E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 2452

CM ETO 3153

VOLS. 7-8

HOLDINGS AND OPINIONS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

EUROPEAN THEATER OF OPERATIONS

VOLUME 8 B.R. (ETO)

CM ETO 2766 - CM ETO 3153

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

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC. ON 26 FEB. 52

Judge Advocate General's Department

Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 8 B.R. (ETO)

including

CM ETO 2766 - CM ETO 3153

(1944)

Office of The Judge Advocate General

Washington : 1946

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

BOARD OF REVIEW

ETO 2766

17 JUL 1944

UNITED STATES	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Second Lieutenant PHIL C. JARED (O-2044475), Quartermaster Corps, Quartermaster Section, General Depot G-50.	Trial by GCM, convened at Taunton, Somerset, England, 11-12 April 1944. Sentence: Dismissal, total forfeitures, and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

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

Specification 1. In that Second Lieutenant Phil C. Jared, Quartermaster Section, General Depot G-50, did at the Mill Race Hotel, Salisbury, Wilts, England on or about 29 November 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Eric E. Beck, a minor, by rectum.

Specification 2. In that* * * did at the County Hotel, Taunton, Somerset, England, on or about 30 November 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Eric E. Beck, a minor, by rectum.

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(2)

Specification 3. In that * * * did at the Corner House Hotel, Taunton, Somerset, England, on or about 6 December 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Eric E. Beck, a minor, by rectum.

Specification 4. In that * * * did at the County Hotel, Taunton, Somerset, England, on or about 14 December 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Eric E. Beck, a minor, by rectum.

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

Specification 1. In that * * * did at the Mill Race Hotel, Salisbury, Wilts, England on or about 29 November 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Eric E. Beck, a minor, by rectum.

Specification 2. In that * * * did at the County Hotel, Taunton, Somerset, England, on or about 30 November 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Eric E. Beck, a minor, by rectum.

Specification 3. In that * * * did at the Corner House Hotel, Taunton, Somerset, England, on or about 6 December 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Eric E. Beck, a minor, by rectum.

Specification 4. In that * * * did at the County Hotel, Taunton, Somerset, England, on or about 14 December 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with Eric E. Beck, a minor, by rectum.

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

Specification: In that* * * did at Taunton, Somerset, England, between 8 December 1943 and 20 December 1943, feloniously embezzle by fraudulently converting to his own use, British money in the amount of Forty-four Pounds, four shillings and two pence half-penny (£44-4s-2½d) equivalent value in United States money of One Hundred Seventy Eight dollars, thirty nine cents ($178.39), the property of the United States, entrusted to him in the performance of his duties as Officer in charge of the Officers and Nurses Clothing and Accessories Sales Store, Taunton, Somerset, England.

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ADDITIONAL CHARGE II: Violation of the 61st Article of War.

Specification. In that * * * did at Taunton, Somerset, England, between 8 December 1943 and 20 December 1943, without proper leave, absent himself from his station at General Depot G-50, Taunton, Somerset, England, from about 1600 hours, 18 December 1943 to about 1300 hours, 20 December 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 dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, Southern Base Section, Services of Supply, European Theater of Operations, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

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

(a) With reference to Specifications 1, 2, 3, and 4, Charges I and II, the pathic, a 17-year old boy, testified to each act of perversion charged (R29-41,46); the accused's signed confessions of each offense, made after due warning, were introduced in evidence (R49,52; Pros.Exs.G and H); and employees of hotels where the offenses in question were committed testified that accused and pathic occupied a single room jointly on the respective occasions (R10-18).

(b) With reference to the specifications, Additional Charges I and II, the evidence shows that accused was manager of the Officers' Sales Store, General Depot G-50, from its opening date 8 December until 21 December 1943, during which period he was in charge of all operations and was both accountable and responsible for the safekeeping of the stock and all cash received, and for keeping accounting records of the store (R62-64). Each sale was required to be recorded on a sales slip and his cash receipts turned over to the Finance Officer at the close of each day's business, accused retaining not more than $200.00 over night (R69,103). Sales slips and cash were kept in the safe, to which accused had the key until 13 or 14 December when he delivered it to his senior non-commissioned officer, from whom he obtained it two days or three days later, at which time he took a few pound notes out of the safe, remarking as he did so, "I know this is not right". Simultaneously, he borrowed a pencil and made a notation on a slip of paper (R104, 106-107, 112,116). On another occasion he transferred several pound notes from the safe to his pocket (R127-128). Money was customarily

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taken from the safe to make change and a notation of the amount taken put in its place, but once or twice accused took notes to the bank for change (R117-118). The cashiers had no previous experience with British money, and the first daily check, a day or two after the store opened, revealed a cash shortage of one or two pounds (R110,115). There were no daily checks made of the sales slips against the cash on hand for 15, 16 or 17 December 1943 (R105). Accused was absent without leave from 4:00 p.m. 18 December to 1:00 p.m. 20 December 1943, which period he spent in London with his fellow pervert (R21,32,62-63; Pros.Exs. D and H). On 21 December 1943 the store was closed and an inventory and audit made. The sales slips covering the period of accused's management were checked against accused's deposits with the Finance Officer and the money in the safe, revealing a shortage unaccounted for of receipts shown by the sales slips amounting to £44-4-2½ (R93-100).

4. The evidence for the defense shows that the officers' store was opened while construction was still in progress and operated for well over a week with carpenters, painters and electricians still at work on the building, causing inevitable congestion and confusion (R138-139). On 8 January 1944, a sanity board examined accused and found him to be sane and responsible although a sexual pervert or a true sodomist, possessing an inherent constitutional defect, rendering him not susceptible to ordinary human motives actually influencing the normal control of his actions (R140). The defense tendered and the court refused to admit as evidence War Department Circular No. 3, 3 January 1944, entitled "Homosexuals"; also a stipulation, which prosecution agreed was true but contended was irrelevant, that on 4 April 1944, defense counsel, on behalf of accused, tendered £44-4s-3d to the Finance Office, G-50, and that it was accepted (R141-144).

5. After accused's rights were duly explained to him, he elected to be sworn as a witness and testified in substance as follows:

He did not have time to instruct his employees in handling British money and the shortages could have occurred as a result of their inexperience in making change (R145). On several occasions he personally supplied from his own pocket the difference between the amount shown by sales slips and cash on hand, as well as change necessary in making cash sales. At times he also took notes from the cash drawer or safe to the bank to obtain necessary change for use in the store. He used the expression "This is not right" on many occasions with reference to various phases of the store's operation (R146). He undertook, unsuccessfully, to account for the source of his admitted disbursements during the period of his operation of the officers' store by showing that on 29 November 1943, he had $15.00 or $20.00 personal funds and received $110.00 and £13 personal funds between that date and 20 December 1944. Out of this aggregate of $183.50 or £45,9s, he made, during the period in question, the following disbursements:

Hotel bill £14.12.6
Beck £37.10.
£52. 2.6

These were all unusual expenditures, incurred in connection with his affair with Beck, and do not take into account his routine living expenses during the period (R149-168).

6. The uncontradicted evidence establishes commission by the accused of each of the sodomies per anum described in the specifications, Charges I and II, each offense in violation of Article of War 93 and Article of War 95, which latter "article includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman" (MCM, 1928, par.151,p.186). His absence without leave, alleged in the Specification, Additional Charge II, is proved by clear and competent evidence and is admitted by accused. The circumstantial evidence of the embezzlement charged strongly supports the inference of guilt as alleged, unweakened by accused's unconvincing denial and the showing of confusion inevitably attendant upon the opening of the officers' store before the construction thereof was completed. An officer in charge of trust funds who fails to account for them on proper demand cannot complain if the natural presumption that he embezzled them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting (CM 123492, Dig. Op. JAG, 1912-1940, sec.451 (17), p.317). On appellate review the court's findings will not be disturbed (ETO 1631, Pepper).

7. The charge sheet shows that accused is 27 years of age. He was inducted 20 February 1941 and discharged 1 May 1943 to accept commission. On 2 May 1943, he was temporarily appointed Second Lieutenant (AUS) and ordered to extended active duty for the duration of the war plus six months. The only prior service shown is one enlistment 9 February 1931, terminated by discharge 8 February 1934.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal of an officer is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 61 or 93.

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

Judge Advocate

Judge Advocate

Judge Advocate

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(6)

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 17 JUL 1944 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of Second Lieutenant PHIL C. JARED (O-2044475), Quartermaster Corps, Quartermaster Section, General Depot G-50, 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 2766. For convenience of reference please place that number in brackets at the end of the order: (ETO 2766).

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

(Sentence ordered executed. GCMO 56, ETO, 22 Jul 1944)

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

BOARD OF REVIEW

ETO 2767

20 JUL 1944

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private LINWOOD L. RIDDICK (31195784), 1962nd Ordnance Depot Company (Aviation), Combat Support Wing (Prov.).	Trial by GCM, convened at Leicester, Leicestershire, England, 2 June 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 92nd Article of War.
(Finding of Not Guilty)
Specification:(Finding of Not Guilty)

ADDITIONAL CHARGE:
CHARGE II: Violation of the 93rd Article of War.
Specification: In that Private Linwood L. Riddick, then Sergeant, 1962nd Ordnance Depot Co. (Avn.), Combat Support Wing (Prov.), AAF 581, APO 635, did, at or near Syston, Leicestershire, England, on or about 30 April 1944, commit the crime of sodomy by feloniously and against the order of nature having carnal connection, per os, with Private Lily Jacques, ATS, British Army.

He pleaded not guilty and was found not guilty of Charge I and its Specification, and guilty of Additional Charge II 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 five years. The reviewing

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

3. The uncontradicted evidence, including the testimony of both accused and prosecutrix, establishes the commission by accused of the offense alleged in the Specification, Additional Charge II, in violation of Article of War 93.

"Sodomy consists * * * in sexual connection, by rectum or by mouth, by a man with a human being." (MCM, 1928, sec.149k, p.177, underscoring supplied). Sodomy per os is condemned by Article of War 93 (CM ETO 24, White; CM ETO 339, Gage; CM ETO 612, Suckow; CM ETO 1743, Benson; CM ETO 2695, White).

4. The charge sheet shows that accused is 22 years two months of age. He was inducted at Hartford, Connecticut, 20 October 1942. He had no prior service.

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

6. Confinement in a penitentiary is authorized for the offense of sodomy (AW 42; D.C.Code, Title 22, sec.107; MCM, 1928, par.90a,p.81). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir.229, WD, 8 Jun 1944, sec.II).

Judge Advocate

Judge Advocate

Judge Advocate

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(9)

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 20 JUL 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, U. S. Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private LINWOOD L. RIDDICK (3119578½), 1962nd Ordnance Depot Company (Aviation), Combat Support Wing (Prov.), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2767. For convenience of reference please place that number in brackets at the end of the order: (ETO 2767).

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 2776

1 4 JUL 1944

U N I T E D S T A T E S)	8th INFANTRY DIVISION.
)	
v.)	Trial by GCM, convened at Knocknamoe, Omagh, Northern Ireland, APO 8, 2 June 1944. Sentence: Dismissal, total forfeitures, and confinement at hard labor for three years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant ROBIN L. KUEST (0-1297388), Headquarters Company, 8th Infantry Division.)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Robin L. Kuest, Headquarters Company, 8th Infantry Division, did, at Knocknamoe Camp, Northern Ireland, on or about 10 January 1944, feloniously embezzle by fraudulently converting to his own use the sum of Twenty-five Pounds, Seven Pence (equivalent in United States currency One Hundred One Dollars ($101.00), the property of Private Hubert Adams, Headquarters Company, 8th Infantry Division, entrusted to the said Second Lieutenant Robin L. Kuest for transmission to Mrs. G. C. Adams in the United States through the 8th Infantry Division Finance Office.

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Specification 2: In that * * *, did, at Knocknamoe Camp, Northern Ireland, on or about 2 May 1944, feloniously embezzle by fraudulently converting to his own use the sum of Twenty-four Pounds, Fifteen Shillings, Eight Pence (equivalent in United States currency One Hundred Dollars ($100.00), the property of Private First Class Thomas J. Frinzi, Headquarters Company, 8th Infantry Division, entrusted to the said Second Lieutenant Robin L. Kuest for transmission to M. Frinzi in the United States through the 8th Infantry Division Finance Office.

Specification 3: In that * * *, did, at Knocknamoe Camp, Northern Ireland, on or about 7 February 1944, feloniously embezzle by fraudulently converting to his own use the sum of Fifteen Pounds, Seventeen Shillings, Three Pence (equivalent in United States currency Sixty-four Dollars ($64.00), the property of Private Frank Tavasso, Headquarters Company, 8th Infantry Division, entrusted to the said Second Lieutenant Robin L. Kuest for transmission to Alfred Bisetta in the United States through the 8th Infantry Division Finance Office.

He pleaded guilty to and was found guilty of the Charge and its specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentence but reduced the period of confinement to three years, designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, but pending further orders, directed that accused be confined at the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as approved, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that accused is a Second Lieutenant, Headquarters Company, 8th Infantry Division, and that at all times mentioned in the specifications was personnel officer of his company. He received monies from soldiers of his company for transfer home (R8,12,19,22,23,34,37). His duty in this connection was to bring this money to the Finance Office where the money transfers were effected

by the Finance Officer (R22). On 10 January 1944 Private Hubert Adams, of accused's company, gave accused English currency, the equivalent of $101 United States money, to send home to Adams' mother. Adams "turned it over to Lieutenant Kuest, and he was to turn it over to finance, and they were to send it for" Adams (R7,8). Similarly, Private Frank Tavasso, of the same company, gave accused $64 on 7 February 1944 and told him to send "it to Mr. Bessetta". It was to go "through finance" (R19,20). Private First Class Thomas J. Frinzi, also of the Headquarters Company, gave $100 to the company mail orderly, Corporal John O'Leary, on 2 May 1944, to send home to Frinzi's father. Frinzi received a receipt from O'Leary showing to whom the money was to be sent. O'Leary received this money from Frinzi, "gave" accused "the money, made out the receipt, and gave it to the man personally". It was customary for O'Leary, upon receiving such monies, to take full information, give the money to accused to be checked and then, with accused, to prepare and issue the receipts (R11-14,30,31). Captain Marcus L. Haas, Headquarters 8th Infantry Division, testified that he was Assistant Finance Officer of the Division, that he had checked the records of the finance office, and that the finance office had not received the amounts which Adams, Tavasso and Frinzi gave to accused until 18 May 1944. On cross-examination, Captain Haas said he received this money at that time (18 May 1944) from "Captain Fiers". At this point defense counsel stated that Captain Fiers had received the money from accused (R22,26,29). In his testimony, Captain Haas said that since 1 January accused had handled these transactions for the Headquarters Company with the finance office. On 26 May 1944 accused was questioned by Captain Guy O. Penwell, Headquarters 8th Infantry Division, duly appointed investigating officer of the charges against accused. Accused was then advised that anything he said could be used against him and that if he wished to remain silent he could do so. The interview was in "question and answer" form and was recorded stenographically by Staff Sergeant Harry Bloom of the Headquarters Company, who identified a transcript of his stenographic notes and testified that the transcript and his original notes constituted an accurate record of the interview. At that interview, accused said he had received the money and from the parties, as alleged in the three specifications of the Charge. Questioned in detail as to Specification 1, he said that Private Adams gave him the money to send home to his mother but that he had used it for his "own personal use". Questions as to the second and third specifications elicited from accused the fact that he had also received the monies alleged in these specifications from Tavasso and Frinzi, respectively, and that he had used their money for his "own personal use". Accused stated that he had repaid all this money "by borrowing". (R31-33,34-36; Ex. C.2-4).

4. No evidence was presented by the defense and accused did not testify or make any statement to the court. It was developed on cross-examination of Captains Haas and Penwell that since 1 January accused had handled "a large amount", "a great deal of money", "up to eight hundred dollars * * * in one transaction", and that in "only this particular instance" had anything been found "in his record that would mar his good conduct" (R29,37). The enlisted men all testified that their money had been sent out (later) "on May 18" (R10,17,21).

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5. The evidence requires little comment. Accused pleaded guilty to each specification and to the Charge. It was affirmatively shown that accused, as Personnel Officer, received sums of money, each in excess of $50.00, from enlisted men of his company to be transmitted home for them. Accused's plain duty in this connection, with which he was familiar, was to turn the money over forthwith to the division finance office for transmittal. Instead, accused used the money for his own use. This was embezzlement, as charged: "the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come" (MCM, 1928, par.149h, p.173). Intention by accused only to borrow the money and the fact that it was subsequently repaid do not constitute a defense to this charge (Dig.Op.JAG, 1912-1940, sec.451 (17), p.317, CM 130989 (1919)), although they may be considered in mitigation.

The effect in law of a plea of guilty is that of a confession of the offense as charged. It is desirable that some evidence of the circumstances be shown so that the reviewing and clemency authorities may each intelligently function (CM ETO 839, W. Nelson; CM ETO 1266, Shipman; CM ETO 1588, Moseff).

6. The charge sheet shows accused is 28 years seven months of age. He enlisted 5 August 1940. He entered Officer Candidate School June 1942 and was commissioned Second Lieutenant, Infantry, in October 1942. Prior Service: Enlisted 5 August 1937 for three years. Allotments to dependents $170.26.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence, as confirmed. Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42).

Judge Advocate

Judge Advocate

Judge Advocate

(15)

1st Ind.

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

1. In the case of Second Lieutenant ROBIN L. KUEST (O-1297388), Headquarters Company, 8th 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 as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published 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 2776. For convenience of reference please place that number in brackets at the end of the order: (ETO 2776).

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

(Sentence ordered executed. GCMO 53, ETO, 19 Jul 1944)

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

BOARD OF REVIEW

2 AUG 1944

ETO 2777

U N I T E D S T A T E S)	SOUTHERN BASE SECTION, SERVICES OF
)	SUPPLY, now designated SOUTHERN
v.)	BASE SECTION, COMMUNICATIONS ZONE,
)	EUROPEAN THEATER OF OPERATIONS.
Second Lieutenant JAMES W.)	
WOODSON (O-1105827), 375th)	Trial by GCM, convened at Tavistock,
Engineer General Service)	Devon, England, 17 March 1944. Sen-
Regiment.)	tence: Dismissal.

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

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

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

CHARGE I: Violation of the 95th Article of War.
Specification 1: In that Second Lieutenant James W. Woodson, Company D, 375th Engineer General Service Regiment, did, at Constantine Bay, Cornwall, England, on or about 6 February 1944, with intent to deceive Lt. Colonel Eldon V. Hunt, Headquarters, 375th Engineer General Service Regiment, officially state that he had not left Constantine Bay and that he played cards with some of the men in his platoon at Constantine Bay on the night of 5 February 1944, which statement was known by the said Second Lieutenant James W. Woodson to be untrue.
Specification 2: (Finding of Not Guilty).

CHARGE II: Violation of the 96th Article of War.
Specification 1: In that * * * having received adequate instructions from the Company Commander, Company D, 375th Engineer General Ser-

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vice Regiment, on or about 7 January 1944, to have all men searched for knives or other weapons by a non-commissioned officer in the presence of an officer prior to their being allowed to go on pass in compliance with Section IV ETOUSA Circular #76, 18 September 1943 and paragraph 5j, Circular 99, ETOUSA, 21 December 1943, allowed enlisted men of his platoon to go on pass on or about 5 February 1944, to Looe, Cornwall, England, without being searched for knives or weapons.

Specification 2: (Finding of Not Guilty).

He pleaded not guilty to the charges and specifications. He was found guilty of Specification 1, Charge I and of Charge I; guilty of Specification 1, Charge II and of Charge II, and not guilty of Specification 2, Charge I and of Specification 2, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Southern Base Section, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence presented by the prosecution showed:

On or about 13 or 14 January and 5 February 1944, accused was a Second Lieutenant, Company D, 375th Engineer General Service Regiment (R3,27). About the middle of January 1944, Captain John W. Natzle, at that time commanding officer of accused's company, testified that he gave instructions to all officers under his command "that men going on pass should be searched for knives or other weapons". Accused was present (R27). Second Lieutenant E. C. Bolduc, of accused's company, testified that he was present when Captain Natzle gave these instructions to his officers and that accused was present, "was there right beside me" (R32, 34). On 5 February 1944, accused was in command of a platoon of his company, stationed at Constantine Bay, Cornwall, "a separate platoon * * * Away from its Company H.Q's". He was the only officer with this unit (R23,28,29). On 5 February, accused issued passes to about 15 enlisted men of his platoon. According to the testimony of seven of the enlisted men who made the trip, they left their camp about six or seven o'clock in the evening and went on a truck to the town of Looe, a ride of about 30 minutes. Accused accompanied them in the same conveyance. They were not searched for knives and weapons before they left camp. They started back from Looe for their camp around 10 or 11 o'clock in the truck and accused returned with them. Six of these soldiers testified that accused had at some time instructed them not to carry knives to town (R10,11,15-24). Technician Fifth Grade Thearthur Gallman testified that he had "never been told about carrying knives". He was absent from his platoon until about 4:30 that day (R15,16). Accused was seen in Looe at about 9:45 that night, 5 February, by William Henry Sambell, a special constable on duty there (R26). Lieutenant Colonel

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Eldon V.Hunt, Corps of Engineers, stationed at APO 150 (R3), accused's regimental commander (R4), questioned accused twice, on 8 and 9 February. Colonel Hunt had received a report of a "fight, or some trouble" between "coloured and white" soldiers at Looe on the night of 5 February (R5). On the first occasion, Colonel Hunt asked accused "where he had been on Saturday night" (R4), Feb 5 (R3), and accused replied that he had not left his billet at Constantine Bay, that he had been there all evening, playing cards with his men (R3,4). Colonel Hunt fixed the date of his first conversation with accused as 8 February (R3). The next day Colonel Hunt again questioned accused. He asked him, this time, "if he had been to Looe on the night of Feb 5", and accused replied that he had not been, that he had stayed at Constantine Bay and played cards until 11:30. Captain Myer Geartner, "second officer commanding 375th Engineer Service", testified as to a written statement made by accused to Colonel Hunt, dated 9 February 1944 (R7,8, Ex.A). In this statement accused said that he had not been in Looe between the hours of 1800 and 2300, 5 February 1944, but had been at Constantine Bay, near Padstow (Ex.A). Colonel Hunt did not "inform" accused "as to his rights on the 24th Article of War" when he questioned him. On the occasion of the second interview, the Colonel "ordered" accused to give him a written statement of his whereabouts on the night of 5 February (R 6).

4. For the defense, Second Lieutenant Taylor, "H.Q's 375 Engineer (GS) Regiment" testified that he was present when the company commander of Company D (Captain Natzle) talked at a company meeting on or about 15 January regarding the carrying of knives by enlisted men while on pass; he did not mention the fact that men would be searched before going on pass (R35).

Accused was sworn and testified. The record states that "accused's rights were explained to him" (R40). He said that he was first questioned by Colonel Hunt at Constantine Bay "regarding the incident at Looe" on Tuesday, 7 February 1944 (Tuesday was the 8th). He knew at that time that the inquiry was the result of the fight in the bar of the Looe Hotel and that two of the officers, including himself, were believed to have been present. Accused was asked by his counsel: "What did he ask you?" After replying that that was a difficult question to answer, accused gave a version of the conversation which suggests that Colonel Hunt's questions were directed only at ascertaining the identity of the enlisted men engaged in that fight. Accused testified he told Colonel Hunt that he was not present at the fight and would not say who was involved because he did not know (R40,41). He "later" made a written statement to Colonel Hunt. Asked: "Under what circumstances did you make that statement?" accused said:

> "Colonel Hunt ordered me to make a statement. He sent for me to go to Lostwithiel. I went down there, and I had orders not to talk to Lieut. Taylor. Capt. Natzle took me down. I went to the orderly room, in a few minutes the Colonel walked in, and he told me, 'You sit down right here, and put me a statement in writing as to your whereabouts on the night of Feb 5, 1944, between the hours of 8

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> and 11 o'clock'. * * * The Colonel gave me the statement back, and he told me to mention some men who were in the room. He said 'don't put in your statement you know anything else'. The Colonel said 'State the fact that you were not in Looe between those hours on the 5th Feb 1944' I did that, and then he accepted my statement. * * * He told me he wanted it for personal information." (R41).

He then made the written statement (R42; Ex.A).

Accused also testified that "Captain Natzle never gave me any direct instructions, directly to me, concerning the carrying of knives by enlisted men". He added -

> "but after holding a company formation, I happened to be upstairs. At that meeting, Capt. Natzle told the men of the platoon, 'if you men are caught in town without identification tickets you will be fined 5 dollars for it, and told us of some new officer in Command of our group who required that to be done. If you think that is bad, it is 70 (10?) dollars if the officer is caught. Another thing don't go round carrying these damn knives about, because if you do there is going to be a general court martial. The question was raised about men carrying long daggers around here? He said 'We will get them away from them.' As soon as he finished talking to the company he dismissed them, and walked into the hall there, and saw me, and he stopped and said 'Read this to the third platoon.' The third platoon was not there because they lived about a mile away, and I told him I would. Next morning I went to the platoon and read these notes. They said not carry knives while on pass.' That is all it said about knives. I am definitely certain that those instructions did not say that men were to be searched for knives before going on pass." (R42).

Accused said he had been in Looe the night of 5 February, leaving there about 10:00 or 10:30 (R44). At the end of his direct examination, accused was asked: "Did you know from any other source that men were to be searched before going on pass?" His answer was: "Heard of it." (R43).

5. The uncontradicted evidence shows that on the night of 5 February accused was in command of a detached platoon at Constantine Bay, England, and that he issued passes to a number of enlisted men of his platoon to leave camp. Between six and seven o'clock that night accused left camp at Constantine Bay with these men in a truck and drove to the town of Looe,

a ride of about 30 minutes. The enlisted men were not searched for knives or weapons before they left camp. A fight in which some men were cut occurred in Looe. Accused returned to camp about 11 o'clock p.m. The credible evidence shows that around the middle of January, accused with the other junior officers of his company had been instructed by their commanding officer that enlisted men should be searched for knives and weapons before leaving camp. Accused denied having been so instructed. However, the testimony of the company commander that he gave these instructions and that accused was present at the time is corroborated in both respects by the evidence given by a brother lieutenant of accused who was present. Furthermore, accused admitted that he had known "from another source" that men were to be searched before going on pass. On 8 and 9 February, Colonel Hunt, the regimental commander, interviewed accused, the first time at Constantine Bay, relative to a fight at Looe on the night of 5 February, at which accused and another of theColonel's officers were believed to have been present. Accused knew of this reason for the inquiry. Colonel Hunt testified that he asked accused where he had been that night and that accused replied he had not left his billet at Constantine Bay but had been there all evening playing cards with his men. Accused, in effect, denied Colonel Hunt's testimony. He said the interview on 8 February embraced only the question as to whether accused knew the identity of the men involved in a fight at Looe on the night of 5 February and that his answer was that he had not been present at the fight and did not know those involved. However, it was also proved, and accused admitted, that he signed a statement on 9 February in which he said that he had been in his billet and not at Looe the night of 5 February 1944. Colonel Hunt testified that at this second interview he did ask accused if he had been in Looe. Accused contended he had been forced to make this written statement and that Colonel Hunt had directed him to include the fact that he had not been inLooe that night, explaining that he wanted the statement for his personal use. Accused did not attempt to explain why the written statement repeated the false assertion, which is the basis of Specification 1, Charge I, that he had not left his billet the evening of 5 February. Common sense and experience render the testimony of Colonel Hunt credible and that of accused unbelievable. The order of Colonel Hunt that accused reduce his statement to writing served two most natural purposes: First, if the statement was false, the mere act of writing it out would give accused pause, impress him with the seriousness of his conduct and might produce the truth; and second, the writing would serve as evidence of the actual context of the original statement should charges be preferred. The contention of accused that he was forced into this falsehood by Colonel Hunt is incredible since it is impossible to conceive of any motive Colonel Hunt could have in procuring accused to make a false statement for the Colonel's own "personal use". The only apparent purpose of Colonel Hunt was to secure concrete evidence of a falsehood persisted in. The Board of Review is of the opinion that competent evidence supports the court's findings that on 8 February accused told Colonel Hunt that he had not left Constantine Bay on the night of 5 February 1944, which statement was untrue and was made with the intent to deceive Colonel Hunt.

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The credible evidence legally supports each allegation of Specification 1 of Charge I. The statement in question was made in the language set forth in the Specification. That statement was false. The fact that the proof shows it to have been made on 8 February is an immaterial variance of two days from the date alleged in the Specification. The statement made by accused was official. Colonel Hunt was making an official inquiry into the matter of a fight at Looe at which accused was believed to have been present. Accused knew that. It is presumed that a falsehood is engendered by an intent to deceive. The facts of this case support that presumption. The evidence fully supports the findings of guilty of making a false official statement in violation of Article of War 95, as charged (MCM, 1928, par.151, p.186).

6. The evidence also supports each material allegation of Specification 1 of Charge II, disobedience of orders, charged under Article of War 96. Accused, the responsible officer, on 5 February 1944 allowed men of his platoon to leave camp in his very presence and company, on passes which he had issued, without being searched for knives or weapons, contrary to instructions which he had personally received from his company commander about the middle of January 1944. The allegation is that accused received these instructions on 7 January 1944. The variance is immaterial. The Specification also alleges that the instructions so given were in compliance with two "ETOUSA" Circulars, same being more specifically described in the Specification. There was a failure of proof as to the exact contents of these circulars. There was no failure of proof, however, as to the instructions given accused in this connection by his commanding officer, and these instructions, presumably legal, were sufficient to support Specification 1, Charge II, laid under Article of War 96. The allegations with respect to the circulars may be treated as surplusage without impairing the validity of the remainder of the Specification (Wharton's Criminal Evidence, Vol.2, sec.1089, p.1908).

7. It was contended that accused was not advised of his right under Article of War 24 to remain silent when being questioned; and that his statement in reply: that he had not left his billet the night of 5 February, could not be introduced in evidence in support of Specification 1, Charge I. The failure of a superior officer to advise a soldier that he need not answer an official question does not render the answer inadmissible on the trial of a charge that the answer was false (Bull JAG, Vol III, No.4, Apr 1944, sec.381, p.140 (CM 245724)).

8. Accused is 25 years old. He was a member of the Reserve Officers Training Corps from 1937-1941. He was inducted under the Selective Service Act, 17 April 1942. He attended the Engineer School, Fort Belvoir, Virginia, and was commissioned Second Lieutenant 11 November 1942.

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. Dismissal of an officer is manda-

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tory upon conviction under Article of War 95.

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. - 2 AUG 1944 TO: Commanding General, European Theater of Operations, United States Army, APO 887, U. S. Army.

1. In the case of Second Lieutenant JAMES W. WOODSON (0-1105827), 375th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published 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 2777. For convenience of reference please place that number in brackets at the end of the order: (ETO 2777).

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

1 Incl:
Record of Trial, ETO 2777.

(Sentence ordered executed. Par. 1, GCMO 64, ETO, 8 Aug 1944)

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

BOARD OF REVIEW

ETO 2779

15 JUL 1944

U N I T E D S T A T E S)	VIII AIR FORCE COMPOSITE COMMAND
)	
v.)	
)	
Privates ELMO G. ELY (13015870), JOHNNY C. HARRIS (38208704) and HAROLD JOSHUA SHELDAHL (20717080), all of 1261st Military Police Company (Aviation).)	Trial by GCM, convened at Army Air Force Station 237, APO 639, 27 May 1944. Sentences: Dishonorable discharge, total forfeitures, and confinement at hard labor; ELY, five years; HARRIS, three years; SHELDAHL, three years. Eastern Branch, United States Disciplinary Barracks, Beekman, New York.

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification 1: In that Private Elmo G. Ely, 1261st Military Police Company (Avn), did, without proper leave, absent himself from his station at AAF Station 237, APO 639, from about 0001 hours, 29 April 1944 to about 1100 hours, 29 April 1944.
Specification 2: In that Private Johnny C. Harris, 1261st Military Police Company (Avn), did, without proper leave, absent himself from his station at AAF Station 237, APO 639, from about 0001 hours, 29 April 1944 to about 1100 hours, 29 April 1944.

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Specification 3: In that Private Harold Joshua Sheldahl, 1261st Military Police Company (Avn), did, without proper leave, absent himself from his station at AAF Station 237, APO 639, from about 0001 hours, 29 April 1944 to about 1100 hours, 29 April 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that Private Elmo G. Ely, 1261st Military Police Company (Avn), AAF Station 237, APO 639, Private Johnny C. Harris, 1261st Military Police Company (Avn), AAF Station 237, APO 639, and Private Harold Joshua Sheldahl, 1261st Military Police (Avn), AAF Station 237, APO 639, acting jointly and in pursuance of a common intent, did, in the vicinity of Ballyardle Post Office, County Down, Northern Ireland, on or about 29 April 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Thomas McAtee, Greencastle Street, Kilkeel, County Down, Northern Ireland, one (1) Model 1937 Vauxhall sedan-type motor vehicle, Engine No. 458039, the property of Thomas McAtee and Gerald McAtee, partners, of the value of about Three hundred and twenty-five pounds (£325.0.0) and of the exchange value of about Fourteen hundred dollars ($1400.00).

Each accused consented to be tried together as to Charge I and its Specifications, and they were jointly tried as to Charge II and its Specification (R6). Each pleaded not guilty to and was found guilty of the charges and their respective specifications. Evidence was introduced of one previous conviction as to accused Ely by special court-martial for absence without leave for 21 days in violation of Article of War 61. No evidence was introduced of any previous convictions as to accused Harris or Sheldahl. 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: Ely for five years, Harris for three years, and Sheldahl for three 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 and forwarded the record of trial for action under the provisions of Article of War 50½.

3. The evidence for the prosecution showed that on 29 April 1944 the accused were members of the 1261st Military Police Company stationed in Greencastle, Northern Ireland (R11-12). They were absent without leave from their organization from 0001 hours to 1130 hours 29 April 1944 as evidenced by the organization's morning report (Pros.Ex.1). The company commander, Captain William H. Darrow, testified that none of them had any authority to be absent (R12).

About 9:15 p.m. on the evening of 28 April 1944, the three accused came to the garage of Thomas McAtee on Greencastle Street, Kilkeel, Northern Ireland (R20-21) and inquired for a taxicab to take them to the Cranfield airdrome. Thomas McAtee thereupon drove the three of them toward the airdrome in a cab belonging to himself and his brother. Evidence fixed the fair value thereof at £200 and the replacement value at £300. One sat in the front seat beside the driver and the other two sat in the rear seat. Before they reached the airdrome the driver McAtee was asked to drive them to a place named Maghaberry and he refused. Shortly thereafter McAtee was blindfolded by Harris who sat behind him. He was beaten and dragged away from the steering wheel. The soldier who had been sitting in the front of the automobile took the wheel and drove about a mile and then the three of them put McAtee out of the car and drove away (R22-23). The cab was recovered with "badly smashed up mudguards", and damaged bumpers, radiator and running boards (R24,35). As a result of the beating he received McAtee was confined to bed for four days under a doctor's care and remained away from work for 14 days (R25). The cost of repairs to the cab was estimated at £50 (R25,36).

Miss Jean Hylands saw the three accused about 11 p.m. 28 April 1944 in Maghaberry 34 miles from their station. They represented that the automobile which Sheldahl was driving belonged to one of them, and drove her to a point near Belfast where the car ran off the road. They abandoned it and walked to Ballynahich where they sat in a bus for the rest of the morning. The bus was finally driven to Newcastle where the accused were apprehended (R30-31). Ely and Sheldahl were identified by a civilian James Green as having approached him in Kilkeel, Northern Ireland, about 7:15 p.m. 28 April 1944, inquiring for a cab (R13). Private Ernest Williams, Headquarters, 10th Infantry, while on duty as a military policeman on the same evening at Kilkeel observed Sheldahl in a cab with two other soldiers whom he did not know (R18).

4. Having been advised of their rights to testify in their own behalf, each accused elected to remain silent.

5. The charge of being absent without leave was clearly established by the commanding officer of the accuseds' organization and the morning report of that organization (CM ETO 364, Howe; CM ETO 1671, Matthews).

Robbery is defined as -

"* * * the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation" (MCM, 1928, par.149f, p.170).

It was clearly shown that the three accused who were identified with absolute certainty did, at the time and place averred in the specification, take the personal property (an automobile) of the McAtee brothers from the possession of Thomas McAtee himself and in his presence against his will by force and violence. All of the elements of the offense of robbery were therefore proven beyond any reasonable doubt (CM ETO 1621, Leatherberry; CM ETO 78, Watts).

6. The charge sheets show that Ely is 22 years and four months of age and that he enlisted at Roanoke, Virginia, 16 January 1941; that Harris is 23 years and five months of age and was inducted at Little Rock, Arkansas 14 July 1942, to serve for the duration of the war plus six months; and that Sheldahl is 26 years and five months of age and enlisted at Boone, Iowa, 14 January 1941. None of the accused had any prior service.

7. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of any 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.

8. The designated place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. 210, WD, 14 Sep 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

(ABSENT ON DETACHED SERVICE) Judge Advocate

1st Ind.

WD, Branch Office, TJAG, with ETOUSA. 17 JUL 1944 TO: Commanding General, VIII Air Force Composite Command, Army Air Force Station AAF-113, APO 639, U. S. Army.

1. In the case of Privates ELMO G. ELY (13015870), JOHNNY C. HARRIS (38208704), and HAROLD JOSHUA SHELDAHL (20717080), all of 1261st Military Police Company (Aviation), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. Attention is invited to the designated place of confinement, which should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, as amended). This may be done in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2779. For convenience of reference please place that number in brackets at the end of the order: (ETO 2779).

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 2780

- 3 JUL 1944

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 102, APO 639, 3 June 1944.
Private WILLARD D. WOOLSEY)	Sentence: Dishonorable discharge,
(16143024), 1645th Ordnance)	total forfeitures and confinement
Supply and Maintenance)	at hard labor for 15 years.
Company, Aviation.)	Eastern Branch, United States Dis-
)	ciplinary Barracks, Beekman, New
)	York.

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

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

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

CHARGE: Violation of the 61st Article of War.
Specification: In that Private Willard D. Woolsey, 1645th Ordnance Supply & Maintenance Company, Aviation, Army Air Force Station 102, Army Post Office 634, did, without proper leave, absent himself from his station at Army Air Force Station 102, Army Post Office 634, United States Army, from about 0800 hours 6 December 1943 to about 0800 hours 31 January 1944.

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ADDITIONAL CHARGE I: Violation of the 69th Article of War.
Specification: In that Private Willard D. Woolsey, 1645th Ordnance Supply & Maintenance Company, Aviation, Army Air Force Station 102, Army Post Office 639, having been duly placed in arrest in quarters at Army Air Force Station 102, Army Post Office 634, on or about 31 January 1944, did, at Army Air Force Station 102, Army Post Office 634, on or about 8 February 1944, break his said arrest before he was set at liberty by proper authority.

ADDITIONAL CHARGE II: Violation of the 58th Article of War.
Specification: In that * * *, did, at Army Air Force Station 102, Army Post Office 634, on or about 8 February 1944, desert the service of the United States by breaking arrest in quarters and absenting himself without proper leave from Army Air Force Station 102, Army Post Office 634, and did remain absent in desertion until he was apprehended at the city of Peterborough, Northamptonshire, England, on or about 12 May 1944.

He pleaded guilty to the Charge, Additional Charge I and their respective specifications, and not guilty to Additional Charge II and its Specification. He was found guilty of the Charge, Additional Charge I and their respective specifications; of the Specification of Additional Charge II guilty except the words "desert the service of the United States by breaking arrest in quarters and absenting himself" and "in desertion", substituting therefor, respectively, the words "absent himself" and "without leave", of the excepted words, not guilty, of the substituted words, guilty, and not guilty of Additional Charge II but guilty of violation of the 61st Article of War. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York, as the place of confinement and forwarded the record of trial for action under the provisions of Article of War 50½.

3. The competent evidence for the prosecution showed that the accused was a member of the 1645th Ordnance Supply & Maintenance Company stationed in England and on 6 December 1943 absented himself without leave from his organization. He voluntarily returned on 31 January 1944 and because the guardhouse was filled to capacity was placed in arrest in quarters. On 8 February 1944 he broke his arrest and again absented himself without leave until 12 May 1944 when he was apprehended in a house in Eye Green, Eye, near Peterborough, Northamptonshire, England. The accused elected to remain silent.

4. The charge sheet shows the accused to be 36 years nine months of age and that he enlisted at Chicago, Illinois on 10 November 1942 for the duration of the war plus six months. He had no prior service.

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

6. The designated place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir 210, W D, 14 Sep 1943, sec VI, par 2a, as amended by Cir 331, W D, 21 Dec 1943, sec II, par 2).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 3 JUL 1944 TO: Commanding General, VIII Air Force Composite Command, APO 639, U.S. Army.

1. In the case of Private WILLARD D. WOOLSEY (16143024), 1645th Ordnance Supply and Maintenance Company, Aviation, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir 210, W D, 14 Sep 1943, sec VI, par 2a, as amended by Cir 331, W D, 21 Dec 1943, sec II, par 2). This may be done in the published general court-martial order if you decide that accused should be returned to the United States.

No evidence was introduced of previous convictions and the offenses of which accused was found guilty did not involve moral turpitude. It is apparent that this soldier is in need of severe discipline. I do not believe, however, that he should be relieved from war service until all possibilities of his value as a soldier have been exhausted, or that the Government should, for the present, be deprived of the opportunity of using his services in a combat area. In view of the policy prevailing in this theater of conserving man power, I recommend that execution of the dishonorable discharge be suspended until the soldier's release from confinement and that the place of confinement be changed to Disciplinary Training Center No 2912, Shepton Mallet, Somersetshire, England. Supplemental action should be forwarded to this office for attachment to the record of trial.

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 2780. For convenience of reference please place that number in brackets at the end of the order: (ETO 2780).

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

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

BOARD OF REVIEW

15 JUL 1944

ETO 2782

U N I T E D S T A T E S	)	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	)	
Private First Class JAMES L. JONES (35702718), 3983rd Quartermaster Truck Company.	)	Trial by GCM convened at Radstock, Somerset, England 26 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private James L. Jones, 3983rd Quartermaster Truck Company, did, at Radstock, Somerset, England, on or about 12 April 1944, with intent to do bodily harm commit an assault upon Private Thomas Miller, 3983rd Quartermaster Truck Company, by willfully and feloniously striking the said Private Thomas Miller on the head with a stone.

Specification 2: In that * * *, did, at Radstock, Somerset, England, on or about 12 April 1944, with intent to commit a felony, viz; rape, commit an assault upon Elizabeth Jean Johnston by willfully and feloniously forcing himself against the person of the said Elizabeth Jean Johnston, lifting up her skirt, and striking her on the neck and face with his fist.

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He pleaded guilty to and was found guilty of the Charge and its 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 20 years. The reviewing authority approved the sentence, reduced the period of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under the provisions of Article of War 50½.

3. The evidence for the prosecution established that:

On the evening of 12 April 1944, Private Thomas Miller, 3983rd Quartermaster Truck Company and accused of the same organization were walking from Radstock, England when they met a girl named Vera Alma Holcombe with whom Miller was acquainted. After a brief conversation, Miller and the girl left accused and walked a few yards away from him into a field. They commenced to have intercourse. Suddenly the girl cried "Look out" and Miller was struck on the head with a rock wielded by accused. The blow did not render him unconscious, but "took all the strength out of him". Accused said he was sorry and that he had lost his head (R7). In a statement made by the accused prior to the trial and which was admitted in evidence, accused admitted striking Miller on the head with a rock and stated that he was jealous of him (Pros.Ex.A). The rock which struck Miller was about six inches across and had sharp edges. Miller was bleeding badly (R8,9). He suffered a moderately severe cerebral concussion and a lacerated wound, right parietal (R10).

After accused's assault on Miller, he started down the road toward his camp. He had walked a short distance when he met a sixteen year old girl named Elizabeth Johnston. He asked her to wait and, when she did not comply, he caught her by the waist. They fell over a fence into a field. Accused, still retaining his hold, got on top of her, unbuttoned his trousers, pulled her skirt up and forced her legs apart. He admits in his statement, that he was trying to have intercourse with the girl. She screamed, and he threatened to kill her if she did so again. However, she continued to scream and attracted the attention of a passing civilian who approached them and asked what was going on. Accused then got up and ran away. While the girl was struggling with accused, he struck her on the face and mouth. In his statement, accused alleges that previous to the above incidents, he had inbibed ten drinks of beer, wine, whiskey and cider (R11; Pros.Ex.A).

4. The accused elected to remain silent, and no evidence was presented in his behalf.

5. All of the necessary elements of the two offenses with which the accused was charged were not only admitted by the accused by his plea of guilty but were clearly shown beyond reasonable doubt by the evidence produced by the prosecution; as to assault with intent to do bodily harm (CM ETO 804, Ogletree et al; CM ETO 1982, Tankard); as to assault

with intent to commit rape (CM ETO 1673, Denny; CM ETO 2422 Morin; CM ETO 2500, Bush; CM ETO 2652, Jackson).

6. The charge sheet shows the accused is 19 years of age and was inducted on 7 May 1943, to serve in the Army of the United States for the duration of thewar plus six months. He had no prior service.

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

8. Confinement in a penitentiary is authorized for the offense of assault with intent to rape by AW 42, and sec. 276 Federal Criminal Code (18 USCA 455); sec. 335 Federal Criminal Code (18 USCA 541); Act June 14, 1941, c.204, 55 Stat. 252 (18 USCA 753f); Cf: US v. Sloan, 31 Fed. Supp. 327. As the accused is under 31 years of age and the sentence as approved by the reviewing authority is not more than ten years the designation of the Federal Reformatory, Chillicothe, Ohio is authorized (Cir.229, WD, 8 June 1944, sec.II, pars. 1a(1), 3a).

_____ Judge Advocate

_____ Judge Advocate

(ABSENT ON DETACHED SERVICE) Judge Advocate

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1st Ind.

WD, Branch Office TJAG, with ETOUSA. 19 JUL 1944 TO: Commanding General, Southern Base Section, Communications Zone, ETOUSA, APO 519, U.S. Army.

1. In the case of Private First Class JAMES L. JONES (35702718), 3983rd Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2782. For convenience of reference please place that number in brackets at the end of the order: (ETO 2782).

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

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

BOARD OF REVIEW NO. 1

19 AUG 1944

CM ETO 2788

U N I T E D S T A T E S)	XX CORPS.
)	
v.)	
)	Trial by GCM, convened at Headquarters
Privates PURVIS W. COATS)	5th Field Artillery Group, Banbury,
(14046594) and JESSE H. GARCIA)	England, 8 June 1944. Sentence as to
(17046892), both of Head-)	each accused: Confinement at hard
quarters and Headquarters)	labor for six months (later suspended)
Battery, 5th Field Artillery)	and forfeiture of $25 per month for a
Group.)	like period.

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

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1. The record of trial in the case of the 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 insufficient to support the findings and sentence as to accused Garcia, and the sentence in part as to accused Coats. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

2. Accused were charged separately and tried together with their consent.

Accused Coats was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Technician Fifth Grade Purvis W. Coats, Headquarters and Headquarters Battery, Fifth Field Artillery Group, did, in the vicinity of Badsey, Worcestershire, England, on or about 16 May 1944, feloniously and unlawfully kill one Mrs. Annie Morgan, a civilian, by negligently and recklessly operating a 2½ ton truck so as to cause the said truck to collide with and against the said Mrs. Annie Morgan, thereby causing her death.

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 only so much of the findings of guilty of the Charge and Specification "as shows" that the accused did, at the time and place alleged, so negligently operate a two and one-half ton truck as to cause the said truck to collide with and against one Mrs. Annie Morgan in violation of Article of War 96; approved and ordered executed only so much of the sentence as provided for confinement at hard labor for six months and a forfeiture of $25 per month for a like period, and directed that pending further instructions on the place of confinement, accused be retained in the unit guard house.

The proceedings were published in General Court-Martial Order No.2, Headquarters XX Corps, APO 340, 17 June 1944. The unexecuted portion of the sentence relating to confinement was suspended in General Court-Martial Order No.4, Headquarters XX Corps, APO 340, 14 July 1944.

Accused Garcia was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.
Specification: In that Technician Fifth Grade Jesse H. Garcia, Headquarters and Headquarters Battery, Fifth Field Artillery Group, having been charged with responsibility for the operation of a 2½ ton truck, did, in the vicinity of Badsey, Worcestershire, England, on or about 16 May 1944, feloniously and unlawfully kill one Mrs. Annie Morgan, a civilian, by negligently and without attention to duty, allowing the driver of said vehicle one Technician Fifth Grade Purvis W. Coats, Headquarters and Headquarters Battery, Fifth Field Artillery Group to operate said vehicle in a negligent and reckless manner, thereby driving said vehicle into and upon the said Mrs. Annie Morgan, causing her death.

He "demurred" to the Specification on the ground that there was not stated therein "any offense under the Articles of War". The court overruled the "demurrer". He then 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 only so much of the findings of guilty of the Charge and Specification as involved the finding that accused, at the time and place alleged, "having been charged with the responsibility for operating a two and one-half ton truck", did negligently and without attention to duty allow the driver of the vehicle, accused Coats, to operate it

in a negligent manner, thereby driving said vehicle into and upon one Mrs. Annie Morgan in violation of Article of War 96; approved and ordered executed only so much of the sentence as provided for confinement at hard labor for six months and a forfeiture of $25 per month for a like period, and directed that pending further instructions on the place of confinement, accused be retained in the unit guard house.

The proceedings were published in General Court-Martial Order No.3, Headquarters XX Corps, APO 340, 17 June 1944. The unexecuted portion of the sentence relating to confinement was suspended in General Court-Martial Order No.5, Headquarters XX Corps, APO 340, 14 July 1944.

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

Captain John S. Petty, 5th Field Artillery Group, testified that on 16 May 1944, each accused was a Technician Fifth Grade. On that day accused were sent in a two and one-half ton Government-owned vehicle to obtain some post-exchange supplies. Accused Coats was detailed to drive the vehicle which was "dispatched" to accused Garcia who was in charge of it. Garcia "was the senior man", and signed the trip ticket (R5,7; Pros.Ex.A). Captain Petty further testified that several months before, a memorandum was read to all drivers

> "and it more or less stated that you should not drive any faster than you would be able to stop or your visibility permitted, and that is what they are supposed to be operating on. I have told them to take their time * * * that they will always be able to eat * * * that the war will last a long time."

Witness did not know whether Garcia received these instructions but did know that Coats received them. Witness also "put out a Memo * * * that they would pick up no one unless there was an officer present in the vehicle". "Everyone", including Garcia, signed this memorandum (R6-7).

A.C.W. Amy Hall, Honeybourne Royal Air Force Camp, Honeybourne, England, testified that she knew both accused. As she was "waiting for a lift" she saw them coming and stopped them. She said she was going to Honeybourne and asked for a ride. She entered the vehicle and "sat between the driver and the other chap". As they proceeded along the Evesham Road, Hall, who was a driver herself in the motor transport, asked the driver if he knew the road and he replied in the affirmative. She said that they were going "a little fast" and that she "hoped they would get to Evesham all right". The truck was being driven at about 30 miles per hour and as they approached a visible curve the driver did not slow down but continued at the same rate of speed.

> "he was travelling fast and he came around the bend rather fast and wide. He hit the curve and bounced on the footpath. I saw an old lady

> in the road and screamed. The driver tried to get out of the difficulty that he was in and at the same time the old lady was trying to dodge and the truck ran over her."

There was nothing which obstructed the driver's view of the curve. Asked if it was raining at the time of the accident she testified she believed that "it had stopped then" but that the road was "wet, quite wet". Driving was not hazardous "if you took it fairly easy, but if you took it fast, yes." (R7-9).

About 1:45 p.m. Constable Frank W. Haines, Worcestershire County Constabulary, Evesham Division, Badsey, received notice of an accident in the vicinity of Badsey and went to the scene where he saw deceased (Mrs. Annie Morgan) lying in the road with her feet about four inches from the curbing. The truck was facing toward Bretforton at an angle of about 90 degrees to the roadway. It was across the footpath and its rear wheels were

> "on the wrong side of the road. The extreme front point of the bumper * * * was about four inches from the white line, and the lorry was at an angle and practically facing in the opposite direction from which it had been proceeding."

Its rear wheels were about 18 feet from deceased. On the greensward on the inside of the footpath the grass was "churned up" for a distance of about 125 feet from the rear of the lorry wheels. The road was "quite wet." On that particular portion of the road there were some iron palings about three feet high and a small hedge. However, there were no obstructions which would prevent a driver from seeing the curve and slowing down. There was a sharp curve to the left and then to the right (R10-11).

Mr. Henry King, surveyor, 48 Mill Bank, Evesham, son-in-law of deceased, identified the body as that of Mrs. Morgan. Prior to the accident deceased's eyesight and hearing were good. After leaving her house she had no occasion to walk in the road. Before one arrived at the curve there were no obstructions in the road from Bretforton which hampered the driver's vision. The curve was fairly sharp (R11-13).

4. No evidence was presented by the defense and each accused, after being advised of his rights, elected to remain silent (R14).

5. Constable Haines, recalled as a witness by the court, testified that it was raining slightly when he arrived at the scene of the accident, and that the truck was facing in the opposite direction from which it was originally travelling (R14).

6. (a) With reference to accused Costa it is alleged in the Specification that he feloniously and unlawfully killed deceased

"by negligently and recklessly operating a 2½ ton truck so as to cause the said truck to collide with and against the said Mrs. Annie Morgan, thereby causing her death", (Underscoring supplied),

in violation of Article of War 93. The reviewing authority approved only so much of the findings of guilty of the Charge and Specification

"as shows that the accused did * * * so negligently operate a two and one-half ton truck as to cause the said truck to collide with and against one Mrs. Annie Morgan"

in violation of Article of War 96. The reviewing authority, therefore, in his action retained the word "negligently", omitted the words "and recklessly", omitted the words alleging that accused "did feloniously and unlawfully kill" deceased and also the words "thereby causing her death". Two problems are presented for consideration, (1) the nature of the offense, the finding of guilty of which was approved by the reviewing authority; (2) whether such offense is a lesser included offense within that originally charged.

(1) The conclusion is fully justified that the reviewing authority concurred with the conclusions reached in the review of the Staff Judge Advocate, who recommended therein the identical action signed by the reviewing authority. The Staff Judge Advocate stated it to be his opinion

"that the act of the accused was nothing more or less than simple negligence and could have been charged under the 96th Article of War.

* * * * * * * * *

It is my opinion that the evidence produced before the court is legally sufficient to support a finding of guilty of a specification of reckless driving under a Charge of violation of the 96th Article of War" (Underscoring supplied).

The Staff Judge Advocate further stated in effect that it was his opinion that the negligence of accused was not of the "criminal" or "culpable" degree necessary to sustain a finding of guilty of involuntary manslaughter.

The word "reckless" is defined as follows:

"Not recking; careless, heedless, inattentive; indifferent to consequences. According to circumstances 'reckless' may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent" (Black's Law Dictionary, 3rd Ed., p.1503) (Underscoring supplied).

As the Staff Judge Advocate in his recommended action omitted the word "recklessly" contained in the Specification, it is apparent that when he stated it to be his opinion that accused was guilty of simple negligence only and that the evidence was legally sufficient to support a finding of guilty of reckless driving, he was using the word "reckless" in the sense of "careless, inattentive, or negligent" only.

It is provided in section 40-606 (6:246a), District of Columbia Code that

> "Any person who, by operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000 or both" (Underscoring supplied).

It is provided in section 40-607 (6:246b), District of Columbia Code that

> "The crime of negligent homicide defined in section 40-606 shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter such jury may, in its discretion, render a verdict of guilty of negligent homicide" (Underscoring supplied).

Assuming that this statute is applicable to an offense of negligent homicide committed by United States military personnel in England, but without deciding this fact (CM ETO 2663, Bell and Kimber), the action of the reviewing authority clearly precludes its applicability in the present case. He approved only so much of the finding of guilty "as shows" that accused Coats so negligently operated the truck as to cause it to collide with and against Mrs. Morgan. He did not approve the allegations of the Specification that accused feloniously and unlawfully killed her, and that his negligent and reckless operation of the truck caused her death.

It might be contended that the wording of the reviewing authority's action constituted in effect an approval of a finding of guilty of assault and battery.

> "The intent which is required in battery is a general criminal intent. * * *. Negligence supplies intent in those crimes which * * * require only a general criminal intent. Consequently, the general criminal intent which is required in battery may be

found from circumstances of criminal negligence. So, for example, in a case where the defendant drove his automobile at a speed of fifty miles per hour, on a much used public highway, just at dusk, it was held, on his trial for assault and battery, that an unlawful intent was shown from his negligence" (Miller on Criminal Law, sec. 101, pp.313-314) (Underscoring supplied).

However, as previously stated, the reviewing authority approved only so much of the finding of guilty as involved simple negligence on the part of accused, and not negligence of a criminal, gross or culpable degree which is involved in involuntary manslaughter and from which could be found the general criminal intent required in assault and battery.

However, an offender may be found guilty under Article of War 96 for operating a motor vehicle negligently, that is, where he fails to use the care which an ordinarily prudent driver would have used under the circumstances. The basis of such a charge is not the resulting death or injury to another person or to his property, but the failure to use due care in the operation of the vehicle. If a driver, while operating a motor vehicle negligently, runs into and injures or kills another, or damages another's property, and the evidence shows that the degree of his negligence was such as to render him liable for civil damages only, and that he was not criminally, grossly or culpably negligent, he may be found guilty of a violation of Article of War 96, based upon his negligent act rather than upon the resulting death or injury of another or injury to another's property. Evidence as to any resulting injury or death is admissible, however, as an aid in determining an adequate penalty. Such conduct by accused is "of a nature to bring discredit upon the military service", denounced by Article of War 96. (See Military Justice Circular No. 3, BOTJAG-E 250.49, 11 Mar 1944, par.6). It is clearly such an offense, namely, the negligent operation of a motor vehicle in violation of the 96th Article of War, which was approved by the reviewing authority. Such a conclusion is fully warranted by the disapproval of the court's finding of criminal negligence, the omission of the words "and recklessly," the omission of the allegation that accused feloniously and unlawfully killed Mrs. Morgan, and of the words "thereby causing her death".

(2) The question arises whether such an offense is a lesser included offense within the offense charged, namely, involuntary manslaughter.

> "One or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or

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increase the amount of punishment that might be imposed for any such offense. * * *. Lesser Included Offense.- If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words, etc., of the specification, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty of the substituted matter. A familiar instance is a finding of guilty of absence without leave under a charge of desertion" (MCM, 1928, par.78c, pp.64-65).

"The fact that the charge is designated a violation of a specific Article of War does not render improper either a finding of guilty of a violation of the 96th Article of War, the general article, or an approval of such portion of findings as involves such a finding, provided the latter offense is lesser than and included in the offense charged in the specification" (CM ETO 2212, Coldiron).

"But the authority to find guilty of a minor included offense, or otherwise to make exceptions or substitutions in the finding, cannot justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged" (Dig.Op.JAG, 1912, p.574).

As has been stated, the reviewing authority approved a finding of guilty of so negligently operating the truck as to cause it to collide with and against Mrs. Morgan. Such negligence is of a lesser degree than the criminal gross or culpable negligence involved in the offense originally charged. It is simple negligence. It is evident that the reviewing authority was of the opinion that accused was not guilty of the greater degree of negligence necessary to sustain a finding of guilty of involuntary manslaughter and, therefore, that he should not be held responsible for her death as the result of such negligence. However, it was apparent that he was of the opinion that the lesser degree of negligence exhibited by accused did cause the vehicle to collide with and against her and he approved a finding of guilty to this effect. The Board of Review is of the opinion that such an offense is "a lesser offense necessarily included in that charged".

(3) The question next presented is whether the evidence is legally sufficient to support the approved findings of guilty. Although the rain

ceased before the accident the road was very wet. Driving was hazardous if "you took it fast." Hall, herself an experienced motor transport driver, asked accused if he knew the road and remonstrated that they were going "a little fast." Accused acknowledged to Hall that he knew the road. As he approached the curve which was sharp, he failed to reduce his speed and "came around the bend rather fast and wide. He hit the curve and bounced on the footpath." As accused "tried to get out of the difficulty", deceased was trying to dodge the vehicle but it ran over her. When Haines arrived at the scene the truck was practically facing in the opposite direction from which it had been proceeding, its rear wheels were on the wrong side of the road and it was across the footpath. On the greensward on the inside of the footpath the grass was "churned up" for a distance of about 125 feet. There was no obstruction which in any way obscured accused's view of the curve as he approached it.

The Board of Review is of the opinion that as to accused Coats the evidence is legally sufficient to support the findings of guilty as approved by the reviewing authority.

(4) Another question presented for consideration is whether the evidence is legally sufficient to support the sentence to confinement as approved by the reviewing authority. The offense, the findings of guilty of which were approved by the reviewing authority, is not listed in the Table of Maximum Punishments nor is it included in or closely related to any offense listed therein. There is no Federal statute of general application denouncing the offense. Sub-section (b), section 40-605 (6:246), Title 40, District of Columbia Code provides that:

> "Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving." (Underscoring supplied).

Sub-section (c) provides in part that:

> "Any individual violating any provision of this section where the offense constitutes reckless driving shall upon conviction for the first offense be fined not more than $250 or imprisoned not more than three months, or both;"

As has been stated the word "reckless" is, according to circumstances, susceptible of different meanings. The operation of a vehicle in the manner described in the first part of sub-section (b) appears to embrace negligence of a criminal or gross character. The manner of operation contemplated in

the underscored portion of this sub-section apparently embraces negligence of a less reprehensible character such as simple negligence. Also, as has been previously emphasized, the gravamen of the approved findings of guilty is accused's negligent operation of the motor vehicle and not a resulting death of or injury to another person. The action of the reviewing authority in fact absolved Coats from responsibility for Mrs. Morgan's death and precludes the consideration, by analogy, for the purposes of punishment only, of the District of Columbia statute denouncing negligent homicide (sec.40-606, 40-607, supra). By analogy, the period of confinement in the instant case should not exceed the maximum period of confinement set forth in the District of Columbia Code for reckless driving. Accordingly, as to accused Coats, the Board of Review is of the opinion that the record of trial is legally sufficient to support a sentence of confinement at hard labor for three months and forfeiture of $25 of his pay per month for a like period. CM NATO 1151 (1944), (Bull.JAG, Mar 1944, Vol.III, No.3, sec.454(76), pp.101-102). The action of the reviewing authority omitted the words "of his pay" with reference to the forfeiture imposed. However, it is apparent that these words were inadvertently omitted, and they may be implied.

(b) (1) With reference to accused Garcia the first question presented for consideration is the nature of the offense, the findings of guilty of which were approved by the reviewing authority. It was alleged in the Charge and Specification that this accused

> "having been charged with responsibility for the operation of a 2½ ton truck, did, * * * feloniously and unlawfully kill one Mrs. Annie Morgan, * * * by negligently and without attention to duty, allowing the driver of said vehicle * * * Coats * * * to operate said vehicle in a negligent and reckless manner, thereby driving said vehicle into and upon * * * Mrs. Annie Morgan, causing her death" (Underscoring supplied),

in violation of Article of War 93. The reviewing authority approved only so much of the findings of guilty of the Charge and Specification as involved a finding that accused Garcia

> "Having been charged with the responsibility for operating a two and one-half ton truck, did * * * negligently and without attention to duty allow the driver * * * Coats, * * * to operate said vehicle in a negligent manner, thereby driving said vehicle into and upon one Mrs. Annie Morgan" (Underscoring supplied)

in violation of Article of War 96. The action of the reviewing authority

therefore charges accused with responsibility for the operation of the vehicle and with negligently and without attention to duty allowing Coats to operate it in a negligent manner, thereby driving the truck into and upon Mrs. Morgan. The evidence shows that the vehicle was dispatched to Garcia, that he signed the trip ticket as official user, that he was senior to Coats and was in charge of the vehicle. The responsibility of the official user of a Government vehicle is as follows:

> "The senior (officer, warrant officer or enlisted man) present in a vehicle is responsible for the proper operation of the vehicle and that it does not exceed the speed limit" (ETOUSA Directive AG 451/2 Pub.GC, 24 Jan 1944, XXXIII, par. 6,p.34) (Underscoring supplied).

The court was authorized to take judicial notice of general orders and circulars of Headquarters European Theater of Operations, and the Board of Review may likewise take judicial notice of same upon appellate review (CM ETO 1538, Rhodes, and authorities cited therein). In CM ETO 1554, Pritchard, accused was charged with notice of Army Regulations and the safety regulations contained in an applicable field manual. The principles enunciated in the Pritchard and Rhodes cases are equally applicable to the above-quoted directive with reference to Garcia.

The substance of the offense, the findings of guilty of which were approved by the reviewing authority, is Garcia's failure to discharge the military duty imposed upon him by the above-quoted directive, namely, to see that the vehicle was properly operated. The gravamen of such offense was not joint criminal responsibility as such with Coats for the negligent operation of the vehicle. The directive was not intended to, nor could it legally, change fundamental principles with respect to criminal liability for simple negligence on the one hand and culpable, gross negligence on the other. It merely imposes upon the senior present in a vehicle the military duty of seeing that it is properly driven.

The evidence plainly shows that Garcia failed to perform this military duty. He was riding in the front seat of the truck with Coats and Hall and was in an excellent position to observe the manner in which the vehicle was driven. The road was very wet. The conditions were such that "if you took it fast" driving was hazardous. Hall, an experienced driver, asked Coats if he knew the road, warned him that he was driving "a little fast", and said that she hoped they "would get to Evesham all right." The evidence indicates no action whatsoever on the part of Garcia at any time. Coats continued at the same speed and, without slowing down, went around a sharp curve "rather fast and wide * * * hit the curve and bounced on the footpath." Coat's negligence caused the vehicle to strike Mrs. Morgan. The evidence, considered as a whole certainly substantiates Hall's testimony as to the manner of Coats' operation of the vehicle and amply shows that his negligent driving should have been perfectly apparent to

Garcia. There was no evidence showing that Garcia ordered the driver to slow down or that he took any measures whatsoever to ensure the proper operation of the vehicle. He apparently remained silent. The Board of Review is of the opinion that Garcia failed to discharge the military duty imposed.

(2) The question also arises whether such an offense is a lesser included offense within that originally charged. The Specification indicates an attempt by the drafter thereof to charge accused with involuntary manslaughter in violation of Article of War 93. The Specification was not drawn in the form ordinarily employed when charging this offense and its allegations are unusual. A careful examination of the Specification leads to but one conclusion, namely, that the offense actually alleged was a violation of a military duty and that as a result of such violation accused committed the offense of involuntary manslaughter. It was alleged that Garcia, having been charged with responsibility for the operation of the truck, feloniously and unlawfully killed Mrs. Morgan by negligently and without attention to duty allowing Coats to operate the vehicle in a negligent and reckless manner, thereby driving it into and upon her, causing her death. It is especially noted that the reviewing authority in his action retained the words which charged Garcia with responsibility for the operation of the truck, and with his negligent failure to perform such duty whereby he allowed Coats to drive the vehicle in a negligent manner, thereby driving the vehicle into and upon the woman. The reviewing authority in his action omitted the words charging Garcia with feloniously and unlawfully killing Mrs. Morgan, reduced the degree of Coats' negligence by omitting the words "and reckless," and also omitted the words "causing her death". The drafter of the Specification based the responsibility of Garcia for the death of Mrs. Morgan primarily upon his military responsibility for the proper operation of the truck and upon his negligent failure to perform such military duty in allowing Coats to operate the vehicle as alleged. The approval of the findings of guilty by the reviewing authority was clearly based upon the same premise. The gravamen of the approved findings of guilty is that, having been charged with a military responsibility for the proper operation of the vehicle, Garcia negligently failed to perform such military duty, the result of which was that Coats operated the truck negligently and it collided with Mrs. Morgan. In view of the nature of the offense alleged, the Board of Review is of the opinion that the action of the reviewing authority did not constitute an approval of findings of guilty of a lesser offense included in that charged, but in effect, it was an approval of the findings of guilty of the offense originally charged, namely, the violation of a military duty and it merely lessened the degree of seriousness of the results of such violation of duty. Although the drafter of the Specification supposed that he alleged the commission of the offense of involuntary manslaughter in violation of Article of War 93, he in truth alleged an offense chargeable under Article of War 96, namely, the violation of a military duty.

> "We must look to the indictment itself, and if it properly charges an offense under the laws of the United States that is sufficient

to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute" (Williams v. United States, 168 U.S. 382,389, 42 L.Ed., 509, 512).

The Board of Review has followed the principle of the Williams case in CM ETO 2005, Wilkins and Williams, CM ETO 1109, Armstrong, and CM ETO 1249, Marchetti.

(3) The question remaining for consideration is whether the evidence is legally sufficient to support the sentence to confinement as approved by the reviewing authority. The most closely related offense to the one the findings of guilty of which were approved by the reviewing authority, is that of failing to comply with general or standing orders, an offense which is a disorder and neglect to the prejudice of good order and military discipline in violation of Article of War 96 (MCM, 1928, par. 134h, p.149). Such an offense is not listed in the Table of Maximum Punishments, but is similar in character, considering the source of the quoted directive, namely, Headquarters, European Theater of Operations, to that of failing to obey the order of a superior officer, the maximum penalty for which is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (MCM, 1928, par.104c, p.100). As has been stated, accused was chargeable with notice of the directive. The Board of Review is of the opinion, therefore, that the record of trial is legally sufficient to support the sentence as approved. In the action of the reviewing authority the words "of his pay" are also omitted, but it is apparent that the omission was inadvertent, and they may be implied.

7. The facts involved in the instant case are to be distinguished from those in CM ETO 393, Caton and Pikes, wherein accused were charged jointly with and found guilty of involuntary manslaughter. The evidence in that case disclosed that accused were joint venturers in a wrongful joint enterprise, and the legal principles involved therein are readily distinguishable from those in the case under consideration.

8. The charge sheets show that accused Coats is 25 years of age and enlisted at Montgomery, Alabama, 20 March 1941; that accused Garcia is 23 years of age and enlisted at Jefferson Barracks, Missouri, 16 May 1942. Neither accused had any prior service.

9. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. For the reasons stated the Board of Review is of the opinion that as to accused Coats, the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and to support only so much of the approved sentence as involves confinement at hard labor for three months

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and forfeiture of $25 of his pay per month for a like period, and that as to accused Garcia the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority.

B. Franklin Ritter Judge Advocate

Edward H. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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

BOARD OF REVIEW

ETO 2806

29 JUN 1944

U N I T E D S T A T E S v. Private GERARD M. TORPEY (12064876), Detachment "D", Casual Pool, 10th Replacement Depot.	WESTERN BASE SECTION, SERVICES OF SUPPLY, redesignated WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 5 June 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. United States Penitentiary, Lewisburg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
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 Gerard M. Torpey, Detachment "D", Casual Pool, 10th Replacement Depot, did, at Bristol, England, on or about 23 July 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 18 April 1944.

