation." (ibid., sec.426, pp.655-656).

In considering the facts involved in the instant case the following citations are pertinent:

> "Where the evidence shows an intent on the part of the defendant to kill, no words of reproach, no matter how grievous, are provocation sufficient to free the party killing from the guilt of murder; nor are indecent provoking actions or gestures expressive of contempt or reproach without an assault upon the person." (1 Wharton's Criminal Law, 12th Ed., sec.584, pp.802-803).

> "But if a party, under color of fighting upon equal terms, used from the beginning of the contest a deadly weapon without the knowledge of the other party, and kill the other party with such weapon; or if at the beginning of the contest he prepare a deadly weapon, so as to have the power of using it in some part of the contest, and use it accordingly in the course of the combat, and kill the other party with the weapon, - the killing in both these cases will be murder." (ibid., sec.603, pp.816-817).

Construing the evidence in a light most favorable to accused, including his statement to Russa and his own testimony, and considering the foregoing authorities, the Board of Review is of the opinion that such evidence is legally sufficient to sustain the findings of guilty of murder. The opprobrious words directed toward accused by the "big" American sailor (presumably the deceased) before accused got on the train, clearly did not constitute sufficient provocation to reduce the offense committed from murder to voluntary manslaughter. Nor would mere anger on the part of accused because of such treatment, serve to reduce the offense to voluntary manslaughter. The evidence shows that after being addressed in a slurring manner by deceased, accused boarded the train and then heard Fisher ask a short, stout sailor why he hit him. Accused immediately jumped off the train, approached deceased instead of the short, stout sailor and asked him why he hit his "buddy". Deceased responded by attempting to strike him with his torch. Accused dodged the blow and immediately jumped at deceased with a little potato knife which he had in his hand. Deceased backed across the platform "because I guess he saw the knife in my hand". He was followed by accused who struck him in the chest with his knife after deceased had retreated to the foot of the stairs. The court evidently

refused to believe accused's testimony that Lynch was the sailor at whom he struck.

It is reasonable to infer from the evidence that accused was thoroughly angered by the contemptuous words addressed to him by deceased before he boarded the train, and that he was, as a consequence, "itching for a fight". It is significant that when leaving the train he did not approach the short, stout sailor who presumably struck Fisher, but went directly toward deceased who had previously insulted accused. Further, it is clearly established by the evidence that accused made no effort to retreat when deceased attempted to strike him, but "under color of fighting upon equal terms, used from the beginning of the contest a deadly weapon without the knowledge of the other party" (supra). The use of the knife in such a deadly manner was intentional, deliberate and cold-blooded, and the evidence disclosed no circumstances "serving to mitigate, excuse, or justify the act." The requisite element of malice is, therefore, clearly inferred (supra). Accused's claim of self-defense in his statement to Russa is entirely unsupported by the evidence.

His actions after being forced aboard the train corroborate the foregoing analysis of the evidence. Although he had already stabbed deceased he had to be forcibly restrained by his companions from leaving the train and continuing the fracas. He said that he wished he had his "45", and was unlucky because he "couldn't finish him". When requested to sing he said "Boy, I love singing but it is not singing in my heart tonight, its killing." He stated to a fellow passenger "If you hit my buddy I would kill you, and I would have paid off my debt."

The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty and the sentence (CM ETO 2007, Harris).

6. The charge sheet shows that accused is 37 years of age and that he was inducted 7 February 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. The penalty for murder is death or life imprisonment as a court-martial may direct (AW 92). Confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is authorized by AW 42 and Sections 275 and 330 Federal Criminal Code (18 U.S.C.A. 454,567) and Cir.291, WD, 10 Nov 1943, sec.V, par.3a and b.

B. Franklin Riter Judge Advocate

Edward Dudchenko Judge Advocate

Elwood H. Langvet Judge Advocate

CONFIDENTIAL

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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 HENRY O. BATTLES (32199498), Detachment C, 3197th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 1941. For convenience of reference please place that number in brackets at the end of the order: (ETO 1941).

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

27 APR 1944

ETO 1953

U N I T E D S T A T E S	EIGHTH AIR FORCE
v.	Trial by G.C.M., convened at AAF Station 101, 31 January - 1 February 1944. Sentence: To be dismissed the service.
First Lieutenant GRAHAM B. LEWIS (O-506127), 1274th Military Police Company (Aviation).	

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 83rd Article of War.
Specification: In that 1st Lt Graham B. Lewis, 1274th Military Police Company (Aviation), AAF Station 234, APO 633, did, on the Oxford Henley Road, at a point about 1½ miles north of Nuneham Courtenay, Oxfordshire, England, on or about the 26th day of November 1943, wrongfully, and through neglect, suffer a ¼ ton truck, 4 X 4 Willys, 1942 Model MB, Serial Number 206011, U. S. Army Serial Number 20337390 of the value of more than fifty dollars ($50.00), military property belonging to the United States, to be damaged by collision with another motor vehicle.

CHARGE II: Violation of the 95th Article of War.
Specification: In that * * *, did, at AAF Station #234, APO 633, on or about 26th day of November 1943, with intent to deceive Cpl Woodrow W. Breig, 1274th MP Co (Avn), then on duty as guard at the main gate of AAF Station #234, APO 633, officially state to the said Cpl Breig, that "he was going to drive his

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vehicle to Site #3", or words to that effect, which statement was known by the said Lt Lewis to be untrue in that he, the said Lt Lewis, intended to drive the vehicle elsewhere on an unauthorized trip.

CHARGE III: Violation of the 96th Article of War.
Specification 1: In that * * *, did, at AAF Station #234, APO 633, on or about the 26th day of November 1943, wrongfully take and use, without proper authority, a certain automobile, to wit, a truck, ¼ ton, 4 X 4 Willys, 1942 Model MB, Serial Number 206011, U. S. Army Serial Number 20337390, property of the United States Government of a value of more than fifty dollars ($50.00).
Specification 2: In that * * *, did, at AAF Station #234, APO 633, on or about the 26th day of November 1943, wrongfully, and in violation of standing orders of said station, introduce L.A.C.W. Adina B. Imray, WAAF, an unauthorized person into the limits of said station.
Specification 3: (Finding of Not Guilty)
Specification 4: (Finding of Not Guilty)

CHARGE IV: Violation of the 63rd Article of War.
(Finding of Not Guilty)
Specification: (Finding of Not Guilty).

He pleaded not guilty to all charges and specifications. He was found guilty of Charge I and its Specification, of Charge III and Specifications 1 and 2 thereof, and of the Specification of Charge II; not guilty of Specifications 3 and 4, Charge III, of Charge IV and its Specification, and of Charge II not guilty, but guilty of a violation of the 96th Article of War. 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, Eighth Air Force, approved only so much of the sentence as provides for dismissal from the service and forfeiture of all pay and allowances due or to become due, 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 but remitted the forfeitures and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that shortly after noon on 26 November 1943 the accused, with jeep and driver, was dispatched from AAF Station 234, where he was assigned as transportation officer (R.7, 10-12,40; Ex.1). The jeep was identified on the trial as the vehicle described in the Specification, Charge I, and Specification 1, Charge III (R.46-47; Ex.1,5). It belonged to the military service of the United States and its official list price, as a basic item, was $1000 - with spares and

accessories, $1360 (R.11,46-47). The trip ticket assigning it to the accused from the base motor pool showed a speedometer reading of 773 miles and Widewing as the destination (R.10; Ex 1). The accused was authorized, upon his return from the destination designated on the trip ticket, to the use of the jeep for the remainder of the day, for official duties. He was not required to sign the ticket until, at the end of the day, he returned the jeep to the motor pool (R.12-13).

At that time, AAF Station 234 comprised several sites, each entered from the highway through a separate gate (R.13,27). In order to drive from headquarters - site 1 - to Bachelor Officers quarters - site 3 - where the accused was billeted, it was necessary to proceed through the main gate on to the public highway, thence on to the base again through gate 3 (R.9). However, all vehicles leaving for destinations off the base were required to depart through the main gate, where the base clearance stamped on the trip ticket was checked and the destination recorded by the sentry on duty (R.27,41; Ex.2). An officer using on the same day an assigned vehicle for a subsequent off-base trip, after completing the trip originally designated, was not required to obtain a new trip ticket or base clearance stamp, but was required to enter his second destination on his original trip ticket and to report it, at the time of his departure, to the sentry at the main gate (R.13,27). A vehicle was permitted to leave the main gate without a base clearance only for the purpose of proceeding along the highway through another entrance to another site on the same base, in which case its destination was not recorded (R.17,24,25,27).

The accused returned from his original trip at about 5 p.m., bringing with him an enlisted member of the British Women's Auxiliary Air Force (R.8). Outside the base, about 25 or 30 yards short of gate 3, the driver stopped the jeep and accused and the girl alighted. The driver, in compliance with accused's instructions, drove into the base through the main gate, procured gasoline for the car, drove out again, then through gate 3 into site 3 of the base where he left the car parked in front of the accused's quarters (R.8-9; Miss Imray's Dep.2). Meanwhile the accused and the girl, by climbing through the hedge and over the fence, thus reached the accused's billet without entering the site through gate 3 (R.15,19; Imray Dep.2). Standing orders prohibited civilians from entering the station or any areas designated as a part of it except upon presentation of a Civilian Special Pass signed by the Commanding Officer or adjutant (Ex.3). Typed instructions to the guard at Post Number 1 required the roster at the main gate to be signed by all visitors to the base with certain exceptions which did not include enlisted members of the British Women's Auxiliary Air Force (Ex.4). By verbal order of the commanding officer, issued at an officers' meeting prior to date in question, all officers assigned to the base had been informed that military guests, though accompanied by station personnel, must show their military credentials and register at the guard gate (R.42-45).

The sentry at gate 3 saw the accused's visitor enter through the hedge (R.15,16), he made prompt report to the officer of the day, who proceeded to the accused's quarters, and after one interview returned with the provost marshal for another (R.15,17-22). At about 6 p.m. shortly after the

second interview, the accused and the girl got into the jeep, which he, as transportation officer, was authorized to drive personally on official business, left the base through gate 3, and "turned into the road heading for the main gate" (R.15-16; Imray Dep.3). The sentry at Gate 3 did not require the accused to show his trip ticket because "It was not a habit at 2 or 3; it is part of the base and all vehicles leave from the main gate" (R.16).

The accused drove into the main gate, stopped the jeep, instructed the sentry to tell the officer of the day that he was back and proceeded into the station (R.23-24,28; Imray Dep.3). Four or five minutes later he again approached the main gate from the inside still driving the jeep with the girl beside him (R.25-26,28; Imray Dep.6). "He stopped; said he was going to his quarters or words to that effect; I saluted him and that was all there was," the sentry testified (R.24). The sentry knew the accused's quarters were in Area 3 and that to reach it from Gate 1, it was necessary to go outside the base and re-enter through Gate 3 (R.24). He did not require the accused to exhibit his trip ticket or any other authority at that time, explaining "when he said he was going to Area 3, he was not required to show a trip ticket because that is considered part of the station even though he had to go on the civilian road to get to that part of the station" (R.24).

Instead of driving in through Gate 3, the accused proceeded six or seven miles along the Oxford highway to the King's Arms Hotel, where he and his companion dined. They left at about 8 p.m. to return to the base. The road was a narrow one; the night was "foggy in patches"; visibility obscure. "* * * it was the fog," the girl testified, "and I thought the lights of the jeep was very poor, but Lt. Lewis thought otherwise; said the trouble was they were too good" (Imray Dep.4). The accused was driving "just about normal speed" when the jeep passed a cyclist travelling in the same direction (R.30-31). The cyclist pedalled three or four hundred yards along a straight stretch of road after the accused passed him; then, simultaneously he heard a crash and observed a red light in front of him. Continuing approximately 200 yards, he reached a stationary "fairly tall built in lorry * * * something about the same size" as an American Army truck, facing south, the direction in which the jeep was travelling when it passed the cyclist (R.31,32). The lorry was parked on the left side of the highway, close to the verge. While it covered a good half of the road there was room for a double decker bus to get by (R.34). The lorry's tail light was "set in some inches" from the extreme right of the vehicle, about 2 feet above the ground just under the tailboard (R.35). It was burning and the cyclist identified it as the light he observed when he heard the crash and continuously thereafter until he reached the lorry (R.31-32,36). It had not moved in the interim. The tailboard was halfway down, on long chains, projecting its full, undetermined width in a horizontal position from the back of the lorry about a foot and a half above the tail-light (R.35,37). The jeep's windshield lay in the middle of the road "just past" the lorry. The jeep itself was on the righthand side of the road about 20 yards in front of the lorry, facing in the same direction (R.31) with its windshield off and its steering wheel bent (R.34). The accused and the girl, both injured, were lying on the bank to the right of the road (R.33). At the scene of the accident, according to the cyclist, the fog "was not too bad. * * * From where the jeep passed me it was very thick and then it gradually eased off until at the scene of the accident there was hardly any at all." There was only a slight fog when he first saw the lorry's tail light, about 200 yards away (R.32).

The girl testified that the accused was driving slowly and carefully, about 30 miles an hour. However, she was constantly looking ahead, "straining all the time". As for the lorry and its tail-light, "We saw this truck;" she testified, "it just happened (indicating by snap of the finger); there was a 'bang' and we crashed." Asked on cross examination how long she saw the lorry "before the jeep went into it," she testified to her impression that it was more than a fraction of a second - "just for a moment I saw it." "But you did not have time to utter anything?", the assistant defense counsel persisted. "No", she responded, "I did not have time." (Imray Dep.4,5,7).

Repairs to the jeep, as a result of the accident, involved the installation of two front windshield glasses and a new steering wheel as well as 8 hours of military labor at an aggregate estimated cost of $18.30 (R.47-48).

4. The only evidence adduced on behalf of the defense was the testimony of the accused, who, after being duly advised of his rights, elected to take the stand under oath and testify as to Charge II and its Specification only (R.48). He denied that he told the guard at the main gate that he was going to drive to his quarters when he was leaving the base for the last time on the night of the accident (R.49). He drove to the main gate with his "passenger" beside him at about 10 minutes to 6. There he stopped the jeep, inquired for the officer of the day and being informed he was not there requested the sentry, "Would you please tell him I have cleared out." Because he did not want to "advertise" what he characterized as "a violation I had already committed," he said to the sentry, "If you tell the OD I have cleared out, he will understand" (R.50). He then drove into the station - "I had to drive about 100 yards to turn around," he testified, "and I was gone 3 or 4 minutes and of all places to tell the guard I was going to Site 3!" When he reached the gate on his way out, instead of stopping he merely slowed down into first gear, the guard shone a light on him, the accused said, "goodnight boys," and drove the jeep out through the gate (R.49,51-52). Asked if his remark could have been indistinct enough for the guard to have thought he had said he was going to his quarters, the accused replied:

> "I am not saying, because he is not indifferent to his job, that is what he thinks. I said I thought he really believed I said that. I don't doubt that, but I always go by and say 'Goodnight boys'. I call out to all the gates. They know me and I know them and I always say 'Goodnight'. That is all I ever say to any of them. I am about as sure as I could be that I didn't say I was going to Site 3."

He did not think the sentry was lying but, "knowing the jeep didn't go to Site 3, is using all the art he has to say he wasn't lax on the job". The accused expressed the opinion that the sentry made a mistake in letting him go without a trip ticket "insofar as I didn't go to Site 3 but had an accident" (R.52).

He testified and produced honorable discharge certificates to show that he had served over 21 years in enlisted grades (R.49). He was last honorably discharged as Master Sergeant, temporary grade, in December 1942. During his 21 years of enlisted service, he received no punishment except "three days restriction about 15 years ago. * * *. That was one of the two times I missed reveille. * * *. I didn't get anything for the second one" (R.50).

5. Recalled by the prosecution in rebuttal, the sentry at the main gate on the night of the accident testified that when the accused drove in that night, "he said words to the effect 'Tell the OD I am back' and I had no further conversation with him until he came out again and he said words to the effect 'I am going to my quarters'. That was all" (R.53).

As the car entered the base at gate 1, the jeep definitely stopped. It was dark and the sentry had to put his light on to see who the accused was. On his exit, the accused did not stop the car completely. "It was one of those rolling stops," but long enough for the sentry to determine who was in the car. In passing, the witness on rebuttal concluded, "He said words to the effect 'I am going to my quarters'" (R. 53-54).

6. The Specification, Charge I, alleges that the accused wrongfully and through neglect suffered a government vehicle of the value of more than $50.00 to be damaged by collision with another vehicle, in violation of AW 83. The value of the vehicle described is established as more than $50 by evidence of the list price and the speedometer reading. That it was substantially damaged when the accused drove it in collision with a parked lorry is also established. The evidence shows that the accused was using the vehicle wrongfully and supports the inference that he was operating it negligently when the collision occurred, and that, in the absence of his wrongful use and negligent operation, the vehicle would not have been damaged as it was on the occasion in question. Article of War 83 provides that

> "Any person subject to military law who * * * through neglect, suffers to be * * * damaged * * * any military property belonging to the United States shall * * * suffer such punishment as a court-martial may direct."

Thus it appears that competent evidence sustains the court's findings of guilty of Charge I and its Specification (CM ETO 393, Caton & Fikes).

7. The Specification Charge II, alleges a false official statement made with intent to deceive the guard on duty at the main gate of the accused's station, in violation of AW 95. The guard's testimony, contradicted by the accused, supports the court's finding that the accused made the statement to the guard substantially as alleged. Abundant, competent, substantial and uncontradicted testimony establishes the falsity of the

statement if made, and strongly supports the inference that it was motivated and accompanied by an intent to deceive the guard for the purpose of preventing his anticipated compliance with his orders to inquire and make a record of the destination of the off-base trip upon which the accused was then and there knowingly and surreptitiously setting forth in a government vehicle. Knowingly making a false official statement is, for an officer, a violation of Article of War 95 (MCM,1928, par.151,p.186) and has been so held when the accused was a field officer and the person to whom the false statement was made an army nurse officially engaged within the line of her professional duties as a ward nurse in a hospital ward in which the accused was a patient (CM 153703 (1922) Dig.Op.JAG,1912-1940, sec. 453 (18) p.345). However, the offense alleged is equally a violation of Article of War 96 (CM 122249 (1918), Dig.Op.JAG,1912-1940,sec.454(49), p.357) and the court's finding that the offense established by the evidence was a violation of the latter article and not of Article of War 95, was an authorized exercise of the court's discretion. Accused's denial that he made the statement attributed to him by the guard at the gate presented a question of fact solely within the province of the court to decide and unless palpably in error its determination will not be disturbed by the Board on appellate review (CM ETO 132, Kelly and Hyde; CM ETO 397,Shaffer; CM ETO 1191, Acosta). As to Charge II and its Specification, the evidence is legally sufficient to sustain the findings of the court.

8. Specifications 1 and 2, Charge III, allege respectively the wrongful taking and use without proper authority of a government vehicle adequately described,of a value in excess of $50.00, and the wrongful introduction into station limits, in violation of standing orders, of a named member of the Women's Auxiliary Air Force, both offenses in violation of Article of War 96. The evidence is uncontradicted that the accused used the jeep assigned to him for official business to drive his guest to a hotel 6 or 7 miles away from his base for purposes purely personal to the two of them. The value of the jeep was satisfactorily shown to be more than $50. The offense alleged and proved constitutes a violation of Article of War 96 (CM ETO 393, Caton and Fikes). Whether or not the member of the British Women's Auxiliary Air Force whom the accused "introduced" into the limits of his station through the hedge and over the fence was a civilian visitor within the purview of the memorandum identified as Exhibit 3, need not be decided in view of the clear showing of a prior verbal order of the commanding officer issued at an officers' meeting and known to the accused, that military guests, though accompanied by station personnel, must show their credentials and register at the guard gate. This verbal order was a standing one and disobedience of it was a disorder and neglect to the prejudice of good order and military discipline, in violation of Article of War 96 (MCM, 1928, par.152a, p.187). As to Charge III and Specifications 1 and 2 thereunder, the evidence is legally sufficient to sustain the findings of the court.

9. The Manual for Courts-Martial provides that

> "After being read to the court a deposition will be properly marked as an exhibit with a view to incorporation in the record." (MCM, 1928, par. 119a, p.124).

The record does not indicate that either of the depositions introduced at page 29 were marked at all. The trial judge advocate, upon introducing Miss Imray's in evidence, stated:

> "At this time I would like to read the deposition of ADINA BERYL IMRAY, the girl about whom testimony has been given here. This deposition was taken at the St.Hughes British Military Hospital, Oxford, England, on 26 January, 1944, by agreement and waiver of formal written notice at which time the TJA and Assistant Defense Counsel were present. Is there any objection on the part of the accused to reading this deposition taken at that time?"

The accused replied, "No sir." Appended to the record following the prosecution's exhibits is an unmarked deposition of Adina Beryl Imray which shows on its face that it was taken at the St. Hughes British Military Hospital, Oxford, England, on 26 January 1944, by agreement and waiver of formal written notice at which time the TJA and Assistant Defense Counsel were present. The Board of Review is of the opinion that it is warranted in assuming that the appended unmarked deposition of Adina Beryl Imray is the identical deposition which was read to the court by the trial judge advocate on the trial of the case.

10. The charge sheet shows that the accused is 44 years of age with continuous enlisted service from 8 August 1918 until commissioned "direct" 2 December 1942.

11. 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 confirmed. Dismissal of an officer is authorized upon conviction of a violation of AW 83 or 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 APR 1944 TO: Commanding General, ETOUSA, APO 887, U.S.Army.

1. In the case of First Lieutenant GRAHAM B. LEWIS (O-506127), 1274th Military Police Company (Aviation), 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. 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 1953. For convenience of reference please place that number in brackets at the end of the order: (ETO 1953).

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

(Sentence as mitigated ordered executed. GCMO 27, ETO, 5 May 1944)

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

BOARD OF REVIEW

ETO 1954

23 MAY 1944

U N I T E D S T A T E S	EIGHTH AIR FORCE.
v.	Trial by G.C.M., convened at AAF Station 115, APO 634, 17 March 1944.
Private First Class FRED LOVATO (37341891), 61st Station Complement Squadron.	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
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 Fred (NMI) Lovato, 61st Station Complement Squadron, AAF Station 120, APO 634, did, at Norwich, Norfolk County, England, on or about 3 February 1944, with intent to commit a felony, viz: rape, commit an assault upon Lily Ada Bobbins, by wilfully and feloniously throwing the said Lily Ada Bobbins to the ground, getting on top of her, striking her on the face and choking her on the neck with his hands.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 20 years at such place as the reviewing authority may direct. The reviewing authority approved the sentence but remitted ten 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.

(52)

3. A sharp issue of fact was created by the evidence in this case as to the existence, on the part of accused of the specific intent to rape Miss Bobbins when he committed the assault and battery upon her. While the Board of Review is fully conscious of the fact that the offense with which accused is charged is within the category of crimes where the "accusation /is/ easy to be made, hard to be proved but harder to be defended by the party accused, though innocent" (MCM, 1928, par.148b, p.165) it is of the opinion that the testimony of the victim is of such substantial and credible nature as to indicate accused's coexistent intent to rape her when he subjected her person to violence. The determination of the issue presented by the total evidence was peculiarly within the province of the court, and its finding is entitled, upon appellate review, to the full benefit of the presumption that it is true and correct (CM 192609, Hulme (Rehearing), Dig.Op.JAG, 1912-1940, sec.408(2), p.259; CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer). The Board of Review therefore concludes that the finding of guilty was supported by substantial evidence (CM ETO 1673, Denny and authorities therein cited).

4. The charge sheet shows that accused is 25 years six months of age and was inducted at Fort Logan, Colorado, 13 February 1943, 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. The sentence is less than the maximum for the offense charged (MCM, 1928, par.104c, p.99). 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. 23 MAY 1944 TO: Commanding General, Eighth Air Force, AAF Station 101, APO 634, U.S. Army.

1. In the case of Private First Class FRED LOVATO (37341891), 61st Station Complement Squadron, AAF Station 120, APO 634, 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, as well as by copies of letters to civilians, as required by Circular 72, ETOUSA, 9 September 1943, section II, paragraph 5c. The file number of the record in this office is ETO 1954. For convenience of reference please place that number in brackets at the end of the order: (ETO 1954).

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

(55)

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

BOARD OF REVIEW

ETO 1957

-8 MAY 1944

U N I T E D S T A T E S	2D INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Armagh, Northern Ireland, 17 March 1944.
Private EDWARD J. WARD (6950124), Company "C", 23d Infantry.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 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 58th Article of War.
Specification: In that Private Edward J. Ward, Company C, 23d Infantry, did, at Tynan Abbey Camp, County Armagh, North Ireland on or about 10 November 1943 desert the service of the United States and did remain absent in desertion until he was apprehended in the vicinity of Rich Hill, County Armagh, North Ireland on or about 2 March 1944.

He pleaded "Not Guilty, but Guilty of absence without official leave" to both the Specification and the Charge. (Accepted by the court as a plea of not guilty to the 58th Article of War, but guilty under the 61st Article of War). He was found guilty of the Specification and the Charge. Evidence of one previous conviction was introduced, for absence without leave for 47 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 for 40 years at

(56)

such place as the reviewing authority may direct. The reviewing authority approved the sentence but reduced the period of confinement to 15 years, 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 22 years of age and that he enlisted 18 October 1939. 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 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. The designated place of confinement is authorized.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 8 MAY 1944 TO: Commanding General, 2d Infantry Division, APO 2, United States Army.

1. In the case of Private Edward J. Ward (6950124), Company "C", 23d 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 as approved, 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 1957. For convenience of reference please place that number in brackets at the end of the order: (ETO 1957).

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 1965

19 MAY 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 JACK LEMISHOW (12040530), 554th Bombardment Squadron, 386th Bombardment Group.	Trial by G.C.M., convened at London, England, 24 March 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
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 58th Article of War.
Specification: In that Private Jack Lemishow, 554th Bombardment Squadron, 386th Bombardment Group, ETOUSA, did, at Great Dunmow, England, on or about 9 October 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 3 March 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that * * *, did, at London, England, on or about 1 December 1943, feloniously take, steal and carry away, seven one pound notes, English currency, of the value of about Twenty Eight dollars ($28.00), the property of Private Rudolph Amrien, 327th Glider Infantry, ETOUSA.

(60)

Specification 2: In that * * *, did, at London, England, on or about 6 January 1944, feloniously take, steal and carry away, two one pound notes, English currency, of the value of about Eight dollars ($8.00) the property of Staff Sergeant Philip L. Feske, Headquarters, 385th Bombardment Group, ETOUSA.

Specification 3: (Withdrawn by direction of appointing authority).

Specification 4: In that * * *, did, at London, England, on or about 28 January 1944, feloniously take, steal, and carry away, five one pound notes, English currency, of the value of about twenty dollars ($20.00), the property of Sergeant Glade A. Neil, 36th Bombardment Squadron, 482nd Bombardment Group, ETOUSA.

Specification 5: In that * * *, did, at London, England, on or about 7 February 1944, feloniously take, steal and carry away one one pound note, English currency, of the value of about four dollars ($4.00), the property of Staff Sergeant George H. Finney, 351st Fighter Squadron, ETOUSA.

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, and to Charge I, not guilty, but guilty of a violation of the 61st Article of War; and not guilty to Charge II and its specifications. He was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 15 years at such place as the reviewing authority may direct. The reviewing authority approved the sentence, 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 charge sheet shows that accused is 24½ years of age. He enlisted 5 January 1942 at New York City, New York, for the duration of the war plus six months.

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. The punishment for desertion committed in time of war is death or such other punishment as the court may direct (AW 58). The place of confinement designated is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(62)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 19 MAY 1944 TO: Commanding General, Central Base Section, SOS, ETOUSA, APO 887, U.S. Army.

1. In the case of Private JACK LEMISHOW (12040530), 554th Bombardment Squadron, 386th 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 1965. For convenience of reference please place that number in brackets at the end of the order: (ETO 1965).

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 1981

17 MAY 1944

U N I T E D S T A T E S	EIGHTH AIR FORCE
v.	Trial by G.C.M., convened at AAF Station 117, 11 February 1944.
General Prisoner ROY E. FRALEY (14070757), (formerly Private), 527th Bombardment Squadron, 379th Bombardment Group (H)	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
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 58th Article of War.
Specification: In that General Prisoner Roy E. Fraley did on or about the 14th November 1943, desert the service of the United States at Station 117, APO 634, U. S. Army and did remain absent in desertion until he was apprehended at Station 594, APO 635, U. S. Army on or about 14 December 1943.

CHARGE II: Violation of the 69th Article of War.
Specification 1: In that * * *, having been placed in confinement in Guardhouse, AAF Station 117, APO 634, on or about 25 September 1943, did at AAF Station 117, APO 634, on or about 14 November 1943, escape from said confinement before he was set at liberty by proper authority.

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Specification 2: In that * * *, having been duly placed in confinement in Guardhouse, Eighth Air Force Replacement Depot, AAF Station 594, APO 635, on or about 14 December 1943, did at Eighth Air Force Replacement Depot, AAF Station 594, APO 635, on or about 15 December 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 96th Article of War.
Specification 1: In that * * * did at AAF Station 117, APO 634, on or about 14 November 1943, wrongfully take and use without proper authority a certain motor vehicle, to wit: a ¼ ton 4x4 jeep, serial number 20339009, property of the United States of the value of more than $50.00.
Specification 2: (Disapproved by reviewing authority)

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of three previous convictions by summary court for absence without leave for 15, 2 and 3 days respectively in violation of AW 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 for 10 years at such place as the reviewing authority may direct. The reviewing authority disapproved the finding of guilty of Specification 2, Charge III, 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 evidence shows that on 14 November 1943 the accused was a private (R8) confined in the guardhouse (R8-12,26-27; Exs.1,2). The present charges were preferred against him on 18 December 1943. An examination of the records of this office (CM ETO 1219) discloses that accused was sentenced by General Court Martial on 9 November 1943 to dishonorable discharge, total forfeitures and confinement at hard labor for three years. The approved sentence suspending the dishonorable discharge until the soldier's release from confinement, was promulgated in GCMO No.106, Headquarters VIII Bomber Command, APO 634, 28 December 1943. The Board of Review may take judicial notice of the foregoing data upon appellate review of the present case (CM ETO 1538, Rhodes, citing Caha v. United States, 152 US 211, 222, 38 L.Ed. 415,419; Thornton v. United States, 271 U.S. 414,420,70 L.Ed.pp.1013,1017). No question as to accused's amenability to trial by General Court-Martial can arise in the instant case inasmuch as the dishonorable discharge on the prior conviction was suspended. The issue in this case is therefore distinguishable from that which arose in CM ETO 960, Fazio, Nelson and Poteet.

The Manual for Courts-Martial provides:

> "In the case of a general prisoner, whether the sentence of dishonorable discharge was suspended or not, the rules as to an enlisted man apply, except that the evidence of previous convictions should be limited to evidence of offenses committed during his status as a general prisoner." (MCM, 1928, par.79c, p.66).

Accused at time of trial on 11 February 1944 was a general prisoner inasmuch as he had been sentenced to confinement and dishonorable discharge (AR 600-375, sec. III, par.12(b)). He became such on 28 December 1943, the date of GCMO No. 106, Headquarters VIII Bomber Command.

The foregoing restriction precludes proof of the conviction evidenced by the foregoing general court-martial order upon deliberation of the court in the instant case to adjudge the sentence. The trial judge advocate correctly made no reference to such conviction.

Under the same provisions of the Manual for Courts-Martial, the evidence of three other previous convictions introduced on the trial after the findings of guilty were announced, was improperly admitted. However, no objection was asserted to the introduction of this evidence and the Manual for Courts-Martial expressly provides, with particular reference to evidence of previous convictions, that

> "Any objection not asserted may be regarded as waived." (MCM, 1928, par.79b, p.66).

Moreover the sentence adjudged in the instant case is so far below the maximum authorized for the first of the four offenses of which the accused was convicted as to clearly indicate that none of his substantial rights were injuriously affected by the admission in evidence of the previous convictions (AW 37).

4. The charge sheet shows that the accused is 23 years of age, that he enlisted at Jackson, Mississippi, 16 Jan 1942, to serve for the duration of the war plus six months, and that 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 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.

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6. The designation of the 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

(67)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 17 MAY 1944 TO: Commanding General, Eighth Air Force, APO 634, U.S.Army.

1. In the case of General Prisoner ROY E. FRALEY (14070757), 527th Bombardment Squadron, 379th 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. 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 1981. For convenience of reference please place that number in brackets at the end of the order: (ETO 1981).

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 1982

18 MAY 1944

U N I T E D S T A T E S	NORTHERN IRELAND BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Technician Fourth Grade CHARLES E. TANKARD (32828494), 273rd Port Company	Trial by G.C.M., convened at Wilmont House, County Antrim, Northern Ireland, 21 March 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 specifications:

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that Technician Fourth Grade Charles E. Tankard, 273rd Port Company, did, at Belfast, Northern Ireland, on or about 14 December 1943, with intent to do him bodily harm, commit an assault upon Private Herbert Hall, 376th AAA, A.W. Battalion, by unlawfully and feloniously cutting him with a dangerous instrument, to wit: a dagger.
Specification 2: In that * * *, did, at Belfast, Northern Ireland, on or about 14 December 1943, with intent to do him bodily harm, commit an assault upon Private First Class James F. Knuckles, 376th AAA, A.W.Battalion, by unlawfully and feloniously cutting him with a dangerous instrument, to wit: a dagger.

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 for five years at such place as the reviewing authority may direct. 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 record contains competent substantial evidence in support of the conviction of accused of two assaults of the character and under the circumstances alleged (CM ETO 1284, Davis et al, and authorities there cited).

4. The order appointing the court (SO #45, 14 Feb 1944), otherwise in proper form, is captioned "HEADQUARTERS NORTHERN IRELAND BASE SECTION APO 813." The Board of Review may take judicial notice that the incompletely designated command is an official geographical and administrative subdivision of the Services of Supply, European Theater of Operations, U.S.Army. Furthermore, the clerical omission from the designation was ratified by the subsequent action of the reviewing authority, referred to above, approving the sentence (Cf CM ETO 1606, Sayre). The Board of Review is therefore of the opinion that the irregularity is not fatal (Cf CM 120875 (1918), Dig. Op. JAG 1912-1940, sec. 365(1), p.169).

5. The charge sheet shows that accused is 20 years of age, that he was inducted 9 March 1943 and that his period of service is governed by the Service Extension Act of 1941.

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 is legally sufficient to support the findings of guilty and the sentence. The sentence does not exceed the maximum for either of the offenses charged (MCM, 1928, par.104c, p.99). 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. 18 MAY 1944 TO: Commanding General, Northern Ireland Base Section, SOS, ETOUSA, APO 813, U.S. Army.

1. In the case of Technician Fourth Grade CHARLES E. TANKARD (32828494), 273rd Port 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 1982. For convenience of reference please place that number in brackets at the end of the order: (ETO 1982).

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

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

BOARD OF REVIEW

ETO 1991

10 MAY 1944

U N I T E D S T A T E S)	30TH INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at APO 30,
)	18 March 1944. Sentence: Dismissal,
First Lieutenant WILLIAM V.)	total forfeitures and confinement at
PIERSON (0-1297421), Service)	hard labor for five years. Eastern
Company, 119th Infantry.)	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 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 93rd Article of War.
Specification: In that First Lieutenant William V. Pierson, Service Company, 119th Infantry, did, at Camp Atterbury, Indiana, on or about January 2, 1944, feloniously embezzle by fraudulently converting to his own use the sum of $18.75 in lawful money of the United States, the property of Technician Grade V Victor C. Navone; the sum of $37.50 in lawful money of the United States, the property of T/Sergeant Henry I. Crawford; the sum of $18.75 in lawful money of the United States, the property of Sergeant George Bailes; the sum of $18.75 in lawful money of the United States, the property of S/Sergeant William J. Andrews; the sum of $1.00 in lawful money of the United States, the property of Pfc Ralph K.Davis; the sum of $18.75 in lawful money of the United States, the property of Technician Grade V Alvin L. Piper; the sum of $2.25 in lawful money of

the United States, the property of Technician Grade V Harry H. Morro; the sum of $75.00 in lawful money of the United States, the property of Technician Grade IV Ronald M. Ruth; the sum of $1.00 in lawful money of the United States, the property of Sergeant Clarence E. Hales; the sum of $27.75 in lawful money of the United States, the property of Technician Grade IV Michele Corhan; the sum of $5.00 in lawful money of the United States, the property of Technician Grade V Roy A. Hankins; the sum of $2.00 in lawful money of the United States, the property of Technician Grade V Robert J. Drury, entrusted to him by the individuals aforementioned for the purchase of United States War Bonds or Stamps or both.

CHARGE II: Violation of the 61st Article of War.
Specification: In that * * *, did, without proper leave absent himself from his organization and station at APO #30, c/o Postmaster, New York, New York, from about 0600 9 February 1944 to about 0600 10 February 1944.

He pleaded not guilty to Charge I and its Specification, guilty to Charge II and its Specification and was found guilty of both charges 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 five years. The reviewing authority, the Commanding General, 30th 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, designated 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 summarized as follows:

On 2 January 1944 at Camp Atterbury, Indiana, accused assisted Captain Oliver W. Franklin, commanding officer, Service Company, 119th Infantry, in the payment of his troops. In the same room, Lieutenant Guy Drennan, of the same organization, in accordance with a customary procedure, collected money from the soldiers, for the purchase by them of war bonds and stamps (R21-22,32). Prior to January 1944 similar collections and lists of buyers were, upon completion, delivered by the collecting officer to the first sergeant of the company who personally attended to the purchase and distribution of the bonds abd stamps. On the occasion in question, Captain Franklin and Lieutenant Drennan were obliged to leave before payment

of the troops was completed. In compliance with Captain Franklin's instructions, Lieutenant Drennan delivered to accused the money which he had collected, approximating $220, together with the list of names of bond and stamp purchasers and their respective deposits. Captain Franklin directed accused "to stay and pay the other men and to turn the bond money over to the first sergeant--or who was actually the acting first sergeant--the first sergeant was on furlough."(R22,31). After completing the payment of the troops present on 2 January 1944, accused attached to the payroll the list of bond and stamp purchasers, and placed it with an envelope marked "bond money" in the field desk in the orderly room, where it was seen by the acting first sergeant, who left camp on furlough that night (R40-42).

The following night (3 January 1944) a number of men, including the first sergeant, returned from furlough. Some of them were paid the next afternoon - 4 January - by accused. At that time the first sergeant opened and "laid the payroll and money back on" the field desk. The payroll was in the money bag. No list was attached to it and the first sergeant saw no sign of any Bond money in a separate folder. Accused never gave him any money or "list to buy bonds for," nor talked to him at all about the January payday collection for the purchase of bonds and stamps (R42-44). Accused continued to pay men returning from furlough after payday and to collect bond and stamp subscriptions from them until 5 or 6 January 1944. Sergeant Andrews who returned from his furlough 4 January 1944 was paid by accused 5 January 1944 at which time he gave accused $18.75 for the purchase of a bond. Each of the other enlisted men named in the Specification, Charge I, paid the amount of money alleged to have been embezzled from him, either to Lieutenant Drennan or to the accused on 2 January or to the accused between 4 and 6 January 1944. All amounts paid to Lieutenant Drennan were delivered by him to accused on 2 January 1944 (R7-22,31).

On 2 January 1944, the officers of the 119th Infantry received their paychecks at regimental headquarters, where, between 3:30 and 4 p.m., Captain Franklin inquired if accused desired to accompany him to the bank for the purpose of cashing his check. He replied that he would cash his own check from the "bond money," a not unprecedented procedure as the post office would accept government checks as well as cash in payment for war bonds and stamps. Returning from the bank an hour later, Captain Franklin again saw accused "and asked him about his check, and he said he had cashed it, intimating, if not actually saying, that he had cashed it with bond money"(R23,28-30).

"About January 4th or 6th" accused paid his officers' club bill which had been delinquent for several months, to Corporal Casey, a club employee, with $96.93 in cash (R33-35). On 15 January, accused returned $75 in cash to an enlisted man who had paid that amount for the purchase of bonds on 2 January but who later desired to have it returned to him because he was being married (R39-40).

About 12 January 1944, Captain Franklin learned that no bonds and stamps had been purchased for the men and that some of them "were getting

pretty hot" about it. They had never waited for delivery of their bonds and stamps more than four or five days after thus paying their money. The captain ascertained that the first sergeant had received no money for the purchase of bonds and stamps, and thereupon telephoned accused directing him to "turn the money over" to the first sergeant. He replied "he would be by in fifteen minutes to do this." Later the same afternoon, the captain learned he had not seen the first sergeant. At that time and daily thereafter until 18 January Captain Franklin repeated by telephone his instructions to accused to deliver the "bond money" to the first sergeant. Each time he received these instructions from Captain Franklin, accused promised to comply with same within a few minutes (R23-24).

On 18 January 1944 in a personal interview with Captain Franklin, accused first asserted the money had been stolen from his room. Captain Franklin suggested that he would cause to be traced accused's check which he had cashed with bond money, accused "explained that the thief would probably throw the check away."(R25-26). Captain Franklin did not then demand the money but the next day he demanded it, whereupon accused stated he was waiting for his wife to bring the money to camp. "He said she was at home--New Jersey or New York or somewhere in the east to get the money from his father."(R25,29-30). The accused never delivered the bond money as directed nor did he ever reimburse the soldiers nor deliver to them the bonds and stamps to which their payments to the fund entitled them (R25,27-29,43).

On 25 January 1925, having decided to purchase the bonds and stamps with his own private funds, Captain Franklin asked accused for the list. He replied that it was in a laundry roster folder in the field desk. The captain and the first sergeant thoroughly searched the field desk; they found the laundry roster but no bond and stamp list. Obtaining the necessary information from other undisclosed sources, Captain Franklin, the same day, advanced from his own funds a sum of money to the first sergeant, who purchased bonds and stamps and distributed the same to the soldiers. In particular instances refunds in cash were effected (R25-26,28,44). On 1 February 1944, accused delivered his pay check to Captain Franklin in reimbursement of $143.83 of the sum so advanced, and, after March payday paid $12 in addition. There remained an unpaid balance of approximately $150.00 (R27,31).

According to extract copies of morning reports of accused's company, properly certified, introduced in evidence, and ifentified by Captain Franklin on the witness stand as true and correct, accused was absent without leave from his organization from 0600 hours 9 February 1944 to 0600 hours 10 February 1944 (R26; Pros.Exs.1,2).

4. For the defense, it was stipulated that if accused's wife were present in court she would testify that her husband "told her on or about 5 January 1944, that he collected some money for the purchase of war bonds which he had put in his foot locker and the locker was broken open and the money was taken. He further told her that he found this out about January 5, 1944"(R46).

Lieutenant Colonel Daniel W. Quinn, 119th Infantry, having testified for the prosecution, was recalled as a witness for the defense. He testified that he made an informal investigation of the case on 18 January 1944 in his capacity as regimental executive officer without orders from higher authority. As a result of this he concluded that the incident was "apparently" closed, provided accused continued to repay the money Captain Franklin had advanced for the war bonds, "but there was no threat that anything would happen if he didn't pay it back," and no agreement or understanding between the witness and accused.

5. Accused, after being duly advised of his rights, elected to testify under oath. He testified as follows:

"When the men were paid off, they gave their money to Lt Drennan. The Captain and Lt Drennan were called off on some kind of business and Captain Franklin left me in charge to see that the rest of the men were paid off. I paid the rest of the men off and put the money in the field desk. That night Captain Franklin and I went to get our pay checks and Captain Sency (personnel officer) was not there. The Captain picked up my check. He went to the bank and had his cashed and gave me my check and asked if I wanted it cashed and I said I would cash it from the bond money. We went in the officer's club and then I went home that night. The money was in the field desk. Sunday morning I got the money and went to the hospital and paid three or four men there who had missed the pay day. Lt Smith was there when I got the money and had the key to the desk. I had some business in town on Monday and I had planned to take the money in with me and buy the bonds there as I had to go in to see about a telephone anyway. I had the money in my foot locker over night. Then on Monday we started turning in property and I got too busy to go to town to buy the bonds. I had not turned the money over to the first sergeant because he was on furlough. I figured I would get the bonds and stamps when I had the chance to go to town. Tuesday afternoon I paid the remainder of the company off and told the sergeant I had the rest of the money in my foot locker. I collected some money from the men that day for the purchase of war bonds and added that

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> with the other money in my foot locker. That night the locker was broken open and the money taken out of it. I did not report it because I didn't want anyone to know of my carelessness with the bond money and I told my wife about it and we figured we could make it good by getting the money from my father. We tried to get it from him and had no luck, so we tried to get it from my brother-in-law and had no luck there either. When Captain Franklin asked me about it, I was expecting my wife back and I told him I was waiting for a call from her. She called and told me she was unable to get the money from my father or anybody else. That afternoon I was called in to Colonel Quinn's office and I explained the whole situation to him."(R47).

He obtained the $75.00 from the proceeds of his wife's allotment check to repay the man who contemplated marriage (R47). He paid his club bill by delivering his December pay check to Corporal Kieth, who was employed at the officers' club. He received in cash the difference between the amount of his pay check and the amount of his bill. From 2 January to 10 February, he neither made any unusual expenditures of money nor did he incur any unusual expenses. His authority to hold the bond and stamp money received on payday until 6 January was "the fact that some of the men had not returned from furlough." He explained the reasons for the delay in obtaining the war bonds by stating that "after the money was stolen, there was no place I could raise the money at that time." He believed but was not sure that the list of bond buyers was in the field desk, to which he had no key (R50).

On cross examination, he testified that on 4 January he stated to the first sergeant he would turn the money over to him the next day. The next night he revealed his discovery of his loss to his wife, but to no one else. He was familiar with the practice of delivering the bond money to the first sergeant, but, in this case, he could not do it, although the first sergeant was there on the 4th. He recalled telling Captain Franklin that he intended to cash his check out of the bond money, but denied that when he informed Captain Franklin the bond money was stolen, Captain Franklin made the suggestion that he could probably trace the accused's check if it was in the bond money, or that he told Captain Franklin that the check would be thrown away. Although he reiterated that he paid his bill at the officers' club by check to Corporal Kieth, he later testified that he would not swear that it <u>was</u> Corporal Kieth to whom he paid it, or that it was <u>not</u> Corporal Casey (who had testified for the prosecution that the accused paid him) (R49-50).

He placed Lieutenant Drennan's and his own subsequent bond collections -- $400 in paper and change -- in the tray of his foot locker

fastened with an old lock in his barracks, which was located about 300 yards distant from the orderly room. He locked it but he later found it open -- the lock not knocked off, just open -- and the money gone. He later exchanged his old locker for a new one without showing it to anyone (R50-51). He decided to buy the bonds himself because of the first sergeant's absence, although he admitted that the first sergeant returned on the 4th and that his locker was not broken into until sometime between the night of the 4th and the morning of the 5th (R52).

After he informed Captain Franklin he intended to cash his check out of bond money, "I just didn't and instead got it cashed at the club." He claimed that he paid his bill with his pay check and not with cash as Corporal Casey testified (R52-53).

Questioned as to the reason he went absent without official leave accused answered: "I missed my train back. My train was 20 minutes late and I missed my last connection until 6:15 back to Atterbury. I got some liquor and started drinking and incapacitated myself and that is all I remember." (R51).

6. In rebuttal, by direct evidence it was shown that accused paid his officers' club bill to Corporal Casey and not to Corporal Kieth, in cash - "in twenties and tens" - and not by delivery of his pay check (R53-54).

7. The Specification, Charge I, alleges embezzlement in violation of Article of War 93. Competent substantial evidence established every element of the offense, within the doctrines announced and elucidated in CM ETO 1302, Solsin, and affirmed in CM ETO 1538, Rhodes and CM ETO 1588, Moseff. Accused's evidence created an issue of fact which was resolved against him by the court and its finding is binding on the Board of Review (CM ETO 132, Kelly and Hyde; CM ETO 397, Sheffer; CM ETO 1191, Acosta).

8. The Specification, Charge II, alleges absence without leave for one day in violation of Article of War 61. Competent evidence established the offense, to which accused pleaded guilty (CM ETO 364, Howe).

9. The court properly overruled the defense counsel's motion that the Specification of Charge I be stricken and a finding of not guilty entered at the conclusion of the prosecution's evidence-in-chief, an abundance of substantial evidence having then clearly established every essential element of the offense charged. The motion was properly denied (MCM 1928, par.71d, p.56; CM ETO 393, Caton and Fikes).

10. Immediately following the testimony of the prosecution's witness, George H. Bailes, Jr., Sergeant, Service Company, 119th Infantry, it was stipulated "between accused, the defense and the Trial Judge Advocate that that portion of the Specification of Charge I reading as follows, 'the sum of $18.75 in lawful money of the United States, the property of Sergeant George Bailes' be amended to read as follows, 'the sum of $29.25, in lawful money of the United States, the property of Sergeant

George Bailes'"(R10). The total amount alleged to have been embezzled, according to the original specification in question, was $226.50. Thus the amendment neither altered the nature nor increased the grade of the offense. It did not subject accused to liability for any greater punishment than the original specification, which in the light of the proof was defective merely as to the inconsequential amount of one contributor's interest in the embezzled fund. While

> "Neither the judge advocate nor the court has the power to make substantial amendments to specifications without the authority of the convening authority. (Par.97, MCM, 1917; par.73, MCM, 1928; Winthrop, Mil. Law and Precedents, reprint, p.155.) C. M. 129525 (1919)" (Dig.Op.JAG, 1912-1940, par.428(9), p.296).

the court may during trial permit the appropriate amendment of a defective specification which originally was sufficient to apprise the accused fairly of the offense intended to be charged, provided it clearly appears that the accused has not been misled, and that a continuance is unnecessary for the protection of his substantial rights (MCM 1928, par.73, p.57). Had the original specification alleged embezzlement of $18.75 and no more, amendment by the court to meet the proof adduced would have been unauthorized as increasing the quantity of the offense originally alleged (MCM, 1928, par. 104g, p.99). Had the amendment affected the corpus of the embezzlement, substituting bonds for money, for example, it would have been unauthorized. Such amendment would have changed the quality of the original offense, alleging in lieu thereof, one separate and distinct (CM 189741 (1930); CM 188571 (1929); CM 185034 (1929); Dig.Op.JAG 1912-1940, par.451(20),pp.317-318). Since the amendment affected neither the quality nor the quantity of the offense originally alleged, the court properly permitted it, under the circumstances disclosed by the record of trial.

11. The charge sheet shows that the accused is 28 years of age and that he was commissioned a second lieutenant, Army of the United States, at Fort Benning, Georgia, 20 October 1942.

12. 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 as confirmed. Dismissal of an officer is authorized upon conviction of a violation of Article of War 93 or 96.

13. 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).

B. Franklin Peters Judge Advocate

Richard Winchester Judge Advocate

Elwood H. Sargent Judge Advocate

CONFIDENTIAL

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1st Ind.

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

1. In the case of First Lieutenant WILLIAM V. PIERSON (0-1297421), 119th 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 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. The record of trial shows that accused's commanding officer was, on or about 18 January 1944, fully informed of all of the material facts establishing embezzlement by the accused of the fund described in the Specification, Charge I. No charges were preferred until 16 February 1944 after the accused had been absent from his organization without leave for one day, as alleged in the Specification, Charge II. At the end of January he had delivered his pay check to Captain Franklin. He received the maximum sentence for the offense under the 93rd Article of War.

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 1991. For convenience of reference please place that number in brackets at the end of the order: (ETO 1991).

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

(Sentence ordered executed. GCMO 31, ETO, 15 May 1944)

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

BOARD OF REVIEW

ETO 2002

30 MAY 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 JOSEPH BELLOT (38262944), 958th Quartermaster Service Company.)	Trial by G.C.M., convened at Camp Rugby, Hampshire, England, 29 February and 1 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The 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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Joseph (NMI) Bellot, 958th Quartermaster Service Company, did, at Cosham, Hants, England on, or about, 9 February 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Mary Restall.

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 and 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, 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.

