E. T. O.
BOARD
OF
REVIEW

OPINIONS

CM ETO 839
CM ETO 1538

VOLS. 3-4

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 3 B.R. (ETO)

including

CM ETO 839 - CM ETO 1096

(1943-1944)

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC EXEC ON 26 FEB 1952

Office of The Judge Advocate General

Washington : 1945

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

BOARD OF REVIEW

ETO 839

19 OCT 1943

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private WARREN G. NELSON (20503176), Company "A", 4th Replacement Battalion.	Trial by G.C.M., convened at Lichfield, Staffordshire, England, 27 September 1943. 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

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 Warren G. Nelson, Company A., Fourth Replacement Battalion, Whittington Barracks, Lichfield, Staffordshire, England, did, without proper leave, absent himself from his Organization at Whittington Barracks, Lichfield, Staffordshire, England, from on or about 1530 hours 29 August 1943, until he was apprehended at Nuneaton, Warwickshire, England, on or about 1730 hours, 8 September 1943.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that Private Warren G. Nelson, Company A., Fourth Replacement Battalion, Whittington Barracks, Lichfield, Staffordshire, England, did, at 104 Holly Lane, Baddesley, Ensor, Atherstone, Warwickshire, England, on or about 31 August 1943, feloniously take, steal and carry

away nineteen pounds (19L) lawful money of the United Kingdom, of the exchange value of about ($76.66) Seventy-six dollars sixty-six cents, the property of Albert Edward Gee.

He pleaded guilty to, and was found guilty of, all charges and specifications. Evidence of one summary and two special court-martial convictions for absence without leave for 6, 16 and 46 days respectively, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. No evidence was presented in explanation of the circumstances or in mitigation of the offenses. The effect in law of the plea of guilty is that of a confession of the offenses as charged. The record shows accused was represented by counsel and understood the effect of his plea of guilty.

"***. While it was no doubt the practice formerly, as it is now in the majority of cases in which this plea is interposed, not to take any evidence whatever, the fact that some evidence was necessary to a comprehension of a considerable proportion of such cases seems to have been appreciated at an early period. ****. In a General Order **** of 1830, it was declared **** that: 'In every case in which a prisoner pleads guilty, it is the duty of the court-martial, notwithstanding, to receive and to report in its proceedings such evidence as may afford a full knowledge of the circumstances; it being essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect.' ****. Later, in No.21 of the Orders of 1833, the General Commanding, in remarking that the old rule that no evidence should be received with the plea of guilty, had been abrogated by recent Orders, disapproves the action of a certain court-martial in disregarding the same and refusing to allow the judge advocate to show, notwithstanding such plea, the facts and circumstances of the case, which - it is declared - are essential both to the reviewing officer and to the President as the pardoning power. ****" (Winthrop's Military Law & Precedents, 1920 Reprint, pp.278-279).

Occasional statements are found in the reports of courts-martial cases similar to the following:

> "***. After a plea of guilty, it is not necessary for the prosecution to make out a case ****". (CM 118766 (1918), Dig.Ops.JAG., 1912-1940, par.378(3), p.189.

> "Under ordinary circumstances, a plea of guilty is sufficient, in the absence of any evidence by the prosecution to justify a finding of guilty. ***" (CM 134185 (1919), Dig.Ops.JAG., 1912-1940, par.378(3), p.190).

Legal treatises on Practices and Procedure are brief in discussing guilty pleas:

> "The effect of this plea (guilty) is a record admission of whatever is well alleged in the indictment. If the latter is insufficient, it confesses nothing; but if good, the court proceeds to sentence ****". (2 Bishop's New Criminal Procedure, 2nd Ed., par.795(2), p.620).

The more recent practice of both our civil and military courts clearly inclines towards requiring some evidence to be produced in explanation of the circumstances of the commission of the offense that the court, the reviewing and the clemency authorities may each intelligently function:

> "In addition to a careful investigation into the circumstances surrounding the plea, the court ought always to hear evidence to determine the degree of punishment ****. No court ought to accept a judicial confession as final until a most searching investigation has been made into all the conditions and surrounding circumstances." (Wharton's Criminal Evidence, Vol.2, par.587, pp.975-976).

> "While it is true that a plea of guilty admits the facts set forth in the Specification, it has always been deemed to be the better practice for the prosecution to present a prima facie case against accused by competent evidence notwithstanding the plea. ****". (CM 236359 (1943), Bul.JAG., July 1943, sec.416(3), p.270).

While it is self-evident that both good practice and an intelligent consideration of the elements involved in a plea of guilty require

some evidence of the circumstances of the offense to be presented in the record, which evidence was denied to the court herein, the numerous letters and signed statements of the principals involved included among the attached papers accompanying the record of this trial, rather fully detail the entire circumstances of the offenses charged, and may be considered, in this case, to supply the information essential for the use of reviewing and clemency authorities.

4. The accused is 23 years 3 months old. He enlisted at Akron, Ohio, on 15 July 1940, with no prior service. His service period is governed by the Service Extension Act 1941.

5. 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.

6. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement in a penitentiary is authorized for the crime of larceny of property valued in excess of $50.00 (18 U.S.C., sec.466). As accused is under 31 years of age with a sentence of not more than 10 years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is correct (War Department letter AG 253 (2-6-41) E, 26 February 1941).

B. Franklin Kite Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 19 OCT 1943 TO: Commanding General, Western Base Section, SOS, ETOUSA., APO 515, U.S. Army.

1. In the case of Private WARREN G. NELSON (20503176), Company "A", 4th Replacement Battalion, APO 515, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and 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 839. For convenience of reference please place that number in brackets at the end of the order: (ETO 839).

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 850

22 NOV 1943

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 575, 16 September 1943.
Sergeant HERBERT R. ELKINS (11016741), 86th Air Transport Squadron, 27th Air Transport Group.	Sentence: Dishonorable discharge, suspended, total forfeitures and confinement at hard labor for two years. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.

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 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. 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Sergeant Herbert R. Elkins, 86th Air Transport Squadron, 27th Air Transport Group, AAF 575, APO 635 did, at AAF 575, APO 635 during the period from about 15 October, 1942 to about 18 January 1943, feloniously embezzle by fraudulently converting to his own use a sum of money, to wit: £304. 13. 8. ($1229.40) the same having been received by him in his capacity as the non-commissioned officer in charge of the said Post Exchange.

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 two years. The reviewing authority approved the sentence but suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England as the place of confinement.

The result of the trial was promulgated in General Court-Martial Order No. 33, Headquarters VIII Force Service Command, APO 633 dated 9 October 1943.

3. The evidence for the prosecution shows that on 15 October 1942, Technical Sergeant Fred T. Gove, 86th Air Transport Squadron, then acting first sergeant of the headquarters detachment, VIII Air Force Service Command, which was stationed at AAF Station 575, placed accused in charge of the post exchange upon verbal orders of the commanding officer. Accused operated the exchange from 15 October 1942 until Sergeant Anderson assumed charge during the first part of 1943 (R15-17).

During October, November and December 1942 Sergeant Harry R. McCall, 86th Air Transport Squadron, who was accused's room-mate and who had known him about a year and 10 months, occasionally accompanied him to an office on Commercial Road where he obtained tally-out slips. They then went to the "Docks" where accused collected post exchange supplies. McCall also helped him to display the supplies for sale and to sell them. Accused kept the money received in a wall locker "until it was paid over to the quartermaster". McCall had never seen him pay any money over, but had observed him working on his records. He kept his tally-outs and requisitions in a book which he had in his wall locker. McCall noticed no receipts for payment of money for post exchange supplies in accused's possession (R21-24).

During November and December 1942, a person drawing post exchange supplies would bring his tally-out slip from an office on Commercial Road to Victoria Docks. Both the deliverer and receiver of the goods would first check the order by the tally-out. After the order was checked and loaded each would sign the tally-out. The signature of the receiver on the tally-out would indicate that the supplies had been delivered to him. Master Sergeant Jesse A. Dudley and Sergeant Ennis D. Preston, both of Depot G 30, SOS who were stationed at the docks and checked tally-outs, identified their respective signatures appearing on certain tally-outs which also bore the signatures of either Sergeant "Herbert R. Elkins" or Sergeant "H. R. Elkins". No proof as to the authenticity of the signatures "Herbert R. Elkins" or "H. E. Elkins" was established in evidence. One tally-out (Ex.H) bore the signature of a checker other than Sergeant Dudley or Sergeant Preston. Seven tally-outs were admitted in evidence "for what they are worth" pursuant to a stipulation between the prosecution and defense. They covered a period beginning 7 November 1942 and ending 30 December 1942 (R24-27; Pros.Exs. B - H).

First Lieutenant Leonard Krieger, Air Corps, 27th Air Transport Group was adjutant of his organization until 1 November (1942). He testified that the post exchange was operated on a cash basis up to 15 October but he did not know whether it was operated on a cash or credit basis after that time as his duty was changed on 1 November. During the time he was adjutant, all purchases were for cash, no book-keeping system was established nor were there any records, books, checks or sales receipts. Until 1 November (1942) as adjutant he signed requisitions presented to him by accused which were in triplicate and which contained a list of what was to be requisitioned for the post exchange. He did not sign receipt form 389 or any similar form of receipt transferring money. During this period accused never turned in to him any money, deposit slips or receipts, nor did Lieutenant Krieger ever transmit to the finance department money belonging to the post exchange. No sales officer was appointed during the time that he was adjutant (R3-8).

On both direct and cross-examination Lieutenant Krieger testified that he never authorized accused either verbally or in writing to purchase supplies for the post exchange. However, on cross-examination when asked if his signature was on a certain document he admitted that "It looks like it" (R4,6). The letter, which was introduced in evidence by the defense with the consent of the prosecution (R6; Def.Ex.1) was dated 21 October 1942 and was addressed to the officer in charge, U.S. Army Exchange Service, ETOUSA. It described accused as of Headquarters and Headquarters Squadron, VIII Air Force Service Command, and authorized him to draw post exchange supplies for 20 officers and 65 enlisted men stationed at Hendon Airdrome. Also introduced in evidence by the defense with consent of the prosecution was Circular #67, Headquarters, ETOUSA, dated 25 October 1942 which contained a paragraph entitled "SALES STORE SERVICE IN THE ETOUSA" (R7; Def. Ex.2).

On 7 December (1942) Captain Russell M. Molyneaux, Air Corps, 86th Air Transport Squadron relieved Lieutenant Krieger as station adjutant. Accused gave him some papers to sign as adjutant but he could not recall their nature. He never received from accused any money, sales or deposit slips to be transmitted to the finance office at Widewing or elsewhere, nor did he ever sign any receipts issued by the finance department showing payment for post exchange supplies. He "was under the impression" that the supplies were paid for on a cash basis but did not know whether payment had actually been made. In January (1943) accused was relieved of his duty as the non-commissioned officer in charge of the post exchange and a Sergeant Anderson replaced him. As the result of a letter received in May (1943) Captain Molyneux detailed a Lieutenant Brown to make certain investigations concerning the finances of the exchange and a Lieutenant Zipper was subsequently appointed investigating officer (R17-21).

First Lieutenant Harry Zipper, Air Corps, 86th Air Transport Squadron, found as a result of his investigations that during the time accused operated the post exchange he made seven purchases of post exchange

supplies, the first tally-out being dated 7 November 1942, and the last tally-out being dated 30 December 1942. Lieutenant Zipper found on file at the finance office, SOS copies of these tally-outs. Upon investigation he found no copies of receipted payments at the finance offices at Widewing, London, or at the SOS headquarters, Cheltenham for these quartermaster supplies which had been issued to accused. He also made inquiries at "Kew Gardens" because that office at one time had maintained some of the London finance records, but found no financial records on file. An examination of the records at Victoria Docks disclosed that no letter of authority (to purchase supplies) addressed to accused and signed by an officer was on file (R8-14).

Captain Francis W. Anderson, Finance Department, VIII Air Force Service Command, disbursing officer, Camp Griffiss (Widewing) testified that when payments for post exchange supplies were made to his office, the post exchange officer concerned would sign and submit in quadruplicate a receipt (form 389). Captain Anderson would "receipt for the money" and return one copy to the post exchange officer. He would send one copy to the SOS finance officer, another copy went with his original papers and the fourth copy was placed with his retained records. Every payment that was made through his office would be shown in the office records. At the request of Lieutenant Zipper, Captain Anderson had examined the records of his office and identified a certain letter bearing his signature which gave the results of his examination. It was stated in the letter which was addressed to Lieutenant Zipper, dated 10 August 1943 and admitted in evidence, that the retained office records indicated that no collections on Form 389 were made from Captain Molyneux as sales officer for Detachment Headquarters Squadron, VIII Air Force Service Command, during the period 16 October to 31 December 1942, and that the first collections deposited with the office to his credit were made on or about 20 January 1943. It was further stated therein that the examination disclosed that no collections were made during the period 16 October to 31 December 1942 from any sales officers on Form 389 for credit to any unit in the seven separate amounts set forth therein. The seven amounts corresponded to the seven totals appearing on prosecution's Exhibits B - H (R33-35; Pros.Ex.J).

Warrant Officer Junior Grade Russell H. Dawson, Finance Department, SOS (Cheltenham) testified that under the post exchange system in effect during October, November and December 1942, the commanding officer of any organization would designate a sales officer for the organization who would requisition supplies from a quartermaster depot. This officer would receive a tally-out representing the supplies drawn, one copy of which would be retained by the organization and one copy of which would be sent to the finance department, SOS where it was checked and filed with the account of the sales officer concerned. The sales officer would send payments to the finance department accompanied by WD QMC Form 389, a copy of which was placed in the individual file of the sales officer. The

finance office at Widewing was under the "office administrator" of the finance office, SOS. If payment for post exchange supplies was made to any finance office under the jurisdiction of witness' office, the records of his office would normally show such payment because copies of the cash collection voucher should be forwarded to the finance office, SOS from the office where the money was paid. Mr. Dawson further testified that the seven tally-outs admitted in evidence (Pros.Exs. B - H) had been on file in his office. Two of the seven belonged to Captain Molyneux' account. The records of the finance office, SOS did not contain the name of a sales officer for the detachment concerned before Captain Molyneux: Also, according to the records of his office the first payment on behalf of the organization involved was made by Captain Molyneux on 27 January 1943 in the sum of 82 pounds, 1 shilling and 9 pence which amount was the total of a tally-out dated 18 January 1943 (which was not introduced in evidence). A survey of the account made up at the finance office, SOS for the period 7 November 1942 to 23 April 1943, disclosed that the unit concerned received post exchange supplies valued at 899 pounds, no shillings, 1 pence and that there had been received in payment of this amount 593 pounds, 16 shillings, 3 pence leaving a difference unaccounted for of 305 pounds, 3 shillings, 10 pence. It could not be determined that the seven tally-outs admitted in evidence as Exhibits B - H covering the period 7 November 1942 - 30 December 1942 were actually the ones remaining unpaid, because there was no requirement that payments be allocated to any particular tally-outs. However, the unpaid sum of 305 pounds, 3 shillings, 10 pence approximated the total of the seven exhibits B - H (304 pounds, 13 shillings, 8 pence), the latter sum being the amount alleged in the Specification (R28-33).

4. For the defense, accused testified that about 15 October 1942, he "took over the handling of the post exchange" from a Sergeant Daer. He received a letter from Lieutenant Krieger authorizing him to draw the supplies and for the first two weeks obtained the supplies at Regents Parks for which he paid cash (R38-39). He then received notice from Regents Park that the supplies would thereafter be obtainable at Victoria Docks and that a new system would be established 1 November. From then on he made out his requisitions, took them to 110 Commercial Road, went from there to the Victoria Docks where he drew goods on the basis of the tally-out slips which he signed. He put the goods on sale, "rationed them out to the boys" and received payment (R38-40). On Thursday nights or Friday mornings he would sell out all the remaining supplies on hand, fill out Forms No. 389 (sales slips) which he had signed by either Captain Molyneux or Lieutenant Krieger, whichever one was in charge of post exchange supplies at the time, place 4 copies of the sales slips and the money in an envelope addressed to the finance officer at Widewing which he placed in his basket for delivery by courier (R38-40). No receipts were obtained from the courier for the envelope and its contents (R41). The money consisted mostly of paper currency and a very small amount in silver (R44). About 2 days later there would be returned to him from Widewing one receipted copy of the sales slip signed by the

finance officer, and accused's copies of the tally-outs. He kept these papers and the copies of his requisitions in a ledger book in his wall-locker, together with "*** my copies showing who I sold supplies to" (R38-41). During November and December (1942) he forwarded about seven such cash payments in this manner (R43). He paid and received receipts for all bills which he owed for post exchange goods (R41).

About 1 January 1943, accused was relieved from supply duty and put in charge of the squadron as acting first sergeant. He turned over to his successor, Sergeant Anderson, all supplies on hand, "filled up my last sales slips, turned them in and cleared up all supplies" (R39). About 1 February (1943) a Sergeant Belcher became acting first sergeant and asked for his ledger book to use for another purpose. Accused gave him the book after he removed his receipts, papers and the first few sheets of the book in which he had kept his records (R41). He destroyed his receipts during the latter part of May (1943) (R38,42). Accused never reported an operating loss. He was never asked by Captain Molyneux or Lieutenant Krieger how much money was being forwarded (R40), nor were any inquiries made by an officer as to whether he maintained any records (R44).

Lieutenant James E. Brown, Jr., Air Corps, 86th Air Transport Squadron, at the request of Captain Molyneux, checked the tally-outs "against the payments of finance at Widewing". There were no books to check at the post but he did have at the post duplicate copies of the requisitions and tally-outs and "duplicate copies of the payments into the finance office of Widewing". He checked receipts covering a period beginning in October (1942) until June (1943) and established a shortage (R45).

Sergeant John W. Belcher, Technical Sergeant, 86th Air Transport Squadron, confirmed accused's testimony that he had given his ledger book to Belcher after removing two or three pages (R46).

Sergeant Gove, recalled as a witness for the defense testified that between 15 October and 31 December 1942, mail was taken to Widewing from the post by a courier who would collect it, but that no record of any nature was kept of the outgoing mail (R47).

Sergeant Walter H. Holden, 86th Air Transport Squadron, who acted as one of the couriers to Widewing during October, November and December 1942 testified that he never picked up in the supply room an envelope containing loose silver money and that he would have known if an envelope did contain money of this nature (R49).

Captain George A. Seamens, Civil Disbursing Finance Officer, APO 887 (London) testified that an examination of the records of his office for the months of November and December 1942 and January 1943 showed that no payments for the post exchange goods in question had been received in

his office, and that his office would have no records of any payments made to the finance office at Widewing (R50).

Sergeant McCall, recalled as a witness for the defense testified that over the long period of time during which he had known accused he had never seen him have "any more than what a sergeant would receive for pay". Asked if he had known accused to spend or "flash" a great deal of money, he replied that he "used to go on some 'pretty big benders'" (R51).

Mrs. Eileen Elkins, accused's wife met him in November 1942 and they were married in June 1943. Neither she nor accused ever had any unusually large sums of money and they just managed to pay their way. During the month previous to trial (August 1943) his pay was stopped and she was destitute. She had borrowed the rent and repaid it from her own wages. She had returned to "lodgings" and could not even pay her bill for the present week (R52).

5. Sergeants George B. Baker, Russell W. Politz, and Royce A. Bradrick, all of the 86th Air Transport Squadron, called as witnesses in rebuttal by the prosecution, acted as couriers during October, November and December 1942. Baker and Politz testified that they would have known if an envelope given them for delivery had contained metal currency, but that they could not recall the delivery of such an envelope to Widewing (R53-54,56). Sergeant Bradrick could not recall whether or not he delivered any mail addressed to the finance officer at Widewing (R57).

6. At the close of the case for the prosecution the defense moved for a finding of not guilty on the grounds of insufficient evidence (R35). The motion was "overruled" (R37). The denial of the motion was clearly justified as the prosecution had then presented sufficient evidence to establish a prima facie case and to warrant the court's action in considering such evidence when making its ultimate findings.

Paragraph 2 of the review of the Staff Judge Advocate, VIII Air Force Service Command, contains a discussion concerning irregularities contained in the record of trial and the evidence. Further comment thereon is unnecessary, as is a detailed comment upon certain rulings of the law member which, although erroneous, did not injuriously affect the substantial rights of accused.

7. It is alleged in the Specification that accused, at AAF 575, APO 635, from about 15 October 1942 to about 18 January 1943 feloniously embezzled "£304. 13. 8. ($1229.40) the same having been received by him in his capacity as the non-commissioned officer in charge of said Post Exchange". The Specification varies from the form set forth in the Manual for Courts-Martial, 1928 (Form No. 95, Appendix 4, p.250) in that it does not contain any allegations either as to the ownership of the money involved, or the name of the person who entrusted the money to accused.

that the error complained of has injuriously affected the substantial rights of an accused" (Underscoring supplied).

"No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby. ***." (MCM., 1928, par.87b, p.74) (Underscoring supplied).

The counterpart of Article of War 37 contained in the United States Criminal Code is as follows:

"No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. R.S. sec.1025." (18 USCA, sec.556, p.34).

"An indictment or information is sufficient under this section, if the offense be described with sufficient clearness to show a violation of law, to enable accused to know the nature and cause of the accusation, and to plead a judgment, if one be rendered, in bar of further prosecution for the same offense". (18 USCA, Note 27, p.43).

"An indictment which will enable a person of common understanding to know what is intended is sufficient". (Ibid).

"Mistakes in expressing the substance of a crime, if the meaning can be understood, will be looked upon as formal defects". (18 USCA, Note 28, p.44) (Underscoring supplied).

The Specification in the case under consideration definitely sets forth the place where the offense was committed, the dates concerned, and the amount involved. It is further alleged that accused feloniously

embezzled by fraudulently converting to his own use the amount described which was received by him as the non-commissioned officer in charge of the Post Exchange. Thus, the capacity in which accused received the money stated to have been embezzled was also alleged. The allegations contained in the Specification were sufficiently detailed in nature as to enable accused adequately to prepare his defense and to obviate any risk of double jeopardy. The "facts alleged therein and reasonably implied therefrom" constituted an offense despite the absence of an allegation as to ownership and a more detailed description of the manner in which the money was entrusted to him. It cannot reasonably be claimed that accused was misled by any defects contained in the specification. The defense made no objection with relation to the sufficiency of the allegations. In fact, the sole contention by the accused was in substance that he had forwarded all payments received for post exchange supplies to the finance officer at Widewing, but that he had destroyed the receipts showing that such payments had been received. In view of the foregoing the provisions of Article of War 37 are clearly applicable. The allegations of the Specification are legally sufficient. (Moore v. United States, 160 U.S. 268, 40 L. Ed., 422; Grin v. Shine, 187 U.S. 181, 47 L. Ed., 130).

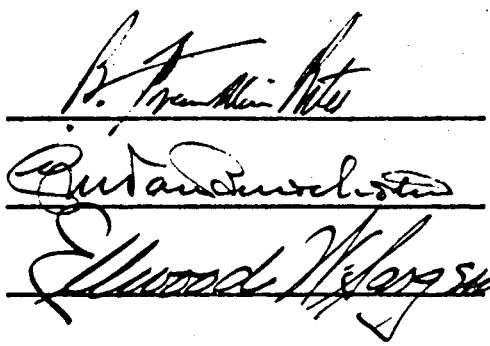
8. Accused testified that he was in charge of the post exchange during the period involved, that he purchased and sold supplies, and received money therefor. He further testified that he had paid for all supplies purchased, had sent about seven payments to the finance officer at Widewing and had received from that officer receipts for all payments made. He destroyed the receipts about four or five months after he had been relieved as non-commissioned officer in charge of the post exchange. The seven tally-outs, the total amount of which represented the sum alleged to have been embezzled were found on file in the finance office, SOS at Cheltenham. No payments had been received at the finance offices at Widewing, London or Cheltenham. The finance office, SOS at Cheltenham would normally have records of payments made to finance offices under its jurisdiction as such offices should forward copies of their collection vouchers. Whether payments had actually been made was a question of fact for determination by the court and the Board of Review will not disturb that finding. The evidence was legally sufficient to support the findings of guilty of the offense alleged. (CM 210942, Funderburke).

9. Attached to the record of trial is an "Appeal from Decision of Trial by General Court-Martial" signed by defense counsel and addressed to the Commanding General, VIII Air Force Service Command, APO #633, U.S.Army.

10. The charge sheet shows that accused enlisted at Augusta, Maine, 2 January 1941 for three years.

11. For the reasons stated, 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 court was legally constituted and no errors injuriously affecting the substantial rights of accused were committed at the trial.



Judge Advocate

Judge Advocate

Judge Advocate

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

BOARD OF REVIEW

ETO 866

- 8 NOV 1943

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 505, 28 September 1943.
Private JOHN J. O'CONNELL (32297460) and Private JAMES (NMI) HAZA (13060930), both of 46th Depot Supply Squadron, 46th Air Depot Group.	Sentence: Each - Confinement at hard labor for six months and forfeiture of $24.00 per month for like period. The 2912th Disciplinary Training Center, APO 508, U. S. Army.

OPINION 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 in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally sufficient to support the findings and sentence as to Private John J. O'Connell and legally insufficient to support the findings and sentence as to Private James Haza. 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 were tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private John J. O'Connell, 46th Depot Supply Squadron, 46th Air Depot Group, did, in conjunction with Private (then Corporal) James (NMI) Haza, 46th Depot Supply Squadron, 46th Air Depot Group, at AAF Station 505, APO 635, on or about 7 August, 1943, with intent to do them bodily harm commit an assault upon Sergeant Edward (NMI) Hynz, Sergeant John W. Mossman, Sergeant Wilbert B. Ortman, Corporal Lawrence W. North, Corporal Jack W. Walters, Private First Class Galen R. Cooper and Private Aurelius E. Miner by Shooting at them with dangerous weapons, to-wit: service rifles.

(20)

CHARGE II: Violation of the 96th Article of War.
Specification 1: In that Private John J. O'Connell, 46th Depot Supply Squadron, 46th Air Depot Group, did, in conjunction with Private (then Corporal) James (NMI) Haza, 46th Depot Supply Squadron, 46th Air Depot Group, at AAF Station 505, APO 635, on or about 7 August 1943, willfully, unlawfully, wrongfully and without proper authority, fire numerous shots from service rifles in barracks occuped by other military personnel.
Specification 2: In that Private John J. O'Connell, 46th Depot Supply Squadron, 46th Air Depot Group, did, in conjunction with Private (then Corporal) James (NMI) Haza, 46th Depot Supply Squadron, 46th Air Depot Group, at AAF Station 505, APO 635, on or about 7 August, 1943, willfully, wrongfully and unlawfully destroy a portion of a building furnished for and used by the United States, value about $40.00.

Each accused pleaded guilty to Specification 1, Charge II, and not guilty to all other charges and specifications. Evidence of one previous conviction of accused Haza for absence without leave, was introduced. Each accused was found guilty of the Specification, Charge I except the words "with intent to do them bodily harm", not guilty of Charge I but guilty of violation of the 96th Article of War, not guilty of Specification 2, Charge II and guilty of Specification 1, Charge II and of Charge II. Each was sentenced to be confined at hard labor at such place as the reviewing authority may direct, for a period of six months, and to forfeit $24.00 per month for a like period. The reviewing authority approved the sentences, ordered their execution and designated the 2912th Disciplinary Training Center, APO 508, United States Army as the place of confinement for each.

The result of the trial was promulgated in General Court-Martial Order No. 36, Headquarters, VIII Air Force Service Command, AAF-586, APO 633, dated 14 October 1943.

3. The three specifications of the two charges against the accused herein are each similarly phrased in the language of the specification involved in CM ETO 882, Biondi and White, recently decided by the Board of Review. In the above cited case the Board found that White, charged "in conjunction with" Biondi, had not been actually charged with committing any offense and that the findings and sentence as to White were therefore not legally sufficient. James (NMI) Haza was likewise before the court upon charges and specifications which failed to allege that he had committed any crime and upon the authority quoted above, the Board of Review is of the opinion that the record of trial herein is legally insufficient to support the findings and sentence as to him.

4. The findings and sentence of the court as to accused James J. O'Connell were found legally sufficient when examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and are therefore not before the Board of Review for consideration.

5. The accused James (NMI) Haza is 20 years 8 months of age. He enlisted 24 April 1942 for the duration of the war plus six months. He had no prior service.

6. The court was legally constituted but as to accused James Haza was without jurisdiction of either the person or the offense.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

CONFIDENTIAL

(22) 1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 8 NOV 1943 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 U.S.C., 1522) and as further amended by Public Law 693, 77th Congress, 1 August 1942, is the record of trial in the case of Private JOHN J. O'CONNELL (32297460) and Private JAMES (NMI) HAZA (13060930), both of 46th Depot Supply Squadron, 46th Air Depot Group.

The opinion of the Board of Review in the instant case is based upon its approved holding in CM ETO 882, Biondi and White. A copy of said holding is inclosed for your information.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings and sentence as to accused Haza. He was before the court upon charges and specifications which failed to allege that he had committed any offense and in legal effect he was not tried or placed in jeopardy. I recommend that the findings and sentence herein as to Private James (NMI) Haza be vacated and that all rights, privileges and property of which he may have been deprived by reason of such findings and sentence so vacated, be restored.

3. The evidence is convincing that Haza is equally guilty with O'Connell, in fact he pleaded guilty to one specification. No legal reason, in my opinion, exists against properly charging and trying him for the offenses committed, which might well be before a special court-martial since dishonorable discharge was not adjudged in the present trial.

4. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also 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.

4 Incls:
Incl.1. Record of Trial
Incl.2. Form of Action
Incl.3. Draft GCMO
Incl.4. Holding of Board of Review - CM ETO 882, Biondi and White.

(Findings of guilty and sentence vacated as to Private Haza, GCMO 24, ETO, 17 Nov 1943)

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

BOARD OF REVIEW

ETO 873

27 OCT 1943

U N I T E D S T A T E S	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
First Lieutenant LEO O. BLOOM (O-523908), Dental Corps, Attached to 364th Engineer Regiment, (GS).	Trial by G.C.M., convened at Kettering, Northamptonshire, England 17 September 1943. Sentence: To be dismissed the service.

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 95th Article of War.
(Finding of not guilty).
Specification 1: (Finding of not guilty).
Specification 2: (Finding of not guilty).

CHARGE II: Violation of the 96th Article of War.
Specification 1. In that 1st. Lieutenant Leo O. Bloom, Medical Detachment, 364th Engineer Regiment, was, at Proteus Camp, Ollerton, Nottinghamshire, England, on or about 29th August 1943, drunk and disorderly.
Specification 2. In that 1st. Lieutenant Leo O. Bloom, Medical Detachment, 364th Engineer Regiment, was, at Proteus Camp, Ollerton, Nottinghamshire, England, on or about 30th August 1943, drunk and disorderly.

CHARGE III: Violation of the 61st. Article of War.
Specification In that 1st. Lieutenant Leo. O. Bloom, Medical Detachment, 364th Engineer Regiment, did, without proper leave, absent himself from his station at the 30th General Hospital, Mansfield, Nottinghamshire, England, from about 1225 hours, 30th August, 1943 to about 1535 hours 30th August, 1943.

He pleaded not guilty to all charges and to the specifications thereunder. He was found not guilty of Charge I and of its specifications, guilty of Specification 1, Charge II except the words "and disorderly", of the excepted words not guilty, guilty of Specification 2, Charge II and of Charge II, and guilty of Charge III and of the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding Officer, Eastern Base Section, Services of Supply, European Theater of Operations, 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 pursuant to Article of War 50½ withheld the order directing the execution thereof.

3. The evidence for the prosecution shows that about 8:30 p.m. 29 August (1943) Second Lieutenant Lyle Smith and First Lieutenant Meyer Rashbaum, both of the 364th Engineer Regiment together with a Lieutenant Hoffman went to the officers' day-room at Proteus Camp, Ollerton, Nottinghamshire, England (R7-8,11-12). Lieutenant Rashbaum had a quart of rum (R8,12). Accused was present with other officers, reading. When the party sat down near the bar "*** the others came over" (R12). Lieutenant Smith mixed drinks of rum and "Pepsicola" and the quart of liquor was consumed in about two hours (R8,12), each officer having four drinks (R8,10,12). Accused had his prorated share (R9). During this period he remained seated and had little to say. He was not observed to have any drinks other than those from the bottle (R8,10,12-13). When the party began, he appeared sober and did not smell of liquor (R11,13). Lieutenant Rashbaum testified that he left the day-room at 10:30 p.m., that accused then appeared to be normal, that he had not been disorderly and that "There was never any suspicion in my mind that he was drinking too much" (R12-13).

At 10:30 p.m. Lieutenant Smith extinguished the lights, went to the outer door with accused and then proceeded to his barracks (R8). Upon seeing a light in the latrine he returned to the day-room where he found accused leaning against the wall drooling at the mouth, with his head hunched forward and hanging down, and his arms loose. "Some of the substance was on his trousers". Lieutenant Smith attempted to assist him to his quarters (R9) but he was unable to walk and had to be partly carried (R10), so he left to get Lieutenant Hoffman and when they returned accused was "sliding against the wall". The two officers took him to his quarters,

removed his shoes and put him to bed. He was muttering and Lieutenant Smith could not make any "sense out of what he was saying" (R9). He offered no violence and was not disorderly (R11). Lieutenant Smith testified that in his opinion accused was sick. "I can't imagine that he was drunk, because no-one else was" (R9,11).

Major John E. Eilerson, attached 364th Engineer Regiment, was billeted in a Nissen hut (No. 95) in the regimental area. Asked if he had seen accused on the night of 29 August, he testified "I can't remember the exact night other than by my statement. If that was the 29th it is correct" (R19-20). About 10:00 p.m., after Major Eilerson had retired Lieutenants Hoffman and Smith entered. One officer carried accused by the "top end" and the other carried him by his legs. He appeared to be grossly drunk and was placed in bed. He spoke "rather incoherently", lay in bed "mumbling away" and "rolled and wriggled around". After observing him for about an hour, Major Eilerson fell asleep (R20,22-23). During the night he heard a commotion as though someone urinated against the wall and saw a lot of human excretion on the floor near his bed (R20). About midnight he awakened to hear other officers advise accused to go to bed as he was walking about (R22).

About 11:30 p.m., 29 August Captain Harold W. Grundy, attached 364th Engineer Regiment, returned to hut No. 95 where he was billeted and retired. Accused was in bed and "seemed normally asleep" (R13-14,19). Between 4-4:30 a.m., 30 August Captain Grundy was awakened by accused who bumped against his bed (R14,16). "He was rubbing his stomach as if in pain and suffering from an accumulation of gas" (R16). He expelled gas (R15,18), went to the rear door of the hut which was permanently locked (R14,16) and asked "How do you get out of here?" (R15,17). He then went to the opposite end of the room where a Captain Miner awakened and asked who was there. Accused said "Give me a hand". When the captain told him to go to bed, he "apparently" stumbled and fell on the floor where he remained for a short time and then went to bed (R15,18-19). When Captain Grundy arose at 6:00 a.m. the following morning (30 August), he observed human excreta on the floor at approximately the same location where accused had been previously rubbing his stomach and had expelled the gas (R15-16). The excreta was spread over an area two or three feet square (R19). Accused also arose at 6:00 a.m. and appeared to Captain Grundy to be slightly intoxicated although he could not say whether he was drunk. His speech was thick when he asked the captain for a cigarette. He walked normally (R15-16). Some of his clothing was spread on the floor (R18).

At 7:00 a.m. (30 August) Major Eilerson saw accused standing by his bed, mumbling. He appeared to be in a dazed condition and it was the major's opinion that he was drunk at that time (R21). His clothing was scattered throughout an area of about 20 feet (R20).

At 6:00 a.m. (30 August) Major James Majarakis, regimental surgeon and accused's superior officer noticed that he was not present at

calisthenics. He later found him in his hut (R24). Accused said that he had missed calisthenics because he was sick. His speech was incoherent and his walk and gait were unsteady (R25,33). As he began to put on some clothes which were lying about his locker, he removed a bottle from the locker and took a drink. Major Majarakis then took him to the 30th General Hospital for further diagnosis (R25), where they arrived at about 8:00 a.m. (R34). On the way accused was more exuberant and loquacious than usual, but spoke "very friendly *** and very intelligently". (R25,32). Major Majarakis was unable to state definitely whether he was or was not sober (R33).

On 30 August Major Henry B. Kirkland, Medical Corps was in charge of the officers' medical ward, 30th General Hospital. There, in the late morning he saw accused who had just been admitted and who stated that he had been drinking the night before (R27-28,35). He was in a very unreasonable frame of mind and resentful at having been brought to the hospital against his will. He refused to remove his clothes and to retire and "showed no disposition to act normally". He talked coherently but "did not show the continuity of thought and answer that one would expect" (R28-29,35). Major Kirkland ordered him to remain in the ward and stated that if he did not he would be considered as absent without leave. Accused appeared to understand the order and inquired as to the consequences should he break the restriction. Shortly after 12:30, the major was called and proceeded to check accused's whereabouts. He was not in the ward (R28-29, 34). He next saw him about 3:30 p.m. on the same day when he was brought to the hospital by a captain of the military police. He was dazed, and his breath smelled very definitely of alcohol. He was "less oriented", his speech was slurred and rambling and his gait was unsteady. When instructed to go to bed, he did so and went to sleep almost immediately (R28-29).

About 6:00 p.m., 30 August Captain Douglas McG. Kelly, Medical Corps, chief of the neuro-psychiatric section, 30th General Hospital saw accused. He was acutely intoxicated and was in bed in a stuporous state. His breath smelled of alcohol and he had "a gross tremor" (R26-27).

4. For the defense, accused testified that he was in his hut at 5:30 p.m. 29 August and that he had two drinks before dinner. "After mess" he went to the day-room and Lieutenants Hoffman, Smith and Rashbaum came in, each with a quart of rum. "I had quite a few drinks, I don't know how many. From then on I don't remember anything except when I was in hospital". He did have flashes of memory "in between". He did not recall being taken home on the night of 29 August, or the trip with Major Majarakis to the hospital. He remembered talking with Major Kirkland but could not recall the conversation, nor did he remember "being warned or put under arrest that day ***". He recalled his admission to the hospital as a patient and "faintly" remembered leaving the hospital, "walking in Mansfield and deciding to get a bus, and then the Provost Marshall came." He did not

remember having anything to drink in Mansfield. He did not have money to buy any drinks because he counted his money in the hospital and had just a few pence. He removed his shorts and threw them away because they "were messed" (R30-32).

5. Recalled as a witness by the court, Captain Kelly testified that accused remained under his observation for some days. The captain's opinion concerning his case was "Alcoholism acute, severe; alcoholism chronic, moderately severe; constitutional psychopathic state, inadequate personality" (R35). The court then asked "What is the prognosis?" After the court overruled an objection by the prosecution on behalf of accused, Captain Kelly testified "The prognosis is poor. Treatment is required for a considerable length of time in the problem of chronic alcoholism, and can never be remedied at this stage". He replied in the affirmative to the court's question as to whether in his opinion the actions of accused might be the result of his type of constitutional inadequacy (R36).

6. The reviews of the staff judge advocate, Eastern Base Section, SOS, ETOUSA, and the assistant theater judge advocate, ETOUSA contain several comments regarding irregularities appearing in the record of trial, Further comment thereon is unnecessary.

7. Before any evidence had been presented the defense moved "that a verdict be directed by the court of not guilty" of Charge I and of the specifications thereunder on the ground that "the specifications *** are insufficient, even if proven, to support a violation of the 95th Article of War". The court denied the motion (R7). The specifications were in proper form. As the prosecution had not then been afforded the opportunity to present any evidence whatsoever pertaining to the offenses alleged, the motion by the defense was obviously premature.

8. At the conclusion of the prosecution's case the defense moved that the court "direct a verdict of not guilty" of Charge I and of the specifications thereunder, and of the Specification of Charge III on the ground that the evidence presented was not legally sufficient to support a finding of guilty. The court denied the motions (R29-30). Sufficient and substantial evidence as to accused's guilt of the offenses alleged had then been presented by the prosecution to warrant the court's action in denying the motions and in considering such evidence when reaching its ultimate findings.

9. With reference to Specification 1 of Charge II (drunkenness at Proteus Camp on or about 29 August 1943), the evidence shows that after drinking rum and "Pepsicola" accused was found in the officers' latrine leaning against the wall drooling at the mouth, with his head hanging down and his arms loose. It was necessary for two officers to carry him bodily to his quarters and to put him to bed. He spoke incoherently, lay in bed "mumbling away" and "rolled and wriggled around". One could not make any "sense out of what he was saying". In Major Eilerson's opinion he was

grossly drunk. There was however, no evidence that accused was disorderly.

With respect to Specification 2 of Charge II (being drunk and disorderly at Proteus Camp 30 August 1943), in the early morning hours of the date alleged accused was wandering around in his billet asking "How do you get out of here?" He bumped into Captain Grundy's cot, expelled gas and awakened three officers who were sleeping in the hut. There was substantial evidence that he defecated on the floor of the billet. He admitted throwing away his shorts because they were "messed". He asked an officer to give him a hand and then stumbled and fell on the floor. Between 6-7:00 a.m. the same morning some of his clothing was found spread over the floor. He was in a dazed condition, his speech was thick and incoherent and his walk and gait were unsteady. In the opinion of Major Eilerson he was drunk. He appeared slightly intoxicated to Captain Grundy. Before leaving for the hospital he took a drink from a bottle which was in his locker.

The evidence as to the drunkenness on 29-30 August was corroborated by accused himself who testified that after having "quite a few drinks" in the day-room, aside from flashes of memory "in between" he remembered nothing except when he was in the hospital.

The evidence is legally sufficient to support the findings of guilty with respect to Charge II and its specifications.

10. During the late morning of 30 August accused was ordered by the officer in charge to remain in the officers' medical ward of the 30th General Hospital, and told that if he did not he would be considered as absent without leave. The fact that he understood the order was evidenced by his inquiry as to the consequences of breaking the restriction. Accused was not in the ward shortly after 12:30 p.m. He was next seen by the officer in charge about 3:30 p.m. when he was brought to the hospital by the military police. He "faintly" remembered leaving the hospital and going to Mansfield. The evidence is legally sufficient to establish the finding that accused was guilty of absence without leave as alleged (Charge III and Specification thereunder).

11. The accused is 45 years of age, and served as a private from 10 October 1942 to 8 June 1943 on which date he was commissioned. He served in the "first world war" for two and a half months.

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 is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(30)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 OCT 1943 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of First Lieutenant LEO O. BLOOM (O-523908), Dental Corps, attached to 364th Engineer Regiment (GS) 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 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 873. For convenience of reference please place that number in brackets at the end of the order: (ETO 873).

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

(Sentence ordered executed. GCMO 23, ETO, 1 Nov 1943)

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

BOARD OF REVIEW

ETO 875

28 OCT 1943

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private RUSSELL (NMI) FAZIO (13012666), Company "A", 1st Provisional Battalion, 10th Replacement Depot.	Trial by G.C.M., convened at Lichfield, Staffordshire, England, 27 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 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 charges and specifications:

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Russell (NMI) Fazio, Company A., 1st Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Whittington Barracks, Lichfield, Staffordshire, England, on or about 9 August 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Kennington Lane, London, Middlesex, England, on or about 24 August 1943.

CHARGE II: Violation of the 61st Article of War.
Specification: In that Private Russell (NMI) Fazio, Company A., 1st Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, (then of: Replacement Company "A" - Separate -) did, without proper leave absent himself from his Organization at Whittington Barracks, Lichfield, Staffordshire, England, from on or about 2330 hours 5 July 1943, until he surrendered himself on or about 1255 hours 30 July 1943, at Number 1 Cumberland Place, London, Middlesex, England.

CHARGE III: Violation of the 69th Article of War.
Specification: In that Private Russell (NMI) Fazio, Company A., 1st Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, having been duly placed in confinement in United States Post Guardhouse, Whittington Barracks, Lichfield, Staffordshire, England, on or about 7 August 1943, did, at United States Post Guardhouse, Whittington Barracks, Lichfield, Staffordshire, England, on or about 9 August 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE IV: Violation of the 94th Article of War.
Specification: In that Private Russell (NMI) Fazio, Company A., 1st Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Whittington Barracks, Lichfield, Staffordshire, England, on or about 9 August 1943, feloniously take, steal and carry away one olive drab blouse, of the value of less than twenty ($20.00) dollars, the property of the United States furnished and intended for the military service thereof.

CHARGE V: Violation of the 93rd Article of War.
Specification 1: In that Private Russell (NMI) Fazio, Company A., 1st Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at 10 Pitney Street, Vauxhall, Birmingham, Warwickshire, England, on or about 18 August 1943, unlawfully enter the office of J. W. GADSDEN AND COMPANY, with intent to commit a criminal offense, to wit, Larceny therein.

Specification 2: In that Private Russell (NMI) Fazio, Company A., 1st Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at 10 Pitney Street, Vauxhall, Birmingham, Warwickshire, England, on or about 18 August 1943, feloniously take, Steal, and carry away, 10 pounds, 9 shillings, and 8 pence sterling, lawful money of the United Kingdom of the exchange value of about $44.32, four small tea plates, one white tea plate, two tea cups and saucers, five teaspoons, one tea pot, one tea caddy with 1/4 pound of tea, one table cloth, one towel, one glass towel, one lady's coat, one biscuit box containing biscuits, one can of beans, one can of sliced peaches, quantity of golden syrup, bread and sugar, one large bread knife, two knifes, one tire pressure gauge, one 3-pound packet candles, about ten Health Insurance stamps, six Unemployment Insurance stamps, postage stamps, gent's mackintosh and one small steel hammer all of the value of about $64.52, the property of J. W. Gadsden and Company, 10 Pitney Street, Vauxhall, Birmingham, Warwickshire, England.

Specification 3: In that Private Russell (NMI) Fazio, Company A., 1st Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Whittington Barracks, Lichfield, Staffordshire, England, on or about 9 August 1943, feloniously take, steal, and carry away one Garrison Cap and one pair of oxford tan shoes, of a value of less than twenty ($20.00) dollars, the property of First Sergeant Gustave V. Anderson, Company A., 3rd Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England.

He pleaded not guilty to the specification and charge I and to specifications 2 and 3 of charge V, and guilty to the specification and charge II, to the specification and charge III, to the specification and charge IV and to specification 1 of charge V and to charge V. He was found guilty of all charges and specifications. Evidence of four previous convictions was introduced: two by special court for larceny of £14 from another soldier and of a 45 caliber pistol, one by special court for escape and one by summary court for failure to obey a lawful command. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years at such place as the reviewing authority may direct. The reviewing authority approved the findings, except as to Specification 2, Charge V, of which he

approved only so much of the finding as involves a finding of guilty of larceny of property of a value not in excess of fifty but more than twenty dollars. He approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3.(a) The evidence presented by the prosecution in support of the charge of desertion against the accused, (Charge I and its Specification) was substantially as follows:

An extract copy of the morning report of Company "A", 1st Provisional Battalion, 10th Replacement Depot, was received in evidence as Pros.Ex.5, with the consent of defense, and shows:

"10 August 1943 - Pvt. Fazio, Russell, 13012666 from conft. to Escaped AWOL 1800 hours as of 9 Aug. (L.C).
26 August 1943 - Pvt. Fazio, Russell, 13012666 AWOL to Abs. Conft. London 0900 Hrs. as of 24 Aug." (R7).

Private Eugene C. Seiflein, Company "C", 4th Replacement Battalion, Whittington Barracks, Lichfield, testified that he met accused in Birmingham on 22 August, at the New Street Station, that accused "told me he had a boat boarded for Philadelphia" and requested a loan of two pounds which witness let accused have. Accused "*** handed over his dog-tags to me and told me to destroy them in case he got picked up for investigation" (R7). Accused was in civilian clothes (R8,10).

Lance Corporal A. Scruton, D-7751, Number 6 Company, Canadian Provost Corps, London, while checking Canadian soldiers at Waterloo station in London on 24 August "had reason to suspect that accused might be a member of the armed forces. In our line of duty, we also checked him for his identity". Accused was in civilian clothes and had a British civilian identity card in the name of Patrick McGrath. The Canadian authorities turned accused over to the civilian police to check his identity card (R10). Scruton identified accused as the same man he apprehended in London as Patrick McGrath. This testimony was corroborated by Lance-Corporal H. R. Bruneau who was with Scruton at the time accused was taken into custody (R11).

The accused, his counsel and the trial judge advocate stipulated (R11) that if Detective Inspector Joseph Keeling were present as a witness, he would testify that he saw accused in civilian clothes, about 11:00 a.m. on Tuesday, 24 August 1943, at Kennington Police Station where he had been brought for questioning as a suspected deserter. At that time accused claimed he was Irish, that his name was Patrick McGrath, that he was working at Wolseley Motor Works, Birmingham and that he was on 14 days holiday. When accused heard arrangements being made to check up with the Birmingham police, he said to Inspector Keeling, "I guess it's no use giving you a lot of trouble. I am an American and am a deserter from the American Army.

I was awaiting a Court-Martial and broke out of the guardhouse at Lichfield about 2nd August. I got the identity card from a drunken Irishman in Birmingham ****. My name is Russell Fazio, and my Army number is 13012666" (R11-12). Inspector Keeling would have testified further that accused was delivered to the American Army authorities, and that in consequence of a telephone message, Inspector Keeling examined on 25 August 1943, the lavatory pan in the Kennington Police Station detention room where accused had been lodged when first brought to the station, and found a number of pieces of paper which were undoubtedly the remains of petrol coupons, a number of which coupons he was able to almost complete.

The signed statement of accused dated 25 August 1943, Pros.Ex.6, was admitted in evidence upon stipulation of the trial judge advocate, accused and defense counsel that it had been obtained after accused had been warned of his rights and that he was free from threats and promises when he gave same (R12). It contains recitals indicative of the intention of accused to remain away from the service permanently.

In the opinion of the Board of Review there is substantial evidence to support the court's findings of guilty of desertion under Charge I and its Specification (CM ETO 656, Taylor; CM ETO 740, Lane; CM ETO 800, Ungard; CM ETO 823, Poteet).

(b) With reference to charge II and its specification, (absence without leave from 5 July 1943 to 30 July 1943 terminated by surrender), accused at his own request was sworn as a witness and in the course of his testimony admitted that in July he was absent without leave for 25 days. He also said: "The reason for me going over the hill, AWOL, is that I wanted to **** get back to the States ****" (R19). There is no doubt of accused's guilt.

(c) Accused made a sworn statement on 10 September 1943 (Pros.Ex.7). It was accepted in evidence with the consent of defense (R13). In it he detailed his escape from confinement, (Charge III and Specification) and his larceny of government property, viz: a blouse (Charge IV and Specification) (R25). Accused's statement supported his plea of guilty to the offenses charged and was of informatory assistance to the court.

(d) In his sworn statement of 25 August 1943 (Pros.Ex.6) accused related in detail the pre-arranged entering of the office of J. W. Gadsden and Company of Birmingham, England, in company with two accomplices with intent to commit a criminal offense (Charge V, Specification 1). His testimony in court (R21-22) elaborates and confirms his former statement. All of the elements of the crime of house-breaking were present (MCM., 1928, par.149e, p.169). His plea of guilty was not ill-advised and the finding of guilty was in all respects proper.

(e) Charge V, Specification 2, charges the theft by accused of specified articles of personal property, British money, British Health stamps, British Unemployment stamps and British postage stamps of the

value of $64.52, the property of J. W. Gadsden and Company Ltd., Birmingham. In his sworn testimony in court accused denied the taking of the tea-pots, the plates, tea, beans, biscuits and the lady's coat "and stuff concerned", but he admitted he had eaten some of the biscuits and canned beans (R22,24).

Miss Winifred Pansy Marguerite Gadsden, a prosecution witness, testified that she was an employee on 18 August 1943 of J. W. Gadsden Company Limited, Vauxhall, Birmingham, and that articles of personal property described in the specification, excepting the bread and sugar had been left in the company's office on 18 August 1943 - some inside the safe and some about the office and that they were missing when she returned to the office on the 19 August 1943 (R14-15). She declared that £10.19. 8d in money had been taken and in addition certain petrol coupons.

The fact that the money and personal property (except the lady's coat) was in the office of Gadsden Company when taken, is evidence upon which the inference that the company owned the same may be based (2 Wharton's Criminal Law, sec.1174, p.1494; Underhill's Criminal Evidence, sec. 508, p.1028). There was adequate evidence of the de facto existence of the corporation (Underhill's Criminal Evidence, sec.508, p.1031). The exchange value of the money was $42.31. The evidence as to the value of the stolen articles of personal property is unsatisfactory. Miss Gadsden's testimony while competent and admissible (20 Am.Jur.,Evidence, sec.894, p.752, note 6) obviously was but a guess. Under the circumstances the approving authority was correct in approving only so much of the finding of guilty of larceny of property of a value not in excess of fifty dollars but more than twenty dollars. This is supported by the value of the money alone. In the opinion of the Board of Review the prosecution fully sustained the burden of proving beyond a reasonable doubt all of the elements of the commission of the crime of larceny by accused, and the record is legally sufficient to support the approved finding (MCM., 1928, par. 148g, p.171).

(f) In his statement of 10 September 1942 (Pros.Ex.7), accused related that when he escaped from the guardhouse at Whittington Barracks, Lichfield, he entered the squad room of one of the barracks and picked up pants and a shirt and then he "walked into another room and got a blouse, cap, tie and pair of shoes" which he "put on in the first-sergeant's room" and then left camp through a hole in the fence. First Sergeant Gustave V. Anderson, Company "A", 4th Replacement Battalion, 10th Replacement Depot, a prosecution witness, stated that an olive drab blouse, a garrison hat and a pair of civilian shoes were taken from his quarters 9 August 1943, the blouse being the property of the United States, issued to him for use in the military service, and the hat and shoes, valued at eight dollars, were his personal property. He identified a blouse shown him as being the one taken from his quarters at the same time the garrison cap and shoes were taken (R16). Captain Marshall F. Hollis, Infantry,

Assistant Provost Marshal, 10th Replacement Depot, testified that in response to a telephone notification on the evening of the 25 August that accused had been apprehended, he went after accused whom he found dressed in civilian clothes with O.D. blouse, shirt, necktie, slacks and garrison cap bundled up, waiting to be "transported back to this depot". He identified the blouse found in accused's possession as that owned by Sergeant Anderson. It had the sergeant's markings on it. "The civilian shoes were worn by the accused" (R17) who admitted taking the garrison cap and shoes from Sergeant Anderson's room (R24). The cap included with this clothing, was misplaced in the guardhouse and not produced in court (R18). Specification 3 of Charge V was proved.

4. The accused, at his own request, was sworn and gave a detailed story which was actually an admission of all the offenses charged.

5. Many errors and irregularities involving the admissibility and exclusion of evidence and examination of witnesses have been noted by the Staff Judge Advocate. As they do not materially affect any of the substantial rights of the accused they require no further comment.

6. Accused is of the age of 18 years and 2 months. He enlisted 7 January 1941 at Pittsburg, Pennsylvania, with no prior service. His service period is governed by the Service Extension Act of 1941.

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, as approved, and the sentence.

8. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942, a sentence of dishonorable discharge may be ordered executed when accused is sentenced to a confinement of not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement in a penitentiary is authorized for the crime of desertion in time of war, Article of War 42. As accused is under 31 years of age with a sentence of not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is correct (War Department letter AG 253 (2-6-41) E, 26 February 1941).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(38) CONFIDENTIAL

1st Ind.

28 OCT 1943

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

1. In the case of Private RUSSELL (NMI) FAZIO (13012666), Company "A", 1st Provisional Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and 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 875. For convenience of reference please place that number in brackets at the end of the order: (ETO 875).

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 882

- 3 NOV 1943

U N I T E D S T A T E S	VIII AIR FORCE SERVICE COMMAND.
v.	
Private BERT (NMI) BIONDI (37133633), 7th Air Depot Group (Repair Squadron), and Private CHARLES H. WHITE (11091322), 33rd Air Depot Group (Repair Squadron), both of Base Air Depot No. 1, VIII Air Force Service Command.	Trial by G.C.M., convened at Warrington, Lancashire, England, 23 September 1943. Sentence as to each accused: 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 soldiers named above has been examined by the Board of Review.

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Bert (NMI) Biondi, 7th Air Depot Group Repair Squadron, AAF-590, APO 635, did, in conjunction with Private Charles H. White, 33rd Air Depot Group Repair Squadron, AAF-590, APO 635, at or near Sankey, Warrington, Lancashire, England, on or about 5 August, 1943, with intent to commit a felony, viz. rape, commit an assault upon Margaret Moores by wilfully and feloniously dragging and throwing the said Margaret Moores upon the ground.

Each pleaded not guilty to and each was found guilty of the Charge and Specification. No evidence of previous convictions of either of the accused was introduced. 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 three years. The reviewing authority approved each of the sentences and designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement of each accused, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence establishes the following facts:

On 5 August 1943 accused Biondi was a member of 7th Air Depot Group (Repair Squadron) and accused White was a member of the 33rd Air Depot Group (Repair Squadron); both squadrons being of VIII Air Force Service Command. On said date they were stationed at AAF Station 590, APO 635, which was at or near Sankey, Warrington, Lancashire, England. Miss Margaret Moores, age 20, a brewery bottler by occupation, resided at 89 Southworth Avenue, Warrington. On the evening of 5 August 1943 Miss Moores (hereinafter called "Margaret" for convenience) at about the hour of 10:20 o'clock was standing on a bridge over St. Helen's canal. She was approached by White who asked her if "her time was booked". She replied: "I am waiting for a boy friend" (R8,12). She had never seen or talked with White previously. White then asked her to escort him across the field. She went halfway with him and then informed him that she was going home. After progressing a distance, she sat down on the grass with him. White kissed her to which she made no objections, and followed same by attempting indecent familiarities with her by putting his hand under her clothes. She repulsed him by saying to him: "You are not doing anything like that to me". She immediately stood up and attempted to run away (R9,12,18-19). White followed her, chasing her about the field. He finally caught her and held her in his arms. At this moment Biondi appeared on the scene. White called to him "to come and help him". Both accused then forced Margaret to the ground and laid her on her back. White grasped her two hands and pulling them above her head pressed them to the ground. An unidentified soldier appeared who grasped her ankles and spread her legs apart and held them. Margaret's dress had been pulled up and her naked thighs were exposed. Biondi was between Margaret's extended legs and laid upon her. She struggled to free herself and screamed once. White then placed his hand over her mouth (R9, 11-14,17-19,34,37,39).

A thirteen-year old boy, Cyril Maher, 60 Ilford Avenue, Warrington, between 11:00 and 11:30 p.m. on 5 August 1943 saw Margaret in the field being chased by two American soldiers one of whom he identified as Biondi (R24,27-28). Cyril approached within ten yards of the trio and saw one of the soldiers tackle the girl around the legs and throw her on to the ground. She lay on her back (R26). Biondi said to Cyril: "Take a powder". Cyril asked: "What does powder mean?" Biondi struck at Cyril with his hand and said: "Scram". Cyril ran to the field gate where Kenneth Powell, age 16, of St. Lawrence, Lodge Lane, Bewsey, was standing. Cyril informed Kenneth as to the events he had observed in the field (R26, 30,34). Kenneth walked into the field and saw Margaret on the ground with one man holding her ankles; another was on his knees between her legs

and a third was bending over her holding her hands to the ground, which were stretched parallel with her body and above her head. Margaret's clothing was above her thighs. She was struggling and crying. She said "Stop it". Kenneth told Margaret that her mother wanted her. She made no reply. The soldier who held her hands told Kenneth to "scram" (R26, 31,34-35). Kenneth returned to the field gate and informed an American soldier, George Anderson, what was happening. Anderson declined to do anything, stating it did not concern him (R25-26,32). In close proximity were Sergeant Hoyle B. Koontz (34435145), Sergeant Leslie M. Pope (34467053), Private first class Ellis J. Lanier (34594764), Private first class James A. Jones (34467257), Private Shannon G. Hodge (34594812), and Private Lloyd F. Ray (34594450) all of Battery D, 461st Coast Artillery Battalion (R36). Kenneth informed Koontz that two "fellows" had a girl on the ground. Koontz with the other soldiers went into the field. White was holding Margaret's hands above her head; Biondi was lying on top of her. The girl's legs were held apart by a third unidentified man. The lower part of her body was nude. She was struggling and crying "Don't, stop it" (R37,39,43,47,49,50,52,53,56). Koontz yelled: "What the hell are you doing?" Lanier grabbed Biondi around the neck and pulled him off Margaret. Jones struck White with his fist and removed him from Margaret's arms. A scuffle ensued. White started to run but was captured. The third unidentified man escaped into the woods. Koontz said to Biondi that "just because he was in England he couldn't get away with it like that", Biondi replied: "I am sorry, I will never do it again". Margaret upon being released left the scene (R37-38,40,45,47,51,54).

Sergeant Alfred G. Prince, 1108 Military Police Company, secured from accused Biondi some of his underwear consisting of "trunks" or "shorts" which Prince identified in court. Biondi informed Prince that he had worn the trunks on the night of the incident and removed them in Prince's presence. Prince took them back to headquarters and delivered them to Sergeant Thomas J. Horan of the 890th Police Company (R57). Horan identified trunks shown him in court as the trunks he received from Prince on 7 August 1943, and delivered to Detective Inspector Hays of the Widnes Station on the same date (R58). Hays delivered them to Dr. David Noel Jones, Staff Biologist and Bacteriologist at the Home Office Science Laboratory in Preston on 9 August 1943 (R59). The Detective Inspector at 1:00 a.m. 7 August 1943 secured from Margaret the pair of knickers which she wore on the night of 5 August 1943 (R20-21). Hays delivered the knickers to Dr. Jones at the same time he delivered the trunks (R60).

Dr. Jones made an examination of the trunks and the knickers. He found on the knickers extensive stains of a vaginal discharge containing a large number of pus cells and bacteria. He also examined and tested the trunks. There was on the front of the trunks a small yellow stain similar in appearance to the stain on the knickers. Upon examination he discovered that the stain on the trunks was of the same constitution as the stain on the knickers. It contained a large number of bacteria and pus cells of the identical type and kind as found on the knickers. Dr. Jones was of the opinion it was a probability that the pus cells found on the trunks and

the knickers came from the same person (R61-62).

4. The defense produced Private Fred Lane whose unit is not shown, who testified he was with the group of American soldiers near the field-gate on the night of 5 August 1943 when a boy approached them and informed them that a bunch of boys was "sheep-shanking" a girl over in the field (R63). He approached with the group of soldiers to a position about ten paces from the girl. He saw one soldier holding the girl's hands, another was holding her feet and a third was on top of her. She was struggling. He then made a jump at the soldiers and a fight ensued in which he was injured. He could recognise no one in the court room who was present and could not identity either the men or the girl involved (R64).

The accused Biondi was duly warned of his rights and elected to make a sworn statement. He testified in substance as follows:

On the evening of 5 August 1943, White and a girl were standing in a field about one hundred yards from the field gate. They were engaged in conversation. Biondi came up to them. The three of them sat down on the grass. After they sat down Biondi put his arms around the girl's neck. He did not try to kiss her. At this moment seven or eight American soldiers came up to them. White was sitting close to the girl (R66-67). One of the soldiers came over and jumped on top of Biondi who arose and got away from him. Another hit him on the back of his head and knocked him down. He made no remarks and ran away (R67). Biondi upon cross-examination attempted to claim that Margaret was not the girl to whom he made improper advances. The pertinent colloquy is as follows:

"Q. And you didn't attempt in any way whatsoever to have intercourse with Miss Moores?
A. No sir.
Q. I want to ask you whether you made the following statement to Sgt. T.J. Horan: 'After sitting with her a few minutes I put my arm around her and tried to have intercourse with her'.
A. Yes sir.
Q. You made that statement?
A. Yes.
Q. Why is it that you have changed your mind now and say you didn't have intercourse with her?
A. Not her I didn't.
Q. You did attempt to have intercourse with a girl?
A. Yes, if there was another one. It wasn't her.
Q. There was a girl you attempted to have intercourse with. Let's talk about this girl you attempted to have intercourse

with. Were you with this girl when the other soldiers came up?
A. Yes.
Q. What position were you in with relation to the other girl when the soldiers came up?
A. Sitting down beside her.
Q. In what way did you attempt to have intercourse with this girl?
A. On her own concern.
Q. Describe to the Court what you did in attempting to have intercourse with her.
A. I didn't sit there long enough to try to have sexual intercourse with her.
Q. You have just said you were there with the girl and attempted to have intercourse with her.
A. I just sat there with my arm around her and I didn't have chance to have intercourse with her before the boys came.
Q. And that is all you did in attempting to have intercourse with her?
A. Yes." (R69-70).

He did not recognise the soldiers who attacked him, nor had he previously known White or the girl. He did not learn the girl's name that evening. He denied he had seen either Cyril Maher or Kenneth Powell in the field that evening and asserted that "All I saw was soldiers" (R74).

The record fails to show that White was informed as to his rights to testify, make an unsworn statement or to remain silent. He was not a witness and he made no unsworn statement.

5. A serious question is presented in connection with the charge against accused, White. Eliminating from the specification all descriptive allegations, the same is as follows:

> " Private Bert Biondi ***, did, in conjunction with Private Charles H. White **** with intent to commit a felony, viz, rape, commit an assault upon Margaret Moores by wilfully and feloniously dragging and throwing the said Margaret Moores upon the ground."

With respect to the form of specification in charging a joint offense the Manual for Courts-Martial provides as follows:

"f. Form of specification in joint offense.- In the case of a joint offense each accused may be charged as if he alone was concerned or the specifications may be in accordance with the principles of the following examples, depending on the decision of the person preferring the charges as to how the persons concerned should be tried:

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

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

In that Private C, Company --, --- Infantry, did, in conjunction with Private A, Company --, --- Infantry, and Private B, Company --, --- Infantry (here allege place, time and offense)." (MCM., 1928, appendix 4, par.f, p.237).

It is manifest that the specification in the instant case is based on the third of the suggested forms above set forth. An analysis of the three forms will reveal their exact purpose:

(a) The first form is intended for use when A and C are all of the joint perpetrators of a crime and it is intended that they should be charged jointly and shall be tried. (All of the joint perpetrators are charged together and are to be tried).

(b) The second form is intended for use when A, B and C are the joint perpetrators of a crime, and it is intended that only A and B shall be charged jointly and shall be tried but that C, while joint actor is neither to be charged nor tried. (Two or more of the joint perpetrators are charged and are to be tried, but one or more are not to be charged and tried).

(c) The third form is intended for use when A, B and C are the joint perpetrators of a crime and it is intended that only A shall be charged and tried but that B and C while joint actors are neither to be charged nor tried. (Only one of the joint perpetrators is charged and is to be tried, and one or more are not to be charged and tried).

Certain fundamental principles of pleading must be observed in drafting specifications and the primary one is that a specification "must specify the material facts necessary to constitute the alleged offense".

(Winthrop's Military Law & Precedents, Reprint, p.133; MCM., 1928, par.29, p.18).

> "An indictment, information or complaint must be positive in respect to the charge that the person accused committed the crime which renders him amenable to the charge and must directly and positively allege every fact necessary to constitute the crime. Nothing can be charged by implication or intendment, nor is it sufficient to charge any material matter by way of argument, or as based on suspicion; the offense cannot be charged on information and belief, nor can the averments be aided by imagination or presumption. ***" (31 C.J., sec.179, p.659).

> "The allegation of the indictment or information must be direct and certain as to the person charged. ***" (31 C.J., sec.226, p.689).

The words of action in the present specification are "did *** commit an assault". It is Biondi who is specifically connected with this verb phrase - "Biondi *** did ** commit an assault". The prepositional phrase "in connection with *** White" is descriptive only; it describes with whom Biondi was associated in the commission of the assault. The prepositional phrase "with an intent to commit a felony" refers to Biondi, not White. The meaning of the specification becomes obvious:

> "Biondi, in conjunction with White, and with intent to commit a felony, did commit an assault etc."

There is, therefore, no allegation that White committed any offense. The specification violates the fundamental principle of pleading that the "indictment, information or complaint must be positive in respect to the charge that the person accused committed the crime which renders him amenable to the charge". The result is that the instant specification fails to allege a cause of action against White. He was brought to trial upon a specification which was fatally defective as to him. Such defect was not waived by his plea to the general issue, nor by his failure to raise the question during trial. It was an organic defect which nullified the whole prosecution against White. It may be considered by the Board of Review upon appellate review (17 C.J., sec.3330, p.55, footnote 92; 24 CJS., sec.1671, footnote 30, p.275; CM 201710, Reynolds (1933)).

The provisions of the 37th Article of War do not permit the Board of Review to ignore this situation. The Manual for Courts-Martial in amplifying the purpose of said article states:

(46)

> "No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby". (MCM., 1928, par.87b, p.74).

The error in the specification as against White is not a defective statement of facts constituting an offense. It wholly fails to allege that White committed any offense. As a consequence the defect is not within the purview of the curative statute, and is fatal to these proceedings.

> "There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence thereof the court acquires no jurisdiction whatever, and if it assumes jurisdiction, a trial and conviction are a nullity. ***" (31 Corpus Juris, sec.1, p.559).

The Board of Review, therefore, concludes, that as to accused White the record of trial is legally insufficient to support the findings of guilty and the sentence.

6. Separate charge sheets were originally prepared as to each accused. Biondi was charged with committing rape upon Margaret under AW 92; White was charged with an assault upon Margaret with intent to commit a felony, viz: rape, under AW 93. Both charges were referred to Major Edwyn G. Rydlun, AC., for investigation under the 70th Article of War. In his report he expressed the opinion that the evidence did not sustain the charge of rape a gainst Biondi and recommended that he be charged with assault with intent to commit rape under AW 93. The investigating officer recommended that White be brought to trial as charged.

Upon reference to the staff judge advocate he altered the charge sheet in the case against Biondi by striking out the charge of rape and inserting in lieu thereof a charge against Biondi under AW 93 of a felonious assault with intent to commit rape upon Margaret. On the White charge sheet he eliminated the original charge a gainst White of felonious assault with intent to commit rape and inserted in lieu thereof a charge against Biondi under AW 93 of felonious assault upon Margaret, with intent to commit rape, "in conjunction with" White. He then eliminated from the Biondi charge sheet the substituted charge under AW 93 of felonious assault with intent to commit rape and upon the White charge sheet first struck out the substituted charge against Biondi of felonious assault, and then reinstated it in the identical language set forth in paragraph 2 supra. Based upon this action the staff judge advocate recommended trial of both accused upon charges of assault ~~in~~ with intent to commit a felony, viz: rape.

The result of these alterations is: (a) the original charge sheet against Biondi carries no charges against him inasmuch as both the original and substituted charges were eliminated; (b) the original charge sheet against White carries no valid, legal charge against him for the reasons set forth in paragraph 5, supra, and (c) the charge against Biondi appears on the original White charge sheet. In preparing the charge sheets in final form the third and fourth pages of the Biondi original charge sheet were eliminated but the single charge against Biondi (appearing on the original White charge sheet) remained over the verifying affidavit of the White charge sheet.

Both charge sheets show that the accuser - Captain Jesse B. Kritzer - did not initial all or any of the alterations in the charge sheets. The initials appearing are evidently those of a subordinate officer in the office of the staff judge advocate. The alterations in respect to Biondi were of such a nature as to be proper without re-verification by the accuser, and the substitution of the charge of assault with intent to commit a felony, viz: rape, in lieu of the charge of rape did not require a re-investigation (CM ETO 106, Orbon).

It is obvious that the staff judge advocate intended the charge sheet against both accused should consist of: (a) the first page of the original Biondi charge sheet; (b) in the first page of the original White charge sheet; (c) a third page which carried the charge which he supposed was valid against both accused; (d) a fourth page carrying the verification and indorsement of reference for trial, and (e) a fifth page showing certificate of service. Manifestly, he acted upon the assumption that the charge in the final form and upon which trial was had was a valid and legal charge against both Biondi and White. In this conclusion he was in error, as is above demonstrated. It failed to charge White with any offense, but was valid as to Biondi. While the above practice is not to be commended the charge sheet in final form adequately informed accused Biondi of the nature of the charge against him. He could not possibly have been misled.

7. The form of the plea of the two accused - "To the Specification of the Charge - Not guilty. To the Charge - Not guilty" (R5) is irregular. The plea of each accused should have been separate and several and the same should have been recorded separately in the record of trial (MCM., 1928, par.49c, p.38). Inasmuch as White was never legally before the court because of the fatally defective specification, the plea was applicable only to Biondi and in its present form it is obvious that he pleaded "Not Guilty".

8. The motion of the defense counsel "for an acquittal" may properly be treated as a motion for a finding of not guilty. It was made on behalf of accused jointly on the ground that specific intent to commit a felony had not been proved (R62). Had defense counsel in his motion pointed out to the court the fatal defect in the specification when applied to White, the court should have granted the motion as to him. However, the failure of counsel to make his motion in proper form was not a waiver of the error (See par.5, supra) as to White. The motion as to Biondi was properly

denied. The prosecution had clearly made its case against him at the time of the motion (CM ETO 527, Astrella).

9. Biondi stands charged with assault with intent to commit a felony, viz: rape.

> "Assault with intent to commit rape.- This is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. ****. The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice. Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted." (MCM., 1928, par. 149 l, p.179).

> "To constitute an assault with intent to rape, there must be, coupled with the required intent, an overt act amounting to an assault upon the female. ****. Generally, the assault may consist of any act tending to an injury, accompanied by circumstances denoting an intent, coupled with a present ability, to use violence against the person, whether there is any battery or not, for in fact there may be an assault with intent to commit rape without any battery. ****." (52 C.J., sec.42, pp.1030,1031).

Biondi's participation in the assault on Margaret is established beyond reasonable doubt. The testimony of Koontz (R38), Pope (R43), Lanier (R47) and Jones (R50) forms a substantial and reliable body of proof that it was Biondi who was directly attempting the rape of the girl. He was on his knees between her outstretched legs as she was held helpless on her back on the ground. The testimony of Dr. Robert Noel Jones, biologist and bacteriologist, who examined Margaret's knickers and accused Biondi's shorts or trunks, that the stains on these articles of clothing were identical in nature and contained the same pus cells and bacteria is highly convincing that Biondi had exposed his person in the execution of his nefarious purpose. That he possessed the desire and intent to have sexual intercourse with Margaret is strikingly revealed by his testimony on cross-examination hereinbefore set forth in extenso (R69-72). He was frustrated in his attempt only by the timely interference of Koontz and his fellow soldiers. There was substantial evidence upon which to base the finding of his specific intent to rape Margaret at the time and place alleged. All of the elements of the crime were clearly proved against Biondi and in the state of the

evidence the court would not have been justified in making any other finding than it did (CM ETO 78, Watts; CM ETO 489, Rhinehart and Fallucco; CM ETO 492, Lewis; CM ETO 595, Sipes; CM ETO 678, DiNuoscio).

The fact that Margaret was unable to identify Biondi as one of her assailants (R10,12,20) or was uncertain as to the identity of the soldier who was on top of her (R10) or that she finally declared that it was White and not Biondi who occupied such position (R14) does not in any respect weaken the foregoing conclusion. Confronted with two, and probably three strange soldiers who assaulted and maltreated her viciously and brutally in the obvious attempt to rape her, there is nothing strange or improbable in her confusion and uncertainty. In any event Margaret's testimony insofar as it conflicted with other evidence presented by the prosecution created only an issue of fact which it was the duty of the court to resolve. Inasmuch as there is substantial evidence to support the court's finding the Board of Review cannot and will not disturb it (CM ETO 106, Orbon; CM ETO 492, Lewis; CM ETO 774, Cooper, Jr; CM ETO 799, Booker).

The Board of Review is of the opinion that the record is legally sufficient to support the finding of Biondi's guilt.

10. Accused Biondi was 29 years 11 months of age at the time of the commission of the offense. He was inducted at Jefferson Barracks, Missouri, on 5 February 1942 for the duration of the war plus six months. Accused White was 19 years 2 months of age on 5 August 1943 and was inducted at New Bedford, Massachusetts on 13 October 1942 for the duration of the war plus six months.

11. The court was legally constituted and had jurisdiction of accused Biondi and of the offense charged against him. No errors injuriously affecting the substantial rights of accused Biondi were committed during the trial, but prejudicial and fatal error was committed as to accused White. 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 accused Biondi, but is legally insufficient to support the findings of guilty and the sentence as to accused White.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 3 NOV 1943 TO: Commanding General, VIII Air Force Service Command, APO 633, U.S. Army.

1. In the case of Private BERT (NMI) BIONDI (37133633), 7th Air Depot Group (Repair Squadron) and Private CHARLES H. WHITE (11091322), 33rd Air Depot Group (Repair Squadron), both of Base Air Depot No. 1, VIII Air Force Service Command 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 as to the accused Biondi and legally insufficient to support the findings and sentence as to accused White, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence imposed upon accused Biondi. The order should, of course, promulgate the vacation of White's sentence.

2. White was before the court upon a Charge and Specification which failed to allege that he committed any crime. In legal effect he was not tried, and he has therefore never been placed in jeopardy. The evidence is convincing that White is equally guilty with Biondi of the felonious assault upon the young woman. No legal reason, in my opinion, exists against properly charging and trying him for the assault with intent to commit a felony, viz: rape, upon Miss Moores.

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 882. For convenience of reference please place that number in brackets at the end of the order: (ETO 882).

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 885

29 OCT 1943

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 (NMI) VAN HORN (33043698), Company A, First Provisional Battalion, 10th Replacement Depot.	Trial by G.C.M., convened at Whittington Barracks, Lichfield, England, 23 September 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Raymond (NMI) Van Horn, Company A., First Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, without proper leave, absent himself from his Organization at Whittington Barracks, Lichfield, Staffordshire, England, from on or about 1250 hours, 12 July 1943, until he was apprehended in Birmingham, Warwickshire, England on or about 10 August 1943 at 2230 hours.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that Private Raymond (NMI) Van Horn, Company A., First Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Birmingham, Warwickshire, England, on or about 4 August 1943, feloniously take, steal, and carry away, six knives and six forks, of the value of less than twenty ($20.00) dollars, the property of Victor Baker, 2/4 Brass Street, Birmingham, Warwickshire, England.
Specification 2: In that Private Raymond (NMI) Van Horn, Company A., First Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Birmingham, Warwickshire, England, on or about 3 August 1943, feloniously embezzle by fraudulently converting to his own use, a ring, of the value of less than twenty ($20.00) dollars, the property of Mr. Manuel Morris, 1/4 Brass Street, Birmingham, Warwickshire, England, entrusted to him by Mrs. Ruby Morris, 1/4 Brass Street, Birmingham, Warwickshire, England.

He pleaded guilty to Charge I and to its Specification, not guilty to Charge II and to both specifications thereunder, and was found guilty of all charges and specifications. Evidence of three previous convictions for absences without leave for 53, 21 and 2 days respectively in violation of Article of War 61, and of one previous conviction for attempting to strike a soldier with a knife in violation of Article of War 96, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, 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. Because of the pleas of guilty to Charge I and to its Specification (absence without leave in violation of Article of War 61) the prosecution introduced no evidence with respect to this offense (R5).

With reference to the offense alleged in Specification 1, Charge II (larceny of six forks and six knives in violation of Article of War 93), the undisputed evidence for the prosecution shows that Mrs. Janet Baker, 2/4 Brass Street, Summer Lane, Birmingham, England first met accused in a pub where she was employed. It was on a Tuesday or Wednesday morning during the latter part of July (1943). He appeared to be lonely and she gave him a drink. He told her he was in trouble, that he had been robbed

of 25 pounds. She invited him to her home for dinner and looked after him until the following Monday when he left, saying that he had to go. He returned during the week on two or three occasions and then was not seen again until Wednesday of the following week (4 August). On that day Mrs. Baker was out from about noon until 3:00 p.m. As had been her custom for 24 years, she did not lock the door when leaving the house but merely latched it. When she returned the latch was undone. She missed a cutlery set belonging to her son Victor which set was in the bottom drawer in Victor's room where accused had slept. The set was in a black case lined with white satin and consisted of six fish-knives and six fish-forks. Mrs. Baker did not know the value of the set which her son had won five years before at "Lucas's Sports" (R6-8).

About 6:00 p.m. Wednesday (4 August) Mr. Terence Maguire, 15 Linton Road, Pheasey Estates, Great Barr, Birmingham saw accused at the bus depot, Birchfield Road, Perry Barr, where he worked. Maguire had seen him the week before when he had been in and obtained a loan on a ring from a man named Blizard. He opened a black box lined with pale silk containing six highly polished fish-knives and six fish-forks with bone or celluloid handles. He said that he had won the set and 10 pounds at a roller-skating competition in London. He wanted to see Blizard who had the ring, and wanted to get the ring back and one pound in addition for the cutlery. Maguire decided to buy the set himself, borrowed 30 shillings and paid the same to accused for the cutlery. As the catch on the box was broken he mended it with two ordinary steel pins. As the result of receiving certain information he informed the police several days later that he had purchased the set. He identified the box and contents at the trial as the articles in question, and they were admitted in evidence with consent of defense (R9-11; Pros.Ex.A).

With reference to the offense alleged in Specification 2, Charge II (embezzlement of a ring in violation of Article of War 93), the evidence for the prosecution, which was undisputed, shows that Mrs. Ruby Morris, 1/4 Brass Street, Summer Lane, Birmingham, England first met accused "the week before August - July - when mother brought him home" (R12). He stayed one week at her mother's, after which she saw him for a fortnight at various intervals (R13). During this time she kept company with accused and went to the motion pictures with him and the children. He admired her husband's ring which was on her finger and said that he would like to wear it. She loaned it to him "because of friendship", telling him that it was a loan. She did not give it to him to sell. The ring was gold and had "a square on it" with her husband's initials "M.M" which stood for Manuel Morris. Later he returned the ring to her "and then he had it back again". She did not see the ring again until the police brought it. Accused told her that a young girl at Perry Barr had "pinched" it from him. Mrs. Morris identified by the initials and shape, a ring shown to her at the trial as the ring in question. She had purchased it for three pounds, five shillings and had paid one shilling, nine pence to have the initials put on (R12-13).

Mr. Frederick G. Blizard, 109 Curbar Road, Beeches Estate, Birmingham was a mechanic at the Birmingham Corporation Transport Depot, Birchfield garage. One morning accused entered the mess room at about 7:30 a.m. and after eating asked Blizard if he would like to buy a ring which he was wearing. Blizard refused whereupon accused asked if he would lend him something on it so that he could return to Lichfield Barracks. Blizard then offered ten shillings on the ring and told him that if he wanted it to be "in pawn" he could get it back at any time. He also gave him his name and address and told him that if he was "stuck" for a place he could come to his house for dinner. Accused said that he would come for the ring the following evening. The ring was of the gold signet type with "M.M" stamped on the top. Blizard identified a ring shown him at the trial as the ring in question and it was admitted in evidence (R14; Pros.Ex.B).

It was stipulated by the prosecution and the defense that accused was a member of the military service of the United States (R16).

4. For the defense, Private John A. Jones, Company A, First Provisional Military Police Battalion, testified that about July 10th he had gone on pass to Walsall with accused who had been "shooting craps" and who had about 70 pounds. He last saw him about 17 July at camp (Lichfield Barracks) when he came to Jones' barracks to have his clothes pressed (R17).

Accused at his own request made a sworn statement to the effect that about 10 July he went absent without leave. He and Jones went to Walsall, remained over night and returned to camp. Accused was then drunk and returned to Walsall for two or three days. About 7 August he had a fight during which a civilian hit him over the eye, and upon regaining his senses he found that he was in a hospital in Birmingham. Upon leaving the hospital to turn himself in as absent without leave he met some "bobbies" who asked if he had been in a fight "down here last night". When he replied in the affirmative, they suggested he go to the police station to see about some money he had lost. He did so, and at the station asked that the military police be called so that he could surrender. While he was waiting for their arrival he was questioned by a civilian. He informed the military police that he had been absent 28 days. As he was out of his head he did not know whether or not he got the forks and knives. He did not remember anything of the period between 10 July and the time of the fight because he was drunk (R18-19).