He pleaded not guilty to and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for seven days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his

natural life. The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. Uncontroverted evidence, corroborated by accused's confession, establishes that at the time and place alleged he absented himself without leave from his organization and remained so absent until his apprehension in London at the time alleged (R6,7,8; Pros.Exs.1,2,3). The only question for consideration is whether accused entertained the specific intent not to return to the military service of the United States. His absence endured nearly nine months and was terminated by his apprehension over 100 miles from his former station and from Bristol, where he had gone initially on pass (Ibid; Pros.Ex.3). During his absence he obtained money by "panhandling" and associating with sexual perverts. He denies committing larceny but admits perversion since 16 years of age. In January 1944 he pawned a set of false teeth issued to him by the Army. He made no attempt to surrender to the military authorities (Pros.Ex.3). The foregoing facts justify the inference of the requisite specific intent to absent himself permanently from the military service of the United States and support the findings of guilty (MCM, 1928, par.130a, pp.143-144; CM ETO 1629, O'Donnell; CM ETO 1737, Mosser; and authorities there cited).

4. The charge sheet shows that accused is 36 years one month of age and enlisted 9 May 1942 at New York City, New York to serve for the duration of the war plus six months. No prior service is shown.

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

6. The penalty for desertion in time of war is death or such other punishment as the court may direct (AW 58). Confinement in the United States Penitentiary, Lewisburg, Pennsylvania is authorized (AW 42; Cir.291, WD, 10 Nov 1943, sec.V, par.3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind

WD, Branch Office TJAG., with ETOUSA. 29 JUN 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U. S. Army.

1. In the case of Private GERARD M. TORPEY (12064876), Detachment "D", Casual Pool, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2806. For convenience of reference please place that number in brackets at the end of the order: (ETO 2806).

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 2827

15 JUL 1944

U N I T E D S T A T E S)	CENTRAL BASE SECTION, SERVICES OF SUPPLY, now designated CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private MILTON SCHECTER (32162860), 10th Replacement Depot.)	Trial by GCM, convened at London, England 27,30 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
RITER, SARGENT and HEPBURN, 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 61st Article of War.
Specification: In that Private Milton Schecter, 10th Replacement Depot, ETOUSA, did, without proper leave, absent himself from his organization at Litchfield, England, from about 21 March, 1944, to about 23 April, 1944.

He pleaded guilty to the Specification except the words "21 March, 1944, to about 23 April, 1944" substituting therefor the words "22 April 1944 to 23 April 1944", of the excepted words, not guilty, of the substituted words guilty and guilty of the Charge. He was found guilty of the Charge and its Specification. Evidence was introduced of two previous convictions by special courts-martial for absence without leave for two hours and two days respectively, in violation of Article of War 61. He

was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial under the provisions of Article of War 50½.

3. The prosecution showed by the morning report of the accused's organization (an extract copy of which was admitted in evidence without objection), then stationed at Litchfield, England, that he became absent without leave 21 March 1944 (R5, Pros.Ex.1). He was apprehended on 23 April 1944 in London. It was stipulated that the accused on that date was in the military service of the United States (Pros.Ex.2).

4. The accused elected to testify on his own behalf. He arrived at the 10th Replacement on 3 March 1944 and was assigned to the Bogard Barracks. He remained there until 21 March 1944 when, his name having been called to report to the Wiltshire Barracks, which was located in the same camp, he reported there and remained in the latter barracks until 22 April 1944. On that date he went to London without authority and was picked up in London by the military police shortly after midnight (R7-8). While at the Wiltshire Barracks his name was never called on roll-call (R8).

5. The court adjourned until 30 May 1944 in order to give the prosecution an opportunity to present further evidence. At that time First Sergeant William E. Webb and Sergeant William A. Michael, both of the 316th Replacement Company, testified that they knew the accused when he was at the Replacement Depot. On 21 March 1944 accused was given extra duty by the company commander but he could not be found. He was not present at bedcheck that night nor the following morning. Nor did he answer roll call at reveille the morning of 22 March 1944. An unsuccessful search was made for him and his clothes and equipment were taken and delivered to the supply department. He was never transferred to Wiltshire Barracks. It was impossible for accused to change barracks in the camp because of the system used - no one would be permitted to occupy a bed in the barracks until he was first inspected for his full equipment and a receipt given by the receiving barracks to the non-commissioned officer delivering the soldier (R16-26).

6. The charge sheet shows the accused to be 25 years of age and that he was inducted 31 October 1941 at Camp Lee, Virginia, "service period governed by service extension act". No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were commited 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. An issue of fact existed as to the exact date of the commencement of accused's absence.

There was substantial competent evidence to sustain the court's findings and they will not be disturbed on appellate review (CM ETO 1621, Leatherberry and authorities therein cited; CM ETO 2602, Picoulas).

8. The designated place of confinement is authorized (AW 42; Cir. 210, WD, 14 Sept 1943, sec.VI and its amendments).

_____ Judge Advocate

_____ Judge Advocate

(ABSENT ON DETACHED SERVICE) Judge Advocate

(60)

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 20 JUL 1944 TO: Commanding General, Central Base Section, Communications Zone, ETOUSA, APO 887, U.S. Army.

1. In the case of Private MILTON SCHECTER (32162860), 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. Although accused has two prior convictions for absence without leave for two hours and two days respectively and the comments of the Staff Judge Advocate indicate that he is a low grade soldier, I do not believe he should be freed from the hazards and dangers of combat by incarceration in the United States. Such punishment would probably achieve accused's real purpose. In accord with present policies of this theater for conservation of man power, it is recommended that you consider suspending the execution of the dishonorable discharge and the designation of Disciplinary Training Center No.2912, Shepton Mallet, Somerset, England, as the place of confinement. If you are in accord with this recommendation your decision should be evidenced by supplementary action which should be forwarded to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2827. For convenience of reference please place that number in brackets at the end of the order: (ETO 2827).

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

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

BOARD OF REVIEW

20 JUL 1944

ETO 2828

U N I T E D S T A T E S	CENTRAL BASE SECTION, SERVICES OF SUPPLY, now designated CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private THADDEUS C. KULAGA (32064046), Company A, 37th Replacement Battalion.	Trial by GCM, convened at London, England, 26 May 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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 Thaddeus C. Kulaga, Company A, 37th Replacement Battalion, ETOUSA, did, at Lichfield, England, on or about 9 November 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 30 March 1944.

CHARGE II: Violation of the 94th Article of War.
Specification: In that * * * did, at London, England, on or about 16 March 1944, feloniously take, steal, and carry away one (1) blouse, olive drab, value about seven dollars ($7.00); one (1) pair of trousers, olive drab, value about three dollars and fifty cents ($3.50); one (1) shirt, olive drab, value about one dollar and fifty-five cents ($1.55); one (1) overseas cap, olive drab, value about eighty-five cents ($.85); 7 Jewel

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Elgin wrist watch, with dark brown leather band, government issue, serial number OC-25497, value about twelve dollars ($12.00), property, of the United States furnished and intended for the military service thereof.

ADDITIONAL CHARGE I: Violation of the 69th Article of War.
Specification: In that * * *, having been duly placed in confinement in the Unit Guardhouse Section, Central Base Section, Services of Supply, ETOUSA, on or about 31 March 1944, did, at London, England, on or about 19 April 1944, escape from said confinement before he was set at liberty by proper authority.

ADDITIONAL CHARGE II: Violation of the 94th Article of War.
Specification: In that * * * did, at London, England, on or about 19 April, 1944, feloniously take, steal, and carry away one (1) wool blouse, Olive Drab, of the value of about ten dollars ($10.00), one (1) pair of wool trousers, Olive Drab, of the value of about four dollars ($4.00), property, of the United States furnished and intended for the military service thereof.

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

ADDITIONAL CHARGE IV: Violation of the 58th Article of War.
Specification: In that * * * did, at London, England, on or about 19 April 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 20 April 1944.

He pleaded guilty to the Specification, Charge I, and to the Specification, Additional Charge IV, except the words "desert" and "in desertion", substituting therefor, respectively, in each instance, the words "absent himself without leave from" and "without leave", to the excepted words, not guilty, to the substituted words, guilty; not guilty to Charge I and Additional Charge IV, but guilty, in each instance, of a violation of Article of War 61; and guilty to all remaining charges and specifications. At the close of the evidence, after argument, accused, at the suggestion of the court, changed his plea to not guilty to Additional Charge III and its Specification. He was found not guilty of Additional Charge III and its Specification. He was found guilty of the Specifica-

tion, Charge I, except the word "Lichfield", substituting therefor the words "8th Convalescent Hospital, APO 162, U.S. Army"; guilty of the Specification, Charge II, except the words and figures "One (1) blouse, olive drab, value about seven dollars ($7.00), one (1) pair of trousers, olive drab, value about three dollars and fifty cents ($3.50)" and the words "One (1) overseas cap, olive drab, value about eighty-five cents ($.85)"; guilty of all remaining charges and specifications. Evidence was introduced of two previous convictions by special court, one for absence without leave for 31 days, in violation of Article of War 61, and one for stealing an Army pistol, in violation of Article of War 94. 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 Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows by duly authenticated extract copy of the morning report, Detachment of Patients, 8th Convalescent Hospital, that accused went absent without leave 9 November 1943 (R7; Ex.1). According to his signed statement, made during the investigation and introduced in evidence in the trial, he caught the night train to London, arriving there on the morning of 10 November 1943. Until apprehended at the Columbia Red Cross Club 30 March 1944, he lived in London, with - and largely upon the bounty of - a succession of prostitutes, whose contributions he supplemented by larcencies from soldiers at the Red Cross Club, including the theft of the government issue shirt and wrist watch described in the Specification, Charge II (R11; Ex.3). On 31 March 1944 accused was apprehended and placed in confinement in the Central Base Section Guardhouse, London, where he remained until 19 April 1944, when, without being set at liberty by proper authority, he picked the lock on the door to his cell, crossed the hall and escaped, by means of a bent bar, through a window in the latrine (R13-15,22; Ex.7). That same night, in London, he stole the articles of government issue clothing described in the Specification, Additional Charge II (R16, 18,22; Ex.7). He was wearing the stolen blouse and trousers when apprehended in a London basement at 0030 hours 20 April 1944 (R20, 22; Ex.7).

4. The only evidence for the defense was the testimony of the accused, who, after his rights were explained to him, elected to testify under oath as a witness in his own behalf (R24). According to the accused's testimony, he was on detached service continuously

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from the date of his arrival in the United Kingdom about 26 February 1943. Despite repeated efforts, he was unable to secure an assignment to a permanent unit. He was injured while working on an obstacle course in England. As a result, he underwent an operation for hernia. He was in the station hospital from 13 October to 9 November 1943, when he was transferred to the 8th Convalescent Hospital. He testified:

> "I was taken over to be classified. They told me I would have to come back the following day. I stayed there until that evening. I just got fed up. I could not get assigned to any outfit. I got fed up and came to London, AWOL.
> * * * I just wanted to go out and forget about it for a while and try it again, to see if I could get assigned to a permanent outfit" (R26-27).

He had no intention of trying to get away from the service. He had a round-trip ticket back to his station but did not know what had become of it. After he had been in London for a month and a half, he tried to turn himself in at 101 Picadilly. He testified:

> "I walked up to the C.Q. there -- it was a Corporal -- and told him I wanted to turn myself in. He asked me what was the reason for turning myself in. I told him I was AWOL. He just told me to go away, 'Don't bother me'. I just walked off and went about my business again" (R27).

About the middle of March his shirt was slashed in a street brawl

> * * * so I went down to the American Red Cross to see if I could get myself a shirt. I went into a room and took out some clothing in there and I got myself a shirt. When I had the clothes I found a watch in the pocket and I took that with me. That was the only reason I went into the Club, to get myself a shirt to wear" (R27).

He never dressed in civilian clothes nor made any attempt to leave the country. After his apprehension on 31 March 1944 he was confined in the guardhouse until 19 April when he and others, awakened by an air raid, decided to break out. After breaking out they went down to Park Street and got themselves some uniforms. Accused got disgusted, went to see his girl a little while and was going to turn himself in and

take his punishment. It was less than 24 hours after escaping from confinement that he was apprehended (R28-30).

5. The respective specifications, Charge I and Additional Charge IV, allege desertion. The protracted duration of the first absence without leave, the larceny committed during it, and its termination by apprehension, all support the inference of intent not to return implicit in the court's findings of guilty. Although the second absence without leave was of brief duration, it involved both escape from confinement and apprehension, significant incidents which, under the circumstances, adequately support the inference drawn by the court. The evidence corroborates and demonstrates the appropriateness of accused's pleas of guilty to the larcenies and escape from confinement alleged in the specification, Charge II, and the respective specifications, Additional Charges I and II.

6. The attached "Evidence of Previous Convictions" referred to at page 32 of the record, while not marked for identification and attached as an exhibit to the record proper, is clearly identifiable among the accompanying papers. No injury to accused's substantial rights is involved.

7. The charge sheet shows that accused is 26 years three months of age. He was inducted at Newark, New Jersey, 25 March 1941 for a service period governed by the Service Extension Act. No prior service is shown.

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

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

Richard Bradshaw, Judge Advocate

John Townsend, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

(66)

1st Ind.

WD, Branch Office TJAG, with ETOUSA. 20 JUL 1944 TO: Commanding General, Central Base Section, Communications Zone, ETOUSA, APO 887, U. S. Army.

1. In the case of Private THADDEUS C. KULAGA (32064046), Company A, 37th Replacement Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2828. For convenience of reference please place that number in brackets at the end of the order: ETO 2828).

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

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

BOARD OF REVIEW

22 JUL 1944

ETO 2829

U N I T E D S T A T E S	CENTRAL BASE SECTION, SERVICES OF SUPPLY, now designated CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private HOWARD G. NEWTON (15323400), Casual Detachment, 10th Replacement Depot.	Trial by GCM, convened at London, England, 6 and 9 June 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
VAN BENSCHOTEN, HILL and SLEEPER, 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 Howard G. Newton, Casual Detachment, 10th Replacement Depot, ETOUSA, did, without proper leave, absent himself from his organization at Lichfield, Staffordshire, England, from about 20 January, 1944, to about 26 March, 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that * * * did, at London, England, on or about 26 March, 1944, feloniously take, steal, and carry away five dollars ($5.00) in money of the United States; eight pounds (£8-0-0) in English money of the value of about thirty-two dollars

($32.00); one (1) cigarette lighter of the value of about eight dollars ($8.00), and one (1) wallet of the value of about four dollars ($4.00), the property of Technician Fifth Grade Marvin Feldman, 502nd Parachute Infantry Regiment, ETOUSA.

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * * did, at London, England, on or about 11 March, 1944, unlawfully pretend to the American Red Cross Rainbow Club that he was Private Jim Maynard, well knowing said pretenses were false, and by means thereof did fraudulently obtain the sum of ten (10) shillings (approximately two dollars ($2.00) in money of the United States) from said American Red Cross Rainbow Club.

He pleaded guilty to Charge I and its Specification, except for the words "about 20 January, 1944, to about 26 March, 1944", substituting therefor the words "about 20 January 1944 to 8 February" and "about 10 March 1944 to 26 March, 1944", of the excepted words, not guilty, of the substituted words, guilty; not guilty to the remaining charges and specifications. He was found guilty of the Specification, Charge I, except the words "20 January, 1944, to about 26 March, 1944", substituting therefor the words "20 January, 1944 to about 12 February, 1944 and about 1 March, 1944 to about 26 March, 1944", of the excepted words, not guilty, of the substituted words, guilty; guilty of the remaining charges and specifications. Evidence was introduced of two previous convictions, one by special court for absence without leave for 35 days, and one by summary court for absence without leave for five days, both in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for eight years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total 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 accused's guilt of the three offenses of which he was convicted was clearly established not only by competent evidence adduced by the prosecution but also by his own testimony, elicited after his election to testify, following a full explanation of his

rights. However, in accord with the precedent cited below, the record is legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, as involves the finding of guilty of absence without leave from his organization from 20 January to 12 February 1944.

> "A court-martial may not change the nature or identity of any offense charged by exception and substitution (MCM, 1928, par.78c). Since the finding divides the period of unauthorized absence into two separate periods, constituting thereby two separate offenses, only so much of the finding as involves a finding of AWOL from * * * /20 January to 12 February/ may be approved. CM 235559 (1943)". (Bull. JAG, Vol.II, No. 10, October 1943, sec. 419(3), p.380).

By reason of Executive Order 9267, 9 November 1942, suspending the maximum limits of punishment for violation of Article of War 61, the sentence is not affected.

4. The only other question requiring consideration is the propriety of the designation of a Federal reformatory as the place of confinement. Paragraph 90b, Manual for Courts-Martial, provides:

> "Subject to such instructions as may be issued from time to time by the War Department, the United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches, or a military post, station, or camp, will be designated as the place of confinement in cases where a penitentiary is not designated."

War Department letter dated 26 February 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).

> "Although Executive Order 9267, 9 November 1942, suspends the maximum limits of punishment for absence without leave, confinement in a penitentiary in punishment for a violation of Article of War 61 is still precluded by the provisions of Article 42 (CM 238707 (1943), Bull JAG, Vol.II, No. 8, August 1943, sec. 419(4), p.308)" (CM ETO 2651, Burdette).

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Accused was also convicted of larceny of property of a value of $49. The maximum confinement for this offense is limited by the Executive Order fixing maximum punishments and may not exceed one year. A penitentiary may not be designated as the place of confinement under a sentence adjudged by a court-martial, "unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year" (AW 42). Confinement in excess of one year not being authorized by the Manual for Courts-Martial for the offense of larceny here in question, it follows that penitentiary confinement in the case is not authorized. (AW 42; CM 226579 (1942); Bull JAG, Vol I, No. 6, Nov 1942, sec. 399 (2), p.324).

5. The charge sheet shows that accused is 20 years six months of age. He enlisted at Fort Hayes, Ohio, 22 October 1942, for the duration of the war. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused, other than therein above specifically indicated, 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 except the words "and about 1 March 1944 to about 26 March,1944" in the finding of guilty of the Specification, Charge I, and 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.

7. The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

(71)

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

1. In the case of Private HOWARD G. NEWTON (15323400), Casual Detachment, 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 except the words "and about 1 March,1944 to about 26 March 1944" in the finding of guilty of the Specification, Charge I, and only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a place other than a penitentiary, Federal reformatory or correctional institution, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. None of the offenses of which accused was convicted were offenses for which penitentiary confinement is authorized. Penitentiary confinement is therefore illegal (AW 42). The place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. Supplemental action in accordance with the foregoing holding should be forwarded to this office to be attached to the record of trial.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2829. For convenience of reference please place that number in brackets at the end of the order: (ETO 2829).

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

(73)

BOARD OF REVIEW

24 JUL 1944

ETO 2831

UNITED STATES	CENTRAL BASE SECTION, SERVICES OF SUPPLY, now designated CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private MORTON KAPLAN (36375174), Company A, 832nd Engineer Battalion.	Trial by GCM, convened at London, England, 1 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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 Morton Kaplan, Company A, 832nd Engineer Battalion, ETOUSA, did, without proper leave, absent himself from his organization at Alconbury, England, from about 31 March, 1944, to about 23 April, 1944.

CHARGE II: Violation of the 93rd Article of War.
(Finding of Not Guilty.)
Specification: (Finding of Not Guilty.)

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * * did, at London, England, on or about 23 April 1944, wrongfully and without authority have in his possession one hundred (100) passforms.

He pleaded guilty to Charges I and III and their specifications and not guilty to Charge II and its Specification; the findings were in accordance with his pleas. Evidence of two previous convictions was introduced; one by summary court for absence without leave for 23 days in violation of Article of War 61, and one by special court-martial for absence without leave for 24 days and for altering or causing to be altered dates on furlough in violation of Articles of War 61 and 96, 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 15 years. The reviewing authority approved the sentence, reduced the period of confinement to ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that with the consent of the defense, an extract copy of the morning report of Company A, 832nd Engineer Battalion, for 31 March 1944, showing accused from duty to absence without leave, and of 28 April 1944 showing accused from absence without leave to arrest by military police in London as of 23 April, was admitted in evidence as Pros.Ex.1 (R5).

Staff Sergeant Dan Robbins, Agent, Criminal Investigation Department, Provost Marshal General's office, stationed in London (R5), testified that in response to information received, he arrested accused on 23 April 1944 and on searching him found in his possession approximately 100 blank passes (Pros.Ex.4), four of which had been filled out, one in the name of Private Earl Williams, one in the name of Private Harold Webb, and two in the name of Herman Lang (R6). These blank forms provided for the name, rank and serial number of a member of "2017th Engr. APO. 560" organization and recited that "He is allowed to be on pass to London from" with place for time to be absent and signature of both his sergeant and issuing officer to be filled in.

4. Accused was sworn as a witness in his own behalf and on questioning by the court stated he had gone from London to Reading and had printed there the passes found in his possession. He got them for his own use (R15-16).

5. Accused pleaded guilty to and the evidence shows he committed the acts alleged. The only question requiring comment is whether his possession of "100 pass forms" with no further description of kind or purpose, states any offense. The evidence shows that these pass forms were similar to those granted by organization commanders to their men granting leave for short periods of time and to nearby localities.

The specification is made more definite by the evidence admitted at the trial and aided by verdict rendered. The evidence compels the plain inference that accused had these forms printed not only for his own unauthorized use but also for use by and probably for sale to other soldiers. Since the circumstances shown preclude any reasonable hypothesis except fraudulent concomitant intent, his possession of such passes was wrongful and unauthorized and constituted an offense denounced by a specific act of Congress:

> "Whoever shall falsely make, forge, counterfeit, alter or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with wrongful or fraudulent intent shall use or have in his possession any such pass or permit, or shall personate or falsely represent himself to be or not to be a person to whom such pass or permit has been duly issued, or shall wilfully allow any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than $2000 or imprisoned not more than five years, or both." (15 June 1917, c.30, title 10, sec.3, 40 Stat.228; 18 USCA 132). (Underscoring supplied).

The violation of said statute constitutes a crime or offense not capital under the 96th Article of War (MCM, 1928, sec.152c, pp.188-189; CM ETO 2210, Lavelle).

6. The charge sheet shows accused to be 24 years and two months of age. He was inducted 22 September 1942 at Chicago, Illinois, for the duration plus six months. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

WD, Branch Office TJAG, with ETOUSA. 24 JUL 1944 TO: Commanding General, Central Base Section, Communications Zone, ETOUSA, APO 887, U. S. Army.

1. In the case of Private MORTON KAPLAN (36375174), Company A, 832nd Engineer Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2831. For convenience of reference please place that number in brackets at the end of the order: (ETO 2831).

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 2840

1 JUL 1944

U N I T E D S T A T E S)	WESTERN BASE SECTION, SERVICES OF SUPPLY, redesignated WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private FRANCIS L. BENSON (33099953), 413th Engineer Dump Truck Company.)	Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 3 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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 Francis L. Benson, 413th Engineer Dump Truck Company, did, without proper leave, absent himself from his post at Llanelwedd Summer Tented Camp, Radnorshire, Wales from about 4 April 1944 to about 11 April 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that * * *, did, at Red House, Builth Road, Radnorshire, Wales on or about 11 April 1944 feloniously take, steal and carry away a bicycle, value about three pounds(£3.0.0) of the exchange value of about twelve dollars and thirteen cents ($12.13), property of Verdun Llewelyn Bound.

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(78)

Specification 2: In that * * *, did, at Rhosferig, Builth Wells, Breconshire, Wales, on or about 11 April 1944 unlawfully enter the shop and office of Timber Ltd, Rhosferig Saw Mills, Rhosferig, Builth Wells, Breconshire, Wales, with intent to commit a criminal offense, to wit: larceny, therein.

He pleaded guilty to Charge I and its Specification, not guilty to Charge II and the specifications thereunder, and was found guilty of all charges and specifications. Evidence was introduced of three previous convictions two by summary court for absence without leave and one by special court-martial for absence without leave for 18 days, all in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence but reduced the period of confinement 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 pleas of guilty to Charge I and Specification (absence without leave) are fully supported by the evidence.

With reference to Specification 1, Charge II (larceny), the question as to whether accused intended permanently to deprive the owner of possession of the bicycle was a question of fact, and it was for the court to determine whether or not evidence offered by accused in explanation of his possession of recently stolen property, namely, that he took the machine but intended to return it, constituted a satisfactory explanation of such possession. CM 157681, 157682, 157686 (1923); CM 159718 (1924) (Dig.Op.JAG, 1912-1940, sec.451(37), p.324). In view of the competent, substantial evidence establishing accused's guilt of larceny of the bicycle, the Board of Review will not disturb the findings of the court. Although the alleged value of the bicycle (about three pounds or $12.13), was not satisfactorily proved, there was evidence from which the court would be warranted in determining that the property had some substantial value not in excess of $20 (CM 228742, Blanco, CM ETO 1453, Fowler).

4. With reference to Specification 2, Charge II (housebreaking), it is held in cases involving burglary that

> "It is ordinarily essential to prove the corpus delicti, or the breaking and entry, in order to render evidence of possession of stolen property ground for conviction, although, where the commission of a burglary has been sufficiently established, proof of defendant's possession of its fruits will be regarded as persuasive, although not conclusive, evidence of his guilt" (12 CJS, sec.59d, pp.738-739).

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"Some authorities hold that to warrant defendant's conviction of burglary there must be corroborating circumstances in addition to proof of his possession of the fruits of the crime shortly after its commission, although slight corroborative evidence is sufficient. Where proof of defendant's possession of the fruits of a burglary is corroborated by other circumstances of a suspicious nature, it tends to show his guilt, and possession coupled with other corroborating evidence may be sufficient to support a conviction, even though either would have been insufficient without the other" (Ibid., sec.59e, p.739) (Underscoring supplied).

"Defendant's explanation of his possession of the fruits of a burglary is entitled to proper consideration by the jury, and, if reasonable and consistent with his innocence of the burglary charged, his possession of the stolen property should not be accepted as an indication of guilt. A conviction of burglary should not be predicated on defendant's possession of the stolen property where he has given a reasonable and credible explanation thereof, or such an account as raises a reasonable doubt of his guilt and where such explanation has not been proved untrue; * * *. However, to avail a defendant his explanation should be, not only reasonable and credible, but also such as to raise a reasonable doubt in the minds of the jury, and, where the burglary has been established, it has been held that the jury may properly convict on the basis of defendant's possession of the stolen goods, even though the state has not directly disproved the truth of defendant's explanation of his possession. An unreasonable or contradictory explanation by defendant, or an explanation contradicted by other evidence, need not be believed by the jury, and will not, as a matter of law, prevent a conviction." (Ibid., sec.59f, pp.740-741)(Underscoring Supplied).

The loss of the petrol coupons and evidence of a breaking and entry were discovered by the foreman of the saw mill about 8:30 a.m., 12 April 1944 (R12). He last saw the missing coupons at the office on 8 April (R13-14,20). The foreman was last in the office on 11 April at 4:00 (p.m.) and did not notice whether the shutter and sill cloth were broken at that time. He testified that if they were broken he thought

he would have noticed the fact (R13-14). Accused admitted that he passed the timber yard on 11 April and stated that he found an envelope containing petrol coupons "in by a gate" (R21; Pros.Ex.4). A colored soldier pushing a bicycle and who resembled accused was seen less than half a mile from the saw mill about 4:20 p.m. 11 April (R10). Accused was arrested the same day about 4:30 p.m. with a bicycle, about a quarter of a mile from the saw mill and the missing coupons were found on his person (R17-20).

In the case under consideration the fact of the unlawful entry was clearly established by the evidence. There was evidence from which it might reasonably be inferred that the offense was committed between 4-4:30 p.m. 11 April. Accused was apprehended about a quarter of a mile from the scene of the crime about 4:30 p.m. on 11 April and the missing coupons were found in his possession. Although accused claimed that he found the coupons in an envelope by the gate, the empty envelope in which the coupons were kept, was found in its usual place in the desk drawer on the morning of 12 April (R12;Pros.Ex.2). His explanation of his possession of the property was a question of fact solely for determination of the court and in view of the foregoing authorities and all the evidence the Board of Review will not disturb the findings of the court. The evidence is legally sufficient to support the findings of guilty of Specification 2, Charge II. CM 157982 (1924). (Dig.Op.JAG, 1912-1940, sec.451(32), pp.321-322).

5. The charge sheet shows that accused is 20 years, 11 months of age and that he was inducted 21 August 1941 to serve for the period of one year. (His period of service is governed by the Service Extension Act of 1941). He had no prior service.

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

7. Confinement in a penitentiary is authorized for the offense of housebreaking by Article of War 42 and secs.22-1801 (6:55) and 24-401 (6:401), District of Columbia Code. As accused is under 31 years of age and the sentence as approved by the reviewing authority is not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio is authorized (Cir.291, WD, 10 Nov 1943, sec.V, par.3a).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind. (81)

WD, Branch Office TJAG., with ETOUSA. 1 JUL 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U. S. Army.

1. In the case of Private FRANCIS L. BENSON (33099953), 413th Engineer Dump Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2840. For convenience of reference please place that number in brackets at the end of the order: (ETO 2840).

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 2842

- 1 JUL 1944

U N I T E D S T A T E S	WESTERN BASE SECTION, SERVICES OF SUPPLY, redesignated WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private RONALD E. FLOWERS (35461048), 457th Engineer Depot Company.	Trial by G.C.M., convened at Liverpool, Lancashire, England, 27 May 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The Federal Reformatory, Chillicothe, Ohio.

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

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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 Ronald E. Flowers, Private, 457th Engineer Depot Company did, at General Depot G-16, Wem, Shropshire, England, on or about 31 March 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at 95 Union Street, Wallasey, Cheshire, England, on or about 1800 hours, 29 April 1944.

He pleaded not guilty to and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence but reduced the period of confinement to

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ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The extract copy of the morning report for 31 March 1944 of the 457th Engineer Company (Pros.Ex.1) shows accused as absent without leave from 31 March to 29 April 1944 (R6). He was not found when search was made of the area on discovery of his absence (R6-7). Through information received, accused was found living at a private home, dressed in civilian clothes (shirt and trousers) (R8,11,13). There was evidence that his hair had been dyed (R13,15,17,19,21) and that accused had said "I will shave this moustache off and nobody will recognize me now." He had secured work with a window-cleaning concern and there was evidence given that "he was hoping to get away. Mrs. Edwards had left her husband and they (she and accused) decided to patch it up between themselves and clear off and live together" (R17). During his unauthorized absence, he remarked to another soldier also absent without leave, "What the hell do you want to go back to camp for and be behind prison bars when you can take it easy here?" (R18).

4. For the defense it was claimed that he was in civilian clothes only on the day he was apprehended and then for the purpose of having his uniform pressed although he wore not only blue trousers but also a blue striped shirt at the time (R20). Some bleaching preparation was put on accused's hair as a joke (R21) and nothing was known of his doing any civilian work (R22). Accused elected to remain silent (R23).

5. Accused was sentenced to a 20 year term of confinement by a two-thirds vote of the members of the court. In so doing the court exceeded its power under Article of War 43. Reduction by the reviewing authority of the sentence to ten years confinement which may be imposed by a two-thirds vote, renders the sentence legal (CM ETO 2602, Picoulas; CM 157144 (1923), CM 185899 (1929), Bull.JAG, Vol.II, No.10, Oct 1943, sec.400, pp. 378-379).

6. The charge sheet shows that accused is 28 years three months of age. He was inducted at Cincinnati, Ohio, and simultaneously transferred to the Enlisted Reserve Corps, 6 July 1942. He reported for duty at Fort Thomas, Kentucky, 20 July 1942. His service period is governed by the Service Extension Act of 1941. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors, except that noted in paragraph five, 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 (ETO 1629, O'Donnell).

8. Confinement in a penitentiary is authorized for the offense of desertion in time of war (AW 42). The designation of the Federal Reform-

atory, Chillicothe, Ohio, is authorized (Cir. 291, WD, 10 Nov 1943, sec.V, par.3a).

B. Franklin Ritz Judge Advocate

Edward Bernstein Judge Advocate

Edward V. Sargent Judge Advocate

(86)

1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 1 JUL 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S. Army.

1. In the case of Private RONALD E. FLOWERS (35461048), 457th Engineer Depot Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 2842. For convenience of reference please place that number in brackets at the end of the order: (ETO 2842).

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 2843

28 JUL 1944

U N I T E D S T A T E S)	2D BOMBARDMENT DIVISION.
)	
v.)	Trial by GCM, convened at AAF
)	Station 147, England, 31 May 1944.
Private CHARLES A. PESAVENTO)	Sentence: Dishonorable discharge,
(7031320), 315th Signal Com-)	total forfeitures and confinement
pany, 2d Bombardment Division.)	at hard labor for five years.
)	Eastern Branch, United States
)	Disciplinary Barracks, Greenhaven,
)	New York.

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Charles A. Pesavento, 315th Signal Company, AAF Station 147, APO 558 did at Cringleford, Norfolk County, England, on or about 2230 hours, 8 May 1944, with intent to commit a felony, viz rape, commit an assault upon Mrs. Edith G. Peck by willfully and feloniously throwing Mrs. Edith G. Peck to the ground and attempting to have carnal knowledge of her against her will.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for failing to report to the commanding officer that accused had a venereal disease, in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved

the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial pursuant to the provisions of Article of War 50½.

3. The undisputed evidence for the prosecution shows that at the time and place alleged Mrs. Edith G. Peck, 2 Intwood Road, Cringleford, England, a housewife 52 years of age, left the Red Lion about 10.20 p.m. and started to walk home. Accused came up to her on his bicycle and asked if he could kiss her. She replied "Certainly not" and walked along the road. He then put his arm around her and again expressed a desire to kiss her and she told him to "get on his bicycle and go to his camp like a good boy". He continued to walk beside her until she reached the end of her street. There, he threw down his bicycle, attacked her from the rear and threw her down on the side of the road where there were stinging nettles, grass and a roll of barbed wire. He threw himself on top of her. She struggled, felt her glasses being broken and said to accused "You will break my glasses". She screamed and accused put his hand over her mouth. She screamed again and he put his hand on her throat and pulled her clothes up to her waist (R7-14). Mr. Hector P. Betts of Keswick Road, Cringleford, was walking along the road about 10.30 p.m. when he heard someone screaming and crying for help. He ran along the road and found accused lying on top of Mrs. Peck who was screaming. Her coat was open and Betts could see "a little" of her underclothes. Betts shouted "Stop that" and as accused turned and began to get up Betts assisted him. Accused "swung out" at Betts "and then thought better of it". He did not speak. Mrs. Peck said she could identify the man and Betts allowed him to ride away on his bicycle (R15-20).

The woman was nervous, exhausted and upset, her hair was down, her glasses were broken and her stockings were torn. She suffered from abrasions and lacerations of her right leg below the knee and minor abrasions around her right ankle. Sedatives were administered (R14,18, 22,25,31). Both Mrs. Peck and Betts identified accused at the trial (R8, 18) and prior to trial she unhesitatingly identified accused who was one of seven men in an identification parade (R24-25). Prior to trial accused, after being warned of his rights, made a written statement in which he admitted assaulting the woman and stated that he had been drinking beer that evening and desired sexual intercourse (R27-28;Pros.Ex.4). He elected to remain silent and did not testify (R36-37).

4. The court properly overruled the defense motion for a finding of not guilty made at the conclusion of the prosecution evidence as such evidence was of a competent and substantial character fairly tending to establish every element of the offense alleged. The evidence is legally sufficient to sustain the findings of guilty (CM ETO 1673, Denny and cases cited therein; CM ETO 1954, Lovato; CM ETO 1873 J. Brown).

5. The charge sheet shows that accused is 23 years of age and that he enlisted at Milwaukee, Wisconsin, 3 January 1940 to serve for the period of three years. His service period is governed by the Service

Extension Act of 1941.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The sentence is considerably less than the maximum for the offense charged (MCM, 1928, par.104c, p.99). Confinement in the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, as amended).

B. Franklin Riter Judge Advocate

Edward H. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(90)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 28 JUL 1944 To: Commanding General, 2d Bombardment Division, APO 558, U.S. Army.

1. In the case of Private CHARLES A. PESAVENTO (7031320), 315th Signal Company, 2d Bombardment Division, 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 2843. For convenience of reference please place that number in brackets at the end of the order: (ETO 2843).

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

2 AUG 1944

ETO 2866

U N I T E D S T A T E S)	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Second Lieutenant JAMES W. WOODSON (0-1105827), 375th Engineer General Service Regiment.)	Trial by GCM, convened at Wilton, Wiltshire, England, 15 May 1944. Sentence: Dismissal, total forfeitures, and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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1. The record of trial in the case of the 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.
(Finding of Not Guilty)
Specification: (Finding of Not Guilty)

CHARGE II: Violation of the 63rd Article of War.
Specification: In that Second Lieutenant James W. Woodson, 375th Engineer General Service Regiment, did, at Whiteway House Camp, Devon, England, on or about 28 April 1944, behave himself with disrespect towards Lieutenant Colonel Eldon V. Hunt, his superior officer, by contemptuously and sarcastically saying to him in a loud and disrespectful manner, "I don't have to and am not going to answer any of your damn questions and you don't have any authority over me and I am going to take

this matter up with the Adjutant General", or words to that effect.

CHARGE III: Violation of the 69th Article of War.
(Finding of Not Guilty)
Specification 1: (Finding of Not Guilty)
Specification 2: (Finding of Not Guilty)
Specification 3: (Finding of Not Guilty)

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

He pleaded not guilty, and was found guilty of Charge II and its Specification, and not guilty of the remaining charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, Southern Base Section, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution showed that on 28 April 1944 accused was a Second Lieutenant, 375th Engineer General Service Regiment, stationed at Whiteway House Camp, Devonshire, England (R6,9). On that date and at that place, accused was under arrest, limited to his quarters, his mess, and several nearby places of convenience and necessity, by order of Lieutenant Colonel Eldon V. Hunt, commanding officer of the regiment. About ten o'clock the evening of 28 April 1944, Colonel Hunt sent Private William A. Harris, of the same regiment, for accused (R9). Harris knew accused and searched for him in the places to which he was restricted and in the camp, without finding him, and at 11:15 o'clock reported his failure to find accused (R6,7). Colonel Hunt, accompanied by his Executive Officer, then looked for accused in his tent and in "the entire area" without finding him. Colonel Hunt testified that "a little bit later" he returned to accused's tent and found him there. He asked accused: "Where have you been during the last two hours?" and that accused replied, in effect: "Have you", * * *"I am getting Goddamn tired with this and I am going to take this matter up with the Adjutant General" (R8,9). Major N. C. Angelopoulos, Executive Officer of the 375th Engineer General Service Regiment, was with Colonel Hunt when the latter searched for accused and found him in his tent. He testified that

"Colonel Hunt and I decided to search the whole area, so we checked his tent three times, we check the Headquarters row of tents and Headquarters and Service Company, and the officers' recreation hall, all the officers' tents and we didn't find him. When we found him, he was

going to bed. At this time, Colonel Hunt, asked Lieutenant Woodson where he had been in the past two (2) hours, and Lieutenant Woodson, without making any attempt to come to attention and slouching around by his bed, he said that he wasn't going to answer any of Colonel Hunt's questions, I believe he said 'God-damn questions', and that he wasn't going to stand for that any more and that he was going to take the matter up with the Adjutant General. Colonel Hunt informed him that he was still under his jurisdiction and he was responsible for his actions." (R15)

4. After defense counsel stated that accused had been warned of his rights and desired to take the stand, he was sworn and testified in his own behalf. He said that from 25 April he was on temporary duty and, by permission of Colonel Hunt, if he left the post he "got the proper authority". He denied he was out of camp the evening of 28 April, that for an hour or so prior to 11 o'clock that evening he had been doing his laundry and had been at the officers' latrine (R23-26). At 11:15, he continued, -

"the Colonel and the Major came in and he said 'where have you been in the last two (2) hours'. I said 'on the post'. He said 'I've been looking for you everywhere. I wanted to know why you hadn't given me a report on your trip to Area "K" headquarters today.' I said that Captain Brown had been there and he could have given you that. I asked Captain Brown if I wasn't supposed to make a report and he said that he made a report to the assistant S-1, and he said he submitted the report to Regimental Headquarters every day of his activities. I said you could have gotton that from Captain Brown. The Colonel said, 'You needn't get smart about it', and I said 'Colonel, I'm not trying to get smart, I just said you could have gotten it from Brown because he was there and he could have given you our activities'. Then he said to me, 'I want you to give me your statement as to your whereabouts at ten o'clock.' I said 'I'm afraid it would be used against me' - I said that because a statement of mine had previously been used against me on another occasion - I could give you instances of where it had been used against me. However, I said 'if you didn't get a report of my activities I will certainly give it to you now. Do you still want one?' He said 'Did you hear that, Major?' and walked out of the tent. Before he went out I said 'Colonel, I honestly believe you are

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> trying to get me into trouble again, and if that is the case, I will have to communicate direct with the Adjutant General on the matter'." (R26).

On cross-examination, accused said he came to attention when Colonel Hunt entered his tent.

5. It is unnecessary to recapitulate the evidence. The Specification of Charge II, of which accused was found guilty, alleges that accused

> "did * * * behave himself with disrespect towards Lieutenant Colonel Eldon V. Hunt, his superior officer, by contemptuously and sarcastically saying to him in aloud and disrespectful manner, 'I don't have to and am not going to answer any of your damn questions and you don't have any authority over me and I am going to take this matter up with the Adjutant General', or words to that effect."

There is credible evidence that accused used the language alleged, "or words to that effect" and it supports each allegation of the Specification, except the words "contemptuously andsarcastically" and the words "in a loud and". The language employed by accused toward Colonel Hunt, his superior officer, itself constituted disrespectful behavior, as alleged, in violation of Article of War 63. Accused's very physical attitude and manner was disrespectful. It was unnecessary to prove the excepted words in order to sustain this charge. By implication, accused attempted to inject as an issue of the trial his right to refuse to answer the question addressed to him by his commanding officer. His right to remain silent was not an issue. He was not on trial for his silence but for the disrespectful behavior found in the language he unnecessarily employed to exercise this claimed right. Disrespectful language used in refusing to obey an illegal order is no defense to a charge under Article of War 63 (Dig.Op.JAG, 1912-1940, sec.421(2), CM 146727 (1921)). The language used by accused was disrespectful behavior within the meaning of Article of War 63.

> "The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed"(MCM, 1928, par.133, p.146).

6. Accused is 25 years old. He was a member of the Reserve Officers Training Corps from 1937-1941. He was inducted under the Selective Service Act, 17 April 1942. He attended the Engineer School, Fort Belvoir, Virginia, and was commissioned Second Lieutenant 11 November 1942.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal and confinement of an officer are authorized upon conviction under Article of War 63.

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

Judge Advocate

Judge Advocate

Judge Advocate

(96)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 AUG 1944 TO: Commanding General, European Theater of Operations, United States Army, APO 887, U. S. Army.

1. In the case of Second Lieutenant JAMES W. WOODSON (O-1105827), 375th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The record of trial of this officer upon other charges, together with the holding by the Board of Review therein (ETO 2777), is transmitted with the holding and record in this case (ETO 2866).

3. 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 2866. For convenience of reference please place that number in brackets at the end of the order: (ETO 2866).

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

3 Incls:
Incl 1-Record of Trial, ETO 2866
Incl 2-Board of Review Holding, ETO 2777
Incl 3-Record of Trial, ETO 2777.

(Forfeiture and confinement remitted. Sentence as thus modified ordered executed. Par. 2, GCMO 64, ETO, 8 Aug 1944)

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

BOARD OF REVIEW

14 JUL 1944

ETO 2867

U N I T E D S T A T E S)	THIRD UNITED STATES ARMY.
)	
v.)	
)	
Second Lieutenant CHARLES E. COWAN (O-1635732), 116th Signal Radio Intelligence Company, Signal Corps.)	Trial by GCM, convened at Knutsford, Cheshire, England 3 June 1944. Sentence: Dismissal.

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

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1. The record of trial in the case of the 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 96th Article of War.
Specification 1: In that Charles E. Cowan, Second Lieutenant, 116th Signal Radio Intelligence Company, was, at Lymington, Hants, England, on or about 7 April 1944, drunk and disorderly in Command.
Specification 2: In that * * *, having received a lawful command from Captain Edward S. Barley, 116th Signal Radio Intelligence Company, his superior officer, who was then in the execution of his office, to put down the squash bottle which he was brandishing as a weapon and behave himself, did, at Lymington, Hants, England, on or about 7 April 1944, fail to obey the same.

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CHARGE II: Violation of the 63rd Article of War.
Specification 1: In that * * *, did at Lymington, Hants, England, on or about 7 April 1944, behave himself with disrespect towards Captain Edward S. Barley, 116th Signal Radio Intelligence Company, his superior officer by saying to him: "Barley, you are a chicken-shit son-of-a-bitch" and "Get the hell out of here and leave me alone", or words to that effect.
Specification 2: In that * * *, did, at Lymington, Hants, England, on or about 7 April 1944, behave himself with disrespect towards First Lieutenant Sidney B. Brownchweig, 116th Signal Radio Intelligence Company, his superior officer, by saying to him repeatedly: "Brownchweigh, you are a chicken-shit son-of-a-bitch", or words to that effect.
Specification 3: In that * * *, did, at Lymington, Hants, England, on or about 7 April 1944, behave himself with disrespect towards First Lieutenant Robert C. Beiswanger, 116th Signal Radio Intelligence Company, his superior officer, by saying to him: "Beiswanger, you are a krout-eating son-of-a-bitch", or words to that effect.
Specification 4: In that * * *, did, at Lymington, Hants, England, on or about 7 April 1944, behave himself with disrespect towards First Lieutenant Bruce Wilson, 116th Signal Radio Intelligence Company, his superior officer, by saying to him: "Wilson, you are a handshaking son-of-a-bitch", or words to that effect.

CHARGE III: Violation of the 64th Article of War.
Specification: In that * * *, did, at Lymington, Hants, England, on or about 7 April 1944, lift up a weapon, to wit, a full quart bottle of orange squash, against Captain Edward S. Barley, 116th Signal Radio Intelligence Company, his superior officer, who was then in the execution of his office.

He pleaded not guilty to and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of all of the charges and specifications. Evidence was introduced of one previous conviction by a General Court-Martial for being disorderly in uniform on 27 December 1942 in violation of the 96th Article of War. Two-thirds of the members of the court present when the vote was taken concurring, he was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Third United States Army, approved the sentence and forwarded the record of trial

for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The competent evidence for the prosecution may be summarized as follows:

About 11:30 p.m. of 7 April 1944 accused, a second lieutenant in the military service of the United States (R6), in the officer's day room of his organization, stationed at Lymington, Hampshire, England, began to break glasses from the bar by throwing or knocking them to the floor. When spoken to by his commanding officer, Captain Edward S. Barley, and other officers present, he began to curse and swear in their presence and that of two visiting English women (R7,16,22,24,28). Captain Barley thereupon ordered him to put down a bottle of orange squash which he held in his hand, to go to his quarters and to go to bed. Accused did not obey this command but instead raised the bottle in a threatening manner at Captain Barley and said "'don't come near me'" (R7). One officer took the two women home. They had been the guests of the accused. About a half hour later the accused entered the officers' quarters, located across the hall from the day room. All the officers were quartered there in one room and the room above was occupied by enlisted men. As soon as the accused entered he started a disturbance by awakening a sleeping officer (R8,17,25,28,34,37). When Captain Barley came into the room accused began to curse him and among other things said "'Barley, you are a chicken shit son-of-a-bitch. I will kill you if you turn me in'" (R8,11,34). The accused advanced upon him and raised the bottle, still clutched in his hand, as if to strike, whereupon he was seized by the other officers present and borne to the floor (R8,11,25,29, 34,37). The accused was held down on the floor for two or two and a half hours by the officers, who tried tosober him up with cold water and towels (R12,20,26,35,38). During this time he used profane language and struggled to free himself. He called them all collectively and individually various types or kinds of "sons-of-bitches" (R9,18,26,30,35). He called First Lieutenant Sidney B. Brownchweig a "'chicken shit son-of-a-bitch'"(R30); First Lieutenant Robert C. Beiswanger a "'krout-eating son-of-a-bitch'"(R18); and First Lieutenant Bruce Wilson a "'hand-shaking son-of-a-bitch'"(R35). These officers were members of accused's company (R15,27,33) and were superior in rank to accused (R10). He fought, struggled, and challenged each in turn to physical combat. Eventually a medical officer was summoned and gave accused an injection, from the effects of which he fell asleep and he was removed to the hospital (R13,19,31,35).

All of the witnesses testified that the accused was drunk (R9,17, 23,35).

4. On behalf of the accused Warrant Officer Darrell J. Cagle of accused's organization testified that he and the accused were and had been friendly. On the night of 7 April 1944 he was asleep in his bunk in the officers' quarters when accused awakened him and wanted him to get up and

fight him (R40). He witnessed the occurrences that followed as described by the prosecution's witnesses. He did not see accused raise the bottle as if to strike Captain Barley (R41). The accused had indulged in drinking intoxicants on prior occasions with the witness and his reaction had always been normal and in no manner similar to his conduct that night (R42).

Captain Robert W. Watson, Medical Corps, ward officer in the 95th General Hospital where accused was confined from 8 April 1944 to 22 May 1944, testified that in his opinion the accused, on the night of the alleged offenses, was suffering from an acute insanity induced by alcoholism, that he could not then distinguish right from wrong, and did not have the power to follow the right (R43). The witness was not a psychiatrist and had no experience in the field (R43,57). His opinion was based upon a diagnosis made 25 May 1944 after consultation with a psychiatrist in the hospital, and upon consideration of the unusual and severe reactions of the accused under the stimulus of alcohol, the length of the reactions, and a manifestation of what the witness considered to be a paranoid tendency and persecution complex (R55,56). The accused was admitted to the hospital on 8 April 1944 with a diagnosis of acute alcoholism and, after examination by the chief psychiatrist of the hospital, the diagnosis was amended to include psychoneurosis severe, mixed anxiety compulsive (R51). On 21 April the diagnosis of psychoneurosis was eliminated and the diagnosis of accused's condition limited to alcoholism acute (R52). On 25 May 1944 an unofficial diagnosis was made by the ward officer which, upon discussion with the chief of medical service of the hospital, was stricken, leaving, according to the hospital records, alcoholism acute as the only diagnosis of accused's condition (R52). The fact that court-martial proceedings were pending and "fairness to the patient" were factors in the ward officer's diagnosis (R53).

It was stipulated that Captain Louis Schlan, Medical Corps, a psychiatrist at the 95th General Hospital where the accused was treated, who had 7 years' experience as a psychiatrist and had been consulted on approximately 200 sanity cases, would testify if present that from his knowledge of accused's case, accused, at the time of the alleged offenses, was suffering from acute alcoholic psychosis, could not distinguish right from wrong and did not have the power to follow the right. This diagnosis was based upon the accused's lapse of memory, state of confusion at the time of the incident and evidence of hallucinations, the details of which the psychiatrist could not recall, although they had been described to him by the accused (Defense Stipulation 3).

The accused elected to make a sworn statement after being fully informed of his rights by the law member (R60). On the night of 7 April 1944, he remembered only taking a few drinks, passing the drinks around, dancing and then waking up in the hospital. He drank about half a bottle of Scotch. He remembered being examined by the psychiatrist who testified for the prosecution and by the psychiatrist whose testimony was stipulated for the defense but did not recall telling about having any hallucinations and declared he had never had any hallucinations (R61-63).

5. In rebuttal, the prosecution called as a witness Major Perry C. Talkington, Medical Corps, Headquarters Third United States Army. He qualified as an expert on neuropsychiatry (R64-65). He

testified that he had examined the accused on 2 June 1944 and in his opinion the accused was not suffering from any nervous or mental disease, that he was responsible for his actions, knew the difference between right and wrong and was capable of adhering to the right and of assisting counsel to conduct his own defense. In his opinion there was no evidence of psychosis at the time of the alleged offense (R65-67).

6. The evidence is clear and uncontradicted that the accused did the acts averred in the various specifications of the charges at the time and place alleged. Without a doubt he did, on the night of 7 April 1944 at his station, (1) become drunk and disorderly and fail to obey Captain Barley's order to put down the squash bottle as charged in Charge I and its specifications, (2) behave with disrespect toward Captain Edward S. Barley, First Lieutenant Sidney B. Brownchweig, First Lieutenant Robert C. Beiswanger and First Lieutenant Bruce Wilson, all his superior officers, by calling them vile and derogatory names as alleged in the four specifications of Charge II, and which clearly constituted a violation of the 63rd Article of War (MCM, 1928, par.134a, p.147), and (3) lift up a bottle of orange squash as a weapon with which to strike his superior officer, Captain Edward S. Barley, as alleged in the Specification of Charge III, which in turn constitutes a violation of the 64th Article of War (MCM, 1928, par.134b, p.148). Although the accused took the stand in his own defense he did not deny these allegations but defended his actions upon his own drunken condition. Drunkenness is no legal excuse except as to those crimes which require the proof of a specific intent (MCM, 1928, par. 126b, p.136). No specific intent need be shown in the case under consideration and therefore his drunkenness can only be taken into consideration in affixing the sentence (CM 223336 (1942), Bull.JAG, Aug.1942, Vol.1, No.3, par.422(5), pp.159-163). He recognized the officers for he addressed each by name. The sentence of dismissal only indicates that the court gave great weight to accused's lack of sobriety in view of the serious offenses involved.

7. There is substantial competent evidence that accused, at the times and places he committed the offenses with which he is charged, was legally responsible for his acts. It was within the exclusive province of the court to resolve conflicts in the evidence on this issue and its findings against accused will not be disturbed by the Board of Review upon appellate review (CM 225837, Gray; CM ETO 314, Mason).

8. The charge sheet, record and the accompanying papers show the accused to be 28 years five months of age. He enlisted in the service 5 March 1936 and served as an enlisted man through various grades in the infantry and signal aviation until he was commissioned a second lieutenant 12 September 1942 upon graduation from Signal Corps Officer Candidate School. As an enlisted man he was never court-martialled.

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is

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of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal of an officer is authorized upon conviction of a violation of Articles of War 63, 64 or 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind. (103)

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

1. In the case of Second Lieutenant CHARLES E. COWAN (0-1635732), 116th Signal Radio Intelligence Company, Signal Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. 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 2867. For convenience of reference please place that number in brackets at the end of the order: (ETO 2867).

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

(Sentence ordered executed. GCMO 54, ETO, 20 Jul 1944)

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

(105)

BOARD OF REVIEW

2 AUG 1944

ETO 2875

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE
v.	
Private SHERMAN W. GRAY, Jr. (33120546), 1997th Quartermaster Company Truck (Aviation), 1511th Quartermaster Truck Regiment Aviation (SP); Private ROBERT MALVEAUX (38262837), and Private First Class EARL H. SMITH (33524002), both of 2055th Quartermaster Truck Company (Aviation), 1511th Quartermaster Truck Regiment Aviation (SP)	Trial by GCM, convened at American Air Force Station 552, APO 635, 9 June 1944. Sentence: EACH ACCUSED, dishonorable discharge, total forfeitures and confinement at hard labor for five years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

GRAY

CHARGE: Violation of the 96th Article of War.
Specification: In that Pvt Sherman W. Gray, Jr., 1997th QM Trk Co Avn, 1511th QM Trk Regt Avn (SP), AAF 552, APO 635, did at Huyton, Lancashire, England, on or about 1 April 1944, wrongfully and unlawfully have carnal knowledge of a female person, to wit, June Emily Cragg, who was then under the age of 16 years, and above the age of 13 years.

(106)

MALVEAUX

CHARGE: Violation of the 96th Article of War.
Specification: In that Pvt Robert Malveaux, 2055th QM Trk Co (Avn), 1511th QM Trk Regt Avn (Sp), AAF 552, APO 635, did at Huyton, Lancashire, England, on or about 1 March 1944, wrongfully and unlawfully have carnal knowledge of a female person, to wit, June Emily Cragg, who was then under the age of 16 years, and above the age of 13 years.

SMITH

CHARGE: Violation of the 96th Article of War.
Specification: In that Pfc Earl H. Smith, 2055th QM Trk Co (Avn), 1511th QM Trk Regt Avn (Sp), AAF 552, APO 635, did at Huyton, Lancashire, England, on or about 1 March 1944, wrongfully and unlawfully have carnal knowledge of a female person, to wit, June Emily Cragg, who was then under the age of 16 years, and above the age of 13 years.

Each accused consented in open court to a common trial. Each pleaded not guilty to and each was found guilty of the respective Charge and Specification against him. No evidence of previous convictions was introduced as to any of accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. (The sentence as to accused Smith provided, first, for his reduction to the grade of Private). 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 pursuant to the provisions of Article of War 50½.

3. The prosecution's evidence shows that Sarah Cragg lived at 232 Southdean Road, Huyton, Lancashire, with her three children, a girl June, aged nearly 14 years (R6), a boy nearly 11 years old, and a girl three years old (R8). The husband and father did not live at home but June thought he was "stopping at my Grandma's". He came to visit them "when he could". She did not know whether he supported her mother but knew he supported her (R30). June testified that about eight months previously she went out with her mother and her mother's girl friend, Mary Finnigan, up "past the camp where them darkies are" and stopped and talked to them and three of them, including accused Smith, went home with them (R7). Smith then returned to their home

on several following nights. Some three weeks later at her home he asked June for some "sugar" and from Mary Finnigan June learned what he meant. She then went upstairs with Smith. They "got down on the bottom of the bed" occupied at the time by her mother and another colored soldier (R9) having intercourse (R26). June removed some of her garments (R10). Smith kissed her (R12), "put his 'thing' in". No one had ever done this to her before (R20). Smith did this to her several times thereafter (R19).

Accused Malveaux started coming to the Cragg home with Mary Finnigan sometime later on and when Smith was on convoy "he used to come and ask me - besides Mary Finnigan - to come upstairs" where, like Smith, he would ask for "sugar". June refused him at first and then they went upstairs to the same bed (R15). He kissed her (R16) and she took her knickers off and got in bed. Malveaux took off his trousers, jacket, shoes and stockings (R18). "He got into bed after me, and he laid over me and he put his 'thing' in - then I just lay back". She was in the bedroom with him about ten minutes (R17). Malveaux did this to her a number of times thereafter (R19).

Accused Gray also did this to her once about three weeks before Easter, while Smith was in the hospital (R19), in the house on the bath board (the board top over the bath tub (R25). His "thing" went into her and "it felt funny" (R21,25). By stipulation, copy of her birth certificate (Pros.Ex.5) was admitted in evidence. It shows June Emily Cragg was born 23 June 1930 (R48).

Both June and her mother told each of accused that she was 13 years old (R21).

William J. McDonald, 18 Criminal Investigation Section, United States Army, took signed statements (R31) from each accused, exact copies of which were offered in evidence and read to the court after defense counsel had suggested and agreed in open court to that procedure (R33). They were marked Prosecution Exhibits 1,2,3, and 4, and attached to the record of trial.

In the statement of accused Malveaux (Pros.Ex.1), he admits asking June Cragg to go upstairs with him to have sexual intercourse and they went upstairs together.

> "June took off her pants and got on the bed * * *. I got on top of her but when I tried to get my thing inside her she was too small. I got off her and told her she was too small. * * * I didn't do anything to her that night * * *."

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In the statement of accused Smith (Pros.Ex.2), he admits going upstairs with June.

> "My friends, Sadie and Mary started to go upstairs and June got up and asked me to come up with her (he had previously asked June for some "sugar"). The six of us went upstairs and all layed down on the bed. June took off her underpants and I got on top of her. As soon as I got my private a little inside June I came and then I got off her. She was small and I had some trouble getting my private in her private * * **."

In the statements of accused Gray (Pros.Exs. 3 and 4), he relates, among other things, that

> "One time I was at the house and Sadie's daughter June and I were out in the kitchen hugging and kissing. I took out my private and put it in between June's legs, but never put it in her. That was the only time I had contact with June * * *."

4. The evidence for the defense consisted in a rather inconclusive attempt to impeach the incidental testimony of June Cragg in connection with an incident with another soldier (R36-39), and the testimony of First Sergeant R. G. N. Jones, 1997 Quartermaster Truck Company, and Staff Sergeant William C. Colburn, Headquarters Detachment, 1511 Quartermaster Truck Regiment, both character witnesses for accused Gray, whom they had known since September 1943 (R39-42), and First Lieutenant Millard A. Sterner, 2055 Quartermaster Truck Company, a character witness for accused Malveaux and Smith, both of whom he had known approximately six months (R42-43).

Each of the three accused elected to remain silent (R44).

5. The offenses charged herein, in the opinion of the Board of Review, are within the purview of those offenses denounced by the 96th Article of War. A young girl less than 14 years of age, living, it is true, in poor environments and under unfortunate influences, is debauched by soldiers in the military service of the United States, in time of war stationed at a camp in an allied country and among a friendly people (CM 211420, McDonald; CM ETO 2620, Tolbert and Jackson; CM ETO 2759, Davis). The record of trial contains substantial evidence of the commission by the accused of the offenses charged. Under such circumstances, the Board of Review will not disturb the trial court's findings of guilty (CM ETO 503, Richmond; CM ETO 1554, Pritchard). Unlawful carnal knowledge of a female under 16 years of age is also a felony de-

nounced by Federal statute (Federal Criminal Code, sec.279 (18 USCA 458); 35 Stat.1143; D.C. Code 22-2801 (6:32) p.536).

6. The charge sheets show accused Gray to be 24 years, three months of age, inducted at Richmond, Virginia, 17 October 1941, without prior service; accused Malveaux to be 25 years, one month of age, inducted at Lafayette, Louisiana, 5 November 1942, without prior service; accused Smith to be 22 years, one month of age, inducted at Richmond, Virginia, 29 January 1943, without prior service.

7. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of any 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.

8. Confinement for five years is authorized on conviction of the offense of carnal knowledge of a female under 16 years of age (AW 42; Federal Criminal Code, sec.279 (18 USCA 458); D.C. Code, sec.22-2801 (6:32), p.536). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3a).

[signature], Judge Advocate

[signature], Judge Advocate

[signature], Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 2 AUG 1944 TO: Commanding Officer, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private SHERMAN W. GRAY, Jr. (33120545), 1997th Quartermaster Company Truck (Aviation), 1511th Quartermaster Truck Regiment Aviation (SP); Private ROBERT MALVEAUX (38262837) and Private First Class EARL H. SMITH (33524002), both of 2055th Quartermaster Truck Company (Aviation), 1511th Quartermaster Truck Regiment Aviation (SP), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as to each accused, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the 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 2875. For convenience of reference please place that number in brackets at the end of the order: (ETO 2875).

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

2875

Confidential

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

BOARD OF REVIEW

ETO 2885

15 JUL 1944

UNITED STATES	XIX CORPS.
v.	Trial by GCM, convened at Boynton Manor, Wiltshire, England 29 May 1944. Sentence: Dismissal and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Second Lieutenant THEODORE R. NUTTMANN (O-1315714), Adjutant General's Department, 576th Army Postal Unit.	

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

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1. The record of trial in the case of the 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 96th Article of War.
Specification: In that Second Lieutenant Theodore R. Nuttmann, Adjutant General's Department, having been classified as "Bigot," and having been entrusted with information classified "Bigot" respecting an impending military operation, to wit, the area of the operation, the composition of the United States assaulting forces, movement dates of units, and the proposed location of the XIX Army Corps Command Post, did, at Birmingham, England, on or about 22 May 1944, wrongfully and without proper authority, divulge such information to First Lieutenant Robert A. Wahlquist, Adjutant General's Department, who had not been classified as "Bigot" and who was not entitled to receive such information.

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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 dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, XIX Corps, approved the findings of guilty of the Charge and Specification thereunder except the words "movement dates of units," approved the sentence, and forwarded the record of trial for action under Article of War 48 with the recommendation that that portion of the sentence pertaining to confinement be remitted. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement but directed that pending further instructions the accused be confined at 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The competent evidence for the prosecution may be summarized as follows:

Accused, a second lieutenant in the 576th Army Postal Unit, APO 270, on or about 8 May 1944 reported to Captain Pierre B. Aiman, Headquarters XIX Corps, who was custodian of all "bigot" records and files and charged with the dissemination of "bigot" material and the "bigoting" of personnel to be classified "Bigot". Accused had been recommended for "Bigot" classification (R6-7,11). Accused was admitted to the "Bigot" Section and was informed of the required reading material which included certain form letters on "Top-Secret Control Procedure" and "Operation Code Word and Bigot Procedure" (R11). The security regulations, code words, a plan of operations including the landings on hostile shores and the subsequent "follow-up" and "build-up" by the XIX Corps were divulged and explained to him. Locations were pointed out to him on a map in the "bigot" room of the proposed landings, assembly areas, and command posts at such places as Trevieres, Aire and St.Lo in the Cherbourg peninsula in France. Dates of the first landings were given to him. All of this information was "bigot" information and only "bigoted" personnel are entitled to receive it. The need for security was explained to accused. He was then issued a classification and identification card to show his classification as "Bigot-NE" (R7-9,12) (Ex.B).

The date 4 June 1944 was not "bigoted" information nor was the fact that a unit had been notified to be on the alert to move at six hours notice from 4 June 1944 (R8-9).

First Lieutenant Robert A. Wahlquist, POW Inclosure #7, APO 152, testified that about 22 May 1944 accused entered the First Base Post Office at Sutton Coldfield, near Birmingham, England, where the witness was working alone at a table as a unit censor. The witness was not "bigoted", and accused did not ask him if he was "bigoted". He showed Wahlquist a card containing the word "Bigot" on it and said "That means top secret." (R14-15,18,27). Accused also stated that June 4th was the "take-off" date with

8:30 as the time; that six hours later "my unit" or "our unit" would take take off, and that other units had been alerted (R15,24). Wahlquist was actually working at the time and did not pay much attention to what the accused was saying. About ten or fifteen minutes later a break came in his work and he left his table to look at the bulletin board. He saw the accused smoking nearby and a conversation ensued (R15). During this conversation accused said to him

> "that the First Army already knew what its objective was going to be * * * that the aim of this maneuver was to isolate the Cherbourg Peninsula and that a division or divisions would go through the center and a corps or corps would go either to the right or left * * * and would cut across from the flank and establish a command post at a town called St.Lo" (R15,22,25,28-29).

The conversation then drifted to personal matters and ceased (R15).

That night about 10:00 p.m. it "dawned" upon Wahlquist that the information accused gave him was "top secret" and involved security measures (R17) and therefore he immediately made arrangements by telephone to make a report of the matter the following evening (R19,27). He made his report to a Major H. M. Miner. Wahlquist stated that when accused gave him the information related he made definite statements and did not preface his remarks with "This is how I think it will be" (R25).

On cross-examination in court Wahlquist was not certain whether the accused in his conversation with him specifically mentioned the words "First Army" or whether he (Wahlquist) assumed he meant the First Army because accused referred to "we" or "our" unit and because he knew accused "was connected" with APO 270 (R22,28).

4. The accused was advised by the court regarding his rights to testify on his own behalf and elected to remain silent (R36).

The defense called as a witness Colonel Charles M. Wells, Adjutant General's Department, Headquarters XIX Corps who testified that he had known the accused for two months during which time he had an opportunity to observe him; that he was acquainted with his character and reputation for truth and integrity; and that in his opinion his character and reputation were excellent. Accused had never violated any confidences to his knowledge and even if the accused was found guilty of the charge he would be willing to retain him as his postal officer (R34).

First Lieutenant John E. Hall, Adjutant General's Department, Headquarters XIX Corps, testified that he had taken over accused's military duties and had access to his files. Contained in his files was a letter (Def.Ex.A) dated 13 May 1944 classified "Top Secret" from the Embarkation Control Officer, Southern Base Section, addressed to the accused's unit notifying it to prepare to move on or after 4 June on six hours notice (R36).

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It was stipulated by and between the trial judge advocate and defense counsel that paragraphs 2a,b,c,d of the report of Major Miner to G-2 of the First Army of his interview with Wahlquist would be read into the record because Major Miner was located at a distance too great to be called as a witness (R32). The admitted paragraphs of the report recited that during the conversation with Wahlquist on the evening of 23 May 1944 the latter revealed to Major Miner that he was dissatisfied with his present assignment as he wanted to continue in G-2 or CIC work (R32); that he had been in grade since February 1942 and had asked for a promotion without success (R32); and that he had conducted "surreptitious" searches to ascertain if classified documents had been improperly handled to the extent that his commanding officer had referred to him as a "snooper" and that everyone else "closes up" when he is around (R33). He further related that accused, whom he knew as a result of postal duty associations had stopped at his desk and told him that the invasion was coming soon and that he knew the objective (R33). Because of his boastful and careless manner of talk Wahlquist drew him out to see how much he would talk. Huttmann then showed him his "Bigot" card and told him, "All this stuff is top secret and bigot" (R33). Huttmann then told Wahlquist that "we" (Wahlquist interpreted this to mean the First Army) "will make the assault"; that Huttmann's unit would be alerted at 8:30 a.m. 4 June 1944 and sail six hours later; other units would be alerted 1 June 1944; that several corps would strike at the base of Cherbourg Peninsula on either the East or West side, drive across and cut the peninsula off; that a corps would go the length of the peninsula "dropping off" various divisions; and that a CP would be established at St. Lo (R33).

5. The specification alleges in substance that accused, having been entrusted with secret information respecting an impending military operation did wrongfully divulge it to a person not entitled to receive it. The evidence showed clearly and without contradiction that the accused was entrusted with "top secret" information regarding the impending invasion of the European continent, which naturally constituted a military operation; that he was charged with the utmost secrecy; and was provided with a classification card to identify him as one entrusted with military secrets regarding the XIX Corps in this particular operation. Notwithstanding the warnings, the impressive ceremony of being so classified, and the vital import of the knowledge that he had thus gained, he deliberately disclosed the area of the operation, the composition of assaulting forces and the proposed location and the part that his organization would play in the plan, to a person who was not qualified to receive it. The success of the pending invasion depended upon the element of surprise, not only as to time but also as to place. History shows that the plan divulged by accused was the one that was actually carried out by the Allied Armies which included the First United States Army - accused's own unit. True it may be that his "friend" Wahlquist drew him out to see how much information he would disclose, possibly for the very purpose of informing on him and thereby enhance his own chances of promotion. True it is also that the person to whom accused confided the secret information was his military superior and one whose duty it was as a censor to prevent the leakage of confidential

material and one whom the accused had good reason to believe would not repeat the information that he gave him. Nevertheless, the accused did, in disclosing the information to one not entitled to receive it, violate his trust and the confidence placed in him contrary to good order and military discipline. A wrongful disclosure of information constitutes a violation of the 96th Article of War (CM ETO 1872, Sadlon, and authorities cited therein).

The evidence is therefore clear and convincing, standing uncontradicted, that the accused was guilty as charged. The surrounding circumstances brought out by the defense had no bearing upon the guilt of the accused, but constituted possible mitigating circumstances to take into consideration when the punishment for the offense is considered.