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3. The evidence for the prosecution, in substance shows that Mary Restall, 22 Mable Thorp Road, Wymering, Portsmouth, England, a 16 year old factory worker, attended a dance on the night of 9 February 1944 at Angerstein Hall in that city (R15-16). She left the hall to go home about ten o'clock with Frederick J. Welch, a fellow factory employee (R32) and Sheila May Knight (R31). They accompanied her part of the way and when they left her at about 10:15 p.m. she continued alone. As she was crossing a street by a railroad, a black soldier seized her by the neck and pulled her into some bushes behind a pile of rubble (R16) located next to the bus parking lot (Pros.Ex.A). When she tried to scream he held her mouth and told her to shut up. He tore her underclothes and forcibly had sexual intercourse with her (R16-17) rupturing her hymen, scratching her face and bruising and scratching her neck (R33). The next day her chin was blue and her cheeks and mouth very swollen (R25). Ronald Steward, a War Reserve Constable of Portsmouth, at about 11:35 the night of 9 February while on duty on the Portsmouth Road near the railroad, heard screams from the direction of a pile of rubble and on investigating found a colored American soldier lying on top of a girl on the ground. He flashed his torch and ordered the man to get up, at which time he saw that the lower part of the girl's body was exposed. She was moaning and said "He has torn my clothes and tried to strangle me." She was in an extremely distressed condition. While the officer was holding the soldier with one hand and attempting to assist the girl with the other the soldier broke away and ran. The officer gave chase and ran toward the Portsmouth bridge but lost sight of the soldier in the dark. He then took a bicycle from a passer-by and rode it in an attempt to catch the soldier. When he reached the bridge and while asking the constable stationed there if he had seen any colored soldier, he saw accused running along the left hand side of the bridge. Steward pursued accused and apprehended him. Accused's jacket was unbuttoned and he was out of breath (R10-11). He was captured "two or three hundred yards" from the place where the soldier had broken away from Steward and "just the time it took me to get from where I was to Portsmouth Bridge" (R15). The reserve constable did not see the face of the soldier (R12). Steward returned to the scene of the crime but the girl was gone (R14). When the police officer followed the soldier, she picked up her "mack" and ran home. The clothing of both the colored soldier and of Mary Restall, exhibits at the trial, showed blood and seminal stains (R27).

4. Accused was taken to the Cosham Police station in Portsmouth. He made a written signed statement to the British police as follows:

> "Cosham Police Station, Portsmouth, 10 February, 1944 Joseph Bellot, Private, No. 38262944, United States Army stationed at Hilsea College. I have been told by Detective Sgt Elwood that I need not say anything. I am making this statement of my own free will s/ Joseph Bellot About 9:30 PM on Wednesday February 9, 1944 I met a girl in a beer joint near Hilsea College. We had a drink together. I don't know her name. I

left the beer joint with her. I asked her if I could screw her and she told me to give her a pound for a short time. I walked with her to a place where there are busses parked. Someone started to run accross the street and the girl said, "Who's that running?" and she started to let fire running too. I grabbed her and asked her for my pound back. She wouldn't answer me and she wouldn't give me back my money so I just went with her. She didn't scream and she didn't struggle. A policeman came over and said to me, "get up", and I did. I had only just started when the policeman came over. s/ Joseph Bellot. This statement has been read over to me and it is true" (R23; Pros.Ex.I).

5. Two questions only need be considered, first, the lapse of approximately an hour and a half between the time Mary left the dance hall and the occurrence at the rubble pile located less than two miles from the dance hall, and second, the proof of the identity of the black American seen on top of the girl.

Mary Restall testified that at the dance somebody kicked her ankle while "jitterbugging" and it bothered her in walking (R20). Sheila May Knight testified that she was with Mary during all of the evening, that Mary did not leave the dance hall and that someone kicked her ankle and hurt her while dancing (R31). The injury to her ankle was not questioned. There was therefore a reasonable explanation of the time element which the court was free to accept.

Mary identified her assailant as a member of the United States army because "there is no black soldiers in our army so it could not have been our army". She was positive he was black. It was dark and she could not see his face (R21). Constable Steward did not see the face of the soldier at the scene of crime but said he was "a colored American soldier" (R12); he lost sight of him momentarily in the dark when he broke away and ran (R12). However, accused was apprehended, running, within two or three hundred yards of the crime. His coat was unbuttoned. His explanation of his whereabouts during the evening and of his actions describe the crime herein except in a few details. Further corroborating evidence of accused's identity is found in the fact that his victim's hymen had been ruptured. "It was torn and bleeding and the tears extended to the base * * *. It was in shreds" (R33,34). The doctor's subsequent examination produced a severe hemorrhage. Accused's clothing bore blood and seminal stains. These circumstances considered in connection with the fact that he was taken in the proximity of the crime support the presumption that the black American soldier found at the scene of the crime and who broke away from the police officer, and the accused who was captured a short

distance away from the locus with his clothes unfastened and while running, were one and the same person.

> "When evidence is of sufficient probative force, a crime may be established by circumstantial evidence, provided that there is positive proof of the facts from which the inference of guilt is to be drawn and that the inference is the only one which can reasonably be drawn from these facts." (People v. Razezicz 206 N.Y. 249; 99 N.E. 557,564).
>
> "whatever may be established by direct evidence in a criminal case may also be established by circumstantial evidence. The rule is one of necessity; only few convictions could be had if direct testimony of eye witnesses were required" (20 Am.Jur.- Evidence, sec.273, pp.260,261).
>
> "A few circumstances may be consistent with several solutions but the whole context of the 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).

The court, whose duty it is to resolve questions of fact and who saw and heard the witnesses and could best judge of their credibility, has found the accused and the black American soldier who attacked the girl to be one and the same man. Inasmuch as there is substantial evidence to sustain the finding the same will not be disturbed on appellate review (CM ETO 1621, Leatherberry, and authorities therein cited).

6. Accused was required upon motion of the prosecution and by direction of the Law Member to disrobe before the court and clothe himself in trousers, shirt and cotton shorts (Pros.Exs.J,K,L) which had been introduced in evidence and identified as clothing which was taken from his person on the night of the crime. The defense resisted the motion but its objections were over-ruled. While such practice is susceptible of abuse and should be adopted only in cases of extreme necessity, accused's constituted privilege under the 5th Amendment of the Federal Constitution not to give evidence against himself was not infringed by such procedure (MCM, 1928, par.122b, p.130; 1 Wharton's Criminal Evidence, 11th Ed. sec.382, p.607; Holt v. United States, 218 U.S. 245, 252; 54 L.Ed. 1021,1030).

7. There is attached to the record of trial a certificate of correction executed pursuant to sec.87b, p.75, MCM, 1928. Also attached is a

sworn list of "irregularities, discrepancies and inaccuracies of the transcribed record of trial", signed by the defense counsel and assistant defense counsel with statements of a spectator and a witness at the trial in support thereof; two signed statements of the Trial Judge Advocate, and one each by two members of the court and one by the president of the court in answer thereto. Records of trial before general courts-martial cannot be impeached by extraneous evidence in the form of certificates and affidavits (4 CJS sec.780, p.1263; Hopt v. People, 114 U.S. 488, 491, 29 L. Ed. 183, 184; Johnson v. United States, 225 U.S. 405, 56 L.Ed. 1142; In re McCall, 145 Fed.898). The Manual for Courts-Martial 1928 specifically provides methods for correction of erroneous or defective records of trial (MCM, 1928, sec.87b, p.75) and the same are exclusive. Even if the verity of the alleged errors in the record be conceded the substantial rights of the accused have not been injuriously affected by them as viewed by the requirements of Article of War 37.

8. Attached to the record of trial is also a petition for clemency signed by various citizens of Portsmouth.

9. The charge sheet shows the accused to be 21 years of age. He was inducted 6 November 1942 for duration of the war plus six months.

10. 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 (CM ETO 1886, Simmons and authorities therein cited).

11. A sentence of death or life imprisonment is mandatory on conviction of the crime of rape under the 92nd Article of War. Confinement in a penitentiary is authorized by AW 42 and secs. 278 and 330 Federal Criminal Code (18 USCA secs.457 and 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement is authorized (Cir.291, WD, 10 Nov 1943, sec.V, pars.3a and b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 30 MAY 1944 TO: Commanding General, Southern Base Section, SOS, ETOUSA, APO 519, U.S. Army.

1. In the case of Private JOSEPH BELLOT (38262944), 958th Quartermaster Service Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, 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 2002. For convenience of reference please place that number in brackets at the end of the order: (ETO 2002).

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 2005

U N I T E D S T A T E S	WESTERN BASE SECTION, successor to NORTHERN IRELAND BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Staff Sergeant LLOYD E. WILKINS (33741318) and Sergeant FRANKLIN D. WILLIAMS (35056431), both of 3992nd Quartermaster Truck Company.	Trial by GCM, convened at Wilmont House, County Antrim, Northern Ireland 3 March 1944. Sentences: Wilkins, dishonorable discharge (suspended), total forfeitures and confinement at hard labor for five years. 2912th Disciplinary Training Center, Shepton Mallet, Somersetshire, England; Williams, dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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1. The record of trial in the case of the above named accused Wilkins 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 of trial has now been examined by the Board of Review as to the said accused Wilkins and also as to the above named accused Williams (forwarded pursuant to Article of War 50½) and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

2. Accused were charged separately and tried together without objection.

Accused Wilkins was tried upon the following charges and specifications:

CHARGE: Violation of the 64th Article of War.
Specification: In that S/Sgt. Lloyd E. Wilkins, 3992 QM Truck Company, having received a lawful command from Captain Robert C. Bradley, his superior officer, to take reveille on the morning of 7 February 1944, did, at Camp Ardnaveigh, Antrim County, Northern Ireland, on or about 7 February 1944, willfully disobey the same.

ADDITIONAL CHARGE
CHARGE: Violation of the 96th Article of War.
Specification: In that Staff Sergeant Lloyd E. Wilkins, 3992d Quartermaster Truck Company, did, at Camp Ardnaveigh, County Antrim, Northern Ireland, on or about 6 February 1944, participate in an unauthorized assembly of enlisted members of the 3992d Quartermaster Truck Company, with intent to arouse insubordination among the enlisted personnel thereof and impede the exercise of the authority of its commissioned officers, to the prejudice of good order and military discipline.

He pleaded not guilty, and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Specification of the Charge, except the words, "willfully disobey the same," substituting therefor the words, "fail to obey the same," and inserting after the words "the morning of 7 February 1944" the words "said Captain Bradley being then in the execution of his office," and of the excepted words not guilty, but of the substituted and added words, guilty, and not guilty of the Charge but guilty of a violation of Article of War 96, and guilty of the Additional Charge and its Specification. No evidence of previous convictions was introduced. Two-thirds 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, remitted all confinement at hard labor in excess of five years and as thus modified ordered the sentence 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, Somerset, England, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 7, Headquarters Northern Ireland Base Section, Services of Supply, European Theater of Operations, U.S. Army, APO #813, 4 April 1944.

Accused Williams was tried on the following charges and specifications:

CHARGE: Violation of the 64th Article of War.
Specification: In that Sgt. Franklin D. Williams, 3992 QM Truck Company, having received a lawful command from 2nd Lt. Francis S. Clarke, his superior officer, to report to Captain Robert C. Bradley at the company orderly-room forthwith, did at Camp Ardnaveigh, Antrim County, Northern Ireland, on or about 7 February 1944, willfully disobey the same.

ADDITIONAL CHARGE
CHARGE: Violation of the 96th Article of War.
Specification 1: (Disapproved by Reviewing Authority).
Specification 2: In that Sergeant Franklin D. Williams, 3992d Quartermaster Truck Company, did, at Camp Ardnaveigh, County Antrim, Northern Ireland, on or about 7 February 1944, participate in an unauthorized assembly of enlisted members of the 3992d Quartermaster Truck Company, with intent to arouse insubordination among the enlisted personnel thereof and impede the exercise of the authority of its commissioned officers, to the prejudice of good order and military discipline.

He pleaded not guilty, and, two-thirds 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 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 disapproved the finding of guilty as to Specification 1 of the Additional 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 Article of War 50½.

3. Evidence introduced by the prosecution showed that on 6 and 7 February 1944, accused Wilkins and Williams were Staff Sergeant and Sergeant, respectively, of the 3992d Quartermaster Truck Company, commanded by Captain Robert C. Bradley, Quartermaster Corps (R15), and were then stationed at Ardnaveigh, County Antrim, Northern Ireland (R18). On the e vening of 6 February 1944, Captain Bradley relieved the first sergeant of the company, (Pruitt) of his duties (R17). Before issuing his order, at about 1930 hours, Captain Bradley informed accused Wilkins that he "believed" he would want the latter "to take over the job as Acting 1st Sergeant." Accused Wilkins demurred. He said: "There were two other Platoon Sergeants that outranked him, * * * had been in the Service longer * * *". Finally Captain Bradley told Wilkins: "to-morrow morning I want you to take reveille and report to the Duty Officer * * *", and after that he could decide about continuing as "acting 1st sergeant" (R16). "To take reveille" in that organ-

ization was to form the company in the courtyard at 0600 hours, take the reports from the platoon sergeants, and report to the company duty officer (R17,40).

Lieutenant Colonel Algon B. Johnson, Quartermaster Corps, commanding officer, 152nd Quartermaster Battalion Mobile, of which accused Wilkins' company was a unit, testified for the prosecution. He identified a written statement and said that it was made and signed by accused Wilkins in answer to questions he propounded on 7 February 1944. Colonel Johnson said that he had informed accused of his rights and instructed him with respect to same under the 24th Article of War (R39,40; Pros.Ex.2). In this statement, Wilkins said that he attended a meeting of "all the platoon sergeants" (of his company) on the evening of 6 February at about 1900 hours. It was held at the headquarters platoon barracks. The occasion of the meeting was the demotion of First Sergeant Pruitt. At this meeting it was concluded that Pruitt was the best man to serve as first sergeant and it was decided to draft, circulate and present a petition (round-robin in form) to Colonel James A. Doyle, District Commander, 36th District, Northern Ireland Base Section. It was also d ecided to hold a meeting in the mess hall the next morning of all the enlisted men and officers to determine the reason for the demotion of Pruitt and to inform the officers that they (the enlisted men) were not in favor of the replacement of the first sergeant (Pros.Ex.2).

The following morning, Corporal Joseph E. Tilley, charge of quarters, awoke Sergeant Wilkins at 0515 hours. Neither first call nor reveille sounded that morning (R18,19). In his statement made to Lieutenant Colonel Johnson (Pros.Ex.2) Wilkins admitted that Captain Bradley had ordered him to act as first sergeant of the company and "take reveille" on the morning of 7 February but that he did not obey the order. He gave as the reason for his failure to comply with the order, "I got up in the company area too late". He explained the reason he did not hold reveille formation that morning after he discovered it had not been held as follows:

> "At that time I looked at the clock in the courtyard and it showed that the hour was 0635. I went to headquarters platoon, then 1st platoon, then to the 2nd platoon, and sent a runner to the 3rd platoon. The men started falling out into the mess hall."

He excused his action in permitting the men to assemble in the mess hall instead of causing them to fall out for reveille formation:

> "Because after I learned there was not an officer there and it was past the time for reveille and it was also time for breakfast."

After Tilley started his fires he went back to the mess hall and found there, as he assumed, the whole company (R19). He then awoke all the officers between 0620 and 0700 hours (R20,23) and informed the following officers that the presence of all the officers was requested in the mess hall: Captain

Bradley (R23), Second Lieutenant Joseph M. Gwin, Quartermaster Corps, officer of the day at the time in question (R35,36), and Second Lieutenant Francis S. Clarke, Quartermaster Corps (R27,28). On being awakened, Captain Bradley sent a message by the charge of quarters to the company sergeants, including both accused, Wilkins and Williams, "to report to the office right away" (R23-24). No one appeared. About 0735 hours the captain gave a similar message to be conveyed by Lieutenant Clarke. This did not evoke the expected result. Accordingly at 0800 hours Captain Bradley gave further orders as a result of which Lieutenant Clarke went to the mess hall, accompanied by Lieutenant Rice, and there individually told accused Williams and four other sergeants, not including accused Wilkins who was not present: "I hereby order you to go to the orderly room". Accused Williams, who was the spokesman of the meeting, said "I will not go", nor did he go (R24,29-30,34). The mess hall was less than 100 yards from the office, also referred to as the orderly room (R20,29,31). Lieutenant Clarke reported back to Captain Bradley at about 0810 hours. After waiting ten minutes, no sergeant having appeared, Captain Bradley went to the mess hall where the men were assembled. Sergeant Williams said to Captain Bradley, upon being asked if he was spokesman: "Yes" and

> "The men in the Company want to know why you have relieved Sergeant Pruitt, * * *. We want them to hear from you first * * * why you have been treating the Company as you have" (R24,25,32).

Captain Bradley described the ensuing events as follows:

> "About that time Staff-Sergeant Jones rose to his feet and said: 'Captain, can I say something? I said 'No, Sergeant; sit down,' which he did. Sergeant Williams then said in the course of conversation: 'I will call upon certain of the non-coms. or certain men in the Company to tell you how they feel, after you have spoken.' Then I said to Sergeant Williams: 'Sergeant Williams, so long as I am Company Commander I will take charge of the meeting, and I will call upon those persons whom I wish to speak when I want them to speak.' I also said that so far as my relieving Sergeant Pruitt from his duties as First-Sergeant was concerned I saw no reason why I needed to explain that or any other promotions or demotions in the Company to the entire Company. I then said that my junior officers and myself had been doing everything we could to make the life to the men comfortable and that we had gotten for the men many things which other Companies did not have, which was solely the responsibility of the

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> officers, and that they had taken it upon themselves to do that for the Company. At about that time Lt. Rice came up to me and said that Colonel Johnson had arrived and for me to report to the Orderly Room. I left the Company in the Mess Hall, saying to them: 'You men will have a ten-minute break and will remain in the Mess Hall. I then left and met Colonel Johnson in the Company Orderly Room. Briefly telling him what had happened, he and I came back to the Mess Hall, within approximately a ten-minute period, and the Company was called to attention. Colonel Johnson spoke, calling the names of the non-coms I had given him, and gave instructions to the Platoon leaders, the lieutenants, to have the men fall our for close order drill and physical training." (R25).

When Captain Bradley left the mess hall to report to Colonel Johnson, accused Williams said to the men in the mess hall "our plan is working better than we expected" (R32).

At about 0900 hours, 7 February, accused Wilkins presented the petition to Colonel James A. Doyle, Field Artillery, District Commander, 36th District, NIBS (R45; Pros.Ex.3). This petition signed by a large number of men of this quartermaster company asked the removal and transfer of three of the company officers and the retention of Pruitt as first sergeant. It was also signed by accused, Wilkins and Williams (R45). Wilkins, without authority of Captain Bradley used a Government truck for the purpose of delivering the petition to Colonel Doyle (R25).

4. For the defense: Private First Class Kyle Knight, 3992d Quartermaster Truck Company, testified that he did not sound bugle call the morning of 7 February because the mouthpiece of his bugle was missing (R47-49). This was confirmed by Corporal Tilley, called by the defense (R49). Colonel Doyle called by the defense testified in effect that at one time the condition of this company "was not too good", that he had spoken to Captain Bradley, and that afterwards he had found conditions "quite good" (R41,50). Willie E. Jones, staff sergeant, 3992d Quartermaster Truck Company on 6 and 7 February, charged separately and tried together with accused Wilkins and Williams, substantially confirmed the proof offered by prosecution, as set forth above (R58).

Accused Wilkins, advised of his rights, elected to testify in his own behalf. He admitted that Captain Bradley had "told" him to take reveille the morning of 7 February; admitted that he had been at the headquarters platoon and discussed with others the functioning of the company and the planning of the petition, and admitted that it had been prepared

and that he delivered it Colonel Doyle. He admitted that he had not taken reveille on 7 February. His claim was that there was no duty officer present and he believed that this fact was cause for not taking it. He justified his presence and participation in the meeting the night before on the ground that he believed he was contributing to betterment of company conditions (R58-62).

Accused Williams, advised of his rights, elected to testify in his own behalf. He testified that when he visited the barracks of one of the platoons on the night of 6 February, he heard accused Wilkins tell the men "how important it was to go and try to straighten things out so we could have an ideal company". He said that he was appointed spokesman for the meeting held the following morning "perhaps" because he had "one of the higher I.Q. in the company". He, in effect, admitted attending the meeting held the following morning and explained that it was prompted primarily because of the reduction of the first sergeant (R62-64).

5. (a) The undisputed evidence shows that accused Wilkins did not obey a lawful command given him by his company commander, Captain Bradley, that he take reveille on the morning of 7 February (Charge and Specification). The excuse given by accused was trifling, invalid, and was properly rejected by the court. The court found accused did not willfully disobey the order of Captain Bradley, as charged, but found him guilty of the lesser included offense of failure to obey in violation of Article of War 96, the maximum punishment for which is confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period (MCM, 1928, par. 104c, p.100). The court in its findings on the Charge, was generous towards Wilkins as there is substantial competent evidence that accused's dereliction was something more than a "failure" to obey Captain Bradley's order. Rather the record bespeaks a situation involving elements of a conspiracy having for its purpose the thwarting of Captain Bradley's intention to displace Pruitt as first sergeant. The mouth-piece of the bugle mysteriously disappeared and reveille was not sounded at the appropriate time. Wilkins made a tardy appearance and instead of promptly assembling the men in reveille formation allowed them to assemble in the mess hall for an illegal meeting. At the convenient moment he departed and, using a Government truck without authority, delivered the "round-robin" petition to Colonel Doyle. This evidence is without doubt abundantly adequate to sustain the finding of guilty of the offense of failure to obey the order in violation of the 96th Article of War (MCM, 1928, par.134b, p.149; CM 223336, Bull.JAG, Aug 1942, Vol.1, No.3, sec.422(5), pp.159-163).

(b) The evidence shows that accused Wilkins participated in an assembly of enlisted members of his company on the evening of 6 February 1944 whereat the demotion of Pruitt was discussed and a plan was conceived which was intended to frustrate Captain Bradley's determination to replace Pruitt. According to Wilkins:

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> "We talked about the demotion of the 1st/ Sergeant. We concluded that Sergeant Pruitt was the best man in the company to serve as 1st/Sergeant and decided to write up the petition, which we did" (Pros.Ex.2).

The petition in "round-robin" form in three parts was written and circulated for signatures as a direct result of this meeting (Pros.Ex.1).

The gravamen of the offense alleged in the Specification of the Additional Charge is that accused

> "did * * * participate in an unauthorized assembly of enlisted members of the * * * Company, with intent to arouse insubordination among the enlisted personnel thereof and impede the exercise of the authority of its commissioned officers".

Relevant to this charge is the Act of Congress in pertinent part as follows:

> "(a) It shall be unlawful for any person, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States --
> (1) to advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States;
> * * * * * * * * *
> (b) For the purposes of this section, the term 'military or naval forces of the United States' includes the Army of the United States, as defined in section 1 of the National Defense Act of June 3, 1916, as amended (48 Stat. 153, U.S.C., title 10, sec.2)" (Act June 28, 1940, c.439, Title I, sec.1; 54 Stat. 670; 18 USCA sec.9).

> "(a) Any person who violates any of the provisions of this title /sections 9 to 13 of this title/ shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than ten years, or both.
> (b) No person convicted of violating any of the provisions of this title shall, during the five years next following his conviction, be eligible for employment by the United States, or by any department or agency thereof (in-

cluding any corporation the stock of which is wholly owned by the United States)" (Act June 28, 1940, c.439, Title I, sec.5; 54 Stat. 671; 18 USCA sec.13).

It is doubtful whether the draughtsman of the specification in question was informed of the existence of this statute when he prepared it. However, such fact is not controlling and can have no bearing as to the applicability of the statute if the facts alleged in the specification state an offense thereunder.

> "We must look to the indictment itself, and if it properly charges an offense under the laws of the United States that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute" (Williams v. United States, 168 U.S. 382,389, 42 L.Ed., 509,512).

The Board of Review has heretofore followed the principle of the Williams case in CM ETO 1109, Armstrong and CM ETO 1249, Marchetti. Reference is made to said holdings for a detailed discussion thereof. It will be applied in the instant case.

The statute obviously requires that the accused at the time he commits the prohibited acts shall entertain a specific intent to:

(1) interfere with	)	((1) loyalty	
or	)	(or	
(2) impair	) the	((2) morale	
or	)	(or	
(3) influence	)	((3) discipline	

of the military forces of the United States.

It is therefore necessary that the specification particularly allege and that the prosecution's proof show this specific intent.

> "A specific intent which is made part of the offense by the statute creating it must be charged; as * * * where an act is criminal only if done with a particular intent" (31 C.J., sec.244, p.697).

In support of the foregoing rule see: United States v. Cruikshank, 92 U.S. 542, 23 L.Ed., 588; United States v. Wentworth 11 Fed. 52; United States v. Jackson, 25 Fed. 548; United States v. Green 136 Fed. 618,658, affirmed 199 U.S. 601; 50 L.Ed., 328; Baender v. United States 260 Fed. 832,834.

The accused Wilkins is charged with entertaining the specific intent

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> "to arouse insubordination among the enlisted personnel * * * and impede the exercise of the authority of * * * commissioned officers /of the company/"

When a person entertains the intent to arouse insubordination among soldiers there is no difficulty in concluding that he intends to impair discipline. Insubordination is the direct opposite of discipline. An intent to produce insubordination is an intent to set aside disciplinary control. The allegations clearly bring accused's intent within the specific description of the statute "to impair the discipline". Further it requires no strained construction of language to hold that the allegation also charges an intent "to interfere with the discipline" or "to influence the discipline" of the enlisted personnel of the company. In any event, a mere comparison of the allegations of the specification with the specific intents described in the statute makes it obvious that this aspect of the specification is adequate to bring the charge under the statute. The Board of Review thus concludes.

In order to constitute a crime under the statute in reference, accused must not only entertain one or more of the specific intents above enumerated, but he must also,

(1)	advise	(1)	insubordination
	or		or
(2)	counsel	(2)	disloyalty
	or		or
(3)	urge	(3)	mutiny
	or		or
(4)	in any manner cause	(4)	refusal of duty

by any member of the military forces of the United States.

The specification alleges that accused with the intent to arouse insubordination did:

> "participate in an unauthorized assembly of enlisted members of the * * * Company."

The denunciatory clause of the statute cogent to the facts alleged appears as follows:

> "It shall be unlawful for any person * * * to * * * in any manner cause insubordination * * * by any member of the military * * * forces".

The phrase "in any manner" is equivalent in meaning to "in any way" (3 W and P. Perm., p.588) and it designates all actions and conduct on the part of a person not included in the preceding specifically denounced acts of advising, counselling and urging. The rule of Ejusdem Generis clearly does not

apply in this instance inasmuch as the specific words, "advise", "counsel" and "urge" embrace all objects of their class so that the general words "in any manner cause" must bear a different meaning from the specific words or be meaningless (59 C.J., sec.581, p.984; Mason v. United States 260 U.S. 545, 67 L.Ed., 396; Mid-Northern Oil Co. v. Walker, 268 U.S. 45, 69 L.Ed., 841). Nor can the rule control where the plain purpose and intent of Congress would thereby be hindered or defeated (59 C.J., sec.581, pp.982-983; Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 79 L.Ed., 211). It is obvious that Congress intended to protect the military forces of the Nation from all subversive influences which are destructive of its integrity, fidelity and valor and for that purpose enacted a statute which is intended to denounce all such influences whether they be overt and violent or of a more subtle approach.

The problem therefore reduces itself to the concrete question:

> Does the allegation that accused participated in an unauthorized assembly of the enlisted men of the company state facts that constitute an offense under the clause of the statute making it an offense to cause in any manner insubordination by any member of the company?

The issue thus presented is a narrow one. Were the problem presented in connection with an indictment or information in a civil court the answer would probably be in the negative as all doubts would be resolved in favor of the accused and against the pleader (31 C.J., sec.187, p.667). In the instant case, however, the specification charges that Wilkins, a staff sergeant of a military organization at a military camp participated in an unauthorized assembly of enlisted military personnel. These facts differentiate this case from a charge that a civilian participated in an unauthorized meeting of civilians. The phrase "participated in an unauthorized assembly" is broader than an allegation that he attended an unauthorized assembly or was present at an unauthorized assembly. The word "participate" means,

> "' to take part in' and connotes to average person meaning and effect of 'engage in' rather than mere presence" (Martin v. Mutual Life Ins. Co. of New York, 189 Ark. 291, 71 SW (2nd) 694,696; Cf: 31 W. and P. Perm., pp.132-134).

The word "unauthorized" possesses under certain circumstances the same meaning as the word "unlawful" (Central Transportation Company v. Pullman's Palace Car Company, 139 U.S. 24,60, 35 L.Ed., 55,69; Yonkers v. Downey, 309 U.S. 590,597, 84 L.Ed., 964,969; McDaniel v. United States, 87 Fed. 324,326).

The reasonable import of the allegation is that accused, a Staff Sergeant in the United States Army, took part in an unlawful meeting of the

military personnel of his company and that he gave aid and sympathy to its purpose. The idea that he was merely an observer or that he attended in order to prevent the accomplishment of its purpose is negatived. Such conduct is well within the denouncement of the statute "in any manner cause insubordination" by any member of the military forces. When a staff sergeant takes an active, sympathetic part in an unlawful assembly of his subordinates he ipso facto causes insubordination. His presence in the role of a participant gives approval to an unlawful gathering, and such conduct is damaging to the disciplinary control of the men. Any other conclusion would be opposed to all processes of military discipline and is unthinkable. The Board of Review is of the opinion that the Specification alleges an offense under the quoted statute.

The proof in support of the specification is positive that Wilkins was not only present but was a leading agitator at the unauthorized meeting of members of his company on the night of 6 February 1944; that he actively engaged in its deliberations and proceedings; that the "round-robin" petition to Colonel Doyle (seeking the displacement of the company officers and the retention of Pruitt as first sergeant) was the product of this meeting; that he was responsible for its circulation among the personnel for signatures and that he finally delivered it to Colonel Doyle the next morning. These facts coupled with the means by which he avoided "taking reveille" on the morning of 7 February constitute substantial proof that he with intent "to impair discipline" did "cause insubordination" among the members of his company.

The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of Wilkins' guilt of the Additional Charge and its Specification against him.

6. (a) The evidence is undisputed, with respect to accused Williams, that he received an order from Lieutenant Clarke, his superior officer, to go to the orderly room. This was a direct order and called for immediate compliance. Accused deliberately disobeyed this order. His disobedience was willfull as is fully established by the fact that when given this order he announced: "I will not go". The evidence fully supports the findings of guilty of the Charge and its Specification in which this disobedience is alleged, in violation of Article of War 64 (Charge and Specification) (CM ETO 2569, Loyd Davis; CM ETO 2921, Span; CM ETO 2764, Huffine; CM ETO 2644, Pointer; CM ETO 1096, Stringer; CM ETO 1232, Baxter).

(b) The Specification of the Additional Charge against Williams alleges that accused participated in an unauthorized assembly on 7 February 1944 with intent to arouse insubordination and to impede the exercise of authority to the prejudice of good order and military discipline. The same language, except for the date, was employed in this Specification as in the Specification charging accused Wilkins with similar conduct. The comments hereinabove set forth with respect to the sufficiency of the Specification as it applies to accused Wilkins are equally applicable with respect to accused Williams, and the same conclusion must be reached.

Williams' conduct at the meeting on the morning of 7 February exhibited an assumption of authority by him in derogation of that of the company officers. He was obviously the chief spokesman of the assembled group of soldiers. His arrogant statement to Captain Bradley, at the opening of the meeting:

> "The men in the Company want to know why you have relieved Sergeant Pruitt, * * *. We want them to hear from you first * * * why you have been treating the Company as you have" (R24,25,32)

was an overt attempt to assert paramount authority and dangerously approached the border-line of mutinous conduct. His comment to the soldiers in the absence of the company officers - "our plan is working better than we expected" (R32) - reveals that Williams was an active participant in a scheme - if not a conspiracy - to frustrate the authority of Captain Bradley and his officers and eventually to displace them. Williams and his confederates also sought to select the company's first sergeant in opposition to the company commander's choice. The evidence is adequate to sustain Williams' guilt of specifically intending to impair the discipline of the company by causing insubordination of its members.

The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of Williams' guilt of the Additional Charge and Specification against him.

7. The Additional Charges were properly laid under the 96th Article of War, inasmuch as the Act of Congress of June 28, 1940, above quoted, denounces a crime or offense not capital (MCM, 1928, par.152c, pp.188,189; CM ETO 2210, Lavelle et al). Penitentiary confinement is authorized by Article of War 42; MCM, 1928, par.90a, p.81 ; sec.335, Federal Criminal Code (18 USCA 541) and Act of June 14, 1941, c.204, 55 Stat. 252 (18 USCA 753f) and Title I, sec.5, Act of June 28, 1940 (18 USCA 13), supra, upon conviction of the offenses alleged under Additional Charges and Specifications. However, confinement of Wilkins in Disciplinary Training Center No. 2912, Shepton Mallet, Somerset, England, and Williams in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized.

8. Accused, though charged separately, were tried together in company with four others, also charged separately. Since there was no objection by any of the six accused, there is no objection to such procedure (CM 195294 (1931), Dig.Op.JAG, 1912-1940, sec.395(33), p.223).

9. Accused Wilkins is 21 years five months of age. He was inducted 10 May 1943 and his service period is governed by the Service Extension Act of 1941. No prior service is shown.

Accused Williams is 21 years one month of age. He was inducted 26 March 1943 and his service period is governed by the Service Extension Act of 1941. No prior service is shown.

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10. 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.

B. Franklin Pettes Judge Advocate

Edward V. Sturgis Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 22 JUL 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S. Army.

1. In the case of Sergeant FRANKLIN D. WILLIAMS (35056431), 3992nd Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 2005. For convenience of reference please place that number in brackets at the end of the order: (ETO 2005).

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 2007

15 MAY 1944

U N I T E D S T A T E S)	XV CORPS.
)	
v.)	
)	Trial by G.C.M., convened at Victoria
Private WILEY HARRIS, JR.,)	Barracks, Belfast, Northern Ireland,
(6924547), 626th Ordnance)	17 March 1944. Sentence: To be
Ammunition Company.)	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 soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the 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 Private Wiley Harris, Jr., 626th Ordnance Ammunition Company, did, at Belfast, N.I., on or about 6 March 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Harry Coogan, a human being, by stabbing him in the chest, head, and abdomen with a sharp instrument.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for 25 days in violation of Article of War 61. He was sentenced to be hanged by the neck until dead, all members of the court concurring. The reviewing authority, the Commanding General, XV Corps, 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 and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

(106)

3. The evidence for the prosecution summarizes as follows:

Eileen M. Megaw, 78 Ava Street, Belfast, Northern Ireland, had been drinking all afternoon on 6 March 1944. Some time after 9:00 p.m. she was in the Diamond Bar, North Queen Street, Belfast. An American negro soldier of slight build came into the box where she was sitting and spoke to her. He was a "high brown", not "too dark", about a head taller than Miss Megaw who was 5 feet 2-3 inches tall. He wore an overcoat and a small cap. He was followed into the box by deceased. Miss Megaw and the American "had a little talk" and the latter sat down. Deceased asked the American "Do you want a woman?", to which he replied "Yes", and deceased pointed at Miss Megaw, saying "There she is." Deceased asked her if she were agreeable and she replied "All right". They discussed terms and Miss Megaw said the price would be one pound. After drinking some "Guinness" the three left the bar and upon deceased's suggestion, went to the first air-raid shelter at the head of Earl Street across North Queen Street from the Diamond Bar (See Pros.Ex.A, chart of vicinity, and Pros.Exs. B and C, photographs of air-raid shelter, all admitted in evidence without objection by defense; R4-6). Before entering the shelter Miss Megaw asked for the money. Deceased held an "electric torch" while the American counted out and handed to her one pound in half-crowns and two-shilling pieces, which she put into her pocket. Thereupon she and the American entered the shelter. Deceased remained outside "in case the police would come." The American put his coat on the floor and Miss Megaw lay down (R8). Shortly thereafter deceased "shouted the police were coming." Miss Megaw, frightened, told the American to "get up quickly" and arose, went to the door of the shelter followed by the American and both went out on the street. The American took the torch (flash-light) from deceased, shone it up and down the street and said there were no police coming. He then asked Miss Megaw to return to the shelter. She refused. She removed the money from her pocket and held it in her hand. The three then "had some words" (R9). Miss Megaw at first stated she would return the American's money to him, but deceased protested, saying "No,no,no," (R14,18,25). The three were within a few feet of each other, and the American was "highly intoxicated" but "seemed to talk all right" and "walked all right". He did not threaten her, and she saw only a flashlight in his hand (R10-12). Miss Megaw testified:

> "Of course, I had some drink. And the American asked me for the money again. I said, he wasn't going to get it. If I hadn't been drunk I would have handed it to him."

Deceased said to the American "'You are not getting the money back.'" Then followed more words, the American pushed Miss Megaw and she dropped some of the money in front of the shelter. She described ensuing events:

> "I bent down to get it and the American had the torch in his hand and he tried to get some -- pick it up himself. But I got it. Well, Harry struck out and hit the American chap. I screamed. I saw the American making for him. And I run off" (R9).

Bridget Murdock, 160 Earl Street, Belfast, testified she was standing on the step of her house at No. 160 Earl Street near the scene about 10:10 p.m. She heard money drop to the ground and saw a woman and a man bend down to look for it. She asked deceased what was wrong, to which he replied that the soldier was about to stab the woman, but he was not going to let him do so and was going to hit him. She said, "'Don't do it,'" and caught him by the arm, but he stepped forward and struck the soldier. The witness fled screaming (R14). The soldier had a torch in his left hand and a sharp instrument in the other. Shortly thereafter she returned, saw the soldier's dark face and "saw him with his hand up and he had a sharp thing and he was going at the man." She left and saw no more (R14-15) until she again returned and saw the civilian lying across the doorway (R16-17).

Mrs. Annie Murdock, 158 Earl Street, Belfast, asserted that on the evening in question she was standing at the door of the home of her sister-in-law (Bridget Murdock). She heard money fall on the ground and saw a soldier "getting out with a flash looking around". A civilian said that the soldier was going to stab the woman, but he was not going to let him, whereupon Bridget said "'No, don't'". The civilian struck the colored soldier,

> "and the soldier straightened himself up and I seen a shining thing - I seen it flash - and I flew in my own house yelling * * *. Then I ran out again and seen the civilian stagger from the wall on to the ground and seen the soldier getting on top of him. And I seen him with a flash and seen him doing that." (R19).

The record of trial then discloses the following:

> "Prosecution: Witness indicating striking with the right hand.
> A. Using the flashlight.
> Prosecution: Using the flashlight in the left hand
> Q. About how many times would you say?
> A. I couldn't tell. He was just getting down that quick.
> Q. More than once?
> A. Yes it was more than once. * * *. I seen the soldier getting up and as he flew I flew after him. (R19).
> * * * * * * * * *
> Q. You stated you saw something shining?
> A. Yes, sir.
> Q. When did you first see that shining object?
> A. At the shelter.
> Q. You stated you saw the civilian strike him?
> A. Yes.

Q. Did you see the shining object before the civilian struck him?
A. Yes, sir, I seen it whenever he stooped looking for the money." (R20).

The soldier went up Earl Street, across the road (North Queen Street) and up into Spamount Street. The civilian was small and the soldier "seemed to be rather tall". The incident was between 10:00 and 10:15 p.m. (R19-21).

Kathleen McGinness, 126 Earl Street, Belfast, testified that she and her aunt were proceeding along Earl Street a few minutes past 10:00 p.m. when a soldier came out of the shelter and she heard money strike the ground. A girl

> "was picking it up and she was down on her knees - not exactly down - bending over to pick up the money, and the soldier was leaning over, too, and had the flashlight looking around. He had the flashlight on the ground and he had an instrument in his left hand. He had it on her back. Well, then the civilian tried to hit him. The soldier made a grab for the civilian. Then everybody flew. And I ran down about three windows. When I turned around again I saw the man on the ground. * * *. The soldier was bigger than the civilian * * * about head and shoulders bigger * * * when I looked back he had the man on the ground and the civilian was shouting, 'You are killing me.'" (R22,23).

The following colloquy then occurred:

> "Q. And who was the man on top?
> A. It was the soldier.
> Q. And what was the soldier doing?
> A. Well, he was stabbing the man." (R23).

Continuing with her testimony Miss McGinness declared she could not tell whether he (the soldier) was stabbing him (the civilian) with a knife or a dagger. The blade came down to a point and was between five and six inches long. The soldier stabbed the civilian "from six to eight times." The civilian was on his back on the ground (R22-24).

Mrs. Kathleen Dickey, 120 Earl Street, Belfast, testified that she and another woman (Kathleen McGinness) walked down Earl Street about 10:00 p.m. She heard money dropped and saw a woman down on her knees picking it up. She continued:

"The colored soldier was leaning over her and this civilian was standing at the other side. * * *. He /the colored soldier/ was leaning over her with the torch in his hand. He had a sharp instrument in his left hand over her back." (R26).

The following particularized interrogation of Mrs. Dickey appears:

"Q. Which hand was the torch in?
A. Right hand.
Q. Then what happened?
A. One of the Murdocks asked the civilian what was wrong and he said he was going to stab her because she wouldn't give him his money back, but she was going to give the money back. She said, 'Surely you couldn't let him do that to her.' The civilian said, 'No I will not.' And he struck the colored soldier, and he threw up his hand to defend himself. At that time I ran into the house. When I came out the man was lying in a pool of blood." (R26).

The soldier had in his hand either a knife or a dagger (R26). The civilian, who struck the soldier the first blow with his fist, had no weapon of any kind. The instrument in the soldier's left hand was not pressed against the woman in any manner but it was "upraised above her back." She saw the colored soldier "make to strike" and then ran into the house.

Each of the four eye-witnesses (R15-16,21,24,27) testified that they did not hear the soldier use threatening language towards the woman prior to the fight with deceased. Miss Megaw affirmed the same fact (R12). Neither Bridget Murdock, Annie Murdock, Kathleen McGinness nor Kathleen Dickey were able to identify accused as the American soldier involved in the fight (R7,15,18-20,24,27).

James Tynan, 34 Pittsburgh Street, Belfast, observed deceased and a soldier struggling immediately outside the shelter. Tynan crossed the street and saw "the colored man" come from the place of the struggle, "and I chased him (across North Queen Street) up Spamount Street where he ran around the shelter." After chasing him "to about the fourth air raid shelter" he returned to the man in the street, whom he recognized as deceased. "I felt his pulse and put my ear down to his heart. It was my impression that he was dead at that time." The soldier was colored, five feet 10-11 inches tall, fully dressed in American service uniform and carried his overcoat over his right arm (R30-33).

Head Constable James Armstrong, Victoria Barracks, Belfast, went to the scene on Earl Street where he saw the body of a man whom he recognized as Harry Coogan. In his opinion Coogan was then dead. The body was placed in an ambulance and taken to the Mater Hospital (Belfast). He was present when deceased's body was photographed on 7 March, and noticed several wounds. He identified two photographs of deceased's body as true and accurate representations of his condition at that time (Pros.Ex.D, photograph of upper half of body in prone position on back; and Pros.Ex.E, photograph of shoulders, neck and head, both showing wounds) both of which were admitted in evidence without objection by defense (R33-35).

Sergeant William J. Harron, Royal Ulster Constabulary, Belfast, accompanied Head Constable Armstrong and another policeman to Earl Street, where deceased's body was lying on the footpath about four feet from the wall near the second entrance to the air-raid shelter. He accompanied the body in an ambulance to the Mater Hospital, where the chest and abdomen were stripped. The wounds were substantially as represented by Prosecution's Exhibit D (R36-37).

Dr. James Crilly of the Mater Hospital made a superficial examination of deceased's body at about 10:25 p.m. on 6 March, and a more thorough post-mortem examination at 2:30 p.m. on 7 March which he recorded in Prosecution's Exhibit F. An extract copy of the portion relating to deceased was substituted, admitted in evidence, and read into the record, without objection by defense (R56-57,60). The extract described the various wounds on the trunk, arms and head of deceased (R57-59) and concluded:

> "The cause of death in my opinion was shock following the injury to the brain and vital organs plus a severe haemorrhage. The wounds appear to have been caused by a heavy sharp two-edged knife which had a blade at least four inches long."

Dr. Crilly testified there were 16 skin wounds, one in the back of the neck appearing to have two stabs through it, or an actual total of 17 wounds (R59). He also testified to the accuracy of the photographs of the body (Pros.Exs.D and E; R60).

Private Clarence J. Fuller, a member of accused's company, saw accused with "Eileen" at the Diamond Bar between 9 and 9:30 p.m. that evening (R40,42). Accused was dressed in "his suit and overcoat." Later in the evening he saw accused at the Red Cross (R41).

Private Robert Fils, also a member of accused's company, drank wine and whiskey with him about 5-6:00 p.m. on 6 March. He (accused) was "pretty high", but did not stagger, and talked "normal" (R51,54). He also saw accused at the Diamond Bar between 9 and 10:00 p.m. (R51). Later in the evening, before midnight, he saw accused at the "colored Red Cross". "He told me he got in a little trouble and he was wiping some of the blood

off his clothes. * * * his trousers and his coat". Fils attempted to remove one spot on the back of accused's trousers (R52-53).

Master Sergeant John W. London, another member of accused's company, saw accused, wearing an overcoat, at the Red Cross about 11:30 p.m. Accused stated "he had got in some trouble." (R43-45). After refreshing his memory by reference to a statement previously signed by him, he testified without objection by defense that accused had blood on his right hand (R45-46). It was agreed between prosecution and defense that a statement voluntarily made upon the official investigation and signed by Sergeant London should be submitted to the court, to be read in closed session. So much of the statement as referred to "Eileen" and deceased was admitted in evidence and an extract was attached to the record (R48-50; Def.Ex.A). The extract showed in substance that Sergeant London in company with Privates Fuller and Harris met "Eileen" in Diamond's "Pub" and that a "civilian man" was present who said he knew a place where London and Eileen could go to engage in sexual intercourse. Eileen asked him for a pound and the civilian took them to an air-raid shelter across the street, where Sergeant London and Eileen had intercourse. Thereafter at another bar the civilian asked Eileen for money, but she refused. Fuller thereupon gave Sergeant London a shilling which he gave to the civilian.

Staff Sergeant James E. O'Connor, Criminal Investigation Division Detachment, APO 813, testified that accused's blouse and trousers, each bearing the serial number H-4547, were delivered to him by accused on 7 March, at Headquarters 626th Ordnance Company. There was a spot on the trousers indicating the presence of blood. Accused informed witness that he wore them on 6 March while in Belfast. These garments were admitted in evidence and permission was granted to withdraw them and substitute a verbal description (R73-75; Pros.Exs. H and I).

Technician Fourth Grade Herbert L. Nash, 12th Military Police Criminal Investigating Section, APO 813, received accused's coat and trousers, both marked "H-4547" (Pros.Exs. H and I) on 8 March from Agent O'Connor. He took them to the 317th Station Hospital where Captain Thomas N. Lide, Medical Corps, examined them with the Benzidine blood test.

Captain Lide testified that under the microscope it was impossible to identify scrapings of the stains from the clothing, but the Benzidine test was positive (indicating the presence of blood) both on the cloth and on the scrapings and it was negative in other parts of the material. In Captain Lide's opinion the stains were blood stains, but he could not state definitely that they were human blood (R76-78).

4. (a) Staff Sergeant O'Connor testified that at headquarters 626th Ordnance Ammunition Company, APO 813, accused was duly warned of his rights under Article of War 24 and in the presence of Constable Ray of Royal Ulster Constabulary, voluntarily, without force or duress, dictated a statement to the witness. Accused read and signed the statement (R61-63). Witness denied telling accused that he was his friend and came to help him (R64).

(112)

(b) By permission of the court, accused, after having been warned of his rights, testified in his own behalf with respect to the statement only, that when Agent O'Connor first came in,

> "he got acquainted with me and made me acquainted with the other fellow. Then he told me he was from the States. He came here to help me. He was my friend."

He told accused it would be easier for him if he made a statement and told the truth, but he made no promises or threats. Accused read and signed the statement. He did not remember anyone telling him that any statement he might make might be used against him (R65-67), but he thought that Article of War 24 was read to him. He could not "make out everything" in the statement (R68-69).

(c) Staff Sergeant O'Connor, recalled for the court, testified that he questioned accused as to his name, read him the 24th Article of War, showed him clothes which accused identified as his own and then asked him to tell witness in his own words what happened in Belfast on 6 March. Accused made no objection and made the statement a second time for dictation (R70).

(d) In rebuttal for the prosecution, Second Lieutenant A.J. Woodward, of accused's company, testified that as summary court officer he witnessed accused's signature to the statement and had him swear to its truth. Accused signed freely, asked no questions concerning it and raised no objection. The court admitted the statement as voluntarily made by accused (R71-72; Pros.Ex.G).

(e) The statement in pertinent part was as follows:

Accused, on pass in Belfast after 5:00 p.m. on 6 March, drank some wine and beer in a "pub" in York Street with Private Robert Fils. Just as it was getting dark they went to Diamond's public house, where they had a number of glasses of "Guinness". Accused joined three girls, two of whom left, and a civilian man approached, spoke to the remaining girl and sat at the table with them. The man said "If you want to go out with this girl I will get her for you.'" Accused said he wanted to go and the man said he would watch for them outside an air-raid shelter and that accused would have to pay her a pound as he had to get something for watching. The three then left the "pub" together and went to an air-raid shelter on a nearby street, opposite the "pub". Accused paid the girl a pound in two-shilling and half-crown pieces. The girl and accused entered the shelter and the man remained at the door. Accused took off his overcoat and spread it on the shelter floor and the girl laid down on the coat and raised her dress.

> "I got down on top of her and before I could do what I intended to do the man said 'Here come the police.' * * * the girl hopped up."

Accused shone his flashlight, and not seeing any police coming, asked the girl for his money.

> "The man said, 'She can't give you the money back.' The girl started to run and I grabbed her and she dropped some money. As I had hold of her she was screaming, and the girl and I were trying to pick up the money. Just at this time the man hit me a blow on the right cheek with his fist, and a crowd began to gather. After the man hit me I reached in my right hand pocket and pulled out my Jack knife. I then opened the big blade on my knife and struck the man. The man did not fall the first time I struck him, but made a swing at me again. I then struck him again with the knife. * * * he kicked me across the knees and I struck him again. I do not know how many times I struck this man with the knife because I was just swinging the knife. I saw the man fall to the ground and I picked up my coat and ran up the street. * * * I could hear some one following me for quite a bit. I stepped behind an air-raid shelter and the person * * * ran by. * * * I threw the knife on the street."

Accused took a street car and horse cab to the Red Cross, where he saw Pvt. Robert Fils and

> "saw there was blood on my pants at this time and I wiped it off with my handkerchief. At this time I told Pvt Fils that I had a fight near Diamonds. As I was coming out of the latrine I met M/Sgt. London of my outfit and told him about the fight. * * * I threw the bloodstained hankerchief (sic) with which I had cleaned my pants out of the train window, between Belfast and Portadown."

(Pros.Ex.G).

5. At the close of the prosecution's case in chief the defense moved the court for a finding of not guilty on the ground the prosecution had failed to show either premeditation or malice aforethought, as there was sufficient provocation for accused's act. The court denied the motion (R79). Defense thereupon moved that the specification be amended by deleting the words "with malice aforethought" and "with premeditation" and that the charge be changed from violation of the 92nd Article of War to violation of the 93rd Article of War. The court also denied this motion (R79-80).

(114)

6. For the defense, Captain Earl R. Garner, commanding officer of accused's company, testified that he had known accused, as a member of his company, since 9 August 1943; that his character from that time up until 6 March (1944) was "very satisfactory"; that he performed his duties efficiently; that he had received no company punishment nor had he been court-martialed, and that he had "no trouble with noncoms, or any of the other men that were in the company." Due to the trouble he was in, however, witness would not now desire accused in his organization (R80-81).