5. Accused pleaded guilty to the alleged offense of absence without leave (Charge I and Specification).

Although proof of the dates alleged in Specifications 1 and 2 of Charge II was not definitely established, considering all the testimony it is apparent that the offenses were committed during the latter part of July or the first week in August. No question as to the date of commission of the offenses was raised by the defense. There was no doubt as to the

identity of the articles involved as the descriptions given by Mrs. Baker and Mrs. Morris sufficiently coincided with those of Mr. Maguire and Mr. Blizard. Although the value of the articles was not fully established, they were before the court as exhibits and its findings that they were of some value less than $20 were clearly justified (MCM., 1928, par.149g, p.173).

Accused's possession of the recently stolen cutlery was not satisfactorily explained and may raise a presumption that he stole the property (MCM., 1928, par.112a, p.110). Also,

> "Proof of a subsequent sale of stolen property goes to show intent to steal, and, therefore, evidence of such sale may be introduced to support charges of larceny." (MCM., 1928, par. 149g, p.173).

It was clearly established by the evidence that Mrs. Morris loaned the ring to accused and that he pawned it shortly thereafter.

> "*** where an article is borrowed **, the person borrowing ** it does not commit a larceny if he subsequently, while holding the property as a borrower, *** decides to and does convert the article to his own use. In such a case there is no trespass and the offense is, in consequence, not larceny but embezzlement" (MCM., 1928, par.149g, p.172).

> "The loan of a topcoat by one friend to another, through an informal transaction, involves an element of trust in the borrower by the lender. Pawning it or selling it is a breach of that trust, and constitutes the offense of embezzlement under A.W. 93, as defined in paragraph 149h, Manual for Courts-Martial" (Dig.Ops.JAG., 1912-1940, sec.451(18), p.317) (Underscoring supplied).

The evidence is legally sufficient to support the findings of guilty of Charge II and of the specifications thereunder.

6. The review of the assistant staff judge advocate and the addendum thereto of the staff judge advocate, Western Base Section, SOS, ETOUSA contains comments on certain irregularities contained in the record of trial. Further comment thereon is unnecessary.

7. The charge sheet shows that accused is 23 years of age and that he was inducted 9 May 1941, his service being governed by the Service Extension Act of 1941. He had no prior service.

CONFIDENTIAL

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

Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. The designation of the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement is correct (War Department circular No. 210, 14 September 1943, par.2a, sec.VI).

Judge Advocate

Judge Advocate

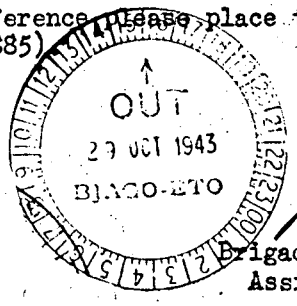
Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 OCT 1943 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private RAYMOND (NMI) VAN HORN (33043698), Company A, First Provisional Battalion, 10th Replacement Depot attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and 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 885. For convenience of reference please place that number in brackets at the end of the order: (ETO 885).



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

10 FEB 1944

ETO 895

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

v.

Private (formerly First Sergeant) FRED A. DAVIS (19046017), Staff Sergeant PHILIP (NMI) WADE (34052926), Private (formerly Corporal) LEROY (NMI) GALLIER (34154618), Sergeant (formerly Corporal) CARROL T. REED (34145879), Corporal EDWARD R. WILLIAMS, JR., (34136468), Private First Class HAROLD F. FRELOT (34154584); all of the foregoing being of 1958th Quartermaster Truck Company (Avn.), 1515th Quartermaster Truck Battalion (Avn.); First Sergeant GEORGE W. PATTERSON (13010389), Private JAMES D. HILL (34064160), Private WILLIAM L. OGLETREE (34064159), T/5 MAX I. CRADIC (39232918), Corporal (formerly T/5) HILLRIE (NMI) SAFFO (34063445), Private First Class (formerly Private) LEVE (NMI) ENGRAM (34064059), Private BEUFFORD (NMI) FLAGG (39232993), Private JESSIE F. KIRKSEY (34056345), all of the foregoing being of 1945th Quartermaster Truck Company (Avn.), 1515th Quartermaster Truck Battalion (Avn.); Private (formerly Sergeant) JAMES H. HORTON (34062018), Private (formerly T/5 MATTHEW (NMI) ARBUCKLE (34181309), Private WILLIAM H. AVERY, JR., (14072962), Private SIDNEY G. KENDALL (34064789), Private KERMIT R. MACK (14068043), Private JAMES H. WISE (6996370), all of the foregoing being of 1949th Quartermaster Truck Company (Avn.), 1515th Quartermaster Truck Battalion (Avn.);

VIII AIR FORCE SERVICE COMMAND.

Trial by G.C.M., convened at AAF Station 586 on 3-9, 11-19 September 1943.
NOT GUILTY: Purcelle T. Johnson, Triplett, James A. Williams, Alexander, Robinson, Bailey, Doakes. DISAPPROVED: Magee.
SENTENCES: Dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Davis 10 years, Hill 10 years, Reed 9 years, Starks 8 years, Wade 7 years, Gallier 7 years, Patterson 7 years, Walter Johnson 7 years, Ogletree 3 years, Kendall 3 years, Mack 3 years, Eastern Branch, United States Disciplinary Barracks, Beekman, New York; Dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Cradic 2 years, Avery 2 years, James E. Johnson 2 years, Edward R. Williams 1 year, Frelot 1 year, Saffo 1 year, Engram 1 year, Flagg 1 year, Kirksey 1 year, Horton 1 year, Arbuckle 1 year, Wise 1 year, Roach 1 year, Smith 1 year, Terrell 1 year, Grigg 1 year, 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.

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Private WALTER (NMI) JOHNSON (34206503), T/5 PURCELLE T. JOHNSON (11096029), T/5 RANDOLPH R. TRIPLETT (32162207), T/5 JAMES A. WILLIAMS (37209332), Private First Class CURTIS (NMI) ALEXANDER (32314203), Private First Class PEMBERTON J. ROACH, JR., (11089667), Private First Class ROBERT (NMI) SMITH (34245563), Private First Class BERNARD (NMI) TERRELL (32161543), Private LEE (NMI) GRIGG, JR., (12027912), Private JAMES E. JOHNSON (33066560), all of the foregoing being of 1933rd Quartermaster Truck Company (Avn.), 1513th Quartermaster Truck Battalion (Avn); Staff Sergeant HOMER E. ROBINSON (34145841), T/4 EDWARD (NMI) BAILEY (14014726), Corporal JULIUS (NMI) MAGEE (14014606), Private LLOYD K. DOAKES (38022281), Private WILLIAM O. STARKS (35207247), all of the foregoing being of 1994th Quartermaster Truck Company (Avn.), 1513th Quartermaster Truck Battalion (Avn.). All of the 1511th Quartermaster Regiment (Avn.).

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 charges and specifications:

CHARGE I: Violation of the 66th Article of War.

Specification 1: In that Private (then 1st Sergeant) Fred A. Davis, Staff Sergeant Philip (NMI) Wade, Jr., Private (then Corporal) Leroy (NMI) Gallier, Sergeant (then Corporal) Carrol T. Reed, Corporal Edward R. Williams, Jr., and Private First Class Harold F. Frelot, of the 1958th Q.M. Truck Co., (Avn), 1515th Q.M. Truck Battalion (Avn)., 1511th Q.M. Truck Regiment (Avn) (SP); 1st Sergeant George W. Patterson, Private James D. Hill, Private William L. Ogletree, T/5 Max I. Cradic, Corporal

(then T/5) Hillrie (NMI) Saffo, Private First Class (then Private) Leve (NMI) Engram, Private Beufford (NMI) Flagg, and Private Jessie F. Kirksey, of the 1945th Q.M. Truck Co. (Avn), 1515th Q.M. Truck Battalion (Avn), 1511th Q.M. Truck Regiment (Avn) (SP); Private (then Sergeant) James H. Horton, Private (then T/5) Matthew (NMI) Arbuckle, Private William H. Avery, Jr., Private Sidney G. Kendall, Private Kermit R. Mack, and Private James H. Wise, of the 1949th Q.M. Truck Co. (Avn), 1515th Q.M. Truck Battalion (Avn), 1511th Q.M. Truck Regiment (Avn) (SP); Private Walter (NMI) Johnson, T/5 Purcelle T. Johnson, T/5 Randolph R. Triplett, T/5 James Williams, Private First Class Curtis (NMI) Alexander, Private First Class Pemberton J. Roach, Jr., Private First Class Robert (NMI) Smith, Private First Class Bernard (NMI) Terrell, Private Lee (NMI) Grigg, Jr., and Private James E. Johnson, of the 1933rd Q.M. Truck Co, (Avn), 1513th Q.M. Truck Battalion (Avn), 1511th Q.M. Truck Regiment (Avn) (SP); Staff Sergeant Homer E. Robinson, T/4 Edward (NMI) Bailey, Corporal Julius (NMI) Magee, Private (then Private First Class) Lloyd K. Doakes, and Private William O. Starks, of the 1994th Q.M. Truck Co. (Avn), 1513th Q.M. Truck Battalion (Avn), 1511th Q.M. Truck Regiment (Avn) (SP); acting jointly and in pursuance of a common intent, did, at AAF Station 569 and vicinity, on or about 24 and 25 June 1943, voluntarily join in a mutiny which had begun in AAF Station 569 and vicinity against the lawful military authority of Major George C. Heris, QMC, acting commanding officer of said Station and other officers of said Station, and did, with the intent to usurp, subvert and override said lawful military authority for the time being, in concert with sundry other members of said 1511th Q.M. Truck Regiment assembled at various places in said Station and vicinity, wrongfully and unlawfully seize arms and ammunition by breaking into store rooms, bear arms, disregard and ignore the lawful efforts of their superior officers to have them return to barracks and surrender their arms, make inflammatory statements in the presence of other soldiers, bargain with their superior officers as to conditions under which they would cease their mutinous conduct, fire upon their superior officers, and refuse to disperse and cease making preparations for fighting with Military Police, U.S. Army.

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Specification 2: In that * * * * * * * * * * * * * * * *; acting jointly and in pursuance of a common intent, did, at AAF Station 569 and vicinity, on or about 24 and 25 June 1943, voluntarily join in a mutiny which had begun at AAF Station 569 and vicinity against the lawful military authority of the Military Police, U.S. Army, and did, with the intent to usurp, subvert and override said military authority for the time being, in concert with sundry other members of said 1511th Q.M. Truck Regiment assembled at various places in said Station and vicinity, wrongfully and unlawfully take up arms against and fire upon members of the said Military Police.

CHARGE II: Violation of the 89th Article of War.

Specification: In that * * * * * * * * * * * * * * * * *; being in garrison at AAF Station 569, did, at AAF Station 569 and vicinity, on or about 24 and 25 June 1943, commit a riot, in that they, together with certain other soldiers whose names are unknown, did, wrongfully and unlawfully and in a violent and tumultuous manner assemble to disturb the peace of AAF Station 569 and vicinity, and having so assembled did wrongfully and unlawfully and in a violent and tumultuous manner bear arms, disregard the authority of their superior officers, fire upon their superior officers and members of the Military Police, U.S. Army, to the terror and disturbance of the said Station and vicinity.

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

Specification: In that * * * * * * * * * * * * * * * * * * *; acting jointly and in pursuance of a common intent, did, at AAF Station 569 and vicinity, on or about 24 and 25 June 1943, in conjunction with certain other soldiers whose names are unknown, wrongfully and unlawfully seize arms and ammunition by breaking into store rooms, bear arms, intentionally discharge firearms in a reckless manner, take and use U.S. Government vehicles, disregard and ignore the lawful efforts of their superior officers to have them return to barracks and surrender their arms, make inflammatory statements in the presence of other soldiers, bargain with their superior officers as to conditions under which they would cease their mutinous conduct, halt and question their superior officers, fire upon their superior officers and members of the Military Police, U.S. Army, and damage and destroy U.S. property.

3. Each of the accused pleaded not guilty to the charges and specifications. Accused Purcelle T. Johnson, Triplett, James A. Williams, Alexander, Robinson, Bailey and Doakes were acquitted of all charges and

specifications. Accused Davis, Wade, Gallier, Reed, Hill, Walter Johnson and Starks were found guilty of all charges and specifications. Evidence of two previous convictions was introduced as to accused, Walter Johnson: one by summary court for violation of the 61st Article of War for failure to repair at fixed time and to properly appointed place for bed check and place of assembly at reveille and one by special court-martial for violation of the 96th Article of War for absence without leave on two occasions; and also there was introduced as to accused, Starks, evidence of three previous convictions by summary court for violation of the 61st Article of War, for absence without leave for one and seven days respectively and for failure to repair at fixed time to the properly appointed place for bed check, and one previous conviction by special court-martial for violation of the 69th Article of War for breaking arrest. No evidence of previous conviction was introduced as to accused Davis, Wade, Gallier, Reed and Hill. Each of the said 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 as follows: Davis, 15 years; Wade, 12 years; Gallier, 13 years; Reed, 13 years; Hill, 15 years; Walter Johnson, 14 years and Starks, 15 years. The reviewing authority approved each of the sentences but reduced the periods of confinement as follows: Davis, to 10 years; Wade to seven years; Gallier to seven years; Reed to nine years; Hill to 10 years; Walter Johnson to seven years and Starks to eight years, and designated Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement.

Accused Patterson, Ogletree, Cradic, Mack and James E. Johnson were each found not guilty of Charge I and its specifications but guilty of Charges II and III and their respective specifications. Evidence was introduced of one previous conviction by summary court of accused James E. Johnson for violation of the 65th Article of War for disobedience of order of non-commissioned officer to drill. No evidence of previous convictions was introduced as to accused Patterson, Ogletree, Cradic and Mack. Each of the said 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 as follows: Patterson, nine years; Ogletree, six years and six months; Cradic six years and six months; Mack six years and six months and James E. Johnson eight years. The reviewing authority approved each of the sentences but reduced the periods of confinement as follows: Patterson to seven years; Ogletree to three years; Cradic to two years; Mack to three years and James E. Johnson to two years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement of accused Patterson, Ogletree and Mack, and 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England as the place of confinement of accused, Cradic and James E. Johnson.

Accused Edward R. Williams, Jr., Frelot, Saffo, Engram, Flagg, Kirksey, Horton, Arbuckle, Avery, Kendall, Wise, Roach, Smith, Terrell, Grigg and Magee were each found not guilty of Charges I and II and of their respective specifications, but each was found guilty of Charge III

and its Specification. Evidence of previous convictions of accused was introduced as follows: Flagg, one conviction by summary court for violation of 61st Article of War for absence without leave; Kendall, three convictions, one by special court-martial for violation of 96th Article of war for wrongfully taking and using a Government beach wagon without authority, one by summary court for violation of 61st Article of War for absence without leave from guard duty, and one by summary court for violation of 61st Article of War for absence without leave for two days; Wise, two convictions, one by summary court for violation of 65th Article of War for threatening to assault non-commissioned officer with loaded rifle, using threatening and insulting language to non-commissioned officer and disobedience to orders of non-commissioned officer, and one by summary court for violation of 61st Article of War for absence without leave for two days. No evidence of previous convictions was introduced as to accused Edward R. Williams, Jr., Frelot, Saffo, Engram, Kirksey, Horton, Arbuckle, Avery, Roach, Smith, Terrell, Grigg and Magee. Each of the said 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 as follows: Edward R. Williams, Jr., Frelot, Saffo, Engram, Flagg, Kirksey, Horton, Arbuckle, Avery, Roach, Smith, Terrell, Grigg and Magee, each for three years; accused Kendall for five years and accused Wise for six years. The reviewing authority disapproved the sentence of accused Magee, and approved each of the other sentences but reduced the period of confinement as follows: Edward R. Williams, Jr., Frelot, Saffo, Engram, Flagg, Kirksey, Horton, Arbuckle, Roach, Smith, Terrell, Grigg and Wise, each to one year; Avery to two years and Kendall to three years. He designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement of all of said accused except Kendall and he was ordered confined in Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

The reviewing authority forwarded the record of trial for action pursuant to Article of War 50½.

4. Bamber Bridge is a town situate about three miles south of Preston, Lancashire, England. On 24 June 1943, AAF Station 569, also known as Adam's Hall Camp, was located in a suburban area immediately adjacent to the north-east section of the town. The principal street of Bamber Bridge is Station Road. Its compass direction is approximately north and south, and it extends through a closely built area. Reference is made to CM ETO 804, Ogletree et al for a particular description and location of points and places in the town relevant to the instant case. Mounsey Road, which intersects Station Road at right angles commences at the east line of Station Road and extends in an easterly direction approximately five hundred feet to the main entrance gate or entrance of AAF Station 569. A projection of said street in the camp is designated Access Road, and forms the principal street thereof. Family dwelling houses are constructed on both sides of Mounsey Road for its entire length. (Pros.Exs.1,2).

On 24 June 1943, there was stationed at AAF Station 569, the 1511th Quartermaster Truck Regiment (Avn.). It consisted of two battalions whose units are shown as follows:

1513th Battalion	1515th Battalion
1933rd Company	1938th Company
1957th Company	1945th Company
1994th Company	1949th Company
	1958th Company

The regiment, on 24-25 June 1943, was under command of Major George C. Heris, Quartermaster Corps, the Executive Officer of the regiment. These units were composed of colored soldiers under the command principally of white officers. The regular commanding officer was absent (R34). The following officers of the regiment were immediately concerned with the events hereinafter related:

Officer	Duty on 24 June 1943
R 54 Capt. Ellis M. Anderson,	Commanding Officer 1515th Quartermaster Truck Battalion.
R192 First Lieutenant Michael J. Arcuri,	1994th Quartermaster Truck Company (Avn.).
R155 Second Lieutenant Jeroy E. Bjerke,	Supply Officer, 1958th Quartermaster Truck Company.
R330 Captain Charles W. De Baun,	Medical Corps, on temporary duty with 1511th Quartermaster Truck Regiment (Avn.).
R315 First Lieutenant Burton M. Edwards,	1938th Quartermaster Truck Company (Avn.) Officer of Day at AAF Station 569 on 24 June 1943.
R654 First Lieutenant George C. Foss,	1945th Quartermaster Truck Company (Avn.).
R623 Captain Harold J. Gerardot,	Commanding Officer 1933rd Quartermaster Truck Company (Avn.).
R220 First Lieutenant Cecil C. Gibson,	Commanding Officer, 1949th Quartermaster Truck Company (Avn.).
R632 Second Lieutenant Edward F. Gormley,	Regimental Provost Marshal, 1511th Quartermaster Truck Regiment (Avn.).
R268 First Lieutenant Robert J. Huxtable,	1957th Quartermaster Truck Company (Avn.).
R243 Major Artemus L. Latham, Jr.,	Commander, 1513th Battalion, 1511th Quartermaster Truck Regiment (Avn.).
R808 Captain Richard Maguire	Executive Officer, 1515th Battalion, 1511th Quartermaster Truck Regiment (Avn.).
R418 Major Hugh J. Mattia,	Adjutant, 1511th Quartermaster Truck Regiment (Avn.).
R136 Second Lieutenant Joseph H. McCarthy,	Commanding Officer, 1958th Quartermaster Truck Company (Avn.).

R 43 Second Lieutenant Edwin B. Jones,	Chaplain, 1511th Quartermaster Truck Regiment (Avn.).
R115 Captain Paul T. Milnamow,	Medical Corps, Regimental Surgeon, 1511th Quartermaster Truck Regiment (Avn.).
R327 First Lieutenant David D. Ousset,	Special Service and Post Exchange Officer, 1957th Quartermaster Truck Company (Avn.).
R206 First Lieutenant Hollis I. Ryland,	Motor and Supply Officer, 1933rd Quartermaster Truck Company (Avn.).
R174 First Lieutenant Marvin B. Saniter,	Commanding Officer, 1945th Quartermaster Truck Company (Avn.).
R 67 First Lieutenant Gerald C.) R526 Sylvester,)	Adjutant, 1515th Battalion, 1511th Quartermaster Truck Regiment (Avn.).
R260 First Lieutenant Laurence N. Willis,	Executive & Operations Officer, 1515th Battalion, 1511th Quartermaster Truck Regiment (Avn.).

5. On the evening of 24 June 1943 at about 10:30 p.m. in a residential section of Station Road in Bamber Bridge, four military policemen attempted to arrest and take into custody two colored soldiers, who were stationed at AAF Station 569 for alleged violation of certain standing orders. The arrest was resisted not only by the two soldiers, but also by a group of colored soldiers who accompanied them and who were also stationed at AAF Station 569. There arose a serious disturbance during the course of which two of the soldiers, the accused Ogletree and one Private Lynn M. Adams (34151263), 1949th Quartermaster Truck Co.(Avn), 1511th Quartermaster Truck Regiment (Avn.) were shot and wounded by the policemen and two of the policemen were injured by rocks and bottles thrown by some of the soldiers (R53,54). Reference is made to CM ETO 804, Ogletree et al, supra, for a description of this episode.

At the conclusion of this street fighting Ogletree and Adams were assisted into camp by companions and were taken to the dispensary for treatment (R115,116,177,240,537-541). After examination and the administration of "first aid" by the post medical officers, they were placed in an ambulance as "stretcher cases" and were transferred to the 110th Station Hospital at Warrington (R117,129,177,183,331,534-536).

Rifles or carbines were stored in various supply rooms in camp. The rifles of the 1938th company were kept in a room at the extreme eastern wing of Building H. All rifles of the 1945th company were contained within a store room located in the westerly projecting wing of Building M. The 1958th company stored its rifles in a small room near the center of Building N. In Building C there were separate gun rooms for the 1933rd, 1957th and 1994th companies. The rifles of the 1949th company were in a room in Building J. (Pros.Ex.B). Each gun or supply room was in charge of a supply sergeant, all rifles and carbines of the companies were in the designated storage rooms prior to 10:30 p.m. on

24 June 1943 and each room was locked (R102,207,222,246,611).

A soldier was authorized to possess or use an arm only upon special order or authorization from higher authority (R52,182). On the night of 24-25 June 1943 no permission had been given to the men to take and possess rifles or carbines (R52,188,195,218,222,248) and no order was issued authorizing any of them to enter the rifle storage rooms, except those charged with the duty of care and preservation of the ordnance (R52,182,195). No ammunition had been issued to the troops except to the camp guards, and the only rifles authorized to be in the possession of the men were those rifles issued to sentries - one for each post (R52, 415). It was the duty of the sentry leaving his guard tour to deliver his rifle and clip of cartridges to the sentry relieving him (R445,449, 450). Ammunition was stored in a special room in the guardhouse (R82, 83,415,450) and also at regimental headquarters (R86). No authority was given to enter the guardhouse ammunition room, except to a small number of officers and men whose duties required them to make such entry.

Except on special occasions hereinafter stated no one was authorized to take any of the automotive equipment from the camp (R248, 318).

The main entrance to the camp leading from Mounsey Road was barred by a gate and there was a sentry posted at the gate (R325,326). Immediately adjacent to the gate on the right-hand side entering camp was a sentry-box or guard-hut. The guardhouse (containing the ammunition storage room) was situate about fifty feet easterly from the guard hut on the right-hand side of Access Road and about 25 feet back from the street line. On the left-hand side of Access Road immediately adjoining the front line of the camp was a parking space for 70 trucks (herein designated "motor pool") which was entered from Access Road (Pros.Ex.B).

Within a short period of time after the return to camp of the two wounded men, Ogletree and Adams, information as to their injuries and the melee wherein they were involved apread rapidly among the soldiers (R133,190,235). Descriptions of the disorder in town became distorted and exaggerated. The soldiers became excited and a degree of hysteria swept through the post (R37,133,156,221,222,228,244,316). It is possible to infer from portions of the evidence that there were certain non-commissioned officers who were responsible for indirectly inciting and arousing the men (R138,139,141,146,161,179,185,189,261,267,271). There was almost a complete failure on their part to assert authority over their men, and very little or any effort was made by any of them to prevent the disorders (R138,139,141,149,179,185,189,198) which continued into the early morning hours of 25 June 1943.

Resultant upon distorted narratives rapidly passed from soldier to soldier of the fight between the military police and the soldiers on Station Road in the town, soldiers of the units mentioned above left their barracks and collected in the various company areas. Rifle and carbine

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storage or supply rooms were broken into and arms removed therefrom (R60, 85,138,180,189,192,195,200,272). Soldiers with rifles and carbines made their appearance in and about the barracks and at separate points within the post (R38,47-49,56,58,65,70,78,79,82,129,141,144,147,157,178,188,181, 190,194,202,211,222,223). There is no evidence as to the identity of the men who actually broke into the store rooms (including the regimental supply room) although it was clearly proved that door panels were crushed in and locks broken and smashed (R60,85,86,180,195,211,613).

At approximately 11:00 p.m. a group of soldiers collected about the main entrance gate and in the proximity of the guardhouse. There were 125 to 200 men in this assemblage. About 25 of the men were armed with rifles; some wore helmets and they were indiscriminately clad in "Class A" uniforms and fatigues (R37,38,46,51,80,190,141,269,291,304). The men were in a frenzy of excitement as they gathered at the gate (37, 38) fore-shadowing a spirit of active violence, but their conduct (developed) into an exhibition of passive disobedience (R38,42,48,72,102, 212,219). The conversation of the men pertained to the shooting of Ogletree and Adams and the grievance of the colored soldiers arising out of alleged unfair and persecutory treatment of them by the military police (R77,271-277). There also arose among them disjointed and desultory talk concerning the social and political status of the negro race in the United States and of certain discriminations practiced in the United Kingdom against colored American soldiers alleged to have been inspired by white American troops (R138,140,141,157).

Direct and positive orders were given by Major Heris to junior officers and non-commissioned officers to assemble the men and march them away from the gate but the orders of the junior officers were ignored by the men and not obeyed (R38,42,48). Major Heris also gave orders in a loud voice addressed to the assembled group to form into organizations and return to the respective company areas, but this order also was not obeyed by the men (R48).

Following the breaking and entering of the gun or supply rooms certain soldiers, acting without authority or permission, took possession of government 2½ ton trucks and carry-alls. Nine or ten of the vehicles came out of the motor pool on to Access Road (R38,48,49) immediately prior to Major Heris' talk to the men. Major Heris stopped one of the carry-alls containing five soldiers at the gate and they acceded to his demands (R52, 79,80) not to proceed further. A 2½ ton truck, containing six or seven soldiers armed with rifles, which was being driven in the rear of the carry-all swung around it and crashed through the closed gate. It was being driven at the rate of 25 or 30 miles per hour (R38,49,55,56,64,65,79,88,179, 208,316) and it and its passengers disappeared down Mounsey Road. The identity of the men in the truck was never established during the course of the trial (R49,65,79,179,316).

Following this episode the crowd of soldiers was addressed by Major Heris (R47,58,80,208,270) who urged them to return to their barracks

and company areas and put down their guns informing them that neither Colonel Pitcher, the regimental commander, nor himself as second in command knew anything of the situation that had developed in Bamber Bridge. Major Heris further stated to them that until such time as the facts were known their officers wanted them to do nothing that would cause further trouble or in any wise jeopardize or embarrass the relations of the American soldiers with the civilians, and that they would have to believe their officers and allow them to discover the full facts before they proceeded any further (R47,305). Certain subordinate officers likewise repeated the "requests" of Major Heris and attempted to get the men to return to their quarters. The soldiers did not voluntarily respond to this request, but Lieutenant Edwin B. Jones, a colored officer, by pre-arrangement with Major Heris led the men back from the gate in "sheep-like" fashion with the representation that he wanted all who had seen the affair in town to report the facts to him (R43).

Simultaneously with the occurrences at the camp gate, information concerning the wounding of Ogletree and Wise reached other soldiers who had remained in and about their barracks. They also collected in company areas, in their recreation or common rooms and in the hall-ways of their barracks (R138,156,178,207,209,222,224,231,605,613,541,700,774). Conversation and discussion ensued between the men relative to the fight in Bamber Bridge, and the wounding of the two soldiers. There were no overt acts of violence or disorder evidenced by these particular groups except their assembling and engaging in threatening conversations and the taking by many of them without authority of rifles and carbines from the various company supply rooms (R56,64,138,194,222,228,244). Some wore helmets and carried gas masks (R194,613). Several of the accused were in these groups and the only evidence of their misconduct at the time alleged is their unauthorized possession of arms under the above circumstances (R58,65,138, 141,157,178,202,724,742,768). Company officers were with these men, and after the passing of several hours, the men voluntarily went to bed.

There were other groups of soldiers within the camp, however, who did engage in acts of violence and disorder. Government automotive equipment - trucks and carry-alls - were taken without authority from the motor parks and driven about the camp with no proven purpose or object. Such demonstrations were manifestly the result of loss of disciplinary control over the men (R245,542). In addition to the 2½ ton truck which crashed through the camp gate, there were other vehicles driven from the camp without authority (R82,105,251,294,295,299,306,685). Of the accused, only Hill (R58,70) and Starks (295-7) are connected or implicated in this wrongful use of Government motor vehicles at the time and place alleged.

From a time commencing about eleven o'clock p.m. 24th of June 1943 and continuing until about four o'clock a.m. 25th June 1943 the

discharge of fire-arms was heard in and about camp (R59,138,192,195, 244,245,694,708,747,752,753). Some of the shots were fired from within the camp area and stray and ricochet bullets passed dangerously near officers and men (R117,134,137,143,332,613,641,659,665,751,286,287). At intervals the sound of other shots coming from a considerable distance was also heard in camp (R59,180,209,210,244,618). With respect to the shooting from both within and without the camp there is not even a scintilla of evidence proving that any of the accused was responsible for same.

Within the camp limits unidentified armed soldiers molested and interferred with the free movements of officers. In several instances officers were halted and denied the right to proceed on their missions (R117,118,129,142,143,166,167,317,318,468,658) and both officers and enlisted men were menaced with fire-arms (R117,134,137,223,332). Again the proof fails to show the participation of any of the accused in such misdeeds.

Upon telephonic request at about 11:00 p.m. 24 June 1943, a detachment of Military Police left Preston and drove to Bamber Bridge. The detachment was commanded by Captain Herman A. Hech and consisted of 12 military policemen (R290,291). The convoy was composed of an armored scout-car and two quarter-ton trucks. On the second of the trucks a machine gun had been mounted (R80,81,249,290-293). The military police contingent arrived at the main gate of the camp and Captain Hech conferred with Lieutenants Roller and Sylvester. The military policemen shone flash-lights over the camp until such action was stopped by the commander of the detachment. Captain Hech was requested by Major Heris to take his men and vehicles out of sight of camp and stand by for emergency call. The police detachment drove south on Station Road in the direction of the main part of Bamber Bridge (R81,141,210,250,251,256,257,212,291). News of the arrival of the military police with the armored car and mounted machine-gun spread with electric rapidity through camp, and it is clearly evident that the purpose of the visit was magnified and distorted (R199,200,700). There were shouts of "The white MPs are here with machine guns" (R141,199,200, 215); "Here come the MPs. Let's get the rifles" (R272); "Get your rifles; they are at the gates with machine guns" (R635), and "They are coming in tanks" (R687). The excitement resultant upon news of the shooting of Ogletree and Adams had greatly subsided, but following the visit of the military police there was an obvious resurgence of excitement and hysteria (R81,199,200,247,272) and among certain groups there was an exhibition of mob psychology which denoted fear approaching a frenzy (R81,199,200,213). Men ran through company streets and areas shouting and yelling. Rifle shots from within camp became numerous during the next 10 minutes. The sound of motor vehicles being "warmed up" and motors "racing" filled the air, and several vehicles were driven from the motor parks into the camp roads and some of them were taken from camp (R59,60,80-82,90,101,199,200, 272,317,722). There were but few men with rifles until the military police made their appearance at the camp gate, but immediately thereafter numerous armed soldiers were visible (R89,90).

Perhaps the most violent act occurring in the camp was committed

by 15 to 25 soldiers, who, armed with rifles, rushed the rear door of the guardhouse and entered the room where 1600 rounds of .30 caliber ammunition was stored. A box of ammunition was broken open and cartridges were distributed to the men. Lieutenant Roller discovered the depredation and believed he took possession of all remaining ammunition. However, he overlooked a box. The soldiers returned. They were intercepted by Lieutenant Roller in the act of distributing this box of ammunition. One of the soldiers said to Lieutenant Roller: "I am sorry, Lieutenant, but we just had to take things into our own hands." There was not a fragment of identification of the soldiers who participated in this indefensible violation of orders and discipline, and not even an inference that any of the accused were involved (R82,83,91,256,257).

6. Colored soldiers of an uncertain number, armed with rifles which had been secured without authority from the company supply rooms and carrying ammunition taken from the regimental supply room and the guardhouse ammunition room, escaped from camp during the darkness. Several were seen climbing over a rear fence of the camp (R601,641,643). These men together with those who rode in the 2½ ton truck and other vehicles which left AAF Station 569, formed marauding parties which for several hours wandered about the town of Bamber Bridge and committed acts of violence. There were several separate incidents proved at the trial.

Episode 1: One group composed of about twenty men, armed with rifles and clad in either "Class A" uniforms or fatigues reached a point in the southern part of Bamber Bridge near the intersection of the Chorley and Wigan highways. They fired several shots near the home of the civilian witness, Ashcroft, who went to the front door of his home. One of them warned him: "Get inside there is going to be a war". Some of the men were hiding behind a stone wall while two crouched on the ground. These men went in the direction of Hob Inn and soon thereafter shooting was heard by Ashcroft (R110-112). Some time later another crowd of about 12 soldiers went over the wall which surrounds Ashcroft's place and also went down the road in the direction of Hob Inn. After 12:30 a.m. 25 June 1943 Ashcroft heard more shooting for about an hour (R112). Ashcroft became cautious and his wife nervous. Neither of these groups of soldiers were identified and it is not proved that any of the accused were with them (R112).

Episode 2: The "Queens Hotel" is also located on Station Road in the southern end of Bamber Bridge near Hob Inn. At about 11:15 p.m. Arthur Laidler, the proprietor of the hotel heard shooting and upon going out of doors saw 20 or 30 colored soldiers armed with rifles and running down Chorley Road in the direction of Bamber Bridge. One soldier called to Laidler: "You better get inside, boss, there is going to be plenty of shooting". Another soldier shouted: "Shoot the bugger." Two of the men discharged their rifles and there was spasmodic rifle fire in the distance until two or three a.m. One shot passed over the "Queens Hotel". Laidler and his wife were "very upset" (R107-111). None of these soldiers were

identified.

Episode 3: Another group of six colored soldiers were seen about 11:00 p.m. on Station Road at a point opposite the police station which is located north of AAF Station 569 (R104). They were all armed. Two jeeps passed south on Station Road coming from the direction of Preston and they were fired on. Then three more jeeps passed south and they were also fired on. This group of negroes disappeared south on Station Road. Frequent rifle shots coming from Adams Hall Camp were heard by Sergeant Lawrence Constable, County Police Officer of Bamber Bridge who was at the police station. Many civilians came to the police station to seek protective shelter and remained until 1:30 a.m. 25 June 1943, because it was unsafe to go on to the public streets. These people were much disturbed (R103-105;113;295).

Episode 4: As Edward Brindle proceeded south on Station Road from the police station at about 2:40 a.m. 25 June 1943 he saw four colored soldiers, with rifles, on a wall near Midland Bank. As he entered the door of his house a bullet struck a half-yard behind him. His wife and daughter were hysterical(R114).

Episode 5: First Lieutenant Richard J. Dickinson, Detachment B, 234th Military Police Company was stationed at Preston on 24 June 1943. Pursuant to a call he left Preston with a detachment of military policemen proceeding in three vehicles (R249). Arriving Bamber Bridge a call was made at AAF Station 569 where Lieutenant Dickinson conferred with a major (Major Heris) and a captain (Captain Anderson) and upon Major Heris' advice left the proximity of the camp (R38,250,255,256,257), drove into the main part of the town and parked his vehicles. After proceeding south on Station Road for a distance, Lieutenant Dickinson was informed that there were armed soldiers in one of the back streets. Accompanied by Private First Class Howard Miller and Private Lester, of the Military Police Corps, he went down the back street endeavouring to find the soldiers. Three armed soldiers approached from the north. At that moment Miller saw a truck filled with armed soldiers coming from the opposite direction. Miller and Lester took cover behind a wall and Lieutenant Dickinson ran into a house. He stumbled in the door-way and fell as a bullet passed over his head (R251,258). Lieutenant Dickinson and his men wore Military Police brassards (R253,259). According to Miller, Lieutenant Dickinson, he and Lester were riding in the same jeep and two shots were directed at them as they halted (R258). The evidence fails to connect any of the accused with this incident (R259).

Episode 6: Connected with the foregoing episode is another one involving Lieutenants Willis and Huxtable. Major Heris at about 11:00 p.m. ordered the two officers to leave the station, go into town, "round-up" the men and return them to camp. They drove down Station Road in a jeep. About opposite the "Queens Hotel" public house three colored soldiers dressed in fatigues and armed with rifles stepped into the street. They shouted "halt" and as Lieutenant Willis stopped the car, commenced to shoot. Lieutenant Willis jumped out and ran around the corner into an air-raid warden's house. Lieutenant Huxtable took the wheel and backed the jeep around into a side

street and sought refuge in a private home. Shots were heard a few minutes later that sounded as if they struck the Military Police vehicle (R262,263, 269,270). There was no identification of the three colored soldiers.

Episode 7: Warrant Officer Salim Ghazil, of 1513th Battalion, 1511th Quartermaster Truck Regiment (Avn) left Preston at 11:00 p.m. 24 June 1943 driving a jeep with two colored soldiers as passengers. At a point between the railway tracks and Hopwood Street in Bamber Bridge he was given an order to halt and, when he did not obey, three shots were fired. He stopped. An armed colored soldier being one of a group of three or four soldiers approached the jeep and wanted to know who was in the car. Ghazil told the man sitting next to him to tell the soldier: "It was Sergeant Ghazil". He was then informed that it was not safe to proceed, but Ghazil drove towards the camp. The armed men rode on the hood and in the back of the car, but when he stopped they dismounted and disappeared. They were not identified (R282-284).

Episode 8: Private First Class Edward Smith, a member of the 234th Military Police Company left Preston about 11:00 p.m. 24 June 1943, driving a Government half-ton Dodge truck. When he reached a point between Hopwood and Mounsey streets in Bamber Bridge he heard two shots. Something hit him in the face and the next day two pieces of brass were removed from the left side of his face. Pros.Ex.3 and Pros.Ex.4 are photographs of the truck driven by Smith on this occasion. Sixteen bullet holes are shown in the left front door of the truck and the evidence is clear that they did not exist prior to this incident. The identity of the persons responsible for this shooting was not shown (R286-290).

Episode 9: Lieutenant Ousset was Special Services and Post Exchange Officer at AAF Station #569 on 24 June 1943. During the evening of that day he had been absent from the camp and was returning in a command car. At about 11:00 p.m. as he turned from Station Road into Mounsey Street he heard a couple of shots. A truck stood cross-wise in the street, and Lieutenant Ousset stopped and parked his car. Some one shouted: "Cut the lights off and the motor". He complied, waited about five minutes and then attempted to drive around the truck. There were further shots and he stopped. One shot went through the wind-shield of his car and he then received three bullets in his left leg and two in his right leg as he sat in the car. When the shooting ceased a voice called: "Come out with your hands up". Lieutenant Ousset struggled out of the car and went to the rear of it. There were about 30 men about. Some one said: "This is Lieutenant Ousset". When the officer said he was wounded, a soldier came to him, entered the car and took the wheel. A second soldier assisted Lieutenant Ousset into the vehicle. They went through the camp gate with permission of the guard, driving first to the officers' quarters and then to the dispensary(R328-330). The wounded man was examined, dressings were applied and at about 1:45 a.m. 25 June 1943 he was placed in an ambulance and taken to the 110th General Hospital at Warrington (R84,332,333). A Red Cross flag was placed on the ambulance in order to afford protection (R335). The ambulance was stopped in camp by several armed men as it turned into Access Road, but after explanations were

given it was allowed to proceed (R85,334). None of the accused except Doakes (who was acquitted) were connected with this incident, and Doakes was apparently the soldier who entered Lieutenant Ousset's car and drove him to the dispensary (R332,335).

Episode 10: The ambulance which carried Ogletree and Adams to the 110th General Hospital at Warrington returned to camp early on the morning of 25 June 1943. When it reached within about 15 yards of the main gate it was challenged and stopped by a group of about 40 soldiers wearing fatigues and gas-masks and bearing arms. The occupants (Captain Milnamow, Sergeant Walker, Sergeant Bentley and Private Knox) obeyed an order to turn out the lights and dismount. There were wild curses. Anger and fear were evidenced by the soldiers. Upon giving explanations, the occupants of the ambulance were allowed to proceed (R117,130,134). None of the accused were identified as being in this group of soldiers.

Sergeant Constable, the County Police Officer, made a survey of damages suffered by individual civilian house-holders as a result of the various disturbances in the town and the same showed:

> House at #246 Station Road - bullet penetrated frame work of door;
> House at corner of Mounsey Street and Station Road - bullets penetrated upper window 10 feet above floor with breakage of glass and damage to plaster frieze in room;
> House at #2 Jackson Street (Corner of Mounsey Street)- Three bullet holes in window seven feet from floor and one hole within foot from floor.
>
> (R105-106).

7. It is necessary to consider certain motions made by the defense and rulings on evidentiary questions during the course of the trial:

(a) A motion for continuance was made on behalf of accused Ogletree and Wise which was denied (R11-14). The motion was made after arraignment but before pleas were received which was proper (MCM., 1928, par.52c, p.41). The bases of the motions were (1) that Captain Thomas L. Hogan, individual counsel for the two named accused, had been retained less than three days prior to commencement of the trial on 3 Sept 1943, although the charges had been served on said accused on 24 August 1943, and (2) that the two accused had been tried and convicted on charges which would sustain a plea of former jeopardy in the instant case. Insufficient time to enable counsel to prepare for trial is a ground for a continuance. However, the refusal of the court to grant a continuance does not nullify the trial, although it may be grounds for a rehearing (MCM., 1928, par.52b, pp.40-41). The two accused were served with the charges ten days prior to trial. The regularly appointed defense counsel and his assistants were engaged in the preparation of the defense during this period and their services were available to these accused. The selection by the two accused of Captain Hogan as individual counsel occurred a week after they were informed of the nature of the charges against them and of their prospective

trial. The granting or denying of a motion for continuance is within the sound judicial discretion of the court and its action in denying a motion for continuance will not be disturbed upon appellate review in the absence of a showing of abuse of that discretion (CM 126974 (1919), CM 135095 (1919), Dig.Ops.JAG., 1912-1940, par.377, p.187). The record of trial reveals that the two accused were defended with skill and diligence and such effort resulted in their acquittal of the serious charge of mutiny. Under the circumstances the Board of Review is unable to discover anything arbitrary or capricious on the part of the court in denying the motion for continuance on the ground that counsel did not have sufficient time to prepare for trial. There was a proper exercise of its judicial discretion (CM 228507 (1943), Bul. JAG., May 1943, Vol.II, No.5, par.377, p.183).

The further contention of the two accused was that they had been tried and convicted of offenses in which the sentences had not been acted on by the reviewing authorities on date of commencement of trial of the instant case, and that therefore they were entitled to a continuance until such time as the sentences in the first case became final, in order to enable them to assert such sentence in the instant case in support of pleas of former jeopardy. By stipulation, part of the charge and specifications in the first case was read into the record. A person cannot without his consent be tried a second time for the same offense:

> "*** but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial *** until the reviewing *** authority shall have taken final action upon the case." (AW 40; MCM 1928., par.68, p.53).

The rule of law governing this situation is stated as follows:

> "Where accused has been convicted of a certain offense and an appeal has been taken, a trial against him, under the same statute, on the same state of facts, and on the ground of the case already pending in the appellate court, and involving the same questions, should be continued until the determination of the former case in the appellate court. However, the mere fact that accused has been convicted of another offense and is at the time awaiting sentence or determination of an appeal is not ground for a continuance on a charge of an entirely different offense." (22 CJS., sec.501d, p.797).

"Accused, pending his appeal from a conviction of violating a statute, is not entitled to a stay of proceedings against him on other charges for violations of the same statute (State v. Rose, 50 So. 520, 124 La. 526)". (22 CJS., sec.501d, footnote 85, p.797).

The former case to which individual defense counsel made reference in his motion for continuance and with respect to which part of the charges and specifications were placed in evidence is CM ETO 804, Ogletree, Nunn, Adams and Wise decided by the Board of Review and approved by the Assistant Judge Advocate General on 6 November 1943. While it is true that Ogletree and Wise (who were two of the accused in the former case) were in both the former and in the instant case charged with violation of Articles of War 89 and 96, a comparison of the specifications laid under said Articles of War in the former case with the specifications laid under the same articles in the instant case, reveals without doubt that the specifications involved in the instant case describes acts of misconduct separate and distinct from the offenses alleged in the former case. A plea of former jeopardy could not have been sustained. As a consequence the accused were not entitled for the reason stated to a stay of proceedings in the instant case. The court committed no error in denying the motion for continuance.

(b) On behalf of accused Roach and James A. Williams, a motion for severance and separate trials was made after arraignment and before receiving their pleas. The motion was denied (R14-16). The grounds for the motion were: (1) prejudice accruing to the rights of the two movants because of evidence which would be introduced against the other accused and (2) that the defense of the other accused would be prejudicial to the rights of the movants.

A similar motion made on behalf of accused Doakes, Patterson and Walter Johnson, was denied. The grounds for the motion were the same as in the Roach and Williams motion (R15-17).

Likewise a motion for severance was made on behalf of accused Ogletree and Wise, which was denied. This motion was also on the grounds stated in the Roach and Williams motion (R18-19). Thereafter the motion was renewed on the ground that the defense intended to call co-accused as defense witnesses. The motion was also denied (R238).

The regularly appointed defense counsel, representing 28 of the accused other than the seven represented by individual counsel, also moved for separate trials for his clients on the following basis: The accused were members of the following groups: six were members of the 1958th company, eight were members of the 1945th company, six were members of the 1949th company, ten were members of the 1933rd company and five were members of the 1994th company. The motion proposed severance of trials in such manner that no member of a given company should be tried jointly with another

member of the same company. The reason for such procedure was asserted to be the probability of an accused calling as his witnesses co-accused who were members of his own company and the severances were required so as to compel such co-accused to become witnesses. In further explanation of the motion the court's attention was invited to the fact that each company lived in its own set of barracks on the 24 June 1943 and each company's barracks were separated from those of other companies by a considerable distance (Pros.Ex.1). Consequently in many cases the most reliable and valuable witnesses for an accused would be the fellow members of his company. The motion was denied (R19-21).

With respect to severance of trials of accused jointly charged with an offense the Manual for Courts-Martial directs:

> "****** A motion to sever is a motion by one of two or more joint accused to be tried separately from the other or others. It will regularly be made at the arraignment. The motion should be granted if good cause is shown; but in cases where the essence of the offense is combination between the parties - conspiracy, for instance - the court may properly be more exacting than in other cases with respect to the question whether the facts shown in support of the motion constitute a good cause. The more common grounds of this motion are that the mover desires to avail himself on his trial of the testimony of one or more of his coaccused, or of the testimony of the wife of one; or that a defense of the other accused is antagonistic to his own; or that the evidence as to them will in some manner prejudice his defense.(Winthrop)". (MCM 1928, par. 71b, p.55).

The foregoing quotation should be considered against the background of judicial principles applicable in connection with motions for severance of trials of jointly charged accused.

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"The question *** is this, whether two or more persons, jointly charged in the same indictment with a capital offense, have a right, by the laws of the country, to be tried severally, separately and apart, the counsel for the United States objecting thereto, or whether it is a matter to be allowed in the discretion of the court, ****. In our opinion, it is a matter of sound discretion, to be exercised by the court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence." (United States v. Marchant & Colson, 12 Wheat. 480-485; 6 L.Ed., 700,702).

"These two defendants moved that they be tried separately from Millard F. Ball, because he had been previously acquitted; because the government relied on his acts and declarations made after the killing and not in their presence or hearing; and because he was a material witness in their behalf. But the question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below. ***. It does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together ***." (Ball,Ball and Boutwell v. United States, 163 U.S. 662,672; 41 L.Ed., 300,303).

"That it was within the discretion of the court to order the defendants to be tried together there can be no question, and the practice is too well established to require further consideration." (Stilson v. United States, 250 U.S. 583, 585-586, 63 L.Ed., 1154,1156).

"Unless such privilege is conferred by statute or court rule *** defendants jointly indicted are not entitled to a severance or separate trials as a matter of right. Both at common law and under statutes declaratory thereof, the grant or denial of a severance or a separate trial to defendants jointly indicted

> rests in the discretion of the trial court, which, in the absence of good cause therefor, may in the exercise of its discretion properly refuse separate trials, and whose grant or denial of a seperate trial or severance will be upheld in the absence of an abuse of discretion clearly shown. The court should, however, in passing on an application for a severance exercise a sound discretion, so as to prevent injustice and should not proceed arbitrarily or capriciously. What constitutes an abuse of discretion in denying severance or separate trials necessarily depends largely on the whole situation as revealed in each particular case, by the circumstances as disclosed at the time the application for severance was made ***." (23 CJS., sec.933a, pp.217-218).

The accused were charged jointly with joining in a mutiny, rioting and wrongfully possessing and using government property. Each offense charged, was of the nature which may be committed by two or more persons. Therefore a joint charge was entirely proper. The record of trial reveals that care and caution were exercised both by the law member and trial judge advocate in the presentation and receiving of the statements of certain accused. The court was strictly enjoined that a statement should be considered only as evidence against the accused making same (R396-397). (Johnson v. United States, 82 Fed.(2nd) 500, Certiorari denied 298 U.S. 688, 80 L.Ed. 1407). The primary ground of the motions, viz: the necessity of securing testimony of certain co-accused becomes idle in the face of the fact that twenty-three of the thirty-five accused appeared as witnesses and each testified at length and was subjected to plenary cross-examination. Considering the record of trial as a whole and the peculiar nature of the offenses charged the Board of Review concludes that the court did not proceed arbitrarily or capriciously in denying the several motions for separate trials. (Olmstead v. United States, 19 Fed.(2nd) 842, 53 ALR.1472; Certiorari denied 275 U.S. 557, 72 L.Ed.424). It exercised a sound judicial discretion and its decisions will not be disturbed on appellate review (CM 144367 (1921); Dig. Ops. JAG., 1912-1940, par.395 (49), p.234; Annotation 131 ALR, sec.VI, p.926; United States v. Olmstead, supra).

(c) On behalf of each and all accused a motion was made to strike Charges II and III and their respective specifications for the reason that they were duplications of Charge I and its specifications and therefore multifarious (R21,22). The motion was denied (R26). The argument of the

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defense was premised upon the principle of pleading that:

> "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. ***. However, there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis for charging two or more offenses." (MCM 1928, par. 27, p.17).

An analysis of the charges against accused shows that four distinct offenses are alleged:

Charge I - Violation of the 66th Article of War.
Specification 1: Joining in a mutiny against the military authority of the commanding officer and other officers of AAF Station #569 and vicinity.
Specification 2: Joining in a mutiny against the military authority of the military police at AAF Station #569, and vicinity.

Charge II - Violation of the 89th Article of War.
Specification: Commission of riot at AAF Station #569 and vicinity.

Charge III - Violation of the 96th Article of War
Specification: Wrongful and unlawful seizure and damage of government property and riotous and disorderly conduct at AAF Station #569 and vicinity.

Four separate and distinct offenses are therefore joined. While such form of pleading is condemned by a majority of civil courts, before military courts such practice is permissible and has long been recognised.

> "*****, Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offence or connected criminal transaction, is, in general brought to trial at one time, the military usage and procedure permits of an indefinite number of offences being charged and adjudicated together in one and the same proceeding. And, with a view

> to the summary and final action so important in military cases,-wherever an officer or soldier has been apparently guilty of several or many offences, whether of a similar character or distinct in their nature, charges and specifications covering them all, should, if practicable, be preferred together and together brought to trial; separate sets of charges, where they exist, being consolidated. ***". (Winthrop's Military Law & Precedents, Reprint, p.152).

Joining in a mutiny and committing a riot are separate and distinct offenses. A mutiny in military law is a revolt by two or more soldiers with or without armed resistance against the authority of their commanding officers (5 C.J., sec.168, p.352, footnote 2; CM 116735, CM 122535 (1918), Dig. Ops. J.A.G. 1912-1940, par.424 p.288), and the offense of joining in a mutiny requires the performance of an overt act of insubordination by the person accused (MCM., 1928, par.136b, p.151). Committing a riot is the joining in a tumultuous disturbance of the peace by three or more persons acting with a common intent either in executing a lawful private enterprise in a violent and turbulent manner to the terror of the people or in executing an unlawful enterprise in a violent and turbulent manner (54 C.J., sec.1, p.828; MCM., 1928, par.147c, pp.161,162). Proof of the facts constituting the offense alleged under Charge III and its Specification (violation of 96th Article of War) would not in and of themselves prove either the charge of joining in a mutiny or committing a riot. The latter offenses obviously contain elements not embraced in the charge under the general article, and conviction of the commission of both or either of said offenses would not be inconsistent with a finding of not guilty under the 96th Article of War. The accused may be found guilty of all the offenses charged without being placed in jeopardy for the same offense (CM 230222 (1943), BUL.TJAG., March 1943, Vol.II, No.3, par.395(44), p.96).

Where the conduct of accused as alleged in a specification constitutes the violation of more than one article of war, the pleader may lay the same under separate charges without subjecting the pleading to the criticism of multifariousness or duplicity. In fact, such practice is dictated by common prudence.

> "In military cases where the offence falls apparently equally within the purview of two or more articles of war, or where the legal character of the act of the accused cannot be precisely known or defined till developed by the proof, it is not

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> unfrequent in cases of importance to state the accusation under two or more Charges ***". (Winthrop's Military Law & Precedents, Reprint, p.143).

In the instant case the charges were drafted in accordance with this practice and are therefore free from the defects relied upon by defense counsel. In any event the granting or denying of the motion was a matter wholly with the judicial discretion of the court and the Board of Review can find in the denial of the motion by the court no such arbitrary action as would justify it in disturbing the court's ruling (Winthrop's Military Law & Precedents, Reprint, p.251).

(d) On behalf of each and all accused motions were made separately to strike Specifications 1 and 2 of Charge I and also the respective specifications of Charges II and III on the ground that "the allegations contained therein do not specifically allege the time, place and specific acts as to each accused so as to sufficiently advise each accused of the offense that is charged against them" (R26). In support of this motion it was argued by defense counsel that accused were charged "with numerous acts over a period of two days and a large vicinity in the area of Station 569 which is certainly unfair, for these defendants to have to meet a blanket allegation in a trial where there are 35 different defendants involved"(R26).

It is exceedingly doubtful that the motions to strike the specifications were procedurally proper inasmuch as their bases were alleged defects in form of the specifications rather than defects in substance (Winthrop's Military Law and Precedents, Reprint, p.252). However, it will be assumed that the motions performed the functions of a motion to make more definite and certain, or of a special demurrer (were such pleadings known in courts-martial practice) (31 C.J., sec.404, pp.819,820).

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

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

the offense as a basis for a plea of former jeopardy. Beyond that he was not entitled to be informed. Allegations describing generally the conduct of the several accused renders the charge of joining in a mutiny complete and intelligible, but allegations particularizing the actions of each accused are not necessary and are not part of the gravamen of the charge.

The constituent elements of the offense of rioting are: (1) an unlawful assembly consisting of three or more persons; (2) an intent mutually to assist against lawful authority and (3) acts of violence (MCM., 1928, par.146c; 54 C.J., sec.3, p.830; 2 Wharton's Criminal Law - 12th Edition - sec.1869). A specification alleging these three elements states facts constituting the offense. Allegations describing the acts of violence committed are essential averments inasmuch as it is from them that terror of the populace is inferred, but they may be general allegations (2 Wharton's Criminal Law - 12th Edition - sec.1869, p.2199). It is unnecessary to set forth the particularized acts of each rioter and if the same are contained therein they are descriptive merely (Commonwealth of Massachusetts v. Frishman, Mass., 126 NE 828, 9 ALR. 549). The Specification of Charge II meets all of these requirements and fully informed accused as to the exact nature of the charge against them.

As directed to Charge III and its Specification the motions are wholly devoid of merit. The accused are charged jointly with wrongfully and illegally seizing arms and ammunition, wrongfully and illegally taking and using Government vehicles, damaging and destroying Government property and other acts of violence and disorder constituting serious breaches of discipline and of the peace. These allegations clearly charge an offense under the 96th Article of War (Winthrop's Military Law & Precedents, Reprint, p.732). With respect to the form of allegations charging a joint offense there is no requirement that averments shall be included alleging that the accused acted severally, nor -

> "After a joint charge, counts containing individual charges need not be inserted, and if inserted, they may be rejected as surplusage to prevent the indictment from being regarded as containing a misjoinder. ***. If the offense may have been committed by one of defendants singly, it is held that it is not necessary to allege which of them committed the actual criminal act, that the correctness of the allegation, if made, is not material, and that the particular acts constituting the charge against each defendant need not be severally set out ***." (31 C.J., sec.287, p.737-738).

It is manifest that the court committed no error in denying the motions.

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(e) Major Heris referred to his typewritten log or record of occurrences at camp on the night of 24-25 June 1943 to refresh his memory (R38,39). Defense objected to its use. In his own hand-writing he had made extended notes and same were reduced to typewritten form by his clerk. The typewritten copy was proof read and verified by him. The use of the log for the purpose indicated was proper. The objection was properly overruled (CM ETO 492, Lewis; CM ETO 739, Maxwell; CM ETO 765, Claros).

(f) Defense objected to Capt. Anderson naming accused Hill and Mack, as two of the soldiers he saw dismount from the carry-all after the truck had crashed the gate on evening of 24 June 1943 because witness admitted he did not know their names at that time but learned them subsequently. However, Captain Anderson positively identified the two accused as soldiers he had seen leave the carry-all (R55-57). The objection was without merit (20 Am.Jur.Evidence, sec.880, p.740; 1 Wharton's Criminal Evidence, sec.265, p.327).

(g) Objections were made by the defense to Captain Milnamow repeating certain statements made to him by Davis and Patterson respectively, during the course of the evening and while the disorders about camp continued. Witness asked Davis what he thought he (Davis) would gain by all of the disturbance. Davis replied that it would bring the incident to the attention of higher authority; that his soldiers were not getting a fair break and that while in town on a pass he was stopped six or eight times by military police and required to show his pass and that he did not like that (R119,120). Patterson stated to the witness that he was primarily interested in knowing whether any of his men had been killed, and if they were he was going to get revenge and do something about it, but since the men were going to be all right he was not much interested (R120). The statements made by the two named accused were clearly admissible in evidence as admissions against interest provided they were relevant to any issue in the case (20 Am.Jur.Evidence, sec.545, p.461; 31 CJS., sec.276, p.1028). Both accused were charged with joining in a mutiny and rioting (Charge I and II). Davis and Patterson were non-commissioned officers. The fact that they were sympathetic to the violence and disorder is relevant to the paramount question of their actual participation in the mutiny and rioting. Evidence as to the mental attitude of an accused towards a given incident or situation is admissible (20 Am.Jur.Evidence, sec.585, p.491. Cf: Mutual Life Insurance Company v. Hillmon, 145 U.S. 285, 36 L. Ed., 706). The court properly overruled the objection.

(h) Lieutenant Bjerke used for purpose of refreshing his memory prior written statements prepared and written by him for officers of the Inspector General's and Provost Marshal General's Department (R158,159). Such use of said statements is unobjectionable (See (e) of this paragraph, supra).

(i) Witnesses for the prosecution while awaiting their call to the witness stand remained in the lounge room adjoining the court room. On the sixth day of trial Defense Counsel asserted that while accused were in

an adjacent yard during periods when court was closed or in recess, they were seen through a window of the lounge by certain of the witnesses who were awaiting their calls to testify and that certain other persons in the lounge had identified particular accused for the benefit of these prospective witnesses (R278). Defense counsel further asserted that the rights of accused had been prejudiced by this conduct, and asked that the practice cease. He did not move for a mis-trial (R279). The president directed the trial judge advocate to prevent a reoccurence of such incidents and stated that accused would be given the opportunity of recalling for examination such prior witnesses as they believed had been influenced on the question of identity by the means stated (R280). The claim of prejudice was based on such incidents as were observed personally by defense counsel and no other evidence was offered in proof of same. One of the critical issues in the case was the identification of the soldiers who were participants in the disorder and violence. Consequently, evidence of the coaching of witnesses so as to assist them to effect identification would be admissible as bearing on the issue of the credibility of these coached witnesses (70 C.J., sec.916, p.760). The record of trial reveals the fact that Captain Anderson (R413), and Lieutenant Ryland (R730,731,732, 734) were witnesses for the defense and were examined at length as to identifications theretofore made by them. Captain Milnamow (R477), Lieutenant Sylvester (R526), Captain Gerardot (R623), Lieutenant Arcuri (R629), Lieutenant Ryland (R725), Lieutenant Huxtable (R764) and Lieutenant Saniter (R766) re-appeared on the stand as defense witnesses and there was no examination of them as to the alleged "coaching" incidents. When Lieutenant Huxtable (R281) was examined as a prosecution's witness he denied any of the accused had been pointed out to him. Major Heris, Lieutenant Gibson and Major Mattia, as defense witnesses, denied they had "pointed out" any of accused (R415,417,419).

The "coaching" of witnesses in the manner asserted by defense counsel is not to be condoned. However, the action of the president in directing the trial judge advocate to take action which would prevent a reoccurrence of same, and the opportunity afforded the defense to cross-examine all of prosecution's witnesses who had previously testified on the question of identity, removed any prejudice to rights of accused which may have accrued. The subsequent conduct of the defense fully supports this conclusion.

(j) The objections (R288,289) to the admission in evidence of Pros.Ex.3 and Pros.Ex.4 (photographs of bullet riven truck) were without foundation. The requirements of proof of authenticity and genuineness were fully met (MCM., 1928, sec.118b, p.122).

(k) The written statements of James E. Johnson, Pros.Ex.6 (R342-346, 351-352), Edward R. Williams, Pros.Ex.7 (R354-356), Frelot, Pros.Ex.8 (356-365), Roach, Pros.Ex.9 (R364-371), Smith, Pros.Ex.10 (R371-375) and

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Wm. O. Starks, Pros.Ex.11 (R380-386) were admitted in evidence after vigorous objection in each instance by the defense on the grounds that as to each accused they were not voluntary; that the person securing the statements had secured an admission from the respective accused as to their identity and serial number without prior warning of their right to remain silent (and the penalty for speaking) and that they were obtained under false pretenses. Each of the statements are admissions and not confessions.

> "A confession is an admission of the criminal act itself, not an admission of a fact or circumstance from which guilt may be inferred." (20 Am.Jur. Evidence, sec.478, p.417).
>
> "An admission has been defined as a statement of a party inconsistent with his claim in an action and amounting therefore to proof against him." (20 Am.Jur.Evidence,sec.543,p.460).
>
> "An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all the elements of the crime." (State v. Masato Karumai, 126 Pac.(2nd), 1047,1052).
>
> "A confession is defined as an acknowledgment of guilt of the crime charged or of the facts which constitute the crime; but it is an admission and not a confession if the facts acknowledged raise an inference of guilt only when considered with other facts." (Underhill's Criminal Evidence, sec.265, pp.507-508).

While each of the statements admit incriminating facts none of them admit legal guilt (CM 141755 (1920), Dig.Ops.JAG., 1912-1940, sec.395 (10), p.205; CM ETO 292 Mickles). They were therefore admissible in evidence regardless of their voluntary nature(MCM., 1928, par.114b, p.117; CM ETO 804, Ogletree et al). Although both Askew and Keegan, the operatives of the Criminal Investigation Division of the Provost Marshal General's Office were not over scrupulous in their explanations of their purposes

in interviewing accused and exhibited a degree of sharp practice in their methods in obtaining the statements (R345,351,353,364,370,372,373); such facts alone would not bar their admission in evidence (Olmstead v. United States, 277 U.S. 438; 72 L. Ed., 944, 951; McIntosh v. State of Nebraska, 180 N.W. 573, 12 ALR. 798,804). The statements were properly admitted.

(l) Sergeant Michael P. Keegan of the Criminal Investigation Division, Provost Marshal General's Office, testified that accused Bernard Terrell orally admitted that he obtained his own rifle from the supply room and asserted he had returned it. He refused to sign a statement (R386,394). Keegan informed this accused that he was primarily concerned with recovering the rifles, but gave him the regular warning under the 24th Article of War as to his rights to remain silent. Defense's objection to the testimony was without merit (See par.7k, supra).

(m) Accused Purcelle T. Johnson testified that he had talked to Lieutenant Ryland while he (Johnson) was in the guardhouse about two months subsequent to the date of the alleged offenses. Upon objection of prosecution he was prevented from repeating Lieutenant Ryland's statements to him at that time (R662). The ruling was correct, as such evidence would have been hearsay. Considered as an attempt to impeach prior testimony of Lieutenant Ryland, no proper foundation had been laid in his cross-examination (MCM., 1928, par.124b, p.133).

(n) Upon request of the trial judge advocate, the law member instructed the court that each written and oral statement of certain accused (James E. Johnson, James R. Williams, Edward R. Williams, Frelot, Roach, Smith, Terrell and Starks) which had been admitted in evidence was evidence only against the accused making the statement and must not be considered as evidence against any other of the accused (R396,397). This was proper practice in this case. The statements themselves were devoid of incrimination of other accused and were simple in form. They could not possible form a "matrix of hearsay evidence" as was condemned by the Board of Review in CM ETO 134, Stump et al. (Cf: Anderson et al v. United States, 63 Sup.Ct.Rep. 599,602). In instances where the statements are simple or names of co-accused either do not appear or are deleted, the practice followed in this instance fully protects the rights of accused (CM ETO 804, Ogletree et al; Johnson v. United States, supra).

8. Defense counsel and individual counsel at the conclusion of prosecution's case in chief moved for findings of not guilty (R397,402, 403,405,407,409). The motions were not renewed at the conclusion of the case. Any errors committed in denying the motions were therefore waived because of the failure of counsel to renew the motions and will not be considered on appellate review (CM ETO 564, Neville).

9. After their rights had been fully explained to them the following accused elected to remain silent: Gallier, Hill, Walter Johnson, Mack,

Starks, Terrell, Edward R. Williams, Jr., and James E. Johnson (R834).

10. The accused, Edward R. Williams, Jr., Frelot, Saffo, Engram, Flagg, Kirksey, Horton, Arbuckle, Avery, Kendall, Wise, Roach, Smith, Terrell, and Grigg were found not guilty of Charges I and II and their respective specifications, but guilty of Charge III and its Specification.

The specific, particularized evidence against each of said accused and evidence presented in their respective defenses summarizes as follows:

Prosecution's Evidence.	Defense's Evidence.
EDWARD R. WILLIAMS	
1. Was seen in company with three other men with rifle and was disarmed by Lieutenant McCarthy (R138,143,151).	Accused remained silent. Private Solomon Manuel had been in Preston on pass with Edward R. Williams returning about 12 midnight 24-25 June 1943. Manuel left Williams at gate. He had no rifle (R735).
2. Accused admitted that during disturbance some one handed him a carbine about midnight and he carried it for about 30 minutes when he took it to barracks and placed it in hall (Pros.Ex.7).	
FRELOT	
1. Frelot was one of soldiers at company supply room who had a carbine (R138,146,151) which he gave up on request (139).	Accused testified that he picked up carbine in hall of barracks and went outside for about 15 minutes and then went to bed(R423). He claimed he signed Pros.Ex.8 without reading it and denied the truth of the recitals therein(R425).
2. Accused admitted he secured carbine at 3:30 a.m. 25 June 1943 from supply room, but denied he had ammunition. Returned it at 3:45 a.m.(Pros.Ex.8).	

Prosecution's Evidence.	Defense's Evidence.
SAFFO	
Accused was one of five men armed with rifle and dressed in fatigue and mackintosh seen by Lieutenant Saniter. They remained armed from 10:40 p.m. to midnight while Lieutenant Saniter remained with them, and talked with them (R178,188). He failed to put away rifle when ordered (R181).	Accused testified that upon hearing disturbance he arose from bed and went outside. By the supply room he found a rifle without a bolt in it. He picked it up as Lieutenant Saniter came around corner of building. Lieutenant Saniter told him to put it away, and after holding it about five minutes he placed it inside of building (R547-549).
ENGRAM	
Same as Saffo (R178,188). He failed to obey order to put up rifle (R181).	Accused declared he obtained a rifle from company supply room which was open, but after Lieutenant Saniter explained things, accused returned rifle to supply room (R551,552).
FLAGG	
Same as Saffo (R178,188). He failed to obey order to put up rifle ((R181).	Accused asserted that he had been to office for his mail, and upon returning, he approached the supply room end of Building M. On the ground were two rifles. He took the guns to the supply room, but it was locked. Lieutenant Saniter was at end of hall and he looked back at accused, who held the rifles about 2½ minutes. Accused laid rifles down and joined Lieutenant Saniter who was talking to the men. Lieutenant Saniter saw him with rifles (R555-561).
KIRKSEY	
Same as Saffo (R178,188). He failed to obey order to put up rifle (R181).	Accused denied that he had possession of a gun at any time during night (R565).
HORTON	
Private Albert F. Jackson saw accused carrying a rifle walking in the direction of company supply room. Accused informed witness he had found a rifle	Accused stated that he went to headquarters barrack and found rifle in hallway and took it and placed in store room. Had it about two minutes. Jackson saw him with it and

Prosecution's Evidence. (Horton - Cont'd).	Defense's Evidence.
and was taking it to the supply room (R240).	asked what he was doing with it. Accused replied he was putting it in store room (R574,576).
ARBUCKLE	
Accused delivered a rifle and three rounds of ammunition to Lieutenant Gibson, when the latter required men to turn in their guns (R222,224).	Corporal Raymond D. Ferguson saw accused about 10:30 p.m. standing at corner of barracks without a rifle (R579). Accused denied he had a rifle at any time during evening and did not go to orderly room (R597,598). Sergeant Fred Walters saw accused in movie between 8:30 p.m. and 10:00 p.m. without rifle (R599).
AVERY	
Lieutenant Gibson did not see accused at barracks between 11:45 p.m. and 1:00 a.m. while he was with his men and rifles were being turned in (R222,224,225). Accused, with Kendall came to room of Sergeant Ulysses B. Engram between 12:30 a.m. and 1:00 a.m. carrying rifles and inquired why Engram was not leading his men (R229,232,233,236).	Accused denied he had a rifle any time that night (R604). Saw Sergeant Engram in door of his room and only asked how men who were shot were getting along (R605). S/S McDonald saw Avery from 10:30 p.m. to 11:00 p.m. in common room, but he had no rifle (R610). Corporal Raymond D. Ferguson saw accused in hallway about 5 minutes without rifle or helmet (R585). T/5 Boney saw accused in barracks hall in evening and he did not have a rifle (R608). Sergeant Fred Walters saw accused between 10:30 and 11:00 p.m. on front of barracks, but he had neither rifle nor helmet (R599).
KENDALL	
Same as Avery (R222,225,228,229, 230,233,236).	Accused denied he had a rifle that night (R642,645). Saw Sergeant Engram in door of his room and asked: "Are you going out to see about the men that have been shot?" (R642). Corporal Walter Carney saw accused about 10:30 p.m. or 11:00 p.m. outside of barracks, again about 12:00 M. for 15 or 20 minutes and neither time did he have rifle, helmet or gasmask (R647,648).

Prosecution's Evidence. (Kendall - Cont'd).

Defense's Evidence.

Sergeant James Wiggins saw Kendall between 10:30 p.m. and 11:00 p.m. when Kendall was coming from infirmary to barracks. He had no rifle (R649,650).

WISE

Sergeant Ulysses B. Engram saw Wise in company area walking in direction of administration building armed with a rifle (R228-230, 235-236).
Private Albert F. Jackson saw Wise standing in a ditch crying. He had a rifle. This was after 10:30 p.m. (R239-240).
Corporal Raymond D. Ferguson at about 11:30 p.m. saw Wise with a rifle standing at end of barracks. Wise voluntarily delivered rifle to Ferguson who was collecting them under Lieutenant Gibson's orders (R582,583,585).

While leaving barracks to attend meeting in company area he had to jump a ditch. He fell and his foot hit a rifle. He picked it up and put against the building. Corporal Ferguson came up and accused gave rifle to him. He did not see Sergeant Engram that night (R587,588, 590).
Corporal Raymond D. Ferguson at about 11:30 p.m. saw Wise at end of barracks with a rifle. Wise gave Ferguson the rifle voluntarily because Ferguson was under orders of Lieutenant Gibson to collect rifles (R582,583,585).
Private Milton C. Boulden saw Wise at about 11:00 p.m. at head of passage-way as he was handing rifle to Corporal Ferguson (R653).

ROACH

Lieutenant Ryland saw Roach first time in day-room after armored car had left. He had a rifle. He saw him a second time as he lay on the floor asleep with his head against a chair. He had a rifle. Lieutenant Ryland said to him: "You had better go to bed", but did not order him to put rifle away. Accused wore a helmet. He obeyed order to go to bed (R212,215,217). Accused admitted he took a .30 caliber rifle from the supply room at 12:45 a.m., but asserted he returned it next morning. He took no ammunition (Pros.Ex.9).

Accused testified that upon returning from Preston at 10:30 p.m. saw a crowd about gate, and when Capt. Anderson ordered men back to barracks he complied. As he stood in company area a shot sounded as if it ricochetted off barracks roof. Accused obtained helmet and went to air-raid shelter where he remained until 12:00 M. He started to go to bed and heard some one shouting: "Get your rifles, they are at the gates with machine guns". He was frightened and got rifle from supply room and went into day-room. After talking to some men he fell asleep. Lieutenant Ryland woke him up and told him to go to bed. Took rifle to his room and put it in wall-locker and went to bed. Turned rifle in

Prosecution's Evidence. (Roach - Cont'd).	Defense's Evidence.
	the next morning. Had no intention to use rifle against officers or military police or joining in riot (R634-636).
SMITH	
Accused had a rifle as he stood in barracks common room (R212, 213). Accused admitted he took a Springfield .30 caliber rifle with 4 rounds of ammunition from company supply room and returned it next morning (Pros.Ex.10).	Accused made an unsworn statement to the effect that when he heard shouts of "Get your rifle" he went to supply room and took his rifle and then returned to his room. About half an hour later he went to common room and remained there until Lieutenant Ryland advised everybody to go to bed. Accused obeyed and went to bed (R724,725).
TERRELL	
Accused had a rifle as he stood in common-room (R212,213). Accused admitted that at 11:00 p.m. on 24 June 1943 he took a Springfield .30 rifle from company supply room, but took no ammunition. Returned rifle next morning (Accused's oral admission to Keegan R375-377,386-389,393,394).	Accused remained silent.
GRIGG	
Captain Latham was inspecting barracks of 1933rd company between 11:00 p.m. and 12 midnight on 24 June 1943. Heard rifle bolt click and went into a room and saw Grigg with a rifle. Captain Latham told him not to be foolish, to stay out of trouble and to put rifle down. Grigg put rifle down, turned out lights and went outside. Captain Latham locked door (R245-247).	Accused testified he found a rifle during evening standing against door of barracks. Picked it up and took it to his room. Captain Latham saw him with it and said: "What do you intend to do with that rifle?" Accused replied: "Nothing, Sir." Captain Latham said: "Leave the rifle in the room and go outside." Witness obeyed. Captain Latham locked the door of the room. Accused spent the night in the day-room (R710,711,714,716).

The Specification of Charge III alleges that the accused violated the 96th Article of War in ten separate and distinct ways any one of which would have sustained a conviction. With respect to the fifteen accused whose

convictions are now subject to review, considerations need only be given to the allegations that they did (1) seize arms and ammunition by breaking into store rooms and (2) bear arms. There is no proof of any kind or nature that they or either of them were guilty of acts alleged in the remainder of the specification.

The form of the Specification is not subject to criticism on the ground of duplicity.

> "An indictment or count in which two or more separate and distinct offences, whether of the same or a different nature, are set forth together, is said to be double, and such a pleading is bad on account of duplicity.
>
> This rule, however, does not apply to the stating together, in the same count, of several distinct criminal acts, provided the same all form parts of the same transaction, and substantially complete a single occasion of offence. Thus it has been held that assault and battery and false imprisonment, when committed together or in immediate sequence, may be laid in the same count without duplicity, since 'collectively they constitute but one offence.' So it is held not double pleading to allege in the same count the larceny of several distinct articles appropriated at the same time and place.
>
> A further description of cases is to be noted as not within the rule, or as constituting an exception to the rule,- viz., cases of statutory offences or phases of offence of the same nature, classified in the enactment as of the same species and made similarly punishable. In a case of this class it was observed by a U. S. court that the several criminal acts indicated may be regarded as 'representing each a stage in the same offence, and therefore properly to be coupled in one count.'"
> (Winthrop's Military Law & Precedents, Reprint, pp.143-144)

> "Where a single offense may be committed by several means or in several ways, it may be charged in a single count to have been so committed, if the ways or means are not repugnant; but a count cannot be sustained if the means alleged are inconsistent ***" (31 C.J., sec.324, pp.763-764).

(94)

The ways and means alleged in the Specification are not in any degree repugnant, contradictory or inconsistent. Due to the difficulties involved in charging and trying such a large group of men the form of pleading used in this case was proper (CM 153268 (1922), CM 192530 (1930); Dig.Ops.JAG.,1912-40, sec.428(14), p.298).

It will be noted that the accused were charged with committing the acts "jointly and in pursuance of a common intent". While the act of each accused in securing or bearing a fire-arm was an individual act the evidence is highly convincing that such acts were the result of a common motive and common purpose. It fully sustains the charge of joint action with a common intent.

The evidence is uncontradicted that on the night of 24-25 June 1943, all rifles and carbines of the military units stationed at AAF Station #569, except those issued to guards and sentries on duty were stored in company supply rooms. The ammunition was stored in a room in the guard-house and at regimental headquarters. None of the accused were authorized either specifically or as members of a command to take or procure fire-arms or ammunition. Under such circumstances their seizure was wrongful and illegal and the taking of them constituted an offense under the 96th Article of War as a disorder and neglect "to the prejudice of good order and military discipline". Likewise the bearing of arms at times when same is unauthorized or prohibited is a similar offense.

> "'All disorders and neglects.' In this comprehensive term are included all such insubordination; disrespectful or insulting language or behavior towards superiors or inferiors in rank; violence; **** turbulent, wanton, mutinous, or irregular conduct; violation of standing orders, regulations, or instructions; **** in fine all such 'sins of commission or omission,' on the part of either of officers or soldiers as, on the one hand, do not fall within the category of the 'crimes' previously designated, and, on the other hand, are not expressly made punishable in any other ('foregoing') specific Articles of the code, while yet being clearly prejudicial to good order and military discipline." (Winthrop's Military Law & Precedents, Reprint, p.722) (Underscoring supplied).

(a) With respect to the findings of guilty of the accused Frelot, Engram, Roach, Smith and Terrell there is substantial competent evidence that each of the accused without authorization of any kind entered company gun or supply rooms and seized a rifle or carbine and thereafter carried the same wrongfully and without authority for some part of the time during which there was disturbance and violence in the camp and in contiguous areas. The evidence, however, as to each accused, fails to establish the

fact that the seizure was effected "by breaking into the store rooms." Oppositely it shows that each of these accused entered the store rooms after they had been broken into and secured a rifle or carbine. There was no element of force involved in their entries; hence there was no "breaking" within the technical and generally recognized meaning of the word (W. & P., Perm, p.775). However, the gist of the offense was the wrongful and unauthorized seizure and bearing of arms. The allegation "by breaking into store rooms" was surplusage and an unnecessary averment. It is merely descriptive. It could have been eliminated entirely without affecting the gravamen of the offense. Hence, failure of proof to support such averment may be wholly disregarded (31 C.J., sec.455, pp.837, 838).

(b) The findings of guilt against accused Edward R. Williams, Saffo, Flagg, Kirksey, Horton, Arbuckle, Avery, Kendall, Wise and Grigg are supportable upon entirely different evidentiary foundations. There is no proof that any of the named accused entered a supply or gun storage room and seized a rifle or carbine, nor are there any facts upon which legitimate inferences of such conduct may be based.

It may be assumed as a general proposition that proof of mere possession of a rifle or carbine is not sufficient to establish that accused's possession was wrongful and unlawful. It may further be assumed that if the only relevant evidence as to the conduct of the above named ten accused is that particularly summarized immediately above, it would be insufficient to establish that the possession by each accused of a rifle or carbine sometime during the night of 24-25 June 1943 was wrongful and unlawful under the 96th Article of War.

There can be no question as to the seriousness or extent of the disorders and violence prevailing at AAF Station #569 and the adjacent community at the time these accused were found in possession of rifles and carbines. Neither is there any doubt that the supply rooms where arms were ordinarily stored had been wrongfully and forcibly broken into and rifles and carbines removed therefrom without authority, and that the firearms which were later in possession of accused were some of the rifles and carbines which had been wrongfully taken from the supply rooms. At approximately the same time the ammunition storage rooms in camp had been forcibly entered and ammunition stolen therefrom. There is no proof that any of these ten soldiers committed these unlawful and disorderly acts. However, the proof is abundant that each of them was fully cognizant of the turbulent, riotous conditions then prevailing. It is fair to impute to them the knowledge that other of their fellow soldiers had not only wrongfully secured possession of arms and ammunition but were also using the same promiscuously, dangerously and unlawfully; that Government motor vehicles had been or were being seized and used without authority and that there were assemblies of soldiers in the camp engaged in excited and emotional argument and discussion. It is also fair to charge them with knowledge that the rifles "found" by them were part of the rifles which had been removed from the supply rooms without authority.

(96)

These accused have been acquitted of charges of joining in a mutiny and committing riot. The situation under consideration is identical with one which would have existed had these accused been charged only with wrongful and unlawful possession of fire-arms. It is manifest that the defense early in the trial anticipated this legal issue when it moved to strike the part of Lieutenant Roller's testimony pertaining generally to disturbed and riotous conditions of the camp (R87). The motion was denied and in the opinion of the Board of Review the ruling was proper at the stage at which it was made. Had it been renewed at the conclusion of the prosecution's case in chief it should also have been denied. Notwithstanding the acquittal of these accused of charges of joining in a mutiny and rioting, the causes and circumstances under which they came into possession of the fire-arms are certainly relevant and material facts bearing directly upon the issue of the wrongfulness and illegality of their possession.

> "The general rule is well settled that all evidence must be relevant. If evidence is relevant upon the general issue of guilt, or innocence, no valid reason exists for its rejection merely because it may prove, or may tend to prove, that the accused committed some other crime, or may establish some collateral and unrelated fact. Evidence of other acts to be available must have some logical connection and reveal evidence of knowledge, design, plan, scheme, or conspiracy of the crime charged ***" (Underhill's Criminal Evidence, 4th Ed., sec.184, pp.333-335).

The following decisions are interesting examples of the application of the foregoing rule to circumstances similar to those of the instant case: Moore v. United States, 150 U.S. 57, 37 L.Ed., 996; Jackson v. United States, 102 Fed. 473, 5 C.J., p.780, footnote 67; Smith v. State, 123 Alabama 64, 26 Southern 641, 5 C.J., p.780, footnote 67; State v. Belisle, 79 N.H. 444, 111 Atlantic 316, 6 C.J.S., sec.117, p.981, footnote 12; State v. McCahill, 72 Iowa 111, 30 N.W. 553, 33 N.W. 599, 1 Wharton's Criminal Evidence, sec. 346, p.493, footnote 17.

The possession of fire-arms by the ten accused soldiers when considered against the background of this larger scene assumes an entirely different aspect than that suggested by the specific evidence (summarized above) against each of them when considered alone. The accused did not "find" the rifles and carbines in and about the barracks and in the company areas as they went about routine military duties during the ordinary tranquility and orderliness of a well disciplined camp. The fire-arms "found" by them had not been mislaid or carelessly left behind by others and then picked up by accused and returned to the storage rooms. If such were the facts there would be most serious doubts as to the guilt of these accused.