6. Attached to the record is a document entitled "Recommendation of Clemency" presented by defense counsel. Incorporated therein is an argument concerning the law and evidence contained in the record of trial. The only point that merits consideration pertains to alleged prejudicial remarks by the trial judge advocate in his argument to the court prior to the closing of the court to deliberate upon its findings. The comments of the trial judge advocate which are subject to criticism are:

(1) "Regardless of any stipulation between the counsel and the defendant and the prosecution the court cannot find the letters which were read into the record, which were reports of Major Miner to G-2 of the First Army, cannot find them to be admissible. They are hearsay only as far as what Lieutenant Wahlquist told him. There is no evidence by the defense to show that Major Miner or Lieutenant Wahlquist were sworn or that Major Miner was sworn when he made his report to G-2 of the First Army. * * *.

(2) The eyes of the ETO are focused on this trial today. Yesterday when we went to the disciplinary training center where the accused has been confined ..... * * *. Yesterday the members of the defense when they talked with the commanding officer of the disciplinary training center were told by him that there have been two generals already to see him and gave him special instructions in this case.

(3) The record of this trial will not go through the normal channels. This will go through to the Staff Judge Advocate of General Eisenhower's Staff.

(4) The defense has not in any way denied the alleged offense." (R37-38).

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The error asserted by defense counsel is not without merit, and requires serious consideration.

The prosecution agreed by stipulation that parts of the report of Major H.M. Miner, Infantry, Headquarters First United States Army, made to G-2 of said Army concerning accused's conduct which gave rise to the instant charge, might be admitted in evidence (R32). It is apparent from the cross-examination of Lieutenant Wahlquist (R18-21) that the purpose of the defense in offering the Miner report in evidence was to impeach the credibility of Lieutenant Wahlquist and to show that his narrative to Major Miner differed in several details from his court testimony. The report was of itself inadmissible, but having agreed that it might be admitted in evidence rather than requiring Major Miner's personal testimony in open court in impeachment of Lieutenant Wahlquist, the trial judge advocate's comments upon the evidence thus introduced were unfair and wholly unwarranted.

Similarly, the remarks of the trial judge advocate with respect to "the eyes of the ETO" being focused on the trial and his reference to the rank of the military personnel displaying unusual interest in the case were also improper in the highest degree. His statement that the record of trial would "not go through normal channels" in the process of appellate review was a false statement and if not deliberately made with knowledge of its falsity, it was at least an exhibition of ignorance that is appalling. The further statement that "the defense has not in <u>any way</u> denied the alleged offense" (underscoring supplied) is equivocal and is subject to a double inference. If it be interpreted as a comment that the prosecution's evidence was uncontradicted, it was not improper, as

> "lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell" (Lefkowitz v. United States, 273 Fed. 664,668; Baker v. United States, 115 Fed.(2nd) 533,544).

If the assertion had reference to accused's election to remain silent, the trial judge advocate was guilty of committing a gross error, as he was particularly prohibited from commenting upon accused's failure to take the stand (MCM 1928, par.77, p.62; AW 24). Since the statement was made in the face of the plea of not guilty and was part of an argument containing other improper remarks, it is not unreasonable to interpret it as referring to accused's failure to take the s tand as a witness. In that light it was not only improper, but prejudicial to accused.

It was the obligation of the trial judge advocate fairly, honestly and truthfully to present the government's case to the court. The members of the court were under sworn duty to try and determine the issues before it "according to the evidence" and to administer justice "without partiality, favor or affection". The repudiation by the trial judge advocate of his stipulation made in open court concerning the Miner report; his false statement concerning the appellate procedure; his ambiguous remark concerning

accused's denial of guilt, and finally his attempt to influence the court by asserting the interest of high ranking military personnel in the outcome of the case, constituted reprehensible conduct which was wholly at war with the solemn responsibilities placed upon him by Congressional mandate.

> "While his primary duty is to prosecute, any act * * * inconsistent with a genuine desire to have the whole truth revealed is prohibited" (MCM, 1928, par.41d, p.32).

It is manifest that serious error resulted from the conduct and remarks of the trial judge advocate. The problem, however, for solution is whether such error was prejudicial to the substantial rights of the accused.

It is the general rule in the trial of criminal cases in the Federal civil courts that improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal of the judgment of conviction unless the court has been requested to instruct the jury to disregard them and has refused to do so, or unless the remarks are obviously prejudicial to the rights of the accused (16 C.J., sec.2269, p.915; 23 C.J.S., sec.1115, p.598; United States v. Socony-Vacuum Oil Co. 310 U.S. 150,243, 84 L.Ed., 1129,1178; Dunlop v. United States 165 U.S. 486,498, 41 L.Ed., 799,803; Diggs v. United States 220 Fed. 545, 242 U.S. 470, 61 L.Ed., 442; United States v. Wexler 79 Fed.(2nd) 526,529; Jarvis et al v. United States 90 Fed. (2nd) 243,246). Courts-martial are judges both of law and facts (Winthrop's Military Law & Precedents - Reprint - p.54) and consequently there is no procedure equivalent to that of the civil courts with respect to purging the trial from the effects of improper remarks or argument of the trial judge advocate.

It is the duty of the Board of Review to determine whether or not a record of trial is legally sufficient to support the findings and sentence and whether or not errors of law have been committed at the trial injuriously affecting the substantial rights of the accused (AW 50½, par.3). This duty is synchronized with the further mandate of Congress which directs that

> "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case * * * for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused" (AW 37) (Underscoring supplied).

In view of the foregoing it follows that it is within the authority of the Board of Review to consider the effect upon the rights of an accused of improper remarks or misconduct by a trial judge advocate occurring during

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the course of trials before a Federal general court-martial although there be absent in the procedure of the latter courts the technical trial procedure of the Federal civil courts above indicated. While in the instant case the defense counsel did not make an affirmative objection to the improprieties above noted contained in the argument of the trial judge advocate such objection was not necessary, in the opinion of the Board of Review to empower it upon appellate review to examine and consider the consequence of the improper remarks and misconduct of the trial judge advocate. Such practice finds its equivalent in the Federal civil appellate courts in criminal cases involving life or liberty of an accused which permits the court to notice and correct plain and serious prejudicial errors in trial, though such errors were not challenged by objection, motion, exception or assignment of error (Wiborg v. United States, 163 U.S. 632,658, 41 L.Ed., 289,298; Brasfield v. United States, 272 U.S. 448, 71 L.Ed., 345; McNutt v. United States, 267 Fed. 670; Lewis v. United States, 92 Fed.(2nd) 952; Edgmon v. United States, 87 Fed.(2nd) 13).

The situation presented herein has arisen in the Federal civil courts under section 269 of the Judicial Code (40 Stat. 1181; 28 USCA 391) which in pertinent part reads:

> "On the hearing of any appeal, certiorari, writ of error * * * in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties".

The close resemblance of this statute to the quoted part of AW 37, supra, is obvious. In truth both AW 37 and sec.269 of the Judicial Code are in the category of statutes ordinarily designated "Statutes of Amendments and Jeofailes" and are intended to effectuate identical purposes. The following comments with respect to sec.269 of the Judicial Code are cogent:

> "From recent legislation (40 Stat. pt. 1, p. 1181, Comp. St. Ann. Supp. 1919, § 1246) we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial." (Haywood v. United States, 268 Fed. 795,798).

"We think it proper to observe that this statute was not passed for the benefit of any particular party to litigation, and we have observed the command of the statute in noticing errors that were not assigned or excepted to; this in the interest of justice where the liberty of a citizen is involved." (Rich v. United States, 271 Fed. 566,569-570).

With particular reference as to the circumstances and conditions under which improper remarks or argument of a prosecutor will require a reversal of judgment of conviction the courts have said:

"It is true that by section 269 of the Judicial Code, as amended, 28 U.S.C. § 391 (28 U.S.C.A. § 391), not every technical error, defect, or exception which does not affect the substantial rights of the parties is ground for reversal, and if upon examination of the entire record substantial prejudice does not appear, the error, if it exists, must be regarded as harmless. * * *. The inquiry, however, must always be as to whether in view of the whole record the impression conveyed to the minds of the jurors by irrelevant and prejudicial matter is such that the court may fairly say that it has not been successfully eradicated by the rulings of the trial judge, his admonition to counsel, and his instruction to the jurors to disregard it. Sometimes a single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow * * *. At other times transgressions may be so slight that if promptly corrected and their repetition avoided the court may not say that the jury was prejudiced, though often the mere cumulative effect of a course of improper conduct compels reversal. * * *. Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the government itself be there a litigant. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, there-

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fore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' * * *. 'Public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.' * * *. Where such paramount considerations are involved, procedural niceties will not preclude a court from correcting error." (Pierce v. United States, 86 Fed.(2nd) 949,952-954).

"But to entitle the accused to a reversal when objection is made and the language not withdrawn it must appear that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused" (Chadwick v. United States, 141 Fed. 225,245).

"The cases show that a prosecuting officer, while he may not appeal either to the fears or the vanity of a jury, and so seek to coerce or cajole them into a verdict of conviction and in this case he did neither, may legitimately appeal to them to do their full duty in enforcing the law. In so far as counsel went beyond that legitimate appeal we are not inclined upon this record to say that the defendant was prejudiced so that the verdict should be set aside. If the evidence of guilt was less overwhelming, and any possible and reasonable doubt of guilt existed, there would be better reason for asking the court to reverse; but, in view of the evidence which we find in the record, we do not deem it proper, in the due administration of criminal justice, to reverse the judgment on the ground assigned." (Fitter v. United States, 258 Fed. 567,573).

The principle above set forth was adopted and confirmed in Diggs v. United States, 220 Fed. 545,556, 242 U.S. 470, 61 L.Ed., 442; Meyer v. United States, 258 Fed. 212,215; Volkmor v. United States, 13 Fed.(2nd) 594,595; Bogy v. United States, 96 Fed.(2nd) 734,741; United States v. Johnson, 129 Fed.(2nd) 954,962,963, 318 U.S. 189, 87 L.Ed., 704; Ippolito et al v. United States, 108 Fed.(2nd) 668).

The prosecution's evidence in the instant case is clear and convincing that accused was guilty of divulging highly important and critical information concerning the prospective invasion of the European continent to a person not entitled to receive the same. The finding of guilty was not only supported by competent substantial evidence but it was the only finding the court could make if it performed its sworn duty honestly and with fidelity. Under such circumstances it is difficult to discover any prejudice accruing to the substantial rights of accused as a result of the improper conduct and argument of the trial judge advocate. The conclusion above set forth does not in any degree condone or approve the conduct and remarks of the trial judge advocate which have been the subject of this consideration. Conversely they are emphatically condemned. Had the question of accused's guilt resolved itself to a narrow one of law or fact or had the evidence created a conflict on any material issue, the obvious error might have proved highly prejudicial and have required the setting aside of the court's findings.

7. The charge sheet shows the accused is 29 years of age and was inducted into the service 19 January 1941. (Accused stated that he enlisted and was not inducted (R39)). On 24 March 1943 he was discharged for the convenience of the Government and on 25 March 1943 was commissioned a second lieutenant, Infantry (AUS). He was transferred to the Postal Department, Adjutant General's Department, 30 September 1943.

8. At the close of the prosecution's case the defense moved "to dismiss on the ground that the prosecution has not set forth a case" (R31). This motion was equivalent to a motion for finding of not guilty. The court denied the motion (R32). No error was committed in denying the motion but if there were it was waived because it was not renewed at the conclusion of the evidence (CM ETO 564, Neville; CM ETO 1414, Ellis; CM ETO 2686, Brinson and Smith).

9. The sentence did not include forfeitures. The court evidently intended that accused should have the benefit of his accrued pay and allowances. To be effective forfeitures must be imposed in express terms, they cannot be implied (MCM, 1928, par.103g, p.94).

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

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

Judge Advocate

Judge Advocate

(ABSENT ON DETACHED SERVICE) Judge Advocate

SECRET

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 20 JUL 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Second Lieutenant THEODORE R. NUTTMANN (O-1315714), Adjutant General's Department, 576th Army Postal Unit, 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 approved 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 2885. For convenience of reference please place that number in brackets at the end of the order: (ETO 2885).

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

(Sentence ordered executed. GCMO 58, ETO, 28 Jul 1944)

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

BOARD OF REVIEW

ETO 2899

19 JUL 1944

U N I T E D S T A T E S	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private RICHARD REEVES (34676913), Company F, 1313th Engineer General Service Regiment.	Trial by GCM, convened at Newton Abbot, Devonshire, England, 1 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Richard (NMI) Reeves, Company F, 1313th Engineer General Service Regiment, did, at Slapton Assault Range, Frogmore, Devon, England, on or about 3 May 1944, with intent to commit a felony, viz. murder, commit an assault upon Technician Fifth Grade Lodric (NMI) Clark, by wilfully and feloniously shooting the said Technician Fifth Grade Lodric (NMI) Clark in his body with a dangerous weapon, to wit a rifle.

Specification 2: In that * * *, did, at Slapton Assault Range, Frogmore, Devon, England, on or about 3 May 1944, with intent to commit a felony, viz. murder, commit an assault upon Technician Fifth Grade Ernest L. Pike, by wilfully and feloniously shooting the said Technician Fifth Grade Ernest L. Pike in his body with a dangerous weapon, to wit a rifle.

Specification 3: In that * * *, did, at Slapton Assault Range, Frogmore, Devon, England, on or about 3 May 1944, with intent to commit a felony, viz. murder, commit an assault upon Private First Class Carl R. Emery, by wilfully and feloniously shooting the said Private First Class Carl R. Emery in his body with a dangerous weapon, to wit a rifle.

Specification 4: In that * * *, did, at Slapton Assault Range, Frogmore, Devon, England, on or about 3 May 1944, with intent to commit a felony, viz. murder, commit an assault upon Private Willie V. Jaynes, by wilfully and feloniously shooting the said Private Willie V. Jaynes in his body with a dangerous weapon, to wit a rifle.

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

3. Substantially undisputed evidence shows the following:

At about 11:00 p.m. on the evening of 3 May 1944 accused, a negro, drove up in a jeep to a sentry post at the entrance to the Slapton Assault Range, Frogmore, England, for the purpose of relieving one of the guards on patrol duty. About 15 minutes thereafter a truck bearing 12 white soldiers, all members of the 526th Ordnance Truck Company who were singing, drove up and stopped at the post in order to have the sentry on duty check their pass and admit them into the range, where their camp was located (R8,9,12,14-16, 19). While the truck was parked one of the passengers, evidently addressing accused as a "nigger", requested him to move his jeep in order to make way for the truck to drive into the range (R8-13,16,17). After accused moved his jeep he passed by the truck and said to one or more of the passengers, "Say it again, say it again" and one of them replied to the effect that no one had said an improper word, whereupon accused asked one of the patrol guards for his rifle. Upon the refusal of the guard to permit accused to take his rifle, accused secured a rifle from the sentry box (R8-10, 13,15-17). After the sentry checked the truck and it proceeded through the opening in the road into the range, accused raised the rifle to his shoulder, pointed it in the direction of the truck, then about 50 yards from him, but without leveling the sights, and fired one shot at the truck (R8-11,13,15-20). The shot entered the truck, wounding four soldiers, named respectively in the specifications, in the arms and legs (R20-22; Pros.Exs.A,B). When asked by the sentry why he fired the shot, accused stated, "If anyone wants to know who did it, I did" (R9,11,13). In his written confession, which is

in substantial agreement with the foregoing testimony, accused stated:

> "I then went into the Sentry Box and took Pvt Waters M1 rifle. I went outside, into the road and fired the rifle at the truck. I meant to scare the soldier, but I did realize at the time that I used the rifle in a dangerous manner, however I did not intend to hurt anyone.
>
> I fired at the truck because one of the white soldiers called me a nigger and it made me mad." (R23-24; Pros.Ex.C).

4. The accused was advised by the court concerning his right to testify in his own behalf and elected to remain silent (R24).

5. (a) Accused's commission of an assault at the time and place and under the circumstances alleged is clearly established by the foregoing evidence. The sole question for determination is whether at the time of the assault there was present either the specific intent on accused's part, with malice aforethought, and without justification or excuse, to take the lives of the four victims assaulted, or the legal equivalent of such specific intent (CM ETO 1535, J.Cooper; CM ETO 2297, Johnson and Loper; CM ETO 2672, Brooks). The offense of assault with intent to commit murder is described as

> "an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an attempt to murder. As in other attempts there must be an overt act, beyond mere preparation or threats * * *.
>
> * * * where a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group." (MCM, 1928, par.149a, pp.178-179) (Underscoring supplied).

The rule as to proof of the requisite intent is thus stated:

> " 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. It includes not only anger, hatred, and revenge, but every unlawful and unjustifiable motive. It is not confined to ill will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive, done with a wicked mind under such circumstances as evince a plain indication of a heart reckless of social duty and fatally bent

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on mischief. It is implied from any deliberate or cruel act against another which shows an abandoned and malignant heart. It is the opposite of an act performed under uncontrollable action which prevents all deliberation or cool reflection in forming a purpose.

* * * * * * * *

* * * The existence of malice as an element of assault with intent to murder may be inferred or presumed from the surrounding circumstances, such as the use of a deadly weapon, the character of the assault, the unexplained attempt to take life, or where the assault is unlawful and is done without reasonable provocation or circumstance of palliation, or is committed deliberately and is likely to result fatally, or from the reckless disregard of human life" (40 CJS, sec.78, pp.940-942) (Underscoring supplied).

" While a specific intent to kill is an essential ingredient of the offense of assault with intent to commit murder * * * this requirement does not exact an intent, other than an intent which is inferable from the circumstances. The law presumes that one intended the natural and probable consequences of his act and the requisite intent to kill may be inferred from such acts. It may be inferred or presumed as a fact from the surrounding circumstances, such as the acts and conduct of accused, the nature of the instrument used in making the assault, the manner of its use, from an act of violence from which, in the usual and ordinary course of things, death or great bodily harm may result, or from a total or reckless disregard of human life. * * * The question of intent as dependent on the physical circumstances and the impression made by them on the mind of accused must be determined by the facts as they were perceived or understood by accused.

* * * * * * * *

The requisite intent in an assault with intent to murder may be inferred or presumed from the unlawful use of a deadly weapon, provided it was used in such a manner as to indicate an intention to kill." (40 CJS, sec.79a, pp.943-944) (Underscoring supplied).

"Reckless disregard of human life may be equivalent of specific intent to kill.--Looney v. State, 153 S.E.372, 41 Ga.App. 495--Chambliss v. State, 139 S.E. 80, 37 Ga.App.124." (Ibid., fn.67).

"It is not necessary, however, to sustain such an indictment /assault with intent to commit murder/ that a specific intent to take life should be shown. If the intent were to commit grievous bodily harm, and death occurred in consequence of the attack, then the case would have been murder * * * and, in case of death not ensuing, then the case would be an assault with intent to commit murder * * **. (1 Wharton's Criminal Law, 12th Ed., sec.841, pp.1131-1132) (Underscoring supplied).

(b) The evidence is susceptible of a variety of inferences, any of which, under the foregoing authorities, supports the court's findings of guilty.

(1) A specific intent on accused's part to take the life of one or more of the occupants at the time he fired the rifle at the truck was justified in view of the nature of the weapon, the manner in which accused used it and the probable and natural disastrous result of the act. There is present substantial evidence of malice, premeditation and deliberation.

(2) The evidence would have sustained a finding of murder had death ensued (40 CJS, sec.16, pp.863-864; sec.20, pp.866-867; sec.31, p.880; sec.35a,b, pp.892-894; 1 Wharton's Criminal Law, 12th Ed., sec.841, pp.1131-1132; MCM, 1928, par.148a, pp.163-164). Absent the fact of death, accused's guilt of the crime of an assault with intent to commit murder is an automatic legal sequence (40 CJS, sec.80, pp.945-946).

(3) Interpreting the evidence in the light most favorable to accused, and according full credence to his confession (as the court was not bound to do), it is clear that accused intended to frighten at least one of the occupants of the truck by deliberately and knowingly using a lethal weapon in a highly dangerous, abandoned and reckless manner. It is difficult to conceive of a more reckless act than pointing and firing a rifle at a group of men, assuming arguendo that the act was not accompanied by a specific intent to kill. Such action indicated "a heart reckless of social duty", "reckless disregard of human life" and knowledge that the act would probably cause death or grievous bodily harm "accompanied by indifference whether death or grievous bodily harm is caused or not or (possibly) by a wish that it may not be caused" on accused's part, and as such is punishable to the same extent as if it were accompanied by a specific intent to murder (40 CJS, sec. 78, pp.940,942; MCM, 1928, par.148a, pp.163-164).

(c) Assuming it to be a fact that one member of the group called accused a "nigger", such circumstance fell far short of adequate provocation to reduce his offense to assault with intent to commit manslaughter wherein there is "an assault in an attempt to take human life in a sudden heat of passion * * * and the act must be done under such circumstances that, had death ensued, the offense would have been voluntary manslaughter" (MCM, 1928, par.149l, p.179). It is well established that mere words, however insulting, abusive, vulgar or aggravating, do not constitute adequate provocation to negative malice (40 CJS, sec.87, p.950; Cf: 26 Am.Jur. sec.29, p.175; MCM, 1928, par.149a, p.166).

6. Technician Fourth Grade Jerone F. Sweeney, an agent of the Criminal Investigation Department, testified that he took accused's statement on 19 May 1944 (R23). Both the statement and the jurat thereto (Pros.Ex.C), however, are dated 4 May 1944. Whatever the reason for this discrepancy, it is immaterial in view of Sweeney's clear testimony that, after due warning as to his rights, accused did in fact make and sign the statement, to the admission of which defense counsel expressly waived objection (R24).

7. The charge sheet shows that accused is 22 years of age and was inducted into the Army of the United States 7 July 1943 to serve for the duration of the war plus six months. He had no prior service.

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

9. Confinement in a penitentiary for ten years is authorized for the crime of assault with intent to commit murder (AW 42; MCM, 1928, par.104c, p.99; sec.276, Federal Criminal Code (18 USCA 455); sec.335, Federal Criminal Code (18 USCA 541); Act June 14, 1941, c.204, 55 Stat. 252 (18 USCA 753f); Cf: U.S. v. Sloan, 31 Fed.Supp.327). As accused is under 31 years of age and the sentence is for not more than ten years, the d esignation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement is authorized (Cir. 229, WD, 8 June 1944, sec.II, pars.1a(1),3a).

H. Franklin Peters Judge Advocate

Edward K. Leggett Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 19 JUL 1944 TO: Commanding General, Southern Base Section, Communications Zone, ETOUSA, APO 519, U.S. Army.

1. In the case of Private RICHARD [redacted] (34676913), Company F, 1313th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2899. For convenience of reference please place that number in brackets at the end of the order: (ETO 2899).

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 2901

11 AUG 1944

UNITED STATES	CENTRAL BASE SECTION, SERVICES OF SUPPLY, now designated CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Privates DAILEY L. CHILDREY (33637858) and RAYMOND CUDDY (31240684), both of Company D, Field Force Replacement Center.	Trial by GCM, convened at London, England, 24 May 1944. Sentence: EACH ACCUSED, dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. The United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHILDREY

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Dailey L. Childrey, Company D, Field Force Replacement Center, ETOUSA, did, at Shrivenham, England, on or about 24 January, 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 26 February 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that Private Dailey L. Childrey, Company D, Field Force Replacement Center, ETOUSA, in conjunction with Private Raymond Cuddy, Company D, Field Force Replacement Center, ETOUSA, did, at London, England, on or

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about 3 February, 1944, feloniously take, steal, and carry away three pounds and ten shillings (£3-10-0), in English money, of the value of about fourteen dollars ($14.00), one (1) Ronson cigarette lighter, of the value of about five dollars ($5.00), one (1) brass buckle, of the value of about fifty cents ($.50), one (1) Parker fountain pen, of the value of about fifteen ($15.00), twenty-eight pounds (£28.0.0) in English money, of the value of about one hundred and twelve dollars ($112.00), the property of Sergeant John F. Finsterwalder, Company H, 2nd Infantry, 5th Division, ETOUSA.

NOTE: And 13 additional specifications, identical with Specification 1 above, except as to place and date of the alleged larceny, and the nature, value and owner of the property stolen, which are, respectively, as follows:

	Place	Date	Owner	Property	Value
Specification 2:	London, England	3 Feb 1944	Pfc. John J. Harrington	£31, $5.00, black leather wallet, brass buckle, package Lucky Strike cigarettes and package of gum, brown fountain pen	$135.60
Specification 3:	London, England	17 Feb 1944	Tec 4 James Graham	£2, Ronson cigarette lighter	$12.00
Specification 4:	(Nolle Prosequi)				
Specification 5:	London, England	23 Feb 1944	Pfc. Lonnie C. Brown	12s, 1 Chronometre bat pocket watch and chain	$22.25
Specification 6:	London, England	23 Feb 1944	Pfc. Harry L. Rosen	£1-10-0, 1 aluminum ring	$7.00
Specification 7:	London, England	23 Feb 1944	Sgt. Edward J. Mendrala	£9, 1 Sheaffer pen and pencil set	$46.00
Specification 8:	(Nolle Prosequi)				
Specification 9:	(Nolle Prosequi)				
Specification 10:	(Nolle Prosequi)				
Specification 11:	(Nolle Prosequi)				
Specification 12:	London, England	26 Feb 1944	Pvt. George H. Stephenson	£5-10-0, 1 Parker fountain pen, 1 pr.	$27.00

				silver cup mounted wings, 1 small pearl-handled knife	

Specification 13: (Nolle Prosequi)

Specification 14:	London, England	26 Feb 1944	Tec 4 James F. Gormally	£2, 1 Rosscopf pocket watch, 1 watch chain and key ring	$21.00

CHARGE III: Violation of the 96th Article of War.
Specification 1: In that Private Dailey L. Childrey, Company D, Field Force Replacement Center, did, at London, England, on or about 26 February 1944, wrongfully and without proper authority impersonate anon commissioned officer by wearing Technical Sergeant's chevrons.
Specification 2: In that * * *, Did, at London, England, on or about 26 February 1944, wrongfully and without proper authority wear and display Bombadier's Wings and a European Theatre Ribbon.

ADDITIONAL CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Dailey L. Childrey, Company D, Field Force Replacement Center, ETOUSA, did, at London, England, on or about 3 March 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Swindon, England, on or about 2 April 1944.

ADDITIONAL CHARGE II: Violation of the 69th Article of War.
Specification: In that * * * having been duly placed in confinement in London, England, on or about 26 February 1944, did, at London, England, on or about 3 March 1944, escape from said confinement before he was set at liberty by proper authority.

ADDITIONAL CHARGE III: Violation of the 93rd Article of War.
Specification 1: In that* * * did, at London, England, on or about 9 March 1944, feloniously take, steal, and carry away one (1) Shaeffer fountain pen, with initials "O.K.V." of the value of about five dollars ($5.00), seventeen shillings (£0-17-0) in English money, of the value of about three dollars and sixty cents ($3.60), three one (1) cent pieces money of the

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United States Government, one (1) pearl-handled, two-bladed knife, of the value of about one dollar and twenty-five cents ($1.25), one (1) silver colored, Ronson cigarette lighter, of the value of about five dollars ($5.00), one (1) cashier's receipt for forty-eight pounds (£48-0-0) of the value of about one hundred and ninety-two dollars ($192.00), the property of Private First Class Oscar K. Vaughn, 9th Recon. Troops, ETOUSA.

NOTE: And four additional specifications, identical with Specification 1 above, except as to place and date of the alleged larceny, and the nature, value and owner of the property stolen, which are, respectively, as follows:

	Place	Date	Owner	Property	Value
Specification 2:	London, England	14 Mar 1944	1st Lt. Keith G. Acker	1 Officer's blouse, 1 pair Officer's trousers, 1 Illinois 15-jewelpocket watch, 1 wallet, £10.	$191.00
Specification 3:	(Nolle Prosequi)				
Specification 4:	London, England	14 Mar 1944	1st Lt. George R. Eldridge	1 Officer's blouse, 1 Officer's shirt, 1 pair Officer's "pink" trousers, 1 pair shoes, 1 trench-coat, 1 ruby ring, 1 crash bracelet, 1 tan leather wallet, £40.	$263.00
Specification 5:	(Nolle Prosequi)				

ADDITIONAL CHARGE IV: (Nolle Prosequi)
Specification: (Nolle Prosequi)

ADDITIONAL CHARGE V: Violation of the 96th Article of War.
Specification 1: (Nolle Prosequi)
Specification 2: In that Private Dailey L. Childrey, Company D, Field Force Replacement Center, ETOUSA, did, at London, England, from about 14 March 1944 to about 31 March 1944, without lawful authority appear in a public place, to wit: Jermyn Street, in the uniform of a commissioned Officer and did then and there wrongfully represent himself to be an officer commissioned in the Army of the United States.

Specification 3: In that * * * did, at Swindon, England, on or about 2 April 1944, unlawfully carry a concealed weapon, viz, a .45 automatic pistol, M1911-A-1, with six rounds of live ammunition.

CUDDY

CHARGE I: Violation of the 58th Article of War.
Specification: (Identical with similar Specification of Charge I against Childrey, set forth above, except Cuddy is named as offender).

CHARGE II: Violation of the 93rd Article of War.
Specification 1:

Specification 2:

Specification 3:

Specification 4: (Specifications 1, 2, 3, 5, 6, 7, 12 and 14 are identical with similarly numbered specifications, respectively, of Charge II against Childrey, set forth above, except Cuddy is named as offender "in conjunction with" Childrey.)

Specification 5:

Specification 6:

Specification 7:

Specification 8:

Specification 9: (Specifications 4, 8, 9, 10, 11 and 13 were nolle prossed.)

Specification 10:

Specification 11:

Specification 12:

Specification 13:

Specification 14:

CHARGE III: Violation of the 96th Article of War.
Specification 1: (Identical with similar Specification 1 of Charge III against Childrey, set forth above, except Cuddy is named as offender).
Specification 2: (Identical with similar Specification 2 of Charge III against Childrey, set forth above, except Cuddy is named as offender and he is alleged to have wrongfully, * * * worn * * * "A blue operational patch with Aerial Gunner's Wings, a Pearl Harbor Ribbon and Good Conduct Medal").

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

Specification: (Identical with similar Specification of Additional Charge I against Childrey, set forth above, except Cuddy is named as offender and he is alleged to have remained "absent in desertion until he was apprehended at London, England, on or about 14 April 1944.")

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

Specification: (Identical with similar Specification of Additional Charge II against Childrey, set forth above, except Cuddy is named as offender and he is alleged to have been placed in confinement and escaped from "the Unit Guardhouse, Central Base Section, Services of Supply, ETOUSA".)

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

Specification 1: In that Private Raymond Cuddy, Company D, Field Force Replacement Center, ETOUSA, did, at London, England, on or about 9 March 1944, feloniously take, steal, and carry away one (1) Shaeffer fountain pen bearing the initials, "O.K.V", of the value of about five dollars ($5.00), seventeen shillings (£0-17-0) in English money, of the value of about three dollars and sixty-cents ($3.60), three (3) one cent pieces, one (1) pearl-handled knife, of the value of about one dollar and twenty-five ($1.25), one (1) silver-colored Ronson cigarette lighter, of the value of about five dollars ($5.00), one (1) cashiers receipt forty-eight pounds (£48-0-0) of the value of about one hundred and ninety-two dollars ($192.00), the property of Private First Class Oscar K. Vaughn, 9th Reconnassance Troops, ETOUSA.

NOTE: And six additional specifications, identical with Specification 1, above, except as to the place and date of the alleged larceny, and the nature, value and owner of the property stolen, which are, respectively, as follows:

	Place	Date	Owner	Property	Value
Specification 2:	London, England	14 Mar 1944	1st Lt. Keith G. Acker	1 Officer's blouse, 1 pair Officer's trousers, 1 wallet, 1 Illinois 15-jewel pocket watch, £10,	$190.00

Specification 3: (Nolle Prosequi)

	Place	Date	Owner	Property	Value
Specification 4:	London, England	14 Mar 1944	1st Lt. George R. Eldridge	1 Officer's blouse, 1 Officer's shirt, 1 pair Officer's pink trousers, 1 pair shoes, 1 trench coat, 1 ruby ring, 1 crash bracelet, 1 leather wallet, £40.	$345.00
Specification 5:	(Nolle Prosequi)				
Specification 6:	London, England	4 Apr 1944	T/Sgt William A. Fisher	1 overseas cap, 1 brown necktie, 1 shirt, £13, 2 French Franc coins, 1 package Lucky Strike cigarettes	$58.10
Specification 7:	London, England	4 Apr 1944	Sgt. Frank J. Buszek	1 set furlough papers, 1 cashier's receipt for £7, £3, 1 comb, 1 necktie	$41.70

ADDITIONAL CHARGE IV: Violation of the 94th Article of War.

Specification 1: (Nolle Prosequi)

Specification 2: In that Private Raymond Cuddy, Company D, Field Force Replacement Center, ETOUSA, did, at London, England, on or about 9 March 1944, feloniously take, steal, and carry away one (1) pair of wool trousers, Olive Drab, of the value of about four dollars and eighty-three cents ($4.83), property of the United States furnished and intended for the military service thereof.

Specification 3: In that * * * did, at London, England, on or about 14 March 1944, feloniously take, steal, and carry away one (1) Elgin wrist watch, government issue, of the value of about twelve dollars and fifty cents, ($12.50), property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that Private Raymond Cuddy, Company D, Field Force Replacement Center, ETOUSA, did, at London, England, from about 14 March 1944 to about 4 April 1944, without lawful authority appear in a public place, to wit: London, England, in the uniform of a commissioned officer and did then and there wrongfully

represent himself to be an officer commissioned in the Army of the United States.

Specification 2: In that * * * did, at London, England, on or about 14 April 1944, wrongfully and without proper authority wear and display, a set of crew member silver wings on a blue operational patch, a DFC Ribbon, and the Air Medal Ribbon with three (3) Oak Leaf clusters.

Specification 3: In that * * * did, at London, England, on or about 14 April 1944, wrongfully and without authority impersonate a non commissioned officer by wearing Technical Sergeant's chevrons.

Each accused consented in open court to a common trial, and each was accorded the right of one peremptory challenge. Before arraignment, the prosecution withdrew Specifications 4, 8, 11 and 13 of Charge II and Specifications 3 and 5 of Additional Charge III of the charges and specifications against each accused, respectively. Each accused pleaded guilty to the Specification of Charge I, against him, except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty, and not guilty of Charge I but guilty of a violation of Article of War 61; each accused pleaded similarly as to the Specification and Additional Charge I against him; and each accused pleaded guilty to the remaining charges and specifications against him. During the trial the prosecution withdrew Specifications 9 and 10 of Charge II, Additional Charge IV and its Specification, and Specification 1 of Additional Charge V against accused Childrey, and withdrew Specifications 9 and 10 of Charge II, and Specification 1 of Additional Charge IV against accused Cuddy. Two-thirds of the members present at the time the votes were taken concurring, each accused was, on separate vote, found guilty of all the charges and specifications remaining against him. Evidence was introduced of two previous convictions against each of accused: Childrey was found guilty by special court-martial on two occasions for absences without leave, in violation of Article of War 61, one from 11 May to 16 June 1943, inclusive, and one from 28 July to 5 September 1943 and from 14 September to 16 October, respectively; Cuddy was found guilty by special court-martial on two occasions for absences without leave, in violation of Article of War 61, from about 12 July to about 11 August 1943 and from 22 August to 9 November 1943, respectively. Each was sentenced, by separate vote, three-fourths of the members present at the time the vote was taken concurring, to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. With respect to the charges of desertion against each accused:

As to accused Childrey: In addition to his pleas of guilty to absence without leave in violation of Article of War 61, under Charge I and its Specification and Additional Charge I and its Specification, both of which charged desertion in violation of Article of War 58, the evidence introduced by the prosecution showed the initial absence without leave of this accused from his organization, Company D, Field Force Replacement Center, at Shrivenham, England, on 24 January 1944, and his apprehension at London on 26 February 1944 as alleged in the Specification of Charge I; and also showed that after his return to military control by his apprehension on 26 February, he again absented himself without leave from the Unit Guardhouse, Central Base Section, Services of Supply, European Theater of Operations, on 3 March 1944, until his apprehension at Swindon, England on 2 April 1944, as alleged in the Specification of Additional Charge 1 (R25,41,49-58, 75,76, 78-80; Pros.Exs.1,12,18).

As to accused Cuddy: The evidence was the same except that the termination of his second absence was by apprehension in London on 14 April 1944.

As to the remaining charges and specifications to which each accused pleaded guilty: (R25,41,47,51-58,76-80; Pros.Exs.2,11,19)

The prosecution showed that accused Childrey, while absent without leave between 3 and 26 February 1944, inclusive, employed different aliases and lived at various hotels in London (R49,50,78-80; Pros.Exs.12,18). He visited Red Cross Clubs in London and stole the property, of substantially the value, at the times and places, and from the owners alleged in Specifications 1,2, 3, 5, 6, 7, 12 and 14 of Charge II (R25-45, 49, 50, 78-80; Pros.Exs.12,18). The owners of the property established the larceny in each case (R25-45). Some of the stolen property was found on his person and some in his hotel room at the time of his arrest (R27,29,31,33-38, 41-45; Pros.Exs.3-8). Childrey acknowledged his guilty participation in these larcenies in a signed statement made after he had been advised of his right to remain silent and that any statement he might make could be used against him (R49,50; Pros.Ex.12). At the time of his arrest, on 26 February 1944, Childrey was wearing Sergeant's chevrons, bombardier's wings of the Air Corps and "ribbons", as alleged in Specifications 1 and 2 of Charge III (R41,44). On 3 March 1944, Childrey broke out of the Detention Barracks in London, where he was in confinement awaiting trial, as alleged in the Specification of Additional Charge II (R51-58,78-80; Pros.Ex.18). While at large, this accused used different aliases and stole the property which is the subject of Additional Charge III and Specifications 1, 2 and 4 thereof. The owners of the property established the several larcenies, and accused in a signed statement, voluntarily made, admitted his guilty participation therein (R58-66,78-80; Pros.Ex.18). Also, an Elgin wrist watch, one item of the stolen property, was found in his possession (R63-65,75,76; Pros. Ex.14). When Childrey was arrested on 2 April 1944, at Swindon, he was wearing the insignia of a Captain and an officer's cap, as alleged in Specification 2 of Additional Charge V (R75-77). At the same time

and place he was wearing a loaded .45 calibre automatic underneath his top coat, as alleged in Specification 3 of Additional Charge V (R75).

The prosecution showed with respect to the remaining charges and specifications against accused Cuddy that this accused was absent without leave between 24 January and 26 February 1944, inclusive, used different aliases and lived at various hotels in London (R45-49, 78-80; Pros.Exs.11,19). He visited Red Cross Clubs in London and stole the property, of substantially the value, at the times and places, and from the owners alleged in Specifications 1, 2, 3, 5, 6, 7, 12 and 14 of Charge II (R25-45,47-49,78-80; Pros.Exs.11,19). The owners of the property established the larceny in each case (R25-45). Some of the stolen property was found on his person and some in his hotel room at the time of his arrest (R27,29,31,33-38,41-45; Pros. Exs.3-8). Cuddy acknowledged his guilty participation in these larcenies in a signed statement made after he had been advised of his right to remain silent and that any statement he might make could be used against him (R45-49; Pros.Ex.11). At the time of his arrest on 26 February 1944, Cuddy was wearing Sergeant's chevrons, gunner's wings of the Air Corps and "ribbons", as alleged in Specifications 1 and 2 of Charge III (R41,44). On 3 March 1944, this accused broke out of the Detention Barracks in London, where he was in confinement awaiting trial, as alleged in the Specification of Additional Charge II (R51-58, 78-80; Pros.Ex.19). While he was at large, he again engaged in a series of thefts of clothing, money and other property as alleged in Specifications 1, 2, 4, 6 and 7 of Additional Charge III and Specifications 2 and 3 of Additional Charge IV. Here, too, the owners, or the custodians of the government property, testified to the asportation of the property (R58-61, 63-66,68,70); one of the items of stolen property was found in accused's possession (R66,67,77; Pros. Ex.16); and accused in a signed statement, voluntarily made, admitted his guilty participation therein (R78-80; Pros.Ex.19). During his second absence, from 3 March 1944, this accused wore the uniform of a First Lieutenant, United States Army (R73,78-80; Pros.Ex.19), as alleged in Specification 1 of Charge V; and, at the time of his arrest on 14 April 1944, he was wearing a set of crew member's (silver) wings on a blue operational patch, ribbons and the chevrons of a Technical Sergeant, as alleged in Specifications 2 and 3, respectively, of Charge V (R66,67,77-80; Pros.Exs.16,19,p.8).

4. The accused, after being fully advised of their rights, elected to be sworn and testify. The testimony of each was substantially the same and corroborated the testimony of the other. Each accused in effect denied that it was his intention to desert the service and said that when he left his station it was his intention to return. On 7 February 1944 they returned together to their station "to turn in"; but there was only "one soldier left in" their "outfit" there; this soldier told them that the "whole company had moved out" and that their company commander was changed. They then left and went back to Swindon. They again returned on 20 February "to turn in",

but there were no soldiers at all in the camp, "nobody there to turn in to", and accordingly they went back to Swindon (R82-86).

5. Direct evidence introduced by the prosecution established the absence without leave of accused during the periods alleged in the Specification of Charge I and the Specification of Additional Charge I against Childrey and in the specifications of similar charges, similarly numbered, against Cuddy. These charges were laid under Article of War 58, desertion. Accused pleaded not guilty of desertion but guilty of absence without leave. Each was so absent for about 33 days on the first occasion. Childrey was absent without leave for about 30 days and Cuddy for about 42 days on the second occasion.

Direct proof offered by the prosecution, supplemented by signed confessions, established each of the remaining charges and specifications excepting those which were discontinued by the prosecution. This proof in itself was conclusive to establish each factual element of the offenses so alleged and charged, except that in certain instances the value of every item of property alleged in a single specification to have been stolen as part of one transaction was not fully proved. However, the pleas of guilty of accused made it unnecessary for the prosecution to establish values as alleged; and in no event was the failure of proof in this connection, under any specification, of an amount sufficient to decrease the sentence imposable and authorized had every allegation of value in that specification been proved. The effect of a plea of guilty is that of a confession of the offenses as charged (CM ETO 839, Nelson; CM ETO 1266, Shipman).

The additional offenses so proved, involved numerous larcenies of cash and other property worth hundreds of dollars, escape from confinement while awaiting trial on charges, impersonation of both a commissioned and a non commissioned officer, the wrongful wearing of aviation insignia and decorations, and the carrying by accused Childrey of a .45 automatic pistol concealed on his person.

In determining whether accused absented themselves with intent to desert the service, the court was entitled to regard the additional offenses and all the attendant implications. These included substantial periods of absence during war in an active theater of operations, a long series of larcenies responsibility for which might well be discovered andpunishment exacted if accused returned to military control, their escape from confinement conclusively inconsistent with their stated intent to return to service, and the further fact that each absence was terminated, involuntarily, by apprehension.

> "Absence without leave with intent not to return" is desertion, condemned by Article of War 58. "* * * to warrant conviction of desertion, evidence, such as evidence

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> of a prolonged absence or other circumstances, must be introduced from which the intent can be inferred. Such inference may be drawn from such circumstances as that the accused * * * was under charges or had escaped from confinement * * * that just previous to absenting himself he stole * * * money * * * or other property that would assist him in getting away" (MCM, 1928, par.130, pp.142-144).

If taking money prior to departure to aid one "in getting away" is a circumstance which justifies an inference of intent to desert, then the taking of money by an absentee to enable him to remain absent justifies the same conclusion. Theft committed by a soldier while absent without leave is generally to aid and perpetuate such absence. The willful commission of a serious civil offense by such a soldier is most persuasive that he has intended to depart permanently from the military establishment, its constructive influences and its punitive policies.

On these facts the court was fully justified in finding each accused guilty of Charge I and its Specification and Additional Charge I and its Specification against each, being desertion in violation of Article of War 58. The court was also justified, as pointed out, in finding each accused guilty of the remaining charges and specifications.

6. The confessions of accused Childrey and Cuddy were admitted without limitation. The court should have been warned not to accept the confession of one accused as evidence against the other (MCM, 1928, par.114c, p.117). However, since one confession was substantially a recapitulation of that of the other and since each accused admitted by his plea of guilty each offense except that of intent to desert, which both denied, the error in question did not prejudice the substantial rights of either accused (Dig.Op.JAG, 1912-1940, sec. 395(2), CM 177400 (1927)).

7. Accused Childrey is 22 years of age. He was inducted 6 March 1943 at Richmond, Virginia, for duration of the war plus six months. Accused Cuddy is 23 years of age. He was inducted 21 December 1942 at Boston, Massachusetts, for duration of the war plus six months. Neither accused had prior service.

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

legally sufficient to support the findings of guilty and the sentences. Confinement in a United States Penitentiary is authorized for the offense of desertion in time of war (AW 42) and for larceny of more than $50.00 (AW 42; sec.287 Federal Criminal Code (18 USCA 466)).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 11 AUG 1944 TO: Commanding General, Central Base Section, Communications Zone, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Privates DAILEY L. CHILDREY (33637858) and RAYMOND CUDDY (31240684), both of Company D, Field Force Replacement Center, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of WAR 50½, you now have authority to order execution of the sentences.

2. The sentences to confinement are severe but are warranted by the convictions of war-time desertion and the many serious larcenies committed while absent.

3. When copies of the published orderare 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 2901. For convenience of reference please place that number in brackets at the end of the order: (ETO 2901).

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

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

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BOARD OF REVIEW No. 2

ETO 2904

21 AUG 1944

UNITED STATES	)	XIX TACTICAL AIR COMMAND
	)	
v.	)	Trial by GCM, convened at Aldermaston, Berkshire, England, 28, 29 and 30 May 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 15 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private ROY D. SMITH (38074015), Company "A", 448th Signal Construction Battalion, Aviation.	)	

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

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

2. Upon a common trial, expressly agreed to by accused and his co-accused, Privates John A. Diggs (33538897), Fred C. Fountain (33530920), Edward T. Jackson (32794165), and John S. Pope (32794059), all of Company "A", 448th Signal Construction Battalion, Aviation, accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 64th Article of War.

Specification: In that Private Roy D. Smith, Company "A", 448th Signal Construction Battalion Aviation, did, at or near Blandford, Dorset, England, on or about 1 May 1944, lift up a weapon, to-wit: a thompson sub-machine gun, calibre 45, against 2nd Lt., Paul V. Ryan, Regimental Headquarters Company, 26 Infantry Regiment, his superior officer, who was then in the execution of his office.

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

Specification: In that Private Roy D. Smith, Company "A", 448th Signal Construction Battalion (Avn), did, at USAAF Station 427, APO 141, U.S. Army, on or about 1 May 1944, wrongfully and unlawfully bear arms and assemble together with Private John A. Diggs and Private Edward T. Jackson, both of Company "A", 448th Signal Construction Battalion (Avn), with wrongful common intent to enter the town of Blandford, Dorset, England, and engage in combat with other U.S. soldiers, whose names are unknown; and did, wrongfully and unlawfully, in conjunction with the said Private John A. Diggs and the said Private Edward T. Jackson, in pursuance of such common intent, evade the sentry and depart from said USAAF Station 427, APO 141, U.S. Army, and proceed toward the said town of Blandford, Dorset, England.

CHARGE III: Violation of the 61st Article of War.

Specification 1: In that Private Roy D. Smith, Company "A", 448th Signal Construction Battalion Aviation, Did, without proper leave absent himself from his station at U.S.AAF Station 427, APO 141, U.S. Army, from about 1900 hours 1 May 1944, to about 2200 hours 1 May 1944.

Specification 2: In that * * * did, without proper leave absent himself from his station at U.S.AAF Station 427, APO 141, U.S. Army, from about 2200 hours 1 May 1944, to about 2230 hours 1 May 1944.

Specification 3: In that * * * did, without proper leave absent himself from his station at U.S.AAF Station 427, APO 141, U.S. Army, from about 2000 hours 2 May 1944, to about 1300 hours 8 May 1944.

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 15 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence shows that about 9:30 p.m., on the evening of 1 May 1944, accused and another colored soldier, returning to camp from a "pub" which they had visited, were cursed and threatened by white soldiers in the town of Blandford, on separate outskirts of which both white and colored organizations were encamped (R26,48). Neither accused nor his companion were attacked physically by the white soldiers and their retaliation was wholly verbal. However, a report reached them upon their return to camp, that other colored soldiers had been physically attacked that night by white soldiers in Blandford and that some were being detained there on account of the attack (R27-29,72; Ex.6). Accused thereupon procured a Thompson sub-machine gun, which had been recently issued to him, and started back to Blandford with several other colored soldiers who left the camp area by a route which did not involve their passage through the regular exit where a sentry was posted (R18,30-33,72; Ex.6). At a road fork a short distance from camp, they met 2nd Lieutenant Paul V. Ryan of the 26th Infantry. It was then about 10 p.m. (R35-37,53-54). Accused, carrying his "tommy gun", walked up to Lieutenant Ryan and ordered him to halt. Lieutenant Ryan halted, whereupon accused remarked, "Oh, it is just an officer". Lieutenant Ryan inquired where accused was going with the sub-machine gun. Accused replied that he was going to town. The officer "told him he couldn't go into town with that gun". Asked then if accused told him why, Lieutenant Ryan testified, "They were going into town to make trouble". To the ensuing question, "Tell us what they said to you?", Lieutenant Ryan replied, "They were going to town to clean up the place". As accused started to back away, Lieutenant Ryan withdrew his own sidearm from its holster, at the same time instructing accused to drop the sub-machine gun. Accused pointed the sub-machine gun toward Lieutenant Ryan, who thereupon "said I had bullets in my gun and he said he had bullets in his. I said I would shoot him if he didn't drop it, and he was going to shoot me. After a while of arguing, then he put the gun up". The officer then ordered accused to turn his gun over to a colored sergeant who was standing nearby. Accused "unloaded the gun, took the clip out and held the gun up in the air and pulled the trigger", firing one round of ammunition still lodged in the chamber. Accused then relinquished his gun to the sergeant, walked over to Lieutenant Ryan and started talking. There were about a dozen colored soldiers in the group "and we talked there", according to the Lieutenant, "for almost three-quarters of an hour * * * I was trying to convince them not to take things into their own hands. They wanted to go into town and there were a few agitators", who, while Lieutenant Ryan was talking to accused, "wanted action instead of standing talking". In the meantime, two other officers arrived and the group of colored soldiers finally returned to camp at about a quarter of eleven. As they went around the bend in the road a shot was fired. The officers, standing talking at the fork, "could hear the path of the

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bullet through the trees" (R36-38,40,53-55).

The next day, 2 May, accused departed with a detail of his organization for a problem in Wales. The detail traveled in convoy. On the first day out, the truck in which accused was riding ran out of gas approximately 40 miles from camp. When it arrived at the bivouac area at about 10:30 p.m., the sergeant in charge of it reported that "some of the men went out to get something to eat and it was rather late at night and they couldn't find them, so they had to go on without them". Accused was one of the missing men (R21-23). According to a properly authenticated extract copy of the morning report, accused went absent without leave at 2000 hours 2 May 1944 and remained in that status until 1430 hours 8 May 1944. On 3 May 1944 accused was reported absent at reveille and the first sergeant checked the area and looked for him. He was not present with his organization from 2 May until 8 May (R17-18,20-21).

Accused did not have permission from his company commander or from his first sergeant to be absent from 1900 to 2200 hours or from 2200 to 2230 hours on 1 May 1944 (R18,20).

4. The evidence for the defense shows that three members of the accused's organization had, in the town of Blandford, on different occasions, one in February and two in April 1944, been insulted and threatened by white troops belonging to the First Division (R82-85). Three other members of accused's organization testified that on the night of 1 May they were physically attacked by white soldiers in Blandford (R86,89-91); another, that, on the same night and in the same town, he saw white soldiers beating a colored soldier and that he himself detoured in returning to camp in order to avoid other groups of white soldiers on the streets (R88). Another colored soldier testified concerning the return to camp on the night of 1 May of a wounded colored soldier with a crowd of others in a state of wild excitement, a shouted alarm that "the white boys" were coming up the hill, and a general exodus of colored soldiers from the camp into the surrounding woods (R92).

From the testimony of his four co-accused, it appears that on the night in question accused reported to a group of his organization, including co-accused Diggs and Jackson, in a tent at their camp, that some of their men had been badly beaten by white soldiers in town that night and "they couldn't get out"; further that he (accused) "would try and go and get them out of town". Accused left and others followed (R106-109,115). At the fork of the road they were met by Lieutenant Ryan and, during the ensuing conversation, were joined by other colored soldiers, some departing from and others returning to the camp (R94-95,101-102,107, 112,117). Co-accused Pope testified that he had no thought of going back to fight as he did not wish to be beaten again; co-accused Jackson and

Diggs, that they intended to rescue Private Brown, who had been reported unable to return on account of the white soldiers' attitude, but had no intention of fighting (R106-109,112,118). They did not see accused point his gun at Lieutenant Ryan but one co-accused heard accused threaten to shoot the officer (R110,117,119).

5. Accused, having been advised of his rights, elected to take the stand under oath and testified, in substance, as follows:

On 1 May 1944, he went, sometime after 4 p.m., to town without permission and without eating supper, "about closing time", he was returning to camp when "a bunch of white soldiers * * * called us black sons of bitches and niggers", adding "If you don't like it you can fight". Pursued by some of the white soldiers, accused ran back to camp. There he obtained the Thompson sub-machine gun which had been issued to him at three o'clock that afternoon, and "left to go back to town to find Henry O. Brown and the rest of the fellows that couldn't get out". On the way down the road, he took from his pocket a bullet which he had been carrying for two months, put it into the clip, and inserted the latter in the machine gun. "Just as we were arriving at the fork", he testified,

> "an officer was coming towards us down on the road that leads to the 1st Division. The left fork leads to our camp. I couldn't recognise who he was, so I halted him to see who it was. After he got there I saw it was an officer, so I said 'It is an officer'. I had my gun and dropped it to my side. He said 'Where are you going with that gun?' I said I was going down town to find Henry O. Brown and the other fellows that couldn't get back to camp. By that time he said 'You are not going down town with that gun', so he reached down and pulled out a pistol which looked like a .32 automatic. He said, 'Put that gun down'. He told me to give him the gun. That is what it was. I said 'I can't. I will have to give it to Sergeant Jones'. He said 'If you don't give it to me I will shoot you'. I said 'I still can't give it to you. I have to give it to Sergeant Jones'. At that time I gave it to Sergeant Jones".

He was not going to town for the purpose of finding white soldiers, explaining "It would have been suicide to try it" (R.123). He took the gun for protection "in case they ganged up". Although he knew how to operate that gun, he "wasn't intending to use it, but carried it for bluff" (R130). Before delivering the gun to Sergeant Jones, he shoved the bolt home, ejecting the load of one bullet out of the clip and in-

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jecting it into the chamber. Remembering this he promptly reclaimed the gun from Jones for the purpose of unloading it. He removed the clip but was unsuccessful in his efforts to dislodge the load in the chamber, so concluded the best thing to do was to "fire up into the air", which he did (R130-132). He denied threatening to shoot Lieutenant Ryan. "I was scared to say I would shoot him. He had his gun pointed at me and I figured if I tried to raise mine he would shoot me". He admitted that he did not have permission to be absent from his station at any time on 1 May (R133).

As for his absence in Wales, accused testified that, about 8 or 9 p.m., 2 May, his convoy ran out of gas and lost the other trucks at Morristown. Having eaten K rations for lunch,

> "all the men was hungry and there wasn't no officer with us and nobody to take us anywheres to get something to eat so we decided we would find a cafe somewhere and get something to eat and we did" (R124).

The members of the convoy separated into groups patronizing different establishments. When accused and the two other soldiers in his group finished eating and sought to rejoin the convoy, the trucks were gone. After waiting until dark for their return, accused and one of his companions "stayed in the Red Cross". The following morning accused saw some other members of his convoy and "asked them, had they found the rest of the convoy and they hadn't". On the second or the third day after losing his convoy, accused went to the Railway Transportation Office at Port Talbot, nine miles away. At accused's request, this office endeavored unsuccessfully to locate the convoy by telephone. Obtaining the telephone number of the Railway Transportation Office for purposes of further inquiry, should the office later succeed in ascertaining the location of the convoy, accused returned to Morristown where he spent the night "in the motor pool with the trucks at the colored camp". That night he procured transportation with a driver to take him back to Port Talbot RTO. Upon arrival there, he found the office closed and spent the night with "some colored people at Port Talbot". The following day, he learned that the RTO had been unable to locate the convoy, so returned to Morristown. Asked how he got back to Blandford, he testified:

> "The last time we went back to the RTO and we had them phone to Blandford and see where the convoy was, they got the answer the convoy was there, so the company commander said we were AWOL and we wasn't, we were just lost".

He and his companion slept in jail that night and the next morning military police put them on the train and they returned unescorted to Blandford (R125).

6. The Specification, Charge I, alleges that accused lifted up a Thompson sub-machine gun, against Lieutenant Ryan, his superior officer, then in the execution of his office, in violation of Article of War 64, which denounces the lifting up by a soldier of a weapon against his superior officer "on any pretense whatsoever". While the last-quoted phrase does not exclude as a defense the fact that accused did not know the officer to be his superior, or that the lifting up was done in legitimate self-defense, or in the discharge of some duty such as the suppression of a mutiny or sedition, the evidence raises no such issue. Lieutenant Ryan testified that the accused raised the sub-machine gun against him in a threatening manner, under circumstances involving every element of the offense charged (MCM, 1928, sec.134a, pp.147-148). Defense testimony controverted that of Lieutenant Ryan as to the physical act of the raising up of the weapon only. Indeed, one co-accused testified that, although he did not raise his weapon, accused threatened to shoot Lieutenant Ryan. It was strictly within the province of the court to determine the controverted issue thus raised. Substantial evidence supports the court's findings of guilty, which, are, therefore, not susceptible of disturbance upon appellete review (CM ETO 1953, Lewis).

7. The Specification, Charge II, alleges on the part of accused, in conjunction with others, unlawful arms-bearing and assemblage with wrongful common intent to engage in combat with other American soldiers, and, in pursuance thereof, evasion of sentry and departure from post, in violation of Article of War 96. The uncontradicted evidence shows that, on the night in question, accused was cursed and insulted by white soldiers in Blandford. He returned to camp, informed Diggs, Jackson and others that some of their men had been attacked and beaten by white soldiers, expressed the intention of returning to Blandford to rescue one Brown, procured a Thompson sub-machine gun, loaded it and, accompanied by Diggs and Jackson, without authority, departed from camp, proceeding in the direction of Blandford as far as the road fork where they met Lieutenant Ryan. There, according to Lieutenant Ryan's testimony, members of the group indicated to him that "they were going into town to make trouble" and "to clean up the place". Lieutenant Ryan and others ultimately persuaded the group to return to camp which, reluctantly, they did, discharging a firearm as they started back. The conduct established by the evidence is accurately described in the specification and so clearly constitutes a violation of Article of War 96 as to hardly require discussion. If it does not, in itself, involve a consummated riot, it involves all of the elements of the commonlaw offense of rout.

> "A rout is an attempt at riot made by an unlawful assembly. Such preparatory steps must have been taken as would lead, if carried out, to a riot.

> At least three persons are essential to constitute the offense" (Wharton's Criminal Law, sec.1859, p. 2191).

Had the accused and his companions carried out the purpose of their unlawful assembly, pursuant to the preparatory steps already taken at the time they were forestalled, they would have committed a riot (CM ETO 895, Davis). Moreover, the assembly and bearing of arms under the circumstances shown were both unlawful and prejudicial to good order and military discipline, as were the evasion of the sentry and the abortive march on Blandford, all alleged in the specification and established by the evidence, whether a purpose of rescue only or one of revenge as well, motivated the participants. The evidence amply sustains the court's findings of guilty of Charge II and its Specification.

8. Specifications 1 and 2, Charge III, allege absence without leave for three hours and half an hour, respectively, on the evening of 1 May 1944. The uncontroverted evidence, including the testimony of accused, shows that he was absent from camp without permission on two occasions on the evening alleged, between approximately the hours specified. The approximation is sufficiently close to support the inference involved in the findings of guilty that accused was absent from 1900 to 2200 hours and again from 2200 to 2230 hours as alleged. Although the inclusion of these two specifications involves an unreasonable multiplication of charges and, as they are certainly unnecessary to explain the circumstances of the more serious offenses involved in the specifications under Charges I and II, improper joinder (MCM, 1928, sec.27, p.17), the evidence establishes accused's guilt of the (relatively) minor derelictions alleged.

9. Specification 3, Charge III, alleges absence without leave from 2 May to 8 May 1944. Competent evidence establishes absence without authority for the period alleged. Accused's testimony in explanation and extenuation of his admitted unauthorized absence is unconvincing in view of the length of time he remained in and around Morristown and Port Talbot, together with the showing that other members of his convoy, marooned at the same time and place by the same misadventure, managed to return to their organization with far less delay. Substantial evidence sustains the court's finding of guilty.

10. The charge sheet shows that accused is 22 years of age and that, with no prior service, he was inducted at Fort Sam Houston, Texas, 3 January 1942, for the duration and six months.

11. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 21 AUG 1944 TO: Commanding General, XIX Tactical Air Command, APO 141, U. S. Army.

1. In the case of Private ROY D. SMITH (38074015), Company "A", 448th Signal Construction 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 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 CM ETO 2904. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 2904)

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

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

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BOARD OF REVIEW

9 AUG 1944

ETO 2905

U N I T E D S T A T E S	XIX TACTICAL AIR COMMAND
v.	Trial by GCM, convened at Ashford, Kent, England, 31 May 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private SAMUEL W. CHAPMAN (35646766), 1230th Military Police Company (Avn), Detachment "A".	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Samuel W. Chapman, Detachment A, 1230th Military Police Company (Avn), XIX Tactical Air Command, did, at Deep's Lane, near AAF Station 419, APO 141, U.S. Army, on or about 24 May 1944, wrongfully, unlawfully and feloniously attempt to have carnel knowledge of Mary Dawn Weller, a child of the age of nine years, by wrongfully, unlawfully and feloniously taking off her knickers and placing his penis up between her legs.

Specification 2: In that * * * did, at Deep's Lane, near AAF Station 419, APO 141, U.S. Army, on or about 24 May 1944, commit the crime of sodomy with a child by feloniously and against the order of nature, having carnel connection with Mary Dawn Weller, a child of the age of nine years, by placing his penis in her mouth.

Specification 3: In that * * * did, at Deep's Lane, near AAF Station 419, APO 141, U.S. Army, on

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> or about 24 May 1944, wrongfully contribute to the delinquency of Mary Dawn Weller, nine years of age, in that the said Private Samuel W. Chapman protruded his penis through his trousers in her presence, rubbed it up between her legs and requested her to play with it.

He pleaded not guilty to and was found guilty of the Charge and its 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 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The following facts are undisputed: On Wednesday evening, 24 May 1944, Mary Weller was a nine year old (R20) girl living with her parents at Hengherst Farm in Woodchurch (R7), the farm adjoining a camp of United States Army Forces (Pros.Ex.1). About seven o'clock that evening accused took a "bike" from his camp area and rode down to Gate No. 3 (R10; Pros.Ex.3a), then back to the main road where he helped drive the Weller cow home (R21; Pros.Ex.3a). About eight o'clock he was seen "in the yard" with some children (R22) and he rode several of them around on the crossbar of his bicycle (R22;Pros.Ex.2b and 3a). Mary was one of the children given such a ride (R8;Pros.Ex.2b and 3a). She testified that he took her to the top of Place Lane and then a little way down the lane.

> "When we were down the lane, he got on top of me and then he got his thing out and put it in my mouth and then he pulled my knickers down and got on top of me again. Then he pushed his thing between my legs. That is something I forgot to tell you yesterday, that he made me rub it. He made me rub it and I said I didn't want to, but he made me and then he was coming home and he wanted me to come home with him so I come up the lane a little way and I slipped through the hedge and then I crept round and come home by myself and then when he come some of the way he saw me and then he wanted me to come out but I wouldn't come out. Then he crept behind a bush and I slipped out of the hedge and then I went a little way across the airdrome and come down through some more Americans and come in and told Rose." (R8)

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Rosemary King, a member of the Women's Land Army, working on the Weller Farm, testified in corroboration of Mary that the latter had come in the house, the evening in question, and said that a soldier had taken her for a ride on his bicycle, pulled her knickers down and "messed about with her" (R22,23). Mary also told her mother, who arrived home about ten (R23) to 20 (R20) minutes after Mary's return home, the additional fact that "she cried and hollered but he put his hand over her mouth" (R21). Mary was examined by Dr. Frank K. Tomlinson, of Woodchurch, about one o'clock in the morning of 24 May (R9,17), but he found no bruises or evidence of penetration (R17). At 9:40 a.m. on 25 May accused was lined up with 11 other American soldiers for identification and though he changed places in the line-up, he was successively identified as the offender by Mrs. Weller, who had seen accused previously when he helped with their cow (R21), by Rose King, who had previously seen accused riding the children on his bicycle (R22), and by Mary. The three were separated so that they did not communicate with each other or see the identification made by the others (R25-26, 29-30). Accused, after due warning, made three statements, the first and third of which he signed, one at about ten o'clock 25 May (R17; Pros.Ex.2aprime), one about seven o'clock of the evening of 27 May (R18; Pros.Ex.2b), unsigned, and a third about a half hour later also dated on 27 May 1944 (R20;Pros.Ex.3a). In his first statement (Pros.Ex.2aprime) he admitted taking the "girl for a ride on the bike" and stated that he wanted

> "to confess to it all. I had been drinking and I didnt know quite what I was doing. * * * I dont know what happened but I did take her knickers down. I hardly realized what I was doing. I undid the front of my trousers and rubbed it up between her legs. I asked her to play with it but she didnt do it. If she says I put it in her mouth I dont remember."

The second statement (Pros.Ex.2b) was similar in substance but a little more detailed. He again "don't remember putting it in her mouth. If she says I did I dont remember." The third statement (Pros.Ex.3a) is more in detail but substantially the same except that he states, "I asked her to let me put it in her mouth but she said no so I did not force her".

4. Accused after full explanation of his rights therein, announced in open court his desire to remain silent.

5. All three specifications herein are placed under Article of War 96. Specification 2 charges the "crime of sodomy" specifically mentioned in and punishable under Article of War 93. However, it does sufficiently allege an offense under Article of War 93, and the fact that it was laid under Article of War 96 is not material (Dig. Op.JAG 1912-1940, sec.394 (2),pp.197-198).

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6. The testimony of the child, Mary Dawn Weller, supports every factual allegation contained in Specifications 1, 2 and 3. Her testimony is corroborated legally by the evidence given by her mother and by Rosemary King which shows that Mary made complaint against accused immediately after the occurrence on her return home (CM ETO 709, Lakas; CM 228891, Robnett, 16 B.R. 359). The admission of accused constitutes a full confession of the offenses set forth in Specifications 1 and 3; and his statement that he asked Mary to let him "put it in her mouth" proves what was in his mind and gives credence to Mary's testimony that he accomplished this purpose, despite his version that when she said "no" he did not "force her".

Specification 1 alleges the offense of attempted carnal intercourse with a minor, while Specification 3 alleges the offense of contributing to the delinquency of the child. The acts of accused alleged as a basis for the offense stated in Specification 3 are the same in substance as those alleged as a basis for the offense stated in Specification 1. The two offenses constitute different aspects of the same act.

> "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person" (MCM, 1928, par.27, p.17).

While the Board of Review may not disturb findings of guilty merely because they are predicated on a multiplicity of charges arising out of the same transaction (Dig.Op.JAG, 1912-1940, sec.428(5), CM 192409 (1930); CM 233196, 19 B.R. 365), the Board will regard the sentence imposed to the end that the act or offense of accused is punished only in its most important aspect (MCM, 1928, par.80, p.67; CM 231710, Bearden, 18 B.R. 277). In the present case the findings of guilty of Specifications 1 and 2 support the sentence of imprisonment for 20 years, the maximum imposable for the offenses alleged in the first two specifications. Also, it must be assumed that the sentence imposed included some punishment for the offense alleged in Specification 3. However, errors in the trial of cases, such as the multiplication of charges here, while not prejudicial error so far as findings of guilty are concerned, may find prejudicial expression in the sentences imposed. A maximum sentence might not be imposed for one offense were not the offense aggravated in the eyes of the court by a repetitious charging. Military law provides and expects that inequities so expressed in the sentence will be corrected by the reviewing or the confirming authority.

> "The reviewing or confirming authority is an integral part of the court-martial system and no case of conviction is finally concluded until

> he has acted upon it (AW 40). * * * It is to the confirming authority that we must look for relief from an excessive sentence unless, of course, the sentence is actually illegal. (CM 232160, McCloudy, 18 B.R. 389).

7. The charge sheet shows accused is 24 years of age. He was inducted 6 January 1943 at Huntington, West Virginia, for the duration plus six months. He had no prior service.

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

9. Confinement at hard labor for five years is authorized on conviction of the offense of sodomy, by the Table of Maximum Punishments (MCM, 1928, par. 104c, p.100), and for 15 years on conviction of the offense of carnal knowledge of a female under 16 years of age (being the nearest related offense to that of attempting to have carnal knowledge of a nine year old girl) (AW 42; sec.279, Federal Criminal Code (18 USCA 458); D.C. Code, sec.22-2801 (6:32), p.536). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

[signature], Judge Advocate

[signature], Judge Advocate

[signature], Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 AUG 1944 TO: Commanding General, XIX Tactical Air Command, APO 141, U. S. Army.

1. In the case of Private SAMUEL W. CHAPMAN (35646766), 1230th Military Police Company (Avn), Detachment "A", attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved.

2. The sentence imposed is the maximum permissible for the first two offenses. The third charge is duplication. Critically examined, what accused did amounted to an indecent assault on a girl of nine years and sodomy by mouth. The latter offense appears the worse. The assault was not vicious and the girl was not physically hurt. There were no previous convictions. Liquor may have been an influencing factor. The term of confinement is more severe than the usual sentence imposed for such crimes. In the interest of uniformity, it is recommended that the sentence be reduced to ten years.

3. 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 2905. For convenience of reference please place that number in brackets at the end of the order: (ETO 2905).

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

8 AUG 1944

ETO 2908

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trail by GCM, convened at Bristol, Gloucestershire, England, 31 May 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. United States Disciplinary Barracks, Greenhaven, New York.
Private FRANK J. GRAHAM (32330272), Company "C", 291st Engineer Combat Battalion.	

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

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

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

CHARGE: Violation of the 61st Article of War.
Specification: In that Private Frank J. Graham, Company C, 291st Engineer Combat Battalion, did, without proper leave, absent himself from his post at Ragland Barracks, Plymouth, Devon, England, from about 8 February 1944 to about 17 February 1944.

ADDITIONAL CHARGE: Violation of the 61st Article of War.
Specification: In that * * * did, without proper leave, absent himself from his post at Highnam Court, Gloucester, from about 3 April 1944 to about 17 May 1944.