After his rights were explained to him, accused elected to remain silent.

7. Certain preliminary matters of procedure and evidence will be discussed before consideration of the merits of the case.

(a) There was a direct conflict between prosecution and defense testimony on the issue of the voluntary nature of accused's statement (Pros. Ex.G). The Board of Review will assume arguendo, that the statement was a confession rather than an admission. An issue of fact was thereby presented for the determination of the court. The court believed that the circumstances surrounding the making of the confession were such that it was voluntary, as indicated by the statement of the President:

> "It is the opinion of the court that the accused voluntarily made this statement" (R72).

The court's determination will not be disturbed upon appellate review, in view of the substantial affirmative evidence of its voluntary nature (MCM, 1928, par.114a, pp.114-116; CM ETO 559, Monsalve; CM ETO 1606, Sayre). The fact that the confession was reduced to writing by one other than accused does not militate against its admissibility (CM ETO 438, Smith).

(b) The corpus delicti is adequately established by the testimony of eye-witnesses to the stabbing and related events. Therefore accused's confession, having been voluntarily given, was properly admitted in evidence (MCM, 1928, par.114a, p.115; Forte v. United States, 94 Fed.(2d) 236, 127 ALR 1120, annotation at p.1130, and authorities there cited). It was thus competent evidence of accused's identity as the colored American soldier who stabbed deceased and would sustain his conviction even without other evidence of identity (ibid.; CM ETO 559, Monsalve). But there was other evidence of his identity, including testimony that accused was seen at the Diamond Bar with the girl just prior to the stabbing, that he was seen later in the evening at the Red Cross Club wiping stains from his clothing, that he made statements to other soldiers there that he was in trouble, admissible as admissions against interest (CM ETO 895, Davis et al and authorities there cited), and duly qualified expert evidence that there was in fact blood on his clothes. Such was competent evidence of identity and supports the court's determination of the question against accused (CM ETO 996, Burkhart, and authorities there cited).

(c) The court admitted, for the defense, so much of the statement of Master Sergeant London, voluntarily made after due warning as to his rights during the official investigation, as referred to "Eileen" and deceased. The Prosecution expressly agreed to its admission (R48-50; Def. Ex.A). The admission was proper (MCM, 1928, par.119g, p.124, par.126g, p.137), and in any event could not have injuriously affected accused's rights since the evidence was in his favor.

8. There is competent substantial evidence that accused at Belfast, Northern Ireland, on 6 March 1944 killed Harry Coogan by stabbing him in the chest, head, and abdomen with a sharp instrument, as alleged in part. The vital question is whether the record is legally sufficient to support the findings that the killing amounted to murder in violation of Article of War 92.

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse.
>
> * * * * * * * * *
>
> Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.).
>
> Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony." (MCM, par.148a, pp.162,163-164).

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"The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the wrongful intent essential to the commission of crime. When used, however, in connection with the word 'aforethought' or 'prepense,' in defining the particular crime of murder, it signifies the same evil intent, as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating, in the view of the law, a malignant or depraved nature, or, as the early writer, Foster, has expressed it, 'a heart regardless of social duty and fatally bent upon mischief.' The deliberate purpose need not have been long entertained; it is sufficient if it existed at the moment of the act.

* * * * * * * * *

In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defence appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law." (Winthrop's Military Law & Precedents - Reprint, pp.672-673).

"A specific intent to kill does not enter into the definition of murder at common law or under statutes declaratory thereof; it is sufficient if the unlawful killing is with malice aforethought either express or implied, and a homicide may be malicious, and hence may be murder, although there was no actual design to take life. If an unlawful act, dangerous to, and indicating disregard of, human life, causes the death of another, the perpetrator is guilty of murder, although he did not intend to kill. Thus, if an assault was made upon deceased, not with the design of killing him, but of inflicting great bodily harm upon him, it is murder if his death is caused thereby; and it is murder where death results from an assault or other unlawful act, intentionally done in such a manner as was

likely to cause death or serious bodily harm, even though there may have been no actual intent to cause death or great bodily harm, but the injury intended must be such as involves serious consequences, either in endangering life or leading to great bodily harm, and death or great bodily harm must have been a reasonable or probable consequence of the act." (29 C.J., sec.69, pp.1095-1096).

"It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act. The use of a deadly weapon is not conclusive as to malice, but the inference of malice therefrom may be overcome, and where the facts and circumstances of the killing are in evidence, its existence of malice must be determined as a fact from all the evidence.

* * * * * * * * *

In order that an implication of malice may arise from the use of a deadly weapon it must appear that its use was willful or intentional, or deliberate. This, like other matters of intent, is to be gathered from the circumstances of the case, such as the fact that accused had the weapon prepared for use, or that it was used in such a manner that the natural, ordinary, and probable result would be to take life." (29 C.J., sec.74, pp.1099-1101).

The definition of voluntary manslaughter (in violation of Article of War 93) and its distinction from murder are thus stated:

"Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought. The intent to kill being formed suddenly under the influence of violent passion or emotion which, for the time being, overwhelms the reason of the accused. It is * * * the uncontrollable passion, aroused by adequate provocation, which for the time being renders the accused incapable of reasoning and unable to control his actions." (1 Wharton's Criminal Law, sec.423, pp.640-642).

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"The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice in connection with the crime of killing is but another name for a certain condition of a man's heart or mind, and as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of a killing is to infer it from the surrounding facts and that inference is one of fact for a jury. The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter." (Stevenson v. United States, 162 U.S. 313,320; 40 L.Ed., 980,983). (Cf: Jerry Wallace v. United States, 162 U.S. 466; 40 L.Ed., 1039; John Brown v. United States, 159 U.S. 100, 40 L.Ed., 90). (See CM ETO 739, Maxwell).

The two elements of (1) uncontrollable passion and (2) adequate provocation are thus analyzed:

"The passion thus aroused must be so violent as to dethrone the reason of the accused, for the time being; and prevent thought and reflection, and the formation of a deliberate purpose. The theory of the law is that malice and passion of this degree cannot coexist in the mind at the same time; and the grade of the offense is fixed by the preponderance of passion, or the legal presumption that the act was malicious and for motives of revenge. Mere anger, in and of itself, is not sufficient, but must be of such a character as to prevent the individual from cool reflection and a control of his actions." (1 Wharton's Criminal Law, sec.426, pp.646-647).

"Malice is not an ingredient of manslaughter. Malice being present, passion and anger, whatever their extent or degree, will not serve to reduce an unlawful killing to voluntary manslaughter." (ibid. sec.426, p.659).

"Such passion must be produced by due and adequate provocation, and be such that would cause an ordinary man to act upon the impulse of the moment, engendered by such passion, and without due reflection and the formation of a determined purpose. The moving cause of the action of the accused in any given incident under investigation may be either such anger as above described, or fear, or terror of such a character or degree as to render the accused incapable of cool reflection. What may reasonably inspire these feelings is not viewed alike." (ibid., sec.426, pp.647-649).

"Deadly weapon used by the accused, the provocation must have been very great in order to reduce the crime in a homicide to that of voluntary manslaughter. Mere use of deadly weapon does not if itself raise a presumption of malice on the part of the accused; but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act. * * *. Mere fear, apprehension, or belief, though honestly entertained, when not justifiable, will not excuse or mitigate a killing where the danger was not urgent." (ibid., sec.426, pp.652-655).

"Mutual combat will reduce a homicide to voluntary manslaughter in those cases only where it is shown that the deed was perpetrated in a transport of passion, or in the heat of blood, upon an adequate provocation, and that the act was without malice. But homicide with deadly weapons in mutual combat willingly entered into is murder." (ibid., sec.426, p.659).

The necessity for the concurrence of the two elements in order to reduce a homicide to voluntary manslaughter is thus expressed:

"Heat of passion, alone, will not reduce a homicide to voluntary manslaughter; to do this there must have been an adequate provocation." (ibid., sec.426, pp.655-656).

Accused had paid Eilsen Megaw one pound in coins, as a consideration for sexual intercourse. The deceased thwarted accused in the gratification of his lustful desire. Accused was denied the return of the

money. Megaw dropped the coins to the ground and while she was stooping over in an attempt to recover same, accused produced a knife or dagger and held it over her back. At this point deceased, a smaller man than accused, struck him a blow in the face. A fight ensued in which accused stabbed deceased. In one respect only does accused's confession differ substantially from the prosecution's evidence. This difference is in accused's assertion that it was not until deceased struck him that he pulled out his knife. The court was warranted in believing the testimony of eye-witnesses that accused had produced the knife before deceased struck him and held it over the woman in a position that strongly suggested his intention to strike her with it. It was logical and reasonable for the court to infer that deceased's action in striking accused was justified by deceased's reasonable apprehension that accused was about to stab the girl. Under this view of the evidence accused was the aggressor, although deceased struck the first blow.

There were seventeen knife wounds in deceased's body. Some of the blows were applied with such force and vigor as to drive the knife into deceased's skull, fracture both tables thereof and loosen pieces of skull bone. Another blow inflicted a wound three or four inches in depth and the knife pierced deceased's diaphragm transfixing the left lobe of the liver. Deceased's abdominal cavity was pierced by another thrust and a piece of his omentum two inches in length protruded at the time of the post-mortem. The other wounds ranged from superficial cuts to depth-wounds of two or three inches. The number and nature of the wounds are mute but unimpeachable witnesses - "poor dumb mouths" - of the ferocity and persistence of accused's attack. From this silent but undisputed evidence the court was logically and legitimately justified in concluding that accused commenced and persisted in his attack upon deceased not only with the purpose of inflicting great bodily harm upon him, but with the specific intent of killing him.

There is no evidence in the record, nor is it even suggested in accused's confession, that he was seized with uncontrollable passion or fear, or that he lost control of himself after deceased struck him or that he was intoxicated to a degree that he had no control of his mental faculties. Anger alone will not reduce the crime of murder to manslaughter. There must also be adequate provocation. Within the principles of CM ETO 82, McKenzie and CM ETO 72, Jacobs and Farley, there was neither adequate provocation nor hot-blooded mutual combat.

The function of the Board of Review in examining the record of trial in this case is to determine if there exists competent, substantial evidence to support the findings of the trial court.

> "In the exercise of its judicial power of appellate review, the Board of Review treats the findings below as presumptively correct, and examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself

a trier of fact on appellate review, and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrative of justice. C.M.192609, Rehearing (1930)." (Dig.Op.JAG, 1912-1940, sec.408(2), p.259). (Cf: CM ETO 268, Ricks; CM ETO 422, Green). (CM ETO 82, McKenzie).

The Board of Review has examined the record of trial with care and circumspection and it is entirely satisfied that there was competent substantial evidence before the court to support its findings that accused killed deceased with malice aforethought and thereby committed the crime of murder.

9. The issue of whether accused was sufficiently intoxicated to prevent his entertaining the intent requisite to constitute murder was one of fact for the determination of the court. As there was substantial evidence that he was not so intoxicated, its findings will not be disturbed (CM ETO 82, McKenzie; CM ETO 969, Davis).

10. The fact that deceased might have been a moral degenerate or even that he was a menace to the social well-being of his community is no legal justification for his death under the circumstances revealed by the record:

"A murderer is not excusable merely because the person murdered was a bad man (Underhill's Criminal Evidence, 4th Ed., sec.562, p.1111). (See CM ETO 506, Bryson).

11. In view of the foregoing considerations, the denial by the court of the motions by the defense for a finding of not guilty and for a finding of guilty of voluntary manslaughter only (R79-80) was proper (MCM, 1928, par.71d, p.56). As indicated, the prosecution established at least a prima facie case of murder against accused.

12. The charge sheet shows that accused is 25 years nine months of age and enlisted 21 May 1937 at Fort Benning, Georgia to serve three years. "Deserted service from 4 Oct 1937 to 14 Dec 1937. Deserted service 12 Jan 1939. Restored to duty 9 Oct 1942."

13. 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. The penalty for murder is death or life

imprisonment as a court-martial may direct (AW 92). The sentence that accused be hanged by the neck until dead is legal (CM ETO 1621, Leatherberry, and authorities there cited).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

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

1. In the case of Private WILEY HARRIS, JR., (6924547), 626th Ordnance Ammunition 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 sentence, which holding is hereby approved.

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 2007. For convenience of reference please place that number in brackets at the end of the order: (ETO 2007).

3. Should the sentence as imposed by the court be carried into execution it is requested that a full copy of the proceedings be furnished this office in order that its files may be complete.

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

(Sentence ordered executed. GCMO 32, ETO, 19 May 1944)

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

BOARD OF REVIEW

ETO 2023

6 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 Penllergaer, Glamorgan, Wales 20 February 1944 and Headquarters, 5th Engineer Special Brigade 8 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for six years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private OKLAND J. CORCORAN, (7003734), Company C, 336th Engineer Combat 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 61st Article of War.
Specification 1: In that Private Okland J. Corcoran, Company C, 336th Engineer Combat Battalion, did, without proper leave, absent himself from his station at Camp Mynydd Lliw #1, Wales, from about 16 January 1944 to about 17 January 1944.
Specification 2: In that * * *, did, without proper leave, absent himself from his station at Camp Mynydd Lliw #1, Wales, from about 17 January 1944 to about 24 January 1944.

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CHARGE II: Violation of the 69th Article of War.
Specification 1: In that * * *, having been duly placed in confinement in the 5th Engineer Special Brigade, Stockade, Camp Mynydd Lliw, Wales, on or about 25 January 1944, did, at Camp Mynydd Lliw #1, Wales on or about 25 January 1944, escape from said confinement before he was set at liberty by proper authority.
Specification 2: In that * * *, having been duly placed in confinement in the 5th Engineer Special Brigade Stockade, Camp Mynydd Lliw, Wales, on or about 25 January 1944, did, at Camp Mynydd Lliw #1, Wales, on or about 28 January 1944, escape from said confinement before he was set at liberty by proper authority.
Specification 3: In that * * *, having been duly placed in confinement in the 5th Engineer Special Brigade Stockade, Camp Mynydd Lliw, Wales, on or about 25 January 1944, did, at Camp Mynydd Lliw #1 Wales, on or about 30 January 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 * * *, having been restricted to the limits of the Battalion Area, 336th Engineer Combat Battalion, Camp Mynydd Lliw #1, Wales, did, at Camp Mynydd Lliw #1, Wales, on or about 17 January 1944, break said restriction.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of one previous conviction by Summary Court was introduced, for absence without official leave for six 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 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 for action pursuant to the provisions of Article of War 50½.

3. The question as to accused's legal responsibility for his acts was one of fact for determination by the court. There was substantial

evidence that accused was sane at the times of the commission of the offenses charged. The finding of the court under such circumstances is binding on the Board of Review (CM ETO 559, Monsalve; CM ETO 739, Maxwell). The general finding of guilty suffices to cover the issue of insanity and all of its elements. No interlocutory finding of accused's sanity was necessary. The ruling of the law member was irregular but harmless (CM 225837, Gray).

4. The charge sheet shows accused to be 23 years of age. He enlisted at Fort McClellan, Alabama, 18 December 1939 for three years. His service was 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 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 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

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1st Ind.

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

1. In the case of Private OKLAND J. CORCORAN (7003734), Company C, 336th 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 the 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 2023. For convenience of reference please place that number in brackets at the end of the order: (ETO 2023).

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 2039

18 MAY 1944

U N I T E D S T A T E S v. Private B. T. WRIGHT (34064556), 3916 Quartermaster Gasoline Supply Company	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Whittington Barracks, Lichfield, Staffordshire, England, 6 April 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 B. T. Wright, 3916 Quartermaster Gasoline Supply Company, having received a lawful command from First Lieutenant ROSS V. FREER, his superior officer, to give him a knife in the possession of said Private B. T. Wright, did, at Uttoxeter, Staffordshire, England on or about 9 March 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years at such place as the reviewing authority may direct. 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 accused is 20½ years of age. He was inducted into the United States Army 16 October 1941 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. The punishment for willfully disobeying the lawful command of a superior officer is death or such other punishment as a court-martial may direct (AW 64). The designated place of confinement is authorized.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(131)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 18 MAY 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U. S. Army.

1. In the case of Private B. T. WRIGHT (34064556), 3916 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 2039. For convenience of reference please place that number in brackets at the end of the order: (ETO 2039).

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 2042

10 MAY 1944

U N I T E D S T A T E S	5TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Tollymore Park, County Down, Northern Ireland, 7 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for eight years. The Federal Reformatory, Chillicothe, Ohio.
Private JOHN T. SMITH (34162426), Company "K", 11th 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 Charge and specifications:

CHARGE: Violation of the 93d Article of War.
Specification 1: In that Private (then Private First Class) John T. Smith, Company K, 11th Infantry, did, at Downpatrick, County Down, Northern Ireland, on or about 11 March 1944, unlawfully enter Rea's Commercial Hotel, with intent to commit a criminal offense, to wit, steal and carry away whiskey and wine therein.
Specification 2: In that * * *, did, at Downpatrick, County Down, Northern Ireland, on or about 11 March 1944, feloniously take, steal, and carry away about twenty-eight (28) bottles of alcoholic beverages, value about $75.00, the property of Frank Rea, Commercial Hotel, Market Street, Downpatrick, County Down, Northern Ireland.

He pleaded not guilty to the Charge and specifications. He was found guilty of Specification 1, of Specification 2, guilty, except the words "about $75.00", substituting therefor the words "in excess of $50.00," 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 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.

3. The charge sheet shows that accused is 22 years of age. He was inducted into the army 22 October 1941 without 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. The designated place of confinement is authorized (AW 42; 18 U.S.C. 466; Cir. 291, WD, 10 Nov 1943, sec.V, pars. 2a and 3a).

B. Franklin Kotey Judge Advocate

Richard Burdette Judge Advocate

Ellwood W. Leggett Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 MAY 1944 TO: Commanding General, 5th Infantry Division, APO 5, U.S. Army.

1. In the case of Private JOHN T. SMITH (34162426), Company "K", 11th 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. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The sentence adjudged and approved appears excessive for the offense under the circumstances shown by the record of trial. This case will be re-examined in Washington and, I believe, will result in a very considerable reduction in the sentence. In order to comply with instructions from the Commanding General, European Theater of Operations, in reference to uniformity of sentences, and which direct me to take action so that this theater may not be subject to criticism for returning prisoners to the United States with sentences which require immediate clemency action by the War Department, I recommend that you reconsider the sentence with a view to reducing the term of confinement. If this is done, the signed action should be returned to this office for file with 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 2042. For convenience of reference please place that number in brackets at the end of the order: (ETO 2042).

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

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Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW

23 MAY 1944

ETO 2044

U N I T E D S T A T E S	VIII AIR FORCE SERVICE COMMAND
v.	Trial by G.C.M., convened at AAF Station 595, APO 636, England 4 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private DUFFY R. LANDEROS (39252122), 39th Station Complement Squadron, 2nd Strategic Air Depot.	

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 I: Violation of the 61st Article of War.
Specification: In that Private Duffy R. Landeros, 39th Station Complement Squadron, 2nd Strategic Air Depot, did, without proper leave, absent himself from his Station at AAF Station 547 from about 0615 hours, 13 March 1944, to about 0615 hours, 20 March 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of five previous convictions: four by summary court for absence without leave for seven, one and four days respectively in violation of the 61st Article of War and for breaking restriction in violation of the 96th Article of War, and one by special court-martial for absence without leave for 13 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 for one year at such place as the reviewing authority may direct. 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 Article of War 50½.

3. The charge sheet shows that accused is 35 years four months of age and was inducted into the service at Los Angeles, California, 14 August 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 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.

5. Confinement of accused in 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. 23 MAY 1944 TO: Commanding General, VIII Air Force Service Command, APO 636, U.S. Army.

1. In the case of Private DUFFY R. LANDEROS (39252122), 39th Station Complement Squadron, 2nd Strategic Air 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. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In addition to the five previous convictions of accused properly introduced in evidence, papers accompanying the record of trial reveal that accused was absent without leave on four other separate occasions for which offenses no charges were preferred. In 19 months service he was absent without leave for 82 days and suffered 112 days confinement prior to commission of present offense. In civil life he suffered one conviction for automobile theft. His G.C.T. grade is 61. These circumstances justify the imposition of the present punishment, and his ultimate elimination from the service.

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 2044. For convenience of reference please place that number in brackets at the end of the order: (ETO 2044).

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

23 MAY 1944

ETO 2063

U N I T E D S T A T E S)	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private CLARENCE JOHNSON (36795985), Company F, 95th Engineer General Service Regiment.)	Trial by G.C.M., convened at Chester, Cheshire, England, 6 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten 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 92nd Article of War.
Specification: In that Private Clarence Johnson, Company F, 95th Engineer General Service Regiment, did, at Bridgenorth, Shropshire, England, on or about 1 February 1944, forcibly and feloniously, against her will, have carnal knowledge of Mrs. William Hollines Swayne.

He pleaded not guilty to the Charge and Specification. He was found guilty of the Specification except the words "forcibly and feloniously, against her will, have carnal knowledge of Mrs. William Hollines Swayne", substituting therefor the words "with intent to commit a felony, viz, rape, commit an assault upon Mrs. William Hollines Swayne, by wilfully and feloniously holding and choking the said Mrs. William Hollines Swayne, and striking her on the face and body with his fists"; of the excepted words, not guilty; of the substituted words, guilty. Of the Charge, not guilty, but guilty of violation of the 93rd Article of War. Evidence was introduced of one prior conviction by summary court for absence without leave from his station for 11 hours in violation of the 61st Article of War.

(142)

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 20 years at such place as the reviewing authority may direct. The reviewing authority approved the sentence but reduced the period of confinement to ten 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. The charge sheet shows that accused is 22 years of age and that he was inducted into military service on 18 February 1943 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 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 (CM ETO 1743, Penson, and authorities therein cited).

5. 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

CONFIDENTIAL

(143)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 23 MAY 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private CLARENCE JOHNSON (36795985), Company F, 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 2063. For convenience of reference please place that number in brackets at the end of the order: (ETO 2063).

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

(145)

BOARD OF REVIEW

ETO 2072

1 0 MAY 1944

U N I T E D S T A T E S	1ST INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Swanage, Dorsetshire, England, 7 April 1944.
Private BENJAMIN A. DOUGLASS (32043884), Company "I", 26th Infantry.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for nine 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.
Specification 1: In that Private BENJAMIN A. DOUGLASS, Company "I", 26th Infantry, did, without proper leave, absent himself from his organization at Valmy, Algeria from about 0630 hours, 24 May 1943, to about 1630 hours, 3 June 1943.
Specification 2: In that * * *, did, without proper leave, absent himself from his organization at Ain El Turk, Algeria from about 0800 hours, 6 June 1943, to about 0300 hours, 9 June 1943.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * *, having been duly placed in arrest at Ain El Turk, Algeria on or about 1630 hours, 3 June 1943, did, at Ain El Turk, Algeria on or about 0800 hours, 6 June 1943, break his said arrest before he was set at liberty by proper authority.

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CHARGE III: Violation of the 58th Article of War.
Specification 1: In that * * *, did, at Liverpool, England, on or about 9 February 1944, desert the service of the United States and did remain absent in desertion until he was apprehended, at Widnes, Lancashire, England, on or about 13 February 1944.
Specification 2: In that * * *, did, near Wincanton, Somerset, England, on or about 1300 hours, 17 February 1944, desert the service of the United States, and did remain absent in desertion until he was apprehended at Trowbridge, Wilts, England, on or about 1915 hours, 17 February 1944.

He pleaded not guilty to the charges and specifications. He was found guilty of Charges I and II and their respective specifications, and of Charge III not guilty of violation of the 58th Article of War but guilty of violation of the 61st Article of War, guilty of the Specifications thereof except the words, "desert the service of the United States" substituting therefor the words "absent himself without proper leave from his command" and excepting the words "in desertion", contained in each of said specifications, of the excepted words, not guilty and of the substituted words, guilty. Evidence of two previous convictions by summary court was introduced: one for appearing off limits without a proper pass in violation of standing orders and one for appearing off limits in improper uniform, both in violation of the 96th 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 nine years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, directed that pending further orders accused be held 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. The charge sheet shows that accused is 26 years of age. He was inducted 6 March 1941 at Albany, New York for the duration of the war and six months thereafter. He had no prior service.

4. 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 of Charges I and II and their respective specifications

and the findings of guilty of Charge III and its specifications by exceptions and substitutions, and the sentence.

5. The designation of Eastern Branch, United States Disciplinary Barracks 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

(148)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 MAY 1944 TO: Commanding General, 1st Infantry Division, APO 1, U.S. Army.

1. In the case of Private BENJAMIN A. DOUGLASS (32043884), Company "I", 26th 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 of Charges I and II and their respective specifications and the findings of guilty of Charge III and its specifications 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 2072. For convenience of reference please place that number in brackets at the end of the order: (ETO 2072).

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 2082

10 MAY 1944

U N I T E D S T A T E S	THIRD UNITED STATES ARMY
v.	Trial by G.C.M., convened at Stoke-on-Trent, England, 11 April 1944.
Private EUGENE H. HALL (33721806), 443rd 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

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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 93rd Article of War.
Specification: In that Private Eugene H. Hall, 443rd Quartermaster Troop Transport Company did, at Stoke-On-Trent, England, on or about 19 March 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per annum with Raymond Bibby, a human being.

He pleaded not guilty to the Charge and Specification and was found guilty of the Specification except the words "commit the crime of sodomy, by feloniously and against the order of nature having carnal connection" and substituting therefor the words "attempt to commit the crime of sodomy, by feloniously and against the order of nature attempting to have carnal connection", of the excepted words, not guilty, of the substituted words guilty, and not guilty of the Charge but guilty of a violation of Article of War 96. 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.

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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 charge sheet shows accused is 18 years of age. He was inducted 20 April 1943 at Fort George Meade, Maryland for the duration of the war and six months thereafter. He had no prior service.

4. 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 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).

B. Franklin Riter Judge Advocate

Judge Advocate

Ellwood W. Sargent Judge Advocate

CONFIDENTIAL

1st Ind. (151)

WD, Branch Office TJAG., with ETOUSA. 10 MAY 1944 TO: Commanding General, Third United States Army, APO 403.

1. In the case of Private EUGENE H. HALL (33721806), 443rd Quartermaster Troop Transport 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 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 2082. For convenience of reference please place that number in brackets at the end of the order: (ETO 2082).

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

26 MAY 1944

ETO 2098

U N I T E D S T A T E S	VIII AIR FORCE SERVICE COMMAND.
v.	Trial by G.C.M., convened at AAF Station 506, APO 636, 6 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for six years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private JOHN E. TAYLOR, (34262317), alias Private JOHN R. ERVIN TAYLOR, (34262317), alias Private first class FRED TAYLOR, alias Private ROBERT E. TAYLOR, (35125145), 1st Mobile Repair and Reclamation Squadron, attached to 1915th Quartermaster Truck Company (Aviation).	

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 John E. Taylor, 1st Mobile R & R Squadron attached to 1915th Quartermaster Truck Company (Avn), 2nd Strategic Air Depot, AAF-127, APO-635, did, without proper leave, absent himself from his station at AAF-127, APO-635 from about 0615 hours 2 February 1944, to about 2100 hours 16 February 1944.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * * having been duly placed in confinement in Guard House, AAF-127, on or about 25 February 1944, did, 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 1: In that * * *, did, at 15 Cardiff Street, Luton, Bedfordshire, England, on or about 16 February 1944, feloniously take, steal and carry away a sum of money, namely about twenty pounds (£20), British currency, ($80.70), the property of Pvt. Wallace Sneddon, 425 Bomb Squadron, 306 Bomb Group, APO 634, U.S.Army.
Specification 2: In that * * *, did, at the Rabbit Bar, Luton, Bedfordshire, England, on or about 16 February, 1944, feloniously take, steal and carry away a contribution box containing nine shillings (9s.0d), British currency, ($1.80), the property of the Rabbit Bar, Luton, Bedfordshire, England.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence of two previous convictions was introduced; one by summary court for absence without leave for eight days and one by special court for absence without leave for 12 days, both 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 for six years at such place as the reviewing authority may direct. 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. (a) Escape from confinement (Charge II): Accused had been confined in the guard house at AAF Station 127. In company with three other prisoners he was placed in the custody of two armed guards and was taken to a sewer disposal unit located at the station. The prisoner detail was then required to clean the disposal unit. They remained under the immediate direction and control of guards. During the process of this work accused escaped. While physically removed from the confines of the guard house he remained under the physical restraint imposed by the guards. He succeeded in freeing himself from this restraint which was actual and obvious. He was neither an "honor" prisoner nor was he on parole. His offense was clearly an escape from confinement denounced by the 69th Article of War (CM 188150, Thompson; CM 197553, Ross; MCM 1928, par.139a, and b, pp.153,154).

(b) Larceny (Charge III, Specification 2): Accused confessed the theft of funds (9 shillings; $1.80) which were contained in a "contribution box" in the physical possession of the Rabbit Bar in Luton. This box was used for the purpose of receiving voluntary contributions from persons frequenting the public house for the benefit of some unnamed charitable institution. It will be assumed that the general ownership of the funds deposited in the box was vested in this charitable institution. There is evidence in the record that the Rabbit Bar was the custodian of the money deposited in the box until it was collected by the general owner. It held a special interest therein which as against accused, a trespasser, was of sufficient quality to support that allegation of the specification that

it was the owner of the money (32 Am. Jur. Sec. 113, p.1025; State v. Hubbard, 126 Kan. 129, 226 Pac.939, 58 A.L.R.327 with annotation at p.330 et seq.; Hall v. United States 277 Fed.19,24).

Proof of the corpus delicti of the theft of the funds in the "contribution box" rests primarily upon hearsay evidence given by Special Agent Moyer of the Criminal Investigation Department of the United States Army (R.9,12). The evidence was given not only without objection by the defense, but also its subsequent motion to strike the evidence was voluntarily withdrawn (R.12). Under such circumstances the hearsay evidence may be "considered and given its natural probative effect as if it were in law admissible". (Diaz v. United States 223 U.S.442, 450; 56 L. Ed. 500,503). Moyer's testimony is sufficient to show that the "contribution box" and its contents had been taken from the public house without authority. This is sufficient proof of the corpus delicti to permit the admission in evidence of that part of accused's confession pertaining to this theft (Specification 2, Charge III).

(c) All of the elements of larceny (Specification 1 and 2 Charge III) were proved by substantial evidence and accused is satisfactorily identified as the thief (CM ETO 885, Van Horn; CM ETO 952, Mosser; CM 1191, Acosta; CM ETO 1415, Cochran).

(d) Proof of absence without leave (Charge I) is substantial (CM ETO 364, Howe; CM ETO 1991, Pierson).

4. The charge sheet shows accused to be 20 years two months of age, that he was inducted into the military service at Fort McPherson, Georgia, 28 February 1942, for the duration of the war plus six months and that 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 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 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).

B. Franklin Riley Judge Advocate

Judge Advocate

Edward H. Lovett Judge Advocate

CONFIDENTIAL

(156)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 26 MAY 1944 TO: Commanding General, VIII Air Force Service Command, APO 636.

1. In the case of Private JOHN E. TAYLOR (34262317), alias Private JOHN R. ERVIN TAYLOR (34262317), alias Private first class FRED TAYLOR, alias Private ROBERT E. TAYLOR (35125145), 1st Mobile Repair and Reclamation Squadron, attached to 1915th Quartermaster Truck Company (Aviation), 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 the 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 2098. For convenience of reference please place that number in brackets at the end of the order: (ETO 2098).

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 2103

12 JUN 1944

U N I T E D S T A T E S)	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.)	
Private First Class SCOTT J. KERN (15323730), 17th RCD (Avn), Squadron A, VIII Air Force Service Command.)	Trial by G.C.M., convened at Altrincham, Cheshire, England, 21 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal 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 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 First Class Scott J. Kern, 17th RCD (Avn), Squadron A, VIII AFSC, AAF 533, APO 635 did, at Altrincham, Cheshire County, England, on or about 16 February 1944, willfully, feloniously, and unlawfully kill Sergeant Richard A. Garcia, a human being, by stabbing him in the abdomen with a knife.

Specification 2: In that * * *, did, at Altrincham, Cheshire County, England, on or about 16 February 1944, willfully, feloniously, and unlawfully kill Technical Sergeant Louis S. Cygan, a human being, by stabbing him in the abdomen with a knife.

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 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. Accused as a witness for himself testified substantially as follows: He had been in the armed service since October 1942, arrived overseas 1 November 1943 and was immediately assigned to Military Police duty at Altrincham under Captain Huston (now dead) and later Second Lieutenant Walter J. Doolen, Quartermaster Corps, Squadron F, 17th RCD. He was an acting-sergeant heading a twelve-man patrol, on 24-hour duty, working a six-hour shift and the other 18 hours at camp ready for duty if needed (R53). On the Saturday night previous to the incidents giving rise to the charges herein, on making his rounds, he found a soldier-cook named Russell, who had "passed out" with drink, sitting at a table in a public house. On being awakened and asked to go out and get some air, Russell wanted to create a disturbance so accused arrested him and took him to the guardhouse on a drunk and disorderly charge. There had been for some time a slight feud between the military police and the cooks because of the necessity of feeding the military police at irregular hours. Often the military police found there was no food for them and at times they found foreign material in their "chow". Accused found a prophylactic in his food and notified Lieutenant Doolen. He had trouble with both Garcia and Cygan around "pubs" and dance halls, and reported to Sergeant Mitchell that he had been informed that Garcia was carrying a knife and was "laying for him" (R54). Garcia was dark skinned, about five feet ten inches in height, weighed about 170 pounds and was "pretty powerful". He was called "Chief". Cygan was heavy set, weighed about 230 pounds, was about five feet six inches tall and also "a powerful fellow". Both were cooks at accused's camp (R55). Accused was five feet ten inches tall (R61). The knife in question, admitted in evidence as Pros.Ex."C", was bought by accused from a British soldier in the American Red Cross Club in Manchester the latter part of December 1943. Accused went to Manchester a great deal while off duty. He bought the knife because "they were having trouble" over there with "the blacks". Several boys got cut up. He was not on duty the night of 16 February 1944, went to the Woolpack and had a couple of drinks, then stopped at two or three other "pubs" where he was known, got some "chips" and returned to the Woolpack and had a beer. He was stopped by Cygan as he was coming out of the smoke-room of the "pub" to the bar and told "That was a pretty rotten trick you pulled the other night when you took Russell in." Accused replied that if Cygan did not like the way cases were handled by the "M.P.s" he could see Lieutenant Doolen (R55). Cygan took his coat off and handed it to Garcia, saying he would sooner settle it with accused. To avoid a brawl in the hotel, accused suggested that "If thats the way you feel, lets go out". He did not expect Garcia to follow them. Cygan went ahead and as accused stepped through the doorway and down the one step to the sidewalk, he was hit in the eye by Cygan. Before he could recover, Cygan hit him again in the mouth and Garcia jumped on his back from behind on Cygan's instructions to "Hold him Chief".

"The knowledge flashed through my mind (159)
that he carried a knife, and it was known
that he was out to get me. The first
thing I thought then was to get him
before he got me."

Accused could not run as Garcia was holding him from the back and Cygan was in front of him hitting him in the face. He twisted and tried to get loose but could not, and then felt for his knife in a sheath in his back pocket. He got in one sweep backwards at the man behind and one jab forward. They "let loose" and he put the knife in his pocket. Just then he saw an acquaintance, Margaret Calnun, and at her request went down the street with her. He gave her the knife. He informed her that he had to get rid of it and instructed her to burn it. He then went to camp in order to inform Lieutenant Doolen to whom he told substantially the foregoing story. From camp he went with Doolen to the home of Margaret Calnun several hours later where the knife was retrieved (R56-57). Accused knew he was not supposed to carry a knife with so long a blade and did not carry it regularly. He happened to have it this night which was dark (R58). He knew whom he was striking at with his knife and it was done without thinking whether it was the right thing to do (R59). The only thing he could do was to fight. He could not possibly get away as Garcia had both arms around his neck (R61). Accused was afraid "he was going to get badly knifed" (R62). His story was not controverted but was corroborated in certain particulars by other witnesses.

4. Both Cygan and Garcia were discovered on the footpath in front of the hotel and removed by ambulance to a hospital (R5). There were no witnesses of the fight. The identity of the two victims was learned from their identity tags (R8). Both had been drinking (R11). The knife in question was about 12 inches long; the blade was 6 3/4 inches and very sharp (R19). It was red-hot when taken from the fire at the Calnun home some five hours after being placed there (R21). Accused received a "pretty bad" black eye (R26). He was rated by his Provost Sergeant as "the best man we had on the patrol; he was always on the job, and did his work excellently" (R28).

Garcia died in the hospital about one o'clock and Cygan about five o'clock the morning after the encounter (R32). Each died as the result of stab wounds in the abdomen. Garcia had one stab wound and Cygan two, both deep (R38).

Accused made two sworn statements the day after the fight, both substantially the same as his testimony before the court, which were admitted in evidence as Pros.Exs. "A" and "B" (R42,44).

5. Accused was a military policeman in charge of a 12-man detail. He was doing good work but as often happens in that kind of a job he had incurred the apparently undeserved animosity of the two cooks, both strong, powerful men physically. Accused had heard of their threats to "get him". He had bought a knife from a British soldier at a time when there had been some trouble with colored soldiers in his vicinity, which knife he sometimes carried. It was of illegal length and accused knew he should not carry it.

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On the night in question the two cooks who had been drinking, committed an unprovoked assault upon him in the blackout darkness. One unexpectedly seized him from behind while the other as unexpectedly struck him in the eye and mouth from in front. He could not free himself, thought of their threats and of his knife at the same time, drew his knife, struck with it and broke free. There is no evidence of actual malice or premeditation on the part of the accused. He was interested only in defending himself from their assault and freeing himself from their clutches. He had the legal right to use all force necessary, but no more, to attain that end. There is no evidence that accused intended to cause any serious injury to either of his assailants except as such intention may be inferred from his use of a knife. Examination of the body of Cygan, however, disclosed, not one but two separate and distinct wounds, one in the chest piercing the heart and one appreciably lower down. There is no evidence in the record of trial other than the unexpectedly sudden and violent assault made upon him, to indicate that accused used his knife in "the heat of sudden passion caused by provocation" (MCM, 1928, par.149a, p.165).

> "Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought, either express or implied and is either voluntary or involuntary homicide, depending upon the fact whether there was an intention to kill or not." (1 Wharton's Criminal Law, 12th Ed., sec.422, pp.637-640).
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> "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought."(Ibid., sec.423, p.640).
>
> "Voluntary manslaughter is an intentional killing, without malice, in hot blood produced by adequate cause, and differs from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice aforethought, which is the essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proportionately lenient." (Ibid., sec.425, pp.643-645).
>
> "Assault upon accused * * * by the person killed, an attempt to commit serious personal injury, or equivalent circumstances, is necessary to reduce a homicide to voluntary manslaughter. A slight assault does not justify killing with a deadly weapon." (Ibid., sec.426, p.651).

"Deadly weapon used by the accused, the provocation must have been very great in order to reduce the crime in a homicide to that of voluntary manslaughter. Mere use of deadly weapon does not of itself raise a presumption of malice on the part of the accused; but where such a weapon is used in a manner likely to, and does, cause death, the law presumes malice from the act. Fear * * * is an element reducing a homicide to voluntary manslaughter, but, in order to accomplish this, the fear must be such as a reasonable man would entertain under circumstances of the homicide. Mere fear, apprehension, or belief, though honestly entertained, when not justifiable, will not excuse or mitigate a killing where the danger was not urgent." (Ibid., sec.426, pp.652-655).

Accused was charged with and found guilty of voluntary manslaughter. There is substantial evidence to support that finding (CM ETO 422, Green; CM ETO 835, Davis).

6. There is another aspect of the circumstances herein which though not directly raised should be considered. Was accused in ths situation described, justified in his actions as a matter of self-defense? One is not punishable criminally for taking the life of another person when he has been put under the necessity, or apparent necessity, of doing so without any fault on his own part, in order to protect himself from the peril of death or serious bodily harm at the hands of the persons whose lives he took. One cannot, however, go further than is reasonably necessary in defense of his person. He cannot carry his right of self-defense to the extent of using a deadly weapon upon his assailants, except where, to his apprehension as a reasonable man, such extreme measures are necessary to save himself from death or great bodily harm.

"To justify or excuse a homicide upon the ground of self-defense it is necessary to establish that the slayer was without fault in bringing on the difficulty, that is, that he was not the aggressor and did not provoke the conflict; that the accused believed at the time that he was in such immediate danger of losing his own life, or of receiving serious bodily harm, as rendered it necessary to take the life of his assailant to save himself therefrom; that the circumstances were such as to afford or warrant reasonable grounds for

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such belief in the mind of a man of ordinary reason and firmness; and that there was no other convenient or reasonable mode of escaping or retreating or declining the combat." (26 Am. Jur., sec.126, p.242).

"The right to kill in self-defense is founded in necessity, real or apparent. The right exists only in extremity, where no other practical means to avoid the threatened harm are apparent to the person resorting to the right. If there was under the facts of the particular case at bar no real or apparent necessity for the killing, the defense completely fails and the slayer will be deemed guilty of some grades of culpable homicide." (Ibid., sec.137, p.249).

Here Garcia had both arms around the neck of accused and accused must have known he had no weapon. Certainly none that he could immediately use. Cygan was striking him with his fist, not a deadly weapon. Surely there was nothing to cause accused to be in fear of his life. If he had not been in possession of the lethal weapon, it would appear that nothing more serious than an assault and battery would have occurred. Assuming the story of accused to be correct and true, the killing cannot be justified as done in self-defense.

7. The charge sheet shows accused to be 21½ years of age. He enlisted at Fort Hayes, Ohio, 28 October 1942 for the duration 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. Confinement in a penitentiary is authorized upon a conviction for voluntary manslaughter (AW 42; sec.275, Federal Criminal Code (18 U.S.C.454), however, prisoners under 31 years of age and with sentences of not more than ten years, will be confined in a Federal correctional institution or reformatory (Cir.291, WD, 10 Nov 1943, sec.V, par.3a, b and c). The place of confinement herein designated is therefore authorized.

B. Franklin Riter Judge Advocate

Judge Advocate

Edward Kilgarlin Judge Advocate

1st Ind. (163)

WD, Branch Office TJAG., with ET USA. 12 JUN 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U.S. Army.

1. In the case of Private First Class SCOTT J. KERN (15323730), 17th RCD (Avn), Squadron A, VIII 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. The fact that accused carried a sharp, dangerous knife in violation of standing orders cannot be excused. Neither can his use of same in the fight with Garcia and Cygan be justified. He was entitled to defend himself but not, under the circumstances shown, with a deadly weapon. He was clearly guilty of manslaughter. However it does not appear that he was a bellicose, belligerent individual and his record as a soldier was excellent. He appears to be a fairly intelligent person of value to the military service. The two deceased called accused to account for his conduct in the performance of official duties imposed on him by higher authority. They were large, powerful men. The circumstances of their joint attack on accused, although invited by him, were such as to detract from the homicide a large degree of moral turpitude. Accused's testimony at the trial was forthright and honest. I believe discipline will be sustained and justice vindicated if the dishonorable discharge is suspended and accused is confined in Disciplinary Training Center No.2912, Shepton Mallet, Somersetshire, England. I so recommend. If such recommendation be followed the additional 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 2103. For convenience of reference please place that number in brackets at the end of the order: (ETO 2103).

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

11 MAY 1944

ETO 2114

U N I T E D S T A T E S)	29TH INFANTRY DIVISION.
)	
v.)	Trial by G.C.M., convened at APO 29, U. S. Army, 13 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private ROY E. COUCH (6969580))	
Battery "B", 227th Field)	
Artillery 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Roy E. Couch, Battery "B", 227th Field Artillery Bn. did, at Tidworth Barracks, Wiltshire, England, on or about 4 May 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at London, England on or about 30 March 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial, one for desertion involving absence for 197 days in violation of Article of War 58, the other for absence without leave for 42 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 25 years. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg,

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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 charge sheet shows that accused is 26 years of age and enlisted at Charlotte, N. C. 12 May 1939. Assigned Battery "D" 36th F.A. Fort Bragg, N.C. 12 May 1939; assigned Battery "A" 36th F.A. Fort Bragg, N.C., 7 October 1941; assigned Disciplinary Training Center #2, APO 511, New York, N.Y. 14 December 1942; assigned 29th Infantry Division APO 29, New York, N.Y. 31 March 1943; assigned Battery "B" 227th FA.Bn. APO 29, New York, N.Y. 4 April 1943.

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. 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 United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; Cir. 291, WD, 10 Nov 1943, sec. V).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 11 MAY 1944 TO: Commanding General, 29th Infantry Division, APO 29, U. S. Army.

1. In the case of Private ROY E. COUCH (6969580), Battery "B", 227th Field Artillery Battalion, 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 2114. For convenience of reference please place that number in brackets at the end of the order: (ETO 2114).

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

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

BOARD OF REVIEW

ETO 2131

27 MAY 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 THOMAS E. MAGUIRE (34051575), Headquarters Company, Field Force Replacement Depot Number Two.)	Trial by G.C.M., convened at Bristol, Gloucestershire, England, 4 April 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 Charge and Specification:

CHARGE: Violation of the 86th Article of War.
Specification: In that Private Thomas E. Maguire, Headquarters Company, Field Force Replacement Depot No. 2, United States Army, Muller's Orphanage, Bristol, Gloucester, England, a member of the guard detail, being on guard and posted as a sentinel at Muller's Orphanage, United States Army, Bristol, Gloucester, England on or about 1800 hours 14 March, 1944, did leave his post before he was regularly relieved.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by summary court, each for being drunk and 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 for 15 years at such place as the

reviewing authority may direct. 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. The evidence for the prosecution shows that accused, who had been in the army for two years, was a member of the permanent guard detail, Field Force Replacement Depot No. 2, on 21 February 1944 and continuously thereafter until 14 March 1944, the date of his alleged offense (R6,12,14, 15-16). According to the established practice and custom of this particular permanent guard detail, members reported daily to the guardhouse. They ascertained from the duty roster (which was kept there) to which of the six posts serviced by the permanent guard detail and to which relief each was assigned (R12,15). The testimony of one member of the detail, who was a witness for the prosecution, shows the method by which sentries were posted on 14 March 1944.

> "Q. When you go on guard, do you just go from the guardhouse down to the post, or does the Sergeant of the Guard take you down there?
> A. We just go down from the guardhouse.
> Q. Does that hold true in most all cases? All the posts?
> A. Yes sir.
> Q. A man just goes down by himself?
> A. Yes sir." (R14).

Asked:

> "To your knowledge, do you think anyone of the guard knows what the post is by its particular number?

the same witness replied:

> "Well, maybe not when they first come on guard; I don't imagine they do, sir. But it doesn't take long to learn the posts." (R15).

On 14 March 1944, the accused was regularly assigned as sentry on Post No. 4, a night-time post unguarded until 6:00 p.m. at which hour the accused was scheduled to take and remain in charge of it until 9:00 p.m. which was the hour for the posting of the next relief (R6-7). At ten minutes to six the accused reported to the sergeant of the guard, "checked his flashlight out and said he was going on post. * * *. After that," the sergeant of the guard testified, "I saw him go out and start towards his post. That was about as far as I saw him." (R7). The sergeant did not know if he was "ever actually on post or not" (R8).

Post No. 2 at the rear gate of the installation serviced by the permanent guard detail of which the accused was a member, was less than 200 feet from the north-westerly limits of Post No. 4 (R7; Ex.1). The sentry who went on duty on Post No. 2 at 6:00 p.m. 14 March 1944 testified:

> "About a quarter after seven, Maguire /accused/ approached me at my gate and spoke a few words to me and then passed on out. * * *. I took it for granted he had a pass. * * *. Approximately nine o'clock, Sergeant Raxter came down from the guardhouse and asked me where Maguire was. I told him he was on pass, and I left him out. He told me that Maguire was to be on post, and to pick him up when he came, which I did about five after ten." (R13).

The officer of the day checked Post No. 4 at approximately 7:30 p.m. He found no sentry but thought he "might have missed him." He made another check 15 minutes later and again found no sentry on Post No. 4, which he described as a "horseshoe post around the PX." He reported the sentry's absence to the guardhouse and instructed the sergeant of the guard to put another man on the post (R8-9).

The provost marshal inspected the Post No. 4 at 8:00 p.m. He found no sentry on duty at that post. He then ascertained that the accused was scheduled for sentry duty on Post No. 4 from 6:00 to 9:00 p.m. He forthwith "left orders with the guard that should this man return to the post, or should the man come back on the post, if he was off it, that he should be put in confinement pending an investigation in the morning." (R11). When the sentry detailed to relieve the accused arrived at Post No. 4 at about 9:15 p.m., the accused was not there (R15). He was seen at a public house about three blocks from his station shortly after 9:00 p.m. (R17).

4. No evidence was adduced on behalf of the defense and after the accused's rights as a witness were duly explained to him, he elected to remain silent (R18).

5. The elements of proof for the offense with which the accused was charged are:

(1) That the accused was posted as a sentinel as alleged; and
(2) That he left such post without being regularly relieved. (MCM, 1928, par.146c, p.161).

The fact that the sentinel was not posted in the regular way is not a defense (MCM, 1928, par.146a, p.160). The direct evidence without contradiction shows that the accused left his station about 7:15 p.m. through the rear gate less than 200 feet from Post No. 4, where, according to the guard roster he was detailed for sentry duty from 6:00 to 9:00 p.m., and

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whither, at ten minutes of 6:00 p.m., he had reported to the sergeant of the guard that he was going. The testimony of the sergeant of the guard does not directly prove that the accused actually arrived at his post on the occasion in question, but it does prove conduct on the part of accused and a declaration made by him from which, in connection with the testimony of the sentry on Post No. 2, and the established proximity of Post No. 2 to Post No. 4, the court might reasonably infer, that the accused actually did arrive at his post pursuant to his expressed intention, indicated when he left the guardhouse at 5:50 p.m. These facts constitute "one or more" circumstances which, according to the Manual for Courts-Martial "may be more convincing than a plausible witness" (MCM, 1928, par.112, p.111), and together constituted a sufficient matrix of probative facts from which the court was authorized to infer the ultimate fact that accused was actually "posted" within the purview of the 86th Article of War (CM ETO 132, Kelly and Hyde; CM ETO 527, Astrella).

Moreover, the evidence adduced by the prosecution was clearly sufficient to shift the burden of explanation to the accused (CM ETO 2273, Sherman; CM ETO 1629, O'Donnell; CM ETO 1317, Bentley; CM ETO 527, Astrella). He made no attempt to discharge it.

The Board of Review is therefore of the opinion that the record is legally sufficient to support the findings of guilty and the sentence.

6. The charge sheet shows that the accused is 28 years four months of age, that he enlisted at Camp Blanding, Florida, 12 April 1941, to serve one year, and that his term of service was continued by the "National Act of 1941." 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 the accused were committed during the trial.

8. The designation of the 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

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 MAY 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private THOMAS E. MAGUIRE (34051575), Headquarters Company, Field Force Replacement Depot Number Two, 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 2131. For convenience of reference please place that number in brackets at the end of the order: (ETO 2131).

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

BOARD OF REVIEW

ETO 2134

13 MAY 1944

UNITED STATES	4TH INFANTRY DIVISION
v.	Trial by G.C.M. convened at APO 4, England, 11 April 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor, Smiley for 12 years at the United States Penitentiary, Lewisburg, Pennsylvania, and Hamilton for 10 years at the Federal Reformatory, Chillicothe, Ohio.
Private LOUIS A. SMILEY, JR. (7020718), and Private CECIL J. HAMILTON (14041154), both of Headquarters Battery, 42nd 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 soldiers named above has been examined by the Board of Review.

2. Accused were tried upon the following charge and specifications:

SMILEY

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private (then Private First Class) Louis A. Smiley, Jr., Headquarters Battery, 42nd Field Artillery Battalion, did, at Iron Bridge, Gettisham, Devon, England, on or about 22 March 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with one Keith Powell, a male human being.