These accused acquired possession of the rifles and carbines during a tumultuous disturbance and agitation in camp characterized by open violation of rules, orders and regulations, the discharge of fire-arms endangering life and limb, the seizure and unauthorized use of Government property, and assembly of personnel, emotional and sensitive to canards and rumours, in groups more nearly resembling mobs than military organizations. Discipline and control by superior officers had deteriorated to the point where it had largely been replaced with argument and persuasions addressed not to soldiers, but to frightened, angry men. The situation was highly explosive and manifestly it possessed the potentialities of a large scale mutiny and rioting with promise of tragic and disastrous consequences. The possession of lethal weapons, even for short periods of time under such circumstances and conditions cannot be treated as casual, harmless episodes. Under the circumstances a soldier possessed a rifle or carbine at his peril. This conclusion is neither harsh nor arbitrary; it is dictated by prudence and common sense.

It was within the particular province of the court to consider the actions and conduct of each accused with respect to his possession of fire-arms in the light of the entire circumstances as shown by the evidence. The denials of certain accused that they were in possession of rifles at the time and place alleged produced issues of fact. The explanations offered by other accused in instances where possession of fire-arms was admitted were in the nature of confessions and avoidance of the charge. Their exculpatory value as against culpatory evidence resulted also in factual issues.

The weighing of the evidence and determining its sufficiency, the judging of credibility of witnesses, the resolving of conflicts in the evidence and the determination of the ultimate facts were functions committed to the court as a fact-finding tribunal. Its conclusions are final and conclusively binding on the Board of Review where the same are supported by substantial competent evidence (CM ETO 106, Orbon; CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer; CM ETO 422, Green; CM ETO 492, Lewis; CM ETO 804, Ogletree et al). In the instant case the Board of Review is satisfied that the supporting evidence is competent and admissible; that the findings are supported by substantial evidence and are legally sufficient in every respect.

11. The accused, Patterson, Ogletree, Cradic, Mack and James E. Johnson were each found Not Guilty of Charge I and its specifications but Guilty of Charges II and III and their respective specifications. Prosecution's evidence specifically directed against the above mentioned accused and each accused's defensive evidence summarizes as follows:

Prosecution's Evidence.

Defense's Evidence.

PATTERSON

Captain Anderson saw Patterson in group of soldiers at the main gate. He was excited and emotional as he asked for permission to go to town to see the wounded men (R61). His attitude might have had a bad effect on other men. Captain Anderson told him to calm his men down and return them to barracks, but did not know whether Patterson complied (R68).

Lieutenant Roller heard Patterson very excitedly say he was determined to leave post. About 50 men were present. Several men got him by the arm and held him (R77) but he was struggling toward the gate (R99). Lieutenant Sylvester tried unsuccessfully to calm Patterson who was insistent upon leaving camp because two of the men had been shot (R77,96). Major Heris gave Patterson permission to go to town on promise of good behavior if he dressed in "Class A" uniform. He left post in a jeep, but when he returned he was walking (R97).

Captain Milnamow, of the Medical Corps, on returning from 110th General Hospital in ambulance met Patterson with another soldier in a jeep. He was excited, but he (Milnamow) assured him that Ogletree and Adams were all right and he returned with party to camp (R117,126). At the dispensary Patterson admitted that rifle in hall was his. He had six rounds of ammunition in his pocket (R120). Patterson said he was primarily interested in knowing if men were killed, and if they were they would get revenge, but since they were not he was not much interested (R120).

Sergeant Eugene C. Walker was with ambulance that met Patterson. Patterson was with Sergeant Bentley and a Lieutenant. Patterson said he had to be sure the men were all

Sergeant Eugene C. Walker was at camp dispensary between 2 & 4:00 a.m. on 25 June 1943. Captain Milnamow, Lieutenants Fernstein and Warjackie, Patterson and accused Davis were present. They engaged in general conversation.

Lieutenant Sylvester saw Patterson at front camp gate. He was yelling and seemed agitated and was in O.D. uniform without hat (R528).

Saffo asserted Patterson told him to pick up any rifles he saw and bring them to rifle room (R547).

Lieutenant Saniter testified he promoted Patterson to permanent grade of First Sergeant and considered him of value to the military service. He was a good first sergeant (R766,767). He saw Patterson for a few seconds. Patterson volunteered the statement: "Sir, the men are out of control" (R767). He gave Patterson no orders or instructions as to conduct (R769) and could not say Patterson had incited his men to bear arms (R767).

Patterson, as a witness in his own behalf, gave the following narrative of his actions and conduct on night of 24-25 June 1943:

He worked with company in the master motor pool of camp. At 5:30 p.m. he went to "chow" and company commander ordered company to return to pool in evening. The company was preparing to move next day. After concluding work later in evening he washed the company commander's jeep and then between 9:30 p.m. and 10:00 p.m. he went to company assembly room and obtained bottles of Coca Cola. He returned empty bottles to assembly room. He then went to theater and looked at picture from entrance (R770). He came out of theater about 10:30 p.m. and went to snack-bar in assembly room, obtained

Prosecution's Evidence. (Patterson - cont'd).

right because he had to let the boys back at camp know that fact (R120).

Lieutenant Bjerke went with Patterson on trip to 110th General Hospital. Patterson drove the jeep. He drove fast but not recklessly (R162,164,173). En route met returning ambulance. Upon Captain Milnamow's assurance that men were all right, Patterson seemed pleased (R173) and drove back to camp. On return trip to camp jeep containing Lieutenant Bjerke, Bentley and Patterson was stopped first by civil police and then by group of soldiers. Patterson said: "This is Sergeant Patterson. The men in the hospital are OK". Was stopped a third time with similar salutation from Patterson (R166,171). Upon returning to camp Patterson was at camp dispensary with Captains Milnamow and Gerardot and Lieutenant Bjerke. Was there 1½ hours and was respectful (R168). He had a handful of ammunition. He did not seem rebellious towards witness (R164).

Lieutenant Saniter saw Patterson once during evening when Patterson came up to Lieutenant Saniter while latter was engaged in conversation with battalion commander. Patterson said his men were out of control and he could do nothing with them. Patterson had no rifle but was disheveled (R179,185,186,189). Lieutenant Saniter gave him no orders (R186). Patterson was a strong first sergeant and was member of same company as Ogletree (R187).

Lieutenant Willis returned to main gate in a jeep. Patterson came to him and said: "Lieutenant, who shot my man?" Lieutenant Willis replied: "Sergeant, I don't know who has been shot or anything about it. I am going outside now to find out". Patterson said: "By God, I am going

Defense's Evidence.

a sandwich and looked at pool game. He left snack-bar between 10:30 and 11:00 p.m. and proceeded to his barracks. He noticed two or three soldiers running in direction of camp infirmary (R771). He then walked towards infirmary and saw two soldiers. One said: "Sergeant Patterson, one of your men got shot (naming him)".

Then Patterson went to infirmary door where company commander informed him that Ogletree and a boy from 1949th company had been shot. Patterson returned to his barracks at about 10:45 p.m. As he walked towards barracks he saw an ambulance leave. He went to latrine and then orderly room where he heard confusion in the road. Looking out of window he saw men running towards camp gate. (R772). Patterson went down to gate where he saw Lieutenants Roller and Sylvester. The latter was on walk in front of sentry box. There were 40 or 50 men in front of guardhouse (R773). Patterson asked Lieutenant Roller's permission to go to see wounded men. Lieutenant Roller refused permission on Major Heris' orders. He gave no orders. Saw no men at gate with rifles. Patterson returned to barracks L and M between 11:00 p.m. and 11:10 p.m. There were about 50 men outside and inside of barrack M (R774). Company commander was making a speech to men. Captain Anderson was standing by his jeep talking to two men. Saw no men with rifles. Patterson walked up to Captain Anderson, who said to him: "Sergeant, as your men under control?" Patterson replied: "As far as I can see, sir, they are under control; standing there talking to the company commander." Patterson then entered his barracks by exit door and saw two men - one a noncommissioned officer - standing there with rifles. He asked

Prosecution's Evidence.
Patterson - cont'd)

to find out" and turning to the men said: "Come on men" and started back into camp followed by five men. Patterson did not have a rifle. He was excited, and did not salute. He was not disrespectful unless his statement, "By God, etc" was disrespectful (R261,267,268).

Lieutenant Huxtable saw Patterson about 10:30 p.m. just before Major Heris talked to men. Patterson was in a jeep. He was excited and mentioned fact that one of his men had been shot and he was going to do something about it. He was not directing his conversation to anyone in particular, but a group of soldiers were about who could hear his remarks. Patterson drove away in a jeep with Lieutenant Bjerke. (R271,273,275,276,277).

Sergeant Gordon B. Hicks saw Patterson talking to Major Heris in a nervous manner between 11:00 p.m. and 12:00 midnight, stating he wanted to go to 110th General Hospital to see wounded men. Major Heris gave his assent and Lieutenant Bjerke, and Hicks went with Patterson in a jeep. Major Heris told Hicks to accompany Patterson to keep him under control, (R305). At Warrington they met the ambulance returning. Patterson said to Captain Milnamow: "How is the boys?" Captain Milnamow answered: "The boys are going along all right." Sergeant Walker, who was with the ambulance said: "Yes, the boys are all right, Pat, don't worry". Patterson said: "One boy, Ogletree- he was in my company. He was my friend. I never known him to take a drink. I am worried about him. He was one of my best friends." Patterson was respectful to Captain Milnamow (R305,309, 310) and seemed relieved at news concerning wounded men (R310). Patterson was also respectful to Lieutenant Bjerke (R309). Patterson, Lieutenant Bjerke, Bentley and Hicks

Defense's Evidence.

them what they were doing with them and ordered them to put them back in supply room (R775). The two men were none of the accused. In barracks hallway saw two more men picking up rifles. Patterson inquired what they were doing with them, and receiving no reply told them to put them in supply room. Patterson then went to own room for cigarettes and obtaining them went to supply room where there were 16 or 20 rifles on table and in racks. Supply room was open. Patterson picked up the rifles and took them to his room. One of the rifles had 3 rounds of ammunition in it. Normally there were 103 rifles in company (R776,784). Witness left his room and locked his door. Men were coming into barracks and it started to rain. This was about 11:20 p.m. Patterson went to exit door where Captain Anderson and Lieutenant Saniter were talking, and asked Captain Anderson if he thought there was any possibility of Patterson going to see Ogletree. Captain Anderson made no reply. Then Captain Anderson and Patterson got into former's jeep and drove to main gate. Stopped in front of guardhouse. The number of men had doubled - many with rifles. Saw Lieutenant Sylvester and Major Heris. Patterson approached the latter, saluted and asked permission to see how the wounded men were. Major Heris inquired: "Who are you?" Patterson replied that he was first sergeant of the 1945th company. Major Heris said: "What hospital did they go to?" Patterson replied: "I really don't know, but I could find out from the infirmary." Patterson telephoned infirmary from guardhouse and was informed wounded men had been taken to Warrington hospital. This was only time

Prosecution's Evidence.
(Patterson - cont'd).

followed ambulance back to camp (R310). About 50 or 60 or 80 armed men stopped party on Access Road. Patterson called: "This is Sergeant Patterson. The Boys are OK" and they were allowed to pass (R310). Hicks did not see Patterson with a gun. He was not disrespectful but "contrary". Upon reaching camp Lieutenant Bjerke, Patterson and Hicks were informed Lieutenant Ousset had been shot (R312).

Lieutenant Edwards, officer of day, was called at guardhouse at 10:45 p.m. He saw Patterson at the camp gate. Patterson asked if he could leave and Lieutenant Edwards refused him permission, and told him to go back to his quarters and take his men with him. Patterson was excited, and was with witness about three minutes. He asked to go to his men who were in trouble, and did not ask to go to hospital (R316,324).

Captain DeBaun, M.C., was at camp dispensary and during course of evening received two telephone calls from Patterson. His voice was excited. He was inquiring as to his men who had been shot (R331,337).

Captain Gerardot did not see Patterson with a gun during the evening, and at no time that night did he order a noncommissioned officer or soldier to pick up a rifle (R8,11).

Defense's Evidence.

Patterson telephoned infirmary(R777). Returning to Major Heris, Patterson reported where the men were, Major Heris said he did not see any harm in witness going and asked if he had a blouse. Patterson was dressed in O.D. pants and field jacket. Major Heris told Patterson to secure blouse which he did and returned to Major Heris. Major Heris told him to take a specified jeep, and directed that Lieutenant Bjerke and a sergeant accompany him. As they started Major Heris asked Lieutenant Bjerke and Patterson to give their word of honor that they would go to the Warrington hospital and report back to him. He shook hands with them (R778). Drove out of Access Road about 11:30 p.m. Saw outside of camp two military police with "tommy" guns and Sergeant Bentley and Henry Bryant. Stopped jeep and went over to police. Lieutenant Moll, the chaplain, came up to Bentley and told him he "had too damned much mouth", but told Bentley to get in jeep and Bryant to go back to camp (R774). On returning from Warrington and at a short distance from camp gates someone shouted: "Turn out them lights" and asked who was there. Patterson identified himself and said he was returning from the hospital; that the men were all right and that all should come back to the barracks. Patterson and party were stopped once more as they were about to turn into officers' quarters. Patterson left jeep at corner in company with Lieutenant Bjerke. They proceeded as far as officers' quarters when they saw a command car in front of it containing Lieutenant Ousset. He was shouting for some one to take him into the dispensary. There was an enlisted man driving car (R780,787). Lieutenants Warjackie, Roller and Bjerke walked in front of car and

Prosecution's Evidence.
(Patterson - cont'd).

Defense's Evidence.

Patterson walked by the side of it. Lieutenant Ousset was taken into dispensary. Patterson accompanied party and remained until 4:00 a.m. on 25 June. Patterson picked up a rifle in entrance-way to dispensary and on encountering Captain Gerardot asked him what to do with it. Captain Gerardot told Patterson to place it inside the door-way and help Lieutenant Ousset into the dispensary which Patterson did (R781). While in the dispensary Patterson took three rounds of ammunition out of his left-hand pocket and placed it on desk in presence of other people. The three rounds had been obtained from one of the rifles of the company which Patterson had taken to his room (782, 788). One hundred rifles were missing from supply room but company was under control because officers were talking to them (R789). Assisted in collecting company rifles next day - found 32 rifles in another barracks. Patterson denied saying to Sergeant Hicks that he hoped the men were all right for otherwise "I do not know what I would do," but did say he hoped Ogletree was all right (R790). Denied saying: "Well, By God, I am going to find out who shot them", and "I am going to do something about it." (R792). Patterson intended to report Ogletree's and Adams' condition to company. He reported to Major Heris upon return. Patterson denied he had ever received a direct order from Major Heris or any other officer, and denied he had told Lieutenant Saniter he could not control his men (R793). He returned the 16 rifles to the store room next day (R794).

Captain Moll remembered when engaged in a conversation with Sergeant Bentley and a jeep drove up and stopped, a sergeant in the car said: "Sergeant Bentley come along with us, we are going to the hospital at Warrington" (R795). Lieutenant Bjerke,

Prosecution's Evidence.
(Patterson - cont'd).

Defense's Evidence.

who was in the car gave his consent to Bentley going (R797).

Sergeant J.D.Bentley went to Warrington with Patterson in a jeep. He got into the jeep under impression that Patterson was ordering him to do so (R801).

Major Heris testified he gave Patterson permission to leave camp between 10:30 and 10:45 p.m. after Patterson had expressed anxiety as to condition of his men (R803). Major Heris put Patterson on his honor to return to post and he may or may not have shaken hands with him. It was a proposition of individual to individual rather than a military matter. Patterson was entirely emotional - rational but shaky and highly strung. He was not shouting, but made his request in a courteous manner (R804). The lieutenant and noncommissioned officer accompanied Patterson on trip to hospital as a precautionary measure because there had been some disturbance and not because Major Heris thought Patterson might do something wrong. He had every confidence in Patterson (R805).

OGLETREE

Captain Milnamow saw Ogletree in front of dispensary with group of colored soldiers. He was excited and shouted: "I am still fighting," and "Are you not going to get those guys?" Ogletree was not suffering from shock, but exhibited anger (R116,125-127).

Lieutenant Saniter saw Ogletree on the operating table in hospital about 10:30 p.m. on 24 June. Ogletree said: "Sir, I went over the gate without a pass". He seemed happy (R177,183). Ogletree and Patterson were members of the same company (R187).

Ogletree, appearing as his own witness testified that he was shot in a fight with military police on Station Road in Bamber Bridge early in the evening of 24 June 1943. He was 2½ or 3 blocks from camp when accosted by Private Albert Jackson and Private Eugene Nunn who helped him to camp gate. There he was placed in a truck and taken to dispensary. He disclaimed knowledge of any events from time he reached gate to time he reached 110th General Hospital at Warrington. He was in hospital for a month and two days (R534-537).

Private Nunn testified Ogletree was shot in a riot in town of Bamber Bridge. He and Private Jackson assisted Ogletree to camp where he was placed in truck and taken to dispensary. Nunn was with Ogletree in truck and assisted him into dispensary. He did not hear Ogletree

Prosecution's Evidence.
(Ogletree - cont'd).

Defense's Evidence.

make any remarks (R537-541).

T/5 Calvin Harvey driving a truck arrived at camp gate between 10:00 p.m. and 11:00 p.m. on 24 June 1943. Saw Ogletree who was wounded. He was with Nunn. Ogletree got into front seat of truck with Harvey. Nunn sat other side of him. Drove to dispensary where Nunn helped Ogletree from truck. Ogletree said he had been shot, but that was all (R541).

Private John T. Collie was in motor pool. Upon hearing Ogletree had been shot, went to his barracks and then ran to infirmary. He saw a colored soldier helping Ogletree. Collie took Ogletree by shoulder and helped him into room where there was a table. Ogletree said nothing but smiled at Lieutenant Saniter (R544,545).

CRADIC

Lieutenant Saniter saw Ogletree taken to dispensary and then went to 1949th company area - buildings L and M. A few minutes later he saw Cradic (in company of Engram, Flagg, Saffo and Kirksey) armed with rifle and dressed in fatigues and macintosh. They gathered about Lieutenant Saniter who told them to take their rifles back to store room, and pointed out to them what they were doing. Lieutenant Saniter remained in company area from 10:40 p.m. to midnight (R178,188) and Cradic carried the rifle the entire time he was with the men (R179). Cradic was not belligerent. He made no effort to leave company area and join disturbance while Lieutenant Saniter was with him. Cradic approached Lieutenant Saniter in a friendly manner (R181,183).

Cradic testified in his own behalf that he obtained a rifle from the company store room when he heard that an armored car had come. He held the rifle between 11:00 p.m. and 12 midnight while Lieutenant Saniter was at the barracks. He could not get into supply room so he put rifle by supply room door when Lieutenant Saniter left, and went to air-raid shelter. He was in shelter for 1½ to 2 hours and had no gun. When he left shelter he went to bed (R513). He said he had rifle for own protection against armored car. The majority of the company obtained their rifles, but no one in particular told him to take his rifle (R517).

Private Vangelo Threadgill saw Cradic in air-raid shelter, after 11:00 p.m. on 24 June, but he did not have gun (R518,519).

Sergeant Lewis P. Phillips saw Cradic in hallway of barracks between 12 midnight and 12:30 a.m. but he had no rifle. Cradic was nervous and excited and Phillips invited him to sleep in his room. They went to bed at 1:00 a.m. and

Prosecution's Evidence.
(Cradic - cont'd)

Defense's Evidence.

Cradic was in bed next morning (R520).

Sergeant Nesbit Johnson saw Cradic in hallway of barracks between 11:15 p.m. and 12:30 a.m. without steel helmet or rifle (R523).

MACK

Captain Anderson identified Mack as one of the soldiers who was in the carry-all and approached the camp gate ahead of the truck containing armed soldiers. Captain Anderson ordered Mack and others from the carry-all. At that time Mack was armed with a rifle. Captain Anderson ordered all of the men to return to barracks and surrender their rifles but could not truthfully testify that Mack disobeyed (R57,58,65,66,70-72).

Lieutenant Gibson had men of 1949th company turn in their rifles to him from 11:45 p.m. to 1:00 a.m., but he did not see Mack in the group (R 220-225).

1st Sergeant Ulysses B. Engram of the 1929th company was returning from "movie" about 10:30 p.m. He saw Mack in company area walking in the direction of the administration building. He was armed with a rifle, but Engram did not attempt to overtake him (R229,230,235,236).

Mack remained silent (R834).

Private Milton C. Bouldin saw Mack in common room of 1949th company a little before 10:00 p.m. Played checkers with him. While engaged in checkers heard report that someone had been shot. Mack did not have a rifle (R652-654).

JAMES E. JOHNSON

Lieutenant Ryland saw Johnson outside of Barracks B with a rifle (R212). Johnson in a written statement (Pros.Ex.6; R343-346) admitted he obtained a rifle from the 1933rd company supply room on the night of 24 June. He stated that he knew the rifle was returned to the supply room the following morning.

Johnson remained silent (R834).

Private George C. Moore went to the day room of the 1933rd company with Johnson about 11:00 or 11:30 p.m. on 24 June. Lieutenant Ryland talked to men. Moore and Johnson left day room together, and went to bed. Johnson was in bed next morning (R718-720).

Staff Sergeant Lloyd Day saw Johnson between 11:30 p.m. and 12 midnight on 24 June in Barracks B. He had neither rifle nor helmet (R721). Day also saw Johnson in common room between 12 midnight and 12:15 a.m.

Prosecution's Evidence.
(James E. Johnson - cont'd).

Defense's Evidence.

while Lieutenant Ryland was talking to men. He did not have a rifle or helmet (R722,723).

Lieutenant Ryland had known Johnson rather closely for about a year and considered him of value to military service. His reputation for truth and veracity was good (R727).

(a) Beyond question there is competent substantial evidence that Patterson, Cradic and Mack were each in possession of fire-arms during the night of 24-25 June 1943. Accused James E. Johnson admits he entered the supply room and obtained a rifle and thereafter possessed same. The discussion in paragraph 10 hereof as to the legal issues involved under the proof of Charge III and its Specification is here applicable and need not be repeated. The record is legally sufficient to support the findings of guilty of these four named accused of Charge III and its Specification.

(b) As to accused Ogletree there is not even a scintilla of evidence that he possessed fire-arms at the time and place alleged. The findings of Guilty of Charge III and its Specification cannot be supported on the basis of wrongful and unlawful possession of fire-arms. The finding of Ogletree's guilt of Charge III and its Specification will be treated hereinafter in connection with the finding of his guilt of Charge II and its Specification (joining in a riot).

(c) The accused Cradic belonged to the group of soldiers which included Engram, Flagg, Saffo and Kirksey (see paragraph 10 supra) who were seen with rifles by Lieutenant Saniter between 10:40 p.m. and midnight (178, 188). The four named accused were acquitted by the court of the charge of joining in a mutiny (Charge I and its Specifications) and committing a riot (Charge II and its Specification). Cradic, likewise, was acquitted of joining in a mutiny. The evidence against Cradic is of the same quality, weight and substance as that against the four mentioned accused and requires the same treatment as was accorded by the court in the latter instances. Cradic was undoubtedly guilty of wrongfully and unlawfully possessing a rifle at the time and place alleged, but even the prosecution's evidence exculpates him from further responsibility. Accordingly the Board of Review is of the opinion that the record is legally insufficient to support the finding of accused Cradic guilty of Charge II and its Specification (committing riot).

(d) As to accused James E. Johnson, evidence is wholly lacking as to any pernicious or illegal activity during the evening except his possession of a rifle which by his written statement (Pros.Ex.6) he admits he secured from the supply room. He was acquitted of the charge of joining in a mutiny (Charge I and its specifications). The Board of Review is of the opinion that the record is legally insufficient to support the finding of Johnson's guilt of Charge II and its Specification.

(e) There remains to be considered the guilt of Patterson, Mack and Ogletree of the charge of committing riot (Charge II and its Specification). Hereinbefore the essential elements of the offense have been set forth (paragraph 7c and d, supra). The Board of Review in its holding CM ETO 804, Ogletree et al, reference to which has been made herein, considered at length the nature of the offense of committing riot under the 89th Article of War, wherein military personnel is involved. It was there concluded that the crime could be committed at places other than "quarters, garrison, camp and on the march". However, such conclusion does not deny that a riot may be committed by soldiers within and upon a military reservation or establishment.

> "A riot is a riot even though the rioters are soldiers and it takes place in a military camp" (39 T.L.R.7; 54 C.J., sec. 3, p.830, footnote 25).

That a riot prevailed at AAF Station #569 on the night of 24-25 June 1943 has been adequately demonstrated. There was a violent disturbance of the public peace. Life and limb were put in jeopardy by the uncontrolled discharging of fire-arms, and many armed men were active in the disorders. Ammunition stores had been robbed and a condition of hysterical excitement prevailed. The fact that British civilians were not injured or threatened by the immediate disturbance in the camp is irrelevant.

> "Riot is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such. It involves the execution of an agreement, express or implied between three or more persons to commit an assault or battery or a breach of the peace. ****. The place where the riot occurs is immaterial. ****.
>
> The violent and turbulent enterprises of bodies of men have uniformly been considered as dangerous to the rights of other citizens. Thus where a band of persons makes an uproar and displays arms, or marches on a public street with violence and without a permit, or makes an assault accompanied with loud threats and threatening display of force, or forcibly destroys the property of another, a riot may be committed, often in combination with another offense. ****. Mischief makers may become rioters while indulging in a charivari, or in holiday celebrations. Intimidating or resisting civil officers may constitute a riot and so may the coercion of workmen.

> Malicious mischief, night disorders, pole raising, and prize fights may also become riots. The forcible appropriation of property is an act of riotous tendency, while public meetings are prolific sources of this offense. ****.
>
> The common law rule requires that three or more persons must act together in committing the offense, and most of the statutes defining riot provide that the offense cannot be committed by less than three persons. ****.
>
> It is not necessary that the riotous violence should have been premeditated by the assembled perpetrators; therefore the original assembly may have been by accident or for a lawful purpose. ****." (54 C.J., secs.3,4 and 5, pp.830,831,832).

The legal principles involved in determining the responsibility of Patterson, Mack and Ogletree are found in the following statements:

> "All persons who are actually or constructively present at the time and place of a crime, whether it is a felony or merely a misdemeanor, and who either actually aid, abet, assist, or advise its commission, or are there with that purpose in mind, to the knowledge of the party actually committing the crime, are guilty as principals in the second degree, although they did not themselves accomplish the purpose." (16 C.J., sec.117, p.130; 22 C.J.S., sec. 88a, p.157).

> "So, among offenders, the Articles recognize no principals, and no accessories either before or after the fact, as such. The grades of crimes and of participators in crime, familiar to the common law, are unknown to the law military, and the embarrassing technicalities which have grown out of the division of crimes into principal and accessorial are wholly foreign to the procedure of courts-martial. In the military practice all accused persons are treated as independent offenders. Even though they may be jointly charged and tried, as for participation in a mutiny for example, and each may be guilty of a distinct measure of criminality calling for a distinct punishment, yet all are principals in law." (Winthrop's Military Law & Precedents, Reprint, p.108).

"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).

Patterson's conduct during the disturbance and his participation therein is frankly revealed by his own testimony. The evidence of the prosecution serves only to high-light and explain it. He was first sergeant of the company. It is manifest that he had established leadership and influence over the enlisted men thereof. This leadership and influence was also recognized by the company officers. The fact that Major Heris in granting him permission to make the trip to the Warrington hospital elected to treat with him on an "individual to individual" basis and put him upon his "honor to return" unconsciously bespeaks volumes as to his position in the company and among his men. His stature in this respect cannot be ignored in analyzing his conduct on this occasion. It is, in fact, the most vital point in the case against him. Patterson became highly excited and reached an emotional stage approaching hysteria. There is substantial evidence that these demonstrations of emotional stress occurred in the presence of the men over whom he exerted more than usual influence. Reason and logic both dictate that such conduct on Patterson's part effectually served to increase the unrest and anger of the men who saw and heard him, and assisted materially in aggravating the disturbance. Considering the entire evidence with respect to Patterson, both the favorable and unfavorable, but one conclusion can be reached. Patterson was not a mere

spectator, by-stander or non-participant, but he was an aider and abetter in creating the riotous condition in camp. The fact that he occupied a position of influence and prestige made his conduct the more damaging to public peace, good order and military discipline. The Board of Review is of the opinion that the record is legally sufficient to sustain the findings that Patterson was guilty of joining in a riot (Charge II and its Specification).

Mack's case requires but little consideration. He was one of the armed men who rode in the carry-all to the gate and were stopped and turned back by Captain Anderson. Mack possessed a rifle and was using Government property without order or authority. A riotous condition prevailed in the camp at this time. Here was an overt act which stands undenied and unexplained. It convicts Mack of joining in a riot. The finding of the court is sustained by substantial competent evidence.

Ogletree's position is a peculiar one and requires special treatment. He and Adams had been shot in a street brawl with military police earlier in the evening. The fact that they had been wounded was the origin and cause of the disorders and disturbance which followed. Distorted narratives of the events occurring a short time previously in Bamber Bridge stirred the emotions and animosity of their fellow soldiers. Both wounded men returned to camp and were taken to the dispensary. Their presence excited curiosity and interest and their condition and actions directly influenced the conduct of the other soldiers. A group had gathered in front of the dispensary as Ogletree and Adams were assisted from the truck. Seizing this opportunity Ogletree in a pitch of excitement and anger shouted: "I am fighting. I am still fighting. Are you not going to get those guys?". Language of this nature coming from one of the victims of a supposed unfair attack would certainly serve to influence the sympathies of the auditors and incite them to acts of violence and breaches of the peace. Ogletree became thereby one of the principal originators of the disorder and he was certainly guilty of "joining in a riot" (Charge II and Specification). As heretofore noted there is no evidence that he was in possession of fire-arms. However, his harangue to the soldiers while being assisted into the dispensary also constituted "inflammatory statements in presence of other soldiers" under Charge III and its Specification and is complete proof of such offense.

It must be noted that making "inflammatory statements in the presence of other soldiers" (and thereby constituting the offense under the 96th Article of War) is part of the proof sustaining the charge of "joining in a riot" (under the 89th Article of War). This is not an improper multiplication of charges but since the two offenses were substantially the same transaction, the sentence must not exceed the maximum authorized for a single offense (MCM., 1928, par.80, p.67; CM 231710 (1943), Bul.JAG., Vol.II, No.5, May 1943, par.428(5), p.187; Cf: Dig.Ops.JAG., 1912-1940, par.428(5), pp.294,295). Ogletree's approved sentence includes dishonorable discharge, total forfeitures and confinement at hard labor for three years. There is no maximum limit for punishment for violation of the 89th Article of War, except that death is excluded (AW 43; MCM., 1928, par.104c, p.99). Consequently Ogletree has not been prejudiced.

12. The accused Davis, Wade, Gallier, Reed, Hill, Walter Johnson and Starks were found guilty of all charges and specifications. The seriousness of their offenses and the severity of the penalties inflicted upon them requires that the specific and particularized evidence of their conduct be analyzed in detail:

Prosecution's Evidence.

Defense's Evidence.

DAVIS

Captain Anderson testified that Davis appeared at the camp gate early in the disturbance and there encountered Captain Anderson. He was excited, wrathful and indignant. He delivered an ultimatum to Captain Anderson whereby he declared that he would be responsible for the good conduct of his men if the military police were removed; otherwise he would not be responsible. Upon Captain Anderson's refusal to entertain such proposition, Davis asked for permission to go through the gate to see if the military police were gone. Captain Anderson gave such permission. Davis went through the gate and upon his return said: "There is a whole detachment there". Captain Anderson answered: "You go back to the barracks and take the men with you and leave the MPs to me". Captain Anderson departed, and did not know if Davis and the men returned to barracks (R59,69,70-72).

Captain Milnamow saw Davis at the dispensary and asked him what he thought he would gain out of the demonstration and disturbance. Davis stated he did not think the MPs were giving them (colored soldiers) a "fair break" (R119).

Lieutenant McCarthy identified Davis as one of the soldiers who came into the crowd of soldiers at the company supply room. Lieutenant McCarthy asked him to help quiet the group. Davis said he could control them if proof was given that the MPs who did the shooting were under guard, and insisted that he and one or two

Captain Anderson amplified his testimony as to meeting Davis at camp gate. Captain Anderson replied to Davis' ultimatum: "You are not dictating to the United States Army". Davis replied: "No sir, I am not trying to dictate." Captain Anderson considered Davis' attitude as implying he had to look after his men. After that conversation Davis asked permission to go through the gate and such permission was granted (R414).

Private Harry Miles was a sentry at gate on night of 24 June. He allowed Davis to go through gate because he had a Class A pass (R150).

Davis testified as a witness on his own behalf (R457). In his conversation with Lieutenant McCarthy at the company supply room, Lieutenant McCarthy said to Davis: "Do something, do something". Davis asserted that he replied that he would try but there was nothing he could do unless he could get some assurance that the 19 men returning on pass would be able to return in safety and would not be subject to be shot as had been stated by some men. He claims he further said to Lieutenant McCarthy: "May I make a suggestion, sir? I believe if Captain Anderson assured the men that the men returning on pass could return in safety, the men might quiet down" (R459,466). Lieutenant McCarthy, Davis, Reed and Gallier started towards guardhouse. About 20 yards from barracks Lieutenant McCarthy said: "The men are following us". Davis replied: "I do not think they are following us. I think they are returning to their quarters". Davis

Prosecution's Evidence.
(Davis - cont'd).

other NCOs should see them under guard. Lieutenant McCarthy agreed to take Davis and Reed to see Captain Anderson. Gallier insisted upon accompanying them. Upon departing the crowd of soldiers followed. Wade was leading the group. Lieutenant McCarthy said to Wade: "Stop those men and take them back". Wade replied: "You stop them, I can not". Davis returned to the group and told them to wait for fifteen minutes and if he was not back with satisfactory answer they could do whatever they wanted (R137-140,146). Upon appearing before Captain Anderson, Davis was assured by Captain Anderson that all MPs were in the hospital. Davis insisted that all MPs be taken from the street. Major Heris then gave Davis permission to make inspection and Davis departed for town (R140,149). Davis returned and reported that the military police were on the street. Soon thereafter a military police armored car arrived at the gate. Davis yelled: "I am going back to get the company" (R141). Davis had no rifle during the evening (R147). He was not disrespectful but he did not help quiet the soldiers and he made demands (R149,154). When bed check was made at 5:00 a.m. on 25 June the barracks were locked. Lieutenant McCarthy talked to Davis who said all of the men were in but refused to open the doors of barracks for Lieutenant McCarthy (R152). Davis had been recommended for officers' candidate school by Lieutenant McCarthy, who considered him a good first sergeant (R151, 153,154).

Lieutenant Bjerke, upon hearing disturbance went to company head-

Defense's Evidence.

then told Wade to instruct the men to return to quarters. Wade asked Davis: "How long will you be gone?" Davis answered: "About 15 minutes". Wade spoke to the men and they did not follow. Davis specifically denied that he said: "If I am not back in 15 minutes, you men can do what you please." There were 40 or 50 men following and some had arms (R459,466,467,474). At the gate Lieutenant McCarthy and Davis talked to Captain Anderson who gave him permission to go to end of Access Road which he did. He saw military police and then returned and informed Captain Anderson who said he would take care of them (R459,468). Davis testified he informed Captain Anderson that he could not control his men because they were frightened that the men out on pass would be shot or hurt, and his men wanted an assurance that the others would return in safety (R467). Davis further denied that he had said to Lieutenant Huxtable that some of his men had been shot and that they would take things into their own hands (R474). On returning to barracks Davis asserted he found eight rifles which he picked up and put in racks - one outside and seven in the supply room. None had been fired. He had no other rifle in his possession that night (R459). Davis then went to the dispensary. Captain Milnamow and Lieutenant Bjerke came in. Davis appealed to Lieutenant Bjerke for a detail of ten men to pick up rifles which was refused (R460). Davis asserted that none of the company officers gave him a direct order that night. He was only told to return to his barracks (R474). There was a rifle in hall of dispensary and some ammunition on a table (R475). Davis further denied that he said to Captain Milnamow that he thought the MPs were not giving his men a fair chance. Captain

Prosecution's Evidence.
(Davis - cont'd).

quarters and saw Davis in his room. Davis said two of his men had been shot in cold blood. Lieutenant Bjerke asked Davis to talk to men and quiet them down. He was asked by Lieutenant Bjerke a second time. Davis replied: "Yes,Sir", but did not accompany Lieutenant Bjerke into the barrack hallway where many men had congregated (R156). Lieutenant Bjerke accompanied Lieutenant McCarthy, Davis, Reed and Gallier to see Captain Anderson. Lieutenant Bjerke heard Davis say: "On condition that we get to see Captain Anderson and have MPs put in confinement". As the party started for main gate and soldiers attempted to follow Davis said to them: "If I am not back in 15 minutes you can do what you like" (R161). Upon reaching gate Davis asked Captain Anderson about having the military police confined. Captain Anderson replied: "You are not dictating to us" (R162,170).

Lieutenant Arcuri saw 12 or 15 men with rifles, helmets and gas masks in front of B building. Davis was among them. Lieutenant Arcuri told Davis he should take himself and men back to company area. Davis refused saying he would not leave until he was sure the men in Bamber Bridge were safe. Davis had a rifle which he carried at port-arms, but Lieutenant Arcuri did not know whether he had helmet or gas mask (R194,197, 198).

Lieutenant Huxtable saw Davis at gate about 11:00 p.m. with Lieutenants McCarthy and Bjerke. Davis said something about the men being shot in the back and that something ought to be done about it. Davis further said that they (meaning the soldiers) were going to take things into their own hands if something were not done about it (R271-274).

Defense's Evidence.

Milnamow asked: "Have you had any trouble down town?" Davis answered: "Yes, on numerous occasions I have been stopped by the MPs and asked to present my pass seven or eight times" (R474). Davis asserted he saw no one point a rifle at the armored car and heard no shot when it left (R475).

Captain Milnamow testified he saw Davis at dispensary but did not see him with rifle or other weapon up to 2:00 p.m. (R478). In the course of a conversation between Captain Gerardot, Lieutenant Warjackie, Lieutenant Bjerke and Captain Milnamow, Davis said Lieutenant Sylvester was not a good company officer, did not hold the esteem of his men and did not display enough military bearing. None of the officers agreed with or contradicted Davis. Davis was not disrespectful. When Captain Milnamow asked Davis what he expected to achieve by his actions, Captain Milnamow referred to enlisted personnel as a whole and not to Davis in particular (R480).

Private Ludlow Swafford saw Davis at the gate with Lieutenant McCarthy but Davis had no rifle (R482).

Private Harry Miles also saw Davis at gate talking to Lieutenant McCarthy but Davis had no rifle (R486).

Sergeant Eugene C. Wilks was on duty at camp dispensary between 1:00 a.m. and 4:00 a.m. on 25 June 1943. Davis was present but had no rifle, ammunition or helmet (R487,488).

Prosecution's Evidence.

Defense's Evidence.

WADE

Lieutenant McCarthy asserted that Wade had a rifle while standing at company store room door. Lieutenant Bjerke attempted to take it, but Wade turned his back on him (R138). Wade was in front of group that followed Lieutenant McCarthy, Davis and Reed to see Captain Anderson. Lieutenant McCarthy said to Wade: "Sergeant, stop these men and take them back". Wade replied: "You stop them, Sir, I cannot" (R139). Wade had a rifle but he stopped with his men (R146,147).

Lieutenant Bjerke was at the company headquarters with Lieutenant McCarthy. Wade and other men had rifles (R157). There were about 30 or 35 men outside gun room. Lieutenant Bjerke requested Wade to surrender rifle. Wade turned his back and made no reply (R157,160,173,174).

Wade as a witness on his own behalf asserted he was in his barracks from about 6:00 p.m. to 11:30 p.m. on 24 June 1943 when he heard a disturbance outside. Lieutenant McCarthy came to the barracks and talked to the men (R488). Wade did not hear what Lieutenant McCarthy said. He left his barracks followed by the men and Wade. It was about 11:45 p.m. Lieutenant McCarthy was going to see Captain Anderson. Lieutenant McCarthy said he did not want the men to go to the gate. Davis told Wade "to take over". Wade told the men to go back to the barracks. They complied. Wade went with them. Wade did not have a rifle at that time (R490,492). At time Lieutenant Bjerke was talking to men several put their rifles on floor. Wade picked one up and put it in his room to prevent men from walking on it. Did not have any ammunition (R492). The arms were all carbines - not rifles. Wade denied that he turned his back on any officer when the officer tried to take a carbine from him (R492,494). The men put their carbines down before following Lieutenant McCarthy (R493). Wade was in room with Sergeant Watts when officers were stopped and then allowed to go through when Wade cleared way (R494).

Sergeant Fred Watts was roommate of Wade. Around 10:00 p.m. Wade brought a rifle into the room and placed it behind the door. Heard someone outside tell Wade to put rifle away. Wade went out and later came back and went to bed (R495-497).

Prosecution's Evidence. (Wade - cont'd).

Defense's Evidence.

Sergeant R.H.Wright saw Wade between 11:30 p.m. and 12 midnight on 24 June in exit door of barracks. Lieutenant McCarthy was talking to men. Wade had no rifle, although there were carbines on floor of hall (R498-500).

GALLIER

Lieutenant McCarthy saw Gallier with a carbine at company supply room door. He was hysterical. Lieutenant McCarthy shook him by the arms, but he did become quiet (R138, 146). Gallier insisted upon accompanying Lieutenant McCarthy, Davis and Reed to see Captain Anderson. He was ordered to return but refused to obey and continued with the three men. When Davis was authorized to go outside the gate Gallier attempted to accompany him, Lieutenant McCarthy ordered him back (R139,140). Gallier took a rifle to the gate (R149) and he was the one soldier to whom Lieutenant McCarthy gave a direct order to return to barracks (R153).

Lieutenant Bjerke saw Gallier with rifle at headquarters (R157). Gallier accompanied Lieutenants McCarthy and Bjerke and Davis and Reed to see Captain Anderson. He was excited but Lieutenant Bjerke "could not say he was raising against authority" (R161, 163).

Gallier remained silent.

REED

Lieutenant McCarthy saw Reed in front of company supply room door. He was armed with a rifle and refused to surrender it on request. He was hysterical and tears were running down his face. He said his race was down trodden and that he would rather fight for his race than he would against out enemies (R137,138,144, 146). Reed accompanied Lieutenant McCarthy and Davis to see Captain

Sergeant R.H.Wright saw Reed the night of the disturbance talking to Lieutenant McCarthy but he had no rifle (R501,502).

Reed, as his own witness, stated he had been in town on a pass returning about 10:40 p.m. He saw Lieutenant McCarthy at company barracks between 11:00 p.m. and 11:30 p.m. He went to camp gate with Lieutenant McCarthy, who picked

Prosecution's Evidence.
(Reed - cont'd).

Anderson. Reed carried a rifle with Lieutenant McCarthy's permission and it was Lieutenant McCarthy's idea that Reed go with him to the gate (R139,147). After Davis had departed for town under Captain Anderson's permission Reed was with colored soldiers in front of the guardhouse who were talking of ill-treatment of their race. Reed said in effect that he would rather fight for his race than he would against our enemies (R140,141).

Lieutenant Bjerke testified Reed was one of the men who had rifles in the company headquarters (R157). When accompanying Lieutenant McCarthy's party to the camp gate Reed talked about his down trodden race. He was excited but Lieutenant Bjerke could not say he was raising against authority (R161,162).

Reed had made a previous written statement to the Inspector General, which on Reed's cross-examination was admitted in evidence with cautionary instruction against its use with respect to co-defendants (R507-512). The part of the statement, which conflicts with Reed's testimony was read to the court. It was offered by way of impeachment only (R513). In part it reads as follows: "I changed to fatigue clothes. I could hear men running towards the rifle room. I went down and found out that someone had kicked in the lower part of the door to the rifle room and the carbines were laying outside the room. I took one in my hands. The reason I took this gun was because I had heard that the M.P's were coming to the camp with machine guns, hand grenades, and riot guns. If they came, I wanted to protect myself. I had no ammunition and I did not see anyone else with any. I had the gun in my hands only a few minutes when Lieutenant Joseph McCarthy and Lieutenant Jeroy Bjerke appeared. They told the men not to get excited, and that they would only get themselves in trouble. By this time most of the men

Defense's Evidence.

Davis and Reed to accompany him. Neither Davis nor Reed had a rifle on the trip. Before he went to gate he picked up a rifle in the hallway of the barracks near air-raid shelter and latrine. He carried it to door of store room. He met Lieutenant McCarthy at store room door as he held rifle in his hand. He picked up the rifle in order to put it in store room. Lieutenant McCarthy said nothing to Reed about rifle. It was left standing at supply room door when Reed went to gate (R503-505).

Prosecution's Evidence.
(Reed - cont'd).

had their guns. Most of the men listened to the officers and stayed in the company area, but they kept their guns ****. At the guard house there were about fifty (50) colored soldiers, most of them with rifles. Captain Anderson and Lieutenant Sylvester were there. Sergeant Davis talked with Captain Anderson. The men around there were talking among themselves and saying they did not like the way the colored men had been treated, and that now was the time to stand up for their rights ****. When I left the rifle room to go to the guardhouse I gave my carbine to someone standing nearby ***." (R513).

Defense's Evidence.

HILL

Captain Anderson positively identified Hill as being one of the armed men who were in the carry-all which he stopped as an attempt was made to drive it from the camp gate. Captain Anderson's jeep was parked in Access Road. After Hill had been stopped he said to Captain Anderson: "Captain, I'd move that jeep if I were you." Hill entered the jeep and tried to move it but Captain Anderson removed the keys and ordered him out of it and back to quarters but Captain Anderson did not believe Hill returned to quarters (R57,58,66,70,71).

Lieutenant Saniter saw Hill while an armored car was at the camp gate about 11:15 p.m. Hill was behind a carry-all which stood at the entrance to the motor pool on left-hand side of Access Road facing inward. Hill pointed a rifle at the armored car and told Lieutenant Saniter to get out of the line of fire. Lieutenant Saniter withdrew and did not attempt to take Hill's rifle nor order him to give it to him (R188). Hill was not on guard that night and had no right to possession of rifle (R189).

Lieutenant Willis saw Hill talking to Major Heris who called him (Willis) Hill remained silent.

Sergeant Louis Phillips and Sergeant Nesbitt Johnson each testified that Hill's reputation for truth and honesty was "allright" and that Hill was of value to the military service (R758,759).

(Prosecution's Evidence. (Hill - cont'd).

Defense's Evidence.

over to him and said: "This man says he has had military police experience. Why don't you take down his name?" Hill then had a rifle. Lieutenant Willis took his name but no orders were given Hill to surrender his rifle (R264). Shortly afterwards an armored car appeared at the gate. Hill walked over to a carry-all, then standing near motor-pool and put his gun over the hood and pointed it at the armored car. Lieutenants Willis and Saniter walked in Hill's direction and Hill said to Lieutenant Saniter: "Lieutenant, you are a pretty good fellow. I wouldn't want to see you get hurt. You had better get out of the line of fire" (R264).

WALTER JOHNSON

Lieutenant Ryland testified he made a bed-check at 4:30 a.m. and there was a man asleep in Johnson's bed but he did not see Johnson (R216). Lieutenant Ryland did not authorize Johnson to take a rifle or drive a jeep from camp that night (R216,218).

Staff Sergeant Gordon B. Hicks testified he saw Johnson in Manchester about 8:00 p.m. on 25 June 1943 on Brunswick Street; he was in a jeep but had no trip ticket. He wore fatigue clothes. In the back of the jeep was a 30-30 Government rifle. Johnson gave Hicks 25 rounds of ammunition. Hicks walked up to Johnson and told him: "we wanted him to go in". Hicks had been appointed by Colonel Conley, acting commander of the Quartermaster Regiment, as head of a group of soldiers to "gather in" rifles and "pick up" men on the street. Johnson told Hicks he knew where some more men were and took Hicks to an air-raid shelter and then disappeared (R306,307). Hicks asked Johnson: "What the hell he was doing down here with a gun?" Johnson

Johnson remained silent.

Prosecution's Evidence.
(Walter Johnson - cont'd).

replied: "I did not take the jeep." Hicks said: "What are you doing with the gun then?" Hicks did not see Johnson during the night of 25 June after he disappeared (R308), but picked him up between 10 and 11:00 a.m. on 26 June near Tottenham Club on Brunswick Street in Manchester and brought Johnson to camp and placed him in guardhouse (R312,313). Hicks did not examine Johnson's rifle but delivered it to Provost Marshal (R314). An extract copy of the morning report of the 1933rd company for 25 June 1943 was introduced in evidence showing:

"Pvt.Johnson,W. duty to AWOL HIR"
(Pros.Ex.5; R339-341).

Purcelle T. Johnson named Walter Johnson as a person who criticized him during the time of the disturbance in camp for his (Purcelle's) conduct towards other soldiers (R661, 662).

Defense's Evidence.

STARKS

Staff Sergeant Victor J. Webber was a member of 234th Military Police Company. He was returning after midnight on the 24-25 June 1943 from Bamber Bridge to Preston in a command car. A 1½ ton truck approached, driven in direction of Bamber Bridge. It blinked its lights and passed Webber's car and at a distance of about 25 yards stopped. Webber and three other police stopped their car and dismounted. A colored soldier got off the truck, came around to the back of it and gave a whistle. Corporal Brown, one of the policemen, ordered the soldier "to keep coming as he was covered". The soldier came to the command car and was searched. He had four rounds of .30 caliber ammunition in his pocket, and in the truck was a 1903 Government rifle (R294,295). Webber looked at the "dog tag" on the soldier and it identified him as

Starks remained silent.

Prosecution's Evidence. (Starks - cont'd).

Defense's Evidence.

Private William Starks. He was taken under arrest to the military police station in Preston. A month later Webber "picked" Starks "out" of a "chow line" at camp (R295-297). At time of arrest Webber asked Starks for a trip ticket and Starks replied he was returning from a dance in Manchester and had none. He said it was customary to carry a rifle. He wore a steel helmet and a "Class A" uniform. He was the only person in the truck and Webber was under impression that Starks blinked the truck lights to make contact with someone (R297).

Sergeant Walton Shetley of 234th Military Police Company was with Webber at time Starks was apprehended. He testified substantially to the same facts as stated by Webber (R298-300, 302). Shetley later saw Starks in orderly room when he was interviewed by Colonel Wallace. At that time Starks claimed he had been to a dance in Manchester (R301). Shetley was with Webber, when the latter identified Starks in the "chow line" two days before commencement of trial. Webber and Staff Sergeant Dumore took Starks to Preston. Witness drove the truck (R301,302).

Starks gave a written statement dated 25 June 1943 to Master Sergeant Roger A. Pendry (R380-395) which was admitted in evidence as Pros.Ex.11. Its pertinent part is as follows: "At about 9:15 p.m., I went over to our mess hall to get some coffee and sandwiches. I could not get anything at the mess hall but was told that about 11:00 p.m. I could get something to eat. I went to my barracks and in a little while one of the other soldiers passed my barracks and I heard him say that two of the boys got shot in the back by the M.P's. The talk of our two boys being shot spread over camp and

Prosecution's Evidence. (Starks - cont'd).

Defense's Evidence.

quite a few fellows got rifles and ammunition. I went up to the gate of the front entrance into camp where quite a few fellow soldiers with rifles were standing. I did not have a rifle at this time. ****. I then went over to the mess hall and got some sandwiches and was on my way back to the guardhouse which is next to the front gate, when a soldier passed me and said 'Don't go down there. Some M.P's are down there in an armory car'. I went to one of the barracks where I left the sandwiches. I then went to my barracks where one of the boys told me to go over to one of the barracks and get a rifle. I went over to this barracks and got a rifle out of the supply room which had been broken into. One of the fellows told me to go behind the guard house where I could get some ammunition. I went behind the guard house and a fellow gave me a full clip and four rounds of ammunition. I put the full clip in my rifle. When I say behind the guard house I mean in a room in back of the guard house building. ****. I went over to the motor pool where I got the truck which is usually assigned to me and I drove out the front gate alone. I had my rifle with the full clip and four rounds of ammunition in my pocket. I had my helmet with me at the time I got the rifle at first. When I drove out the gate several fellows called and asked for a lift, but I did not stop as I was intending on driving to Manchester to stay all night. ****. I drove about 10 miles along the Manchester highway and then decided to go back to camp as my truck would probably be checked. Just before I got back to camp, I saw a peep coming toward me and the peep's lights were blinked at me several times. I thought some of my fellows were in the peep, so, I stopped and walked over to the peep. An M.P. got out of the peep with a Tommy Gun and asked me who

Prosecution's Evidence. (Starks - cont'd).

Defense's Evidence.

was with me. I told him no one was with me. Upon being ordered, I got into the peep with the M.P's, and one of the M.P's drove my truck as we came to M.P. Headquarters in Preston. When I got out of the truck to go over to the peep, I had left my loaded rifle in the truck. ****. I left the post without a pass and did not have a trip ticket for the truck or any permission to take the truck on 24 June 1943." (Pros.Ex.11).

(a) The defense made vigorous objections to the admission of evidence as to the breach of the peace and rioting occurring in the town of Bamber Bridge (described in CM ETO 804, Ogletree et al) prior to the outbreak of violence and disorder in AAF Station #569 (R34-36,54). These objections were overruled. The defense also moved to strike evidence of acts of violence, disorder and rioting which occurred in places distant from the camp, simultaneously with the rioting in the camp. These motions were particularly directed at the testimony of the civilian witnesses Constable (R106), Laidler (R109,110) and Ashcroft (R112) and of Private First Class Miller (R259). Thereafter the defense moved to exclude all evidence pertaining to incidents in Bamber Bridge on the ground that same had not been shown to be connected with the accused who were accounted for in camp (R265). All of these motions were severally denied.

In considering the guilt of the accused named in paragraphs 10 and 11 hereof the Board of Review elected to ignore the effect of evidence of the rioting and disorder occurring exterior to the camp and based its conclusions on the facts and conditions proved as existing solely at the station. Consideration of evidence of the prior riot in Bamber Bridge and of the evidence of subsequent violence and disorder prevailing at places exterior to the camp was postponed until the cases against the seven accused named above in this paragraph were discussed, but such consideration is of course, equally applicable to all of the accused.

The testimony of Major Heris (R34,35,36) and of Corporal Roy A. Windsor (R54) refers to the prior riot on Station Road in Bamber Bridge in which Ogletree and Adams were wounded. One of the first questions arising in the mind of the court would be as to the cause of the outbreak in camp. Such events as occurred at AAF Station #569 do not simply happen; they are caused or motivated by some situation or some condition. The testimony which defense considered objectionable in this respect was highly illuminating to the court. It was thereby informed that street fighting had previously occurred in which soldiers stationed at AAF Station #569 and military police were involved; that policemen were injured and two colored soldiers were shot; that the wounded soldiers returned to camp and that there resulted from this combination of circumstances the disorders and

disturbances giving rise to the instant charges. The testimony was admissible as evidence of motive and intent on the part of the accused and in explanation of the cause of their subsequent conduct (31 C.J.S., sec.178, p.879; Jones on Evidence - 2nd Ed. - sec.138, p.154; 20 Am.Jur. Evidence, sec.273, pp.260,261; Cf: Ulrich vs. Schwarz, 225 NW(Wis) 195, 63 ALR 886).

The motions to strike the evidence of the acts of violence and disorder at places exterior to the camp but occurring simultaneously with the disorders in the camp itself, are directed primarily at proof of the ten episodes hereinabove specifically narrated. It must be frankly admitted that except as to Doakes (who was acquitted) there is no proof that any accused were actors in or were present at these riotous and violent events. The admission of evidence pertaining to same must therefore be justified on some other basis than accuseds' actual physical participation therein.

Beyond all doubt the persons who committed these unlawful acts were colored soldiers from AAF Station #569. There is reliable substantial evidence that a number of them without permission left the station soon after rumors concerning the shooting of Ogletree and Adams spread through camp. They were armed with rifles and in possession of ammunition. At least two and probably more, government motor vehicles occupied by armed men were driven from camp. Some of the exterior acts of violence occurred on public streets immediately adjacent to the camp, and were in fact part of the camp disorders. Others transpired considerable distances from the camp and there were other episodes which had their situs within lesser distances. To determine the admissibility of this evidence on the basis of distances from camp of the occurrence of the several events is an irrational treatment of the situation and denies its actualities.

The legal principles set forth in paragraph 11g, pp.50,51 hereof are applicable. The accused together with the soldiers who committed the wrongful illegal acts out of their presence were engaged in a common enterprise, were motivated by a common cause and possessed a common purpose. The serious disorders and breaches of discipline which arose in camp and the ten episodes within the town of Bamber Bridge were part and parcel of a single unlawful demonstration. The court was entitled to be informed as to the nature and extent of the disturbance as a whole. The distinction asserted by the defense between acts of violence without the camp and those within the station limits was artificial and without merit. The denial of the motions to strike evidence pertaining to the violence and disturbances exterior to the camp limits was proper.

(b) Walter Johnson's guilt is dependent upon the following evidence:

(1). The testimony of Purcelle T. Johnson (R661,662) on cross-examination wherein he named Walter Johnson as a person who criticised him during the time of the disturbance in camp for his (Purcelle's) conduct towards certain other soldiers. The Law Member committed error in his attempt to exclude this testimony (MCM., 1928, par.120d, p.125; 28 USCA,

sec.632; Wolfson v. United States 101 Fed.(5 Cir.) 430,436, cert.den. 180 U.S. 637, 45 L.Ed., 710.) It was admissible evidence and will be considered by the Board of Review.

(2) The morning report of the company which showed Walter Johnson's absence without leave on 25 June 1943, which was clearly admissible in evidence on the authenticating evidence presented to the court (R339-341).

(3) The testimony of Sergeant Hicks that he apprehended Johnson about 5:00 p.m. on 25 June 1943 in Manchester - 60 miles from camp - in possession, without authority, of a government motor vehicle, a rifle and ammunition; that Hicks asked Johnson: "What the hell he was doing down here with a gun?"; that Johnson replied: "I did not take the jeep," and that Hicks then said "What are you doing with the gun then"; and that Johnson through an artifice escaped from Hicks' custody but was again apprehended on the morning of 26 June 1943 in Manchester (R308,312,313).

The evidence proves that Johnson was absent without leave; that he was unlawfully in possession of Government property at Manchester and that he escaped from custody (AW 96), but these are not the offenses with which he was charged and upon which he was brought to trial. Hicks' evidence pertained to episodes occurring at least twelve hours subsequent to the termination of the disturbance in camp and at a location sixty miles distant therefrom. They were too remote, both as to time and place, to possess any relevancy to the offenses charged. Purcelle T. Johnson's testimony placing Walter Johnson in camp during the tumult and rioting and evidence of Walter Johnson's absence without leave form a connection too nebulous in character to serve as proof of any participation in the offenses alleged. Under such circumstances there is a fatal variance which constituted a total failure of proof of the offenses alleged (31 C.J., sec.459, p.845; CM 224109, Bul.JAG., Sep 1942, Vol.I, No.4, sec.427(6a), p.214; CM 120948, CM 120949, Dig.Ops.JAG., 1912-1940, sec.451(43), p.327). As to Walter Johnson the record is legally insufficient to support the findings of guilty and the sentence.

(c) With respect to the guilt of accused Davis, Wade, Gallier, Reed, Hill and Starks of the offenses of committing a riot (Charge II and its Specification) and wrongfully and unlawfully possessing fire-arms (Charge III and its Specification) the legal principles involved have been fully discussed (pars.10 and 11 supra), and repetition of same is unnecessary.

The fact that a serious riot arose at AAF Station #569 on the night of 24-25 June 1943 has hereinbefore been demonstrated. Davis, Wade, Gallier, Reed, Hill and Starks were each at the scene of the riot. Their guilt of "committing a riot" is dependent upon their participation therein by actually aiding, abetting, assisting or advising the execution of same (CM ETO 804, Quletreo et al). The evidence as to their respective actions and conduct has been carefully summarized above. None of them were

spectators, by-standers or non-participants but each accused was active in either promoting or aggravating the disturbance. In spite of conflicts in the evidence and explanatory evidence on behalf of certain accused the findings of the court that each of them committed a riot are supported by substantial and convincing evidence. The Board of Review is of the opinion that as to these named accused the record is legally sufficient to support the findings of guilty of Charge II and its Specification.

Each of them, during the course of the night was in possession of a rifle or carbine and there is substantial evidence fully supporting the court's finding that such possession was wrongful and unlawful. The record is legally sufficient to support the finding of their guilt of the offense alleged in Charge III and its Specification.

(d) Davis, Wade, Gallier, Reed, Hill and Starks are each charged (Charge I) with (1) joining in a mutiny against the lawful authority of the camp commander (Specification 1) and (2) joining in a mutiny against lawful authority of the military police (Specification 2) with the intent of usurping, subverting and overriding the authority of the camp commander in the first instance and the authority of the military police in the second instance.

Mutiny is defined:

> "Concerted insubordination, or concerted opposition or resistance to, or defiance of, lawful military authority, by two or more persons subject to such authority, with the intent to usurp, subvert, or override such authority, or to neutralize it for the time being." (MCM., 1917, par.417, p.213; MCM., 1928, par.136, p.150; Dig.Ops.JAG., 1912, XXII A, p.123; Winthrop's Military Law & Precedents - Reprint - p.578).

One of the principal elements of mutiny is the intent to override, supplant or neutralize lawful authority.

> "The intent which distinguishes mutiny **** is the intent to resist lawful authority in combination with others." (MCM., 1928, par. 136a, p.151).

> "Mutiny has been variously described, but in general not in such terms as fully to distinguish it from some other military crimes, the characterizing intent not being sufficiently recognized. ****. It is this intent which distinguishes it from the other offences ***. The definition of mutiny at military law is indeed best illustrated by a reference to

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the adjudged cases treating of that offense as understood at maritime law. Thus, in regard to mutiny or revolt on American merchant vessels it has been expressly held that an intention to overthrow for the time at least the lawful authority of the master is an essential element of the crime, that simple violence against the officer, without proof of intent to override his authority, is not sufficient to constitute revolt or mutiny, that mere disobedience of orders, unaccompanied by such intent, does not amount to mutiny, and that insolent language or disorderly behavior is per se insufficient to establish it." (Winthrop's Military Law & Precedents - Reprint - pp.578-580).

Winthrop discusses the proof of this specific intent as follows:

"The intent may be openly declared in words, or it may be implied from the act or acts done,- as, for example, from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a rescue or attempt to rescue a prisoner, a stacking of arms and refusal to march or do duty, a taking up arms and assuming a menacing attitude, &c; or it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of combination- that the opposition or resistinance is the proceeding of a number of individuals acting together apparently with a common purpose- is, though not conclusive, the most significant, and most usual evidence of the existence of the intent in question." (Winthrop's Military Law & Precedents - Reprint - pp.580-581).

The second fundamental element of the offense is proof of the opposition to authority by the commission of some overt act:

"While the intent indicated is essential to the offence, the same is not completed unless the opposition or resistance be manifested by some overt act or acts, or specific conduct. Mere intention however deliberate and fixed, or conspiracy however unanimous, will fail to constitute mutiny. Words alone, unaccompanied by acts, will not suffice." (Winthrop's Military Law & Precedents - Reprint - p.581).

"The opposition or resistance need not be active or violent. It thus may consist simply in a persistent refusal or omission (with the intent above specified,) to obey orders or do duty." (Winthrop's Military Law & Precedents - Reprint - p.581; Southern Steamship Co. v. National Labor Relations Board, 316 U.S. 31,40-41, 86 L.Ed., 1246, 1256).

"There can be no actual mutiny or sedition until there has been an overt act of insubordination joined in by two or more persons. Therefore no person can be found guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person is not guilty of beginning a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; and a person can not join in a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases." (MCM., 1928, par.136b, p.151) (Under-scoring supplied).

The 66th Article of War provides in pertinent part:

"Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny *** in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct." (Underscoring supplied).

The acts of disorder and violence, breaches of the peace, and the disobedience of orders and regulations which occurred at the time and place alleged have been described in detail. This evidence fully sustains the conclusion that AAF Station #569 and the surrounding and adjacent territory, including a principal part of the town Bamber Bridge were on the night of 24-25 June 1943 the scene of a tumultuous, riotous, illegal and wrongful disturbance against the peace and good order of the community. This disorder was not only a riot but the many acts of violence in the aggregate constituted insubordination to superior military authority joined in by two or more persons.

Breaking into gun and ammunition storage rooms and the unauthorized taking of arms and cartridges therefrom; seizure of motor equipment and the driving same from camp; halting and examining of officers, who were engaged in lawful missions; discharge of fire-arms at military police, and the glaring and humiliating fact that the camp officers required the withdrawal

of the military police in order to prevent further and increased anger and violence on the part of the soldiers, is substantial evidence of the specific intent to override the authority of the military police in which the soldiers exhibited animosity and a spirit of revenge and also of the intent to override and neutralize the authority of the camp commander and his subordinates in order to accomplish the ulterior purpose of attacking the police and subverting and destroying their authority. All of the elements of a mutiny were therefore manifestly present (CM 116735, CM 122535, CM 122396, CM 145286, Dig.Ops.JAG., 1912-1940, sec.424, pp.288,289).

A mutiny at the time and place alleged in the specifications (Charge I, Specifications 1 and 2) against the authority of the camp commander and of the military police having been established, the guilt of the six named accused (Davis, Wade, Gallier, Reed, Hill and Starks) is dependent upon the proof that they each joined in the same and committed one or more overt acts of insubordination. This question was essentially one of fact for the court which listened to the testimony as it unfolded, had seen the witnesses and had observed the demeanor of the accused in the court toom over a period of several days. Proof of "joining in a mutiny" and of "overt acts" can be sustained without evidence of acts of physical violence. Speech, temperate and mild in delivery, or actions, harmless in themselves, can constitute inculpatory conduct in offenses of the nature of mutiny, when considered with the surrounding facts and circumstances. A clever and intelligent person by appropriate and insidious utterances can incite and encourage insubordination and unlawful conduct in a manner and degree equally effective and dangerous as any physical acts he might commit. The power of suggestion when used propitiously by a leader of a mob sometimes obtains results that no other means can secure. Davis, Wade, Gallier and Reed exhibited themselves as effective agitators and promoters of the mutiny by the use of these subtle, poisonous means. On the other hand, Hill and Starks each committed acts of a most violent character which were obviously directed against constituted authority. The evidence relating to the actions and conduct of the named accused during the course of the mutiny, in the opinion of the Board of Review fully sustains in a most convincing manner the finding that each of them joined in and materially aided in the overriding and neutralizing of the authority of both the camp commander and military police by the commission of overt acts over and above mere expressions of sympathy with the unlawful demonstration of the soldiers. In the opinion of the Board of Review the record is legally sufficient to sustain the findings of the court that Davis, Wade, Gallier, Reed, Hill and Starks were guilty of joining in a mutiny (Charge I and its specifications).

13. The charge sheet shows the service of the several accused as follows:

ENLISTED (E) or INDUCTED (I)

Accused.	Place.	Date.
Davis	(E) Fort McArthur, Cal.	31 Aug 1940
Wade	(I) Camp Blanding, Florida.	27 May 1941
Gallier	(I) Camp Livingston , La.	2 Dec 1941
Reed	(I) Fort Oglethorpe, Ga.	8 Sep 1941
Williams, Ed.R.Jr.,	(I) Camp Shelby, Miss.	2 Dec 1941
Frelot	(I) Camp Livingston, La.	1 Dec 1941
Patterson	(E) Pittsburg, Pa.	29 Aug 1940
Hill	(I) Fort Benning, Ga.	13 Sep 1941
Ogletree	(I) Fort Benning, Ga.	13 Sep 1941
Cradic	(I) Fort McArthur, Cal.	23 Apr 1941
Saffo	(I) Fort Benning, Ga.	6 Aug 1941
Engram	(I) Fort Benning, Ga.	11 Sep 1941
Flagg	(I) Fort McArthur, Cal.	23 Apr 1941
Kirksey	(I) Camp Blanding, Fla.	20 Aug 1941
Horton	(I) Fort Benning, Ga.	22 May 1941
Arbuckle	(I) Camp Forrest, Tenn.	7 Jan 1942
Avery	(E) Charlotte, N.C.	12 Jan 1942
Kendall.	(I) Fort Benning, Ga.	20 Oct 1941
Mack	(E) Fort Bragg, N.C.	23 Dec 1941
Wise	(E) Richmond, Va.	13 Oct 1939
Johnson, Walter.	(I) Camp Blanding, Fla.	5 Jun 1942
Roach	(E) Boston, Mass.	22 Oct 1942
Smith	(I) Camp Blanding, Fla.	4 Aug 1942
Terrell	(I) Camp Upton, N.Y.	22 Jul 1941
Grigg	(E) New York City, N.Y.	12 May 1941
Johnson, James E.	(I) Fort George Meade, Md.	9 Oct 1941
Starks	(I) Huntington, W.Va.	10 Jun 1941

14. (a) The approved sentences of Davis, Wade, Gallier, Reed, Hill and Starks for violation of the 66th, 89th and 96th Articles of War: dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Davis for 10 years, Wade for seven years, Gallier for seven years, Reed for nine years, Hill for 10 years and Starks for eight years, are legal. Conviction of the crime of mutiny would sustain penitentiary confinement (AW 42). However, the designation of the disciplinary barracks as the place of confinement of the named accused is authorized. Pursuant to pars.1 and 2, Section II, WD, Cir. #321, 11 December 1943, as amended by Section II, WD, Cir.#331, 21 December 1943, the place of confinement should be changed from Eastern Branch, United States Disciplinary Barracks, Beekman, New York to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

(b) The approved sentences of Patterson, Ogletree, Cradic, Mack and James E. Johnson for violation of the 89th and 96th Articles of War: dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Patterson for seven years, Ogletree for three years, Cradic for two years, Mack for three years and

James E. Johnson for two years, are legal. The offenses of which accused were found guilty require confinement in the disciplinary barracks and not a penitentiary (AW 42). Pursuant to pars.1 and 2, Section II, WD, Cir. #321, 11 December 1943 as amended, the place of confinement of Patterson, Ogletree and Mack should be changed from Eastern Branch, United States Disciplinary Barracks, Beekman, New York to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. The 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, is the authorized place of confinement of Cradic and James E. Johnson. However, the sentences of Cradic and James E. Johnson to dishonorable discharge should be suspended during period of confinement (par.8b and c, Cir. #72, ETOUSA, 9 Sep 1943).

(c) The approved sentences of Edward R. Williams, Jr., Frelot, Saffo, Engram, Flagg, Kirksey, Horton, Arbuckle, Avery, Kendall, Roach, Smith, Terrell, Grigg and Wise of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Avery for two years, Kendall for three years and the others of the named accused for one year each are authorized sentences. The named accused were convicted of an offense under the 96th Article of War for which no statutory maximum punishment is fixed, except that the sentence of death is prohibited (AW 43). The Table of Maximum Punishments (MCM., 1928, par.104c, p.97) does not prescribe a maximum punishment for the offenses of which accused were convicted (1) wrongfully and unlawfully seizing arms and ammunition; (2) wrongfully and unlawfully bearing arms. Neither does the table prescribe a maximum penalty for an offense closely related to these offenses. "Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service" (MCM., 1928, par. 104c, p.96). The sentences are therefore legal. The place of confinement of Kendall should be changed from Eastern Branch, United States Disciplinary Barracks, Beekman, New York to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York which is the authorized place of confinement for him (pars.1 and 2, Section II, WD, Cir. #321, 11 December 1943 as amended). The 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, is the correct place of confinement of the other named fourteen accused. However, as to them the sentences of dishonorable discharge should be suspended during period of confinement (pars.8b and c, Cir. #72, ETOUSA, 9 Sep 1943).

15. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of the accused, except Cradic, James E. Johnson and Walter Johnson 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 that the accused:

(a) Edward R. Williams, Jr., Frelot, Saffo, Engram, Flagg, Kirksey, Horton, Arbuckle, Avery, Kendall, Wise, Roach, Smith, Terrell and Grigg are each guilty of Charge III and its Specification and to support their respective sentences;

(b) Patterson, Ogletree and Mack are each guilty of Charges II and III and their respective specifications and to support their respective sentences;

(c) Cradic and James E. Johnson are each guilty of Charge III and its Specification and to support their respective sentences but insufficient to support the finding of their respective guilts of Charge II and its Specification;

(d) Davis, Wade, Gallier, Reed, Hill and Starks are each guilty of Charges I, II and III and their respective specifications and to support their respective sentences; but the record is legally insufficient to support the findings of guilty of accused Walter Johnson, and the sentence imposed upon him.

Judge Advocate

Judge Advocate

Judge Advocate

(132)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 FEB 1944 TO: Commanding General, VIII Air Force Service Command, APO 633, U.S. Army.

1. In the case of:

Private (formerly First Sergeant) FRED A. DAVIS (19046017);
Staff Sergeant PHILIP (NMI) WADE (34052926);
Private (formerly Corporal) LEROY (NMI) GALLIER (34154618);
Sergeant (formerly Corporal) CARROL T. REED (34145879);
Corporal EDWARD R. WILLIAMS, JR., (34136468);
Private First Class HAROLD F. FRELOT (34154584);
(All of the foregoing being of 1958th Quartermaster Truck Company (Avn.) 1515th Quartermaster Truck Battalion (Avn));
First Sergeant GEORGE W. PATTERSON (13010389);
Private JAMES D. HILL (34064160);
Private WILLIAM L. OGLETREE (34064159);
T/5 MAX I. CRADIC (39232918);
Corporal (formerly T/5) HILLRIE (NMI) SAFFO (34063445);
Private First Class (formerly Private) LEVE (NMI) ENGRAM (34064059);
Private BEUFFORD (NMI) FLAGG (39232993);
Private JESSIE F. KIRKSEY (34056345);
(All of the foregoing being of 1945th Quartermaster Truck Company (Avn.), 1515th Quartermaster Truck Battalion (Avn.));
Private (formerly Sergeant) JAMES H. HORTON (34062018);
Private (formerly T/5) MATTHEW (NMI) ARBUCKLE (34181309);
Private WILLIAM H. AVERY, JR., (14072962);
Private SIDNEY G. KENDALL (34064789);
Private KERMIT R. MACK (14068043);
Private JAMES H. WISE (6996370);
(All of the foregoing being of 1949th Quartermaster Truck Company (Avn.), 1515th Quartermaster Truck Battalion (Avn.));
Private WALTER (NMI) JOHNSON (34206503);
Private First Class PEMBERTON J. ROACH, JR., (11089667);
Private First Class ROBERT (NMI) SMITH (34245563);
Private First Class BERNARD (NMI) TERRELL (32161543);
Private LEE (NMI) GRIGG, JR., (12027912);
Private JAMES E. JOHNSON (33066560);
(All of the foregoing being of 1933rd Quartermaster Truck Company (Avn.), 1513th Quartermaster Truck Battalion (Avn.)); and
Private WILLIAM O. STARKS (35207247);
(of 1994th Quartermaster Truck Company (Avn.), 1513th Quartermaster Truck Battalion (Avn.)),

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 sentences as to the several accused as follows:

(a) Edward R. Williams, Jr., Frelot, Saffo, Engram, Flagg, Kirksey, Horton, Arbuckle, Avery, Kendall, Wise, Roach, Smith, Terrell and Grigg are each guilty of Charge III and its Specification and to support their respective sentences;

(b) Patterson, Ogletree and Mack are each guilty of Charges II and III and their respective specifications and to support their respective sentences;

(c) Cradic and James E. Johnson are each guilty of Charge III and its Specification and to support their respective sentences but insufficient to support the finding of their respective guilts of Charge II and its Specification;

(d) Davis, Wade, Gallier, Reed, Hill and Starks are each guilty of Charges I, II and III and their respective specifications and to support their respective sentences; but the record is legally insufficient to support the findings of guilty of accused Walter Johnson, and the sentence imposed upon him.

The holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentences of all the accused, except Walter Johnson.

2. In the case of the accused: Cradic, James E. Johnson, Edward R. Williams, Jr., Frelot, Saffo, Engram, Flagg, Kirksey, Horton, Arbuckle, Avery, Roach, Smith, Terrell, Grigg and Wise, the dishonorable discharges should be suspended during their respective periods of confinement inasmuch as they will be confined in Disciplinary Training Center #2912 in this theater.

3. Pursuant to paragraphs 1 and 2, Section II, WD, Cir. #321, 11 December 1943, as amended by Section II, WD, Cir. #331, 21 December 1943, the place of confinement of the accused Davis, Wade, Gallier, Reed, Hill, Starks, Patterson, Ogletree and Mack should be changed from Eastern Branch, United States Disciplinary Barracks, Beekman, New York to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

4. With respect to accused Walter Johnson, there was a fatal variance between the allegations of the charges and specifications and the proof. The evidence shows that he was probably guilty of (a) absence without leave, (b) unlawful possession of a rifle and unlawful possession and use of a Government motor vehicle at Manchester, England, 25-26 June 1943 and (c) escape from custody under the 96th Article of War. The prosecution failed to connect these offenses with those charged and upon which he was brought to trial. Legally speaking he has never been charged or tried for the offenses indicated by the evidence in the record and he may still be brought to trial for such offenses.

5. In view of the fact that the approved holding of the Board of Review adjudges that the record is legally insufficient to support the

findings of guilty of Charge II and its Specification as to Cradic and James E. Johnson, it is manifest that the periods of their confinement respectively should be reduced to the same duration as that of accused who were found guilty only of Charge III and its Specification. The sentences of all of this group except Kendall and Avery were reduced to one year. It is recommended that the period of confinement in the cases of these two soldiers be reduced to one year. It is also recommended that the dishonorable discharge be suspended as to Private Sidney G. Kendall and that Disciplinary Training Center #2912 be designated as the place for his confinement.

6. It is apparent from an examination of this record that the worst offenders, those who left camp in defiance of authority and did the firing in the town of Bamber Bridge when the inhabitants were terrorized and Lieutenant Ousset was wounded, were not discovered. This was due to the lack of positive action by the officers of the command. They acted more as observers than as officers in command of troops. Most of the few orders given were disobeyed and no further affirmative action was taken. As a whole, their testimony in court was likewise inadequate. It seems incredible that company officers who had been with the same companies for months did not recognize or make note of men who committed definite acts at critical times.

I agree with the statement of Brigadier General Edmund W. Hill, President of the court, contained in his letter 19 September 1943, recommending clemency as follows:

> "It is quite apparent that their acts resulted in great part from lack of able leadership on the part of their superiors. The evidence clearly established an appalling state of discipline and training in the unit and at the station where they were serving. Many of the officers whose job it was to guide and control the action of their men utterly failed in the performance of these duties and refused to meet and accept responsibility. Had these officers exercised the degree of proficiency normally expected, it is reasonable to assume that the offenses might never have been committed, or at least would not have reached such serious proportions. Although it is recognized that these facts do not excuse the misconduct of the accused, they nevertheless serve to explain the underlying cause of the disorder and to lessen the degree of guilt of the accused."

7. Inclosed for your use is draft of proposed supplemental action by the approving authority, consistent with the approved holding by the Board of Review. It is in form for use in the published action in the GCMO. It is requested that the signed supplemental action be returned to this office with copies of the published order.

8. 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 895. For convenience of reference please place that number in brackets at the end of the order: (ETO 895).

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

1 Incl:
Draft Supplemental Action.

In the foregoing case, the sentence as to Corporal Julius (NMI) Magee is disapproved. Pursuant to Article of War 50½, the findings of guilty and the sentence as to Private Walter (NMI) Johnson are disapproved, and the findings of guilty of Charge II and its Specification as to Private Max I. Cradic and Private James E. Johnson are disapproved. Except as to Magee and Walter Johnson, the sentence as to each other accused is approved, but the period of confinement as to each is reduced as stated below:

Davis to 10 years
Hill to 10 years
Reed to 9 years
Starks to 8 years
Wade to 7 years
Gallier to 7 years
Patterson to 7 years
Ogletree to 3 years
Mack to 3 years.

As to those named above, the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is designated as the place of confinement. AW 50½ having been complied with, the sentence as modified as to each will be duly executed.

Avery to 1 year
Cradic to 1 year
Johnson,James E. to 1 year
Williams,Edward R. to 1 year
Frelot to 1 year
Saffo to 1 year
Engram to 1 year
Kendall to 1 year
Grigg to 1 year
Flagg to 1 year
Kirksey to 1 year
Horton to 1 year
Arbuckle to 1 year
Wise to 1 year
Roach to 1 year
Smith to 1 year
Terrell to 1 year

As to those accused named immediately above, 2912th Disciplinary Training Center, APO #508, is designated as the place of confinement. Article of War 50½ having been complied with, the sentence, as modified as to each of said accused, will be duly executed, but the execution of that portion of each sentence adjudging dishonorable discharge is suspended until the release from confinement of each accused.

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

BOARD OF REVIEW

ETO 902

19 NOV 1943

U N I T E D S T A T E S	VIII BOMBER COMMAND.
v.	Trial by G.C.M., convened at AAF Station 123, 10 September 1943.
Private EUGENE G. BARRETO (34249328), and Private GEORGE M. COLITTO (32341005), both of 335th Quartermaster Depot Company.	Sentence: Barreto - Dishonorable discharge, total forfeitures and confinement at hard labor for one year; Colitto - Dishonorable discharge, total forfeitures and confinement at hard labor for two years. The 2912th Disciplinary Training Center.

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

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

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

BARRETO

CHARGE: Violation of the 96th Article of War.
Specification 1: In that Pvt. Eugene G. Barreto, 335th Quartermaster Depot Company, did at Station Q-104, on or about 31 July 1943, wrongfully introduce into Quartermaster Station Q-104, five (5) ounces, more or less, of Marijuana.
Specification 2: In that Pvt. Eugene G. Barreto, 335th Quartermaster Depot Company, did at Station Q-104, on or about 31 July 1943, wrongfully use Marijuana, a narcotic drug.

COLITTO

CHARGE: Violation of the 96th Article of War.
Specification 1: In that Pvt. George M. Colitto, 335th Quartermaster Depot Company, did at Station Q-104, on or about 31st day of July 1943, wrongfully introduce into Station Q-104, five (5) ounces, more or less, of Marijuana.
Specification 2: In that Pvt. George M. Colitto, 335th Quartermaster Depot Company, did at Station Q-104, on or about 31st day of July 1943, wrongfully use Marijuana, a narcotic drug.

Each accused was separately charged but their trials were consolidated. Each pleaded not guilty to the Charge and specifications. Accused Barreto, was found not guilty of Specification 1 and guilty of Specification 2 except the words "at Station Q-104", substituting therefor the words "at or near Station Q-104", of the excepted words not guilty, of the substituted words, guilty and guilty of the Charge. Accused Colitto, was found guilty of both specifications and the Charge. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct; Barreto for one year and Colitto for two years. The reviewing authority approved each of the sentences, 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 Article of War 50½.

3. The prosecution's evidence was substantially as follows:

(a) Sergeant Cliff Goldsmith, Investigator of the Provost Marshal General's Department, identified Pros.Ex.1, a statement by accused Barreto (R9) and Pros.Ex.1a, a statement by accused Colitto (R10) as statements which were obtained by him, after each had been informed by him "of their rights before any statement was taken" (R34). Major Paul V. Wilcox, Air Corps, witnessed the signing by accused Barreto of Pros.Ex.1. He saw no evidence of coercion upon Barreto in the process of obtaining his statement (R18). Captain Tyler M. Birch, Air Corps Headquarters, 2nd Bombardment Wing, identified Pros.Ex.1a. "The constitutional rights of the accused with reference to his ability to remain silent if he so desired" were explained to accused Colitto in the presence of this witness who also read to accused the warning paragraph in the statement. Captain Birch also witnessed the signing of the statement by accused (R19).

Each accused was sworn as a witness only for the purpose of explaining the circumstances of his signing Pros.Ex.1 and 1a respectively (R20,26). The court correctly limited their cross-examination to facts pertaining to the taking of their statements (R21,26).

Accused Barreto denied that Goldsmith at any time advised him of his rights (R21). He testified that on the morning of 12 August (1943) he was taken to Hangar 5 and Goldsmith "started asking questions and writing on a scratch pad all the questions and answers I gave him" (R23). When he had obtained all the answers, he drew out of a drawer:

> "a sheet of paper with some mimeograph in the top of it, in which I lent over and read that it was my right to remain silent or to make a statement. *******. I said not to start writing that because it was my right to remain silent and I would wait to see my lawyer and I was not going to make any statement. ******. He got mad, and told me if I didn't sign the statement it would be mighty tough for me. ******. He said 'After I have been working two or three hours on this statement, I am not going to let it go. Just sign this or it will be mighty tough for you'" (R23).