He pleaded not guilty to and was found guilty of all the charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave from 12 April to 4 July 1943. He was sentenced to be dishonorably discharged the service, to forfeit allpay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority

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may direct, for ten years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. The prosecution showed that accused was a private in the 291st Engineer Combat Battalion, which was stationed on 8 February 1944 at Ragland Barracks, Plymouth, Devon, and on 3 April 1944 at Highnam Court, Gloustershire, England (R6,7,9). On 8 February 1944, accused absented himself from his post at Plymouth, Devonshire. His absence was unauthorized. It continued until he returned, voluntarily, to his organization on 17 February 1944 (R7,8,11,12; Pros.Ex.1). On 3 April 1944, accused again absented himself without leave from his organization and post and remained absent from military control until 17 May 1944 (R6, 8-10,13-16; Pros.Ex.2), on which date "accused surrendered himself to the military police in London" (R16). The prosecution introduced a stipulation, made with defense counsel and agreed to by accused, which embodied a statement made by accused to the investigating officer on 20 February 1944. The statement is to the effect that:

> "the accused had been in the Army over 19 months; that 15 months of that time he has spent in England; that when he first came over he thought he would get to fight and that is what he wanted to do, but it seemed that his outfit was just a construction outfit; that when he was assigned to the 291st Engineer Combat Battalion he thought he would get to see combat, but this outfit had too many picks and shovels in it; that he worked hard and was made acting squad leader and then he was paid for the first time in a year; that he went out and had alittle too much to drink; that he was in for bed check but got up later and left; that he was on his way back when Lieutenant Pintari passed him and stopped, but Lieutenant Pintari asked him where he was going and that the accused told him he was going back to camp; that the accused got in the jeep and went back to camp with him." (R17).

4. The rights of accused as a witness were fully explained to him by his defense counsel, according to the record (R18). Accused elected to remain silent and called no witnesses.

5. The unauthorized absence of accused from his post on two occasions, from 8 February to 17 February 1944, and from 3 April to 17 May 1944, as alleged in the Specification of the Charge and in the Specification of the Additional Charge, respectively, each laid under Article of War 61, was established by competent evidence. The offense charged, according to the Manual for Courts-Martial, 1928, paragraph

132, page 146, requires proof:

> "That the accused absented himself from his command, guard, quarters, station, or camp * * *".

In this case, each Specification alleges, in part, that accused "did, without proper leave, absent himself from his post". In the Specification of the Charge, this post is described as "at Ragland Barracks * * *". In the Specification of the Additional Charge, this post is described as "at Highnam Court * * *". In view of the entire context of each Specification, there can be no doubt that employment of the term "post" was synonymous with either "command" or "station" and that the language of each Specification properly and adequately alleged the offense of absence without leave in violation of Article of War 61.

6. The accused is 24 years of age. He was inducted at Fort Jay, New York, 2 May 1942 for the duration of the war plus six months. There was no prior service.

7. The court was legally constituted and had jurisdiction over the person and offenses. No errors injuriously affecting the substantial rights of accused was committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement for ten years is authorized upon conviction under Article of War 61. The designation of Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 AUG 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Private FRANK J. GRAHAM (32330272), Company "C", 291st Engineer CombatBattalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Accused has been convicted of absence without leave only. It is suggested that consideration be given to suspension of the dishonorable discharge, with confinement at Shepton Mallet, in order that the government may retain the right to use him for combat in this theater if the prison authorities decide that he is rehabilitable. Such action may be taken in the published general court-martial order.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2908. For convenience of reference please place that number in brackets at the end of the order: (ETO 2908).

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

14 JUL 1944

ETO 2911

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at Bristol, Gloucestershire, England, 19 May 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 35 years. United States Penitentiary, Lewisburg, Pennsylvania.
Private HERMAN ARNDT (12021038), Company "K", 115th Infantry.	

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

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private HERMAN ARNDT, Company "K", 115th Infantry did, at Bodmin, Cornwall, England on or about 17 September 1943 desert the service of the United States and did remain absent in desertion until he was apprehended in Bristol, Gloucester, England on or about 23rd February 1944.

ADDITIONAL CHARGE I: Violation of the 93rd Article of War.
Specification: In that * * *, did, at Cardiff, Wales, on or about 21 February 1944, feloniously take, steal and carry away British currency, value about four dollars ($4.00) and four (4) clothing coupon books of some value less than one dollar ($1.00), the property of Winifred Wakeman, and British currency, value about two dollars ($2.00), the property of Audrey Little.

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

Specification 1: In that * * *, did, at Weston Super Mare, England, on or about 5 November 1943 feloniously receive, have and conceal British currency value about Twenty Dollars and Fifteen Cents ($20.15), of the goods and chattels of Thomas M. Sumner, Kenneth Morrison, Vern Thornton and Steve Romanyk, then lately before feloniously stolen, taken and carried away; he, the said Private Herman Arndt, then well knowing the said goods and chattels to have been so feloniously stolen, taken and carried away.

Specification 2: (Finding disapproved by reviewing authority).

Specification 3: In that * * *, did, at Weston Super Mare, England, on or about 24 December 1943 feloniously receive, have and conceal British currency value about Twenty-Four Dollars and Eighteen Cents ($24.18), of the goods and chattels of Stanley A. High and Kenneth E. H. Filer, then lately before feloniously stolen, taken and carried away; he, the said Private Herman Arndt, then well knowing the said goods and chattels to have been so feloniously stolen, taken and carried away.

ADDITIONAL CHARGE III: Violation of the 93rd Article of War,

Specification: In that * * *, did, in conjunction with Private Steven Stack, Canadian Forces, at Weston Super Mare, England, on or about 5 November 1943, feloniously take, steal and carry away one (1) Gents bicycle value about Fourteen Dollars ($14.00), the property of John Price, and one (1) Gents bicycle value about Twelve Dollars ($12.00), the property of Derek Ellis.

He pleaded not guilty to Additional Charges I, II, III and their respective specifications, guilty to the Specification of the (original) Charge, except the words "desert the service of the United States and did remain absent in desertion", substituting therefor the words "did absent himself without leave and did remain absent", of the excepted words, not guilty, of the substituted words, guilty, and not guilty to the (original) Charge, but guilty of a violation of Article of War 61. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of all charges and specifications. Evidence was introduced of one previous conviction

by special court-martial for absence without leave for 139 days in violation of Article of War 61. Three-fourths of the members of the court present concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the finding of guilty of Specification 2 of Additional Charge II, approved the sentence but reduced the period of confinement to 35 years, designated the United States Federal Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The competent evidence of the prosecution may be summarized as follows:

CHARGE: Desertion in violation of Article of War 58.

The accused pleaded guilty to being absent without leave from 17 September 1943 to 23 February 1944 but not guilty to desertion (R.6). The unauthorized absence was shown by an authenticated copy of an extract of the morning report of the accused's organization (R.8; Pros. Ex. 1) and the testimony of the first sergeant of that organization who made a search for the accused (R.8). Accused was apprehended by the civilian authorities in Bristol, England, after an absence of 159 days (R. 16-19). During this time he, according to his own statement (Pros. Ex.4), travelled from place to place in England in uniform.

ADDITIONAL CHARGE I: Article of War 93 - larceny.

Mrs. Winifred Wakeman, who resided in Cardiff, was the wife of a British soldier who was away from home in the military service. At the time of the alleged offense Mrs. Wakeman had living with her at her home her father, two cousins and her child. Audrey Little, one of the cousins, and Mrs. Wakeman met the accused in a public house in Cardiff on 21 February 1944. Accused and Miss Little then left for a hotel but when Mrs. Wakeman arrived at home later that evening, she found accused. Mrs. Wakeman "fixed" up two fireside chairs in the living room to make him comfortable and then she and Miss Little went to bed at about 2330 hours. Sometime during the "early hours of the morning" Mrs. Wakeman was awakened by Miss Little, who said, "Somebody is here in the bedroom". Miss Little discovered that her purse was missing. Both women then went downstairs where they found Miss Little's purse and the handbag of Mrs. Wakeman on the piano. Both the purse and handbag had been opened by someone other than the owners. Ten shillings were missing from the purse of Miss Little and about 1 pound and 4 coupon books were missing from the handbag of Mrs. Wakeman. It was about 0130 hours

when Mrs. Wakeman and Miss Little missed accused and Mrs. Wakeman did not see him again until the following Friday when he was in the hands of the police. Both women identified accused in the courtroom (R.19-24). The clothing coupon books were found on the person of accused when he was apprehended (R.18). In a statement made to Agent J. A. Landen of the CID Detachment on 24 February 1944, accused admitted taking the clothing books (R.38-40; Pros.Ex.4).

ADDITIONAL CHARGE II: Article of War 96, Specifications 1 and 3 - receiving stolen property.

Thomas M. Sumner, Kenneth Morrison, Vern Thornton and Steve Romanyk spent the night of 5 November 1943 at the servicemen's hotel in Weston Super Mare, England. In the morning they discovered that they had each been robbed of various sums of money taken from their clothing while asleep, totalling about 24 pounds (R.24-27). Steven Stack, a Canadian soldier, spent the night with accused at that hotel and during the night stole 24 pounds from the other guests. He awakened accused and told him about it, and the two then left the hotel through a window. The two of them lived on the stolen money. Stack could not say how much, if any, of the sum he gave accused (R.11-12) but accused admitted (Pros.Ex.2) receiving "five or six pounds" of the money.

On the night of 24 December 1943, accused and Private Stack spent the night at the Granby Hotel in Weston Super Mare, England. On the following morning two other guests of the hotel, Stanley A. Haigh and Kenneth Filer, discovered that someone had removed from their clothes while they were asleep a total of 22 pounds (R.32-34). Private Stack testified that without the knowledge of accused he stole 20 pounds from the guests of the hotel that night and told accused about it. They spent the money together (R.11-12). Stack stated that he did not actually turn any of it over to accused (R.12). Accused signed a statement (Pros. Ex.3) in which he averred that "We left the hotel and about four or five hours later he (meaning Stack) gave me about six pounds".

ADDITIONAL CHARGE III: Article of War 93 - Larceny of two bicycles.

On the night of 5 November 1943 after accused and Stack hurriedly left the servicemen's hotel at Weston Super Mare, and while accused waited in the vicinity, Stack stole two bicycles from the backyards of two of the homes and turned one over to accused. The two then rode on them to Chippenham and shortly thereafter abandoned them (R.11). Stack testified that accused did not know that he (Stack) planned to take the bicycles and that he did not assist the witness in any manner in the commission of the theft, although he did not ask Stack how he obtained the bicycles, "* * * he must have known that I stole them" (R.13,15). Accused in a state-

ment admitted that "we took a couple of bikes" (Pros.Ex.2). John E. Price and Derek Ellis, residents of Weston Super Mare, each testified that he was the owner of a bicycle valued at about four pounds, which disappeared from his backyard during the night of 5 November 1943 and which was subsequently returned by the police (R.31-32).

4. After the court explained to accused his rights as a witness he elected to have his counsel make an unsworn statement in his behalf (R.4). This statement reads as follows:

> "The accused feels that he would be unable to make the statement himself, but he has told me certain things and asked me to tell that to the court.
>
> "He states that prior, or about eight months prior to the 17th of September 1943, he was confined in the Guardhouse at Litchfield and that he was in confinement for approximately six months; that at Litchfield or the 10th Replacement Depot, he was assigned to the 29th Infantry, or rather to the 29th Division. The 29th Division remained there until he went absent without leave on the 17th of September; that during that period of time he didn't have any passes or any leave; that he became extremely restless and went absent without leave on the 17th of September; that he intended to return to his organization; that he had no intentions to desert the service of the United States; that at all times he remained in the territory surrounding Bristol; that at all times he wore his uniform and wore his identification tags and that he always used his name and his grade; that on several occasions he started to return back to his organization, but somehow he was too scared to go back; he just couldn't get up a sufficient amount of nerve to get back to the organization; accused further states that he did not in any way steal or assist in any way in the taking or stealing of the bicycles as alleged in the specification of Additional Charge III; that after these bicycles were stolen, he did use one to go to Bristol."

5. With reference to the Charge and its Specification averring desertion, the court was justified in concluding from the evidence of the absence of 159 days terminated by apprehension and the conduct of

accused during his unauthorized absence, that he did not intend to return. The absence without leave was admitted. Both of the essential elements of the offense - absence without leave and intent not to return - were therefore amply supported by the evidence.

> "If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent" (MCM, 1928, par.130a, p.143).

The evidence reveals conduct on the part of the accused which the Board of Review has consistently held supports the irrefragable inference that accused did not intend to return to the military service of the United States (CM ETO 2806, Torpey; CM ETO 1629, O'Donnell; CM ETO 1737, Mosser and authorities therein cited).

6. With reference to the remaining charges and specifications, it was established by competent evidence that accused stole the British currency and the clothing coupon books at the time and place averred in the Specification of Additional Charge I. He admitted the theft of the books from the pocketbook which contained the money. The books were found in his possession.

He also admitted that he and Stack "took" two bicycles on the night of 5 November 1943 from Weston Super Mare. It is doubtful if a value of over $ 20 was satisfactorily established by the evidence (CM ETO 1453, Fowler; CM 228742, Blanco). However, in view of the findings of guilty of the other offenses, the question of value of the bicycles becomes unimportant. Although it was Stack who effected the manual asportation of the property, the evidence is legally sufficient to sustain the findirgs of accused's guilt of the larceny alleged in Additional Charge III and its Specification (CM ETO 2951, Pedigo).

He admitted the receipt of the sums of five or six pounds on each occasion when Stack stole various sums from the guests of the hotels where they visited, knowing at the time that the money was stolen, as averred in the Specifications 1 and 3 of Charge II.

7. The charge sheet shows that accused is 29 years of age and that he enlisted at New York City, New York, on 14 November 1940. 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 sub-

stantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved.

9. Confinement in a United States penitentiary is authorized for the offense of desertion in time of war (AW 42; MCM, 1928, par. 90a, p. 80). Designation of the United States Penitentiary (erroneously designated United States Federal Penitentiary), Lewisburg, Pennsylvania, as the place of confinement is authorized (Cir.229, WD, 8 Jun. 1944, sec. II, pars. 1b (4) and 3b.

B. Franklin Pitts Judge Advocate

Lloyd H. Layman Judge Advocate

Earle Stephens Judge Advocate

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1st Ind.

WD, Branch Office TJAG, with ETOUSA. 15 JUL 1944 TO: Commanding General, First United States Army, APO 230, U. S. Army.

1. In the case of Private HERMAN ARNDT (12021038), Company "K", 115th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as approved, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The place of confinement should be correctly designated in the published order as "United States Penitentiary, Lewisburg, Pennsylvania".

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 2911. For convenience of reference please place that number in brackets at the end of the order: (ETO 2911).

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 2921

6 JUL 1944

U N I T E D S T A T E S v. Private WESLEY SPAN (38500581), 659th Port Company, 483rd Port Battalion, Transportation Corps.	WESTERN BASE SECTION, SERVICES OF SUPPLY, redesignated WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS. Trial by GCM, convened at Liverpool, Lancashire, England, 10 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
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 63rd Article of War.
Specification: In that Private Wesley (NMI), Span, 659th Port Company, 483rd Port Battalion, TC, did, at Poverty Lane Camp, Maghull, Lancashire, England, on or about 19 May 1944, behave himself with disrespect toward Captain Maurice E. Kassels, his superior officer, by saying to him, "You goddamn son-of-a-bitch" or words to that effect.

CHARGE II: Violation of the 64th Article of War.
Specification 1: In that * * *, did, at Poverty Lane Camp, Maghull, Lancashire, England, on or about 19 May 1944, offered violence against Captain Maurice E. Kassels, his superior officer, who was then in the execution of his office, in that he, the said Private Wesley (NMI) Span, did thrust himself against and forcibly grasp by the forearms the said Captain Maurice E. Kassels.

Specification 2: In that * * *, having received a lawful command from Captain Maurice E. Kassels, his superior officer, to submit to examination for venereal disease, did at Poverty Lane Camp, Maghull, Lancashire, England, on or about 19 May 1944, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, he was found guilty of all charges and specifications. Evidence was introduced of two previous convictions by special courts-martial: one for willful disobedience of the order of a non-commissioned officer, and one for willful disobediance of the order of a flight officer and for disrespectful and insubordinate behavior toward a flight officer both in violation of the 65th Article of War. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence, reduced the period of confinement to ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. (a) Charge I and Specification: The evidence is uncontradicted that accused applied to Captain Kassels, an officer of the Medical Corps, the profane epithet alleged when the officer gave him a legitimate and proper order (R6). Such conduct constitutes disrespectful conduct toward a superior officer in violation of the 63rd Article of War (CM ETO 1015, Branham; CM ETO 1661, Hass).

(b) Charge II, Specification 1: Accused grasped Captain Kassels by the arms and shook him when the officer attempted to verify accused's conduct in applying a profane epithet to him. The overt act of accused was proved (R6,14,16) and admitted by accused (R11,16). Captain Kassels was obviously in the execution of his office. The offense was fully proved (MCM 1928, par 134a, p 148; CM ETO 768, Dixon).

(c) Charge II, Specification 2: Accused had complained to Captain Kassels of an urethral discharge. The officer made an examination of accused's penis and observed the presence of a discharge (R6,16). He

thereupon ordered him to secure a urethral "smear". Accused replied, "I don't want to", the officer repeated the order and accused turned in the direction of the test room where the doctor's assistants did such work. He apparently changed his mind and said "I won't do it". Captain Kassels then said "I command you to have a smear examination" and told him that he "could be subject to a court-martial for refusing treatment". Accused then applied the profane epithet to the officer (Charge I, supra) and assaulted him (Charge II, Specification 1, supra) (R6-7, 9-10, 16). Accused never obeyed the order (R15). Accused knew Captain Kassels was his superior officer and that he gave him an order to go into the adjoining room to "take a smear", although he denied he knew the meaning of the word "smear" (R12,13). The evidence is clear that accused received a direct order from Captain Kassels to go into the adjoining room for purpose of additional examination and that he disobeyed such order. The specification alleges that the order was "to submit to examination for venereal disease". The proof shows that the order to accused was for him to secure a urethral "smear". The Board of Review may take judicial notice of the fact that by modern scientific methods a bacteriological examination is one of the fundamental methods of diagnosis (Jacobson v Massachusetts 197 US 11,29; 49 L Ed, 643,651; 20 Am Jur, sec 97, p 111, fn 10; Underhill's Criminal Evidence - 4th Ed, sec 66, p 85). The securing of a urethral "smear" of the discharge from accused's penis was necessary in order to make microscopic examination of the discharge. An expeditious and certain diagnosis of the disorder would then result. While the order "to submit to an examination for venereal disease" may possibly be broader in its content than an order "to secure a 'smear'," under the facts of this case the formal language was interchangeable in meaning. It is clear accused knew that the order he received was to do an act which was part of an examination to determine whether or not he was afflicted with a venereal disease and he was not misled nor deceived. The specification fully informed him of the nature of the charge he must meet. The evidence supported such charge. Insofar as he was concerned the order "to secure a 'smear'" was equivalent to an order "to submit to an examination for venereal disease". While there exists a technical variance between the order alleged in the specification and the order proved, it is not a fatal variance. The findings of accused's guilt is fully sustained by the evidence (MCM 1928, par 134b, p 149).

4. Accused is 25 years seven months of age. He was inducted 2 November 1943 to serve for the duration of the war plus six months. He had no prior service.

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

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6. Confinement in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized by AW 42 and Cir 210, WD, 14 Sep 1943, sec VI, as amended by Cir 311, WD, 26 Nov 1943, sec VI, and Cir 321, WD, 11 Dec 1943, sec II, par 1).

B. Franklin Riter Judge Advocate

Judge Advocate

Edward V. Sargent Judge Advocate

1st Ind

WD, Branch Office TJAG, with ETOUSA. 6 JUL 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, US Army.

1. In the case of Private WESLEY SPAN (38500581), 659th Port Company, 483rd Port Battalion, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½ you now have authority to order execution of the sentence.

2. The evidence shows that this accused is a recalcitrant, unruly soldier, who should be severely disciplined. However, there is nothing in the record of trial or accompanying papers that indicates that he possesses no salvage value. Neither the offenses in the instant case nor those upon which his previous convictions were based involve moral turpitude. I believe that the Government should preserve the right to insist that he perform military service instead of incarcerating him in the United States freed from the dangers and hardships of combat. The policies of this theater having for their purpose the conservation of man power also require his retention in this theater where, after he has undergone disciplinary punishment, he will be available for service in combat zones. Accordingly I recommend that the place of confinement be changed to Disciplinary Training Center No 2912, Shepton Mallet, Somersetshire, England, and that the dishonorable discharge be suspended until the soldier's release from confinement. Supplemental action should be forwarded to this office to attach to the record of trial.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2921. For convenience of reference please place that number in brackets at the end of the order: (ETO 2921).

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

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

BOARD OF REVIEW No. 1
CM
ETO 2926

17 AUG 1944

U N I T E D S T A T E S	FIRST UNITED STATES ARMY.
v.	Trial by GCM, convened at Bristol, Gloucestershire, England, 25 May 1944.
Privates WILLIAM D. NORMAN (15041501) and RALPH C. GREENAWALT (14008641), both of 505th Engineer Light Ponton Company.	Sentences: EACH ACCUSED, dishonorable discharge, total forfeitures and confinement at hard labor for eight years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private William D. Norman, 505th Engineer Light Ponton Company, and Private Ralph C. Greenawalt, 505th Engineer Light Ponton Company, acting jointly and in pursuance of a common intent, did, at Woodchester, Gloucestershire, England, on or about 11 April 1944 by their negligence in operating a United States Army motor truck in a reckless and unauthorized manner, feloniously and unlawfully kill Mary C. Timson, a civilian British subject, by running into and striking her with said truck.

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CHARGE II: Violation of the 83rd Article of War.
Specification: In that * * * acting jointly and in pursuance of a common intent, did, at Woodchester, Gloucester, England, on or about 11 April 1944 wilfully suffer a motor truck of the value of about Three Thousand Two Hundred dollars ($3200), military property belonging to the United States, to be damaged by striking a stone wall.

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * * acting jointly and in pursuance of a common intent, did, at Westonbirt, Gloucestershire, England, on or about 11 April 1944 wrongfully and unlawfully take, use and operate without proper authority a motor truck, property of the United States, of the value of about Three Thousand Two Hundred dollars ($3200).

Each accused pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced as to accused Norman of one previous conviction by summary court for failure to repair at the fixed time to the properly appointed place of assembly in violation of Article of War 61, and as to accused Greenawalt of two previous convictions by summary court, one for absence without leave "fr 14 Jan 44 to 14 Jan 44", in violation of Article of War 61, the other for leaving his appointed place of duty and reporting back at kitchen police too drunk to perform duty in violation of Articles of War 61 and 96. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for eight years. The reviewing authority approved the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution may be summarized as follows:

Both accused were members of the 505th Engineer Light Ponton Company stationed at Westonbirt, England on 11 April 1944 (R7). Norman was a truck driver. Greenawalt's duties were not shown. The trucks of the unit were kept in a motor pool and were not to be used by the personnel without permission evidenced by a trip ticket. There was no guard on duty at the pool during the daytime on 11 April 1944 and a 2½-ton United States Army dump truck No.4492195-S, with winch equipment in front was missing from the pool about 5:00 p.m. without a trip ticket and therefore without authority (R52,57-62). It was stipulated that the value of the missing truck was $3200 (R61; Pros.Ex.7).

About fifteen miles away from accuseds' station, the main highway from Nailsworth to Stroud going in a northerly direction turned at approximately a right angle across a bridge which spanned Frogmarsh creek running parallel to the road before the turn. On each side of the road where it crosses over the creek was a stone and concrete wall or abutment estimated to have been 18 inches in thickness. Its height was not disclosed, but from a photograph (Pros.Ex.2) it appears to have been about 3 feet. The road as it approached the turn was 24½ feet in width, widened out to 33½ feet as it crossed the creek for a distance of 20 feet and then narrowed to 24½ feet (R19,35-36,49; Pros.Exs.1,2,6,6A). The road to the left leading to Woodchester continued approximately in a straight line from the main road as it approached this turn (R26; Pros.Ex.1).

A British constable who examined the scene described it as "definitely" a dangerous corner, and testified that one driving to Stroud from Nailsworth would not observe the turn until about 75 yards from it (R35). Another witness testified that it was a dangerous corner, that "We have had quite a few experiences" (R29). Two days before, a motor vehicle struck the abutment or wall on the north side of the bridge and damaged it to an extent not disclosed (R30,35).

About 3:30 p.m. 11 April 1944, Miss Edith Sheriff, Tower House, South Woodchester, alighted from a bus coming from Stroud and observed a United States Army convoy approaching from Stroud, and a woman about 30 years old entering upon the bridge. Miss Sheriff then crossed the road, and proceeded up Frogmarsh Lane toward Woodchester. She turned around, observed the passing convoy and saw a truck coming from Nailsworth toward Stroud. She could not judge the speed of the truck. "It appeared to me to be going fast. * * * He seemed to go fast coming around". She walked onward and heard a crash. She looked back and saw the truck in the creek. The woman had disappeared and the truck had gone through the abutment. She saw two white American soldiers dressed in dungarees, one who was of fair complexion, sitting on the witness' side of the road, and another of dark complexion who was stumbling up the bank on the opposite side of the creek. The fair one had blood on his face, and the clothes of the other soldier looked wet. She could not identify either of accused (R10-17).

Phyllis M. Fawkes, Frogmarsh Lane, Woodchester, testified that her house was about 50 yards from the Frogmarsh Bridge. She looked out and saw a girl standing on the bridge and some trucks going from Nailsworth to Stroud. She turned away, heard a crash, looked again and saw that a truck had gone through the bridge and into the creek. She ran down and met two white American soldiers coming away from the scene. One had blood on his face, and the other "was just dirty looking." She could not identify either accused (R27-28).

The body of Mary C. Timson was found cut in two and jammed between the truck and a wall running at a right angle to the road and along the side of the creek. She was dead (R8-9,32,38-39; Pros.Ex.2). Police Constable John M. Hillier, stationed at Nailsworth, arrived at the scene

about 3:50 p.m. and observed a 2½-ton GMC truck No.4492195-S in the creek, the damaged abutment, and also heavy tire marks upon the road apparently caused by a jamming of the brakes of the vehicle. The road was dry. The marks were caused by the left wheels only and measured 97 feet from a certain point on the road to the bridge. The distance from the bridge to where the body was jammed against the wall on the other side of the brook was an additional 33 feet (R32-33). One stone which weighed "500 weight" (560 pounds) and was originally a part of the abutment, was apparently carried by the truck across the creek, a distance of approximately 45 feet (R34). The truck destroyed about ten yards of the abutment but the extent of the damage could not be exactly ascertained because the damage caused by an accident two days before had not been repaired (R35).

Second Lieutenant Robert B. Culan, 86th Engineer Heavy Ponton Battalion, testified that he received a report of the accident, went to the scene and assisted in removing deceased's body which was severed at the waist. The upper part of the body was over the right fender and the lower part was at the bottom of the stream. Heavy skid marks measured over 116 feet to the edge of the brook and it was 33-1/2 feet from the point where the truck left the embankment to its final resting place. He ordered Corporal Sutter to take photographs of the scene (R38-40). Witness also had sketches prepared, which were introduced as Prosecution's Exhibits 6 and 6A (R40).

Captain Francis M. Carson, commanding officer of accuseds' company, testified that on 11 April he received a report that a vehicle of his organization was involved in an accident. He immediately ordered a roll call of the company. Everyone except the two accused were present. About 15 minutes later accused Norman was brought to him, - soaking wet, hatless and disheveled. Asked how long he had been away, Norman replied "Just a little while," but was indefinite in his answers. He stated that scratches on his face were received in a scuffle the previous day. He denied any knowledge of the accident. A few minutes later accused Greenawalt was brought to Captain Carson. Greenawalt had a bump on his forehead with a cross-shaped cut in the middle of the bump, and numerous scratches on his forehead and face. He was in a generally disheveled condition. His clothes were wet, but apparently from the rain. He said he had been in a "pub" down the road most of the afternoon, had received the injury on his forehead when he fell from his bicycle in the vicinity and had left the bicycle at the spot. He was taken to the place where he said he fell but his bicycle could not be found. The woman at the "pub" told Carson in accused's presence that three soldiers had been in the "pub" until about 1415 hours but she could not identify accused as one of them (R7,45-48).

First Sergeant Kenneth F. Whitehead, of accuseds' company, testified that a bugle call was sounded at 1745 hours for the check formation. Both accused were absent. When discovered about 10 or 15 minutes later, both were dressed in fatigues (R52-54).

Major Robert L. Harnish, Medical Corps, 1128th Engineer Combat Group, testified that he examined accused Greenawalt about 1930 hours 11 April and accused Norman about 1945 hours. The result was as follows:

> "Private Norman appeared before me. * * *. He had a small abrasion on the nose and right upper arm. On the lateral aspect of his left leg was a large abrasion extending above and below the knee. I noticed at the time there was a fine gravel around his belt line and also in his ears. Other than that he had no findings. Private Greenawalt * * * had a bruise over his left forehead about the size of a walnut; minor cuts on his nose and over his forehead below the hair line. He had a partly healed cut on the right forehead of about one weeks duration. They all seemed to appear fairly fresh. There was fresh coagulated blood on the cuts and abrasions except the one that was partly healed."

Witness added that by "fresh" he meant between four and five hours. Neither accused was then under the influence of liquor (R55-56).

Neither accused had authority or permission to use the truck (R52) which was recovered by the military authorities. The front end was pushed in, the bumper was bent, the wheel and windshield were broken and there were "quite a few other things" (R58-59; Pros.Exs.3,4,5).

John A. Osterholt (T/4) and Walter A. Maurovich, investigators for the Provost Marshal General's Office, Criminal Investigation Division, testified that they questioned the accused separately for two hours during the early morning hours of 12 April. Accused had been in bed in confinement. Both voluntarily made certain statements, without first being warned of their rights. They were then advised that it was their privilege to remain silent and that anything they might say would be used either for or against them in the e vent of a trial. They both signed an acknowledgment of this warning which stated that they understood their rights. Thereupon the investigator wrote out the facts as they were given him by each accused and each signed a statement of these facts. The written statements contained some of the things each accused stated orally prior to being warned. The investigators testified that no threats or promises of any kind were used in obtaining their signatures but that all was done voluntarily by the accused (R63-72).

Greenawalt took the stand as a witness solely to testify respecting the signed statements which were offered in evidence. He was told by the investigators that he "was just a witness to the crack-up, before and after the fact, and if I lied and tried to get out of it I could get two years with a D.D. They said if I owned up to it I could get off light" (R74).

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He testified that no one warned him of his rights before he told the investigators about the truck accident when questioned. After he had told "just about everything", he was warned and signed the statement and acknowledgment of the warning (R75).

Over the objection of defense counsel the statements signed by the accused were admitted in evidence. The law member stated that only that part of each statement pertaining to the accused who signed the statement would be considered by the court (R76-77; Pros.Exs.8,9). Greenawalt's statement was as follows:

> "I enlisted in the U.S. Army on 7, Jan 1941 at Anderson, S.C. I have been with my present organization about one month.
>
> On 11 April 1944 at about 1100 hrs, I left camp with Pvt. Norman and went to the New Inn. We stayed there until about 1345 hrs and I had about seven pints of cider. I left the Inn and came back to the parking lot at the camp and got a vehicle to have my bicycle repaired. I picked up the bicycle at the camp, it was not my bicycle but belonged to Pvt.Vidasi. After I got the bicycle, I met Pvt. Norman on the road from the New Inn. I was driving a 6 x 6 truck with a winch on the front. As soon as Pvt. Norman got into the truck he drove as he had a licence and I did'nt. We went to Tetbury and we found the bicycle shop closed. I intended to go back to camp but Pvt. Norman wanted to go to Stroud. We were going down the main Stroud-Nailsworth Road about 65 miles per hour. I suggested that he slow up but he seemed to have the vehicle under control so I did'nt say anymore. When we were nearing the bridge near Woodchester, we came upon a convoy which was going towards Nailsworth. We were going towards Stroud which is in the opposite direction from Nailsworth. I then told him to slow down. He did'nt and I saw a woman frozen in front of us. She was just a few feet from in front of the vehicle. Something then flew up and hit me in the head. The next thing I knew there was a big crowd around. I got out of the truck and there was a niger there who told me there was a woman under there. I went up and looked at her and I get scared and took off. Pvt. Norman was already gone, I met him about 200 feet up the road. We then went up the road and into the woods and cut back to the road and started for camp. After walking about ten minutes we got a ride into

Nailsworth with some Lt.Colonel in a jeep. Then we got another ride from there almost to camp in a GMC. 6 x 6 truck. It was about 5:30 PM when we got back to camp and we were picked up by Lt. Carson. He asked me where I had been and how I got the cuts? When I met Pvt. Norman after the accident, my shoes were wet and he was wet all over because the truck ended up in the creek.

I have read my statement of 2 pages and it is true.

SIGNED: Pvt. Ralph C Greenawalt

Subscribed and sworn to before me this 12 of April 1944,

Howard D May 1st Lt. C.E. Witnessed by:
Summary Court. Robert B Culen, 2nd Lt,C.E."
(Pros.Ex.8).

Normans statement was as follows:

"I enlisted into the U.S. Army on 25 July 1940 at Charleston, West Virginia. I have been with my present organization about six (6) weeks.

On 11 April 1944 at about 1215 hrs I went up to the New Inn Pub. About 15 or 20 minutes later Pvt. Greenawalt, of my organization came in. We were both drinking Cider. We had three or four pints of cider. Sometime between 1300-1400 hrs. Pvt Greenawalt said he was going to get a truck to bring his bicycle to be repaired. A little while later I left the New Inn and was returning to Camp. I was walking down the road when Pvt Greenawalt came down the road driving a GMC, 6 x 6 truck with a winch on the front. He asked me to come with him to have the bicycle repaired. I then drove the truck as I have a Drivers Permit and he does not. I drove the truck to Tetbury to the Bicycle Repair Shop but it was closed. We then proceeded towards Stroud to a shop there.

We were driving down the main Stroud-Nailsworth Road. I was driving about 25 or 30 MPH most of the time.

There was a convoy of trucks coming in the opposite direction. About seven or eight trucks passed me when I noticed that the next truck was crowding the road - coming down the center of the road. That was where the road makes a curve over a little

bridge. I came around the curve and I first noticed, about 10 feet in front of me, a woman. I think she was walking. After I saw her I applied my brakes. I was on the bridge when I jammed the brakes. The front bumper struck the woman and continued over the bridge into the creek. I was dazed by the impact. I got out of the truck and found myself in the water. I swam a bit then walked on to the bank of the creek. I got up on the road and a little later Greenawalt came up to me. I told him I had to get some dry clothes on and we headed for camp. We went up the road and walked through some woods. We walked about 10 or 15 minutes and were picked up by an officer who was driving a jeep. He drove us to Nailsworth. We walked a little bit and were then picked up by a GMC, 6 x 6 truck and were dropped off close to camp.

When we arrived at Camp the First Sargent told us to report to the company commander, which we did.

I have read my statement of 3 pages and it is true.

SIGNED: William D Norman

Subscribed and sworn to before me this 12 of April 1944,

Howard D May 1st Lt. Witnessed by:
Summary Court. Robert B Culen, 2nd Lt,C.E."
(Pros.Ex.8).

4. Upon being advised of his rights to testify, each accused elected to remain silent (R77).

5. The admission in evidence of the prior statements of each accused over the objection of the defense, was proper. Both Osterholt and Maurovich, before whom the statements were made, testified that each accused voluntarily made certain statements without first being warned of his rights. Each was then advised of his rights, signed an acknowledgment of the warning, and the investigators wrote out the facts as they were given them by each accused. Each accused signed his statement. The investigators further testified that no threats or promises were made in obtaining the signatures and that the statements were freely and voluntarily made by each accused. The written statements contained facts which each accused stated orally before being warned of his rights. Greenawalt admitted in his testimony that he was warned prior to signing his written statement, and Norman remained silent.

Admissions against interest are admissible in evidence without any showing that they were voluntarily made (MCM, 1928, par.114b, p.117), but a confession involuntarily made must be rejected (Ibid., par.114a, p.116). However, it is unnecessary to consider the question whether the statement of each accused constituted an admission or a confession.

> "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)." (CM ETO 1057, Redmond; CM ETO 1663, Ison; CM ETO 2368, Lybrand).

The foregoing principles are applicable in the present case. Moreover, each accused was actually advised as to his rights before he signed his written statement. The question of fact as to whether the statement of each accused was freely and voluntarily made, or was made as the result of threats, promises or duress, was resolved against each accused by the court. Its decision was supported by competent, substantial evidence (CM ETO 1606, Sayre).

6. (a) With reference to Charge III and its Specification (wrongfully taking and using the truck without authority), the evidence, including Greenawalt's own statement, shows that the truck was taken by this accused without authority, and it may be clearly inferred from the statement of Norman, the driver, that he knew that Greenawalt's taking of the vehicle was unauthorized. The evidence, including the statements of each accused shows that they were in possession and control of the vehicle at the time of the accident. It was stipulated that the value of the truck was $3200. The evidence was legally sufficient to support the findings of guilty of Charge III and its Specification.

(b) Accused were found guilty of the crime of involuntary manslaughter (Charge I and Specification). It is alleged in substance that "by their negligence in operating a United States Army motor truck in a reckless and unauthorized manner", they feloniously and unlawfully killed deceased by running into and striking her with the vehicle.

> "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable

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negligence in performing a lawful act, or in performing an act required by law". (MCM, 1928, par.149a, pp.165-166).

"The degree of negligence necessary to be shown in a prosecution for involuntary manslaughter, based upon an unintentional killing by a motor vehicle, is more than is required on the trial of an issue of negligence in a civil action. The general rule is that negligence, to become criminal, must necessarily be reckless or wanton and of such a character as to show an utter disregard of the safety of others under circumstances likely to cause injuries" (Blashfield, Cyclopedia of Automobile Law and Practice, Vol.8, pp.108-109).

"'* * *. At common law, one causing death by negligent driving is not criminally responsible unless the negligence is so great that the law imputes a criminal intent. A motor vehicle is not a deadly or inherently dangerous instrumentality, so as to impose liability for mere carelessness in its use or operation, and the degree of negligence necessary to support a conviction is such recklessness or carelessness as is incompatible with a proper regard for human life. It is sufficient, however, if it reasonably appears that death or great bodily harm was likely to result from the driver's consent. (conduct).' (Sec.1380, 42 C.J., pp.1356-1357). (Underscoring supplied)." (CM ETO 393, Caton and Fikes, pp.7-8).

"In CM ETO 393, Caton and Fikes and CM ETO 1414 Elia the Board of Review affirmed the principle that the degree of negligence required to establish a charge of involuntary manslaughter under the 93rd Article of War must possess such culpability as to be denominated 'gross' or 'culpable' or exhibit a 'willful wanton and reckless' disregard of human life, and limb. In any event the negligence must be greater than that which suffices in civil tort actions" (CM ETO 1317,Bentley).

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The court in the instant case was fully entitled to infer that accused Norman was grossly negligent in operating the vehicle just prior to the accident. The evidence indicated that the corner was a dangerous one and that a driver was not able to see the turn until he was only about 75 yards away. Miss Sheriff testified that as the driver approached the corner "He seemed to go fast coming around". The evidence, including the tire marks, showed that the truck was driven at such a rate of speed that after the brakes were applied, the vehicle traveled a distance of 97 feet, struck deceased who was either on or just coming on the bridge, demolished a stone wall about 18 inches thick, plunged into the creek, continued on for another 33 feet and came to rest against a stone wall. A 560-pound stone which was originally a part of the bridge abutment was apparently carried by the truck for a distance of about 45 feet. The body of deceased was severed in half. Such evidence clearly warrants the conclusion that accused Norman operated the vehicle recklessly and with a wanton indifference as to the consequences. As to this accused the evidence is legally sufficient to support the findings of guilty of voluntary manslaughter (Charge I and its Specification).

With reference to accused Greenawalt, it was clearly established by the evidence that he took the vehicle for his own purposes, namely, to take his bicycle to be repaired, and that Norman, who later drove the truck for Greenawalt, did so with the knowledge that its use was unauthorized. Although the unauthorized taking by Greenawalt was primarily for his own benefit, both accused were knowingly engaged in a wrongful joint enterprise (CM ETO 393, Caton and Fikes). With reference to cases involving civil liability arising as the result of an automobile collision, the fact that accused were engaged in a joint enterprise may render the occupant of a vehicle liable for the negligence of the operator of that vehicle (authorities cited in CM ETO 393, Caton and Fikes). This principle equally applies in cases involving criminal offenses:

> "It has been held that a person may commit the offense of reckless driving, although not actually in control of the car at the time of the alleged violation" (42 C.J., sec.1270, p. 1323).
>
> "Where several persons agreed to take an automobile without consent of the owner for a ride on a public highway, and the machine was operated recklessly, they were held guilty of reckless driving, it being of no consequence which particular one was at the steering wheel at the time" (State v. Davis, 88 S.C.229, 70 S.E. 811, footnote 81a, 42 C.J., 1323). (Underscoring supplied).

As the element of intent is not involved in the offense of involuntary manslaughter but that of negligence only, the negligence of Norman may be imputed to Greenawalt, not on the basis of principal and agent, but because

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the two men were joint adventurers in a joint enterprise (CM ETO 393, Caton and Fikes).

There is a further basis on which the evidence is legally sufficient to sustain the findings that Greenawalt, as well as Norman, was responsible for the homicide.

> "one who participates in or is responsible for the reckless operation of a motor vehicle may be guilty of the offense, although not actually in control of the car" (42 C.J., sec.1273, p. 1323). (Underscoring supplied).

Greenawalt without authorization took the vehicle exclusively for his own purposes and he controlled its destination. He picked up Norman, who drove the truck because he (Norman) had a driver's license. They went to a bicycle shop in Tetbury which they found closed. Although Greenawalt stated that he then intended to return to camp, Norman wanted to go to Stroud. There was no evidence that Greenawalt did other than consent to the journey. Norman stated that the purpose of going to Stroud was to visit another bicycle shop (that is, for Greenawalt's benefit). In view of these facts the second principle in the Caton and Fikes case (supra) is applicable, namely, that under such circumstances, Greenawalt was chargeable with responsibility for the operation of the truck, which responsibility entailed, among other things, the duty of seeing that it was properly driven. His failure to perform this duty, coupled with the grossly negligent driving of Norman, caused the homicide.

Greenawalt asserted in his statement that they were driving along the main road to Stroud from Nailsworth at about 65 miles per hour. He suggested to Norman "that we slow up but he seemed to have the vehicle under control so I didn't say anything more". Greenawalt further stated that as they approached the bridge they met a convoy coming in the opposite direction. He told Norman to slow down but the latter failed to do so. The question arises as to whether Greenawalt's foregoing statements absolve him from the imputation of Norman's negligence on the ground that he (Greenawalt) was doing everything possible under the circumstances to see that the vehicle was properly driven.

> "Where a statement or admission of a defendant is partially self-serving, the entire statement is to be received, and the jury is to pass on its weight; it is not necessary that the jury in such a situation give equal credit to both the self-serving and the dis-serving parts of such a statement. They may reject either part which they believe to be untrue" (1 Wharton's Criminal Evidence, sec.506, p.792) (Underscoring supplied).

"A party to a criminal trial is entitled to any benefit which may be derived from evidence offered by the opposing party. However, when the state introduces a purported confession, it is not bound by the self-serving declarations contained therein. It vouches only for the fact that the admission or confession was actually made" (2 Wharton's Criminal Evidence, sec.882, pp.1521-1522). (Underscoring supplied).

"It is also well settled that if a confession is made under such circumstances as to authorize its admission in evidence the accused is entitled to have the entire conversation, including any exculpatory or self-serving declarations connected therewith, also admitted. However, it is for the jury to say what weight shall be given to the several parts of the statement, as they may believe that part which charges the prisoner and reject that which tends to exculpate him" (2 Wharton's Criminal Evidence, sec.606, pp.1012-1014).

In view of the foregoing authorities, the credibility of the exculpatory statements contained in Greenawalt's statement was a matter for the determination of the court which evidently rejected such exculpatory statement. The Board of Review is of the opinion that as to Greenawalt the evidence is legally sufficient to support the findings of guilty of Charge I and its Specification.

(c) With reference to Charge II and its Specification, it is alleged in substance that accused did "wilfully suffer" the Government vehicle "to be damaged by striking a stone wall," in violation of Article of War 83.

"The willful or neglectful sufferance specified by the article may consist in a deliberate violation or positive disregard of some specific injunction of law, regulations, or orders; or it may be evidenced by such circumstances as a reckless or unwarranted personal use of the property; * * * permitting it to be * * * injured by other persons; loaning it to an irresponsible person by whom it is damaged, etc. (Winthrop)" (MCM, 1928, par. 143, p.158) (Underscoring supplied).

The evidence is clearly legally sufficient to support the findings of guilty of accused Norman of this offense (CM ETO 393, Caton and Fikes;

CM ETO 1317, Bentley).

The findings as to Greenawalt's guilt of wilfully suffering the Government vehicle to be damaged are legally sustainable upon the aforementioned basis that both he and Norman were engaged in a wrongful joint enterprise and that the negligence of Norman which resulted in the damage to the truck was, therefore, attributable to Greenawalt. Also, as has been previously stated herein, and for the reasons indicated, Greenawalt was charged with the responsibility of seeing that the vehicle was properly driven, and of exercising such supervisory control as to insure this fact. The court evidently refused to believe that he performed that duty (CM ETO 393, Caton and Fikes).

7. The charge sheets show that Greenawalt is 23 years one month of age and that he enlisted 7 January 1941 to serve for three years; that Norman is 22 years four months of age and that he enlisted 25 July 1940 to serve for three years. The period of service of e ach accused is governed by the Service Extension Act of 1941. They had no prior service.

8. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that as to each accused the record of trial is legally sufficient to support the findings of guilty and the sentences. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 AUG 1944 TO: Commanding General, First United States Army, APO 230, U.S. Army.

1. In the case of Privates WILLIAM D. NORMAN (15041501) and RALPH C. GREENWALT (14008641), both of 505th Engineer Light Ponton Company, attention is invited to the foregoing holding by the Board of Review that as to each accused the record of trial is legally sufficient to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 2926. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 2926).

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 2951

- 8 JUL 1944

U N I T E D S T A T E S)	WESTERN BASE SECTION, SERVICES OF SUPPLY, redesignated WESTERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
Private ARLIE C. PEDIGO (20825744), Detachment of Prisoners, Western Base Guardhouse, (formerly of 305th Replacement Company, Casual Detachment Number 45, Replacement Depot Number 2).)	Trial by G.C.M., convened at Newport, Monmouthshire, South Wales, 8 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE I: Violation of the 61st Article of War.
Specification: In that Private Arlie C. Pedigo, Detachment of Prisoners, Western Base Guardhouse, Whittington Barracks, Lichfield, Staffordshire, England, then of: 305th Replacement Company, Casual Detachment Number 45, Replacement Depot Number 2, Bristol, Gloucestershire, England, did, without proper leave, absent himself from his organization at Bristol, Gloucestershire, England, from on or about 22 February 1944 to on or about 13 April 1944.

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CHARGE II: Violation of the 93rd Article of War.
Specification: In that * * * did, at the Grand Hotel, Port Talbot, Glamorganshire, Wales, on or about 23 March 1944 in conjunction with Pvt. Alfred L. Rutledge feloniously take, steal and carry away a chromium plated alarm clock, a jewel case containing a lady's ring (gold) set with opals, a lady's gold ring set with diamonds, a gent's gold dress watch, a gold watch chain, a child's gold signet ring, a lady's eternity diamond ring, a lady's gold signet ring, a set of gold cuff links and studs, a gold brooch, a silver and green enamelled compact set, a brooch set with green stones and diamonds, a gold wristlet watch, a chromium plated wristlet watch, a lady's gold ring set with amethyst, a lady's platinum necklace with green and black stone, a metal key chain, two (2) half Sovereigns and Jubilee silver five shilling (5s) piece, all of a total value of more than fifty ($50.00) dollars, the property of Essie Williams and David Williams.

CHARGE III: Violation of the 96th Article of War.
Specification: In that * * * being indebted to the Grand Hotel, Port Talbot, Glamorganshire, Wales, in the sum of one pound, nine pence (£1.9d), lawful money of the United Kingdom of the exchange value of about four dollars and nineteen cents ($4.19) for lodging for the night of 22 March 1944, which amount became due and payable on or about 23 March 1944, did, at the Grand Hotel, Port Talbot, Glamorganshire, Wales, on 23 March 1944, dishonorably fail and neglect to pay said debt.

He pleaded guilty to Charges I and III and their respective specifications, not guilty to Charge II and its Specification, and was found guilty of all charges and specifications. Evidence was introduced of three previous convictions: one by summary court for absence without leave for 42 days, and two by special courts-martial for absence without leave for six and 31 days respectively, all in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. (a) - The findings of guilty of Charge I and its Specification are adequately supported by accused's pleas of guilty thereto and by

competent evidence of his absence without leave from his organization during the period alleged (R8,9; Pros.Exs.1,3) (CM ETO 2414, Mason).

(b) - Likewise, the findings of guilty of Charge III and its Specification are adequately supported by accused's pleas of guilty thereto and by accused's sworn testimony in open court that he did not pay his hotel bill at the Grand Hotel (R18) (CM ETO 2581, Rambo, and authorities there cited).

(c) - With respect to Charge II and its Specification, although the evidence is vague as to the larceny of "a chromium plated wristlet watch" and "a lady's gold ring set with amethyst", alleged to have been among the numerous contents of the stolen jewel case, the property of Essie and David Williams, accused in his confession (R14; Pros.Ex.3) stated that after the larceny he and his accomplice "examined the jewelry and found about nine rings" and other articles. The record contains clear evidence of accused's complicity in the larceny of the other articles specified (R9-13,15,16,19; Pros.Exs.2,3) and that their total value was well in excess of $50.00 (R10-11). There is evidence of preconcert between accused and Rutledge, and that accused acted as "look-out" during the asportation. His active participation in the larcenious transaction establishes his guilt of the larceny even though the proof shows that Rutledge rather than he actually effected the initial manual asportation of the property (2 Wharton's Criminal Law, 12th Ed, sec.1167, p.1485, fn 18; Cf: CM ETO 2297, Johnson and Loper, and authorities there cited).

4. The record fails to reveal that accused specifically consented in open court to the use of the stipulation as to the testimony of Joan Alberta Watkins, chambermaid at the Grand Hotel, Port Talbot (R15-16). The failure to obtain such consent, while improper (see MCM, 1928, par. 126b, pp.136-137), did not injuriously affect accused's substantial rights, in view of other clear evidence of the larceny (Charge II and Specification).

5. The charge sheet shows that accused is 22 years two months of age (accused stated in open court that his age was 19 years two months (R20)) and enlisted at Beggs, Oklahoma on 13 May 1940. His service period is governed by the Service Extension Act of 1941. He had no prior service.

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

7. Confinement in a penitentiary is authorized for the crime of larceny of property of value in excess of $50.00 (AW 42; sec.287, Federal

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Criminal Code (18 USCA 466), sec.335, Federal Criminal Code (18 USCA 541); Act June 14, 1941, c.204, 55 Stat.252 (18 USCA 753f); Cf: United States v. Sloan, 31 Fed.Supp.327. As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement is authorized (Cir.229, WD, 8 Jun.1944, sec.II, pars.1a(1),3a).

B. Franklin Riter Judge Advocate

Judge Advocate

Ellwood K. Sargent Judge Advocate

1st Ind.

WD, Branch Office TJAG., with ETOUSA. 8 JUL 1944 TO: Commanding Officer, Western Base Section, Communications Zone, ETOUSA, APO 515, U.S. Army.

1. In the case of Private ARLIE C. PEDIGO (20825744), Detachment of Prisoners, Western Base Guardhouse, (formerly of 305th Replacement Company, Casual Detachment Number 45, Replacement Depot Number 2), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 2951. For convenience of reference please place that number in brackets at the end of the order: (ETO 2951).

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 2962

29 JUL 1944

UNITED STATES	)	5th INFANTRY DIVISION.
	)	
v.	)	Trial by GCM, convened at Camp
	)	Ballyedmond, Down, Northern
General Prisoner DEE McBEE	)	Ireland, 28 June 1944. Sen-
(15058027), (formerly Private,	)	tence: Dishonorable discharge,
Company M, 10th Infantry).	)	total forfeitures, and confine-
	)	ment at hard labor for 20 years.
	)	United States Penitentiary,
	)	Lewisburg, Pennsylvania.

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

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

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

CHARGE I: Violation of the 96th Article of War.
Specification 1: In that General Prisoner Dee McBee, then Corporal, Company M, 10th Infantry, did, at Kilkeel, County Down, Northern Ireland, on or about 14 December 1943 with intent to defraud, wilfully, unlawfully, and feloniously pass as bearing a true and genuine indorsement a certain check dated 14 December 1943 in the amount of one hundred dollars ($100.00), payable to cash, signed Dee McBee, and drawn upon the First National Bank of Manchester, Kentucky, and having the indorsement "Harry Backer, 1. Lt." said check being of a private nature which might operate to the prejudice of another, and which indorsement was, as he, the said Dee McBee, then well knew, falsely made and forged.

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The eight subsequent specifications are identical with Specification 1 except as to date, amount and indorsement, as indicated below:

Specification 2: 23 December 1943; amount $100.00; indorsement "Lst. Baker"

Specification 3: (Disapproved by Reviewing Authority)

Specification 4: 31 December 1943; amount $300.00; indorsement "Lst Brooky"

Specification 5: 3 January 1944; amount $300.00; indorsement "Lt. Brooker"

Specification 6: (Disapproved by Reviewing Authority)

Specification 7: 19 January 1944; amount $150.00; indorsement "ist Lt Baker Inf"

Specification 8: (Disapproved by Reviewing Authority)

Specification 9: 25 January 1944; amount $300.00; indorsement "Capt E. L. Bucker"

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

Specification 1: In that General Prisoner Dee McBee, then Corporal, Company M, 10th Infantry did, at Kilkeel, County Down, Northern Ireland on or about 14 December 1943, with intent to defraud, falsely indorse with the signature, "Harry Backer, 1. Lt" a certain check in the amount of one hundred dollars ($100.00), dated 14 December 1943, payable to cash, signed Dee McBee and drawn upon the First Nation Bank of Manchester, Kentucky, which said check and indorsement was a writing of a private nature which might operate to the prejudice of another.

The ten subsequent specifications are identical with Specification 1 except as to date, amount, indorsement and - in Specifications 8 and 9 - payee, as indicated below:

Specification 2: 23 December 1943; amount $100.00; indorsement "Lst Baker"

Specification 3: (Disapproved by Reviewing Authority).

Specification 4: 31 December 1943; amount $300.00; indorsement "Lst Brooky"

Specification 5: 3 January 1944; amount $300.00; indorsement "Lt Brooker"

Specification 6: (Disapproved by Reviewing Authority).

Specification 7: 19 January 1944; amount $150.00; indorsement "ist Lt. Baker Inf."

Specification 8: 24 January 1944; amount $300.00; indorsement "Capt ED Bucker"; payee Charlie Pennington.

Specification 9: 25 January 1944; amount $200.00; indorsement "Capt Harry Bocker"; payee Charley Pennington.

Specification 10: (Disapproved by Reviewing Authority).

Specification 11: 25 January 1944; amount $300.00; indorsement "Capt E L Bucker"

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction for absence without leave for 16 days in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority disapproved the findings as to Specifications 3, 6 and 8 of Charge I and as to Specifications 3, 6 and 10 of Charge II, 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 shows that accused signed as maker (R6,18; Pros. Exs. A through K) and, in some instances, cashed (R19-23) and in other instances, personally procured for his own benefit the cashing of all of the checks described in the specifications of which the findings of guilty were approved (R24-35). At the time accused cashed or delivered the checks to his agents for cashing each bore a fictitious indorsement purporting to be the signature of an officer (R20-32).

4. Accused's unsworn statement admits that he

> "filled out" and signed the checks "but I didn't put in the officer's name on it myself. It was a thing going around in the company. * * * you had to have an officer's signature on the checks to get it cashed. * * * anyone could put an officer's name on the checks. * * * When they caught up with us there was about twelve guys * * * that had cold checks. * * * I didn't realize the checks was cold when I wrote them, but afterwards I did. I didn't realize there was so many of them" (R39).

5. Applying the long-established and well-recognized rules and principles clearly elucidated in CM ETO 2273, Sherman (1944), and equally applicable here, the Board of Review is of the opinion that the record is legally sufficient to support the approved findings of guilty and the sentence.

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

7. The charge sheet shows that accused is 22 years of age. With no prior service, he enlisted 14 October 1940 at Fort Thomas, Kentucky, for three years, his service period being governed by the Service Extension Act of 1941.

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.

9. Confinement in a penitentiary is authorized for the offenses of forgery and uttering a forged instrument (AW 42; sec.22-1401 (6;86) District of Columbia Code). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is correct (Cir. 229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 JUL 1944 TO: Commanding General, 5th Infantry Division, APO 5, U. S. Army.

1. In the case of General Prisoner DEE McBEE (15058027), (formerly Private, Company M, 10th Infantry), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the approved 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 2962. For convenience of reference please place that number in brackets at the end of the order: (ETO 2962).

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

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

BOARD OF REVIEW NO. 2.

16 AUG 1944

ETO 2966

U N I T E D S T A T E S	IX AIR FORCE SERVICE COMMAND
v.	Trial by GCM, convened at American Air Force Station 402, 26 May 1944.
Private First Class ARTHUR (NMI) FOMBY (34164439), 1957th Quartermaster Truck Company (Aviation), 1513th Quartermaster Truck Battalion, 1585th Quartermaster Truck Regiment Aviation (Special).	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 15 years. United States Penitentiary, Atlanta, Georgia.

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

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

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

CHARGE I: Violation of the 61st Article of War.

Specification 1. "In that Private First Class Arthur Fomby (NMI), 1957th QM Trk Co (Avn), 1513th QM Trk Bn Avn (Sp), did, without proper leave, absent himself from his station at AAF Station 544 from about 1900 hours, 27 March 1944, to about 2400 hours, 27 March 1944."

Specification 2. "In that Private First Class Arthur (NMI) Fomby, 1957th QM Trk Co (Avn), 1513th QM Trk Bn Avn (Sp), did, without proper leave, absent himself from his station at AAF Station 544, from about 1900 hours, 29 March 1944, to about 2400 hours, 29 March 1944."

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Specification 3. "In that Private FirstClass Arthur (NMI) Fomby, 1957th QM Trk Co (Avn), 1513th QM Trk Bn Avn (Sp), did, without proper leave, absent himself from his station at AAF Station 544, from about 1900 hours, 1 April 1944 to about 2400 hours, 1 April 1944."

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

Specification: "In that Private First Class Arthur (NMI) Fomby, 1957th QM Trk Co (Avn), 1513th QM Trk Bn Avn (Sp), did, at Wanborough, Wilts., England, on or about 28 March 1944, willfully and feloniously commit an assault upon Mrs. Emily Garrett with intent forcibly to have carnal knowledge of her against her will."

ADDITIONAL CHARGE I: Violation of the 61st Article of War.

Specification: In that Pfc Arthur (nmi) Fomby, 1957th QM Trk Co Avn, 1585th QM Trk Regt Avn (Sp), APO 149, U. S. Army, did, without proper leave, absent himself from his Station, at AAF Station 544, from about 0600 hours, 8 May, 1944 to about 2005 hours, 9 May, 1944.

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

Specification 1: In that Pfc Arthur (nmi) Fomby, 1957th QM Trk Co (Avn), 1585th QM Trk Regt Avn (Sp), APO 149, U. S. Army, having been restricted to the limits of his station, did, at AAF Station 544, on or about 8 May, 1944, break said restriction by going to Manchester, Lancashire, England.

Specification 2: In that Pfc Arthur (nmi) Fomby, 1957th QM Trk Co (Avn), 1585th QM Trk Regt Avn (Sp), APO 149, U. S. Army, did, at AAF Station 544, on or about 6 May, 1944, wrongfully take and use without proper authority, a certain motor vehicle, to-wit: Truck 2½ ton, 6 x 6, cargo, property of the United States of a value of more than $50.00.

Specification 3: In that Pfc Arthur (nmi) Fomby, 1957th QM Trk Co (Avn), 1585th QM Trk Regt Avn (Sp), APO 149, U. S. Army, being a rider in a motor vehicle property of the United States intended for military use, did at Slowough Road, nr Manchester, Lancs., on or about 7 May, 1944, wrongfully and in violation of

Par 6a (3), AR 850-15, dated 28 August, 1943, allow Miss Ruth Harrison, Miss Rita Collins, and Miss Mary Manchester, civilians, to be transported in said vehicles.

He pleaded not guilty to the Specification of Charge II and Charge II, and guilty to all other specifications and charges. During the trial he changed his plea to not guilty to Specifications 2 and 3, Additional Charge II. He was found guilty of Specification 2, Additional Charge II, except the words "take and", of the excepted words, not guilty; guilty of Specification 3, Additional Charge II, except the words "Miss Ruth Harrison, Miss Rita Collins, and Miss Mary Manchester", of the excepted words, not guilty, and guilty of all remaining charges and specifications. Evidence was introduced of one previous conviction by summary court for speeding in a truck in violation of Article of War 96. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 25 years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for 15 years, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that -

Accused was on and about 28 March 1944, a member of the 1585th Quartermaster Truck Regiment, since changed to First Quartermaster Truck Regiment, Provisional, stationed at American Air Force Station 544 (R11), in the vicinity of which is located both the village of Wanborough (R55) and the Black Horse Inn (R24).

(a) Emily Garrett, a married woman with three children (R18), living at her sister's place in Wanborough (R16), and employed as a kitchen hand at an airplane factory (R27), was coming home about a quarter past eight on the evening of 27 March 1944 with her little boy when she met two "dark" soldiers coming from the opposite direction, pushing their bicycles up the hill. They asked the way to the Black Horse and continued on. However, before she reached home one of the soldiers came running after her and walked with her as far as the Plough which he entered after inviting her in to have a beer, which she refused (R16). He also asked her if she came that way at that time each night and she answered that she did. The next night she was later going home and it was getting dark when she saw a figure some distance ahead of her cross the road and go behind a hedge and as she hurried on accused came up behind her and said he was afraid he had missed her. They continued on together to the "bottom of the hill by the Black Horse". He asked her

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to have a beer and after "some urging", she went in. They were in the Black Horse "just over an hour" (R17). They had a couple of beers a piece (R28) during this time and accused left her for some time leaving "his beer and cigarettes on the table" (R17). He also played darts with the landlady. They left the Black Horse together at closing time and went on down the hill (R18) on her usual way home (R30). Just before they got to a little lane leading off the road, they heard some footsteps and accused said, "There are some people coming behind us, - will you come inside here a minute until they pass by" and without giving her a chance to answer, he caught her by the arm and pulled her into the lane. After the people had passed, he said to her either, "Will you lay with me" or "stay with me for a half an hour". She refused and she testified that he then tripped her with his feet and she fell down and he fell on top of her and tried to force his hands up her clothes. They struggled on the ground and he forced his hand up her clothes and touched her with his hand, trying she thought to also "interfere with his own trousers" (R18). She managed to get to her feet and begged him to let her go home but "he was like a mad man more than anything else, and he pushed me all over the place". She screamed (R19) and "he sort of caught me by the throat * * * and gave me a clout at the back of my head, because I felt a bit funny" (R20) and accused put his hand over her mouth. She finally managed to free herself, picked up her bag and ran and accused ran after her and caught hold of her bag. She let loose of the bag and kept running. She received a fingernail scratch on her forehead, nose and finger (R19). She "sort of felt his" private on her thigh when he fell on her on the ground and she fancied the fly of his trousers was not buttoned (R20). She ran to a cottage "in a sort of collapse. I just managed to get inside of the door before I went out". She informed the people in the cottage she had been attacked by a black man. They washed some blood from her face (R21). She went to work the next day and did not telephone her husband in order to avoid scandal in the small village (R26). Walter Johnson, a visitor at the cottage where Mrs. Garrett took refuge, testified that when the door was opened, she came rushing in saying, "Let me in. * * * A black man is after me". She sat down in a chair a bit faint (R35). She was bleeding on the face and was pale. There were leaves all over the back and sides of her coat as though she had been on the ground. It was about half past ten and he went to her sister's house and brought Mrs. Garrett's sister for her (R36). Mrs. Gladys Roberts, the lady of the cottage, testified similarly (R37-38). Frederick Roberts arrived at his home just as Mrs. Garrett, her sister and daughter were leaving and the next morning on his way to work, he searched for and found Mrs. Garrett's bag in the ditch along the main road about 20 feet from the entrance to the small lane. There was nothing of particular value in it and he left it to be found later (R39). The landlord of the Black Horse Inn, near Wanborough, corroborated Mrs. Garrett's story of her

visit there with accused (R41-42). Norman C. Mountain, an agent of the Criminal Investigation Department of the United States Provost Marshal's Office (R7-8), testified that he saw accused about 1 April 1944 at the Black Horse Inn and asked him for his pass. As accused had none, he took him in custody and turned him over to Captain Moore (R8). Accused later gave him a sworn statement which was admitted in evidence as Prosecution Exhibit A. With accused he visited the lane and the spot where accused said he thought that he and the lady were sitting (R10).

(b) Captain William J. Moore, 1957th Quartermaster Truck Company, and commanding officer of accused (R11), testified that he signed the passes for the men in his organization and that he did not sign a pass for accused on 27 March, 29 March, 1 April 1944, and that he did not give accused any authority to leave the station on 8 May or 9 May 1944. He had restricted accused to the limits of the post on 8 May (R12) pending the clearing up of charges against him and the restrictions were never removed. He further testified that he authorized personally the dispatching of vehicles on local runs for the company. On all other runs, the battalion works from the regimental headquarters, drawing on the different companies (R13). A record is made of trucks dispatched by the battalions and one is also made in the company (R14). Private Samuel L. Saxon, of 1513th Headquarters Battalion, testified he went with accused to a little pub in the village the evening of 27 March 1944 and returned with him after ten o'clock (R42). First Sergeant Carl J. Roberts of the 1957th Quartermaster Truck Company, identified an extract copy of the morning report of that company for 8 and 9 May 1944, admitted in evidence as Prosecution Exhibit B (R44). This report shows accused from duty to absence without leave at 0600 hours on 8 May and from absence without leave to duty at 2005 hours 9 May 1944. Corporal Walter P. McIver, 1957th Quartermaster Truck Company, identified Prosecution Exhibit C, admitted in evidence, as his daily dispatch record of motor vehicles, made by himself as company dispatcher and his assistant of the entries for 6 and 7 May (R45). He testified that the record shows the first vehicle dispatched on 6 May was to John T. Johnson but that no trip ticket was entered for or turned in on it. The trip ticket should be turned in when the vehicle is turned in. He identified a trip ticket made out to John T. Johnson, admitted in evidence as Prosecution Exhibit D, as the one shown on daily dispatch record for 6 May and as the one not turned in (R46). Second Lieutenant Sidney Freshman, 1957th Quartermaster Truck Company, testified that Prosecution Exhibit D was the trip ticket he picked up when he "brought the truck from where it was wrecked" (R47), about eight miles south of Newcastle. There was a colored soldier with the vehicle when found and he saw John T. Johnson, Henry Johnson and accused when he went to pick up the truck (R63). Technical Sergeant Cornelius D. Johnson, Headquarters Detachment, 1513th

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Quartermaster Truck Battalion, and chief operations clerk in the battalion in charge of dispatching vehicles from the battalion, testified that his records of all vehicles dispatched by the battalion show no vehicle dispatched to accused on the 6, 7 or 8 May 1944, but do show a vehicle dispatched at 1000 hours 6 May to John T. Johnson to go to Watton in Norwich County. A job order is issued to the driver of the vehicle and it is turned in when the job has been completed and the truck returned. This job order (called dispatch records by the company and job orders by the battalion) (R64) was turned in at 1400 hours 6 May and this truck was not again dispatched on either the 6 or 7 May 1944 (R48-49). The vehicle was not checked in on the company dispatch sheet or (battalion) job order. John T. Johnson was not authorized to go anywhere on that date after the job order was turned in at 1400. hours (the record is silent as to whether the vehicle was checked in), nor was he authorized to take the truck and go anywhere on 7 May. Neither Henry Johnson nor accused was so authorized on either the 6 or 7 May (R64).

4. For the defense, Frank Garrett, Prison Officer in the British Prison Service (R32), and husband of Emily Garrett, first heard of the incident by a letter from his sister-in-law on the Saturday after its occurrence and he arrived unexpectedly to see his wife on the following Tuesday, his duties preventing his arriving earlier. He heard her version of the story after he demanded to know why he hadn't been told. She informed him

> "that it was to our advantage that it be given no publicity and wanted no scandal to be thrown on my name or on my family. * * * She told me that it would be better without me knowing anything about it. Her sister thought differently and after some discussion with her sister, who communicated with me by letter, I was told what happened." (R33)

He protested against the manner in which his "wife was interrogated and brow beaten". "She told me about it and I protest against the manner in which she was interrogated by this American detective" (R34). He was opposed to either of them testifying until he found on consulting legal authority that they were subject to punishment for contempt of court if they failed to obey the summons (R34).

Accused elected to be sworn as a witness. He testified to substantially the same story as that of Mrs. Garrett except as to the incident in the lane. His story was that she asked to link her arm with his on leaving the Black Horse. She asked where hewas going and he said to the dance. They were walking down the hill in the moonlight. Two men were walking down behind them. They came to a lane and

"so we stopped there in the lane, and she put her arm around me like this (indicating) and I turned my jaw around right like that (indicating). She asked me if I didn't mind sitting down, if I wouldn't care to sit down, and I said, 'No, Ma'm, I don't mind.' She was still leaning on my left side and we walked on in and sat down on the bank and the bank was about three and a half or a little better than three feet high; she was sitting on the left hand side of me and she laid her bag by the side of her. So I sat down beside her and we were sitting there for about two minutes and so I put my hand on her leg and she didn't say anything and the next time I put my hand on her leg, she said, 'Don't touch me', so I pulled my hand back and she still had her arm around me and her head on my chest, so I said, 'It is getting pretty late for me to go to the dance, let's go on'. When she went to get up, she stumbled and fell on her back and I was standing in front of her and I seen her stumble and I went to pick her up and then she snatched aloose and left her bag there and didn't say anything, just kept on going. So I reached down and got my cap, which I had laid down by her bag and I took her bag and I called for her, but she didn't answer. So I laid the bag just at the entrance to the lane on a little spot of grass" (R52-53).

He denied he ever hit the woman or tripped her. She stumbled and fell and he went to pick her up and took her by the arm and she ran off and left her bag and though he called her to come back for it, she did not. He denied he ever told her anything about intercourse but said that she wanted to go in the lane and

"she put her head by mine and I turned my jaw and after she asked me to go in the lane and sit down, she wanted to kiss me and I just kind of turned my jaw, turned it like this, and she kissed me on the the side of the jaw" (R53).