Specification 2: In that Private (then Private First Class) Louis A. Smiley, Jr., Headquarters Battery, 42nd Field Artillery Battalion, did, at Iron Bridge, Gettisham, Devon, England, on or about 22 March 1944, with intent to commit a felony, viz sodomy, commit an assault upon Keith Powell, by willfully and feloniously striking him in the face with his fist.

(176) HAMILTON

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that Private (then Technician 5th Grade) Cecil J. Hamilton, Headquarters Battery, 42nd Field Artillery Battalion, did, at Iron Bridge, Gettisham, Devon, England, on or about 22 March 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os and per anum with one Keith Powell, a male human being.
Specification 2: In that Private (then Technician 5th Grade) Cecil J. Hamilton, Headquarters Battery, 42nd Field Artillery Battalion, did, at Iron Bridge, Gettisham, Devon, England, on or about 22 March 1944, with intent to commit a felony, viz sodomy, commit an assault upon Keith Powell, by willfully and feloniously and forcibly holding his arms, legs and body and disarranging his clothing.

Each pleaded not guilty to and each was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced against either of accused. Each 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 12 years at such place as the reviewing authority may direct. The reviewing authority approved the sentence as to Smiley, and designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement. He approved only so much of the sentence as to Hamilton as involved dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years, and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement. The record of trial was forwarded for action pursuant to the provisions of Article of War 50½.

3. Each accused consented in open court to a common trial.

4. The charge sheet shows the following: Smiley is 25 years 3 months of age. He enlisted 6 January 1940 to serve three years (duration plus six months). Hamilton is 22 years, 1 month of age. He enlisted 19 October 1940 to serve three years (duration of the war plus six months). Neither accused had prior service.

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

6. Confinement in a penitentiary as punishment for the crimes of sodomy and assault with intent to commit sodomy is authorized (CM 187221, Sumrall;

CM 171311, Stearns; District of Columbia Code secs. 24-401 (6-401), 22-107 (6:7) and 22:503 (6:28); 1 Wharton's Criminal Law Sec 761, p. 1042). The respective places of confinement are authorized (Cir. 291, WD, 10 Nov.1943, Sec. V, pars 3a and b).

B. Franklin Ritz Judge Advocate

Gustav Bruchhaten Judge Advocate

Edward H. Young Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG., with ETOUSA, APO 871. 13 MAY 1944 TO: Commanding General, 4th Infantry Division, APO 4, U. S. ARMY.

1. In the case of Privates LOUIS A. SMILEY, JR., (7020718) and CECIL J. HAMILTON (14041154), both of Headquarters Battery, 42nd Artillery Battalion, attention is invited to the foregoing holding of the Board of Review, that the record of trial is legally sufficient to support the findings 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. 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 2134. For convenience of reference please place that number in brackets at the end of the order: (ETO 2134).

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

26 MAY 1944

ETO 2157

U N I T E D S T A T E S v. Private DAVID CHEEK (33194194), 1962nd Ordnance Depot Company (Aviation), Combat Support Wing.	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE. Trial by G.C.M., convened at City Hall, Leicester, Leicestershire, England, 29 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three 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 93rd Article of War.
Specification: In that Private David (NMI) Cheek, 1962nd Ordnance Depot Co (Avn), Combat Support Wing did at or near Leicester, Leicestershire England on or about 1 February 1944 with intent to do him bodily harm commit an assault upon James Henry Harrison by willfully and feloniously attempting to run him down with a motor vehicle, to wit a 3/4 ton Weapons Carrier.
CHARGE II: Violation of the 96th Article of War.
Specification 1: In that * * *, did at AAF 520, APO 635 on or about 1 February 1944, wrongfully and without proper authority, take and use a certain vehicle, to wit a 3/4 ton Weapons Carrier, the property of the United States of a value of more than $50.00.

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Specification 2: In that * * *, did on or about 1 February 1944, at or near Leicester, Leicestershire, England, wrongfully and unlawfully drive a motor vehicle on a road in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at the time, or which might reasonably be expected to be on the road, thereby causing injury to certain people, to wit:

Miss Kathreen Duddle, 3 Brunswick Place, Leicester.
Gunner Alfred Thomas Turner, 430th Battery Light Anti-Aircraft, R.A..
Agnes Cecilia Clague, 356 London Road, Leicester.
Horace Mould, 47 Brook Street, Leicester.
Rose Parker, 47 Brook Street, Leicester.

Specification 3: In that * * *, did on or about 1 February 1944, at or near Leicester, Leicestershire England, wrongfully and unlawfully drive a motor vehicle on a public highway while drunk.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of two previous convictions by summary courts: one for absence without leave for four days in violation of the 61st Article of War and one for disorderly conduct in quarters in violation of the 96th 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 for three years at such place as the reviewing authority may direct. The reviewing authority approved the sentence, 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. (a) The deposition of Kathleen Duddle, a witness for the prosecution, was taken upon written stipulation of the trial judge advocate and defense counsel and was read at the trial (R46). It contains interrogations propounded by the trial judge advocate and cross-interrogatories propounded by defense counsel. Miss Duddle was confined in a nursing home at the time her deposition was taken, under-going treatment for severe injuries sustained by her as a result of being struck by the motor truck then being driven by accused. She was physically incapacitated to the extent that her attendance at trial was impossible (R54,55). The deposition was signed and sworn to by Miss Duddle before the trial judge advocate. The stipulation recites that the deposition was "taken" by the trial judge advocate and defense counsel. The defense objected to the reading of the deposition solely on the ground that the witness's testimony was immaterial because it did not connect accused with the incident therein recited, nor with the injuries sustained by the witness. The trial judge advocate was authorized to administer the oath to Miss Duddle (AW 114). In view of the stipulation supporting the deposition there was no valid objection to the

trial judge advocate administering the oath to the witness as it is apparent that the defense consented thereto. The materiality of Miss Duddle's testimony was adequately established. There was no error in admitting the deposition in evidence.

(b) The motion of defense counsel to strike Specification 2, Charge II on the grounds that it was so indefinite that it did not apprise accused of the nature of the offense charged (MCM, 1928, par.71g, p.56) was properly denied. Such form of allegation adequately charges reckless driving of a motor vehicle upon a public highway (5 Am.Jur.,sec.802,p.932; 42 C.J., sec.1278, p.1325; 86 A.L.R., annotation, sec.IIIa,p.1273). The accused was fully informed as to how, when and where he operated the truck. The allegation identifying the persons injured was evidentiary and surplusage in nature, but the same was harmless (5 Am.Jur., sec.802, p. 932; 42 C.J., sec.1278, p.1325; 86 A.L.R., annotation, sec.III, p.1273).

(c) There was no error in permitting Lieutenant Rubenstein to refer to plans and operation sheets, official records made under his supervision, in order to refresh his memory as to the number of the vehicle driven by accused (R7). Likewise there was no error in permitting Dr. Noble to refer for purpose of refreshing his memory, to the form of report of suspected intoxicated persons prepared and signed by him (CM ETO 895, Davis et al and authorities therein cited). However, the form prepared by Dr. Noble (Pros.Ex.A) was improperly admitted in evidence. It was hearsay (CM ETO 438, Smith). The error was harmless inasmuch as Dr. Noble's testimony included all of the information shown on the report.

4. (a) Assault with intent to do bodily harm (Charge I). The evidence is clear and convincing that Police Sergeant Harrison was hit by the motor truck driven by accused, not as a result of accused's negligent operation thereof but consequential upon accused's wilful and deliberate act in steering the vehicle upon Harrison. The inference that he did so with intent to injure the police-officer is obvious (6 C.J.S.,sec.63, p.919). The evidence also clearly establishes the fact that he possessed the present ability to inflict bodily harm (6 C.J.S., sec.64, p. 920). The record sustains the finding that accused assaulted Harrison by use of the truck with intent to do him bodily harm (1 Wharton's Criminal Law - 12th Ed., - sec.802, p.1098; sec. 813, p.1107).

(b) Wrongful use of Government vehicle (Specification 1, Charge II). The evidence is uncontradicted that accused took and used the weapons carrier without proper authority. The record is legally sufficient to support the finding of guilty of this specification (CM ETO 393, Caton and Fikes; CM ETO 492, Lewis; CM ETO 656, Taylor; CM ETO 1953, Lewis).

(c) Reckless driving of motor vehicle on public highway (Specification 2, Charge II). The evidence is substantial and complete that accused drove the weapons carrier upon crowded public thoroughfares at and near Leicester, England, in a manner which indicated a reckless disregard for the safety of others. As a result thereof injuries were inflicted upon five persons rightfully upon the highways. The offense was a serious one

and was fully proved beyond a reasonable doubt (See authorities cited in 3(b), supra). Reckless driving of a motor vehicle upon a public highway is an offense under the 96th Article of War (CM 191695 (1930), Dig.Op.JAG, 1912-1940, sec.428(5), p.295; CM NATO 1151 (1944), Bull.JAG, Vol.III, No. 3,Mar 1944, sec.454(76), p.101).

(d) Driving motor vehicle on public highway while drunk (Specification 3, Charge II). The evidence shows, without contradiction that accused was in a beastly condition of intoxication while he was driving the weapons carrier on the public streets of Leicester, England, and vicinity. Such offense is separate and distinct from the reckless driving charge. The record is legally sufficient to support the finding of guilty (CM ETO 1107, Shuttleworth).

5. The punishment for assault with intent to do bodily harm is dishonorable discharge, total forfeitures and confinement at hard labor for one year. Although a motor vehicle may become a "dangerous weapon or thing" (Winkler v. State, 45 Okla.Crim Rep 322, 283 Pac.591; People v. Goldsby, 284 Mich.375, 279 N W 867; People v. Benson, 321 Ill. 605, 152 N.E 514, 46 ALR 1056), the specification of Charge I alleges an assault with intent to do bodily harm only (Form 99, p.250,MCM 1928). It does not include an allegation that accused committed an assault upon Harrison with intent to do him bodily harm by striking him with a "dangerous thing, to-wit a motor vehicle". Hence neither Section 276 of the Federal Criminal Code (18 USCA 455) nor Sections 22-502 (6:27) and 22-503 (6:28) District of Columbia Code are applicable in determining the place of confinement. The offense of "wrongful taking and using" Government property is analogous to larceny and the same punishment may be imposed upon one convicted thereof (CM 234468 (1943, Bull.JAG, Vol.II, No.6,Jun 1943, sec.454(105), p.239). The stipulated value of the weapons carrier was $1465.00. The maximum punishment therefore included confinement at hard labor for five years. The punishment for reckless driving on a public thoroughfare includes confinement for three months (CM NATO 1151 (1944), Bull.JAG, Vol.III, No.3, Mar 1944, sec.454(76), p.101). The punishment imposed is within authorized limits.

6. The charge sheet shows that accused is 34 years five months of age and that he was inducted on 4 August 1942 at Fort Myer, Virginia. He had no prior service.

7. 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.

8. None of the offenses of which accused was convicted were offenses for which penitentiary confinement is authorized by either the Federal

Criminal Code or the Code of the District of Columbia. Penitentiary confinement is therefore illegal (AW 42). The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (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

Elwood K. Sargent Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 26 MAY 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U.S. Army.

1. In the case of Private DAVID CHEEK (33194194), 1962nd Ordnance Depot Company (Aviation), Combat Support Wing, 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. None of the offenses of which accused was convicted were offenses for which penitentiary confinement is authorized by either the Federal Criminal Code or the Code of the District of Columbia. Penitentiary confinement would therefore 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 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 2157. For convenience of reference please place that number in brackets at the end of the order: (ETO 2157).

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 2158

27 MAY 1944

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private FRANK E. HUCKABAY (18042825), Headquarters, MAS., BAD No. 1, AAF 590.	Trial by G.C.M., convened at Albert Hall, Manchester, Lancashire, England, 4 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. The 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 61st Article of War.
Specification: 1 In that Pvt. Frank Earl Huckabay, Headquarters, MAS., BAD No. 1, did, without proper leave, absent himself from his quarters, at AAF 590, APO 635 from about 26 December, 1943 to about 29 December, 1943.
Specification: 2 In that * * *, did, without proper leave, absent himself from his quarters, at AAF 590, APO 635 from about 17 January, 1944 to about 24 February, 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that * * *, did, at 36 Grosvenor Road, Whalley Range, Manchester, Lancs., England, on or about 27 January, 1944 feloniously, take, steal and carry away a ladies engagement ring, value about $48.00, the property of Muriel May Hamilton.

Specification 2: In that * * *, did, at 31 Blackfriars, St., Manchester, Lancs., England, on or about, February 22, 1944 with intent to commit a felony, viz: Robbery - Commit an assault upon Isidor Apfelbaum, by willfully and feloniously striking the said Isidor Apfelbaum, on the head and hands with a piece of iron.

He pleaded guilty to Charge I and its specifications, not guilty to Charge II and the specifications thereunder, and was found guilty of both charges and their specifications. Evidence was introduced of two previous convictions by summary court for absence without leave 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 for five years at such place as the reviewing authority may direct. 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. It is doubtful if a value of over $20 was satisfactorily established by the evidence with reference to the ring alleged in Specification 1, Charge II. However, in view of the findings of guilty of assault with the intent to commit robbery, for which penitentiary confinement is authorized, the findings of guilty of two periods of absence without leave, and the sentence imposed, a consideration of the question of value of the article alleged becomes unimportant (CM ETO 1453, Fowler).

4. The charge sheet shows that accused is 22 years of age and that he enlisted for three years on 24 May 1941 at Houston, Texas.

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. Confinement in a penitentiary is authorized for the offense of assault with the intent to commit a felony (robbery) (18 U.S.C. 455). As accused is under 31 years of age and his 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

(187)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 MAY 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U.S. Army.

1. In the case of Private FRANK E. HUCKABAY (18042825), Headquarters, MAS., BAD No. 1, AAF 590, 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 2158. For convenience of reference please place that number in brackets at the end of the order: (ETO 2158).

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 2160

27 MAY 1944

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private WARREN H. HENRY (37262909), Squadron A, 12th Replacement Control Depot, AAF-591, VIII Air Force Service Command.	Trial by G.C.M., convened at AAF Station 591, APO 635, U.S. Army, 8 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for nine and one-half years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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 61st Article of War.
Specification: In that Pvt. Warren H. Henry, Sq A, 12th Repl Contl Depot, AAF-591, APO 635, VIII A.F.S.C., did, without proper leave, absent himself from his station at AAF Station 591 from about 0001 hours, 13 December, 1943 to about 1400 hours 2 March, 1944.

He pleaded guilty to and was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions by special court: two for absence without leave for 16 and 24 days respectively in violation of Article of War 61, and one for absence without leave for one day in violation of Article of War 61 and for embezzlement of $81.44, the property of another soldier. 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 nine and one-half years at such place as the reviewing authority may direct. The reviewing authority approved the

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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 pleas of guilty are fully supported by the evidence.

4. The charge sheet shows that accused was 22 years, ten months of age, and that he was inducted 11 September 1942 at Fort Crook, Nebraska, 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. 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 MAY 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U.S. Army.

1. In the case of Private WARREN H. HENRY (37262909), Squadron A, 12th Replacement Control Depot, AAF-591, VIII 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 2160. For convenience of reference please place that number in brackets at the end of the order: (ETO 2160).

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 2185

6 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 136, APO 559, U.S. Army, 16 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. 2912th Disciplinary Training Center, APO 508, U. S. Army.
Corporal JAMES R. NELSON (34588501), Detachment "A", 1249th Military Police Company (Avn).)	

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 94th Article of War.
Specification: In that Corporal James R. Nelson, Detachment "A", 1249th Military Police Company (Aviation), AAF Station 126, APO 634, U. S. Army, did, at AAF Station 126, APO 634, U. S. Army, on or about the 20th of February 1944, feloniously take, steal, and carry away approximately four thousand (4,000) francs French money, of the value of about $80.00 property of the United States, furnished and intended for the military service thereof.

CHARGE II: Violation of the 96th Article of War.
(Disapproved by reviewing authority)
Specification: (Disapproved by reviewing authority)

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He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be 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 two years. The reviewing authority disapproved the findings of guilty of Charge II and its Specification, approved the sentence, designated the 2912th Disciplinary Training Center, APO 508, U.S. Army as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The only question requiring consideration is whether proof of the corpus delicti was legally sufficient to warrant the admission in evidence of accused's written confession of guilt (Pros.Ex.3). Proof of the corpus delicti was substantially as follows:

On 20 February 1944 at AAF Station 126, a B-17 airplane landed on return from a mission about 5 p.m. on that date (R5; Pros.Ex.2). Accused guarded the airplane during the early morning hours of the following day (R6; Pros.Ex.3). Early one morning in February accused, with the consent of Private Jack C. Lyons, Detachment A, 1249th Military Police Company (Aviation), placed in the latter's locker a bundle wrapped in a towel, saying it was "some stuff taken from the plane". Accused removed the bundle from the locker between 4 and 8 p.m. the same evening. The following morning Lyons overheard accused telling a soldier named Long that he (accused) wanted to turn in "the money" (R7-11).

Private R.J.Long, 1202nd Military Police Company, testified that about 21 February he had a conversation with accused about some French money, but that the witness did not receive any French money from accused at that time (R29).

Captain Ray H. Moneymaker, Air Corps, 92nd Bombardment Group, AAF Station 109 (home base of the ship), Prisoner of War officer of that organization, testified that he had supervision of the issuing of escape kits and purses. Each purse contained 2000 francs. The records with regard to these items were maintained in his office. The witness identified a "check out list" which was admitted in evidence and which showed that ten escape kits and ten purses were issued on 20 February to "M.Ford" and that four purses and one escape kit were "stolen". Ford was a flight officer and co-pilot of the airplane. Six purses and nine kits were returned (R12-13,15,17; Pros.Ex.1). Captain Moneymaker asked Lieutenant Beach, commanding officer of the ship, about the missing property, which had to be disposed of etc. by a report of survey or a certificate of destruction, if it was to be "written off". As the result of their conversation, Lieutenant Beach was directed by Captain Moneymaker to write a letter to the Security Officer, 1st Bombardment Division, concerning the missing property. Beach did so, and at the trial Moneymaker testified that he was familiar with Beach's signature and identified the letter (R12-14,24-25). Captain Moneymaker further testified that the letter was part of the official records of his file with respect to the missing items (R24). It constituted a preliminary step to and formed the basis of any ultimate report of survey, and was the only document on record to

show that the purses were lost (R25-26). As the pilot was usually at the "briefing" when the kits and purses were issued, the property was generally issued to the co-pilot. If the property was later lost, a written statement would be obtained "from the man involved, usually the pilot or co-pilot" or, if they were absent, from "any man that is available". In the event the escape kits and purses were lost or misplaced, Captain Moneymaker's duties required that he initiate the subsequent report of survey. In this instance he was the "responsible" officer and Ford was the "accountable" officer (R25). The escape kits and purses were items issued by the Government for military purposes (R23).

It was stipulated that Lieutenant Beach and his entire crew were since reported missing in action (R14). The letter signed by Lieutenant Beach, which was admitted in evidence over the objection of the defense (R27; Pros.Ex.2), stated in substance that the airplane concerned landed at the place alleged 20 February 1944, and that arrangements were immediately made to have the ship guarded. About 2 p.m. 21 February, certain property was found missing from the airplane including inter alia "1 escape kit; 1 money pouch, complete; the money and maps of 1 pouch; the money of 2 pouches". Beach made a report to the provost marshal of the station and "took off" on the morning of 22 February (Pros.Ex.2).

Pursuant to an investigation made by First Lieutenant Fabian L. Checkie, 1202nd Military Police Company (Aviation), Long turned over to Checkie 7,950 francs. Long refused to say how he obtained the money, "said it was another man" and refused to name him (R35-36).

> "An official statement in writing (whether in a regular series of records, or a report, or a certificate) is admissible when the officer or other person making it had the duty to know the matter so stated and to record it; that is, where an official duty exists to know and to make one or more records of certain facts and events, each such record * * * is competent (i.e., prima facie) evidence of such facts and events, without calling to the stand the officer or other person who made it" (MCM, 1928, par.117a, p.121) (Underscoring supplied).

> "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, transcation, 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." (Act June 20, 1936, c.640, sec.1, 49 Stat.1561; 28 USCA 695).

It is apparent from the evidence that the report made by Lieutenant Beach was an official statement or report made by an officer whose official duty it was to know the matter stated therein and to record it. He was commanding officer of the airplane in which the property was placed. The letter was an official document which formed a part of the official records with respect to the missing property. In fact it was the only document to show that the property was missing, and would constitute the basis for a report of survey should such a proceeding be initiated. Further, such a letter was always obtained when a loss of this character occurred. The letter and the signature of Lieutenant Beach thereon were properly identified by Captain Moneymaker. The fact that Beach signed the letter instead of Ford, the officer to whom the property was originally issued, does not affect the admissibility of the document, which could be signed by the pilot, co-pilot, or, in their absence, by "any man that is available". In view of the evidence and the foregoing authority, the Board of Review is of the opinion that Pros.Ex.2 was properly admitted in evidence. In view of the testimony of Captain Moneymaker and the foregoing Federal statute, Pros.Ex.1 was also properly admitted in evidence. The Board is of the further opinion that the contents of the letter, together with evidence that four of the ten pouches were not returned, that accused was guarding the airplane in which the pouches were stored and later possessed a bundle which he said was taken from the ship, and that he told Long he wanted to turn in "the money", was legally sufficient proof of the corpus delicti to warrant the admission in evidence of accused's written confession of guilt.

4. The charge sheet shows that accused was 20 years of age and that he was inducted 7 January 1943 at Fort McClellan, Alabama, 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 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 Disciplinary Barracks is authorized (AW 42).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 6 JUN 1944 TO: Commanding General, Headquarters 3d Bombardment Division, APO 559, U.S. Army.

1. In the case of Corporal JAMES R. NELSON (34588501), Detachment "A", 1249th Military Police Company (Avn), 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. Unless that portion of the sentence adjudging dishonorable discharge is suspended, the place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. However, I recommend that the dishonorable discharge be suspended and that the 2912th Disciplinary Training Center, A.P.O.508, U.S. Army, be designated as the place of confinement. This can 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 2185. For convenience of reference please place that number in brackets at the end of the order: (ETO 2185).

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 2188

31 MAY 1944

U N I T E D S T A T E S)	EIGHTH AIR FORCE.
)	
v.)	Trial by G.C.M., convened at AAF
)	Station 121 (Royston, England)
Private First Class OCIE D.)	17, 25 March 1944. Sentence:
PRINCE (34169339), 441st)	Dishonorable discharge, total for-
Sub Depot (Class 1), 1st)	feitures and confinement at hard
Bombardment Division AAF,)	labor for ten years. United States
then 364th Service Squadron,)	Penitentiary, Lewisburg, Pennsyl-
39th Service Group AAF.)	vania.

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 93rd Article of War.
Specification 1: (As amended to conform to proof)
In that Private First Class Ocie D. Prince, 441st Sub Depot (Class 1), AAF Station 121, APO 634, then of 364th Service Squadron, 39th Service Group did at Royston, Hertfordshire, England on or about 23 July 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per annum with Raymond Robert Colliver.
Specification 2: (As amended to conform to proof)
In that * * *, did at Royston, Hertfordshire, England on or about 26 July 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per annum with Raymond Robert Colliver.

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Specification 3: In that * * * did at Royston, Hertfordshire, England on or about 2 August 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anmum with Raymond Robert Colliver.

CHARGE II: Violation of the 96th Article of War.
Specification 1: In that * * * did at Royston, Hertfordshire, England, on or about 9 August 1943, wrongfully handle and manipulate the privates of Derek Malcolm Reed with his hands.
Specification 2: In that * * * did at Royston, Hertfordshire, England, on or about 9 August 1943, wrongfully handle and manipulate the privates of Graham Elvin with his hands.

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 dishonorably discharged from the service of the United States, 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 United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The offenses in Specifications 1 and 2 of Charge I were alleged to have been committed on 27 June and 1 July 1943. The proof showed the incidents occurred on the 23 July and 26 July 1943 and over the objections of the defense, the specifications were amended to correspond with the evidence. This procedure was legally permissible (MCM, 1928, par.73, p.57). The defense stated that a continuance was not desired (R60).

"Within the limitations, first, that the offense must be proved to have been committed prior to the finding of the indictment, and second, that the offense must be proved to have been committed within the time specified by the Statute of Limitations, and except where a special day is essential or where time is the essence of the offense, the time of the commission of the offense as averred in the indictment is not material, and the proof is not confined to the time charged" (Wharton's Criminal Evidence Vol.2, sec. 1039, pp.1824-1826; MCM, 1921, sec.74g, pp.52-53; MCM, 1928, sec. 73, p.57).

4. The charge sheet shows that accused is 32 years of age and was inducted 7 May 1942 at Fort McClellan, Alabama, to serve for the duration of the war and six months. He had no prior service and lost no time under the 107th Article of War.

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. Confinement in a penitentiary is authorized (AW 42; District of Columbia Code, title 22-107; Cir. 291, WD, 10 Nov 1943, sec.V, par.3b).

B. Franklin Pettey Judge Advocate

Judge Advocate

Ellwood W. Sargent Judge Advocate

CONFIDENTIAL

(202)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 31 MAY 1944 TO: Commanding General, Headquarters, Eighth Air Force, APO 634, U.S. Army.

1. In the case of Private First Class OCIE D. PRINCE (34169339), 441st Sub Depot (Class 1), 1st Bombardment Division AAF, then 364th Service Squadron, 39th Service Group AAF, 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 2188. For convenience of reference please place that number in brackets at the end of the order: (ETO 2188).

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 2194

U N I T E D S T A T E S v. General Prisoner WILLIAM E. HENDERSON (35130919), 2912th Disciplinary Training Center.	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Taunton, Somersetshire, England, 29 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. The 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 69th Article of War.
Specification: In that General Prisoner William E. Henderson, 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, having been duly placed in confinement on or about 3 February 1944, did, at or near Marston Magna, Somerset, England, on or about 22 February 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 or near Marston Magna, Somerset, England, on 22 February 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at or near Bruton, Somerset, England on 23 February 1944.

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CHARGE III: Violation of the 93rd Article of War.
Specification: In that * * *, did, at or near Bruton, Somerset, England, on or about 23 February 1944, feloniously take, steal, and carry away one coat, mackintosh type, value about $2.00 the property of Arthur White.

He pleaded not guilty to Charge II and its Specification but guilty to Charges I and III and their respective specifications. He was found, of the specification, Charge II, guilty except the words, "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty; of Charge II, not guilty, but guilty of violation of the 61st Article of War, and guilty of Charges I and III and their respective 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 three 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 evidence shows that on 22 February 1944, the accused was in the military service of the United States and that he was a prisoner at a camp near Marston Magna, wearing "blue fatigues with a white 'P' on the back and front." (R9-10). There was no direct evidence of his status as a general prisoner, as alleged in the charges and specifications, although both the trial judge advocate and the defense counsel referred to him as "General Prisoner Henderson" while interrogating the prison sergeant who testified for the prosecution (R10). However, by reference to CM ETO 1330, Henderson it appears that at the time accused committed the offenses alleged in the charges and specifications of the instant case he was under sentence of dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The dishonorable discharge was suspended during period of confinement. The sentence was promulgated in GCMO No.2, Headquarters Central Base Section, 20 January 1944. The Board of Review may take judicial notice of the foregoing data upon appellate review in the present case (CM ETO 1981, Fraley, and authorities therein cited). The records in the Branch Office of The Judge Advocate General with the European Theater of Operations furnish no indication that the suspension of the dishonorable discharge adjudged in CM ETO 1330 has ever been vacated.

> "A condition having been shown to have existed at one time, the general presumption arises, in the absence of any indication to the contrary, that such condition continues" (MCM, 1928, par.112a, p.110).

"A soldier was sentenced to 15 years confinement and dishonorable discharge by general court-martial. The reviewing authority approved the sentence but suspended the dishonorable discharge until the prisoner be released from confinement. The prisoner escaped on the day of the trial. He was a 'general prisoner' and has the status of a soldier and may be tried for desertion. 253.6, Feb 13, 1919" (Dig.Op.JAG, 1912-1940, sec.359(15), p.167).

The evidence amply supports the court's finding that the accused was guilty of absence without leave (Charge II) (CM ETO 1981, Fraley).

4. Accused at the time of his escape was under the physical restraint of a guard detail. This offense was clearly one denounced by the 69th Article of War. The record is legally sufficient to sustain the findings of guilty of Charge I and its Specification (CM ETO 2098, Taylor).

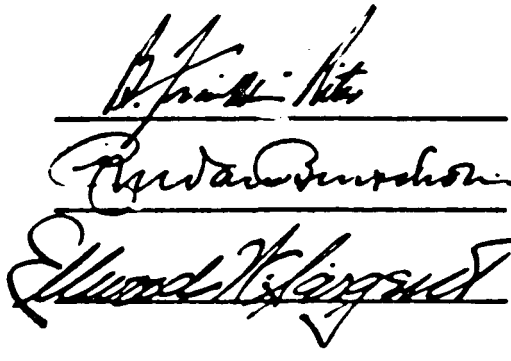
5. The testimony adduced by the prosecution to prove the larceny of the coat (Charge III), of itself, is of questionable substance to establish ownership or value. However, there is no requirement of law that evidence must be taken upon a plea of guilty. The purpose of such evidence is to assist the court in fixing the punishment, and the reviewing authority in his consideration of the case. The finding of guilty may be based solely on the plea of guilty, which is no less than a judicial confession that the accused committed the offense charged (CM ETO 1588, Moseff; CM ETO 1266, Shipman; CM ETO 839, Nelson). The Board of Review is therefore of the opinion that the record of trial legally sustains the court's findings of guilty of Charge III and its Specification.

6. The charge sheet shows that the accused is 21 years of age and in a "non pay status", but no further data as to service. However, the charge sheet in CM ETO 1330, supra, shows that he was inducted 21 October 1941 at Fort Thomas, Kentucky, for "service governed by Service Extension Act".

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. None of the offenses of which accused was convicted were offenses for which penitentiary confinement is authorized by either the Federal Criminal Code or the Code of the District of Columbia. Penitentiary confinement is therefore illegal (AW 42). The place of confinement should

be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (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, Southern Base Section, APO 519, U.S. Army.

1. In the case of Private WILLIAM E. HENDERSON (35130919), 2912th Disciplinary Training Center, 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. None of the offenses of which accused was convicted were offenses for which penitentiary confinement is authorized by either the Federal Criminal Code or the Code of the District of Columbia. Penitentiary confinement would therefore 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 2194. For convenience of reference please place that number in brackets at the end of the order: (ETO 2194).

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 2195

24 JUN 1944

U N I T E D S T A T E S v. Private CHARLIE R. SHORTER (14061233), 463d Engineer Base Depot Company.	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at U.S. General Depot G-25, Ashchurch, Gloucestershire, England 14 April 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 Charge and specifications:

CHARGE: Violation of the 96th Article of War.
Specification 1: In that Private Charlie R. Shorter, 463rd Engineer Base Depot Company, did, at Stratford-on-Avon, Warwickshire, England, on or about 17 March 1944, wrongfully and unlawfully take indecent liberties with Jean Thelma Coldicott, a female child, under six years of age, by placing his hand inside her clothing and against the legs and private parts of said Jean Thelma Coldicott.
Specification 2: In that * * *, did, at Stratford-on-Avon, Warwickshire, England, on or about 17 March 1944, wrongfully and unlawfully take indecent liberties with Celia Mary Jeffrey, a female child, under seven years of age, by placing his hand inside her clothing and against the legs and private parts of said Celia Mary Jeffrey.

He pleaded not guilty to and was found guilty of the Charge and specifications. Evidence of three previous convictions was introduced: one by summary court for absence without leave for one day and two by special courts-martial for absences without leave for one day and two days respectively, all 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 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. Evidence for the prosecution was as follows:

(a) Specification 1 of the Charge: Mrs. Frances Coldicott, 19 Scholars Lane, Stratford-on-Avon testified that about 4:30 p.m. on 17 March 1944 she permitted her daughter, Jean Thelma Coldicott, who became six years of age on 7 April 1944, to go to the children's playground adjoining the recreation area along the Avon River in Stratford-on-Avon. She went to the playground about 5:45 p.m. to bring her daughter home. Upon entering she could not see her daughter, but did see another little girl playing "over towards the shelter." She asked the latter, "'Where is Jean?'" and was told she was "in the shelter." Mrs. Coldicott went to the shelter and looked in. She saw accused standing at the end of the shelter with his back towards her and in front of Jean, who stood facing accused upon a form about two feet above the level of the ground (R11). She could see only the top of her daughter's head (R7,8,9). She could not say that accused was touching any part of Jean's person or clothing (R11), and could not see what he was doing, but his hands were in front of him. Witness was about 20 feet from accused when she saw him (R8). Not knowing what to think, witness "ran, and the man must have heard me; because he immediately stepped on one side, with his back still towards me, and I noticed my little girl's dress drop down." She saw that the front of accused's trousers was open, but could not see his person (R8).

Jean's clothing could not have fallen down from climbing upon the form. The clothing (dress) was fastened at the shoulders by means of shoulder straps. Her knickers were fastened by elastic at the top (R11). The clothing looked as if it had been disturbed, but was not torn or dirty (R10). Witness then asked, "'What are you doing Jean?'", to which she replied "'Nothing, Mummy' and jumped off the seat and then began to cry." Witness asked accused what he was doing to her little girl, to which he replied "'I haven't done anything to her. I just gave her some gum and was asking her where the other little girl was.'" (R8,10). Witness said "'You are a filthy liar, you are a filthy beast, you should be down there,'" and asked him what his name was (R8). He replied "'I have no name'" (R10). She told him he was a "beastly liar" and that she would report the matter to the police (R8). Accused thereupon turned around and gradually walked away, "and as he got near the

back /of the playground/ he began to hurry" (R10). He left by way of the steps leading to the tram track (R8).

Accused's condition was "probably like he had been drunk and then slept it off. His eyes looked blurred." (R10). The day was bright and she was able to see accused very clearly and was absolutely positive in her identification of him. She saw no other soldiers or other people in the recreational grounds or playground at the time of the occurrence, except the other girl (R8-9).

Jean did not subsequently state that accused had harmed her (R10). When witness asked Jean what accused was doing, she replied "'he put his hand down there.'" When asked if he did anything else Jean replied "'Yes, he put his thing there.'" "She would call it that because she had seen her little brother."

Witness and her daughter left the playground and proceeded to the police station at Stratford where they reported the affair to the police. At the police station Mrs. Coldicott examined her daughter and from the examination she did not think accused had injured the child. Her knickers had been partly pulled down. Thereafter at the American Red Cross Club about 9:50 p.m. on 17 March 1944, Mrs. Coldicott positively identified accused to the receptionist, who obtained his "passport" and notified the American military police. She was also able to identify him twice at an identification parade the day before the trial (R9).

Jean Thelma Coldicott, without voir dire as to her qualification as a witness and without objection by the defense, was sworn and testified that she was six years old and that her birthday was Good Friday (7 April 1944). She remembered when she and "Celia" were playing at the playground and saw a soldier in the shelter there. He came from the rear of the playground along the tramway. "Celia" entered the shelter to ask the soldier for chewing gum, which he gave to her. Thereupon witness entered the shelter at the playground where a soldier gave her some chewing gum (R12). Then he raised Jean's dress and put his hand "down in my knickers" "down here", between her legs. Her mother called out and the soldier stepped back a bit and took his hand out of her knickers. Witness "just stood on the seat" "and the soldier 'didn't do anything'" when he saw her mother. The latter asked him what his name was, to which he replied "'I have no name.'" He then did "nothing" (R13-14).

Detective Sergeant George F. Bailey, Warwickshire Constabulary, Stratford-on-Avon testified that he knew accused and that on 17 March 1944 he received a complaint from Mrs. Coldicott concerning an indecent assault on her daughter by an American soldier. Witness saw accused at 11:00 a.m. the following morning 18 March (R16) at the "CID" office, Stratford police station. He was in a "more sober frame of mind", appearing "as if he had been drunk, and had just gotten over it" (R17). With him witness examined

the scene of the offense at about 11:30 a.m. He questioned accused in the "CID" office, warning him of his rights, to the effect that he could make a sworn verbal or written statement which could be used against him or he could remain silent (R16). Accused at that time stated:

> "'If they say I was there, I must have been there, but I do not remember. I remember sitting on a bench or something around a tree, but I do not remember talking to any little girls. I must have been very drunk.'" (R16).

There were circular seats of this kind beside the river about 300 yards from the children's playground. Witness searched Jean Coldicott and found a green paper wrapper for Beechnut chewing gum in her pocket. A search of accused revealed similar green wrappers. The wrapper taken from Jean's dress was introduced in evidence without objection by the defense and subsequently withdrawn (R17;Ex.E). Witness examined Jean's clothes, but there were no seminal stains upon them and they were not torn or dirty. Jean was in a very frightened state of mind (R17-18).

First Lieutenant Harvey G. Boughton testified that he was commanding officer of accused's company and on or about 17 March issued a pass to accused for Stratford-on-Avon effective from 0700 hours 17 March to 0700 hours 19 March (R18).

(b) Specification 2 of the Charge: Mrs. Frances Coldicott testified that when she returned to the playground she saw a "little girl" playing "over towards the shelter," who directed her to her daughter Jean in the shelter (R7,8,9).

Jean Thelma Coldicott, as part of her examination, when asked whether the soldier did anything to Celia, testified "Yes", but she testified further that she did not see him touch Celia (R12-13).

Celia Mary Jeffrey, as part of her examination, testified that she was six years of age, and that she went into the shelter (R14) to get chewing gum, which a soldier gave to her. He lifted up her dress and put his hand not under her knickers but in the middle between her legs, whereupon she "went away from him." Thereafter she ate her chewing gum while swinging. She saw Jean's mother coming and heard her call. Jean's mother said nothing when she first came and only "got ahold of Jean's hand." She did not call to witness, who was on the other side of the playground (R15).

Detective Sergeant George F. Bailey testified that upon examining the playground area he found an American yellow paper wrapper which had contained chewing gum, about one foot from the entrance of the shelter. A search of accused's pockets revealed packets of chewing gum with

wrappers from Beechnut chewing gum similar to that which he found outside the shelter. The latter wrapper was introduced in evidence, without objection by the defense, and subsequently withdrawn (R17; Ex.D). Witness examined Celia's clothes, but there were no seminal stains upon them and they were not torn or dirty. He saw "her /Celia/ the Sunday morning /Easter Day, 9 April/, and she was very loath to tell me anything about the whole matter" (R17-18).

4. Evidence for the defense was as follows:

Jean Thelma Coldicott, recalled, testified that the soldier was with her at the playground "not very long" - only a minute. She was unable to identify him out of a group of about six soldiers at the police station the day before the trial, but her mother identified him (R19).

Celia Mary Jeffrey, recalled, testified she was with the soldier at the playground for "about a minute," that he had stripes on his sleeve which, however, were unlike those worn by her father and that she saw many soldiers "all over" with stripes on their arms, including many American soldiers (R20-21).

After his rights were explained to him, accused testified on his own behalf that he arrived at Stratford in the morning of 17 March (R21), and went to a "pub". He did not remember anything except seeing two girls in blue uniform. He denied being "around any bench," but testified "we weren't far from the river." "We just drank and drank. That is all I remember." The next morning a civilian policeman awakened him in the jail house (R22,23).

5. Recalled as a witness for the court, Mrs. Frances Coldicott testified that the uniform of accused was that of an American private, and that she did not notice any marking or insignia on the sleeve of his coat. She was positive he had no stripes. She reiterated her identification of accused at the American Red Cross Club and testified she was positive accused was the man she saw at the playground (R24-25).

6. The specifications allege the commission of offenses, namely, wrongfully and unlawfully taking indecent liberties with two female minor children, which were clearly such as to bring discredit upon the military service and constituted violations of Article of War 96 (CM ETO 571, Leach). At common law it was generally held that a man who took improper liberties with the person of a female without her consent was guilty of an assault. When the assault was committed upon a child, it was immaterial whether there was submission or resistance thereto (Beausoliel v. United States (CA, DC, 1939) 107 Fed. (2d) 292,296; CM ETO 571, Leach and authorities there cited).

7. (a) The first question for determination in this case is the admissibility of the testimony of the two children with whom accused is

alleged to have taken indecent liberties. Jean Thelma Coldicott and Celia Mary Jeffrey, both aged six years, were sworn and testified without preliminary questioning by the court touching their competency as witnesses. Article of War 19 provides in part:

> "All persons who give evidence before a court-martial shall be examined on oath or affirmation"

The reason for this requirement is based upon the fundamental rule of competency that the witness must appreciate the difference between truth and falsehood, as well as his duty to tell the former (Wheeler v. United States, 159 U.S.523,524, 40 L.Ed.244,247). Although no precise age determines the question of competency to testify (ibid.),

> "Under the common law, competency of a child under the age of 14 years to testify must be shown to the satisfaction of the court. He is presumptively incompetent, but if he is shown to be competent it is immaterial how young he may be when he testifies. He is competent if he possesses mental capacity and memory sufficient to enable him to give a reasonable and intelligible account of the transaction he has seen, if he understands and has a just appreciation of the difference between right and wrong, and comprehends the character, meaning and obligation of an oath. * * *. In the wise discretion of the court, a child five, six, and for such ages as seven, eight, nine, ten, eleven, twelve, thirteen or fifteen years of age may be shown competent to testify. It may not be said that there is any particular age at which as a matter of law all children are competent or incompetent. * * *. It is the duty of the court to examine the child witness in order to ascertain if he or she is competent. This is usually done by putting leading questions to the child * * *. A child should be permitted to explain his understanding of the meaning and character of an oath in simple words * * *. Intelligence and not age is the test of a child witness. * * *. It is not only necessary to show that the child understands the nature and application of an oath, but it must also appear that the child is sufficiently intelligent to testify with an understanding mind of what he or she has seen or heard. Children who do not understand the nature or meaning of an oath are incompetent. If the child does not, in the opinion of the court, appear to understand the nature and obligation of an oath,

> the court may in its discretion, if the child seems to have the age and mental capacity to receive and profit by the instruction, allow him to be instructed by a proper person as to the signification and obligation of a judicial oath * * *. The determination of a child's competency as a witness is peculiarly within the trial court's discretion, being error only in case of gross abuse" (Underhill's Criminal Evidence (4th Ed.), sec.377, pp.722-727) (Underscoring supplied).

In the leading case of Wheeler v. United States, supra, a murder conviction was upheld wherein the child of the deceased, a boy five and one half years of age, was permitted to testify. The boy was examined upon his voir dire and determined to be competent. The court stated:

> "That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities. In Rex v. Brasier, 1 Leach, C.C. 199, it is stated that the question was submitted to the twelve judges, and that they were unanimously of the opinion 'that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their

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> admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court.'" (159 U.S. at 524-525, 40 L.Ed. at 247) (Underscoring supplied).

In Beausoliel v. United States, supra, the voir dire examination of a six-year-old witness was not included in the record on appeal, but there was evidence of the child's testimonial qualifications in her statements on cross-examination, that she believed liars would be punished in some manner. (See also authorities cited in Beausoliel v. United States, 107 Fed. (2d) 292,293-294; Oliver v. United States, 267 Fed.544; Military Justice Circular #1, BOTJAG with ETO, 1 Jan 1944, par.2).

In all the foregoing authorities the requirement of some form of examination addressed to the competency of the infant witness was either expressed or implied.

In the instant case, the testimony elicited from the children fails to reveal the slightest evidence of their appreciation of the difference between truth and falsehood or of their duty to tell the truth. Nor does the testimony of Celia Mary Jeffrey reveal that she possessed mental capacity or memory sufficient to enable her to give an intelligent account of the events as to which she testified.

(b) As to Specification 1 of the Charge, although it is unnecessary to decide specifically whether or not Jean Thelma Coldicott was competent to testify, it will be assumed for the purpose of this holding that she was incompetent and that her testimony was improperly admitted in evidence. The question for determination then, as in CM ETO 1693, Allen, is whether the improper admission of this testimony "injuriously affected the substantial rights" of accused within the purview of Article of War 37. The elements of the indecent assault upon the child and accused's identity as her assailant are clearly established by the positive and uncontradicted testimony of Jean's mother, Mrs. Coldicott, that at the time and place alleged she discovered accused in the shelter, his hands in front of him, face to face with her daughter, who was standing on a form or seat; that upon hearing Mrs. Coldicott approach he immediately stepped aside, whereupon Jean's dress dropped down; that his fly was unbuttoned; that he denied having any name; that he fled after Mrs. Coldicott threatened to report the matter to the police; and that Jean told her of the assault substantially contemporaneously therewith. In the opinion of the Board of Review such testimony substantially compels the conviction of accused of the offense alleged and meets the test laid down in CM ETO 1201, Pheil and CM ETO 1693, Allen. Even assuming that Jean did not resist accused's indecent conduct, the offense is clearly established if she did not comprehend the nature of the act (CM ETO 571, Leach; Beausoliel v. United States, 107 Fed. (2d) 292,296).

"'Mere submission to an indecent act, without any positive exercise of a dissenting will, where, owing to circumstances, the person submitting is in ignorance of the nature of the act, is not such a consent as the law contemplates, so as to prevent the act from being an assault, and the age and the mentality of the subject of an indecent assault should always be considered in determining the presence or absence of consent.' (5 CJ, sec.228, p.743) (Underscoring supplied).

"The question as to whether the victim consented to the act committed was a fact for determination by the court. The appearance of the victim, her age, her capacity to understand what had occurred and her truthfulness were matters for observation by the court. The court evidently found as a fact that she did not comprehend the nature of the act and the evidence was legally sufficient to justify its conclusion" (CM ETO 571, Leach).

Jean's tender age alone was sufficient to justify the court's finding in the instant case. It should be noted that the fact that the court was justified in inferring from Jean's testimony and its observation of her that she did not comprehend the nature of accused's act does not legally excuse the court for its failure to examine Jean specifically upon a voir dire to determine her competency to testify. The Board of Review is of the opinion that the record is legally sufficient to support the findings of guilty of Specification 1, notwithstanding the erroneous admission of the testimony of the alleged victim of the assault and that of her playmate which was clearly inadmissible as shown hereinafter, in view of the compelling nature of the other evidence in the record.

(c) As to Specification 2 of the Charge, Celia Mary Jeffrey, testifying for the prosecution without preliminary interrogation, failed to identify accused as the soldier involved. She stated that a soldier gave her chewing gum in the shelter, lifted up her dress and put his hand between her legs. Her statement that she merely "went away from him" after the alleged assault, apparently without complaining to anyone concerning his conduct, and proceeded to eat her chewing gum while swinging; that Jean's mother did not call to her because she was on the other side of the playground, contrary to Mrs. Coldicott's clear testimony; and (as a defense witness) that the soldier had stripes on his sleeve, lead to the conclusion, in the absence of compelling independent evidence, that

accused's substantial rights were highly prejudiced by the failure of the court to comply with its duty of interrogating Celia as to her capacity, intelligence, memory, and appreciation of the difference between truth and falsehood and of her duty to tell the truth. In view of her tender age and apparent unreliability as a witness, the failure of the court affirmatively to establish her competency to testify constituted an abuse of discretion which the Board of Review may not condone, and which requires the Board to hold the witness' testimony inadmissible. Aside from her own testimony, the only evidence bearing upon the alleged assault upon her by accused consists in Mrs. Coldicott's testimony that she saw "a little girl" at the playground (whom she did not identify as Celia) and that accused stated to Mrs. Coldicott that he had inquired of Jean as to the whereabouts of "the other little girl," and Jean's conclusion that the soldier did something to Celia, although she did not see him touch her. Any inference to be deduced from the presence of a chewing gum wrapper near the shelter entrance is too nebulous for serious consideration.

It is clear that evidence of accused's physical presence and opportunity to commit the alleged crime is not in itself substantial evidence of his actual commission thereof (CM ETO 804, Ogletree et al; CM ETO 895, Davis et al). It certainly is not compelling evidence, nor is there any other compelling evidence that accused took indecent liberties with Celia. The Board of Review is of the opinion that the test laid down in CM ETO 1201, Pheil and CM ETO 1693, Allen is not met with respect to Specification 2.

There is also for application here, by analogy, the general rule that a conviction for rape or assault with intent to commit rape may not be sustained where it is based upon uncorroborated testimony of the complaining witness which is inherently incredible and unreliable. Her testimony must be clear and convincing. Again, if the complainant is too young to comprehend the nature and responsibility of an oath, her testimony is inadmissible (2 Wharton's Criminal Evidence, 11th Ed. sec.916, pp.1587-1594; Underhill's Criminal Evidence, 4th Ed. sec.672, pp.1265-1268; and see Weston v. State (Okla.) 138 Pac. (2d) 553). As indicated, Celia's testimony is, at least in certain respects, incredible and unreliable.

(d) The failure of defense counsel to object to the testimony of the children on the ground of lack of evidence of their competency did not operate as a waiver or render them competent witnesses or their testimony admissible (CM ETO 1042, Collette and authorities there cited). The same may be said of the fact that the defense cross-examined both of the children and called them as its own witnesses. The Board of Review is therefore of the opinion that the record is legally insufficient to support the finding of guilty of Specification 2 of the Charge.

8. Mrs. Coldicott testified that she asked Jean "what this man was doing" to which she replied that "he put his thing there." It is

reasonable to assume that this conversation took place within a relatively short space of time after the assault, as in Beausoliel v. United States, 107 Fed. (2d) 292,294-295. Although statements of this character which are not substantially contemporaneous with the offense to which they relate are inadmissible except in cases of rape (CM ETO 571, Leach and authorities there cited), the following language in the Beausoliel case, supra, leads to the conclusion that the statements testified to by Mrs. Coldicott were properly admitted:

> "Error is assigned, also, to the admission of the testimony of the child's mother. She testified, in substance, that she was not present when her daughter arrived at the department store but that she met her a few minutes later; that after walking with her a short distance she noticed a peculiar expression on her face and that, upon questioning, the child told her what had happened in the taxicab. Over objection of appellant, the court permitted the witness to testify to this conversation. Declarations, exclamations and remarks made by the victim of a crime after the time of its occurrence are sometimes admissible upon the theory that 'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy * * *.' What constitutes a spontaneous utterance such as will bring it within this exception to the hearsay rule must depend, necessarily, upon the facts peculiar to each case, and be determined by the exercise of sound judicial discretion, which should not be disturbed on appeal unless clearly erroneous. That the statements in the present case were made in response to inquiry is not decisive of the question of spontaneity, as appellant contends, although

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> that fact is entitled to consideration. Likewise, while the time element is important, it is not in itself controlling. 'Indeed, as has been well asserted, no inflexible rule as to the length of interval between the act charged against the accused and the declaration of the complaining party, can be laid down as established.' It has been held, moreover, that where, as in the present case, the victim is of such an age as to render it improbable that her utterance was deliberate and its effect premeditated, the utterance need not be so nearly contemporaneous with the principal transaction 'as in the case of an older person, whose reflective powers are not presumed to be so easily affected or kept in abeyance.' The declarations of the child- a party to the actual occurrence- were made under such circumstances and so recently after the occurrence of the transaction as to preclude the idea of reflection or deliberation. Therefore, the ruling of the lower court was correct." (107 Fed. (2d) at 294-295).

In any event, assuming the statements were improperly admitted, the other evidence is of a substantial enough character to warrant conviction of Specification 1 of the Charge, as hereinbefore indicated.

9. (a) As stated above, taking of improper liberties with the person of a female child is an assault at common law (Beausoliel v. United States, supra). As there is no Federal statute of general application within the continental United States and no law of the District of Columbia denouncing the offense, penitentiary confinement is not authorized for its commission (AW 42; CM ETO 571, Leach; CM 146247 (1921), Dig.Op.JAG, 1912-1940, sec.402(14), pp.252-253; CM 212272 (1939), Dig. Op.JAG, 1912-1940, sec.399(2), pp.246-247; CM 23469 (sic) (1942), Bull. JAG, Vol.1, No.4, Sep 1942, sec.399(2), p.213). As the designation of a Federal reformatory is authorized only when penitentiary confinement is authorized by law (CM 220093; CM 222093; CM 23469 (sic) (1942), supra; AR 600-375, 17 May 1943, sec.II, par.5d), the designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement is unauthorized and should be changed to a place other than a penitentiary, Federal correctional institution or reformatory.