Accused Barreto admitted he was neither assaulted nor physically mistreated (R24). He was simply told to sign and did so without being threatened by anyone (R25).

Accused Colitto testified that he was also taken to Hangar 5 on 12 August (1943), where he was questioned by Goldsmith but was not advised of his rights therein by the sergeant (R27). He described approximately the same procedure by Goldsmith in taking his statement as was followed in the case of Barreto. When the sergeant had transcribed his notes from the scratch pad to the mimeographed sheet, he handed it to Colitto to read when Colitto noticed some writing at the top of the paper and for the first time became aware of his rights. "It was too late to do anything then because I had given the statement". Accused and the sergeant then proceeded to the officers' club where they met Captain Birch who took the paper and asked accused if he had read it and was willing to sign it. Colitto said he was willing to sign and Captain Birch advised him of his rights before he signed (R27). Accused admitted that he was not at any time told he had to sign the statement (R28).

Captain Donald L. Brame, 335th Quartermaster Depot Company, commanding officer of accused, testified he advised both accused that anything they might tell him could be used against them (R32) and that he told Barreto he had the right to remain silent but didn't remember if he had also so informed Colitto (R33). The two statements were admitted in evidence by the court as Pros.Ex.1 and 1a (R34).

Barreto's statement in pertinent part summarizes as follows: he had commenced smoking marijuana cigarettes in Cuba and after entering the United States continued to use them; he had smoked them for a period of five years and had probably smoked fifty before entering the Army. From induction, 11 September 1942 to the date he met Colitto at the port of embarkation

on or about 1 July 1943 he had not smoked marijuana. At the port he met Colitto in an open field and from the odor of a cigarette smoked by Colitto he recognized it as a marijuana cigarette. Colitto offered him and he accepted a marijuana cigarette. Colitto and Barreto continued to smoke marijuana cigarettes at the port and on shipboard while en route over-sea. The marijuana was always supplied by Colitto. Colitto gave Barreto some marijuana on shipboard. After arriving at Bungay, Barreto continued to secure marijuana from Colitto - in all about 25 or 30 marijuana cigarettes. The last he obtained on 7 August 1943. On one evening late in July 1943 he smoked marijuana in Ditchingham, England. Colitto is the only person who had given him marijuana since he has been in the army (Pros.Ex.1).

Colitto's statement contains the following relevant admissions: he entered the Army 21 May 1942 and had been smoking marijuana cigarettes occasionally for a year prior to that time. While stationed at San Bernardino, California, he went into Mexico and purchased eight cans of marijuana. He gave one can to a Lieutenant Francisco of the Medical Corps; five of the cans went to civilians and he kept two cans. Occasionally he and Lieutenant Francisco smoked marijuana cigarettes together. He met Barreto at the port of embarkation. On shipboard en route to England, Colitto, Barreto and Lieutenant Francisco twice smoked marijuana cigarettes while together and Lieutenant Francisco and Colitto on one occasion. Lieutenant Francisco gave him less than ¼ tobacco can of marijuana immediately prior to making port in England. Barreto made about 30 cigarettes from this can.

Since arriving at Bungay he has smoked several marijuana cigarettes with Barreto, Manos, Maddalena and others. He furnished the cigarettes. He has given Barreto and other American soldiers marijuana cigarettes but has never sold them (Pros.Ex.1a).

(b) Private Albert S. Gribek, 335th Quartermaster Depot Company, testified he was stationed at Bungay the latter part of July 1943. In answer to the question, "Did you ever request of Private Colitto the procurement of a marijuana cigarette", he stated he did (R35) and that Colitto said "he would try and get them for me". The next evening Colitto gave witness two cigarettes (R36) in camp (R38). Witness had had no experience with marijuana cigarettes or with marijuana. He smoked the cigarettes given him which did not appear to be of the ordinary kind. He was not a cigarette smoker and took it for granted these were marijuana cigarettes (R36), but did not recall that Colitto stated the cigarettes to be marijuana (R38).

(c) Private Nicholas J. Maddalena, 335th Quartermaster Depot Company, testified he saw accused Colitto near the latrine at Bungay, rolling a cigarette. Witness asked if he could have one and one was given him which he smoked. It made him a little dizzy (R39). He is a cigar but not a cigarette smoker, had never had any "connection" with marijuana (R40) and had never smoked marijuana before so as to be able to make a comparison (R41). This cigarette might have been just an ordinary one and

it had little effect on witness (R41). He did not recognise the taste and smell as being different from any other cigarette. This smoking occurred in camp at Bungay (R40).

(d) Private Thomas C. Manos, 335th Quartermaster Depot Company, testified that accused Colitto offered him what Colitto said was a marijuana cigarette and and that Colitto also said he had smoked marijuana prior to coming to this theater (R43). One evening in July 1943 in Bungay, while witness was in Colitto's tent, Colitto blamed accused Barreto for taking a can of marijuana which was missing. Witness also testified that Barreto told him of giving a marijuana cigarette to a civilian boy and girl at a pub (R44). He had smoked several of Colitto's cigarettes without their affecting him. Although he had never seen, examined or made a study of marijuana, he was sure the cigarettes Colitto gave him were marijuana from what Colitto had told him and from what he had seen of marijuana when in Colitto's company (R45-46). While at Bungay he had seen both of accused smoking marijuana cigarettes which witness knew because of their peculiar odor (R46-47).

(e) Captain James H. Mouradian, Medical Corps, Headquarters 2nd Bombardment Wing, testified he knew a substance known as "cannabis sativa indicus or hemp" and that it possesses narcotic properties. The Captain described some of the effects of marijuana on a novice smoker and testified it was more habit-forming than alcohol or tobacco (R50). However, he did not identify "cannabis sativa indicus" as being the same as marijuana or having any relation to it.

(f) Private George Fleischman, 345th Quartermaster Depot Company, testified that sometime in July (1943) he was on a detail with Colitto during which time they had a discussion about marijuana and he requested accused Colitto to obtain some marijuana for him. Later "in front of the warehouse", Colitto gave witness a cigarette. Colitto did not state whether or not it was a marijuana cigarette. They affected witness when he smoked them (R52).

(g) Private Joe Cavellari, 345th Quartermaster Depot Company, testified he knew both accused, being stationed with them. He knew marijuana cigarettes and could distinguish them by their smell. Colitto told witness he smoked marijuana to relieve the pain in his leg (R53-54).

(h) Corporal Lewis F. Otero, 335th Quartermaster Depot Company, testified he was stationed with both of accused and had talked with accused Barreto about smoking marijuana (R54). Witness did not see him smoking in camp but had seen him smoking cigarettes out of camp which because of the smell he believed to be marijuana (R56). Barreto told him of giving a marijuana cigarette to a civilian girl. He knew they were smoking marijuana cigarettes by the smell (R55).

4. The evidence for the defense was in substance as follows:

(a) Mr. William Francis Greeves, an analytical chemist, testified that a person named Goldsmith brought him certain packets containing powder-

ed leaves and seeds to determine what they were. The substance was "undoubtedly hemp" but he was unable to give anything more definite about it. "Hemp grown in tropical climates is a narcotic or contains a narcotic body". He further testified that "the name marijuana has not until recently been known to me. Hemp, the scientific name known to any biologist, cannabis sativa, is known the world over. The name marijuana, I understand, is the name by which it is known in the United States ***" (R60).

(b) 2nd Lieutenant Frank Marcovitch, CMP., 1119th Military Police Company, and Police and Prison officer of the post, testified both accused had been in the guardhouse about a month and their work had been satisfactory (R61).

5. (a) The staff judge advocate attached to his review a list of 45 errors and irregularities occurring at the trial. Most of these errors and irregularities were of form and procedure. Some undoubtedly were dangerously close to being prejudicial to the substantial rights of the accused. However, inasmuch as there is sufficient competent evidence to support the findings the errors and irregularities can affect only the severity of the sentence and do not require further comment.

(b) The effort of the defense to establish the fact that the respective statements of Barreto and Colitto were obtained in an irregular manner and without due and timely warnings utterly failed. The evidence is clear that in the case of each accused the statements were freely and voluntarily given and that is the major test of their admissibility (CM ETO 397, Shaffer; CM ETO 506, Bryson; CM ETO 559, Monsalve).

(c) Proof of the corpus delicti of the offenses of which accused Colitto was found guilty was furnished by the testimony of Gribek (R36,38), Maddalena (R39), Manos (R44), Fleischman (R52) and Cavellari (R53-54). The corpus delicti as to Barreto was proved by the testimony of Manos (R46-47) and Otero (R56). The necessary foundation for the admission of the respective statements of accused was therefore laid (MCM., 1928, par.114a, p.115; CM 202213, Mallon).

(d) The separate statement of each accused contained recitals which were prejudicial to the co-accused. Each statement was admitted in evidence without any explanation from the law member that it was admissible only against the accused making the same (MCM., 1928, par.114c, p.117). While it is apparent that the rights of each accused have therefore been infringed, the question presented for consideration is whether such infringement is merely technical or whether it substantially affected their rights. The case of CM 210985, Bonner, Judd and Riley is particularly applicable. The Board of Review in that case concluded that where there exists substantial evidence of the guilt of a co-accused, independent of any statements admitted in evidence, that such infringement is merely technical and is not prejudicial error. Oppositely if the evidence of

guilt of a co-accused is fragmentary or of doubtful character such infringement is highly injurious and requires the Board of Review to set aside the finding of guilty. The Board of Review, in said holding, particularly indicated that such action is dictated where the trial judge advocate refers to the statement as evidence against the co-accused. In the instant case there is substantial evidence that Colitto both introduced marijuana into Bungay camp (Specification 1) and smoked it on or about the time alleged in Specification 2. Likewise there is convincing evidence that Barreto used the narcotic on or about the time alleged (Specification 2). The record does not reproduce the argument of the trial judge advocate. Under such situation and following the principle announced in the Bonner et al case, supra, the Board of Review is of the opinion that the irregularity in the use of the statements of each accused did not prejudice the rights of the co-accused.

6. By paragraph 4, General Orders #25, War Department, 11 March 1918, the possession of habit-forming drugs by military personnel not ordered by a medical officer is prohibited. By cable, 6 November 1943, The Judge Advocate General has advised the Assistant Judge Advocate General in charge of this office, that paragraph 4, General Order #25, mentioned above is still operative. Marijuana, or the plant Cannabis Sativa, has been recognised, regulated and taxed by Congress as a dangerous, habit-forming drug (Act of February 10, 1939; 53 Stat. 279 et seq and 384 et seq; 26 USCA 2590,3230). Webster's New International Dictionary, second edition, defines marijuana as being identical with Cannabis Sativa, and it was thus classified by Dr. Greeves, the analytical chemist (R60). The court was authorized to take judicial notice of the fact that marijuana is a narcotic (James v. United States 61 Fed (2nd) 912, Certiorari denied 288 U.S. 613, 77 L. Ed., 987; 1 Wharton's Criminal Evidence, 11th Ed., sec.50, p.58). Therefore, there can be no question but what the provisions of par.4, General Order #25, War Department were applicable to the possession of marijuana on the dates alleged in the specifications in the instant case.

In passing it should be noted that the possession of marijuana by the accused in the small quantities shown would not be a violation of the Harrison Narcotic Act nor of the Marijuana Act (United States v. Jin Fuey Moy 241 U.S. 394, 60 L. Ed., 1061) had the offenses been committed within the continental United States, and it is extremely doubtful if the tax and penal provisions of the mentioned narcotic regulative statutes possess extra-territoriality (American Banana Co. v. United Fruit Co, 213 U.S. 347; 53 L. Ed., 827,832; Sandberg v. McDonald, 248 U.S. 185,196; 63 L. Ed., 200,204; New York Central R. Co. v. Chisholm, 268 U.S. 29; 31; 69 L. Ed., 828,832).

The proof of use of the narcotic includes proof of possession of same. While proof of mere possession will not necessarily sustain a charge of use of an article, contrawise proof of use will sustain a charge of possession. The "possession" prohibited by the General Order means not only a mere physical holding, but also includes control of the thing possessed with the right to dispose of it in any manner the possessor sees

fit (49 C.J., sec.1, p.1094; Colbaugh v. United States, 15 Fed (2nd) 929, 931). The allegation in Specification 2 and the proof thereof that each accused "did *** wrongfully use" marijuana is legally equivalent under the circumstances to a declaration and finding that accused "did wrongfully possess" the narcotic. The verb "use" means:

> "to make use of, to convert to one's service, to avail one self of, to employ" (Black's Law Dictionary, 3rd Ed., p.1787).

and it is entirely consistent with the approved principles of pleading under the Manual for Courts-Martial to construe the word "use" in the specifications in this case as "possess" (MCM., 1928, par.87b, p.74).

It was not necessary for the prosecution to negative by allegations in the specifications and by its proof the fact that accused possessed marijuana by order of a medical officer. Such excepted possession was a matter of defense. (Keith v. United States, 11 Fed (2nd) (CCA) 933; Wemstein v. United States 11 Fed (2nd) (CCA) 505; United States v. Union Pacific Railroad Co., 20 Fed. Supp. (Idaho) 665; United States v. Cook, 17 Wall. 168, 21 L. Ed., 538; 31 C.J., sec.269, p.720).

Barreto, by his statement (Pros.Ex.1) admitted he had "been smoking marijuana cigarettes for the last 5 or 6 years". He smoked them while at the port of embarkation, on shipboard while en route over-sea and after his arrival at Bungay. Corporal Otero testified he had seen Barreto smoke cigarettes he "thought were marijuana" at the warehouse (R55-56). Private Manos testified Barreto said he smoked marijuana cigarettes and had given some away (R44). This testimony was not contradicted.

Colitto by his own statement (Pros.Ex.1a) admitted that he had been smoking marijuana cigarettes occasionally for about a year before he entered the army on 21 May 1942. He described purchasing eight tobacco cans of it for himself and others, in old Mexico while in the army stationed in California, of which purchase he retained two cans. He smoked marijuana on shipboard while coming over to England and since arriving in Bungay. He furnished the cigarettes smoked in Bungay and he gave some marijuana cigarettes away (R55). Private Gribek asked Colitto for a marijuana cigarette and was later given two cigarettes by accused in camp (R38). Private Maddalena also asked for and was given by Colitto a cigarette in the camp at Bungay which cigarette made him a little dizzy when he smoked it (R40). Private Manos testified that accused Colitto offered him what Colitto said was marijuana in June 1943 while still in the United States and that one evening in July 1943 while Manos was in Colitto's tent, Colitto missed a can of marijuana (R44). Private Fleischman talked with Colitto, while on a detail with him, about smoking marijuana and requested Colitto to obtain some for him and Colitto later gave him a cigarette in front of the

warehouse. It affected him when he smoked them (R52).

The proof as to Barreto establishes that his possession of the narcotic was in the neighborhood of Station Q-104.

> "The rule accepted now by practically all courts is that a variance in criminal law is not now regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense, or is likely to place him in a second jeopardy for the same offense. Hence, the tests of a fatal variance are: Was defendant misled in preparing his defense? Will defendant be protected against a future proceeding involving the same charge?" (2 Wharton's Criminal Evidence, sec.1028, p.1802-3).

> "The substitution of a new date or place may, but does not necessarily, change the nature or identity of the offense." (MCM., 1928, par.78c, p.65".

> "If the specification alleges the offense to have been committed 'on' a certain date or 'at' a certain place, the court in its findings may, by exceptions and substitutions, find another date or place if the evidence supports such amendments, provided the new date or place is sufficiently near the one alleged that an injustice is not done the accused." (MCM., 1921, par.74g, p.53).

In the case against Barreto the difference between the place named in Specification 2 - "at Station Q-104" - and that named in the findings - "at or near Station Q-104" - is not material under the above rules. Barreto could not have been misled nor can he again be placed in jeopardy for this offense.

There is therefore substantial evidence that both accused were not only in manual possession of marijuana on or about 31 July 1943, but also used the same in form of cigarettes.

The violation by accused of paragraph 4, General Orders #25, War Department, 11 March 1918 by possessing a narcotic drug, viz: marijuana, was an offense under Article of War 96 (CM 156134 (1923), Dig.Ops.JAG., 1912-1940, par.454(74), p.361).

7. Colitto was found guilty of wrongfully introducing five ounces, more or less of marijuana into Station Q-104 on or about 31 July 1943. The evidence and his own statement clearly establishes that on or about the time alleged he had manual possession of some marijuana at said station. The inference is logical and just that he brought part of the marijuana acquired in Mexico into the Army station at Bungay. The proof does not show the quantity of marijuana brought into camp. However, such deficiency in the proof is immaterial in the face of the proof that he did bring a quantity of marijuana into camp. The variance involved no element of surprise prejudicial to the accused's efforts to prepare his defense (United States v. Ragen, 314 U.S. 513, 86 L. Ed., 342,349).

The act of introducing a habit-forming narcotic drug into a command, quarters, station or camp is an offense under Article of War 96. Marijuana contains vicious habit-forming properties. The results of its promiscuous and indiscriminate use by soldiers are so obvious that no detailed comments are necessary. Manifestly its presence in a camp cannot be tolerated and vigorous measures to prevent its introduction are not only dictated by ordinary prudence and common sense, but also by the higher requirements of military efficiency and discipline. The act of bringing the drug into a camp is certainly a disorder directly and palpably to the prejudice of good order and military discipline.(MCM., 1928, par.152a, p.187). The Table of Maximum Punishments prescribed by Executive Order of 10 December 1920 recognises such act as an offense (MCM., 1928, par.104c, p.100).

The record is legally sufficient to sustain the finding of Colitto's guilt of Specification 1.

8. The maximum punishment for the offense of possessing a habit-forming drug is dishonorable discharge, total forfeitures and imprisonment at hard labor for one year (CM 156134, supra). The offense of introducing a habit-forming narcotic drug into command, quarters, station or camp for purposes other than sale c arries a maximum punishment of dishonorable discharge, total forfeitures and confinement at hard labor for one year (MCM., 1928, par.104c, p.100). The sentence imposed upon each of the accused is legal. Execution of the sentence of dishonorable discharge will be ordered only when accused has been convicted of an offense which renders his retention in the service undesirable or when he has been sentenced to a term of not less than three years. (General Orders #37, Headquarters, ETOUSA, 9 September 1942 as amended by par.5c, General Orders #63, Headquarters, ETOUSA, 4 December 1942). A general prisoner whose approved sentence to confinement is less than three years will not be returned to the United States for the service of such sentence except on express orders of Headquarters, ETOUSA (General Orders #37, Headquarters, ETOUSA, 4 December 1942). Confinement of the accused at 2912th Disciplinary Training Center is therefore proper.

9. The charge sheet shows that accused, Private Eugene G. Barreto, is 37 years 4 months old and was inducted at Camp Blanding, Florida, on 27 August 1942 and that accused, Private George M. Colitto, is 28 years 2 months old and was inducted at Fort Jay, New York, 21 May 1942.

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

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 19 NOV 1943 TO: Commanding General, VIII Bomber Command, APO 634, U.S. Army.

1. In the cases of Private EUGENE G. BARRETO (34249328) and Private GEORGE M. COLITTO (32341005), both of 335th Quartermaster Depot Company, AAF Station Q-104, attention is invited to the foregoing holding by the Board of Review that the record is legally sufficient to support the findings and sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences, but your attention is invited to the provisions of paragraph 5c of General Orders #37, Headquarters, ETOUSA, 9 September 1942 as amended by General Orders #63, Headquarters, ETOUSA, 4 December 1942 providing that execution of a sentence to dishonorable discharge will be ordered only when accused has been convicted of an offense which renders his retention in the service undesirable or when he has been sentenced to a term of not less than three years confinement. It is not clear from the evidence in this case that either of accused are chronic marijuana addicts. While their offenses are serious and merit substantial punishment, it is doubtful that they render accused undesirable persons for the military service. I suggest that the dishonorable discharges be suspended during the period of confinement.

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 902. For convenience of reference please place that number in brackets at the end of the order: (ETO 902).

OUT
19 NOV 1943
BJAGO-ETO

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 913

10 NOV 1943

UNITED STATES	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private EDWARD PIERNO (32338171), Headquarters Company, 2nd Battalion, 175th Infantry.	Trial by G.C.M., convened at London, England, 7 October 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Edward Pierno, Headquarters Company, 2nd Battalion, 175th Infantry, ETOUSA, did, at Tidworth, England, on or about 10 May, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Brockenhurst, England on or about 15 July, 1943.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: ********, did, at London, England, on or about 23 May, 1943, feloniously take, steal, and carry away £69-30-0 in English money, (about $284.00), one diamond ring, two gold wedding rings, value about £5-0-0, (about $20.00), the property of Sophie Cooke.

Specification 2: ********, did, at Poole, Dorsetshire, England, on or about 9 June, 1943, feloniously take, steal, and carry away £18-10-0 in English money, (about $82.00), one pair of black and gold Japanese ear-rings, value about £0-30-0, (about $6.00), one pair of pearl drops set in gold, value about £0-10-0, (about $2.00), one pair of ear-rings, blue stones set in silver, value about £0-6-0, (about $1.20), one old thin gold wedding ring, value about £2-0-0 (about $8.00), one engagement ring, value about £2-0-0, (about $8.00), one gentlemen's old gold ring, value about £2-0-0, (about $8.00), one leather notecase with a pair of nail scissors in it, value about £0-10-0, (about $2.00), one magnifying glass, value about £0-5-6, (about $1.12), one leather purse with compartment which opens out like a wallet to contain notes, value about £0-15-0, (about $3.00), one leather purse with two compartments for money and s tamps, value about £0-5-0, (about $1.00), the property of Violet Elizabeth Diffey.

Specification 3: ********, did, at London, England, on or about 15 June, 1943, feloniously take, steal, and carry away one suit, one leather wallet, one clothes brush, value about £5-0-0, (about $20.00), the property of William Simpson Ferguson.

Specification 4: ********, did, at London, England, on or about 15 June, 1943, feloniously take, steal, and carry away one mackintosh coat, value about £4-0-0, (about $16.00), the property of Patrick Christopher Kelly.

Specification 5: ********, did, at London, England, on or about 15 June, 1943, feloniously take, steal, and carry away two suits of clothing, one gentlemen's silver watch, one gentlemen's three stone diamond ring, one pair of ear-rings, one cap, one shirt, one Home Safe, one green fountain pen, value about £100-0-0, (about $400.00), the property of Arthur William Kelly.

Specification 6: ********, did, at London, England, on or about 27 June, 1943, feloniously take, steal, and carry away one summar coat, one pair of gloves, one gold ring, three razors, ten shirts, one fountain pen, one alarm clock, one powder compact, value about £35-0-0, (about $140.00), the property of Andrei Lisin.

Specification 7: ********, did, at Ringwood, England, on or about 3 July, 1943, feloniously take, steal, and carry away one brown leather suitcase with initials "S.B.S" in black on the outside, one gentlemen's brown lounge suit, one shirt, one stiff white collar, one pair of gold cuff links, one pair black shoes, one cricket shirt, two pair of socks, three handkerchiefs, one sponge bag containing razor and shaving kit, flannel and tooth brush, one brown fibre suitcase, one pair of lady's fawn colored sandals, one pair of gentlemen's pajamas, one pair of lady's pajamas, one pair of boy's pajamas, one girl's sleeping suit, one pair of Military hair brushes in leather case, one lady's ebony hair brush, two stamp albums both containing stamps, two reading books, one leather zip fastener pencil case, one box of pencils, one pair of boy's knickers, one pair of boy's green socks, three boy's blouses, three girl's frocks, three pairs of girl's knickers, six pieces of hair ribbon, two lady's frocks, one gentlemen's bathing suit, two children's bathing suits, two towels, two leatherette cases each containing knife, fork and spoon, two pairs of lady's stockings, two pairs of ankle socks, two old pairs of children's paddling shoes, one lady's full length mustard colored coat, valued about £50-0-0, (about $200.00), the property of Stanley Barrett Sales.

Specification 8: ********, did, at London, England, on or about 13 July, 1943, feloniously take, steal, and carry away one brown striped shirt with two collars to match, one blue shirt with two collars to match, two pairs of socks, two neckties, one pair newly repaired brown shoes, two wrist watches, one pearl handled penknife, one pair gabardine flannel trousers, one ronson lighter, one pair of pants, one vest, one wallet, £12-0-0 in English money, (about $48.00), two driving licenses, one motor car insurance certificate, one identity card, five books clothing coupons, one railway ticket, valued about £34-13-5, (about $138.70), the property of Herbert Charles Jeffery.

Specification 9: ********, did, at Brockenhurst, Hampshire, England, on or about 15 July 1943, feloniously take, steal, and carry away two albums, value about £0-5-0, (about $1.00), four boxes of handkerchiefs, value about £0-15-0, (about $3.00), three handbags, value about £3-0-0, (about $12.00), one writing case, value about £1-0-0, (about $4.00),

four hair nets, value about £0-2-0, (about $.40), nine scarves, value about £1-0-0, (about $4.00), seven pairs of gloves, value about £1-0-0, (about $4.00), twenty-four handkerchiefs, value about £0-15-0, (about $3.00), two nightdress cases, value about, £0-5-0, (about $1.00), two pin boxes, value about £0-5-0, (about $1.00), two sprays, value about £ 0-4-0, (about $.80), one pair tweezers, value about £0-0-6, (about $.12), two coat hangers, value about £0-2-0, (about $.40), one methylated lamp, value about £0-2-6, (about $.52), one clothes brush, value about £0-3-0, (about $.60), the property of Frances Mildred Cowap.

CHARGE III: Violation of the 96th Article of War.
Specification: ********, did, at London, England, on or about 9 July, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Henri and Company, London, England, through Eugene Jelinek, manager of the said Henri and Company, a certain check in words and figures as follows, to wit:

FRONT

THE CANADIAN BANK OF COMMERCE WITH WHICH IS INCORPORATED THE BANK OF BRITISH COLUMBIA	No D 36858 London July 9, 1943 To THE CANADIAN BANK OF COMMERCE 2 LOMBARD STREET, E.C.3 Pay Henri & Co. or Order Eight Pounds and none ---------- £ 8:-:- Edward Pierno - 32338171 A.P.O. 633 - U S Army

and by means thereof, did fraudulently obtain from the said Eugene Jelinek, the manger of Henri and Company, one Beethoven battery wireless set, of the value of about £8-0-0, English money, (about $32.00), he, the said Private Edward Pierno, then well knowing that he did not have and not intending that he should have any account with The Canadian Bank of Commerce, London, England, for the payment of said check.

He pleaded not guilty to the Specification of Charge I but guilty of absence without leave, not guilty to Charge I but guilty of a violation of Article of War 61, guilty to Charges II, III and to the specifications under each, and was found guilty of all charges and specifications.

Evidence of one previous conviction by special court-martial for failing to report to barracks in violation of Article of War 61, and for bringing discredit upon the military service by claiming assault and robbery in violation of Article of War 96 was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 30 years. The reviewing authority approved the sentence, d esignated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

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

The defense stating that it had no objection thereto, an extract copy of the morning report of accused's organization was admitted in evidence, wherein it was recited that he went absent without leave on 10 May 1943 (R7-8; Pros.Ex.1) (Charge I and Specification).

About 12 May 1943 at 4 Eversholt Street, Euston, London, accused engaged a room from Mrs. Sophia M. Cook who owned a shop and an apartment house at that address. He told Mrs. Cook that he was in the "Intelligence Office, or something" and that he was looking for a friend who had committed sabotage in Scotland. He wore an American uniform, signed the register as Peter Loriente and remained "from Monday until the Sunday". On 23 May 1943 (Sunday) Mrs. Cook missed her attache case which contained 69 pounds in notes, 30 shillings in silver, two wedding rings, a sapphire and diamond ring and a small gold watch which she had purchased from accused in a five-shilling copper bag. She did not see accused after missing the case, and did not give him permission to take her property (R8-9) (Specification 1, Charge II).

On 23 June 1943, Miss Mary I. Gait, a nurse residing at 23 Edge Hill Court, Wimbledon saw accused at the Wimbledon Town Hall. He was dressed in the uniform of an American Staff Sergeant and he had Eagle Squadron wings and five medal ribbons. On his blouse were "R.A.F" wings. He told Miss Gait that his name was Edward Pierno and that "he had just come back from Turkey, or North Africa, that day". She saw him on four or five occasions and he led her to believe that he was connected with the Air Corps (R10-11).

About 27 June 1943 Mr. Andrei Lisin, a Russian journalist, was living at the Pembridge Court Hotel, London. Upon returning to the hotel at about 5:00 p.m. on that day he discovered that some of his property was missing. The missing articles were a summer top coat, seven or eight shirts, a gold ring with a large stone, one Rolls razor, two Swedish razors, an alarm clock, a powder case and "small belongings like link studs". Asked if he recognized accused Mr. Lisin testified "I did not know him before. I might recognize him because he came to me before, asking me for a key". He twice identified the guard as accused (R9-10) (Specification 6, Charge II).

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On 15 July 1943, as the result of a telephone call Constable William C. Cherrett, Hampshire Joint Police Force, stationed at Brockenhurst went to the Womens' Volunteer Services Canteen, Brockenhurst, where he found accused asleep in a chair "dressed as a Flight Sergeant in the American Army". He wore five "medal ribbons" and the wings of both the United States Army and Royal Air Forces. Accused told Constable Cherrett that he had arrived on the London train that morning, that he was going to Isleworth Aerodrome to collect a plane and that he had to be at his station at Birmingham that day prior to 5:30 p.m. Upon request he produced identification papers which disclosed that he was Edward Pierno, a private in the United States Army. He told Cherrett that his ribbons were those of the European Theater of Operations; North African Theater of Operations, Purple Heart wounded in action, Distinguished Flying Cross and Good Conduct for three years regular service. After further questioning accused was taken to the Lymington police station and detained. After he had been "cautioned" he stated that he had taken a suit-case found in his possession from the railroad station at Brockenhurst as he left the London train (Specification 9, Charge II). At the trial Cherrett identified certain ribbons as "similar" to those displayed by accused. The ribbons were admitted in evidence and later withdrawn, the defense stating that there was no objection (R11-12; Pros.Ex.2).

On 15 July 1943 accused was taken from the Lymington police station to the military police headquarters at Bournemouth (R13). After being warned of his rights pursuant to Article of War 24 he made a statement to Technical Sergeant Charles J. Miller, Investigations Division, Southern Base Section, which statement was reduced to writing and signed by accused. The defense stating that it had no objection, the document was introduced in evidence (R13-14; Pros.Ex.3). In substance accused stated that he was absent without leave on 10 May 1943, and went by train to London. On the train he took a suitcase which was in the aisle and removed a small watch and diamond ring. While in London he lived mostly at Cook's boarding house. He sold the watch to Mrs. Cook for three pounds, ten shillings, and the diamond ring to a male employee of Mrs. Cook for nine pounds 10 shillings. He left Mrs. Cook's on 23 May 1943, taking a bag which was in her shop. In the bag he found 73 pounds in money and some papers including insurance papers and a bankbook (Specification 1, Charge II).

After visiting several towns accused arrived at Cardiff where he asked some sailors how he could get to Southern Ireland where he hoped to be interned as he did not intend to return to the army. He then went to Poole where he bought some staff-sergeant stripes which he began to wear. He also purchased a civilian suit and from then on wore both military and civilian clothing. While at Poole he stayed part of the time at the house of a Mrs. Diffey. When leaving on 9 June he took her suitcase which contained 16 pounds, 4 savings books, 2 bank books and some jewelry including rings and ear-rings (Specification 2, Charge II).

He went to London, stayed at the Pembridge Court Hotel and then at the Hyde Park Hotel where he found and took a man's suit which was hanging in the closet of his room. He entered the adjoining room and took a diamond ring, a Longine pocket watch, a suit of clothes and a check book (Specification 5, Charge II). He pawned the ring and sold the watch, both suits and two of Mrs. Diffey's gold wedding rings, receiving substantial sums therefor. Accused returned to the Pembridge Court Hotel for two days and when leaving gave the manager a check for three pounds. He went to Wimbledon where he told people that he was in the Eagle Squadron, and then to Gloucester where he visited military police headquarters and "gave them a cock and bull story about flying home". He destroyed letters which several men there gave him to mail in the United States. After visiting several other towns accused arrived at Ringwood where he took two suitcases which he saw at the station. He subsequently sold both suitcases and a Rolls razor and shoes contained therein (Specification 7, Charge II). He finally returned to London where he went to a radio store operating under the name of Henri & Co., and bought a portable radio with a "bum" check for eight pounds (Charge III and Specification). He pawned the radio for 6 pounds 10 shillings. After remaining for a few days in Norbiton he departed, after having cashed a third check for four pounds. He then lived at 8 Norfolk Square, London, where he "went through" a room, took an electric razor and sold it. He then went to Brockenhurst, took a suitcase which was in the station (Specification 9, Charge II), and went to the canteen where he was apprehended by the police. When drawing the three checks he used the check book taken from the room in the Hyde Park Hotel and signed his own name (Pros.Ex.3).

4. For the defense accused testified in substance that he was legally separated from his wife and had been unsuccessfully endeavoring to stop an allotment from his pay which she had obtained. He received a special court-martial sentence whereby he "was fined $144 and given two months company confinement". He became discouraged because of the allotment difficulty and the situation in general, lost his head and "just took off". He wanted to return to the army, did not know how to go about it, and "just stayed out longer and longer". He was returning to his organization when finally apprehended. At that time he was in uniform, wore the stripes of a staff-sergeant, Air Corps insignia and five medal ribbons (R15-17). Admitted in evidence with consent of the prosecution was a letter of commendation addressed to accused from Major General L. T. Gerow, Commanding General, 29th Infantry Division, United States Army for services in the operation of a Red Cross Service Club (R14-15; Def.Ex.1).

On cross-examination accused admitted writing two letters addressed respectively to Miss Gait and to his company commander, Captain James Hays and also his "last will and testament" addressed "To whom it may concern". Accused in substance described himself therein as a deserter, admitted committing larceny and posing as a member of the air corps during his absence, and wrote that he was "taking the easy way out". The documents were admitted in evidence with the consent of the defense (R17-18;

Pros.Exs. 4,5,6). Accused further testified that the letters were written when in a moment of stress, that he had in fact twice attempted to kill himself, and that if successful he would have been classed as a deserter. Instead, as he was returning to his organization (when apprehended), he believed that he was guilty of absence without leave only (R18).

5. The review of the assistant staff judge advocate, Central Base Section, SOS, ETOUSA contains comments on certain irregularities contained in the record of trial. Further comment thereon is unnecessary.

6. In view of accused's plea of guilty of absence without leave to the offense of desertion alleged in Charge I and Specification thereunder, the only question presented for consideration is whether the evidence was legally sufficient to establish the requisite intent to desert. Accused's prolonged absence of over nine weeks was terminated by apprehension. Although frequently in the vicinity of military installations he did not surrender to military authorities. He represented to Mrs. Cook that he was from the "Intelligence Office" and registered under an assumed name. He subsequently purchased and wore civilian clothing, posed as a non-commissioned officer of the Eagle Squadron, and e xisted upon the substantial proceeds of a series of thefts which he committed. He inquired as to the possibilities of going to Southern Ireland where he hoped to be interned as he did not intend to return to the army. Intent to desert was clearly established by the evidence (CM ETO 656, Taylor; CM ETO 740, Lane; CM ETO 800, Ungard; CM ETO 823, Poteet; CM ETO 875, Fazio).

The prosecution introduced evidence of the corpus delicti pertaining only to the Specifications 1 and 6, Charge II. The confession of accused relates specifically to certain specifications of Charge II and to the Specification of Charge III, but in other respects is so general in character that an exact reference therefrom to the remaining specifications of Charge II is impossible. Despite this fact the pleas of guilty to Charges II, III and to the specifications under each fully warranted the court in finding accused guilty of the offenses alleged therein (CM ETO 839, Nelson). The record plainly shows that the president of the court explained in detail the effect of his pleas of guilty to accused who desired that the pleas still stand.

7. The charge sheet shows that accused is 28 years of age and was inducted 18 May 1942 for the duration of the war plus six months.

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

9. Pursuant to paragraph 5c, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement of accused in a penitentiary is authorized for the offense of desertion in time of war (Article of War 42; AR 600-375, 17 May 1943, sec.II, par.5d; MCM., 1928, par.90) and for the offense of larceny of property valued in excess of $50 (18 U.S.C., sec. 466; 35 Stat. 1144).

B. Franklin Riter Judge Advocate

H. C. VanBeverhoudt Judge Advocate

Edmund Kargau Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 NOV 1943 TO: Commanding General, Central Base Section, SOS, ETOUSA, APO 887, U.S. Army.

1. In the case of Private EDWARD PIERNO (32338171), Headquarters Company, 2nd Battalion, 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 and 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 913. For convenience of reference please place that number in brackets at the end of the order: (ETO 913).

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 942

12 NOV 1943

U N I T E D S T A T E S	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private HARRY J. SHOOTEN (12063206) and Private SIDNEY R. CURRIN (13074463), both of Company "B", 840th Engineer Battalion (Aviation).	Trial by G.C.M., convened at London, England, 13-14 October 1943. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 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 soldiers named above has been examined by the Board of Review.

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

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

Specification: In that Private Harry J. Shooten, Company "B" 840th Engineer Battalion (Aviation), ETOUSA, did, at London, England, on or about 23 September 1943, in conjunction with Private Sidney R. Currin, Company "B", 840th Engineer Battalion (Aviation), ETOUSA, with intent to commit a felony, viz, robbery, commit an assault upon First Lieutenant Lawrence G. Kiser, Air Corps, 65th Fighter Wing, ETOUSA, by willfully and feloniously striking the said First Lieutenant Lawrence G. Kiser, Air Corps, 65th Fighter Wing, ETOUSA, on the head with a piece of iron pipe.

CURRIN : CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Sidney R. Currin, Company "B", 840th Engineer Battalion (Aviation), ETOUSA, did, without proper leave, absent himself from his organization at Matching, Essex, England, from about 21 September 1943, to about 23 September 1943.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that Private Sidney R. Currin, Company "B" 840th Engineer Battalion (Aviation), ETOUSA, did, at London, England, on or about 23 September 1943, in conjunction with Private Harry J. Shooten, Company "B", 840th Engineer Battalion (Aviation), ETOUSA, with intent to commit a felony, viz, robbery, commit an assault upon First Lieutenant Lawrence G. Kiser, Air Corps, 65th Fighter Wing, ETOUSA, by willfully and feloniously striking the said First Lieutenant Lawrence G. Kiser, Air Corps, 65th Fighter Wing, ETOUSA, on the head with a piece of iron pipe.

3. Each of the accused pleaded guilty to the Charge alleging violation of Article of War 93 and guilty to the Specification thereunder with the exception of the words "with intent to commit a felony, viz: robbery", and Currin pleaded guilty to the further Charge and Specification against him alleging violation of Article of War 61. Each was found guilty of the charges and specifications upon which they were tried. Evidence was introduced of one previous conviction of Private Currin, absence without leave for one day, and of two previous convictions of Private Shooten, one for absence without leave for three days and one for breaking restriction. Each accused 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 10 years. The reviewing authority approved each of the sentences, designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement and forwarded the record of trial for action under Article of War 50½.

4. The evidence, uncontradicted except in a few very minor details, shows that First Lieutenant Lawrence G. Kiser, Air Corps, 65th Fighter Wing, was in the vicinity of Mercer Street, London W.C., at about 3:30 in the morning of 23 September 1943 when one of accused approached him from his left and asked where he was going. A short distance ahead the other accused approached him on his right. They all discussed looking for rooms when without notice or warning the Lieutenant felt a rather severe blow on his head. As he staggered against a wall from the effects of the

blow, one of the accused held the Lieutenant's arms against the wall and demanded his money. At about this moment a flash-light beam was shone on the three of them and a police sergeant appeared and asked if he could help the Lieutenant who, somewhat dazed by the blow, requested the police-sergeant to take the names, serial numbers and addresses of the two accused (R7). When produced, the pass of accused, Currin was out of date. The police sergeant then, at the further request of Lieutenant Kiser, arrested both accused. At the same time he picked up a piece of pipe which his light disclosed lying on the ground where the Lieutenant was standing, which pipe the police sergeant produced in court where it was admitted in evidence, with consent of defense, as Pros.Ex.1. Currin's pass, covering authorized absence from 1800 hours 18 September 1943 to midnight of 20 September 1943 was produced, identified and introduced in evidence with consent of defense as Pros.Ex.2 (R10). Lieutenant Kiser and both accused appeared sober (R11). With consent of defense, an extract of the morning report of Company "B", 840th Engineers (Aviation), was received in evidence as Pros. Ex.3, showing Private Currin 21 September 1943, duty to absence without leave.

The two accused were picked up at the Bow Street Police Station and returned to the military detention barracks on 23 September 1943 by Private Edward J. Smith, 32rd Military Police Company, stationed in London (R12).

Each of accused made a written sworn statement to Staff Sergeant William C. Yerg, Investigations Division, Provost Marshal General's Office, on 23 September 1943, after each had been duly warned. The statement of accused Currin, with consent of defense, was admitted in evidence as Pros. Ex.4. In it Currin admitted overstaying his leave; that he met accused Shooten in Piccadilly Circus, London, about midnight of 22 September 1943 and they planned to assault and rob someone; that Shooten gave him a piece of pipe which he identified as the piece of pipe shown him by Sergeant Yerg, and which pipe he used to strike the officer on the head at the same time demanding his money. Sergeant Yerg also took a sworn written statement from accused Shooten on 23 September 1943 which was produced and with consent of defense admitted in evidence as Pros.Ex.5 (R14). In his statement, accused Shooten recites that he found a piece of pipe on the ground near the Liverpool Street Station the evening of 22 September 1943 which he picked up and put in his pocker; that later he met accused Currin, a member of his company; that he learned Currin had overstayed his leave and was "broke" and that they decided they would hit somebody over the head and rob him. He gave Currin the pipe which was the same piece of pipe shown him by Sergeant Yerg and which was later used by Currin in striking the officer on the head when his money was demanded (R14).

5. Both of accused were sworn as witnesses at their request. Shooten denied striking Lieutenant Kiser; said that he informed the Lieutenant he was "sorry this has happened" after he had been struck on the head and offered to "get a bobby to help him to a hotel" (R16). He admitted that

he and Currin planned to rob somebody and that he picked up the pipe and carried it for sometime and that he was about a foot in front of the lieutenant when he was struck by accused Currin who was just behind the officer. Accused Currin stated that they were with the officer "at least a half hour" before the blow was given with the pipe (R17); that the officer was intoxicated and that he struck Lieutenant Kiser on the back of the head at the time when accused Shooten asked for his money. Accused Currin admitted he asked Shooten to search the lieutenant and Shooten refused. He also admitted the plan to rob somebody and that when he hit the lieutenant on the head he intended to take his money. He identified Pros.Ex.1 as the pipe used.

6. The extract of morning report of Company "B", Pros.Ex.3, shows Currin as absent without leave on 21 September 1943. Pros.Ex.2 showed Currin's pass as expiring at midnight 20 September 1943. Although Currin pleaded guilty to Charge I and its Specification, the proof sustains the finding of guilty in the absence of such plea.

In proof of the assault with intent to rob in violation of Article of War 93, it is necessary to show (a) that the accused assaulted a certain person as alleged, and (b) the facts and circumstances of the case indicating the existence at the time of the assault of the specific intent of the accused to commit robbery as alleged (MCM., 1928, par.149 l, p.180). Both accused admit all the facts required as proof and the record evidence fully shows the offenses committed as charged.

In the charge against Shooten the specification alleges that he, with intent to commit a felony, viz: robbery, did commit an assault on Lieutenant Kiser by striking him on the head with an iron pipe. The proof is specific that it was Currin who actually administered the blow. This was not a fatal variance of proof. Shooten and Currin by preconcert design determined to commit robbery and both actually participated in the attack on Lieutenant Kiser. Both were principals although it was Currin who actually committed the assault (CM ETO 72, Jacobs and Farley; 22 CJS., sec.82(c), p.147; sec.88(b)1, p.158; Jin Fuey Moy v. United States, 254 U.S. 189, 65 L. Ed., 214).

7. Accused, Sidney R. Currin is 21 years 11 months old. He enlisted at Washington, D.C., on 27 July 1942 for the duration of the war plus six months.

Accused, Jarry J. Shooten is 23 years 3 months old. He enlisted at New York City on 17 April 1942 for the duration of the war plus six months.

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 sentences.

9. Pursuant to paragraph 5g, GO #37, ETOUSA, 9 September 1942 as amended by GO #63, ETOUSA, 4 December 1942, a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years or where he has been convicted of an offense which renders his retention in the service undesirable. Assault with intent to commit a felony is such an offense and the approved sentence as to each accused is ten years. Both conditions of the order are present. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement in a penitentiary is authorized for the offense alleged of assault with intent to commit a felony (18 U.S.C., sec.455; 35 Stat. 1143). War Department directive (AG 253 (2-6-41) E, 26 February 1941) requires that prisoners under 31 years of age with sentences of not more than ten years be confined in a Federal Correctional Institution or Reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, is correct.

B. Franklin Riter Judge Advocate

Judge Advocate

Judge Advocate

(164) CONFIDENTIAL

1st Ind.

12 NOV 1943

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

1. In the case of Private HARRY J. SHOOTEN (12063206) and Private SIDNEY R. CURRIN (13074463), both of Company "B", 840th Engineer Battalion (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 and 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 sentences.

2. When copies of the published orders are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 942. For convenience of reference please place that number in brackets at the end of the orders: (ETO 942).

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 945

15 NOV 1943

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, 18-21 October 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.
Private PAUL K. GARRISON (39254537), Cannon Company, 115th 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 93rd Article of War.

Specification 1: In that Private PAUL K. GARRISON, Cannon Company, 115th Infantry did, in a bivouac area near Wadebridge, England, on or about 26 July, 1943 commit the crime of sodomy, by feloniously and a gainst the order of nature having carnal connection per os with Technician Fifth Grade Richard C. Free.

Specification 2: In that Private PAUL K. GARRISON, Cannon Company, 115th Infantry did, at or near Bodmin, England, on or about 8 August, 1943 commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Technician Fifth Grade Richard C. Free.

Specification 3: (Finding of not guilty).

Specification 4: In that Private PAUL K. GARRISON, Cannon Company, 115th Infantry, did, at Bodmin, England, on or about 22 July 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Private Walter J. Niziol.

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CHARGE II: Violation of the 96th Article of War.
Specification 1. In that Private PAUL K. GARRISON, Cannon Company, 115th Infantry, did, at Bodmin, England, on or about 10 July 1943, attempt to commit the crime of sodomy, by wilfully and feloniously taking Private Walter J. Niziol into a room with him, closing the door of same, and asking the said Private Niziol to "let me go down on you", or words to that effect,
Specification 2. In that Private PAUL K. GARRISON, Cannon Company, 115th Infantry, did, at or near Bodmin, England, on or about 27 July 1943, attempt to commit the crime of sodomy, by wilfully and feloniously opening the fly of the trousers of Technician Fourth Grade Albert L. Wolfe and putting his, the said Private Garrison's, hand on the penis of the said Technician Fourth Grade Wolfe.

He pleaded not guilty to all charges and specifications and was found not guilty of Specification 3, Charge I, and guilty of both charges and of all other specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The undisputed evidence for the prosecution with reference to the offenses of which accused was found guilty, shows that on the evening of 26 July 1943 in a bivouac area near Wadebridge, England accused and Corporal Richard C. Free, Cannon Company, 115th Infantry, slept in the same pup tent. During the night Free awakened to find his penis in the mouth of accused. Free struck him with his knee and accused let him go (R8,10) (Specification 1, Charge I).

About 8 August 1943, Free awakened "in a room in the junior officers' mess building where we slept", and his penis was in accused's mouth. He gave accused a push and he went back to bed (R8-9,10-11) (Specification 2, Charge I).

About 22 July 1943, Private Walter J. Niziol, Headquarters Company, 3rd Battalion, 115th Infantry, went to Bodmin where he drank beer. He told accused at a pub that he was going to the officers' mess later. When he returned to camp he went to accused's room in the mess building, lay on the bed and accused put Niziol's penis in his mouth. Niziol did not know what happened next as he "must have fallen asleep". He awoke the next morning in his own bed, but did not remember how he got there as he had been drunk (R12-15) (Specification 4, Charge I).

About 10 July 1943, Niziol was in a kitchen when accused asked him to accompany him to the "phone room". After entering the room accused asked him to pull out his penis and said "I want to blow you". Niziol was about to take his penis out but left when someone with a light passed by the window. Niziol "believed" that accused, who did not touch him, was then kneeling and had his hands "on the couch" (R13-14) (Specification 1, Charge II).

About 27 July 1943, during a field problem near Bodmin, Technician 4th Grade Albert L. Wolfe, Cannon Company, 115th Infantry, and accused occupied the same pup tent. Wolfe awakened during the night and found that accused "was fooling with the fly on my trousers and had his hand on my penis". Wolfe turned his back to him and told him to stop it (R17-18) (Specification 2, Charge II).

Captain Grat B. Hankins, Anti-Tank Company, 115th Infantry, investigating officer, took a statement from accused after he had warned him as to his rights. The statement, which had been reduced to writing and signed by accused was admitted in evidence, the defense stating that it had no objection. In substance accused admitted therein the commission of the offenses of which he was found guilty (R6-7; Pros.Ex.1).

4. For the defense accused testified that he had been a sexual pervert ever since he could remember, and that to him an act of sodomy was like an act of intercourse. He had never consulted a physician (R21-22).

5. When both the prosecution and defense had rested, the court adjourned on 18 October 1943 "to report to the reviewing authority for instructions as to further proceedings in view of the probability of an inherent defect which renders the accused not susceptible to normal human motives, and which actually influences the normal control of his action" (R29). Attached as Exhibit No. 2 is a basic communication to this effect from the president of the court dated 19 October 1943 and addressed to the Commanding General, 29th Infantry Division. By first indorsement dated 20 October 1943 the reviewing authority ordered the court to proceed with the trial. On 21 October the court re-convened, made its findings and passed sentence (R30).

6. The evidence submitted by the prosecution, including the confession of accused fully supports the findings of guilty of Specifications 1, 2 and 4, Charge I and of Charge I, and of Specification 2, Charge II and of Charge II. The crime of sodomy as denounced by the 93rd Article of War includes carnal knowledge per os (MCM., 1928, par.149k, p.177; CM ETO 339, Gage).

It is alleged in Specification 1, Charge II that at the time and place alleged accused "did *** attempt to commit the crime of sodomy, by wilfully and feloniously taking Private Walter J. Niziol into a room with him, closing the door of same, and asking *** Niziol to 'let me go down on you', or words to that effect".

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The evidence showed that accused asked Niziol to go into a room with him, asked him to take out his penis and said "I want to blow you". He did not touch Niziol who was about to comply with the request when a person with a light passed by the window and he (Niziol) left the room. Niziol "believed" that accused was then kneeling and had his hands on the couch.

It is apparent that by virtue of the acts alleged in the Specification and the evidence, accused was in fact charged with and committed the offense of soliciting and offering to commit sodomy but not of an attempt to commit sodomy. There was no overt act. The fact that accused was kneeling with his hands upon the couch when Niziol saw the light by the window and left the room, constituted mere preparation (CM 185778, Kiers).

> "Accused was charged with attempting to commit sodomy 'by offering and endeavoring to feloniously and against the order of nature have carnal connection' with certain soldiers; and it was proved that he offered and solicited the opportunity to commit sodomy upon them. HELD, That such offers and solicitations constituted offenses under A.W. 96, and the evidence is legally sufficient to support the findings of guilty. Being closely related to the offense of attempting to commit sodomy, the offenses proved were punishable as would have been attempts, ***. CM 145155, CM 145266." (Dig.Ops.JAG., 1912-1930, sec.1484, p.735); (Underscoring supplied).

The principles involved in the foregoing case apply to the case under consideration. The Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II as involves findings that accused did, at the place and time alleged, solicit and offer to commit sodomy in violation of Article of War 96.

7. The charge sheet shows that accused is 25 years of age and was inducted 31 August 1942 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 of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specifications 1, 2 and 4, Charge I and of Charge I, Specification 2, Charge II and of Charge II, legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II as involves findings that accused did, at the

place and time alleged solicit and offer to commit the offense of sodomy in violation of Article of War 96, and legally sufficient to support the sentence.

9. Pursuant to paragraph 5c, General Orders #37, ETOUSA, 9 September 1942 as amended by General Orders #63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement of accused in a penitentiary is authorized for the offense of sodomy (MCM., 1928, par.90, p.81). As accused is under 31 years of age with a sentence of not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement is correct (War Department letter AG 253 (2-6-41) E, 26 February 1941).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(170)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 15 NOV 1943 TO: Commanding General, 29th Infantry Division, APO 29, U.S. Army.

1. In the case of Private PAUL K. GARRISON (39254537), Cannon Company, 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 of Specifications 1, 2 and 4, Charge I and of Charge I, Specification 2, Charge II, legally sufficient to support only so much of the findings of guilty of Specification 1, Charge II as involves findings that accused did, at the place and time alleged solicit and offer to commit the offense of sodomy in violation of Article of War 96, and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 945. For convenience of reference please place that number in brackets at the end of the order: (ETO 945).

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 947

17 NOV 1943

U N I T E D - S T A T E S	)	VIII BOMBER COMMAND.
	)	
v.	)	Trial by G.C.M., convened at AAF
	)	Station 123, on 22 September
Second Lieutenant GORDON A.	)	1943. Sentence: Dismissal, total
YEOMANS (O-562396), 328th	)	forfeitures and confinement at
Bombardment Squadron (H),	)	hard labor for two years. Eastern
93rd Bombardment Group (H).	)	Branch, United States, Disciplin-
	)	ary Barracks, Beekman, 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 61st Article of War.
Specification: In that 2ND LT. GORDON A. YEOMANS, 328th Bombardment Squadron (H), 93rd Bombardment Group (H) AAF, AAF Station 104, APO 634, did, without proper leave absent himself from his organization at AAF Station 104 from about 16 August 1943, to about 7 September 1943.

CHARGE II: Violation of the 96th Article of War.
Specification 1: (Finding of guilty disapproved by reviewing authority).
Specification 2: (Finding of not guilty).

Specification 3: In that ******, did, at AAF Station 104, on or about 11 August 1943, with intent to defraud, wrongfully and unlawfully make and utter to Sgt. Angelo M. Lavalle, 11045032, 330th Bombardment Squadron (H), 93rd Bombardment Group (H) AAF, AAF Station 104, APO 634, a certain check, in words and figures as follows, to wit:

25988

No. 1/B789237 August 11, 1943

Barclays Bank Limited
Gurney's Bank
Bank Plain, Norwich

Pay Cash ---------- or Order the sum of Twenty Pounds

£20.00 /s/ Gordon A. Yeomans
2nd Lt., A.C.(0562396

and by means thereof, did fraudulently obtain from Sgt. Lavalle, twenty pounds (£20), he the said Lt. Yeomans, then well knowing that he did not have and not intending that he should have any account with the Barclays Bank Limited, Bank Plain, Norwich, Norfolk, England, for the payment of said check.

Specification 4: In that ******, did, at AAF Station 104, on or about 12 August 1943, with intent to defraud, wrongfully and unlawfully make and utter to Sgt. Angelo M. Lavalle, 11045032, 330th Bombardment Squadron (H), 93rd Bombardment Group (H) AAF, AAF Station 104, APO 634, a certain check, in words and figures as follows, to wit:

25988

No. 1/B789228 August 12, 1943

Barclays Bank Limited
Gurney's Bank
Bank Plain, Norwich

Pay Cash ---------- or Order the sum of Ten Pounds

£10.00 /s/ Gordon A. Yeomans
2nd Lt., A.C.(0562396)

and by means thereof, did fraudulently obtain from Sgt. Lavalle, ten pounds (£10), he the said Lt. Yeomans, then well knowing that he did not have and not intending that he should have any account with the Barclays Bank, Bank Plain, Norwich, Norfolk, England, for the payment of said check.

Specification 5: In that ******, did, at AAF Station 104, on or about 13 August 1943, with intent to defraud, wrongfully and unlawfully make and utter to 1ST LT. WILLIAM L. STAHL, 0792758, 5th Station Complement Squadron, AAF Station 104, APO 634, a certain check, in words and figures as follows, to wit:

25988

No. 1/B789236 August 13, 1943

Barclays Bank Limited
Gurney's Bank
Bank Plain, Norwich

Pay Cash ---------- or Order the sum of Five Pounds

£5.00 /s/ Gordon A. Yeomans
2nd Lt., A.C.(0562396)

and by means thereof, did fraudulently obtain from Lt. Stahl, five pounds (£5), he the said Lt. Yeomans, then well knowing that he did not have and not intending that he should have any account with the Barclays Bank Limited, Bank Plain, Norwich, Norfolk, England, for the payment of said check.

He pleaded guilty to Charge I and its Specification and not guilty to Charge II and the five specifications thereunder. He was found not guilty of Specification 2, Charge II, and guilty of both charges and all other 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, Commanding General, VIII Bomber Command disapproved the finding of guilty of Specification 1 of Charge II, construed the dishonorable discharge as adjudging dismissal and as thus construed, approved the sentence but reduced the confinement to two years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and pursuant to Article of War 50½, withheld the execution thereof.

3. The uncontradicted evidence concerning the offenses of which accused was found guilty, as approved by the reviewing authority, shows substantially as follows:

The accused was absent without leave from 16 August to 9 September 1943 (Pros.Exs.1 and 2; R7) (Charge I and Specification).

On the evening of 11 August 1943 he was playing poker in the squadron day-room of the 330th Bombardment Squadron with Sergeant Angelo M.

Lavalle, 330th Bombardment Squadron, 93rd Bombardment Group, during which game the sergeant cashed for accused a check on Barclays Bank for £10 signed at that time by accused. Later in the game Lavalle returned the check to accused, took from him another check (Pros.Ex.3) for £20, and gave him another £10, making a total of £20 (R9,11). Accused who said he had money in the bank, asked the sergeant to hold the check until he (accused) went to the bank the next day to draw the money himself to pick up the check.

On the following evening, 12 August 1943, a similar game took place in the same room. Accused and the sergeant were both playing and again the sergeant cashed for accused a further check on the same bank (Pros.Ex.4), for £10; accused saying "he had not had time to go to the bank that day". The sergeant presented both checks at the bank for payment which was refused on each check as accused had no account at the bank. Accused did not redeem the checks (R10) (Specifications 3 and 4, Charge II).

First Lieutenant William L. Stahl, 5th Complement Squadron, mess officer of the officers' mess at AAF 104 testified that accused gave him a check on 13 August 1943 (Pros.Ex.5) to cash for him (R14) and that he gave accused English money for it. Accused left the impression with the Lieutenant that it could be cashed at anytime but that he would rather it be held until the following Saturday. The Lieutenant personally presented the check to the bank for payment (R15) which was refused (R14) (Specification 5, Charge II).

First Lieutenant Larry R. Smith, Air Corps, 328th Bombardment Squadron, 93rd Bombardment Group, testified that the checks (Pros.Exs. 3, 4 and 5) were taken from his check-book as shown by their numbers; that the check-book was missing and that the check-book was on Barclays Bank where he had an account. He denied ever giving any checks to accused to use (R17).

Herbert L. Cawston, Assistant Manager of Barclays' Bank, on which these checks (Pros.Exs. 3, 4 and 5) were drawn, testified that he had investigated these checks and that the signer of the checks (accused) did not have and had never had, an account with his bank (R18). When these checks were presented at the bank, payment was refused because "drawer had no account with us" (R19).

4. Accused stated he "did not wish to take the stand", when his rights as a witness were explained to him by the law member of the court (R22).

5. Several errors and irregularities as shown by the record of trial have been noted by the Staff Judge Advocate and Theater Judge Advocate in their reviews. They were all minor and non-prejudicial. They will not be commented upon further.

6. The accused pleaded guilty to an unauthorized absence for 22 days and such absence without leave is also clearly shown by competent evidence.

The evidence also is clear and convincing that he issued three separate checks without permission or authority out of the check-book of another officer. For each of said checks he received money on his representations that he had funds on deposit in the bank on which he had drawn them. Payment of the three checks was refused when presented at the drawee bank for the reason that accused did not then have nor did he ever have any account thereat.

7. The charge sheet shows that accused is 21 years 11 months of age and that he served as an enlisted man two years and one month as of 6 August 1940. Appointed Second Lieutenant, Army of the United States, 5 August 1942 at Miami Beach, Florida.

8. The court was legally constituted and had jurisdiction of the person 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. The confirmed sentenceof accused includes confinement at hard labor for two years in the Eastern Branch, United States Disciplinary Barracks, Beekman, New York. Persons sentenced to dishonorable discharge (dismissal from the service) and to confinement, not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the reviewing authority may direct (AW 42). Designation of the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement herein is correct (sec.VI, par.2a, Cir. 210, WD, 14 September 1943).

B. Franklin Yates Judge Advocate

Judge Advocate

Judge Advocate

(176)

CONFIDENTIAL

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 17 NOV 1943 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Second Lieutenant GORDON A. YEOMANS (O-562396), 328th Bombardment Squadron (H), 93rd 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 and 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 947. For convenience of reference, please place that number in brackets at the end of the order: (ETO 947).

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

(Sentence ordered executed. GCMO 25, ETO, 23 Nov 1943)

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

BOARD OF REVIEW

ETO 952

30 NOV 1943

U N I T E D S T A T E S	CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private CECIL MOSSER (19096562), Company A, 342nd Engineer General Service Regiment.	Trial by G.C.M., convened at London, England 19 October 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. The 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 Cecil Mosser, Company A, 342nd Engineer General Service Regiment, ETOUSA, did, at Bishops Stortford, Great Dunmow, England, on or about 20 June 1943, desert the service of the United States and did remain in desertion until he was apprehended at London, England, on or about 23 July 1943.

CHARGE II: Violation of the 69th Article of War.
Specification: *******, having been duly placed in confinement in the Detention Barracks, Central Base Section, Services of Supply, ETOUSA, on or about 24 July 1943, did, at London, England, on or about 29 July 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 94th Article of War.
Specification 1. *******, did, at London, England, on or about 29 July 1943, feloniously take, steal, and carry away one blouse, Olive Drab, of the value of about ten dollars and thirty-four cents ($10.34), one pair trousers, Olive Drab, of the value of about four dollars and eighty-three cents ($4.83), one waist belt, web, of the value of about twenty-two cents ($.22), the property of the United States government furnished and intended for the military services thereof.
Specification 2. *******, did, at London, England, on or about 29 July 1943, feloniously take, steal, and carry away one woden shirt, Olive Drab, of the value of about three dollars and sixty-eight cents ($3.68) the property of the United States government furnished and intended for the military service thereof.

CHARGE IV: Violation of the 96th Article of War.
Specification: *******, did, at London, England, on or about 21 July 1943, knowingly assist Gunner Reginald W. Gunn, H26097, No. 1.C.A.R.U., Canadian Army, by wrongfully providing the said gunner Reginald W. Gunn., with an American Army uniform in order to aid the said Gunner Reginald W. Gunn, to desert from the Canadian Army.

ADDITIONAL
CHARGE: Violation of the 93rd Article of War.
Specification 1. *******, in conjunction with Private William Nolan, Company D, 112th Engineer Regiment, ETOUSA, did, at London, England, on or about 15 July 1943, by force and violence, feloniously take, steal and carry away from the person of Sergeant Robert D. Fairchild, Headquarters and Headquarters Squadron, 8th Bomber Command, ETOUSA, one Gruen wrist-watch of the value of about twenty dollars ($20.00), and six pounds and ten shillings in English money of the value of about twenty-six dollars ($26.00), the property of Sergeant Robert D. Fairchild, Headquarters and Headquarters Squadron, 8th Bomber Command, ETOUSA.
Specification 2. *******, in conjunction with Private William Nolan, Company D, 112th Engineer Regiment, ETOUSA, did, at Bishops-Stortford, England, on or about 1 August 1943, feloniously take, steal and carry away five dollars ($5.00) in the money of the United States, one money order of the value of about two dollars ($2.00), and one one wallet and personal papers of the value of about one dollars ($1.00), the property of Technician Fourth Grade

Ernest W. Kodera, 818th Engineer Battalion (Aviation), ETOUSA.

Specification 3. *******, in conjunction with Private William Nolan, Company D, 112th Engineer Regiment, ETOUSA, did, at Bishops-Stortford, England, on or about 1 August 1943, feloniously take, steal and carry away one dollar ($1.00) in the money of the United States, seven shillings in English money of the value of about one dollar and forty cents ($1.40), one leather wallet and personal papers of the value of about one dollar ($1.00), the property of Sergeant Henry T. Knittel, 818th Engineer Battalion, ETOUSA.

Specification 4. *******, in conjunction with Private William Nolan, Company D, 112th Engineer Regiment, ETOUSA, did, at Bishops-Stortford, England, on or about 1 August 1943, feloniously take, steal, and carry away one leather wallet of the value of about one dollar ($1.00), the property of Corporal Joseph Reitano, 818th Engineer Battalion, ETOUSA.

Specification 5. *******, in conjunction with Private William Nolan, Company D, 112th Engineer Regiment, ETOUSA, did, at Bishops-Stortford, England, on or about 1 August 1943, feloniously take, steal and carry away one Monroe wrist-watch of the value of about twenty-five dollars ($25.00), the property of Technician Fourth Grade Clarence J. Zogleman, 818th Engineer Battalion, ETOUSA.

Specification 6. (Findings of not guilty.).

Specification 7. *******, in conjunction with Private William Nolan, Company D, 112th Engineer Regiment, ETOUSA, did, at Bishops-Stortford, England, on or about 1 August 1943, feloniously take, steal and carry away nine pounds (£9) in English money of the value of about thirty-six dollars ($36.00), the property of Private First Class James C. Ellis, 818th Engineer Battalion, ETOUSA.

Specification 8. (Findings of not guilty).

He declined to plead to the charges and specifications and pleas of not guilty to all charges and specifications were entered on his behalf. He was found guilty of all charges and of all specifications except Specifications 6 and 8, Additional Charge, of which he was found not guilty. Evidence of one previous conviction for absence without leave for two days in violation of Article of War 61 was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 20 years. The reviewing authority approved the findings of the court with the following modifications: Specification 1, Additional Charge, except the words "one Gm en wrist-watch of the value of about twenty dollars ($20)", substituting therefor the words, "one Gruen wrist-watch, value unknown"; Specification 5, Additional Charge, except the words "one Monroe wrist-watch of the value of about twenty-five dollars ($25)", substituting therefor the words "one Monroe wrist-watch of the value of less than twenty dollars"; Specification 4,

Additional Charge except the words "one leather wallet of the value of about one dollar ($1)", substituting therefor the words "one leather wallet, value unknown"; Specifications 2, 3, 4, 5 and 7, Additional Charge except the words "Bishops-Stortford", substituting therefor the words "Dunmow, England". He 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 concerning the offenses of which accused was found guilty was as follows:

The defense stating that it had no objection thereto, a certified extract copy of the morning report of accused's organization was admitted in evidence which contained the entry:

"20 June 1943 - Pvt Mosser fr duty to AWOL, 2245 hrs. TOS" (R8; Pros.Ex.1).

On 23 July 1943 on Dean Street, Soho, London, England, Sergeant John L. Kozak, Investigations Division, Provost Marshal General's Detachment, APO 887 was looking for a Canadian wearing an American uniform. He observed accused talking to a Canadian Highlander. The two soldiers were joined by a man named Reginald Gunn. When asked by Kozak for his pass accused produced a pass issued in the name of Carl E. Lorraine. He and Gunn were taken to the Investigation Division, Provost Marshal General's Detachment where Gunn admitted he was a "Canadian deserter". Accused insisted his name was Lorraine. When the name Mosser was found on his clothing he said that he had borrowed the uniform from a Corporal Mosser. Upon further questioning he admitted that he was Private Cecil Mosser, and he was then taken to the guardhouse section of the Headquarters Detachment, CBS., SOS, APO 887. The defense stating that it had no objection, the pass bearing the name Carl E. Lorraine was admitted in evidence (R9-10; Pros.Ex.2) (Charge 1 and Specification).

About 23 July 1943, accused was placed in confinement in the guardhouse, CBS, SOS, ETOUSA (R11). About 29 July, Corporal Edward J. Meade, Guardhouse Section, APO 887 was in charge of a work detail composed of prisoners from the guardhouse of which accused was a member. Accused and a prisoner named Nolan were washing windows in a building situated about 10 miles from the guardhouse. Meade went downstairs to obtain some rags. When he returned, he took a roll call of the prisoners and found that accused and Nolan were missing. He had given them no permission to leave (R11-12) (Charge II and Specification).

Reginald W. Gunn, H26097, Gunner, No.1 Canadian Army Reinforcement Unit, testified that at the time of the trial, he was serving a three-year sentence for absence without leave. On 23 July 1943 he was in a status of absent without leave and was with accused in Soho, London. Gunn was then wearing a United States army uniform consisting of a tunic, trousers, shirt, tie and forage cap which he had borrowed from accused (R16-17) (Charge IV and Specification).

About 29 July 1943. Technicians Fifth Grade John B. Nurdin, Jr., and William K. Garrett, both of Headquarters Detachment, CBS were billeted in Room 2A, 43 Green Street (London). About that date Nurdin found that there was missing certain Government property which had been issued to him, consisting of one blouse, two pairs of "O.D" trousers, a tie and a belt. Garrett found missing one wool "O.D" shirt which was also Goverrmment property and which had been issued to him. Neither man had given accused permission to take the property. At the trial Nurdin identified a blouse bearing the name "Lambert" as the blouse which was missing. It was admitted in evidence and later withdrawn, the defense having withdrawn a previous objection thereto. The prosecution asked the court to take judicial notice of AR 30-3000, stating that a blouse was valued therein at $10.34, a pair of "O.D" trousers at $4.83, a waist belt at $.22 and a wool "O.D" shirt at $3.68. There was no indication as to whether the court granted the request. (R13-15; Pros.Ex.3) (Specifications 1 and 2, Charge III).

About 15 July 1943 Sergeant Robert D. Fairchild, Headquarters and Headquarters Squadron, VIII Bomber Command went to the Fitzroy Tavern, London where he ordered "a Scotch and a glass of bitter, beer". He saw a red-haired girl and asked if she would like a drink. She accepted and had a drink of Scotch and a glass of beer. The girl had a second glass of beer and Fairchild ordered another drink of Scotch and another glass of beer. He went to the lavatory, returned to finish his drink and could remember nothing further until he "momentarily" awakened that night in a British hospital. He was then transferred to the 16th Station Hospital. He missed his Gruen wrist-watch, and his wallet containing about seven pounds in English money, his pass and several other personal items. At the trial he was shown a wrist-watch which he had never seen before (R17-18). It was stipulated by the prosecution and defense that if First Lieutenant Louis W. Shabat, Medical Corps, 16th Station Hospital were present he would testify that his findings with regard to Fairchild were:

> "Multiple bruises, abrasions, cuts, and lacerations about scalp and jaw, caused by unknown assailant. Soldier was dazed and ran temperature of 102 for three days due to head blow. Temperature above normal for three days. Diagnosis: (1) Lacerations, scalp, mild; (2) Contusions, scalp, severe; (3) Contusions, jaw, severe; (4) Contusions, lower lip, severe; (5) Concussion, cerebral, severe". (R19; Specification 1, Additional Charge).

About 1 August 1943 the following members of the 818th Engineer Battalion were stationed in or near Dunmow, England: Technician Fourth Grade Ernest W. Kodera, Sergeant Henry T. Knittel, Corporal Joseph Reitano, Technician Fourth Grade Clarence J. Zogleman, Private First Class James C. Ellis. About that date each man discovered that certain property belonging to him was missing. Kodera's property, which was in his trouser's pocket next to his bed consisted of a black leather wallet containing a five-dollar American bill, a two-dollar money order, a canteen check and some other personal property (R19) (Specification 2, Additional Charge). Knittel missed from his trousers a wallet, an American dollar bill, a "PX" card,

about six shillings in change and some photographs (R19-20) (Specification 3, Additional Charge). Reitano's property consisted of his black leather wallet, marked with his initials "J.R" which contained a "PX" card, driver's license, and a few personal photographs (R20-21) (Specification 4, Additional Charge). Zogleman missed a silver Monroe wrist-watch which had been in his shirt pocket (R21) (Specification 5, Additional Charge), and Ellis missed his wallet containing a passport and nine pounds (R21-22) (Specification 7, Additional Charge).

On 24 July and on 27 September 1943, Kozak took statements from accused who had previously been warned as to his rights. The statements, which were reduced to writing and signed by accused were admitted in evidence with the exception of certain portions bracketted in red pencil (R23-24; Pros.Exs. 4, 5).

In substance accused stated therein that he "deserted" his organization about 19 June 1943 at Bishops-Stortford, Great Dunmow, and went to London with 25 pounds in his pocket. After spending this money he lived on the earnings of prostitutes, on money he received from a girl acquaintance and by "panhandling" from American soldiers. About four weeks prior to 24 July he asked a soldier to request "the boys in hut seventeen" to bring some of his clothing and toilet articles to a London restaurant. Thereafter some things were left for him at the restaurant including a complete uniform (Pros.Ex.4) (Charge 1 and Specification).

In a bar in Soho he met a Canadian in civilian clothes whose name and identity he later discovered to be W.R. Gunn, H26097, a gunner in the Canadian army who was a deserter and escaped prisoner. Gunn expressed a desire for an American uniform which would make it easier for him to escape detection. Accused agreed to let Gunn wear his extra uniform, and on 21 July 1943 left it for him at a bar where Gunn later picked it up. The two men met at the bar, secured some passes from an American soldier, filled them in with "fake" names and serial numbers and registered at the Victory Club (Pros.Ex.5) (Charge IV and Specification).

On 15 July 1943 accused and Private William Nolan, 112th Engineer Regiment, Company D, and a red haired girl named "Violet" went to the Fitzroy Tavern, London. They planned that the girl should "pick up" an American soldier with a lot of money, and put some aspirin in his drink when he was not looking "to make him groggy". Nolan and accused were to rob him when he left the pub. At the Fitzroy Tavern the girl became acquainted with an American Sergeant and put two aspirin tablets in his drink when he went to the lavatory. When they left the pub, Nolan and accused followed the girl and the sergeant to an alley which had been previously selected as the place to commit the robbery. Accused hit the sergeant on the head with a rock and both he and Nolan then knocked him unconscious. Accused took his wallet and Nolan removed his wrist-watch. They divided the proceeds, accused receiving two pounds ten shillings, the girl two pounds, and Nolan two pounds and the watch (Pros.Ex.5) (Specification 1, Additional Charge).

Accused met Nolan again when he was sent to the guardhouse, Headquarters

Detachment, CBS, SOS, APO 887. On 29 July 1943 he and Nolan were members of a detail of prisoners cleaning windows at premises occupied by 14th Port Battalion. The two men were on a high first floor and escaped by going down the rainpipe (Pros.Ex.5) (Specification, Charge II).

They went to some billets on Green Street, London and stole two complete uniforms (Pros.Ex.5) (Specifications 1 and 2, Charge III).

On 30 July 1943 accused and Nolan entered a building occupied by the 818th Engineer Battalion at Bishops-Stortford, Great Dunmow, where they stole the wallets of two men who were asleep. One wallet was empty, and the other contained three one-dollar bills and a five-dollar bill. Accused also took seven shillings from the trousers of one of the soldiers. They threw away the papers and kept the wallets (Pros.Ex.5).

On the night of 31 July 1943 Nolan and accused returned to the same camp and after the men were asleep, entered about six tents and stole some wallets, one of which, plain brown in color and bearing the initials "J.M", contained three American one-dollar bills. From these thefts they realized about twelve pounds. He did not recall how many wallets they took nor was he sure that Nolan informed him of all the articles which he had taken (Pros.Ex.5).

They returned to Bishops Stortford the following morning (1 August), spent the day drinking, became very drunk and separated. Nolan was trying to sell things to soldiers. On 2 August, accused woke up in the railroad station at Stanstead, went to Cambridge with another soldier where they did "quite a lot of drinking". He then went to Oxford where he was picked up by the military police and sent to the 2nd General Hospital where he was identified by Sergeant Kozak. He was sent to APO 887 where he was questioned by Kozak at the Investigation Division (Pros.Ex.5).

4. Upon being advised of his rights accused elected to remain silent (R24-25).

5. (a). The trial judge advocate requested the court to take judicial notice of Army Regulation 30-3000 (Quartermaster Corps price list of clothing and equipage) stating that it valued the articles described in Specifications 1 and 2 of Charge III as alleged therein. There was no indication in the record of trial as to whether or not the court acceded to this request (R15). As accused was found guilty of the specifications it may be presumed that the court did in fact take judicial notice of the provisions of the army regulation concerned. Similarly it may be assumed that the court granted the request of the trial judge advocate that it take judicial notice of the fact that the value of the English pound was $4.03 (R22).

(b). Before accused pleaded to the charges and specifications the defense counsel moved to strike out "all the specifications after the first charge under the 93rd Article of War on the grounds that each specification after the first alleges a separate charge, a duplicity of crimes specified, instead of being separately charged, and the effect of such duplicity is

prejudicial to the defendant". It was maintained that accused "might have a better chance" if he were tried separately on the specifications contained under the charge alleging a violation of the 93rd Article of War. The motion was denied (R6-7). The contention by the defense that accused was entitled to a separate trial with respect to the Additional Charge and the specifications thereunder is, of course, without merit.

Multiplicity of charges and specifications should be avoided.

> "The theft of several articles at the same time and place and in the same manner constitutes but one larceny. CM 164838; 166326; 185535 (1929); 192790 (1930)" (Dig. Ops. JAG. 1912-1940, sec. 428 (14), p.298).

> "Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where a thief *** goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification". (MCM., 1928, par. 149g, p.171).

The articles described in the specifications of the Additional Charge were alleged therein to have been stolen at the same place on or about 1 August 1943, and the evidence shows that the respective owners of such articles found them to be missing on or about that date. The statement by accused shows that he and Nolan on the night of 30 July stole the wallets of two men who were asleep in the same building, and that the following night they entered about six tents at the same camp where men were sleeping and took several wallets. The period of confinement imposed was twenty years. Assuming but not deciding that because of the foregoing circumstances the various thefts should have been at least partially consolidated, the Board of Review is of the opinion that any multiplicity involved did not injuriously affect the substantial rights of accused in view of the allegations of other and serious offenses for one of which the court could legally have imposed the death sentence (desertion in violation of Article of War 58).

6. It was established by the evidence, and by his own statement, that accused absented himself without leave at the place and time alleged and that such absence was terminated by apprehension in London 33 days later. Although he was frequently in the vicinity of military installations he did not surrender to military authority. During his absence he lived on the earnings of prostitutes, on money received from a girl acquaintance, by "panhandling" from American soldiers, and committed the crime of robbery. At his request, a complete uniform and some other articles were brought to London for his use. When apprehended he produced a pass issued in the name of Carl E. Lorraine and insisted that his name was Lorraine. When the name of Mosser was found on his clothing he said that he had borrowed the uniform from a Corporal Mosser, but upon further questioning finally admitted that he was Private Cecil Mosser. Intent to desert was fully established

(CM ETO 913, Pierno; CM ETO 823, Poteet; CM ETO 800, Ungard; CM ETO 740, Lane) (Charge I and Specification).

Similarly it was clearly proved by the evidence, including the statement by accused that at the timesand places alleged he committed the offenses alleged in Charge II and Specification (escape from confinement in violation of Article of War 69), in Charge III and specifications (larceny in violation of Article of War 94) and in Charge IV and Specification (knowingly assisting a soldier to desert from the Canadian army by wrongfully providing him with an American army uniform in violation of Article of War 96). The evidence, including accused's statement is also legally sufficient to support the findings of guilty as approved by the reviewing authority of the offense alleged in Specification I of the Additional Charge (robbery in violation of Article of War 93).

It has been held that where several articles have been stolen, the corpus delicti in each case having been established, and accused is found in possession of part of the stolen articles after the theft, such fact may be considered as tending to show he was guilty of stealing all of the articles (CM 157982, Acosta; CM 192031, Allen). If the finding of part of the stolen articles in accused's possession furnishes the basis for such an inference, an admission by accused himself that he actually stole some of the articles would normally provide an even stronger inference that he took all of the articles alleged. Kodera testified that about 1 August at Dunmow he missed his wallet which contained a five-dollar American bill, a two-dollar money order, a canteen check and other personal property, and that when Knittel searched his own trousers he found that his wallet was missing. Knittel testified that about 1 August at Dunmow he missed a wallet, an American dollar bill, a "PX" card, about six shillings in change and some photographs (Specifications 2 and 3, Additional Charge). Both men were members of the 818th Engineer Battalion. In his statement accused admitted that on the night of 30 July he and Nolan entered a building occupied by the 818th Engineer Battalion and stole the wallets of two men, that one wallet was empty and the other contained three one-dollar bills and one five-dollar bill. He also took seven shillings from the trousers of one of the men. They threw away the papers and kept the wallets. It is the opinion of the Board of Review that the property concerned was satisfactorily identified by the evidence and that in view of the principle enunciated in the Acosta and Allen cases hereinbefore cited, the evidence is legally sufficient to support the findings of guilty of Specifications 2 and 3 of the Additional Charge.

Reitano testified that about 1 August he missed his leather wallet and Ellis missed his wallet containing a passport and nine pounds. Both men were members of the 818th Engineer Battalion. In his statement accused admitted that on the evening of 31 July he and Nolan returned to the same camp at Great Dunmow, entered about six tents, stole some wallets and realized about 12 pounds from the thefts. Although accused's statement as to the wallets and their contents is most general in character, it is the opinion of the Board of Review that the property was sufficiently identified, that the principle of the Acosta and Allen cases is similarly applicable and that the evidence is legally sufficient to support the findings of guilty of Specifications 4 and 7 of the Additional Charge.

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With reference to Specification 5 of the Additional Charge (larceny in violation of Article of War 93), the only evidence presented by the prosecution was the testimony of the owner Zogleman, a member of the 818th Engineer Battalion, that when he arose on the morning of 1 August 1943 near Great Dunmow he found missing from his shirt pocket a silver Monroe wrist-watch. The statement made by accused contained no reference to this watch and is limited to his admission that on 30 and 31 July he and Nolan committed a series of thefts of wallets containing money and papers from members of the 818th Engineer Battalion at Bishops Stortford, Great Dunmow. There was no evidence that accused or Nolan were ever in possession of the watch. The statement by accused that on the evening of 30 and 31 July, they stole wallets and money from members of Zogleman's organization at the place alleged, that he was not sure that Nolan had told him of all the articles which he, Nolan, had taken and that on the morning of 1 August Nolan was trying to sell articles to soldiers, clearly does not justify any inference that Zogleman's watch was among the articles which were stolen. Accordingly, the evidence is legally insufficient to support the findings of guilty of Specification 5 of the Additional Charge.

7. The charge sheet shows that accused is 22 years of age and that he enlisted on 17 April 1942 at Seattle, Washington for the duration of the war plus six months.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial with reference to the findings of guilty which have been sustained herein. 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, II, III, IV and of the specifications thereunder, legally sufficient to support the findings of guilty as approved by the reviewing authority of Specifications 1, 2, 3, 4 and 7 of the Additional Charge and of the Additional Charge, legally insufficient to support the findings of guilty of Specification 5 of the Additional Charge and legally sufficient to support the sentence.

9. Pursuant to paragraph 5c, GO # 37, ETOUSA, 9 September 1942 as amended by GO # 63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement of accused in a penitentiary is authorized for the offense of desertion in time of war (Article of War 42) and for robbery by Sec. 463 Federal Criminal Code (18 USCA 463).

W. MacAllister Peters Judge Advocate.

Absent on sick leave. Judge Advocate.

Edmund Klingsen Judge Advocate.

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 30 NOV 1943 TO: Commanding General, Central Base Section, SOS, ETOUSA, APO 887, U. S. Army.