He denied he threatened her or that he unbuttoned his pants (R54), or that he was on top of her or that she screamed (R58). He testified that he was restricted 28th April. On the 6th of May he had returned from driving an officer (R54) and was sitting in the barracks talking when

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> "two boys, Johnson and Johnson, they told me, 'Come on, let's go outside. We'll go for a ride and be right back'. They had a truck outside so I got in the truck with them. They said, 'Come on, let's go. We'll only be gone for a minute and we are coming right back'. So I got in the truck and we started riding and I thought we were coming right back and would only be gone for a short while. They said, 'We're only going down here a minute and we'll be right back', and after we drove along thirty-five or forty miles from the camp that is when I found out they were going to Manchester and that they were coming back, so I didn't say anything as they decided to go, so we went along and on the way back, we was coming down the road and" (R55).

On 7 May they met and picked up these girls. At that time Henry Johnson was driving the truck

> "so we got out and I got in the back and me and Johnson was in the back and we were sitting there in the back, and that is when he sideswiped a weapons carrier and that was Henry -- he was driving, and that is how the accident happened to the truck" (R55).

He denied he took the car and used it, he was just riding in it. Accused admitted he went to Wanborough on 27 and 29 March and 1 April without a pass any night (R55-56) and that he went to Manchester in this truck while restricted and without a pass (R56). He denied that he let the girls get in the truck.

> "The driver stopped and one of them got in and then the rest of them got in. * * * they were just riding, they weren't with me."

The driver stopped and picked them up.

> "They just asked me to come along ridirg with them and I didn't feel like I had anything to do with it."

He didn't know where they were going when they asked him to ride but he just got in the truck and went along. Although they drove first to Lambourn and then through Swindon, he still didn't ask where they were going. They had something to eat in Manchester and the accident occurred on the way back. Accused affirmed again his plea of guilty to being absent without leave on 27 March, 29 March and 1 April, from 0600 hours 8 May to 2005 hours 9 May and to breaking restrictions, but was allowed to change his plea to not guilty to Specifications 2 and 3, Additional Charge II (R60-61).

5. The accused pleaded guilty to and the record of trial fully supports the court's findings of guilty of Specifications 1, 2 and 3, Charge I, and Charge I, and of Additional Charge I and its Specification, and of Specification 1 of Additional Charge II.

As to the Specification of Charge II, he denies assaulting Mrs. Garrett with intent to rape her, suggesting that she forced herself upon him. However, the incident of their first meeting, his inquiry as to her coming that way again and his statements to her the next evening when he presented himself to her, together with her injuries and appearance immediately after her escape from him, and his improbable story of how she left her bag behind, all lend credence to her version of the affair. She may have lacked judgment in accepting his invitation to enter the Black Horse for a beer and remaining to walk out with him when it closed, but the undeniable mute evidence thereafter tends most strongly to corroborate her story. This was a question of fact solely within the province of the court to decide and, unless plainly in error, its determination will not be disturbed by the Board upon appellate review (CM ETO 1953, Lewis).

As to Specification 2 of Additional Charge II, accused accepted the invitation of "Johnson and Johnson" to go for a ride after supper on 6 May. He got in the truck and started riding, raising no objection nor asking any questions when the truck continued on through several towns. It does not appear that at any time he questioned the trip or raised any objections to the length, time, speed or purpose of the trip. He was a truck driver and knew what was going on. He unquestionably knew that the truck was being used without permission, that he and the two Johnsons were absent from their station without authority, and that their joint use of the truck for their individual purposes was wrongful (C.J. 1942 Annotations, sec.886, p.3939; CM ETO 393, Caton & Fikes).

As to Specification 3, Additional Charge II, Army Regulations 850-15, paragraph 6a (3) provides that

> "Motor vehicles will be used only for official business and for the special purposes listed in b below."

The special purposes named do not include any such trip as that of accused herein. Accused testified,

> "when we met and picked up these girls. * * * Johnson, Henry, he was driving the truck, so we /John T. Johnson and accused/ got out and I got in the back and me and Johnson was in the back" (R55).

Accused was engaged in a joint adventure (Ibid, CM ETO 393). He lamely alleges that

> "I didn't let them get in. The driver stopped * * * two of them got in the back, but they were just riding, they weren't with me" (R57).

The admitted facts strongly infer that accused had an active part in giving the girls a ride but whether he did or not, the circumstances of the trip, under the authorities just quoted, make each individually responsible for the acts of the others incident to the trip.

6. The charge sheet shows accused to be 28 years ten months of age. He was inducted at Fort Benning, Georgia, 3 December 1941, with no prior service.

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

8. Confinement in a penitentiary is authorized for the crime of assault with intent to commit rape (AW 42; sec.276, Federal Criminal Code (18 USCA 455)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, is proper (Cir.229, WD, 8 June 1944, sec.II, par.1b (4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

2966

1st Ind. (217)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 AUG 1944 TO: Commanding General, IX Air Force Service Command, APO 149, U. S. Army.

1. In the case of Private First Class ARTHUR (NMI) FOMBY (34164439), 1957th Quartermaster Truck Company (Aviation), 1513th Quartermaster Truck Battalion (Special), 1585th Quartermaster Truck Regiment Aviation (Special), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The issues were unnecessarily confused and the trial lengthened by the inclusion of several minor offenses. Attention is invited to the following from the Manual for Courts-Martial, 1928, paragraph 27, page 17:

> "Where charges are preferred for serious offenses, there should not be joined with them charges for minor derelictions unless the latter serve to explain the circumstances of the former. Thus, as an extreme case, charges for willfully disobeying an order of a commissioned officer and for absence from a routine duty should not be joined."

3. The United States Penitentiary, Lewisburg, Pennsylvania, is designated by War Department order to be used for prisoners from this Theater and should be named in place of the United States Penitentiary, Atlanta, Georgia. This may be done in the published court-martial order.

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 2966. For convenience of reference please place that number in brackets at the end of the order: (ETO 2966).

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

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

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BOARD OF REVIEW

ETO 2972

21 JUL 1944

U N I T E D S T A T E S)	THIRD UNITED STATES ARMY
)	
v.)	Trial by GCM, convened at Knutsford, Cheshire, England, 17 June 1944.
)	Dismissal.
First Lieutenant HOWARD R. COLLINS (O-1796925), Company B, 503rd Military Police Battalion.)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Howard R. Collins, Company B, 503rd Military Police Battalion, did, at San Antonio, Texas, on or about 14 October 1943, borrow the sum of forty-four dollars and seventy-three cents ($44.73) from Sergeant Arthur L. LaBrecque, Company C, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 2: In that * * * did, at Peover Camp, Cheshire, England, on or about 10 March 1944, borrow the sum of two pounds, from Private First Class Peter P. Joseph, Company B, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

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Specification 3: In that * * * did, at Toft Camp, Cheshire, England, on or about 27 March 1944, borrow the sum of ten shillings, from Private First Class Russell K. Joyce, Company B, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 4: In that * * * did, at Warrington, England, on or about 30 March 1944, borrow the sum of one pound eighteen shillings, from Private First Class Russell K. Joyce, Company B, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 5: In that * * * did, at Macclesfield, Cheshire, England, on or about 1 April 1944, borrow the sum of one pound, from Private First Class Joseph (NMI) Merrill, Company B, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 6: In that * * * did, at Alderley Edge, Cheshire, England, on or about 20 April 1944, borrow the sum of one pound, from Private First Class Elon J. Manley, Company B, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 7: In that * * * did, at Alderley Edge, Cheshire, England, on or about 15 May 1944, borrow the sum of one pound from Private First Class Richard R. Stull, Company B, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 8: In that * * * did, at Alderley Edge, Cheshire, England, on or about 18 May 1944, borrow the sum of three pounds from Private First Class George R. Fearing, Company B, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 9: In that * * * did, at Wilmslow, England, on or about 1 June 1944, borrow the sum of one pound from Corporal Harold L. Eakins, Company B, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 10: In that * * * did, at Alderley Edge, Cheshire, England, on or about 3 June 1944, borrow

the sum of three pounds from Sergeant Joseph I. Schlag, Company B, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

Specification 11: In that * * * did, at Peover Hall, Cheshire, England, on or about 1 March 1944, borrow the sum of three pounds from Private Leroy A. Newton, Company C, 503rd Military Police Battalion, an enlisted man, this to the prejudice of good order and military discipline.

He pleaded not guilty to and was found guilty of the Charge and all specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Third United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

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

Specification 1. Sergeant Arthur L. LaBrecque, Company C, 503rd Military Police Battalion, was engaged with accused on a mechanical repair job on 14 October 1943 just before leaving on his furlough. Accused directed him to secure and forward from Flint, Michigan, certain engine parts amounting to the net cost of $44.00 and some odd cents". LaBrecque paid for them (R7-9).

Specification 2. Private First Class Peter P. Joseph, Company B, 503rd Military Police Battalion, was a table waiter in the Officers' Mess "around the first part of March". Accused asked for and received from him a loan of two pounds (R9-10).

Specifications 3 and 4. Private First Class Russell K. Joyce, Company B, 503rd Military Police Battalion, was driving accused, who was Officer of the Day, on 27 March 1944. Accused asked how much money he had with him and took it all, amounting to ten shillings. Three days later they were buying a windshield wiper costing one pound eighteen shillings and accused asked for and received from Joyce a loan of that amount (R10-12).

Specification 5. Private First Class Joseph Merrill, Company B, 503rd Military Police Battalion, was detailed "about two months ago" to drive accused to pick up some beer. Accused said he had run short and asked for and received from Merrill one pound, to be repaid when they "got back to the area" (R12-13).

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Specification 6. Private First Class Elon J. Manley, Company B, 503rd Military Police Battalion, while acting as officers' orderly on "April 20th", was asked by accused for a loan of one pound when in accused's room, and he let accused have the money (R13-14).

Specification 7. Private First Class Richard R. Stull, Company B, 503rd Military Police Battalion, was company barber "about the middle of May" when accused asked for and received from him a loan of one pound (R15-16).

Specification 8. Private First Class George R. Fearing, Company B, 503rd Military Police Battalion, on "May 18th" on the road in front of Ashfield billet, was asked by accused for a loan of three pounds, which he gave to him (R16).

Specification 9. Corporal Harold L. Eakins, "503rd MP Battalion", was driving for accused on "June 1st" when accused asked for and received from him the loan of a pound, two ten-shilling notes (R17-18).

Specification 10. Sergeant Joseph I. Schlag, "503rd Military Police Battalion", on "June 3rd" was "on CQ" in his billet when accused came and asked for and received from him a loan of three pounds (R18-19).

Specification 11. Private Leroy A. Newton, Company C, 503rd Military Police Battalion, night janitor at Peover Hall, during "the first week in March" loaned accused three pounds. Accused said he was "low on money" (R19-20).

4. The defense neither cross-examined prosecution's witnesses nor produced any witnesses for the defense. Accused remained silent (R21).

5. Article of War 96 provides that -

> "though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service * * * of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."
>
> "The disorders and neglects include all acts or omissions to the prejudice of good order and mili-

tary discipline not made punishable by any of the" other Articles of War. (MCM, 1928, par.152, p.187).

"Prejudice" is here used in the sense of detriment, depreciation or as affecting injuriously (Winthrop's Military Law and Precedents, 1920 reprint, p.723).

The act of an officer in borrowing money from noncommissioned officers of his organization is conduct which is clearly prejudicial to good order and military discipline within the meaning of Article of War 96 (CM 221833 (1942); BUL. JAG, Vol.I, No. 2, sec.454, p.106).

It is prejudicial to good order and military discipline for an officer to borrow money from an enlisted man in the same organization. The obligation that flows from indebtedness to a subordinate tends to weaken authority; it can become the cause of improper favor; it impairs the integrity of required relationship (CM 230736 (1943); BUL. JAG, Vol.II, No. 4, sec.454, p.144).

The record shows that six of the enlisted men from whom accused borrowed money were members of his company and all were members of his battalion. The acts shown were therefore all within the general rule that borrowing by an officer from enlisted men of his organization is a violation of Article of War 96 (CM 192128, Strickland).

6. The definite date when the loans were made is not shown in several of the transactions. However, as the statute of limitations in respect to the offenses charged is two years (Article of War 39) and accused was not commissioned as an officer until January 1943, it is reasonable to assume the offenses occurred within the statutory period and the record of trial sufficiently establishes that fact.

7. The charge sheet shows accused to be 26 years and six months of age. He served as an enlisted man from 1936 to 29 January 1943, was commissioned Second Lieutenant, Corps Military Police, 29 January 1943.

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. In the opinion of the Board of Review the record of trial is legally suf-

ficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind. (225)

WD, Branch Office TJAG, with ETOUSA. 21 JUL 1944 TO: Commanding General, ETOUSA, APO 887, U. S. Army.

1. In the case of First Lieutenant HOWARD R. COLLINS (O-1796925), Company B, 503rd Military Police Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 2972. For convenience of reference please place that number in brackets at the end of the order: (ETO 2972).

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

(Sentence ordered executed. GCMO 59, ETO, 28 Jul 1944)

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

BOARD OF REVIEW NO. 2

12 AUG 1944

ETO 3004

UNITED STATES	CENTRAL BASE SECTION, SERVICES OF SUPPLY, now designated CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.	
Private FREDERICK T. NELSON (12019386), Company K, 16th Infantry Regiment.	Trial by GCM, convened at London, England, 20 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The Federal Reformatory, Chillicothe, Ohio.

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

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1. The record of trial in the case of the soldier named above has been examined 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 Frederick T. Nelson, Company K, 16th Infantry Regiment, ETOUSA, did, at Axminster, Devon, England, on or about 27 December, 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 3 April 1944.

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

Specification 1: In that * * * did, at London, England, on or about 16 February 1944, feloniously take, steal and carry away one

(1) pair of trousers, wool olive-drab, of the value of about five dollars fifty cents, ($5.50), and one (1) neck-tie, cotton khaki, of the value of about sixteen cents ($.16), the property of the United States furnished and intended for the military service thereof: one (1) cotton khaki shirt of the value of about one dollar and eighty-three cents ($1.83); two pounds (£2) English currency, of the value of about eight dollars ($8.00) and one dollar ($1.00) in United States currency, property of Technician Fifth Grade Daniel Mogell, all being of the total value of about sixteen dollars and forty-nine cents ($16.49).

Specification 2: (Withdrawn by direction of appointing authority).

He pleaded to the Specification of Charge I, guilty, except the words "on or about 27 December 1943", "desert", and "in desertion", substituting therefor the words "on or about 3 January 1944", "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 the 61st Article of War; to Specification 1 of Charge II, guilty, except the words "one (1) Neck-tie, cotton khaki, of the value of about sixteen cents ($.16)", "two pounds (£2) English currency, of the value of about eight dollars ($8.00) and one dollar ($1) in United States currency", "of the total value of about sixteen dollars and forty-nine cents ($16.49)", substituting therefor the words "of the total value of about seven dollars and thirty-three cents ($7.33)"; of the excepted words, not guilty, of the substituted words, guilty, and guilty of Charge II. Two-thirds of the members of the court present when the vote was taken concurring, he was found guilty of Charge I and its Specification, as charged, and guilty of Charge II and its remaining Specification, as pleaded. Evidence of two previous convictions was introduced, both by summary court, one for entering off-limits area in violation of orders, and the other for being drunk in uniform at Military Police Headquarters, Algiers, Algeria, and for visiting Algiers without a pass, in violation of Article of War 96. Two-thirds of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved the sentence, 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. After accused had pleaded, the prosecution requested the court to accept the plea of guilty of accused as to Specification 1 of Charge II as it was made, it being impossible to get a witness at that time who could testify as to that Specification and Charge.

The only questions left for consideration are whether an in-...nt by accused to remain permanently absent was proved and whether he absented himself on 27 December 1943 or as claimed by accused that he left after New Years Day. The extract copy of the morning report of accused's organization, admitted in evidence as Prosecution Exhibit 2, shows accused as absent without leave 27 December 1943 (R6). Sergeant William A. Obremski, 5th Military Police, Criminal Investigation Division, testified as a witness for the prosecution that he arrested accused on the evening of 3 April 1944 as being absent from his organization without leave (R6). The court was fully justified in accepting the record of accused's absence as correct.

4. Accused being fully informed by the court as to his rights, testified that he had served over three years, including about two months in action in North Africa, where he was wounded (R8) across the chest and back (R11). He spent about five months in hospital. His unit returned to England at the beginning of December and he left the 315th Station Hospital (R8) at the beginning of January without a pass and came to London, where he "was waiting for the invasion to start and then turn into another outfit and go with another outfit". He did not want to go back to the outfit he was in. He attempted once or twice to go back (R9) and actually went to the railroad station and then decided not to go (R11). During the time he was in London he ate at the Red Cross and restaurants and slept for awhile in a tube, "underground" shelter. The rest of the time he was in a rooming house. There were military units and military police in London and he did not turn in to any of them but was apprehended (R10).

5. As to the Specification, Charge I:

a. The absence of accused without leave for a period of three months, spent entirely in London, where are located many units of the American Army and military police to whom he could have surrendered, together with the fact that such prolonged absence was terminated by apprehension, is strongly indicative of an intent to remain permanently absent (MCM, 1928, par.130, pp.144-145; CM ETO 1549, Copprue, et al; CM ETO 656, Taylor; CM ETO 740, Lane; CM ETO 1259, Rusniaczyk). This is a question of fact entirely within the province of the trial court to decide and in the absence of manifest error its findings will not be disturbed by the Board of Review on appellate review.

As to Specification 1, Charge II:

b. Accused pleaded guilty, with exceptions, to this specification and was found guilty according to his plea. The effect of his guilty plea was fully explained to him in open court and his understanding thereof verified. There is no requirement of law that evi-

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dence must be taken upon a plea of guilty; rather such evidence is intended to assist the court in fixing the punishment and the reviewing authority in his consideration of the case. The finding of guilty may be supported solely on the plea of guilty (Winthrop's Military Law and Precedents, Reprint, pp.278-279; CM 212197, Rocker; CM ETO 612, Suckow; CM ETO 1588, Moseff).

6. The charge sheet shows accused to be 24 years and seven months of age. He enlisted 14 October 1940 at New York, New York, with no prior service.

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

8. Confinement in a penitentiary is authorized for the offense of desertion in time of war (AW 42). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is proper (Cir.229, WD, 8 Jun 1944, sec.II, pars.1a(1), 3a).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 AUG 1944 TO: Commanding General, Central Base Section, Communications Zone, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private FREDERICK T. NELSON (12019386), Company K, 16th Infantry Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 3004. For convenience of reference please place that number in brackets at the end of the order: (ETO 3004).

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

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

BOARD OF REVIEW NO. 1

14 SEP 1944

CM ETO 3042

U N I T E D S T A T E S v. Private CRISS GUY, JR (34108969), 2005th Quartermaster Truck Company (Aviation), 1517th Quartermaster Truck Battalion (Aviation) (Special).	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE. Trial by GCM, convened at Liverpool, England, 23,28 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Atlanta, Georgia.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private Criss (NMI) Guy Jr., 2005th QM Trk Co Avn, 1517th QM Trk Regt Avn (Sp) did at or near the Old Swan, Liverpool, Lancashire, England, on or about 28 May 1944 with intent to do him bodily harm, commit an assault upon Kenneth Terry Appleby by wilfully and feloniously striking him on the head with a bottle.

CHARGE II: Violation of the 92nd Article of War.
Specification: In that Private Criss (NMI) Guy Jr., 2005th QM Trk Co. Avn, 1517th QM Trk.Regt. Avn (Sp) did at or near the Old Swan, Liverpool, Lancashire, England, on or about 28 May 1944 with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill Leonard Walter Keen, a human being by striking him on the neck with a broken bottle.

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He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for life. The reviewing authority approved the sentence, designated the U. S. Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence in chief for the prosecution was as follows:

(a) Charge I and Specification.

On the evening of 28 May 1944 Kenneth Terry Appleby, an English merchant seaman, was drinking at the bar in the Old Swan Vaults public house, Liverpool, Lancashire (R6,15). On his way to the lavatory, Appleby passed by accused, a colored American soldier, who was leaning against the wall to the right of the entrance door, in the passageway to the lavatory, and unavoidably "knocked" accused, as the room was "very crowded". Accused asked "What is wrong with you?", to which Appleby replied "Nothing is wrong." Accused asked "Would you like me to come out with you?" Appleby replied, "You can please your bloody self" (R6-7,10). Accused thereupon followed the seaman into the lavatory (R7). Appleby was wearing a foreign service ribbon (R10) and accused inquired if he had ever been in action. The seaman stated he had been with "things like submarines and airplanes." Accused asked if he had any fist fights, to which he replied affirmatively. Thereupon accused, looking "nasty," raised his hands (R7) and stepped back from Appleby, who, believing accused was "going to get annoyed" with him or strike him, twice struck accused, evidently with his fists. Accused was knocked to the floor by the second blow (R8,11), thereupon accused's companion (Private First Class Dexter Davenport, also a negro and a member of accused's company) entered the lavatory and helped him to his feet (R8). Although neither attempted to attack Appleby, the latter challenged both to an encounter, but no fight immediately ensued. As Appleby left the lavatory, accused said "I will see you outside," and the seaman said "All right." He went outside of the building. As accused and Davenport failed to follow him outside he returned to the inside of the "pub" and informed his friend, James Dean, also a merchant seaman, that he "was going" (R8,11). Appleby then stepped out of the doorway entrance, immediately followed by accused, who with his right hand struck Appleby from the rear on the right side of the head with an empty beer bottle. The force of the blow broke the bottle and forced Appleby from the doorway out into Broad Green Road (R8,9,13,16,25,27-28,30,31,34). The blow did not knock Appleby down but made him "dizzy" (R9). He and accused immediately "closed" together and grappled. At this point Davenport rushed out of the "pub", and advanced upon Appleby, raising his fists. The two grappled or sparred for a short period, and Davenport succeeded in separating Appleby from accused (R9,22,25,28-29,31-32,35), who tried unsuccessfully to strike Appleby (R15).

The police then intervened and terminated the encounter (R13). Appleby was not armed with a bottle or otherwise (R14). Several pieces of broken bottle, some of which were similar in color to the bottle which accused used, were found by Police Sergeant Robert Andrew McLellan of the Liverpool City Police, on the footpath outside of the door of the public house following the incident (R17,19), which occurred about 10:00 p.m. (R15,24,30,44).

(b) Charge II and Specification.

Leonard Walter Keen, the deceased, was at the "Old Swan" during the evening of 28 May. He had been involved in no disorders (R44-45), had not in any manner entered into the altercation above described and had not talked to accused. At the time of the incident he stood just outside the doorway of the public house, facing toward the road and about two or three feet behind accused (R16,21,25,26). While Davenport and Appleby were grappling, as above mentioned, accused still held in his right hand a broken portion of the bottle with which he had struck Appleby. He commenced swinging his arms around, turned about to a position facing deceased, who was behind him, "swung sideways" and stabbed deceased with the broken bottle in the left side of the neck, just behind the left ear (R16,25,28; Pros.Ex. 1, ##7,8). McLellan, the police constable arrested accused while he was backing into Broad Green Road directly following his attack upon Keen. The constable testified that in his opinion accused "was bordering on a state of frenzy" (R16,20). Accused reported his name to the constable as Richard Thomas. He was taken with Davenport and Appleby to the Bridewell, the Old Swan Police Station, Liverpool (R16,32).

Deceased, bleeding badly from his wound, which another police constable bandaged, was taken by ambulance from the scene of the attack to the Broad Green Road Hospital, where he was attended by Dr. Beryl Lovell Bentley, resident medical officer (R36-37). According to Dr. Bentley's testimony, several large vessels were bleeding. Keen lost much blood and was "practically pulseless -- in a state of collapse." Dr. Bentley believed he was dying (R37-38). The wound, on the left side of the neck directly behind the ear, running backwards and slightly downwards (R39; Pros.Ex.1, ##7,8), was narrow, although torn, about two and one-half inches long and about two inches deep at its deepest point (R38). It "very likely" was straight into the body (R42), and necessarily resulted from a "fairly heavy" blow, inflicted with a very sharp instrument, "ideally" by a piece of glass (R41). Keen died on the morning of 31 May (R38). Post mortem examination revealed that the left occipital artery and the jugular vein were severed and the left carotid artery was nicked (R40). The precipitate cause of death was cerebral thrombosis (blockage to arterial circulation resulting from clot formations in arteries in the b rain) due to injuries to the arteries in the neck. The hemorrhage, which immediately followed the infliction of the wound and practically "bled the man white", was the contributory cause of death (R40).

(c) It was duly stipulated that two diagrams, one showing the floor plan of the Old Swan public house and the other showing streets and buildings in the neighborhood, were accurate. During the testimony reference

was made thereto and they were attached to the record (R12). Photographs of the interior and exterior of the building and two post mortem photographs of deceased, showing the wound, were authenticated as accurate and admitted in evidence without objection (R42-43; Pros.Ex.1).

The prosecution stated that the presence in court of James Dean, the companion of Appleby, could not be secured because he was at sea (R46).

4. Defense evidence, in summary, was as follows:

(a) Miss Kathleen Cannon testified that when she saw accused and Davenport in the Old Swan Vaults public house about 10:00 p.m. on the evening in question, they were conducting themselves very well (R46). When Appleby left the room "he said he had a date" and, in witness' opinion, "was in a mood for fighting" because his teeth were clenched and his hands were clenched (R47). He returned to the room and said, "They were yellow." When he left again he was followed by accused who had a bottle in his hand. Thereupon accused

> "hit Appelby with the bottle. With the neck of the bottle, he ran forward and jabbed the other fellow (deceased) in the throat" (R48, 49).

Deceased, who never spoke, had crossed in front of Appleby and turned around facing indoors just before he reached the door. A second later he was struck by accused (R49-50).

(b) Davenport testified that he and accused left their station together on the evening in question and each drank two glasses of beer (R53-54). In the "Old Swan" accused became engaged in conversation with a lady and gentleman near the wall. Accused asked "the fellow (Appleby) if he was in a hurry?" Thereafter, someone informed witness that accused was having a "do" in the latrine, where witness went and saw Appleby in one corner, accused in another and accused's cap on the floor. Accused was rubbing his face and eye (R55-57). He stated that Appleby hit him unexpectedly. Witness spoke to accused and Appleby left, followed later by accused and Davenport. Witness returned to the bar and on hearing a scream left the "pub" (R57). He saw Appleby and "another fellow" advance toward accused. Witness did not see accused with a broken bottle in his hand and did not see a man who had been wounded in the neck (R58-59).

(c) After his rights were explained to him, accused testified in his own behalf as follows:

On the evening in question, he drank two glasses of beer and one of cider (R62). He and Davenport were at the bar in the public house. Accused became engaged in conversation "against the wall" with a British soldier and his two sisters. Appleby

> "came right through us and in doing so he pushed me kind of hard and I almost lost my beer. I almost went off balance" (R63).

Appleby stared at accused from the corner for about two or three minutes. After about five minutes accused went to the latrine, where he waited to go to the urinal. He was standing behind Appleby who "looked back." Conversation between the two ensued about the war and about fist fighting. As accused started to return to the bar, he was struck twice by Appleby and went down after the second blow. Accused's face was swollen, his mouth was bleeding and he could hardly see out of one eye. Appleby tried to hit accused again but a civilian prevented him, and he offered to fight outside with accused, who said he would step outside with him. Then Davenport entered and as accused was leaving the lavatory he saw Appleby reach up, take a bottle and proceed to the door. Accused also took a bottle.

> "I started out after him and I wasn't going to wait - I was going to hit him with mine first. * * * He turned around and I wasn't going to wait to see what he was going to do. I was going to hit him first before he got me. I threw the bottle at him and it hit him in the head and broke. * * * I was taken up in the crowd - by a bunch of civilians. * * * Then, I was snatched out of the crowd by somebody and when I fell out in the street like - I was off balance and I was trying to hold up all the time. I knew if I fell what would happen to me. * * * I saw a man in a grey coat coming towards me. This fellow was throwing his fists like at me but he never did hit me. He acted like he was wanting to fight me so I grabbed him around the waist to keep me from falling. * * * Then the bobbies came in and stopped the whole thing."

He did not know who the civilian was, did not remember having seen deceased, and did not know him (R63-64). He was never tried by any court for any offense before (R65).

On cross-examination he denied having a piece of the bottle in his hand or cutting anybody on the neck with a bottle. He testified that he gave only his correct name at the police station (R67-69). He denied seeing a man bleeding from the neck or seeing an ambulance arrive on the scene. He admitted that he intended to hit Appleby and that he "was mad at" him when he threw the bottle (R70).

5. (a) The prosecution's rebuttal evidence showed in substance that the official "Police Memo Book" of the Liverpool City Police, admitted in evidence without objection, contained a regularly recorded entry of the name and description accused gave the police on the evening in question as follows: "Private Richard Thomas, 19 years, of the 2024th QM Regiment, Magaw Camp, United States Army" (R74; Pros.Ex.2). The entries were manifestly admissible

in evidence (CM ETO 2185, Nelson, CM ETO 2343, Welbes; CM ETO 2481, Newton).

(b) Police Sergeant McLellan identified six fragments of beer bottle glass which, he testified, were picked up by him on the footpath outside of the public house about half an hour after the incident. This was the only glass he could find in the area (R74,78). The fragments were admitted in evidence over objection by defense (R76; Pros.Ex.3) on the grounds that there was testimony that the bottle used by accused was light colored (whereas some of the fragments were dark colored) and that there was no evidence that any of the fragments were from the lethal bottle. The law member ruled "whether or not they are to be accepted as pieces of the bottle which was used is for the Court as finders of the facts to determine" (R75). The ruling was correct (2 Wharton's Criminal Evidence - 12th Ed., sec.760, pp.1289,1290; sec.762, pp.1293,1294).

6. Charge I and Specification - Assault with intent to do bodily harm.

Assault with intent to do bodily harm is

> "an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended. * * *.
> Proof- (a) That the accused assaulted a certain person, as alleged; and (b) the facts and circumstances of the case indicating the concurrent intent to do bodily harm to such person" (MCM, 1928, par.149n, p.180).

> "A simple assault and battery is usually accomplished by the primitive means ordinarily resorted to by individuals in inflicting punishment on one another, and the motive of the assailant is not ulterior to the mere punishment of the person assailed. An aggravated assault, or assault and battery, which is ordinarily made a felony by statute, is one where the means or instrument used to accomplish the injury are highly dangerous or where the assailant has some ulterior and malicious motive in committing the assault other than a mere desire to punish the person injured."
> (4 Am.Jur., Assault and Battery, sec.26, p.142)
> (Underscoring supplied).

> "an inference of the intent may be justified from * * * the implement employed, or the

other circumstances attending the assault" (6 CJS, Assault and Battery, sec.79b,(2), pp.937-938). (Quoted with approval in CM ETO 1177, Combess).

The prosecution's evidence is substantial that accused, angered at Appleby as a result of a recent altercation with him during which he had twice struck accused with his fists, deliberately struck him from behind on the side of the head with a beer bottle. The force of the blow was sufficient to break the bottle, render the victim "dizzy" and force him from the doorway of the public house out into the road. Accused himself testified that he was "mad" at Appleby, threw the bottle at him, intending to hit him. Even assuming that the responsibility for the commencement of the altercation was Appleby's,

> "proof that the prosecutor struck the first blow will not justify an excessive battery or attack with a dangerous weapon" (1 Wharton's Crim.Law, 12th Ed., sec.826, p. 1115).

The Board of Review has held that evidence of the use of "dangerous things," such as bottles, mugs, glasses and rocks, in a manner likely to produce bodily harm, supports the inference of a specific intent on the part of the user to do bodily harm, within the meaning of Article of War 93 (CM ETO 804, Ogletree et al, par.12(a), p.21; CM ETO 1284, Davis et al; CM ETO 2782, J.L.Jones). Under the foregoing authorities, the court was fully warranted in inferring the existence of a specific intent on accused's part to do bodily harm to Appleby concurrent with the unjustified assault upon him. Although accused testified that he "was going to hit him first before he got" accused, the evidence that Appleby, unarmed and preceding accused on the way out of the public house, was struck from the rear by accused, whom he could not see, fully warranted the court's conclusion that accused was not acting in self-defense. Its findings of guilty of Charge I and its Specification will thus not be disturbed upon appellate review (CM ETO 25, Kenny; CM ETO 3180, Porter; Cf: CM ETO 422, Green; CM ETO 1941, Battles; CM ETO 2103, Kern).

7. Charge II and Specification - Murder.

(a) The unequivocal testimony of eye witnesses, including one defense witness, establishes that accused, at the time and place alleged, struck Leonard Walter Keen in the neck with a broken bottle. Medical testimony demonstrates clearly that the wound was the result of a hard blow and that the death of Keen three days thereafter was proximately caused thereby. The court was at liberty to disbelieve accused's testimony denying that he hit anyone in the neck with a bottle or that he knew or saw deceased. The sole question for determination is whether there is substantial evidence in support of the court's finding that accused was guilty of murder in view of the peculiar circumstances of the killing. There is

substantial evidence that deceased had no trouble with anyone, and did not speak to accused during the evening in question, did not enter into the altercation which involved accused, Davenport and Appleby, and was merely a bystander. The prosecution's evidence shows that following an altercation with Appleby, accused deliberately struck him with the bottle, thereby breaking it, and immediately thereafter swung his arms, turned around to a position facing deceased, who was two or three feet behind him, and stabbed him in the neck with the broken bottle. A defense witness testified "With the neck of the bottle, he ran forward and jabbed the other fellow (deceased) in the throat."

(b) "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. * * *.

Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. * * *.

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

" Intent to kill is not a necessary element in the crime of murder in those cases where the design is to perpetrate an unlawful act, and the homicide occurs in carrying out that purpose; and in such cases it is not necessary that the jury believe beyond a doubt

> that accused intended to kill the decedent, or to do him bodily harm.
>
> * * *
>
> an intent to kill a particular person is not an essential element in murder, where an unlawful act is done deliberately with the intention of killing, or of inflicting serious bodily harm, and where death ensues from such unlawful act.
>
> * * *
>
> intent may be inferred under the rule that everyone is presumed to intend the natural consequences of his act. Thus where an angry altercation leads a party to arm himself with a deadly weapon, a subsequent homicide is murder, or voluntary manslaughter, according to the circumstances" (1 Wharton's Crim. Law, 12th Ed., sec.420, pp.632,633).

The use of a deadly weapon (which may consist of a bottle) in a manner likely to cause and causing death raises a presumption of malice (Ibid., sec.426, pp.652-655).

An intent to kill

> "may be inferred from the acts of accused, or may be founded on a manifest or reckless disregard for the safety of human life. Thus an intention to kill may be inferred from the willful use of a deadly weapon" (40 CJS., sec. 44, p.905).

Under the foregoing authorities, accused's act in swinging around and stabbing Keen with the broken bottle warranted the inference of a coexistent intent to kill. The act evinced a "manifest or reckless disregard for the safety of human life" (CM ETO 2297, Johnson and Loper; CM ETO 2899, Reeves; and authorities therein cited).

(c) Whether or not accused's intent to kill was formed suddenly under the influence of an uncontrollable passion or emotion aroused by adequate provocation, whether or not a sufficient "cooling period" had elapsed for the passion or emotion, if any, to abate, or whether the formation of the intent was the result of mere anger, were questions of fact peculiarly within the province of the court, whose determination thereof against the accused in finding him guilty of murder rather than manslaughter, is supported by substantial evidence and will not be disturbed upon appellate review (CM ETO 292, Mickles; CM ETO 2007, Harris Jr.; CM ETO 3180, Porter).

Even assuming, however, that the court believed that Appleby's assault on accused was sufficient provocation to reduce the homicide to

voluntary manslaughter had it been committed on Appleby, the following rule is applicable:

> "The provocation must have been given by the person who was killed, except in those cases in which the wrong person was killed by accident or mistake, or deceased was present aiding and abetting the person causing the provocation" (40 CJS., sec.53, p.917).

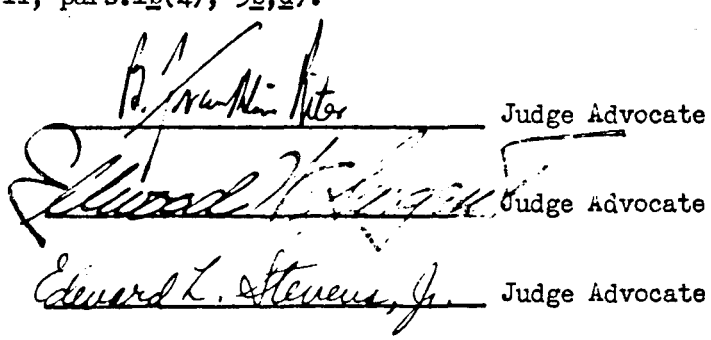
The evidence, considered as a whole, negatives the conclusion that accused's attack on Keen was the result of accident or mistake or that Keen was in any way concerned with the altercation, and the court was warranted in determining these factual questions against accused (CM ETO 969, Lee A. Davis).

The evidence of accused's unjustified assault upon Appleby, followed immediately by his vicious attack upon Keen, wholly unprovoked by the latter, a mere casual bystander, fully warranted the court, under the foregoing authorities, in determining all the mentioned factual questions against accused, and in finding him guilty of murder as alleged in Charge II and its Specification.

7. The charge sheet shows that accused is 23 years 11 months of age (he testified that he was 20 years of age (R62)), and was inducted at Fort McClellan, Alabama 9 August 1941 to serve for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and 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. The penalty for murder is death or life imprisonment, as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized for the crime of murder (AW 42; sec.275, Federal Criminal Code (18 USCA 454)). The designation of the United States Penitentiary, Atlanta, Georgia, should be changed, however, to Lewisburg, Pennsylvania (Cir. 229, WD, 8 June 1944, sec.II, pars.1b(4), 3b,d).



Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 SEP 1944 TO: Commanding General, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U.S. Army.

1. In the case of Private CRISS GUY, JR. (34108969), 2005th Quartermaster Truck Company (Aviation), 1517th Quartermaster Truck Battalion (Aviation) (Special), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The designation as the place of confinement in your action of "U. S. Penitentiary, Atlanta, Georgia," is unauthorized and should be changed to "United States Penitentiary, Lewisburg, Pennsylvania" (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b,d). This correction may be effected in the published 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 CM ETO 3042. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3042).

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

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

BOARD OF REVIEW NO. 2

CM ETO 3044

14 SEP 1944

U N I T E D S T A T E S	BASE AIR DEPOT AREA, AIR SERVICE COMMAND, UNITED STATES STRATEGIC AIR FORCES IN EUROPE.
v.	
Private First Class MATTHEW J. MULLANEY (31165639), 2211th Quartermaster Truck Company (Aviation).	Trial by GCM, convened at Langford Lodge, AAF 597, APO 635, 15 June 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Pvt 1cl Matthew J Mullaney, 2211th Quartermaster Truck Co (Avn), 3rd BAD, did, at Belfast, Northern Ireland, on or about 18 May 1944 wrongfully and unlawfully have carnal knowledge of Annie Henry, a female under the age of sixteen (16) years.

Specification 2: In that * * * did at AAF Station 597, APO 635, U.S. Army, on or about 17 May 1944, wrongfully take and use, without proper authority, a certain motor vehicle, a Ford sedan, No. 112073, property of the United States of a value of more than fifty ($50.00) dollars.

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He pleaded not guilty to and was found guilty of the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and 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 evidence for the prosecution showed that accused was a private first class, 2211th Quartermaster Truck Company, Aviation, Army Air Force Station 597, on 17 May 1944, and was detailed to drive the staff car of Lieutenant Colonel Augustus W. Nelson, Air Corps, Commanding Officer of the station (R6, 57-60). On 17 May 1944, accused secured permission from Lieutenant Colonel Nelson to go to Belfast that night, telling him that he had an opportunity to drive into Belfast in connection with a party being given there. Accused neither requested nor received authorization from the Colonel to use the staff car (R6-8). At about 1500 hours the same day, accused went to the office of Captain Melvin L. Crook, Air Corps, the same squadron and station, and told Captain Crook that he had permission to drive him that night "into town with Colonel Nelson's car". Having already arranged for transportation, Captain Crook thereupon "called the motor pool" and requested that the number of the car on the trip ticket previously ordered be changed to the number of the car accused was driving (R8,9). Accordingly, accused picked up Captain Crook that evening and drove him in this car to the "Congo Club" in Belfast (R10). The car, so used, was a United States Army 1941 Ford staff car, No. 112073, which, according to First Lieutenant Anthony Sembekos, accused's company commander and Base Motor Officer, was at the time worth more than $50.00 (R57-59,62,120). That same evening, Annie Henry, aged 14 years, 11 months, and her sister Eileen, of 300 Cupar Street, Belfast, were walking home "from the pictures" when accused drove up in a khaki-colored car and asked them if they wanted to go to a Mother's Day dance at the Congo Club. The two girls accepted the invitation contingent upon obtaining their mother's consent. Accused, who at the time had "another American soldier" with him, drove them to the corner of their street. Annie and her sister obtained permission and they all went to the dance, arriving there about 2200 hours (R14-16,28,29,87; Pros.Ex.1). They remained about an hour and accused drove the girls home. The other soldier did not accompany them. Accused stopped the car at the corner of Cupar Street and Eileen Henry got out. Accused closed the door and drove off with Annie in the front seat (R17,30). He drove about six miles to a quarry near Hanniston, where he parked the car off the road (R18). He put his hand on the top of her skirt, and Annie got out of the car and ran away. Accused caught her and took her back to the car, telling her he would take her home. However, "he started the same thing once again" and the girl again got out of the car and ran away. He again caught her and

"dragged" her back to the car. But while he was "getting in on the other side", she once more got out of the car and ran. Once more accused caught her. This time he threw her on the ground, "put" her knickers down (R19-23) and, according to Annie:

> "He took out his penis and placed it in my private parts and moved up and down for about five or ten minutes and put me in the car and brought me home" (R63).

In the meantime Eileen, when her sister did not get out of the car with her, had told her mother and father about it (R30,40), and Charles Lally, Constable in the Royal Ulster Constabulary, Belfast, "got a report" (R. 45). Accordingly, when accused and Annie got home, there were two military police, Constable Lally and the girls' brother-in-law, William McKinney, waiting for them on the corner at Cupar Street. It was about 0115 hours 18 May 1944. Accused was driving, what Constable Lally described as, "a military car, similar to a Ford - a V8" (R26,37,41,42, 45,46). McKinney said that Annie's clothes and hair were badly disarranged (R42,43). Annie was interviewed at 0115 hours by Detective Constable Thomas Diamond, Belfast, who took her to the Royal Victoria Hospital (R87,88), where Howard Morris Stevenson, a doctor attached to the hospital, made a physical examination. Dr. Stevenson "found no definite signs of violence on any parts of her body" except that on a detailed examination of her genitalia he "found that there was a recent tear of the posterior part of her hymen * * * it was still bleeding * * * the vaginal orifice * * * admitted only one finger without pain". A microscopic examination made by the doctor of hair which he removed from around the vaginal orifice of the girl showed the presence of male spermatozoa (R27,36,51,52,75). Sergeant Clifford H. Goldsmith, Criminal Investigation Department, 20th Military Police Company, interviewed accused about 1000 hours on 18 May (R98,104,111) and again on 19 May 1944. Sergeant Goldsmith, on the occasion of each interview, advised accused of his right to remain silent and also told him that anything he said could be used against him (R98,99,111). Accused made two statements, one on the 18th and one on the 19th, which statements were reduced to writing and signed by accused. Sergeant Goldsmith identified the statements and they were received in evidence (R99,110-112; Pros.Exs.7,8). In his first statement accused said he had met "Ann" Henry and her sister "Ilene" and had taken them to a dance at the Congo Club, Belfast, on the evening of 17 May 1944. He said that after they had been at the dance about an hour he and Ann Henry left in the staff car and went about two miles out of town where he had sexual intercourse with her; that they then returned to the Congo Club and remained there until about midnight, at which time he drove the two girls home; that he was pretty drunk; that at their home Ilene got out of the car, Ann attempted to, but he grabbed her and drove off; and that a mile or two out on Springfield Road he had

sexual intercourse with "Ann again" (Pros.Ex.7). In his second statement, accused referred to his statement of the day before and said that it was not true that he had had sexual intercourse with Ann Henry earlier in the evening, but that the intercourse had occurred on Springfield Road after he had left the dance with both girls. The further details of the second statement are largely in accord with the story told by Annie on the witness stand except that accused contended that Annie, after at first screaming and running away, finally consented to the act (Pros.Ex.8).

4. The trial judge advocate was called as a witness by the defense and testified that he had talked to Annie Henry "many times" during the trial that day, during recesses; that he told her she had testified up to the point where accused had thrown her on the ground and had taken down her knickers but that "we wanted her to tell the whole story". The trial judge advocate said, further, that he asked her if she would tell the whole story, exactly what happened after that, and that she replied that she would.

Accused, upon being advised by the court as to his rights, took the stand and testified on his own behalf. Accused's testimony, so far as it involved his use of the Army staff car No. 112073, on the night in question, was in accord with the evidence introduced by the prosecution. He said, in effect, that he asked Colonel Nelson if he would be needed that night; and if not, some drivers were needed to take officers to town, and that it would be an opportunity for him to get in touch with some friends. With reference to what happened after he met Annie Henry, accused told of his drinking beer, whiskey and gin at the Congo Club "for the biggest part of the evening". He told of driving the two girls home at 2300 hours, of Eileen getting out of the car and of his driving off with Annie. He said that at first she made no objection, but that when they reached the quarry and parked she twice ran away and he caught her. The second time they fell into a gully while trying to hide from a passing car. There, he said, he kissed her, played with her breasts and "asked her then that I wanted to have some". According to accused, Annie made no objection, he "tried to get it in * * * for a couple of minutes", did not get it in and did not "penetrate her private parts" to his "knowledge", and finally had an emission with his penis "down between her legs". He said he then made an engagement with Annie for the following Friday night, drove her home and was picked up by the Military Police on the corner of Cupar Street (R117-124). On cross-examination, accused said that on 19 May 1944 he did tell Sergeant Goldsmith that he had had sexual intercourse with Annie Henry (R125,126). On redirect examination, accused explained that by the words "sexual intercourse" he meant that he had "come" (R126). On being questioned by the court, accused said he "was fooling around with her - first I had my hands down there and I was trying to get my finger in". Asked by the court if Captain Crook had

given him permission to take the car and go off on his own business with it, accused answered "No, sir" and added that the officers, however, had been permitting it at the different parties.

5. The evidence shows beyond question that accused did, at Belfast, North Ireland, on or about 18 May 1944, have sexual intercourse with Annie Henry, a girl under 16 years of age, as alleged in Specification 1 of the Charge. Annie testified that accused placed his penis in her private parts late on the night of 17 May. The child was examined physically by a competent physician shortly after 0115 hours on 18 May. The examination showed that her hymen had been recently torn and was at that time still bleeding. This proved penetration, concededly effected by accused since, admittedly, he was the only one with Annie who had opportunity for sex play since 2200 hours the night of 17 May. The conclusion that the penetration was by accused's sexual organ and not by his fingers is inescapable in view of Annie's direct testimony and in the light of accused's testimony in which he admitted that for a couple of minutes, during which time Annie lay quietly on her back with her legs spread, he had attempted to introduce his penis into her person. The specification does not allege the use of force or that the intercourse occurred against the will of the female, but does allege that Annie Henry was under the age of 16. She was unable, legally, to consent. The act was out of wedlock.

On the night of 17 May 1944, accused, at the place mentioned in Specification 2 of the Charge, obtained for his own personal use the possession of a Ford Sedan automobile, a United States Army staff car, No. 112073, worth more than $50.00. He took this car away from his station under color of authority procured as a result of his own misrepresentation. Later in the evening, he used the car for his own benefit, first to take two girls (civilians) to a dance and later to take one of the girls for a trip out of town for the purpose of having sexual intercourse with her. Such use of a government car was not authorized and could not have been authorized. The conduct of accused while not amounting to larceny was a violation of Article of War 96, as charged (Bull.JAG, Vol.I, Jan-June 1942, sec.454, p.21, CM 219438, Tate, 12 B.R. 265; CM ETO 393, Caton & Fikes).

6. The conduct of accused as alleged in Specification 1 (carnal knowledge of a female under 16), and as proved, was a violation of Article of War 96, which reads:

> "Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty,

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> shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

Thus, there are three types of offenses made punishable under this article: (a) Disorders and neglects to the prejudice of good order and military discipline, (b) conduct of a nature to bring discredit upon the military service, and (c) all crimes or offenses not capital (MCM, 1928, par.152a,b,c., pp.187-189).

In the European Theater of Operations, the Board of Review held in CM ETO 1366, English, that the offense of carnal knowledge of a female under 16 was properly chargeable under Article of War 96, because "this offense is denounced and made punishable for a first offense by imprisonment for not more than 15 years by Federal Criminal Code, Section 279 (35 Stat. 1143; U.S.C. 458)". No doubt influenced by CM 211420, McDonald, the Board of Review held in CM ETO 2620, Tolbert & Jackson, that the offense under present consideration was properly laid under Article of War 96, because it was not only "a crime or offense not capital", a felony denounced by Federal Statute (sec.458, Title 18, USC), but because it was service discrediting as well, the McDonald case, supra, being cited as authority for the latter proposition. In CM ETO 2663, Bell & Kimber, the Board of Review held that similar conduct was prejudicial to good order and military discipline and also service discrediting, in violation of Article of War 96, on the authority of CM ETO 1366, English, and CM ETO 2620, Tolbert & Jackson. In CM ETO 2759, Davis, the Board of Review held this conduct was service discrediting, in violation of Article of War 96, on the authority of the McDonald case, and CM ETO 2620, Tolbert & Jackson. And, in CM ETO 2875, Gray, et al, this offense was held properly laid under Article of War 96, on the authority of the McDonald case and CM ETO 2620, Tolbert & Jackson, the Board saying that the conduct was "also a felony denounced by Federal Statute (18 USCA 458)".

The offense under consideration, carnal knowledge out of wedlock of a female under 16, is denounced by State and Federal Statute in the United States (18 USC 458). It has repeatedly been punished under Article of War 96. Convictions of this offense have been uniformly sustained by Boards of Review, from time to time, either as a "crime or offense not capital" or as "service discrediting" conduct, both of which are denounced by Article of War 96. This offense is called a crime and punished as a felony by the laws which govern the conduct of Americans when "at home". If it is denounced as a "crime or offense not capital" by Article of War 96, then is it most unwise, as well as unrealistic, to describe this conduct merely as service discrediting. Public opinion in England, for instance, as reflected by its laws, is somewhat different with respect to "statutory rape" than it is in the United States. It fol-

lows that not every case of "statutory rape" under section 458, title 18, United States Code, would bring discredit to our military service if committed in England. It does not seem, therefore, that the Army's right to punish conduct which falls below American standards should be stated to rest on such a tenuous basis, viz: that it is service discrediting, if in fact this offense is denounced as a "crime or offense" by Article of War 96. In the one case, our standards may well be lowered to fit those of a foreign country. In the other, our code of ethics follows the flag, so to speak, insofar as American soldiers are concerned. It does not seem as though Congress, in legislating for the Army, could have intended other than the latter alternative. In fact, Congress intended that crimes should be tried as crimes, and that service discrediting conduct was something else again, and should be so tried. Congress never intended that conduct on its face a crime should be reached and punished by the devious method of treating it as service discrediting.

The jurisdiction of a court-martial is not territorial. There is no such thing in military law as venue. This has always been acknowledged. Courts-martial may, and have, tried military offenses and crimes as well, committed in Canada, Iceland, the United Kingdom, North Africa, New Guinea and elsewhere around the world. There has never been any question about the jurisdiction of courts-martial to try the crimes listed in Article of War 93 wherever committed. Every day soldiers are tried by courts-martial for larceny, robbery, assaults, committed "off the reservation and down town" where the jurisdiction of the Federal civil courts does not extend. There is nothing to indicate that the jurisdiction conferred by Article of War 96 over all "crimes or offenses not capital" is any less extensive than that included in Article of War 93. Nor is it generally so regarded. Article of War 96 is in this respect merely complimentary of Article of War 93 and comprehends the other usually lesser crimes. The general court-martial orders of the War Department abound with cases of officers convicted of uttering forged instruments, frauds, assaults not included in Article of War 93, and other crimes which are considered and approved as crimes, in violation of Article of War 96, and not supported by a devious process of reasoning as "discrediting conduct" denounced in the second clause of Article of War 96.

In CM 211420, McDonald (10 B.R. 61), accused was charged under Article of War 96 with having had carnal knowledge of a female under the age of 16 years, in violation of section 458, title 18, United States Code. The offense occurred in California where a state statute denounced acts of this nature. The Board of Review there held that 18 United States Code 458 was not applicable to the offense under consideration,

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> "for the reason that the said section is applicable only to offenses therein named when committed at sea or on land under the exclusive jurisdiction of the United States (18 USC 451; secs.272,279, Federal Penal Code, 1910). Los Angeles, California, is not land under the exclusive jurisdiction or control of the United States * * * Because the offense was not committed on a Federal reservation, jurisdiction was not conferred by the provisions of the assimilating statute (sec.289, Federal Penal Code, 1910; 18 USC 468), making the violation on a Federal reservation of a state law a Federal offense".

The Board of Review in CM 211420, McDonald, supra, said, further, that the view taken in CM 139323, McMahon (sec.1485, Dig.Ops.JAG, 1912-30) that 18 United States Code 458 was applicable to such an offense committed in Kentucky had been "followed in section 446 (III), Manual for Courts-Martial, edition of 1921, but is repudiated by paragraph 152c, 1928 edition of the Manual, now in force".

It is difficult, if not impossible, to follow the summary conclusion expressed in the McDonald case, viz: That the 1928 edition of the Manual repudiated the meaning of section 446 (III) of the 1921 edition, as expressed in the McMahon case.

The 1921 edition of the Manual, in its "Discussion" of "Crimes or Offenses not Capital", says (sec.446 (III), p.463):

> "The crimes referred to in A. W. 96 manifestly embrace those not capital committed in violation of public law as enforced by the civil power (U.S. v. Grafton, 206 U. S. 348), the 'public law' here in contemplation being that of the United States; that is, that enacted or adopted by the authority of the Government of the United States. This includes the laws of the District of Columbia and of the several Territories and possessions of the United States as well as all laws of the United States; but it excludes city ordinances and regulations and State statutes, as well as the laws of friendly foreign countries (violations of which are, however, chargeable as conduct of a nature to bring discredit upon the military service.)"

The 1928 edition of the Manual, in its "Discussion" of "Crimes or Offenses not Capital", says (par.152c, p.188):

> "The crimes referred to in this article embrace those crimes, not capital and not made punishable by another Article of War, which are committed in violation of public law as enforced by the civil power. The 'public law' here in contemplation includes that enacted by Congress or under the authority of Congress. For example, it includes (but only as to violations within their respective jurisdictions) the Code of the District of Columbia, and the laws of the several Territories and possessions of the United States. A person subject to military law can not, however, be prosecuted under this clause of the article for an act done in a State, Territory, or possession which is not a crime in that jurisdiction, merely because the same act would have exposed him to a criminal prosecution in a civil court of the District of Columbia had he done the act within the jurisdiction of such court."

The only real difference in the two discussions is that in the latter it is pointed out that an act cannot be charged as a crime or offense not capital on the authority of the District of Columbia Code unless the act was committed in the District of Columbia, nor on the authority of the "laws of the several Territories and possessions of the United States" unless committed within the jurisdiction of the "respective" territory or possession. The meaning of this limitation is very clear. An act condemned by the Code of the District of Columbia, although that code be enacted by Congress, does not make that act punishable as a "crime or offense not capital" unless committed in the District of Columbia. "The laws of the several Territories and possessions", passed by Congress, are similarly limited.

But the limitation thus pronounced applies only to Federal statutes which are purely local in character. This limitation does not apply to that group of Federal statutes which military law itself (Article of War 42) characterizes as of "general application".

Instances of these local laws, in addition to the Code of the District of Columbia, are those which provide for the government of Alaska, Hawaii, Puerto Rico, the Philippine Islands, Canal Zone, the Virgin Islands, Guano Islands. Each of these has laws enacted for it by Congress, some of which laws contain penal provisions of local importance, appropriate only to local needs (48 USC 21-1419). Alaska

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fisheries are regulated and protected by Federal laws which are purely local (18 USC 221-247). And Congress has enacted special laws with reference to "prize fights", which are applicable to Hawaii and Alaska only (18 USC 520,521). These are all local laws, local in application, and conduct denounced therein if committed out of the locality is not a violation of that statute. Analyze the sentence which is actually employed:

> "For example, it includes (but only as to violations within their respective jurisdictions) the Code of the District of Columbia, and the laws of the several Territories and possessions of the United States".

A proper paraphrasing, by substituting for "their" the words to which it refers, would be: "(but only as to violations of the laws of the several Territories 'and possessions' - respective jurisdictions)". This clearly shows the reference is to local territorial laws. The use of the words "respective" and "several" is significant.

On the other hand, there are Federal statutes described in the Articles of War as statutes of general application. The 1928 edition of the Manual did not, in intent or effect, apply this principle of limitation to "statutes of the United States of General application". This phrase "Statute of General Application" has had a definite and accepted meaning. It is used in Article of War 42. Its meaning has been well known in military law. The 1921 edition of the Manual said that the definition of "Crimes and Offenses" under Article of War 96 was to be found "as the forty-second article prescribes, (1) in the 'Statutes of the United States of General Application within the continental limits of the United States'" (sec.442, p.408). The particularization by the 1928 edition of the Manual, of those local statutes which it says are limited, necessarily excludes from such limitation statutes of general application. Had the intention of the 1928 edition of the Manual been to include in such limitation statutes of general application, this descriptive phrase which was so well known and accepted would have been definitely employed.

The remaining question is whether the Federal statute, which denounces the offense of carnal knowledge of a female under sixteen (18 USC 458), is a statute of general application as that definition is employed by military law.

The offenses condemned in Chapter II, Title 18, United States Code, including murder (sec.452), felonious assaults (sec.455), rape (sec.457), and that under present consideration, carnal knowledge of a female under sixteen (sec.458), have all been legally punished from

time to time by penitentiary confinement under Article of War 42 on the principle that these offenses are condemned by a United States Statute of General Application (Ex parte, Givins, 262 Fed. 702; In re Langan, 123 Fed.132). This principle has been uniformly sustained without question by Boards of Review. If the sentence in the McDonald case had been for more than a year, the accused undoubtedly would have been sentenced to the penitentiary on the theory that the statute in question was under Article of War 42, a statute of general application, and this interpretation would have been sustained by the very Board of Review which, in the same case, held that the statute is one of local application under Article of War 96. Chapter II, Title 18, United States Code, makes the offenses therein condemned (including those listed above) punishable when committed within the Admiralty, Maritime and Territorial jurisdictions of the United States. This chapter has been held consistently to be a statute of general application within the meaning of Article of War 42.

There are, as pointed out, many Federal statutes of purely local application. The offense and the statute with which we are dealing do not fall within that category. Consistency requires the rejection of the conclusion that the limitation of jurisdiction, which the 1928 edition of the Manual imposes, includes statutes of the United States of general application.

It is not believed that Congress, which wrote both Articles of War 42 and 96, ever intended a situation whereby an accused may be punished by confinement in a penitentiary under a Federal statute which defines and denounces an offense and at the same time may not be tried under the very statute by which that punishment has been measured.

It is the opinion of the Board of Review that CM 211420, McDonald, is in error in holding that carnal knowledge of a female under sixteen, although conduct denounced by section 458, title 18, United States Code, is not a "crime or offense not capital" condemned by Article of War 96. It is submitted that the McDonald case is erroneous and should be overruled.

The conduct of accused being an offense, denounced by section 458, title 18, United States Code, is a "crime or offense not capital" and, as such, a violation of Article of War 96.

7. Accused is 29 years old. He was inducted 1 September 1942, at Boston, Massachusetts, for the duration of the war plus six months. There was no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the sub-

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stantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. Confinement for five years in a penitentiary is authorized on conviction of the offense of carnal knowledge of a female under sixteen years of age (AW 42; sec.279, Federal Criminal Code (18 USCA 458); D.C. Code, sec.22-2801 (6;32), p.536). The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, is authorized (Cir.229, WD, 8 June 1944, sec.II, pars. 1a (1), 3a).

(On Leave) Judge Advocate

Judge Advocate

Judge Advocate

1st Ind. (257)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 SEP 1944 TO: Commanding Officer, Base Air Depot Area, Air Service Command, United States Strategic Air Forces in Europe, APO 635, U. S. Army.

1. In the case of Private First Class MATTHEW J. MULLANEY (31165639), 2211th Quartermaster Truck Company (Aviation), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3044. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3044).

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

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

BOARD OF REVIEW NO. 1

2 SEP 1944

CM ETO 3046

U N I T E D S T A T E S v.	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated, SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
Warrant Officer (Junior Grade) CHARLES H. BROWN (W-2120902), Headquarters and Service Company, 374th Engineer General Service Regiment.	Trial by GCM, convened at Yeovil, Somersetshire, England, 2 June 1944. Sentence: Dismissal (suspended), confinement at hard labor for six months (suspended) and total forfeitures (suspended as to excess over $120 pay per month for six months).

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

1. The record of trial in the case of the warrant officer 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 of trial has now been examined by the Board of Review and the Board submits this, its holding to the Assistant Judge Advocate General in charge of said Branch Office.

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

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CHARGE: Violation of the 64th Article of War.
Specification: In that Warrant Officer (Junior Grade) Charles H. Brown, Headquarters and Service Company, 374th Engineer General Service Regiment, having received a lawful command from Lieutenant Colonel James S. Barko, his superior officer, to make a statement as to whether he does or does not desire to reenlist on the day following the date of termination, should his appointment as Warrant Officer be terminated, did at Camp Alfoxton, Somerset, England, on or about 19 April 1944, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present when the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for six months. The reviewing authority approved the sentence and ordered it executed, but suspended the execution thereof insofar as it related to dismissal, confinement at hard labor for six months and forfeiture of pay in excess of $120 of his pay per month for six months.

The proceedings were published in General Court-Martial Orders No.242, Headquarters, Southern Base Section, Communications Zone, European Theater of Operations, APO 519, 25 June 1944.

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

On 19 April 1944, Lieutenant Colonel James S. Barko, commander of the 374th Engineer General Service Regiment (R8, 11), which was stationed at Camp Alfoxton, Somersetshire, England (R6), received official correspondence with reference to the termination of accused's appointment as a warrant officer (R11). The fourth and fifth indorsements thereon were admitted in evidence (R7). They were as follows:

" S: 1 May 44
AG 201 Brown, Charles H. (O) MPOB
(12 Mar 44) 4th Ind. RSH/MGE/dl/jwj
Hq. SOS, ETOUSA, 17 April 1944.
To: Commanding General, SBS, APO 519.
It is desired that a statement be obtained from officer as to whether he does or does not desire to reenlist on the day following the date of termination, should his appointment as warrant officer be terminated.
By command of Lieutenant General LEE:
/s/ Russell S. Hahn,
/t/ RUSSELL S. HAHN,
Major, AGD,
Assistant Adjutant General.
7 Incls.
n/c "

"AG 201 - Brown, Charles H. (WO) (S:29 Apr 44)
5th Ind. /Exec.
HQ, SBS, SOS, ETOUSA, APO 519, 19 April 1944.
TO: Commanding Officer, 374th Engr Regt (GS),
APO 508, U.S. Army
(Thru: BSE, SBS, APO 519)

1. For immediate compliance with preceding indorsement.
By command of Brigadier General THRASHER:
/s/ Charles E. Bowen,
/t/ CHARLES E. BOWEN,
Captain, A.G.D.,
Asst Adj General.

7 Incls: n/c "(Pros.Ex.A).

About 4 p.m. Colonel Barko gave the correspondence to Captain James T. Hinton, regimental adjutant, and told him to obtain from accused a statement as to whether or not he would reenlist on the day following the date of termination of his appointment as a warrant officer, should such appointment be terminated (R7, 11). Captain Hinton summoned accused and explained the nature of the correspondence to him. Hinton testified that the situation was not "new" to accused who was cognizant of the fact that a request for the termination of his appointment was submitted. Accused said that he understood the situation and stated that he would not sign such a statement (R7-8). About 4:30 p.m. Captain Hinton entered Colonel Barko's office, informed him of the situation and was told to tell accused he was being ordered to sign the statement and that if he did not, he would be tried

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by general court-martial (R8,11). Hinton returned to accused and told him that he (Hinton) as regimental adjutant was speaking for the commanding officer, "was ordering him to sign the statement one way or the other", and that if he failed to do so it would constitute a failure to obey a direct order and court-martial charges would be preferred. He again said that he would not sign a statement. Colonel Barko then entered the room, picked up the official correspondence and read it to accused. Barko said "This is an order from General LEE and as Commanding Officer of this Regiment, I am giving you a direct order to sign a statement" (R8). Accused replied "I will not sign a statement". When Barko then said "Sign the statement", accused asserted that he "had put in a written request for a transfer and that if such request was approved he would sign the statement, but that he would not sign it if the transfer was disapproved. Barko replied that he was in no position to bargain with any of his subordinates and as accused refused to sign the statement, Barko then told him he would prefer charges, placed him under arrest and sent him to his quarters. During this time the statement was being typed for his signature (R8,11). Captain Hinton testified that during this interview no extension of time was given accused to think over the matter (R9). The following question and answers occurred during the cross-examination of Colonel Barko:

> "Q. Was there any time being set for how long before he would give a statement?
> A. He was asking for more time. And, he flatly refused to sign the statement. If he asked for more time I would have given him time.
> Q. No time was granted whatever?
> A. No sir" (R11).

Colonel Barko sent for three officers, "Chaplain Brown, Mister (Warrant Officer) Knox, Major Wilkes" and told them they could be of assistance to accused. In about 30 minutes accused was again summoned to the office, and the three officers talked with him (R9-10). Hinton testified:

> "he (Barko) then gave him (accused) an order. Mister Brown, 'I will give you five minutes to make a decision' At the end of five minutes and I am sure of this, particularly, Mister Brown had not signed this statement and had asked for an extension of time" (R9).

Colonel Barko testified that after the three officers were summoned he again ordered accused to make a statement and accused refused (R12).

Accused then talked to three additional officers who were brought to the office after he expressed a desire to converse with them (R9,12). Captain Hinton testified that accused talked to the three officers and "stated he would not sign the statement" (R9). Colonel Barko testified that after the additional officers were called to the office, accused asked witness "if he could have until the next morning". "In the mean time" Barko telephoned the "Southern Base Section Engineer's" and received instructions to the effect that if accused did not give a statement, witness was to "have Mister Brown in their office at 9:00 o' clock in the morning". Barko told accused that he could not give him any more time. He finally extended the time to 8:00 o'clock (p.m.) (R12).

During Hinton's evening meal accused handed him a slip of paper and said he would sign a statement. The statement handed to Hinton "wasn't very clear" and after reading it he went to accused's table and asked him to write it "in clearer form".

> "We rewrote the statement and about 8:00 o'clock he signed the statement" (R9).

The statement, which was given to Colonel Barko about 8 p.m. (R12), was admitted in evidence (R9) and was as follows:

> " HEADQUARTERS
> 374TH ENGINEER GENERAL SERVICE REGIMENT
> APO 511 U. S. ARMY
> 19 April 1944
>
> TO WHOM IT MAY CONCERN:
>
> Having been ordered by my Commanding Officer to make a statement as to whether or not I will re-enlist on the day following my termination of appointment as Warrant Officer (Junior Grade) in the event that my appointment be terminated the following statement is hereby made:
>
> 'In the event of termination of my appointment as Warrant Officer (Junior Grade), I will re-enlist on the day following such termination.

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A preference is hereby stated for an Ordnance Unit.'

/s/ Charles H. Brown
/t/ CHARLES H. BROWN
WOJG
USA "(Pros.Ex.B).

4. For the defense, Captain L. Q. Brown, chaplain, a member of accused's regiment, testified that he interviewed accused on the date alleged at the request of Colonel Barko. Accused refused to sign the statement unless he knew whether his request for a transfer "had gone through" (R18-19). Chief Warrant Officer James W. Knox, also of accused's regiment, testified that he and Captain Brown talked with accused who showed them the fourth and fifth indorsements and said he was to make a statement. Accused told Colonel Barko that he would make a statement if he would be given consideration on his request for a transfer which had been previously forwarded. He wanted to know what happened to the request. It was about 7:00 p.m. when he said at the evening meal that he desired to make the statement (R19-20).

Accused after being informed of his rights testified that he was assigned to the regiment about 5 January 1943 as assistant motor officer. Soon after his assignment he "saw difficulties arise" and on 11 April submitted through channels a request for a transfer to a combat or non-combat organization, stating his reason therefor. The request was admitted in evidence over the objection of the prosecution (R13-14; Def.Ex.1). About 4 p.m. 19 April Captain Hinton presented him with some papers and asked him to sign a statement concerning the termination of his warrant and whether or not he would reenlist (R13,15). He read the statement and asked Hinton what had been done about his transfer. Hinton replied that he did not know anything about it. Accused refused to sign the statement and asked for more time, stating that he would "sign a letter from higher headquarters" (R15,18). He was aware of the fact that the indorsement required immediate compliance (R18). He then entered Colonel Barko's office and upon inquiry learned that "the transfer was disapproved". He told the regimental commander that before he made a statement he wanted to know whether the transfer was disapproved by "higher headquarters"

"Then I came out and he gave me a direct order whether or not I would reenlist * * *. A matter pertaining, whether or not I would reenlist was not a matter pertaining to the government" (R15).

He was then placed in arrest and went to his tent. He was again summoned to the office and Chaplain Brown, who took him into an office, stated that the request for a transfer was disapproved. Accused then "went back out" and said that he would not sign the statement. He could not truthfully say whether he would or would not reenlist.

> "He (Barko) said, he would give me five minutes to sign the statement and I didn't sign it in five minutes that is all he said."

After thinking that he would be court-martialed he decided to sign the statement and did so later on (R15).

Asked why he refused to sign the statement he testified as follows:

> "Because he (Barko) gave me five (5) minutes to sign it and I didn't think it was right.
> * * * * * *
> I wanted to know about my transfer and I would like to have more time"(R18).

> "In that transfer, I sent a letter and Army Regulation, 380-15 states that correspondence will be forwarded. And, that goes for my transfer. That is why he held up my assignment. I wanted to get the exact transfer before I made any decision"(R16).

> "I felt I was getting a raw deal and that is why I wouldn't sign it. I would have signed if they put in the paragraph concerning my transfer" (R17).

> "I couldn't sign that, if I got a dirty deal. If I was transferred entirely to a new outfit then I would reenlist again" (R16).

He further testified that he did not think he was getting an even break (R16) and that he felt that the procedure was illegal (R17). He knew that a warrant could be terminated (R17).

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5. (a) The first question presented for consideration is whether the order given accused by Colonel Barko was a legal order. Accused in his testimony contended that the order was not only unjust but illegal in character.