(b) The offense herein described is not listed in the Table of maximum punishments (MCM, 1928, par.104c, p.100). The District of Columbia Code, after prescribing punishments for assaults with intent to kill, to commit rape, to commit robbery and for other types of assaults, further provides:

"Sec. 22-503 (6:28). * * *. Whoever assaults another with intent to commit any other offense which may be punished by imprisonment in the penitentiary shall be imprisoned not more than five years. (Mar. 3, 1901, 31 Stat. 1322, ch.854, sec.805)."

The assault alleged in the instant case is of a less serious character than the type denounced in the above quoted section because penitentiary confinement is not authorized punishment for its commission, as above indicated, but is authorized punishment for the assaults to which reference is made in the statute. The period of confinement may equal, but may not exceed, the maximum period of confinement authorized for commission of the latter assaults (CM ETO 571, Leach). The period of confinement of five years provided in the sentence herein is therefore legal.

10. The charge sheet shows that accused is 24 years of age and enlisted in the Regular Army 12 November 1941 to serve for three years. No prior service is shown.

11. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused, other than as hereinabove specifically indicated, 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 Specification 1 of the Charge and the Charge, legally insufficient to support the findings of guilty of Specification 2 of the Charge and legally sufficient to support so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years in a place other than a penitentiary, Federal correctional institution or reformatory.

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 24 JUN 1944 TO: Commanding General, Southern Base Section, Communications Zone, ETOUSA, APO 519, U. S. Army.

1. In the case of Private CHARLIE R. SHORTER (14061233), 463d Engineer Base Depot 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 of Specification 1 of the Charge and the Charge, legally insufficient to support the findings of guilty of Specification 2 of the Charge and legally sufficient to support so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years in a place other than a penitentiary, Federal 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 penitentiary confinement is not authorized punishment for the offense of which accused has been convicted, the designation of a Federal reformatory as the place of confinement is unauthorized and should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (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). 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 2195. For convenience of reference please place that number in brackets at the end of the order: (ETO 2195).

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 2203 - 9 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 JOHNNIE BOLDS (34780629), Company "C", 560th Quartermaster Service Battalion.	Trial by G.C.M., convened at Norton Fitzwarren, Somersetshire, England 4 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The Federal 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 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 Private Johnnie Bolds, Company C, 560th Quartermaster Service Battalion, did, at or near Taunton, Somerset, England, on or about 11 February 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Joyce Victoria Rendall.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, reduced the period of confinement to ten 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.

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3. On the night of 11 February 1944 at about half-past nine o'clock, Private Joyce V. Rendall, Auxiliary Territorial Service, British Army, was accosted by accused as she was leaving the town of Taunton to walk to her base several miles away (R9,58). Despite her remonstrances, he walked beside her until they arrived at a point on the Shoreditch Road in the open country (R9,10). He suddenly seized her throat with one hand, stifled her screams with the other, and dragged her into a nearby copse (R10,17). He threw her to the ground, and threatened to cut her throat with something that "glittered" which he took from his pocket(R10,11,18). Then, while she was still struggling, attempting to scream and resisting accused's approaches he managed to tear a hole in her knickers through which he forced his penis into her vagina. At the sound of approaching footsteps he disengaged, whereupon she started to flee (R12,19,21). He followed and caught hold of her, interrupting her flight for a moment, kissed her and disappeared (R13). Blood-stained, mud-stained and hysterical, she immediately reported the attack to three fellow members of the Auxiliary Territorial Service whom she fould walking along the nearby road (R13,23,26). Prompted by shame and reluctance to have them know, she falsely stated that accused had not achieved penetration (R60). The medical examination to which she submitted on the following day disclosed recent bruises at the base of the spine and inside each knee but was inconclusive as to vaginal penetration. However, the young woman was not a virgin, and the size of her vagina "larger than the normal vagina of a girl * * * who has had no children" - was such, according to the examining officer, that it was "more likely that penetration should occur without injury under the circumstances" (R46,51,52).

4. Having been duly warned, accused made two statements and signed them after they were reduced to writing. Both were introduced in evidence (Pros.Exs.B and C). The first admits that intercourse was forcibly achieved despite the prosecutrix's manifest reluctance to submit; the second admits her resistance and stifled attempts to scream, as well as accused's threat to use a knife. He denied, however, that he had a knife when he made the admitted threat.

5. There is substantial evidence to support the court's findings that the accused committed the crime of rape upon the prosecutrix (CM ETO 611, Porter; CM ETO 397, Shaffer; CM ETO 90, Edmonds).

6. The charge sheet shows that accused is 20 years of age and that he was inducted at Camp Blanding, Florida, 3 April 1943 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 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 in a penitentiary is authorized for the crime of rape by AW 42 and secs.278 and 330 Federal Criminal Code (18 U.S.C. secs. 457 and 567). 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

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 9 JUN 1944 TO: Commanding General, Southern Base Section, SOS, ETOUSA, APO 519, U.S. Army.

1. In the case of Private JOHNNIE BOLDS (34780629), Company "C", 560th Quartermaster Service 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. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. At the commencement of the trial, the trial judge advocate propounded the following question to the members of the court:

> "Is there any one here who believes that a forcible rape is impossible unless it is aided by an accomplice? Is there any member of the court who holds such an opinion?"(R4,5).

Upon being questioned as to the purpose of such interrogation, the trial judge advocate responded:

> "Then the prosecution would challenge him for cause. * * * The cause would be that he is biassed (sic), unfit. In his opinion the crime cannot be consummated, so that the accused is therefore of necessity not guilty and cannot be proven guilty"(R5).

This colloquy was harmless to accused, but I do not approve of such type of voir dire of court members. It assumes that there may be members of the court who are unwilling to follow the mandates of the law and is a gratuitous assumption carrying aspersions which are unfair and unauthorized.

3. On the voir dire of the court the trial judge advocate failed to comply with par.1d (2), Military Justice Circular No 1, 1 January 1944 BOTJAG, ETOUSA, with respect to preliminary notice to court members concerning conscientious scruples against imposition of death sentence. The right of challenge for cause thereby implemented is valuable and legitimate and should not be destroyed through faulty presentation.

4. The reduction of the sentence from life imprisonment to ten years appears unwarranted on the evidence, and creates inequality in the punishment for the crime of rape. In my judgment this was an aggravated case with no encouragement from the victim, who was a uniformed member of the British forces.

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 2203. For convenience of reference please place that number in brackets at the end of the order: (ETO 2203).

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 2205

10 MAY 1944

U N I T E D S T A T E S	1ST INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Beaminster, Dorsetshire, England, 22 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class JOHN R. La FOUNTAIN (12005429), Company A, 16th 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 Charge and Specification:

CHARGE: Violation of the 75th Article of War.
Specification: In that Private First Class John R. LaFountain, Company A, 16th Infantry, being present with his company while it was engaged with the enemy, did at Beja, Tunisia, on or about 25 April 1943, shamefully abandon the said company and seek safety in the rear, and did fail to return to military control until 13 February 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 30 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New

York as the place of confinement, directed that accused be held at the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England pending further orders, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The uncontroverted evidence was as follows:

On 25 April 1943, accused was a member of the first squad, second platoon, Company A, 16th Infantry (R9). The company, having taken a certain terrain feature on the preceding day, was in a front position in a valley in the Beja-Mateur sector, preparatory to an attack upon another terrain feature about 1000 yards forward (R5,7,8). The company was under enemy observation and artillery fire (R7,8). Accused absented himself from his company without leave on 25 April 1943 prior to the attack (R6-7; Pros.Ex."A") and remained absent until he was apprehended at Oran, Algeria on 13 February 1944 (Stipulation, R13).

On 23 March 1944, after due warning as to his rights in the premises and in the presence of the adjutant of his regiment, accused made voluntary confession which was reduced to writing. It stated in part:

> "I was assigned to 'A' Company, 16th Infantry, and in the latter part of April, 1943, we were somewhere east of Beja preparing for an attack. At that time I was a chief scout, and had been pulling continuous patrols. It seemed that I got every patrol detail and it reached a point where I couldn't take it any longer. As we were preparing to move forward in the attack, I left the company and went to the rear."

(R11-13; Pros.Ex."B").

4. No evidence was introduced by the defense. After his rights were explained to him, accused elected to remain silent.

5. Accused's confession was adequately corroborated by independent evidence which showed that his company was engaged with the enemy, (synonymous with "before the enemy"), thus establishing the first element of the offense (CM ETO 1693, Allen, and authorities there cited), and that he abandoned his company and sought safety in the rear, thus establishing the second element of the offense (ibid.). The evidence that he failed to return to military control until his apprehension on 13 February 1944, while unnecessary (CM ETO 1663, Ison, and authorities there cited), "makes the evidence of accused's guilt of the offense charged the more complete and compelling" (CM ETO 1693, Allen).

6. At the end of the record appears the following statement:

"I have examined a copy of the record of trial before it was authenticated and have no comment to make".

It was signed by the law member in lieu of Defense Counsel, "on detached service." One of the duties of defense counsel for accused is thus prescribed:

"He will examine the record of the proceedings of the court before it is authenticated" (MCM, 1928, par.45b, p.35).

Nowhere is provision made for the discharge of this duty by anyone other than accused's counsel or his assistant (see MCM, 1928, par.44, p.34). The Board of Review is of the opinion that the quoted provision, like provisions prescribing other duties of defense counsel and similar provisions, is directory rather than mandatory, procedural rather than jurisdictional, and that unless "after an examination of the entire proceedings, it shall appear that the error * * * has injuriously affected the substantial rights of" accused, the proceedings shall "not be held invalid, nor the findings or sentence disapproved" (AW 37; see MCM, 1928, par.87b, p.74). The record shows that a carbon copy thereof was received by accused on 26 April 1944, that the reporter, members of the court, and prosecution were sworn, and that the record was signed by the president and trial judge advocate, as well as by the law member, with specific indications by the last two that they had examined it. In view of these circumstances the Board of Review is of the opinion that the irregularity did not injuriously affect accused's substantial rights and may therefore be disregarded.

7. The charge sheet shows that accused is 22 years of age and enlisted at Albany, New York on 24 January 1941 in the grade of Private to serve for a period of three years. 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. The penalty for misbehavior before the enemy is death or such other punishment as a court-martial 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.2g, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2).

B. Franklin Kite, Judge Advocate

[signature], Judge Advocate

Edward H. Sargent, Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 MAY 1944 TO: Commanding General, 1st Infantry Division, APO 1, U.S. Army.

1. In the case of Private First Class JOHN R. La FOUNTAIN (12005429), Company A, 16th 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 2205. For convenience of reference please place that number in brackets at the end of the order: (ETO 2205).

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

16 JUN 1944

ETO 2210

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Privates BERNARD J. LAVELLE (33678234), 310th Replacement Company, 41st Replacement Battalion; CLINTON A. GRIER (39325396), 203rd Replacement Company, 52nd Replacement Battalion; and WILLIAM A. SALVATORIELLO (32607728), 469th Replacement Company, 82d Replacement Battalion.	Trial by G.C.M., convened at Camp Lufton, Yeovil, Somersetshire, England 7 April 1944. Sentence: Lavelle - Dishonorable discharge, total forfeitures and confinement at hard labor for three years; Grier - Dishonorable discharge, total forfeitures and confinement at hard labor for four years; Salvatoriello - Dishonorable discharge, total forfeitures and confinement at hard labor for six years. The Federal 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 soldiers named above has been examined by the Board of Review.

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

LAVELLE

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Bernard J. Lavelle, 310th Replacement Company, 41st Replacement Battalion, did without proper leave, absent himself from his command at Lufton Camp, Yeovil, Somerset, England, from about 25 February 1944 to about 26 February 1944.

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

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CHARGE III: Violation of the 93rd Article of War.
Specification: In that * * *, did in conjunction with Private Clinton A. Grier, 203rd Replacement Company, 52nd Replacement Battalion, and Private William A. Salvatoriello, 469th Replacement Company, 82nd Replacement Battalion, at Yeovil, Somerset, England, on or about 26 February 1944, feloniously take, steal and carry away four (4) pounds and ten (10) shillings, having an exchange value of about eighteen dollars ($18.00), the property of Louie A. Bunce.

GRIER

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Clinton A. Grier, 203rd Replacement Company, 52nd Replacement Battalion, did, without proper leave, absent himself from his command at Camp Stabley, Somerset, England, from about 13 February 1944 to about 27 February 1944.

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

CHARGE III: Violation of the 93rd Article of War.
Specification: In that * * *, did, in conjunction with Private Bernard J. Lavelle, 310th Replacement Company, 41st Replacement Battalion, and Private William A. Salvatoriello, 469th Replacement Company, 82nd Replacement Battalion, at Yeovil, Somerset, England, on or about 26 February 1944, feloniously take, steal, and carry away four (4) pounds and ten (10) shillings having an exchange value of about eighteen dollars ($18.00), the property of Louie A. Bunce.

SALVATORIELLO

CHARGE I: Violation of the 61st Article of War.
Specification : In that Private William A. Salvatoriello, 469th Replacement Company, 82nd Replacement Battalion, did, without proper leave, absent himself from his post and duties at Camp Lufton, Somerset, England, from about 23 February 1944 to 26 February 1944.

CHARGE II: Violation of the 96th Article of War.
Specification 1: In that * * *, did, at Yeovil, Somerset, England, on or about 26 February 1944, without authority, appear with chevrons of a Technical Sergeant.
Specification 2: In that * * *, did, at Yeovil, Somerset, England, on or about 26 February 1944, with intent to defraud, wilfully, unlawfully and feloniously pass as true and genuine a certain Enlisted Man's Pass, in words and figures as follows:

ENLISTED MAN'S PASS

Bill Davis Sgt 32607728
(Name) (Grade) (Army Serial No.)
is authorized to be absent from his post --
From 2/24/44 0900
To 2/26/44 2400
To Visit
Signed Bill Smith Capt
Company Commander
Inf

a writing of a public nature, which might operate to the prejudice of another, which said Enlisted Man's Pass was, as he, the said Private William A. Salvatoriello then well knew, falsely made and forged.

CHARGE III: Violation of the 93rd Article of War.
Specification: In that * * *, did, in conjunction with Private Clinton A. Grier, 203rd Replacement Company, 52nd Replacement Battalion, and Private Bernard J. Lavelle, 310th Replacement Company, 41st Replacement Battalion, at Yeovil, Somerset, England, on or about 26 February 1944, feloniously take, steal and carry away four (4) pounds and ten (10) shillings, having an exchange value of about eighteen dollars ($18.00), the property of Louie A. Bunce.

Lavelle pleaded not guilty to Charge I and its Specification and guilty to Charges II and III and their Specifications. During the trial he changed his plea of guilty to Charge II and its Specification to not guilty. He was found not guilty of Charge II and its Specification and guilty of Charges I and III and their Specifications. Evidence was introduced of one previous conviction by special court-martial of absence without leave for 37 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 three years.

Grier pleaded not guilty to Charge II and its Specification and guilty to Charges I and III and their Specifications. He was found not guilty of Charge II and its Specification and guilty of Charges I and III and their Specifications. Evidence was introduced of two previous convictions both by special courts-martial; one for absence without leave for 22 days and five days respectively in violation of the 61st Article of War and for breach of arrest in violation of the 69th Article of War, and one for absence without leave for seven 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 four years.

Salvatoriello pleaded not guilty to Charge II and its Specifications and guilty to Charges I and III and their Specifications. He was found guilty of all Charges and Specifications. Evidence was introduced of three previous convictions; one by summary court for absence without leave for seven days and two by special courts-martial for absence without leave for 49 days and 40 days respectively, all 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 six years.

The reviewing authority approved the sentence of each of the accused, designated The Federal Reformatory, Chillicothe, Ohio, as the place of confinement for each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. Salvatoriello is charged with uttering a forged enlisted man's pass which he knew was falsely made and forged (Specification 2,Charge II). The evidence establishes without contradiction that he not only uttered and used the pass but actually forged it (R 16,17,19,33-36, Pros Ex N; R31). His offense is denounced by a specific act of Congress:

> "Whoever shall falsely make, forge, counterfeit, alter, or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with wrongful or fraudulent intent shall use or have in his possession any such pass or permit, or shall personate or falsely represent himself to be or not to be a person to whom such pass or permit has been duly issued, or shall wilfully allow any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than $2000 or imprisoned not more that five years, or both." (Act June 15, 1917, c. 30, Title X, sec. 3; 40 Stat. 228; 18 U.S.C.A. xxx 132). (Underscoring supplied).

The violation of said statute constitutes a crime or offense not capital under the 96th Article of War (MCM 1928, sec. 152c, pp. 188, 189), and penitentiary confinement is authorized by AW 42; MCM 1928 par. 90a, p. 81; sec 335 Federal Criminal Code (18 U.S.C.A.541) and Act June 14, 1941, c. 204; 55 Stat. 252 (18 U.S.C.A.753f); Cf. U.S. v Sloan 31 Fed. Supp. 327.

4. The charge sheets show that:

Accused Lavelle is 20 years six months of age and was inducted at Pittsburg, Pennsylvania, 13 April 1943, to serve for the duration of the war plus six months. He had no prior service;

Accused Grier is 20 years of age and was inducted at Portland, Oregon, 18 January 1943 to serve for the duration of the war and six months. He had no prior service;

Accused Salvatoriello is 22 years of age and was inducted at Newark, New Jersey, 16 January 1943 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 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 as to each accused.

6. Neither of the offenses of which the accused Lavelle and Grier were convicted were offenses for which penitentiary confinement is authorized by either the Federal Criminal Code or the Code of the District of Columbia. Penitentiary confinement is therefor illegal (AW 42). The place of confinement should be changed as to the said two accused to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec. VI, par. 2a, as amended by Cir.331, WD, 21 Dec 1943, sec. II, par. 2). Confinement of accused Salvatoriello in a penitentiary is authorized (see par. 3, supra, and Cir.291, WD, 10 Nov 1943, sec. V, par. 3a)

Judge Advocate

Judge Advocate

Judge Advocate

(238) 1st Ind.

WD, Branch Office TJAG., with ETOUSA. 16 JUN 1944 TO: Commanding General, Southern Base Section, SOS, ETOUSA, APO 519, U.S.Army.

1. In the case of Privates BERNARD J. LAVELLE (33678234), 310th Replacement Company, 41st Replacement Battalion, CLINTON A. GRIER (39325396), 203rd Replacement Company, 52nd Replacement Battalion, and WILLIAM A. SALVATORIELLO (32607728), 469th Replacement Company, 82d 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 sentences as to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Neither of the offenses of which the accused Lavelle and Grier were convicted were offenses for which penitentiary confinement is authorized by either the Federal Criminal Code or the Code of the District of Columbia. Penitentiary confinement is therefore 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 court-martial order.

3. I believe that the ends of justice will be fully achieved and discipline will be maintained by confinement of all accused in Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England with suspension of their dishonorable discharges, and I so recommend. While their offenses are not to be condoned; they are of the type that do not require the return of accused to the United States, unless and until accused demonstrate, while in confinement, their further incorrigibility and lack of value to the service. In the event you agree with this recommendation your action thereon should be returned to this office for attachment to the record.

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 2210. For convenience of reference please place that number in brackets at the end of the order: (ETO 2210).

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 2212

U N I T E D S T A T E S	2D BOMBARDMENT DIVISION.
v.	Trial by G.C.M., convened at AAF Station 115, 23 March - 25 April 1944.
Private EDWARD E. COLDIRON (35452621), 506th Bombardment Squadron, 44th Bombardment Group (H).	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 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 Charge and specifications:

CHARGE: Violation of the 75th Article of War.
Specification 1: In that Private Edward E. Coldiron, 506th Bombardment Squadron, 44th Bombardment Group (H), did at AAF Station 115, APO 634, on or about 1 December 1943, misbehave himself before the enemy by wilfully failing to accompany and fly with his crew which had been ordered by Lieutenant Colonel Dexter L. Hodge, AC, Group Operations Officer of said 44th Bombardment Group, to execute a combat operational mission by flying over territory occupied by the enemy in Europe.
Specification 2: In that * * *, did at AAF Station 115, APO 634, on or about 5 December 1943, misbehave himself before the enemy by wilfully failing to accompany and fly with his crew which had been ordered by Lieutenant Colonel Dexter L. Hodge, AC, Group Operations Officer of said 44th Bombardment Group, to execute a combat operational mission by flying over territory occupied by the enemy in Europe.

He pleaded not guilty to and was found guilty originally of the Charge and both specifications. No evidence of previous convictions was introduced. He was sentenced originally to be shot to death with musketry, all members of the court concurring. The reviewing authority found the evidence legally sufficient to sustain only so much of the findings as involves a finding of guilty of the lesser included offense of misbehavior by wilfully failing to fly on an ordered mission, in violation of the 96th Article of War, returned the record of trial to the court with orders to reconvene and reconsider its findings of guilty of both specifications of the Charge and of the Charge, to reconsider its sentence and to impose a sentence appropriate to its findings under both specifications and the Charge. The court reconvened, revoked its former findings and found accused guilty of both specifications, except the words "before the enemy" and of the excepted words not guilty, and not guilty of the Charge but guilty of a violation of the 96th Article of War. The court thereupon revoked its sentence, reconsidered the same for both specifications and the Charge of which accused was convicted and, three-fourths of the members present at the time the vote was taken concurring, sentenced 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, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the (revised) sentence, reduced the period of confinement to 25 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. Uncontroverted evidence for the prosecution shows the following:

Accused on 1 and 5 December 1943 was a waist gunner in a heavy bomber crew of the 506th Bombardment Squadron, 44th Bombardment Group (H), AAF Station 115 (R16,26,28-29; Pros.Ex.F). The procedure preparatory to the execution of a bombing mission, which had been in operation at that station for approximately one year, was as follows: The group operations section relayed to squadron headquarters the notice of alert and the field order received from higher headquarters (R6). The squadron operations officer thereupon prepared a schedule of ships and crews of the squadron to fly on the forthcoming mission (R10-12; Pros.Exs.A,B), and submitted the same for confirmation to the group operations section (R6-7,16). The latter, upon receipt of orders from higher authority, determined the approximate "take-off" time and then ordered squadron headquarters to awaken crew members to report for the briefing and mission (R6,17). The group unit might decide the identity of the officers, and occasionally of the enlisted men, of the crews which were to fly (R30). The schedule, in the form of a squadron operations order, was posted on the bulletin board at the squadron living site during the evening before the scheduled mission. Crew members thereby had frequent opportunity to observe it. It served as an order and was the only source of a crew member's knowledge that he was to fly on a stated mission (R14,25,31-32; Pros.Ex.E). When crew members returned from a "Liberty Run", they reported and "signed in" at the "picket post". Usually at that time they examined the schedule to determine if they were scheduled for the ensuing mission (R36). It also contained the names of "spares" (indicated by an asterisk), not members of

but scheduled to fly with, individual crews in specified ships. The ships were identified by the last three digits of their numbers. The schedule further contained the names of "spare" crew members, for whom no ship was listed or available and who were thus not scheduled to fly initially (R15-16,29; Pros.Exs.A,B). Pursuant to instructions, and in discharge of his duty when a mission was scheduled, the squadron charge of quarters awakened the crew members two hours before briefing and informed them of the time of day and of briefing (R28,31). The foregoing procedure was followed with respect to the missions scheduled for 1 and 5 December 1943 (R6,10-12). On those dates Lieutenant Colonel Dexter L. Hodge was operations officer of the 44th Bombardment Group (R6-7).

Squadron Order Number 26, 1 November 1943, paragraph 2, detailed certain named enlisted men of the 506th Bombardment Squadron "to duty requiring them to participate in regular and frequent aerial flights commencing this date until relieved by competent authority". All combat men of the squadron were listed in the order. Accused's name and serial number were on the list and his duty assignment was specified as "Tail Gunner" (R28-29; Pros.Ex.F).

Accused's name was listed and marked with an asterisk under the names of members of Crew No.3, Ship No.427-642, on the posted schedule for the mission of Wednesday, 1 December 1943 (R11,29; Pros.Exs.A,C). As a "spare", accused, although not assigned regularly to Crew No.3, was required to be individually awakened by charge of quarters and informed of the ship on which and the time when it was intended he was to fly (R28). On the occasion of this mission charge of quarters awakened accused, who was living with the combat crew personnel, and informed him of the ship on which he would fly, "who was flying it" and the time of briefing. Accused informed him that "he was sick and was going on sick call" (R30,31). Charge of quarters reported the matter to the squadron operations officer (R11,32). Accused did not report for flight or fly on the scheduled mission, which was executed (R11,21,23; Pros.Ex.C).

The custom in the squadron when a man reported that he was sick, was for him to report to the hospital for a check and verification of his claim of illness or physical disability by the squadron flight surgeon. His illness was not a valid excuse for not arising (R18). Accused did not report on sick call on 1 December, nor was the squadron flight surgeon informed on that day that accused was sick (R40-41). Charge of quarters himself had no authority to allow a man to remove himself from an authorized crew by means of a statement to him that he was sick or indisposed. Authority to remove the man was the personal responsibility of the squadron operations officer. Such authority was exercised if the hospital (flight surgeon) stated that the man should be "grounded" or if the operations officer himself decided that the man was unfit to fly or otherwise to fulfil his duties (R18-19). That officer did not remove accused from the authorized crew on 1 December. When accused was reported sick, the operations officer replaced him with a substitute "as a precautionary measure against time". Nevertheless this did not alter the rule that no substitution would actually

be made except on confirmation by the flight surgeon that the man originally scheduled was sick (R19-20).

The squadron operations officer issued a bulletin, dated 3 December, reading in part as follows:

> "ATTENTION ALL COMBAT PERSONNEL:
> If you are scheduled to fly on the list of Crews or Spares on the daily schedule, and you are awakened for a mission, YOU WILL TELL CPL.REPETSKY AT THAT TIME IF FOR SOME REASON YOU ARE NOT INTENDING TO FLY. The reason for this is quite obvious. If Operations can't locate you or must replace you shortly before take-off it is very unfair to the man replacing you. He gets neither breakfast nor time to check his guns and equipment." (Def.Ex.I).

The purpose of issuing the bulletin was to require crew members to report to charge of quarters immediately if they were not going to fly, so that some indication would be given as to where they would be at "take-off" time (R13-14,18; Def.Ex.I).

Accused's name was listed, without an asterisk, under the names of members of Crew No.4, Ship No.427-509, on the schedule for the mission of Sunday, 5 December 1943 which schedule was posted as usual (R12,30; Pros.Exs. B,D). Accused, with other crews members "from down at the local pub", was present at the picket post about midnight on 4-5 December when they reported from a "Liberty Run" from Norwich and "signed in". At this time two crew members asked charge of quarters in accused's presence if an alert, to which there was charge of quarters replied in the affirmative. A discussion ensued, in which accused participated, concerning the time of arising and of briefing and the expected temperature. Accused appeared to be sober (R33-36). On the morning of the mission, charge of quarters awakened accused individually. The former testified:

> "I knew that he had been individually assigned to this crew and so I got him up early to make sure he got up".

Accused when awakened stated "'I am drunk and going on sick call.'" He did not appear to be drunk and was not "too hard" to awaken - "just like anybody else would wake up that early in the morning." (R30-31). Thereafter another crew member at least partially awakened accused, who "said he was sick and wasn't going to fly" (R34). Charge of quarters reported the matter to the commanding officer and operations officer of the squadron (R32). Accused was absent from briefing at 0400 on 5 December 1943 and did not report for flight or fly in the scheduled mission, which was executed (R12,21,24; Pros. Ex.D). He did not report on sick call on 5 December, nor was the squadron flight surgeon informed on that day that accused was sick. Drunken men had

never been seen on sick call (R40-41). The squadron operations officer did not remove accused from the authorized crew on 5 December (R18-19).

Major Robert E. Kalliner, commanding officer of accused's squadron from 3 January to 20 March 1944, testified that after he assumed command he discovered the charge herein against accused. He discussed the case with him and requested him to consider his situation carefully so that he could be made a positive force in the unit and to state whether he wished to continue to fly or preferred to be assigned to another type of duty. Accused replied that at one time he felt he would rather be court-martialed than fly but had since changed his mind and would like to continue to fly. Witness therefore placed him on a combat status as a member of a combat crew. Accused was scheduled for a number of missions following that time, flew some of them but refused to fly on three separate occasions. Defense objected to the testimony as to "what happened subsequently" to 5 December 1943. The law member sustained the objection and the prosecution stated that it would "withdraw the question" (R26-27).

Captain O.W. Allison, squadron flight surgeon, testified that he knew accused well, as one of the "old boys of the outfit" and that he would not consider him neurotic, but rather a good combat crewman and aerial gunner and one of the stronger men (R37,40).

4. At the close of the prosecution's case the defense moved for findings of not guilty of the Charge and specifications. The court denied the motion. No evidence was introduced for the defense. After his rights were explained to him, accused elected to remain silent (R41-42).

5. After the arraignment the defense entered a special plea of "constructive condonation", stating:

> "Since the dates of the 1st of December and the 5th of December Private Coldiron has been on three missions, and has been awarded the air medal. The defense is prepared to introduce evidence to that effect."

Without permitting the introduction of evidence or argument, the court denied the plea and accused pleaded to the general issue (R5).

The award of the Air Medal to accused was a recognition that he had distinguished himself by meritorious achievement while participating in an aerial flight; the required achievement to warrant the award must have been accomplished with distinction above and beyond that normally expected, either in single actions of merit or sustained operational activities against the enemy (AR 600-45, 22 Sep 1943, par.17).

> "Except as otherwise indicated in the discussion of special pleas, the burden of supporting a special plea by a preponderance of proof rests on the accused. * * *.

Before passing on a contested special plea the court will give each side an opportunity to introduce evidence and make an argument" (MCM, 1928, par.64a, p.51; CM ETO 108, Abrams; CM ETO 110, Bartlett).

"Constructive Condonation of Desertion.- An unconditional restoration to duty without trial by an authority competent to order trial may be pleaded in bar of trial for the desertion to which such restoration relates" (MCM, 1928, par. 69b, p.54).

It is well established that restoration to duty without trial of one charged with desertion, as authorized by Army Regulations (AR 615-300, 25 Mar 1944, par.19d and predecessor provisions), is a complete bar to trial for such desertion (Winthrop's Military Law & Precedents - Reprint - pp.270-271; Dig.Op.JAG, 1912, p.415; JAG 251.29, Sept. 11, 1919, Dig.Op.JAG, 1912-1940, AR 615-300, par.18b, p.996). Winthrop comments as follows:

"But the mere restoring to command or duty, or ordering on duty, of an officer or soldier, when in arrest under charges, by his commanding officer, while regarded in the English law as practically a pardon and pleadable as such in bar of trial, is not authorized in our law to be so treated, (except in the single case above mentioned as provided for in the Army Regulations (desertion),)and is not so treated in practice. Nor can the mere fact that charges once preferred have been dropped by a commander be pleaded in bar as a constructive pardon of the same, upon being subsequently revived and brought to trial" (Winthrop's Military Law & Precedents - Reprint - p.271).

That a specific directive by high authority would be required to make the defense available against a charge other than desertion is further indicated in a footnote reference in Winthrop's discussion:

"And see G.O.4, Dept. of the West, 1861, where the plea was sustained in cases of soldiers, not deserters, restored to duty while under charges, in the same manner as deserters, by the Department Commander, in a General Order" (ibid., p.270, fn.41).

In his discussion of defenses to the charge of misbehavior before the enemy, the author states:

"Brave or efficient conduct in action or before the enemy, subsequently to the offence, (where the accused, after the commencement of the prosecution- by arrest or service of charges- has been permitted to do duty,) while it may be put in evidence in mitigation of the punishment, and should in general mitigate it very considerably, will not, strictly, constitute a defence" (ibid., p.624).

The Board of Review (sitting in Washington) recently held that an assignment to military duties while court-martial charges were pending does not constitute a constructive pardon or condonation of the offenses of absence without leave and being drunk in quarters, citing Winthrop as authority. (CM 231357 (1943), Bull.JAG, Apr 1943, Vol.II, No.4, Const. Art.II, sec.2, cl.1, p.133).

As a general proposition, condonation or ratification of an offense of such character as to affect the public interest and welfare is not a valid defense to a prosecution for the offense, in the absence of specific statutory authority (1 Wharton's Criminal Law, sec.385, pp.517-518; 22 C.J.S., secs.41,42, pp.97-98).

There is no specific proof in the record that accused was actually removed from duty subsequent to 5 December 1943. Assuming, however, that such was the case, his restoration to duty and the award of the Air Medal to him subsequent to the derelictions herein charged did not effect a constructive condonation of his offenses under the authorities above cited. Only a direct mandate from Congress or a direction from higher authority could produce such result.

The provision in the Manual for Courts-Martial, 1928 (par.64a, p.51), for an opportunity by an accused to introduce evidence before a special plea is considered by the court, was not available to accused because the plea in bar was bad on its face. As a matter of law it did not state facts sufficient to constitute a defense to the charge. Under such circumstances the rule of the Abrams and Bartlett cases, supra, is not applicable. If a demurrer by the prosecution to the plea were recognized by military justice practice it would have been the duty of the court to sustain such demurrer. The action of the court was free from error.

6. The review of the Staff Judge Advocate, 2d Bombardment Division, dated 11 April 1944, contains the following explanation as to the reference of the charges for trial and subsequent events:

"These charges were referred for trial on March 4, 1944, on the theory that under the facts presented in the investigation the accused misbehaved himself by refusing to participate in the missions, and that at said time he was before the enemy within the meaning of Article

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of War 75. After this case was referred for trial the Board of Review in the Branch Office of the Judge Advocate General with the European Theater of Operations in the case of United States vs. Private Johnnie (NMI) Muir, ETO 1226, rendered an opinion construing Article of War 75 in cases of this nature. Notification of the holding in the Muir case was not received by this office until after the trial of the instant case. In the Muir case the rule is stated as follows: '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.' Inasmuch as it appears that the accused's misbehavior occurred while he was still at his base in the United Kingdom and that his base was not then the immediate object of enemy attack, the accused was not 'before the enemy' under Article of War 75 as it has now been construed.

* * * * * * * *

For the reasons stated * * *, the evidence is legally insufficient to support the findings and the sentence in toto, but it does support all of the allegations of each specification except the allegation that accused was 'before the enemy'. It is believed that a lesser included offense of misbehavior under Article of War 96 has been established under each specification.

* * * * * * * *

It is recommended that the record of trial be returned by indorsement to the President of the Court under the provisions of 87b, MCM, 1928, with instructions to convene the Court for proceedings in revision to reconsider its finding of guilty of the specifications of the charge and of the charge and to reconsider its sentence and impose a sentence appropriate with its findings under all of the specifications of the charge."

Pursuant to the foregoing advice, the reviewing authority returned the record of trial, stating in his indorsement:

"1. Pursuant to paragraph 87b, MCM (1928), the record of trial in this case is returned herewith for revision.
2. The evidence is legally insufficient to sustain the findings, under the specifications, of guilty of misbehavior before the enemy in violation of Article of War 75 but is legally sufficient to sustain only so much of the findings as involves a finding of guilty of the lesser included offense of misbehavior by wilfully failing to fly on an ordered mission, in violation of Article of War 96.
3. The court will reconvene in accordance with paragraph 83, MCM (1928), for the following purposes:
a. To reconsider its findings of guilty of both specifications of the charge and of the charge.
b. To reconsider its sentence and to impose a sentence appropriate with its findings under both specifications and the charge."

The above practice was approved by the Board of Review in CM ETO 1743, Penson. The advice of the Staff Judge Advocate, the action of the reviewing authority pursuant thereto and the action of the court in revising its findings were properly premised on the principles announced in the holding of the Board of Review in CM ETO 1226, Muir. Consequently the action of the court on revision in finding accused not guilty of the words "before the enemy" and not guilty of the Charge and in reducing its sentence was proper.

7. There remains for consideration the question whether the action of the court in finding accused guilty of the specifications except the words "before the enemy" and guilty of violation of the 96th Article of War can be sustained. This involves the questions (a) whether the specifications are broad enough after excepting the words "before the enemy" to allege an offense under the 96th Article of War as a lesser included offense and (b) if the answer to the first question be in the affirmative, whether the evidence in the record is legally sufficient to sustain the findings of guilty of such a violation.

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

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necessarily, change the nature or identity of an offense.
Lesser Included Offense.- If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words, etc., of the specification, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty of the substituted matter. A familiar instance is a finding of guilty of absence without leave under a charge of desertion." (MCM, 1928, par.78c, pp.64-65).

The fact that the charge is designated a violation of a specific Article of War does not render improper either a finding of guilty of a violation of the 96th Article of War, the general article, or an approval of such portion of findings as involves such a finding, provided the latter offense is lesser than and included in the offense charged in the specification (CM ETO 1057, Redmond, and authorities therein cited). There are numerous instances of such findings and approvals. One of the most familiar examples of such practice involves findings of guilty of assaults of lesser included degree (Dig.Op.JAG, 1912-1940, sec.451(3) et seq., p.311; CM ETO 1177, Combess; CM ETO 1690, Armijo). In a case arising out of the Civil War it was stated:

"But the authority to find guilty of a minor included offense, or otherwise to make exceptions or substitutions in the finding, can not justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged. Thus held that it was not a finding of a lesser included offense to find the accused guilty merely of absence without leave under a charge of a violation of the forty-second article of war in abandoning his post before the enemy. R. 11,274, Dec., 1864." (Dig.Op. JAG, 1912, p.574).

In CM 133585, Huff (France) 20 Jan 1919, the accused was tried upon the following charge and specification (among others):

"CHARGE I.- Violation of the 75th Article of War.
Specification.- In that 1st Lieut. Frederick H. Huff, D.C., 113th Infantry, being present on duty with his regiment when it was about to engage the enemy, did, at Ravine des Roches, France, on or about the 10th day of October, 1918, abandon the regiment and seek safety in the rear and did fail to rejoin it until the 22nd day of October, 1918."

He was found guilty by exceptions and substitutions of the following specification under the 96th Article of War:

> "In that 1st Lieut. Frederick H. Huff, D.C., 113th Infantry, being present on duty with his regiment when it was about to engage the enemy, did at Ravine des Roches, France, on or about the 10th day of October, 1918, when his regiment had moved away to engage the enemy, and after he had been directed by his commanding officer to rejoin his organization, neglect and fail to rejoin it until the 22nd of October, 1918."

The following language appears in the opinion:

> "Was the court authorized by its power to make exceptions and substitutions to shift the charge from the 75th to the 96th Article of War? This depends upon whether the offense found under the 96th Article is included within the offense laid under the 75th Article (M.C.M., Sec.300). It is clear that it is not. Failure to obey the order of a superior officer is no necessary part of misbehavior before the enemy as described by the 75th Article of War. It is a wholly separate and distinct offense - quite as separate and distinct as absence without leave. (Dig., Ops.J.A.G., 1912, p.574)." (Underscoring supplied).

It is clear that in the Huff case the court substituted a specification alleging facts entirely different and distinct from those alleged in the original specification. Such is not the situation in the instant case, where the original specification remained intact except for the elimination of the phrase "before the enemy".

When some other offense is necessarily included in the phraseology of a specification under the 75th Article of War, a conviction under the 96th Article of War (or some other cognate article) is proper (CM 130412 (1919); CM 126647 (1919), Dig.Op.JAG, 1912-1940, sec.433(3), p.304; CM NATO (M.J.Review) 1021, Boudreaux). The last cited authorities represent the modern rule, and insofar as they conflict with Dig.Op.JAG, 1912, p.574, cited in CM 133585, Huff, they should be followed. However, the underscored phrase in the Huff case is in the nature of obiter dicta, and when disregarded there can be no quarrel with the results of that case. As indicative of the true basis of the Huff case reference is made to CM 125263, Wachsman, (France) 17 Dec 1918 (of which no mention was made in the Huff case) in which accused was found guilty of the following charge and specification:

"CHARGE II: Violation of the 75th Article of War. Specification: In that Pvt. 1st Cl. (Surgical Assistant Dentist) Samuel Wachsman, did, at or near St. Juvin, France, American E.F., on or about the 23rd day of October, 1918, in disregard of his duty, shamefully abandon his post, to which he had been ordered by 1st Lt. Martin J. Seid, M.C., Med. Det. 307th Engineer Regiment, his proper superior officer, to care for the wounded."

The reviewing authority approved only so much of the finding of guilty of the charge as involved a violation of the 96th Article of War. In the opinion it was stated:

"The specification under Charge II does not charge an offense under the 75th Article of War, for the reason that the misconduct is not alleged to have been 'before the enemy'; but it clearly charges an offense under the 96th Article of War."

The true test is whether "the specification is so drawn as sufficiently to allege an unauthorized absence for a stated period" (CM 130412, supra). As stated in CM 126647, supra,

"Abandoning or running away from his company on the part of a soldier necessarily comports and includes separation from the company without authority".

The alleged willful failure of the instant accused, on two occasions, to accompany and fly with his crew, even though it was not "before the enemy", constituted "disorders and neglects to the prejudice of good order and military discipline," both as failure to obey lawful orders of a superior officer and as malingering (Winthrop's Military Law & Precedents - Reprint - p.730; MCM, 1928, par.134b, p.149; par.152a, p.187; CM ETO 1057, Redmond; CM ETO 1366, English). The specifications are clearly broad enough, after excepting the words "before the enemy", to allege violations of the 96th Article of War.

(b) The evidence is clear and uncontradicted that accused at the place and times alleged did in fact willfully fail to accompany and fly with his crew as scheduled, and that the crew, at the times of accused's derelictions had been ordered by Lieutenant Colonel Dexter L. Hodge, AC, 44th Bombardment Group Operations Officer, in accordance with well established and familiar practice, to execute combat operational missions by flying. That such missions were to be executed by flying "over territory occupied by the enemy in Europe" was a proper subject of judicial notice (MCM, 1928, par.125, p.135). The willful character of accused's refusal to fly is demonstrated by his notice of the fact that he was scheduled to

fly on each mission, his pretension of illness on one occasion and of drunkenness on the other, and his declarations of intention to report on sick call on each occasion. The falsity of all of said statements was demonstrated by his failure to report for medical examination and attention following each refusal. Accused's malingering conduct was not only reprehensible but of such a character as seriously to jeopardize the success of the missions involved as well as the morale of his squadron. He should not be accorded the immunizing advantage of a legal technicality. All of the elements of misbehavior within the meaning of the 75th Article of War were present in both of accused's derelictions except the fact that such misbehavior was not before the enemy. Such fact precludes the applicability of that article but

> "does not relieve accused from culpability. * * *. His conduct in ignoring his commander's control and authority displayed such a spirit of insubordination and defiance as to constitute a disorder prejudicial to good order and military discipline under the 96th Article of War" (CM ETO 1366, English quoted in CM ETO 1057, Redmond).

Like the conduct of the accused in the last cited case, Coldiron's actions were deliberate and contumacious and were aggravated by the baselessness of his purported reasons for refusing to comply with the orders involved. His conduct in offering patently falacious excuses for his refusal on two separate occasions may be regarded as

> "a rank and deliberate undertaking- no matter how predestinedly futile and ill advised - to flout and subvert duly constituted authority and to substitute his own, as the determining factor as to whether or not" (CM ETO 1920, Horton)

he should fly.

The Board of Review is of the opinion that the record is legally sufficient to sustain the finding of guilty of an offense under the 96th Article of War.

8. The specific offenses of which accused was found guilty are not included in the table of maximum punishments set forth in the Manual for Courts-Martial (par.104c, pp.97-101). They are of a more serious quality than failure to obey a lawful order in violation of the 96th Article of War. Rather accused's conduct resembles willful disobedience of the command of a superior officer in wartime in violation of the 64th Article of War, for which no maximum punishment is prescribed (MCM, 1928, par.104c, p.98), except that the maximum penalty of death cannot be imposed in the instant case inasmuch as it involves a conviction under the 96th Article of War.

Present are the elements of such offense: (1) accused received a lawful command to fly (although not direct in form) (2) from his superior officer (3) which he willfully disobeyed (MCM, 1928, par.134b, p.149). The Board of Review is therefore of the opinion that the record of trial is legally sufficient to support the sentence (CM ETO 1920, Horton).

9. In view of the foregoing, the denial by the court of the defense motion for findings of not guilty of the Charge and specifications was proper. There was

> "substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tend(ed) to establish every essential element of an offense * * * included"

in the specifications (MCM, 1928, sec.71d, p.56).

10. The charge sheet shows that accused is 28 years six months of age and was inducted 20 April 1942 at Fort Thomas, Kentucky in the Army of the United States for the duration of the war plus six months. He had no prior service.

11. 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.

12. 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. 21 JUN 1944 TO: Commanding General, 2d Bombardment Division, APO 558, U.S. Army.

1. In the case of Private EDWARD E. COLDIRON (35452621), 506th 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, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Although the offenses were committed on 1 and 5 December 1943, accused was not brought to trial until 23 March 1944. The squadron commander, Major Wm. N. Anderson, on 9 December 1943, recommended trial by special court-martial. Thereafter, the Commanding General, Eighth Air Force, by 7th Indorsement dated 27 January 1944, to Commanding General, 2d Bombardment Division, directed that Charge II (Violation of 75th Article of War) be not referred for trial and authorized reference of the revised charges to a special court-martial. Upon a request for reconsideration by the Commanding General, 2d Bombardment Division, by 8th indorsement, 10 February 1944, the Commanding General, Eighth Air Force, (9th indorsement, 2 March 1944) expressed the opinion "that the expected testimony warrent prosecution for failure to fly, in violation of AW 96 and not under AW 64 or 75" and returned the file for "action in the exercise of your power." (2d Bombardment Division acquired general court-martial jurisdiction on 22 February 1944). The Charge (75th Article of War only) was referred for trial on 4 March 1944. Between 5 December 1943 and date of trial on 23 March 1944, accused engaged in combat flights and was awarded the Air Medal, although refusing three other flights. The trial was had for the first refusals rather than the later ones. The original sentence of the court was death but same was reduced upon revision after decision of the Board of Review in CM ETO 1226, Muir (approved by me), to life and reduced by you to 25 years.

I am of the opinion that the period of confinement, viz: 25 years is indefensible in view of the above history of the case revealed by the accompanying papers, and I recommend a material reduction in same and suggest consideration of suspension of the dishonorable discharge and confinement of accused in Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England.

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 2212. For convenience of reference please place that number in brackets at the end of the order: (ETO 2212).

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

27 MAY 1944

ETO 2215

U N I T E D S T A T E S)	NORTHERN IRELAND BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.)	
First Lieutenant WILLIAM P. BRODERICK (O-1533017), Medical Administration Corps, Company B, 48th Armored Medical Battalion.)	Trial by G.C.M., convened at Wilmont House, County Antrim, Northern Ireland, 8 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 Charge and specifications:

CHARGE: Violation of the 96th Article of War.
Specification 1: In that 1st Lieutenant William P. Broderick, MAC, Company B, 48th Armored Medical Battalion, did, at and near Goraghwood Station, Northern Ireland, on or about 21 March 1944 wrongfully appear in civilian clothes, contrary to the provisions of Section I, Circular 28, War Department, 1942.
Specification 2: In that * * *, did, at and near Goraghwood Station, Northern Ireland, on or about 21 March 1944, with intent to deceive the civil authorities charged with the duty of controlling travel by individuals from Eire into Ulster, wrongfully represent to a constable of The Royal Ulster Constabulary that he was James B. Cafferkey of Belfast, Northern Ireland.

Specification 3: In that * * *, stationed in the European Theater of Operations, United States Army, having been granted a leave of absence for eight days effective on or about 13 March 1944, did, on or about 15 March 1944, enter into Eire contrary to the provisions of paragraph 2c, Section I, Circular 80, Headquarters ETOUSA, 7 October 1943.

He pleaded guilty to and was found guilty of the Charge and specifications thereunder. 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, Northern Ireland Base Section, SOS, ETOUSA, approved only so much of the sentence as provided 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 and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The undisputed evidence was substantially as follows:

It was stipulated in writing by the prosecution and defense that Section I, War Department Circular No. 28, 30 January 1942 provided:

"Wearing of the uniform.- Officers will wear the uniform at all times when out of the house or quarters except when dressed for exercise in exercise clothes. The uniform will also be worn when dining at home with more than two guests present." (R.7; Pros.Ex.1).

It was further stipulated in writing that Sec.I, par.2c, Circular No. 80, Headquarters, ETOUSA, 7 Oct 1943 was as follows:

"2. RESTRICTIONS ON TRAVEL: Military personnel on leave, furlough, or pass may not enter:
c. Eire." (R7; Pros.Ex.1).

The stipulation was admitted in evidence, copies of the two circulars were furnished the court and were also attached to Pros.Ex.1. The trial judge advocate informed the court that it could take judicial note of the circulars (R6-7).

It was also stipulated in writing that on 6 March 1944 accused was granted a leave of absence of eight days effective on or about 13 March 1944, by virtue of par.6, Special Orders No. 11, Headquarters 48th Armored Medical Battalion. The stipulation was admitted in evidence (R8; Pros.Ex.2).

It was further stipulated in writing that an attached verbatim transcript of questions voluntarily answered by accused, and propounded on 21-22 March 1944 by Lieutenant Colonel Sam G. Elliot, Inspector General's Department, could be read to the court. The stipulation and the attached document were admitted in evidence (R8-9; Pros.Ex.3). An examination of the answers given by accused after he was warned as to his rights, discloses that he arrived in Northern Ireland 13 March 1944 and spent the night in the Kensington Hotel, which was the Red Cross Club at Belfast. He asked the porter at the club how he could go to Southern Ireland and was told that there was no way he could get there. He later found a civilian identity card at the club in the name of "James B. Cafferkey" of Belfast. He telephoned the police station and asked if the card would enable him to get across the border, and when he was answered in the affirmative he "set out to find civilian clothes". He rented the clothes from a store in Belfast for 15 pounds, and used them for about a week. He went to Southern Ireland and presented the civilian identity card when crossing the border. He knew that Eire was a neutral country, was familiar with the provisions of War Department Circular No. 28 with respect to wearing the uniform, and also knew that he violated regulations when he left his uniform in Belfast and donned civilian clothing. During his visit to Eire he stayed with relatives. He made no effort to obtain official authorization to enter Eire and went there because he was Irish, his mother and father were from Ireland, and the temptation to spend Saint Patrick's Day there was "a little too hard to resist" (Pros.Ex.3).

Private Robert A. Laman, Company C, Detachment C, 713th Military Police Battalion, testified that on 21 March accused, dressed in civilian clothes, arrived at Goraghwood station, Northern Ireland on the train from Dublin. The station was about 10 miles north of the border between Northern Ireland and Eire and there was no train stop between Dundalk, Eire and Goraghwood station. When asked for his identity card by a member of the Royal Ulster constabulary, whose duty it was to check personnel on the train, accused produced a card in the name of "Brandon Cafferkey". He was asked by the constable if it was his card, and aswered in the affirmative. When asked how long he had lived in Ireland he replied "all his life". He was asked to sign his name in a notebook and wrote "Brandon Cafferkey" (R10-13).

Private Everett E. Dennis of the same military police organization, testified that after being removed from the train accused said that he found the civilian identity card on the floor of the Kensington Hotel, and gave his correct name, rank and branch of service. The civilian card in his possession was in the name of "James Cafferkey" (R13-16).

4. For the defense, it was stipulated in writing that the Commanding General, 2nd Armored Division, stated in a teletype received by the Staff Judge Advocate of the Northern Ireland Base Section that accused had an "'excellent prior record'", and that "This information was volunteered, without request therefor". The stipulation was admitted in evidence (R16-17; Def.Ex.A).

Accused, after being warned of his rights, testified that he went to Eire because he was on leave and desired to see his relations. He was of Irish heritage and it was also St. Patrick's Day. He did not discuss military information with anyone. He believed his record with his organization in Africa and Sicily "were both ones which speak for themselves". He realized both his mistake and the fact that he should be punished, and testified that he was "certainly sorry" (R18).