1. In the case of Private CECIL MOSSER (19096562), Company A, 342nd 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 of Charges I, II, III, IV and of the specifications thereunder, legally sufficient to support the findings of guilty as approved by the reviewing authority of Specifications 1, 2, 3, 4 and 7 of the Additional Charge and of the Additional Charge, legally insufficient to support the findings of guilty of Specification 5 of the Additional Charge and legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. 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 952. For convenience of reference please place that number in brackets at the end of the order: (ETO 952).

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 960

11 DEC 1943

UNITED STATES v	WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
Private RUSSELL (NMI) FAZIO (13012666) and Private CHARLES B. POTEET, (6996601) both of Company "A", First Provisional Battalion, 10th Replacement Depot, and Private WARREN G. NELSON, (20503176) Company "A", Fourth Replacement Battalion, 10th Replacement Depot.	Trial by GCM, convened at Whittington Barracks, Lichfield, Staffordshire, 25 October 1943. Sentences: Dishonorable discharge, total forfeitures and confinement for 10 years each for Privates Fazio and Nelson, in the Federal Reformatory, Chillicothe, Ohio, and for 20 years for Private Poteet, in 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 soldiers named above has been examined by the Board of Review.

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

FAZIO

CHARGE: Violation of the 69th Article of War.
Specification: In that Private Russell (NMI) Fazio, Company A., First Provisional Battalion, Tenth Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, having been duly placed in confinement in Western Base Guardhouse, Tenth Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, on or about 25 August 1943, did at Western Base Guardhouse, Tenth Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, on or about 1 October 1943, escape from said confinement before he was set at liberty by proper authority.

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ADDITIONAL CHARGE: Violation of the 58th Article of War.
Specification: In that Private Russell (NMI) Fazio, Company A., First Provisional Battalion, Tenth Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Tenth Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, on or about 1 October 1943 desert the service of the United States and did remain absent in desertion until he surrendered himself at Rugby, Warwickshire, England, on or about 6 October 1943.

POTEET

CHARGE I: Violation of the 69th Article of War.
Specification: In that Private Charles B. Poteet, Company "A", First Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, having been duly placed in confinement in Western Base Guardhouse, Whittington Barracks, Lichfield, Staffordshire, England, on or about 9 September 1943, did, at Western Base Guardhouse, Whittington Barracks, Lichfield, Staffordshire, England, on or about 1 October 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE II: Violation of the 94th Article of War.
Specification: In that Private Charles B. Poteet, Company "A", First Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, on or about 1 October 1943, feloniously take, steal, and carry away one wool olive drab blouse and one pair of wool olive drab pants of the value of less than twenty dollars ($20.00), property, of the United States furnished and intended for the military service thereof.

CHARGE III: Violation of the 93rd Article of War.
Specification 1: In that Private Charles B. Poteet, Company "A", First Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Coventry, Warwickshire, England, on or about 1 October 1943, feloniously take, steal, and carry away a plain wrist watch of Swiss make, of a value of less than twenty dollars, ($20.00), the property of Mrs. G.A. Saunders, Coventry, Warwickshire, England.
Specification 2: In that Private Charles B. Poteet, Company "A" First Provisional Battalion 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Whittington Barracks, Lichfield, Staffordshire, England, on or about 1 October 1943, feloniously take, steal, and carry away nine pounds (£9), lawful money of

the United Kingdom of the exchange value of thirty-six dollars, thirty one cents ($36.31), the property of Corporal Duane B. Hamlin, Headquarters Detachment Company, 40th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England.

ADDITIONAL CHARGE: Violation of the 58th Article of War.
Specification: In that Private Charles B. Poteet, Company A, 1st Provisional Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did at 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, on or about 1 October 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Weston Haddon, Northamptonshire, England, on or about 6 October 1943.

NELSON

CHARGE I: Violation of the 69th Article of War.
Specification: In that Private Warren G. Nelson, Company A., Fourth Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, having been duly placed in confinement in Western Base Guardhouse, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, on or about 9 September 1943, did, at Western Base Guardhouse, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, on or about 1 October 1943, escape from said confinement before he was set at liberty by proper authority.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that Private Warren G. Nelson, Company A., Fourth Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did, at Coventry, Warwickshire, England, on or about 4 October 1943, feloniously take, steal, and carry away five pounds (£5), lawful money of the United Kingdom of the exchange value of twenty dollars and fourteen cents ($20.14) and one plain gold wedding ring and one ring with five small stones, all of the above property and currency being of the value of less than fifty dollars ($50.00), and more than the value of $20.00, the property of Mrs. Doris Elizabeth Leeming, 131 Honiton Road, Wykin, Coventry, Warwickshire, England.

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ADDITIONAL CHARGE: Violation of the 58th Article of War.
Specification: In that Private Warren G. Nelson, Company A., Fourth Replacement Battalion, Tenth Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, did at Tenth Replacement Depot, Whittington Barracks, Lichfield, Staffordshire, England, on or about 1 October 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Nuneaton, Warwickshire, England, on or about 7 October 1943.

Each accused pleaded guilty to all charges and specifications with the exception of the charges and specifications alleging desertion in violation of Article of War 58, to which each pleaded not guilty. Each was found guilty of all charges and specifications with which he was charged. Evidence of four previous convictions was introduced against accused Fazio, two for larceny, one for escape from confinement and one for failure to obey a lawful command of his company commander. No evidence of previous convictions was introduced against either Nelson or Poteet. 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, Fazio and Nelson for 10 years each and Poteet for 20 years. The reviewing authority approved the sentences, designated the Federal Reformatory, Chillicothe, Ohio, as the places of confinement for Fazio and Nelson, and the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for Poteet and forwarded the record of trial for action pursuant to Article of War 50½.

3. Other than the written statements of each of the accused, no evidence was introduced by the prosecution except in support of the charges and specifications alleging desertion and escape from confinement. The evidence introduced summarizes as follows:

Captain Marshall F. Hollis, Infantry, on 30 September 1943, was Assistant Provost Marshal in charge of the Western Base Guardhouse at the 10th Replacement Depot, and had received, among others, the three accused as prisoners: Poteet for a life term, Fazio for a 10 year term and Nelson for a 5 year term (R18). About 5:30 on the morning of 1 October 1943, he went to No. 3 Guardhouse, 10th Replacement Depot and found that accused Nelson, Poteet and Fazio had escaped from their cells. They had gone out through the window over the lavatory after prying open their cell doors, and though immediate search was made of the buildings and surrounding territory they were not found. He had not authorized their release and they escaped before being set at liberty by proper authority (R19).

Corporal Harry S. Carney, 10th Replacement Depot, worked in the office of the Provost Marshal, and was in charge of the Guard Book of the Western Base Guardhouse. He produced and identified the book and

the entry therein of 1 October 1943 reciting: "Escaped: Fazio, No.29, Poteet, No. 97, Nelson, No.122, escaped from the guardhouse around 0400 hours, 1st October" (R20-21; Pros. Ex."C"). (The records fail to disclose the admission of any exhibits marked Pros. Ex. A and B.)

Private Dillon (NMI) Maynor was on duty at Western Base Guardhouse No.3 on the morning of 1 October 1943. He knew accused had been prisoners in the guardhouse and that they escaped on that morning. He personally searched for them and they were not in their cells (R22).

Corporal Joseph (NMI) Lackup, Company "B", 4th Replacement Battalion was acquainted with the accused. About 4.30 A.M. of 1 October 1943 he came down to No.3 Guardhouse "to collect a man" he made a personal search of the cells and accused were not present.(R23).

Harry Wheeler, Police Inspector, Northamptonshire Constabulary, identified accused Poteet. He saw a soldier dressed in American Army uniform and wearing sergeant's stripes on the night of 6 October 1943 at the Headquarters of a British Artillery unit at West Haddon Hall, Northamptonshire. He "challenged him with being one of the three escaped American prisoners, Poteet. He produced to me a pink leave pass bearing the name of Charles Allen. In answer to my further questions he became confused, and I took him into custody on suspicion of being Poteet". On further questioning at Police headquarters, the prisoner admitted his identity as Poteet and was handed over to the American authorities (R22).

Mrs. Nellie Weston, George Hotel, Kilsby, near Rugby, identified Poteet and Fazio who registered respectively as Charles Allen and Ben Rainwater at her hotel sometime between 30 September and 6 October 1943. Both later admitted their true identity to Mrs. Weston and Fazio told her he "would like to give himself up" and Poteet said he was "willing to come back after December 1st". Poteet said the reason he wanted to stay out till then was a personal matter (R26-27).

Police Sergeant John A. Thomas, Warwickshire Constabulary, in response to a telephone message on 7 October (1943) "made a search and found the prisoner Warren (Nelson) at a house in Heath End Road, Nuneaton. I told him I suspected him of being a person wanted by the U.S. Authorities, and searched him. I found in his possession two dog tags by the name of John R. Smith. I told him he appeared identical with a man we wanted, arrested him and took him to Nuneaton Police Station" (R28). He was dressed in United States Army uniform with sergeant's stripes (R29).

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John Edward Croker, Detective Sergeant, Warwickshire Constabulary, on 6 October 1943, as result of a message received from Mrs. Weston at the George Hotel, Kilsby, "went there and saw the prisoner Fazio standing in the bar. I recognized him as Fazio and told him I was a police officer and should take him into custody. He said 'I'm the guy'". He was dressed in American uniform and was handed over to the American authorities. He was apprehended about 25 miles from "this station" (the place of escape) (R31).

Second Lieutenant Thomas B. Weatherby, Infantry, who investigated the charges identified various statements which were voluntarily made by the accused after due warning given that they did not have to make any statement and that if they did it might be used for or against them in a trial by court-martial (R32). These statements were offered as confessions "only for the 58th Article of War". The objection by the defense to "three sheets" was sustained and the balance consisting of one statement each of Poteet and Fazio (3 sheets) and three separate statements of Nelson were admitted as Pros. Ex. "D" to "J" inclusive (R33).

Poteet in his sworn statement (Pros. Ex "D") stated that he wanted to stay out until his child was born, that while away he never changed into civilian clothes, and denied that any accused had any weapons while absent. He also stated that "The property which I have been questioned about was taken from me at Northampton where I was taken from West Haddon".

Nelson, in his signed statements, Pros. Ex. "E", "F" and "G", agreed "with the statement of Fazio in so far as it pertains to what we did up to the time I left them" and in so far as it pertained to him Nelson attached and adopted Fazio's statement as his own with certain exceptions. He got some clothes from a barracks not far from Guardhouse No. 3.

> "On Monday morning when I parted from the boys I went to a girls house across the street from the Webster's and about three houses down where this girl was staying. She was of Italian descent. The reason I did not rejoin Fazio and Poteet was that I saw some police outside. I stayed with this girl all day Monday and Monday night and Tuesday night until about 2200 hours when I left, started back for camp since I had seen our pictures in the paper and knew that it was useless to try to stay out any longer. I went first to Bedworth where I stayed in the train station that night and I stayed around Bedworth the next day and caught the train for Nuneaton this morning, 7 October 1943, at 0630 hours. I got off the train at Nuneaton and was arrested there about 30 minutes later by

the civilian police. I did not intend permanently deserting the Army of the United States but merely wanted to get out and get some whiskey and cigarettes. I have been drinking since I was 15 and can not do without it." (Pros. Ex."F").

He admitted taking two rings, one a wedding band, the other a small wing with five stones in it, from a little box on the dresser of a lady (Mrs.Leeming) living "across the street from Mrs. Webster", and at the same time taking from her a five pound note (Pros.Ex.E).

Fazio in his statement detailed the particulars of the escape of the three accused and of their activities thereafter as long as they were together (Pros.Exs.H-I). He denied any outside assistance of any sort in the escape (Pros. Ex. "J").

Private Harry M. Long, Disciplinary Training Centre No. 1 was confined in the Western Base Guardhouse with the accused prior to 1 October 1943 (R35). About two or three days before they escaped, the accused told him that they would like to get out of the guardhouse and go to a battle front with American troops because their sentences might then be suspended.

4. Three members of the court, Col. Herr, Lt.-Col. Haney and Capt. Mulberg, who were members of a court which had previously tried Fazio and Nelson on other and different charges than the present ones were each challenged for cause by the defense, and each was sworn and questioned. Each denied any prejudice toward accused and stated that he could, as a member of the present court, give accused a fair and impartial trial. One of the three challenged members, the president of the court, Colonel Herr, testified that he had an unfavourable impression of both accused after the last trial which impression was still maintained. The court closed and considered the challenges in the absence of the three members and refused to sustain them. Thereafter the defense announced that there were no peremptory challenges and that there was no objection to any member of the court. (R3-7).

The failure of the defense to exercise its peremptory challenges after denial of its challenges for cause prevents any consideration upon appellate review of the court's action in denying the challenges for cause. (CM ETO 804, Ogletree et al).

5. Evidence of four previous convictions of accused Fazio was received by the court prior to their announcing their findings. However, the court closed just prior to receiving such evidence and the record does not clearly indicate the order of procedure. Such evidence may be

received only after the findings have been made, and then only for the purpose of determining the punishment. As Fazio was given the same sentence as Nelson he apparently was not prejudiced by any irregular action of the court.

6. Several errors and irregularities occurring during the trial have been noted by the Assistant Staff Judge Advocate in his review. As these pertained mostly to form and procedure and did not injuriously affect the substantial rights of the accused under the provisions of Article of War 37, further comment is unnecessary.

7. Each of accused pleaded guilty to all charges and specifications against them with the exception of the charge of desertion under Article of War 58 and its specification. By inference, Poteet in his statement refers to the articles he is charged with taking, when he mentions "the property which I have been questioned about". Nelson in his statement admits his guilt of the larceny to which he pleaded guilty. Fazio was not charged with larceny. Each was fully advised of the effect of their plea of guilty but declined to change it. In connection with the charges of larceny there was no evidence except accused's statements. The record is legally sufficient to sustain the charges of larceny against Poteet (Charge II and its Specification; Charge III and its Specifications) and against Nelson (Charge II and its Specification).

8. The undisputed evidence fully warrants the findings of guilty as to each accused of escape from confinement. It is also legally sufficient to support the findings of guilty as to each accused of the charge of desertion. Each escaped from confinement and there was evidence that each desired to leave the country. Each used a false name while absent. The absence of each accused was terminated by apprehension although it was alleged that Fazio surrendered (CM ETO 952, Mosser; CM ETO 913, Pierno; CM ETO 823, Poteet; CM ETO 800, Ungard; CM ETO 740, Lane). The trial court passes on disputed facts and is the sole judge thereof. Its findings will not be disturbed when supported by competent substantial evidence. (CM ETO 132, Kelly and Hyde; CM ETO 422, Green; CM ETO 492, Lewis).

9. The present offenses were committed on 1 October and 4 October 1943, charges were preferred 7 October and 12 October, trial was had on 25 October and action taken 8 November, 1943.

On 27 September 1943 Nelson was sentenced in a former trial on other charges to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The sentence was approved by the reviewing authority 4 October 1943 and published in a general court-martial order dated 21 October 1943 (CM ETO 839, Nelson).

On 1 September 1943 Poteet was sentenced in a former trial on other charges to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The sentence was approved by the reviewing authority 26 September 1943 and published in a general court-martial order dated 15 October 1943 (CM ETO 823, Poteet).

On 27 September 1943 Fazio was sentenced in a former trial on other charges to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The sentence was approved by the reviewing authority 13 October 1943 and published on the same day. As this published order was void because the Board of Review had not acted upon the record of trial, (AW 50½), the sentence was later published in a "corrected" general court-martial order dated 29 October 1943 (CM ETO 875, Fazio).

None of the former sentences to dishonorable discharge were ordered suspended by the reviewing authority. The Federal Reformatory, Chillicothe, Ohio was designated as the places of confinement for Fazio and Nelson, and the United States Penitentiary, Lewisburg, Pennsylvania for Poteet. The former sentences of Nelson and Poteet were approved by the reviewing authority and the general court-martial orders thereon published prior to 25 October 1943, the date of the present trial. The former sentence of Fazio was approved by the reviewing authority prior to the date of the present trial but the only valid general court-martial order thereon was published four days after the date of this trial. The offenses by the three accused which were the subject of the present trial were all committed prior to the dates on which they were dishonorably discharged. They were therefore soldiers when the offenses were committed.

It is now well settled that where a general prisoner is tried for an offense committed while a soldier and prior to his dishonorable discharge, such discharge did not terminate his amenability to trial while in confinement under his sentence for offenses committed prior to discharge. (Dig. Ops. JAG. 1912-1930, sec.1326, p.657; CM 156977, Howell; CM 173082, Curran; CM 175471, Evanco)

> " * * * where a dishonorably discharged general prisoner was tried for an offense committed while a soldier and prior to his dishonorable discharge, it was held that such discharge did not terminate his amenability to trial for the offense" (MCM; 1928, par.10, p.9).

In a case decided prior to the Howell case just cited, the evidence showed that accused was sentenced to dishonorable discharge, advised of the sentence and actually discharged prior to 30 November 1921, the date on which the reviewing authority approved a second sentence imposed upon trial for an offense prior to his discharge. It was held that except for violation of Article of War 94, courts-martial did not have jurisdiction

to try general prisoners for offenses committed prior to their discharge as soldiers, and that as accused had been discharged subsequent to the offenses charged and prior to the completion of his trial, such trial was void (CM 149849, Ogilvie et al; CM 142257, Kolockly; CM 126359, Sparks; CM 144965, Jones; CM 152203, Acree). However, the principle enunciated in the Ogilvie case and similar cases immediately above cited, has been overruled by the Howell, Curran and Evanco decisions.

The principles of the last mentioned cases apply to the case under consideration. The offenses alleged in the present cases were committed by Poteet and Nelson and charges were preferred, prior to the promulgation of their former sentences to dishonorable discharge, by general court-martial orders dated 15 and 21 October respectively, although the date of the present trial is subsequent to the date of such publication. Fazio however committed the offenses herein alleged, charges were preferred against him, and he was actually tried prior to the publication of his former sentence to dishonorable discharge by general court-martial order dated 29 October 1943. All three accused were in confinement when charges for the commission of the present offenses were preferred. According to the principles enunciated in the Howell and associate cases cited above, the three accused were amenable to trial by courts-martial for the commission of the offenses charged herein. To hold otherwise would result in allowing them to escape punishment entirely with respect to these offenses.

Although the sentences herein imposed are, therefore, entirely legal, those portions thereof adjudging dishonorable discharge and total forfeitures are now inoperative as the prior sentences to dishonorable discharge and total forfeitures have been promulgated, and have effected the discharges and forfeitures.

10. The charge sheets show that accused Fazio, is 18 years and 3 months old, and enlisted at Pittsburg, Pennsylvania, 7 January 1941 with no prior service; that accused Nelson is 24 years 4 months old, and enlisted at Akron, Ohio, 15 July 1940 with no prior service; and that accused Poteet is 22 years old and enlisted at Richmond, Virginia, 7 November, 1939, with no prior service. The service period of each accused was governed by the Service Extension Act of 1941.

11. The court was legally constituted and had jurisdiction of the persons 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 sentences as to each accused.

12. Pursuant to paragraph 5c, General Orders No. 37, ETOUSA, 9 September 1942, as amended by General Orders No. 63, ETOUSA, 4 December 1942, a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general prisoner may be returned to the United States to serve a sentence of three years or more. It is provided in War Department Circular 291, 10 November 1943, section V 3a and b that with respect to military prisoners sentenced to confinement in a Federal institution, prisoners under 31 years of age and with sentences of not more than 10 years will be confined in a Federal correctional institution or reformatory. All other prisoners will be confined in a penitentiary. Confinement in a penitentiary is authorized for the offense of desertion in time of war (Article of War 42). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place for confinement of accused Poteet, and of the Federal Reformatory, Chillicothe, Ohio, as the place for confinement of accused Fazio and Nelson, is correct. The place designated for each is the same designated as the place of confinement for the prior sentences.

_____ Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

1st Ind.

WD, Branch Office TJAG with ETOUSA, 11 DEC 1943 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U. S. Army.

1. In the cases of Private Russell (NMI) Fazio (13012666), Private Charles B. Poteet, (6996601), both of Company "A", 1st Provisional Battalion, 10th Replacement Depot, and Private Warren G. Nelson, (20503176), Company "A", 4th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the 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 960. For convenience of reference please place that number in brackets at the end of the record: (ETO 960).

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 969

3 DEC 1943

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private LEE A. DAVIS (18023362), Company "C", 248th Quartermaster Battalion (Service).	Trial by G.C.M., convened at Tottenham House, Marlborough, Wiltshire, England, 6-7-26 October 1943. Sentence: To be hanged by the neck until dead.

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 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 92nd Article of War.

Specification 1: In that Private Lee A. Davis, Company C, 248th Quartermaster Battalion (Service) did, at or about London Hill, Marlborough, Wilts, England, on or about, 28 September 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one, Cynthia June Lay, a human being, by shooting her with a rifle.

Specification 2: In that Private Lee A. Davis, Company C, 248th Quartermaster Battalion (Service) did, at or about London Hill, Marlborough, Wilts, England, on or about 28 September 1943, forcibly and feloniously, against her will, have carnal knowledge of Miss Muriel Joyce Rosalie Fawden, a female person.

He pleaded not guilty to and was found guilty of the Charge and of the specifications thereunder all members of the court concurring. Evidence of three previous convictions was introduced as follows: (a) absence without leave and disrespect to an officer in violation of Articles of War 61 and 96; (b) absence without leave for two days in violation of Article of War 61; and (c) failure to obey the order of a noncommissioned officer in violation of Article of War 65. He was sentenced to be hanged by the neck until dead all members of the court concurring. The reviewing authority, the Commanding Officer, Southern Base Section, SOS, ETOUSA, 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 the execution thereof, pursuant to Article of War 50½.

3. The evidence for the prosecution shows that during the early afternoon of 28 September 1943 Miss Muriel Joyce Rosalie Fawden, Station House, Castle Cary, Somerset, an employee of Savernake Hospital, went to the motion pictures in Marlborough. Upon leaving the theater about 7:45 p.m. she met a friend, Miss June Lay, and both girls started walking toward Savernake Hospital (R63,184). Miss Fawden testified in pertinent part as follows:

> "We got half-way up the hill to the hospital, I think about quarter past eight, and a colored American soldier came up from behind and spoke to us. He said 'How far are you going?' We both answered 'We are going to the hospital.' He said 'How far is that?' and I said 'Just up there,' and with that he dropped behind us again.
>
> A few minutes afterwards I heard a voice behind us say 'Stand still, or I'll shoot' or words to that effect - I can't really remember the exact words. We both turned round, hardly believing our ears, and we saw a colored American soldier standing levelling a rifle at us.
>
> He told us to get over the other side of the road, into the bushes. We sort of went towards that side of the road, and tried to stall him. We said we could not get into the bushes because there was barbed wire there, which was a lie - we were trying to stall him. We said it was much better further down the road, so we walked backwards, facing him, down the road, and he still levelled the rifle at us.
>
> Then June said to me 'Run, Muriel;' we both started to run, and then I heard shots.

I was in front - I was leading - June behind - and I looked round and June was still running, and I heard more shots, and I turned round and June threw up her arms and screamed, and rolled over in the road.

Well, I then turned my back and started running hard, and I could hear more shots, and had the impression of bullets whistling past me, so I stopped dead in my tracks, because I thought the next one would go in my back. I didn't turn round. I just stayed there as I was, with my back towards him. Then after a few seconds he caught me up and caught hold of my arm and pulled me through the barbed wire - at least, he ordered me to get through the barbed wire, and we crouched there for a few minutes listening.

I had a white mackintosh on, and he stood over me with the gun and said 'Take your white coat off. When we run it will show up'. I could not take my mackintosh off without taking my gloves off, which I did, and for some reason or other I sort of handed them to him - I mean I don't know why I did it, but I did, and he took them from me, and then I took my mac off and just left it where we were crouching. Then we went further up into the Forest, up on the hill into the grass, and stayed there a few minutes listening, and I heard a lorry come down the hill and stop, and I knew June had been found, and I knew that people would start searching for me.

Then he stood over me with the gun, and he said 'Either you do what I want you to do or you die. I am going to count ten.' So he started to count ten. I did not want to die, so I had no option but to give in to him.

After that I asked him if he would let me go and he said he would if I'd show him the way to the railway line, so I took him over in the direction I thought the railway line lay. Of course it was dark, and when we got there the bushes were thick and I found we couldn't get through, so we turned and started to go back more in the direction that we had

come, and I could see torches and I knew that they were searching for me. So then he pulled me down behind a bush and said 'If you dare move or make a sound I will shoot you, so I didn't, and after a while the torches went away, and then we went further on and through a wicket gate, and over the old gate just to the left there were some haystacks, and we went in there, and I said 'won't you let me go now' and he said 'No, I am not going to let you go until morning' so I sort of felt in my mind that he knew that I was the only one that had witnessed anything. I sort of felt that he was contemplating whether he was going to shoot me or not, so I knew it was up to me to do all I could to save my life.

So we talked for a little while and I saw torches going across the top of the field, and he said 'What are those lights?' and I said 'Why, I don't think it is anything'. He said 'If anybody comes near I've got thirty rounds of ammunition. I shall shoot whoevever comes near.' And the torches went away again. An then he forced me again.

Q. Miss Fawden, 'Forced you' You mean he had carnal knowledge of you?

A. Yes. Then I just started talking. I never talked so hard in all my life. I told him that I was a nurse at the hospital, which was untrue, and I thought I should get into a row for being out all night, and if he would let me go back I'd get into bed - I was most unscrupulous - I mean, I told lies all the time. My main object was to get away with my life - and I can't remember half that I did talk about. I know that I blasphemed. I asked him if he was a Christian. I said I would forgive him, but it was only to save my life. I could see that these words were having an effect on him, so I played on them and after a while he said he would let me go. I said 'Won't you be afraid to walk back to the hospital by yourself?' Well, I wasn't going to say no or yes. I said 'Oh, I don't think so' or something like that, so he said I will

come a little way with you.

So he came as far as the wicket gate with me. By this time he had slung the rifle over his right shoulder and wasn't holding it any more. So I sort of said 'Good-bye' to him - I don't know how - I can't remember. I turned away and I fully expected to have a shot in my back, but it didn't come. So I ran across the forest in the direction of the hospital, and when I got to the top I got lost in the trees. I remember getting through some barbed wire and I found myself going down the same slope that we had come up earlier in the evening, and then I saw lights in front of me and I think I shouted 'Help' or something like that' and the police found me, it was a policeman, and other police took me back to the hospital." (R184-186).

Miss Fawden further testified that the incident occurred "quite near the hospital off the London Hill", Marlborough, Wiltshire County, England. Her assailant was the same person who shot Miss Lay. He wore a khaki overcoat, put it on the grass and told her to lie on it. She identified as hers a pair of gloves which she had given him that evening, and also a "white mac". (R186; Pros.Exs.11,20).

Mrs. Lucy L. Fawden, Station House, Castle Cary, Somerset, Miss Fawden's mother, identified the gloves as belonging to her daughter by the initials "F.A" which were the marks used by a cleaner for all Mrs. Fawden's linen. She produced at the trial a table napkin marked in the same manner and also identified her daughter's mackintosh which was admitted in evidence (R55; Pros.Exs.11,20).

About 12:10 a.m. 29 September 1943, Police Constable Albert E. Boyer, stationed at Marlborough, heard the screams of a woman coming from the direction of Savernake Forest. He searched the forest and found Miss Fawden who was hysterical and distressed. She told Boyer that she had been raped twice by a colored soldier who had "fired two shots at June and marked me off to some haystacks in the forest with a rifle pointing in my ribs". She also told him that "**** it will be terrible if I have a black baby". Mr. Albert C. Smith, 2 Lees Road, Marlborough, heard her say "My God, my god, where am I *** I have been raped". Boyer took her to the Savernake Hospital (R103-104,106,109-111). When she arrived at the hospital about 12:30 a.m. Miss Fawden, who was still hysterical, nervous and in great mental distress, was immediately undressed. Removed from her body were a pair of camiknickers, an undervest, a suspender belt and a pair of stockings (R95-96,99-101; Pros.Exs.13-16). She was immediately physically examined by Dr. Timothy K. Maurice of Kingsbury Hill House, Marlborough who found that she was trembling and obviously suffer-

ing from a grave emotional disturbance. Her hair was dishevelled, there was considerable dried blood and bruising about her genitals and the bleeding appeared to emanate from her hymen which had been recently torn and lacerated. In the opinion of Dr. Maurice she had been subject to violence and her injuries had been caused by the introduction of a male organ; penetration had occurred (R15-16). He testified that the injuries could have been caused by an instrument or thing other than a male organ (R18). After the examination she was put to bed. On the first day of the trial (6 October 1943) Miss Fawden, who was about 22 years of age was in the hospital, her mental condition was still rather critical and large doses of hypnotics were being admistered. She was excitable and more than ordinarily emotional (R17). On 30 September 1943, her blood type was determined to be "O" by Dr. Charles J. Baschall, The Gables, Burbage, Wiltshire (R179).

About 8:10 p.m. 28 September 1943, George E. Browning, 2 South View, Marlborough, a porter at Savernake Hospital, was on a railway bridge at London Hill and heard two shots in quick succession, a scream and a scuffle. He ran "towards where the shots were fired," saw a lorry stop and men jump out. He saw June Lay, whom he recognized, lying on the ground. She was aliye, was coughing and blood was running from her face (R28-29).

Francis Beasley, 35 Deansway, Chippenham, "Just after eight o'clock" on the evening of 28 September was driving a lorry toward Chippenham when he noticed the body of a woman lying on Marlborough Hill. He left a friend at the scene and drove to Marlborough where he informed the police (R26).

About 8:45 p.m. 28 September, Dr. Maurice went to the place where Miss Lay was found which was about 200 yards above a railroad bridge on the main London road leading out of Marlborough. He found Miss Lay, whom he knew, lying on the main road. Examination showed that she had not been dead for more than a half hour (R12-13).

A post-mortem on the body of Miss Lay was performed on 29 September 1943 by Dr. Baschall, assisted by Dr. Maurice who took notes at the former's dictation. Dr. Baschall, reading from his notes, testified that the results of the post-mortem were in part as follows:

> "The body was of a stout young woman. Rigor Mortis is present. There are several external wounds.
> (1) A small circular, clean-cut perforated wound about ¼" in diameter situated about 3" above the left external auditory meatus. Secondly, an irregular wound situated 2" anterior to the first wound. This irregular would is approximately 3/8" from above downwards and ¼" across.

3. An irregular circular wound just above the canthus of the right eye. This one is 3/4" in diameter. There is some dark mottling on the skin round this wound, and two small pieces of the skin has been removed for the purpose of microscopic examination.
4. A perforating wound 3/4" in diameter about 4" distal to and slightly anterior to the right acromio-clavicular joint.
5. A perforating wound ¼" in diameter 1" to the left of the mid-line at the back and at the level of the spine of the eighth dorsal vertebrae.
6. **********.
7. **********. In the right pleural cavity a wound was found 1½" posterior to the body of the seventh dorsal vertebrae. This wound was large enough to admit the tip of the index finger and was found to be in communication with the wound mentioned in '5' - that is, the perforating wound near the mid-line of the back. Also in the right pleural cavity was another wound, in the right mid-axillary line, which had fractured the fifth rib. Examination of the right lung showed a wound in the posterior part of the lower lobe, and another slightly anterior, above and lateral to the former. These two wounds communicated with each other through a narrow track passing through the lung tissue. Further explorations showed that the wound fracturing the fifth rib passed through the axilla and was in communication with the one mentioned in '4' - that is, the wound in the region of the right acromio-clavicular joint. The left lung did not show any abnormality.

There is a fracture of the right humerus, 1" below the surgical neck. The site of the fracture is in a straight line joining the wound in the back, that is number '5', the wounds in the right pleural cavity and the wound in the right shoulder (number '4').

The head: The hair was moist with blood. The wound over the right external auditory meatus had perforated the skull and was in communication with the wound on the inner side of the right orbit. The bones of the skull between these two points were in fragments, the largest fragment being approximately

2" square. The posterior border of this fragment was formed by the left coronal suture. This suture had separated for some distance above the fracture, approximately as far as to 2" to the right of the mid-line of the skull. The anterior part of the left frontal lobe of the brain was lacerated. The wound 2" anterior to the one over the left ear was apparently caused by one of the fragments of bone." (R9-10).

The conclusion reached by the two doctors was that Miss Lay's death had been sudden and violent, and was caused by two bullet wounds, one penetrating the brain and the other penetrating the lung (R11,14).

A certified copy of an entry of death of Miss Cynthia June Lay with the exception of that part thereof entitled "Cause of Death" was admitted in evidence with the consent of the defense (R19; Pros.Ex.1).

About 8:25 p.m. 28 September, Police Sergeant William J. Willis, stationed at Marlborough, arrived at the scene, found the body of a woman lying in the road and immediately drew chalk marks around the body, which was not moved until photographs were later taken. Upon inquiry he found that the deceased was Miss June Lay. She was lying on London Hill, a half to three-quarters of a mile from Marlborough and about 500 yards from Savernake Hospital (R22-24). Photographs were taken about 12:30 a.m. (29 September) by Detective Sergeant Reginald T.M. Butler, Photographic Branch, British Constabulary, Devizes. One picture was a view of the body facing towards Marlborough, another of the body facing towards Savernake Forest. The following day Butler took two photographs of the road where Miss Lay was found, one being a general view of the road towards Marlborough and the other towards Savernake Forest. The four photographs which were identified by Sergeant Willis as correct reproductions of the scenes intended to be portrayed were respectively admitted in evidence (R20,23-24; Exs. A,B,C,D). On 1 October, Butler took a photograph of a stake "showing where various articles of clothing were found" (R20) (Later admitted in evidence as Ex.E).

About 11:10 p.m. 28 September, Mr. Albert G. Smith, who was one of a group of men searching the area, found a lady's brown woolen scarf on the ground near a wire fense on the side of the road. About eight yards away on the other side of the fence, Constable Boyer found an American soldier's "forage cap" lying on the ground about 60 yards from where the body of Miss Lay was found (R103-105,109). Boyer identified Pros.Ex.19 as the cap which he had found, and marked the spot by placing an "X" on a photograph which was then admitted in evidence as Ex.E (R105-106). Smith marked with a "Y" on Ex.E the place where he found the scarf (R111). About 10:15 p.m. 28 September, Sergeant W.J. Gale of the

Wiltshire Special Constabulary found a lady's mackintosh on the ground about ten yards inside the wire fence. He identified Pros.Ex.20 as the coat which he found and designated the spot on Ex.E by placing a "Z" thereon (R112). At 7:15 a.m. 29 September, Detective Sergeant Arthur R. Hill, stationed at Marlborough found an empty .30 carbine rifle-cartridge about 14 feet from the place where the body of Miss Ley had been discovered. The cartridge was two feet from the curb and on the curb directly opposite the case were splashes of blood. Hill identified Pros.Ex.4 as the cartridge-shell which he had found (R60,115-116,128).

During the evening of 28 September Private James Henderson, 354th Engineer Regiment went to bed in barracks 28 at Iron Gates Camp at 8 p.m. Sometime during the night he heard a noise in the hut and someone turned on the lights. A pair of "O.D" trousers were "lying there". He identified a pair of trousers as the ones which were found. On the same evening Sergeant Willie Wilson, Company D, 354th Engineer Regiment was charge of quarters and about 11:30 p.m. entered barrack 28 at Iron Gates Camp to make a bed check. Henderson gave him the pair of "O.D" trousers which had been discovered. Wilson identified Pros.Ex.6 as the trousers which had been delivered to him by the bloodstains thereon. They were removed by Second Lieutenant A.D. Mothershed, Company D, 354th Engineer Regiment, who also by the bloodstains identified the trousers as being similar in appearance to the pair which he had taken (R31-33,48-52).

About 6:15 a.m. 29 September, at Iron Gates Camp a wrinkled "G.I" overcoat was seen hanging up inside the door of barrack 28 by Private First Class James W. Patterson, Company D, 354th Engineer Regiment. The coat was not there when he went to bed on the night of 28 September, nor did it belong to any of the occupants of barrack 28. The overcoat, and a shirt were taken from the barrack by First Sergeant Bowens, Company D, 354th Engineer Regiment and turned over to Lieutenant Mothershed. Patterson identified Pros.Ex.5 as the overcoat in question, and Bowens and Lieutenant Mothershed both identified Pros.Ex.5 and Pros.Ex.7 as similar in appearance to the overcoat and shirt which they had received. There was a bloodstain on the shirt (R168-178).

On the morning of 29 September First Lieutenant Clarence L. Villemez, Company D, 354th Engineer Regiment was the leader of a group of men searching the area around Barrack 28. About 25 yards from the barrack they discovered a carbine rifle "sticking straight up, barrel down, in the mud". A clip containing live ammunition was found about 10 or 15 yards away between the rifle and the barracks. Barrack 28 was occupied by Company D, 354th Engineer Regiment which company was not armed with carbines. Lieutenant Villemez turned over the carbine and clip to Lieutenant Mothershed who gave it to Detective Sergeant Hill. Hill identified Pros.Ex.2 as the carbine-rifle in question. It bore the number 1594722 (R52-53,130-138).

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It was recorded on accused's identification tag and service record that his name was Lee A. Davis, his serial number 18023362 (Underscoring supplied) and his blood type "O". His identification tags were admitted in evidence (R8,65-66,70; Pros.Ex.22). Clothing of the members of his company was marked with the first letter of the soldier's surname followed by the last four digits of his serial number. The letter and figure D3362 would be used by accused to mark his clothing (R66). The wrinkled overcoat and shirt found in Barrack 28 (Pros.Exs.5,7) were each marked D3362 (R66,173,175-177). The soldier's cap (Pros.Ex.19) found near the wire fence was marked "W8470" (R56,129), which consisted of the first initial of the last name and the last four digits of the serial number of a Private J.C. Wheeler, a member of accused's company (R68,80) who testified that the cap was his, that he had loaned it to accused 27 September 1943 and that accused did not return it (R83). The rifle found outside barrack 28 (Pros.Ex.2) bore the number 1594722 and had been issued to Wheeler who also identified this rifle as the one issued to him (R86,135-137).

Private J.C. Wheeler, Company C, 248th Quartermaster Battalion was stationed at Iron Gates Camp and occupied the same barrack with accused and five other soldiers. He last saw accused at "chow" about 6:00 p.m. 28 September. After supper Wheeler went by truck to a "show" given at Tottenham House, left when it was over at about 10-10:30 p.m., returned to his quarters and went to bed. When he returned accused was not in his bunk which "was made up just like he made it up that morning" (R80-83). Wheeler was seen at supper about 6:30 p.m. and was also accompanied to the theater between 7-7:30 p.m. by Private First Class Sylvester McCormack, Company C, 248th Quartermaster Battalion who sat behind him during the entire performance which ended about 10:00 p.m. McCormack also rode back to camp on a truck with Wheeler (R89-90). Private George F. Hunt, Company C, 248th Quartermaster Battalion saw Wheeler sitting behind him at the theater (R93).

Between 11:30 - 12:15 a.m. 28-29 September, Second Lieutenant Carl H. Schneider, Company C, 248th Quartermaster Battalion, and Captain Raymond P. Logan of the same company began a bed-check, each taking one half of the company area (R64,74). Lieutenant Schneider found accused's bunk vacant, it "had not been touched and the fatigue clothes were neatly piled on top of it" (R74-75). He also searched the latrine and shower rooms in his half of the company area which would normally be used by accused, who was not found (R77,87). Captain Logan then ordered the entire company to be assembled in the mess hall for the purpose of determining whether any weapons had been fired, and whether all carbines and "O.D" caps were accounted for. The company was assembled about 1 - 1:30 a.m. (29 September). Accused was present at this inspection (R64,75).

When Wheeler was awakened and told to go to the mess hall with his rifle and "O.D" hat, he looked for his rifle but could not find it.

He then took the only rifle left in the barrack, which was hanging at the foot of his bed, and went to the mess hall. The rifle did not belong to him. He did not have his "O.D" cap (Pros.Ex.19) because he had loaned it to accused on the evening of 27 September and it had not been returned. Wheeler's own rifle had been inspected 22 September by Lieutenant Schneider and he had not given anyone permission to take it (R82-86). At the inspection in the mess hall about 1:15 a.m. Captain Logan examined each carbine to see if it had been fired and looked at each man to see if he was wearing an "O.D" cap. He read off the number of each carbine to Lieutenant Schneider who checked the number with a card file showing to whom it had been issued. Captain Logan read off the number of the rifle in the hands of Wheeler to Lieutenant Schneider who called for a check of that number because it did not correspond with the number of rifle issued to Wheeler. Accused then said that the carbine was his. Captain Logan again called off the number of the rifle held by Wheeler and the supply-sergeant checked the number with a numerical list of carbine numbers in order to determine to whom the rifle was issued. The list showed that it had been issued to accused, who had no rifle at the inspection and who told Captain Logan that he had gone into the hut and found no rifles there. The rifle possessed by Wheeler and the other rifles inspected did not appear to have been fired. The rifle assigned to Wheeler (Pros.Ex.2 - found outside barrack 28) was, according to the records, the only rifle missing at the company inspection. (R64-65,67,70,75,77). Accused appeared at the inspection in a garrison cap (R69), and Wheeler wore a fatigue cap (R68). Accused was dressed in fatigue clothing as were the other men, but his jacket was unbuttoned and his shoes unlaced (R77). He was sober but "acted extremely nervous and agitated" when he claimed the rifle (R75).

At the trial, Captain Logan identified accused's gun which Wheeler had in his possession at the inspection, and which was numbered 1594492. It was admitted in evidence (R69-70; Pros.Ex.23). He also identified "exhibit 4" (actually Pros.Ex.2) as the rifle issued to Wheeler (R68). He further testified that in the barrack in which accused and Wheeler were quartered, there were double bunks, one above the other. Wheeler and accused occupied a double bunk together. The clothing of the men was kept in barrack bags, their field equipment was on one end of their bunks, and the carbines were at the other end. The weapons were not locked and it was possible for one man to appropriate the clothing or weapon of another. Ammunition was not issued except for the performance of guard duty. A check "the next day" disclosed that no ammunition was missing (R68,70-72).

About 11:35 p.m., 28 September, Inspector Alexander Keiller, Special Constabulary, Marlborough received a United States army cap from Boyer. The cap (Pros.Ex.19) was marked W8470 and was given by Keiller at Iron Gates Camp to Superintendent Walter H. Gibson, Wiltshire Constabulary about 12:55 a.m. 29 September (R56,58,128-129). At 1:45 a.m.

29 September, Superintendent Gibson received from Lieutenant Mothershed a pair of bloodstained American khaki trousers (R57,123). In the hip pocker he found a badly bloodstained handkerchief marked with the number "3362", a pair of pigskin gloves marked inside with the initials "F.A" in red cotton, a dirty unmarked white handkerchief, and an unmarked khaki service tie. The right hand pocket contained a .30 carbine live bullet (R57,60-61,123). At 4:00 a.m. 29 September at the mess hall, Iron Gates Camp, Superintendent Gibson warned accused as to his rights, who then acknowledged ownership of the trousers and also the handkerchief marked with the number 3362. Accused said that the cap was Private Wheeler's, that he had worn it "last night" but that "to-night" he had been wearing Philip Hall's wool knit cap. Accused said that the gloves belonged to him, that "*** he gave them to me to-night", but that he did not know who "he" was (R57-58,114,123).

Pros.Exs. 6,10,11 were identified as the trousers, bloodstained handkerchief marked 3362, and gloves in question. Pros.Ex.12 was identified as a shell similar to the one removed from the pocket of the trousers (R57-58,66,124-125).

At 4:30 a.m. 29 September, Detective Sergeant Hill examined accused's undergarments and saw what appeared to be bloodstains on his underpants and shirt. No injuries or abrasions from which the blood could come were observed on his body but the middle finger of his left hand appeared to be stained with blood. Scrapings were taken from underneath and above the finger nails of each hand and placed in separate, marked envelopes (R114-115,122,124,126). The stained underpants and shirt (Pros.Exs.8,9) were identified as the ones worn by and taken from accused that morning. The under-pants were marked D-3362 (R66,116,121). Also identified were the envelopes containing the scrapings from accused's finger nails (R117,124; Pros.Ex.17).

On 30 September 1943, First Lieutenant William L. Bradford, Corps of Military Police, CID, SOS, received from Superintendent Gibson the following exhibits: one carbine rifle, a magazine clip with cartridges, an empty cartridge case, greatcoat, trousers, shirt, under-pants and underdrawers, soiled handkerchief, pair of gloves, two envelopes containing scrapings, woolen scarf, a cap and a mackintosh. He delivered the articles to Major William J. King, Corps of Military Police (R154-156; Pros.Exs. 2-11, 17-21). Major King delivered them to Scotland Yard where they were sorted for distribution to various technical experts. He again received the exhibits and they were returned on 7 October to Lieutenant Bradford who brought them to court (R157,166).

On 4 October a gun expert, Mr. Robert Churchill, 32 Orange Street, Leicester Square, London was given by Major King a .30 caliber U.S. carbine rifle No. 1594722 (the gun issued to Wheeler and found near barrack 28 - Pros.Ex.2), a magazine for the rifle containing 15 rounds of

special carbine ammunition, and a fired shell (found by Hill near the body of Miss Lay - Pros.Ex.4), of identical make and size as the ammunition in the magazine. The rifle was automatic loading but not automatic firing, in that the trigger had to be pulled to fire each shot (R34-35). The fired shell bore four sets of markings, namely, the striker imprint and the breech face, extractor and ejector marks. Mr. Churchill fired from the gun 6 test shots. From a comparison of the extractor markings on the fired shell and those on the test shells, Mr. Churchill was of the opinion that the fired shell (Pros.Ex.4) was fired from the carbine rifle numbered 1594722, and could not have been fired from any other rifle (R35-36). Mr. Churchill used two of the fifteen rounds of ammunition contained in the clip. Admitted in evidence were the rifle No. 1594772 (Pros.Ex.2), the magazines with the cartridges contained therein (Pros. Ex.3) and the fired shell (Pros.Ex.4). The defense consented to the introduction of the exhibits but objected to the withdrawal from the record of the fired shells (R36-37).

On 4 October Mr. James Davidson, Director of the Metropolitan Police Laboratory, an expert pathologist, received from Major King certain property labelled as belonging to accused and Miss Fawden (R39-40). He found human bloodstains belonging to group "O" on the outer surface of the lining of the left pocket, and the back inner surface of the overcoat. Mixed with the bloodstains was male seminal fluid. Human bloodstains belonging to group "O" were found in the regions of the left hip and left pocket of a pair of trousers. Upon examination of a United States army shirt, Mr. Davidson found a bloodstained area on the inner surface of the left front near the lower hem. The blood belonged to group "O" and was mixed with seminal fluid. Similarly, a pair of under-pants stamped "D3362" bore evidence of blood smearing mixed with seminal fluid on the front in the region of the fly opening, and the front outer surface of a cotton under-shirt was faintly smeared with blood. Extensive bloodstains were discovered on two handkerchiefs. On one of the handkerchiefs the blood, which was human in character, belonged to group "O" and was mixed with seminal staining. Nothing was found upon an examination of a pair of gloves, a scarf, an army cap and a carbine cartridge. Extensive bloodstaining belonging to group "O" and mixed with seminal fluid, was discovered in the region of the fork of a pair of camiknickers, and group "O" bloodstains were present on the inner front surface of a lady's under-vest. A suspender-belt was also bloodstained on the front lower end. Mr. Davidson discovered bloodstains near the foot of a torn pair of lady's stockings. An examination of two envelopes containing scrapings purporting to be from the nails of the left and right hand of accused, showed evidence of the presence of blood on both hands. The defense stating that there was no objection to the admission in evidence of these exhibits provided that their connection with the case was subsequently established, they were admitted in evidence, subject to such condition, as follows: overcoat (Pros.Ex.5), trousers (Pros.Ex.6), shirt (Pros.Ex.7), under-pants (Pros.Ex.8), under-shirt (Pros.Ex.9), one hand-

kerchief (Pros.Ex.10), gloves (Pros.Ex.11), .30 caliber carbine cartridge (Pros.Ex.12), camiknickers (Pros.Ex.13), lady's under-vest (Pros.Ex.14), suspender-belt (Pros.Ex.15), lady's stockings (Pros.Ex.16), two envelopes containing scrapings (Pros.Ex.17), scarf (Pros.Ex.18) and army cap (Pros. Ex.19) (R40-46).

Mr. Davidson further testified that there are four blood groups, O, A, B and AB. He did not examine all blood spots on the articles but did examine at least one bloodstain on each garment. The blood type of the stains examined was "O" in every instance. The bloodstains on the female clothing was not menstrual (R46-47).

At 4:00 p.m. 30 September, Major Ferris U. Foster, Chemical Warfare Service, SBS saw accused, told him that he had been appointed investigating officer and informed him as to the nature of the charges (R139-140,151). Major Foster read Article of War 24 to accused and asked if he understood it. When he replied that he did not, the major "went to some length to explain to him exactly what it meant: that if he did not wish to answer any question or make any statement, say anything about any question that I might ask him if it was in his estimation against him - and I used that term because I thought that he might best understand it - he did not have to answer". Accused signified that he understood the provisions of Article of War 24 (R140,147). At that time Major Foster, who had been appointed investigating officer at 5:00 p.m., 29 September had not interviewed the British constabulary. As Miss Fawden was too ill to undergo an extensive examination, he had visited her at the hospital and asked her to identify her signature on a statement she had made on the previous day to another officer. He read this statement to accused together with two other statements, one from a "Commanding Officer" and one from Wheeler. The three statements comprised the only testimony available at the time. Accused was also given the name of one witness appearing on the charge sheet, and was informed that Miss Fawden's illness was the reason why she was not examined in his presence. He was also told that he could question the persons who had made the other two statements, that he had the right to cross-examine witnesses, and could present anything he desired in his own behalf subject to the risk of it being used against him. Accused stated that he would accept the testimony as shown to him (R143-144,151-152).

After accused was placed under oath he answered several questions asked him by Major Foster. After reading over his statement given in answer to these questions, accused deleted a good portion of the statement (R141,143-144,146) and requested that he be allowed to write out a substituted statement telling "how it happened". Accused wrote the second statement himself after being told by Major Foster that he did not have to make the statement unless he so desired (R140-141,143-144). The second statement written by accused was then typed by a Major Warner and compared word for word by Major Foster with the statement written by accused. The four typed copies were read over with accused by Major Foster after he was

asked if he wanted to substitute it in lieu of the answered questions, and accused then signed the original typed statement and at least one copy thereof. He was given his original handwritten second statement and it was burned. Accused asked that he be allowed to send a note to "the girl in the hospital" and wrote a few words at the end of one of the copies of his typed statement. Major Foster delivered this to Miss Fawden (R141-142,149-150). He identified the original of the four type-written copies of the statement signed by accused in his presence (R142), and also the note which was written by accused to Miss Fawden and delivered to her (R149-150). The statement and note were admitted in evidence over the objection of the defense (R144,148,150; Pros.Exs. AA, BB).

The statement of accused admitted in evidence was as follows:

"Statement of Lee Andrew Davis

On Tursday 28 Sept 1943 I Lee A Davis eat supper and got my rifle and went thruogh the forrest to town and when I got to town I went to several pubs and bought beer, wine and scotch. Me and some soldiers and I drink some beer with some asprins in it, and then I left to come home when I got up the street I picked up my rifle where I left it and went up the street and I caught up with 2 girls and I spoke to them and ask them where they going and the told me and I told them to wait and go over in the forest and they did not and I told them I was going to shoot and I thought I had the gun in the air and I pulled the trigger two or three times and one girl fell and the other ran but I didn't know I had shot her because I was pretty intoxicated with beer and asprens and scotch and I didn't think she was shot either did the other girl because she said the girl might turn it in.

I didn't have an intention of shoting her because I didn't intend to carry the rifle all the way in town, and the other girl and I went over in the woods. I know I have committed a crime and should be punished for it but I didn't mean to kill anyone. I wasn't in my right mind then and it was an accident because I thought I had the gun in the air.

All I ask of you all will you spare my life. I am sorry I did what I did but

I know it won't bring back the girls life/and I am sorry and I want all the christians to pray for me.

/s/ Lee Andrew Davis

The above statement was typed in its exact spelling from penciled notes written by and at the suggestion of Lee Andrew Davis. The statement was typed in four (4) copies, one of which was given to Davis on his request to be allowed to send a note to the girl in the hospital. He wrote the note on the bottom of the fourth copy, signed it, and gave it to me for delivery. He then signed the other three copies, one of which was given to Major King, CMP.

/s/ Ferris U. Foster
FERRIS U. FOSTER
Major, CWS
Investigating Officer." - (Ex. AA).

The following note was delivered to Miss Fawden by Major Foster on behalf of accused:

"To the girl in Hospital

I am sorry for what happend the other night and I want your forgiveness and will you pray for me like you said.

/s/ Lee Andrew Davis " (Ex. BB).

The defense entered a "plea of abatement to any further proceeding in the matter" on the ground that "the investigation required under the 70th Article of War and the provisions of 35a of the Manual have not been complied with" (R152). The plea was overruled. The summary of evidence and the report of investigation made by Major Foster was identified by that officer and admitted in evidence with the consent of the defense "not as evidence in the case itself" but solely with respect to the plea in abatement (R153; Ex. CC).

4. The defense introduced evidence that the laundry for the members of the company was sent to a contract launderer in Chippenham. Each man would turn in his bundle, marked with his name, to the supply sergeant who would check the items and send them to the laundry (R189). Individuals were frequently found in the possession of laundry and other issue material belonging to another person. Prior to departure from the United States each member of the organization marked both his clothing and equipment with the first initial of his last name and the last four digits of his serial number (R190). If accused's serial number was 18023362 the identification on his clothing would be D3362 (R191).

When clothing was issued information as to the date, size and amount of the clothing concerned was entered in the company records (R195). According to these records the clothing issued accused included among other articles two pairs of wool "O.D" trousers, the waist being 33 and the length of the leg 31. He was never issued wool "O.D" trousers with a 31 waist and a 33 leg (R191). It was common practice for members of the organization to have clothing altered but the measurements in the company records would remain unchanged (R192-193,199). Trousers similar in style to Pros.Ex.6 had been issued (R196-197). The trousers admitted in evidence as Pros.Ex.6 were measured in court and the waist was found to be 32 and the "inseam" about 29 (R198-199). Accused, at his own request put on the trousers and it was recorded that they were "*** close fitting when properly fastened, and a little short in the leg" (R204).

Accused, after being warned of his rights (R200), made an unsworn statement in substance as follows:

After supper on the evening of 28 September he had a nose bleed, stopped it and went to his hut where he remained until 7:30 - 7:45. He then went to the NAAFI, remained about one hour and fifteen or twenty minutes, returned to his hut and took a shower. He went back to the NAAFI and then returned to his hut about 10 o'clock "or a little after" where he lay down with his fatigues on. As he had been drinking beer that evening he had to get up during the night to go to the latrine. On the way to the latrine he met some soldiers who told him to get his rifle and "O.D" cap and go to the mess hall. He found his "O.D" cap in his barracks bag, but his rifle was missing. At the mess hall when Captain Logan called Wheeler's name and checked the number of the rifle in his possession, accused told the captain that the rifle belonged to him (R201-202).

> " After he got through checking the rifle he said that all men in hut 14 to remain in the mess hall. Afterward they called me in and questioned me. A fellow told me, he said 'I am from the Police Department. He held up a cap and asked me did I know it. I told him 'No' and he said 'take it and look at it.' I took the cap and looked at it and I see the number in it and I said 'It's Wheeler's.' He asked me 'How do you know it's Wheeler's' I said 'It's the one that he let me wear on Monday' which was the 20th or 21st - the day I had a day off. Then he asked me, this police officer asked me, he said, 'Whose gloves did you have in your pocket?' I told him they were mine, and he asked me 'Where did you get them?' I said 'A boy found them and gave them to me.' I thought he was talking about the gloves that I had in the

pocket with the number T0047, which some boy in the Company lost, but I don't know who he was. Then he showed me the gloves he was talking about and they were white gloves, and I told him I didn't know.

Afterwards they took off a pair of shorts and an undershirt of mine and he asked me - no he took them - no he asked me first 'whose cap did you wear tonight?' I told him I wore Philip Hall's and he held up an O.D. cap and said 'Like this?' and I told him 'No, a wool-knit cap.' Then he took off the undershirt and pair of shorts off of my body. The shorts were marked with one of my serial numbers, the undershirt was not marked though the shorts was marked like some of my clothing. I'd lost some of my clothing. I'd said something to the supply sergeant about it, but he said we would probably have field clothing and wouldn't get it for six months, so it was about 5 a.m. then, at least they were making reveille. I left to come to Tidworth Garrison stockade. I got there about 7 a.m. in the morning and went to work and about 2 p.m. the sergeant at Tidworth came down and got me and sent me to Shepton Mallet. I got there about 4.30 or 5 p.m.

I taken a shower and eat and went into my cell. Then about ten o'clock the sergeant that was on duty at Shepton Mallet gave me some blankets so I could go to sleep. I was then woke up approximately twelve o'clock on the night of the 29th and questioned until about 4.30 or 5 a.m. on the morning of the 30th. by Major King.

I then went back into my cell and stayed until approximately 9 a.m. At nine o'clock we were ready to go to Tot House. We arrived here a little after ten or eleven o'clock. I was questioned by Major King and Major Foster until noon. I went and eat and come back at about 12.30 or 1 O'clock. Major King and Major Foster taken me out some place to show them something. Anyway I couldn't show them what they wanted to see, so they brought me back about two o'clock on the 30th - that was the day of the 30th.

Then they questioned me here approximately till 2.30 or close 3 o'clock. Then Major

Foster taken me in a room and he read something to me and asked me did I understand. I told him 'No' and he tried to explain it to me, and asked me did I understand it then, and I said 'I guess so' and then he questioned me and asked me questions and I guess he didn't like the statement I told him, so he asked me he said 'Davis, I am going to read three statements to you'.

He read the statements and he said 'This statement here I know is true, because the lady that made it she is not the type to lie,' or 'She don't have no right to lie' or words to that effect, and then after he got through reading he asked me did I want to cross-examine the witness. I told him I did want to cross-examine the person, whoever made that statement, and he said she was a lady and she was sick in the hospital and I could not see her, and about that time Major King came into the room.

Major Foster said 'This is your third and last chance to make a statement' and Major King said 'You are not fooling us, you are only fooling yourself'. I asked Major King and said 'What do you want me to do, make a statement like the one you just read out to me?' and Major Foster said 'No, I want you to make a statement of your own.' And I sat there a few moment and asked Major King - let's see - Major Foster asked him to let me see that statement, then I could write one. He let me have the statement and I copied off the statement and added some to it; after that, Major told me he was my friend, to write it. After I was about through writing I tore it up because it wasn't so, and Major King said, 'All, right, that's confidential, and it can be used against you or for you' or something like that. He said 'We hold the rifle and we can tell who it is by the rifle' and after that he said 'Why don't you write the girl in the hospital a letter and tell her you are sorry' and he told me to write it and I did, and he said 'Sign it, and these papers and Major Foster and I will go take it to her.'

Then after I signed it I tore up some part of it - the one that I had wrote, and throwed them in the fire, and he asked me

'Now do you want to give this to me' and I told him 'No, I did not' and then he asked me did I want him to give the statement to the girl. I told him 'If he wanted to'. The reason I made the statement was because Major King told me that he was my friend, and the statement could not be used against me nor for me, and he had the rifle and the rifle could tell who it was, and I know that I had not had no rifle." (R202-203).

5. (a) Pros.Exs. 5-19 were admitted in evidence with the consent of the defense subject to the condition that their connection with the case be subsequently established. The exhibits were finally admitted in evidence (R188). The Board of Review is of the opinion that with the possible exception of the lady's scarf (Pros.Ex.18), their admission was proper and that their connection with the case was sufficiently established. The Board is also of the opinion that the prosecution had established a proper foundation for the admission of the photographs A,B,C and D which were admitted in evidence over the objection of the defense (R24) (MCM., 1928, par.118b, p.122). Similarly the objection by the defense to the reading by a witness of the first initial of accused's last name and the last four letters of his serial number on the shirt and overcoat, was properly not sustained (R173,175). These exhibits had been admitted in evidence subject to their connection with the case and the fact that accused's identification marks were on the shirt and overcoat were part of the proof establishing such a connection.

(b) The defense objected to the testimony of Miss Bell that at 12:25 a.m., 29 September Miss Fawden was very distressed and hysterical when she appeared at the hospital (R95). The defense also objected to the statements by Miss Fawden to Constable Boyer that she had been raped twice by a colored soldier, that he had "fired two shots at June and marched me off to some haystacks in the forest with a rifle pointing in my ribs," and that it would be terrible if she had a black baby. The court admitted the testimony on the theory of res geatae (R103-104,106-107). It was about 8:10 p.m. when the witness Browning heard two shots and ran to the place where Miss Lay was found. It was "just after eight o'clock" when the lorry driver Beasley noticed her body lying in the road. About 12:10 a.m. Miss Fawden was found by Boyer. There was no definite evidence as to what time the offense of rape was committed during the interval of four hours, and accordingly it was difficult to determine whether Miss Fawden's remarks to Boyer were too far removed in point of time from the commission of that offense to constitute part of the res gestae. However, it is not necessary to base the admissibility of Miss Bell's and certain portions of Boyer's testimony on the theory of res gestae. In cases involving the offense of rape the weight of authority is that one to whom a complaint is

made may testify as to the making of the complaint by the prosecutrix, her physical condition and appearance, and the state of her clothing at the time. Testimony by the witness concerning the details of the outrage as stated by the prosecutrix are, however, inadmissible (Coppage v. State, 137 Pac.2d (Okla.) 797; CM ETO 709, Lakas).

In view of the foregoing, Miss Bell's testimony as to the victim's distressed and hysterical condition when she came to the hospital and Boyer's testimony that she informed him that she had been raped twice by a colored soldier were admissible in evidence. The statement that it would be terrible if she had a black baby was not only corroborative of her statement that she had been raped twice by a colored soldier, but also partly explained and was indicative of her greatly distressed physical condition. Her statements that, after firing two shots at Miss Lay, he marched her off to some haystacks in the forest with a rifle pointing in her ribs were details of the incident and were improperly admitted in evidence. However, Miss Fawden herself testified without objection by the defense that after Miss Lay was shot, accused threatened on several occasions to shoot the witness and took her into some haystacks. Such testimony was clearly admissible. Because of this and other competent evidence establishing accused's guilt of the offense of rape, the Board of Review is of the opinion that the improper admission of this statement did not injuriously affect the substantial rights of accused (CM ETO 709, Lakas; CM ETO 611, Porter). For the foregoing reasons, the court also properly overruled the objection by the defense concerning the testimony of the witness Smith to the effect that when found Miss Fawden was exclaiming "My God, my God, where am I *** I have been raped" (R109-111).

(c) The defense also objected to the admission in evidence of accused's statement to Major Foster, as well as his note to Miss Fawden, delivered to her by the major at his request, and entered a "plea in abatement to any further proceedings in the matter" on the ground that "the investigation required under the 70th Article of War and the provisions of 35a of the Manual have not been complied with". (R144,148,152). The evidence shows conclusively that accused was thoroughly warned as to his rights by Major Foster, informed as to the nature of the testimony then available, was definitely told that any statement he made might be used against him, and that he was not compelled to make any statement or to answer any questions if he believed that it might be "against him". The provisions of Article of War 24 were carefully explained to him and he said that he understood its provisions. He wrote the statement introduced in evidence (Ex. AA) after he requested that he be allowed to tell "how it happened" and after being told that he did not have to make the statement. He signed the statement voluntarily and without any coercion. The note (Ex. BB) which was delivered to Miss Fawden was written by accused of his own volition without suggestion by others, and contained a clear implication of his guilt. Both the statement and the note were properly admitted in evidence. The "plea in abatement" was a misnomer as such a plea relates to an objection to a charge or specifica-

tion in matters of form only (MCM., 1928, par.66, pp.51-52). The claim by the defense that the investigation was not in conformance with Article of War 70 and the provisions of paragraph 35a of the Manual was based upon the contention that the investigation was in the nature of "an inquisition" (R144). On the contrary, as shown by the evidence the investigation was fair and impartial and all rights of accused were fully protected. In support of its argument the defense cited a case in which the record disclosed that no investigation had been made prior to trial. It was held therein that the provisions of Article of War 70 with respect to an investigation of the charges were mandatory and that there must be a substantial compliance therewith before charges could be legally referred for trial. It was further held that as a consequence the proceedings were void ab initio (Dig.Ops.JAG., 1912-1940, sec.428(1), p.292; CM 161728, 1924). However, the cited case is no longer applicable as it has since been held that the requirements of Article of War 70 with respect to the investigation of charges before trial "are not jurisdictional" (CM 229477, Floyd, 30 January 1943).

(d) The court properly overruled the objection by the defense to Lieutenant Schneider's testimony that accused "acted extremely nervous and agitated" when he claimed his rifle at the company inspection (R75-76). Such testimony was plainly admissible as it was the result of ordinary visual observation and did not require expert knowledge. (20 Am.Jur. Evidence, sec.823, p.692; Underhill's Criminal Evidence - 4th Ed.- sec.231, p.432; CM ETO 804, Ogletree et al).

(e) The president of the court at the opening of the trial included in his instructions to the press that "*** there must be no reference to color in your descriptions or any articles of the trial in this court" (R3). Whether or not the president was authorized to give this instruction to the press, it certainly was not prejudicial to accused.

(f) The reviews of the Staff Judge Advocate, SBS, ETOUSA and of the Assistant Theater Judge Advocate, ETOUSA contain discussions of several minor irregularities appearing in the record of trial and further comment thereon is deemed unnecessary.

6. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM., 1928, par.148b, p.165). Although at the trial Miss Fawden was not asked if she could identify her assailant, the evidence is clear and convincing that accused was the man involved and that he committed the offense alleged. His note to Miss Fawden containing his apology for "what happend the other night" clearly implicates accused. He admitted in his statement to Major Foster that he went into the woods with the "other girl" after one of the two girls was shot. He also admitted to Superintendent Gibson that he owned the trousers in the pocket of which the victim's gloves marked "F.A" and his own bloodstained handkerchief were found. Wheeler's cap, which accused had borrowed the previous evening but had not returned, was found in the immediate vicinity of the place

where the girl's mackintosh and scarf were discovered. Both his outer and inner clothing were bloodstained and in part stained with seminal fluid, and Miss Fawden's underclothing was also stained with blood and bore evidence of seminal fluid. The scrapings from accused's nails showed evidence that blood was present on each of his hands. His blood and that of Miss Fawden both belonged to group "O", but an examination during the early morning hours of 29 September disclosed that accused had no injuries or abrasions on his body which would have caused any bleeding. The testimony of Miss Fawden that an American colored soldier had carnal knowledge of her twice, was corroborated by the testimony of Constable Boyer who found her just after midnight in a distressed and hysterical condition. She told him that she had been raped twice by a colored soldier. Her testimony was further corroborated by that of Dr. Maurice who found upon examination about 20 minutes later that there was considerable dried blood and bruising about her genitals, and that her hymen had been recently torn and lacerated. In his opinion the injuries had been caused by the introduction of a male "organ" and penetration had occurred.

The testimony of Miss Fawden as to the details of the actual commission of the offense itself was limited to the statement that she "had no option but to give in to him", that he "forced" her again, and that by "forced" she meant that he had carnal knowledge of her. However, there could be no doubt that she meant that accused had actually raped her and the corroborating evidence clearly demonstrates this fact. Her testimony that she had to "give in" to her assailant because the man had threatened to shoot her, was corroborated in part by the admission contained in accused's statement to Major Foster that he had a rifle in his possession when he met the two girls. The circumstances to which Miss Fawden testified fully justify the inference that she did not in fact consent, that accused had carnal knowledge of her by force, and that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death. Such being the facts rape was committed (Wharton's Criminal Law, 12th Ed., sec.701, pp.942,944; CM 227909, Scarborough).

There was evidence that on the first day of trial the girl's condition was still rather critical, that large doses of hypnotics were still being administered, that she was excitable and more than ordinarily emotional. Such testimony was admissible to corroborate the victim's testimony and to show the probability that a rape was committed (CM ETO 611, Porter; Underhill's Criminal Evidence, 4th Ed., sec.671, p.1262).

The evidence is legally sufficient to support the findings of guilty of Specification 2 of the Charge.

7. Murder is legally defined as follows:

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> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse ***." (MCM., 1928, sec.148a, p.162).

The important element of murder, namely, "malice aforethought" has been analyzed as follows:

> "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 on mischief'. The deliberate purpose need not have been long entertained; it is sufficient if it exist at the moment of the act. Malice aforethought is either 'express' or 'implied'; express where the intent, - as manifested by *** threats, the absence of any or of sufficient provocation, etc.- 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 on him some excessive bodily injury which may naturally result in death; implied, where the intent is to commit a felonious or unlawful act but not to kill or injure the particular person ***; ***." (Winthrop's Military Law & Precedents, 2nd Ed., Reprint, pp.672-673) (Underscoring supplied).

There is no doubt that accused was the man who shot Miss Lay. Miss Fawden testified that her assailant was the same person who shot Miss Lay. Accused wrote a note of apology to Miss Fawden for what had occurred. In his statement to Major Foster, he admitted that when he told the two girls to go over in the forest and they failed to do so, he told them he was going to shoot, that he thought he had the gun "in the air", that he pulled the trigger two or three times and "one girl fell" while the other ran.

The evidence shows that the colored American soldier first accosted the girls, asked where they were going, and upon being told they were going to the hospital asked "How far is that?" He then dropped behind them. Suddenly Miss Fawden heard a voice say "Stand still, or I'll shoot". Upon turning around the girls saw a colored American soldier levelling a rifle at them. He told them to get into the bushes on the other side of the road. The girls tried "to stall him" and said "it was much better further down the road". They walked backwards, facing the soldier who still pointed the rifle at them. Miss Lay suddenly told Miss Fawden to run. Both girls ran, Miss Fawden being in front. She heard shots, turned around and saw Miss Lay still running. She heard more shots, turned around again and saw Miss Lay who screamed, threw up her arms and roll over in the road. Miss Fawden continued to run, heard more shots, "had the impression of bullets whistling past" her, and stopped because she thought "the next one would go in my back". The soldier then caught up with her and dragged her through some barbed wire.

The facts thus disclosed form a substantial basis for the court's findings that accused was guilty of murder, and that he killed Miss Lay with malice aforethought "manifested by threats, the absence of any or of sufficient provocation". The testimony of Miss Fawden that he told them to get into the bushes and threatened to shoot them is corroborated by the statement made to Major Foster by accused himself. His actions show a cold, deliberate purpose either to kill Miss Lay or to at least inflict on her "some excessive bodily injury which may naturally result in death". (CM ETO 739, Maxwell).

Accused, in his statement to Major Foster asserted that he did not know that he had shot the girl because he was "*** pretty intoxicated with beer and asprens and scotch ***". The only other evidence with respect to intoxication was the testimony of Lieutenant Schneider that accused was sober at the company inspection about 1:30 a.m. 29 September. Accused also in his statement asserted that the shooting of Miss Lay was accidental as he thought he had the gun "in the air". The issues of intoxication and accidental death were questions of fact for the exclusive determination of the court.

The evidence shows that Miss Lay was killed by a bullet fired from Wheeler's rifle and that his cap was found in the immediate vicinity of the killing and near where Miss Fawden's scarf and mackintosh were discovered. However, any question as to Wheeler's implication in the commission of the offenses alleged was obviated by the testimony of Wheeler, corroborated by that of other witnesses, which clearly accounted for his movements on the evening in question.

In the opinion of the Board of Review, the offense of murder alleged in Specification 1 of the Charge was proved beyond all reasonable doubt.

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8. The charge sheet shows that accused was 20 years 8 months of age at the time of the commission of the offense. He enlisted March 25, 1941 for a period of three years. He had no prior service.

9. 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 penalty for murder or rape is death or life imprisonment as the court-martial may direct (AW 92). The sentence that accused be hanged by the neck until dead is legal (CM ETO 438 - Smith; CM ETO 255 - Cobb; MCM., 1928, par.103a, p.93).

B. Franklin Riter Judge Advocate

Judge Advocate

Edward H. Sargent Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 3 DEC 1943 TO: Commanding General, ETOUSA, U.S. Army, APO 887.

1. In the case of Private LEE A. DAVIS (18023362), Company "C", 248th Quartermaster Battalion (Service), 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 record of trial, the foregoing holding and this indorsement. The file number of the record in this office is ETO 969. For convenience of reference please place that number in brackets at the end of the order: (ETO 969).

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.

1 Incl:
Record of Trial.

(Sentence ordered executed. GCMO 27, ETO, 4 Dec 1943)

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

BOARD OF REVIEW

ETO 970

30 NOV 1943

U N I T E D S T A T E S	VIII AIR FORCE COMPOSITE COMMAND.
v.	Trial by G.C.M., convened at Wilmont House, Dunmurry, Northern Ireland, on 21 October 1943.
Captain FRANKLIN A. McCARTNEY (0-310406), Quartermaster Corps.	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. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 85th Article of War.
Specification: In that Capt. Franklin A. McCartney, Gen Depot G-10, was, at Wilmont House, Dunmurry, Northern Ireland, on or about 10 October 1943, found drunk while on duty as Officer of the Day.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, VIII Air Force Composite Command, approved the sentence and "pursuant to Article of War 50½" directed that the "execution of the sentence" be "withheld". The Board of Review has treated the record of trial as if forwarded as directed by Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and pursuant to Article of War 50½, withheld the execution thereof.

3. The prosecution's evidence was substantially as follows:

Captain Charles J. Martin, Infantry, Headquarters Commandant of the Northern Ireland Base Section, was on 17 September 1943, Headquarters Commandant of the Northern Ireland District. He identified Ex. A as the roster for Duty Officer for the period from 18 September to 19 October, posted on the officer's bulletin board at headquarters, Wilmont House (R7). The roster showed accused was assigned to duty on 10 October 1943. The duty hours were from four o'clock P.M. until the same hour the following afternoon. The roster was captioned "Northern Ireland District, Western Base Section, SOS, ETOUSA" (R8), and was signed by Major Wilcox in behalf of Colonel Dierking, then Commanding Officer of the Northern Ireland District. There was no other official notice given (R9).

Major Frank P. Wilcox, Jr., A.G.D., was on 10 October 1943, Adjutant General of the Northern Ireland Base Command at Wilmont, and prior to that time was Adjutant of the Northern Ireland District at the same location. About 4:00 o'clock P.M., the customary time for the officer of the day to report for duty, witness met Captain McCartney coming up the stairs on 10 October 1943. He was dressed in service uniform and wearing side arms.

> "When I met Captain McCartney on the stairs he stopped me and asked me about reporting. He asked me if I cared to take his report as new officer of the day. Captain Hensley was not there -- he was old officer of the day -- but Captain McCartney had the guard book with him at the time so I said, 'I accept your report; there are no special instructions,' and he saluted and went on duty" (R12).

About 5:15 p.m., witness saw accused in the bar but did not speak to him. However, about 6:10 p.m.:

> "Major Gabel came into me in the dining room and asked me if Captain McCartney was duty officer. I told him he was and he left and a few minutes later Colonel Andrew came in and said, 'Is Captain McCartney duty officer', and I said, 'yes' and he said, 'I believe he is drunk. I want him relieved, another officer put on duty and put him in arrest of quarters'" (R12).

Major Wilcox then went into the hall and found accused "leaning against the wall with a few officers grouped around him", ordered Lieutenant Robbins to take accused's side arms, told accused he was under arrest

and directed that he be taken to the hospital for examination. He had no conversation with accused but noticed that his speech was very slow. His eyes and facial expression were unusual and he appeared bewildered. He was intoxicated (R13). The Major identified Ex.B as Staff Memorandum No.2, Instructions for the officer of the day at Northern Ireland District Headquarters in effect on 10 October 1943. These instructions are dated 29 December 1942 and captioned,"Headquarters, Northern Ireland District, Western Base Section, SOS, ETOUSA" (R14). They are signed by Major Wilcox for Colonel Dierking who was Commanding Officer of the Northern Ireland District at that time. The proper method of reporting is for the old officer of the day and the new to report together to the Adjutant General or Chief of Staff. He explained that the old officer of the day reports at the office, hands over the guard book and reports any unusual occurrences. The new officer of the day reports, receives any special instructions and is given custody of the guard book. He stated he was in his office on 10 October but neither the new or old officer of the day reported there. He was on the stairway en route to his office at 4 o'clock and he denied that, when he met him on the stairs, he told accused "Go to my office -- I'll be right up" (R15). He did not recall whether accused was wearing a raincoat. At the time he saw accused he was returning to his office on the ground floor (R16). On further questioning he said he was not in his office at 4 o'clock but was there shortly thereafter; that he did not officially relieve the old officer of the day as he did not see him. Accused was not drunk when he reported as officer of the day on the stairs (R17) and looked quite normal (R18).

Major Francis S. Gabel, Infantry, was Assistant Chief of Administration of Northern Ireland Base Section on 10 October 1943. He testified that on that date:

> "**** at about 5:15 p.m., I came down to the bar and Captain McCartney was standing at the bar wearing a belt and gun. I offerred to buy him a drink and he bought it for me. I asked him if he was officer of the day and he said he was and I told him he'd better not drink any more. I came into the lounge and sat there until about six o'clock when I saw Captain McCartney being assisted from the bar by two officers." (R19).

Accused was then drunk. He had on a regulation blouse, trousers, a cap with cover and was wearing the gun and web belt of the officer of the day (R19).

Colonel George S. Andrew, General Staff Corps, Headquarters, Northern Ireland Base Section, was on duty as Chief of Staff of that headquarters on 10 October 1943 at Wilmont House. He testified:

"I was in the lounge which is adjacent to the bar and my attention was called to an officer's condition. I went out into the hall and saw an officer being conducted through the hall by another officer. I asked him what his name was and if he was officer of the day. I forget whether or not he gave me his name but he did state that he was officer of the day. He was wearing belt and side arms at the time. He was obviously drunk, so drunk that he had to be assisted through the hall by another officer. ***. As soon as I had definitely established him as officer of the day I directed the Adjutant to relieve him and to detail another officer to duty and place Captain McCartney under arrest in quarters. I later instructed the Adjutant to have him sent to the hospital for observation, (R21), *** to determine whether or not he was drunk and if not to find out what was wrong with him." (R22).

First Lieutenant Donald L. Robbins, Chemical Warefare Services, Ordnance Section, General Depot G-10, about 5:15 p.m. of 10 October 1943, was in the lounge of headquarters when accused came into the bar and spoke to him. When the dinner bell rang and he went out in the hall he heard Major Wilcox ask who was next in line for officer of the day and when he answered that he was, the Major told him to take over the duties of officer of the day, place accused under arrest and take him to the hospital which he did. He took accused's side arms and got the guard book but he did not report officially (R23-25).

Captain James A. Campbell, Medical Corps, 10th Station Hospital was Medical Officer of the Day on 10 October 1943 at above hospital and admitted accused that night as a patient for examination and observation. He examined accused at 7:15, at 7:40 and at 8:00 that night (R25) and found the pupils of his eyes were sluggish to light; his speech was thickened with some looseness of the lips. He walked on a wide base, staggered as he turned and had difficulty in carrying out commands to walk, halt and turn. There was some impairment of co-ordination on the mental side. It was dull and slow. In the opinion of Captain Campbell accused was drunk (R26).

4. Evidence for the defense was in substance as follows:

It was stipulated between the prosecution and defense that if Kenneth R. Hensley, Captain, Infantry, Assistant T. & S. Officer, Northern Ireland Base Section, were present in court and sworn he would testify in

accordance with his signed statement which was admitted in evidence and marked "Exhibit C". Captain Hensley's statement related that on 10 October 1943 at about 4:00 p.m. he was sitting in his office on the second floor of Wilmont House, Headquarters, Northern Ireland Base Section when accused came in and stated that he was ready to relieve Captain Hensley as Officer of the Day. Captain Hensley asked accused if he had brought the guard book and accused stated that he had and put it down in front of Captain Hensley who was the Officer of the Day. He signed the book and handed it back to accused. Further Captain Hensley stated:

> "The published order for the changing of the officer of the day provides that the old officer of the day and the new officer of the day report together to the adjutant at 1600 hours, at which time the old officer of the day is relieved and the New officer of the day takes over the duties of officer of the day. This method of changing the officer of the day has been effect for several months and I have gone through this procedure many times." (R28).

The adjutant's office was on the second floor of Wilmont House. Captain Hensley at this time asked accused if he noticed whether the adjutant was in his office. Accused informed Captain Hensley that the adjutant was not. Accused then left the office taking the guard book with him. Captain Hensley never heard more from either accused nor the adjutant nor did he report to the adjutant terminating his period of duty as the old officer of the day (R28).

Major Frank P. Wilcox, Jr., recalled as a defense witness, identified Ex."D" as the General Order dated 4 October inactivating the Northern Ireland District, signed by him for Colonel Dierking, Commanding Officer of that District (R29), and Ex."E" as the General Order dated 5 October 1943 announcing the opening of the Northern Ireland Base Section which he signed for General Collins. Ex."F" he identified as the General Order announcing that General Collins assumed command of the Northern Ireland Base Section (R30-31). The military post has been at Wilmont House at all times since 17 September 1943. Captain Martin has been Headquarters Commandant and Post Commander at Wilmont House since prior to 5 October 1943 (R31-32). The duty roster, Ex."A", covers a period extending from before the inactivation of the Northern Ireland District until after the activation of the Northern Ireland Base Section (R32). He testified that it was the custom to appoint Quartermaster officers as officers of the day and that they served as such (R33).

Accused was sworn as a witness in his own defense and testified that he:

> "*** came to Northern Ireland on 1 September 1942, where I was at Larkfield connected with the Quartermaster Section of Northern Ireland Base Section and then when it was changed to a District, I came to Wilmont where I was assigned to Depot G-10 where I have been since ***" (R35).

He denied reporting to anybody as officer of the day on 10 October 1943, but stated that:

> "I came to Wilmont at the proper time to report as officer of the day. I started up the stairs and met the Adjutant on the stairs near the bottom. I remarked that I was on my way up to report as new officer of the day. The Adjutant threw up his hand and said, 'O.K., go ahead'. I walked up the stairs and waited at the outer entrance to the Adjutant's office. When I saw him on the stairs the Adjutant had something in his hand and I got the impression that he was going down to his room and would be back to receive my report in a few minutes. When he did not return I went to Captain Hensley's office which was on the second floor on the other side of the building, and asked him to sign the guard book. He did so and I told him that I was waiting to report to the Adjutant but that he had not come back. I am not absolutely positive about what Captain Hensley said but I think he said, 'When he returns call me'. I went back to the entrance to the Adjutant's office and waited for quite some time and when he did not come back to his office I came on down and waited at the bar" (R36).

He waited at the Adjutant's office approximately ten minutes after going there at four o'clock. After leaving the office of Captain Hensley, who was the old officer of the day (R36), he went back to the entrance of the Adjutant's office where some enlisted men were laying linoleum. They had not seen the Adjutant. He denied that he was officially reporting to Major Wilcox on the stairs (R37). After waiting, he went downstairs to the bar and had three double drinks between five and six o'clock. While there Lieutenant Miles said, "Captain, your eyes are showing your drinks. You'd better get out of here and I'll go with you." Out in the

hall he met Colonel Andrew who questioned him, sent for Major Wilcox and directed the Major to inform accused officially that he was relieved as officer of the day and to place him under arrest in quarters. Lieutenant Robbins took his pistol and belt and took accused to the hospital, where he stayed the night and was examined (R38). He admitted he wore his service uniform with pistol and web belt but that he had a raincoat on and it would have been impossible for Major Wilcox to have seen the belt and pistol. He stated that he did not consider himself on duty as officer of the day and denied that he had had any drinks before five o'clock that he could remember. When asked if he thought Major Gabel and Colonel Andrew were mistaken when they testified that they asked if he was officer of the day and he said he was, he answered:

> "I don't think so. I realized that I was being questioned as to my personal conduct, and as everybody was grouped around and I felt very conspicuous, the idea in my mind was to bring the interview to a close. I had expected that Colonel Andrew would say that I had better not drink any more. I wanted to get the mob broken up and then come back later and do any explaining that was necessary." (R39).

He had not signed for the guard book and thought the old officer of the day remained as such until he was relieved. He was waiting until he found Major Wilcox before he signed the book (R40).