Winthrop, in writing of the words "lawful command", contained in Article of War 21 (now AW 64) states:

> "The word 'lawful' is indeed surplusage, and would have been implied from the word 'command' alone, but, being used, it goes to point the conclusion affirmed by all the authorities that a command NOT lawful may be disobeyed, no matter from what source it proceeds. But to justify an inferior in disobeying an order as illegal the case must be an extreme one and the illegality not doubtful. The order must be clearly repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land. The unlawfulness of the command must be a FACT, and, in view of the general presumption of law in favor of the authority of military orders emanating from official superiors, the ONUS of establishing this fact will, in all cases - except where the order is palpably illegal upon its face - devolve upon the defence, and clear and convincing evidence will be required to rebut the presumption" (Winthrop's Military Law & Precedents-Reprint - 1920, par.888, pp.575-576).

> "That the order was merely unjust or unreasonable would, it need hardly be added, constitute no defence to a charge of disobedience of orders under this Article" (Ibid, par.890, p.576) (Underscoring supplied).

> "The obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full; nothing short of a physical impossibility ordinarily excusing a complete performance.

* * * * * *

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> the inferior cannot, as a general rule, be permitted to raise a question as to the propriety, expedience, or feasibility of a command given him, or to vary in any degree from its terms. Even where the order is arbitrary or unwise, and its effect must be injurious to the subordinate, he should first obey, postponing until after compliance his complaint and application for redress" (Ibid, par.883,884, pp.572-573).

It is indicated by the evidence that a request for termination of accused's appointment as a warrant officer had been submitted before 19 April 1944. On that date Colonel Barko received official correspondence concerning termination of the appointment, and by 4th indorsement thereon dated 17 April the Commanding General, Services of Supply, European Theater of Operations directed the Commanding General, Southern Base Section (Services of Supply, European Theater of Operations) to secure from accused a statement as to whether he did or did not desire to re-enlist on the day following the termination of his appointment as a warrant officer, should such appointment be terminated. By 5th indorsement dated 19 April the Commanding General, Southern Base Section referred this directive for "immediate compliance" to Colonel Barko, accused's regimental commander, and on 19 April, pursuant to the foregoing instructions, Colonel Barko as regimental commander, personally ordered accused to make such a statement. It is apparent that the underlying purpose in obtaining the statement was to take certain measures concerning accused's status with respect to the Army upon the termination of his warrant. In Army Regulations No. 610-15, War Department, 27 February 1943, par.13c, it is provided that

> "Individuals at oversea stations whose temporary appointments are to be terminated will be returned to the continental United States. In such cases the effective date of termination of appointment will be the date of arrival in the continental United States and orders issued by the appointing authority will so state. In appropriate cases, however, where the individual is eligible and agrees to reenlist on the day following the date of termination

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> of appointment, the appointing authority may direct that the termination of appointment be made effective at the oversea station" (Underscoring supplied).

If accused intended to reenlist and was eligible to do so, it was possible that his warrant would be terminated in England and that he would not be returned to the United States. It was necessary, therefore, first to ascertain his intentions with respect to reenlistment in order that appropriate orders might be issued concerning accused's future status. The Board of Review is of the opinion that Colonel Barko, who was carrying out the mandates of his own superiors, gave accused an order which was legal in every respect. Further, it was presumed to be legal and the defense offered no evidence whatsoever, let alone the "clear and convincing evidence" described by Winthrop, to rebut this presumption. Accused contended that the order was unjust in that he wanted more time in which to make a decision, that he wanted to know the status of his request for a transfer, and whether such request was disapproved by "higher headquarters". As has been stated by the foregoing authority, the fact that an order is unjust or unreasonable does not constitute a defense and accused was not permitted to question its propriety or feasibility, or to vary from its terms.

(b) The question next presented is whether accused willfully disobeyed the order as alleged.

> "The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do * * * a particular thing at once and refuses * * * to do what is ordered" (MCM, 1928, par.134b, p.148).

> "It is agreed by the authorities that the offense specified in this Article is a disobedience of a positive and deliberate character. * * * the disobedience must be willful and intentional" (Winthrop's Military Law & Precedents - Reprint - 1920, par.884, p.573).

> "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 accused in person" (Ibid, par.885, p.573).

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Accused ultimately made the statement. Considered from the standpoint of an objective performance there was an eventual compliance with Colonel Barko's order. Such an interpretation of the evidence is not a conclusive answer to the vital question whether this compliance was THE obedience required by the order (CM ETO 3147, Gayles). Accused had two interviews with Barko. In the first, he was given a specific order to sign the statement and he definitely refused to do so. When Barko thereafter said "Sign the statement," accused said he had submitted a request for a transfer and that if such request was approved he would sign the statement, but that he would not sign it if his request was disapproved. Barko said that he (Barko) was in no position to "bargain" with any of his subordinates, and as accused "flatly refused" to sign the statement he was placed in arrest and sent to his quarters. Both Hinton and Barko testified that no extension of time was given accused during the first interview although the regimental commander testified that he "was asking for more time".

After Barko sent for three officers, accused was again summoned to the office about 30 minutes later and talked to these officers. Hinton testified that Barko then gave accused five minutes "to make a decision", and that at the end of five minutes accused had not signed the statement and had asked for an extension of time. Barko testified that he again ordered accused to make a statement and he refused. Hinton testified that accused then talked to three additional officers and "stated he would not sign the statement". Barko testified that accused asked him "if he could have until the next morning". The regimental commander replied that he could not give him any more time but he did finally extend the time to 8 p.m. that evening. Accused signed the statement and it was delivered to the regimental commander about 8 p.m.

The evidence therefore shows that during the first interview accused first definitely refused to obey a specific, legal order and then offered to bargain with his superior officer. The offer was categorically refused. Any request for an extension of time was also denied. As accused "flatly refused" to sign the statement he was placed under arrest. The commission of the offense alleged was a complete and accomplished fact. During the first part of the second interview accused definitely persisted in his refusal to sign the statement and then asked for more time. Finally the regimental commander acceded to his request for an extension of time. Accused testified that after thinking he would be court-martialed, he later decided to sign the statement. His reasons for refusing to sign the statement when ordered to do so were his belief that he was "getting a raw deal", his desire for more

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time in which to make a decision and the fact that he wanted to be transferred to another organization. Accused wanted to remain in the Army but desired to do so solely on his own terms (CM 225598, Davis (1942) 14 B.R. 297; Bull. JAG., Vol. I, No.5, sec.422(5), pp.273-274).

In the last analysis accused signed the statement not in full compliance with Colonel Barko's original orders but solely because he had, by his refusals to sign, actually accomplished one of his purposes in that he gained more time, and because he admittedly feared being court-martialed if he persisted in his refusal to obey the order. An assertion that under such circumstances he did not willfully disobey the previous orders makes a travesty of Colonel Barko's authority as regimental commander. The fact that the regimental commander, after persistent refusals by accused to make a statement, finally gave him until eight o'clock in the evening to comply, does not retroactively cancel or modify the legal efficacy of the previous orders, or the effect of accused's defiant, willful and flagrant disobedience thereof (CM ETO 3147, Gayles). To hold otherwise would be seriously to endanger the cause of military discipline and to put a premium upon a soldier's contumaciousness and obstinacy. The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty.

6. At the close of the case for the prosecution the defense moved for a "finding of not guilty" on the ground that Colonel Barko later gave accused more time in which to make the statement (R12). The motion was denied (R13), and was not renewed at the conclusion of the evidence. Under the rule of CM ETO 564, Neville, and CM ETO 1414, Elia, the error, if any, in denying the motion was thereby waived. It is clear from the foregoing, however, that there was no error.

7. The charge sheet shows that accused is 25 years five months of age and that he was appointed a warrant officer, junior grade, 5 July 1943. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the approved sentence. The separation of a warrant officer from the service by sentence of a court-martial is effected by dishonorable discharge, not dismissal. Although the

use of a sentence of dismissal is inappropriate, it has the same effect as one of dishonorable discharge (CM ETO 1447, Scholbe and cases cited therein).

B. Franklin Ritzy Judge Advocate

Edward H. Sargent Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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

BOARD OF REVIEW NO. 2

16 [illegible] 1944

CM ETO 3056

UNITED STATES	CENTRAL BASE SECTION, COMMUNICATIONS ZONE, formerly designated CENTRAL BASE SECTION, SERVICES OF SUPPLY, EUROPEAN THEATER OF OPERATIONS.
v.	
Private MERLE T. WALKER (34051591), Company F, 115th Infantry Regiment, 29th Infantry Division.	Trial by GCM, convened at London, England, 23 June 1944. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Merle T. Walker, Company F, 115th Infantry Regiment, 29th Infantry Division, ETOUSA, did, without proper leave, absent himself from his organization at Exeter, England, from about 4 July 1943, to about 31 July 1943.

Specification 2: In that Private Merle T. Walker, Company F, 115th Infantry Regiment, 29th Infantry Division, did, without proper leave absent himself from his organization at Exeter, England, from about 4 August 1943, to about 5 April 1944.

CHARGE II: (Nolle Prosequi)

Specification 1: (Nolle Prosequi)

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Specification 2: (Nolle Prosequi)

Specification 3: (Nolle Prosequi)

Specification 4: (Nolle Prosequi)

Specification 5: (Nolle Prosequi)

Specification 6: (Nolle Prosequi)

Specification 7: (Nolle Prosequi)

Specification 8: (Nolle Prosequi)

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

Specification: In that * * * did, at London, England, on or about 19 April 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at London, England, on or about 9 May 1944.

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

Specification: In that * * * having been duly placed in confinement in the Unit Guardhouse, Central Base Section, Services of Supply, ETOUSA, on or about 5 April 1944, did, at London, England, on or about 19 April 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that * * * did, at London, England, on or about 19 April 1944, feloniously take, steal, and carry away, one (1) Waterman Pen and Pencil Set bearing the name "American Bosch", of the value of about nine dollars ($9.00), one (1) pair of civilian rimless glasses, of the value of about fifteen dollars ($15.00), ten shillings (£0-10-0) in English money, of the value of about two dollars ($2.00), and one (1) ration card, the property of Technical Sergeant Henry H. Kellogg, Headquarters Company, Special Troops, ETOUSA.

Specification 2: In that * * * did, at London, England, on or about 19 April 1944, feloniously take, steal, and carry away, one (1) Parker Pen and Pencil Set,

bearing the name "Don Edwards", of the value of about eight dollars ($8.00), and about 13 personal pictures, the property of Private Robert D. Edwards, Signal Section, Headquarters, ETOUSA.

ADDITIONAL CHARGE IV: Violation of the 94th Article of War.

Specification 1: In that * * * did, at London, England, on or about 19 April 1944, feloniously take, steal, and carry away, one (1) Blouse wool, Olive Drab, of the value of about ten dollars and fifty-three cents ($10.53), one (1) wool shirt, Olive Drab, of the value of about four dollars and twenty-two cents ($4.22), one (1) wool trousers, Olive Drab, of the value of about four dollars and seventy-one cents ($4.71), one (1) wool cap, Olive Drab, of the value of about ninety-one cents ($.91), one (1) cotton tie, Khaki, of the value of about sixteen cents ($.16), property, of the United States furnished and intended for the military service thereof.

Specification 2: In that * * * did, at London, England, on or about 19 April 1944, feloniously take, steal, and carry away, one (1) wool trousers, Olive Drab, of the value of about four dollars and seventy-one cents ($4.71), property, of the United States furnished and intended for the military service thereof.

Specification 3: In that * * * did, at London, England, on or about 19 April 1944, feloniously take, steal, and carry away, one (1) wool shirt, Olive Drab, bearing the name "Edwards" inside, of the value of about four dollars and twenty-two cents ($4.22), one (1) Mohair tie, of the value of about twenty-three cents ($.23), one (1) wool cap, Olive Drab, of the value of about ninety-one cents ($.91), property, of the United States furnished and intended for the military service thereof.

He pleaded as follows: To Charge I and its specifications, guilty; (Specifications 1 to 8, inclusive, of Charge II and Charge II, by direction of the appointing authority, were nolle prossed); to the Specification, Additional Charge I, guilty, except the words "desert" and "in desertion", substituting therefor, respectively, the words, "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty; to Additional Charge I, not guilty, but guilty of a violation of the 61st

Article of War; to Additional Charge II and Additional Charge IV and their specifications, guilty; to Additional Charge III and its specifications, not guilty. Two-thirds of the members of the court present when the vote was taken concurring, he was found guilty of all charges and specifications. Evidence of two previous convictions was introduced, both by special court-martial, one for violations of the 61st, 65th, and 96th Articles of War, on 21 September 1942, and one for one day's absence without leave on 3 April 1943, in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 50 years. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. An extract copy of the morning report of Company F, 115th Infantry, of July 5, 1943, showing "Walker" from duty to absence without leave, 2100 hours 4 July 1943, was admitted in evidence as Prosecution Exhibit 1, without objection by the defense. First Lieutenant Eugene H. Vogel, Corps of Military Police, commanding the Central Base Section Guardhouse, London, England, testified that accused was "picked up in a raid" and confined there 31 July 1943. "He was released to a guard to go back to his organization on /3 August 1943/" (R18-19). A stipulation signed by the accused, the trial judge advocate, and by defense counsel, that accused was apprehended by "Agent Charles E. Brill, C.I.D. Detachment, London, England, at London, England, on 5 April 1944" was admitted in evidence as Prosecution Exhibit 2.

Private First Class Robert A. Allen, Guardhouse Section, Central Base Section, London, England, testified that he was in charge of the second floor at the guardhouse (R7) on 19 April 1944 from midnight until eight o'clock in the morning. Accused was a prisoner confined in one of the cells on that floor. At three o'clock that morning he was there but on checking at 4:30 that morning, accused was missing. On examination, it was found that a bar in the grill work in his cell facing the corridor was pulled out. In the corridor latrine (R8), practically opposite accused's cell (R10), the blackout was down and a bar bent (R8, 10).

Detective Constable James Graney, Metropolitan Police, testified that he was on duty 9 May 1944 when he saw accused leave No. 4 Grove Road at 1:15 p.m. with a woman. He informed accused that he was a police officer and arrested and took him to the police station as a deserter from the American forces to whom he was subsequently turned over. The officer returned and searched the Grove Street address and

in a bedroom found a jacket, a pair of trousers, and a forage cap, all part of an American uniform. When arrested, accused was dressed in American uniform, wearing sergeant's stripes, medal ribbon on his left breast, and Air Force circle on his shoulder. Graney identified Prosecution Exhibit 6 as the coat accused was wearing when arrested (R17) and Prosecution Exhibit 7 as the jacket he found in the flat (R18).

Technical Sergeant Henry H. Kellogg, Chemical Warfare Service, Headquarters Detachment, 1st United States Army Group, testified that he was attached to Headquarters Detachment, in London, and billeted at 108 Park Street. On getting up on the morning of 19 April 1944, he found his clothes had disappeared, his blouse, shirt, trousers, overseas cap, and cotton tie (R11). He identified Prosecution Exhibits 3, 4 and 5 as his trousers, overseas cap, and shirt, all property of the United States Government issued to him and being part of the clothing missing as mentioned (R12). Also missing at the same time was his pair of civilian glasses and a pen and pencil set which were in the pockets of his blouse and ten shillings in change in his trousers pocket. None of these have been seen since by Kellogg (R13).

Private Robert D. Edwards, Signal Section, Headquarters, European Theater of Operations, was billeted at 108 Park Street, London, on 19 April 1944. He testified that an overseas hat, a tie, and a shirt, all issued to him by the United States Government, were missing that morning, together with his own $8.00 Parker pen and pencil set, and 12 or 13 personal pictures. He has since seen the shirt but none of the other property (R14). The pen and pencil set was in his shirt pocket (R15).

Technician Third Grade Anthony P. Skupas, Headquarters Detachment, European Theater of Operations, was also billeted at 108 Park Street, London, on 19 April 1944, and on awakening that morning found missing his trousers and a belt, issued to him by the United States Government. They have not since been seen by him (R16).

Sergeant John B. Murphy, "CID" Detachment, Central Base Section, London, England, testified that on 9 May 1944 in response to a call he went to the Bow Road Police Station where he received accused from the civilian police. Accused was dressed in "OD" uniform with sergeant's chevrons. He also identified Prosecution Exhibit 6 as the blouse and Prosecution Exhibit 5 as the shirt accused wore when taken in custody, and that Prosecution Exhibit 4 is the hat which was in accused's possession at that same time. Prosecution Exhibit 7 is the blouse and Prosecution Exhibit 3 are trousers he received from Detective Graney of the Police. He also testified that after due warning to accused, he took his signed and sworn statement (R21), admitted in evidence without objection as Prosecution Exhibit 8. The statement reads as follows:

> "On 5 April, 1944 I was confined in the Guardhouse Section, CBS, SOS, APO 887, U.S. Army awaiting trial by court martial. While in the guardhouse I

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occupied a cell on the third floor. The adjoining cell was occupied by Pvts. Thaddeus C. Kulaga, and Arthur C. Ragan also awaiting court martial. On several occasions Pvts. Kulaga, Ragan and I discussed means of escaping from confinement.

"On 19 April, 1944 Ragan, Kulaga and I intended to put into effect a plan which we had formulated for our escape. At about 0100 hours, 19 April, 1944 after Ragan and Kulaga left their cell by picking the lock with a piece of wire, I attempted to do the same to the lock on my door but to no avail. I then spread the one of the lower bars on my cell door, which allowed me to remove it. I then left my cell; and Ragan and I went to the latrine across the hall and tore a bar from the window. Kulaga then joined us in the latrine and we slid down the drain pipe onto the roof below; and went through a window into a vacant building through which we made our way to the street. We then all proceeded to 108 Park Street, billets for American troops, where we intended to steal some uniforms. Ragan, Kulaga and I entered various rooms at 108 Park Street and removed about three sets of uniforms and anything else of value that was handy. All three of us then went to the bathroom and changed from my prison fatigues to the uniforms that we had just stolen. At this time I identify a blouse, Government Issue, bearing Sgt. stripes and initialed in the collar I-9548, a shirt, Government Issue, bearing the initials HHK-9739, a pair of O.D. trousers Government Issue, bearing name T/3 HH Kellogg, 9739, O.D. cap and sun tan tie, as the property that I removed from 108 Park Street on 19 April, 1944. From the trousers I got about 6 shillings in silver and in the blouse I found a pen. Ragan, Kulaga and I then went to another billet on Green Street where we stole some more clothing. After we all were dressed in uniform we went to the Strand Corner House where Ragan sold the pen I found in my blouse with a pen and pencil set (Parker) which he had gotten out of a blouse in 108 Park St. Ragan, Kulaga, and I went to Walham Green where we spent the day. Kulaga left Ragan and I that night and I have not seen him since. The following day, 20 April, 1944 Ragan and I went to my girl friend's house, 4 Grove Road, Mile End, London. Ragan left me there and I stayed for the night. The next day I seen Ragan was on the 21 April, 1944, at which time he called at 4 Grove Road, Mile End, and

left a blouse O.D. bearing the name Thomas Kiernan, 32894131, A pair of O.D. trousers bearing the name Roffle, and an O.D. cap bearing the initial K-9739. At this time Ragan was dressed in civilian clothes. I have not seen Ragan since that date, 21 April, 1944. I continued to live with my girl (Ada Stevens) 4 Grove Road, Mile End, London; and though she knew I was a deserter and had escaped from confinement she supplied me with money and kept me in her house. I lived at 4 Grove Road, Mile End, London from the 20 April, 1944 until I was apprehended by the civil police on 9 May, 1944."

Written stipulations signed by accused, defense counsel, and the trial judge advocate, fixing the agreed value of the pound at $4.00 and acknowledging accused to have been on 4 July 1943, and to and including the present time, in the military service of the United States (Pros. Ex.9), and fixing the agreed value of the alleged stolen personal property (Pros.Exs.10,11), were admitted in evidence (R22-23).

4. His rights as a witness having been fully explained to him by the court, accused remained silent.

5. The evidence was not complete in proof of each of the charges and specifications to which accused pleaded guilty, but such proof was not necessary. The effect in law of the plea of guilty is that of a confession of the offenses as charged. The record shows that accused was represented by counsel and that the effect of his pleas of guilty was explained to him by the court and was understood by him. While sentence may be legally passed upon the plea of guilty alone (Winthrop's Military Law and Precedent, 1920 Reprint, pp. 278-279; Dig.Op.JAG 1912-1940, par.378(3), pp.189-190; 2 Bishops New Crim. Pro., 2nd Ed., par. 795(2), p.620), good practice and an intelligent consideration of the elements involved in a plea of guilty require that some evidence, if available, of the circumstances of the offense be presented to the court (Wharton's Crim. Ev., Vol.2, sec.587, pp.975-976; CM 236359 (1943), Bul.JAG July 1943, sec.416(3), p.270, CM ETO 839, Nelson).

The only questions left for consideration are whether the intent to remain permanently away has been shown in support of the Specification to Additional Charge I, and the proof of the larcencies charged in Specifications 1 and 2 of Additional Charge III.

Accused escaped from confinement resulting from his apprehension after nearly ten months of unauthorized absence. He immediately engaged in a series of criminal acts terminated only by his being again apprehended. He confesses these acts in his statement in which he speaks of himself as a deserter. The trial court found him to be a deserter, which finding is amply supported by the record of trial.

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Accused's statement also described the larcenies, the place where committed, and articles taken. Considered together with the evidence given by the victims, the court could have reached no other finding than guilty. Under such circumstances, their findings will not be disturbed by the Board upon appellate review (CM ETO 1953, Lewis).

6. The charge sheet shows accused is 23 years and two months of age. He enlisted 13 April 1941 at Camp Blanding, Florida. No prior service is shown.

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

8. 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 the sentence is for more than ten years, the designation of the United States Penitentiary, Lewisburg, Pennsylvania, is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 16 AUG 1944 TO: Commanding General, Central Base Section, Communications Zone, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private MERLE T. WALKER (34051591), Company F, 115th Infantry Regiment, 29th 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 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 3056. For convenience of reference please place that number in brackets at the end of the order: (ETO 3056).

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

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

BOARD OF REVIEW NO. 2

19 AUG 1944

CM ETO 3062

U N I T E D S T A T E S	CENTRAL BASE SECTION, COMMUNICATIONS ZONE (formerly designated CENTRAL BASE SECTION, SERVICES OF SUPPLY), EUROPEAN THEATER OF OPERATIONS.
v.	
Private JACOB OSTHER (32785855), Company B, 99th Infantry Battalion (Separate)	Trial by GCM, convened at London, England, 27 June 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for two years. No place of confinement designated.

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

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1. The record of trial in the case of the soldier named above has been examined 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 Jacob Osther, Company B, 99th Infantry Battalion (Separate), did, at Tidworth, Hants, England, on or about 26 January 1944, desert the service of the United States, and did remain absent in desertion until he surrendered himself at London, England, on or about 28 February 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Two-thirds of the members of the court present at the time the vote was taken concurring, he was found guilty of the Charge and Specification. Evidence was introduced of four previous convictions, two by special court for absence without leave, each for seven days,

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in violation of Article of War 61, and two by summary court, one for being in the room of a female government employee and attempting to conceal himself from military police, in violation of Article of War 96, the other for absence without leave for two days, in violation of Article of War 61. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for two years. The reviewing authority approved the sentence, without however designating any place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 26 January 1944, accused escaped from the XVI District Guardhouse, Tidworth, Hampshire, England, where he was confined as a garrison prisoner (R 3-7; Pros.Ex.1). He proceeded to London and there, prior to 31 January 1944, applied to the Norwegian Conscription Board for enlistment in the Norwegian Merchant Marine (R8). He was dressed in civilian clothes and exhibited a purported certificate of discharge from the United States Army, which, it was stipulated by accused, trial judge advocate and defense counsel, was neither valid nor in proper form (R9,14; Pros.Ex.2). The Norwegian Conscription Board had on 11 January 1944 written accused in response to his letter requesting the Board's assistance in effecting his transfer to the Norwegian Merchant Marine, according to the testimony of Lieutenant C. S.F. Berg, Chief Clerk of the Norwegian Conscription Board, that

> "his service was urgently required because there was an acute shortage at the time -- there still is by the way -- and we said 'We cannot get you out of the American Army, that has to pass through the usual channels, that is to say, you have to send in an application to your commanding officer and when that is done we are more than willing to take you into the Merchant Service.' " (R8).

The Norwegian Conscription Board accepted the purported certificate as proper evidence that accused had been regularly discharged from the United States Army and, in accordance with established procedure, instructed him to apply to the British Emigration Authorities, in the same building, for a clearance (R9-10). The British Emigration Office was suspicious of the authenticity of the purported discharge certificate "in view of the fact that the paper had no heading and no stamp or anything else", and, therefore, advised accused that the matter of his clearance would have to be held in abeyance pending further investigation. During the next fortnight accused made several inquiries of the British emigration authorities as to the disposition of his ap-

plication for a clearance, but by the time they received pertinent information as to the character of the purported discharge certificate, accused had discontinued his visits to their office and had, in fact, left his former place of abode without advising the emigration authorities of his new address (R11-13). On the night of 28 February 1944, accused, wearing civilian clothes, approached a military police sergeant in London, correctly identified himself by name and as a soldier in the United States Army, said "he wanted to turn in", and was taken by the sergeant to the Store Street Guardhouse (R13-14).

4. For the defense, Lieutenant C. F. S. Berg, Chief Clerk of the Norwegian Conscription Board, testified that he remembered a letter in October 1943, indicating that accused was endeavoring to enter the Norwegian Merchant Marine. "I think he applied in vain because after all it is the Conscription Board who can take him on and we can do nothing as long as he is in the American Army". If he were discharged, there would definitely be a place for him in the Norwegian Merchant Marine (R15). Lieutenant Berg identified a letter from Norwegian Selective Service Board, New York, to Headquarters, Inter-Allied Personnel Board, Washington, dated 14 January 1944, requesting consideration of accused's application for discharge and transfer; a reply dated 17 January 1944, advising that "All such transfers overseas are controlled by the Commanding General of the particular theatre of war in which the man is serving", and a letter from the Royal Norwegian Selective Service Board, New York, to the Royal Norwegian Conscription Board, London, dated 25 January 1944, advising that

> "the proper procedure would be for the Norwegian Ministry of Defence to take this matter up with Mr. Osther's Commanding Officer in the United Kingdom. We suggest that it be pointed out to him in the United States, the Selective Service agreement between the Norwegian and American Governments is interpreted in such a manner that a former Norwegian seaman may request a transfer not only to the Armed Forces of Norway, but also to the Norwegian Merchant Marine, a procedure which has been frequently practiced in this country" (R15-16).

5. Accused was duly advised of his rights and elected to take the stand under oath as a witness in his own behalf. He testified that his service as a seaman in the Norwegian Merchant Marine began when he was 14 years of age; that he was a member of that service on 10 September 1942, when he last entered the United States at Mobile, Alabama, where he burnt his hand while on duty in the fire room aboard ship and was sent to the Marine Hospital, and thence, four days later, to New York for further treatment. He stayed there until, having registered

for the draft in November 1942, he was inducted in the United States Army 29 January 1943 (R17-18, 19-20). After two months' service he applied to his company commander for naturalization. When action on his application was indefinitely delayed, he applied unsuccessfully to the same source for transfer back to the Norwegian Navy (R18-19). He came to London from Tidworth in January 1944 "to get into the Norwegian Merchant Marine". When he failed to do so, he voluntarily "turned in to an MP Sergeant". If he had succeeded, he intended

> "to write to the United States Army authorities and explain to them that I was in the Merchant Marine and let them decide what to do and if they wanted me to come back I would come back. My service would be much more useful in the Merchant Marine" (R19).

On cross-examination he testified that he was a Norwegian citizen. As for his citizenship,

> "I want to change if it is possible, but I waited so long and nothing happened and I did not know what to do. I would not fight as good not being a citizen of a country I did not belong to" (R20).

He thought if he were going into combat, he deserved to be a citizen and was dissatisfied because he was not made one. "I will stay in the Army", he testified, "if I can get my citizen papers, but if not I want to go back to the Merchant Marine". He admitted that he forged and fabricated in its entirety the purported discharge certificate from the United States Army, which he exhibited to the Norwegian Conscription Board and presented to the British emigration authorities. (R21).

6. Accused is charged with desertion. His unauthorized absence for the period alleged is established by competent uncontradicted evidence. Under Article of War 28,

> "Any soldier who, without having first received a regular discharge, again enlists * * * in any foreign army, shall be deemed to have deserted the service of the United States * * *."

In view of the clear and obvious purpose, spirit and intent of this particular Article, accused's undertaking to enlist in the Norwegian Merchant Marine, while undischarged as a soldier in the United States Army, would appear to be sufficient to support the inference of requisite intent to remain permanently absent, which is the essential element of the offense of desertion. When there is taken into consideration his escape from confinement, his wearing civilian clothes

contrary to regulations in wartime, his forgery of a discharge certificate, and attempted fraudulent deception by the use of it and his testimony in explanation of his plans, intentions and attitude with reference to his service in the United States Army, no doubt remains that the court's inference was correctly drawn.

7. By action dated 4 July 1944, the reviewing authority approved the sentence but remitted so much thereof as adjudges confinement at hard labor. By subsequent action dated 24 July 1944, he approved the sentence without any remission whatsoever. Each action recites that "Pursuant to Article of War 50½ * * * the execution of the sentence is withheld".

> "Any action taken (by the reviewing authority) may be recalled and modified before it has been published or the party to be affected has been duly notified of the same" (MCM, 1928, sec.87b, p.78).

The record discloses that the first action was never published and there is no showing that accused was duly notified. It would be unusual to so notify him. In the absence of affirmative showing of due notification, it will be presumed that the first action was duly recalled and modified.

8. No place of confinement was designated in the second action approving without remission the sentence imposed by the court. As this is the corrected, and effective, action, it will be necessary for the reviewing authority to designate a place of confinement before publication of the order promulgating the sentence as presently approved.

9. The charge sheet shows that accused is 22 years six months of age and that he was inducted 29 January 1943 at New York City, New York, for a term of enlistment governed by the Service Extension Act. No prior service is shown.

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.

11. Confinement in a penitentiary is authorized for the offense of desertion in time of war (AW42). As accused is under 31 years of age and the sentence is for not more than ten years, the designation of a Federal Reformatory is required (Cir. 229, WD, 8 Jun 1944, sec. II, pars. 1a(1), 3a), unless, despite authorization for penitentiary

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confinement, the reviewing authority should determine upon the designation of a disciplinary barracks as more appropriate.

Judge Advocate

Judge Advocate

Judge Advocate

3062

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 19 AUG 1944 TO: Commanding General, Central Base Section, Communications Zone, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private JACOB OSTHER (32785855), Company B, 99th Infantry Battalion (Separate), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The pending arrangements for accused's enlistment in the Norwegian Merchant Marine immediately upon promulgation of his sentence will, of necessity, involve remission of the unexecuted portion of his sentence to confinement at hard labor. If a place of confinement is designated it should be either Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, or 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3062. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3062).

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 3076

22 JUL 1944

U N I T E D S T A T E S)	CENTRAL BASE SECTION, SERVICES OF SUPPLY, now designated CENTRAL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
v.)	
First Lieutenant BERNARD WILLIAM PATTERSON (0-673717), 90th Troop Carrier Squadron, 438th Troop Carrier Group.)	Trial by GCM, convened at London, England, 3 June 1944. Sentence: Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Bernard William Patterson, 90th Troop Carrier Squadron, 438th Troop Carrier Group, ETOUSA, did, at London, England, on or about 10 May 1944, wrongfully strike Woman Police Constable Stella Taylor, 163 "D" Paddington Police Station, by pushing her against a door.

Specification 2: In that * * * was at London, England, on or about 10 May 1944, drunk and disorderly in uniform in a public place, to wit: Paddington Railway Station Booking Office.

Specification 3: In that * * * did, at London, England, on or about 10 May 1944, commit an assault upon John William Burbidge, by then and there wrongfully striking and kicking the said John William Burbidge in and upon his head, face and body, with his fists, knees, feet, and by striking the said John William Burbidge with a hand telephone set.

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He pleaded not guilty to and was found guilty of the Charge and its specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Central Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but withheld the order directing the execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that as John William Burbidge, a booking clerk at Paddington Station of the Great Western Railway Company, in London, was working alone in his ticket office or booth at about ten minutes to six on the afternoon of 10 May 1944, he was interrupted by accused appearing at a ticket window and addressing him as "You bastard Englishman" (R10). Burbidge simply ignored him and went on with his work (R15). This ticket booth or booking office is located in the corridor leading from the street to the trains and is exposed on all sides; it has one door in the end and a ticket window on each side, being about 11 feet long by eight feet wide (Pros.Ex.1), with counters about 18 inches wide all around except for the door (R14). Accused then went to the door of the booth, fastened with a flimsy bolt (R16) and entered. Burbidge ordered him out, at which accused called him a "cock-sucking bastard Englishman". They then clinched and wrestled as Burbidge tried to push accused, who had placed his hand on some money (R10,13), out of the office. Accused repeatedly struck Burbidge over the head with the telephone receiver (R10). Burbidge eventually got accused outside where the fight was continued, accused punching, kneeing and kicking Burbidge on the body, head and face and tearing his clothes (R11). The fight subsided. Accused returned to the booking office and the fight was continuing there when Woman Police Constable Stella Taylor, of Paddington Police Station, in uniform, arrived and endeavored to stop it (R22). Burbidge asked her to arrest accused for "He has nearly done me in for the money". As she approached, accused said:

> "Don't you come any nearer. I'll shoot your guts out. * * * Go ahead and arrest me. You try it on. You come any nearer and I'll smash your fucking nose in."

He threw the telephone at her but it failed to reach her as the cord held it. As she went nearer, accused gave her a shove and she "went up against the door". She ran to a nearby police station for help. The fight was still continuing on her return with police who took accused in custody (R23). In the opinion of the policewoman, accused had been drinking heavily. He was very violent and the officers had to "literally sit on him to get hold of him" (R24). He was extremely violent and very abusive (R26). In Burbidge's opinion, accused was drunk, his language was filthy and disgusting. He called the policewoman many foul names (R13). Burbidge was unable to continue on duty and closed the office (R14). He did not return to duty until the following afternoon (R11). He normally worked from two in the afternoon until ten at night (R10). There was a considerable number of people gathered observing the distur-

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bance (R18,20,29-30,34). Accused was in uniform (R13,20,23,29,33).

John Mannings, Detective Sergeant, Metropolitan Police, London, stationed at Paddington Police Station, was on duty and arrived at the booking office in question about six o'clock in the evening of 10 May 1944 (R31). Accused was in the middle of the booking office, standing up waving a telephone about in his hand and shouting, "Come on in, you bastard". The booking clerk was up against the counter behind him and seemed in a very distressed condition. Accused was overpowered and taken into custody with difficulty. As he was being taken to the van, he started laughing and said, "Go on; arrest me, you English bastards. This is the best fun I have had today" (R32-33). The police sergeant thought accused just violently drunk (R33). He was taken to Paddington Police Station and subsequently turned over to American military authorities (R34) some two hours and 40 minutes later when he looked sober, walked straight and was very quiet (R35).

Dr. William Andrew Kennedy, a physician and surgeon, of 1 Portman Street, W.1, London, was called to the police station to examine accused about half past seven the night of 10 May. He testified:

> "During the whole time he was lying face down on the floor. Physically he was in a state of disorder. His mouth and face were covered with saliva. His pulse was what we call an alcoholic pulse, and he was not intelligent enough to answer questions properly." (R5).

There was nothing to indicate he should have any special treatment and accused was given the same treatment as any ordinary drunk. He was "simply drunk" (R7).

4. The evidence for the defense consisted principally of accused's denial of any knowledge of the incident at the booking office and that he had ever seen the various witnesses who told of it, together with the inference that the liquor he drank might have been drugged. Testimony was also given that a combat flyer was filling his job and would be relieved for combat if accused was sent back to his station (R45,50).

Accused testified that he came to London the evening of 9 May 1944 on pass, arising the morning of 10 May around 11 or 11:30. He ate dinner before coming to London and did not eat breakfast the morning of 10 May. He went out to see the Tower of London and on finding he was too early for the conducted tour, visited a nearby pub, where he had two sandwiches and some drinks (R38). He there met some people who invited him to a private club, where he had additional drinks. The next he remembers was being in the police station, weak and dizzy. From there the military police took him to the detention barracks where he learned for the first time of what he was accused (R38-39). An officer of accused's organization testified he had known accused more

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than a year and had been out with him several times (R48), that up to a certain point in his drinking, accused is quite happy "and if he gets a little more than usual he becomes a little quarrelsome" (R49).

5. The evidence is convincing and undenied that accused wrongfully struck Woman Police Constable Stella Taylor by pushing her against a door (Specification 1), that he was drunk and disorderly, in uniform, in a public place, Paddington Railway Station, London (Specification 2), and that he committed an unprovoked assault upon John William Burbidge by wrongfully striking and kicking him and by striking him with a telephone set (Specification 3). The evidence fully supports the allegations of the specifications, as well as the findings of the court.

Article of War 96 is a general article which provides that

> "Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court".

Accused is an officer in the military service of the United States, stationed in time of war in an allied country and among a friendly people. Without provocation, in a very public place and while in uniform, he committed an assault upon several of these people, accompanying the assaults with filthy and degrading epithets. The Board of Review is of the opinion that the offenses committed by accused are within the purview of those denounced by the foregoing Article of War.

6. The charge sheet shows accused to be 22 years and one month of age. He enlisted 26 January 1942, at Detroit, Michigan, and served as an enlisted man until commissioned a Second Lieutenant on 5 February 1943. He had no prior service.

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

Richard Burchstein Judge Advocate

Tim Arundel Judge Advocate

Benjamin R Sleeper Judge Advocate

30776

1st Ind.

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

1. In the case of First Lieutenant BERNARD WILLIAM PATTERSON (O-673717), 90th Troop Carrier Squadron, 438th Troop Carrier Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 3076. For convenience of reference please place that number in brackets at the end of the order: (ETO 3076).

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

(Sentence ordered executed. GCMO 80, ETO, 2 Oct 1944)

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

BOARD OF REVIEW NO.1

CM ETO 3078

25 AUG 1944

U N I T E D S T A T E S v.	SOUTHERN BASE SECTION, SERVICES OF SUPPLY, now designated, SOUTHERN BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS.
Privates PHILLIP BONDS (34321399), WALTER JOHNSON (13077231), WYCIE GREEN (36399173), BENNIE BRASHER (38226636), FRED L. THOMAS (37099130), BLEASE SIMPSON (34513444), FREDERICK SMITH (38479836), JOHN E. SYKES (34469155), CLARENCE L. FISHER (34061547), MARTIN WILLIAMS (34111467) and BUSTER WALTERS (34111428) all of the 606th Ordnance Company (Ammunition).	Trial by GCM, convened at Yeovil, Somersetshire, England 8 June 1944. Sentences: Dishonorable discharge, total forfeitures and confinement at hard labor: Bonds, Johnson, Green, Brasher, Thomas, Simpson, Smith, Fisher, Williams and Walters each for five years and Sykes for seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE: Violation of the 64th Article of War.
Specification: In that Privates Phillip Bonds, Walter Johnson, Wycie Green, Bennie Brasher, Fred L. Thomas, Blease Simpson, Frederick Smith, John E. Sykes, Clarence L. Fisher, Martin Williams, and Buster Walters, all of 606th Ordnance Company (Am), acting jointly, and in pursuance of a common intent, having received a lawful command from CAPT. KENNETH R. CHRISTY, their superior officer, to proceed to work, did at Horsington, Somerset, England, on or about 21 May 1944 willfully disobey the same.

Each accused pleaded not guilty, and, three-fourths of the members of the court present when the vote was taken as to each accused concurring, each was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions as to accused Sykes: one by summary court for absence without leave for four days in violation of Article of War 61 and one by special court-martial for larceny of one wool OD shirt in violation of the 93rd Article of War. No evidence was introduced of any previous convictions of the other named accused. Three-fourths of the members of the court present when the vote was taken as to each accused concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority approved each of the sentences but reduced the period of confinement of accused Bonds, Johnson, Green, Brasher, Thomas, Simpson, Smith, Fisher, Williams and Walters each to five years, and of accused Sykes to seven years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record of trial for action under the provisions of Article of War 50½.

3. The evidence for the prosecution showed that on 21 May 1944 the accused were members of the 606th Ordnance Company (Ammunition) stationed at Horsington, Somersetshire, England (R6). The company was under the command of Captain Kenneth R. Christy (R10). When the company returned to camp for its noon meal on said date the members thereof were released from work for the afternoon except a detail of 16 men selected for emergency work at an ammunition depot (R6-7). First Sergeant Alphonso H. Dunham announced in the mess hall that there

would be a company formation at 2.15 p.m. At 2.10 there was a bugle call summoning the men to formation (R6). At formation Dunham called the names of the 16 men for the detail. The 11 accused were included. The detail was placed in charge of Technical Sergeant White (R6-7). Thereafter Dunham discovered that the detail had not entrucked to leave camp. He went to the trucks which were to transport the men to the ammunition depot. Four or five men of the detail were on a truck but the remainder (which included the 11 accused) stood about and made no move to board the trucks (R7). He said to them

> "They are waiting for you out in the depot area, so get on. Those who is getting on get on and who isn't stay off" (R7).

Dunham ordered them a second and then a third time to board the trucks but the accused refused. He then telephoned to the officers' quarters and requested that Captain Christy be informed that the men had refused to go to work (R8). Returning to the truck area, Dunham saw Second Lieutenant James E. Heal, one of the commissioned officers of the company, in the distance and called him over to the area (R7,8). The accused were leaning against the trucks and standing about (R8,9). Lieutenant Heal asked accused Fisher "what was the trouble". Fisher replied "the majority rules". Heal then asked accused Smith what the trouble was and he replied that "He couldn't lift the ammunition boxes at any time" (R8). Lieutenant Heal directed the men to go to work but they "stood with their hands in their pockets and slouched around". He called the men to attention but they did not obey (R7). At that moment Captain Christy arrived on the scene (R7-9) and upon hearing that the men had refused to go to work made inquiry of them as to the reason for their refusal. Accused Smith said he was not able to work. Two or three men stated they "were sticking with the majority". Captain Christy related ensuing events as follows:

> "I told the men to get on the truck and to go to work and not one of them moved. I told them that by refusing to go to work, they were laying themselves open to charge of mutiny and trial by General Court Martial. I again told them to get on the truck and go to work but nobody moved. I told them I would give them 5 minutes

> to get on the truck and by refusing to obey that order would lay themselves open to be tried by general court martial, a violation of the Article of War. No body moved, * * *then I timed them for 5 minutes and told them at the end of 4 minutes that they had one minute to go and at the end of 5 minutes, gave them Right Face, and turned them over to the First Sergeant and told him to march them over to their quarters and place them in arrest, by an armed guard" (R10).

The name of accused Smith did not appear on the company's sick report for 21 May 1944. Accused Walters and Fisher were marked "duty" on the report (Pros.Ex.A).

4. Each accused elected to remain silent. No evidence was submitted by the defense (R11).

5. The proof required to sustain the charge against accused was

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

The evidence without contradiction proved all of these elements of the offense. The conduct of accused approached that of mutiny (Winthrop's Military Law and Precedents - Reprint - p.578; CM ETO 1920, Horton) and was well within the ambit of the offense of willful disobedience of the command of a superior officer under the 64th Article of War (CM ETO 106, Orbon; CM ETO 314, Mason; CM ETO 817, Yount; CM ETO 2005, Wilkins and Williams and authorities therein cited; CM ETO 2608 C. Hughes; CM ETO 3080, Holliday).

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

(I) Inducted, (E) Enlisted.

Name	Age	Date
Bonds	21 yrs.	(I) 21 May 1942
Johnson	20 "	(E) 24 Mar 1942
Green	33 "	(I) 7 Apr 1942
Brasher	22 "	(I) 24 Sep 1942
Thomas	21 "	(I) 23 Sep 1941
Simpson	23 "	(I) 12 Nov 1942
Smith	26 "	(I) 14 Aug 1943
Sykes	21 "	(I) 26 Dec 1942
Fisher	25 "	(I) 9 May 1941
Williams	27 "	(I) 14 Apr 1941
Walters	24 "	(I) 16 Apr 1941

Each accused was inducted for duration of war plus six months, or came under the provisions of the Selective Training and Service Act of 1941. No prior service for any accused is shown.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

3078

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 AUG 1944 To: Commanding General, Southern Base Section, Communications Zone, European Theater of Operations, APO 519, U.S. Army.

1. In the case of Privates PHILLIP BONDS (34321399), WALTER JOHNSON (13077231), WYCIE GREEN (36399173), BENNIE BRASHER (38226636), FRED L. THOMAS (37099130), BLEASE SIMPSON (34513444), FREDERICK SMITH (38479836), JOHN E. SYKES (34469155), CLARENCE L. FISHER (34061547), MARTIN WILLIAMS (34111467) and BUSTER WALTERS (34111428), all of 606th Ordnance Company (Ammunition), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the approved sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentences.

2. An inequality is shown with respect to accused Sykes which does not appear justified by the record. The evidence does not show that he was any more culpable than the other accused. There is no proof that he was contumnacious or disorderly at the time of his disobedience. His prior convictions were for minor offenses. Under such circumstances I recommend that his period of confinement be reduced to five years. This may be done by supplemental action which should be returned to this office for attachment to the record.

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 CM ETO 3078. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3078).

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 3080

- 1 AUG 1944

U N I T E D S T A T E S	IX BOMBER COMMAND
v.	Trial by GCM, convened at AAF Station 166, APO 140, United States Army, 30 May 1944.
First Lieutenant EDWARD F. HOLLIDAY (0669724), 573rd Bombardment Squadron, 391st Bombardment Group (Medium).	Sentence: Dismissal and total forfeitures.

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

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1. The record of trial in the case of the 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 64th Article of War.
Specification: In that First Lieutenant Edward F. Holliday, 573rd Bombardment Squadron, 391st Bombardment Group (M), having received a lawful command from Major Joseph E. Dooley, Jr., his superior officer, to report for briefing for a combat mission on which he was scheduled to fly, to be held at the crew room at 0900 hours, did at AAF Station 166, APO #140, U.S. Army, on or about 21 April 1944, willfully disobey the same.

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CHARGE II: Violation of the 96th Article of War.
Specification: In that 1st Lt. Edward F. Holliday, 573rd Bombardment Sq, 391st Bombardment Gp (M), did, at AAF Station 166, on or about 22 April 1944, wrongfully refuse to accompany and fly as co-pilot with his crew, which had been ordered by Major Joseph E. Dooley, Jr., Commanding Officer, 573rd Bombardment Squadron, 391st Bombardment Group (M), of which said crew formed a part, to fly in a bomber and to execute a combat operational mission over territory occupied by the enemy in Europe.

He pleaded not guilty to, and two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present when the vote was taken concurring, he was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, IX Bomber Command, 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, expressed the opinion that the sentence was wholly inadequate for such grave offenses, but in order that accused will not escape all punishment for his disgraceful conduct confirmed the sentence and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The following is a summary of the pertinent facts shown by the prosecution's evidence:

CHARGE I and SPECIFICATION

Major Joseph Ellis Dooley, Jr., was on 20,21,22 April 1944, the commanding officer of 573rd Bombardment Squadron, 391st Bombardment Group which was stationed at AAF Station 166. Accused at said time was the first pilot of a B-26 bombardment airplane and was a member of aforesaid squadron and group (R7). On 20 April 1944 there was prepared by the Operations Officer of the 391st Bombardment Group an "Alert List and Crew Changes for 21 April 1944" (R23,26,34; Pros. Ex.1) which was posted on 20 April 1944 on the bulletin board in the officers' wash room (R23,34). A relevant excerpt from said List is as follows:

"Position	Crew No.	Pilot	Changes
*	*	*	*
A-3	14	Holliday	Sgt Fiedler as B/T - Add Sgt Conte AG. Sgt Ortega fr Crew #20 as EG"
*	*	*	(Pros.Ex.1).

The foregoing data served to convey the information that on the proposed mission of 21 April 1944 accused's

> "position in the formation will be A-3, the lead flight, left wing, crew number fourteen. The crew had been Sergeant Fiedler as bomb toggler, with Conte added as armorer-gunner, and Sergeant Ortega as engineer-gunner, from crew twenty" (R25).

Major Dooley at approximately 2300 hours on 20 April 1944 "checked" the alert list in the orderly room. He observed that accused was scheduled to fly on the next day's combat mission. He thereupon went to the hutment wherein accused was quartered. Accused was in bed, but awake. Major Dooley informed him that he was scheduled to fly on a mission the next morning as first pilot with his own crew. In reply accused requested Major Dooley to inform Colonel Williams (his command and function not disclosed) that he (accused) did not want to fly as first pilot the next morning. In response Major Dooley stated to accused that he (Dooley) had received an order which required him to schedule accused to fly the next morning and that accused himself could inform Colonel Williams of his wish (R7,13).

On the occasion of this interview with accused, Major Dooley was unable to state the briefing time for the next morning's mission because such information would not be received by the squadron until next morning (R8).

On the morning of 21 April 1944, at approximately seven-fifty o'clock Major Dooley again went to accused's hutment and informed him that briefing time would be at nine o'clock. Again accused asked Major Dooley to notify Colonel Williams that he (accused) did not desire to fly as a pilot or as a first pilot. Thereupon accused was ordered by Major Dooley to be present at the briefing in the crew room at nine o'clock that morning. At eight-thirty Major Dooley returned to accused and advised him that he had one-half hour before appearing at the crew room. Accused made acknowledgment of such fact and did not appear either mutinous or defiant (R8,13,16).

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Major Dooley went to the briefing at nine o'clock. When accused's name was called he did not answer (R8,23). The briefing concluded at about 9:35 or 9:40 a.m. Lieutenant Colonel John S. Samuel, Air Executive of 391st Bombardment Group, inquired if accused had presented himself and received a negative answer from a crew member, Lieutenant Cole (R8). Accused did not appear at the briefing and did not accompany his crew on its mission. A substitute was provided to perform his duties (R23). He was found during the morning and ordered to report to the crew room (R9,23,24). Standard operating procedure of AAF Station 166 required accused to appear at the briefing or to notify proper authority that he would not fly and get excused from the briefing (R23).

At about 11:00 a.m. on 21 April 1944, Major Dooley met accused in the orderly room and placed him in arrest in the squadron area. Accused was then informed that the cause of his arrest was his non-appearance at the briefing that morning and his failure to report for his scheduled combat mission (R9,14).

Briefing for another mission, which was "scrubbed", was held on the afternoon of 21 April. Accused was present. When the mission was canceled Major Dooley called accused into the orderly room and informed him that his arrest had been "lifted". At that time he delivered to accused a letter which advised him that charges for trial by Court-Martial were in process of preparation, that the privilege of obtaining passes to leave AAF Station 166 was withheld and that such denial of privilege was not to be considered punishment under the 104th Article of War or as an act placing him under arrest, restriction or confinement. He acknowledged receipt of the letter (R10,15,37; Court's Ex.II). It was further explained to accused that the reason for lifting the arrest was to permit him to fly, as there was a shortage of pilots (R10,15).

CHARGE II and SPECIFICATION

Accused was scheduled to fly on a combat mission on the afternoon of 22 April 1944 as co-pilot with Major James Sullens (R11,27). His name was placed on the operational schedule posted on the officers' bulletin board and he was duly notified as to time of briefing (R11). He appeared at the briefing dressed in flying clothes at 1600 hours on 22 April. Immediately after the briefing the crews left the crew room and went to their airplanes (R11). Accused did not go to his 'plane. Upon Colonel Williams' orders, Major Dooley made a search for accused. He found him in the squadron area in front of the orderly room, dressed in Class A uniform - "blouse and pinks" (R11). Major Dooley directed accused to enter the orderly room. The ensuing conversation was related by Major Dooley as follows:

In the presence of First Lieutenants Arthur L. Battson and James G. Mills, accused was asked at least three times by Major Dooley to explain the reason he was not at the airplane ready to fly as co-pilot with Major Sullens. Accused finally replied, "Well, you know why I wasn't there." Major Dooley questioned, "Do you mean that you refuse to fly?" Accused answered, "Yes, I do". Accused was then placed in arrest in quarters. Major Dooley informed accused that there was being prepared an additional charge against him for failure to fly that afternoon "and that he would be given the right to have any witnesses and have their names entered on the charge sheet" (R11,28). Major Dooley did not believe that in this conversation he informed accused that he could answer or not answer his questions or that he advised him of his rights (R13). According to Lieutenants Battson and Mills, when Major Dooley initially propounded to accused the first of the above questions, there was no response. Upon its being repeated, accused replied "that he did not think he should answer as he had been advised that anything he said might be held against him" (R28,30). Major Dooley repeated the question a third time and demanded an answer. The response of accused was:

> "inasmuch as the Major had asked him and he wanted a reply to that question, that he would never fly a B-26 again" (R29).

Accused was not advised of his rights under the 24th Article of War (R29,30).

Major Dooley had been informed that accused had previously expressed his intention of attending the afternoon briefing, but of not flying (R23). Accordingly an emergency substitute for accused had been provided (R17,28). Accused did not go on this mission which in fact was flown over "occupied Europe"(R27-28). However, accused did participate in a combat flight over enemy territory on the afternoon of 22 April 1944 as a co-pilot attached to 575th Bombardment Squadron (R52; Pros.Ex.2; R35, Court Ex.1). This flight departed from its station about 2 p.m. on said date. Accused returned from this mission and attended the 4 p.m. briefing for the mission with Major Sullens which he did not perform (R11).

4. The defense presented the following evidence:

(a) Proof that accused had passed the instrument flight test in B-26 type airplane prescribed by AAF Regulations 50-3, AFPS (S-2E) on 29 September 1943 (R16; Def.Ex.A);

(b) Proof that accused had met the requirements for the

Instrument Pilot Certificate (green) prescribed by AAF Regulations 50-3 on 29 September 1943 (R17; Def.Ex.B);

(c) Proof that accused had requested on 16 March 1944 transfer from 573rd Bombardment Squadron, 391st Bombardment Group (Medium) to Air Transport Command, any theater of operations, and that the request had been disapproved (R18; Def.Ex.C);

(d) Letter dated 24 April 1944 from Major Dooley to Commanding Officer AAF Station 166 transmitting present charges which contained the recital

> "In my opinion he should not be eliminated from the service. Because of his training and past experience, I feel that he can be of value to the service" (R19; Def.Ex.D).

(e) Testimony of Staff Sergeant Stanley D. LeMaster, Jr., 573rd Bombardment Squadron, 391st Bombardment Group (Medium), a radio operator gunner, that he had flown with accused both in the United States and in the European Theater of Operations; that he noticed a marked difference in accused's flying ability when flying in formation in England, as compared with his ability when flying in the United States; that he had confidence in accused's ability when he flew alone but not when he flew in formation; that accused did not seem able to keep in formation and seemed nervous and flustered (R42,43).

5. Accused elected to become a witness in his own behalf. His testimony was in substance as follows:

Major Dooley and accused had prior to 20 April 1944 engaged in frequent conversations with respect to accused's flying ability. He had explained to Major Dooley his deficiency in flying in formation and his belief that he was becoming more or less dangerous to others while in formation. During one such interview accused described an episode to Major Dooley which indicated his deficiency in this respect; and had informed his commander that he had previously had his co-pilot do the formation flying for him (R45). Major Dooley was sympathetic to his views and went to see Colonel Williams concerning accused's situation. After his interview with Colonel Williams, Major Dooley notified accused, "You are now a copilot". Accused had requested a transfer but upon its refusal he again conferred with Major Dooley on the subject of his ability to fly in formation and asked to be "evaluated" but Major Dooley informed him that he (accused) had no power to ask for an evaluation board (R45).

Accused had engaged in two and one-half hours of formation flying in the United States. In the European Theater of Operations he had been on nine combat missions, each of about two hours duration. He had difficulty in formation flying on these missions. The difficulty

arose as soon as the ship left the ground, and then at his solicitation his co-pilot did the flying (R50). He knew his deficiency in formation flying as he did not like it in training and had difficulty with it "all the way through". "It had been something that had been drummed in to me to stay away from other airplanes". At the training center in the United States he was an instrument instructor, but had volunteered for combat flying. He "asked to fly a P-38, pursuit or strafing, or Air Transport Command in China or India". He refused to consider flying a "26" or "24". He was transferred to a group that "specialized in formation flying". He refused to fly on 21 April 1944 because in formation he knew his capacity and was incapable of doing it (R51).

On the night of 20 April 1944, Major Dooley came into his hutment and said to him, "You are flying tomorrow morning as first pilot", and he interpreted such statement as an order (R44). In reply he asked if he could request Colonel Williams to change such schedule as he did not feel capable of flying (R49).

Corporal Brennan L. Grifford, the Charge of Quarters, awakened him the next morning and announced that briefing would take place at nine o'clock. He remember Major Dooley informed him that morning that he had a half hour to prepare for briefing at nine o'clock. On the previous evening Major Dooley ordered him to report for flying, but he did not interpret that he was to go to briefing if he were not going to fly. He had never gone on a mission without going to briefing and he had been on nine combat missions (R49). All other members of the crew attended the briefing because if one performed a mission he must be briefed (R50). As a result of an order transmitted to him by Staff Sergeant Donald W. Crawford on the morning of 21 April 1944 he reported to Major Dooley in the orderly room (R46,50). He was placed in arrest in area and quarters "with the exception of flying duty". He was informed as to his rights and Major Dooley asked him if he desired to make a statement. Accused replied in the affirmative, whereupon Major Dooley asked him, "Why were you not at briefing?" In response thereto accused said that inasmuch as he had not intended to fly he considered he "had no business" at the briefing as it was a "confidential business" (R46).

Early that afternoon accused attended the briefing of a mission which was subsequently "scrubbed", and later Major Dooley called accused to his office and informed him that he was taken out of arrest and said to accused, "We will put it this way. We will withhold your privileges, but you are not under arrest. Do you clearly understand that?" Accused answered in affirmative. The letter (Court's Ex.II) was then delivered to him (R46).

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At about four o'clock on the afternoon of 22 April 1944, accused attended a briefing of his crew and informed Lieutenant Williams, acting Operations Officer, who was present, that he did not intend to fly. A substitute was provided (R47). Accused returned to his area, and encountered Major Dooley who ordered him to report to his office. Accused complied with the order. Major Dooley called Lieutenants Mills and Battson into the office and said to them, "I want you to stand there and listen". He then said to accused, "Do you know Major Sullens is down there waiting for you to fly?", and then asked accused to make some statement, but he did not desire to make a statement "without more or less cooling down" (R47). Accused knew at this time he was to be tried under the 64th Article of War for refusing to attend the briefing on the morning of 21 April 1944 (R48). Accused related the conclusion of the conversation thus:

> "Well, I then requested that I not make any statement because of the rights that I believe I had. Major Dooley said, 'I want an answer', or, 'You will answer this.' I realized then I was getting an order. He said, 'Do you mean that you refuse to fly?', and I said, 'Well, yes, I do.' That was the summarization of the conversation. Then he put me in arrest of quarters and I returned to my quarters" (R48).

In response to his counsel's question,

> "When Major Dooley directed a question at you and you answered it, what did you mean--what was behind it?",

accused answered:

> "Well I knew, I gathered that he knew what I meant, that we had been talking about formation flying. I thought he believed I was deficient at it, and that is what my implications meant--I wouldn't fly formation. I felt everyone's neck I was flying with was at stake. That became obvious on two or three occasions." (R48).

Accused's civilian occupation was that of flyer. When he enlisted in the Army he was released from his civilian position ona military leave of absence. It was not a resignation (R48). When he informed Major Dooley that he did not want to fly he did not mean that he did not want to fly again, because flying is the only occupation he knew (R48).

6. The record of trial reveals some confusion of thought in connection with the interview between Major Dooley and accused on the afternoon of 22 April 1944 in the orderly room at which Lieutenants Battson and Mills were present. Accused had attended the briefing of the crew but did not join his crew at the airplane then about to depart on its mission. On Colonel Williams' orders, Major Dooley searched for accused, discovered him dressed in Class A uniform and required him to repair to the orderly room. Major Dooley then asked accused to explain the reason he was not at the airplane ready to fly as co-pilot with Major Sullens. Accused made no answer. Again Major Dooley propounded the question and in response accused said "that he did not think he should answer as he had been advised that anything he said might be held against him". For the third time Major Dooley asked the question and accused finally replied, "Well, you know why I wasn't there". Upon receiving from Major Dooley the query, "Do you mean that you refuse to fly?", accused answered, "Yes, I do". Accused in his testimony confirmed the above facts but explained that he finally answered because he "realized then I was getting an order". It may be assumed that Major Dooley did not as a preliminary matter explain to accused his rights under the 24th Article of War during this conversation. Defense counsel in his cross-examination of Major Dooley strongly suggests that accused's rights were infringed by Major Dooley's insisting upon a reply without warning accused of his right not to incriminate himself. There are two answers to this assertion, either of which entirely eliminates any question as to misconduct on the part of Major Dooley.

It is obvious that accused was fully cognizant of his rights under the 24th Article of War not to be compelled to incriminate himself and that he knew that inculpatory statements made by him might be used against him upon trial. His response to Major Dooley proved that fact. The giving of the warning would therefore have been an idle formality. There is no requirement of law that a suspect must receive the formal warning as to his rights when he asserts them and makes known to his interrogator that he has full knowledge of them. In fact, proof of a formal warning under any circumstances is not a condition precedent to the admission in evidence of a confession. While it may be an expedient and salutary practice, it is not a necessity (16 C.J. sec.1482, pp.723-724; CM ETO 397, Shaffer; CM ETO 1057, Redmond).

A more cogent answer to defense counsel's suggestion is found in the fact that the situation presented by the evidence is not one wherein accused had the right to remain silent. His past conduct was not under investigation. Major Dooley asked no question involving accused's actions on the previous day which gave rise to the charge

under the 64th Article of War (Charge I and Specification). He demanded that accused reply to a question which had for its purpose the determination of accused's present intention with respect to a present order. Accused's reply was not a narrative or statement of a past event or of his past conduct; it was a refusal to comply with an instant order. It was the verbal indication of his dereliction, viz, his refusal to accompany and fly with his crew on the designated combat mission. It was in truth part of the res gestae and admissible as such. The rule respecting the inadmissibility in evidence of involuntary confessions has no application.

> "The rules relating to res gestae on the one hand, and to admissions and confessions on the other, are separate and distinct. * * * Where evidence of an act of accused is admissible, his declarations accompanying the act and tending to qualify, explain, or characterize it are a part of the res gestae of the act, and as such are admissible in evidence" (16 CJ, sec.1116, pp.575-576).

7. In order to sustain a conviction of the offense of willful disobedience of the lawful command of a superior officer in violation of the 64th Article of War (Charge I and Specification) the burden is upon the prosecution to prove the following elements:

> "(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 accused willfully disobeyed such command" (MCM, 1928, par.134b, p.149).

The record is replete with proof that accused received from Major Dooley a direct oral order at approximately 7:50 a.m. on 21 April 1944 to be present at nine o'clock a.m. on that date at the briefing of his crew for a combat mission on which he was scheduled to fly. At 8:30 a.m. Major Dooley returned to the hut and advised accused that he had a half hour before appearing at the crew room. It is further shown by competent evidence, and in fact admitted by accused, that although he knew Major Dooley was his superior officer and was authorized to give the order he deliberately did not attend the briefing of the crew which was conducted at the time and place of which accused received notice from Major Dooley. No extended discussion of the evidence is necessary inasmuch as the ultimate necessary facts constituting the offense stand undisputed. The record is legally sufficient to support the findings of accused's guilt of Charge I and its Specification (CM ETO 817, Yount; CM ETO 1232, Baxter).

8. The allegations of the Specification laid under the 96th Article of War (Charge II and Specification) recite that accused

> "did * * * wrongfully refuse to accompany and fly as co-pilot with his crew, which had been ordered by Major Joseph E. Dooley, Jr., * * * to fly in a bomber and to execute a combat operational mission over territory occupied by the enemy in Europe".

Competent substantial evidence, including accused's testimony, shows that accused had been regularly scheduled to fly on a bombing mission as co-pilot with a crew of which Major Sullens was pilot on the late afternoon of 22 April 1944. He attended the briefing of the crew, but thereafter by deliberate choice did not report to the bomber. While his crew, complete except for accused, and ready "to take-off", awaited his arrival at the airplane, he was discovered by Major Dooley in the squadron area dressed in Class A uniform. After an exchange of words, Major Dooley propounded to accused the direct question, "Do you mean that you refuse to fly?". Accused responded, "Yes, I do". Accused was placed in arrest. The mission was performed with a substitute performing accused's duties.

Accused's refusal to accompany his crew and fly on the bombing mission over enemy territory was a considered, deliberate act. It exhibited a spirit of insubordination and defiance of superior authority which was highly culpable and reprehensible. Accused's own testimony gives rise to the inference that he not only deliberately refused to perform his duty on the immediate mission, but also that the refusal was the execution of a premeditated design on his part to secure the termination of the service which required him to perform "formation flying". Such conduct in flouting military orders and authority and in attempting to substitute his will and choice for that of his superiors clearly constituted a disorder or neglect to the prejudice of good order and military discipline in violation of the 96th Article of War (CM ETO 1366, English; CM ETO 1057, Redmond; CM ETO 1920, Horton).

The evidence offered in proof of Charge II and its Specification very closely resembles that involved in CM ETO 2212, Coldiron. The specification herein is a duplicate of those which form the basic pleading in the Coldiron case after the court excepted the phrase "before the enemy". The discussion of the Board of Review in the Coldiron case with respect to the culpability of accused therein is equally applicable to the actions of accused in this case. The principle of the Coldiron decision is confirmed and upon its authority the Board of Review is of the opinion that the evidence is legally sufficient to support the findings of accused's guilt of Charge II and its Specification.

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9. The charge sheet shows that accused is 23 years four months of age. He was an aviation cadet from 15 January 1942 to 15 January 1943 inclusive, and was commissioned as second lieutenant, Officers' Reserve Corps on 14 January 1943. No prior service is shown.

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

11. The sentence of dismissal from the service and forfeitures of all pay and allowances due or to become due is authorized upon conviction of an officer of offenses under the 64th and 96th Articles of War.

B Franklin Sites, Judge Advocate

Elwood K. Sergeant, Judge Advocate

Edward L. Stevens Jr., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. - 1 AUG 1944 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant EDWARD F. HOLLIDAY (0669724), 573rd Bombardment Squadron, 391st Bombardment Group (Medium), attention is invited to the foregoing holding of the Board of Review that the record 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 3080. For convenience of reference please place that number in brackets at the end of the order: (ETO 3080).

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

(Sentence ordered executed. GCMO 63, ETO, 7 Aug 1944)

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

BOARD OF REVIEW No. 1

ETO 3081

12 AUG 1944

UNITED STATES	1ST U.S. INFANTRY DIVISION.
v.	Trial by GCM, convened at Ballercy, Calvados, Normandy, France, 4 July 1944. Sentence: dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private WILBUR L. SMITH (39913213), Medical Detachment, 26th Infantry.	

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private Wilbur L. Smith, Medical Detachment, 26th Infantry, did, in the vicinity of Caumont, Calvados, France, on or about 27 June 1944, while before the enemy, by his misconduct, endanger the safety of the 26th Infantry Regimental Aid Station which it was his duty to safeguard, in that he did become drunk and in the vicinity of personnel of the 26th Infantry Regimental Aid Station, did throw a live hand grenade, the explosion of which endangered the lives of these soldiers.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence of three previous convictions was introduced: two by summary courts for absences without leave for six and three days, respectively, in violation of Article of War 61, and one by special

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court-martial for being drunk and disorderly in uniform in a public place in violation of Article of War 96 and breaking restriction, stated to be in violation of Article of War 69. Three-fourths of the members present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, directed that pending further orders accused be held at 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution was as follows:

On 27 June 1944 accused, who since approximately November 1943 was a surgical technician in the Medical Detachment, 26th Infantry, was on duty in the regimental aid station. He had no special duties to perform at the time, but was available for duty on a 24-hour basis (R12,15-16,21). On that date the aid station was located approximately one mile northwest of the town of Caumont, (Calvados) France, between 2000 and 3000 yards from the enemy. The 26th Infantry occupied a defensive position east and south of the town and was engaged with the enemy, as indicated by occasional small-arms fire and shells, some of which were bursting in the air approximately 300 yards from the aid station (R8,15).

On the morning of the day in question Private First Class William M. Walters, also a member of the regimental medical detachment, who was brewing coffee, saw accused with another member of the detachment (evidently Private Earl Isham) at the rear of a two-and-one-half-ton supply truck near the regimental headquarters motor pool (R5-6,8,9,12). Accused was "falling down in the back of the truck", "and when he walked away anyone could tell that he was intoxicated" (R8). He had a fragmentation hand grenade in his hands and was "pulling" the firing pin of the grenade despite the remonstrance of the other man. Accused remained about five minutes "pulling the firing pin out a little ways and pushing it back" and then proceeded toward the regimental command post (R6,7). Thereupon at approximately 8:30 a.m. Walters went to the pup tent of Technical Sergeant Chauncey B. Shepard, acting first sergeant of the detachment, awakened him and reported that accused "was over there intoxicated and had a grenade in his hand," "informed him of what was going on" and told him the direction in which accused had gone (R6,9,10-12,16). Shepard arose, proceeded to the rear of the truck and saw accused "walking away from our area in a general direction of the Reconnaissance Troop which is in our general area" (R12,16). Meanwhile Walters returned to a point about ten yards from the truck and "went on about my business which was washing some pots and pans" (R6). Shepard stood by the truck and observed accused talking to members of the Reconnaissance Troop who were

eating breakfast (R17). Shepard "had no idea" accused would use a grenade for any dangerous purpose (R20).

Approximately 20-30 minutes later, about 9:00 a.m., accused approached the back of the truck, where Shepard and Isham were seated, and asked Shepard what he had said about him. Shepard denied saying anything about him and called Private Walters to verify his statement (R13,18). Shepard testified that in his opinion accused was drunk, because his speech was very slow, hesitant and "wasn't exactly clear" and he staggered when he walked. His conduct was not sober (R14). Accused thereupon pulled the grenade from his pocket, looked it over, fumbled with it, "apparently quite deliberately" pulled out the firing pin, placed the firing pin on the tail-gate of the truck and held the grenade "for a few minutes", but made no "gesture to throw it" at that time. He did not threaten Shepard by words (R13,18,19). He was not accusing Shepard of talking against him while pulling out the pin - "he seemed more attentive about the grenade". He was "weaving back and forth" (R19). He mumbled to himself, but made no statement as to what he was going to do (R13,17). He then released the lever on the grenade, allowing it to "fly up" and ignite the fuse, which began to smoke in his hands. After holding the grenade for a "very short time" he "threw it back of him on the ground" - "more or less back of him from where he stood" (R13,19,20), in an apparent attempt to throw it away. He did not throw it "very far". Shepard testified accused's condition probably made him "slower to react" in disposing of it (R18). He did not "appear to throw it" at Shepard or the truck (R19), but called no warning when he threw it (R20). Shepard "pulled back in the back of the truck", accused fell or threw himself flat on the ground "fairly fast" and the grenade exploded at a point approximately six feet from Shepard and from four to six feet from accused (R6,13,18).