5. The pleas of guilty are fully supported by the evidence.

6. The order appointing the court (SO #56, 25 Feb 1944), otherwise in proper form, is captioned "HEADQUARTERS NORTHERN IRELAND BASE SECTION APO 813". The clerical omission of the words "SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS", was an irregularity which was not fatal (CM ETO 1982, Tankard). The review of the Staff Judge Advocate, Northern Ireland Base Section, SOS, ETOUSA, contains a discussion of other minor irregularities contained in the record of trial, none of which injuriously affect the substantial rights of accused.

7. The charge sheet shows that accused is 30 years of age and that he was inducted 27 June 1941 at Camp Grant, Illinois. His further service is as follows: "OTC at Carlisle Barracks, Pa. Commissioned 2d Lieutenant, MAC, 19 May 1942. Promoted to 1st Lieutenant, MCA, 4 September 1942". 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. Dismissal of an officer is authorized upon conviction of a violation of Article of War 96.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 MAY 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of First Lieutenant WILLIAM P. BRODERICK (O-1533017), Medical Administration Corps, Company B, 48th Armored Medical 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 2215. For convenience of reference please place that number in brackets at the end of the order: (ETO 2215).

Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 37, 2 Jun 1944)

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

BOARD OF REVIEW

11 MAY 1944

ETO 2216

U N I T E D S T A T E S	5TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Camp Ballyedmond, County Down, Northern Ireland, 10 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private LAWRENCE E. GALLAGHER (16025712), Company M, 10th 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 58th Article of War.
Specification: In that Private Lawrence E. Gallagher, Company M, 10th Infantry, did, at Camp Ballyedmond, County Down, Northern Ireland, on or about 3 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Belfast, County Antrim, Northern Ireland, on or about 27 February 1944.

CHARGE II: Violation of the 93d Article of War.
Specification 1: In that * * *, did, on or about 30 November 1943, with intent to defraud, falsely make and forge the indorsement of E. L. Britton, 1st Lieutenant, Company M, 10th Infantry, upon a certain check dated 30 November 1943 in the amount of seventy-five dollars ($75.00) and drawn by said Lawrence E. Gallagher upon the Newberry State Bank, Newberry, Michigan, which said check was a writing of a private nature, which might operate to the prejudice of another.

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Specification 2: In that * * *, did, on or about 7 December 1943, with intent to defraud, falsely make and forge the indorsement of L. E. Britton, 1st Lieutenant, Company M, 10th Infantry, upon a certain check dated 7 December 1943 in the amount of one hundred dollars ($100.00) and drawn by said Lawrence E. Gallagher upon the Newberry State Bank, Newberry, Michigan, which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 3: In that * * *, did, on or about 13 December 1943, with intent to defraud, falsely make and forge the indorsement of E. L. Britton, 1st Lieutenant, Company M, 10th Infantry, upon a certain check dated 13 December 1943 in the amount of two hundred dollars ($200.00) and drawn by said Lawrence E. Gallagher upon the Newberry State Bank, Newberry, Michigan, which said check was a writing of a private nature, which might operate to the prejudice of another.

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

Specification 1: (Stricken on motion of trial judge advocate).

Specification 2: In that * * *, did, at Belfast, County Antrim, Northern Ireland, on or about 20 December 1943, without proper authority, appear in civilian clothing.

ADDITIONAL CHARGES

CHARGE: Violation of the 93d Article of War.

Specification 1: In that * * *, did, on or about 24 December 1943, with intent to defraud, falsely make and forge the indorsement of E. L. Britton, 1st Lieutenant, Company M, 10th Infantry, upon a certain check dated 24 December 1943 in the amount of two hundred dollars ($200.00) and drawn by said Lawrence E. Gallagher upon The Newberry State Bank, Newberry, Michigan, which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that * * *, did, on or about 31 December 1943, with intent to defraud, falsely make and forge the indorsement of E. L. Britton, 1st Lieutenant, Company M, 10th Infantry, upon a certain check dated 31 December 1943 in the amount of one hundred dollars ($100.00) and drawn by said Lawrence E. Gallagher upon Newberry State Bank, Newberry, Michigan, which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 3: (Disapproved)
Specification 4: (Disapproved)

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for six 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 disapproved the findings of guilty of Specifications 3 and 4 of the Additional Charge; approved only so much of the findings of guilty of the Specification of Charge I and of Charge I as involved a finding of guilty of absence without leave from 3 December 1943 to 27 February 1944 in violation of Article of War 61; approved only so much of the sentence as provided for 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 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. Accused's guilt of forging Lieutenant Britton's indorsement to the checks (Pros.Exs. C,D,E,F,G) was proved by substantial evidence:

> "A person who is recently in possession of and attempts to sell or obtain money on a forged instrument is presumed to have forged it. Although, no witness actually saw accused forge the checks, where it was shown that he cashed them, and the court had the checks before it, the evidence is sufficient to support conviction. CM 120113 (1918)."
> (Dig.Op.JAG, 1912-1940, sec.451(27), p.319).

(See also: 2 Wharton's Criminal Law - 12th Ed., sec.933, p.1233, sec.875, p.1181; 26 C.J., sec.140, p.972).

There is substantial evidence which justified the court inferring that accused intended to defraud the Northern Bank upon delivering the checks bearing Lieutenant Britton's forged indorsements (Underhills Criminal Evidence - 4th Ed., sec.683, p.1286; 26 C.J., sec.17, p.903, sec.144, p.974). The fact that Lieutenant Britton might not have been exposed to a financial loss because of the forgery of his name as an indorser is not material (United States v. Phyler, 222 U.S. 15, 56 L.Ed., 70). It is sufficient that the presence of his purported signatures on the checks might expose him to an action of assumpsit or to a suit for damages for deceit (2 Wharton's Criminal Law - 12th Ed., sec.887, p.1190, sec.893, p. 1203; 26 C.J., sec.20, p.906).

4. Accused is 25 years five months of age. He enlisted 17 September 1940 at Fort Brady, Michigan for three years. Service period governed by Service Extension Act of 1941. He had no prior service.

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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. 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. Forgery is a penitentiary offense under secs.22-1401 (6:86) and 24-401 (6:401) District of Columbia Code. Confinement of accused in the United States Penitentiary, Lewisburg, Pennsylvania is authorized (Cir.291, WD, 10 Nov 1943, sec.V, pars. 3a and b.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 11 MAY 1944 TO: Commanding General, 5th Infantry Division, APO 5, U.S. Army.

1. In the case of Private LAWRENCE E. GALLAGHER (16025712), Company M, 10th 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. It is noted that the conviction of desertion, Charge I and Specification, was reduced to absence without leave on the recommendation of your Staff Judge Advocate who states "This is in accord with recent holdings of the Board of Review, ETOUSA."

The evidence shows that this accused was absent for 86 days, that he was apprehended in Belfast where he was living in a private residence, that during his absence he forged several checks and committed frauds involving $675, and that while in Belfast he appeared in civilian clothes. These circumstances in connection with the long absence sufficiently prove desertion, and such findings would not be disturbed by this office. The case is in no way similar to CM ETO 1567, Spicocchi and CM ETO 1395, Saunders. It is more similar to that of Private Robert Artwell, Company "L", 10th Infantry, (CM ETO 1691) in which the Board of Review, because of the attending circumstances, upheld two convictions of desertion involving absence without leave for 26 and 50 days respectively.

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 2216. For convenience of reference please place that number in brackets at the end of the order: (ETO 2216).

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 2260

11 MAY 1944

U N I T E D S T A T E S)	82ND AIRBORNE DIVISION.
)	
v.)	Trial by G.C.M., convened at Division
)	Headquarters, 82nd Airborne Division,
Private GUY L. TALBOTT, Jr.,)	APO 469, U. S. Army, 22, 29 April
(34671402), Company "E",)	1944. Sentence: Dishonorable discharge,
401st Glider Infantry.)	total forfeitures and confinement at
)	hard labor for three years. The
)	Federal 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 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 Guy L. Talbott, Jr., Company "E", 401st Glider Infantry, did, at Leicester, Leicestershire, England, on or about 29 March 1944, feloniously take, steal, and carry away two one pound notes, three ten shilling notes, ten shillings in silver, all lawful money of England, value about $16.00, one ring box, value about 40 cents, one gold wedding ring, value about $16.00, one gold solitaire ring, value about $14.00, and one gold solitaire ring with platinum setting, value about $33.60, all of the aforesaid being of a total value of about $80.00, the property of Mrs. Annie Rabbitt.

He pleaded not guilty to the Charge and its Specification and was found guilty of the Specification except the words "40 cents, $16.00, $14.00, $33.60, and

$80.00" substituting therefor, respectively, the words "35 cents, $12.00, $35.00, $70.00, and $117.35," of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be 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 returned the record of trial to the court to reconsider its findings and sentence, as its findings of the value of the property alleged to have been stolen exceeded the value alleged in the Specification. The court reconvened and found accused guilty of the Specification except the words "40 cents, one gold wedding ring, value about $16.00" and "$80.00", substituting therefor, respectively the words "35 cents, one gold wedding ring, value about $12.00" and "$75.95", of the excepted words not guilty, of the substituted words guilty, and guilty of the Charge. The court in closed session adhered to its former sentence. The reviewing authority approved the sentence but reduced the period of confinement to three years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, directed that pending accused's transfer to the designated place of confinement he be confined in 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. The charge sheet shows that accused is 19 years of age, that he was inducted 6 April 1943 and assigned to Company E, 401st Glider Infantry, 16 November 1943.

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 as approved.

5. Confinement in a penitentiary is authorized for the offense of larceny of $50.00 or more (AW 42; 18 U.S.C. 466). As accused is under 31 years of age and the sentence is under 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. 11 MAY 1944 TO: Commanding General, 82nd Airborne Division, APO 469, U. S. Army.

1. In the case of Private GUY L. TALBOTT, Jr., (34671402), Company "E", 401st Glider 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 as approved, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In accordance with existing policies, the dishonorable discharge might well be suspended and Disciplinary Training Center #2912, Shepton Mallet, Somerset, England, designated as the place of confinement so that the soldier may not escape combat service. I so recommend.

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 2260. For convenience of reference please place that number in brackets at the end of the order: (ETO 2260).

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 2273

15 MAY 1944

U N I T E D S T A T E S)	5TH INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at Kilkeel,
)	County Down, Northern Ireland,
Private ROY A. SHERMAN)	13 April 1944. Sentence: Dishonor-
(15056710), Company M,)	able discharge, total forfeitures and
10th Infantry.)	confinement at hard labor for eight
)	years. The 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. He was tried upon the following charges and specifications:

CHARGE I: Violation of the 93d Article of War.
Specification 1: In that Private Roy A. Sherman, Company M, 10th Infantry, did, at Kilkeel, County Down, Northern Ireland, on or about 13 November 1943, with intent to defraud, falsely indorse with the signature Capt. Charley Pennington a certain check in the amount of twenty-five dollars ($25.00) payable to cash, signed Roy A. Sherman, and drawn upon the First National Bank, New Carlisle, Ohio, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

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Specification 2: In that * * *, did, at Kilkeel, County Down, Northern Ireland, on or about 14 December 1943, with intent to defraud, falsely indorse with the signature Porter Depew, Capt., a certain check dated 12-14-43 in the amount of fifty dollars ($50.00) payable to cash, signed Roy A. Sherman, and drawn upon First National Bank, New Carlisle, Ohio, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that * * *, did, at Kilkeel, County Down, Northern Ireland, on or about 31 December 1943, with intent to defraud falsely indorse with the signature Capt. Harry Davis a certain check dated 31 December 1943 in the amount of fifty dollars ($50.00) payable to cash, signed Roy A. Sherman, and drawn upon The First National Bank, New Carlisle, Ohio, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

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

Specification 1: In that * * *, did, at Kilkeel, County Down, Northern Ireland, on or about 13 November 1943, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check in the amount of twenty-five dollars ($25.00) payable to cash, signed Roy A. Sherman, and drawn upon The First National Bank, New Carlisle, Ohio, and having the indorsement "Capt. Charley Pennington", said check being a writing of a private nature which might operate to the prejudice of another and which said indorsement was, as he, the said Private Roy A. Sherman, then well knew, falsely made and forged.

Specification 2: In that * * *, did, at Kilkeel, County Down, Northern Ireland, on or about 14 December 1943, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 12-14-43 in the amount of fifty dollars ($50.00) payable to cash, signed Roy A. Sherman, and drawn upon First National Bank, New Carlisle, Ohio, and having the indorsement "Porter Depew, Capt.", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Roy A. Sherman, then well knew, falsely made and forged.

Specification 3: In that * * *, did, at Kilkeel, County Down, Northern Ireland, on or about 31 December 1943, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 31 December 1943 in the amount of fifty dollars ($50.00) payable to cash, signed Roy A. Sherman, and drawn upon The First National Bank, New Carlisle, Ohio, and having the indorsement "Capt.Harry Davis", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Roy A. Sherman, then well knew, falsely made and forged.

Specification 4: In that * * *, did, at Banbridge, County Down, Northern Ireland, on or about 16 November 1943, wrongfully and in violation of Circular Number 88, Headquarters European Theater of Operations, United States Army, dated 3 November 1943, marry without proper authority.

Specification 5: In that * * *, did, at Banbridge, County Down, Northern Ireland, on or about 16 November 1943, procure R. C. Cupples, Registrar of Marriages for the District of Banbridge, County Down, Northern Ireland, to perform a marriage ceremony uniting in marriage the said Private Roy A. Sherman and one Annie Gilliland, by falsely representing to the said R. C. Cupples that permission to marry had been granted the said Private Roy A. Sherman by the commanding officer of said Private Roy A. Sherman, which representation was false and was then and there known by the said Private Roy A. Sherman to be false.

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Specification 6: In that * * *, did, at Banbridge, County Down, Northern Ireland, on or about 18 January 1944, wrongfully and in violation of standing security and censorship regulations mail a letter without passing through United States Army censorship.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for 9 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 for eight years at such place as the reviewing authority may direct. 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. Concerning the specifications, Charge I and Specifications 1, 2 and 3, Charge II, the evidence for the prosecution shows that on 13 November 1943, the accused requested Mr. Arthur Hill Lloyd, Cashier, Provincial Bank, Kilkeel, County Down, Ireland, to cash a check for $25.00, dated ----, 1943, drawn on The First National Bank, New Carlisle, Ohio, payable to "Cash", signed and indorsed by the accused, and bearing, as a second indorsement, immediately below the accused's, the purported signature of "Capt. Charley Pennington, A.P.O.#5." The accused showed Mr. Lloyd "his dog tags" and identification card. The cashier testified,

> "I saw it was indorsed by an officer -- purporting to be an officer as far as I knew -- and I just paid him the money." (R6,7; Ex.A).

On 15 December 1943, Mr. Lloyd cashed for the accused a check for $50.00 drawn on First National Bank, New Carlisle, Ohio, dated "12-14-43," payable to cash, signed and indorsed by the accused, and bearing, as a second indorsement, immediately below the accused's, the purported signature of "Porter Depew Capt" (R7;Ex.B). On 31 December 1943 Mr. Lloyd cashed for the the accused a check for $50.00 drawn on The First National Bank, New Carlisle, Ohio, date 31 December 1943, payable to cash, signed and indorsed by the accused and bearing, as a second indorsement, immediately below the accused's, the purported signature of "Capt. Harry Davis" (R7-8; Ex.C). All three checks were cashed at the office of the Provincial Bank, Kilkeel (R8).

Recalled as a witness by the court, after the prosecution and the defense had both rested, Mr. Lloyd testified that the checks "were returned from America within the last month." When cashed at banks other than those on which they were drawn, checks were sometimes returned from drawees to such other banks.

"There is one way of returning them if there is not sufficient funds in the bank, or if the indorsement is not correct, or if the date is not correct. But that answer is specified on the check. Wrong date or insufficient funds or indorsement irregular." (R19).

The reason for the return is specified on the check

"or pinned to the check with a slip. In our country the answer is written on the check. Apparently in your country--there is a slip comes with the answer on the slip." (R18).

First Lieutenant Frank L. Bradley, 10th Infantry, testified that he had been stationed at Camp Ballyedmond, Northern Ireland, since 21 January 1944 on which date he took command of the company to which accused belonged. He had known accused since that time. With reference to the existence or identity of the officers whose names appeared as indorsements on the three checks described above, the only evidence produced at the time was elicited from this witness. In its entirety, it follows:

"Q. Did you have occasion to inquire into the whereabouts of certain officers whose names appear on indorsed checks?
A. I have
Q. I call your attention to the name Captain Charley Pennington and ask you whether or not you have been able to determine whether there is such a person?
A. There is no such officer as Captain Charley Pennington in the 5th Division. There is a private in my organization, Private Charley Pennington.
Q. Private Charley Pennington?
A. Yes, sir.
Q. Now, concerning the name of Porter Depew, Captain, what is the status as to that officer?
A. There is no Captain Porter Depew in the 5th Division.
Q. And Captain Harry Davis?
A. There is no such person as Captain Harry Davis." (R13-14).

4. Concerning Specifications 4,5 and 6, Charge II, the evidence for the prosecution shows that on 8 November 1943 accused gave notice to Mr. Robert Cameron Cupples, Registrar of Marriages, Banbridge, County Down, Northern Ireland, of his intended marriage to Annie Gilliland, Ballymoney,

Banbridge. "Regarding American soldiers," the resgistrar testified, "they have to have permission in writing before they can be married" (R9). He could not remember, however, from whom they were required to obtain that permission, except that it must be an officer, of what rank he had no recollection, and that such permission was required to accompany the soldier's application to the registrar of marriages. Mr. Cupples testified:

> "I don't remember whether I took the notice first or not, but I told him that before I could go any further I would have to have the permission in writing before he could be married. * * * I think I said he would have to go to some of his officers first; that they would know the procedure in this case. * * * I can't recollect whether he brought the permission on the day he was to be married or not, but he had the note before he was married at any rate." (R10).

The note referred to by the registrar was identified by him as the following written document, which was received in evidence as Pros.Ex.D:

> "10th Infantry
> Ballyewdards Camp
> U.S. Army.
>
> 15.11.43
>
> This is to certify that Pte 1st class R. Sherman. No 15056710 is unmarried and has my permission to marry on any definite period
>
> Signed
> G. Prophets Captain"

On the date of the trial there was no such officer as Captain G. Prophets in the 5th Division (R14). On 16 November 1943 the registrar performed the marriage ceremony for accused and Annie Gilliland (R9-12; Exs.D,E).

On 18 November 1943 there was posted in a civilian mail box at Banbridge, County Down, Northern Ireland, an air mail letter, written by the accused on that date and addressed to Mrs. L. A. Cook, New Carlisle, Ohio. In the letter, which began, "Dear Sister & all," the accused wrote, "The army would not let me get married so I got married anyway * * *."(R15; Ex.F). The court took judicial notice of Circular 88, Hq ETO 3 Nov 1943, particularly that portion of paragraph 2 thereof providing:

> "No military personnel on duty in any foreign country or possession may marry without the

approval of the commanding officer of the United States Army forces stationed in such foreign country or possession." (R16).

The court also took judicial notice

"of the fact that posting mail in other than military receptacles is prohibited by the regulations existing in ETO." (R17).

5. No evidence was presented for the defense and the accused elected to remain silent after his rights as a witness were explained to him.

6. The three specifications of Charge I, and Specifications 1,2 and 3, Charge II, allege respectively the making and uttering of three checks, each signed by the accused as maker, drawn on the First National Bank, New Carlisle, Ohio, payable to cash and bearing the forged indorsement of a different name in each instance, each designating the purported indorser as a captain. The proof shows that accused cashed the three checks, indorsed as alleged, at the Provincial Bank, Kilkeel; that all three were subsequently returned to the Provincial Bank by the drawee bank; and that on the date of the trial - 13 April 1944 - there was no officer in the 5th Division of the same name as any of the three indorsed respectively on the three checks.

"An indorsement on a check may be forged notwithstanding the check itself is not, and the writing of a fictitious name as an indorsement on a check may constitute forgery although the check, having been indorsed in blank, could have been negotiated by defendant without further indorsement." (37 CJS sec.34, p.55 (citing Milton v. U.S., 110 Fed.2d 556, 71 App.D.C., 394)).

"Failure to allege that the signature on the instrument was that of a fictitious person and proof that there was no such person constitutes no variance." (ibid., sec.68, p.83).

"It has been held that slight evidence that a name is fictitious is sufficient to shift the burden of going forward to accused. Where a signature is allegedly that of a fictitious person it is not necessary to show that there was no such person in existence anywhere at the time the writing was signed." (ibid., sec.80a, p.90).

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"Any circumstantial evidence tending to prove that the name is that of a fictitious person is likewise admissible. Thus persons so situated that they would probably know the signer if he existed may testify that they do not know of any such person. Similarly, evidence as to the result of inquiries made for persons whose names appear on an instrument is admissible to show their nonexistence, although the person making the inquiries may have been unacquainted with the place, or the search may not have been extensive." (ibid., sec.82, p.94).

"It has been held that the fictitious character of a party to an instrument need not be proved beyond a reasonable doubt, but only to a common certainty. * * * testimony by a person largely acquainted in the locality where accused represents the maker of the instrument to live that he knows of no such person sustains a conviction, accused offering no proof of the existence of such person." (ibid., sec.95, p.101).

Lieutenant Bradley, having been with the accused's division for almost three months prior to the trial, occupied a status analagous to "a person largely acquainted in the locality" where the accused may reasonably be regarded as having represented, at least by implication, that the officer-indorsers lived. Moreover, Lieutenant Bradley's testimony as to the result of inquiries made by him for the persons whose names appear as officer-indorsers on the checks was admissible to show their non-existence, although the witness was not assigned to the 5th Infantry Division at the time the offenses were committed and his testimony does not disclose the extent of his search. Notwithstanding the evidence that the names were fictitious was slight, it was sufficient to shift the burden of going forward to accused (37 CJS sec.80,p.90 (supra); CM ETO 1629, O'Donnell; CM ETO 1317, Bentley; CM ETO 527, Astrella). As to the other elements involved in the offenses of forging and uttering, as alleged, pleading and proof fall squarely within the principles announced in CM ETO 2216, Gallagher. The record supports the court's findings of guilty of Charge I and its specifications, and Specifications 1,2 and 3 of Charge II.

7. Specification 4, Charge II, alleges wrongful and unauthorized marriage in violation of Circular Number 88, Hq, ETOUSA, 3 Nov 1943. The specification states an offense in violation of Article of War 96 and the evidence supports the court's findings of guilty (CM ETO 567, Radloff; Bull, JAG, Vol.II, No.11, Nov 1943, sec.454 (67b), p.429).

8. Specification 5, Charge III, alleges procurement of the performance of the accused's marriage by false representation that permission had been granted by his company commander. Although the evidence does not show that the accused represented to the registrar that he had the permission of his company commander, it shows very definitely that he falsely represented that he had the permission of an officer and that he delivered to the registrar, for the purpose of inducing him to perform the marriage ceremony, a writing purporting to be a certificate of permission to marry, signed by a fictitious "G. Prophets, Captain." The accused was charged with and had actual knowledge of the provisions of Circular 88, in an effort to comply with which the registrar made "permission" a condition precedent to his performance of the marriage. There was clearly an implied representation by the accused that the person whose name was signed to the certificate was his commanding officer, authorized to grant the requisite permission. The record supports the findings of guilty in violation of Article of War 96.

9. Specification 6, Charge II, alleges mailing an uncensored letter in violation of standing security and censorship regulations. The court took "Judicial notice of the fact that posting mail in other than military receptacles is prohibited by the regulations existing in ETO." The offense alleged and proved falls within regulations appropriately implementing the express power of censorship conferred by the First War Power Act of 1941 (55 Stat.840; 50 USC. app.Sup.618; Cir.65, Hq, ETOUSA, 26 Aug 1943, par.2; /War Department/ Pamph.21-1: "When you are overseas"(U.S. Govt. Printing Office: 1943); CM ETO 1872, Sadlon). The record supports the findings of guilty in violation of Article of War 96.

10. The charge sheet shows that accused is 25 years of age and that he enlisted at Fort Thomas, Kentucky, 24 September 1940, for three years and that his period of service was extended by the Service Extension Act of 1941. No prior service is shown.

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

12. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (AW 42; District of Columbia Code, 22-1401 (6:86) and 24-401 (6:401); Cir. 291, WD, 10 Nov 1943, sec.V, par.3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 15 MAY 1944 TO: Commanding General, 5th Infantry Division, APO 5, U.S. Army.

1. In the case of Private ROY A. SHERMAN (15056710), Company M, 10th 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 2273. For convenience of reference please place that number in brackets at the end of the order: (ETO 2273).

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 2289

12 MAY 1944

U N I T E D S T A T E S	29TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at APO 29, U.S. Army, 19 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private JAMES W. GRIMES (20704781), Company B, 175th 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 96th Article of War.
Specification 1: In that, Private James W. Grimes, Company B, 175th Infantry, having been restricted to the limits of his company, did, at Marazion, England, on or about 16 November 1943, break said restriction by going to Birmingham, England.
Specification 2: In that, * * *, having been restricted to the limits of Bay Hotel, did, at S. Ives, England, on or about 3 February 1944, break said restriction by going to Birmingham, England.

CHARGE II: Violation of the 58th Article of War.
Specification 1: In that, * * *, did at St. Ives, England, on or about 16 November 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Birmingham, England, on or about 27 January 1944.

Specification 2: In that, * * *, did at St. Ives, England, on or about 3 February 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Birmingham, England, on or about 3 April 1944.

CHARGE III: Violation of the 94th Article of War.
Specification: In that, * * *, did, at St. Ives, England, on or about 3 February 1944, feloniously take, steal and carry away one pair of Parachute Boots of the value of about $5.44, and one O.D. Flannel Shirt of the value of about $4.22, property of the United States, furnished and intended for the military service thereof.

CHARGE IV: Violation of the 93rd Article of War. (Finding of Not Guilty).
Specification: *(Finding of Not Guilty).

He pleaded not guilty and was found guilty of Charges I, II and III and their specifications and not guilty of Charge IV and its Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for ten 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 20 years. The reviewing authority approved the sentence, 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 charge sheet shows that accused is 26 years of age, that he enlisted on 6 February 1941 at Des Moines, Iowa to serve for three years. He had prior service: 2 May 1938 to 10 Nov 1938, Company A, 168th Infantry, National Guard.

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 punishment for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58) and confinement may be in a penitentiary (AW 42). Confinement in the United States Penitentiary, Lewisburg, Pennsylvania, is authorized (Cir. 291, WD, 10 Nov 1943, sec.V, pars.3a and b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 12 MAY 1944 TO: Commanding General, 29th Infantry Division, APO 29, U.S. Army.

1. In the case of Private JAMES W. GRIMES (20704781), Company B, 175th 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 2289. For convenience of reference please place that number in brackets at the end of the order: (ETO 2289).

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 2293

16 MAY 1944

U N I T E D S T A T E S)	5TH INFANTRY DIVISION.
)	
v.)	Trial by G.C.M., convened at Tollymore Park, County Down, Northern Ireland, 19 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. The United States Penitentiary, Lewisburg, Pennsylvania.
Private ARTHUR A. MILLS (15014375), Company M, 10th Infantry.)	

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 58th Article of War.
Specification: In that Private Arthur A. Mills, Company M, 10th Infantry did, at Camp Ballyedmond, County Down, Northern Ireland on or about 23 January 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Goraghwood Station, County Armagh, Northern Ireland on or about 18 March 1944.

CHARGE II: Violation of the 96th Article of War.
Specification: In that * * * did, at Dungannon, County Antrim, Northern Ireland, on or about 11 February 1944, without proper authority, appear in the uniform of an officer of the Army of the United States.

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ADDITIONAL CHARGES

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

Specification 1: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, falsely indorse with the signature "1st Lt John L. Knoblock" a certain check in the amount of two hundred dollars ($200.00), dated 10 February 1944, payable to cash, signed Clyde D. Foulsham and drawn upon the Second National Bank of Springfield, Ohio, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, falsely indorse with the signature "1st Lt John L. Knoblock" a certain check in the amount of two hundred and twenty-five dollars ($225.00), dated 10 February 1944, payable to cash, signed Tabor H. Benton and drawn upon the Brooklyn Trust Company, Brooklyn, New York, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, falsely indorse with the signature "1st Lt John L. Knoblock" a certain check in the amount of two hundred dollars ($200.00), dated 10 February 1944, payable to cash, signed Henry W. Castle and drawn upon the First National Bank, New York, New York, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 4: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, falsely indorse with the signature "1st Lt John L. Knoblock A.P.O. 2" a certain check in the amount of two hundred dollars ($200.00), dated 11 February 1944, payable to cash, signed James E. Webb and drawn upon the First National Bank, Cleveland, Ohio, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 5: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, falsely indorse with the signature "John L. Knoblock 1st Lt A.P.O. 2" a certain check in the amount of two hundred dollars ($200.00), dated 11 February 1944, payable to cash, signed John L. Knoblock and drawn upon the Second National Bank, Battle Creek, Michigan, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

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

Specification 1: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated Feb 10 - 44 in the amount of two hundred dollars ($200.00) payable to cash, signed Clyde D. Foulsham, and drawn upon the Second National Bank, Springfield, Ohio, and having the indorsement "1st Lt John L. Knoblock", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Arthur A. Mills, then well knew, falsely made and forged.

Specification 2: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated Feb. 10, 1944 in the amount of two hundred and twenty-five dollars ($225.00) payable to cash, signed Tabor H. Benton, and drawn upon the Brooklyn Trust Company, Brooklyn, New York, and having the indorsement "1st Lt John L. Knoblock", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Arthur A. Mills, then well knew, falsely made and forged.

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Specification 3: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated Feb 10, 1944 in the amount of two hundred dollars ($200.00) payable to cash, signed Henry W. Castle, and drawn upon the First National Bank, New York, New York, and having the indorsement "1st Lt John L. Knoblock", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Arthur A. Mills, then well knew, falsely made and forged.

Specification 4: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 11 Feb 1944 in the amount of two hundred dollars ($200.00) payable to cash, signed James E. Webb, and drawn upon the First National Bank, Cleveland, Ohio, and having the indorsement "1st Lt John L. Knoblock A.P.O.2", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Arthur A. Mills, then well knew, falsely made and forged.

Specification 5: In that * * *, did, at Dungannon, County Armagh, Northern Ireland, on or about 11 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 11 Feb 1944 in the amount of two hundred dollars ($200.00) payable to cash, signed John L. Knoblock, and drawn upon the Second National Bank, Battle Creek, Michigan, and having the indorsement "John L. Knoblock 1st Lt A.P.O. 2", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Arthur A. Mills, then well knew, falsely made and forged.

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 30 years, at such place as the reviewing authority may direct. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I and of Charge I as involves a finding of guilty of absence

without leave from 23 January 1944 to 18 March 1944, in violation of Article of War 61, approved the sentence, 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 charge sheet shows that accused is 24 years of age, that he enlisted 24 October 1940 at Fort Hayes, Columbus, Ohio for a service period of three years, now 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 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 (CM ETO 2273, Sherman; CM ETO 2216, Gallagher).

5. Confinement in a penitentiary is authorized for the offenses of forgery and uttering a forged instrument (Secs.22-1401 (6:86) and 24-401 (6-401) District of Columbia Code)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania is correct (Cir.291, WD, 10 Nov 1943 sec.V, pars.3a and b).

B. Franklin Riter Judge Advocate

Richard Burkhardt Judge Advocate

Ellwood W. Kingsley Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 16 MAY 1944 TO: Commanding General, 5th Infantry Division, APO 5, U.S. Army.

1. In the case of Private ARTHUR A. MILLS (15014375), Company M, 10th 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. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The accused was absent for 55 days. The evidence is substantial that the forgery and uttering of the checks and the resultant procurement of over one thousand dollars from the bank was part and parcel of accused's scheme to finance his trip to the Irish Free State where he spent nearly five weeks. He secured civilian clothes and was dressed in same when apprehended upon his return crossing of the Free State boundary line. These facts would sustain a finding of desertion and would have been upheld by the Board of Review and myself. The comment of the Staff Judge Advocate: "Under the recent holdings of the Board of Review, ETO, the evidence is not sufficient to sustain the finding of desertion under Charge I * * *" is not justified. CM ETO 1567, Spicocchi and CM ETO 1395, Saunders in no manner or degree resemble this case. The holdings of the Board of Review have consistently upheld the charge of desertion upon facts resembling those revealed by this record. (See CM ETO 1691, Artwell.)

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 2293. For convenience of reference please place that number in brackets at the end of the order: (ETO 2293).

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 2297

1 JUL 1944

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.)	
Privates MANUEL JOHNSON JR. (34230424), 762nd Chemical Depot Company (Aviation) and IRVIN R. LOPER (33551918), 4087th Quartermaster Service Company.)	Trial by G.C.M., convened at Sudbury, Staffordshire, England, 3 April 1944. Sentence: Each accused, 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 soldiers named above has been examined by the Board of Review.

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

JOHNSON

CHARGE: Violation of the 93rd Article of War.
Specification: 1 In that Private Manuel Johnson Jr., 762nd Chemical Depot Company (Aviation), did, on a passenger train on the London, Midland, and Scottish Railway, between Derby and Egginton, Derbysnire, England, on or about 4 March 1944, with intent to commit a felony, viz, murder, commit an assault upon Staff Sergeant Clayton R. Geib, Junior by willfully and feloniously striking him about the head and face with his hands and fists, and by pushing the said Staff Sergeant Clayton R. Geib, Junior off of a moving train.
Specification 2: In that * * *, did, on a passenger train on the London, Midland, and Scottish Railway, between Derby and Egginton, Derbyshire, England, on or about 4 March 1944, with intent to commit a felony, viz, murder, commit an

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assault upon Private Edward V. Donovan by willfully and feloniously striking him about the head and face with his hands and fists, and by pushing the said Private Edward V. Donovan off of a moving train.

LOPER

CHARGE: Violation of the 93rd Article of War.
Specification 1: In that Private Irwin R. Loper, 4087th Quartermaster Service Company, did, on a passenger train on the London, Midland, and Scottish Railway, between Derby and Egginton, Derbyshire, England, on or about 4 March 1944, with intent to commit a felony, viz, murder, commit an assault upon Staff Sergeant Clayton R. Geib, Junior by wilfully and feloniously striking him about the head and face with his hands and fists, and by pushing the said Staff Sergeant Clayton R. Geib, Junior off of a moving train.
Specification 2: In that * * *, did, on a passenger train on the London, Midland, and Scottish Railway, between Derby and Egginton, Derbyshire, England, on or about 4 March 1944, with intent to commit a felony, viz, murder, commit an assault upon Private Edward V. Donovan by wilfully and feloniously striking him about the head and face with his hands and fists, and by pushing the said Private Edward V. Donovan off of a moving train.

The accused, in open court, consented to be tried together. Each pleaded not guilty to and each was found guilty of the Charge and specifications preferred against him. Evidence was introduced against accused Johnson of three previous convictions; two by summary court for absence without leave for part of one day and one day, respectively, and one by special court-martial for absence without leave for two days, all in violation of the 61st Article of War. Evidence was introduced against accused Loper of one previous conviction by special court-martial for disobedience of a lawful order of a non-commissioned officer in violation of the 65th Article of War. Each 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 the sentence, 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 in this case establishes the following facts:

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On the night of 4 March 1944, two white American soldiers, Staff Sergeant C. R. Geib Jr. and Private E. V. Donovan entered a compartment of an English train at the station in Derby, England, to proceed to their respective destinations (R9,10). An American negro soldier was seated in the same compartment. After Geib and Donovan entered the compartment the negro soldier left but soon returned with other negro soldiers. The number of colored soldiers who entered the compartment was variously estimated at from eight to twenty. Among them were the accused Johnson and Loper. The compartment extended across the width of the car and was constructed to seat 12 persons (R9,10,13). It was completely dark (R11). Johnson had been seated elsewhere on the train but left this seat for one in the compartment occupied by Geib and Donovan when told there were two "patties" (white soldiers) in there. After the train departed from Derby Station the negro soldiers began to question the white soldiers regarding their furlough status and the section of the United States from whence they came. Feigning dissatisfaction with the answers, the negroes set upon the white soldiers by striking them with their fists. Certain of the negroes applied profane epithets to the white men and termed them "white bastards". Others said, "Lets finish them off and slit their throats". The train stopped at a switch and the white soldiers endeavoured to leave the compartment, which had a door at each side. The negroes prevented them from leaving (R9,12,16,17,35,36). When the train was again in motion the colored soldiers resumed the beating and slapping of Geib and Donovan (R14). After it had attained a speed, estimated by one witness at sixty miles per hour, the two white soldiers were physically ejected from the moving train by the negroes (R9,12,14,16,35,36).

Johnson as witness in his own behalf admitted participating in the assault on the two white soldiers and assisting in their ejection from the train (R43). In an extra-judicial statement, admitted in evidence as Pros.Ex.5 (R33) Johnson declared that he was a member of the group of colored soldiers in the railroad car, that he joined in the assault and hit one of the white soldiers. Loper also as a witness for himself admitted he struck the white soldiers four or five times without provocation (R41-42) and in a statement made during the course of the investigation of the affair (Pros.Ex.3; R31), admitted he joined in the fight in the compartment and struck one of the white soldiers on the chin. There were blood stains on Loper's overcoat and trousers (R28-29,30). On 5 March 1944 an examination of Loper's right hand disclosed a bruised joint on his fourth finger which appeared to have been caused by striking a sharp edge of a tooth (R39). The white soldiers were found by the crew of a passing train shortly thereafter (R23,24). Donovan was lying on the ground between two sets of tracks, suffering from concussion, shock, lacerations to the head, face and hand and a fractured nose (R25, 26). Geib was lying between the rails of a track with both ankles and his nose fractured (R25,26). They were discovered and rescued by the train crew shortly before an express train was due on the track on which Geib was lying (R23,24). Both would have been killed by the on-coming train had they not been removed to safety by the train crew (R23,24).

4. (a) - The evidence is clear and substantial that Johnson not only struck and beat Donovan and Geib, but also actively assisted in the ejection of one of them from the train (R16,17,19). Loper was identified with certainty as one of the active assailants of the two white soldiers and the proof is positive that he struck one of them four or five times. There is no evidence that he, acting alone or in conjunction with others of the colored soldiers physically ejected either of the white men from the train. The over-all evidence, however, proves beyond peradventure that both accused were active, violent participants in the unprovoked, inexcusable assault upon Donovan and Geib. They were not passive observers or mere bystanders. The legal principle governing this situation is well established:

> "But where two or more persons acting with a common intent jointly engage in the same undertaking and jointly commit an unlawful act, each is chargeable with liability and responsibility for the acts of all the others, and each is guilty of the offense committed, to which he has contributed to the same extent as if he were the sole offender. And the common purpose need not be to commit the particular crime which is committed; if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal, if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose, or as a natural or probable consequence thereof. In order to show a community of unlawful purpose it is not necessary to show an express agreement or an understanding between the parties. Nor is it necessary that the conspiracy or common purpose shall be shown by positive evidence; its existence may be inferred from all the circumstances accompanying the doing of the act, and from conduct of defendant subsequent to the criminal act; in other words, preconcert or a community of purpose may be shown by circumstances as well as by direct evidence." (16 C.J., sec.115, p.128; 22 C.J.S., sec.87a, p.155).

Under this doctrine it was not necessary for the prosecution to prove that <u>each</u> accused physically pushed Geib (Specification 1) and Donovan (Specification 2) from the moving train. All that was required was proof that the two white soldiers were forcibly ejected from the train by <u>some</u> of the members of the group of colored soldiers which attacked them and that the two accused at that time and place were engaged with the group in the attack. The accused were responsible not only for their own illegal acts but also for all illegal acts committed by other assailants in pursuance of the common purpose of molesting and inflicting bodily harm upon the two white men. Further it was not

necessary for the prosecution to prove that accused contemplated or intended that Geib and Donovan should be pushed from the train, as such acts were natural and probable consequences of the vicious and wholly indefensible assault in which the two accused actively participated. The Board of Review has heretofore approved the principle in CM ETO 804, Ogletree et al and CM ETO 895, Fred A. Davis et al, and reference is made to said holdings for an extended discussion of same.

(b) - Each accused is charged with assaulting Donovan and Geib with the intent to commit a felony, viz murder. Such charge required the prosecution to prove that each accused at the time of the assault entertained the specific intent to kill the victims (30 C.J., sec.164, p.20). However,

> "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 inferrable from the circumstances. So while the intent cannot be implied as a matter of law, it may be inferred as a fact from the surrounding circumstances, such as * * * an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result." (30 C.J., sec.165,pp.21,22).

> "Where a particular intent is an element of a felony, it is essential that one aiding and abetting the commission of such offense should have been aware of the existence of such intent in the mind of the actual perpetrator of the felony; but if accused had knowledge of the particular intent on the part of the actual perpetrator of the felony this is sufficient." (22 C.J.S., sec.87a,p.157).

There is direct and positive proof, that Johnson pushed one of the white soldiers from the train (R16,17). There is also evidence that both Johnson and Loper were active aggressive participants in the attack immediately prior to the eviction (R16-19). Each accused admitted such participation. In addition there is proof of a discussion among the coloredassailants contemplating such violent action in which Johnson and Loper each participated or were cognizant of the same (R14,43; Pros.Ex.5). These surrounding facts and circumstances afford substantial legal basis for imputing to each accused the specific intent of the particular colored soldiers who pushed Geib and Donovan from the train. The conduct of each accused immediately prior to the overt acts coupled with knowledge of the conversation on the subject is evidence of preconcert and joint design which distinguishes this case from CM 200047 (1933) Dig.Op.JAG, 1912-1940, sec. 451(13), pp.314-315. This conclusion is supported by

the principles announced in CM ETO 1052, Geddies et al.

(c) - The deliberate, premeditated eviction of Geib and Donovan from a fast moving train were acts which possess inherently the elements of criminality necessary to sustain the charge of assault with intent to commit murder. Death or most serious bodily injuries were most certain results.

> "An intent to kill may be inferred from the fact that the defendant threw the prosecutor from a rapidly moving train in a manner reasonably calculated to destroy life." Anderson v. State, 147 Ind. 445, 46 N.E. 901 (30 CJ, sec.165,p.22,fn. 32).

All of the elements of the crime charged were fully proved beyong reasonable doubt (CM ETO 78, Watts; CM ETO 1052, Geddies et al; CM ETO 1535, Cooper; CM ETO 2321, Moody).

5. During the course of the trial both accused were called as witnesses for the prosecution. With respect to accused Loper, the record of trial reveals the following preliminary proceedings:

> "The prosecution then called Private Irvin R. Loper, 4087th Quartermaster Service Company as a witness for the prosecution.
>
> Law Member: Private Loper, you are being called as a witness for the prosecution. You may decline to answer any question which might incriminate you. You will not be required to answer any question which you feel may hurt you.
>
> Prosecution: Do you have any objection to testifying before the court?
>
> Private Loper: No, sir.
>
> Prosecution: Do you have any objection to being sworn?
>
> Private Loper: No, sir.
>
> Private Irvin R. Loper, 4087th Quartermaster Service Company, was then sworn and testified as follows:" (R34).

In his testimony which followed he admitted that in the train compartment he struck Geib and Donovan. He also asserted that accused Johnson struck one of the white soldiers and threw one of them from the train. He was not asked nor did he volunteer evidence as to his participation in the actual eviction (R35).

Thereafter he appeared at his own request as a sworn witness in his own behalf and repeated his former testimony but denied that he threw either Geib or Donovan from the train (R41,43).

When accused Johnson was called to the stand the following preliminary examination occurred:

> "The prosecution then called Private Manuel Johnson, 762nd Chemical Depot Company (Aviation) as a witness for the prosecution.
> Law Member: Private Johnson, you are being called as a witness for the prosecution. You may decline to answer any question which might tend to incriminate you. You will not be required to answer any question which you feel may degrade or hurt you.
> Prosecution: Do you fully understand your rights at this time?
> Private Johnson: Yes, Sir.
> Prosecution: Do you voluntarily take the stand as a witness?
> Private Johnson: I do.
> Prosecution: Do you have any objections to being sworn?
> Private Johnson: No, sir.
> Private Manuel Johnson, 762nd Chemical Depot Company (Aviation), was then sworn and testified as follows:" (R35-36).

In his ensuing testimony he admitted leaving a seat in another car at the invitation of another colored soldier and entering, in company with about 16 colored soldiers, the compartment occupied by Geib and Donovan. He also admitted striking the white men but denied that he assisted in throwing them from the train. He stated he did not see Loper strike either Geib or Donovan but he (Loper) was in the group of four or five who threw them off the train (R37,38).

As a sworn witness in his own behalf he repeated his former (supra) testimony but also admitted that he, with three or four other colored men, pushed one of the white soldiers from the train (R43).

The Fifth Amendment to the Federal Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

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> life, liberty, or property, without due process of law;"

The questions presented by this situation are of vital importance in the administration of military justice and are of such nature as to deserve painstaking care and consideration by the Board of Review.

(a) - Applicability of the privileges and immunities guaranteed by the Fifth Amendment of the Federal Constitution to court-martial proceedings.

The doctrine has been asserted that the protective and immunity clauses of the Fifth Amendment of the Federal Constitution do not operate with respect to an accused on trial before a courts-martial. A full and complete discussion of the doctrine with plenary citation of authorities was presented by Major General Enoch H.Crowder in his testimony before a Sub-committee of the Committee on Military Affairs of the United States Senate on 24 October 1919. Reference is made to General Crowder's discussion and brief of authorities found on pages 1163-1175 of "Hearings before a Sub-committee of the Committee on Military Affairs United States Senate, 66th Congress, First Session on S.64, a Bill to Establish Military Justice". It will be there noted a doubt was cast upon the integrity of the principle by certain language used by the United States Supreme Court in Grafton v.United States, 206 U.S. 333, 51 L. Ed. 1084, as follows:

> "The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States can not withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter." (p.351; p.1090).

In the Grafton case, decided in 1907, the "double jeopardy" clause of the Fifth Amendment was indirectly considered. However, it was the Act of Congress of July 1, 1902 (32 Stat.691) providing temporarily for the administration of affairs of the Phillipine Islands which was specially and directly involved. This Act provided:

> "No person, for the same offense, shall be twice put in jeopardy of punishment".

Notwithstanding the above-quoted language the court in its opinion concluded:

> "But passing by all other questions discussed by counsel, or which might arise on the record, and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902, and for the reasons stated, the plaintiff in error, a soldier in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that territory." (p.355; p.1092).

It is therefore obvious, to quote General Crowder:

> "An analysis of Grafton v. United States shows that that case by no means disposes of the doctrine of the applicability to courts-martial of the jeopardy clause of the fifth amendment to the Constitution." (p.1174).

The reported colloquy between Senator Lenroot and General Crowder which followed General Crowder's conclusion above set forth, is interesting and illuminating:

> "Senator Lenroot. Generally, your position is that the Supreme Court has in no case decided this question?
> Gen. Crowder. I do not find that it has.
> * * * *
> Senator Lenroot. I said the Supreme Court has never passed upon it.
> Gen. Crowder. It has not passed upon the exact question, so far as I can find.
> * * * *
> Senator Lenroot. I just asked as to the question, whether it was an open question with the Supreme Court of the United States?
> Gen. Crowder. It seems to be. * * *" (pp.1174, 1175)

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Twenty-five years have passed since the foregoing exposition of this important question and during that period cases have arisen in the Federal courts which are relevant if not determinative of the question involved.

Terry v. United States, 2 Fed.Supp.962 (March 1933), applied the clause of the Fifth Amendment requiring grand jury indictment of an accused "except in cases arising in the land * * * forces" to the case where the accused had been charged under the 94th Article of War after he had been honorably discharged from the service and convicted by a general court-martial for presenting fraudulent vouchers and for embezzlement, and held that the case fell within the exception and there had been no violation of the Fifth Amendment.

Sandford v. Robbins, 115 Fed (2d) (5th Cir) 435, wherein it was claimed that the double jeopardy clause of the Fifth Amendment had not been violated by the President in ordering a new trial after disapproving the sentence on the first trial. (The case arose prior to the enactment of Article of War 50½). The court said:

> "We have no doubt that the provision of the Fifth Amendment, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb', is applicable to courts martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment, abundantly shows that such cases were in contemplation but not excepted from other provisions." (p.438).

United States ex rel Innes v. Hiatt, 141 Fed (2d) 664, involving a claim in a habeas corpus proceeding that the due process clause in the Fifth Amendment had been violated when the court-martial heard the trial judge advocate in the absence of accused. The court said:

> "We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be. The guarantee of the fifth amendment that no person shall * * * be deprived of life, liberty, or property, without due process of law, makes no exception in the case of persons who are in the

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armed forces. The fact that the framers of the amendment did specifically except such persons from the guarantee of the right to a presentment or indictment by a grand jury which is contained in the earlier part of the amendment makes it even clearer that persons in the armed forces were intended to have the benefit of the due process clause. This is not to say that members of the military forces are entitled to the procedure guaranteed by the Constitution to defendants in the civil courts. As to them due process of law means the application of the procedure of the military law. Many of the procedural safe-guards which have always been observed for the benefit of defendants in the civil courts are not granted by the military law. In this respect the military law provides its own distinctive procedure to which the members of the armed forces must submit. But the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way. We conclude that it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court-martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law and, if it so finds, to declare that the relator has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody. Accordingly the allegations of the relator must be examined to ascertain whether even if they were proved to be true it would still have to be concluded that he had failed to establish any fundamental unfairness in his trial by the court-martial which convicted him." (141 Fed (2d) Adv.Sheet May 22 1944, p.666) (Underscoring supplied)

Kahn v. Anderson, 255 U.S. 1, 65 L.Ed. 469, wherein the court held that military prisoners undergoing punishment under previous sentences imposed by courts-martial were, for offenses committed during their confinement, liable to trial and punishment by courts-martial under the Articles of War and that such trials did not infringe the guaranties as to jury trial and presentment and indictment by grand jury respectively secured by Art.1, sec.8 of the Constitution and the Fifth Amendment, and neither did such trials involve a violation of the Fifth Amendment against the deprivation of life, liberty or property without due process of law.

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Ex parte Quirin, 317 U.S. 1, 87 L.Ed. 3, holding that the Fifth and Sixth Amendments do not restrict the authority conferred by the Constitution to try offenses against the law of war by military commission and that the accused charged with such offense were lawfully placed on trial by a military commission without a jury.

The opinions in the Terry, Kahn and Quirin cases confirm the principle with respect to cases arising in the land and naval forces that the accused is not entitled to a trial by jury under Article I, sec. 8 of the Constitution nor the presentment or indictment by a grand jury guaranteed by the Fifth Amendment. Such conclusion recognizes the exception of the Fifth Amendment covering cases arising in the land and naval forces. However, this conclusion does not impinge upon the doctrine asserted in Sanford v. Robbins and United States ex rel Innes v. Hiatt, supra, that the due process and double jeopardy clauses of the Amendment apply to a defendant in criminal proceedings in a Federal military court. Considering the fact that the "non-self incrimination" clause is intermediate to the "double jeopardy" and "due process" clauses of the Amendment, it is logical to conclude that the privilege of "non-self incrimination" is also applicable to an accused on trial before a Federal military court. It is manifest, however, that the Supreme Court has not specifically decided the point and that it remains an "open question", but the tendency of judicial thought is to apply the three enumerated guaranties of the Fifth Amendment directly to an accused on trial in Federal military courts.

(b) - Relationship of 24th Article of War to non-self incrimination clause of Fifth Amendment.

The 24th Article of War in relevant part provides:

> "No witness before a military court * * * shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him."

The non-self incrimination clause of the Fifth Amendment directs:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

The term "witness" as used in the article includes without doubt an accused. (Counselman v. Hitchcock, 142 U.S. 547, 35 L.Ed. 1110; United States v. Kimball, 117 Fed. 156,160). The phrase "to incriminate himself" means the "giving of evidence or answering questions the tendency of which would be to subject one to a criminal prosecution." (Webster's New

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International Dictionary - 2nd Ed. - p.2271), or "to expose to an accusation or charge of crime; to involve oneself or another in a criminal prosecution or the danger thereof." (Bl.Law Dict.(3d Ed.) p.946).