Major Wilcox, recalled as a defense witness, identified Form 66 of the 201 file of accused which was admitted in evidence as Ex.G. The entries under "Type of duty" and "Manner of Performance" were read to the court and showed performance of duty by accused in the Quartermaster Corps as excellent and superior. He again stated that when he saw accused on the steps he "accepted his report as new officer of the day and told him that there were no special instructions" (R42).

Captain Martin, Headquarters Commandant on 10 October 1943, recalled as a defense witness, stated that the Adjutant's office was being moved at that time from upstairs but that he had notified no one of the move. He also stated that accused was an excellent officer (R43-45).

Corporal Merl Hopkins, "head orderly and bartender" at Wilmont House on 10 October, helped lay linoleum in front of the Adjutant's office upstairs and about four o'clock saw accused who spoke to him just outside the Adjutant General's office. Accused remained about fifteen minutes. Furniture was in the Adjutant's office but Major Wilcox was not around while accused was there. He was dressed in blouse, pink trousers and hat, but witness did not remember whether he wore a raincoat or side arms. The Adjutant's office was upstairs (R46-48).

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Lieutenant Colonel Harold K. Holden and Captain George Cornelius, both of Quartermaster Corps, Headquarters Northern Ireland Base Section, who had each known accused for about a year, gave evidence of his very good reputation as an officer (R49-50).

First Lieutenant Robbins, recalled as a defense witness, related that he received orders from Major Wilcox to take over the duties of Officer of the Day and of telling accused that he was under arrest in quarters. He took the guard book from accused, whom he took by the arm to escort him out because he needed help (R51).

5. Although the charge sheet fails to designate the branch and unit of accused, his Form 66 from his 201 file definitely shows him an officer of the Quartermaster Corps during his entire active commissioned service.

The evidence fairly proves that accused was drunk at about six o'clock on the evening of 10 October 1943. His defense was in the nature of a confession and avoidance with evidence of his good record as a Quartermaster officer in mitigation. His claims are, first, that he was not the duly appointed Officer of the Day, second, that he never assumed the duties of the Officer of the Day on 10 October 1943, and, third, that as a Quartermaster Officer he could not properly be assigned to that duty.

(a) Exhibit "A", captioned Northern Ireland District, Western Base Section, SOS, ETOUSA, Staff Memorandum, No. 20, dated 17 September 1943, is the Duty Roster for that headquarters covering the period from 18 September to 19 October 1943, in usual form and signed by Major Frank P. Wilcox, Jr., Adjutant, by order of Colonel Dierking, who is shown to have been at that time the district Commanding Officer. This roster lists accused for duty on 10 October 1943. Exhibit "D", captioned and signed like Exhibit "A", is a General Order dated 4 October 1943, inactivating, by proper authority, Headquarters and Headquarters Detachment, Northern Ireland District, Western Base Section, SOS, ETOUSA. Exhibit "E" is a General Order dated 5 October 1943, captioned, Headquarters, Northern Ireland Base Section, SOS, ETOUSA, signed for Brigadier General Collins by Major Frank P. Wilcox, Jr., Adjutant General. Exhibit "F" is the General Order dated also 5 October 1943, announcing that General Collins had assumed command of the Northern Ireland Base Section, SOS, ETOUSA. It therefore appears that Northern Ireland District, Western Base Section, SOS, ETOUSA and Northern Ireland Base Section, SOS, ETOUSA were the same command with the same headquarters in Wilmont House, the same Headquarters Commandant and the same Adjutant. General Collins, as Base Section Commander had replaced Colonel Dierking as District Commander. The court may take judicial notice that the area covered by each designation was the geographical limits of Northern Ireland. It was in fact at all times one single operating and existing command and the standing orders or details to duty would remain effective until changed by the new Commanding General (CM 191631 (1930), Dig.Ops., 1912-1940, sec.427(2), p.290).

(b) The claim of accused that he never assumed the duties of Officer of the Day is untenable. At the proper time he presented himself to the old officer of the day who signed the guard book and turned it over to accused. Accused, in proper dress and side arms reported, informally perhaps, to the Adjutant whom he met on the s tairway near his office and who accepted accused's report and informed him that there were no special instructions. Accused thereafter informed several officers including headquarters chief of staff that he was the Officer of the Day. Accused was found drunk after 4:00 p.m. the time of commencement of his tour of duty. He had, in fact at that time assumed the duties and functions of Officer of the Day (Winthrop's Military Law & Precedents - Reprint - p.614, footnote 57).

(c) AR 600-20, Changes No. 5, dated May 3, 1943, provides that "Chiefs of supply and administration services or officers on duty in the offices of such chiefs, officers of any of the services **** though eligible to command, according to his rank, will not assume command of troops except those of his service or bureau or that in which he is on duty, unless put on duty under orders which specifically so direct, by competent authority, but any staff officer, by virtue of his commission, may command all enlisted men like other commissioned officers." (Underscoring supplied). Accused although a Quartermaster officer was placed on the duty roster for duty on 10 October 1943 by competent authority. He manifestly became eligible for duty as Officer of the Day by virtue of the exception contained in the Regulation itself. His contention in this respect is without merit.

6. The charge sheet shows the accused to be 43 years 6 months old. He enlisted for World War service 23 April 1919 and was honorably discharged 22 April 1922. He entered active duty in the present conflict on 30 June 1942.

7. A recommendation for clemency dated 25 October 1943 asking that execution of the sentence of dismissal be suspended in view of accused's long record of honorable service and excellence of previous ratings, signed by all the members of the trial court, is attached to the record of trial.

8. 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. An sentence of dismissal is mandatory upon the conviction of an officer of being drunk on duty in time of war in violation of Article of War 85.

B. Franklin Riter Judge Advocate

(ABSENT ON SICK LEAVE) Judge Advocate

Edmund Klaggett Judge Advocate

CONFIDENTIAL

1st Ind.

WD, Branch Office of TJAG., with ETOUSA. 30 NOV 1943 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Captain FRANKLIN A. McCARTNEY (O-310406), General Depot G-10, (Quartermaster Corps), Northern Ireland Base Section, SOS, ETOUSA, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and 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 970. For convenience of reference please place that number in brackets at the end of the order: (ETO 970).

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

(Sentence ordered executed. GCMO 26, ETO, 3 Dec. 1943)

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

BOARD OF REVIEW

ETO 971

27 NOV 1943

U N I T E D S T A T E S	)	VIII AIR FORCE COMPOSITE COMMAND.
	)	
v.	)	Trial by G.C.M., convened at AAF
	)	Station 231, 20 October 1943.
Private First Class CHARLES S. BURNETT (35487587), 1253rd Military Police Company (Avn).	)	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 Specification:

CHARGE: Violation of the 86th Article of War.
Specification: In that Private First Class Charles S. Burnett, 1253rd Military Police Co., (Avn), VIII Air Force Composite Command being on guard and posted as sentinel, at Army Air Force Station AAF-236, APO 639, on or about September 17, 1943, was found sleeping upon his post.

3. The only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement. Paragraph 90b of the Manual for Courts-Martial provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

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E)

War Department letter dated February 26, 1941 (AG 253 (2-6-41)/, subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel; CM 228072, Wallace).

4. Confinement in a penitentiary is not authorized in this case for the reason that the offense of which accused was found guilty is not recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by any statute of the United States of general application within the continental United States or by the law of the District of Columbia. See Article of War 42.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 NOV 1943 TO: Commanding General, VIII Air Force Composite Command, AAF Station 231, APO 639, U.S. Army.

1. In the case of Private First Class CHARLES S. BURNETT (35487587), 1253rd 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 only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a place other than a penitentiary, a Federal reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution, you will have authority to order the execution of the sentence.

2. The record indicates that accused has an excellent character and over a year of satisfactory service as a trained soldier. He stands convicted of a purely military offense. He definitely appears to have salvage value and under announced policies the dishonorable discharge should be suspended and Disciplinary Training Center No. 2912 designated as the place of confinement thus allowing him the opportunity to demonstrate his right to another chance to serve his country. When action is taken suspending the execution of the dishonorable discharge, the GCMO should be published.

3. When copies of the published order are forwarded to this office, they should be accompanied by the record of trial together with this holding and indorsement. The file number of the record in this office is ETO 971. For convenience of reference please place that number in brackets at the end of the order: (ETO 971).

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

1 Incl:
Record of trial.

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

BOARD OF REVIEW

ETO 972

27 NOV 1943

U N I T E D S T A T E S	VIII AIR FORCE COMPOSITE COMMAND.
v.	Trial by G.C.M., convened at Army Air Force Station 231, APO 639, 22 October 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. United States Federal Reformatory, Chillicothe, Ohio.
Private First Class ANDREW S. PETROVICH (12163914), 35th Station Complement Squadron, VIII Air Force Composite Command.	

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 86th Article of War.
Specification: In that Pfc. Andrew S. Petrovich, 35th Station Complement Squadron, VIII Air Force Composite Command AAF Sta. 238, APO 639, being on guard and posted as a sentinel, at AAF Sta. 238 APO 639, on or about 23 September 1943, was found sleeping upon his post.

3. The only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement. Paragraph 90b of the Manual for Courts-Martial provides:

"Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its b ranches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

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War Department letter dated February 26, 1941 (AG 253 (2-6-41) E), subject: "Instructions to reviewing authorities regarding the designation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel; CM 228072, Wallace).

4. Confinement in a penitentiary is not authorized in this case for the reason that the offense of which accused was found guilty is not recognized as an offense of a civil nature and so punishable by penitentiary confinement for more then one year by any statute of the United States of general application within the continental United States or by the law of the District of Columbia. See Article of War 42.

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

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 27 NOV 1943 TO: Commanding General, VIII Air Force Composite Command, AAF Station 231, APO 639, U.S. Army.

1. In the case of Private First Class ANDREW S. PETROVICH (12163914), 35th Station Complement Squadron, VIII Air Force Composite Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a place other than a penitentiary, a Federal reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correctional institution, you will have authority to order the execution of the sentence.

2. The record indicates that accused has an excellent character and a year of satisfactory service as a trained soldier. He stands convicted of a purely military offense. He definitely has salvage value and under announced policies the dishonorable discharge should be suspended and Disciplinary Training Center No. 2912 designated as the place of confinement thus allowing him the opportunity to demonstrate his right to another chance to serve his country. When action is taken suspending the execution of the dishonorable discharge, the GCMO should be published.

3. When copies of the published order are forwarded to this office, they should be accompanied by the record of trial together with this holding and indorsement. The file number of the record in this office is ETO 972. For convenience of reference please place that number in brackets at the end of the order: (ETO 972).

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

1 Incl:
Record of trial.

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

BOARD OF REVIEW

ETO 973

29 NOV 1943

U N I T E D S T A T E S	VIII AIR FORCE COMPOSITE COMMAND.
v.	Trial by G.C.M., convened at Army Air Force Station 231, APO 639, 21 October 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. United States Federal Reformatory, Chillicothe, Ohio.
Private DONALD H. McFALL (32474205), Headquarters and Headquarters Squadron, 403rd 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: Violation of the 86th Article of War.
Specification: In that Private Donald H. McFall, Hq. & Hq. Sq., 403rd Air Depot, being on guard and posted as a sentinel, at AAF Station 597, APO 636, on or about 2235 hours 6 October 1943, was found sleeping upon his post.

3. The only question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement. Paragraph 90b of the Manual for Courts-Martial provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated February 26, 1941 (AG 253 (2-6-41) E), subject: "Instructions to reviewing authorities regarding the d e signation of institutions for military prisoners to be confined in a Federal penal or correctional institution", authorizes confinement in a reformatory only when confinement in a penitentiary is authorized by law (CM 220093, Unckel; CM 228072, Wallace).

4. Confinement in a penitentiary is not authorized in this case for the reason that no offense of which accused was found guilty is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by any statute of the United States of general application within the continental United States or by the law of the District of Columbia. See Article of War 42.

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 NOV 1943 TO: Commanding General, VIII Air Force Composite Command, AAF Station 231, APO 639, U.S. Army.

1. In the case of Private DONALD H. McFALL (32474205), Headquarters and Headquarters Squadron, 403rd Air Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a place other than a penitentiary, a Federal reformatory or correctional institution, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal reformatory or correction institution, you will have authority to order the execution of the sentence.

2. The record indicates that accused has over a year of satisfactory service as a trained soldier. He stands convicted of a purely military offense. He definitely appears to have salvage value and under announced policies the dishonorable discharge should be suspended and Disciplinary Training Center No. 2912 designated as the place of confinement thus allowing him the opportunity to demonstrate his right to another chance to serve his country. When action is taken suspending the execution of the dishonorable discharge, the GCMO should be published.

3. When copies of the published order are forwarded to this office, they should be accompanied by the record of trial together with this holding and indorsement. The file number of the record in this office is ETO 973. For convenience of reference please place that number in brackets at the end of the order: (ETO 973).

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

1 Incl:
Record of trial.

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

BOARD OF REVIEW

10 DEC 1943

ETO 991

V CORPS

U N I T E D S T A T E S	Trial by G.C.M., convened at Norton Manor Camp, (England), 2 November 1943.
v.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor, Gugliotta for two years and six months at the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, and Harrington for four years at The Federal Reformatory, Chillicothe, Ohio.
Private ANTHONY J. GUGLIOTTA (32203234) and Private THOMAS M. HARRINGTON (20244628), both of Troop "C", 102nd Cavalry (Mecz).	

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:

GUGLIOTTA

CHARGE: Violation of the 96 Article of War.

Specification 1: In that Private Anthony J. Gugliotta, Troop C, 102nd Cavalry (Mecz), did, at West Burton, England, on or about 13 September 1943, attempt to commit the crime of sodomy, by feloniously and against the order of nature attempting to have carnal connection in the mouth of a human being, to wit: one Ernest Victor Frank Gray of Dunns Lane, Sillon, Gillingham, England.

Specification 2: In that Private Anthony J. Gugliotta, Troop C, 102nd Cavalry (Mecz), did, at West Burton, England, on or about 13 September 1943, willfully, wrongfully, and unlawfully, damage a bicycle, the property of Ernest Victor Frank Gray of Dunns Lane, Sillon, Gillingham, England, in the amount of about $6.00.

HARRINGTON

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private Thomas M. Harrington, Troop C, 102nd Cavalry (Mecz), did, at West Burton, England, on or about 13 September 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection in the mouth of a human being, to wit: one Ernest Victor Frank Gray of Dunns Lane, Sillon, Gillingham, England.

CHARGE II: Violation of the 96th Article of War.
Specification: In that Private Thomas M. Harrington, Troop C, 102nd Cavalry (Mecz), did, at West Burton, England, on or about 13 September 1943, willfully, wrongfully, and unlawfully damage a bicycle, the property of Ernest Victor Frank Gray of Dunns Lane, Sillon, Gillingham, England, in the amount of $4.00.

Each accused was separately charged but their trials were consolidated. Each pleaded not guilty to, and each was found guilty of their respective charges and specifications. No previous convictions were introduced against Gugliotta. One previous conviction for absence without leave was introduced against Harrington. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, Gugliotta for two years and six months and Harrington for four years. The reviewing authority approved each of the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement for Gugliotta, and the Federal Reformatory, Chillicothe, Ohio, as the place of confinement for Harrington, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution's evidence was substantially as follows:

Ernest Victor Frank Gray, a farm laborer about 18 years old (R12) of Dunns Lane, Sillon, Gillingham, Dorset, at about 10:30 on the night of 13 September 1943, was riding his sister's bicycle, and at Bourton Cross Roads in the village of Bourton, was accosted by the two accused who inquired the way to Wincanton. Upon being given the directions, they asked Gray to "Come up the road with us." (R9-10). After going a way with them, they said it was not Wincanton "but the camp at Cucklington they were going to." They then asked if Gray "knew of any women or WAAFs about" and Gray replied in the negative. As they went down the road past a hayrick, they asked Gray to "Come out behind the hayrick with us." He refused but they "kept on about it." Harrington told Gugliotta to take Gray's bicycle, which he did without protest from Gray who "didn't want to make a row." Gugliotta was riding the bicycle as Constable Charles Standfield came along on his bicycle and told Gugliotta to turn his lights on, at which Gugliotta got off and walked. Gray said he didn't want to go any further but accused insisted that he continue, and as they got near to

camp they told him, "You better come over here with us." Gray locked his bicycle on the gate and went over to the field as he "didn't want to refuse." Harrington, according to Gray's version of the incident:

> "took out his penis and told me to suck it." "I did not suck it long. Then he told me to play with it with my hands which I did until some stuff came out. After that he put his penis away. He told me to take my trousers down before playing with his penis. After the stuff came out, he went back for the other one. When the other one came, he wanted me to do it. I refused. He said 'Do you want me to do you in.' I heard someone coming down the road. I started calling for help and running away. I never saw any more of them. I went straight to Police Officer Standfield's house and told him what had happened. He put on his boots and came down the road with me. When we got there, the accused had gone. When we got to the bike, the two tires were slashed. The tires were cut and the front lamp gone." (R10).

After Gray had finished with Harrington, both accused told Gray to take Gugliotta's penis in his hand. Gray started to play with Gugliotta's penis, but refused to put it in his mouth (R10-12). He identified both accused at Cucklington Camp the following day (R11).

Constable Charles Standfield, No. 12 Bourton, Dorset, first saw the two accused on the main road at Bourton, Dorset, about 10:40 p.m. on 13 September. One was riding a bicycle without lights and one was walking with Gray. It was fairly light. Standfield slowly rode up on his bicycle, spoke to the man riding with no lights on his bicycle, who dismounted and apologized and Standfield rode away. He "couldn't definitely identify them as these (the accused) two men" (R13). Standfield had known Gray for years. Later that evening at 11:10 p.m. he opened his door in response to loud knocking and saw Gray "in a very distressed condition", who told him "I have been assaulted by two American soldiers. My bicycle is along the road and I am afraid to go and fetch it. Come with me." Standfield dressed, went to the gateway of a farm field owned by a Mr. Puddy, and saw a locked bicycle chained to the gate. Both tires were slashed. He searched several fields for the soldiers but found no trace of them except the marks where the dew on the grass had been disturbed (R14). The next day Gray was taken to the camp at Cucklington in company with Constables Standfield and King, arriving about noon. They went to where the men were having their mid-day meal and Gray identified both accused. Each accused made and signed the statement "I know nothing about it" after Standfield had "charged them with committing an offense of gross indecency and cautioned them". These statements were received in evidence as EX. "A", the defense stating there was no objection thereto (R14).

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Constable Thomas King, Dorset, identified both accused as the men picked out by Gray at the time the men were coming to their meal at the camp at Cucklington (R15-16).

Herrick Higson, Agent, Criminal Investigation Division, APO 511, identified Harrington who made a statement to him on 24 September 1943, after Higson had duly warned him of his rights in regard to making such a statement. It was received in evidence as Ex. "B", read to the court (R17) and is as follows:

"On 13 September 1943, I was on official pass, I left my camp at about 1900 hours with Gugliotta of my organization, we were going to visit ZEALE.
The first villiage we stopped in was a small place just out of camp on the way to ZEALE, we were going to stop in a pub, "The Rising Sun", but we didn't. We asked some people the way to ZEALE and they told us. We then walked to ZEALE, arriving there about 2045 hours. We went into the "Bell and Crown" pub. We were the only American soldiers in the pub with Breeches and Boots on, there were other American soldiers there but they had slacks. While we were in this pub we met 3 WAAFS. We all had about 4 beers a piece, then we left with the WAAFS sometime before closing time. We were in the pub for about an hour. We walked the WAAFS down to their camp, when we got to the WAAF camp we talked to the girls for about 10 minutes. We left the WAAFS and started walking towards camp.
At about 2215 hours, after we have left the WAAFS, while walking back to our camp, we met a fellow, an English civilian, coming towards us on a bicycle. As he was riding past us we yelled at him, "Is this the way back to camp." He turned his bicycle around and came up to us. We were walking along and he was riding his bicycle beside us. We asked him where all the women were in town. He told us there were not any women in town, and then he asked us, what we wanted women for. When he asked us this I had a good idea he was "Queer". He got off his bicycle and started walking along with us. I knudged GUGLIOTTA and he took a ride on the kid's bicycle. I asked the kid if he ever 'got down on it', he replied, 'either way'. I asked him what he meant and he said he didn't mind which way he took it. About this time a police officer stopped GUGLIOTTA riding a bicycle because it didn't have the lights on. GUGLIOTTA then started walking with us.

The kid suggested he knew a place where we could be off the road. He locked his bicycle on a gate post. I told GUGLIOTTA to stay at the gate, while I went down into the field with the kid. We got about 10 or 15 yards into the field when he dropped his pants and turned around, back to me. I asked him what he wanted, and he said 'Go ahead!, I replied, 'No, you'll have to go down on it'. I didn't have to ask him the second time, he just grabbed hold of my penis and started sucking on it. I didn't shoot in his mouth but pulled back from him and 'Come' on the ground. I said I would send GUGLIOTTA down to him. I started to walk away and when I looked back, I saw the kid masterbating. I went back to the gate where GUGLIOTTA was and told him the kid might want you to "Brown" him. I was about 5 yards away when GUGLIOTTA got to the kid. GUGLIOTTA, had his penis out, I don't know whether the kid started to "Blow" him or not. The kid got scared and started to yell, running up to the road. The kid ran past me and I told him to be quiet but he kept on running, it looked like the kid was throwing a fit. GUGLIOTTA and I went up on the road and were laughing about it. When we got on the road we saw a British Sailor. The sailor wanted to know what the yelling was about, we told him that it was one of the fellows of our unit who didn't want to go back to camp. The sailor went away. We saw the kid's bicycle so we went up to it, GUGLIOTTA cut the front tire and I cut the rear. GUGLIOTTA then threw the front light away. We went back to camp arriving there at about 2330 hours.

During the time we were with the kid, he seemed to want to 'Blow' us, and it wasn't necessary to use any force on him. The kid appeared to be a real 'Queer', and liked it.

I have read the foregoing statement on 3 pages and it is true."

SIGNED: THOMAS M. HARRINGTON.

I have read my statement of 3 pages and it is true.

SIGNED:_____

Subscribed and sworn to before me this 24 of September 1943.
EDWARD EDGERTON.
Summary Court. (Ex.B).

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Charles J. Miller, Agent, Criminal Investigation Division Detachment, Headquarters, SBS, APO 519, identified both accused (R17) and also identified a statement given him by GUGLIOTTA after he had been warned of his rights, which statement was also admitted in evidence, with consent of defense, as Ex. "C" (R18). The statement was read to the court and was in part as follows:

"* * * * * * * * *
After walking a short ways down the road we met a boy riding a bicycle towards us. We asked him if this was the right way back to camp. He stopped. We asked him where all the girls were in this town. He said there were no girls here, and what did we want with girls. We walked away and he turned and walked with us. Diring the walk we hinted around about him giving us a blow job and he said "he didn't mind.' He also told us he knew a good place. He took us down to the field chained his bicyele to the fence and then Harrington and the fellow went over the fence and into the field. They stayed there about 5 or 10 minutes then Harrington came back and I went into the field, Harrington followed me. When I got in the field I asked the fellow for a 'blow job' and he said 'no'. At the time I saw him, he had his pants up. I then took the fellow by the shoulder and said, 'Go ahead.' He then pulled away started to scream and then run.
We ran the other way, jumped over the fence and at this time saw a sailor. We walked down the road a short ways then walked back to the bicycle and I cut the front tire and Harrington cut the rear tire, I then grabbed the front light and threw it away.
We then walked back to camp and got there about 11:30 P.M.
During the whole time we were with the fellow we did not force him in any way and he was perfectly willing to 'suck us off' in fact he told us he didn't mind. He is also the one that picked the place for us to go. While up in the field I was only with him about two minutes.
I have had the above statement read to me and it is true."
WITNESS:
PVT. ROLAND HILL.
PRISON CLERK.

SIGNED: ANTHONY J. GUGLIOTTA.
(EX.C).

4. No witnesses or evidence were produced on behalf of accused who, after having their rights to make a statement in court fully explained to them, elected to remain silent.

5. "Sodomy consists of sexual connection with any brute animal, or in sexual connection, by rectum or by mouth, by a man with a human being. Penetration alone is sufficient ****. Proof:- That the accused had sexual connection with a certain brute animal or had sexual connection by rectum or by mouth with a certain human being, as alleged in the specification." (MCM 1928, par.149k, p.177).

That Harrington actually did commit sodomy as charged is shown by his own admission as well as by the testimony of Gray. Carnal knowledge per os is a crime under the 93rd Article of War (CM ETO 339, Gage; CM ETO 945, Garrison).

An attempt to commit a crime is an act done with intent to commit that particular crime, and forming a part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission. (Clark.) (MCM 1928, par.152,p.190).

Gugliotta went into the field with Gray, took him by the shoulder and said, "Go ahead." Gray took Gugliotta's penis in his hand but refused to put it in his mouth even when Gugliotta threatened to "do him in". Only Gray's refusal to submit to Gugliotta's wishes and his subsequent flight from the scene, prevented the actual crime of sodomy from being committed. The attempt to commit the crime of sodomy by Gugliotta is clearly shown by his own admission as well as by Gray's testimony.

Each accused admitted slashing a tire on the bicycle and Gugliotta admitted throwing away the front light. The actual monetary damage to the bicycle is not proved but the court is legally justified in assuming from the evidence that the damage was in some substantial amount less than $20.00.

6. The maximum penalty prescribed by the Table of Maximum Punishments 1928 Manual for Courts-Martial for the offense of sodomy is dishonorable discharge, total forfeitures of all pay and allowances due or to become due and confinement at hard labor for five years. "**** An attempt which is not separately listed in the Table of Maximum Punishments is subject only to the same limit of punishment as is the offense attempted, if the latter is listed." (Par.402(1), Dig.Ops.JAG. February 1943). An attempt to commit sodomy is therefore punishable as if the crime had been committed.

As Harrington is less than 31 years old with a sentence of not more than ten years, confinement in a Federal correctional institution or

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reformatory is authorized (Sec.II, par.6g, Cir.72. Hq. ETOUSA, 9 September 1943; War Department Circular No.291, 10 November 1943, sec.V,3a).

Penitentiary confinement is not authorized under AW 42 for an attempt to commit sodomy (1912-1940 Dig.Ops.JAG. Par.399(2),p.246). Confinement as designated is authorized.

7. The charge sheet shows:

Gugliotta is 23 years of age. He was inducted into active military service 20 January 1942 and assigned to 102nd Cavalry (Mecz), 30 March 1942.

Harrington is 24 years of age, was inducted into active military service 6 January 1941, 102nd Cavalry (H-Mecz): redesignated 6 April 1942, 102nd Cavalry (Mecz).

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 sentences.

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

WD. Branch Office of TJAG with ETOUSA. 10 DEC 1943 TO: Commanding General, V Corps, ETOUSA, APO 305, U.S. Army.

1. In the case of Private ANTHONY J. GUGLIOTTA (32203234) and of Private THOMAS M. HARRINGTON (20244628), both of Troop C, 102nd Cavalry (Mecz), attention is invited to the foregoing holding by 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 the 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 991. For convenience of reference please place that number in brackets at the end of the order: (ETO 991).

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 992

10 DEC 1943

U N I T E D S T A T E S	EIGHTH AIR FORCE.
v.	
Private DUNCAN (NMI) FORTENBERRY (34623669), Headquarters and Headquarters Squadron, 44th Bombardment Wing, 1st Fighter Division (Prov.), VIII Air Support Command.	Trial by G.C.M., convened at USAAF Station No. 466, APO 638, 4 November 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. United States 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 charges and specifications:

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

Specification 1: In that Private Duncan (NMI) Fortenberry, Hq & Hq Sq. 44th Bomb Wing (H), 1st Fighter Division (Prov), VIII Air Support Command, did, at Grazeley Green, Burghfield, Berkshire, England, on or about 1 October 1943, with intent to do him bodily harm, commit an assault upon Alexander Ferguson, by stabbing him in the right shoulder, with a dangerous weapon to wit, a knife.

Specification 2: In that Private Duncan (NMI) Fortenberry, Hq & Hq Sq, 44th Bomb Wing (H), 1st Fighter Division (Prov), VIII Air Support Command, did, at Grazeley Green, Burghfield, Berkshire, England, on or about 1 October 1943, with intent to do him bodily harm, commit an assault upon George Frederick James Stubbington by stabbing him in the back with a dangerous weapon, to wit, a knife.

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CHARGE II: Violation of the 96th Article of War.
Specification: In that Private Duncan (NMI) Fortenberry, Hq & Hq Sq, 44th Bomb Wing (H), 1st Fighter Division (Prov), VIII Air Support Command, did, at Grazeley Green, Burghfield, Berks, England, on or about 1 October 1943, unlawfully carry a concealed weapon, viz: a knife with a three and one-half inch blade, during his off duty hours and among the civilian population, contrary to Section IV, Circular No 76, Hq ETOUSA, 18 Sept 1943.

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 at such place as the reviewing authority may direct for a period of 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 Article of War 50½.

3. 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 accused is 22 years of age with less than ten months service. Confinement in a penitentiary is authorized for the offense of assault with intent to do bodily harm with a dangerous weapon (35 Stat. 1143; 18 USC., sec.455). As accused is less than 31 years of age and the approved sentence is less than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement is correct (WD, Cir.291, 10 November 1943, sec.V,3a).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 DEC 1943 TO: Commanding General, Eighth Air Force, APO 633, U.S. Army.

1. In the case of Private DUNCAN (NMI) FORTENBERRY (34623669), Headquarters and Headquarters Squadron, 44th Bombardment Wing, 1st Fighter Division (Prov.), VIII Air Support 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 and 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 992. For convenience of reference please place that number in brackets at the end of the order: (ETO 992).

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 996

30 DEC 1943

U N I T E D S T A T E S	5TH INFANTRY DIVISION
v	Trial by G.C.M., convened at Tidworth Garrison, England, 4 October 1943. Sentence: Dishonorable discharge, suspended, total forfeitures and confinement at hard labor for ten years. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.
Sergeant SHERMAN BURKHART (6985599), Service Battery, 50th 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 in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and sentence in part. The record has 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 93rd Article of War.
Specification: In that Sergeant Sherman Burkhart, Service Battery, Fiftieth Field Artillery Battalion, did, at or near Andover, Hampshire, England, on or about 30 August 1943, with intent to commit a felony, viz, rape, commit an assault and battery upon E. M. Duggan, (Female, human being) by willfully and feloniously attempting to have sexual intercourse with her forcibly and against her will.

CHARGE II: Violation of the 94th Article of War.
Specification: In that Sergeant Sherman Burkhart, Service Battery, Fiftieth Field Artillery Battalion, did, at Tidworth Barracks, Wiltshire, England, on or about 30 August 1943, knowingly and willfully misappropriate and apply to his own use and benefit one motor vehicle of the value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

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 ten years. The reviewing authority approved the sentence but suspended the execution of the dishonorable discharge until the prisoner's release from confinement and designated 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Order No. 80, Headquarters 5th Infantry Division, APO 5 dated 15 November 1943.

3. For the prosecution, Warrant Officer (junior grade) Hubert A. Flumerfelt, of accused's battalion, testified that accused on 29 August 1943 drove a party of officers, including the witness, on an automobile trip from Tidworth to Bath and return. The party returned to Tidworth at 23:40 hours. Accused was in O.D.'s with blouse, wearing proper insignia of grade and a braided garrison cap (R4-5).

First Lieutenant Lawrence W. Young testified that he was temporary commanding officer of accused's battery, and was on a reconnaissance trip using a command car on 29 August 1943. Accused was the driver. The trip was completed at Tidworth about 11:45 p.m. He instructed the accused to take the command car to the motor park. He did not grant permission to take it elsewhere. The car was worth about $1200 or $1300. Witness accomplished the trip ticket sometime after the journey was over (R7-9). Recalled by the court, he testified that there had been orders that a vehicle should not leave camp without a trip ticket (R43). On a subsequent duplicate trip made for test purposes to Bath and return over the same route the car's speedometer read approximately 97 miles. The trip ticket (Pros.Ex.B) shows total mileage of 122 (R47). (The record contains no evidence of the distance between Andover and Tidworth, but according to the Ten Mile Map of Great Britain, Military Edition, that distance is about 10-12 miles, a proper subject of judicial notice.)

L.A.C.W. Eileen C. Duggan, Women's Auxiliary Air Force, testified that she left Andover railway station about two minutes past 12:00 on the night of 29-30 August 1943, for Andover Camp station. While proceeding along the road an "Army transport" stopped and she accepted the offer of a "lift." The vehicle, a size larger than a jeep, had no doors but had a cover over the top (R10-11). She was driven to a point about two hundred yards beyond Greggs' Corner when the driver informed her he could not take her further. Continuing, the witness testified:

> "I went to get out and he got hold of me and went to kiss me. I was flabbergasted. I just said I thought it was a bad show and I went to get out and he wouldn't let me.

> *** he managed to get out of his driving seat and stopped me from getting out of the car. And he made some remarks to me and I went to raise my voice and then he struck my face. And then I managed to kick at him and as I kicked at him he got out of the transport, and meanwhile I lost my hat and I started screaming getting hysterical. I managed to get out of the transport and he went around to the front of the car, and I got a hold of my case and I grabbed for my hat and it happened to be his but I got it and kept it just the same. I was screaming meanwhile and I noticed there were torches in the distance, and he got back into the driver's seat and drove the transport towards Red Post Ridge; that is at the end of the camp. And in the meantime the R.A.F. Police came up to me." (R11-12).

She identified a cap by the number B-5559, as the one belonging to the driver of the vehicle and it was received in evidence as Pros.Ex.A (R12). On cross-examination, she testified that when the driver passed in front of the headlights, which were quite bright, he appeared to be without a hat (R13). On examination by the court, she stated:

> "As he went to kiss me I objected very much. I still wanted to get out of the car. He got in front of me. He got out of the seat and barred the way for me to get out of the transport, and he got me down on to the seat and I was struggling with him all the time. Then he made the suggestion that I lift my skirt or something to that effect, and I tried struggling with him then he struck my face. And for an instance (sic) he let go and I managed to kick at him. Then he got out and that is when I got out of the car". (R13). (Under-scoring supplied).

She struggled with him because he was holding her. He struck her a severe blow in the face with his fist, which she thought definitely was a deliberate one; its mark remained for about a week. Further interrogation by the court proceeded as follows:

> "Q. *** Will you tell me how he was holding you. What part of the body he had his hold?
> A. By my throat, sir. He made remarks to the effect that if I screamed he would kill me. He was holding my throat.

Q. Did he put his hand on any part of your body?

A. No, just my throat as I was laying back. That is when I managed to kick at him". (R16) (Under-scoring supplied).

* * * * *

Q. Did you testify that he forced you down on the seat under him?

A. Yes. (R16) (Underscoring supplied).

He was wearing a coat, but she did not notice his rank (R16). On recross-examination, she would not swear he was without a hat (R18). On further examination by the court she testified:

"Q. *** Were you certain that he asked you to lift your skirt?

A. Yes, sir.

Q. Had you any doubt what his purpose was or not?

A. No, I had no doubt. I had no doubt at all what his intentions were.

Q. Was that belief based entirely upon the request that you lift your skirt or upon something else?

A. Well, by his attitude. By his whole attitude. (R18) (Underscoring supplied).

Miss Duggan declared she is five feet, five and one-half inches tall and weighs nine stone, and that a stone is fourteen pounds (R19). The witness was recalled later in the trial as a witness for the court and indicated that the driver of the vehicle was wearing an olive drab blouse and not a field jacket. She did not remember whether or not he had chevrons on it (R49).

Corporal G. H. Evans, R.A.F. Station Police, Andover, testified that he knew accused and had identified him at Tidworth at an identification parade (R38). About 12:20 on the morning of 30 August the witness and other R.A.F. personnel were on patrol on the main camp road and stopped a vehicle. Accused said a "WAAF" was in trouble on top of the road and that he would take them back there. He turned around in the dispersal field but did not stop and went as fast as he could up the road. This was near the sub-guard room on the camp road which goes through Andover to Ampert and Thruxton. Witness saw accused about 500 yards from the main Tidworth road. The patrol stopped the car and shone torches (flash-lights) on it. Accused was leaning over the wheel of the vehicle, which the witness thought was a Dodge truck, open with a top. He had three stripes and a "T" on his arm, was wearing a field jacket and had nothing on his head. (R20,22). Miss Duggan, who was later brought into the sub-guard room, had a big bump on her head. She acted very upset, as evidenced by crying (R23-26).

Corporal Lewis Abrahams, R.A.F. Station Police, Andover, testified that about 12:20 on the morning of 30 August, he was in charge of the patrol "leading" from the main guardroom to the sub-guard room.

He was with Corporals Evans and Sherlock and heard people shouting "stop him" and they flashed their torches on the car which stopped at the dispersal point, about 150-200 yards from Greggs' Corner, which is past the R.A.F. Police sub-guard room. The accused was driving. Abrahams confirmed the substance of the testimony of Corporal Evans as to the words and actions of accused, the condition of Miss Duggan, and the identification of accused at the parade at Tidworth (R26-29). On cross-examination, he testified that accused was wearing sergeant's stripes, and as he thought, a "rocker" and a "T" underneath (R30). Examined by the court, he thought accused had on a field jacket (R31).

Corporal Basil Pearson, R.A.F. Station Police, Andover, testified that he did not know accused. While in the sub-guard room witness heard a woman scream. He went outside and ran towards the direction of the scream. A car was driven down the camp road towards him and he heard a woman shout "stop that car". He tried to do it but "the car with a terrific speed went past". It then passed by him again despite his attempt to stop it. He identified the car as a command car, open with a top. He saw Miss Duggan at 12:15 a.m. 30 August 1943 outside the sub-guard room. She was in a very distressed condition, rather flushed and inclined to be hysterical, with quite a large bump on the left temple. She handed him an American soldier's hat with the number B-5559 inside, which is Pros.Ex.A. (The accused's Army serial number is 6985559) (R32-34).

Captain James E. Couty, 5th Infantry Division, Military Police, testified that he knew accused and that on the morning after the incident, accused identified the cap, Pros.Ex.A, as his own. He said "I lost it last night." (R36).

It was stipulated that the value of the command car described was well in excess of $50 (R37).

Private John H. Rediford, of accused's battery, declared he was charge of quarters 29-30 August and as such made bed check that evening between 12:00 and 12:15, which did not disclose any absentees. He knew accused who did not turn in his pass, but he thought accused was in bed at 12:10 or 12:15 (R50-51). Rediford admitted he did not see his face but noticed what he believed were accused's feet projecting from under bed blankets (R51-53). As a result of this adverse testimony, the prosecution recalled Rediford (R 85) and confronted him with Pros.Ex.D - a trip ticket of a motor vehicle bearing date of "8-29-43" which shows "Time out 1900" and "Time in 1930". On the reverse side of the trip ticket the vehicle movement is stated as: "Moolton to Alival to Moolton"

with a mileage of one mile from Moultan to Alival and further recites: "Vehicle released at 179 (speedometer reading) Date 30 Aug 43 at 1920 PM" and bears the signature of "Laurence W. Young 1st Lt FA". The witness testified that independent of the ticket he had no recollection of this duty, but admitted the genuineness of his signature appearing on the first page thereof. He further testified he drove Lieutenant Young to Alival at 5 PM on 29 August 1943 and upon returning at 5:30 PM (R85,87) assumed his duties as charge of quarters. He asserted that the ticket must be an error in stating the time of the trip to be from 7 PM to 7:30 PM as he was not out of the barracks at said time (R86).

Private First Class Robert W. Coffal, of accused's battery, testified that he drove a truck on a recreation run to Salisbury and return on 29 August 1943. He identified the ticket covering the trip (Pros.Ex.C) bearing his signature and which is dated 8.29.43 and shows "Time in 00:15", at which time, he testified, he was in his quarters. Rediford was charge of quarters that night and witness saw him in orderly room, but did not see him leave it. If anyone had come in to make bed check in his quarters he would have noticed him, but he did not notice anyone making bed check that night (R54,57). The witness did not state that he and accused lived in same room or quarters.

4. For the defense, Technician 5th Grade Arnold B. Clements of Battery C, 50th Field Artillery Battalion, testified that he had been in Amesbury on night of 29-30 August 1943 and was picked up in the vehicle driven by accused and was taken to Tidworth Garrison. The motor car and passengers arrived in the vicinity of the Service Battery Orderly Room of the 50th Field Artillery Battalion before 12:00 o'clock midnight. When he alighted he saw it drive off in the direction of the mess hall or motor park (R60). On cross-examination, he testified that he arrived at his quarters before bed check which is held at 12 midnight. Someone made bed check that night (R.61).

Private Doyle T. Henson, Battery B, 50th Field Artillery Battalion, testified that he and Clements rode with accused from Amesbury to Tidworth Garrison, arriving in camp about seven minutes to 12:00 midnight. He too saw the car depart in toward the general mess hall which is in the direction of the motor pool (R62-63). Henson admitted that there were other roads near that mess hall by which a vehicle might have left the post instead of going to the motor park (R63).

Private Jessie Chaney, of accused's battery, testified that on the night of 29-30 August accused came upstairs and asked if there was somebody walking around up there. The witness heard a noise somewhere. He conversed with accused. On cross-examination, he testified that about five minutes after he talked to accused he heard someone who he thought was the charge of quarters come around but did not see him (R64-66). Accused was wearing an O.D.coat. After the conversation accused went back downstairs and made a noise as if he were going to bed (R67-68).

The accused, after his rights had been explained to him, took the stand as a sworn witness. According to his narrative of events, he "guessed" he returned to Tidworth at about 23:40 hours with Captain Sumner, Lieutenant Young, Mr. Flummerfelt, Mr. Lacy, Clements and Henson. After leaving his passengers in front of the Service Battery Orderly Room, he proceeded to the motor park where he parked the command car. He then went to his quarters, where he conversed with Privates Chaney and Williams. He did not see the charge of quarters making the bed-check tour. He has never held the grade of Technician. When he came into his quarters he thought he heard someone walking around upstairs and went to see who it was (R72-73). On cross-examination he remembered telling Major Gill he reached his quarters around 11:30. (R74). On examination by the court, he testified that before he left the car in the park he felt around for his cap on the front seat and floor-board. He identified the cap shown him in court as the one he lost that night. The cap could have fallen out of the car (R77-8).

It was stipulated that A. C. Longdon, if present and sworn, would testify that he was one of the British military police on duty the evening of 29 August 1943; that he saw the command car in question and did not recognize the driver, but believed the driver wore the insignia of Technician 5th Grade (R80).

First Sergeant Gavin T. Flener, of accused's battery, testified that he was on 24-hour pass to Salisbury and that he returned on the pass truck from Salisbury between 11:45 and 12:00. He asked the charge of quarters if everybody was checked in and he replied "Yes", and the witness went to bed (R81). Examination by the court showed that that was around 12:00 (R83).

5. Major Dewey B. Gill, Inspector General's Department, Inspector General, 5th Infantry Division, appeared as a witness for the court. His testimony showed that seven or eight days after the incident in question, Corporals Abrahams and Evans of the R.A.F. each identified accused as the driver whom they previously stopped in the R.A.F. camp. Twenty or twenty-five men in separate groups of four, five or six men each, were examined by Abrahams and Evans. The particular group in which the accused was identified was composed of four men of substantially the same size and weight and all wore fatigues (R90-93).

6. The identity of the accused as Miss Duggan's assailant is adequately established by the following evidence: testimony of passengers in the command car that accused was in possession of it shortly before 2400 hours, 29 August 1943; identification of the car accused was driving as a command car by Miss Duggan and three non-commissioned officers of the R.A.F. Military Police; evidence that accused had lost his garrison cap (Pros.Ex.A) after returning with his passengers and that he was seen without a cap, combined with the girl's

testimony that shortly after midnight as she escaped from the command car she sought for her hat and picked up her assailant's cap by mistake and with accused's identification of that cap as the one he had lost; and direct testimony of the two R.A.F. Military policemen positively identifying the accused as the driver of the vehicle stopped by them after the assault. This evidence is confirmed by the discrepancy of 25 miles between the actual measured mileage for the day's trip and the mileage shown on the trip ticket and which could account for a trip to Andover some 12 miles away. (Pros.Ex.B). The court resolved against the accused the conflict in evidence as to his identity. The finding in this respect is supported by substantial evidence and upon appellate review will not be disturbed by the Board of Review (CM ETO 492, Lewis; CM ETO 503, Richmond; CM ETO 531, Melnrkin; CM ETO 559, Mousalve).

7. The finding of guilty of the Specification of Charge I, i.e., assault and battery upon Miss Duggan with intent to commit rape "by willfully and feloniously attempting to have sexual intercourse with her forcibly and against her will" is supported by substantial evidence.

> "Assault with intent to commit rape. - This is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. Indecent advances, importunities however earnest; mere threats; and actual attempts to rape wherein the overt act is not an assault do not amount to this offense. * * * * *
>
> "No actual touching is necessary.* * *
>
> "The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice.
>
> "Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted." (MCM., 1928, par.149 l, p.179).

The overt act, i.e., the assault upon the victim, is clearly established by her direct testimony and is corroborated by testimony of the R.A.F. Military Police that immediately after its commission she was in an upset condition, weeping, and had a large bump on her forehead.

In CM 233183 (1943) (Bul. JAG., May 1943, sec.451 (2), p.188) there was evidence of an assault and circumstantial evidence of an intent to commit rape. The accused, a total stranger to the victim, forced his

company again her at a bar and made lewd comments. While accompanying her home he forced her to some bushes where it was dark and there struck her and knocked her down. There was some money in her purse but none was taken. It was held that the record was legally sufficient to support findings of guilty of assault with intent to commit rape and the sentence adjudged on the ground that, under the familiar rule, in seeking the motive of human conduct, the court need not be limited to direct evidence and that inferences and deductions from human conduct may properly be considered where they flow naturally from the acts proved. Similarly, the intent of this accused to have carnal knowledge of Miss Duggan by force and without her consent may be inferred from her testimony as summarized above and particularly from the underscored verbatim portions thereof. Accused forced his victim down on the seat of the car under him, struck her face when she struggled with him, asked her to lift her skirt, held her by the throat and threatened to kill her if she screamed. She had no doubt of his intentions as evidenced "by his whole attitude". Miss Duggan's testimony in this respect was admissible. Although her statement was a conclusion she was testifying as to facts which could not be clearly or adequately reproduced and described to the court. (State v.Collins, 294 Pac.957, 73 ALR 862, 866). Accused was in a position to effect his intent had he not been defeated by her resistance and fear that help for his victim would arrive. His later desistance, evidently induced by her kick and screams, of course, is no defense (last sentence of MCM., 1928, par.149 a, p.179, above quoted). Consideration of the question whether accused's intent was to have intercourse with his victim against her will, by force and regardless of her resistance or to pursue his purpose unless she resisted, or to seek the satisfaction of his desires to the point where her resistance made his efforts futile, is a speculative indulgence that can have no place in the practical administration of justice. There was substantial competent evidence from which the court was warranted in inferring the intent as charged and its findings should not be disturbed by the Board of Review (CM ETO 76, Watts; CM ETO 489, Rhinehart and Fallmoco; CM ETO 492, Lewis; CM ETO 595, Sipes).

8. The findings of guilty as to Charge II and its Specification, intentional misappropriation of a Government motor vehicle of the value in excess of $50, are amply supported by the record. Misappropriation is defined as "devoting to an unauthorized purpose" (MCM.,1928,par.150 a, p.184). The record contains strong evidence that accused devoted the government vehicle in question, valued at $1200-$1300, to an unauthorized purpose by driving it a considerable distance from his post without any authority.

9. The charge sheet shows that accused is 25 years of age and enlisted 12 October 1939 for three years.

10. For the reasons stated, 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 court was legally constituted and had jurisdiction of the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed at the trial.

11. Confinement in a disciplinary training center in the United Kingdom in execution of a ten-year sentence upon conviction of a heinous offense, while not in harmony with the policy announced in paragraph II, 7b, Circular # 72, ETOUSA, 9 September 1943, is legally authorized by paragraph II, 6c thereof, at the discretion of the officer exercising general court-martial jurisdiction.

B. FRANKLIN RITER _____ Judge Advocate

CHARLES M. VAN BENSCHOTEN _____ Judge Advocate

ELLWOOD W. SARGENT _____ Judge Advocate

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

BOARD OF REVIEW

ETO 1015

22 JAN 1944

U N I T E D S T A T E S	5TH INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Tidworth Garrison, England, 13 October 1943.
Private First Class BUSTER BRANHAM (6669557), Battery C, 46th Field Artillery Battalion.	Sentence: Dishonorable discharge, suspended, total forfeitures and confinement at hard labor for ten years. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, 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 and sentence 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 charges and specifications:

CHARGE I: Violation of the 63rd Article of War.
Specification: In that Private First Class Buster Branham, Battery C, 46th Field Artillery Battalion, did, at Tidworth Garrison, England, on or about 28 September 1943, behave himself with disrespect toward Captain Richard D. Martin, Medical Detachment, 46th Field Artillery Battalion, his superior officer, by being contemptuous, surly and unduly familiar.

CHARGE II: Violation of the 64th Article of War.
Specification 1: In that Private First Class Buster Branham, Battery C, 46th Field Artillery Battalion, having received a lawful command from Second Lieutenant George Dutko, Battery C, 46th Field Artillery Battalion, his superior officer, to take a hike, did, at Tidworth Garrison, England, on or about 28 September 1943, willfully disobey the same.

Specification 2: (Finding of not guilty).

CHARGE III: Violation of the 65th Article of War.
(Finding of not guilty).
Specification: (Finding of not guilty).

He pleaded not guilty, and was found guilty of Charge I and its Specification and of Specification 1, Charge II and Charge II, and not guilty of Specification 2, Charge II and of Charge III 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 ten years. The reviewing authority approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 81, Headquarters 5th Infantry Division, APO 5, c/o Postmaster, New York, New York, 18 November 1943.

3. Accused was found not guilty of the offense alleged in Specification 2, Charge II (willful disobedience of the lawful command of Lieutenant Wesley, his superior officer, in violation of Article of War 64) and of the offense alleged in the Specification of Charge III (using insubordinate language toward First Sergeant Basil R. Slaughter, a non-commissioned officer who was then in execution of his office in violation of Article of War 65). However, in view of the circumstances surrounding the commission of the offenses of which accused was found guilty, and of the nature of the defense, it is considered necessary to set forth in substance the evidence pertaining to all charges and specifications.

On the morning of 27 September 1943 First Lieutenant Clark Wesley, commanding officer of accused's organization, Battery C, 46th Field Artillery Battalion, was observing the battery which had fallen out for dismounted drill. As one platoon marched by at attention he noticed that several men had the collars of their fatigue jackets open. Not wishing to halt the platoon, he announced generally that the men should button their collars. Several men obeyed the order but one man (accused) failed to do so. When the platoon passed by again the lieutenant told accused to button his collar but he "still didn't." Thereupon Lieutenant Wesley walked beside the platoon, ordered him to fall out, and when he obeyed, asked if he had heard him. Accused replied "Yes, sir, but I cannot do two things at once." The lieutenant told him that he could do four things at once if he told him to, ordered him to button his collar before he preferred charges, and informed him that "he would hear more of it later." Accused obeyed the order, buttoned his collar and fell back in ranks (R4-5,7).

On the following evening (28 September) Lieutenant Wesley told the first sergeant (Sergeant Slaughter) that several men including accused, were to take a hike (R5). On direct examination the lieutenant was asked:

> "Q. And what was the nature of this hike?
> A. It was to be a hike for about an hour or an hour and a half for several of the men of the Battery, who I thought a little exercise would be good for them (R5).

The following question and answer occurred on cross-examination:

> "Q. Now, then on the next day when this trouble over the hike came up -- as a matter of fact isn't it true that you were having him take this hike as a disciplinary measure for his neglect of the previous day?
> A. Yes, sir" (R7).

Between 5:00-6:00 p.m. accused came to the room of First Sergeant Basil R. Slaughter, Battery C, 46th Field Artillery Battalion, and asked if he had to go on a hike that evening. Upon being told that he did, he said "I am not taking it. I have a sore leg. I wouldn't take the hike if I did not have a sore leg." When told by Slaughter that he had better go on the hike, he replied "No." The sergeant then informed the battery commander (Lieutenant Wesley) and "asked him what he was going to do about it." Slaughter thought accused "had had a drink", but had no proof of this fact (R11-13).

About 5:30 p.m. pursuant to Lieutenant Wesley's orders, accused appeared at the orderly room and was asked by the lieutenant whether or not he was going to go on the hike. He replied that it was not a question of his refusing to take the hike, that he had received an injury in Iceland when struck on the hip by a gun trail, that his hip had been bothering him and that he had gone to the dispensary for this reason. As the lieutenant did not wish to give him a direct order to take the hike without knowing more of the circumstances of his physical ailment, he informed accused that he would have him checked by a doctor and that if he was "capable of taking the hike according to medical authority, he would take the hike." Lieutenant Wesley testified that accused seemed normal and in full possession of his faculties and that he was not drunk. The idea that he had been drinking never occurred to him (R6,8-9).

About 7:00 p.m. 28 September, accused entered the dispensary in a "slouchy, surly manner" and said: "Good evening, Mr. Martin" to Captain Richard D. Martin, battalion surgeon of the 46th Field Artillery Battalion. The captain replied: "Mr. Martin?", whereupon accused said: "Captain Martin". When asked if he had been on sick call that morning, accused

replied "I went to the dentist; that is the only way I can get away from the organization." Upon being asked if he had anything to drink he said "Yes, sir, I had a couple of drinks." Captain Martin then asked what he could do for him. He answered "Nothing". When asked if he had any pains or whether there was anything wrong with him, he replied "There is not a thing wrong with me." When asked by the captain if he was going on the hike, accused said "No. They can't make me go on a hike. I will go to the guardhouse first." Although he had previously been requested to make a physical examination of accused, Captain Martin did not do so. "I wasn't going to give him a general physical examination when there was nothing wrong with him." With reference to accused's sobriety at that time, the Captain testified: "He wasn't drunk. He had had a couple of beers or a couple of drinks, something like that. He was far from being drunk. He knew what he was doing at all times." (R9-10).

The deposition of Second Lieutenant George Dutko, 46th Field Artillery Battalion, was admitted in evidence as Pros.Ex.A, the defense stating that it had no objection thereto, and that the deposition had been taken with defense counsel present and that cross-interrogatories had been presented (R11; Pros.Ex.A). It is stated in the deposition that it was taken by consent of the parties in view of the contemplated unavailability of the witness, and that it was to be offered, introduced and read in evidence before a general court-martial appointed by paragraph 1, Special Orders No. 92, Headquarters 5th Infantry Division, 18 September 1942 as amended by paragraph 1, Special Orders No. 105, same headquarters, 13 October 1943, the trial court. It is further stated therein that the trial judge advocate and defense counsel were present. The defense counsel propounded cross-interrogatories.

Lieutenant Dutko deposed that about 7:30 p.m. 28 September, he was present in the orderly room of Battery C, 46th Field Artillery Battalion. He sent the charge of quarters and two non-commissioned officers to get accused who later appeared at the orderly room, saluted, and said "Private First Class Branham reporting as ordered, sir." He told Lieutenant Dutko that he was not feeling well and was unable to take a hike, whereupon the lieutenant informed him that the medical officer, Captain Martin, had pronounced him able and fit to take the hike. Lieutenant Dutko then said "Branham, this is a direct order. Will you take this hike." He replied "No, sir, I won't." The order to take the hike was given in the presence of three non-commissioned officers pursuant to instructions which had previously been received by the lieutenant from his superior officer in the battery, Lieutenant Shannon. When he sent for accused and gave him the order in the presence of the three witnesses, he was merely following out these instructions. Lieutenant Dutko "had some knowledge, but not a complete knowledge" of what had occurred earlier in the day. He noticed nothing unusual about the condition of accused who had, however, "seemed to be distressed about something". He did not know if the man was drunk, nor did he know whether or not he was then physically fit to go on the hike (Pros.Ex.A).

The order to take the hike was given by Lieutenant Dutko in the presence of Staff Sergeant Harry Schroedter, Battery C, 46th Field Artillery Battalion, who heard accused reply that "he wasn't going to take the hike". Accused had reported to the lieutenant in the proper manner, and Schroedter did not notice whether he had been drinking or whether he was under the influence of liquor (R14-16).

Accused did not go on the hike (R5,15).

4. For the defense, Private First Class John J. Brewster, Battery C, 46th Field Artillery Battalion, testified that from 10:30 or 11:00 a.m. until about 12:30 p.m. 28 September, he was with accused in a pub named the Ram. Accused was drinking whiskey and beer and was one of a group of three men who, with two other men, drank a quart of whiskey. When Brewster left the pub at about 12:30 p.m. accused acted as though he was "pretty high" (R17-18).

It was stipulated by the prosecution and defense that if Private First Class Sampson Douglas, Jr., were present he would testify in substance that on 28 September he and accused went to the Ram about 11:30 a.m. where they drank about five or six "double shots" of whiskey "chased" by beer. When they left at about 2:30 p.m. to return to the battery area, accused was feeling "pretty high." When the post-exchange opened about 5:00 p.m. the two men "resumed drinking beer." About 6:00 p.m. the charge of quarters of accused's battery came to the post-exchange to take him to the orderly room. In the opinion of Douglas, when he left the building accused was very much under the influence of liquor. "*** he was, however, able to walk straight-- he was making efforts to walk straight ***." (R19).

5. The evidence is legally sufficient to support the findings of guilty of Charge I and of the Specification thereunder (behaving with disrespect toward his superior officer, Captain Martin, in violation of Article of War 63). Accused entered the dispendary in a "surly, slouchy manner" and said "Good evening, Mr. Martin." He said that he had gone to the dentist because it was the only way he could "get away from the organization." He further stated that he was not going on the hike, that he could not be made to go, and that he would "go to the guardhouse first." His behavior was clearly disrespectful and was contemptuous, surly and unduly familiar as alleged.

The defense introduced evidence to the effect that accused had been drinking rather heavily during the day, and that he was drunk when he left the post-exchange to go to the orderly room. Captain Martin testified that although accused had had a couple of beers or drinks, he was far from being drunk while at the dispensary at 7:00 p.m., and that he knew what he was doing at all times. Sergeant Slaughter thought

that accused "had had a drink" when he came to the former's room between 5:00-6:00 p.m. but had no proof of this fact. According to Lieutenant Wesley, who saw accused about 5:30 p.m., the idea that he had been drinking never occurred to him. Accused had seemed normal and in full possession of his faculties. Lieutenant Dutko noticed nothing unusual about his condition at 7:30 p.m. although he "seemed to be distressed about something." He did not know if accused was drunk. The issue of drunkenness was one of fact for the sole determination of the court and in view of the evidence, the Board of Review will not disturb its findings (CM ETO 1065, Stratton).

6. With reference to the offense alleged in Specification 1 of Charge II (willful disobedience of the order of Lieutenant Dutko, his superior officer, in violation of Article of War 64), it is evident that when giving the order to accused in the presence of three witnesses, Lieutenant Dutko was merely carrying out express instructions which he had previously received from superior authority and acted, so to speak, simply as a conduit. He had been instructed by his superior officer in the battery, Lieutenant Shannon, to order accused to take the hike. However, in view of all the evidence, including the testimony of Lieutenant Wesley, accused's battery commander, it is apparent that Lieutenant Wesley himself was primarily responsible for the ultimate issuance of the order by Lieutenant Dutko and the merits of the case should be discussed accordingly.

There can be no doubt that the order given accused was clearly intended as a punishment for his conduct at drill on the previous day, and that the order to go on the hike was not given in furtherance of any ordinary routine training program as such. When Lieutenant Wesley gave accused the final order to button his collar, he told him that "he would hear more of it later". The lieutenant thought that "a little exercise would be good" for several men, including accused, who were to take the hike. He answered in the affirmative when asked on cross-examination if he was having accused take the hike "as a disciplinary measure for his neglect of the previous day".

As the order was intended as a punishment the provisions of Article of War 104 become pertinent. By virtue of that article

> "**** the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial ****" (AW 104). (Underscoring supplied).

"The commanding officer, after ascertaining to his satisfaction, by such ingestigation as he deems necessary, that an offense cognizable by him under AW 104 has been committed by a member of his command, will notify such member of the nature of such offense as clearly and concisely as may be, and inform him that he proposes to impose punishment under AW 104 as to such offense unless trial by court-martial for the same is demanded. *****". (MCM., 1928, par.107, p.104). (Underscoring supplied).

"*****. With reference to each offense as to which no demand for trial by court-martial is made, the commanding officer may proceed to impose punishment. The accused will be notified of the punishment imposed as soon as practicable and at the same time will be informed of his right to appeal. *****". (MCM., 1928, par.107, p.105). (Underscoring supplied).

"A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through proper channels, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. (AW 104). An appeal not made within a reasonable time may be rejected by the 'next superior authority'. An appeal will be in writing through proper channels **** and will include a brief signed statement of the reasons for regarding the punishment as unjust or disproportionate. The immediate commanding officer of the accused will when necessary include with the appeal a copy of the record **** in the case. ****." (MCM., 1928, par.108, p.105).

During drill on the morning of 27 September, accused was marching in formation with the collar of his fatigue jacket unbuttoned. Although he admittedly heard Lieutenant Wesley's order to button his collar, he failed to do so. When ordered to fall out of formation by Lieutenant Wesley, he offered the insufficient excuse that he could not "do two things at once". He finally buttoned his jacket when again ordered to do so. This offense by accused was a "minor offense" for which punishment might be imposed pursuant to the provisions of Article of War 104. "Generally speaking, the term includes derelictions not involving moral

turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial" (MCM., 1928, par.105, p.103).

The order to go on the hike was intended to be given as a punishment (Lieutenant Wesley expressly testified that was his intention) (R7), but there was no evidence that accused was notified that disciplinary action under Article of War 104 was contemplated, that he could demand trial by court-martial in lieu of accepting the punishment, or that he was informed of his right to appeal to superior authority if he believed the punishment to be unjust. The requirements of AW 104 as stated in the Manual for Courts-Martial that the accused (a) be given the opportunity to demand trial by court-martial before imposition of punishment, and (b) be informed of his right to appeal to superior authority if he believes the punishment imposed is unjust, are mandatory, and the failure of the officer imposing the punishment to notify the accused of his rights nullifies the order of punishment and renders it illegal. (Dig.Ops.JAG., 1912-1940, sec.462(5), p.370).

The case under consideration is readily distinguishable from the case cited in Dig.Ops.JAG., 1912-1940, sec.422(6), pp.286-287, (CM 200289, (1933)). In that case accused was convicted of refusing to obey a lawful order to scrub a floor, a punishment imposed under AW 104. The record did not show that he was advised of his right to demand trial in lieu of accepting the punishment, but did show that he was advised of his right to appeal to higher authority, and that the Articles of War had been read to him on several occasions. It was held that in the absence of an affirmative showing to the contrary, it must be presumed that punishment under Article of War 104 was lawfully imposed after compliance with all the preliminary requirements. It was further held that the order was a lawful one and the conviction was sustained. However, in that case the provisions of Article of War 104 were at least partially complied with in that accused was specifically informed of his right to appeal to higher authority, and it is reasonable to presume, in the absence of a contrary showing, that the other preliminary requirements were fully observed. In the present case the record of trial is completely silent with reference to compliance with <u>any</u> of the requirements of the article and indicates rather clearly that no compliance was attempted. Consequently, no basis whatsoever is furnished for any such presumption. The order of punishment was, therefore, illegal.

In view of the foregoing the Board of Review is of the opinion that the evidence is legally insufficient to sustain the findings of guilty of Specification 1, Charge II and of Charge II.

7. A commanding officer is authorized to order a soldier to go on a practice march or hike as a form of additional training, as he is authorized to order other additional training for backward soldiers, provided the additional training is reasonable, as, for example, where

a soldier is not up to standard in the manual of arms, close order drill, etc. As a commander, he could no doubt order an additional practice march if the physical condition of the soldier or his state of training is such as to require it and make it a reasonable measure of training. But this is not such a case. Lieutenant Wesley testified that this hike was ordered as a disciplinary measure for accused's neglect of the previous day. A practice march is clearly a military duty and is not in the nature of extra fatigue duty within the purview of Article of War 104. Courts-Martial are prohibited from degrading military duties such as drill by imposing them as punishments (MCM., 1928, par.102, p.92). Obviously the same prohibition applies to disciplinary punishments; military duties may not be degraded by their use as forms of punishment under Article of War 104.

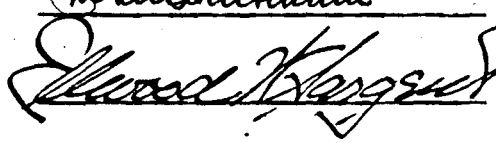
8. The Board of Review expresses no opinion with reference to the question of the admissibility in evidence of the deposition of Lieutenant Dutko.

9. The charge sheet shows that accused is 26 years of age and that he enlisted at Fort Knox, Kentucky, 13 October 1939 for a period of three years. He had no prior service.

10. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and of the Specification thereunder, legally insufficient to support the findings of guilty of Specification 1, Charge II and of Charge II, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period.

Judge Advocate

Judge Advocate



Judge Advocate

CONFIDENTIAL

(284)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 22 JAN 1944 TO: Commanding General, ETOUSA, APO 887, U. A. 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 U.S.C. 1522) and as further amended by Public Law 693, 77th Congress, 1 August 1942 is the record of trial in the case of Private First Class BUSTER BRANHAM (6669557), Battery C, 46th Field Artillery Battalion.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings of guilty of Specification 1, Charge II and of Charge II be vacated, that so much of the sentence be vacated as is in excess of confinement at hard labor for six months and forfeiture of two-thirds of his pay per month for a like period, and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated, be restored.

3. The accused in this case was surly, undisciplined, insubordinate. He deserves more punishment than this holding permits, but the responsibility for that result lies elsewhere. This case is an example of the exercise of unrestrained authority by officers, which caused Congress after the last war to revise the procedure governing courts-martial to include the present Article of War 104, limiting and regulating the disciplinary power of a commanding officer. Punishments must be of the kind permitted by the Article and imposed as there required; soldiers may not be punished at the arbitrary whim of an officer. There is great need for the instruction of junior officers in their duties toward the men committed to their charge, and in the proper exercise of their command powers.

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 and sentence vacated in part in accordance with recommendation of the Assistant Judge Advocate General. GCMO 3, ETO, 25 Jan 1944)

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

- 9 DEC 1943

BOARD OF REVIEW

ETO 1017

CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.

U N I T E D S T A T E S)
)
v.)
)
Private ROBERT A. McCUTCHEON (20515936), Company C, 4th Replacement Battalion.)

Trial by G.C.M., convened at London, England 29 October 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 30 years. The 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 Robert A. McCutcheon, Company C, 4th Replacement Battalion, ETOUSA, did, at Lichfield, Staffordshire, England, on or about 14 December 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 2 October 1943.

CHARGE II: Violation of the 96th Article of War.
Specification: In that Private Robert A. McCutcheon, Company C, 4th Replacement Battalion, ETOUSA, did, at London, England, on or about 2 October 1943, without lawful authority appear in a the uniform of a commissioned officer, and wrongfully represent himself to be an officer commissioned in the army of the United States.

CHARGE III: Violation of the 93rd Article of War.
Specification 1: In that Private Robert A. McCutcheon, Company C, 4th Replacement Battalion, ETOUSA, did, at London, England, on or about 25 August 1943, feloniously take, steal, and carry away one khaki shirt, value of about four dollars ($4.00), one pair of pink trousers, of the

value of about eight dollars and fifty cents ($8.50), the property of 2nd Lt., Lewis H. Walker, 559th Bombardment Squadron, 387th Bombardment Group, ETOUSA.

Specification 2: (Nolle prosequi by direction of appointing authority).

CHARGE IV: Violation of the 94th Article of War. (Nolle prosequi by direction of appointing authority).

Specification: (Nolle prosequi by direction of appointing authority).

He pleaded guilty to the Specification of Charge I "except the words 'desert' and 'in desertion', substituting therefor the words 'absent himself without leave from' and 'without leave'; of the excepted words, Not Guilty; of the substituted words, Guilty", and not guilty to Charge I but guilty of a violation of Article of War 61, guilty to Charge II and its Specification, and guilty to Specification 1, Charge III and Charge III. He was found guilty of all charges and specifications upon which he was tried. Evidence of one previous conviction by general court-martial for desertion involving an absence of 10 days in violation of Article of War 58, and for attempting to defraud a department store in violation of Article of War 96 was introduced. He was sentenced to be dishonorable discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 30 years. The reviewing authority approved the sentence, 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 is substantially as follows:

The defense stating that it had no objection thereto, a certified extract copy of the morning report of accused's organization was admitted in evidence, which recites that he went absent without leave on 14 December 1942 (R6; Pros.Ex.1). It was stipulated that accused's organization was at Lichfield, England and that he was in the military service (R6).

On 2 October 1943, Staff Sergeant William Slevin, C.I.D. Detachment, APO 887 saw accused enter a building numbered 38 Redcliffe Square, London, wearing the uniform of a captain of the United States Air Force, and carrying a type of trench coat worn by officers. Slevin and an agent named Kozak went to a flat on the second floor of the building and knocked at the door, which was opened by accused. He was then dressed in officer's pink trousers and an "O.D." lightweight shirt. Upon being asked if he was Robert McCutcheon, accused replied that he was Captain Walker of the United States Air Force and produced "an identity" which bore "his resemblance of a picture" and contained the description "Captain Harold L. Walker, U.S. Air Force, from R.A.F.". He also produced identity tags issued to Lieutenant Lewis H. Walker, stating that he had changed his

name because he preferred to be known as "Hal". Slevin left on the pretence of making an investigation to see if there was a Captain Harold L. Walker, and returned to inform accused that there was no Captain Harold L. Walker in the United States Air Force. Accused then said "Well, I guess you have got me. I am McCutcheon" (R6-8).

The defense stating that it had no objection thereto, the following exhibits which, with one exception (Pros.Ex.14) were found in the flat of accused or on his person, were identified by Slevin and admitted in evidence: blouse and shirt worn by accused (R8; Pros.Exs. 2,3); coat which accused had carried on his arm (R8-9; Pros.Ex.4); two pairs of officer's pink trousers, one of which was worn by accused, and two officer's shirts (R9; Pros.Exs. 5,6,7); officer's coat with captain's bars, battle dress, officer Air Force model and two pairs of officer's olive drab trousers (R10; ProsExs. 8,9,10); officer's cap with captain's insignia, picture of accused in an enlisted man's uniform with sergeant's stripes, picture of accused with an unknown friend, both as sergeants, and a pass for the period 11 - 16 August 1943, made out to Technical Sergeant R. McCutcheon which was found on the person of a deserter from the Canadian merchant marine (R10-11; Pros.Exs. 11,12,13,14); a "home made" letter of notification of the transfer, with the rank of second lieutenant, of "Flight Sergeant" Harold L. Walker from the Royal Air Force to the United States Army Air Force and two pictures of accused in the uniform of a United States Army Air Force lieutenant (R12; Pros.Exs. 15,16,17); an application for leave of absence which was, according to the testimony of Slevin issued to Captain Harold Walker, the description of the exhibit itself, however, being that of a "Grounded certificate" (R12; Pros.Ex.18); an order "made up by the accused" citing his promotion from second lieutenant to captain, and identification tags issued to Lewis H. Walker and worn by accused when apprehended (R13; Pros.Exs. 19,20); an obliterated and altered official A.G.O. form 65-4 shown by accused to Slevin and containing, according to the testimony of Slevin his picture and the name "Harold L. Walker, Captain, Air Corps," the description of the exhibit itself, however, being an AGO card belonging to "Lewis H. Walker" (R13; Pros.Ex.21); two "home-made" identification cards bearing accused's pictures in an American officer's uniform with the words "Harold L. Walker Capt AC FR RAF to US", one being a purported form W.D., A.G.O. 65-4 and the other an identification and membership card for members of the "133 Eagle Squadron only" (R14; Pros.Exs. 22,23); a pilot and crew member physical record card in the name of Captain Harold Walker and a "home made leave of absence" in the name of Captain Harold L. Walker (R14-15; Pros. Exs.24,25); a picture of accused in the uniform of an American Army Air Force captain with several service ribbons thereon, and a "short snorter" (R15; Pros.Exs. 26,27); several rubber stamps bearing legends of an official military character and some ink pads (R15-16; Pros.Exs.28,29).

Accused was taken to the investigating officer at 33 Davies Street, London (R16).

On 13 August 1943 Lieutenant Lewis H. Walker, 559th Bombardment Squadron, 387th Bombardment Group was in London on pass and registered at the Red Cross Club, Princess Gardens. When he awakened "in the morning"

he found missing a shirt, and a pair of trousers which contained his "War Department pass" (AGO Card), his identification tags, about ten shillings in change, a knife and a cigarette lighter. At the trial he identified Pros.Ex. 6 and Pros.Ex. 20 as his missing trousers and identification tags. He also identified Pros.Ex.21 as his missing AGO card ("War Department Pass") by the signature thereon of one Major Kilgore, and also by his serial number, the last digit of which had been changed. He did not give accused permission to take his property (R16-17).

On 25 October 1943, after being warned as to his rights, accused made a statement to Staff Sergeant James D. Murphy, C.I.D., Theater Provost Marshal's Office, APO 887. Murphy identified the statement which had been reduced to writing and then signed and acknowledged by accused. It was admitted in evidence with reference to the charge of desertion only (R17-18; Pros.Ex.30). Accused stated therein in pertinent part that he went absent without leave on 3 or 4 December 1942 and eventually went to London. During his absence he lived on money solicited from American soldiers, prostitutes, and from women with whom he lived. He received money from the proceeds of worthless checks cashed by another soldier, and used fictitious passes which he made up for his own use. He also made out passes for the use of others. He talked to various sailors about going to Africa but was told that the journey was impossible. Part of the time he wore the chevrons of a technical sergeant, U.S.A.A.F., gunner's wings and an Air Force shoulder patch, but during his absence never wore civilian clothing. He met an American soldier named Gibson with whom he planned to steal articles from various clubs and to dispose of the stolen property. With this idea in mind, during the latter part of August they went to the Princess Garden Red Cross Club and registered, using fictitious passes which accused had executed. One night Gibson stole an officer's sun tan shirt, a pair of officer's pink trousers, identification tags and an A.G.O. form No.65-4 belonging to Lieutenant Lewis Walker, o-662703. Because the lieutenant's description fitted accused they decided that he should impersonate the officer. He altered the A.G.O. card by burning a corner of it bearing the name "Lewis H.", changing the last number in the serial number from "3" to "8", erasing the name "Lewis H. Walker" and insering "Harold L. Walker" and by adding the words "Promoted to Capt. 8/30/43, Maj. L.C. Landis". He also substituted his own picture for that of Lieutenant Walker. Accused carried the card in his identification folder from then on. The following day they purchased a United States Army battle dress jacket of a type used by members of the Air Force, and also a peaked officer's cap. Accused wore the stolen trousers and shirt, together with the battle dress jacket and peaked hat. On several occasions he pawned articles which had been stolen by Gibson, and they divided the proceeds. He made purchases of officer's clothing and insignia, and wore several articles of officer's clothing received from Gibson. During the time he impersonated an officer he wore the insignia of a second lieutenant and captain, and wore without right the "Purple Heart Ribbon, the D.F.C. ribbon, Air Medal ribbon, with three clusters, and the British D.F.M. ribbon". He used the names of "Lewis H. Walker" and "Harold L. Walker". He "made up" the "short snorter" by writing the names thereon himself, and on several occasions falsely stated that he served in the "R.A.F." and the Canadian Air Force. He further identified several of the articles found in his possession when

apprehended on 2 October 1943 at 38 Redcliffe Square (Pros.Ex.30).

4. Upon being advised of his rights accused elected to make an unsworn written statement (R19; Def.Ex.1). In brief, accused stated that he had been a soldier since 27 April 1940 and was sent to England under guard. His morale was then low. He was "afraid to die" and felt he had received unfair treatment. He was "completely strong headed" and went absent without leave without "giving anything a second thought". While absent he heard that desertion in time of war might result in being shot by a firing squad, or life imprisonment. Accordingly, he thought it would be "just as bad" for him if he surrendered. He tried to board a ship for Africa with the hope of joining a unit at the battle front. He had realized the error of his conduct and aksed for a chance to redeem himself (Def.Ex.1).

5. The certificate of previous convictions (Pros.Ex.31) does not contain the date of the commission of the offense alleged under AW 96 (attempt to defraud). The defense did not object to the receipt of the evidence. Such an omission did not injuriously affect the substantial rights of accused (CM 210685, Le Gette).

6. In view of the plea of guilty of absence without leave with respect to the offense of desertion alleged in Charge I and Specification thereunder, the only question presented for consideration is whether the evidence is legally sufficient to establish the requisite intent to desert. Accused's prolonged absence of almost ten months was terminated by apprehension. Although he was for several months in the vicinity of military installations he did not surrender to military authority. He lived on money solicited from soldiers and prostitutes, on the proceeds of thefts in which he participated, posed as and wore clothing of a certain commissioned officer, used this officer's identity card which he had altered, and his identification tags. He also forged passes for his own use, and tried to board a ship to Africa. The evidence was legally sufficient to support the findings of guilty of Charge I and its Specification (CM ETO 952, Mosser; CM ETO 913 Pierno; CM ETO 823, Poteet; CM ETO 800, Ungard; CM ETO 740, Lane). The entry of 6 January 1943 in Pros.Ex.1 (morning report) citing the change in accused's status from absent without leave to desertion, was an administrative conclusion only and was, therefore, inadmissible. No objection to its introduction was made by the defense.

The pleas of guilty to Charge II and its Specification and to Specification 1, Charge III and to Charge III, were also fully supported by the evidence, including both statements of accused. It was alleged in Specification 1, Charge III that the offense of larceny was committed 25 August 1943, and accused, in his statement to Murphy said that the theft occurred during the latter part of August. It might be inferred, however, from the testimony of the owner of the property, Lieutenant Walker, that the theft occurred during the night of 13 August. The variance, if any, was immaterial (CM 272183, Tourey).

7. The charge sheet shows that accused is 22 years of age and that he enlisted at Dayton, Ohio 27 April 1940 for three years, his service being governed by the Service Extension Act.

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 of the charges and specifications upon which accused was tried, and the sentence.

9. Pursuant to paragraph 5c, GO # 37, ETOUSA, 9 September 1942 as amended by GO # 63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same order a general prisoner may be returned to the United States to serve a sentence of three years or more. Confinement of accused in a penitentiary is authorized for the offense of desertion in time of war (AW 42).

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind. - 9 DEC 1943

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

1. In the case of Private ROBERT A. McCUTCHEON (20515936), Company C, 4th 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 of the charges and specifications upon which he was tried, 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 1017. For convenience of reference please place that number in brackets at the end of the order: (ETO 1017).

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

9 DEC 1943

BOARD OF REVIEW

ETO 1036

WESTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.

U N I T E D S T A T E S	Trial by G.C.M., convened at Whittington Barracks, Lichfield, England, 13 November 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 10 years. The Federal Reformatory, Chillicothe, Ohio.
v.	
Private MARSHALL K. HARRIS (6153269), Company A, 37th Replacement Battalion, 10th Replacement Depot.	

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 Marshall K. Harris, Company A., 37th Replacement Battalion, 10th Replacement Depot, Whittington Barracks, Lichfield, England, did, at Whittington Barracks, Lichfield, England, on or about 15 October 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Birmingham, Warwickshire, England, on or about 23 October 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of three previous convictions, two by special courts-martial and one by summary court for absences without leave of 52, 48 and 25 days respectively in violation of Article of War 61, were 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. The evidence for the prosecution may be summarized as follows:

The morning report of accused's organization was identified by his company commander, Captain Leroy Cunningham, Infantry, was admitted in evidence and later withdrawn, and an extract copy certified by Captain Cunningham was inserted in the trial record in lieu thereof. It contained in pertinent part the following entries:

"16 Oct.1943.
6153269 Harris, Marshal K. FA Pvt.
Duty to AWOL 2359 Hrs. 15 Oct. (LC)
****
24 Oct.1943.
6153269 Harris (Abs Conft) Pvt.
Abs Conft to Conft Post Guardhouse
APO 874 1830 hrs. 23 Oct.(LC)"
(R6; Pros.Ex.1).

At 11.25 p.m., 22 October 1943, Constable Charles Terrance of the Birmingham City Police noticed accused on a street in Birmingham, dressed in a civilian suit that was much too small for him. Upon being stopped by Terrance and asked who he was and where he was going, accused said that his name was Marshall Harris, that he was in the American merchant marine navy and that he was picking up a lorry to Wolverhampton. Asked where he got his army type shirt, he said "from a friend down the road" and pointed towards the Bull Ring. (R6-7). During the conversation he said that he obtained his suit "aboard a ship". Terrance took him to the police station where he voluntarily revealed that he was in the military service. He was wearing a khaki shirt, a brown civilian coat and trousers and had an identification tag around his neck. Terrance did not know if he wore trousers underneath the civilian clothing (R7).

About 2345 hours, 22 October, accused was turned over by the civil police to Corporal Beryl E. Foster, Company A, 769th Military Police. He was wearing a civilian coat and trousers, an army "O.D." shirt and identification tags. In the opinion of Foster he did not wear trousers under the civilian trousers because the latter "were so tight on him" (R8-9).

4. For the defense, a sworn statement signed by accused and made before Second Lieutenant Thomas B. Weatherly, Infantry, investigating officer, was received in evidence (R9-10; Def.Ex.2). It was stated

therein that accused realized that he was not compelled to make a statement unless he wished to do so, and that his statement could be used in evidence in a trial by court-martial. In substance he stated that he left his organization on pass to Lichfield at about 1800 hours, on Friday, 15 October 1943, the pass expiring at 2330 hours that evening. He wore his class A uniform. He "got drunk" in Lichfield and remembered nothing until the following Thursday (21 October) when he found himself in Birmingham. He was then wearing civilian clothes over his uniform but did not know how he got them or how he happened to be wearing them. Between Thursday and Friday night he remained in Birmingham trying to become sober before he turned himself in. He wore the civilian clothing over his uniform as it was badly torn and "would have made a very bad appearance". He decided to start back to camp and was apprehended by the military police on Friday night. He never intended to desert, his drunkenness being the cause of his absence without leave. This occasion was the first in ten months on which he had had anything to drink and he "just overdid it". (Def.Ex.2).

Accused, after being warned of his rights, testified that when he left camp his trousers were in good condition (R15), and that he remembered nothing from the time he became intoxicated in Lichfield on the night of 15 October until he found himself in Birmingham. On Thursday he felt "damn funny", had a bad headache and roamed around the city (R12). When apprehended he was wearing a woolen undershirt, woolen trousers (under pants), army socks, "O.D." trousers and "O.D." shirt, black knit tie, blouse, civilian trousers and civilian coat (R10). The civilian clothing was worn outside his uniform, the uniform blouse being under his shirt (R.10-11). As he had been drunk he did not know how he happened to be then wearing the civilian clothing (R10, 12-14). He had not removed the civilian clothes because he found that the trousers of his uniform were badly torn and he "did not want to disgrace the U.S. Army uniform" (R10, 13-14). He did not know how his trousers became torn (R.15). He did not want to surrender until he became sober and was getting ready to turn himself in when apprehended (R13). He did not remember whether or not he had told Constable Terrance that he was a member of the American merchant marine or that he was on his way to Wolverhampton. He was sober when apprehended (R.12). The military trousers worn by accused when arrested were offered in evidence by the defense, admitted, and later withdrawn (R11; Def. Ex.4).

5 (a). The entry in the morning report (Pros.Ex.1) dated 24 October 1943, reciting the change in accused's status from absence without leave to absent in confinement in Birmingham, was apparently hearsay in character and therefore inadmissible. No objection was made by the defense. The irregularity was non-prejudicial.

(b). The morning report, admitted as Pros.Ex.1.(R6), and accused's statement to Lieutenant Weatherly, admitted as Def.Ex.2 (R10) were not so labelled. The trousers were offered in evidence by the

defense (R11), but the exhibit itself is described as that of the prosecution (Pros.Ex.4).