The explosion caused two holes in the top of the canvas of the truck (R13). Present in the immediate vicinity, in addition to Shepard and Isham, were Walters and Private First Class Kenneth Moran (evidently a member of the detachment) (R8,14). Walters inquired "'Is anybody hurt'" (R6). Shepard and Isham jumped out of the truck and, believing accused might be injured, examined him, but discovered that he was not (R13). Accused "got up and staggered away" from the truck, holding his abdomen. Fearing anew that accused might be injured, Shepard and Walters attempted to examine him further, but he would not permit them to do so (R7,13). Meanwhile a member of the detachment awakened the detachment commander, Captain Dalrymple, who appeared, ordered Shepard to call a guard from the command post and ordered accused to "pack his roll up" (R7,11,13). After the guard arrived pursuant to Shepard's call, Captain Dalrymple searched accused and removed from his person two bottles, the contents of which "had a very distinct odor of alcohol" and upon ignition "burned very well" (R7,14). Shepard testified that accused "apparently stole it from the truck", which was not guarded (R16-17).

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Shepard further testified that, in his opinion, accused at the time of the incident was not capable of performing his duties as surgical technician (R21); also that it was not customary in the detachment to have men carry firearms or other missiles (R18). Walters testified that the men were not allowed to have any grenades or ammunition in the area and that he had always been told that they could not do so (R10).

4. At the conclusion of the prosecution's case the defense moved "to dismiss the charge and the specification thereunder". The court denied the motion (R22-23). After accused was advised concerning his rights he elected to remain silent, and the defense introduced no evidence (R23).

5. Article of War 75, diagrammatically presented, provides as follows:

"	)	(1) misbehaves himself			)		
	)	(2) runs away			)		
	)	or			)		
Any officer	) before	(3) shamefully abandons			) any fort	)	which it is
	)	or			) post	)	
or	) the	(4) delivers up			) camp	)	his duty
	)	or			) guard	)	
soldier	) enemy	(5) by any	)		) or	)	to
	)	(a) misconduct	) endangers		) other	)	
who	)	(b) disobedience	) the		) command	)	defend,
	)	or	) safety of		)	)	
	)	(c) neglect	)		)	)	

* * * shall suffer death or such other punishment as a court-martial may direct."

The Specification herein, analysed in parallel diagrammatic form, alleged the following facts:

) in the	) by his misconduct,	) did en-	) the 26th	) which it
) vicinity	) in that he did be-	) danger	) Infantry	) was his
) of Caumont,	) come drunk and in	) the	) Regi-	) duty to
) Calvados,	) the vicinity of	) safety	) mental	) safe-
Accused) France, on	) personnel of the	) of	) Aid	) guard.
) or about	) 26th Infantry Reg-	)	) Station	)
) 27 June	) imental Aid Station,	)		
) 1944, while	) did throw a live	)		
) before the	) hand grenade, the	)		
) enemy	) explosion of which	)		
	endangered the lives	)		
	of these soldiers	)		

The Specification follows Form 48 (AW 75), Forms for Specifications, Manual for Courts-Martial, 1928, Appendix 4, page 244 (the language of

which form follows portions of Article of War 75 verbatim), with the single exception that the clause in the form, "which it was his duty to defend" (derived from the statutory clause, "which it is his duty to defend"), has been altered in the Specification to: "which it was his duty to safeguard".

(a) The verb "safeguard" is defined generally as follows:

> "To guard; to protect; to provide a safeguard for" (Webster's New International Dictionary, 2d Ed., p.2197).

The noun "safeguard" is defined as

> "A means of defense or protection; a guard" (Ibid.).

An interpolation of the foregoing definitions results in the following definition of the verb "safeguard":

> "To provide a means of defense for".

The noun "safeguard" also has a more specific military connotation, as indicated in the definition in The Basic Field Manual on Rules of Land Warfare:

> "a detachment of soldiers posted or detailed by a commander of troops for the purpose of protecting some person or persons, or a particular village, building, or other property" (FM 27-10, 1 Oct 1940, par.241, p.66);

and in the definition in Manual for Courts-Martial, 1921, in the discussion of Article of War 78 (forcing a safeguard):

> "a detachment, guard, or detail posted by a commander for the purpose of protecting some person or persons, place, or property" (MCM, 1921, par.428, p.384).

The word "defend" is thus defined:

> "To repel danger or harm from; to protect; to secure against attack; * * * to uphold; guard; as to defend a town" (Webster's New International Dictionary, 2d Ed., p.687).

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The foregoing definitions indicate that the verb "safeguard", certainly when applied to a medical aid station, as in the Specification, is the practical equivalent of "protect" or "defend", although it has a more limited scope, as indicated.

Article of War 75 is couched in broad phraseology for the evident purpose of encompassing various acts of misconduct too numerous and accompanied by too many varying types of circumstances to admit of specific enumeration. Its very title, "Misbehavior before the Enemy", corroborates the breadth of its scope (see MCM, 1928, par.141a, p.156 and authorities cited infra). The Board of Review, approving a construction of the terms of the article consonant with such evident purpose, is of the opinion that th clause in the Specification: "which it was his duty to safeguard", sufficiently alleges that element of the offense covered by the clause in the statute: "which it is his duty to defend", despite the fact that "defend" is a generic term which is more inclusive than "safeguard".

(b) Even if it be assumed that a regimental aid station is not strictly a "fort, post, camp or guard" within the meaning of Article of War 75, yet it is clearly an "other command" of the same general class as those enumerated. As Brigadier General Enoch H. Crowder, then The Judge Advocate General of the Army, testified before the Subcommittee on Military Affairs, United States Senate, 64th Congress, 1st Session, on the hearing on S.3191, being a project for the revision of the Articles of War (session of 8 Feb 1916):

> "New article 75, which substitutes articles 41 and 42, has been further broadened so as to include any kind of command, instead of the particular commands 'fort, post, or guard,' which we find mentioned in the existing law" (Calendar No.122, Senate, 64th Cong., 1st Sess., Report No.130, Appendix, p.78).

As the Board of Review held in CM ETO 2602, Picoulas, the words "'other command' must refer to things or objects of the same general nature as 'fort, post, camp, guard'" (see authorities therein cited). The Board of Review is therefore of the opinion that the Specification sufficiently alleges an offense in violation of Article of War 75.

6. (a) Uncontroverted evidence establishes that on the morning in question accused was on 24-hour duty as surgical technician with the 26th Infantry Medical Detachment, located at the regimental aid station near the front line of the regiment in the vicinity of Caumont, and that the detachment, like the remainder of the regiment, was before the enemy; that he had become drunk; that he deliberately removed the firing pin from a fragmentation hand grenade, caused its fuse to be ignited and threw the grenade to a point where it exploded within six feet of two of the personnel of the aid station and in the immediate vicinity of two others; and that the explosion endangered the lives of these four soldiers in addition to his own. That accused endangered the safety of

the aid station and its personnel is obvious. From evidence of the tactical situation of accused's detachment and of the aid station and evidence of his status at the time, it may be inferred that he was under a duty to safeguard, i.e. defend (supra), the station and the personnel located there.

In discussing the several elements of the offense by "any officer or soldier" in violation of Article of War 42 (forerunner of the present Article 75), Winthrop comments upon the clause, "which he is commanded to defend" (progenitor of the clause in the present article, "which it is his duty to defend"). It is evident from the context of the author's comment that it applies to personnel of any "fort, post or guard" whose commanding officer is under a duty to defend the same, such duty devolving in turn upon each member thereof. The comment is as follows:

> "'WHICH HE IS COMMANDED TO DEFEND.' This term is regarded as substantially synonymous with that employed in the original Article of 1775--'committed to his charge,' or the fuller phrase of the corresponding British Article--'committed to his charge or which it was his duty to defend.' It is conceived that, to constitute the offence, no express or specific instruction to defend the post need have been given, but that it is sufficient if an obligation to make a defence was--as it could hardly fail to be--devolved upon the commander as a necessary or reasonable implication from the order which assigned him to the command, or as a duty properly attaching to his position" (Winthrop's Military Law & Precedents - Reprint, p.625).

(b) The only question requiring further consideration is whether accused was guilty of such "misconduct" as to constitute a violation of Article of War 75. Misconduct, like running away, is but a particular form of misbehavior specifically made punishable by the article (see MCM, 1928, par.141a, p.156; Winthrop's Military Law & Precedents - Reprint, pp.622-623; CM ETO 1249, Marchetti; CM ETO 2602, Picoulas).

> "Misbehavior is not confined to acts of cowardice. It is a general term, and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. * * *
>
> * * * * * * * *

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1928, par.141a, p.156).

"Misbehaviour before the enemy is often charged as 'Cowardice;' but cowardice is simply one form of the offence, which, though not unfrequently the result of pusillanimity or fear, may also be induced by a treasonable, disloyal, or insubordinate spirit, or may be the result of negligence or inefficiency. An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offence as if he had deliberately proved recreant.

* * * * * * * * *

"The act or acts, in the doing, not doing, or allowing of which consists the offence, must be conscious and voluntary on the part of the offender" (Winthrop's Military Law & Precedents - Reprint, p.623).

"Misbehavior before the enemy may be exhibited in the form of cowardice, or it may consist of a willful violation of orders, gross negligence or inefficiency" (Dig. Op. JAG, 1912, XLII A, p.128).

In CM NATO 240, Stojak (1943), accused was charged, among other things, with a violation of Article of War 75 in that he did

"while before the enemy, by his misconduct endanger the safety of the antiaircraft defense of his platoon and surrounding ammunition dump, which it was his duty to defend in that he caused such disorder and confusion that it disrupted the functions of the remainder of his platoon at his antiaircraft gun position during a time it was threatened by enemy forces".

The proof showed that while in a drunken condition he, among other things, procured a Thompson submachine gun with which he threatened and fired upon military personnel, including his superior officer, and picked up a hand grenade, thereby gravely endangering the safety of his comrades and the vast stores of ammunition which it was his duty to guard. The Board of Review (sitting in the North African Theater of Operations) held that accused was properly found guilty as charged.

The situation in the instant case is similar. The evidence is clear that, although accused was intoxicated, his acts were not only conscious and voluntary, but were done in a spirit of reckless insubordination and were of a gravely serious and dangerous character. The Board of Review is of the opinion that accused was clearly properly found guilty of "misconduct" within the meaning of Article of War 75. No evidence in the nature of a defense to the allegations was presented.

In view of the foregoing, it is apparent that the motion by the defense "to dismiss the charge and the specification thereunder", which may be regarded as a motion for findings of not guilty, was properly denied by the court (MCM, 1928, par.71d, p.56).

7. The charge sheet shows that accused is 22 years one month of age and was inducted on 28 April 1943 to serve for the duration of the war plus six months. He had no prior service.

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

9. The penalty for a violation of Article of War 75 is death or such other punishment as the court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

B. Franklin Riter Judge Advocate

Edward H. Lazarus Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 12 AUG 1944 TO: Commanding General, 1st U.S. Infantry Division, APO 1, U.S. Army.

1. In the case of Private WILBUR L. SMITH (39913213), Medical Detachment, 26th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty 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 3081. For convenience of reference please place that number in brackets at the end of the order: (ETO 3081).

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

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

BOARD OF REVIEW NO.1

CM ETO 3091

18 AUG 1944

U N I T E D S T A T E S	29TH INFANTRY DIVISION
v.	Trial by GCM, convened at APO 29, U.S. Army, 4 July 1944. Sentences: Dishonorable discharge, total forfeitures and confinement at hard labor: BETTERS, 25 years; MURPHY, 20 years; SCHIMPF, 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.
Private First Class MARTIN T. MURPHY (36367812), Private First Class WILSON T. SCHIMPF (35402161) and Private GEORGE D. BETTERS (37564541), all of Company "B", 121st Engineer Combat Battalion.	

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

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

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

Charge: Violation of the 75th Article of War.
Specification: In that Private George D. Betters, Company "B", 121st Engineer Combat Battalion, Private First Class Wilson T. Schimpf, Company "B", 121st Engineer Combat Battalion, and Private First Class Martin T. Murphy, Company "B", 121st Engineer Combat Battalion, acting jointly, and in pursuance of a common intent, did, while before the enemy, quit their post at les Foulons, France, on or about 24 June 1944, for the purpose of plundering and pillaging.

Each accused pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, each

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was found guilty of the Charge and Specification. No evidence of previous convictions was introduced as to any accused. Three fourths of the members of the court present when the vote was taken concurring, 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: Betters for 25 years, Murphy for 20 years and Schimpf for 20 years. The reviewing authority approved each of the sentences, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement of each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution summarizes as follows:

On 24 June 1944 the three accused were members of Company "B", 121st Engineer Combat Battalion (R11,12,14) which was in support of the 116th Combat Team, which itself was in the front lines (R14). The commanding officer of the battalion did not give any of accused permission to leave the command post (R13,14). In the course of the afternoon of that day the three accused in a drunken condition entered the house of Mme. Eugene Lelimausin, in les Foulons, near St. Clair, and wandered throughout her house including the attic, without her consent (R15). (Accused Schimpf testified to the effect that this house was about one-half mile from the bivouac area (R22)). Mme. Lelimausin called Georges Bertrand, a neighbor, to her house because she could not get rid of the three accused. Bertrand arrived about 3 p.m. and when he left, accused, uninvited, followed him into his house (R4,8, 10). There they demanded cider from him, which he served to them. Accused were apparently still under the influence of alcohol. Accused Betters and Murphy then proceeded to fire about five or six shots from their rifles within the house (R4-10). Several shots were fired into the corner of a chimney in the house, one in a closet and one through a cupboard drawer. The last mentioned shot destroyed some of Bertrand's personal papers (R7,13; Pros.Ex.4). Accused then searched the house, looking for "various articles". Bertrand's wallet, containing between 6,000 and 7,000 francs, and a silverware case, containing six silver teaspoons, were on a shelf in a cupboard. Bertrand did not see who took the wallet but he did see accused Betters in possession of the wallet, dividing the money therein among the three accused (R4,5,9; Pros.Exs.1, 3a,3b,3c). A search of the three later in the day by the division provost marshal revealed that accused had the following money and property on their respective persons:

Betters: 2900 francs, part of a 1000-franc note and part of a 100-franc note; three of the teaspoons.

Murphy: 1500 francs, part of a 1000-franc note and part of a 100-franc note.

Schimpf: 1300 francs and part of a 1000-franc note; the wallet.

The notes found on the three accused totaled 6,850 francs. Part of the notes, the wallet and the teaspoons were identified as the property of Bertrand (R5-7,11,12; Pros.Exs.1,2, 3a,3b,3c). While in Bertrand's house, accused Murphy said in French, "'Nous servir tous seuls.'" (The record shows the English equivalent as, "'We serve ourselves.'")(R9). Accused paid Bertrand 100 francs of the latter's own money for the cider he served them (R8,9).

Bertrand sought help from the American military police at the house of a Mme. Briard (R8). Upon his return he found several doors in his house broken (R7,13). Accused were taken by military police from Bertrand's house to the division command post where they were searched, as above indicated. Questioned concerning the incident, accused stated that the French civilian (Bertrand) had invited them in for a drink, that they had had a "few drinks" and had "taken a couple of shots around the place". Betters stated he had found the wallet, containing some French currency, lying on the ground near a barn on the premises of the French civilian, picked it up and gave some of the money to both Murphy and Schimpf. Following the questioning, accused were placed under arrest and sent to their unit (R11).

4. (a) The defense introduced opinion testimony of officers of accuseds' platoons that Schimpf was a very good soldier and worker and was in no kind of trouble before the incident in question (R15-16), and that accused Murphy was a very good soldier and acting assistant squad leader (R16).

(b) Each accused elected to testify in his own behalf:

Betters testified that on the morning in question the three took a walk down the road, entered a house about a half-

mile from the bivouac area and drank some cider (R17,20). Thence they proceeded to and were invited into a second house, where they had more cider and some cognac. They were then invited into a third house (that of Bertrand), where they drank still more cider and picked up three spoons from the floor. Witness picked up a wallet near a barn outside the third house. He shared the money with Schimpf and Murphy. They left and witness shot at a limb of a large tree with his rifle. They had never been told that they were not to leave the bivouac area. On cross-examination, he testified that no one told them they could leave. He mentioned a "fourth place" visited by them, the house of an old woman, a young woman and two children. Bertrand's house was the third stop. Witness thought the money in the wallet belonged to the old lady. He had about 300 or 400 francs before leaving the bivouac area (R18-19).

Murphy testified that they drank cider in two houses and then proceeded to the house of the Frenchman (Bertrand) who, witness believed, invited them in. While they were drinking cider there, Bertrand pointed to the ceiling and said "'Boche'", which witness thought to mean that they were Germans "up there". When they left the house, witness fired a shot or two from his rifle at a limb on a tree on the premises. They were never told not to leave their bivouac area until the day following the incident (R20), nor were they given permission to leave. The first time witness had seen or heard about the teaspoons was at the military police station. He did not know how the money got into his pockets (R21).

Schimpf testified that the three had cider in the first house and next visited the house "where the lady claimed we walked all around her house", and where they drank more cider. The Frenchman (Bertrand) invited them into the third house for a drink of cider. After drinking the cider they went outside, witness fired two shots at a limb on a tree and Betters fired one shot. Witness had no French money when they left the bivouac area. He did not know how he came into possession of the wallet, but Betters found it at the third house and put into witness' pocket some of the French money it contained. No one gave them permission to leave the bivouac area (R22-23).

5. (a) The Specification alleges in part that the three accused,

> "acting jointly, and in pursuance of a common intent, did, while before the enemy, quit their post at les Foulons, France, * * * for the purpose of plundering and pillaging."

Article of War 75 provides in pertinent part:

> "Any * * * soldier, who, before the enemy, * * * quits his post * * * to plunder or pillage * * * shall suffer death or such other punishment as a court-martial may direct."

The Specification follows verbatim (except that more than one accused are charged) the phraseology of Form No.52, Forms for Specifications (A.W.75), Manual for Courts-Martial, 1928, Appendix 4, p.245, and that of the quoted portion of Article of War 75. It undoubtedly states an offense in violation thereof.

(b) Winthrop comments upon the offense as follows:

> "Quitting post or colors to plunder or pillage. This offence, which, if permitted to be indulged in by troops, would convert legitimate warfare into mere marauding, and a disciplined military force into a band of stragglers and free-booters, is one of those which are regarded as the most immediately fatal to the discipline and morale of soldiers, and as calling in all cases for severe punishment. It has been stigmatized as a grave military crime in all the codes of Articles from a very early period. The General Orders, published during the late war, abound with declarations of commanders, denouncing and prohibiting pillaging and lawless foraging, and holding officers responsible for the conduct of their commands in this particular. Repeatedly is the distinction pointed out between the authorized taking of, or making requisition for, supplies or levying of contributions for the public use, in accordance with law or the custom of war, and the unauthorized and illicit appropriation of private property by officers, soldiers, or camp-followers.
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> * * * * * *

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The term 'post' is evidently used here in the most general sense, but as referring to a point for the time fixed. * * *. To constitute the offence there must exist the animus indicated in the Article - 'to,' i.e. in order to, 'plunder and pillage:' this animus was expressed still more clearly in the early form by the words - 'to go in search of plunder.' It must be shown that the officer or soldier left the command with a view to the forcible seizing and appropriating of public or private property; and whether private property sought to be taken belonged to persons hostile or friendly can in no manner affect the legal character of the offence. The intent being complete, it is not essential that the property should actually be taken: that it is taken, however, will of course be the strongest evidence that the offender left his station for the purpose of taking it" (Winthrop's Military Law & Precedents - Reprint - pp.626-627) (Underscoring supplied).

"The word 'post' includes any place of duty, whether permanently or temporarily fixed. * * * the words 'quits his post,' as here used, import any unauthorized leaving of that place where the accused should be.

In proving this crime an intent to pillage or plunder must be shown. The words 'to pillage or plunder' may be properly paraphrased 'to seize and appropriate public or private property.'

* * * * * * *

PROOF

(a) That the accused left his post of duty.

(b) That the intention of the accused in leaving was to seize and appropriate private or public property" (MCM, 1921, par. 425, VII, pp.380-381).

The evidence shows that accuseds' battalion was near Les Foulons, in immediate support of a combat team which was in the front lines. Accused and their unit were thus "before the enemy" by virtue of their tactical relation to the enemy (MCM, 1928, par.141a, p.156; CM 128019 (1919), Dig.Op.JAG, 1912-1940, sec.433(2), p.304). There is substantial evidence that they left their post without permission, entered several houses without invitation, terrorized the occupant of at least one house by shooting their rifles in his house (in the case of at least two accused), damaged the occupant's property, and appropriated nearly 7000 francs and at least three silver teaspoons, the property of such occupant, as well as forcing him to serve them cider. Such conduct justifies the inference of a common specific intent on the part of all accused, equally engaging in a wrongful joint adventure and thus equally guilty of all acts done by each (CM ETO 2951, Pedigo; CM ETO 2926, Greenawalt and Norman; and authorities therein cited), to plunder and pillage, i.e.: "to seize and appropriate private property," at the time they quit their post.

> "that it /private property/is taken * * * will of course be the strongest evidence that the offender left his station for the purpose of taking it" (Winthrop, supra).

The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of the Charge and Specification as to each accused (Cf: CM ETO 1109, Armstrong).

(c) The question whether accused, or any of them, were intoxicated to such a degree as to be incapable of entertaining the specific intent, at the time they quit their post, to plunder and pillage, was resolved against each of them by the court in its findings of guilty. In view of the whole record and particularly evidence of the deliberateness and willfulness of accuseds' conduct, such findings will not be disturbed upon appellate review (CM ETO 3118, Prophet, and authorities there cited).

6. The charge sheets show that accused Murphy is 28 years of age and was inducted at Chicago 29 August 1942 to serve for the duration of the war plus six months; that accused Schimpf is 29 years of age and was inducted at Columbus, Ohio 21 April 1942 to serve for a like period; and that

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accused Betters is 20 years of age and was inducted at Fort Snelling, Minnesota 28 May 1943 to serve for a like period. None of accused had any prior service.

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

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

B. Franklin Riter Judge Advocate

Elwood H. Seegert Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 AUG 1944 TO: Commanding General, 29th Infantry Division, APO 29, U.S. Army.

1. In the case of Private First Class MARTIN T.MURPHY (36367812), Private First Class WILSON T. SCHIMPF (35402161) and Private GEORGE D. BETTERS (37564541), all of Company "B", 121st Engineer Combat Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The evidence herein indicates that accused Betters actually appropriated the money and silverware involved and induced the other two accused, Murphy and Schimpf, to share the money with him, reserving for himself the largest portion. The confinement portions of the sentences (Betters, 25 years, Murphy and Schimpf, each 20 years) indicate that the court regarded Betters' conduct as more highly culpable. No testimony was offered concerning the character of Betters' service, but the Staff Judge Advocate's review of the record states that such character was poor and that Betters was acquitted by a special court-martial on a charge of damaging a government motor vehicle through neglect by driving same while drunk, because the evidence in the case was poorly presented.

On the other hand, officers of their respective platoons testified that Schimpf was a very good soldier and worker and had never been in trouble until the incident in question, and that Murphy, acting assistant squad leader, was of squad leader calibre and a very good soldier. The Staff Judge Advocate's review states that Murphy's prior service of 22 months was reported as excellent and that of Schimpf (26 months) was reported as very good. No evidence of previous convictions of either was introduced.

Although the evidence shows that Murphy and Schimpf were guilty of highly reprehensible conduct, which is not to be condoned, there is nothing in the record of trial or accompanying papers indicating that they possess no value which could be salvaged through appropriate discipline or rehabilitation. I believe that the Government should preserve

its right to insist that these two accused perform military service instead of incarcerating them in the United States freed from the dangers and hardships of combat. Moreover, the policies of this theater having for their purpose the conservation of man power require their retention in this theater where, after they have undergone disciplinary punishment, they will be available for service in combat zones. Accordingly, I recommend that the place of confinement of accused Murphy and Schimpf be changed to the 2912th Disciplinary Training Center, Shepton Mallet, Somersetshire, England, with dishonorable discharge suspended until release from confinement. Supplemental action should be forwarded to this office for attachment to the record of trial.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 3091. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3091).

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

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

BOARD OF REVIEW

- 5 AUG 1944

ETO 3093

U N I T E D S T A T E S)	5TH ARMORED DIVISION.
)	
v.)	Trial by GCM, convened at West Down
)	Camp, Tilshead, Wiltshire, England,
Technician Fifth Grade)	26 June 1944. Sentence: Dishonorable
BENJAMIN L. ROMERO (38070191),)	discharge, total forfeitures and con-
Headquarters Battery, 95th)	finement at hard labor for 15 years.
Armored Field Artillery)	United States Penitentiary, Lewisburg,
Battalion.)	Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Tec 5 Benjamin L. Romero, Jr, Hq Btry, 95th Armd FA Bn, did, in the vicinity of Borough Farm, Torpoint, Cornwall, U. K., on or about 7 June 1944, with intent to commit a felony, viz, forcible rape, commit an assault upon Miss Gladys Lilian Ayling, Lance Corporal, 609th (M) HAA, RA, by willfully and feloniously pushing and knocking her to the ground, jumping upon her, threatening to strike and kill her with a stone, and by choking her with his hands.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence but remitted five years of the period of confinement, 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 shows that at about 10:20 p.m. on the date alleged Lance Corporal Gladys L. Ayling, 609th M.H.A.A., R.A., stationed at Borough Farm, Torpoint, England, left a friend's house in the vicinity of Torpoint and started to walk across some fields (R7,21,35-36). It was "quite light" at the time (R23). About ten minutes later (R21) she reached a stile where accused asked her the way to Torpoint. She had never spoken to an American soldier before. Before she could answer he pushed her into a ditch, jumped on top of her, put his fingers around her throat and "everything almost went black". She struggled, managed to free herself and tried to get up the side of the ditch, whereupon he picked up a stone and said that if she tried to do anything he would kill her with it. He pulled her out of the ditch and pushed her down on the grass on her back. Her left hand was under her and her right hand was free. He raised the stone but she did not recall if he hit her. She managed to take the stone away from him and to throw it aside. He then pushed his fingers into her mouth and throat, exerted pressure on her throat and caused her to gasp for breath. He was then kneeling beside her and she became unconscious (R7-11,20,23).

When she "came to", he was "laying flat on top" of her and her knickers were down around her knees and twisted. Accused was "quite calm to what he had been before and said he was terribly sorry." She asked him to accompany her to Torpoint where she had friends, knowing that "if they saw him they would come forward and see what was wrong." Torpoint was nearer to the scene than her camp. He refused but acceded to her request that he take her back to camp (R8,14,21). She leaned against a tree for a short time, saw two civilians pass by and tried "very hard" to speak to them but was unable to say anything because of the choking he had administered. He went over to the civilians, asked what they wanted and they replied that they were looking for a dog (R8,13-14). Accused then told her that they must find her hat and his. They did not find her hat and walked toward her camp (R8,22). She was "stunned * * * it got worse" as she walked along and she finally removed her collar and tie because her tongue and lips were becoming swollen (R22-23). She asked him to meet her the next night "in the hopes that someone would come out and recognize him". Accused said "no", and started to run when they were about 200 yards from the camp (R8,14,19-20,22-23). She then walked to her camp (R8).

Lance Corporal Ayling further testified that her assailant spoke rapidly and without an accent. She believed that she struck him when she took the stone away from him, because when he left her he had a scratch on his nose and cheek (R14,19). She resisted the assault and struggled violently when she was conscious (R9,13,21). At no time did he suggest that she submit to improper relations, nor during the time she was conscious did he attempt to remove or unbutton any of her clothing (R9,20). When she was conscious he made no attempt to penetrate her person nor did he expose his person (R13). The distance between the place of the attack

and her camp was about one mile (R20).

When she appeared at her station about 11:20 p.m. the girl was hatless and carried her collar and tie in her hand. She was "crying terribly", her face was bruised and her eyes appeared to be turning black. She was moaning and it was necessary practically to carry her into the guardhouse. Her lips were blue and swollen and she was "very sickly * * * very upset" (R26-28). A doctor examined her about 12:30 a.m. 8 June and found her suffering from shock. He discovered abrasions on the left side of her face, on the bridge of her nose, on her hands, and cuts on her body. It was his opinion that the abrasions on her face were the "result probably" of being hit by a jagged stone. She also had two red marks on her neck and a cut on her left knee. He "found that no penetration had been made." Although he did not observe that her tongue or lips were swollen, his examination was somewhat cursory and had her lips and tongue been slightly swollen, it was possible that the swelling had receded by the time the examination was made. It was possible that a condition of shock would prevent a person from crying out (R31-35).

The girl later went to five camps where identification parades were held in an attempt to identify her assailant. At the first four camps she was not able to identify him although she saw a great number of soldiers. At an identification parade on 9 June at the fifth camp, Fort Tregantle, she unhesitatingly and positively identified accused as the man who attacked her (R15,29,37-38). She also identified accused at the trial (R7). Fort Tregantle was a short distance, "some few miles" from Torpoint. One passed through Antony when traveling between the two places (R39).

4. For the defense, it was stipulated that up to 7 June 1944 the service rating of accused's character was excellent (R49). First Sergeant Charles J. Claxon of accused's organization testified that he knew him for more than two years, that accused did not speak rapidly and talked with a very pronounced accent (R49-50). Technician Fifth Grade Loraine W. Stickel of the same organization testified that accused was in the identification parade held at Fort Tregantle on 9 June, that he did not appear nervous or apprehensive, and did not attempt to turn his face or change his position (R50-51).

Accused, upon being advised of his rights, elected to remain silent(R54-55).

5. Called as a witness by the court, Technician Fourth Grade Edward D. Wever of accused's organization testified that on the evening of 7 June he was on pass and boarded a truck at Torpoint Ferry to return to his station at Fort Tregantle. The truck made one stop between Torpoint Ferry and Antony Park at a place across the road

from which there was a British "Anti-aircraft" camp. After this stop Wever first saw accused on the truck and noticed that his face was scratched and bleeding. The truck then stopped at Antony Park which was about 3 miles from Fort Tregantle and accused and Wever got off. They went to their station at Fort Tregantle where they arrived about midnight. Wever "signed in" accused, another soldier and himself as of 11:00 p.m. (R59-65).

6. There can be no question as to the identification of accused as the assailant. He was positively identified by the victim at the trial. She previously attended identification parades at four camps and was not able to identify her attacker although she saw a great number of soldiers. At the fifth identification parade at accused's camp she unhesitatingly and positively selected him as the man involved. When she left accused on the evening of the assault his nose and face were scratched, and Wever noticed that accused's face was scratched and bleeding that same night when he saw him on the truck. The testimony of other witnesses as to her physical condition when she arrived at her own station, amply corroborated her factual version of the assault.

The victim testified that during her conscious period accused did not suggest that she submit to improper relations, nor did he expose himself. He did not during this time remove her clothing or attempt to do so, and made no attempt to penetrate her person. The medical evidence showed that penetration was not accomplished. However, accused did commit an entirely unprovoked and brutal attack upon a girl whom he did not know. He pushed her into a ditch, jumped on top of her and tried to choke her. When her struggling enabled her to get away from him, he picked up a stone and threatened to kill her with it if she did anything. He pulled her out of the ditch and threw her on her back. After she took the stone away from him he seized her throat and choked her so that she became unconscious. When she came to her senses he was on top of her and her knickers were twisted and down around her knees. He was then quite calm and apologized for his actions. The question presented is whether under the testimony of Lance Corporal Ayling, properly adjudged credible by the court, the acts done by accused are sufficient to constitute an assault with intent to rape.

The Board of Review is of the opinion that the case is governed by the principles enounced in CM 233183, Gray (19 B.R. 349; Bull. JAG, May 1943, Vol.II, No.2, sec.451(2), pp.188-189). In that case accused, a total stranger to a married woman forced his attentions on her at a bar and persisted in accompanying her as she started to walk home. She later refused his request to cross the street to a sea wall, whereupon he seized her and despite her resistance, pushed her across the street to some bushes. He struck her in the face several times, knocked her down and choked her. Before she lost consciousness she remembered that he pressed his knee against her knees. When she regained consciousness she was lying on her back and accused said "There's your purse". Her underclothing had not been removed or disarranged and

there was no evidence that accused exposed his person. Her sweater was up around her shoulders, and the $15 which had been in her purse was intact. There was no evidence that accused attempted to have intercourse with her. The Board of Review held that the established facts and circumstances clearly warranted the finding that the assault was made with the intent to commit rape.

> "As was said in Ware v. State (67 Ga., 352):
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> '* * * What other motive could he have had? She was unknown to him. She was unprotected. * * * The fiendish flame of lust alone could impel him to such acts. In seeking the motive of human conduct, the jury need not stop where the proof ceases; inference and deductions from human conduct are proper to be considered where they flow naturally from the facts proved, and such conduct as this points with reasonable, if not with unerring, certainty to the lawless intent he had in view.'
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> See also People v. Moore (100 Pac.,688,689):
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> 'In all such cases the intent with which an assault is committed is a fact which can only be inferred from the outward acts and surrounding circumstances. It is, in other words, a question of fact for the jury, and not a question of law for the court, except in a case where the facts proved afford no reasonable ground for the inference drawn.'
>
> The fact that the accused - for some reason known only to himself - apparently abandoned the attack, makes no difference.
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> Paragraph 149 1, Manual for Courts-Martial, 1928, states:
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> 'Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted.'"
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> (CM 233183, Gray, 19 B.R. 349,356).

In view of the evidence and the foregoing authorities, the Board of Review

is of the opinion that the evidence in the case under consideration is legally sufficient to sustain the findings of guilty. The court properly overruled the defense motion for a finding of not guilty made at the conclusion of the prosecution's evidence as such evidence was of a competent and substantial character fairly tending to establish every element of the offense alleged (CM ETO 1873, J. Brown; CM ETO 1954, Lovato; CM ETO 2843, Pesavento; CM ETO 3163, Boyd).

7. The charge sheet shows that accused is 25 years of age and was inducted at Fort Bliss, Texas, 5 January 1942 to serve for the duration of the war plus six months. He had no prior service.

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

9. Confinement in a penitentiary is authorized on conviction of the offense alleged by Article of War 42 and sec. 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary Lewisburg, Pennsylvania as the place of confinement is authorized (Cir. 229, WD, 8 Jun 1944, sec.II, pars.1b(4), 3b).

W. Franklin Ritter Judge Advocate

Elwood K. Sargent Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 AUG 1944 TO: Commanding General, 5th Armored Division, APO 255, U.S. Army.

1. In the case of Technician Fifth Grade BENJAMIN L. ROMERO (38070191), Headquarters Battery, 95th Armored Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. Attached to the record of trial are two petitions for clemency addressed to the reviewing authority, one by accused's commanding officer dated 28 June 1944 and one by his individual counsel dated 7 July 1944.

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 3093. For convenience of reference please place that number in brackets at the end of the order: (ETO 3093).

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 3118

- 4 AUG 1944

U N I T E D S T A T E S	2D ARMORED DIVISION.
v.	Trial by GCM, convened at Headquarters, 2d Armored Division, 30 June 1944.
Private ERNEST A. PROPHET (37157160), Company B, 82d Armored Reconnaissance Battalion.	Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 28th Article of War.
Specification 1: In that Private Ernest A. Prophet, Company B, 82d Armored Reconnaissance Battalion, did at Littry, France, on or about 23 June 1944, well knowing that his organization was then and there on a one (1) hour alert for movement into combat, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and shirk important service, to wit; combat with an armed enemy, and did remain absent in desertion until he was apprehended at Littry, France, on or about 24 June, 1944.
Specification 2: In that * * * did at Littry, France, on or about 1500B, 24 June, 1944, well knowing that his organization was then and there on a one (1) hour alert for movement into combat, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and

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shirk important service, to wit; combat with an armed enemy, and did remain absent in desertion until he was apprehended at Littry, France, on or about 1700B, 24 June, 1944.

CHARGE II: Violation of the 64th Article of War.
Specification 1: In that * * * having received a lawful command from 2d Lt. John B. Miller, his superior officer, to "Give me your Carbine", or words to that effect, did, at Littry, France, on or about 0100B, 24 June, 1944, willfully disobey the same.
Specification 2: In that * * * having received a lawful command from Captain Theodore W. Large, his superior officer, to "Hand me your Carbine", or words to that effect, did, at Littry, France, on or about 1600B, 24 June, 1944, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of Specifications 1 and 2 of Charge I, except (in the case of each Specification) the words "desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and shirk important service, to wit: combat with an armed enemy," and except the words "in desertion," substituting in lieu thereof the words, "abent himself without proper leave from his organization," of the excepted words, not guilty, of the substituted words, guilty; of Charge I, not guilty of violation of the 28th Article of War, but guilty of violation of the 61st Article of War; and guilty of Charge II and Specifications 1 and 2 thereunder. Evidence was introduced of six previous convictions: two by summary courts, one for absence without leave for one hour and one-half, in violation of Article of War 61, and one for appearing in improper uniform, in violation of Article of War 96; and four by special courts-martial, one for two absences without leave for one day and five days, respectively, and breaking arrest, in violation of Articles of War 61 and 69, one for undescribed violations of Articles of War 61, 94 and 96, one for two absences without leave for ten days and one day, respectively, in violation of Article of War 61, and one for failing to appear at fixed time for training and breaking arrest, in violation of Articles of War 61 and 69. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. (a) Charge I should have been designated a violation of the 58th, rather than the 28th, Article of War, as the latter article merely provides in effect that certain acts shall constitute the offender a deserter. The

offense of desertion actually violates and is punished under the 58th Article of War. The designation of the wrong article is not material, however (MCM, 1928, par.28, p.18; CM ETO 1057, Redmond), particularly where, as here, accused is actually found guilty of a lesser included offense within that charged in the specification.

(b) The findings, by exceptions and substitutions, of accused's guilt of absence without leave from his organization at the times and places and for the periods alleged in Specifications 1 and 2 of Charge I, in violation of Article of War 61, are supported by competent and substantial evidence, including accused's own sworn testimony (R4,10,15) (CM ETO 2471, McDermott, and authorities therein cited). The finding of not guilty of violation of the 28th Article of War, in view of the above findings, may be deemed the equivalent of a finding of not guilty of violation of the 58th Article of War.

(c) Likewise, the findings of guilty of the lesser included offense of absence without leave render unnecessary a discussion of the legal sufficiency of the evidence to support the allegation in each Specification that accused at the time of absenting himself well knew "that his organization was then and there on a one (1) hour alert for movement into combat". Such allegation was specifically referable to the offense charged in each Specification, viz: unauthorized absence with intent to avoid hazardous duty and shirk important service, is immaterial to the lesser included offense of absence without leave of which accused was found guilty, except as a matter of aggravation, and thus has no bearing upon the legal sufficiency of the record of trial.

4. The evidence is clear that at the times and places alleged in Specifications 1 and 2 of Charge II, accused willfully disobeyed the lawful commands of his respectively named superior officers, as alleged, which commands he knew to be from his superior officers, one the Officer of the Day and the other the Commanding Officer of accused's company (R5,6,8-12, 14). All the elements of the offenses in violation of Article of War 64 were established (MCM, 1928, par.134b, pp.148-149; CM ETO 2608, Hughes, and authorities therein cited). The court's determination against the accused, in its findings of guilty, of the question whether his drunkenness was such as to negative his willfulness or his ability to recognize his superior officers, is amply sustained by substantial evidence (R6,9,10), and will not be disturbed upon appellate review (CM ETO 2484, Morgan; CM ETO 2672, Brooks).

5. Evidence of a previous conviction of accused by special court-martial for absences without leave for one day (24 January 1943), and five days (3 April - 8 April 1943), in violation of Article of War 61, and for breaking arrest on 9 February 1943, was improperly admitted (R17; Pros.Ex. A), as it related to offenses committed more than one year prior to the date of the commission of the earliest offense charged herein (23 June 1944, Specification 1, Charge I), excluding from the computation of such year periods of unauthorized absences as shown by the admissible evidence of previous convictions (MCM, 1928, par.79c, p.66). In view of the proper

admission of five other previous convictions of accused (par.2, p.2, supra), and of the clear evidence of his guilt of both charges and their specifications, however, it is manifest that the improper admission referred to could not have injuriously affected his substantial rights within the purview of Article of War 37 (See SPJGJ 1944/4686, 12 May 1944, Bull.JAG, Vol.III, No. 5, sec.395(52a), p.186).

6. The charge sheet shows that accused is 32 years five months of age and was inducted 4 April 1942 for the duration of the war plus six months. No prior service is shown.

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

8. The penalty for a violation of Article of War 64 is death or such other punishment as the court-martial may direct. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

B. Franklin Kite, Judge Advocate

Elwood H. Seay, Judge Advocate

Edward L. Stevens, Jr., Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. - 4 AUG 1944 TO: Commanding General, 2d Armored Division, APO 252, U.S. Army.

1. In the case of Private ERNEST A. PROPHET (37157160), Company B, 82d Armored Reconnaissance Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In Special Orders No. 156, Headquarters 2d Armored Division, 27 June 1944, appointing the court which tried this case, Lieutenant Colonel Harry L. Hillyard was designated President. Manual for Courts-Martial, 1928, specifically directs:

> "The senior in rank among the members present is the president and presiding officer of the court" (par.39, p.28) (Underscoring supplied).

It is accordingly improper practice to designate the President in the appointing order. The order properly designated the Law Member, as required by Article of War 8 and Manual for Courts-Martial, 1928 (par.4a, p.3; App.2, p.231, Notes).

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 3118. For convenience of reference please place that number in brackets at the end of the order: (ETO 3118).

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 3141

27 JUL 1944

U N I T E D S T A T E S	FIRST UNITED STATES ARMY
v.	Trial by GCM, convened at Chateau Sigil, Vierville Sur Mer, France, 20 June 1944. Sentence: To be hanged by the neck until dead.
Private CLARENCE WHITFIELD (34672443), 240th Port Company, 494th Port Battalion, Transportation Corps.	

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

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1. The record of trial in the case of the 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 Clarence (NMI) Whitfield, Two-hundred Fortieth Port Company, did, at Vierville Sur Mer, France, on or about 1830, 14 June 1944, forcibly and feloniously, against her will, have carnal knowledge of Aniela Skrzyniarz.

He pleaded not guilty to and, all members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of four previous convictions, three by summary court: one for absence without leave from place of organization, another for absence without leave from detail and the third for absence without leave for 15 hours; and one by special court-martial for absence without leave for nine hours; all in violation of Article of War 61. All members of the court present when the vote was taken concurring, he was sentenced to be hanged by the neck until dead.

The reviewing authority, the Commanding General, First United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

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

On 14 June 1944, Aniela Skrzyniarz and her sister Zofia Sondej, both of whom lived in Vierville Sur Mer, France, were pulling a wagon on a road toward a field where they were going to milk cows. They met four colored soldiers with rifles, one of whom was accused. The soldiers pushed the wagon through a gateway into the field for the two women, and one of them, not accused, said in French that they wanted some milk (R14-16,23). Admitted in evidence was a sketch of two fields (R7,33; Pros.Ex.1). Aniela started to milk a cow at point "B" on the sketch and one soldier, not accused, stood near her at the place marked "1". The other three soldiers were at point "C" (R16-17,23). Zofia then went into the adjoining field to round up the cows (R17,23). As she entered the second field one of the soldiers, not accused, pointed a rifle at her head and knocked her down (R24-25,27-28). Zofia and the soldier were on the ground about ten minutes (R27,29). "He tried to take me by force but I didn't want to give in" (R27). Aniela continued to milk the cow, looked up and noticed that the three soldiers, including accused, had disappeared. She walked into the adjoining field and the soldier who was watching her milk remained behind. In the second field Aniela saw one of the soldiers (designated No.3) lying on her sister Zofia at a place on the sketch marked "D3". Another soldier (designated No.2) was standing at the place marked "E2" and accused and Aniela were standing at point "F". Aniela yelled to her sister "What are you doing?" and she replied "They put a rifle to my head". Accused seized Aniela who tried to get away from him. The soldier known as No.2 then fired a shot and Aniela who was frightened dropped to her knees. The soldier came over, pointed the gun at Aniela's head, seized her shoulder and tried to push accused away from her. Accused pushed the soldier away, seized Aniela and dragged her toward a hedge. The soldier known as No.2 left the field. Zofia, who was with the soldier known as No.3, heard Aniela yell, heard the shot and saw two or three soldiers, one of whom was accused, seize Aniela and throw her to the ground. Zofia jumped up, ran home and informed Aniela's husband about the incident (R17-20,24-25,27-28). Zofia returned to the field about 15 minutes later (R25-26).

Aniela testified that accused then threw her to the ground and fell on top of her. He laid his rifle down close beside her, lifted her dress and had intercourse with her. She was not wearing

any undergarments (R18,21). The following colloquies occurred during her testimony:

"Q. And during this time did you resist in any way?
A. Every time I tried to get up he would reach for his rifle. I was frightened and I was just hoping that someone would come" (R18).
"Q. Where was this rifle?
A. It was laying right alongside.
Q. Did you consent to this act * * *?
A. I had to because he took me by force. I was bare-handed. He had a rifle.
Q. You mean you were afraid of Whitfield?
A. I was afraid.
Q. Why?
A. I was afraid he might shoot me. I was frightened" (R19).
"Q. You testified that when you attempted to resist Whitfield he would reach for his rifle. Did he pick up his rifle at any of these times and point it at you?
A. He would reach for his rifle each time and he wouldn't point it at me. I was afraid the other fellows were close by. I didn't know that the other fellows left the field" (R20).
"Q. Did Whitfield at any time point his rifle at you?
A. They fired a rifle and the other one pointed the rifle at me.

* * *

"Q. Did you get on the ground voluntarily?
A. Not voluntarily; I was forced.
Q. What do you mean you were forced?
A. I was concerned with my life.

* * *

Q. You mean he grabbed you some place? * * *
A. He grabbed me somewhere around here (indicating her shoulders).
Q. Did he trip you or anything like that?
A. He pushed me. I was very frightened. I thought he was going to kill me.
Q. Did you struggle at all?
A. I was afraid that the others would shoot me.

* * *

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Q. Did he have to use force to separate your legs?
A. I was frightened. I don't remember" (R21).
"Q. Did you try to push him off or pull his hair or struggle with him at all?
A. I couldn't. He had a rifle.
Q. Did you cross your legs or take any steps to try to prevent the act after you fell to the ground?
A. I can't say exactly how it was. I was so frightened.
Q. You have testified that the rifle was lying beside you. Did you make any attempt to get it?
A. I didn't make any attempt to grab the rifle because I don't know anything about rifles. I attempted to yell as vehicles passed.
Q. Did you yell?
A. I didn't yell because I was frightened.
Q. During the time that it is alleged Whitfield engaged in this act, where was the man designated as number 2 and also the man designated as number 3 - where were they?
A. They left the field and I didn't know whether they were in that first field or whether they left" (R22).

After accused completed the act he held one hand on her chest, partially lifted himself, and indicated by motions that he wished her to perform an unnatural sexual act. She "wouldn't do anything like that", and pretended she did not understand what he desired. She then heard her husband's voice. Accused arose and seized his rifle. Believing that he was going to shoot her or her husband, she also seized the rifle. Her husband and an officer then entered the field. About ten minutes elapsed between the time accused threw her on the ground and the arrival of her husband. The offense was committed at point A on the sketch (R19-21).

Captain Roland L. Tauscher, First Lieutenant James P. Webster and Second Lieutenant Walter S. Siciah, all of the 3704th Quartermaster Truck Company, were sitting in the orderly room when Aniela's husband and Zofia arrived. Zofia was excited to the point of being hysterical and kept yelling "they are killing my sister and took advantage of her". The husband said in Polish "Come with me". Siciah who also spoke Polish went with the two in a jeep to the pasture and was followed by Tauscher and Webster (R7,9,10,29,31). On the way to the field Zofia conveyed to Siciah in Polish that someone was "molesting" her sister (R11). They passed a colored soldier on the road about 200 yards from the field. They then ran across the first field into the second pasture which was

about 300 yards from the Skrzyniarz home. The husband called Aniela's name several times and she answered on each occasion (R7,9,11-14). On entering the second field they saw accused with a rifle at port arms and Aniela, both of whom were struggling over the rifle. They were at point A on the sketch admitted as Pros. Ex.1, and no one else was in either field. Siciah pushed accused away from the woman and took the rifle. Aniela, who appeared upset and frightened, said that "she was taken advantage of". Her husband struck accused who seemed surprised and asked why he struck him (R7,10-12,32). Siciah asked accused what he was doing there and he replied "I am not doing anything here. I was passing through". Siciah said "Don't lie to me". Webster asked him the same question and upon receiving a like reply said "Don't lie to me. Tell us the true story" (R7,30). Accused then said that "other fellows" were involved and that they had run away. When asked what he did to Aniela, accused said he "was getting something" and made a "back and forth" motion with his hand in front of his penis. Tauscher looked particularly and observed that the fly of accused's trousers was buttoned (R7-8,10,30-31). He was then taken before his executive officer, and also his battalion commander, who found a loaded shell in his .03 rifle which was "cocked and on safe". The executive officer asked accused who was with him and he replied that he did not "know everybody but there was about nine" and that one of them was white. The executive officer said "I am tired of your shit. I want a straight story". Accused replied "Well, sir, there was about twelve of them", whereupon the officer replied "Now, you tell me the truth". Accused then finally said that there were two men from "our organization", a colored boy whom he did not know and himself (R8,11,13,32).

4. Privates Leroy Welch and Morris Tarver of accused's company testified for the defense. They, accused, a soldier named Wright and some others left camp at 2:30 p.m. 14 June. When they arrived by a bombed church Wright returned to camp, and Welch, Tarver and accused met a fourth unknown soldier who did not belong to their company. The four soldiers walked up the road, stopped, and stood drinking from a quart bottle of wine. Two women passed by pushing a wagon. Tarver testified that he and accused took the wagon into the field because "it looked so pitiful for women to be pulling something like that". One woman (Aniela) then started to milk a cow and the other girl (Zofia) went into the adjoining field with the unknown soldier (R33-35,37,40-41,44). Welch, Tarver and accused remained in the first field where accused tried to talk with Aniela. Accused then went into the adjoining field and was followed by Aniela (R35,41,44). Welch testified that in about five minutes Tarver went toward the "front gate" while witness went to the "middle gate" but did not go through it, and saw accused talking to Aniela about 15 feet away in the second field. Both were standing. The other girl (Zofia) was lying on her back about 100 feet away and the unknown soldier was with her, down on

one knee. Neither couple appeared to be struggling. Welch said to accused "Let's go" and he replied "I am ready". Welch turned and walked off. He was half way between the first and second gates when he heard a shot in the direction from whence he came, looked back but did not see anyone. A girl (Zofia) ran past him and went up the road, and Welch walked on and joined Tarver. Welch called accused, received no answer and he and Tarver returned to camp (R36-37,39). Tarver testified that after accused and the girl went into the second field, witness went to the (outer) gate and Welch stopped, looked back into the second field and called accused. Welch did not enter the second field. Witness heard a shot in the vicinity of the bushes about the time Aniela went into the second field. Accused and the unknown soldier were in the field when the shot was fired. Tarver denied that he or Welch fired the shot, or that three men were in the second field at that time. A "little girl" (Zofia) ran past Welch, jumped over the gate by Tarver and "kept on across the road". Welch joined Tarver and they returned to camp (R41-44). Tarver testified that accused had an ".03" rifle and the unknown soldier had a carbine, and both Tarver and Welch testified thatthe shot sounded like one from a carbine (R36,42,44).

Accused testified that Tarver and the unknown soldier who was not from accused's company pushed the wagon into the field and that the unknown soldier then went into the second field with the smaller girl (Zofia). Accused, Tarver, and Welch remained behind with the larger girl (Aniela) who was milking. Accused was then at point C on Pros.Ex.1. About ten minutes later accused went about ten feet into the second field to see what the unknown soldier and Zofia were doing. Aniela followed him but he was not aware of the fact. The unknown soldier and Zofia were lying on the ground indulging in intercourse and Aniela said something to Zofia who jumped up and ran away. Accused did not hear Zofia shout and believed that the unknown soldier followed her. Welch then said "Let's go" and accused replied "I'm ready". Welch left (R45-47,49,52,53). Accused spent about ten minutes trying to ask Aniela for intercourse. He motioned with his hand, but he did not know how to speak French and "She didn't seem to act like she knew what I was talking about". She did not try to leave nor did she do anything to encourage him to have relations with her. He did not touch her, offer her money, knock her down or point his gun at her, nor did they indulge in intercourse. She was never on her knees. He had always carried a live round of ammunition in the rifle "since I got the ammunition", and the "safety was on" (R47-48,50,52). He did not hear a shot fired, "if there was one fired there I didn't pay no mind to it because so many shots had been fired. You heard so many shots that you don't mind them" (R49-52). Accused was standing at point A on Pros.Ex.1 and none of the other men entered the second field except

the unknown soldier and Welch who came only to the gate and said "Let's go" (R48-49). During the time accused was talking with Aniela he had his rifle at parade rest. He then heard "somebody holler" and brought his rifle to port arms. Aniela seized the rifle, the officers arrived and her husband struck him. He asked the man why he struck him and an officer asked accused what he was doing there. He replied that he was not doing anything whereupon the officer said "Don't lie to me" and repeated the same question. Accused "told him I was trying to and made a motion with my hand like this (indicating)". He was then placed in a jeep (R45-46,50-51). Accused further testified that he and the other soldiers drank cider near the bombed church and that they met the unknown soldier who "had a bottle full" (R45). Accused did not drink much wine that day and "There was no kick to it" (R51).

5. Aniela, recalled as a witness by the defense, testified that accused preceded her into the second field and that she did not encourage him to think that she would agree with his desires. He inserted his penis immediately after he threw her to the ground and kept it inserted during the ten minutes she was on the ground. Asked if she attempted to prevent him from inserting his penis she testified "I was very concerned with my life. There wasn't much I could do". She identified accused at the trial as the soldier who had intercourse with her. "I can't be mistaken that he is the one". Three soldiers were in the second field when she entered it and it was not accused who pointed the gun at her and who wanted to shoot her, but another man. Asked if she saw who fired the shot she answered "I am not sure who fired the shot because I was quite frightened" (R53-55).

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

* * *

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

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (MCM, 1928, par. 148b, p.165).

"The force. The force implied in the term 'rape' may be of any sort, if sufficient to overcome resistance. * * * It is not es-

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sential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other forms of duress, or by threats of killing or of grievous bodily harm or other injury * * *.

Non-consent. Absence of free will, or non-consent, on the part of the female, may consist and appear * * * in her yielding through reasonable fear of death or extreme injury impending or threatened; * * * in the fact that her will has been constrained, or her passive acquiescence obtained, by * * * other controlling means or influence" (Winthrop's Military Law and Precedents - Reprint - p.677-678). (Underscoring supplied).

"Acquiescence through fear not consent. Consent, however reluctant, negatives rape; but when the woman is insensible through fright or where she ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape" (1 Wharton's Criminal Law, 12th Ed., sec.701,p. 942). (Underscoring supplied).

"The victim of the rape did not expressly testify that she resisted accused to the extent of her ability, that her resistance was overcome by force or prevented by fear, or that she did not consent to the intercourse. The circumstances to which she testified, however, 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." CM 227809. (Bull. JAG, Vol.I, No.7, Dec.1942, sec.450(9), p.364). (Underscoring supplied).

"The extent and character of the resistance required of a woman to establish her lack of consent depend upon the circumstances and relative strength of the parties, and not upon the presence or absence of bruises or other physical injuries." CM 236801 (1943). (Bull.JAG,Vol.II, No.8, Aug.1943, sec.450, p.310).

"An actual force used by the accused sufficient to create an apprehension of death in the mind of the victim need not be proved. If a less degree of force is used, but coupled with threats to kill as to inflict bodily harm, in fear of which she involuntarily submits, the intimidation practiced will be regarded as constructive force" (Underhill's Criminal Evidence, 4th Ed., sec.675, pp.1272-1273).

The testimony of Aniela and accused constituted the only evidence as to whether the offense alleged was actually committed by accused. There was no question as to the identity of accused. His identification at the trial by the victim was positive, and her testimony in this respect was corroborated by accused's own testimony that he and the unknown soldier were the only soldiers in the second field, that he spent his time there trying to persuade her to have intercourse with him, and by the fact that the two were later discovered struggling over his rifle. Aniela testified that accused had intercourse with her and he denied it. There resulted, therefore, questions of fact and of the credibility of the witnesses which were for the sole determination of the court. Competent and substantial evidence was presented which clearly sustained the findings of guilty and the same will not be disturbed on appellate review (CM ETO 1402, Willison; CM ETO 2472, Blevins). When Aniela entered the second field to look for her sister she saw three of the soldiers in the field. She was seized shortly thereafter by accused. Another soldier approached, fired a shot and also seized her. Accused had a short scuffle with this soldier, pushed him away, dragged her to a hedge, knocked her down and fell on top of her. He placed his rifle down by her side, immediately inserted his penis and had sexual intercourse. Every time she tried to arise he reached for the rifle. She tried to yell as vehicles passed by but was so frightened she was unable to do so. The sum and substance of her testimony concerning the elements of resistance and non-consent was that she was paralyzed with fright, feared that he or the other soldiers would shoot and kill her and, therefore, that she "had to" consent. After finishing the act he then attempted to get her to perform an unnatural sexual act.

Other evidence strongly corroborated the victim's testimony. Zofia testified that she was on the ground with the third soldier in the second field, heard Aniela yell, heard a shot and saw two or three soldiers, one of whom was accused, grab Aniela and throw her to the ground. Both Welch and Tarver, the reliability of whose testimony concerning their own participation in the affair may be disregarded, testified that accused was in the field with Aniela, Zofia and the unknown soldier when the shot was fired. When the officers, Zofia

and Aniela's husband arrived at the scene, Aniela was struggling with accused over the rifle. She appeared upset and frightened and complained that "she was taken advantage of". The hysterical condition of Zofia who said that "they are killing my sister and took advantage of her" at least indicated that something unusual was happening to Aniela in the field. According to accused he had simply engaged Aniela in conversation by means of the "sign language" for several minutes. She did not appear to understand him and unexplainably seized the rifle when the shouts of the approaching party were heard.

There was most substantial evidence to corroborate the victim's version that she was too frightened to offer much resistance to accused during the commission of the offense alleged. The four strange soldiers had rifles. When she entered the second field she saw one soldier attacking Zofia who shouted that he "put a rifle to my head". Another soldier fired a shot which so frightened Aniela that she dropped to her knees. He then pointed the gun at her head. The two soldiers scuffled over her and she was then dragged by accused to the spot where she was pushed to the ground and immediately attacked. Accused's ever-present rifle was by their side during the period of intercourse and he reached for it whenever she tried to arise. She did not know whether the other soldiers were still lurking in the vicinity. The conclusion is fully warranted that the woman was paralyzed with fright and "that any lack of or cessation of resistance was attributable to her fear of great bodily injury or death". In view of the foregoing authorities, the Board of Review is of the opinion that the evidence is legally sufficient to sustain the findings of guilty of the Charge and Specification (CM ETO 969, Davis).

7. (a) Testimony by Lieutenant Siciah that Aniela said "she was taken advantage of" and that he noticed she "was nervous or upset-frightened" was properly admitted in evidence.

> "In cases involving the offense of rape the weight of authority is that one to whom a complaint has been 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 that time" (CM ETO 709, Lukas and authorities cited therein).

(b) Siciah's testimony that Zofia was in an excited and hysterical condition and that she kept yelling "they are killing my sister and took advantage of her", was admissible as part of the res gestae. The Board of Review is of the opinion that in view of all the circumstances of this case and the fact that the girl's condition

and statement occurred within such a short time after the incident, including her own experience, that it was the spontaneous expression of a state of mind caused by the actions of the soldiers, including accused (MCM., 1928, par.115b, p.118; CM ETO 709, Lakas and authorities cited therein).

(c) Accused was not warned of his rights when interrogated at the scene and later by his executive officer, at both of which places his first statements were rejected by his superior officers and he was ordered not to lie and to tell the truth. However, his ensuing statements did not constitute confessions and at the very most were admissions against interest. As such they were admissible in evidence regardless of their voluntary nature (CM ETO 895, Davis et al and authorities cited therein).

8. The charge sheet shows that accused is 20 years four months of age, that he was inducted 23 April 1943 at Fort Bragg, North Carolina, and that his service period is governed by the Service Extension Act of 1941. No prior service is shown.

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92).

D. Franklin Ritz Judge Advocate

Edward W. Sargent Judge Advocate

Edward L. Stevens Jr. Judge Advocate

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1st Ind.

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

1. In the case of Private CLARENCE WHITFIELD (34672443), 240th Port Company, 494th Port Battalion, Transportation Corps, 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 ETC 3141. For convenience of reference please place that number in brackets at the end of the order: (ETO 3141).

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 66, ETO, 12 Aug 1944)

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

BOARD OF REVIEW NO. 1

CM ETO 3147

- 2 SEP 1944

U N I T E D S T A T E S v. Staff Sergeant GEORGE E. GAYLES (36389485), Technician Fourth Grade BERNARD B. JAMES (36389456), Private First Class GEORGE L. WASHINGTON (36389593), Private McKINLEY K. BALLARD (34676568), Private HENRY DAVIS (34064275), Private JAMES FELDERS (34152994), and Private AARON SMITH, JR. (38509766), all of 641st Ordnance Ammunition Company, 101st Ordnance Ammunition Battalion.	FIRST UNITED STATES ARMY. Trial by GCM, convened at Tidworth, Wiltshire, England, 8,9,10,11,12 May 1944. Sentences: Dishonorable discharge, total forfeitures and confinement at hard labor: Gayles, James, Ballard, Davis, Felders and Smith each for 18 years and Washington for 15 years. United States Penitentiary, Lewisburg, Pennsylvania.

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

1. The record of trial in the case of the soldiers named above (hereinafter collectively designated as "primary accused") has been examined by the Board of Review.

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

CHARGE I: Violation of the 64th Article of War.
Specification: In that Staff Sergeant George E. Gayles, Sergeants William F. Fristoe and Theodore C. Wilson, Technician Fourth Grade Bernard B. James, Corporals Richard E. Geaither and Harold Perry, Privates First Class Robert H. Berry, Paris E. Davis Jr, Jimmie L. Day, and George L. Washington, and Privates McKinley K. Ballard, Henry Davis, James Felders, Roger Harris, Walter Johnson, Robert L. Roots, Aaron Smith, Jr., and William B. Whiters, all of the Six Hundred Forty-first Ordnance Ammunition Company, having received a lawful

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command from Captain Herman C. Hinton, their superior officer, to fall out and go to work, did, at Martock, Somerset, England, on or about 6 March 1944, acting jointly and in pursuance of a common intent and in concert with sundry other members of said Six Hundred Forty-first Ordnance Ammunition Company, wilfully disobey the same.

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

Specification 1: In that Private First Class Jimmie L. Day and Privates, Henry Davis, Roger Harris, Walter Johnson, Robert L. Roots and Aaron Smith, Jr., all of the Six Hundred Forty-first Ordnance Ammunition Company, acting jointly and with the common intent to subvert and override, for the time being, lawful military authority and in concert with sundry other members of the said Six Hundred Forty-first Ordnance Ammunition Company, did, at Martock, Somerset, England, on or about 6 March 1944, begin a mutiny in the said Six Hundred Forty-first Ordnance Ammunition Company by concertedly disobeying the lawful orders of Technical Sergeant Lenney A. Barnes, a noncommissioned officer who was then in the execution of his office and of Captain Herman C. Hinton, their commanding officer, to fall out and go to work.

Specification 2: In that Sergeant Theodore C. Wilson, Privates First Class Robert H. Berry and Paris E. Davis, Jr., and Privates McKinley K. Ballard and William B. Whiters, all of the Six Hundred Forty-first Ordnance Ammunition Company, acting jointly and with the common intent to subvert and override, for the time being, lawful military authority and in concert with sundry other members of the said Six Hundred Forty-first Ordnance Ammunition Company, did, at Martock, Somerset, England, on or about 6 March 1944, begin a mutiny in the said Six Hundred Forty-first Ordnance Ammunition Company by concertedly disobeying the lawful orders of Technical Sergeant Ansley H. Williams, a noncommissioned officer who was then in the execution of his office and of Captain Herman C. Hinton, their commanding officer, to fall out and go to work.

Specification 3: In that Staff Sergeant George E. Gayles, Sergeant William F. Fristoe, Technician Fourth Grade Bernard B. James, Corporals Richard E. Gaither and Harold Perry, Private First Class George L. Washington, and Private James

Felders, all of the Six Hundred Forty-first Ordnance Ammunition Company, did, at Martock, Somerset, England, on or about 6 March 1944, voluntarily join in a mutiny which had been begun in the said Six Hundred Forty-first Ordnance Ammunition Company against the lawful military authority of Captain Herman C. Hinton, the commanding officer thereof, and did, acting jointly and with the common intent to subvert and override, for the time being, lawful military authority, in concert with sundry other members of said Six Hundred Forty-first Ordnance Ammunition Company, assembled in the Recreation Hall, disobey the lawful command of the said Captain Herman C. Hinton to fall out and go to work.

Each accused pleaded not guilty to and was found guilty of Charge I and its Specification. Accused Henry Davis and Smith pleaded not guilty to and were found guilty of Specification 1, Charge II. Accused Ballard pleaded not guilty to and was found guilty of Specification 2, Charge II. Accused Gayles, James, Washington and Felders pleaded not guilty to and were found guilty of Specification 3, Charge II. No evidence of previous convictions was introduced as to accused Gayles, James, Washington, Ballard, Henry Davis and Smith. Evidence was introduced of one previous conviction by special court-martial of accused Felders, for absence without leave for four days and for failure to obey lawful order in violation of the 61st and 96th Articles of War respectively. 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: Gayles, James, Ballard, Henry Davis, Felders and Smith each for 18 years and Washington for 15 years. Two-thirds of the members of the court present when the vote was taken voted in favor of the findings and three-fourths of the members of the court present when the vote was taken voted in favor of the sentences. The reviewing authority approved each of the sentences, d esignated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused and forwarded the record of trial for action pursuant to Article of War 50½.

3. Sergeant William F. Fristoe (36389523), Sergeant Theodore C. Wilson (36560179), Corporal Richard E. Geaither (36389652), Corporal Harold Perry (36389721), Private First Class Robert H. Berry (36444825), Private First Class Jimmie L. Day (36389681), Private First Class Paris E. Davis, Jr., (38461701), Private Roger Harris (36389688), Private Robert L. Roots (38295497), Private Walter Johnson (36389717) and Private William B. Whiters (36560159), all of 641st Ordnance Ammunition Company, 101st Ordnance Ammunition Battalion, being certain accused named in the foregoing specifications (hereinafter collectively designated as "secondary accused") were tried jointly with the primary accused. Each of the secondary accused pleaded not guilty to and was found guilty of Charge I and its Specification.

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Accused Day, Harris, Johnson and Roots pleaded not guilty to and were found guilty of Specification 1, Charge II. Accused Wilson, Berry, Paris E. Davis, Jr., and Whiters pleaded not guilty to and were found guilty of Specification 2, Charge II. Accused Fristoe, Geaither and Perry pleaded not guilty to and were found guilty of Specification 3, Charge II. No evidence of previous convictions of accused Fristoe, Wilson, Geaither, Perry, Berry, Day, Paris E. Davis, Jr., Harris, Johnson and Whiters was introduced. Evidence was introduced of two previous convictions of accused Roots by summary courts-martial: one for driving government vehicle in excess of speed limits prescribed by standing orders in violation of the 96th Article of War, and one for absence without leave for an unstated time in violation of the 61st Article of War. Each of the secondary 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: Fristoe and Wilson each for 15 years; Geaither and Perry each for ten years; Berry, Paris E. Davis, Jr., and Harris each for eight years, and Day, Roots, Johnson and Whiters each for five years. The reviewing authority approved each of the sentences of the secondary accused but reduced the periods of confinement of Fristoe to ten years, Wilson to ten years, Perry to eight years, Berry to five years, Paris E. Davis, Jr., to five years and Harris to five years, suspended the execution of the dishonorable discharge as to each secondary accused until his release from confinement and designated Disciplinary Training Center No. 2912, Shepton Mallet, Somersetshire, England, as the place of confinement of each secondary accused.

At the time of the examination of the record of trial by the Board of Review, the reviewing authority had not published the general court-martial order promulgating the sentences of the secondary accused.

4. The facts and circumstances as developed by the prosecution's evidence were as follows:

Prior to 5 March 1944 the 641st Ordnance Ammunition Company, 101st Ordnance Ammunition Battalion, had been stationed at Horsington, England. On that date it moved to a hutment camp located at or near Martock, Somersetshire, England. The last contingent of the company arrived at the new station at about 5:30 p.m. on the day of the removal (R10,20,57,63,74,88, 143,153). The personnel of the company was engaged in the important work of inspecting and reconditioning .155 mm. shells (R11,153). The work was actually performed at Depot 680 which was located in Marston Magna a distance of about eight miles from Martock (R143,153). It was therefore necessary for the men to travel by motor truck from their camp to place of work (R11,74,153).

The 101st Ordnance Ammunition Battalion was on 6 March 1944 composed of 641st Company and 582nd Company. Lieutenant Colonel Herbert E. De Lee was battalion commander (R17,153,170). The officer personnel of the 641st Company on said date was as follows:

Captain Herman C. Hinton,	Company Commander (R237)
First Lieutenant Richard B. Mikesell,	(R206)
Second Lieutenant Ralph James Withey,	Personnel Officer (R84,216, 220) (Officer of the Day)
Second Lieutenant M.L. Penninger,	(R194)
Second Lieutenant Arthur L. Johnson,	(R142)
Lieutenant Thomas C. Fitzgibbons,	Supply Officer (R84,217).

Upon the arrival of the 641st Company at Martock camp on the afternoon of 5 March 1944 the primary and secondary accused were billeted as follows:

Hut No. 3: Smith*, Roots#, Harris#, Johnson#, Henry Davis* and Day# (R32,48,58,75).

Hut No. 5: Washington* (R32,183).

Hut No.17: Gayles*, James*, Fristoe#, Geaither#, Perry#, Felders* (R183,266, 282,287,301).

Recreation Hall: Berry#, Wilson#, Ballard*, Whiters#, Paris. E. Davis Jr.#, (R89,101,102,275).

* - Primary accused. # - Secondary accused.

The accused slept in their assigned huts on the night of 5-6 March 1944. Due to the fact that the company arrived at Martock on the afternoon of 5 March, camp procedure had not been fully established. As a consequence operations were behind the usual schedule (R236) and breakfast was late on the morning of 6 March (R63,228,275). No reveille formation was held (R128, 220,258). Lieutenant Withey, as Officer of the Day, assumed the responsibility of awakening the men. He proceeded to each of the huts and called them (R81,220,221). However, he overlooked hut #3 until his attention was attracted to the oversight. When he entered it later (about 7:15 a.m.) he found only accused Smith therein who was in bed (R220,231). At the recreation hall Lieutenant Withey went among the sleeping men and awakened them by calling, "Get up for breakfast. Breakfast is ready. We've got pancakes for breakfast" and by touching and shaking the men (R128,135). At hut #17, Lieutenant Withey stood in the doorway and called to the men, "Get up, men, pancakes for breakfast" (R287).