In Sanford v. Robbins, supra, the court in considering the 40th Article of War, which provides that

> "No person shall, without his consent, be tried a second time for the same offense;"

held that such statutory prohibition was an expression by Congress of the double jeopardy immunity of the Fifth Amendment and applied the same rules of interpretation to it as are given the double jeopardy provisions of the Amendment.

In Grafton v.United States, supra, the Supreme Court considered the prohibition against double jeopardy contained in the act for the temporary administration of the Philippine Islands as the legal equivalent of the double jeopardy clause of the Fifth Amendment and applied constitutional interpretation to it.

Therefore, on the basis of the intrinsic meaning of the 24th Article of War and of precedents, it is both logical and consistent to consider the Article as the statutory equivalent of the relevant provision in the Amendment and to apply to the Article the same principles as have been applied to the non-self incriminating clause of the Amendment. Under this method of reasoning the rights and immunities under the 24th Article of War of an accused on trial before a Federal military court are identical with rights and immunities of a defendant on trial before a Federal civil court.

(c) - Violation of accuseds' rights under the 24th Article of War.

Both accused in the presence of the assembled court were called to the stand as witnesses for the prosecution and were subjected to the voir dire examinations above set forth. The record is entirely silent as to whether or not the prosecution out of the presence of the court had entered into an arrangement with each accused whereby each of them agreed to appear and testify as a prosecution's witness. Further, there is no evidence that independent of the brief voir dire examinations in open court that they were informed that they might refuse outright and without visitation upon them of penalties of any kind for their refusal of the demand of the prosecution that they take the stand as witnesses.

In considering the question presented the following principle is fundamental:

> "The guaranty that a person shall not be compelled to be a witness against himself precludes a person from being subjected to an

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> inquisition or called as a witness by the state in any judicial inquiry which has for its primary object the determination of that person's guilt or innocence of a given offense." (70 C.J. sec.888, p. 734; Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746; Lees v. United States, 150 U.S. 476, 37 L.Ed. 1150; Twining v. New Jersey, 211 U.S. 78, 53 L.Ed.97).

In order to safeguard and make effective this constitutional guaranty against self-incrimination it is the universal rule that the prosecution must not in open court, before the jury, call the accused to the stand as a witness.

> "Since that procedure could only have, as its chief effect, the emphasizing of his refusal, should he refuse, and thus the indirect suggestion of that inference against him from which he is protected by another aspect of the principle (that is the principle against self-incrimination)." (4 Wigmore, Evidence - 2nd Ed. - sec.2268).

> "Whenever the accused, because of some incident in the trial and through no fault of his, is forced to testify for fear that adverse inferences might be drawn from his failure, then he has not volunteered as a witness and has not waived his rights. Such waiver only follows where liberty of choice has been fully accorded." (Powell v. Commonwealth - Va. - 189 SE 433, 110 ALR 90,95).

Consistent with and in elaboration of the foregoing proposition, it is the almost unanimous conclusion of American courts that in the trial of a criminal case it is improper for the prosecuting attorney, or the court, in the presence of the jury, to call upon the defendant or his counsel to produce a document as being his possession (see annotation in 110 ALR p.101 for complete citation of authorities). The leading case on this subject is McKnight v. United States, 115 Fed 972, wherein the court held it to be a prejudicial infraction of the constitutional right of accused for the prosecution's attorney, upon suggestion of the court and as a basis for introduction in evidence of a copy of an agreement, to demand of the accused, in the presence of the jury, that he produce the original of the agreement. Upon a later appeal of the case after a re-trial, the Circuit Court of Appeals said in explanation of its ruling in the earlier appeal:

> "To say to a defendant in the presence of a jury 'If you do not produce such and such document, we will prove its contents by the

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> best evidence within reach', is a method of compelling a defendant to become a witness against himself, as most unjust inferences may be drawn from a refusal to comply with such a demand, and even more dangerous results from compliance. It was upon this ground that upon the former writ of error we held the defendant to have been illegally prejudiced by the demand made upon him in the presence of the jury." (McKnight v. United States, 122 Fed 926, 930).

The foregoing authorities therefore support the conclusion that the trial judge advocate committed serious error with respect to both accused Loper and Johnson when he called them to testify as witnesses for the prosecution. When he made the demand he placed them in the position of being compelled to testify for fear of adverse inferences if they refused the demands. Their appearances on the witness stand were in no sense voluntary. Voluntary action presupposes freedom of choice.

The voir dire examinations of each accused could not neutralize or remove the prejudicial effect of the infringement of their rights. The examinations came after the trial judge advocate had violated their rights by his demand that they appear as witnesses. It was the demand which inflicted the injury. In fact the examinations served to increase the compulsion visited upon them rather than to alleviate it. The trial judge advocate, defense counsel and the court exhibited their ignorance of this vital principle of criminal jurisprudence but such ignorance cannot excuse the violation of the rights of each accused not to "be compelled to incriminate himself" (AW 24) or "to be a witness against himself." (Fifth Amendment).

(d) - Effect of error upon findings of guilty.

The 37th Article of War provides, in relevant part:

> "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused." (MCM, 1928, pp.210-211).

It is apparent that the error above noted is not an "improper admission or rejection of evidence". Neither is it an error of "pleading". While it may represent an error in "procedure" within the meaning of the majority opinion of the Supreme Court in Sibbach v. Wilson, 312 U.S. 1, 85 L.Ed. 479,

the fact that the error represents a violation of a personal right having its roots deep in Anglo-American law (Twining v. New Jersey, supra) which has been protected and implemented by both constitutional prohibition (Fifth Amendment) and statutory restriction (AW 24) (see dissenting opinion in Sibbach v. Wilson), the Board of Review prefers to consider the question as to the prejudicial effect of the error upon a basis broader than that contained in the 37th Article of War.

Independent of any evidence furnished by each accused either on the occasion he appeared as an involuntary witness for the prosecution or thereafter as witness on his own behalf, the evidence in the record of trial establishes the guilt of each accused beyond all doubt. There is therefore presented the question as to whether the error - serious and fundamental as it is - requires that the findings be set aside.

The testimony of the two accused after they were sworn as witnesses for the prosecution upon demand of the trial judge advocate was of a highly inculpatory nature. Loper admitted that he was one of the group that attacked Geib and Donovan in the train compartment and that he struck the two white soldiers. Johnson likewise testified as to his participation in the mass assault on the two white men; admitted striking both of them but denied he threw either of them from the train. This extremely damaging evidence, secured in violation of the constitutional and statutory rights of each accused, cannot be considered in determining their guilt. It is the type and kind of evidence against which the 24th Article of War was aimed. Had the trial stopped at this point, the Board of Review would have had no alternative except to set aside the findings of guilty.

After the prosecution had closed its case in chief, each accused was properly instructed by the court as to his rights and each elected to appear as a defense witness. Loper repeated his testimony given as a prosecution's witness, but denied he threw either Geib or Donovan from the train. Johnson, likewise, repeated his testimony given as a witness for the prosecution but this time admitted that he assisted three or four other colored soldiers in pushing one of the white soldiers from the train.

The facts thus revealed radically affects the error above noted. It is not the situation which ordinarily requires the annulling of a judgment of conviction because of violation of the rule which prohibits the prosecution from calling an accused to the stand as its witness, when the court-martial is sitting in open session. That situation envisions an accused immediately faced with the necessity of deciding whether he will assert his privilege and refuse the prosecution's demand to take the stand or comply with it in order to protect himself from unfavourable inferences which might arise from his refusal. In the latter alternative he is compelled to assume the role of witness in order to deny the inferences of guilt, which might arise through his silence. By force of the prosecution's demand he is stripped of his right to remain silent and his right to rest his defense on the presumption of his innocence is de-

stroyed. Conversely, he is forced to become a protagonist of his innocence (Cf: Wilson v. United States, 149 U.S. 60,66, 37 L.Ed. 650,651,652). It is this unfair process which the rule seeks to prevent. Manifestly, when this condition does not exist the reason for considering a violation of the rule as prejudicial disappears. Had each accused in this case, after he had testified as witness for the prosecution, in response to the demand of the trial judge advocate, assumed the stand as witness in his own behalf and either attempted to explain or mitigate his forced inculpatory testimony as prosecution's witness, the situation presented would have required the Board of Review to consider the error as highly prejudicial. Such condition does not prevail in this case. Each accused as witness in his own behalf confirmed his former testimony and testified to facts which were highly inculpatory - facts when considered individually as to each accused are equivalent to a confession in open court. In addition there was admitted in evidence, previous to the calling of Loper and Johnson to the stand as prosecution's witnesses, without objection, extra-judicial statements (Pros.Exs.5 and 6) of each accused in which each of them admitted their participation in the mass assault upon Geib and Donovan and thereby fixed on themselves responsibility for the ultimate felonious assaults with which they are charged. Under such circumstances, an assertion that the violation of the right of each accused not to be a witness against himself constitutes reversible error, obviously becomes absurd. The prejudicial error resultant upon the demand of the trial judge advocate that each accused testify as a witness for the prosecution is robbed of its damaging effect and becomes non-prejudicial and innocuous. Such conclusion is well within the ambit of the principle of authoritative decisions which hold that error of the nature involved in this case may be vitiated by subsequent events occurring or subsequent conduct of the accused at the trial (McKnight v. United States, 122 Fed 926; Hannish v. United States, 227 Fed 584,586, Cert. denied 239 U.S. 645, 60 L.Ed. 484; Bain v. United States, 262 Fed 664, Cert. denied 252 U.S. 586, 64 L.Ed. 729; Gridley v. United States, 44 Fed (2d) 716, Cert. denied 283 U.S. 827, 75 L.Ed. 1441). The Board of Review therefore concludes that although error was committed in compelling each accused to be sworn and testify as witness for the prosecution, that such error, under the facts and circumstances revealed by the record of trial, was non-prejudicial.

6. A further question arises out of the action of the trial judge advocate in calling each accused to the stand as a witness for the prosecution. The separate charges against each accused were, with their consent, tried simultaneously before the same court. In practical effect, Loper became a witness for the prosecution against Johnson in the trial of his case, and Johnson became a witness for the prosecution against Loper in the trial of his case. Was this procedure authorized? Relevant to this situation is the following Act of Congress:

> "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United

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States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." (Act Mar. 16,1878, c.37; 20 Stat.30; 28 USCA sec.632).

The above statute has been construed as follows:

"This statute in terms makes a defendant a competent witness. The statute does not say 'a competent witness for himself'. It does not say 'a competent witness for the government'. He is made simply 'at his own request, but not otherwise,' a competent witness. It would clearly be improper for the government, while he was on trial, in the absence of a request on his part, to call him as a witness. The purpose of the law was to make defendants competent witnesses, but at the same time preserve to them the right to remain silent without prejudice. When any defendant chooses to testify, the statute permits him to do so. It does not matter whether his testimony is for or against himself, or for or against his co-defendant. The only limitation in the statute is that he shall not be made a witness except on his own request. Being sworn as a witness at his own request, he is amenable, generally, to the rules governing other witnesses. He could testify against or for his co-defendant on trial with him, because the only reason why he could not do so at common law was that he was a party to the record, and interested in the case. In other words, the only common-law reason for his exclusion was that he was a defendant also on trial. The statute clearly removes that objection. The fact that two defendants were on trial does not prevent the statute applying. There is nothing in it to confine its operation to cases where but a single defendant is named in the indictment." (Wolfson v. United States, 101 Fed (5th Cir) 430,436; Cert. denied 180 U.S. 637, 45 L.Ed. 710).

"This act renders any of a plurality of defendants on trial competent to testify either in his own behalf, or on behalf of any co-defendant, or the government, provided only

that he testifies at his own request."
(Heitler v. United States, 244 Fed (7th Cir) 140,141).

"The provision of the statute * * * to the effect that a defendant in a criminal case shall, at his own request but not otherwise, be a competent witness, does not make the competency of one defendant as a witness dependent upon the consent of a co defendant."
(Rowan v. United States, 281 Fed (5th Cir), 137,139; Cert. denied 260 U.S. 721, 67 L.Ed. 481).

In each of the foregoing cases the quoted statute was applied to cases in which the witness had been indicted and was being tried jointly with other co-defendants. The quoted statements of the court must be considered in view of such circumstances. In the instant case, each accused was charged separately with the offenses of assault with intent to commit murder but, with their respective consents, were tried together. As has been hereinbefore demonstrated, neither Loper nor Johnson was a witness "at his own request" but each was forced to the stand under circumstances which amounted to compulsion.

Two questions arise with respect to the admissibility of Loper's testimony against Johnson and Johnson's testimony against Loper:

a. Does the above-quoted statute govern the admissibility of the testimony of each accused as against his co-accused?

b. If not, was each accused a competent witness for the prosecution against his co-accused although he was not a voluntary witness and possessed the privilege of non-self incrimination?

(a) At common law persons jointly indicted and jointly tried for the same offense were not competent witnesses for each other or for the prosecution. The reason at first given for such rule was that such defendant had an interest in the outcome of the case and was therefore barred. Gradually the rule was extended so as to bar as witness any party to the record whether he had an interest or not. However, if a joint accused pleaded guilty but was not sentenced, or if he were tried separately, or the indictment against him was terminated by nolle prosequi, he was rendered a competent witness either for the prosecution or his co-defendant. (Annotation Wilson v. United States, 162 U.S. 613, 40 L.Ed.1090; Annotation Benson v. United States, 146 U.S. 325, 36 L.Ed. 991; Wolfson v. United States, supra).

However, the rules above stated were not applicable where several accused were separately indicted or charged for the same offense. In such event each separately indicted accused was a competent witness for the prosecution against other separately indicted accused. (Benson v. United States, supra; 16 C.J. sec.1411, p.690; 22 C.J.S. sec.803,p.1376).

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Against the background of these common law rules, Congress enacted the Act of March 16, 1878, above quoted. It is obvious that primarily it was intended to remove the bar which prevented a defendant from testifying for or against a co-defendant in cases where they were jointly indicted and jointly tried. Where each accused was separately indicted or charged for the same offense such disability did not exist and consequently the statutory elimination of the bar was unnecessary (22 C.J.S., sec.803, p.1376, fn.58; sec.804b, fn.62, p.1377). In the instant case each accused, being separately charged for the same crimes, was a competent witness for the prosecution against his co-accused. The statute did not endow him with competency as he previously possessed it. The conclusion is that the statute did not operate upon the status of Loper and Johnson as witnesses, each against the other.

(b) Each accused was an involuntary witness but the 24th Article of War extended to him the privilege of refusing to give self-incriminating evidence. It was a personal privilege which he could claim or waive at his option. (McAlister v. Henkel, 201 U.S. 90, 50 L.Ed. 671; Burrell v. Montana, 194 U.S. 572, 48 L.Ed.1122; 70 C.J. sec.906, p.747). It could not be claimed by the accused against whom the witness was called to testify (70 C.J. sec.906, p.749) and

> "A statute rendering a person competent as a witness does not deprive him of his privilege against self incrimination." (70 C.J. sec.870, p.720).

Neither was the competency of each accused impaired by the fact that he was compelled to testify, inasmuch as attendance at court and the giving of testimony is a compulsory duty upon every person (Blair v. United States, 250 U.S. 273, 63 L.Ed. 979). The availability to the prosecution of the testimony of the accused called to the stand depended upon the will of the witness. He could assert his privilege, and refuse to speak, or he could waive his privilege and testify, but these were matters with which the other accused had no concern. Neither the Fifth Amendment nor the 24th Article of War provide that an accused called as a prosecution's witness is an incompetent witness. Both the constitutional provision and the statute simply prohibit the Government from compelling a witness to testify against himself. It follows from the foregoing that a violation of the non-self incrimination provision of the Amendment and the statute did not disqualify the accused whose rights were affected, as a witness against the other accused. It was the rights of the witness which were violated; not the rights of the accused against whom the witness testified.

The Board of Review therefore concludes that notwithstanding the fact that the prosecution violated the rights of each accused in compelling him to testify as a witness for the prosecution, such violation was not an error which the accused against whom the evidence was offered could complain and hence no prejudice to Johnson's rights occurred when Loper testified against him, and no prejudice to Loper's rights occurred when Johnson appeared as a witness against him.

7. The charge sheets show that accused Johnson is 20 years three months of age and was inducted into the service on 31 January 1942, and that accused Loper is 20 years eight months of age and was inducted into the service on 21 January 1943. Neither had any prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of the accused, except as hereinbefore noted, 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 both accused.

9. Confinement in a United States penitentiary is authorized for the crime of assault with intent to murder by AW 42 and sec.276 Federal Criminal Code (18 USCA 455). 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).

Judge Advocate

Judge Advocate

Judge Advocate

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(312) 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 Privates MANUEL JOHNSON JR. (34230424), 762nd Chemical Depot Company (Aviation) and IRVIN R. LOPER (33551918), 4087th 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. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. The instigator and leader of the mob of colored soldiers which assaulted Geib and Donovan was a colored Corporal described by Geib as:

> "five feet ten inches to five feet eleven inches, 175 pounds, brown skinned, rough complexion, coarse pores. He was wearing an over-coat." (R9).

This Corporal is further described by the accused Johnson in his statement (Prox.Ex.5) as:

> "The light skinned corporal was from Co. D, 534th Q.M Bn, Camp 3, G-18. He was about 5 feet 6 inches tall, slim build, fast talker. He works in the Company Orderly room."

It is evident from the record of trial that this Corporal was one of the principal offenders. Johnson states (Pros.Ex.5) that this Corporal threw one of the white soldiers from the train, and prior thereto he actively participated in the beating of Geib and Donovan(R16,18, Pros.Ex.5).

On the witness stand, Herbert T. Cannon, C.I.D. Detachment, Headquarters 7th District, Eastern Base Section, stated that he had never made any attempt to find this Corporal. The review of the Staff Judge Advocate makes no mention of the activities of this man.

This situation demands further diligent investigation to the end that this Corporal is identified, apprehended and prosecuted. The duty imposed upon me by the Commanding General of this Theater requires that I report to him irregularities of this type in the administration of military justice. Discipline is imperiled and justice is not vindicated if this man is permitted to escape. The conviction and punishment of Johnson and Loper only partially achieves the desired end. There should be no delay in the execution of this additional investigation. I request reports of progress.

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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 2297. For convenience of reference please place that number in brackets at the end of the order: (ETO 2297).

/s/ E. C. McNEIL

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

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

BOARD OF REVIEW

21 JUN 1944

ETO 2302

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private JOHN M. HOPKINS (35321260) 306th Replacement Company, Field Force Replacement Depot No. 2.	Trial by G.C.M., convened at Bristol, Gloucestershire, England, 12 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard 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 Charges and Specifications:

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private John M. Hopkins, 306 Replacement Company, Field Force Replacement Depot No. 2, did, without proper leave, absent himself from his station at Muller's Orphanage, Bristol, Somerset, England, from about 0001 hours, 31 January, 1944, until about 1500 hours, 26 February, 1944.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * * having been duly placed in confinement in the postguard house, Field Force Replacement Depot No. 2, at Muller's Orphanage, Bristol, Somerset, England, did, on 1 March, 1944, at the post guard house, Field Force Replacement Depot No. 2, Muller's Orphanage, Bristol, Somerset, England, escape from such confinement before he was set at liberty by the proper authority.

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CHARGE III: Violation of the 93rd Article of War.
Specification 1: In that * * * did, at Bristol, Somerset, England, on or about 1 February, 1944, unlawfully enter the shop of Maurice Arthur Webber, No. 44, Park Street, Clifton, Bristol, Somerset, England, with intent to commit a criminal offense, to wit: larceny, therein.
Specification 2: In that * * * did, at Bristol, Somerset, England, on or about 5 February, 1944, unlawfully enter the shop of Maurice Arthur Webber, No. 44, Park Street, Clifton, Bristol, Somerset, England, with intent to commit a criminal offense, to wit: larceny, therein.
Specification 3: In that * * * did, at Bristol, Somerset, England, on or about 7 March, 1944, unlawfully enter the shop of David Bollom, trading as "Real Dyers and Cleaners", at No. 35, Queens Road, Clifton, Bristol, Somerset, England, with intent to commit a criminal offense, to wit: larceny, therein.
Specification 4: In that * * * did, at Bristol, Somerset, England, on or about 5 February, 1944, feloniously take, steal, and carry away one cream jigger mohair coat, of the value of about Twelve ($12.00) Dollars, the property of Maurice Arthur Webber.
Specification 5: In that * * * did, at Bristol, Somerset, England, on or about 1 February, 1944, feloniously take, steal, and carry away one red mohair coat, of the value of about Twelve ($12.00) Dollars, the property of Maurice Arthur Webber.
Specification 6: (Nolle Prosequi).

He pleaded guilty to Charges I and II and their respective specifications, not guilty to Charge III and the specifications thereunder, and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for six 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 20 years. The reviewing authority approved the sentence, reduced the period of confinement to eight 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. The charge sheet shows that the accused is 27 years four months of age and was inducted at Cleveland, Ohio 4 September 1942 to serve for the

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 21 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, European Theater of Operations, APO 515, U. S. Army.

1. In the case of Private JOHN M. HOPKINS (35321260), 306th Replacement Company, Field Force Replacement Depot No. 2, 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 2302. For convenience of reference please place that number in brackets at the end of the order: (ETO 2302).

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 2321

21 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 A. T. MOODY (34523017), 214th Port Company, 386th Port Battalion, Transportation Corps.	Trial by G.C.M., convened at Newton Abbot, Devonshire, England, 27-28 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten 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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private A.T. (IO) Moody, 214th Port Company, 386th Port Battalion, TC, did, at Stover Camp "B", Newton Abbot, Devonshire, England, on or about 30 March 1944, with intent to commit a felony, to wit murder, commit an assault upon Technician Fifth Grade Charles H. Steele, 214th Port Company, 386th Port Battalion, TC, by striking him on the head with a dangerous weapon, to wit a hatchet.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for one day 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.

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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 between 11:30 p.m. and midnight of 30 March 1944 accused returned from town to his tent at Camp Stover, Newton Abbot, Devonshire, England. Six occupants were present in the tent - Bobo, Steele, Parker, Rivers, Dix and accused. After reading a letter which he found awaiting him, he engaged in playful wrestling with Private Paul J. Dix. Bobo was shaving; Steele, Parker and Rivers were in bed, the last two asleep. Accused stopped scuffling with Dix when Corporal Charles H. Steele, who was in bed, addressed him and inquired about a flash-light which he (Steele) had loaned to accused for his trip into town. Thereupon accused and Steele became involved in an apparent friendly wrestling bout. Steele remained on his bed continuously during the scuffle. The two were still "laughing and joking" when accused picked up a hatchet from beside the stove in the center of the tent and, engaging Steele with his left hand, brandished the hatchet with his right (R10,13,17-18). Dix observed accused's actions and heard Steele express a desire to quit. Dix then requested accused to give him (Dix) the hatchet. When he secured it he placed it in the wood box. Simultaneously he observed that Steele had covered his head with his blanket. Dix then turned his back on both Steele and a ccused and walked over to where Private Samuel Bobo, another occupant of the tent, was shaving. Almost immediately thereafter, Dix and Bobo heard "pounding blows" from the direction of Steele's cot. Both turned and saw accused standing over Steele holding the ha tchet "in a striking position as if he were going to split something open." The blade was pointed downward. Dix testified:

> "I grabbed the hatchet meantime telling him to stop. We tussled with the hatchet and he told me to let him go as he wanted to hit him and said he wanted to kill the son of a bitch. Then we tussled with the hatchet and I got it away and I flung it away." (R18).

When Dix first turned around, upon hearing the pounding, Steele still had his head under the cover (R21). He was severely and gravely injured about the head by the hatchet blows. The external injuries consisted of several abrasive contusions of the scalp. The most serious one was on the right side of the head in the region of the temple, which was a crushed wound in which the skin was broken. Steele was taken to the hospital for treatment after first aid had been given (R25,26). After Dix relieved accused of the hatchet for the second time, accused picked up, from behind the stove, a stick of wood about two by four inches in breadth and thickness and approximately three feet long, which he flung at Bobo, who had rushed to the side of Steele's cot. Bobo dodged the stick and it "went in Corporal Steele's

direction, and Moody (the accused) lay on the bottom of the bed and cried." Other soldiers came to assist the removal of Steele to the dispensary. Accused again secured the stick and "drew it back again" before it was taken away from him, whereupon he "fell out and cries and kicks like a man when he is knocked out." (R11,14-15).

After being taken to the guardhouse, accused was brought back to his tent, that same night, to get his clothes. He was laughing then and said nothing about the fight (R11-12). However, he told the doctor who dressed Steele's wounds "that he wanted to kill the man, or would have liked to kill the man or words to that effect." The statement was made "in a fit of trembling and anger" about half an hour after the attack occurred (R23-27).

According to his tent-mates who testified for the prosecution, accused was not drunk when he returned from town that evening, although, according to one, he "was acting like it" (R12-13,21). The other testified that he "was not acting in any drunken manner" (R21). He laughed when he read his letter but no change in his expression was observed by either witness until after the attack. The accused did not seem angry when scuffling with Dix or with Steele. No cursing was heard and no apparent provocation of any sort preceded the attack (R11,14,20).

4. The evidence for the defense showed that two other of accused's tent-mates, who were asleep in the tent when accused returned from town, did not awake until after accused struck Steele with the hatchet (R31-33).

5. After his rights were explained to him, the accused elected to remain silent (R33).

6. The uncontradicted evidence establishes the fact that accused committed a murderous assault upon Steele with a lethal weapon under circumstances which fully support the inference of the specific intent to kill. This intent was manifested by his declarations on two subsequent occasions of his desire to kill Steele. All the elements of the crime charged were fully proved (CM ETO 78, Watts; CM ETO 531, McLurkin; CM ETO 533, Brown; CM ETO 1535, Cooper).

7. The charge sheet shows that accused is 23 years six months of age and was inducted 6 November 1942 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.

9. Confinement in a United States penitentiary is authorized for the

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crime of assault with intent to commit murder by Article of War 42 and 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. Supp.327. The designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement is authorized (Cir.291, WD, 10 Nov 1943, sec.V, par.3g).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 21 JUN 1944 TO: Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, APO 519, U. S. Army.

1. In the case of Private A. T. MOODY (34523017), 214th Port Company, 386th Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. There are certain aspects of accused's murderous assault upon Steele which give rise to a suspicion as to his mental competency. The attack was without apparent cause or reason and accured's subsequent actions bespeak abnormality which is not explained by the evidence. No question of his sanity was raised at the trial, and there is an implication in the record of trial that neither the court, the trial judge advocate nor defense counsel were fully conscious of the fact that the case involved such question. Under such circumstances I recommend that before the sentence is ordered executed a board be convened under the provisions of AR 600-500.

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 2321. For convenience of reference please place that number in brackets at the end of the order: (ETO 2321).

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 2343

22 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 JOHN F. WELBES, JR. (37433433), Quartermaster Depot Q-152.)	Trial by G.C.M., convened at United States General Depot G-25, Ashchurch, Gloucestershire, England, 24 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 24 years. The 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.
Specification: In that Private John F. Welbes, Quartermaster Depot Q-152 did at Cheltenham, Gloucestershire, England, on or about 11 October 1943, desert the service of the United States, and did remain absent in desertion until he was apprehended at Cheltenham, Gloucestershire, England, on or about 18 March 1944.

He pleaded guilty to the Specification except the words "desert" and "desertion", substituting therefor the words "absent himself without leave from" and "without leave", of the excepted words, not guilty; to the Charge: not guilty, but guilty of a violation of the 61st Article of War. He was found guilty as charged, all the members of the court present concurring(R26). No evidence of previous convictions was introduced. He was sentenced to be

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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 24 years. The reviewing authority approved the sentence, 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. Accused was absent from his organization for a period of 161 consecutive days. During his absence he lived under assumed names with a woman who masqueraded as his wife; wore civilian clothing after discarding his military uniform; secured employment as a British civilian using a fictitious name and a British identification card issued in the name of the civilian whose name he assumed; traveled about the country but at all times remained in the proximity of American military installations and was finally apprehended after his whereabouts had been discovered by a fellow soldier. The evidence was more than sufficient to establish the fact that accused absented himself from the military services with intent not to return thereto (MCM, 1928, par.130a, p.142; CM ETO 1737, Mosser and authorities cited therein).

4. (a) The admission in evidence of the written statement of Mrs. Phyllis Wilkins to detective constable Slade of the British Constabulary (R22, 23) was error. The statement was hearsay of the most obvious character. In spite of the fact that the defense counsel made no objection, the court on its own motion, should have excluded it. However within the rule announced in CM ETO 1201, Pheil and CM ETO 1486, MacDonald and MacCrimmon, the admission in evidence of this hearsay evidence did not affect the ultimate result. Accused's guilt of desertion was established by other competent evidence of a most substantial nature. Consequently the error did not prejudice any substantial rights of accused.

(b) The entries (admitted in evidence without objection) contained in the "lost and found property book" of the Cheltenham police department with respect to the finding of an American military uniform and the depositing of same on 15 January 1944 with the department were clearly admissible in evidence under authority of Act June 20, 1936, c.640, sec.1; 49 Stat.1561; 28 U.S.C.A. Supp., sec.695; CM ETO 2185, Nelson; CM ETO 2481, Newton.

(c) Although the record fails to show that before accused gave his statement to the investigating officer (Pros.Ex.G; R24) he received either warning as to his right to remain silent and the penalty for self inculpatory statements or that the 24th Article of War was read and explained to him, the statement was nevertheless admissible in evidence.

> "A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made" (MCM, 1928, par.114a, p.116).

5. The charge sheet shows that accused is 23 years of age and was inducted into military service on 15 September 1942 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 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.

7. Confinement in a penitentiary is authorized for the offense of desertion in time of war by Article of War 42. Inasmuch as the sentence includes confinement at hard labor for 24 years, confinement in the United States Penitentiary, Lewisburg, Pennsylvania is authorized (Cir.291, WD, 10 Nov 1943, sec.V, pars.3a and b).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 22 JUN 1944 TO: Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, APO 519, U.S. Army.

1. In the case of Private JOHN F. WELBES, JR. (37433433), Quartermaster Depot Q-152, 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. This case shows the lack of proper instructions to the trial judge advocate. The use of the statement of Mrs. Phyllis Wilkins is inexcusable. There was no necessity for its introduction as the case against accused was proved beyond a reasonable doubt by other legal evidence. Had the question of accused's intent been a narrow one, such error would have been highly prejudicial and would probably have resulted in a new trial for the accused. There was no preliminary examination of the investigating officer upon introduction of accused's statement (Pros.Ex.G) as to warnings given accused. While such evidence is not imperative it has been long recognized as the safest practice to establish at least prima facie the voluntary nature of accused's statement when it amounts to a confession of guilt. There are several instances of the admission of evidence which was obviously hearsay. While in this case the irregularities noted were non-prejudicial, attention is invited to same so that greater care in the future will be exercised in the preparation and trial of other cases.

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 2343. For convenience of reference please place that number in brackets at the end of the order: (ETO 2343).

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 2358

17 MAY 1944

U N I T E D S T A T E S	29TH INFANTRY DIVISION (REHEARING).
v.	
Private (formerly Corporal) LIONEL PHEIL (33052124) Company "L", 115th Infantry	Trial by G.C.M., convened at APO 29, U.S. Army, 24-27 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for three 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 I: Violation of the 93rd Article of War.
Specification: In that Corporal Lionel Pheil, Company "L", 115th Infantry, did, at Bodmin, England, on or about 1 December 1943, feloniously take, steal, and carry away a pocketbook and £ 37, British currency, value about $150.00, the property of Corporal George W. Ward.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years at such place as the reviewing authority may direct. 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 under Article of War 50½.

3. The instant trial of accused was a rehearing conducted after his former conviction for the same offense had been set aside by the Board of Review and the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations, for the reason that the admission in evidence of certain alleged confessions of accused was considered prejudicial to his substantial rights (CM ETO 1201, Pheil). Reference is made to the holding of the Board of Review upon review of the first trial for a statement of the facts. The rehearing was conducted before a court composed of officers not members of the court which first heard the case (AW 50½; MCM, 1928, par.89, p.80). The sentence imposed at the first trial was dishonorable discharge, total forfeitures and confinement at hard labor for five years. Inasmuch as the sentence at the rehearing includes confinement for three years only, the limitations of Article of War 50½ (MCM, 1928, p.215; par.87b, p.73) with respect to sentences were observed.

4. At the rehearing no attempt was made to introduce in evidence accused's confessions which had been condemned upon appellate review of the first trial. The prosecution clearly established the fact that English currency in the total amount of £ 37 was stolen from Ward under circumstances and conditions which implicated accused. There was presented other competent substantial evidence which sustains the court's conclusion that accused was the thief (CM ETO 885, Van Horn; CM ETO 1671, Matthews). Insofar as the defense's evidence, including accused's own testimony, conflicted with that of the prosecution, an issue of fact arose which it was the duty of the court to resolve and its finding will not be disturbed upon appellate review (CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer; CM ETO 1191, Acosta; CM ETO 1786, Hambright). All of the elements of the crime of larceny were proved (CM ETO 875, Fazio; CM ETO 885, Van Horn; CM ETO 952, Mosser; CM ETO 1327, Urie; CM ETO 1415, Cochran; CM ETO 1764, Jones and Mundy). The court was authorized to take judicial notice that the exchange value of an English pound was $4.035 (CM ETO 952, Mosser).

5. The charge sheet shows that accused is 25 years of age. He was inducted on 1 May 1941 at Philadelphia, Pennsylvania. His period of service is governed by Service Extension Act of 1941. 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 the 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.

7. Confinement in a penitentiary is authorized for larceny of $50.00 or more (AW 42; 18 USC 466). As accused is under 31 years of age and his

sentence is under ten years, 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).

B. Franklin Riley Judge Advocate

Edward Breitstein Judge Advocate

Edward K. Lang Jr. Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 17 MAY 1944 TO: Commanding General, 29th Infantry Division, APO 29, U.S.Army.

1. In the case of Private (formerly Corporal) LIONEL PHEIL (33052124), Company "L", 115th 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. I concur in said holding.

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 2358. For convenience of reference please place that number in brackets at the end of the order: (ETO 2358).

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 2368

7 AUG 1944

U N I T E D S T A T E S	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by GCM, convened at Barton Stacey, Hampshire, England, 27 March 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for ten years. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.
Private JACK LYBRAND (7004325), Service and Ammunition Battery, 34th Field Artillery Battalion (formerly of Company E, 47th Infantry).	)	

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 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 which submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Jack (NMI) Lybrand, Company E, 47th Infantry, did, without proper leave, absent himself from his organization at or near Termini Imerese, Sicily, from about 0600, 31 October 1943, to about 0930, 3 November 1943.

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CHARGE II: Violation of the 69th Article of War.
Specification: In that * * * having been duly placed in arrest of quarters at Company E, 47th Infantry on or about 3 November 1943, did, at Termini Imerese, Sicily, on or about 3 November 1943, break his said arrest before he was set at liberty by proper authority.

CHARGE III: Violation of the 58th Article of War.
Specification: In that * * * did, near Termini Imerese, Sicily, on or about 3 November 1943, desert the service of the United States, by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: "Movement overseas", and did remain absent in desertion until he returned to his organization near Palermo, Sicily, on or about 7 November 1943.

ADDITIONAL CHARGE: Violation of the 65th Article of War.
Specification: In that Private Jack (NMI) Lybrand, Service and Ammunition Battery, 34th Field Artillery Battalion, APO #9 (formerly Company "E", 47th Infantry) having received a lawful order from Sergeant William M. Yelton, Service & Ammunition Battery, 34th Field Artillery Battalion, APO #9, a noncommissioned officer who was then in the execution of his office, to get out of bed and stand reveille, did at Camp "A", Barton Stacey, England, on or about February 4, 1944, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of two previous convictions by special courts-martial: one for being found loitering on post while on guard, stated to be in violation of Article of War 86, and one for breaking arrest in violation of Article of War 69. Two-thirds 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 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, Somerset, England, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 110, Headquarters 9th Infantry Division, APO 9, dated 26 April 1944.

3. (a) The evidence for the prosecution with respect to Charges I, II and III and their respective specifications was as follows: Toward the end of October 1943, accused's organization, then Company E, 47th Infantry, was bivouacked near Termini Imerese, Sicily (R6-7). The members of the company "had just come out of the Division field exercises and were doing training and getting equipment prior to our embarkation overseas" (R8). On or about 27 or 28 October, pursuant to instructions from the regimental commander, a formation of Company E was held, at which its members were told that preparations were being made to move overseas and that any man absenting himself without leave at that time would be classified as a deserter (R9). At this time all passes commenced at noon, the formation was held in the morning, the attendance of personnel of all platoons was required and checked and accused was not reported absent (R10-11). That the company at that time was preparing to move to a staging area near Palermo preparatory to movement to England was a matter of common knowledge or general information, or at least general rumor, among the members of the company (R13,16), although it was doubtful whether they knew definitely where they were going (R14). It was, however, common knowledge throughout both the company and the regiment that there would shortly be a movement overseas. "Sometime prior to the time we had left our bivouac, we received notice that we would move into our winter bivouac area" (R16-17).

On 31 October 1943, while the company was bivouacked near Termini Imerese, as above stated, accused was reported absent without leave from reveille formation (R7,9,13; Pros.Ex.1). He had no permission to be absent from the company (R7). About 9:30 a.m., on 3 November his absence was terminated when military police of the 9th Division returned him to the company (R7,9; Pros.Ex.1).

His company commander thereupon placed accused in arrest of quarters, fixing as the limits of the arrest his tent, the latrine and mess, and directed him to report to the charge of quarters "every hour on the half hour" (R7,10; Pros.Ex.1). Accused failed to report as directed at 1930 hours on 3 November. A search by the charge of quarters of the entire company area failed to reveal accused's presence (R7), and he was again reported absent without leave (R9,13; Pros.Ex.1). He had not been released from his arrest prior to this absence (R9,13). Sometime after midnight on the night of 6-7 November accused was again returned to his organization by military police, whereupon he was immediately placed under armed guard (R7,8,12,14; Pros.Ex.1).

On 3 November it was a matter of common knowledge among the members of the company that they were preparing for movement overseas (R10). Between 3 and 7 November the company moved from its semi-permanent bivouac area (near Termini Imerese) into Staging Area Number 3 at Palermo, where accused was returned on 7 November, and was there preparing for overseas movement. "The move [to the

staging area/ was not hazardous duty", according to the testimony of the executive officer of Company E (R11,13,16). On 7 November, just prior to embarking for England, the company was alerted, and line companies (of which Company E was one) were almost completely combat equipped, with such items as personal weapons and vehicles (R14-15). The executive officer testified that he personally did not think that they were going directly into combat - "generally, the rumor was that we were going to England" (R16).

On 7 November, after accused was returned to his organization, his company commander, in the presence of the executive officer,

> "asked him why he left and he claimed that he was fed up and had no intention of coming back until after the 9th Division had left Sicily. He said that he wanted to get into some artillery outfit in Italy" (R8).

Asked by the company commander why he came back, accused replied:

> "'I wouldn't have come back until after the 9th Division left Sicily if the MPs hadn't caught me'" (R16).

After accused made the statement the company commander explained to him his rights "under the Articles of War, that anything he might say could be used against him". Accused's remarks, however, were voluntary, according to the company commander's testimony (R8). The court overruled a motion by the defense that accused's remark to his company commander, first above quoted, be stricken from the record (R8).

On 9 November the company proceeded by water from Palermo to Liverpool, England, without being subjected to enemy attack. Accused was present under guard with the company during the journey (R11,14). Asked upon redirect examination whether such an overseas movement would be considered as hazardous, the company commander testified:

> "I don't confess to be an authority as to whether or not it is hazardous, but it does involve the chance of being torpedoed or hit by a bomb" (R11).

The following colloquy occurred between the prosecution and the executive officer upon the direct examination of the latter:

> "Q. Would the trip from Palermo to England be considered hazardous?
> A. * * * I don't believe at the time that we left that we knew where we were going.

"Q. Would the ordinary overseas movement be considered hazardous?
A. Yes...if you didn't know where you were going.
Q. Then, at the time you were preparing for a movement overseas, while still in Sicily, would that prospective movement be considered dangerous?
A. I think it would be." (R14).

(b) The evidence for the prosecution material to the Additional Charge and its Specification was as follows:

On the morning of 4 February 1944 Sergeant William M. Yelton, ammunition sergeant of accused's organization, then Service and Ammunition Battery, 34th Field Artillery Battalion, Camp A, Barton Stacey, Hampshire, England, whose duty it was to awaken certain men in the organization, including accused, for reveille, having been informed by the first sergeant "that it was time for reveille", directed accused "to get up" and stated "that it was time to stand reveille", to which accused replied, "'All right'", but failed to arise. Yelton again directed him "to get up" and received the same reply, followed by continued noncompliance. A third time he ordered accused "to get up", saying "it was time to stand reveille", whereupon accused raised up in bed and said, "'Get away from here and leave me alone'" (R17-18). Accused was not present at reveille formation but was up and dressed when Yelton returned from reveille (R17 ,18,20). Yelton awoke accused every morning (R19).

4. No evidence was introduced on behalf of the defense. Accused's rights were explained to him and he elected to remain silent (R21).

5. (a) The findings of guilty of the Additional Charge and its Specification are supported by substantial evidence that accused at the time and place alleged willfully disobeyed a lawful order, repeated several times, by Sergeant Yelton, a noncommissioned officer, who was then in the execution of his office, and known to be such by accused, to "get up" and stand reveille. That the order to "get up" was given immediately prior to reveille indicates that time was of its essence and immediate compliance was required. Any variance between the words of the order alleged: "to get out of bed and stand reveille" and those of the order proved: "to get up" "it was time to stand reveille" was technical and not substantial. Under the circumstances, the order would have been meaningless unless intended and understood, as it must have been, as a direction not only "to get up" but also "stand reveille".

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Article of War 65

> "has the same general objects with respect to * * * noncommissioned officers as A.W. * * * 64 / has/ * * * with respect to commissioned officers, namely, to insure obedience to their lawful orders * * *.
>
> * * * the term 'order' is used in the same sense as 'command' in A.W. 64" (MCM, 1928, par.135a, p.149).

> "The form of an order is immaterial, as is the method by which it is transmitted to the accused, but the communication must amount to an order" (MCM, 1928, par.134b, p.149).

The reprehensible character of accused's conduct in reacting to Yelton's lawful exercise of authority by repeated defiant refusals to obey his order and by demanding that Yelton "'Get away from here and leave me alone'", distinguishes accused's offense from the simple one of "nonperformance by a subordinate" of a "mere routine duty," punishable under Article of War 96 (MCM, 1928, par.134b, p.149; Winthrop's Military Law & Precedents - Reprint - p.573). The violation of Article of War 65 was clearly established (CM ETO 1725, Warner).

(b) Accused's absence without leave from his organization at the place and for the period alleged in Charge I and its Specification (31 October - 3 November 1943) is clearly established by the evidence. Likewise, his guilt of breaking arrest of quarters on 3 November 1943, under the circumstances alleged in Charge II and its Specification, is clearly established (MCM, 1928, par.139a, pp.153-154; CM ETO 817, Yount).

(c) Accused is charged in Charge III and its Specification with absenting himself without leave from his organization with intent to avoid hazardous duty, to wit: "Movement overseas" (AW 28 and 58). The competent evidence shows that on 3 November 1943 accused, in breaking his arrest, as above stated, absented himself without leave from his organization, then stationed at Termini Imerese, Sicily, and remained absent without leave until he was returned on 7 November to his organization, which had at that time moved to a staging area at or near Palermo, Sicily.

Under Article of War 28,

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

Absence without leave having been established, the sole question for determination is whether the record contains substantial evidence of each of the three other elements of the offense charged, namely:

(1) that accused's unit "was under orders or anticipated orders involving * * * hazardous duty" (MCM, 1921, par.409, p.344);

(2) that notice of such orders and of the imminent hazardous duty was actually brought home to accused; and

(3) that at the time he absented himself from his command he entertained the specific intent to avoid hazardous duty (CM ETO 2396, Pennington; CM ETO 2432, Durie; CM ETO 2473, Cantwell; CM ETO 2481, Newton).

(1) The evidence leaves no doubt that accused's unit on 3 November was under orders or anticipated orders involving a movement overseas.

The Board of Review (sitting in Washington) has held that "embarkation for duty beyond the continental limits of the United States" is "important service" and that absenting oneself without leave with intent to shirk the duty of such embarkation is therefore desertion under Articles of War 28 and 58 (CM 223300, Manashian (1942), 13 B.R. 363,365). (See also CM 227459, Wicklund (1943), 15 B.R. 299,301.)

The vital question here presented is whether such movement was "hazardous duty" within the meaning of Article of War 28. The only evidence in the record bearing upon the nature of the contemplated movement overseas was that it was common knowledge or there were rumors that the movement would be to a winter bivouac area in England; that line companies were almost completely combat equipped; and the opinions of company officers that the trip would "involve the chance of being torpedoed or hit by a bomb" and that any overseas movement would be hazardous "if you didn't know where you were going". The heart of the case against accused is the question whether the court was justified in taking judicial notice that the journey by water from Palermo, Sicily, to Liverpool, England, contempleted toward the end of October and effected about 9 November 1943, was "hazardous duty". Generally, the principle of judicial notice applies to "matters which are so notorious in common knowledge of all intelligent persons that a requirement of evidence thereon would be superfluous" (MCM, 1921, par.289,1, p.231).

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The word "hazardous" is defined as

"Exposed to or involving danger; perilous; risky" (Black's Law Dictionary, 3rd Ed., p.879);
and
"involving hazard or special danger" (1 Bouvier's Law Dictionary, 3rd Rev., p.1427). (See also 19 W. and P. Perm., pp.111-112; Ibid., supp.pp.19-22).

"The 'hazardous duty' *** may include such service as embarkation for foreign duty or duty beyond the continental limits of the United States" (MCM, 1928, par.130a,pp.142-143). (Underscoring supplied).

"All navigation is perilous * * *. Because we cannot locate the 'peril', it does not follow there was none" (Moores v. Louisville Underwriters (CCWD,Tenn.), 14 Fed. 226,234).

The elements of hazard involved in a war-time journey on open sea waters in an active theater of operations are obvious. Among them are danger of enemy submarine action (Cf: Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co. (DCSD, NY, 1922), 278 Fed.770,778, affirmed, 282 Fed. 976, affirmed, 263 U.S. 487, 68 L.Ed. 402), and dangers consequent upon "removal for belligerent purposes of all or any aids to navigation"; "such act * * * restores the dangers of the seas to their normal" (Muller v. Globe & Rutgers Fire Ins. Co. (CCA 2d Cir.1917), 246 Fed. 759,762). The danger of bombardment by enemy aircraft is ever present. Of such "perils of the deep" and of the air the court was fully warranted in taking judicial notice; the Board of Review may likewise take judicial notice thereof (CM ETO 1538, Rhodes, p.14, and authorities therein cited).

"Overseas movements being secret, the precise nature and place of the duties performed * * * after embarkation were not matters of common knowledge of which the court could properly take judicial notice. The court did, of course, judicially know that the United States is at war and that embarkation might result in combat or might involve other hazardous duties" (CM 228400, McElroy (1942), 16 B.R. 161,164, Bull, JAG, Feb.1943, Vol.II, No.2, sec.395 (30), p.61) (Underscoring supplied).

In CM ETO 105, T. Fowler, the evidence showed that accused absented himself without leave from his organization at Camp Kilmer,

New Jersey, at a time when he knew that it was about to embark for an overseas destination. The Board of Review there held:

> "There was * * * sufficient evidence before the court from which it could properly infer an intention to shirk hazardous duty".

The conclusion that the contemplated journey from Sicily to England was hazardous duty is not at variance with the opinion in CM ETO 455, Nigg, wherein the Board of Review stated:

> "the record wholly fails to disclose whether it /accused's organization/ embarked for service without the United Kingdom or simply moved to a new camp or station within the British Isles. The record is totally silent as to the nature of the duty accused's organization was to perform; hence there is a failure of proof on a vital element of the case".

In the instant case the evidence leaves no doubt "as to the nature of the duty accused's organization was to perform": overseas movement on open sea waters in an active theater of operations. It need not be legally presumed that such duty was hazardous because, as above demonstrated, such fact was a proper subject of judicial notice.

(2) That accused had notice of the orders and of the imminent hazardous duty involved therein at the time in question is established by evidence of his presence at the company formation at which its members were informed of an impending movement overseas, by evidence of common knowledge of such a movement throughout the company and by accused's statement to his commanding officer that he "had no intention of coming back until after the 9th Division had left Sicily" and that he "wouldn't have come back until after the 9th Division left Sicily if the MPs hadn't caught" him. Although his commanding officer failed to warn accused as to his rights under Article of War 24 until after he made the statement, such officer testified that accused's remarks were voluntary and the record discloses no reason to doubt the truth of this testimony. Accordingly, even assuming that the remarks amounted to a confession of guilt, evidence thereof was properly admitted (MCM, 1928, par.114a, p.116; CM ETO 1057, Redmond; CM ETO 1663, Ison; and authorities therein cited).

(3) Accused's remarks, above referred to, constituted strong evidence of his specific intent to avoid hazardous duty, viz: the overseas movement of his unit. Such evidence is corroborated by the evidence, above referred to, that he had absented himself without leave on 31 October and that, after having been returned to his or-

ganization by military police on 3 November and placed in arrest of quarters, he broke his arrest on the same day and once more absented himself without leave, remaining absent until again returned by military police to his organization on 7 November. The evidence that accused actually sailed with his organization lacks the significance with respect to his intent that it would otherwise have in his favor (CF: CM ETO 2396, Pennington; CM ETO 2432, Durie; CM ETO 2481, Newton), because of evidence that the embarkation was unintended and involuntary on his part.

The evidence establishes all theelements of the offense charged and is therefore held by the Board of Review to be legally sufficient to support the findings of guilty of Charge III and its Specification.

6. The charge sheets show that accused is 22 years of age and enlisted at Atlanta, Georgia, 28 November 1939 to serve three years. 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 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 penalty for desertion committed in time of war is death or such other punishment as the court-martial may direct (AW 58). 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; Cir.73, Hq. ETOUSA, 22 Jun 1944, par.4a, b(1).

B. Franklin Riter, Judge Advocate

Edward H. Young, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate.

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

BOARD OF REVIEW

ETO 2380

20 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, 18 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.
Private PAUL F. RAPPOLD (35097067), 3703rd Quartermaster Truck Company.	

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 Paul F. Rappold, 3703rd Quartermaster Truck Company did, at Reservoir Camp, Gloucester, Gloucestershire, England, on or about 17 March 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Ronald Groves, a minor of tender years.

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years at such place as the reviewing authority may direct. 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 pleas of guilty were fully supported by the evidence (CM 192609, Hulme; CM ETO 24, White; CM ETO 339, Gage; CM ETO 612, Suckow; CM ETO 1743, Penson).

4. The charge sheet shows that accused is 20 years of age, and that he was inducted 6 March 1943 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. Confinement in a penitentiary as punishment for the crime of sodomy is authorized (CM 187221, Sumrall; CM 171311, Stearns; District of Columbia Code, secs. 24-401 (6:401), 22-107 (6:7)). The place of confinement is authorized (Cir 291, WD, 10 Nov 1943, sec.V, par.3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 20 MAY 1944 TO: Commanding General, Headquarters First United States Army, APO 230, U.S.Army.

1. In the case of Private PAUL F. RAPPOLD (35097067), 3703rd Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the 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 2380. For convenience of reference please place that number in brackets at the end of the order: (ETO 2380).