(c). The defense stated that as the evidence showed that accused was in the hands of the military police prior to midnight 22 October, accused should not be charged with an absence without leave ending 0010 hours 23 October. The law member announced that the court would give consideration to the fact that accused was apprehended before midnight 22 October (R9). The court found accused guilty of the offense as alleged. There was no variance between the offense alleged in the Specification and the finding of guilty thereof, as the absence of accused was alleged to have been terminated by apprehension on or about 23 October 1943.

(d). One of the three previous convictions introduced in evidence was for absence without leave from 17 June 1942 to 8 August 1942 in violation of Article of War 61. As this offense was committed more than one year prior to the offense charged herein, other previous absences considered, its receipt in evidence was erroneous (MCM., 1928, par.79c, p.66). However, in view of the present authorized maximum punishment for the offense of desertion (death) and the period of confinement adjudged (ten years), the error did not injuriously affect the substantial rights of accused (CM 211080, Basham).

6. The evidence, including the statement and testimony of accused, shows that accused went absent without leave at 2359 hours on 15 October 1943 at the place alleged, and that he was apprehended at the place alleged on 22 October 1943. The only question presented for consideration is whether the evidence is legally sufficient to establish the requisite intent to desert. His absence without leave of eight days was terminated by apprehension. He was then wearing civilian clothes. Although he gave his real name to Constable Terrance he stated that he was a member of the American merchant marine navy, that he was on his way to Wolverhampton, that he got from a friend the army type shirt he was wearing, and that he obtained the civilian suit "aboard a ship". However, accused admitted in his testimony that he was sober when apprehended, that the shirt was his, and that he did not know how he happened to be wearing the civilian clothes. He also testified that he became drunk in Lichfield on the evening of Friday, 15 October and did not remember anything until he found himself in Birmingham on the following Thursday (21 October). He did not then surrender to military control because he wanted to "sober up". An examination of a map of England shows that Birmingham is about 20 miles from Lichfield where he was stationed.

Any conflict in the evidence with respect to the question of intent to desert was a question of fact for the determination of the court. If the evidence was legally sufficient to support the inferential finding by the court that accused had such an intent, the Board of Review will not disturb such finding.

"Determination of the question as to whether an absence is 'much prolonged' or satisfactorily explained, within the meaning of par. 130a, MCM, must depend upon the circumstances of the absence. An arbitrary yardstick of time may not be implied. ****. CM 213817 (1940)." (Dig.Ops.JAG 1912-1940, sec.416(9), p.270). (Underscoring supplied).

In CM 196187, Roath, the only evidence of desertion in the record of trial consisted of whatever inference could be drawn from an absence without leave for 18 days, accused's failure to return until apprehended and the fact that he was dressed in civilian clothes at the time of apprehension. It was held that the evidence was legally sufficient to support a finding of guilty of absence without leave only.

In the case under consideration, the period of absence was eight days and accused was apprehended about 20 miles from his station. He admitted that he was sober when apprehended. He falsely represented to the constable that he was a member of the American merchant marine. His statement to Terrance as to the manner in which he secured the civilian clothing and army shirt varied materially from his testimony at the trial. Although he testified that he was about to surrender when apprehended, he also told the constable that he was on his way to Wolverhampton. Wolverhampton is about 20 miles northwest of Birmingham and about 20 miles southwest of Lichfield, where he was stationed. He did not disclose that he was in the military service until after he had been taken into custody. The foregoing evidence would fully justify a belief by the court that accused falsely represented his status with the purpose of avoiding apprehension. It was entitled to disbelieve his testimony with reference to the wearing of the civilian clothing and to infer from all the evidence that he wore it in order to avoid detection. In the opinion of the Board of Review the evidence is legally sufficient to establish the intent to desert.

7. The charge sheet shows that accused is 22 years of age, that he enlisted at Springfield, Massachusetts, 20 June 1940, and that his service is governed by the Service Extension Act of 1941. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuricusly 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. Pursuant to paragraph 5c, GO # 37 ETOUSA, 9 September 1942 as amended by GO # 63, ETOUSA, 4 December 1942 a sentence of dishonorable discharge may be ordered executed when accused is sentenced to confinement for not less than three years. By virtue of the same orders a general

prisoner may be returned to the United States to serve a sentence of three years or more. Confinement in a penitentiary is authorized for the offense of desertion in time of war (AW 42). As accused is under 31 years of age and his sentence is not more than 10 years, the designation of the Federal Reformatory, Chillicothe, Ohio is correct (War Department Circular 291, 10 November 1943, section V 3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate.

1st Ind.

- 9 DEC 1943

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

1. In the case of Private MARSHALL K. HARRIS (6153269), Company A, 37th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1036. For convenience of reference please place that number in brackets at the end of the order: (ETO 1036).

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 1042

27 JAN 1944

U N I T E D S T A T E S	VIII BOMBER COMMAND
v.	Trial by G.C.M., convened at US AAF Station # 104, APO 634, 25 October 1943. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for six months. 2912th Disciplinary Training Center, APO 508, U. S. ARMY.
Private LEO L. COLLETTE (31026439), 1686th Ordnance Supply and Maintenance Company (Aviation), 2d Bombardment Division.	

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 and sentence. 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 94th Article of War.
Specification: In that Private Leo L. Collette, 1686th Ordnance Supply and Maintenance Co. (Avn) Headquarters, AAF-123, for the purpose of obtaining approval, allowance and payment of a family allowance under the Servicemen's Dependents Allowance Act of 1942, did, at Headquarters, AAF-595, on or about 12 October 1942, execute and present a certain writing which the said Leo L. Collette, as he, the said Leo L. Collette, then knew, contained a statement that Barbara Ann Collette was his child, which statement was false and fraudulent in that the said Leo L. Collette had no child or children, and was then known by the said Leo L. Collette to be false and fraudulent, and by reason of said false and fraudulent representations did obtain money of the value of $156.00 from the United States Government.

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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 three years. 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 six months, suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the 2912th Disciplinary Training Center, APO 508, U.S. Army, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Orders No. 75, Headquarters VIII Bomber Command, APO 634 dated 16 November 1943.

3. For the purpose of consideration of the issue involved in the case, the pertinent evidence for the prosecution may be summarized briefly as follows:

On 12 October 1942, at APO 635, New York, New York, accused executed a sworn application for family allowances under the Servicemen's Dependency Allowance Act of 1942 (W.D., A.G.O. Form No.625) listing as Class A dependents his wife, Geraldine Thelma Collette, and a child, Barbara Ann Collette, who was stated therein to be residing at his wife's address, and to have been born 6 March 1942. The application was made for family allowances "Commencing June 1942" and contained the further statement that the marriage of accused and his wife occurred 9 December 1941. It was requested therein that checks be made payable to his wife (Stip.R5a; Pros.Ex.1.)

After accused had been properly warned of his rights and had read all the documents in the case, including Pros. Ex.1, he made the following signed statement to the officer investigating the charges:

> "1. I, Private Leo Lawrence Collette, 31026439, did on 12 October, 1942 apply for family allowances for one child, Barbara Ann Collette, who did not exist. I knew this to be a false claim in that I had no children and wish to make arrangements to pay the money owed the United States government which I have received by reason of this claim.
> 2. I further affirm that the Documentary Evidence contained in this file was presented to me for my approval and that such evidence is in conformity with the facts.
>
> Leo Lawrence Collette
> /s/Leo Lawrence Collette

(R8-9).

4. At the close of the case for the prosecution the defense moved for "a not guilty verdict" on the ground that the confession was unsupported by any other evidence, that the prosecution (failed to prove) that accused had no child, nor had it submitted any evidence that there was an allotment, or that the allotment had actually been paid (R11). The motion was denied by the court (R12).

5. For the purposes of consideration of the merits of the case, it is deemed unnecessary to set forth the evidence introduced by the defense.

6. Recalled as a witness by the court, Captain William J. Bromley, Ordnance Department, accused's commanding officer was asked upon what information he had preferred the charges. The defense objected to his reply that "Captain Turley told me about the case", and the objection was sustained. He further testified that he had received the papers introduced in evidence from a former officer of the organization, had gone over the papers with the officer, and had talked with accused. Asked by a member of the court whether he was sure, when he preferred the charges, that accused did not have a child when he applied for the allotment, Captain Bromley testified in the affirmative. The member then asked the witness if he had assured himself by investigation and correspondence that accused did not have a child when he applied for the allotment. The defense then entered an objection which was overruled but the question was unanswered (R15-16). This is all that the record discloses outside of the confession and application for allowances.

7. The question presented for consideration is whether the prosecution presented sufficient evidence of the corpus delicti to corroborate and support the confession of accused.

> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. * * * This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. Examples: If unlawful homicide is charged, evidence of the death of the person alleged to have been killed coupled with evidence of circumstances indicating the probability that he was

(304)

"unlawfully killed will satisfy the rule and authorize consideration of the confession if otherwise admissible. In a case of alleged larceny or in a case of alleged unlawful sale evidence that the property in question was missing under circumstances indicating in the first case that it was probably stolen, and in the second case that it was probably unlawfully sold, would be a compliance with the rule." (MCM,1928, par.114a, p.115)(Underscoring supplied).

"The corpus delicti need not be proved aliunde the confession beyond a reasonable doubt, or by a preponderance of evidence, or at all, but some evidence corroborative of the confession must be produced, and such evidence must touch the corpus delicti. Where accused was charged with larceny of a riding crop from a post exchange and confessed the crime, the requirements of this rule of law are met by evidence tending to show, though not absolutely proving, that the crop had been a part of the stock of the post exchange and had been wrongfully taken therefrom (CM 202213 (1934), Dig.Ops.JAG., 1912-1940, sec.395 (11), p.208) (Underscoring supplied).

The principle enunciated in the foregoing case was reaffirmed in a recent case, CM 240329 (1943), Bul.JAG, Vol II, No.10, October 1943, sec.395(11), p.377.

In CM 120063 (1918) it was held that:

"The general rule in this country is that the corpus delicti cannot be established by the confession of the accused unsupported by corroborative evidence. Without such corroborative proof of the corpus delicti, the confession of the accused is inadmissible in evidence, but such corroborative proof need not be conclusive (Wharton's Criminal Law, Vol.I, par.357). The testimony of another soldier that he placed his money in a pocket in his shirt, put the shirt under his pillow, went to sleep on it, and in the morning the money was gone, together with the evidence that the cards and letters placed with the money were found on the foot of his (accused's) locker, is sufficient corroborative evidence to establish the corpus delicti (Dig.Ops.JAG., 1912-1940, par.395 (11), p.207) (Underscoring supplied).

It is alleged in substance that for the purpose of obtaining a family allowance under the Servicemen's Dependents Allowance Act of 1942, accused executed and presented a certain writing containing a statement that one Barbara Ann Collette was his child, which statement was known by accused to be false and fraudulent in that he had no child, and that by reason of such false representation he obtained $156 from the United States Government. The prosecution introduced evidence that he did in fact execute a sworn application for family allowances on the date alleged, which contained among other things a statement that he had as class A dependents a wife and a child, Barbara Ann Collette, who was born 6 March 1942. The prosecution then introduced in evidence a confession by accused in which he stated that on the date alleged he did apply for family allowances for one child, Barbara Ann Collette who did not exist, and that he knew it was a false claim in that he had no children. He further stated therein that he desired to make arrangements to repay the money received to the United States Government.

The prosecution utterly failed to produce any evidence of the corpus delicti to support and corroborate the confession of accused. Apart from the confession, no competent evidence whatsoever was introduced by the prosecution concerning the alleged falsity of accused's statement, or concerning his alleged knowledge that the statement was false and fraudulent. Also, aside from the vague statement in his confession concerning repayment there was no evidence that accused received the $156 alleged, or any other amount. The record of trial contains no other competent evidence "either direct or circumstantial, that the offense charged has probably been committed." "* * * some evidence corroborative of the confession must be produced, and such evidence must touch the corpus delicti." Hence, in the present case it is not a question of the evidence of the corpus delicti being legally insufficient in character to support and corroborate the confession of accused for there is no such evidence whatsoever. The mere introduction in evidence of the application itself wherein accused stated that one of his class A dependents was a child who was born 6 March 1942, cannot be deemed evidence of the corpus delicti. The document appeared on its face to be true and genuine and the prosecution introduced no competent evidence other than the confession to show that the statement contained therein was false and fraudulent.

Accused's commanding officer, Captain Bromley, recalled as a witness by the court and questioned by a member thereof, testified that when he preferred the charges he was sure that accused did not have a child when he applied for the allotment. The defense did not object to this question but did object when the witness was asked by the member whether he had assured himself by investigation and correspondence that accused did not have a child when he made the application. The objection was overruled, but the question was not answered.

An examination of his testimony shows that the witness' conclusion was obviously based upon pure hearsay, and was manifestly

incompetent and inadmissible in evidence. There was no evidence in the record of trial of any competent factual basis for the conclusion. Since evidence was, moreover, elicited upon questioning by a member of the court on his own initiative. In view of the absence of any competent evidence whatsoever touching the corpus delicti which corroborated and supported the confession of accused, the admission of the conclusion was highly prejudicial to the substantial rights of accused and any failure to object to the admission of such testimony did not waive or cure its incompetency. (CM 211829, Parnell, dis. op. by King J.A., followed by the Secretary of War upon recommendation of The Judge Advocate General (Dig. Ops. JAG 1912-1940, par.395 (21), p.216); CM 178446, Dig. Ops. JAG 1912-1940, par 395 (21), p.216; CM 238557, Bul. JAG. Vol.II, No.8, August 1943, par.419 (2), pp.307-308; CM ETO 527 Astrella.)

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

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.
WD, Branch Office TJAG., with ETOUSA. 27 JAN 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 U.S.C., 1522) and as further amended by Public Law 693, 77th Congress, 1 August 1942, is the record of trial in the case of Private LEO L. COLLETTE (31026439), 1686th Ordnance Supply and Maintenance Company (Aviation), 2d Bombardment Division.

2. I concur in the opinion of the Board of Review, and for the reasons stated therein recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which accused may have been deprived by reason of such findings and sentence so vacated, be restored.

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

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

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

(Findings and sentence vacated. GCMO 6, ETO, 4 Feb 1944)

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

BOARD OF REVIEW

ETO 1044

13 DEC 1943

U N I T E D S T A T E S	VIII BOMBER COMMAND.
v.	Trial by G.C.M., convened at AAF Station 104, APO 634, 4 November 1943. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. The Federal Reformatory, Chillicothe, Ohio.
Technical Sergeant GEORGE W. DUNGAN (15016970), 79th Service Squadron, 327th Service Group.	

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 Technical Sergeant George W. Dungan, 79th Service Squadron, 327th Service Group, did, at Wymondham, Norfolk, England, on or about 18 September 1943, with intent to commit a felony, viz, rape, commit an assault upon Beryl Kedge, a female child aged about eight years, by wilfully and feloniously pulling her knickers down, biting her neck, placing his penis between her legs and attempting to have carnal knowledge of the said Beryl Kedge.

Accused had previously been tried on 4 October 1943 upon the same Charge and Specification before a general court-martial convened at AAF Station 123 and appointed by paragraph 2, Special Orders #205, Headquarters VIII Bomber Command, APO 634, 26 August 1943 as amended. He was found guilty of the Charge and Specification and 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. On 19 October 1943 the reviewing authority disapproved the sentence and ordered a rehearing before another court to be thereafter designated. On 21 October 1943 the case was referred for trial to the present general court-martial appointed by paragraph 1, Special Orders No. 248, Headquarters VIII Bomber Command, APO 634, 9 October 1943 as amended.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The reviewing authority, in order to conform with the sentence adjudged upon the first hearing as required by Article of War 50½, 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 five 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 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.

4. The charge sheet shows that accused is 28 years of age. Confinement in a penitentiary is authorized for the offense of assault with intent to commit rape (35 Stat. 1143; 18 USC, sec.455). As accused is under 31 years of age and the sentence as approved by the reviewing authority is under ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is correct (War Department Circular #291, 10 November 1943, sec.V,3a).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 13 DEC 1943 TO: Commanding General, VIII Bomber Command, APO 634, U.S. Army.

1. In the case of Technical Sergeant GEORGE W. DUNGAN (15016970), 79th Service Squadron, 327th 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 and 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 1044. For convenience of reference please place that number in brackets at the end of the order: (ETO 1044)

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

12 FEB 1944

ETO 1052

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private CHARLIE GEDDIES (14110767), Private JAMES H. LINDSEY(34415299), Private FIRST CLASS ALEXANDER SHAW (34325156), Private FREDDY BLAKE (36389972), Private JAMES A. MANNING (36565865), Private HENRY McKNIGHT (18082078), T/Sgt. HENRY AUSTIN (35290641), Private HENRY W. TILLY (18023220), Private First Class CLIFFORD BARRETT (14111118), Private TOM EWING (36389861), Private ARZIE MARTIN (36565895), Private CARL TENNYSON (15197367), Private WILLIS GIBBS (36389998), Sgt. RUPERT E. HUGHES (36531927), all of 581st Ordnance Ammunition Company	Trial by G.C.M., convened at Paignton, England, 15-17 October 1943. Sentences: Dishonorable discharge, total forfeitures and confinement at hard labor, - Geddies, Lindsey, Shaw, Blake, Manning, McKnight, Tilly, Ewing, Martin, Tennyson and Gibbs, each for 15 years, - Austin, Barrett and Hughes, each 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 of the soldiers named above has been examined by the Board of Review.

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

CHARGE I: Violation of the 89th Article of War.
Specification: In that Private Charlie Geddies, 581st Ordnance Ammunition Company, Private James H. Lindsey, 581st Ordnance Ammunition Company, Private First Class Alex Shaw, 581st Ordnance Ammunition Company, Private Freddy Blake, 581st Ordnance Ammunition Company, Private James Manning, 581st Ordnance Ammunition Company, Private Henry McKnight, 581st Ordnance Ammunition Company,

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Technical Sergeant Henry Austen, 581st Ordnance Ammunition Company, Private Henry Tilly, 581st Ordnance Ammunition Company, Private First Class Clifford Barrett, 581st Ordnance Ammunition Company, Private Tom Ewing, 581st Ordnance Ammunition Company, Private Arnie Martin, 581st Ordnance Ammunition Company, Private Carl Tennyson, 581st Ordnance Ammunition Company, Private Willie Gibbs, 581st Ordnance Ammunition Company, and Sergeant Rupert Hughes, 581st Ordnance Ammunition Company, being in garrison and camp at Camp Pennygillum, Depot O-666, Launceston, England, did, at Camp Pennygillum, Depot O-666, Launceston, England, and vicinity, on or about 26 September 1943, commit a riot, in that they, together with certain other soldiers of an unknown number, whose names are unknown, did, wrongfully, unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of Camp Pennygillum, Depot O-666, and Launceston, England and vicinity, and having so assembled, did wrongfully, unlawfully and riotously and in a violent and tumultuous manner, bear arms, disregard lawful authority and their superior officers, march from their quarters at Camp Pennygillum to the center of the town of Launceston, England; defy military authority and local civil authority and unlawfully and riotously assault Sergeant Charles J. Cox and Sergeant Ralph C. Simmons both of the 115th Infantry by shooting the said Sergeant Charles J. Cox and Sergeant Ralph C. Simmons, on and about their bodies with dangerous weapons, to wit, rifles, carbines, Tommy Guns and other guns, and did unlawfully and riotously shoot at other people within the vicinity of the market square, Launceston, England, whose names are unknown, with guns, to the terror and disturbance of the said camp and vicinity and the people therein.

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

Specification 1: In that * * * * * * acting jointly, and in the pursuance of a common intent, did, at Launceston, England, on or about 26 September 1943 in conjunction with certain other soldiers, whose names are unknown, with intent to commit a felony, viz, murder, commit an assault upon Sergeant Charles J. Cox, 2nd Battalion, 115th Infantry by wilfully and feloniously shooting the said Sergeant Charles J. Cox on the body with dangerous weapons, viz, rifles, carbines and Tommy Guns.

Specification 2: In that * * * * * * acting jointly, and in the pursuance of common intent, did, at Launceston, England, on or about 26 September 1943, in conjunction with certain other soldiers, whose names are unknown, with intent to commit a felony, viz, murder, commit an assault upon Sergeant Ralph C. Simmons, Company E, 115th Infantry, by wilfully and feloniously shooting the said Sergeant Ralph C. Simmons, Company E, 115th Infantry on the body with dangerous weapons, to wit, rifles, carbines and Tommy Guns.

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * * * * * acting jointly and in pursuance of a common intent, did at Camp Pennygillum, Launceston, England, and vicinity, on or about 26 September 1943, in conjunction with certain other soldiers, whose names are unknown, wrongfully and unlawfully seize arms and ammunition, bear arms, intentionally discharge fire arms in a reckless and unlawful manner, make inflammatory statements in the presence of other soldiers, march from their camp, at Camp Pennygillum to the center of the town of Launceston, England, fire upon members of the military police, US Army and other persons.

ADDITIONAL CHARGE: Violation of the 66th Article of War
Specification 1: (Finding of Not Guilty).

Specification 2: In that * * * * * * acting jointly, and in pursuance of a common intent, did, at Camp Pennygillum, Launceston, England, and vicinity, on or about 26th September, 1943, voluntarily join in a mutiny, which had begun in Camp Pennygillum, England, and vicinity, against the lawful military authority of the Commanding Officer of said station and other officers of said station, and, did, with the intent to usurp subvert and over-ride said lawful military authority for the time being, in concert with sundry other members of the said 581st Ordnance Ammunition Company, assembled at various places in said station and vicinity, wrongfully and unlawfully seize arms and ammunition from said station, bear arms, make inflammatory statements in the presence of other soldiers, disregard and ignore the lawful orders of their superior officers by proceeding to the town of Launceston, England, and there did usurp, subvert and over-ride for the time being, lawful military authority.

Each of the accused pleaded not guilty to all the charges and specifications. Geddies, Lindsey, Shaw, Blake, McKnight, Austin, Barrett, Ewing, Martin, Tennyson, Gibbs and Hughes were each found guilty of all charges and specifications except Specification 1 of the Additional Charge. Manning and Tilly were each found guilty of all charges and specifications except the Additional Charge and its two specifications. No evidence of previous convictions was introduced against Geddies, Lindsey, Shaw, Blake, Austin, Tilly, Gibbs or Hughes. Evidence was introduced of three previous convictions of Manning, one for absence without leave for ten days, one for failure to return to his place of duty and one for breaking restrictions and absence without leave for one day; of two previous convictions of McKnight, one for absence from post and duty without being properly relieved and one for escape from confinement and absence without leave for six days; of two previous convictions of Barrett, one for absence without leave for 19 days and one for wrongfully taking and flourishing a pistol in an attempt to escape arrest; of one previous conviction of Ewing for absence without leave for ten days; of one previous conviction of Martin for absence without leave for 17 days, and of two previous convictions of Tennyson, one for insubordination and disrespectful language to a non-commissioned officer in execution of his office and one for absence without leave for seven days. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, - Geddies, Lindsey, Shaw, Blake, Manning, McKnight, Tilly, Ewing, Martin, Tennyson and Gibbs, each for 15 years, and Austin, Barrett and Hughes, each for 20 years. The reviewing authority approved each of the sentences, 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 evidence shows that all accused belonged to a company of colored soldiers, numbering approximately 176 men made up of two groups; the first mostly southerners volunteered for service in 1942 from the enlisted reserve corps, the other group, consisting of replacements, came from the northern and eastern parts of the United States (R46). Since 21 September 1943 the company had been stationed at Camp Pennygillum located about three-quarters of a mile from the center of Launceston, Devonshire, England (R50) and on the outer edge of the residential section of the town (R107). The company had been restricted in the United States prior to coming overseas; four days at their home station, three weeks at Camp Patrick Henry, and ever since it had arrived in England (R108). It left Camp Patrick Henry on 8 September (R111). No man of the company had a blouse but in spite of this fact the men had been going down town during the evenings wearing overcoats. Each man had been issued a rifle or carbine (R109), but no man had been issued with any ammunition. Although it was known as an ammunition company, this company had none (R111).

About seven o'clock on the evening of 26 September 1943 rumor circulated through camp that 25 per cent of the company might go to town. The First Sergeant wrote slips of paper for certain of the men to take to a Lieutenant Songy who before signing the passes required the men to remove

their overcoats and then said ;"'I'm sorry but you can't go to town if you don't have a blouse'". A number of the men, notwithstanding the refusal of passes, decided to go to town and departed from camp. These soldiers, including many of the accused entered a public house where they found a "gang of white soldiers sitting at a table" one of whom said: "'That way out'". The colored soldiers paid no attention, but the barman required them to go in another room to be served telling them the first room was crowded. After being served they went to another public house, and after a period, the accused, Barrett called them outside and asked if they would all "stick together". They all answered "Yes". At Barrett's suggestion they returned to camp for their arms and ammunition. Barrett procured a "tommy-gun". Accused Austin and others passed out ammunition (source of supply not disclosed). They loaded their guns, and then returned to town (R78,98). In the town square by a monument at about 10.20 p.m. (R10), these soldiers discovered a jeep and some American military police soldiers standing by it. It was dark (R41). There were also some British Land Army girls and others in the square waiting for buses. One of the group of soldiers asked the Military Police "'Why didn't they want us up in town'". Someone else called out "'Hands up'" and just then firing started from rifles and from Barrett's "tommy-gun" (R78,98). The crowd of colored soldiers was estimated at between 16 and 50 (R15,21,29,99). The shots seemed to come in a volley,followed by a couple of single shots and then another volley (R14). The group then disintegrated and left the square by several streets. Two military policemen, Sergeants Charlie Cox and Ralph Simmons (R12), were shot and seriously wounded.

4. The prosecution's witnesses particularised the events of the evening as follows:

(a) - Captain Richard P. Scott, Headquarters Company, 115th Infantry, 29th Division, was Battalion Military Police Officer in Launceston the night of Sunday, 26 September 1943. As he came out on the square after checking a "pub" shortly after 10 p.m. he heard a shuffling of feet coming into the square. As he started to pass the group he noticed it spread out in a semi-circle "with the monument and the military police on the open side of the semi-circle". Someone shone a flashlight across the group as a shot was fired, and he saw a colored soldier in long coat not over three feet away firing a rifle. There was considerable commotion and someone was moaning and screaming. Several girls were running in separate directions and were screaming. The group "kept fanning out", the firing diminished and then increased in volume. The group finally broke and disappeared (R10-11). He 'phoned camp for a doctor and found his two sergeants who had been wounded (R12). There had been no previous trouble that night between the colored and the white soldiers but on the previous night there had been a slight incident (R18).

(b) - Sergeant Neilson, Company C, 115th Infantry, was also on police duty in Launceston the night of 26 September 1943. The military police were standing by their jeep when about 10:15 p.m. they heard the sound of marching feet. A crowd appeared and "more or less formed a circle around us". Some voice asked: "Why don't you boys want us here in town?". A flash-

light was turned on the military police who started to back up and raise their hands. Then a shot was fired and the police scattered and some fell to the ground. There were two distinct volleys - one came from the edge of the square as the crowd was leaving (R19-20).

(e) Staff Sergeant Potocki, Headquarters Company, 2nd Battalion, 115th Infantry, a room-mate of Sergeant Cox, was in Launceston, not on duty, the night of 26 September 1943. About 10 o'clock in the evening he went to the square to see Cox before returning to camp and while standing by the military police jeep, talking to Cox, Sergeant Neilson and Private Racey, a driver, he "heard a bit of shuffling" and there seemed to be a crowd approaching (R25). A colored man (R26) seemed to be the spokesman for the group, and he said, very quietly, "Why don't you let us come into town, come to the pubs?" and then he stepped back. Just then the firing started. There was considerable firing - then a lull - then it commenced again (R25). More than 20 shots were fired (R26). Potocki ran to a phone, called camp and asked for help and medical assistance (R25).

(d) Private First Class Fred F. Racey, 2nd Battalion, Headquarters Company, 115th Infantry, was a jeep driver for Captain Scott and was standing by the jeep talking with four or five of the military police when a "group of guys" walked up to them. Someone turned a light on and he saw they were colored men. One of them walked up to Sergeant Cox and said something Racey did not hear. Then he heard bolts open on rifles and a shot was fired. He to the monument and lay down until it again became quiet. There appeared to be about 25 or 30 colored men in the group. He later found bullet holes in the two rear tires of his jeep (R29-31).

(e) Tom Cosset, of the White Hart Hotel, located on the square in Launceston, heard the shooting about 10:15 on the night of 26 September 1943. A colored soldier came in with knives and waved them about. There were only residents in the hotel. Then two more soldiers came in. One had a rifle under his coat. Cosset succeeded in getting them out and bolting the door (R32). There were at least 20 shots fired, seemingly in a circle (R33).

(f) George Robinson, on whose farm Camp Pennygillum is located, found a rifle on 2 October 1943, wrapped in a raincoat buried in the straw on his farm (R 35-36).

(g) Sergeant Ralph C. Simmons, Company K, 115th Infantry, was on police duty in Launceston the night of 26 September 1943, and was standing by a jeep listening to Sergeant Potocki. He saw a crowd gathering, walked towards it, and when about 8 or 10 feet away, he heard someone say "And we don't like it". He looked to the side, and saw some colored men with guns pointed at him. He started back to the jeep. Some shots were fired, hitting him in both legs. When the firing ceased he was taken to the aid station, and then to the hospital with Sergeant Cox who had also been wounded (R38-40).

(h) Captain Robert C. Cone, 115th Station Hospital, was on duty the night of 26 September 1943 when two emergency patients, Cox and Simmons, were brought in about 11 p.m. Their wounds were bandaged (R42).

(i) Major Raymond E. Mulrennie, 115th Station Hospital, took care of Simmons on the night of 26-27 September 1943 at about 12:30 a.m. He had lacerations in both legs from fragments of bullets which were removed. The injuries were caused by gunshot wounds (R43).

(j) Captain D. Luthermond, Medical Corps, 115th Station Hospital, operated on Cox, an emergency patient on the night of 26 September 1943. He had a compound fracture of the left femur and an extensive operation was done on his left hip and thigh region. He was given a blood transfusion and a cast was applied to both lower extremities. He was still seriously ill and would probably remain a hospital patient for at least four to six months. It appeared to be a gunshot wound and in the Captain's opinion, there would be at least an inch shortening of the left lower leg (R44-45).

(k) Captain James Bosson, Ordnance Department, Camp Pennygillum, Launceston, identified each accused as a member of the 581st Ordnance Company, colored, of which he was commanding officer (R46-50). He was on temporary detached duty on 26 September 1943. The company arrived at the camp located about three-fourths of a mile from the center of Launceston, on 21 September 1943 and had been restricted to camp to and including 26 September, because they did not have proper uniforms and had not been oriented (R107-108).

(l) Corporal Alfred Joseph, 581st Ordnance Ammunition Company, stationed at Camp Pennygillum, Launceston, on the night of 26 September 1943 went to town "AWOL". He had several drinks in a "pub" with two British soldiers who, when the public house closed, accompanied him in order to show him the way to camp. On the way, they "met a gang of boys coming from my camp". He asked where they were going as everything was closed, but had no reply and they passed by. He called one of them by name and was told not to call his name, so he turned about and walked behind the group to see "where they was going". They came to a four-corner street and he heard somebody cry out: "We will fix you" to some military police, one of whom was standing by a parked jeep.

> "So I asked him what was the trouble, and he told me he didn't know, and when they said that I knew it was fixing up a fight, I said 'Can't we get along? What's the matter?' Just then someone in the crowd hollered: 'Put up your hands'. The M.P. turned with his hands up, and that is when they started shooting."

This was about 10:30 p.m. or later. There were 15 or 20 men or more in the group among whom were Blanchett and accused Hughes, Shaw, and Barrett. Barrett had a two-handled gun and had it "on the M.P's" and started shooting when somebody said: "Put up your hands". The men had on overcoats or raincoats (R71-75).

(m) Private First Class L. V. Edwards, 581st Ordnance Ammunition Company, was stationed at Pennygillum on 26 September 1943. He and others were told they could go to town that evening but passes were refused when it was discovered they had no blouses. In spite of such refusal a group of them went into town. They went to a "pub" and drank some cider. Edwards saw accused Barrett standing up on a bench talking, but it was so crowded and noisy he could not hear him. Barrett then came over and asked Edwards, Blanchett, Steele, Cains, the accused Hughes, Geddies, Shaw and Austin to go outside where he asked them if they all would "stick with him". They said "Yes" (R78). Someone asked him what was the matter and he replied "You'll find out - come on"(R84). He looked angry (R85). They all returned to camp "and gets out our carbines and he gets this tommy-gun, and Sergeant Austin comes round and passed out the ammunition and we goes on back to town". Barrett told them to get their carbines out of their tents and then all to assemble back there in the road. Assembled in the road among others including Edwards, were accused Hughes, Barrett, Lindsey, Ewing, Blake, Shaw, Tennyson and Gibbs. All had guns except Tennyson and Geddies who had bayonets (R79,83). Barrett had them march in threes. When they reached town, "some M.P's were standing there around some jeeps" and Joseph asked why they did not want the colored "boys" up town. Barrett told them "Hands up" and opened fire with his machine-gun and "I started running". Edwards finally got back to camp (R78-79). He also saw Austin fire. They were "shooting at the M.Ps".(R83). When coming from Fort Sill to Camp Patrick Henry Austin asked Edwards if he had his own gas mask. Edwards discovered he had Barrett's mask, by mistake. Austin told him to "get Clifford Barrett". When Edwards opened the gas mask he found carbine ammunition in it. He took it to Barrett, and informed him of his find. Barrett grabbed Edwards by the collar and producing a long knife threatened to cut Edwards' "head off" if he said anything about it (R81).

(n) Private Albert Smith, 581st Ordnance Ammunition Company, was stationed 26 September 1943 in the camp near Launceston. It was dark when some of the men who had gone to town returned to camp and he heard them talking. Austin passed out some ammunition and it looked as if the whole company came out on the street and started off to town. Smith followed behind them. When the group reached the Town Hall there was a bunch of men standing up on the corner whom he could see by some lights from a jeep or truck. He heard Barrett say something and the soldiers started to shoot. Barrett and Austin had guns. Then they started to run. Smith and Blanchett caught up with Geddies, who was running ahead of them. Barrett, Austin, Tennyson and Gibbs were in the company street before the group left for town. Tilly went with the crowd and was ahead of Smith. MaKnight passed Smith, who recognized him only by his voice as he was singing. Smith denied when on the stand that he had a rifle though in his statement previously given he said he had two guns (R90-91).

(o) Staff Sergeant Kenneth Blanchett, 581st Ordnance Ammunition Company, on 26 September 1943, was among those told by his first sergeant that he could go to town that night, but was refused a pass when it was found that he had no blouse. Some of the soldiers went to town anyhow, and had drinks in two pubs. Blanchett was present when Barrett called certain soldiers outside of the public house and asked them to"stick together", and said"'Lets go back and get our arms and ammunition'". Blanchett went along, got his gun and returned with them to the"monument" in town and was present at the events there occurring, and during the subsequent shooting. Some 16 or 18 were in the crowd that returned to town, including himself, Edwards, Smith, Gains and the accused Austin, Hughes, Barrett, Shaw, Geddies, Lindsey, Ewing, Blake, Gibbs, Manning and Martin. All had guns except Joseph and Geddies whom they met while going back to town(R98-102).

(p) First Lieutenant K. Cohn, Company D, 49th Quartermaster Regiment, Camp Pennygillum, was awakened in the officers' quarters of the camp about 11:10 the night of 26 September and informed that there was trouble in town. It was quiet when he reached town and after 20 minutes he returned to camp and was put on guard over the men they were 'picking up'. The next morning about 7:20, about two blocks from camp, he met and apprehended accused Lindsey, who said he had been lost and was on his way back to the battalion area. He had a rifle under his coat which was buttoned around it and also a bayonet and six rounds of ammunition (R112-113).

(q) Second Lieutenant Ariel W. Glenn, Camp Pennygillum, was also called out of bed about 10:30 or 11:00 the night of 26 September because of a report that there had been shooting going on in town. He went to town and learned "it was our troops that were mixed up in the shooting". He returned to camp and made a bed check. Four men, Albert Smith, Charlie Geddies, Tom Ewing and James Lindsey were missing from the section of the company which he checked. He found Ewing about midnight near a guard post. Ewing said he was just out for a walk. A loaded rifle was found leaning up against the guard post. The next morning Barrett, Hughes and several others reported to have been in this incident were taken into custody (R114-115).

(r) First Lieutenant Francis H. Blendgren, 584th Ordnance Ammunition Company, Camp Pennygillum, was aroused from bed by the Officer of the Day, about 11 o'clock the night of 26 September 1943, and notified that there had been some shooting in town. He helped make a bed check of the 581st Company and some men were found to be missing. About 2 o'clock that morning on the road outside of camp he took Blanchett, Smith and Geddies into custody. He was present when Ewing and his rifle were found the next morning (R117-118).

(s) Henry C. Poltrack, Investigation Department, Provost Marshal General's Detachment, after first informing them of their rights in connection therewith, on 27 September 1943, questioned and secured a signed statement

from each of accused Ewing (R53) Pros.Ex."C", Hughes (R55) Pros.Ex."D", Barrett (R57) Pros.Ex."E", and Geddies (R59), Pros.Ex."F", which were each admitted and read to the court as evidence only against the individual making the respective statement(R53).

(t) Sergeant Marvin F. Richardson, Investigation Department, Provost Marshal General's Detachment, after first informing them of their rights in connection therewith, questioned and secured a signed statement from accused Shaw on 29 September 1943, Pros. Ex."G" (R62), from accused Blake and Tennyson on 27 September 1943, Pros.Ex."H" (R64) and Pros.Ex."I" (R65) respectively, from accused Lindsey on 29 September 1943, Pros.Ex."J" (R67) and from accused Martin on 28 September 1943, Pros.Ex."K" (R69). These statements were admitted and read to the court as evidence only against the maker of the particular statement (R62).

5. Stipulations identifying accused Hughes, Shaw, Manning, Austin, Tilly and Ewing with their correct serial numbers and various spellings of their names were made in open court (R119-121).

6. The evidence for the defendants in substance was:

(a) Sergeant Charles W. Bury, Company "F", 115 Infantry, was on "M.P." duty in Launceston the night of Saturday, 25 September 1943. "A mob of 18 colored fellows and five English soldiers" came in the West Gate Inn about 9 o'clock and the barman refused to sell them drinks. When they walked in a couple of white American soldiers got up and walked out and about four of five others stood up and remained standing up until they left. Five colored soldiers walked in to the dance in the Launceston Town Hall that night and the Lieutenant asked them for their passes (R127). The orders were that no colored soldiers were to be out of camp as they were all confined. The military police had orders "to chase any of them back to camp". They were all checked as soon as seen and told "the best thing they could do was hop back to camp before they got themselves into trouble". The five men at the dance could produce no passes and were told to leave. The military police officer got them their money back and gave it to them but they took their own time in leaving. One kept shouting and said "'if you touch me I will give you what I got in my pocket'". When told they had better get on up the road before it was necessary to lock them up, this same one said "'We will get even with you, you wait and see'". Two English Royal Engineers started "butting in and said we was picking on them and we told them they had better keep out of it"(R128-129).

(b) Captain James E. Stevenson, Assistant Inspector General, Headquarters, Southern Base Section, identified Def.Ex.1 as the statement made to him as investigating officer by accused Austin; Def.Ex.2 as a statement similarly made by accused Hughes; and Def.Ex.3 as a statement similarly made by accused Lindsey. Tennyson and Hughes each were sworn as witnesses for the sole purpose of showing method of signing these statements. Each admitted signing them but denied being sworn.The three

statements were read to the court and admitted in evidence (R122-125).

(c) Private James L. Gaines, 581st Ordnance Ammunition Company, stated the outfit came to England about a week before 26 September 1943. All members had been restricted beginning a month or more before they left the United States. No one in the company had a blouse so they could not go to town and there was nothing special in their area they could do in their time off duty (R130).

(d) Sergeant Marvin F. Richardson was recalled as a defense witness and identified Def.Ex.4 as the statement of accused Tilly, and Def. Ex.5 as the statement of accused McKnight made 30 September 1943 which statements were admitted as evidence and read to the court(R131).

(e) Sergeant Harry C. Poltras was recalled as a defense witness and identified Def.Ex.6 as the statement of accused Manning taken 30 September 1943 and Def.Ex.7 as the statement of accused Gibbs taken on same day, both after due warning as to their rights which statements were admitted in evidence and read to the court (R132).

7. The evidence indicates that at least 18 soldiers were in the group who committed some or all of the offenses charged, - that is, the 14 accused and Private Albert Smith, Private First Class L.V.Edwards, Corporal Alfred Joseph and Staff Sergeant Kenneth Blanchett, all of the 581st Ordnance Ammunition Company. The last four named were not charged herein with any offense but appeared as witnesses for the prosecution.

8. The pertinent evidence as to each accused herein appears as follows:

(a) GEDDIES: Edwards says Geddies was with those in the "pub" who were called outside by Barrett and asked by him if they would "all stick with him"; who said 'yes" and who returned to camp, got their carbines, received the ammunition and returned to town where the shooting occurred (R78, 87). Geddies had a bayonet (R83). Smith says Geddies was in a group ahead of him running away from the scene of the shooting (R90). Blanchett says Geddies was in the group who first went to town after being refused passes, returned to camp, got their arms and returned to town (R99). Lieutenant Glenn found Geddies missing at 11 p.m. at bed check (R114) and he was arrested by Lieutenant Blondgren in the road near camp about 2 a.m. the next morning (R118). Geddies, in his signed statement, admits his full participation (Pros.Ex."F").

(b) LINDSEY: Edwards says Lindsey was in the group at camp to whom the ammunition was passed out (R79). Blanchett says Lindsey was in the group which was active through the entire disturbance (R99,102,105). Lieutenant Glenn says Lindsey was missing at a bed check at 11 p.m. (R114) and he was arrested about 7.20 a.m. the next morning with a rifle under his coat, by Lieutenant Cohn (R112-113). In his statement, Pros.Ex."J" Lindsey admits going to town with his rifle, bayonet and six rounds of ammunition.

In his statement, Def.Ex.9 he claims that about 10 p.m. someone came in, took his rifle from the door of his tent, and that he chased and caught him just as the firing started, but that he was with that crowd and did not fire his gun.

(e) SHAW: Joseph says Shaw was with the crowd doing the shooting (R72). Edwards says Shaw was in the "pub" before the Barrett talk and was with those who received the ammunition at camp (R78-79). Blanchett says Shaw was one of those who agreed to return to the place in the road with a gun and that he left camp with those who returned to town and did the shooting (R102-105). Accused Tennyson says he and Shaw were lying behind the monument in the public square during the shooting and that bullets passed over their heads. He saw Shaw while behind the monument give his gun to an "M.P." (R134-139). Shaw in his statement, Pros.Ex."G", admits his participation including his presence at the shooting and the fact that his gun was taken by a military policeman.

(d) BLAKE: Edwards says Blake was present when Austin passed out the ammunition (R79). Blanchett says Blake was among those who promised to return to the meeting place in the road in five minutes (R102) and did return with a gun under his coat (R103). Tennyson says he thought he saw Blake in town (R136). Blake, in his statement, Pros.Ex."H", says he got his bayonet and put it in his pocket and then found the rest of them; that they went down town together "looking for M.Ps to pick a fight with". The firing started and he ran back to camp by himself.

(e) MANNING: Blanchett says Manning was in the group that night and was one of those who agreed to return in five minutes for the trip to town (R101-102), and was in the group when it left the camp(R105). Tennyson says he thought he saw Manning in town that night but was not positive (R136,139). Gibbs says he borrowed Manning's tie, cap and blouse as Manning could not get a pass(R144). Manning, in his statement, Def. Ex.6, says he returned from his duties at 1730 hours and stayed in camp the rest of the evening, going to bed about 2300 hours.

(f) McKNIGHT: Smith says McKnight passed him singing. "That's how I knew who it was"(R91). Blanchett says he did not see McKnight in the group (R102). Tennyson is positive he saw McKnight in town that night (R139); he met McKnight in front of the town hall when he turned to go back to camp after the shooting was over; he was talking to a couple of girls in company with Austin(R133-135). In his statement, Def.Ex.5, McKnight says he went to bed at 8.45 the evening of 26 September 1943 and first learned of the shooting at mess the next morning.

(g) AUSTIN: Edwards says Austin was in the "pub" when Barrett was talking inside (R78); that returning to camp, Austin distributed the ammunition to those who thereafter returned to town (R78-79) and that he saw Austin fire his gun during the shooting in town (R80,83). It was Austin who called Edwards' attention to the fact that he had Barrett's gas mask at the time Edwards found some ammunition stored in it while the detachment was en route from Fort Sill to Camp Patrick Henry (R81). Smith says Austin

was in the group just before they went to town (R91), and that he passed out the ammunition and he saw him with a tommy-gun (R92). When the ammunition was distributed he also saw Austin and Barrett talking of "what they were going to do after they got up in town"(R94). Blanchett testified similarly about Austin (R98-99, 101-102), and says Austin was the last to come back when they assembled in the road at camp to return to town, and he is sure Austin had a carbine under his coat (R103). Tennyson heard Austin tell everybody to get their guns (R135,137). After the shooting he met Austin while on the road back to camp and Austin said he had better hurry as "the M.Ps are picking up everyone"(R134). In his statement, Def.Ex.1, Austin admits going to town with Blanchett and others and then returning to camp. Later some soldiers came into camp and said they had had some trouble in town and were going back. He says he went with them but denies issuing any ammunition or having a gun. When the shooting started he ran and returned to camp.

(h) TILLY: Smith says that Tilly "left in front of me" when they all returned to town (R90-91). Blanchett says he did not see Tilly in the group (R102). Tilly, in his statement, Def.Ex.4, says he shot "craps" that night till about 8:30 p.m., stayed around the tent till about 9:30 p.m., left and went to the mess hall where he went to sleep. He declared that he arose about four o'clock of the morning of 27 September 1943, to build the fires and that he did not know of the trouble or shooting in town.

(i) BARRETT: Joseph says Barrett had a gun and was firing at the military police at a distance of five yards (R72-73, 75). Edwards says Barrett, in the first "pub" in town, stood on a bench talking (R78), and then called the soldiers outside and asked them to "stick with him" (R84-85, 91); that Barrett told them to get their carbines from their tents and then to move in threes towards town (R79,86); that Barrett had a "tommy" or machine gun, ordered the military police to put up their hands and then started firing at them (R79-80). Edwards got Barrett's gas mask by mistake when his detachment was en route from Fort Hill to Camp Patrick Henry, and found some carbine ammunition stored in it (R81). Smith says that Barrett and Austin were telling what they would do on their return to town (R94) and that Barrett had a "tommy gun" when he said "hands up" in the Square (R90). Blanchett says Barrett was with the group all evening (R98); that Barrett directed the soldiers to go to camp for their guns after they had agreed to "stick with him"(R104); that Barrett and Austin passed out the ammunition and Barrett returned to the group with a gun under his coat (R103). Captain Bosson said Barrett had a pass to go to town (R107). Lieutenant Glenn arrested Barrett at six o'clock the next morning (R115). Tennyson says Barrett had a pass to go to town and he saw him there (R133,136-137). He heard Barrett tell the group to "stick together" and to get their guns (R137). Gibbs says he saw Barrett in a pub drinking beer (R144-145). Barrett in his statement, Pros.Ex."E", says that about 9.30 p.m., 26 September 1943, he went to Launceston alone on an official pass and had a beer in a pub. "Sometime, while I was in town, I heard some shots fired". He denied knowing where or how it happened. He returned to camp, went to bed "and that is all that I know of the incident".

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(j) EWING: Edwards says Ewing was with group when the ammunition was passed out (R79). Blanchett says Ewing was in the group that went to town (R99,102,105). Lieutenant Glenn says Ewing was missing at the bed check at eleven o'clock that night (R114) and that they found him with a loaded rifle 'out for a walk' between 11:30 p.m. and 12:30 a.m. the next morning by Guard Post No 2 (R115). Lieutenant Blondgren was with Lieutenant Glenn when Ewing was found (R117). Ewing, in his statement, Pros.Ex."C", admits that on being told they were having trouble in town, he got out of bed, got his rifle and a round of ammunition which he had had for some time and went along with the others to town. He saw Austin passing out ammunition to a group of their unit. They found some military police in the square at the monument. He 'stopped back at the corner". Firing started and he ran away and finally got back to camp, stopping to talk to a sentry, when he was arrested and his rifle taken away.

(k) MARTIN: Blanchett says Martin was with the group assembled in camp to return to town (R102). Tennyson said he saw Martin in town (R136) and Gibbs saw Martin in the pub with Barrett (R146). Martin, in his statement, Pros.Ex."K", tells a detailed story of going to town, returning to camp to obtain weapons, obtaining a bayonet, returning to town where shots were fired at the military police at which time he started running back to camp, losing the bayonet on the way, and then going to bed.

(l) TENNYSON: Edwards says Tennyson assembled with the group to return to town and had a bayonet (R79,83). Smith says Tennyson was in the company street before the group went to town (R91). Blanchett did not see Tennyson with the group. Tennyson, sworn as a witness, says he was in town and saw Barrett in the pub and that on his way home, while in the center of town, he heard bullets and laid down behind the monument in the public square. Bullets passed over his head. He saw Shaw and an "M.P." lying down behind the monument. When the firing stopped he returned to camp and went to bed (R133-134). In his statement, Pros.Ex."I", Tennyson says he went to town without a pass with the group. Barrett asked them to 'stick together", to which they "all" agreed and went back to camp where Austin and Barrett told them to get their guns. He denies he was close to the place where the firing occurred but he could hear it very plainly. He then returned to camp and went to bed.

(m) GIBBS: Edwards and Smith both saw Gibbs with the group assembled to return to town (R79, 89, 91). Blanchett saw Gibbs with a rifle with the group in the road ready to return to town (R102-103). Tennyson says he saw Gibbs (obtain) a pass that night (R138). Gibbs, in his statement, Def.Ex.7, says he went to Launceston on pass, alone. He went to two pubs and returned to camp, arriving about ten o'clock.

(n) HUGHES: Joseph saw Hughes while following the crowd back to town (R74) and in the crowd that did the firing (R72). Edwards saw Hughes in the pub where Barrett was talking and also when they returned to camp and assembled to secure ammunition prior to return to town (R78-79). Blanchett says Hughes was present in the group all evening (R99,102). He was arrested

by Lieutenant Glenn (R115). Hughes, in his statement Pros.Ex."D", admits going to town without a pass and visiting two pubs with others from his camp. He also states that Barrett asked the men if they would "stick together" against the whites and that they agreed to do so. He further admits that the men returned to camp for their weapons, that he obtained his carbine and received five rounds of ammunition which he asserts he gave away. In his statement he further admits that the men went back to town; that he saw the military police near the monument and asked them why they did not want the colored soldiers in town; and that the police put their light on them. He declares he ran away as soon as firing started, returning to camp and going to bed. He was later awakened and placed under arrest.

9. Errors and Irregularities.

(a) Pros.Exs. "C" to "K" inclusive were received in evidence with the direction that the statements therein would apply only to the signer and would not be received or considered as evidence against any of the others (R53). Each contain matter affecting other of the accused than the signer thereof.

In the opinion of the Board of Review heretofore expressed (CM ETO 134, Stump et al), the reading of such statements of accused may become highly prejudicial to the substantial rights of other of the accused. This conclusion is based on the familiar rule that:

> "The confessions or admissions made by a co-conspirator or co-defendant after the termination of the conspiracy and in the absence of the defendant, are not admissible against the defendant as substantive evidence to prove his guilt. His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such, against any but himself and even the most solemn admission made by him after the conspiracy is at an end is not evidence against accomplices". (2 Wharton's Cr. Ev.,sec.722, p.1213-14, and sec.728, p.1223).

The present case differs from the Stump case in that the statements herein were received in evidence with the cautionary instruction to the court that they were admissible only as against the particular signer and should not be considered as evidence against the other accused. Furthermore the statements are few in number and no particular difficulty arises in the court observing the injunction as to their use as evidence against only the makers. Under such circumstances the evil of accumulating a "matrix of hearsay evidence" against accused other than the one making the statement is obviated. The statements were rightfully admitted in evidence (CM ETO 804, Ogletree et al).

(b) Def.Exs.1 to 7 inclusive were self-serving declarations and if objection had been made by prosecution should have been excluded (CM ETO 422,

Green). However, as they were admitted on request of the defense without objection, the error was self-invited and cannot be considered as prejudicial to accused (CM ETO 438, Smith).

(c) Upon cross-examination of Smith, a witness for the prosecution, his prior written statement made to the investigating officer was presented to him (R92). After he admitted its authenticity it was read to the court. It contained some assertions in conflict with his evidence on direct examination. Inasmuch as Smith affirmed the making of the statement it was proper to place it in evidence and read it to the court. There was no necessity of laying foundation for its admission nor for proving it by other testimony (3 Wharton's Crim.Ev., 11th Ed., sec.1359, p.2243). However, it was admissible for the purpose only of impeaching Smith's credibility and was not substantive evidence of the truth of the matter therein stated (70 C.J., sec.1339, p.1153; Southern Railway Co. v. Gray, 241 U.S. 333,337; 60 L.ED., 1030, 1033). Cautionary instructions to this effect should have been given to the court, but in this instance the absence was not prejudicial to rights of accused (AW 37).

10. Conduct prejudicial to good order and military discipline in violation of Article of War 96 (Charge III), committing a riot in violation of Article of War 89 (Charge I), and joining in a mutiny in violation of Article of War 66 (Additional Charge), are separate offenses and not multiple charges although growing out of the same incident (CM ETO 895, Fred. A. Davis et al).

11. The Board of Review has had occasion to examine into many questions arising out of and connected with the offense of "committing a riot" under the 89th Article of War in two recently approved holdings: CM ETO 804, Ogletree et al and CM ETO 895, Fred A. Davis et al. Said holdings establish the principles that the offense may be committed by military personnel at places other than "quarters, garrison, camp and on the march"; that a person who is present at a riotous and tumultuous assembly where his presence is intentional and who encourages the rioters in the furtherance of the enterprise either by overt acts or exhortations or remarks may be prima-facie inferred to be a participant; that a by-stander, spectator or observer cannot be held as a participant; that all participants are responsible as principals; that the offense may be committed by three or more persons and that the substance of the offense is the disturbance of the public peace to the terror of the people. In view of the detailed and careful consideration the subject received in the above cited holdings it is not believed necessary to repeat the discussion of the elements of the offense in the instant case.

Colored American soldiers, among whom were certain of the accused, made an attack with the use of fire-arms upon members of the military police detachment on duty in the town of Launceston, Devonshire, England on the night of 26 September 1943. The attack had been deliberately and premeditatedly planned by accused without cause, except imaginary grievances against the policemen who in the performance of their duties had apparently incurred their animosity. There is no suggestion or inference that any of the military policemen provoked the attack by either verbal threats or acts of menace.

Firearms were not used by the policemen, who neither attempted to prevent nor to repel the assault. The mob of soldiers without warning came out of darkness, fired upon the policemen and then in a cowardly manner disappeared. There were two distinct volleys between which desultory shots were discharged. Two of the policemen received dangerous and painful gun-shot wounds and one of the wounded men has suffered permanent injuries. One of the attackers, Barrett, used a "tommy gun" or sub-machine gun, but the greater number of the attackers were armed with carbines. The public peace manifestly was disturbed in an outrageous manner and proof that the populace was terrorized is indisputable. That the disturbance assumed the violence and turbulence of a riot, as defined by the authorities, is an irrefragable conclusion.

The accused Geddies, Lindsey, Shaw, Blake, Austin, Barrett, Ewing, Martin, Tennyson and Hughes were not only present at the rioting but were active and notorious participants. Their guilt of "committing a riot" is proved by substantial evidence which fully sustains the findings of the court. Conflicts in the evidence were resolved against these accused by the court and the Board of Review having satisfied itself that the evidence of their guilt is competent and substantial, will not re-examine the evidence to test its credibility or weight. An "accused cannot have both a trial by jury and a retrial by an appellate court" (Allen v. United States, 4 Fed.(2nd) (7 Cir.) 688,690; CM ETO 895, Fred A. Davis et al, supra). The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings that the ten named accused were guilty of "committing a riot" (Charge I).

12. The accused are jointly charged with an assault with intent to commit a felony, to wit: murder by shooting Sergeant Cox of the military police with rifles, carbines and tommy guns (Specification 1, Charge II). A similar charge is directed against the accused with respect to the shooting of Sergeant Simmons, also of the military police. Such offenses were properly laid under the 93rd Article of War. The elements of the crime are declared by the Manual for Courts-Martial 1928 (par.149, p.178) to be as follows:

> "Assault with intent to murder.-- This is an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt. To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. ****".

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A more specific analysis of the offense is stated thus:

> "An intentional attempt by violence with present ability, or in some jurisdictions, apparent ability, and without legal excuse or provocation, to do an injury to the person of another, accompanied by facts and circumstances indicative of an intent to take life, constitutes the offense of assault with intent to murder.***** (30 C.J., sec.158, p.15-16).
>
> "In addition to the requisite intent, in order to constitute an assault with intent to murder, there must be an attempt or an assault to carry out that intention. In other words, there must be an overt act in pursuance of the intent as distinguished from the mere intent itself, and also from mere threats, or mere preparations not going far enough to constitute an attempt. There must be a commencement of an act which if not prevented would produce a battery. ****(30 C.J., sec.159, p.16-17).
>
> "Malice or malice aforethought is an essential ingredient of assault with intent to murder. As in the case of murder, malice may be either express or implied. While the expression 'malice aforethough' includes the element of premeditation, it is immaterial for how short a time the malice may have existed.****" (30 C.J., sec.163, p.20).
>
> "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 the unlawful use of a deadly weapon, provided it was used in such a manner as to indicate an intention to kill, or from 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, p.21-22).

Where a number of persons are present at the time of the commission of the assault their individual criminal responsibility is determined by the following well established principles:

> "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 ....; 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.126).

> "All persons who are actually or constructively present at the time and place of a crime, whether it is a felony or merely a misdemeanor, and who either actually aid, abet, assist, or advise its commission, or are there with that purpose in mind, to the knowledge of the party actually committing the crime, are guilty as principals in the second degree, although they did not themselves accomplish the purpose." (16 C.J., sec.117, p.130).

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"Specific intent. 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 CJS., sec.87, p.157).

"So, among offenders, the Articles recognize no principals, and no accessories either before or after the fact, as such. ****. In the military practice all accused persons are treated as independent offenders. Even though they may be jointly charged and tried, as for participation in a mutiny for example, and each may be guilty of a distinct measure of criminality calling for a distinct punishment, yet all are principals in law." (Winthrop's Military Law & Precedents, 1920 Reprint, p.108).

There is substantial evidence that the accused Geddies, Lindsey, Shaw, Blake, Austin, Barrett, Ewing, Martin, Tennyson and Hughes were present in the public square in Launceston at the time when the military police were the victims of an assault with use of fire-arms by the group of colored soldiers of which Barrett and Austin were the leaders. The evidence fails to establish the identity of the particular accused who discharged the bullets into the bodies of the two policemen. It is, however, indisputably shown that it was either Barrett with his "tommy gun" or one or more of the other named accused with their carbines who inflicted the gun-shot wounds on Cox and Simmons. These named accused deliberately planned and executed this attack on the military policemen. They returned to camp for the express purpose of arming themselves and securing ammunition and upon completing these preliminary arrangements proceeded in a body to the public square and without warning opened fire on the policemen. Under the principles above set forth the act of one or more of the group was the act of all, and all are chargeable as principals in the commission of the crime.

The prosecution's evidence substantially supports the conclusion that each of these ten accused had knowledge of the purpose of arming themselves and returning to the center of town. They were "looking for the M.Ps to pick a fight with". While the ammunition was being distributed to them in camp, Austin and Barrett discussed "what they were going to do after they got into town". The other eight accused were present on this occasion. Although it is not proved that any of the ten accused had actual intention of discovering Cox and Simmons and shooting them or that

they knew them, these facts do not alter the juridical process in determining accuseds' guilt. Each of these accused knew that the armed group of which he was a member was engaged in an expedition against the military policemen then on duty in Launceston. Each of these accused entertained the specific intent of seeking the policemen whoever they might be and engaging in an altercation with them. Each of these accused armed himself with a deadly weapon for purpose of this combat. In a body they approached the military policemen then standing in front of the jeep. Some of these accused fired on the policemen. The attack was the result of preconcerted action by these accused and to each of them must be imputed knowledge of the intent of all other members of the unlawful assembly to discharge their fire-arms at the policemen in the course of committing the assault. That the deliberate firing upon the detachment of policemen which included Cox and Simmons, is evidence of the specific intent to commit murder, is a proposition so well established that no further citation of authority other than that above set forth is necessary. The surrounding facts and circumstances afford substantial legal basis for imputing to each and every one of the ten named accused the specific intent of the particular accused who actually shot Cox and Simmons and inflicted the wounds upon them. The evidence of preconcert and joint design distinguishes the instant case from CM 200047 (1933), Dig.Ops.JAG 1912-1940, sec.451 (13), pp.314-315. In the opinion of the Board of Review the record is legally sufficient to sustain the findings that accused Coddies, Lindsey, Shaw, Blake, Austin, Barrett, Ewing, Martin, Tennyson and Hughes were each guilty of Charge II and the specifications thereunder.

13. The Additional Charge is laid under the 66th Article of War. By its first Specification it is alleged that accused joined in a mutiny against the lawful military authority of the military police of the United States Army. By the second Specification they are charged with joining in a mutiny against the lawful military authority of the commanding officer of Camp Pennygillum and other officers of said station.

Accused were acquitted of guilt under the first Specification. They were found guilty of the second Specification.

The offense of "joining in a mutiny" was considered and discussed in the recent cases of CM ETO 855, Fred A. Davis et al, to which reference has hereinbefore been made. The nature and elements of the crime, and the evidence required to sustain findings of guilty of such offenses are set forth in detail in said holding. It is not considered necessary to repeat the same herein, except as may be incidental in the discussion of the facts.

The Manual for Courts-Martial 1928 cogently states the gravamen of the offense:

> "Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority". (MCM., 1928, par.136a p.150).

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Winthrop states the same doctrine thus:

> "Mutiny has been variously described, but in general not in such terms as fully to distinguish it from some other military crimes, the characterizing intent not being sufficiently recognized. It may, it is believed, properly be defined as consisting in an unlawful opposition or resistance to, or defiance of superior military authority, with a deliberate purpose to usurp, subvert, or override the same, or to eject with (sic) authority from office." (Winthrop's Military Law & Precedents, Reprint, p.578).

With respect to the proof of the intent to overthrow or over-ride military authority Winthrop further writes:

> "The intent may be openly declared in words, or it may be implied from the act or acts done,--as, for example, from the actual subversion or suppression of the superior authority, from an assumption of the command which belongs to the superior, a rescue or attempt to rescue a prisoner, a stacking of arms and refusal to march or do duty, a taking up arms and assuming a menacing attitude, &c.; or it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of combination--that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose--is, though not conclusive, the most significant, and most usual evidence of the existence of the intent in question". (Winthrop's Military Law & Precedents, Reprint, p.580-581).

The offense of "joining in a mutiny" is distinct from the offense of "beginning, exciting or causing" a mutiny and:

> "Joining in a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purposes, or, being present stimulates and encourages those who do". (Winthrop's Military Law & Precedents, Reprint, p.583).

Before a soldier can be guilty of "joining in a mutiny" there must be a mutiny in which he joins. The existence of a mutiny is the major premise of the charge and failure to prove it is fatal to a charge of joining in a mutiny (CM 125432(1919), Dig.Ops.JAG., 1912-1940, sec.424, pp.288-289). Intrinsic in the proof that a mutiny existed, there must be substantial evidence that the mutineers in their conduct were motivated by the specific intent to over-throw or neutralize military authority either permanently or temporarily. Winthrop's cautionary comment with respect to this element of the offense is particularly applicable in the instant case.

Inasmuch as the court acquitted the accused of "joining in a mutiny" against the authority of the military police the issue of accuseds' guilt of "joining in a mutiny" against the camp commander and his subordinate officers must be determined upon an exceedingly narrow factual base. Evidence with respect to the activities of accuseds' superior officers prior to and during the rioting is strikingly absent. Lieutenant Scagy, whose identity, command or authority are not revealed by the evidence, refused to issue passes because the men did not wear blouses (R78). Thence forward there is a hiatus in the evidence as to the whereabouts and activities of the officers until Lieutenants Cohn (R112,113), Glenn (R114,115) and Blondgren (R117,118) were awakened in their quarters at approximately 11:00 p.m. and were informed of the disturbance in the town. After passes had been denied there is not even an inference that any officer attempted to supervise or control the actions of the men. If the record be read literally there were no officers in camp. However, it may be implied from the testimony of Lieutenants Cohn, Glenn and Blondgren that the officers had retired for the night and had left the Officer of the Day on duty. There is a suggestion in Lieutenant Glenn's testimony that sentries had been posted (R114-115), but it is obvious that the group of soldiers, led by Barrett and Austin, returned to camp, armed themselves, secured ammunition and departed for town without interference of any kind. The implication is persuasive that during this period the officers had no contact with their men, were asserting no factual command or authority and were not even cognizant of the developments of the evening. The authority of the commanding officer of the camp was exercised by "remote control" and this situation compels a search of the record to determine where and how the accused and others who were in the group of malcontents over-rode, resisted or neutralized the commander's military authority.

There is one, and only one, facet of the evidence, which suggests a conspiracy having for its purpose the overthrowing or neutralizing of the military authority of the officers.

Edwards in his narrative of activities testified:

> "From seven o'clock that evening, I was in some tent up there, sir, and some one called me and told me 25 per cent. of the Company might go to town, and I -- we goes on in and

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> Sergeant Hughes goes on to the First Sergeant's tent and he writes out some little slips of paper to take to the Lieutenant Songy, and we did not have no blouses and we put on our overcoats and he did not sign the passes, so we all goes on down to town"(R78) (underscoring supplied).

Blanchett after describing the incident of the denial of the passes by Lieutenant Songy states:

> "• • • so we all go outside the Headquarters and we said, 'Let's go to town anyway' so we all goes up town" (R98) (underscoring supplied).

Although the evidence is fragmentary and is far from convincing that each and all of the accused were present at the meeting of the soldiers "outside the Headquarters" immediately following the denial of passes when it was determined to go to town "anyway", it will be assumed for present consideration that each of the accused participated in this meeting and was a party to the agreement and thereafter each departed from camp without proper pass. This is largely an arbitrary concession to the prosecution's case and is opposed to the established principle of law in that it resolves the doubts against the accused rather than in their favor.

The entire enlisted personnel of the camp were restricted on the night of 26 September 1943, and had been continuously restricted for some time thereto because of absence of proper uniforms. The departure of the accused from camp without passes following the preconcerted agreement was therefore an act of deliberate defiance of standing orders. The problem for solution is whether such violation of standing orders, resultant upon a prior confederation of the accused constituted mutiny.

Winthrop's comments are most pertinent:

> " It is this intent which distinguishes it from the other offences with which, to the embarrassment of the student, it has often been confused both in treatises and General Orders. Thus, disrespect toward a commanding officer, the offence which is the subject of Art. 20, has sometimes been charged as mutiny. More frequently the doing or offering of violence to a superior officer, and disobedience of orders, - offences specifically made punishable by Art. 21, - have been so charged or considered. Still more frequently has the designation of 'mutiny' been erroneously attached to disorders of the class known as 'mutinous conduct' - such as defiant behaviour or threatening language

toward superiors, muttering or murmuring against the restraints of military discipline, combinations of soldiers with a view to acts of violence or lawlessness which however are not committed, intemperate and exciting discussions at meetings held for the purpose of protesting against orders, declining to perform service in the honest belief that the term of enlistment has expired, &c. Such disorders, stopping short of overt acts of resistance, or not characterized by a deliberate intent to overthrow superior authority, do not constitute in general the legal offense of mutiny, but are commonly to be treated as 'conduct to the prejudice of good order and military discipline' in violation of Art.62. And the same is to be said of disorderly conduct under the influence of intoxication, which, though accompanied by resistance to a superior, is without the animus peculiar to mutiny in law.

The definition of mutiny at military law is indeed best illustrated by a reference to the adjuged cases treating of that offense as understood at maritime law. Thus, in regard to mutiny or revolt on American merchant vessels, it has been expressly held that an intention to overthrow for the time at least the lawful authority of the master is an essential element of the crime, that simple violence against the officer, without proof of intent to override his authority, is not sufficient to constitute revolt or mutiny, that mere disobedience of orders, unaccompanied by such intent, does not amount to mutiny; and that insolent language or disorderly behaviour is per se insufficient to establish it". (Winthrop's Military Law and Precedents Reprint -pp.578-580).

Since the violation of or disobedience to orders unaccompanied with the intent to overthrow or neutralize military authority is not mutiny (Winthrop's Military Law and Precedents - Reprint, foot-note 49, p.580; 56 C.J. Sec.857, p.1142,1143), will the additional fact that the accused disobeyed the standing orders confining them to camp as a result of a mass agreement elevate their offense to that of mutiny? The additional comment from Corpus Juris in its discussion of maritime mutiny is pertinent:

"The mere act of disobedience to a lawful command of the ship's officers is not of itself an endeavor to make a revolt. To amount to that offense disobedience must be combined with an attempt to

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> excite others of the crew to a general resistance, a general disobedience, or a general neglect and refusal of duty, or there must be a general combination of the crew to resist a single lawful order". (56 C.J. Sec.857, p.1142).

The statement of the Circuit Court of Appeals (Fourth Cir) with respect to the elements of the crime of revolting against the authority of a ship's master which is equally applicable, in the instant case, is illuminating:

> "The specific question is whether the agreement of the entire crew of the ship, anchored in a port of refuge before the end of the voyage, to refuse to obey the orders of the master, and their united action in carrying out the agreement, while remaining on board, is endeavoring to make a revolt. This was not usurpation of the command from the master, for there was no effort to take charge of the ship. But evidently it was a successful endeavor to deprive him of authority and command on board, and to resist and prevent him in the free and lawful exercise of his command. The united action of a crew in refusing to yield obedience to the lawful command of the master deprives him of the authority and command he was in duty bound to exercise. This as much resistance and prevention of the free and lawful exercise of his authority and command as an undertaking by a crew to deprive him of any inanimate instrumentality necessary to the command and management of the ship. A master may have possession of the ship alone, but he cannot be in command of it, if the crew unite in refusing to carry out his orders. Command of a fortress means actual control of the garrison for military purposes. Command of a ship means actual control of the crew for nautical purposes. If all the garrison of a fortress, or all the crew of a ship, refuse obedience to the commander, they deprive him of authority and command; they resist and prevent the exercise of his authority and command". (Hamilton v. United States, 268 Fed.15,18-19).

The record of trial identifies not more than eighteen men as having participated in the informal meeting wherein it was determined to leave the camp and go to town notwithstanding contrary orders. To sustain the charge of "joining in a mutiny" such conduct must be declared to be sufficient to establish an intent to overthrow or neutralize the commander's authority. It is difficult to see in this situation substantial evidence

which would permit a court to infer such criminal intent - and without such intent there is no case proved against accused. A comparison of the facts in this case with those established in CM ETO 895, Fred A.Davis et al decisively discloses the tenous evidentiary foundation from which the mutinous intent on the part of the instant accused must be inferred. The comment of Judge Kane in the case of United States v. Almeida (Phila. 1847, cited in Wharton's Prec.Indict.,p.724) is strikingly pertinent:

> "The single act of unpremeditated resistance to the captain cannot be identified with his formal degradation from the command, still less with the usurpation of his station, without overlooking the gradations of crime and confounding the accidental turbulence of a heated sailer with the deliberate and daring and triumphant conspiracy of mutineers". (Cited in United States v. Huff 13 Fed.630,638).

A practical, common-place explanation of the actions and declarations of the eighteen men (from a total of 176 men subject to the commanding officer's authority) bespeaks only a deliberate disregard, resulting from disappointment and anger, of a standing order of the camp commander and not an intent to overthrow, subvert or neutralize his authority.

While evidence proving the disorder as an entirety was relevant and may be properly considered (CM ETO 895, Fred A. Davis et al) the determinative factors are those events occurring in camp prior to the first unauthorized departure for town. After the visit of the accused to the second public house and Barrett's assumption of leadership a new note is sounded in the evidence. Thence forward it is the military police who are the objects of accuseds' animosity and it is against them that all preparations are directed, culminating in the acts of violence in the public square of the town. There is not even a scintilla of evidence that accused intended to attack any of the military personnel except the military police. It was the authority of the military police which was attempted to be subverted; not that of the commanding officer of the camp and his subordinate officers. It is irrational to contend that such disorder constituted "the deliberate and daring and triumphant conspiracy of mutineers" directed at the commanding officer of the camp and his subordinate officers.

The Board of Review does not herein decide that mutiny against the authority of commanding officers cannot exist out of their presence. Neither does it conclude that a confederated design to violate commands or orders may not constitute a mutiny against authority of superior officers, under circumstances and conditions other than those disclosed by the record of trial in the instant case.

The conclusion therefore must be that the prosecution failed to prove the vital element of its charge of 'joining in a mutiny' against the authority of the camp commander.- viz: the intent to over-ride, subvert or controlling his authority. The accused were guilty of a military offense, but they were not guilty of 'joining in a mutiny'.

In the opinion of the Board of Review the record is legally insufficient to support the findings that accused Geddies, Lindsey, Shaw, Blake, Austin, Barrett, Ewing, Martin, Tennyson and Hughes were guilty of 'joining in a mutiny' against the authority of the commanding officer of Camp Pennygillum and his subordinate officers. (Specification 2 of Additional Charge).

14. The Specification of Charge XII alleges in pertinent part that the accused,

> 'acting jointly and in pursuance of a common intent did ... in conjunction with certain other soldiers, whose names are unknown, wrongfully and unlawfully seize arms and ammunition, bear arms, intentionally discharge fire arms in a reckless and unlawful manner, make inflammatory statements in the presence of other soldiers, march from their camp, at Camp Pennygillum to the center of the town of Launceston, England, fire upon members of the military police, U S Army, and other persons'.

There is thereby alleged an offense under the 96th Article of War - conduct prejudicial to good order and military discipline (Winthrop's Military Law and Precedents - Reprint p.729,731). The following comments are pertinent:

(a) The accused were issued fire-arms and were authorized to retain possession of same (R109); consequently the proof failed to sustain the allegation that they wrongfully and unlawfully seized them. However, no authority was given them to carry their fire-arms from camp into town under any circumstances or for any reason. Hence the proof fully sustains the allegation that accused, Geddies, Lindsey, Shaw, Blake, Austin, Barrett, Ewing, Martin, Tennyson and Hughes did 'wrongfully and unlawfully bear arms'.

(b) There is no proof as to how, where or when Austin came into possession of the ammunition. It is certain, however, that he had a supply of cartridges which he distributed to the men who assembled on the road prior to the second departure for town. No ammunition had been issued to the company (R111). The proof shows wrongful and unlawful possession of same; not wrongful and unlawful seizure. There is, therefore, a variance between the proof and allegations in this respect.

(c) The allegation 'did ... intentionally discharge fire arms in a reckless and unlawful manner' is as to Geddies, Lindsey, Shaw, Blake, Austin,

Barrett, Ewing, Martin, Tennyson and Hughes fully sustained by the evidence. In the discharge of the fire arms the act of one of the attacking group was the act of all (see discussion in paragraph 12 supra).

(d) The charge that the accused "did *** make inflammatory statements in the presence of other soldiers" fails as to all accused except Barrett and Austin. These two soldiers were the leaders of the disorder. There is substantial and competent evidence that Barrett and Austin inspired and directed the unlawful conduct of the group involved by verbal solicitation and instructions.

(e) The allegation that the accused "did *** wrongfully and unlawfully *** march from their camp *** to the center of the town" and "fire upon members of the military police *** and other persons" was proved by substantial competent evidence as to Geddies, Lindsey, Shaw, Blake, Austin, Barrett, Ewing, Martin, Tennyson and Hughes.

The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of guilty of the ten accused named above of Charge III and its Specification.

15. The charges against accused McKnight, Gibbs, Manning and Tilly have not been hereinbefore specifically considered because of the fact that the evidence proving their involvement differs from that presented against the other ten accused. Their cases will now be considered.

McKNIGHT was found guilty of all charges and specifications except Specification 1 of the Additional Charge. For the reasons hereinabove stated, the Board of Review is of the opinion that the record is legally insufficient to support the findings of McKnight's guilt of Specification 2 of the Additional Charge and the Additional Charge.

There is proof that McKnight left the camp with the group of armed soldiers on the expedition to attack the military police. After the shooting, McKnight was seen in front of the Town Hall with Austin talking with a couple of girls. The inference is as reasonable that after reaching the public square he stood aside as a spectator (CM ETO 804, Quintero et al) as it is that he became a rioter or assailant of the policemen. While circumstantial evidence alone will sustain the finding of guilty (20 Am Jur.Evidence Sec.273, pp.260,261; Underhill's Criminal Evidence - 4th Ed - Sec.15, p.16), proof of mere opportunity to commit a crime is not sufficient to establish guilt (CM 195785, Tyson; CM 197408, McGrimmon; United States v. Buchalter, 88 Fed (2nd) 635; CM 202976 (1935), Dig.Ops.JAG 1912-1940, Sec.451 (49) p.330). Unless there is substantial evidence of facts which excludes any fair and rational hypothesis except that of guilt, or where all of the evidence is as consistent with innocence as with guilt, a finding of guilty cannot be sustained (MCM 1928 par.78, p.63; United States v. Silva et al, 131 Fed. (2nd) 247; Romano v. United States 9 Fed (2nd) 522; Manning v. United States, 21 Fed. (2nd) 508; Salinger v. United States, 23 Fed.(2nd)

48; Crescoffo v. United States 46 Fed.(2nd) 852; Towbin v. United States 93 Fed.(2nd) 861). The evidence against McKnight is insufficient to prove that he was an actual participant in the riot or in the shooting of Cox and Simmons, and therefore is not legally sufficient to support the findings of guilty of Charges I and II and their specifications.

McKnight left camp without authority with a group of soldiers who were also unauthorized to leave camp. While he was unarmed the evidence is sufficient upon which to base the inference that he had knowledge of the unlawful mission of his companions and to charge him with the knowledge that the greater number were armed. This is evidence of an offense under the 96th Article of War and the allegations of the Specification of Charge III are sufficiently broad to permit such proof.

GIBBS was found guilty of all charges and specifications except Specification 1 of the Additional Charge. For the reasons hereinbefore stated, the Board of Review is of the opinion that the record is legally insufficient to support the findings of Gibbs' guilt of the Additional Charge and Specification 2 thereof. The evidence against Gibbs is sufficient to prove that he went to town with the armed group and also that he was armed with a rifle, but there is no evidence of his conduct after he left camp. There is proof that he possessed a pass. However, admitting its existence, the pass did not authorize Gibbs to join this armed expedition bound on an unlawful mission, knowledge of which fact is chargeable to him. The fact that he bore arms also inculpates him. The above discussion in respect to McKnight's non-participation in the riot and in the shooting of the policemen is equally applicable to the evidence against Gibbs, and the record is legally insufficient to support the findings of guilty of Charge I and Charge II and their specifications but legally sufficient to support the findings of guilty of Charge III and its Specification.

MANNING AND TILLY each left camp with the armed group, but there is no proof that either bore arms. There is a complete blank in the evidence as to their activities after leaving camp. To each may reasonably be imparted knowledge of the purpose of the group. Their presence in it increased its numbers and thereby gave aid and assistance to an unlawful assembly. Whether or not they were authorized to leave camp is immaterial. A pass is not a license to join an organized mob determined upon mischief and disorder. The reasoning in the case of McKnight (supra) compels the Board of Review to hold that the record as to Manning and Tilly is legally insufficient to support the findings of guilty of Charge I and its Specification, and Charge II and its specifications, but legally sufficient to support the findings of guilty of Charge III and its Specification.

16. The charge sheet shows the following service of accused:

Charlie Geddies, is 26 years of age. He enlisted at Jacksonville, Florida, 30 April 1942.

James H. Lindsey is 22 years of age. He was inducted at Fort Benning, Georgia, 24 September 1942.

Alexander Shaw is 32 years of age. He was inducted at Camp Forrest, Tennessee, 22 September 1942.

Freddy Blake is 20 years old. He was inducted at Chicago, Illinois, 1 February 1943.

Henry McKnight is 21 years old. He enlisted at Dallas Texas, 2 May 1942.

Henry Austin is 23 years old. He was inducted at Fort Hayes, Ohio, 23 March 1942.

Clifford Barrett is 22 years of age. He enlisted at Orlando Air Base, Florida, 1 May 1942.

Tom Ewing is 32 years of age. He was inducted at Chicago, Illinois, 26 January 1943.

Arnie Martin is 19 years of age. He was inducted at Detroit, Michigan, 1 February 1943.

Carl Tennyson is 21 years of age. He enlisted at Fort Knox, Kentucky, 6 May 1942.

Willis Gibbs is 20 years of age. He was inducted at Chicago, Illinois, 1 February 1943.

Rupert L. Hughes is 2[illegible] years of age. He was inducted at Fort Custer, Michigan, 1 October 1942.

James A. Manning is 19 years of age. He was inducted at Detroit, Michigan, 1 February 1943.

Henry F. Tilly is 21 years of age. He enlisted at Fort Huachuca, Arizona, 12 August 1940.

All were to serve for the duration and six months. None had any prior service.

17. 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, except as herein noted. The Board of Review is of the opinion that the record of trial is legally sufficient:

(a) To support the findings that accused Geddies, Lindsey, Shaw, Blake, Austin, Barrett, Ewing, Martin, Tennyson and Hughes were each guilty

of Charges I, II and III and their respective specifications but legally insufficient to support the findings that said ten accused were guilty of the Additional Charge and Specification 2 thereof, and legally sufficient to support the respective sentences of said ten accused (MCM 1928, par 10c, p.99).

(b) To support the findings that accused McKnight and Gibbs were each guilty of Charge III and its Specification, but legally insufficient to support the findings that said two accused were guilty of Charges I, II and their respective specifications and of the Additional Charge and Specification 2 thereof.

(c) To support the findings that accused Manning and Tilly were each guilty of Charge III and its Specification, but legally insufficient to support the findings that said two accused were guilty of Charges I, II and their respective specifications.

The Table of Maximum punishments (MCM, 1928, par.10d, pp.97-101) has not prescribed the maximum punishment for the offenses for which the record is legally sufficient to sustain the findings of guilty of accused McKnight, Gibbs, Manning and Tilly (Charge III and its Specification). Since there is no prevision for same it remains punishable as authorized by Article of War 96 (MCM, 1928, par.10d, p.96). Punishment may therefore be at the discretion of the court, excluding death. The record is therefore legally sufficient to support the sentences of said four accused.

18. (a) The crime of assault with intent to commit a felony, viz: murder is denounced by the Federal Criminal Code and is punishable by confinement in a penitentiary for not more than twenty years (18 USCA 455; 18 USCA 541). By WD Circular 291, 10 November 1943, sec.V, pars. 3a and b, prisoners whose sentences exceed 10 years may be confined in a Federal penitentiary. The designation of United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement of accused Geddics, Lindsey, Shaw, Blake, Austin, Barrett, Ewing, Martin, Tennyson and Hughes is therefore authorized. Pursuant to par.8a, Circular 72, ETOUSA, 9 September 1943 execution of a sentence to dishonorable discharge will be ordered only when accused has been convicted of an offense which renders his retention in the service undesirable or when he has been sentenced to a term of not less than three years confinement. Assault with intent to commit murder is such an offense and the approved sentence as to each of said ten accused is in excess of three years. Execution of sentence of dishonorable discharge is therefore authorized.

(b) Conviction of the offense charged in violation of Article of War 96 does not authorize penitentiary confinement (AW 42). Hence the accused McKnight, Gibbs, Manning and Tilly may not be confined in a penitentiary.

B. FRANKLIN RITER
Judge Advocate

CHARLES M. VAN BENSCHOTEN
Judge Advocate

ELLWOOD W. SARGENT
Judge Advocate

(346) 1st Ind.

W.D., Branch Office TJAG., with KTOUSA. 12 FEB 1944 To: Commanding Officer, Southern Base Section, SOS, KTOUSA, APO 519, U.S.Army.

1. In the case of Privates CHARLIE GEDDIES (14110767), JAMES E. LINDSEY (34415299), FREDDY BLAKE (36389972), JAMES A. CANNING (36565865), HENRY McKNIGHT (18062078), HENRY W. TILLY (18023220), TOM EWING (36389861), ARZIE MARTIN (36565895), CARL TENNYSON (15197367), and WILLIS GIBBS (36389998); Privates First Class ALEXANDER SHAW (34325156), and CLIFFORD BARRETT (14111118); Technical Sergeant HENRY AUSTIN (35290641); and Sergeant RUPERT E. HUGHES (36531927) all of the 561st Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as to accused Geddies, Lindsey, Shaw, Blake, Austin, Barrett, Ewing, Martin, Tennyson and Hughes of Charges I, II and III and their respective specifications, legally sufficient to support their respective sentences, but legally insufficient to support the findings of guilty of said ten accused of the Additional Charge and its Specification 2. The Board of Review, by its said holding further concludes that the record is legally sufficient to support the findings of guilty of accused McKnight and Gibbs of Charge III and its Specification, legally sufficient to support the sentences but legally insufficient to support the findings of guilty of said two accused of Charge I, II and their respective specifications and the Additional Charge and its Specification 2. As to accused Canning and Tilly, the Board of Review further concludes that the record is legally sufficient to support the finding of guilty of Charge III and its Specification, and legally sufficient to support the sentences, with confinement in a place other than a penitentiary, but legally insufficient to support the findings of guilty of said two accused of Charges I, II and their respective specifications. I approve said holding. Under the provisions of Article of War 50½ you now have authority to order execution of the sentences.

2. In view of the fact that as to accused McKnight, Gibbs, Canning and Tilly the record is sufficient only to support the findings of guilty of an offense under the 96th Article of War, I suggest that their respective periods of confinement be reduced to five years. Penitentiary confinement is not authorized upon conviction of an offense under the 96th Article of War. Hence I further suggest that their respective sentences to dishonorable discharge be suspended until the release of each accused from confinement and that Disciplinary Training Center # 2912 be designated as the place of confinement.

3. The evidence disclosed that Austin and Barrett were the instigators and leaders of and active participants in this disturbance. Their respective sentences, which include twenty years confinement at hard labor are therefore justified. The evidence against Hughes proves that he was a participant in the rioting, the shooting of the military policeman and was a

member of the group which armed itself and left camp in pursuit of an unlawful purpose. However, it fails to establish the fact that he was a promoter of the enterprise. It is probable that the court imposed the sentence upon Hughes which includes twenty years confinement at hard labor because he was a non-commissioned officer. Under the facts and circumstances proved with respect to Hughes, I do not believe that the same punishment should be imposed upon him as was adjudged against Austin and Barrett, who conceived and directed the violence. I therefore recommend that Hughes' period of confinement be reduced to fifteen years.

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 1052. For convenience of reference please place that number in brackets at the end of the order: (ETO 1052).

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 1057

17 MAR 1944

U N I T E D S T A T E S)	NINTH AIR FORCE.
)	
v.)	Trial by G.C.M., convened at AAF
)	Station 472, APO 696, 11 November
Private MICHAEL J. REDMOND)	1943. Sentence: Dishonorable
(12065644), Headquarters)	discharge (suspended), total for-
and Service Company, 876th)	feitures and confinement at hard
Airborne Engineer Aviation)	labor for one year. 2912th Dis-
Battalion.)	ciplinary Training Center, APO 508,
)	U. S. Army.

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 and sentence 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 64th Article of War.

Specification: In that Private Michael J. Redmond Headquarters and Service Company, 876th Airborne Engineer Aviation Battalion, having received a lawful command from First Lieutenand Spencer W. Truman, Commanding Officer, Headquarters and Service Company, 876th Airborne Engineer Aviation Battalion, his superior Officer, to report once each half hour (½) to the Charge of Quarters between eighteen hundred hours and twenty two hundred hours for seven (7) days commencing on or about October 22, 1943 as Company Punishment, did at USAAF 472, APO 696, U.S.Army, on or about October 22, 1943 wilfully disobey the same.

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 absence without leave in violation of Article of War 61, for 79 days and for ten days respectively. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence but suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the 2912th Disciplinary Training Center, APO 508, U.S.Army as the place of confinement.

The result of trial was promulgated in General Court-Martial Orders No. 76, Headquarters Ninth Air Force, APO 696, U.S.Army dated 26 November 1943.

5. Evidence for the prosecution established the following facts:

Accused had been restricted to camp by his company commander, First Lieutenant Spencer W. Truman, during the week previous to 22 October 1943 for the reason that he was suffering from trench mouth (R24,25). He was absent from reveille formation of his company at 0730 hours on 22 October 1943. Upon being informed of such fact the company commander required accused to report to him (R10,16). When accused at about 0800 hours appeared before Lieutenant Truman the latter asked him why he had not been at reveille, to which he replied "that his mouth hurt and he didn't feel like it." The officer answered that he should have arisen anyway and had his mouth treated by the doctor. Then he noticed lipstick on accused's face and asked him if he had been to town the night before, and in reply accused admitted such fact (R10,16). Upon thus accidentally discovering that accused had broken the previously imposed restriction which was about to expire, Lieutenant Truman gave him a direct order restricting him to the company area from the time of the order and directing him to report to Charge of Quarters in the orderly room every half hour between the period of 1800 and 2200 hours each evening (R8,10,13,15,16,18). Prior to this conversation with accused, Lieutenant Truman had no knowledge of the breach of restriction (R24). The order was given as company punishment under Article of War 104. Lieutenant Truman did not at that time inform him of the duration of the restriction. Neither did he read to him Article of War 24 (R10), nor state that he proposed to punish him under Article of War 104, nor notify him of his right to appeal to higher authority (R11-12). Sometime during the morning of 22 October, after the order was given to accused, Lieutenant Truman drafted a company punishment order under Article of War 104. The First Sergeant prepared it in final form. The latter called accused into the Orderly Room and presented it to him. Accused read it and said nothing, but hesitated for a time before signing the sheet. Thereafter the commander placed it in the company punishment book (R9, 12-13, 17-18). The sheet (Def.Ex.A), dated 22 October 1943, reads:

"DISCIPLINARY ACTION UNDER THE 104TH ARTICLE OF WAR
The following disciplinary action has been taken under the 104th Article of War in the case of:

NAME Redmond, Michael J. RANK Private ASN#: 12065644

OFFENSE: Leaving Station without pass or permission.
DATE OF OFFENSE: October 21 1943.
PUNISHMENT AWARDED: Restricted to the Company Area for a period of One (1) week and to report to the C.Q. every half hour each night from 1800 hrs to 2200 hrs.
EFFECTIVE DATE OF PUNISHMENT: October 22 1943.

/s/ Spencer W. Truman
Commander.
/t/ SPENCER W. TRUMAN,
1st Lt, CE,
Commanding.

STATEMENT OF SOLDIER

I have been advised as to my rights in either taking company punishment or a Summary Court Martial and I desire to take Company Punishment as outlined above.

NAME: /s/ Michael J. Redmond
/t/ MICHAEL J. REDMOND, Pvt, 12065644."

Lieutenant Truman testified that the punishment did not take effect until after the punishment sheet was signed. He did not talk to accused concerning his right of appeal from the punishment nor was such right of appeal brought to his attention (R13).

First Sergeant Joseph A. Mroz heard Lieutenant Truman give the verbal order to accused. He was Charge of Quarters on the evening of 22 October and was on duty in the Orderly Room from 1730 to 2230 hours. Accused did not report to him (R15).

The next day, 23 October, accused again appeared before Lieutenant Truman sometime after 0730 hours. He was asked why he had not reported the night before as ordered. He replied "that he just didn't want to report", but gave no other explanation. He was informed by Lieutenant Truman that he had been given a direct order which was to be obeyed and was asked if he understood what it meant to refuse to obey it. Accused replied in the affirmative. The company commander explained to him what it meant to disobey a lawful order and ordered him to report again on the night of 23 October (R21-22). Lieutenant Truman declared that accused thoroughly

understood him (R13), but he did not attempt to find out why accused refused to obey the order, because he had no "way of knowing whether he stayed in camp or what he did". It was possible for accused to leave the post without a pass (R23).

On cross examination, Lieutenant Truman testified that he had known accused since he joined the organization in July 1943, that he had been a fairly good soldier and had "worked all right except a few times when he didn't get up for reveille"(R13).

4. At the conclusion of prosecution's case in chief, the defense moved for findings of not guilty on the grounds the record failed to prove the specification but showed that the alleged order was given as punishment under Article of War 104, and that the requirements of the regulations thereunder (See MCM,1928, par.107, pp.104-105) had not been met. It was argued therefore the order was null and void (R18-19). The court denied the motion (R20). After further testimony by Lieutenant Truman, recalled by the prosecution, the defense renewed its motion, which the court again denied (R23).

5. Accused elected to remain silent (R20).

Lieutenant Truman was also called as witness for the defense(R23). He admitted that when he spoke to accused at 0800 hours on 22 October he did not warn him of his rights under Article of War 24. Before giving the verbal order, he did not tell him that he proposed to administer punishment under Article of War 104, nor inform him of his right to elect trial by court-martial instead of such punishment. Accused signed the company punishment sheet after witness had given the verbal order but before he actually gave him any punishment. His restriction did not become effective at the time of the order because he was working in the area at the time and could not leave it in any case. Accused had been restricted by witness for the week previous to the alleged offense because he had trench mouth, and he was thus restricted before the imposition of company punishment. Until Lieutenant Truman talked to him on the morning of 22 October he did not know that accused had broken his prior restriction, so his question as to whether he had been to town was not for the purpose of getting evidence as a basis for punishing him (R24,25).

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

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

Accused received a direct verbal order (which was reduced to writing and served on him before it became effective) from one he knew to be his superior officer, restricting him to the company area and requiring him to report once each half hour to the Charge of Quarters of his company between certain hours on certain successive days commencing on the day of the order. He willfully disobeyed on the first of those days the part of the order requiring him to report half hourly to the Charge of Quarters. The question is whether this order was a lawful "command" within the contemplation of the 64th Article of War. The determination of that question involves consideration of three subsidiary questions: (1) whether the order was a legal order under the 104th Article of War, (2) whether the punishment imposed was legal, permissible punishment, and (3) whether the subject-matter of the order brings it within the contemplation of the 64th Article of War. If the answer to any question be in the negative, the record must be held legally insufficient to support the findings of guilty of the charge of a violation of Article of War 64.

7. The evidence is clear that the order requiring accused to report to the Charge of Quarters during stated hours was given as part of and in aid of the order of restriction to specified limits, and the whole was intended as company punishment imposed upon accused under Article of War 104 for the breach of the prior administrative restriction imposed because accused was suffering from trench mouth.

The first paragraph of that Article provides:

> "Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial."

The offense committed by accused in leaving his station without pass or permission, in violation of the administrative restriction, evidence of aggravated circumstances being absent, was a minor one (MCM, 1928, par.105, p.103). "Restriction to certain specified limits for not exceeding one week" (AW 104) is specifically included in authorized disciplinary punishment. Both the offense and the punishment were therefore properly within the purview of the 104th Article of War.

8. The regulations prescribed by the President for procedure under the Article are contained in MCM, 1928, par.107, pp.104-105:

(354)

"The commanding officer, after ascertaining to his satisfaction, by such investigation as he deems necessary, that an offense cognizable by him under A.W.104 has been committed by a member of his command, will notify such member of the nature of such offense * * *, and inform him that he proposes to impose punishment under A.W.104 as to such offense unless trial by court-martial for the same is demanded. * * *.

With reference to each offense as to which no demand for trial by court-martial is made, the commanding officer may proceed to impose punishment. The accused will be notified of the punishment imposed as soon as practicable and at the same time will be informed of his right to appeal."

In support of its motion for findings of not guilty (R18-19), defense contended that the order was null and void because the following requirements of the regulations under Article of War 104 were not met: (a) warning accused of his rights under Article of War 24, (b) notification to him that punishment under Article of War 104 was proposed, (c) notification to him of his right to elect trial by court-martial in lieu of such punishment, and (d) notification to him of his right to appeal from the imposition thereof to the next superior authority. Defense argued that the order was illegal on the further grounds (e) that two kinds of punishment were ordered without apportionment and (f) that the type of punishment ordered was not authorized under the article. It was also argued that the evidence failed to show willful disobedience. These arguments will be considered in the order mentioned.

(a) The evidence is clear that accused was not warned of his rights under Article of War 24 (R10,24). That article provides:

"No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, 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 source of this provision is the following portion of the Fifth Amendment to the Federal Constitution:

> "No person * * * shall be compelled in any criminal case to be a witness against himself"

The prohibition is clearly directed against "the use of physical or moral compulsion to extort communications" from a witness before one of the named bodies or officers (MCM, 1928, par.122b, pp.129-130; Dig.Op. JAG 1912-1940, sec.381, p.191-192; Holt v. United States, 218 U.S. 245, 54 L.Ed.1021). It obviously has no application to accused's statements made during his conversation on the morning of 22 October with Lieutenant Truman, who had called accused before him to discover the reason for his failure to stand reveille formation. At that time the commander had no knowledge of accused's violation of the restriction previously imposed on him. Tell-tale lipstick prints on accused's face prompted Lieutenant Truman to inquire as to whether accused had been to town the previous evening. Accused admitted such fact. Considering accused's admission of his breach of restriction as a confession it was freely and voluntarily given and was free from compulsion or promise of leniency. The practice of informing an accused of his rights under the 24th Article of War prior to obtaining his confession is not mandatory in the sense that failure to give such warning forbids the admission of the confession in evidence. Such practice is a practical method of insuring that an accused understands his constitutional privilege not to give evidence against himself. If it is shown that the confession was the voluntary act of an accused, the test of its admissibility is met notwithstanding the fact that the 24th Article of War was not read or explained to accused (CM ETO 397, Shaffer). There is no legal substance to this contention.

(b), (c) Prior to the effective time for compliance with the order to report, accused read and signed the company punishment sheet which recorded his punishment (R17). This sheet clearly apprised him both of the "Disciplinary Action under the 104th Article of War" and of his right to elect trial by court-martial in lieu thereof (Def.Ex.A). The prior verbal order was correctly recorded on this sheet, which notified accused for the first time that his punishment was to continue for one week. It was thereby integrated or merged into the written order which became the best evidence of its substance (Winthrop's Military Law and Precedents - Reprint - p.322). The punishment sheet notified accused of his rights to demand trial by court-martial. His written acknowledgment of such notice and of his desire to take company punishment stands unimpeached. The failure of Lieutenant Truman to notify accused of his rights at the time of giving the verbal order was rendered harmless by the subsequent written notice to accused.

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(d) The record is clear that accused was not notified of his right to appeal to superior authority in the event he deemed his punishment unjust or disproportionate to the offense (R12,13). There is no indication in the record that the punishment imposed was in fact unjust, disproportionate or otherwise improper or that an appeal if taken by accused as authorized would for any reason have been successful. The failure to notify him of his right to appeal from the punishment imposed therefore did not result in injury to any of his substantial rights, and thus did not invalidate the punishment or the order imposing it (MCM, 1928, par.105, p.104).

This conclusion is not at variance with the recent holdings of the Board of Review in CM ETO 1015 Branham, and CM ETO 1366 English. It was there held that the requirements of Article of War 104 that accused be given the option of court-martial trial and that he be informed of his right to appeal:

> "are mandatory, and the failure of the officer imposing the punishment to notify the accused of his rights nullifies the order of punishment and renders it illegal. (Dig.Op.JAG 1912-1940, sec. 462 (5), p.370). * * *. In the present case the record of trial is completely silent with reference to compliance with any of the requirements of the article and indicates rather clearly that no compliance was attempted. * * *. The order of punishment was, therefore, illegal." (CM ETO 1015, Branham, par.6, p.8).

It is manifest that in the Branham case total noncompliance with the requirements injured the substantial rights of the accused, which were not waived. Particularly is this made plain by the fact that the order there was to perform the military duty of going on a hike and was thus clearly improper as punishment. Here, on the other hand, there was sufficient compliance with requirements to prevent injury to any of accused's substantial rights.

(e) Defense's next point is based upon an opinion of The Judge Advocate General (JAG 250.3, 31 Dec 1924, Dig.Op.JAG 1912-1940, sec.462 (4), pp.369-370) holding that the 104th Article of War may not reasonably be construed to permit company commanders to impose for the same offense a combination of two or more punishments, each in the maximum amount authorized, and that if it is desired to adjudge two or more forms of punishment for the same offense, there must be an apportionment. One important basis for this holding is evidently the analogy of the requirement of apportionment of punishments adjudged by summary court sentences involving deprivation of liberty (MCM, 1928, par.17 pp.11-12). Defense asserted that there were two punishments imposed upon accused: (1) restriction and (2) "the extra duty of reporting", that both may not be

imposed for the maximum period of one week without apportionment and that, since no apportionment was made, "the punishment is void"(R19).

The Staff Judge Advocate's Review of this record, 26 Nov 1943, p.2, appropriately remarks:

> "However, the requirement of reporting every half hour was incidental to the punishment of restriction and was not a separate and additional punishment. It was in effect merely a method of carrying out and effectuating the punishment, analogous to the situation where a soldier would be given a physical duty to perform as punishment and then told how he was to perform it."

The time during which accused was to report suggests strongly that Lieutenant Truman was cognizant of the fact that it is during the evening hours that breaches of restrictions most frequently occur and he intentionally required accused to report semi-hourly during the evening in order to circumvent disobedience of the restriction. The periodical reporting therefore provided an effective means of ascertaining whether accused was complying with the restriction order and was not in and of itself a punishment. It would be ineffectual unless required concurrently with the restriction. The fixing of the period for reporting at every half hour for a duration of four hours each evening for seven days was wholly consistent with the ultimate purpose of the disciplinary action and it was not unreasonable. There was but one punishment imposed upon accused, viz: restriction. Such restriction consisted of (a) remaining in camp for seven days and (b) reporting at half-hour intervals during the four evening hours. The latter (b) prescribed the process by which the restriction was to operate. Two punishments were therefore not imposed. The rule requiring apportionment of punishments has no application.

(f) Defense counsel also asserted that "reporting every half hour is not considered fatigue" and that not being a particular punishment authorized by Article of War 104 or the regulations thereunder it is illegal (R19). As pointed out above, the duty required was incidental to the principal punishment of restriction to limits and essentially a part thereof. Punishments described in the article <u>are not intended to be exclusive of all others</u>, but a punishment not mentioned therein in order to be proper must be <u>similar in nature</u> to those specifically named (JAG 250.3, 13 Jul 1921, Dig.Op.JAG 1912-40, sec.462(4), p.369). The duty of reporting periodically is not only similar in nature to restriction to limits but, as above indicated, is embraced therein.

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In view of the foregoing considerations, the Board of Review is of the opinion that the order of restriction which included the incidental requirement that accused make periodic reports to Charge of Quarters during four evening hours was legal.

The Board of Review is also of the opinion that the evidence clearly establishes willful disobedience of the order by accused. He declared to the company commander "that he just didn't want to report". This statement and attitude displays an intentional defiance of authority and its culpatory effect is self-evident (MCM, 1928, par.134b, pp.148-149; CM ETO 1366 English, supra).

(g) The final question for determination is whether the order was a "command" within the contemplation of Article of War 64 or an order directing the performance of a "mere routine duty."

> "Failure to comply with the general or standing orders of a command, or with the Army Regulations, is not an offense under this article, but under A.W.96; and so of a nonperformance by a subordinate of any mere routine duty." (MCM, 1928, par.134b, p.149) (Underscoring supplied).

See also Winthrop's Military Law and Precedents - Reprint - p.573 and Manual for Courts-Martial 1928, par.152, p.187, citing as an instance of a disorder and neglect by an officer under Article of War 96 "disobedience of standing orders or of orders of an officer when the offense is not chargeable under a specific article" (Underscoring supplied). The example is applicable in principle to the case of an enlisted man.

Although the fact that the order was to be executed in future does not require that disobedience thereof be charged under the 96th rather than the 64th Article of War, neither does the mere fact that a specific order was given by a commissioned officer require that disobedience thereof be charged under the 64th article (JAG 250.4, 17 Jul 1918, Op.JAG 1918, Vol.II, pp.566,567). The following language from the immediately cited opinion is relevant to the discussion:

> "In the case presented the soldier is charged with having disobeyed an order in future 'to be present at roll call.' * * * he can be tried and punished for failure to attend; if the failure occurred under aggravated circumstances, these may properly be alleged for the purpose of increasing the punishment. * * * the charge should not be laid as a violation of the sixty-fourth article of war, for, as indicated by the Manual, a simple offense, such as absence from a prescribed roll call,

can not properly be converted into a capital offense under the sixty-fourth article of war by the mere addition of a specific order to attend the same. The giving of a specific order with a view of bringing the case within the sixty-fourth article of war is impliedly prohibited under the circumstances in question and, regardless of whether the disobedience was wilful and intentional, the offense should be laid under the ninety-sixth article of war, the aggravating circumstances being properly alleged if desirable." (Underscoring supplied).

The performance of the duty ordered here as incidental to the restriction to the company area viz, to report half-hourly to the Charge of Quarters, so far as the record shows, was not required by any regulations or general standing orders of the accused's organization, nor is there any evidence in the record that the punishment of restriction automatically carried with it the duty of periodically reporting to the Charge of Quarters. Such reporting, however, is a usual and satisfactory mode of informing commanding officers throughout the Army that restricted soldiers are complying with their restriction. It is a reversal of an older well established Army custom whereby the Charge of Quarters himself made a periodical check of restricted soldiers to assure their presence within prescribed limits. Although it may not be a typical "mere routine duty" within the meaning of the above quoted provision of the Manual for Courts-Martial, the Board of Review is of the opinion that it is of the same general quality and nature as a "routine" duty, insofar as the applicability of the 64th Article of War is concerned, and that an order to report periodically in conjunction with restriction is therefore not a "command" within the contemplation of that Article.

The fact that in the absence of Lieutenant Truman's specific command accused was under no duty to report to the Charge of Quarters during his restriction does not bring the command within the article. The disobedience of the command was essentially a "simple offense", as would have been a breach of the very restriction of which it was a part. The maximum punishment for breach of restriction is confinement at hard labor for one month and forfeiture of two-thirds pay per month for a like period (MCM, 1928, par.104c, p.100). The principle of the above quoted opinion applies: a simple offense cannot properly be charged as a capital offense under the 64th Article of War merely because a commissioned officer gave a specific order to report, which order accused willfully disobeyed. Nevertheless, accused's deliberate, contumacious failure to report to the Charge of Quarters even once was reprehensible and is punishable under Article of War 96. As stated in CM ETO 1366 English, p.3:

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"Such conclusion 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(MCM,1928, par.134b, p.149; MCM, 1921, par.415, p.355; Winthrop's Military Law & Precedents - Reprint - p.575 and footnote 26)."

In the opinion of the Board of Review, accused's deliberate disobedience of the legal order of his commanding officer to perform the duty of periodically reporting to the Charge of Quarters constituted a disorder in violation of Article of War 96 and the record is legally sufficient to support so much of the court's findings as involve guilt of such an offense.

"Neither the designation of a wrong article, nor the failure to designate any article is ordinarily material, provided the specification alleges an offense of which courts-martial have jurisdiction" (MCM, 1928, par. 28, p.18).

Furthermore, it is inconceivable that any substantial rights of the accused were injuriously affected by this error in pleading, within the meaning of Article of War 37 nor was he misled thereby. He was properly found guilty of the Specification, which clearly alleged a military offense, although the Charge should have been designated a violation of the 96th rather than the 64th Article of War.

9. The offense in violation of the 96th Article of War of which accused has been proven guilty, is most closely related to that of breach of restriction. Accordingly the sentence is excessive to the extent that it exceeds confinement at hard labor for one month and forfeiture of two-thirds of his pay for a like period (MCM, 1928, par.104c, p.100).

10. The denial by the court of the defense motion for findings of not guilty both originally and upon renewal (R18-20,23) was proper.

"If there be any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tends to establish every essential element of an offense charged or included in any specification to which the motion is directed, the motion as to such specification will not be granted" (MCM, 1928, par.71d, p.56; CM ETO 527, Astrella).

The prosecution prior to the motions had introduced substantial evidence fairly tending to establish every element of the offense of willful disobedience of the lawful command of a superior officer (in violation of Article of War 96), the offense charged in the Specification, although under an inappropriate Article of War.

11. The charge sheet shows that accused is 20 years of age, had no prior service and enlisted at New York City 19 May 1942 for the duration plus six months.

12. 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. For the reasons stated, however, 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 involve findings of guilty of the disobedience of the order charged, in violation of Article of War 96 and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for one month and forfeiture of two-thirds of accused's pay for a like period.

B. Franklin Riter Judge Advocate

Judge Advocate

(SICK IN QUARTERS) Judge Advocate

CONFIDENTIAL

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 18 MAR 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 MICHAEL J. REDMOND (12065644), Headquarters and Service Company, 876th Airborne Engineer Aviation Battalion.

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 the disobedience of the order charged, in violation of Article of War 96, be vacated, that so much of the semtence as exceeds confinement at hard labor for one month and forfeiture of two-thirds of the soldier's pay for a like period 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. Inclosed is a form of action designed to carry into effect the recommendation hereinbefore made. Also inclosed is a draft GCMO for use in promulgating the proposed action. Please return the record of trial with required copies of GCMO.

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

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

(Findings and sentence vacated in part in accordance with recommendation of the Assistant Judge Advocate General. GCMO 20, ETO, 27 Mar 1944)

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

BOARD OF REVIEW

ETO 1065

29 DEC 1943

U N I T E D S T A T E S	2ND INFANTRY DIVISION.
v.	Trial by G.C.M., convened at Armagh, Northern Ireland, 3 November 1943.
Captain ASA G. STRATTON, (O-451084), Finance Department, Headquarters 2nd Infantry Division.	Sentence: To be dismissed the service, to forfeit all pay and allowances due or to become due.

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

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

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

CHARGE: Violation of the 85th Article of War.
Specification: In that Captain Asa G. Stratton, Headquarters 2d Infantry Division, was, at or near Belfast, Northern Ireland, on or about 20 October 1943, found drunk while on duty as Assistant Division Finance Officer.

He pleaded not guilty to and was found guilty of the Charge and of the Specification. 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, 2nd Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution was substantially as follows: About 9:00 a.m. 20 October 1943, accused, who was assistant division finance officer of the 2nd Infantry Division, was directed by his superior officer, Major Lenson Bethel, Division Finance Officer, to accompany him to Belfast, Ireland (R6-7). The two officers were to obtain some money and to familiarize themselves with certain new financial procedure. Major Bethel's main purpose in taking accused along was to enable the latter to learn the new financial procedure in this theater (R7-9,13-14). Sergeants Mattson and O'Hearn accompanied them. Upon their arrival in Belfast about 10:30 a.m., accused was given permission by Major Bethel to get a shave, and was told to report to him at the finance office when he had finished (R7). When he appeared at the office about 11:30 - 11:45 a.m., he had not been shaved. For fifteen minutes there followed a discussion about financial matters by accused, Major Bethel and Major W.C.Tankersley who was on duty in the Base Finance Office (R8,22-23).

Major Bethel testified that accused spoke more or less loudly and kept repeating himself. "He asked questions pertaining to a matter that was taken care of and came back and asked the same question ***". In the opinion of Major Bethel he was drunk, and not in such a condition that he could perform the duty of learning the new procedure (R8-9). He did not smell alcohol on his breath (R14).

Major Tankersley testified that accused's breath smelled of alcohol and he was very loud and boisterous in his manner. "*** he didn't seem to want to listen about how finance was worked over here and had various ideas and I tried to tell him they were not true." He asked one or two questions two or three times (R23). In Major Tankersley's opinion he was under the influence of alcohol (R23,26) but he could not say he was drunk (R25). "In my opinion if a man is under the influence of it, he does not have control of his faculties" (R26). Major Tankersley was of the further opinion that accused was not then in condition "to take charge of any amount of money. Not public funds, at least" (R28).

Finally Major Bethel decided there was no use in continuing and privately told accused to stop drinking, get something to eat and then to get in the car and stay there. He also instructed the two sergeants "to stay with him." After Major Bethel's return from lunch, accused again appeared at the office about 2:00 p.m. His actions and appearance were the same, he was unshaven and in Major Bethel's opinion he was still drunk. He instructed him to return to the car (R8-10). Fifteen or twenty minutes later Majors Bethel and Tankersley went down to the street where they found accused in the car. As the two sergeants had gone to the post office, Major Bethel told accused to wait in the car until they returned and then to come to a certain bank. After Major Tankersley had told the driver how to get there, Majors Bethel and Tankersley walked to the bank which was about four blocks away. In Major Bethel's opinion accused was still drunk and Major Tankersley was of the opinion that he was still under alcoholic influence. He was however, courteous to Major Tankersley (R10,

14-15,23-24).

About 3:15 - 3:30 p.m., Sergeant O'Hearn appeared at the bank and as the result of his conversation with Major Bethel, the latter went to the Dark Horse pub where he found accused whose chin was "skinned". He was "yelling at the top of his voice" and from his actions and speech, Major Bethel concluded that he was drunk (R11,16,18-21). They then drove back to the finance office, secured some cash and returned to Armagh. Accused slept in the rear seat during the journey, and remarked when they arrived at camp "We're here, so what." When Major Bethel ordered him out of the car he walked unassisted into his quarters (R11-12). He was on a duty status that day from approximately 9:00 a.m. to about 6:00 p.m. (R12).

4. For the defense, Technicians 3rd Grade Robert A. Mattson and John O'Hearn, Headquarters 2nd Infantry Division, testified in substance that they walked around with accused in the morning trying to find a barber shop but were unsuccessful because "We weren't too sure what one looked like over here." (R29,34-35,45). Before accused reported to the finance office at 11:30 a.m., he had three jiggers of whiskey. The jiggers were of the usual size and appeared to be of a one-ounce capacity (R29,45). They first went to "Robinson's place" where accused had two whiskies and each of the witnesses drank beer. When they left Robinson's, accused said he needed some cigarettes and entered a small store where he purchased his third drink (R40-41,43,52-55). Both witnesses testified that when accused was at the finance office between 11:30 a.m. - 12:00 noon, his behavior was normal, his questions were logical and pertinent to matters of finance, and in their opinion, he was not drunk (R30-31,45-47). About noon Major Bethel told Sergeant Mattson to go with accused and to stay with him. Mattson replied "Don't worry, I'll take care of him," meaning that he would "see to it that he wouldn't drink any more" (R39). About 2:00 p.m. accused went up to the finance office and left the two soldiers on the street with the car and driver. Accused found them gone on his return and when they returned, he admonished them for having left as he had instructed them to remain with the car. He was normal at that time and said that they would go to the bank to meet Major Bethel and obtain some money (R33,39). On the way to the bank about 2:45 - 3:00 p.m. accused was directing the driver. They became lost and he started to leave the car to inquire the way from a passer-by. He tripped, catapulted out of the car, struck the pavement very hard and received a cut on the chin (R32,36-37,45,47-49,52,54). He was then "*** more or less in a dazed condition ***". When O'Hearn helped him to get up, his chin was cut and bleeding and he said "Take me in there", pointing to the Black (Dark) Horse public house. He sat down on a chair and took one drink, his fourth that day, while Mattson tried to stop the bleeding. O'Hearn left to get Major Bethel (R33,43-44,47). Accused slept most of the way home (R54).

Up to the time of his fall, accused had consumed but three drinks, and had no drinks from the time he left the finance office for

lunch until after he fell on the pavement (R31,46). Both Mattson and O'Hearn testified that up until the time of the accident, his behavior had been normal, he was courteous to his superiors, he performed his duties in the usual manner, and in their opinion he was not drunk (R32, 46-47). Mattson testified that in his opinion his dazed condition after the accident was because of the fall and not the result of drinking alcohol (R33), and O'Hearn was of the opinion that the fall itself was caused by an accidental stumble and not by drunkenness (R48-49).

Captain George Mandeville, Medical Corps, 2nd Infantry Division, examined accused in the e vening of 21 October 1943 at the request of two officers who occupied the same billet with accused. He found on his chin "a laceration and contusion and an irregular cut" about one and one-half inches long. Accused told him that he had received the cut as the result of an accidental fall from a vehicle the previous afternoon, that he remembered nothing until a few hours later, that he faintly recalled being ordered to get out of a vehicle in front of his quarters but that "*** things were very vague to him, and he didn't know where he was or what he was doing." He felt the same way during that evening (20 October), and was taken to his quarters and put to bed. His mind was still "foggy" on the e vening of 21 October. Captain Mandeville's examination disclosed that accused's reflexes were very sluggish. His answers were not very clear and concise, which appeared unusual, the captain having spoken to him on several previous occasions. The rest of the physical examination was "practically negative." The captain's diagnosis was that accused "*** had a fairly severe concussion due to the fall and striking on the chin ***. The history that he gave me was entirely typical of moderate concussion of the brain. I had the impression that he was still suffering from this concussion." On the following day (22 October) his reflexes "had returned practically to normal" and his answers to questions were normal. Asked if accused's condition on 21 October could have been caused by drinking four jiggers of whiskey on 20 October, Captain Mandeville testified "I have never seen the effects of alcohol produce that type of reaction and, secondly, I have never seen them last that long." With reference to any possible injury to the jaw bone he testified "It would be impossible to detect that because the bone was not protruding. He didn't make any complaints." (R56-59).

Accused, upon being advised of his rights, was sworn as witness in his own defense and testified in substance that on the morning of 20 October he and the two sergeants had traveled five or six blocks but could not find a barber shop. Before he went to the finance office he had three drinks. The jiggers used appeared to be of one-ounce capacity. He then reported to Major Bethel at the finance office and was especially interested "in the gain or loss in the exchange of money." He did repeat a number of questions because he did not understand certain facts about financial procedure "over here". Major Bethel did not privately mention to him anything about drinking but had informed him that it was time to go to lunch. Accused paid for the lunches of the two sergeants and did not

drink anything at that time. Prior to the time he left the finance office, Major Bethel had said that the only thing to do was to obtain some money, that "After lunch you can kill time and come back around three o'clock to the car here." After 2:00 p.m. when it was time to go to the bank, accused went upstairs to the finance office and informed Major Bethel that they were ready. He was told to return to the car and wait. He did so and discovered that the two sergeants had gone to the post office. The two majors appeared, gave the directions to the bank and walked away. When the two sergeants returned he did not admonish them but "was peeved" because they had left when they knew that "we were due at the bank." On the way to the bank they became lost. Accused ordered the driver to stop the car and while attempting to get out he stumbled and injured his chin. After he fell he "was blacked-out" and did not realize until the following morning that his chin was injured. Major Bethel had taken him to Belfast in order that he could "find out the set-up of the finance office in the ETO." Asked on cross-examination, why he had stopped to get two drinks when he was unable to find the barber shop, he testified "We had just completed approximately three weeks of traveling -- this isn't an excuse -- and I was feeling considerably bad and thought in order to do my work better, two or three drinks would help. I'll admit I didn't feel any better afterwards, but I don't see how they affected me". He had been an officer in the Army since 31 December 1941 (R60-61).

5. The evidence was legally sufficient to sustain the findings of guilty of the offense alleged. Accused, who was assistant division finance officer had been directed by Major Bethel to accompany him to Belfast for the purpose of learning certain new financial procedure, and was on a duty status while in that city.

> "Drunkenness upon any occasion of duty properly devolved upon an officer or soldier by reason of his office, command, rank or general military obligation" (Winthrop's Military Law & Precedents - Reprint - p.613).

is the offense denounced by Article of War 85.

> "The term 'duty' as used in this article means of course military duty. But, it is important to note, every duty which an officer or soldier is legally required, by superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty" (Ibid. pp.614-615; Manual for Courts-Martial, 1928, par. 145, p.159).

When he appeared at the office at 11:30 a.m. he smelled of alcohol, was

very loud and boisterous in his manner, and kept repeating questions which had already been answered. In the opinion of Major Bethel he was drunk and not in a condition to perform his duties. Although Major Tankersley could not say that he was drunk, he did consider him under the influence of alcohol, and testified that in his opinion if a man is under such influence he does not have control of his faculties. Accused's condition was not such that he could have been intrusted with public funds. Major Bethel was of the opinion that he was still drunk at about 2:00 - 2:30 p.m. and Major Tankersley testified that he was then still under the influence of alcohol. Major Bethel further testified that when he went to the Dark Horse "pub" about 3:15 - 3:30 p.m. he concluded from the speech and actions of accused, who was yelling at the top of his voice, that he was also drunk at that time.

> "*** any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the Article" /AW 85/ (Manual for Courts-Martial, 1928, par.145, p.160).

The evidence for the defense, including that of accused, shows that he took three drinks of whiskey before appearing at the finance office at 11:30 a.m. The jiggers used appeared to be of a one-ounce capacity. He had one drink at the Dark Horse "pub" after his fall. Both Mattson and O'Hearn testified that prior to his fall in their opinion accused's behavior was normal, he was courteous to his superiors, his questions at the office pertaining to finance were logical, and he was not drunk. Mattson believed his dazed condition after the accident was occasioned by the fall and not the result of drinking alcohol. O'Hearn was of the opinion that the fall was purely accidental and not caused by drunkenness. The issue of drunkenness was one of fact for the sole determination of the court and in view of the evidence, the Board of Review will not disturb its findings.

6. Attached to the record of trial is a request for clemency by accused based, in substance, upon his past record of service for nine months as an enlisted man, three months as an officer candidate and approximately twenty-two months as an officer. Also attached at his request is a true copy of his officer's classification card W.D. AGO form No. 66-1, and a recommendation for his promotion to the grade of Major by the Commanding General, 2nd Infantry Division, dated 16 June 1943, together with the indorsements thereon.

7. The charge sheet shows that accused is 26 years of age and that he was commissioned 31 December 1941.

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 is legally sufficient to support the findings of guilty and the sentence. A sentence of dismissal is mandatory upon the conviction of an officer of being drunk on duty in time of war in violation of Article of War 85 (CM 255639 (1942), Bul.JAG., Oct 1942, Vol.I, No.5, par.443, p.275).

B. Franklin Riter Judge Advocate

Judge Advocate

Ellwood W. Sargent Judge Advocate

(370)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 DEC 1943 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Captain ASA G. STRATTON (O-451084), Finance Department, Headquarters 2nd Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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. In addition to dismissal from the service the sentence imposed by the court includes forfeiture of all pay and allowances due or to become due. The sentence is entirely legal in view of the conviction of a violation of Article of War 85. An examination of cases of conviction by courts-martial of officers in the United States wherein the President has acted as the confirming authority, discloses that that part of a sentence which imposes total forfeitures has almost uniformly been remitted. Such a remission would afford the officer involved the means with which to pay his obligations which are outstanding at the termination of his service, as well as the cost of transportation to his home. If such a policy has virtue in the United States, there is even stronger reason for it here in a foreign land distant from home. Attached to the record of trial at the request of accused is a true copy of his officer's classification card W.D.AGO form No. 66-1, from which it appears that the character of performance of accused's duties from shortly after the time he became an officer, 31 December 1941, until 30 June 1943 has been excellent. Also attached at his request is a recommendation for his promotion to the grade of Major by the reviewing authority, the Commanding General, 2nd Infantry Division, dated 16 June 1943 together with the indorsements thereon. The recommendation was returned without action by 2nd indorsement dated 2 July 1943 because of the absence of a position vacancy within the organization, and the impossibility of reassignment from units alerted for oversea movement (WD, Circular #161, 26 May 1942, par.2a; WD, Circular #79, 19 March 1943, sec.II). A study of War Department court-martial orders indicates rather clearly that the President would suspend execution of the sentence to dismissal - the prior record of the officer is excellent, the drunkenness was not extreme and the duty was not one which depended solely on the accused for its performance but was merely to accompany his superior to an informal conference.

Your attention is invited to the foregoing in the event that you should desire in any way to modify your action prior to publication of the 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 1065. For convenience of reference please place that number in brackets at the end of the order: (ETO 1065).

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

(So much of sentence as involves total forfeitures remitted. Sentence ordered executed. GCMO 2, ETO, 7 Jan 1944)

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

BOARD OF REVIEW

18 DEC 1943

ETO 1069

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 (NMI) BELL (34327756), Company C, 390th Engineer Regiment (GS).	Trial by G.C.M., convened at Burton-on-Trent, Staffordshire, England 8 November 1943. Sentence: To be hanged by the neck until dead.

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

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1. The record of trial in the case of the 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 Thomas (NMI) Bell, Company "C", 390th Engineer Regiment (GS) did at Burton-on-Trent, Staffordshire, England on or about 3 October 1943, forcibly and feloniously, against her will, have carnal knowledge of IVY DOREEN CRANFIELD.

He pleaded not guilty to and was found guilty of the Charge and the Specification, three-fourths of the members of the court concurring. Evidence of one previous conviction by special court-martial for willful disobedience of a lawful order of a non-commissioned officer in violation of Article of War 65 was introduced. He was sentenced to be hanged by the neck until dead, all members of the court concurring. The reviewing authority, the commanding officer, Western Base Section, Services of Supply, European Theater of Operations 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 the execution thereof pursuant to Article of War 50½.

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

It was stipulated by the prosecution and defense that accused "Thomas (NMI) Bell, SN. 34327756, is a Private in Company 'C', 390th Engineer Regiment (GS), and is in the military service of the United States" (R56).

At about 10:15 p.m. 3 October 1943, Miss Ivy D. Cranfield, 54 Dale Street, Burton-on-Trent, England, 17 years of age, was sitting on a bench in Memorial Park in that town with Miss Dorothy Ford, 16 years old, 22 Baker Street, John V. Blackshaw, 19 years of age, 498 Anglesey Road and George A. Price, a British soldier, 500 Anglesey Road, all of Burton-on-Trent. A colored soldier (later identified by all of the above named persons as accused) walked up and down before them three or four times, bent over and peered into their faces. Price remarked that the soldier appeared to be lost whereupon the accused placed his hand upon Price's arm and asked him why he thought he was lost. Miss Cranfield told accused, who had been joined by another colored soldier "**** not to get offended, that we like to be friendly with everyone." Blackshaw and Miss Cranfield walked away but returned when they observed that Miss Ford and Price were still talking to the soldier. Blackshaw told Miss Ford that her father was waiting for her and the two couples went to the corner of the park, followed by both soldiers. Price and Miss Ford then went in another direction (R18,31,34,42-43).

As Miss Cranfield and Blackshaw walked down a path toward Lichfield Street the "big" colored soldier (accused) followed them, but the "small one" went away. At the corner accused seized Miss Cranfield's arm and said "What did you mean by that?" She replied "Oh, we didn't say anything; it wasn't us." He replied "Don't you scream or else I will kill you." She observed something in his left hand which seemed "more like a knife ***" (R18-19,34-35). She tried unsuccessfully to seize the arm of another soldier who was passing. She then unfastened her coat and tried to slip it off and escape but he told her to fasten it, released her arm and caught hold of the collar of her dress while she did so. He then said "Come with me or I will kill you." (R19). She told Blackshaw that she did not want to go (R.37), and tried to pull away from the accused (R39). Blackshaw then observed that accused had a "slasher, cut-throat" razor of a type where the "blade part bends back into the handle." It was shining in the dark. "He had got it in his right hand between his fingers, and the blade bent back over his fingers." He was holding the girl's arm with one hand and the razor with his other (R38,40). Two other soldiers came up and said "Hello, Bill." When accused told one of them to "take care" of Blackshaw, the two soldiers

caught his arm and made him walk a short distance between them. They told him that if a white man took a white woman from a colored soldier, the colored soldier would kill the white man, and offered him a cigarette. He turned around and saw that accused and Miss Cranfield had disappeared. After the arrival of the two additional soldiers she had not asked Blackshaw's assistance in any way nor had she shouted, or made any outcry when she left. Blackshaw tried to get away from the two men but as soon as he freed one arm they seized the other. When he finally got away he did not see anyone, went home and got his "mate" who lived next door, went to the girl's house and then to the police station (R19, 34-35,37-41).

Accused took the girl down Abbey Street to the rear gates of an inn where he said "Will you give me sugar?" When she asked him what he meant he replied "Don't try and be funny. Remember, I still have the knife in your back." She told him to let her go, and that she was going home. He picked her clothes up but she knocked his hand down. As two colored soldiers passed he put his hand over her mouth. When the girl again told him she was going home and started to walk down the street, he seized her arm and took her behind some houses on Fleet Street (R19).

There, they met Margaret Harfield, 4 Fleet Street, Burton-on-Trent, who testified that she was returning to her home about 10:30 - 10:45 p.m. and found a colored soldier and girl in her yard. When she ordered them to leave, the girl caught hold of Miss Harfield's arm and said "Oh, save me". When Miss Harfield asked the soldier to go he "muttered a few words and refused". For about ten minutes:

> "We stood there like fools, nobody speaking to anybody else, until I got tired of it. It would have been the simplest thing for me to wake the whole yard, but Miss Cranfield never offered to sing out or scream or anything else. ****. She mentioned something to the soldier, 'I told you my father would be coming,' but she did not sound too distressed at that time."

She said nothing further about saving her. Miss Harfield did not see any weapon in the soldier's hand and he did not threaten the girl. It appeared that "Either he was holding her arm or she was holding his". Finally Miss Harfield "got tired of it," said that she would collect her key and told the girl that she could come indoors with her if she wished to do so. "There was no move", so she got her key and went around to her front door. Upon returning to see if they had left, she saw the couple walking up the alleyway apparently arm in arm (R46-49,51-52).

According to Miss Cranfield's testimony, when she whispered to Miss Harfield "Help me, please" the latter told accused "Let go of her.

If you don't I will call my father." He replied "Go ahead then; call your father." He was holding the right arm of Miss Cranfield who did not know whether or not he still had the weapon which she had previously noticed. She made no attempt to escape because she was frightened, and did not scream when Miss Harfield left to get her key because the latter said she was going to get her father. She did not wait for the father to arrive because accused was gripping her arm, pulled it and she could not get away from him (R19,57-58).

Holding her all of the time, he took her from the rear of the houses into Green Street near some flood gates. Just before they reached a wall she escaped from him but slipped, fell flat on her stomach and was not able to get up for a few minutes. He threatened to kill her, helped her up and put her on top of a wall the height of which did not exceed her own. He then climbed over the wall and pulled her down. She did not jump from the wall as he was climbing over, because she was afraid of falling and he frightened her. Although she did not know whether he still had the knife, he had previously "seemed dangerous" with it and had kept threatening her while in Memorial Park and in Abbey Street (R19,23-24,59,61).

After they were over the wall he knocked her down on the grass and told her to get undressed. She refused, whereupon he removed her knickers and lifted up her clothes while she told him to get off and tried to push him away by his shoulders. She was so frightened that she could not scratch him. She was terrified because although he did not then threaten her, he had threatened to kill her while in the park and "by these big gates" and she did not know whether he still had the knife. He knelt over her, one knee on each side of her legs, unfastened his tunic, removed his belt and unfastened his trousers. When he was on top of her, she caught hold of his hair, told him to get off, that he was hurting her. He told her to "shut up" and put his hand over her mouth. She did not cross her legs but "had them stiff, straight out." He then "had connections" with her while she tried to push him off (R19,23,59-61). The following questions and answers occurred on direct examination of Miss Cranfield:

"Q. Did he force his knees between yours?
A. Yes.
Q. Then did he insert his penis into your private parts?
A. Yes.
Q. How long did he continue in that position?
A. A few minutes.
Q. Did he use force to do that?
A. Yes ***.
Q. Was that without your consent?
A. Yes, sir.
Q. And forcibly?
A. Yes.
Q. You never at any time consented?
A. No." (R19,20).

Accused then dressed, told her to get dressed and when she had done so, put her over the wall and told her to go home and to tell no one about the incident. She was crying and met two Englishmen, one of whom she asked to walk home with her "as there was a colored soldier following me" (R20). She arrived at her home at 54 Dale Street about 11:15 - 11:20 p.m., and called to her father, James W. Cranfield who found the girl in a very nervous, hysterical condition. Her right stocking was ripped and her hand was cut with gravel rash. She told him that a colored soldier had got hold of her and dragged her along Fleet Street. She then nearly broke down and her father then took her to the police station (R20,28,30). She was there examined around midnight on the night of 3 October by Dr. Francis L. Pickett, 181 Hornblow Street, Burton-on-Trent, Division Police Surgeon. His examination disclosed that she "had recently ceased to be a virgin", and that her hymen was then torn and actually bleeding, which indicated that it had been torn within a very short time. He found blood on parts of her body, her thighs, on the pubic area and on her clothes. The blood was actually coming down on her thighs at the time of his examination. In Dr. Pickett's opinion the injury to her genitals occurred "within an hour or so" of the examination and could have been caused by the insertion of a male penis (R26-27).

Prior to 8 October 1943, Miss Cranfield attended two identification parades when accused was absent and she "picked no-one out." Price and Blackshaw attended a parade of 211 colored troops from which accused was also absent and did not identify anyone. On 8 October at an identification parade of eight colored soldiers, Miss Cranfield without hesitation identified accused who was at the end of the line on the right. He was in working clothes, "slops", of a greenish color and wore a hat with a brim "all the way round, a small one". A smaller man was also then present who wore "slops". Some of the other men in the line wore their uniforms. At the trial she also identified accused as the man whom she had previously identified on 8 October, and who had attacked her on the evening of 3 October. When identified by Miss Cranfield at the trial, accused was sitting with other persons at the end of the court room and another colored soldier was seated by defense counsel (R20-22,53-55).

At the identification parade on 8 October Miss Ford also without hesitation identified accused who was the last on the right in a line of eight men. At the trial, after walking about the court toom she identified him as the man whom she had seen at the identification parade and who "took Ivy off". After he had been identified by Miss Ford, accused changed places with the colored soldier who had been seated by defense counsel (R31-33,53).

On 9 October, at an identification parade of eight men, Blackshaw and Price promptly identified accused. Blackshaw testified that accused had been "the second from the end on my right hand," and that all the men in the line were dressed alike and wore a greenish colored working jacket "on the top part." The man he had selected was the one who had taken Miss Cranfield away. He also identified accused at the trial. Price

testified that at the parade accused had worn a forage cap and "the walking-out uniform" with a yellow ribbon on the left side of his jacket. After all the colored soldiers present at the trial had been asked to rise, Price identified accused as the man whom he had previously selected at the identification parade and whom he had seen in Memorial Park on the evening of 3 October (R35-36,43-44,53).

At the identification parade on 9 October, Miss Harfield had also without hesitation identified accused as the man whom she had seen with Miss Cranfield on the evening of 3 October (R47,53). At the trial she selected accused and another soldier and both spoke at her request. She then identified accused as the man who had accompanied the girl, but testified that she was not positive of her identification because at the parade he "stood out amongst the others more than he does now". (R47-51).

Police Inspector Horace J. Brookes, stationed at Burton-on-Trent, who had conducted the identification parades, interviewed Miss Cranfield's father, her step-mother, the "young man with whom she had been keeping company," and Miss Ford, and found that her reputation in the community for truth and veracity was good (R53-54).

4. For the defense accused, after being advised of his rights (R62), made an unsworn statement in substance as follows:

On 3 October he took the convoy from Sudbury about 2-2:30 p.m., arrived in Burton about 2:45 p.m. and walked around the town with another soldier. They later separated and after 6 or 7:00 p.m. he went to the park. About 9:00 p.m. he went with Private Cox to a pub named the "Star", and at closing time, about 10:30 p.m. returned to the corner where the convoy was and talked to Private Cox. At 11:00 p.m. the convoy "packs up". He got on and returned to camp. While at Burton he saw but one girl, June, who promised to bring his watch to town on Tuesday evening or to give it to one of her friends should she not be able to bring it herself. On Monday (4 October) he was sent to Liverpool but was later brought back to camp and told to dress in fatigues. "The rest of the boys was in their O.D's." "**** this girl come and had one boy speak one or two words and then she came to me, and this bobby has me to talk for a while.****. I did not know what it was all about" (R63).

On the evening of 3 October, Private First Class Watie L. Cox, Company C, 390th Engineer Regiment, saw accused on a corner near the park in Burton-on-Trent at about 6:45 p.m. He observed him in the pub named the "Star" at about 10:00 p.m., and at some time between 10:30 and 11:00 p.m. saw him again on a corner by the park "when the convoy left." The convoy was situated about 50 yards from the park. Cox did not speak to accused who was with Private Lee White, and soldiers named De Chayser, Lee Colston and Lee Booker. A large gathering of soldiers was then present. About 10:45 p.m. Cox left on the first convoy which took some of the men to Sudbury. It then returned to take the rest of the soldiers. He did not know whether accused returned to camp with the convoy. He saw

a pocket-knife in accused's possession the following day, the blade of which was "not very long," but had never seen him with a razor (R64-68).

5. Miss Audrey June Gallagher, 52 Lansdowne Road, Swadlincote, Burton-on-Trent, a witness for the prosecution in rebuttal had had a wrist-watch mended for accused. On the evening of 3 October in Memorial Park she met accused who was alone and who said "Hello June, you have got something I want, and if you don't bring it on Tuesday you need not come to town again." Miss Gallagher "*** guessed it was gone 10 because the pubs were closed" and she saw people leaving them (R69-72).

6. The identity of accused as the man involved in the commission of the offense alleged was clearly established by the evidence. The victim, Miss Ford, Price and Blackshaw promptly identified him both at the police parades and at the trial. Miss Cranfield, Price and Blackshaw had attended previous parades when accused was absent, and did not identify anyone. Miss Harfield also without hesitation identified him at the police parade, and she picked out accused at the trial although her identification was less positive. The contention by accused in his unsworn statement that the only girl he saw on the evening of 3 October was Miss Gallagher, that he returned to camp on the convoy about 11:00 p.m., and that at the identification parade he "did not know what it was all about" created an issue of fact for the sole determination of the court, which determination being amply supported by competent evidence will not be disturbed by the Board of Review (CM ETO 492, Lewis; CM ETO 503, Richmond; CM ETO 531, McLurkin; CM ETO 559, Monsalve).

7. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM., 1928, par.148b, p.165). The facts that violence was used and that the victim did not consent were most convincingly established by the evidence. The young girl, 17 years of age, was seized near the park by accused who threatened to kill her if she screamed. She saw something in his hand which appeared to be a knife or razor. Blackshaw testified that it was a razor. She tried to escape from accused by slipping out of her coat, but was ordered to refasten it by accused who shifted his grip to the collar of her dress. He told her to accompany him and again threatened to kill her. She tried to pull away from him and attempted to seize the arm of a passing soldier. When Blackshaw had been taken away by two other colored soldiers, accused took the girl down the street, asked her for "some sugar", and told her to remember that he still had the knife in her back. He picked up her clothes but she knocked his hand down. He put his hand over her mouth as two soldiers passed. When she said she was going home and started to walk away, he seized her arm and took her behind some houses where they met Miss Harfield whom she asked to save her. After that episode, still gripping her arm he took her to the wall, where she made still another attempt to escape but fell flat on her stomach and could not get up for several minutes. Again threatening to kill her he put her over a wall, knocked her down on the grass and ordered her to undress.

When she refused, he removed her knickers himself while she tried to push him away. He knelt over the girl, undressed himself and laid on top of her. When she seized his hair, and told him to get off, he told her to "shut up" and again put his hand over her mouth. During the sexual intercourse that followed she tried to push him away.

Miss Cranfield explained her silence before Miss Harfield after she had asked her aid, her failure to wait for the supposed arrival of Miss Harfield's father, and the fact that she did not escape from the top of the wall when accused was climbing over it, by the fact that she was then terrified. Accused had previously threatened to kill her on two or three occasions, had what appeared to be a knife, and "seemed dangerous" with it. She did not know whether he still had it in his possession. He was gripping her arm while they were with Miss Harfield and pulled her away after the latter's departure.

The circumstances to which Miss Cranfield testified fully justify the inference that she did not in fact consent and that accused had carnal knowledge of her by force. The evidence fully warrants the findings of guilty of the said Charge and of the Specification thereunder (CM ETO 969, Davis; CM ETO 774, Cooper; CM ETO 611, Porter).

The fact that penetration had occurred shortly before the physical examination of Miss Cranfield during the late evening of 3 October was established by the testimony of Dr. Pickett that she "had recently ceased to be a virgin," that her hymen was then bleeding which showed that it had been torn within a very short time, and that in his opinion the injury could have been caused by the insertion of a male penis.

8. (a) Toward the end of his direct examination of Miss Cranfield, the trial judge advocate asked several grossly leading questions hereinbefore set forth, concerning the force used by accused and the lack of consent by the victim during the actual consummation of the act alleged. The law member cautioned him not to "lead the witness quite so much" (R19-20). No objection in this respect was entered by the defense. Accused's guilt of the offense alleged was clearly established by other, competent evidence, and his substantial rights were, therefore, not injuriously affected by the evidence adduced by the use of these leading questions.

(b) During the re-direct examination of Miss Gallagher by the prosecution, she testified that prior to 3 October when she first met accused he "asked me for some sugar", and that this was the reason she had not been with him since that time. On re-cross-examination she testified that the term "sugar" was generally used in Burton with reference to sexual intercourse, that accused had then made no attempt to force her and that nothing further occurred after she refused his request (R70-71). This testimony constituted an explanation of accused's request to Miss Cranfield for "some sugar" as well as evidence of a

solicitation for sexual intercourse by accused. This evidence of prior solicitation by accused of another girl was immaterial to the issue involved and should not have been admitted. However, in view of all the evidence which fully warranted the finding of guilty of the offense alleged, the admission of such evidence, although erroneous, did not injuriously affect the substantial rights of accused.

(c) On direct examination by the prosecution, Police Inspector Brookes testified inter alia that he had made several inquiries in the community where Miss Cranfield resided and found that her reputation for truth and veracity was good. The character of the girl had not previously been impeached but the defense made no objection with reference to the admissibility of such evidence. On cross-examination by the defense, he testified that his conclusions as to her reputation for truth and veracity had been reached as the result of inquiries made of the girl's father and step-mother, her "young man" and Miss Ford. Under certain circumstances it has been held that the introduction of character testimony to support the character of an unimpeached witness is reversible error even in the absence of an objection by the defense (CM 201710, Reynolds; CM 190259, Sheffield). However, the Board of Review is of the opinion that in the instant case accused's guilt of the offense alleged was so convincingly established by the evidence that such erroneous admission of evidence as to Miss Cranfield's reputation for truth and veracity did not injuriously affect his substantial rights (AW 37).

9. The charge sheet shows that accused was about 23 years eleven months of age at the time of the commission of the offense. He was inducted 10 October 1942 for the duration of the war plus six months, and had no prior service.

10. 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 rape is death or life imprisonment as the court-martial may direct (AW 92). The sentence that accused be hanged by the neck until dead is legal (CM ETO 438, Smith; CM ETO 255, Cobb; CM ETO 969, Davis; MCM., 1928, par. 103a, p.93).

B. Franklin Potter, Judge Advocate

Judge Advocate

Ellwood K. Sargent, Judge Advocate

CONFIDENTIAL

(382)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 18 DEC 1943 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Private THOMAS (NMI) BELL (34327756), Company C, 390th Engineer Regiment (GS), 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 1069. For convenience of reference please place that number in brackets at the end of the order: (ETO 1069).

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 28, ETO, 22 Dec 1943)

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

BOARD OF REVIEW

ETO 1073

13 DEC 1943

U N I T E D S T A T E S	EASTERN BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private JOHN J. SANDERS (35604146), 254th Port Company, Transportation Corps.	Trial by G.C.M., convened at Grimsby, Lincolnshire, England 8 November 1943. 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

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

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

CHARGE: Violation of the 93d Article of War.
SPECIFICATION: In that Private John J. Sanders, 254th Port Company, did, at or near Immingham, Lincolnshire, England, on or about October 1, 1943, with intent to commit a felony, viz, rape, commit an assault upon Irene Mathews, of Immingham, Lincolnshire, England, by wilfully and feloniously striking the said Irene Mathews in the face with his fist, and by placing his hand under her clothes against her person.

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

ment to five 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 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.

4. The serial number of accused as it appears on the charge sheet and in the action of the reviewing authority is 35604146. The company commander of accused, Captain Charles W. Gilmore, Transportation Corps, 498th Port Battalion, testified that accused's serial number as shown on his service record is 35604136 (R11). The personal clothing of soldiers were marked with the last four digits of their serial numbers. The number on the trousers worn by accused on the morning following the commission of the offense was 4136 (R12). Informal inquiry made by the machine record unit, SOS, ETOUSA, to the personnel officer of the 498th Port Battalion discloses that the serial number of accused as shown on his service record is 35604146.

5. The charge sheet shows that accused is 24 years of age. Confinement in a penitentiary is authorized for the offense of assault with intent to commit rape (18 USC, sec.455). As accused is under 31 years of age and the sentence as approved by the reviewing authority is under ten years, the designation of the Federal Reformatory, Chillicothe, Ohio is correct (War Department Circular #291, 10 November 1943, sec.V,3a).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 13 DEC 1943 TO: Commanding Officer, Eastern Base Section, SOS, ETOUSA, APO 517, U.S. Army.

1. In the case of Private JOHN J. SANDERS (35604146), 254th Port Company, 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 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. 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 1073. For convenience of reference please place that number in brackets at the end of the order: (ETO 1073).

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 1092

22 DEC 1943

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 586, 3 November 1943.
Private FRANK O. SUSSEX-LOASBY (10600946), 423rd Signal Company, Aviation, Headquarters VIII Air Force.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. The Eastern Branch, United States Disciplinary Barracks, Beekman, 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 I: Violation of the 96th Article of War.

Specification 1: In that Private, then Technician Fourth Grade, Frank O. Sussex-Loasby, 423rd Signal Company, Aviation, HQ., Eighth Air Force, did, at AAF Station 586, APO 633, U.S. Army, on or about 10 April 1943, wrongfully, unlawfully and without authority, appear in the uniform of an officer of the Royal Air Force.

Specification 2: In that ********, did, at AAF Station 586, APO 633, U. S. Army, on or about 21 July 1943, with intent to deceive a duly constituted board of officers, convened for the purpose of examining candidates for commission in the Army of the United States, officially state to the said board of officers that he had been awarded the British Distinguished Flying Cross for shooting down eight or nine German planes in Greece; that he had been a Spitfire pilot in Crete, Greece and

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Egypt; that he had been an Acting Flight Lieutenant in the Royal Air Force Fighter Command; and that he had been sent to the United States in the capacity of Flight Lieutenant to do specialized work in connection with his training; which statements were untrue and known to be untrue by the said Private, then Technician Fourth Grade, Frank O. Sussex-Loasby.

Specification 3: In that ********, did, at London, England, on or about 30 June 1943, with intent to deceive Mrs. Helen Marg, American Red Cross, and to obtain certain ribbons representing the British Distinguished Flying Cross, the George Cross, the Africa Star, the Greek Medal, and the 1939-1943 Star, wilfully, wrongfully, unlawfully, falsely and fraudulently make and write in its entirety a certain paper in the following words, to-wit:

"EIGHTH AIR FORCE HEADQUARTERS
ADJUTANT GENERALS OFFICE.
JULY 28th 1943

SUBJECT: PERMISSION AND VERIFICATION FOR F. SUSSEX-LOASBY, T/4, 10600946 TO WEAR THE MEDALS WON BY HIM FOR SERVICE WITH THE BRITISH.

TO: ALL CONCERNED.

1. F. SUSSEX-LOASBY REQUESTED PERMISSION TO WEAR THE MEDALS WON BY HIM FOR SERVICE WITH THE BRITISH DURING THE YEARS 1940 TO 1943.

2. INVESTIGATION OF THESE CLAIMS THROUGH AIR MINISTRY, ROYAL AIR FORCE WHITEHALL SHOWS THAT THIS SOLDIER IS ENTITLED TO WEAR THE FOLLOWING MEDALS:

1. GEORGE CROSS
2. DISTINGUISHED FLYING CROSS
3. AFRICA STAR
4. 1939-1940 STAR

HE IS ALSO ENTITLED TO WEAR THE GREEK MEDAL OF VALOUR AND THE E.T.O.

2. PERMISSION IS GRANTED.

/s/ James B. Gordon
JAMES B. GORDON
LT.COL., A.G.D."

Specification 4: In that ********, did, at the Princess Gardens Red Cross Club, London, England, on or about 30 June 1943, with intent to deceive Mrs. Helen Marg, American Red Cross, and to obtain ribbons representing the British Distinguished Flying Cross, the George Cross, the Africa Star, the Greek Medal, and the 1939-1943 Star, wilfully, unlawfully, wrongfully and fraudulently offer and deliver to the said Mrs. Helen Marg as true and genuine, a certain paper in words as follows:

"EIGHTH AIR FORCE HEADQUARTERS
ADJUTANT GENERALS OFFICE.
JULY 28th 1943

SUBJECT: PERMISSION AND VERIFICATION FOR F. SUSSEX-LOASBY, T/4, 10600946 TO WEAR THE MEDALS WON BY HIM FOR SERVICE WITH THE BRITISH.

TO: ALL CONCERNED.

1. F. SUSSEX-LOASBY REQUESTED PERMISSION TO WEAR THE MEDALS WON BY HIM FOR SERVICE WITH THE BRITISH DURING THE YEARS 1940 TO 1943.

2. INVESTIGATION OF THESE CLAIMS THROUGH AIR MINISTRY, ROYAL AIR FORCE WHITEHALL SHOWS THAT THIS SOLDIER IS ENTITLED TO WEAR THE FOLLOWING MEDALS:

1. GEORGE CROSS
2. DISTINGUISHED FLYING CROSS
3. AFRICA STAR
4. 1939-1940 STAR

HE IS ALSO ENTITLED TO WEAR THE GREEK MEDAL OF VALOUR AND THE E.T.O.

2. PERMISSION IS GRANTED.

/s/ James B. Gordon
JAMES B. GORDON
LT.COL., A.G.D."

which paper he, the said Private, then Technician Fourth Grade, Frank O. Sussex-Loasby, well knew to be falsely made.

Specification 5: In that ********, did, at AAF Station 586, APO 633, U. S. Army, on or about 18 May 1943, wrongfully, unlawfully and with intent to deceive a duly constituted board of officers, convened for the purpose of examining candidates for commission in the Army of the United States, officially submit to the said board of officers a certain written personnel placement questionnaire, dated 18 May 1943,

and signed by the said Private, then Technician Fourth Grade, Frank O. Sussex-Loasby, which said questionnaire contained statements that he, the said Private, then Technician Fourth Grade, Frank O. Sussex-Loasby, had been a pilot officer in the Royal Air Force; and that he had attended Christ College, Oxford University, for two years, which statements were untrue and known by the said Private, then Technician Fourth Grade, Frank O. Sussex-Loasby, to be untrue.

Specification 6: In that ********, did, at AAF Station 586, APO 633, U. S. Army, on or about 21 July 1943, wrongfully, unlawfully and without authority, wear certain Royal Air Force insignia and badges, to-wit; R.A.F. Pilot's Badge and R.A.F. Medallion, on his service uniform.

He pleaded not guilty to the Charge and to all specifications thereunder. He was found guilty of Specifications 1, 3, 4, 5 and 6 of the Charge, guilty of Specification 2 of the charge except the words "that he had been an Acting Flight Lieutenant in the Royal Air Force Fighter Command and that he had been sent to the United States in the capacity of Flight Lieutenant to do specialised work in connection with his training", of the excepted words, not 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 two years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, 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 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.

4. The charge sheet shows that accused is 25 years of age and that he enlisted at London, England, 16 March 1943 to serve for the duration of the war plus six months. He had no prior service. On 10 May 1943 at Lichfield, Staffordshire, England he was naturalized as a citizen of the United States pursuant to the authority contained in section 702, Nationality Act of 1940 as amended (Petition No. BB-441). It is provided in paragraph 8b, sec.II, Circular #72, ETOUSA, 9 September 1943 that execution of a sentence to dishonorable discharge will be ordered only when

accused has been convicted of an offense which renders his retention in the service undesirable or when he has been sentenced to a term of not less than three years confinement. The offenses of which accused has been convicted are of a nature as not to make his retention in the service desirable.

B. Franklin Riter Judge Advocate

R. VanBenschoten Judge Advocate

Edward N. Sargent Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 22 DEC 1943 TO: Commanding General, VIII Air Force Service Command, APO 633, U.S. Army, through the Commanding General, ETO.

1. In the case of Private FRANK O. SUSSEX-LOASBY (10600946), 423rd Signal Company, Aviation, Headquarters VIII Air Force attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings and 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. Recommendation has been made to the Theater Commander that an inquiry be made to determine whether this soldier obtained U.S. citizenship by means of false and fraudulent representations and whether action should be taken with respect thereto. It is therefore recommended that the prisoner be held within the theater until decision with respect to this matter is taken.

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 1092. For convenience of reference please place that number in brackets at the end of the order: (ETO 1092).

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 FEB 1944

ETO 1096

U N I T E D S T A T E S v. Private DAVID L. STRINGER (34154267), Provisional Headquarters and Headquarters Squadron, 2915th Combat Crew Replacement Center Group (Bomb).	VIII AIR FORCE COMPOSITE COMMAND Trial by G.C.M., convened at Army Air Force Station 231, APO 639, 12 November 1943. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for four years. 2912th Disciplinary Training Center, APO 508, U.S.Army.

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

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1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater of Operations and there found legally insufficient to support the findings and sentence. 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 64th Article of War.
Specification: In that Private David L. Stringer, Provisional Headquarters and Headquarters Squadron, 2915th Combat Crew Replacement Center Group (Bomb), having received a lawful command from Captain Kenneth K. Wallick, Air Corps, his superior officer, to perform the duties of Mess Sergeant, did, at Army Air Forces Station 238, APO 639, on or about 21 October, 1943, wilfully 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 at such place as the reviewing authority may direct for four years. The reviewing authority approved the sentence, suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Disciplinary Training Center No.2912 as the place of confinement.

The result of trial was promulgated in General Court-Martial Orders No. 15, Headquarters, VIII Air Force Composite Command, Station 231, APO 639, 20 November 1943.

3. The evidence for the prosecution shows, in substance, that about three weeks prior to 21 October 1943, General Hill had made an inspection of the kitchen at Army Air Force Station 238, and told a Sergeant Flinn, the commanding officer of the station, Captain Wallick, and the mess sergeant, that the kitchen was "in a sad mess" and that if conditions did not improve within a few weeks the captain was to reduce Sergeant Flinn and assign someone more capable (R 7-8, 12). About 11 A.M. 21 October, Sergeant Flinn was relieved as mess sergeant and about 11:30 A.M. that day Captain Wallick instructed the mess officer to put accused "on orders as mess sergeant". At that time he was a sergeant and was working in the kitchen as a cook. He was supposed to report that day as mess sergeant for the noon meal (R 7, 11,54). As the result of certain information Captain Wallick later ordered the mess officer to have accused report to him. When he did report at 2 P.M. 21 October the captain told him he would "have to be mess sergeant", that he was the highest ranking non-commissioned officer qualified for the position and that "we didn't have anyone else". He asked him why he did not want to take that responsibility. Accused replied that he "wouldn't take the job under that set-up" referring presumably to the "disorganization of the mess", and that "he didn't like the deal that Sergeant Flinn got." Captain Wallick told him that it was his responsibility to take any job assigned, that the job had to be done, and that in both his opinion and that of the mess officer he was capable of holding the position. He was further told that there was a possible promotion if he did good work. The captain informed him that a man who could not accept responsibility could not remain a non-commissioned officer on that post. Accused replied that he had been made a sergeant by a responsible officer and that he thought he had deserved it. The captain told him that he should take the job and do it as well as he could. He sent him to see a Captain Bartos who "understood the mess conditions and I thought he might be able to induce the man to take the job" and show him that it could be done (R 7-9,11,46-47).

Accused went to see Captain Joseph A. Bartos, medical officer at Station 238, who had requested that accused be sent to him "to discuss the problems of the mess from a medical standpoint" (R 13). Captain Bartos testified that "Problems in the mess were inadequate personnel and some of these personnel not doing their jobs satisfactorily". The job as mess sergeant would be a "tough" one, and the captain himself "probably would have hesitated to accept it". In his opinion adequate personnel for the mess were not being supplied. During their discussion of the mess problems accused told Captain Bartos that he did not want to be mess sergeant because when the Commanding General visited the mess hall he wanted to know why there

was not adequate personnel, and the former commanding officer of the base had replied that adequate personnel were available. Accused stated that "if the Commanding Officer of the base did not back the enlisted men any more than that he did not want the job in the mess hall" (R 14-15).

About 5 P.M. accused returned to see Captain Wallick and said that his mind was made up, that his final answer was that he would not take the job as mess sergeant (R 9,47,51). The captain asked accused to "put himself in my position." Accused said "I would make him a private" (R 47, 51). When accused was asked if he knew what refusing an assignment would mean, he replied "Yes, court-martial" (R 9,12,47,52). Captain Wallick did not tell him what the charges would be if he were tried (R.55). Accused was not discourteous or disrespectful (R 10). He did not report to the mess hall and was placed under arrest later that afternoon. He was not immediately put under arrest because Captain Wallick could not conceive that he would refuse the assignment and it took the Captain "a while to make up his mind." It was up to accused to decide and the captain expected he would return and say "I'm sorry" (R 10-11,49,52-53). About 400-500 men were fed in the mess. Although accused had been assured of all cooperation possible, he was not promised additional cooks or "K.P.'s" because no cooks were available (R 50-51,53).

Captain Wallick further testified that at no time had he given accused a direct order to assume the job as mess sergeant (R 46,49,51) but that it was clearly understood that he was to be mess sergeant (R 46,51).

"Q: Do you think the accused was offered an alternative of being busted instead of taking the job as mess sergeant?
A: Yes, I would say he was because I informed him that unless he accepted responsibility he would have to be a private (R 10).

* * * * * *

Q: Were you trying to persuade the accused to take the job rather than order him to take it?
A: I don't see the difference.
Q: (repeated)
A: No, I would not say I was.
Q: And yet, you asked him to take it, explaining the job and the possibilities of promotion?
A: I didn't ask him. I told him he was to be mess sergeant. I told him he would have to be. (R 10-11). * * * *
Q: Did you indicate anything which might lead him to believe that the reduction to private was the alternative to not taking the job?
A: There wasn't any alternative about it. It was the idea of taking the thing or because of his attitude in not wanting to take the responsibility, and of course, court-martial if he didn't report to work. * * * The last time he left his final answer was that he would not take the job and would rather be court-martialled than take it. In my mind, he was a private pending court-martial (R 48)."

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* * * * *

Q: Why, then, did you reduce him from sergeant to private?
A: Because he didn't want to accept the responsibility of being a sergeant in refusing this assignment.
Q: In view of that you were going to try the man and in addition you took it upon yourself to punish the man?
A: In my mind it is not the same offense (R 49).

* * * * *

Q: What did you tell the accused?
A: It wasn't a matter of choice. He was supposed to be mess sergeant. I told him that if he didn't he would have to be reduced. It wasn't the idea of saying you can take either one.
Q: Wasn't that the general trend of the conversation?
A: It was that he would have to be reduced.
Q: That would be the end of it?
A: That was only half of it. He would be reduced and then court-martialled." (R 51-52).

4. For the defense, Staff Sergeant George E. Henson of accused's organization, testified that on 21 October 1943 he was on duty at the service club where his function was to "show the fellows a good time". He had been trained to be a cook and mess sergeant and had the highest average of his class at school. He was not being used as a mess sergeant on 21 October (R 20-21). Staff Sergeant Arthur W. Hill, also of accused's organization, testified that he had attended the cooks' and bakers' school at Camp Shelby, Mississippi, where he had "pretty good grades", and was made first cook. He had been a mess sergeant for two and a half years but on 21 October 1943 was duty sergeant in the squadron. His work consisted of general duty and "picking up butts in the road". He was supposed to have a job in the mess hall but it had not opened at that time (R 22-23).

First Sergeant Harold Mansky of accused's organization had known accused about two months and was of the opinion that he was an excellent soldier (R 24).

Recalled as a witness for the defense, Captain Wallick testified that as commanding officer of Station 238 his duty was to see that the men were housed, clothed, and fed (R 17). He had sent accused to see Captain Bartos because the latter knew the difficulties concerning the messing situation and had a good idea how to correct them. He thought that Captain Bartos could show accused the point of taking the position, how to do the work, and would prove to him that it was not too big an undertaking (R 18).

Accused testified that on 21 October, Lieutenant Jacobs, the mess officer, told him that the mess sergeant had been relieved and that they had decided accused was the man for the job. Accused was then first cook

and a sergeant. He replied that he did not think he was the man for the job, that other men could operate the mess better and that he would rather they got someone else. They discussed mess problems and the lieutenant said he would go to headquarters to see what he could do about getting another man, but that accused might have the job forced on him (R 26,30-31,42). Accused went to his barracks and was later told to report to Captain Wallick who informed him that the mess sergeant had been relieved, that they believed accused was the man for the job and had decided that he was to be mess sergeant (R 26, 31,34,39). The captain discussed the faults of the former mess sergeant and asked if he could improve them. Accused replied that he did not think so, that they needed more cooks and equipment, that he was not the man for the job and could see no use in starting when he could not hold the position. Captain Wallick did not agree nor did he promise extra cooks, "K.P.'s" or equipment. He asked accused if he wanted to keep his stripes. He replied that he did and was asked how long he had been a sergeant. He said for about a year and believed he deserved the promotion when it was made. The captain then said "'We have decided you are to be mess sergeant and think you are the man for the job. There must be some other reason why you don't want to take this job. Don't you like this outfit?'" Accused replied that he could not say that he did, that he wanted a transfer and would have requested it sooner but did not think he would be successful. He was then ordered to report to Captain Bartos (R 26,31-32,34,39-40).

He spent about an hour with Captain Bartos discussing mess problems and told the captain that he was not the man for the position and could see no use in starting when he could not hold the job. He said that he would rather be relieved of his stripes and go on general duty. Captain Bartos said that he would either be mess sergeant or walk out the door a private (R 26,35).

When he returned to Captain Wallick's office, the latter said "I guess you have decided to take over as mess sergeant here". He replied "Not exactly". The captain said "Put yourself in my place; what would you do if you had a man and he didn't want to be mess sergeant?" Accused replied "I would figure he didn't want the responsibility and I would break him and put him to general duty in the outfit", whereupon Captain Wallick said that he would court-martial and "break" accused and that he would "walk out the door a private". Accused left, went to his barracks and about an hour later was placed under arrest and taken to the guard house (R 27,29,32-33,36,39-41).

He further testified that at no time had Captain Wallick given him a direct order (R 29,33), nor had he (accused) definitely stated at any time that he would not be a mess sergeant and that his decision was final (R 32-34,38). There was no definite understanding or anything final about the matter (R 38,43). Accused did not think that he had disobeyed a direct order, but that he had a choice of being mess sergeant or being "busted to private and put on general duty" (R 27,29-30, 34-35,37,43-44). When he finally left Captain Wallick's office he

believed that he would be made a private and placed on general duty. He thought that he could not be reduced without a court-martial proceeding unless the basis for the reduction was inefficiency, and that he would be court-martialed because he preferred to be a private rather than a mess sergeant (R.29-30,33-34,36-39,41-44). He would have gone back to cook on his next shift if he had not been placed under arrest.

He had been on duty from 11:30 A.M. to about 11 P.M., 20 October, and from 3 A.M. to 1:30 P.M., 21 October. He was on duty when called to Captain Wallick's office, and had been on duty about 24 hours with but a four-hour rest (R.27). He had been "pulling a shift" with about 700 men to feed, and was assisted by one cook with very little experience and a "K.P." who was also cooking. He was tired, sleepy and his mind was in a turmoil (R.28). He was classified as a cook and had never been classified as a mess sergeant. His classification card (W.D., A.G.O. Form No.20) was admitted in evidence over objection by the prosecution (R.28-29; Def.Ex.A.)

5. The question presented for consideration is whether accused received and willfully disobeyed the lawful command alleged.

> "Mere instructions would not in general fulfill the definition of an order or 'command', in the sense of the present Article; nor would a mere statement of his wishes and views by his superior, however pointedly impressed upon the inferior in his entering upon the duty" (Winthrop's Military Law and Precedents, Reprint, p.574). (Underscoring supplied).

> "It is also agreed by military writers that the 'command' contemplated by the article is an express and personal one, that is to say an order of a specific character, addressed or given to the accused in person" (Ibid; p.573) (Underscoring supplied).

> "It is agreed by the authorities that the offense specified in this part of the Article is a disobedience of a positive and deliberate character. * * * the disobedience must be willful and intentional" (Ibid; p.573).

> "The willful disobedience contemplated is such as shows an intentional defiance of authority"(MCM, 1928, par.134 b, p.148).

Although Captain Wallick testified that he told accused he would "have to be mess sergeant" he admittedly did not at any time give accused a direct order to assume the duty of mess sergeant. No order detailing

him had been issued. He informed him that he was the highest ranking non-commissioned officer available for the position and that they did not have anyone else; that he should take the job and do as well as he could. There was a possible promotion if he did good work. He sent him to Captain Bartos who, he believed, would be able "to induce the man to take the job". Asked whether he had attempted to persuade accused to assume the duty rather than order him to do so, Captain Wallick testified "I don't see the difference." When accused returned to interview him a second time, the captain said that a man could not remain a non-commissioned officer on the post if he did not accept responsibility. He asked accused what he would do if he were in his position and accused replied that he would reduce such a soldier to the grade of private. The captain informed him that he would have to be reduced. He did not immediately place him under arrest because he could not believe he would refuse the assignment and it took Captain Wallick "a while to make up his mind". He expected him to return and say he was "sorry". Although accused, in response to the captain's question said he realized it would mean a court-martial if he refused the assignment, there was no evidence to indicate that accused was given to understand that Captain Wallick was referring to his willful disobedience of a direct order to assume the duties of mess sergeant. The captain did not say what the charges would be and accused testified that he thought court-martial proceedings were necessary to accomplish a soldier's reduction in grade unless such reduction was made upon the basis of inefficiency.

Viewed in its entirety the record of trial fails to disclose that accused was given "an order of a specific character". On the contrary the evidence shows that Captain Wallick had two discussions with accused during which he "pointedly impressed" upon him his "wishes and views" and attempted to persuade him to assume the duties of mess sergeant instead of giving him a definite, express order to assume such duties. The captain's testimony that accused "clearly understood" that he was to be mess sergeant was merely a conclusion by the witness, unsupported by the evidence (22 C.J. sec.592, p.497, footnote 16; 22 C.J. sec.603, p.515, footnote 39; p.516, footnote 42; Stephenson v. Atlantic Terra Cotta Co., 230 Fed. 14,20). Similarly, the evidence fails to show that accused was guilty of disobedience "of a positive and deliberate character" exhibiting "an intentional defiance of authority". The evidence submitted by the prosecution fully justified accused's stated belief that he actually had a choice of becoming mess sergeant or being "busted to private and put on general duty".

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

B. Franklin Pete Judge Advocate.

Judge Advocate.

Judge Advocate.

CONFIDENTIAL

(401)

1st Ind.

WD, Branch Office TJAG., with ETOUSA 11 FEB 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 USC 1522) and as further amended by Public Law 693, 77th Congress, 1 August 1942, is the record of trial in the case of Private DAVID L. STRINGER (34154267), Provisional Headquarters and Headquarters Squadron, 2915th Combat Crew Replacement Center Group (Bomb).

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty and the sentence be vacated and that all rights, privileges and property of which accused may have been deprived by reason of such findings and sentence so vacated be restored.

3. This accused was charged with a capital offense, the proof of which requires wilful disobedience of an order and an intentional defiance of authority. I find proof of neither element in the evidence. No order detailing accused as Mess Sergeant was issued and no command given that he assume the duties thereof. Over a period of 3½ hours, the accused discussed with two captains their desire that he be Mess Sergeant and his disinclination to be. There was talk of reduction for not assuming responsibility but none of disobedience of orders. The accused was not disrespectful. The facts in evidence show no basis for the serious charge of willful disobedience of orders, which is too often made without intelligent consideration.

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

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

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

(Findings and sentence vacated. GCMO 12, ETO, 22 Feb 1944)

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC ON 26 FEB 1952

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BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC EXEC. ON 26 FEB 1952