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

23 MAY 1944

ETO 2390

U N I T E D S T A T E S	29TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at APO 29, U.S. Army, 9 May 1944.
Private RUSSEL R. MOCK (33318187), Company L, 115th Infantry.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. The 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 93rd Article of War.
Specification: In that Private RUSSEL R. MOCK, Company "L", 115th Infantry, did, at Fort Tregantle, Cornwall, England, on or about 23 April 1944, feloniously take, steal and carry away Sixty-One Dollars ($61.00) in American money and One (1) Pound in English money (value of about Four Dollars ($4.00) total value about Sixty-Five Dollars ($65.00), the property of Private JOHN WILSON.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by special court-martial for larceny of Government property and for absence without leave for seven days, in violation of Articles of War 93 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 for five years at such place as the reviewing authority may direct. 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.

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3. The charge sheet shows that accused is 28 years of age and that he was inducted at Philadelphia, Pennsylvania, 17 June 1942. 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.

5. Confinement in a penitentiary is authorized for the offense of larceny of $50 or more by AW 42 and Sec. 287 Federal Criminal Code (18 U.S.C. 466). 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

CONFIDENTIAL

(349)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 23 MAY 1944 TO: Commanding General, 29th Infantry Division, APO 29, U.S. Army.

1. In the case of Private RUSSEL R. MOCK (33318187), Company L, 115th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, which holding is hereby approved.

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 2390. For convenience of reference please place that number in brackets at the end of the order: (ETO 2390).

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

Branch Office of The Judge Advocate General
with the
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BOARD OF REVIEW

27 JUN 1944

ETO 2396

U N I T E D S T A T E S)	2D INFANTRY DIVISION.
)	
v.)	Trial by G.C.M., convened at Island
)	Farm, Wales, 10,13-14 May 1944.
Private CLARENCE PENNINGTON)	Sentence: Dishonorable discharge
(35264047), Company G, 9th)	(suspended), total forfeitures and
Infantry.)	confinement at hard labor for 35
)	years. The 2912th Disciplinary
)	Training Center, Shepton Mallet,
)	Somersetshire, England.

OPINION 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 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 opinion, to the Assistant Judge Advocate General in charge of said Branch Office.

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Clarence Pennington, Company G, 9th Infantry, did, at Island Farm Camp, County Glamorgan, Wales, on or about 27 April 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 Bridgend, County Glamorgan, Wales, on or about 29 April 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial

for breach of restriction and absence without leave for seven days in violation of the 96th and 61st Articles of War. He was sentenced to be shot to death with musketry. On 13 May 1944 the court at the direction of the reviewing authority, reconvened to reconsider the sentence. It adhered to the same. On 14 May 1944 the court again reconvened at the direction of the reviewing authority to give further consideration to the sentence. It revoked its former sentence and sentenced 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 at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to 35 years, suspended the execution of that portion of the sentence 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.

The proceedings were published in General Court-Martial Orders No.20, Headquarters 2d Infantry Division, 15 May 1944.

3. The competent evidence for the prosecution showed that:

Accused, a member of Company G, 9th Infantry, was present at a formation of the company on 26 April 1944 in camp in Wales when a letter dated 21 April 1944, from Headquarters, V Corps, relating to desertion was read and explained (R8). This letter was admitted in evidence (R8, Pros. Ex.B). The pertinent part thereof is as follows:

"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)

(2) Any person who 'advises' or 'persuades' or knowingly assists another 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 59)

(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 record 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

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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."

During the examination of Captain Alonzo E. Baird, 9th Infantry, commanding officer of accused, the following colloquy occurred:

"Q. Captain Baird, was your organization alerted at that time--the time the letter was read to your organization?
A. Yes, sir; it was.
PROSECUTION: At this time, I will ask the court to take judicial notice of the fact that the Division was under alert orders. The letter itself is not available inasmuch as it is classified as top secret.
LAW MEMBER: Subject to objection by any member of the court, I rule that judicial notice will be taken of that fact"(R8,9).

On the morning of 27 April 1944 the accused was present with a detail searching a wooded area for a missing soldier. Accused disappeared and a search for him was instituted but after a hunt of two hours he was not discovered (R10). A certified extract copy of the morning report showing the accused to be absent without leave as of that date was introduced in evidence without objection (R7,Pros.Ex.A).

About 1930 hours, 29 April 1944 accused was apprehended near Bridgend (not more than six miles from the camp of his organization) by a British police sergeant who was searching for a soldier of his description in connection with a charge of housebreaking. When the sergeant first saw accused he was running away. The sergeant shouted and ran after him and accused stopped. The sergeant walked up to him and explained that he was searching for a man of his description in connection with a charge of housebreaking. Accused said "that's quite right" and shortly thereafter, having been informed that he was not obliged to make any statement, signed a statement written by the sergeant (R12,Ex.C) to the effect that he was absent without leave, that he decided to "break away" two days previously while on a detail searching for another "absentee", and that during the next day he tried to get into a house through a window in a search for food and was in the act of pulling jars out of a pantry window, when someone inside shouted and he ran away. He declared further in his statement,

"I didn't steal anything at all. I was looking for food but didn't find any."

At the time he was apprehended he was dressed in "green overalls" and "needed a shave badly". Subsequently the police sergeant delivered him

into the custody of the military authorities (R13).

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

5. The gravamen of the offense with which accused is charged is that he absented himself without leave to avoid hazardous duty and shirk important service (Articles of War 28 and 58). The burden was on the prosecution to prove beyond reasonable doubt the four elements of the offense:

(a) that accused was absent without leave;
(b) that accused's unit "was under orders or anticipated orders involving either (a) hazardous duty or (b) some important service" (MCM, 1921, par.409, p.344);
(c) 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; and
(d) that at the time he absented himself from his command he entertained the specific intent to avoid hazardous duty or to shirk important service (CM ETO 2432, Durie; CM ETO 2473, Cantwell; CM ETO 2481, Newton).

The record is silent as to whether accused's unit, during his absence, in compliance with orders to participate in the overseas invasion, left its station, Island Farm Camp but it may be inferred from the record that on the date of the trial, 10 May 1944, its station was in the same locality as that of 27 April 1944. Accused, therefore, did not during his two days absence actually miss any hazardous duty or important service, such as occurred in CM ETO 2473, Cantwell. At the trial accused remained silent and offered no explanation of his unauthorized absence. Neither does his statement to the police (Pros.Ex.C) set forth any reason for his absence.

6. The prosecution in the instant case attempted to meet the burden of proving accused's specific intent to avoid hazardous duty or to shirk important service by requesting the court to take judicial notice of the fact that the division, of which accused's unit was a component, was under alert orders for overseas duty. The reason given by the prosecution for requesting the court to take judicial notice of the existence of the alleged alert order was that it was top secret and therefore could not be produced.

Facts which need not be proved because the court may recognize their existence without proof are summarized in MCM, 1928, par.125, p.134. The matters therein enumerated are well known facts or are contained in published documents. The only military orders included are general orders. If the order to which the prosecution referred was so secret that it could not be shown to the court it must necessarily follow that the court did not know of the term or details of the order and therefore could not tell whether

or not it required hazardous duty by or imposed important service upon accused. It was a contradiction of terms to ask the court to take judicial notice of a fact that was so secret that the members of the court did not know what the fact was. The theory and basis of judicial notice is that the fact sought to be proved is so well known that it has become common knowledge and it is therefore not necessary to prove it. The principle which prevented the court in the instant case from taking judicial notice of the secret orders has received approval by the Board of Review (sitting in Washington) and the Judge Advocate General:

> "In the course of the trial * * *, the trial judge advocate asked the court to take judicial notice that the landing team was at the time of the trial engaged in combat in Africa. Held: Overseas movements being secret, the precise nature and place of the duties performed by the landing team after embarkation were not matters of common knowledge of which the court could properly take judicial notice"(CM 228400, McElroy (1942), Bull JAG, Vol.II, No.2, February 1943, sec. 395(30), p.61) (See also CM ETO 455, Nigg).

It, therefore, follows that the court was not authorized to take judicial notice of the so-called "secret order".

7. For the purpose of this opinion the Board of Review will assume that the prosecution successfully met the burden of proving the first three elements of the offense alleged, (a), (b) and (c), (par.5,supra). The question then remains for determination as to whether the prosecution sustained the burden of proving the fourth element of the offense, viz that accused entertained the specific intent when he absented himself to avoid hazardous duty or to shirk important service.

> "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" (CM ETO 2432, Durie pp.6-7).

"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" (CM ETO 2481, Newton p.8).

The Board of Review has heretofore rejected in both the Durie and Newton cases the proposition that accused's specific intent may be inferred from the facts, without more, that he was absent without leave after his unit had been alerted for overseas service and he had received the warning notice contained in the letter of 21 April 1944 from Headquarters, V Corps. It becomes necessary to seek elsewhere in the record of trial for evidence of accused's specific intent to avoid hazardous duty or shirk important service.

The additional facts appearing in the record of trial are simple and few. Accused while on a detail in a wooded area near his camp took advantage of the opportunity to absent himself from his organization. He was dressed in overalls and had made no preparation for the absence. All of his clothing remained in his barracks. On the day following his departure he attempted to steal some food from a house in a nearby town, and on the next day was captured by the local police and returned to his organization. This evidence offered in support of the prosecution's contention that the accused intended to avoid hazardous duty or shirk important service when he absented himself from his organization has no value for such purpose. Conversely, the inference therefrom is that accused entertained no such purpose. Its probative worth is less than the evidence contained in the Durie and Newton cases.

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The record is therefore found by the Board of Review to be legally insufficient to support a finding of guilty of desertion but legally sufficient to support a finding of absence without leave during the period indicated, in violation of Article of War 61.

6. The charge sheet shows that accused is 27 years six months of age and was inducted at Fort Thomas, Kentucky, 30 January 1942. He had no prior service. He went to school four years and has an I.Q. of 60.

7. The court was legally constituted and had jurisdiction of the person and of the offense. 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 the Charge and 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, and legally sufficient to support the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 Jun 1944 TO: Commanding General, ETOUSA, APO 887, U.S.Army.

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 USCA 1522) and as further amended by Public Law 693, 77th Congress, 1 August 1942 is the record of trial and the opinion of the Board of Review in the case of Private CLARENCE PENNINGTON (35264047), Company G, 9th Infantry.

2. I concur in the opinion of the Board of Review and for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof, as involve findings of guilty of absence without leave on 27 April 1944 at Island Farm Camp, County Glamorgan, Wales, terminated by apprehension on 29 April 1944 at Bridgend, County Glamorgan, Wales, in violation of Article of War 61, be vacated, and that all rights, privileges and property of which he has been deprived by virtue of those portions of the findings and sentence so vacated be restored.

3. The theory of the prosecution and of the V Corps letter introduced as Prox.Ex.B, 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, Congress has provided that:

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

Proof of the required intent is an essential element of the crime as defined by Congress. In this case accused was a member of a detail engaged in the search for a missing soldier in a wooded area in the immediate vicinity of accused's camp. Taking advantage of the situation he left his detail without authority. He was dressed in fatigue clothes and left all of his belongings in his barracks. There is no evidence of premeditated design or of preparation for departure. On the third day of his absence he was apprehended by a civil policeman at a point in proximity of his camp. He admitted that on the second day of his absence he attempted to steal food from a private dwelling-house. His total period of absence was about 57 hours. There is no evidence that he concealed himself during his absence. He remained in the proximity of his station. The foregoing evidence falls short of the necessary proof ofspecific intent to avoid hazardous duty or to shirk important service and is proof only of absence without leave in violation of the 61st Article of War.

4. The approved sentence includes confinement at Hard labor for 35 years. The reduction in the grade of the offense should ordinarily call for a reduction in the period of confinement. The average sentence imposed for absence from actual combat on conviction under the 75th or 58-28

Articles of War is 20 years. This offense is less serious and I suggest ten years confinement. The approving authority suspended the execution of the dishonorable discharge until the accused's release from confinement, and designated Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England, as the place of confinement. I also suggest that your action include suspension of the dishonorable discharge and the designation of Disciplinary Training Center No. 2912 as the place of confinement.

5. Inclosed is a form of action designed to carry into effect the recommendations hereinbefore made. Also draft of 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 vacated in part in accordance with recommendation of the Assistant Judge Advocate General. Dishonorable discharge suspended until accused released from confinement. GCMO 52, ETO, 11 Jul 1944)

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

BOARD OF REVIEW

ETO 2409

21 JUL 1944

U N I T E D S T A T E S	ICELAND BASE COMMAND.
v.	Trial by G.C.M., convened at Camp Herskola, Iceland, 12 May 1944.
Private FLOYD S. CUMMINGS (15081951), Fourth Service Squadron, Second Service Group.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. The 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 specifications:

CHARGE I: Violation of the 93rd Article of War.
Specification 1: In that Private Floyd S. Cummings, 4th Service Squadron, 2nd Service Group, did, at Camp Tripoli, Iceland, on or about 5 April 1944, feloniously take, steal, and carry away one wallet containing $47.00 in United States currency and 170 Icelandic Kronur ($26.26), the property of Private First Class Francis J. Martin, 33rd Fighter Squadron.
Specification 2: In that * * * did, at Camp Massey, Iceland, on or about 15 April 1944, feloniously take, steal, and carry away one 21-jewel "Lord Elgin" wrist watch, value about $75.00, the property of Technician Fifth Grade Glen H. Allen, 224th Engineer Composite Company.
Specification 3: In that * * * did, at Camp Tripoli, Iceland, on or about 10 February 1944, feloniously take, steal, and carry away one wallet

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containing 400 Icelandic Kronur ($61.80), the property of Private First Class Delfo J. Patanay, 33rd Fighter Squadron.

Specification 4: In that * * * did, at Camp Massey, Iceland, on or about 15 April 1944, feloniously take, steal, and carry away one Evans cigarette case and lighter, value about $10.00, the property of Sergeant Allen C. Williams, 217th Engineer Composite Company.

He pleaded not guilty to and was found guilty of the Charge and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for one day 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 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 under Article of War 50½.

3. The charge sheet shows that accused is 21 years nine months of age and that he enlisted at Fort Benjamin Harrison, Indiana on 1 October 1941 to serve for a period of three years. His service is governed by Service Extension Act, 1941. He had no prior service.

4. 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. (CM ETO 1671, Matthews and authorities therein cited).

5. Confinement in a penitentiary is authorized for the crime of larceny of property of value in excess of $50.00 by Article of War 42, sec.287, Federal Criminal Code (18 U.S.C.A.466), 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. United States v. Sloan, 31 Fed. Sup.327. The designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement is authorized (Cir.291, WD, 10 Nov 1943, sec.V, sec.3a).

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

(363)

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 21 JUN 1944 TO: Commanding General, Iceland Base Command, APO 860, U. S. Army.

1. In the case of Private FLOYD S. CUMMINGS (15081951), Fourth Service Squadron, Second 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 2409. For convenience of reference please place that number in brackets at the end of the order: (ETO 2409).

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 2410

29 JUN 1944

U N I T E D S T A T E S)	NORTHERN IRELAND BASE SECTION SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private WILLIAM E. McLAREN (33026324), Maintenance Company, 66th Armored Regiment, 2nd Armored Division.)	Trial by G.C.M., convened at Wilmont House, County Antrim, Northern Ireland, 24 April 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, 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 58th Article of War.
Specification 1: In that Private William E. McLaren, Maintenance Company, 66th Armored Regiment, 2d Armored Division, did, at Tidworth, Hampshire, England, on or about 11 March 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Narrow Water, Northern Ireland, on or about 22 March 1944.
Specification 2: In that * * *, did, at Victoria Barracks, Belfast, Northern Ireland, on or about 28 March 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at Goraghwood Station, Northern Ireland, on or about 1 April 1944.

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CHARGE II: Violation of the 69th Article of War.
Specification: In that * * *, having been duly placed in confinement in the Guardhouse, Victoria Barracks, Belfast, Northern Ireland, on or about 22 March 1944, did, at Belfast, Northern Ireland, on or about 28 March 1944 escape from said confinement before he was set at liberty by proper authority.

He pleaded to each of the specifications of Charge I, guilty, except for the words "desert" and "in desertion", substituting therefor respectively the words "absenting himself without proper leave from" and "without leave"; to the excepted words, not guilty, to the substituted words, guilty, and to Charge I, not guilty but guilty of a violation of the 61st Article of War. He pleaded guilty to Charge II and its Specification. Three-fourths of the members of the court present when the vote was taken concurring, he was found guilty of both charges and specifications. Evidence was introduced of two previous convictions: one, by summary court for absence without leave for one day in violation of Article of War 61, and one by special court-martial for failing to obey a lawful order and for being absent without leave on three different occasions for one day, 3½ hours, and nine hours respectively 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 30 years. The reviewing authority approved only so much of the findings of guilty of Specification 1, Charge I as involves a finding of guilty of absence without leave for the period charged, in violation of Article of War 61, approved the findings of guilty of Specification 2, Charge I, and Charge I, and of Charge II and its Specification, reduced the period of confinement to 20 years, designated the Federal Penitentiary, Lewisburg, Pennsylvania 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 showed that the accused absented himself without leave from his organization then located at Tidworth, Hampshire, England on 11 March 1944. He was apprehended on 22 March 1944 near the southern border of Ulster, Ireland. He had with him a package containing toilet articles and civilian clothes. Although placed in confinement in Belfast he escaped on 28 March 1944, obtained civilian clothes and made his way to Dublin. After three days he turned in to the American Legation because he was without money and could not secure a job without an identification card. He was provided with a ticket to Belfast and travel orders. On the evening of 1 April 1944, he was arrested en route at the Irish Free State - Northern Ireland border. He pleaded guilty to the escape and to both absences without leave, and signed a statement admitting all the facts above set forth (R8-24; Ex.4). There is substantial evidence in the record of trial from which the intent to desert may properly and legally be inferred (CM ETO 1737, Mosser and authorities cited therein).

4. The charge sheet shows that accused is 27 years and four months of age, that he was inducted at Philadelphia, Pennsylvania, on 14 February 1941 to serve one year, and that his period of service was extended by the Service Extension Act of 1941. 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 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 approved by the reviewing authority.

6. Confinement in a United States penitentiary is authorized for the offense of desertion in time of war (AW 42; MCM, 1928, par.90a, p.80). 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.3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind

WD, Branch Office TJAG., with ETOUSA. 29 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S.Army. (Successor in Command to Northern Ireland Base Section, SOS, ETOUSA)

1. In the case of Private WILLIAM E. McLAREN (33026324), Maintenance Company, 66th Armored Regiment, 2nd Armored 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 and the sentence as approved by the reviewing authority, 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 general court-martial order to be published should show that the commanding officer of the Western Base Section, Communications Zone, ETOUSA, succeeded to the command of the Northern Ireland Base Section, SOS, ETOUSA by reason of the disbandment of the latter command. This may appear in the caption of the order or by memo thereon in the following form: "Headquarters Western Base Section, Communications Zone, ETOUSA, successor in the command of Northern Ireland Base Section, SOS, ETOUSA," by authority of G.O.# 23 dated 30 May 1944 Hq. SOS, ETOUSA.

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 2410. For convenience of reference please place that number in brackets at the end of the order: (ETO 2410).

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

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

BOARD OF REVIEW

28 JUN 1944

ETO 2414

U N I T E D S T A T E S)	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private RAYMOND MASON (34042986), Company D, 366th Engineer General Service Regiment.)	Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 18 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 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 charges and specifications:

CHARGE 1: Violation of the 61st Article of War.
Specification 1: In that Private Raymond Mason, Company D, 366th Engineer General Service Regiment, Chepstow Monmouthshire, South Wales, did, without proper leave, absent himself from his organization at Chepstow Monmouthshire, South Wales from about 6 December, 1943 to about 7 December, 1943.
Specification 2: In that * * *, did, without proper leave, absent himself from his organization at Chepstow Monmouthshire, South Wales from about 3 January, 1944 to about 7 January, 1944.
Specification 3: In that * * *, did, without proper leave, absent himself from his organization at Chepstow Monmouthshire, South Wales from about 12 February, 1944 to about 13 February, 1944.

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Specification 4: In that * * *, did, without proper leave, absent himself from his organization at Chepstow Monmouthshire, South Wales from about 2300 hours, 1 March, 1944 to about 2300 hours, 8 March, 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that * * *, did, at Chepstow Monmouthshire, South Wales, on or about 2300 hours, 19 February, 1944, with intent to do bodily harm, commit an assault upon Private Melvyn Witt, by cutting him in the left chest, with a dangerous weapon to wit, a switch blade knife.

CHARGE III: Violation of the 64th Article of War.
Specification 1: In that * * *, did, at Chepstow Monmouthshire, South Wales, on or about 2300 hours, 19 February, 1944 lift up a weapon, to wit a knife against First Lieutenant Jefferson R. Ross Jr. his superior officer, who was then in the execution of his office.
Specification 2: In that * * *, having received a lawful command from First Lieutenant Jefferson R. Ross Jr., his superior officer, to put the knife down and to release the man whom he had cut, did at Chepstow Monmouthshire, South Wales, on or about 2300 hours, 19 February, 1944, willfully disobey the same.
Specification 3: In that * * *, having received a lawful command from Second Lieutenant Austin S. Gittens, his superior officer, to report to the guard house, did at Chepstow Monmouthshire, South Wales, on or about 2300 hours, 19 February, 1944, willfully disobey the same.

ADDITIONAL CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Raymond (NMI) Mason, Company "D", 366th Engineer General Service Regiment, Monmouth, Monmouthshire, South Wales, did, near Manson Cross, Monmouth, Monmouthshire, South Wales, on or about 30 March 1944, with intent to commit a felony, viz, rape, commit an assault upon Doreen Margaret Lockwood by willfully and feloniously throwing the said Doreen Margaret Lockwood to the ground, getting on top of her and lifting her clothing.

He pleaded guilty to Charge I and its four specifications, not guilty to Charge II, Charge III, the Additional Charge and their respective specifications, and, two-thirds of the members of the court present when the

vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of four previous convictions by summary courts: two for absence without leave for two days and one day respectively, in violation of the 61st Article of War; one for breaking restriction and failing to assemble for reveille, in violation of the 96th and 61st Articles of War; and one for leaving post and station without proper authority while working, in violation of the 96th Article of War. 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 the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 25 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. (a) Accused's pleas of guilty to Charge I and its four specifications (R6) are fully supported by evidence showing his absence without leave from his organization during the respective periods alleged (R7-8; Pros.Exs.1-4, inclusive) (CM ETO 1606, Sayre, and authorities there cited).

(b) With respect to Charge II and its Specification, there is competent, substantial evidence that accused at the time and place, in the manner and with the intent alleged, assaulted Private Melvyn Witt without provocation (R8-10; Pros.Ex.5) (CM ETO 1284, Davis et al; CM ETO 1982, Tankard). Such variance as there may be between the allegation in the Specification that he cut Witt in the left chest and the proof that he stabbed him in the shoulder (R9) was not fatal under Article of War 37. The record supports the findings of guilty.

(c) With respect to Charge III, Specification 1, the following testimony of First Lieutenant Jefferson R. Ross Jr.: "I commanded again for him /accused/ to release the man. This time he released the man and came toward me and threatened me with a knife and he said, 'I'll cut your _____neck'" (R11), is sufficient to support the findings of guilty of lifting up a weapon against his superior officer who was in the execution of his office, in violation of Article of War 64 (MCM, 1928, par.134a, pp.147-148).

(d) The evidence clearly establishes accused's guilt on two separate occasions of willful disobedience of his superior officer, in violation of Article of War 64, as alleged in Specification 2 of Charge III (R11) (Winthrop's Military Law & Precedents - Reprint, p.572) and Specification 3 of Charge III (R12-13) (MCM, 1928, par.134b, p.148).

(e) The testimony of Miss Doreen Lockwood (R14-18), corroborated by that of a member of the British Women's Land Army (R18-20) and accused's own testimony as to Miss Lockwood's appeal for help when "we were down on the ground" (R27), supports the court's findings that accused was guilty, under the circumstances alleged in the Additional Charge and its Specification, of an assault upon her with intent to commit rape (CM ETO 2652,

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Jackson, and authorities there cited).

4. The court's determination against accused of the issue whether his drunkenness on 19 February 1944 was such as to destroy his mental capacity to entertain the respective specific intents necessarily embodied in the offenses charged in Charges II and III and their respective specifications, is supported by substantial evidence (R12,13), (CM ETO 2484, Morgan and authorities there cited). The court was not required to believe accused's testimony (R26) in this connection (Ibid.).

5. The charge sheets show that accused is 25 years nine months of age and was inducted 23 April 1941 at Fort Bragg, North Carolina 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.

7. Confinement in a United States penitentiary is authorized for the crimes of assault with intent to do bodily harm and 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 designation 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. 28 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S. Army.

1. In the case of Private RAYMOND MASON (34042986), Company D, 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. Particular attention is invited to the apparently unwarranted accumulation of charges against accused for four absences without leave during the period 6 December 1943 to 8 March 1944. The charges were not prepared until 13 March. Attention is further invited to the apparently unwarranted failure to impose any restraint whatever upon accused until 8 March 1944, in the face of evidence that on that date his fourth absence without leave had just terminated and that on 19 February he had committed a vicious, unprovoked assault with a knife, inflicting a dangerous wound upon another soldier to the knowledge of at least two commissioned officers of the regiment, had threatened one of such officers and had willfully disobeyed direct commands by each of them. Despite the obviously serious nature of these offenses, accused's restraint was not only delayed, but when it finally was imposed it consisted merely in restriction to his company area, which he broke on 30 March and assaulted a British civilian with intent to commit rape. In compliance with instructions of the Commanding General, ETOUSA, a report is requested.

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 2414. For convenience of reference please place that number in brackets at the end of the order: (ETO 2414)

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

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

BOARD OF REVIEW

-7 JUN 1944

ETO 2422

U N I T E D S T A T E S	XIX CORPS
v.	Trial by G.C.M., convened at Knook Camp, Wiltshire, England 28 April 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.
Private WILLIAM MORIN, (20146513), Medical Detachment, 963rd Field Artillery 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 96th Article of War.
Specification: In that Private William Morin, Medical Detachment, 963rd Field Artillery Battalion, then a staff sergeant, Medical Detachment, 963rd Field Artillery Battalion, having been granted a pass to visit Dorchester, Dorset, England, did, on or about 4 April 1944, wrongfully exceed the limit of his pass by going to Weymouth, Dorset, England.

CHARGE II: Violation of the 94th Article of War.
Specification: In that * * *, did, at Dorchester, Dorset, England, on or about 5 April 1944, knowingly and willfully apply to his own use and benefit a certain Government motor vehicle, to-wit, a one-quarter ton truck, of a value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

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CHARGE III: Violation of the 93rd Article of War.
Specification: In that * * *, did, at or in the vicinity of Weymouth, Dorset, England, on or about 4 April 1944, with intent to commit a felony, viz., rape, commit an assault upon Private Edna May Button, British Army Territorial Service, by willfully and feloniously striking, scratching and bruising the said Private Button on the face and body, with his hands.

He pleaded not guilty to Charges I and III and their respective specifications and guilty to Charge II and its Specification and was found guilty of Charges II and III and their respective specifications, but not guilty of Charge I 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 15 years. The reviewing authority approved the sentence, reduced the period of confinement to ten 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. Private Caesar Gatta (32637642) Medical Detachment 963rd Field Artillery Battalion, was charged with aiding and abetting the present accused (Morin) in the commission of a felony, viz assault with intent to commit rape upon the person of Private Edna Mae Button in violation of the 93rd Article of War. The convening authority consolidated the charges against Morin and Gatta for trial and defense counsel in open court stated that there was no objection thereto. Gatta was found guilty of the charge 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 a period of two years. The reviewing authority approved the sentence, designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement but suspended that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement. The result of the trial was promulgated in General Court Martial Order No. 13, Headquarters XIX Corps, dated 17 May 1944.

4. The proof that accused committed a violent assault and battery upon the person of Private Edna Mae Button, British Auxiliary Territorial Service, is not only uncontradicted but is corroborated by accused's own testimony. The only question deserving consideration is whether or not accused entertained the specific intent to rape Private Button when he committed the assault and battery upon her. There was substantial competent evidence which supports the finding of the court that accused did entertain such specific intent and that he proceeded to execute his intention in a violent manner without the consent of his victim and against her will (CM ETO 1673, Denny and authorities therein cited). The fact that he

ceased his attack before effecting his purpose is no defense. Repentance came too late.

> "Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted." (MCM 1928, par.149 l p.179).

The findings of the court under the circumstances revealed by the record of trial will not be disturbed by the Board of Review upon appellate review (CM ETO 1954, Lovato and authorities therein cited).

5. The charge sheet shows accused to be 23 years four months of age, that he was inducted into the military service 24 February 1941, for the duration of the war plus six months and that he had prior service in the Enlisted Medical Detachment, 152nd Field Artillery (National Guard) from 23 Jan 1941 to 23 Feb 1941.

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 a United States Penitentiary is authorized for the crime of assault with intent to commit rape by AW 42 and Sec 276 of the Federal Criminal Code (18 USCA 455). The Federal Reformatory, Chillicothe, Ohio is the authorized place of confinement. (Cir. 291, WD, 10 Nov 1943, Sec V, par.3a and b).

B. Franklin Riter Judge Advocate

Judge Advocate

Edward H. Longest Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 7 JUN 1944 TO: Commanding General, XIX Corps, APO 270, U.S. Army.

1. In the case of Private WILLIAM MORIN (20146513) Medical Detachment 963rd 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 the execution of the sentence.

2. The sentence adjudged and approved appears excessive for the offense under the circumstances shown by the record of trial. While the assault on the young woman was deliberate and requires punishment, I do not believe accused's conduct justifies penitentiary confinement. I suggest that the period of confinement be reduced to five years, the dishonorable discharge suspended and Disciplinary Training Center No. 2912, Shepton Mallet, Somerset, England, be designated as the place of confinement.

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 2422. For convenience of reference please place that number in brackets at the end of the order: (ETO 2422).

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

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

BOARD OF REVIEW

29 MAY 1944

ETO 2432

U N I T E D S T A T E S	V CORPS.
v.	
Private CHARLES N. DURIE (33319577), Battery C, 430th Antiaircraft Artillery Automatic Weapons Battalion (Mobile).	Trial by G.C.M., convened at Norton Manor Camp, Somersetshire, England, 13 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 37 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 58th Article of War.
Specification: In that Private Charles N. Durie, Battery C, 430th Antiaircraft Artillery Automatic Weapons Battalion, Mobile, did, at Yeovil, Somerset, England, on or about 1 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 surrendered himself at Yeovil, Somerset, England on or about 5 May, 1944.

He pleaded guilty to the Specification except the words "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," substituting therefor the words "absent himself without proper leave from his organization and did remain absent without proper leave," of the excepted words, not guilty, of the substituted words, guilty, and to the Charge, not guilty but guilty of a violation of the 61st Article of War. He was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions: two by special courts-martial for absence without leave for 32 days and 34 days respectively and one by summary court for absence without leave for 74 days, all 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 37 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 evidence for the prosecution consisted of the following proof:

(a) That on the 20th of April 1944, the 430th Antiaircraft Artillery Automatic Weapons Battalion, while stationed at Yeovil, Somersetshire, England, received orders alerting it under the headquarters at that station in preparation for a "short over-sea voyage to be taken" (R6). There was a meeting of the battery commanders at headquarters at some time after 20 April 1944 and prior to 28 April 1944 whereat they were notified of the alert order (R7).

(b) Extract copy of the morning report of Battery C, 430th Antiaircraft Artillery Automatic Weapons Battalion for 28 April 1944 (Pros.Ex. 1; R8) which in pertinent part reads as follows:

RECORD OF EVENTS

"Paragraphs 1a and 1b of letter, Headquarters V Corps, subject 'Desertion' dated 21 Apr 44, were read to the members of this Btry present as per roll attached at a formation of the Btry at 1115 hours on 28 Apr 44.
'Present: Private Charles N. Durie, ASN 33319577'."

(c) A true copy of the letter dated 21 April 1944 to which reference was made in the foregoing extract of the morning report, "Subject: Desertion" (Pros.Ex.2; R8) of which the following is a relevant excerpt:

" 1. For the information, guidance and admonition of all concerned, it is directed that each unit commander, down to and including companies, as soon as practicable after his command receives orders and is alerted for participation in the oversea invasion operation against the enemy occupied European continent, read subparagraphs a and b of this paragraph to all officers and men of the unit at a formation of the unit.

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).

(2) Any person who 'advises' or 'persuades' or knowingly assists another 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 59).

(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 everyone 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 record 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."

(d) Extract copy of the morning report of Battery C, 430th Antiaircraft Artillery Automatic Weapons Battalion for 1 May 1944 (Pros.Ex.3; R9) reading in pertinent part as follows:

"SERIAL NUMBER	NAME	GRADE
33319577	Durie	Pvt
Fr dy to AWOL 0600"		

(e) Extract copy of morning report of Battery C, 430th Antiaircraft Artillery Automatic Weapons Battalion for 5 May 1944 (Pros.Ex.4; R9) reading in pertinent part as follows:

"SERIAL NUMBER	NAME	GRADE
33319577	Durie (AWOL)	Pvt
Fr AWOL to conf 430th AAA AW Bn Gd House this sta awaiting trial charged 58th AW Desertion"		

4. The evidence for the defense showed:

(a) By stipulation of prosecution and defense that accused on 30 April 1944 came into possession of $286.89 (R15).

(b) That about a week prior to pay day (30 April 1944) accused received from the Finance Officer £72 representing accumulated back pay. He showed it to Private Harry Ceroni, a member of his battery. Accused gave Ceroni the £72 for safe-keeping because Ceroni had a footlocker equipped with a lock. Ceroni at that time returned to accused the sum of £6 (R15,16,17). Thereafter during the week, Ceroni on several occasions returned separate sums to accused, but on Sunday night, 30 April 1944, Ceroni still retained £32 of accused's money. He returned this amount to accused the night before the trial. Aside from this transaction, Ceroni was indebted to accused (R16-18).

On Sunday 30 April 1944 accused, after he was paid, informed Ceroni that "he was going to take a few days off. Take 2 or 3 days off and come back, because of the way things were going on around the battery". Accused had joined the battery on 18 March 1944 (R12), but had had no interview with his battery officers. All of his duties had been "KP and guard"(R17).

Accused and Ceroni were present at formation on 28 April 1944 when Lieutenant Gluch an officer of the battery read the letter concerning desertion (R18). Accused stood next to Ceroni. The officer explained the statement as he read it (R19), and "put it so we could understand it - know what it meant" (R25). Ceroni saw accused in the battery barracks the night he returned from his absence and at that time Ceroni held £32 of accused's money in the footlocker (R19).

(c) That accused had received about an hour's cursory examination by Captain Francis T. Irwin, the battalion surgeon, who was of the opinion that he knew the difference between right and wrong and had the ability to carry out simple direct orders, but not the capacity to perform duties requiring concentration or deliberation (R20-22).

The accused elected to remain silent.

5. (a) Accused is charged 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.

> "It is a well settled rule of criminal pleading that, when an offense against a criminal statute may be committed in one or more of several ways, the indictment or information may, in a single count, charge its commission in any or all of the ways specified in the statute. So where a penal statute mentioned several acts disjunctively and prescribes that each shall constitute the same offense and be subject to the same punishment, an indictment or information may charge all of such acts conjunctively as a single offense." (31 C.J., sec.325, pp.764-765, footnotes 34 and 35).

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There is therefore no objection to the inclusion in the one specification allegations of the two separate specific intents which must be entertained by an accused in order to constitute the offense of desertion laid under Articles of War 58 and 28. The prosecution was free to prove either or both of the specific intents alleged (Sampson v. State 83 Texas Crim. 594, 204 S.W. 324).

(b) Accused's absence without leave for four days terminated by his surrender at his home station is admitted. The prosecution's evidence proved two other of the fundamental elements of its case:

1 - That accused's unit "was 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";
2 - 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.

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 the question as to the existence of proof of accused's specific intent to avoid hazardous duty or to shirk important service when at the time and place alleged he absented himself from his command. This is the c rucial problem of the instant case (CM 231163 (1943), Bull. JAG, Vol.II, No.4, Apr 1943, sec.385, p.139; CM 224765 (1942), Bull.JAG, Vol.I, No.6, Nov 1942, sec.385, p.322; CM 222861 (1942), Bull.JAG, Vol.I, No.2, Jul 1942, sec.385, p.103; CM ETO 455, Nigg; CM ETO 564, Neville). In order to meet this burden of proof the prosecution relied solely upon the evidence particularly summarized in paragraph 3 hereof in spite of motion of defense counsel at the conclusion of prosecution's case in chief for a finding of not guilty of the offense of desertion (R10,11) which motion was renewed before the case went to the court for its deliberations (R26,27).

The prosecution's evidence established the facts that accused's unit was alerted for invasion service, and that accused absented himself for four days after he received direct and positive warning of such status. From such evidence, it was argued (R11) that the necessary specific intent on the part of accused to avoid hazardous duty or shirk important service may be inferred. 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.

When the evidence presented by the defense (which is uncontradicted) is considered, the reason for the hiatus in the prosecution's case is made apparent. Accused immediately prior to his departure had come into possession of a considerable sum of money representing back pay which he placed with his friend Ceroni for safe-keeping. On the day accused left camp he stated to Ceroni "he was going to take a few days off. Take 2 or 3 days off and come back, because the way things were going on around the battery". Accused joined the battery on 18 March 1944, but according to Ceroni accused was dissatisfied because he had never had an interview with his battery officers and had been kept on kitchen police and guard duties. When accused departed he left £32 with Ceroni for safe-keeping. Accused voluntarily returned to the battery after being absent four days.

The Board of Review scrupulously observed the restriction upon its powers which prohibits it from judging the credibility of witnesses, weighing evidence or resolving conflicts in evidence (CM ETO 132, Kelly and Hyde; CM ETO 895, Davis et al and authorities therein cited). It is equally jealous of its duty to determine whether or not a record contains competent substantial evidence to sustain a finding of guilty (CM 223336 (1942), Bull. JAG, Vol.I, No.3, Aug 1942, sec.422, p.159; CM ETO 1661, Hass; CM ETO 804, Ogletree et al; CM ETO 1567, Spicocchi). When required, however, to pronounce upon the sufficiency of evidence to sustain a conviction it will do so without hesitation. In this instance the Board of Review believes the prosecution failed in making proof of a vital element of its case. When the uncontradicted evidence on behalf of accused is placed in this hiatus of prosecution's case, it becomes manifest that the record is not only insufficient to prove accused's intent to avoid hazardous duty or shirk important service, but is also affirmatively sufficient only to sustain a charge of absence without leave. In principle accused's conduct was similar to that of Neville in CM ETO 564, Neville. In that and in the instant case neither accused knew when his unit would actually leave; both knew they were absent without authority; and both must have known they were "taking a chance". Neville walked 18 miles back to camp arriving about 10 hours after his original departure. Durie was absent four days but left most of his worldly wealth with Ceroni and returned in four days in keeping with his announced intention to "take 2 or 3 days off and come back". It is impossible to torture from accused's conduct the inference that he intended to avoid hazardous duty or to shirk important service.

The Board of Review makes particular note of 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,

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Wilson; CM ETO 1685, Dixon sustaining charges of desertion under the 58th and 28th Articles of War. These cases cannot assist the findings in the instant case inasmuch as they are "battle-line" cases arising out of the campaigns in North Africa and Sicily. The circumstances connected with the absence of each accused in the cited cases are entirely dissimilar to those under which Durie absented himself.

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 the Charge and Specification as involves findings that the accused did, at the time and place alleged, absent himself without leave until he surrendered himself at the time and place alleged in violation of Article of War 61, and legally sufficient to support the sentence.

6. The charge sheet shows that accused is 27 years nine months of age, and that he was inducted 25 June 1942 at Philadelphia, Pennsylvania to serve for the duration of the war plus six months. No prior service is shown.

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 except as herein specifically noted.

8. Penitentiary confinement is not authorized by AW 42 for the offense of absence without leave (CM 238707, Bull.JAG, Vol.II, No.8, Aug 1943, sec. 419(4), p.308)). Confinement should be in a place other than a penitentiary, Federal correctional institution or reformatory.

B. Franklin Riter — Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 MAY 1944 TO: Commanding General, V Corps, APO 305, U.S. Army.

1. In the case of Private CHARLES N. DURIE (33319577), Battery C, 430th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specification as involves findings that accused did, at the time and place alleged, absent himself without leave until he surrendered himself 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. Attention is invited to the designated place of confinement, which 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.

3. In view of the reduction of the grade of the offense I believe there should be a reduction in the period of confinement and I so recommend I further suggest that accused be confined in Disciplinary Training Center #2912, and that his dishonorable discharge be suspended until the soldier's release from confinement.

4. The "tentative" general court-martial order is a nullity. I do not approve of the use of simulated judicial process as a means of publicity of General Court-Martial sentences (See my remarks in 1st Ind., CM ETO 2433, Meyer).

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 2432. For convenience of reference please place that number in brackets at the end of the order: (ETO 2432).

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

25 MAY 1944

ETO 2433

U N I T E D S T A T E S	V CORPS.
v.	Trial by G.C.M., convened at Norton Manor Camp, Somerset, England, 16 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. Federal Reformatory, Chillicothe, Ohio.
Private CHARLES MEYER (32713730), Company C, 254th 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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Charles Meyer, Company C, 254 Engineer Combat Battalion, did, at Newquay, Cornwall, England on or about 23 January 1944, desert the service of the United States and did remain absent in desertion until he surrendered himself at London, England on or about 8 May 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 25 years at such place as the reviewing authority may direct. 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. Accused was absent from his organization for a period of 106 consecutive days. His confession indicates that during his absence he entertained the specific intent to remain absent in the hope of being

ultimately court-martialed and transferred to another unit.

> "The fact that such intent [not to return to the service] is coupled with a purpose to return provided a particular but uncertain event happens in the future * * * does not constitute a defense" (MCM, 1928, par.130a, p.142).

Court-martial proceedings might never have been instituted against accused and had such proceedings followed there was no certainty that his "transfer to another outfit" would result. Therefore, his prolonged absence coupled with such declaration is substantial evidence from which the court was justified in inferring his specific intent to absent himself permanently from the military service (Winthrop's Military Law & Precedents - Reprint - p.638; CM 130018 (1919), Dig.Op.JAG, 1912-1940, sec.416(9), p.269; CM ETO 1629, O'Donnell).

4. The charge sheet shows that accused is 23 years four months of age; that he was inducted into military service on 11 January 1943, was transferred to the Enlisted Reserve Corps and reported for active duty at Fort Dix, New Jersey, 18 January 1943. No prior service is shown.

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. Confinement in a penitentiary is authorized for the offense of desertion in time of war by AW 42. Inasmuch as the sentence includes confinement at hard labor for 25 years, the place of confinement should be the United States Penitentiary, Lewisburg, Pennsylvania, and not the Federal Reformatory, Chillicothe, Ohio (Cir. 291, WD, 10 Nov 1943, sec.V, pars.3a and b).

B. Franklin Riter Judge Advocate

Judge Advocate

Edward H. Young Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 25 MAY 1944 TO: Commanding General, V Corps, APO 305, U.S. Army.

1. In the case of Private CHARLES MEYER (32713730), Company C, 254th 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. This would be a proper case for the suspension of the dishonorable discharge.

2. For the reasons stated in the holding of the Board of Review the place of confinement should be changed from the Federal Reformatory, Chillicothe, Ohio, to the United States Penitentiary, Lewisburg, Pennsylvania.

3. The use of the so-called "tentative" general court-martial order in the effort to give publicity among the troops of the sentence in this case is without authority and is objectionable. The order must be of the date the reviewing authority takes final action (MCM, 1928, par.87d, p.79). Inasmuch as the sentence cannot be ordered executed prior to the examination of the record of trial and approval of sentence by the Board of Review and myself (AW 50½, par.3), the "tentative" order possesses no legal efficacy. I recognize the expediency at this time of informing the personnel of the penalty for desertion and unauthorized absences, but it can be done without the use of simulated judicial process for such purpose. Such practice is not approved.

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 2433. For convenience of reference please place that number in brackets at the end of the order: (ETO 2433).

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

2433

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

BOARD OF REVIEW

ETO 2444

2 JUN 1944

U N I T E D S T A T E S)	5TH INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at Camp
)	Ballyedmond, County Down, Northern
Private PAUL E. WARNER)	Ireland 1 May 1944. Sentence:
(16017197), Company M,)	Dishonorable discharge, total for-
10th Infantry.)	feitures and confinement at hard
)	labor for 30 years. United States
)	Penitentiary, Lewisburg, Pennsyl-
)	vania.

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 93d Article of War.
(Finding of Not Guilty).
Specification: (Finding of Not Guilty).

CHARGE II: Violation of the 58th Article of War.
Specification: In that Private Paul E. Warner, Company M, 10th Infantry did, at Camp Ballyedmond, County Down, Northern Ireland on or about 23 January 1944 Desert the service of the United States and did remain absent in desertion until he was apprehended at Goraghwood Station, County Antrim, Northern Ireland, on or about 18 March 1944.

CHARGE III: Violation of the 96th Article of War.
Specification 1: (Finding of Not Guilty).

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Specification 2: In that * * * did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, without proper authority, appear in the uniform of an officer of the Army of the United States.

ADDITIONAL CHARGES

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

Specification 1: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, falsely indorse with the signature "Lt G Valkenburg, 1st Lt, US Army, APO 2" a certain check in the amount of two hundred dollars ($200.00), dated 24 February 1944, payable to cash, signed Albert Talbot, and drawn upon the Firestone Saveing Bank, Akron, Ohio, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, falsely indorse with the signature "G.A. Valkenburg, 1st Lt, U.S.Army, APO 2" a certain check in the amount of two hundred dollars ($200.00), dated 24 February 1944, payable to cash, signed Frank D. Price, and drawn upon the First National Bank, Jackson, Michigan, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, falsely indorse with the signature " G A. Valkenburg, 1st Lt, U.S.Army, APO 2" a certain check in the amount of two hundred dollars ($200.00), dated 24 February 1944, payable to cash, signed Joseph A. Hunter, and drawn upon the Frist(sic) National Bank, Decatur, Illinois, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 4: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, falsely indorse with the signature "G.A. Valkenburg 1st Lt. US Army A.P.O. 2" a certain check in the amount of one hundred dollars ($100.00), dated 24 February 1944, payable to cash, signed Cecil Ray, and drawn upon Farmer Trust Bank, Baxter Springs, Kansas, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 5: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, falsely indorse with the signature "G.A. Valkenburg 1st Lt. U.S. Army APO 2" a certain check in the amount of one hundred and fifty dollars ($150.00), dated 24 February 1944, payable to cash, signed Leonard DuPont, and drawn upon the Second National Bank, Toledo, Ohio, which said check and indorsement was a writing of a private nature which mignt operate to the prejudice of another.

Specification 6: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, falsely indorse with the signature "Lt G. Valkenburg 1st Lt US Army A.P.O. 2" a certain check in the amount of two hundred dollars ($200.00), dated 24 February 1944, payable to cash, signed James Nichols, and drawn upon the First National Bank, Cleveland, Ohio, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

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

Specification 1: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 24 February 1944 in the amount of two hundred dollars ($200.00) payable to cash, signed Albert Talbot, and drawn upon the Firestone Saveing Bank, Akron, Ohio, and having the indorsement "Lt G Valkenburg, 1st Lt, US Army, APO 2", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he the said Private Paul E. Warner, then well knew, falsely made and forged.

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Specification 2: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 24 February in the amount of two hundred dollars ($200.00) payable to cash, signed Frank D. Price, and drawn upon the First National Bank, Jackson, Michigan, and having the indorsement "G.A.Valkenburg, 1st Lt, U.S.Army, APO 2", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Paul E. Warner, then well knew, falsely made and forged.

Specification 3: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 24 February 1944 in the amount of two hundred dollars ($200.00) payable to cash, signed Joseph A. Hunter, and drawn upon the Frist (sic) National Bank, Decatur, Illinois, and having the indorsement "G A. Valkenburg, 1st Lt, U.S.Army, APO 2", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Paul E. Warner, then well knew, falsely made and forged.

Specification 4: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 24 February 1944 in the amount of one hundred dollars ($100.00) payable to cash, signed Cecil Ray, and drawn upon the Farmer Trust Bank, Baxter Springs, Kansas, and having the indorsement "G.A. Valkenburg, 1st Lt. US Army A.P.O. 2", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Paul E. Warner, then well knew, falsely made and forged.

Specification 5: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 24 February 1944 in the amount of one hundred and fifty dollars ($150.00) payable to cash, signed Leonard DuPont, and drawn upon the Second National Bank, Toledo, Ohio, and having the indorsement "G.A. Valkenburg 1st Lt. U.S. Army APO 2", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Paul E. Warner, then well knew, falsely made and forged.

Specification 6: In that * * *, did, at Dungannon, County Tyrone, Northern Ireland, on or about 24 February 1944, with intent to defraud, willfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 24 February 1944 in the amount of two hundred dollars ($200.00) payable to cash, signed James Nichols, and drawn upon the First National Bank, Cleveland, Ohio, and having the indorsement "Lt G. Valkenburg 1st Lt US Army A.P.O. 2", said check being a writing of a private nature which might operate to the prejudice of another, and which said indorsement was, as he, the said Private Paul E. Warner, then well knew, falsely made and forged.

He pleaded not guilty to all charges and specifications and was found not guilty of Charge I and its Specification and Specification 1 of Charge III (original charge sheet), guilty of Charge II and its Specification, and Specification 2 of Charge III and Charge III (original charge sheet), and guilty of both additional charges and their specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave and failing to obey a lawful order of a superior officer 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 30 years. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge II and of Charge II (original charge sheet) as involved a finding of guilty of absence without leave from 23 January 1944 to 18 March 1944 in violation of Article of War 61, approved the sentence, 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.

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3. This is a companion case to that of Private Arthur A. Mills, also of Company M, 10th Infantry. The Board of Review has recently held the record of trial in that case legally sufficient to support the findings of guilty and the sentence therein (CM ETO 2293, Mills), which holding was approved by the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations. The offenses of which accused Mills was found guilty were of the same pattern as those of which accused herein was found guilty. The evidence in the instant case considered alone makes it plain that Mills and Warner were confederates in the execution of the fraudulent scheme whereby each secured from unsuspecting bankers substantial sums. The Board of Review is of the opinion that the record herein is legally sufficient to support the findings of guilty of the additional charges and their respective specifications (CM ETO 2293, Mills; CM ETO 2273, Sherman; CM ETO 2216, Gallagher).

4. The Specification of Charge II alleges that accused's unauthorized absence was terminated by apprehension at Goraghwood Station, County Antrim, Northern Ireland, on or about 18 March 1944. The officer who apprehended him testified that Goraghwood Railroad Station was "just outside of Newry" in County Armagh, "the county adjoining the Irish Free State" (R16-17). A variance in this particular between specification and proof is not fatal in the case of desertion (AW 37; JAG 251.19, Jan. 9, 1919, Dig. Op.JAG, 1912-1940, sec.416(14), p.271); a fortiori it is not fatal where, as here, a finding of guilty of absence without leave only has been approved by the reviewing authority.

5. The charge sheets show that accused is 25 years nine months of age, that he enlisted 24 October 1940 for three years at Peoria, Illinois, and that his service period is governed by the Service Extension Act of 1941. No prior service is shown.

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.

7. Confinement in a penitentiary is authorized for the offenses of forgery and uttering a forged instrument (Secs.22-1401 (6:86) and 24-401 (6:401), District of Columbia Code)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania is authorized (Cir.291, WD, 10 Nov 1943, sec.V, pars. 3a and b).

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 2 JUN 1944 TO: Commanding General, 5th Infantry Division, APO 5, U.S.Army.

1. In the case of Private PAUL E. WARNER (16017197), Company M, 10th 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. As in the companion case of Private Arthur A. Mills, also of Company M, 10th Infantry (CM ETO 2293 and my 1st Indorsement, 16 May 1944), the evidence herein sustains the original finding of desertion. The Staff Judge Advocate in his review of this case recommended that the reviewing authority approve only so much of the finding (Charge II and its Specification) as involves absence without leave, because similar action had been taken in the Mills case. This was done.

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 2444. For convenience of reference please place that number in brackets at the end of the order: (ETO 2444).

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

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BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC. ON 26 FEB 1952