When at Horsington the time schedule of the company usually required the men to leave the area by 8:00 a.m., and on the morning of 6 March no change in the schedule has been made (R11,143). Attendance at breakfast was optional with the men (R27,128,258). They complained that breakfast on the morning of 6 March was of poor quality and short on quantity (R18,92,129, 130,266,287,301).

About 25 February 1944 while the 641st Company was stationed near Horsington, the then First Sergeant John Manigo with permission of the company commander, called a meeting of the members of the company. He

invited them to register complaints and objections to the operation of the company. There were complaints by some of the men with respect to censorship of the mail and the treatment of applications for officer candidate school (R17,24,77,175-177). John R. Miller had replaced Manigo as first sergeant of the company on March 1 (R74,169).

EPISODE AT HUT No. 3

On the morning of 6 March, Technical Sergeant Lenney A. Barnes, leader of section 1 and billeted in hut #3 (R8,10) was awakened by Lieutenant Mikesell. The men in the hut were asleep. Barnes, acting on Lieutenant Mikesell's orders, aroused them (R18,43,211,212) and after dressing he went to breakfast. He returned to the hut and there found men of his section. He called to them, "Let's go; Let's load up." This was the usual form of his order and was understood by the men as a command from him requiring them to proceed to the motor trucks which were waiting to take them to work (R11,25). There were comments from the men to the effect that they were not going to work that morning and none of them complied with the order (R11,19,48,54,55,58,59,70). Barnes left the hut and found First Sergeant Miller, who with Barnes returned to the hut. Miller enquired of the men why they were not going to work. Accused Smith answered that he was "fed up." Accused Henry Davis supplemented Smith's remarks in the same defiant spirit. Someone said that the men were not going to work because they could not trust the leadership (R13,19,32,37,49,55,59). Miller remained in the hut about three minutes. None of the men left the hut nor did any of them indicate that they intended to go to work (R13). Miller and Barnes then departed from the hut but none of the men accompanied them (R13,75). They went to hut #17, and outside of the hut in company with Sergeants Clanton, Ansley H. Williams and Arthur Jackson encountered Second Lieutenant Arthur L. Johnson (R144,155). During the conversation with the sergeants, Lieutenant Johnson looked into the recreation hall (the recreation hall and hut #17 were in proximity to each other) where he saw 45 or 50 men sitting and standing with no apparent intention of leaving (R145,159). He thereupon gave Miller and Barnes instructions to assemble the men of the company in the recreation hall and sent Second Lieutenant Withey for Captain Hinton (R145,155). Barnes and Miller went to hut #3 and informed the men that they were wanted in the recreation hall. Most of them went to the hall (R13,19,36,64).

EPISODE IN HUT No.17

Technical Sergeant Arthur Jackson was the ranking noncommissioned officer billeted in hut #17 on 6 March (R186,187). He went to breakfast and upon returning to his hut proceeded to make his bed and sweep the floor. He gave orders to the men to fix the bunks, clean the barracks and prepare to go to work. He went to the latrine and upon returning encountered First Sergeant Miller. As the result of the conversation with Miller, Jackson went to hut #17 and said to the men, "What's this I hear about you

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fellows not falling out this morning?" For a few minutes there was no answer. Then Gesither said, "Who said we are not falling out?" Acting upon instructions from First Sergeant Miller, Jackson ordered the men then in the hut to assemble at the recreation hall. They complied with the order (R184,188,192,266,282,287,295).

EPISODE IN RECREATION HALL
(Prior to general company meeting)

Technical Sergeant Ansley H. Williams was the ranking noncommissioned officer of section 3 and was immediate commander of the men of said section who were billeted in the recreation hall on the night of 5-6 March 1944 (R87,88). After he had eaten breakfast at about 6:30 a.m. on 6 March he returned to the hall and, about 8:00 a.m. ordered his men to fall out for work. He then went to see if the motor trucks were ready to transport the men, and returned to the hall. None of the men had made any effort to comply with his order. He asked them to explain their disobedience. From soldiers in the hall he received excuses that they were hungry and dissatisfied. Some of the men continued to refuse compliance with the order (R89, 91,98,103,113-115).

Sergeant Kenneth L. Jones was the senior noncommissioned officer in charge of the men of section 4 who were also billeted in the recreation hall on the night of 5-6 March (R102,103,116,117). Jones was awakened by Lieutenant Withey at about 5:45 a.m. on 6 March and upon dressing went to breakfast. He returned to the hall at about 6:30 a.m. and proceeded to police the quarters. He was present in the hall when Williams gave the order to the men of his section to fall out for work. About five minutes later Jones ordered his men to fall out for work by calling to them "All right, let's go fellows". There was some stirring about of the men and murmuring talk but no man left the hall or made any effort to comply with the orders. So far as the record discloses, Jones' order was not obeyed (R117,118,128).

The soldiers who were billeted in the recreation hall proceeded in an orderly manner to make their beds and clean the hall but they did not obey the orders of Williams and Jones to fall out and go to work because Captain Hinton and his subordinate officers entered the hall before the men finished making their beds and cleaning (R103-104,106-108,111,112,114,126).

RECREATION HALL MEETING

The motor trucks which transported the men from camp to work and return, stood in the motor park on the morning of 6 March. Some of the vehicles were about 15 or 20 feet from the recreation hall, their motors were running and they were ready for use. Second Lieutenant Johnson went to the motor pool about 8:00 a.m. None of the men had assembled at the motor park in readiness to mount the trucks (R143,144,153,155,159).

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As a result of Lieutenant Johnson's instructions to Miller and Barnes above recited, the men billeted in huts #3 and #17 went to the recreation hall and at 8:20 or 8:25 a.m. there were about 100 men in the hall (R13,19,78,145,146,155,156,159). Captain Hinton accompanied by Lieutenant Withey entered the hall. They were followed by Lieutenants Johnson, Mikesell and Penninger. Captain Hinton proceeded about 15 feet from the front door and halted. The other officers stood behind him near the door. There was considerable noise and confusion. The men gathered in a half circle and faced Captain Hinton (R145,155-157,217), who directed the accused Gayles to put the men at ease and require them to uncover. They complied automatically following Captain Hinton's direction (R217, 232). Thereupon, Captain Hinton said,

> "I understand that you men are not going to work. Do you fully realize what you are doing? What is the trouble? Why are you not going to work?" (R239).

There was no immediate response. Captain Hinton resumed,

> "Some one sound off and let me hear your troubles." (R14,19,195,208,217,239).

Accused Gayles responded, "We are dissatisfied and discontented". Captain Hinton answered, "We are all dissatisfied and discontented. You could hardly expect a man at war to be satisfied and contented; if you are so dissatisfied and discontented, maybe if you would remove your stripes it would help your feelings." Gayles thereupon removed his sergeant's stripes from his sleeves (R14,50,90,146,181,195,215,239,244). Captain Hinton faced towards accused James who was engaged in removing his stripes. James spoke thus, "Captain, do you think it is fair to have a man remove his stripes merely because he answered your question?" The officer said to James, "If you feel that way, your stripes are where they should be also - off." (R20, 90,147,195,208,239). Other noncommissioned officers commenced to remove their stripes. Others had their stripes removed by fellow soldiers (R239, 244). After the Gayles-James incident Captain Hinton turned to the men and said, "Let's hear your troubles. Let's hear the rest of your troubles." (R195,239).

Smith asked the reason Captain Hinton had moved the company from Wargrave three days ahead of time and declared "what this company needs is some new officers". Captain Hinton informed Smith that if it were necessary for him to see secret orders from battalion headquarters upon which the company had been moved, they would be shown to him (R134,147,195,209, 218,240).

Washington reminded Captain Hinton that he had previously stated that the noncommissioned officers were running the company or played a big part in running the company and he wanted to know why they could not have more control. Captain Hinton answered, "Non-coms had a big part but they

don't have all control". Washington also asked why the company could not have the same privileges as other companies (R148,240), and after non-commissioned officers removed their stripes he further stated that they could not go to work because they had no "non-coms" (R197,199,208,209,210, 213).

Felders informed Captain Hinton that Lieutenant Mikesell cursed him one day in addressing him and declared the men needed a new company commander. He further exclaimed, "Hold your ground men. If we don't get what we want now we'll never get it". (R78,84,90,134,138,147,157,169,186, 208).

Henry Davis then spoke thus, "What the trouble is we need new officers. We have only two officers (Lieutenants Fitzgibbons and Withey) who are looking out for us. The rest of them are no good." (R78,147,195, 208,218,240).

Ballard exclaimed, "We are all in all this together and if one noncom is going to take off his stripes, let all the noncoms take off his stripes because we have agreed to stick together on the deal" (R134,209, 240).

James stated in response to a question that the thing he had to say would be said to the "I.G" (R148,218,234).

There was a general flow of complaints and grievances from the men. Sensing the seriousness of the situation, Captain Hinton expressed the opinion that the meeting was a mutiny and then said,

> "Fellows, you don't know what you are doing. You don't know what you have let yourselves in for. You don't know how serious a meeting like this is or what this can mean. When you gather together for a common cause, the penalties are very severe, and they will bring much disgrace to you or to your families, and when it is all over with, you will be of no benefit to any one. Now, I am giving you a direct order to get out of here and get on those trucks and go to work" (R33, 70,196,209,218,240,254).

Captain Hinton stood still and silent for two or three minutes. Not one of the men moved towards the building exit. The men were mumbling and talking among themselves. The noncommissioned officers did not attempt to secure compliance with the order (R119,240,256). Finally a soldier exclaimed,

> "We want new officers and we want an I.G. investigation, and we won't go to work until we get it" (R240).

There was a further silent pause and then Captain Hinton warned,

> "I am giving you men one more opportunity to get on those trucks and go to work. You will get an I.G. investigation, and you will get new officers if it is in my power to get them for you. I am going to call Colonel D'Lee and put this matter in his hands and you can do what you like about the circumstances" (R94,148,196, 209,219,240,242).

Captain Hinton turned and was leaving the building when Lieutenant Mikesell spoke to him saying, "Captain, I want to say a few words", and then proceeded to say to the men:

> "Men I hate like hell that this had to happen. We have stood by you and we have fought for you and we have worked hard to make you a better company than any body elses', but I am not making any farewell speeches to you or anybody. If you don't want me around here or if I have ceased to be of service to you, then I am ready to leave" (R247).

Captain Hinton interrupted,

> "Don't apologize about what you say to these men; these men know what they are doing, and furthermore, don't say any more to them." (R201,209,241,247).

There was considerable commotion and noise as Captain Hinton moved towards the exit. None of the men made a motion to leave the hall. Some stood against the walls; some sat on the beds. Captain Hinton left the building alone and passed through the motor park. The trucks were there but no one was about (R162,210,241,247).

At this point Felders was heard to say, "Don't let them bluff you men; we'll all stay here; they can't court-martial all of us. Let's stick together". Somebody echoed, "Let's do them". A"mob reaction" was evident (R196).

After Captain Hinton departed from the recreation hall there was a pause of about three minutes during which time the men made no effort to leave the hall (R209,219). They talked among themselves and one soldier was heard to remark that

> "if they gave up what they had that morning they wouldn't get any more; that if they stayed there they would get something" (R210).

Lieutenant Mikesell then walked to the place where Captain Hinton had stood and said that he was sorry the men felt that way about the officers; that Colonel D'Lee would investigate and if the men did not like their officers they would secure new officers (R15,23,24,65,76,84,90,186,196). He further declared,

> "If you * * * go to work this morning, the way things are you may have a leg to stand on, but if you refuse to go to work, you won't have anything" (R209).

He testified that he spoke to the men because military discipline was entirely lacking. Their attitude and frame of mind indicated that they had no intention of leaving the hall in order to go to work (R210).

Washington a gain said, "We can't go to work; we haven't got any noncoms". Lieutenant Mikesell spoke directly to him and said,

> "You don't need any noncoms. You are men; you are grown men, and you are going out and work without having someone stand over you and make you work" (R210).

Lieutenant Mikesell spoke to and conversed with the men for about ten or fifteen minutes (R214,216). His remarks included the statement that the men were not working for their officers but for their country (R149,219). Felders at the end of Lieutenant Mikesell's remarks repeated, "Let's stick together and don't let them bluff you men." (R196,199,208,219, 230).

Then Lieutenant Withey informed the men that he was sorry about the incident but was glad they were in favor of two of the officers (Lieutenants Withey and Fitzgibbons); that he was sorry because he felt their opinions of the other officers were biased as they could not see what the other officers were doing for them. Some of the men mentioned the fact that mackinaws had not been issued to them. Lieutenant Withey informed them that while they could see what they were securing from supply, they could not see what the officers were otherwise doing for them (R76,150,186, 219).

At the conclusion of Lieutenant Withey's remarks, Lieutenant Penninger spoke for about five minutes and advised the men to go to work (R196,214). Three or four minutes elapsed and then Sergeant Manigo spoke (R214,226). Included in his remarks was the statement in substance that "we had come overseas as the 641st and we want to go back as the 641st" and that if the men did not secure an "I.G. inspection" they could repeat their performance on another morning until they did get an inspection. He further advised them to go to work immediately (R150,169,197,210,219). His remarks consumed about four minutes (R214,226).

When Manigo ceased speaking Gayles said to Lieutenant Withey:

> "Wait a minute. Lieutenant Withey, if we go to the field, do we have your word that there will be an investigation?" (R197,205, 209,210,229,232)

Lieutenant Withey answered:

> "I can assure you there will be an investigation. A matter as serious as this shouldn't go without an investigation, and I can promise it" (R15,197,205,209,210,229,232).

At this stage some sergeant called out, "Let's go to work. Get out of here on the double" (R186). The meeting started to disintegrate as the men moved towards the front door. In a few minutes all of them had passed from the hall. They went to their billets, secured their equipment and appeared at and mounted the trucks. Between 9:00 a.m. and 9:30 a.m. the trucks were loaded with soldiers and at 9:30 a.m. they departed for the work sites (R82,151,158,186,202,210,229).

SUBSEQUENT CONDUCT OF ACCUSED

Many of the noncommissioned officers in addition to Gayles and James removed their stripes either at the recreation hall meeting or immediately thereafter (R26,27,62,69,94,97,119,127) and continued for some time to appear without them (R251,253). The accused were placed in confinement on 17 April. During the period intervening between 6 March and 17 April the men performed their duties with usual promptness and diligence. The noncommissioned officers continued to function as such and the men recognized their authority and obeyed them (Charge Sheet, p.1; R27,28,37,66,95, 123,173,191,202,247).

Late in March Captain Hinton informed the noncommissioned officers of the company who had removed their stripes that unless they restored them to their uniforms they would be reduced to ranks by order of the Battalion Commander pursuant to the provisions of AR 615-5 (R251,252,257). The men complied with Captain Hinton's orders (R68).

5. Primary accused Washington, Ballard, Henry Davis, Felders and Smith and secondary accused Berry, Day, Paris E. Davis, Jr., Harris, Roots, Johnson and Whiters each elected to remain silent (R305).

6. The evidence for the defense consisted of testimony of certain of the accused which summarizes as follows:

On 6 March he was attached to the third section under Sergeant Ansley H. Williams for purposes of camouflage work. He arrived at the camp near Martock about 5:00 p.m. on 5 March (R266) and was billeted in Hut #17 (R272). On 6 March he went to breakfast, returned to his hut and prepared to fall out for work. Sergeant Jackson gave an order, "Straighten up your bunks. Get ready to fall out." Gayles left the hut and in front thereof encountered Lieutenant Johnson who spoke of a mutiny and of a meeting of the men in the recreation hall. Gayles went to the hall. Men who were not billeted at the hall commenced to arrive (R266).

Captain Hinton came into the hall, walked through the crowd and then said to accused, "Sergeant, tell the men to uncover and at ease." The men complied without an order from Gayles. Captain Hinton then said "What's this I hear about you men not falling out?" No one answered. Then Captain Hinton looking at accused said, "Well, speak up somebody. Speak up, sound off." Accused then said, "Sir, the men seem to be discontented." Captain Hinton replied, "Discontented, is that it?" Gayles replied, "Yes, sir". Captain Hinton retorted, "Well, if that's the way you feel about it you can take off your stripes." Accused removed his stripes (R267).

At the conclusion of the conversation with Gayles, Captain Hinton continued, "Is there any one else?" James answered with a query directed to Captain Hinton as to whether he thought it was right for a noncommissioned officer to be "busted" when he answered a direct question to the best of his ability or gave an opinion. Captain Hinton replied in substance that James had better remove his stripes. James removed his stripes. Again Captain Hinton declared, "If there is any one else, let's hear them." Felders referred to an incident wherein Lieutenant Mikesell used profanity towards him. Smith answered expressing discontent (R267). Some one in the crowd said that the men did not like any of the officers except two of them. There were complaints concerning laundry, food, mail censorship and the handling of applications for officer candidate school (R268,273).

Captain Hinton in the course of his talk used the expression, "I would advise you to go to work", but he never gave a direct order to go to work (R267,270). Sergeants Williams, Miller, Jackson, Barnes and Manigo were present in the hall on this occasion (R268).

As Captain Hinton ceased speaking and turned to depart, Lieutenant Mikesell said, "At ease men. I would like to say a few words." Captain Hinton addressed Lieutenant Mikesell with the remark that he (Hinton) did not think it was any use as the men had made up their minds so let them suffer the consequences. However, Lieutenant Mikesell addressed the men and said that their job was not working for the officers but for their country; that he had not known how they felt about him but if he had known he would have applied for a transfer, and he advised the men to get on the trucks and go to work (R268). There was no lapse of time between the end

of Captain Hinton's speech and the commencement of Lieutenant Mikesell's remarks which would have permitted the men to fall out for work. None of the officers gave an order to fall out for work (R271).

Lieutenant Penninger spoke and supplemented the remarks of Lieutenant Mikesell. Lieutenant Withey followed with an explanation of what he and Lieutenant Fitzgibbons had done for the men (R268). At this point the situation was more or less "out of hand". In the course of his remarks, Captain Hinton had said there would be an "I.G. inspection" and there had been remarks from the men on the subject. It seemed to be a major point. Having confidence in Lieutenant Withey, Gayles asked him if he could guarantee or if he would promise the men such inspection (R269). Gayles believed the situation was "out of hand" because of the noise and confusion and not because the men did not go to work (R272). He denied he had bargained with Lieutenant Withey with respect to an "I.G. inspection", but he thought that if the men received the assurance, they would go to work (R273,274).

Manigo entreated the men to go out to work and Williams said in substance, "'Come on, let's go men.'" Then the men went out to the trucks (R269,271).

Gayles asserted that he had no intention not to work and declared he had no agreement with any one that he would not work. He intended to go to work on that morning and he did so. After 6 March he continued to act as sergeant and continued to perform his work. He never replaced his sergeant stripes. He went to the hospital on 17 April and was hospitalized for 26 days. On the third day after his return from the hospital he was taken to the guard house (R267,270). In hut #17 on the morning of 6 March, Gayles heard none of the men express the intention of not working (R272).

JAMES

On 6 March 1944 James worked under Sergeant Jackson in the service platoon and was billeted in hut #17. Lieutenant Withey awakened the men that morning by crying, "Get up, men, pancakes for breakfast". Accused went to breakfast after having made his bunk. Enroute from breakfast he encountered Lieutenant Johnson and Sergeant Miller. Miller said something about a meeting in the recreation hall. James returned to hut #17 and heard Jackson's instructions to go to the recreation hall (R287,288).

Upon entering the recreation hall he found a few men present but men thereafter arrived from all directions. The men were talking and fixing up their beds. Captain Hinton entered and ordered Gayles to put the men at ease and to stand uncovered. There was silence and then Captain Hinton asked, "What's the trouble?" There was no response. Captain Hinton continued, "Come on, somebody sound off. What's the trouble?". The following conversation then occurred between Captain Hinton and Gayles:

Gayles: "Sir, the men are discontented."
Captain Hinton: "Well, are you discontented?."
Gayles: "Sir, I am discontented."
Captain Hinton: "Well, you can begin by giving me your stripes."

Gayles removed his stripes and James objected,

> "Captain, do you think it fair to bust a noncommissioned officer when he was more or less answering a question?"

Captain Hinton replied, "Well you can give me your stripes too if that is the way you feel." James removed his stripes (R288).

Captain Hinton prior to that time did not say anything about men going to the trucks. He was listening to complaints. He gave no order to go to work. He finally said to the men "I'd advise you men to go to work" (R289,291). Captain Hinton was belligerent (R288). He said, "If there are any complaints or anything like that I would like to hear them". The men commenced to complain (R288). Felders said he had been cursed by an officer, but James did not hear him say, "Stick together, they can't court-martial all of us; don't be afraid of any court-martial" (R291). Someone spoke of an investigation by the Inspector General, Lieutenant Johnson came to accused and attempted to engage him in conversation. James answered, "Sir, anything else I have to say about my stripes will be to an Inspector General" (R289). Lieutenant Johnson also said, "James, don't do anything to get yourself in trouble". James replied, "Sir, I'm in no trouble" (R288).

Upon conclusion of Captain Hinton's speech, Lieutenant Mikesell exclaimed, "Just a minute, I have something to say". Captain Hinton said to him, "I wouldn't be apologetic". Lieutenant Mikesell did become apologetic. He said he was sorry that things had come up the way they had; that he would apply for a transfer and that he did not remember he had cursed Felders (R289). Lieutenant Penninger, who was company censor, referred to complaints about mail censorship and asserted that he had never divulged the contents of any letter (R289). Lieutenant Withey spoke and said he was sorry about the whole affair and that he and Lieutenant Fitzgibbons were in a position to do more good than could be seen. He further said he would see that the men secured an investigation by the Inspector General (R289). After Lieutenant Withey had finished, some of the men started for the trucks. Manigo arose and said, "Men, let's go to work; let's get out of here". The men left at once (R289).

Accused at all times intended to go to work. He would not have been in the recreation hall had not someone informed him of the meeting. He had no agreement with any one not to work (R289,290,293).

On the evening of 7 March Colonel De Lee ordered him to replace his stripes and accused complied with the order (R289,290).

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WILSON

Wilson was temporarily billeted in the recreation hall on 5-6 March. He went to breakfast which was served late on 6 March and then returned to the hall and made up his bed. It was his intention to go to work and he had no understanding with others not to work (R275). Prior to the meeting he recalled that someone in the hall called out "Let's go," and someone ordered "Fall out." He believed he heard someone say "We aren't going to fall out". He did not fall out pursuant to these orders (R278,279). He was about to leave the hall to go to the trucks when Captain Hinton and the other officers entered and he remained to hear what they had to say (R280). He related Captain Hinton's request for complaints and the Gayles-James episode substantially as stated by the two men involved (R276). He did not hear Captain Hinton order the men to go to work. He heard him say, "But I advise you men to go to work. I will do all in my power to get you six new officers and an I.G." (R276-279). He heard Captain Hinton say to Lieutenant Mikesell "Don't say anything". Lieutenants Mikesell and Penninger and Sergeant Manigo spoke to the men. After Manigo spoke the men went to work. Wilson went to work and performed his usual duties that morning, and had no agreement with anyone not to work (R276,281). He did not remove his stripes in the recreation hall but did so thereafter (R278).

FRISTOE

Fristoe was billeted in hut #17 on the night of 5-6 March. He went to breakfast on the morning of 6 March and returned to his barracks where he cleaned around his bunk. Neither Jackson nor anyone else gave an order to fall out. Upon leaving hut #17 about 8:00 a.m. he noticed men going to the recreation hall and for this reason he also went to the hall (R282). The trucks were then standing about 15 feet from the hall (R283). After he entered the hall Captain Hinton came in. Fristoe described Captain Hinton's request for complaints and the Gayles-James episode in effect as other defense witnesses (R283,286). He asserted that he did not receive an order that morning to fall out and go to work either from a noncommissioned officer or from Captain Hinton. As Captain Hinton was leaving he said to the men, "I would advise you men to get on the trucks". Then Lieutenant Mikesell wanted to speak and Captain Hinton advised him not to say anything and to leave the men alone (R284,286). Lieutenants Mikesell and Withey and Sergeant Manigo spoke. After Manigo concluded, the men went out and boarded the trucks (R283,284).

There was no agreement between him and others not to go to work and he heard no statements from others to that effect (R284). He removed his stripes as he left the hall but restored them the next day (R284,285).

GEAITHER

Geaither was billeted in hut #17 on the night of 5-6 March. After breakfast on the morning of 6 March he returned to his barracks and proceed-

ed to straighten his bed and clean around the same. Subsequently, while he was talking to Fristoe, Jackson came into the hut and said, "What's this I hear about you men not going to work?" Accused replied, "What you mean, not going to work?" He then went outside. Jackson came out and informed him that Sergeant Miller wanted him in the recreation hall and he went into the hall. He intended to work that day and had no agreement with any person not to work (R295). He was in the hall when Captain Hinton entered and related Captain Hinton's request for complaints, the Gayles-James episode, the content of the remarks by Lieutenants Mikesell and Withey and Sergeant Manigo and also the colloquy between Captain Hinton and Lieutenant Mikesell in substantially the same manner as other defense witnesses (R296-298). He asserted that as Captain Hinton left the hall he exclaimed, "I advise you men to get on those trucks and go to work" (R297). He did not remove his stripes in the hall because he wore fatigues without stripes (R296).

PERRY

Perry slept in hut #17 on the night of 5-6 March. He did not arise early and when he did the majority of the men had gone to breakfast. He made his bed. He finally went to the mess hall but the food was gone. He prevailed on a cook to prepare food for him which he took back to the hut where he ate it. He washed his mess-kit, grabbed his equipment and ran out of the hut intending to board a truck. As he passed the recreation hall he saw a meeting was being held therein and he entered the hall (R301). The meeting was a surprise to him (R304) and when he entered the hall he had no knowledge of its purpose (R305). He intended to go to work and had no agreement with any person not to work (R301). He heard no statements from the men either prior to or at the meeting that they were not going to work. At the meeting he remained silent (R302,304,305).

When Perry entered the recreation hall Lieutenant Mikesell was talking to Captain Hinton (R301). He did not hear Captain Hinton order the men to go to work (R304). He saw Lieutenant Mikesell speak but could not hear what he said because he (Perry) was at the back of the room (R303). He also saw Lieutenant Withey speaking and heard him say something concerning the men securing an investigation (R303). When Manigo spoke he said, "OK. fellows, let's go to work" (R304), and then the men left the hall (R305).

Accused went to work on 6 March when the other men left the hall and thereafter he performed his regular duties. On the afternoon of 6 March he removed his stripes for the reason he thought it was unfair for Captain Hinton to "bust" a noncommissioned officer because he answered the Captain's questions (R303,304).

7. Certain procedural and evidential questions arising at the trial require preliminary consideration:

(a) At the arraignment of accused the defense on behalf of each accused moved for a severance of trial on the grounds (1) that each accused desired to avail himself of the testimony of one or more of his coaccused and (2) that the evidence offered in support of Charge I and its Specification would be prejudicial to the rights of the several accused separately charged in Specifications 1, 2 and 3 of Charge II. Defense counsel in response to a question by the law member stated that he did not think that the defense of any of the accused would be directly antagonistic to the defense of other of the accused. The motion was denied (R5).

All of the accused (both primary and secondary) are jointly charged with disobedience of a lawful command of their superior officer in violation of the 64th Article of War (Charge I and Specification). Six of the accused were charged with beginning a mutiny by concerted disobedience of the lawful order of Technical Sergeant Lenney A. Barnes, a noncommissioned officer who gave said order in the execution of his office and the lawful order of Captain Herman C. Hinton, their commanding officer (Specification 1, Charge II). Five other of the accused are jointly charged with beginning a mutiny by concerted disobedience of the lawful order of Technical Sergeant Ansley H. Williams, a noncommissioned officer who gave said order in the execution of his office and the lawful order of Captain C. Hinton, their commanding officer (Specification 2, Charge II). Seven of the accused, other than those named in Specifications 1 and 2, Charge II, are jointly charged with joining in a mutiny which had been begun by others by concertedly disobeying the lawful command of Captain Herman C. Hinton, their commanding officer (Specification 3, Charge II).

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 vital question arising on the motion is resultant upon the

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unusual form of the specifications. All of the accused are jointly charged with violation of the 64th Article of War. Two several groups are separately charged, jointly within each group, with beginning a mutiny and a third separate group is charged jointly within itself with joining in a mutiny commenced by others, all in violation of the 66th Article of War. Are the principles contained in the above quoted excerpt from the Manual for Courts-Martial applicable to this situation? The motion for severance raises the issue.

The allegations of each specification of Charge II directly connect the accused named therein with the offense charged in the Specification of Charge I. The identical locus of the offenses and the same dates are alleged in all of the specifications. Captain Hinton's orders "to fall out and to go to work" are set forth as a basic premise of each offense. The accused charged jointly in the Specification of Charge I are the same accused who are grouped separately in the specifications of Charge II. There is therefore exhibited on the face of the pleading a community of action and common objectives of each and all of the accused and this is true notwithstanding the fact that each specification alleges a separate offense. Had the specifications of Charge II charged offenses committed at times and places other than at the time and place set forth in the Specification of Charge I a different question would have been presented.

The reasonable conclusion from these self-evident circumstances is that the offenses charged in the several specifications although separately alleged were part and parcel of one transaction and the form of the charges and specifications do not prevent the application of the above quoted principles announced by the Manual for Courts-Martial.

The Board of Review in CM ETO 895, Davis et al, considered its authority on appellate review of the court's denial of a motion for severance and approved the following doctrine:

> "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 separate 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 question remains as to whether the court abused its judicial discretion in denying the motion. The first ground of the motion, viz: each accused desired to avail himself of the testimony of one or more of his co-accused, does not possess convincing weight in the face of the record of trial. Six of the accused testified on behalf of the defense; twelve elected to remain silent. The testimony of the six accused who testified displayed a marked consistency. The witnesses were in accord with much of the evidence for the prosecution, but their testimony contained sharp denials of prosecution's claims that (a) Captain Hinton gave an order "to fall out and go to work", (b) that accused intended not to work and (c) that accused concertedly and jointly had agreed not to work. The evidence of the accused who were witnesses did not in any degree incriminate any other of the accused; rather it represented a traverse of the prosecution's major contentions and was in favor of all accused alike. The defense made no showing that any of the accused who elected to remain silent would testify to other or additional exculpatory facts or that the testimony of any of them would present defensive evidence which could not otherwise be proved. In view of such situation it is manifest that the first ground of the motion lacked substance and reality. At best it was but a suggestion of counsel.

Factors involved in the second basis of the motion have been first discussed above. As has been demonstrated, the accused had no right to a severance, and the denial of the motion could become prejudicial error only if it were arbitrary or constituted an abuse of the court's discretion. In view of defense counsel's avowal that he did not think that a conflict would arise in the defense of the respective accused (which estimate is borne out by the facts of the trial) it cannot be said that this ground affords any basis for the claim of error. It should be noted in this connection that the form of the motion included a demand that the trial be severed as to each accused even as to Charge I which alleged that the accused jointly committed the offense therein described. The granting of the motion would have required eighteen separate trials. A mere statement of this situation is enough, in connection with the foregoing to show there was no abuse of discretion by the court, and the denial of the motion was free from error.

(b) At the conclusion of the prosecution's case in chief the defense on behalf of all accused moved for findings of not guilty of the

charges and specifications (R262-264). As will be hereinafter demonstrated, the prosecution's evidence was of a competent and substantial character which sustained the findings of guilt of each accused, except those included in Specification 2, Charge II and as to them it should have been granted in respect to the offense (beginning a mutiny) therein alleged. This error will be hereinafter discussed. As to the offenses covered by Charge I and Specifications 1 and 3, Charge II, the court properly denied the motion (CM ETO 393, Caton and Fikes; CM ETO 1673, Denny; CM ETO 1991, Pierson; MCM, 1928, par.71d, p.56).

(c) Sergeant Lenney A. Barnes, a witness for the prosecution was asked upon direct examination,

> "At any time while you were present in the recreation hall, did any of the accused make any statement or say anything?" (R15).

Upon the witness' answer in the affirmative the defense objected to

> "any statements that were made by any of the accused, except in so far as pertains to that particular accused; that is in no way affecting any of the other accused" (R15).

The objection was overruled and the witness stated that Gayles said that he was dissatisfied; that James said he thought it unfair for the Captain to take Gayles' stripes because he spoke up when he was asked to speak up and that Felders said that he thought it was not right for officers to curse men (R15). When this evidence was received, the presence of all of the accused in the recreation hall at the time of these utterances had not been shown. However, during the course of the trial the prosecution by an abundance of evidence proved that each of the accused was present in the recreation hall at the time Gayles, James and Felders made these remarks. Defense's own evidence confirmed the verity of Barnes' testimony (R267,276,283,286,288, 291,296,298). The statements of Gayles, James and Felders constituted admissions a gainst interest (20 Am.Jur., sec.555, p.467). As will be hereinafter shown, the total evidence in the case fully justified the court in finding that each of the accused was definitely implicated in the exploitation of a mutinous agreement at the time of the recreation hall meeting. In view of such finding, "all acts and statements of each made in furtherance of the common design are admissible against all of them" (MCM, 1928, par. 114c, p.117). Such statements were also admissible as part of the res gestae (CM ETO 3080, Holliday).

(d) Barnes, over objection by defense, was permitted to testify that Manigo (not an accused) at the recreation hall meeting in the presence of each and all the accused exclaimed, "We came over here together and we are all going back together" (R16). Manigo himself confirmed this declaration (R169). The statement was admissible for the reasons set forth in (c) supra.

(e) Sergeant Jones, leader of section 4, was permitted to testify that he gave the order "All right, let's go fellows" to the members of his section in the recreation hall after Sergeant Williams, leader of section 3, had given a similar order to the men of his section also present in the hall. Jones also was allowed to state the identity of the accused who were present when he gave his order. The prosecution and the court particularly limited the purpose of this evidence as a circumstance bearing upon violation of the Williams order as distinct from an order not alleged nor claimed to have been violated (R117,118). It was positively established that certain members of sections 3 and 4 were billeted in the recreation hall on the night of 5-6 March. The evidence served to explain the circumstances under which the Williams order was given and tended to show that all of the men billeted in the recreation hall were acting under a common motive and impulse. It possessed a high degree of relevancy upon the general issue of the guilt or innocence of the accused. While it was evidence of a collateral fact it had a logical connection with the design, plan or scheme of the beginning of and joining in a mutiny. It was therefore admissible (Underhill's Criminal Evidence, 4th Ed., sec.184, pp.333-335; CM ETO 895, Davis et al, pp.37,38).

8. The principles governing the offense of disobeying the order of a superior officer (Charge I and Specification) relevant to the instant case are stated thus:

> "The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses or deliberately omits to do what is ordered"
>
> * * * * * * * * *
>
> "The form of an order is immaterial, as is the method by which it is transmitted to the accused, but the communication must amount to an order and the accused must know that it is from his superior officer; that is, a commissioned officer who is authorized to give the order whether he is superior in rank to the accused or not.
> Proof.-(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. A command of a superior officer is presumed to be a lawful command". (MCM, 1928, par.134b, pp.148,149).

(a) Captain Hinton was on 6 March 1944 the commanding officer of the 641st Ordnance Ammunition Company. He was the superior officer of accused. His authority to give the order which is the subject of Charge I

and its Specification is not questioned. These fundamental elements of the prosecution's case were fully proved and stand undisputed.

(b) There was an abundance of evidence before the court that Captain Hinton in the course of his discussion with the men of his company at the recreation hall meeting on the morning of 6 March 1944 gave a direct order to the assembled men to board the trucks and go to work. He said:

> "Now, I am giving you a direct order to get out of here and get on those trucks and go to work" (R240).

As he was about to depart from the hall he affirmed the order:

> "I am giving you men one more opportunity to get on those trucks and go to work" (R240).

The testimony of the defense witnesses which denied that Captain Hinton gave a positive order and asserted that he merely "advised" the men to go to work created at most a conflict in the evidence which it was the duty of the court to resolve. The court by its findings elected to believe prosecution's evidence on this issue. The determination of such issue upon the total evidence was peculiarly within the province of the court, and its finding is entitled, upon appellate review to the full benefit of the presumption that it is true and correct (CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer; CM ETO 1954, Lovato; CM ETO 2007, W. Harris; CM ETO 2484, Morgan; CM ETO 2672, Brooks). It must therefore, be accepted as a fact that Captain Hinton did give the order alleged in the Specification of Charge I at the time and place alleged.

(c) The evidence established without contradiction that each of the primary accused was present at the recreation hall at the time Captain Hinton gave his order to entruck and go to work:

Gayles: (R167,184,195,199,208,218,239).

James: (R167,184,208,218,239).

Washington: (R195,208,210,218,239).

Ballard: (R195,208,218,239).

Henry Davis: (R195,208,218,239).

Felders: (R167,169,184,195,199,208,218,239)

Smith: (R33,195,208,218,239).

(d) The prosecution therefore successfully sustained the burden of proving two elements of its case: (a) that the accused received from Captain

Hinton the command to fall out and go to work and (b) that Captain Hinton was their superior officer at the time the order was given by him. The problem in the case arises in connection with the proof of the third element (c) that accused willfully disobeyed said order or command.

Beyond doubt each of the accused ultimately did "fall out", board a truck and go to work on the morning of 6 March. Considered from the standpoint of objective performance there was an eventual compliance by accused with Captain Hinton's order. Such interpretation of the evidence is not however, a conclusive answer to the cogent, vital question whether this compliance was THE obedience contemplated and required by the order. The answer to that question requires an analysis of the relevant evidence. In its fundamentals as it pertains to this issue the evidence of the prosecution and the defense is approximately in accord. The testimony of a majority of the witnesses indicates that a difference of opinion arose between Captain Hinton and Lieutenant Mikesell as to the proper and effective course of treatment of the critical situation which arose at the recreation hall meeting - a difference which unfortunately was exhibited to the recalcitrant soldiers. Captain Hinton had issued a specific, direct order to the men "to fall out and go to work". The trucks were waiting and it was long past the normal time to entruck for work. It was an order which called for immediate obedience. The soldiers indicated no immediate intention of obeying the order and made no move to comply. As Captain Hinton was about to leave the hall he uttered a final warning to the men.

> "I am giving you men one more opportunity to get on those trucks and go to work * * * you can do what you like about the circumstances" (R240).

Lieutenant Mikesell intervened at this point and said to Captain Hinton, "I want to say a few words." He then commenced an apologetic explanation which was interrupted by Captain Hinton who exclaimed,

> "Don't apologize about what you say to these men; these men know what they are doing, and furthermore, don't say anything more to them" (R241).

Notwithstanding this order from his company commander, Lieutenant Mikesell thereafter engaged the men in an explanatory speech which concluded with the plea that they go to work. The defense particularly directed its cross-examination of prosecution's witnesses to the question of the time lapse between Captain Hinton's concluding statement to the men and Lieutenant Mikesell's declaration, "Captain, I want to say a few words", and also between the speeches of Lieutenants Mikesell, Penninger and Withey, with the evident purpose of establishing the fact that the accused's noncompliance with Captain Hinton's order was caused by the intervention of these Lieutenants and was not a willful and deliberate act on their part. Such version of the evidence oversimplifies the facts and totally disregards the actualities of the situation. There is substantial evidence that there was a

lapse of time between the termination of Captain Hinton's remarks which concluded with the direct order, "Now, I am giving you a direct order to get out of here and get on those trucks and go to work" (R240) and the commencement of Lieutenant Mikesell's exhortation beginning with, "Men I hate like hell that this had to happen" (R247). Captain Hinton, after giving the direct order remained in the same approximate location for two or three minutes (R240) and there was no movement towards the door (R241). Such facts when coupled with Captain Hinton's final warning "I am giving you men one more opportunity to get on those trucks and go to work" (R240) prior to the commencement of Lieutenant Mikesell's remarks is clearly indicative that there had elapsed a period of time after the direct positive order was given within which the men could have at least commenced compliance with it. This inference is amplified by further evidence that after Captain Hinton had concluded his original remarks by giving the direct order that there was murmuring among the men; that Felders exclaimed, "Don't let them bluff you men; we'll all stay here; they can't court-martial all of us. Let's stick together" and the unidentified response, "Let's do them" with a chorus of approval and a general mob reaction (R196). Ballard at this time said, "Don't give in; we've got to stick together, men" (R209). These facts support in a most substantial manner the inference that there was not only a defiant attitude and a pre-determination by the accused not to obey the order but also that the accused wilfully and premeditatedly disobeyed the same when time and opportunity were afforded them for compliance.

The evidence is clear and succinct that accused and other soldiers, billeted in huts #3 and #17 refused on the morning of 6 March to comply with orders of their noncommissioned officers to fall out and go to work. The evidence is also substantial that those of the accused who were billeted in the recreation hall had knowledge of the mutinous agreement hereinafter discussed and proceeded to act under it, although they had not reached the point of defiance of the order of Sergeant Jackson at the time of the arrival in the hall of Captain Hinton and the other officers. Knowledge of this recalcitrancy came to the attention of Lieutenant Johnson, who thereupon gave orders that the company should report to the recreation hall. Captain Hinton impliedly approved Lieutenant Johnson's action by his attendance at the meeting and participation therein. The meeting was therefore not an illegal or unlawful assemblage of soldiers as was involved in CM ETO 2005, Wilkins and Williams. These undisputed facts give rise to the inference that the soldiers entered the recreation hall meeting animated by the same spirit of defiance of authority that they had lately exhibited to their noncommissioned officers. Such inference is not only just and reasonable but is in truth supported by the logic of the situation.

With this condition confronting him Captain Hinton invited complaints from his men. These complaints considered separately and in solido unconsciously reveal not only a critical attitude of the men towards their officers but also that the men (including accused) intended to persist in their prior defiance of authority and refusal to go to work until their demands were granted.

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It was against this background that Captain Hinton gave his order "to get out of here and get on those trucks and go to work" (R240). There was no overt act by any of the soldiers which evidenced their intention to comply immediately with this command. Allowing the defense the full benefit of its contention that prompt compliance was rendered impossible by the intervention of Lieutenants Mikesell, Penninger and Withey, a considered and balanced analysis of the evidence reveals a much deeper and more incriminating meaning inherent in this situation than such interpretation of the evidence offers.

The over-all evidence in the case supports the inference that the intervention of the three lieutenants did not prevent the soldiers from complying with the order, but oppositely that they intervened because it was evident that the accused and fellow soldiers did not intend to obey the order and that the lieutenants' efforts were purposed to secure obedience to the order of the commanding officer. This conclusion finds striking support in the fact that Gayles toward the end of the meeting bargained with Lieutenant Withey and secured a promise from that officer that an investigation by the Inspector General's Department would be forthcoming. Upon receiving this promise and having thereby gained their objective, the men went to the trucks. Stated otherwise, the men finally went to work, not in compliance with Captain Hinton's order, but because they had accomplished their purpose, viz: the securing of a promise from one of their officers of an investigation. The assertion that accused did not willfully disobey Captain Hinton's order under these circumstances makes a travesty of his authority as company commander. The ultimate performance by the men of the same acts as required by the order after having been bribed by the promises of a junior officer cannot retro-actively cancel their offense nor ameliorate its enormity.

It was within the peculiar province of the court to consider and evaluate the evidence and to draw such inferences therefrom as are logical and reasonable. Inasmuch as there exists substantial evidence upon which to base the inferences herein discussed, the Board of Review cannot upon appellate review, say that the court exceeded its authority. Its findings will not be disturbed (See authorities cited in sub-paragraph (b), supra).

The Board of Review is therefore of the opinion that the record is legally sufficient to support the findings of guilt of the primary accused of Charge I and its Specification (CM ETO 1096, Stringer; CM ETO 1232, Baxter; CM ETO 2005, Wilkins and Williams; CM ETO 2569, Loyd Davis; CM ETO 2644, Pointer; CM ETO 2764, Huffine; CM ETO 2921, Span).

9. The mutiny charges (Charge II) involved in this case are alleged in three separate specifications:

Specification 1: Primary accused Henry Davis and Smith (who were billeted in hut #3) together with four secondary accused (Day, Harris, Johnson and Roots) were charged jointly with beginning a mutiny with intent to subvert and override lawful military authority by concerted disobedience of the lawful orders of Technical Sergeant Lenney A. Barnes, a noncommis-

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sioned officer who was then in the execution of his office and of their commanding officer, Captain Herman C. Hinton, to fall out and go to work;

Specification 2: Primary accused Ballard (who was billeted in the recreation hall) together with four secondary accused (Berry, Wilson, Whiters and Paris E. Davis, Jr) were charged jointly with beginning a mutiny with intent to subvert and override lawful military authority by concerted disobedience of the lawful orders of Technical Sergeant Ansley H. Williams, a noncommissioned officer who was then in the execution of his office, and their commanding officer, Captain Herman C. Hinton, to fall out and go to work.

Specification 3: Primary accused Gayles, James and Felders (who were billeted in hut #17) and Washington (who was billeted in hut #5) together with three secondary accused (Fristoe, Geaither and Perry) were charged jointly with joining in a mutiny which had been begun against the lawful military authority of Captain Herman C. Hinton, the commanding officer of their company, and, with intent to subvert and override lawful military authority, with concerted disobedience of the lawful command of said Captain Herman C. Hinton to fall out and go to work.

The legal principles which are controlling in the consideration of the issues presented are as follows:

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 over-ride such authority, or to neutralize it for the time being." (MCM, 1917, par.417, p.213; MCM, 1928, par.136, p.150; Dig. Op.JAG, 1912, XXII A, p.123; Winthrop's Military Law & Precedents - Reprint, p.578).

One of the principal elements of mutiny is the intent to over-ride, 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

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> indeed best illustrated by a reference to the adjudged cases treating of that offence 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 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, 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.

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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) (Underscoring 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).

In determining the guilt of the primary accused of the mutiny charges their individual personal conduct on the occasion of the disturbance must be measured against the background of events and circumstances occurring prior to and on the morning of 6 March 1944. The evidence in the case fully justified the court in concluding that some time between the Manigo meeting on 25 February 1944 held at the camp in Horsington and the evening of 5 March when the company arrived at the Martock camp, the enlisted personnel of the 641st Company, nursing grievances which may or may not have possessed substance and merit, entered into an understanding or agreement among themselves to refuse to perform their usual and ordinary duties on the morning of the 6 March unless or until they secured from their officers the promise of an investigation of company affairs by the Inspector General's Department. Members of the company billeted in huts #3 and #17

pursued the same general course of conduct and reacted identically to the orders of their superior noncommissioned officer "to fall out and go to work". These highly incriminating facts when supplemented by evidence of unrest and dissatisfaction in the company for several weeks prior to the events at the Martock camp, and of the conduct of the men at the recreation hall meeting, coupled with the critical and subversive comments made thereat by certain of their number, is substantial evidence from which the court was authorized to infer the prior arrangement and understanding of the soldiers to subvert, override or neutralize superior authority until their demands were granted. The denials of the accused who testified, that they had entered into an agreement not to work created an issue of fact which was resolved against accused by the court. Such finding will be accepted on appellate review and will not be disturbed (See authorities cited in par. 8(b), supra).

Parties to subversive agreements of this nature generally attempt to conceal their actions and purposes in a veil of secrecy and of necessity the existence of such agreements must be proved by evidence of a series of external collateral events or transactions, from which the fact finding body may infer the existence of such agreement. The law does not demand the impossible; it recognizes practical necessity. When there is a substantial body of proof of relevant, material facts and the existence of a conspiratorial agreement is a reasonable and logical inference therefrom, the prosecution in a criminal case, asserting the existence of such agreement, has sustained its burden of proof and is entitled to have the verdict or finding of the jury or court on such evidence. In the event there is a finding that such agreement exists it will not under such circumstances be disturbed on appellate review. The following quotations are particularly appropriate to the instant situation:

> "The fact of a conspiracy may be proved by any competent evidence. The conspiracy may of course be shown by direct evidence, and, it is apprehended should be so proved if this character of evidence is attainable. Direct evidence is, however, not indispensable. Circumstantial evidence is competent to prove conspiracy. Proof of the combination charged, it has been said, must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. The nature of the crime usually makes it susceptible of no other proof, and the rule which admits this class of evidence applies equally in civil and criminal cases. Circumstantial evidence if sufficiently strong may outweigh the positive statement of a party or witness." (12 C.J., sec.226, pp.633-634; 15 C.J.S., sec.92a, pp.1140-1141).

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"'In prosecutions for criminal conspiracies,' * * * *, 'the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. In the history of criminal administration the case is rarely found in which direct and positive evidence of criminal combination exists. To hold that nothing short of such proof is sufficient to establish a conspiracy would be to give immunity to one of the most dangerous crimes which infest society. * * *. It is from the circumstances attending a criminal, or a series of criminal acts, that we are able to become satisfied that they have been the results not merely of individual, but the products of concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them; but which may be so linked together by circumstances, in themselves slight, as to leave the mind fully satisfied that these apparently isolated acts are truly parts of a common whole; that they have sprung from a common object, and have in view a common end. The adequacy of the evidence in prosecutions for a criminal conspiracy to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question for the jury'" (2 Wharton's Criminal Law - 12th Ed., sec.1667, pp.1939-1940, fn.4, quoting Judge King).

"Direct and positive evidence is not essential to prove the conspiracy; but circumstantial evidence is sufficient to establish a conspiracy, and common design or conspiracy may be deduced from attending circumstances, where it excludes every reasonable hypothesis but that of guilt, * * *. In a conspiracy trial having numerous actors and shifting scenes of action, great latitude is allowed the trial judge in the admission of circums tantial evidence, as the conspiracy often can be shown only by isolated facts and inferences drawn therefrom" (Underhill's Criminal Evidence, sec.771, pp.1398-1400).

(As sustaining the foregoing principle see Clune et al v. United States, 159 U.S. 590, 40 L.Ed., 269; Williamson v. United States, 207 U.S. 425, 52

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L.Ed., 278; Walker v. United States 93 Fed(2nd) 383, certiorari denied 303 U.S. 644, 82 L.Ed., 1103; Devoe v. United States, 103 Fed(2nd) 584; United States v. Valenti, 134 Fed(2nd) 362).

The burden of proving the existence of the above described agreement among and between the personnel of the 641st Company having been sustained by the prosecution, it is now necessary to consider the evidence of the relationship of each primary accused to this subversive agreement and whether it substantially proves such conduct and activities by him as will sustain the findings of his guilt.

(a) The evidence with respect to Henry Davis and Smith on the occasion of the disorder at the Martock camp on 6 March 1944 (Specification 1, Charge II) summarizes as follows:

> Henry Davis was a member of section 1 and was billeted in hut #3 on the night of 5-6 March 1944 (R10,16). He was present on the morning of 6 March when Barnes gave the order, "Let's go; let's load up" (R11,12,32,49,52,59). He was present when there were comments from the men to the effect that they were not going to work that morning and he did not obey Barnes' order (R11,17,48,54,55,58,59,70). He told Barnes he was not going to work. When Sergeants Miller and Barnes returned to the hut and Miller asked the reason for the men not going to work, Davis supplemented and agreed to Smith's answer that he was "fed up" and he also explained the reasons for the men not falling out (R13,32,74,75). Davis was present at the recreation hall meeting (R33,61,147, 195,208,218,239). During the course of the meeting after the Gayles - James episode and upon Captain Hinton's further invitation for complaints, Davis said, "Sir, none of our officers are any good. We only have two we can trust, Lieutenants Fitzgibbons and Withey". He said they wanted new officers (R147,195, 208,218,240). Davis finally left for work after the termination of the recreation hall meeting (R39).
>
> Smith was a member of section 1 and was billeted in hut #3 on the night of 5-6 March 1944 (R10,11,16,48,58). He was present on the morning of 6 March when Barnes gave the order, "Let's go; let's load up" and did not comply with the order. He told Barnes he was not going to work (R11,12,32,58,59,74). When

Sergeants Miller and Barnes returned to the hut and Miller asked the reason for the men not going to work Smith replied that he was "fed up" and "We aren't satisfied". He did not obey Barnes' order (R13,32,33,58,74,75). He was present at the recreation hall meeting (R33,61,90,147,184,195,208,218,239). During the course of the meeting after Captain Hinton had requested complaints, Smith asked "Why were we moved out of Wargrave three days early?" (R134,137-139,186,195, 209,218,239,240). He further said, "What this company needs is a new bunch of officers" or "What we need is a new C.O." (R147, 195).

It is alleged (Specification 1, Charge II) that Davis and Smith and four other soldiers acting jointly and with the common intent to subvert and override, for the time being, lawful military authority, did begin a mutiny by concerted disobedience of the orders of Technical Sergeant Barnes and Captain Hinton to fall out and go to work. It was therefore incumbent upon the prosecution to prove beyond a reasonable doubt that the two accused entertained the specific intent "to resist lawful authority in combination with others". As has been indicated above, this intent may be shown by declarations of the accused or may be implied from acts and circumstances, and the fact that the opposition or resistance proceeds from a number of individuals acting in cooperation for accomplishment of a common purpose is a most incriminating circumstance.

The conclusion that Davis and Smith were parties to the subversive agreement may legitimately be inferred from their refusal to obey Barnes' order to his section and their subsequent reaction to Miller's and Barnes' inquiry as to the reason for their refusal to work. Their declarations at the recreation hall meeting were clearly indicative of their continued recalcitrant, defiant attitude and disposition and of their adherance to the conspiracy. There is no difficulty in reaching the conclusion that both accused not only intended that the agreement should become effective and operative but also that they intended to act under it and to implement its purpose. The only question therefore is whether the agreement exhibited the intent to subvert or override authority. The mere statement of the proposition is to answer it. Beyond all doubt an agreement among and between a group of soldiers not to perform the duties imposed upon them at a given time and place until certain demands are granted by superior authority is exactly the type of "concerted insubordination, or concerted opposition or resistance to, or defiance of, lawful military authority" that is denounced as mutiny. Inasmuch as Davis and Smith adopted the agreement and followed a course of action inherent in its terms the court was fully authorized to find that they entertained the specific intent to subvert and override superior authority.

Proof that Davis and Smith were parties to the mutinous agreement

and that they possessed the necessary specific intent to override authority did not suffice to complete the case against them. It was necessary for the prosecution in addition to prove that each of them among the first of accused committed some overt act that had for its purpose the accomplishment of the agreement. An overt act was both alleged and proved, viz: the disobedience of the command of Barnes, their superior noncommissioned officer. In view of the company procedure disobedience of this order was the first act of defiance and opposition which would affirmatively put the mutinous agreement into operation and thereby begin the mutiny. Ergo, the two accused were among the first to commit an overt act of mutiny. They were also actually present at the scene of mutiny (MCM, 1928, par.136b, p.151). The allegation that they also disobeyed Captain Hinton's order is, under the circumstances superfluous and may be disregarded as surplusage as it could have been eliminated entirely without affecting the gravamen of the offense (CM ETO 895, Davis et al; CM ETO 1109, Armstrong).

The Board of Review is of the opinion that the record is legally sufficient to support the findings of the guilt of Davis and Smith of Specification 1, Charge II.

(b) The evidence with respect to the individual acts and conduct of accused Ballard (Specification 2, Charge II) shows the following facts:

> On 5-6 March 1944 Ballard was billeted in the recreation hall (R89,101). He was present when Sergeant Williams gave the order to the men of his section to make haste, clean up and fall out for work on the morning of 6 March (R103,113-115). He proceeded with the other soldiers in an orderly regular manner to make his bed and clean the hall but he did not obey Williams' order to fall out for work because Captain Hinton and the other officers entered the hall before the men finished making their bunks and cleaning (R103-104,106-108,111,112, 114,126). He was present at the recreation hall meeting (R96,116,133,147,167,195,208,218, 239). At one time during the meeting, he said, "We don't like our officers" (R197). After the Gayles-James episode and during the time Captain Hinton was listening to the mens' complaints Ballard said, "We are all in this together and if one noncom is going to take off his stripes, let all the noncoms take off his stripes because we have agreed to stick together on the deal" (R134,138,139,240). After Hinton ordered the men to get on the trucks and go to work, Ballard declared that if the men would stick together, they would get what they wanted (R209). He finally departed for work with the other men (R108).

Ballard and four of the secondary accused (Wilson, Berry, Paris E. Davis, Jr. and Whiters) are jointly charged with beginning a meeting by concerted disobedience of the orders of Technical Sergeant Williams and Captain Hinton to fall out and go to work. The evidence is undisputed that in addition to Ballard, secondary accused Wilson (R103,113-115,104-106,108), Berry (R103, 113-115,104-106,111), Davis (R103,108,113-115) and Whiters (R89,101,119,121, 134) were in the recreation hall at the time Williams gave his order to his men to fall out for work.

The case against Ballard presents a different facet of the charge of beginning a mutiny than that of the case against Henry Davis and Smith. The background of the mutinous agreement discussed above is equally applicable to Ballard, but beyond this point Ballard's guilt is dependent on other facts and circumstances than those that inculpated Henry Davis and Smith. Sergeant Williams gave his order "to make haste, clean up and fall out". The men proceeded to perform the order with respect to policing the barracks, but before they could leave the hall and go to the trucks, Captain Hinton and the other officers entered the hall and the so-called meeting ensued. Performance of the part of the order to fall out and go to work was therefore rendered impossible. With this state of the evidence it is impossible to find a willful disobedience of Williams' order by Ballard and the four secondary accused. Hence the prosecution's proof of the first alleged overt act of beginning a mutiny, viz: disobedience of the Williams order fails.

It is also alleged that Ballard committed an overt act of beginning a mutiny by willfully refusing to obey Captain Hinton's order to fall out and go to work. As has been demonstrated above, he disobeyed this order (see par.8, supra), but the question arises whether this disobedience was the overt act by Ballard of <u>beginning</u> a mutiny.

As shown the mutiny began in huts #3 and #17. Ballard was billeted in the recreation hall. The evidence fails to connect him with the incidents in huts #3 and #17, but does show him active in the recreation hall episode. Those in the recreation hall did not <u>begin</u> a mutiny; they <u>joined in</u> a mutiny.

With this state of the proof it is impossible to discover that there was any overt act committed in the recreation hall by Ballard with reference to the <u>beginning</u> of the mutiny. Captain Hinton gave his order during the latter part of the recreation hall meeting after listening to the complaints and grievances of the men. By the time the order was given the mutiny had passed beyond its incipient stage and was full blown. A mutiny then existed. Captain Hinton sought to quell it by his order. When Ballard refused to obey the order it was not an overt act which related back to the prior time when the mutiny commenced coincident with the events in huts #3 and #17. Rather his overt act (<u>disobedience of the Hinton order</u>) was connected with the mutiny then in progress. The evidence would most probably have sustained a finding of Ballard's guilt of <u>joining</u> a mutiny, but he is not charged with that offense. The offense of <u>beginning</u> of mutiny is a distinct offense from that of <u>joining</u> a mutiny. Proof of the latter offense does not sustain allegations charging the former (Winthrop's Military Law & Precedents-

Reprint, pp.582,583). There is a fatal variance between the proof and the charge in the instant case.

The Board of Review therefore is of the opinion that the record is legally insufficient to sustain the findings of Ballard's guilt of Specification 2, Charge II.

(c) Gayles, James, Washington and Felders and three secondary accused (Fristoe, Geaither and Perry) are charged with joining in a mutiny which had been begun against the lawful military authority of Captain Hinton and did, with the joint and common intent of subverting and overriding, for the time being, lawful military authority, concertedly disobey the lawful command of Captain Hinton to fall out and go to work (Specification 3, Charge II). The particularized conduct of each accused, as shown by the evidence, was as follows:

> Gayles was present at the recreation hall meeting. His conduct at the meeting has been hereinbefore set forth in the recital of events at the recreation hall meeting (Par.4, supra, pp. 4-12). Gayles continued to perform his duties as Staff Sergeant after 6 March except for the time he was in the hospital. No order had been issued by battalion headquarters reducing Gayles to ranks (R27,28).
>
> James was present at the recreation hall meeting. His conduct at the meeting has been hereinbefore set forth in the recital of events at the recreation hall meeting (Par.4, supra, pp.4-12). James continued to perform his duties as sergeant after 6 March. No order had been issued by battalion headquarters reducing him to tanks (R27,247). During the meeting Lieutenant Johnson talked with James privately and told him that if the men had any grievances - something to tell the "I.G" that was allright, but they had taken the wrong way to go about it. In refusing to go to work they were incriminating themselves. James agreed with this statement (R150-151).
>
> Washington was present at the recreation hall meeting (R61,90,147,195,208,239). During the course of the meeting Washington asked Captain Hinton, "Why couldn't our company have the privileges that other companies had been getting" (R148,240). After Lieutenant Mikesell advised the men to go to work Washington said, "We can't go to work; we haven't got any noncoms" (R197, 199,208,209,210,213). Lieutenant Mikesell replied,

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"You don't need any noncoms. You are men; you are grown men, and you are going out and work without having someone stand over you and make you work" (R210). Washington reminded Captain Hinton that previously he had stated that the noncommissioned officers were running the company, and he wanted to know why they couldn't have more control. Captain Hinton replied, "Non-coms had a big part but they don't have all the control" (R240).

Felders was present at the recreation hall meeting (R14,33,90,133,147,167,184,195,208, 218,239). In response to Captain Hinton's request for complaints, Felders stated that Lieutenant Mikesell had cursed him in addressing him (R14,77,78,84,169,185,186). During the course of the meeting Felders declared in a voice loud enough so other men could hear, "We need a new C.O." (R78,134,138) and he also asserted, "Hold your ground men. If we don't get what we want now we'll never get it" and "Don't be afraid of a court-martial" (R147, 157). During the period between Captain Hinton's departure and Lieutenant Mikesell's speech Felders said, "Don't let them bluff you men; we'll all stay here; they can't court-martial all of us. Let's stick together". When Henry Davis mentioned the officers, Felders said "Let's get rid of the whole damned lot; none of them are no good." Someone cried, "Let's do them" and there was a mob reaction (R196,199,208,240). Felders in a personal conversation with Lieutenant Mikesell accused the latter of cursing him (R213,214).

In considering the guilt of the four named accused of the offense of joining in a mutiny, two of the fundamental elements thereof must be taken as established beyond all doubt: (1) the existence of the mutinous agreement between a substantial number of the enlisted personnel of the company and (2) that the soldiers had acted under the agreement and had produced a condition whereby military authority had been temporarily subverted, usurped and defied. A mutiny existed when Captain Hinton appeared before his men. That the court was fully authorized to find these facts has been hereinbefore shown.

The evidence with respect to the actions and utterances of Gayles, James, Washington and Felders at the meeting is highly convincing that each of them was fully cognizant of the agreement and was also keenly conscious of the fact that temporarily the enlisted personnel had secured control of

the command of the company. Gayles as a witness on his own behalf betrayed this knowledge of power and authority when he stated that the situation was more or less "out of hand". James' agreement with Lieutenant Johnson's statement to him that the men had pursued the wrong course and in refusing to go to work had incriminated themselves and Washington's repetition of the idea after the Gayles-James episode that the men could not then go to work because they had no noncommissioned officers, showed clearly that James and Washington were not only parties to the mutinous agreement but that they realized that the superior command had been thwarted. Felders' inflammatory declarations (spoken in the presence of Gayles, James and Washington and not disavowed by them): "We need a new C.O.", "Hold your ground men. If we don't get what we want now we'll never get it. Don't be afraid of a court-martial" and "Don't let them bluff you men; we'll all stay here; they can't court-martial all of us. Let's stick together" constitutes a body of evidence which not only directly connected the four accused with the disorder, but also distinctly defined it as a mutiny. There was therefore substantial evidence to support the finding of the court that the four accused acted with full knowledge that a mutiny existed and that the authority of the officers of the company had been temporarily subverted and set aside.

The burden was also upon the prosecution to prove beyond a reasonable doubt that Gayles, James, Washington and Felders each "joined in" the mutiny, and to support such fact proof was required that each of said accused committed one or more overt acts evidencing their adherence to and union with the mutineers. The overt act alleged in Specification 3 is that the four named accused willfully disobeyed Captain Hinton's order to fall out and go to work. That such disobedience by said accused was fully proved has been shown in the discussion, supra, pertaining to Charge I and its Specification. The following comment of the Board of Review in CM ETO 895, Davis et al, p.70, is pertinent in view of the conduct of these accused at the recreation hall meeting:

> "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."

It was Gayles who succeeded finally in securing from Lieutenant Withey the promise of the "I.G." investigation, and following the giving

of such promise the soldiers (including the four named accused) went to the trucks and departed for work. The conclusion appears to be certain that the mutineers succeeded in nullifying for a temporary period military authority; that they flouted and defied the power and authority of their commanding officers and that the purpose of the mutiny was ultimately gained. The actions and utterances of Gayles, James, Washington and Felders at the recreation hall meeting was particularly perfidious, and form a substantial body of incriminating evidence which supports the court's findings of their guilt.

The Board of Review is of the opinion that the record is legally sufficient to sustain the finding of the guilt of the four named accused of Specification 3, Charge II (CM ETO 895, Davis et al).

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

Accused	Age	Inducted into service	Date
Gayles	24 yrs 7 mos.	Fort Custer, Michigan	16 Jan 1943
James	23 yrs 2 mos.	Fort Custer, Michigan	15 Jan 1943
Washington	24 yrs 4 mos.	Fort Custer, Michigan	20 Jan 1943
Ballard	19*yrs 4 mos.	Fort Bragg, North Carolina	30 Jun 1943
Henry Davis	24 yrs 7 mos.	Fort Benning, Georgia	19 Sep 1941
Felders	19*yrs 9 mos.	Camp Livingston, Louisiana	23 Oct 1941
Smith	20 yrs 5 mos.	Camp Jos.T.Robinson,Arkansas	19 Jun 1943

None of accused had any prior service. * As corrected in record by accused (R316,317).

11. (a) The approved sentences of Gayles, James, Washington, Henry Davis, Felders and Smith in violation of the 64th and 66th Articles of War: dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor, Gayles, James, Henry Davis, Felders and Smith each for 18 years and Washington for 15 years are legal. Conviction of the crime of mutiny (beginning or joining in) authorizes penitentiary confinement (AW 42). As the confinement of each said accused is for more than ten years the designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement of each of said accused is authorized (Cir. 229, WD, 8 Jun 1944, sec.II, pars.1b(4) and 3b).

(b) The approved sentence of Ballard for violation of the 64th Article of War: dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 18 years is legal. However, in view of the fact that the record is legally insufficient to sustain the finding of Ballard's guilt of violation of the 66th Article of War (beginning a mutiny) it will be necessary to change the place of confinement of this accused from the United States Penitentiary, Lewisburg, Pennsylvania to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (AW 42; Cir.210, WD, 14 Sep 1943, sec.VI, as amended).

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12. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of the accused except Ballard 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) Gayles, James, Washington, Henry Davis, Felders and Smith are each guilty of Charges I and II and of their respective applicable specifications, and legally sufficient to support their respective sentences;

(b) Ballard is guilty of Charge I and its Specification, but legally insufficient to support the findings of the guilt of said accused of Specification 2 of Charge II and legally sufficient to support the sentence.

B. Franklin Pitts Judge Advocate

Edward H. Hagens Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 6 SEP 1944 TO: Commanding General, First United States Army, APO 230, U.S. Army.

1. In the case of Staff Sergeant GEORGE E. GAYLES (36389485), Technician Fourth Grade BERNARD B. JAMES (36389456), Private First Class GEORGE L. WASHINGTON (36389593), Private McKINLEY K. BALLARD (34676568), Private HENRY DAVIS (34064275), Private JAMES FELDERS (34152994) and Private AARON SMITH, JR. (38509766), all of 641st Ordnance Ammunition Company, 101st Ordnance Ammunition Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as to the several accused as follows:

(a) Gayles, James, Washington, Henry Davis, Felders and Smith as to Charges I and II and their respective applicable specifications and to support their respective sentences;

(b) Ballard as to Charge I and its Specification and the sentence, but legally insufficient to support the findings of said accused's guilt of Specification 2, Charge II.

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

2. Ballard was charged with beginning a mutiny (Specification 2, Charge II). The proof clearly indicated that he joined in a mutiny. A fatal variance between the allegations of the specification and the proof resulted. Beginning a mutiny is a separate offense from joining in a mutiny. Proof of the latter does not sustain a charge of the former. However, this accused was clearly guilty of disobedience of a lawful command of his superior officer under the 64th Article of War (Charge I and Specification). Confinement in a penitentiary is not authorized for a conviction under the 64th Article of War only. Inasmuch as the finding of Ballard's guilt of beginning a mutiny in violation of the 66th Article of War (an offense which does sustain penitentiary confinement (AW 42)) has been nullified, his place of confinement should be changed from the United States Penitentiary, Lewisburg, Pennsylvania to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, as amended). This may be done in the published general court-martial order.

3. I inclose copy of GCMO No.24, 16 February 1944, VIII Air Force Service Command in CM ETO 895, Davis et al. In that case certain accused were found guilty of the offense of joining in a mutiny under the 66th Article of War, and offenses growing out of the same incident under the Articles of War 89 and 96. You will note that the approved penitentiary sentences

ranged from seven to ten years. While the facts in the instant case do not show the violence and riotous condition as prevailed in the Davis case, there is a similarity with respect to the mutiny charges. Therefore, in the interest of maintenance of equality and uniformity of sentences in this theater I submit for your consideration the question whethe the periods of confinement of the soldiers named in paragraph one hereof should be reduced.

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 CM ETO 3147. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3147).

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

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

BOARD OF REVIEW NO. 2

23 AUG 1944

CM ETO 3153

U N I T E D S T A T E S	)	VIII AIR FORCE SERVICE COMMAND
	)	
v.	)	Trial by GCM, convened at AAF
	)	Station 547, 10 July 1944.
Private PAUL J. VAN BREEMEN (31295508), 5th Repair Squadron, ADG, attached 1915th Quartermaster Truck Company (Avn), 2nd Strategic Air Depot.	)	Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 61st Article of War.

Specification 1: In that Private Paul J. Van Breemen, 5th Repair Squadron, Air Depot Group, 2nd Strategic Air Depot, AAF Station 547, APO 636, U.S. Army, did, without proper leave, absent himself from his station at AAF Station 547, APO 636, U.S. Army, from about 13 March 1944 to about 25 April 1944.

Specification 2: In that * * * did, without proper leave, absent himself from his station at AAF Station 547, APO 636, U.S. Army, from about 27 April 1944 to about 18 June 1944.

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

Specification: In that * * * having been duly placed in confinement in charge of Sergeant Raymond J. Wierzbicki

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at Hull, Yorkshire, England, for the purpose of being transported to AAF Station 547, APO 636, U.S. Army, did, at Peterborough, Northamptonshire, England, on or about 27 April 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * * did, at Boulmer, Royal Air Force Station, Northumberland, England, on or about 13 June 1944, feloniously take, steal and carry away 1 silver wrist watch and silver expanding bracelet, of a value of about fifty dollars ($50.00), 1 pair of light suede shoes, size 9, of a value of about five dollars ($5.00), and 5 one-pound Bank of England notes, of a value of about twenty dollars and seventeen cents ($20.17), of a total value of about seventy-five dollars and seventeen cents ($75.17), the property of Lieutenant Eric Capstick-Dale, Royal Air Force, Royal Air Force Station, Boulmer, Northumberland, England.

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

Specification 1: In that * * * did, at AAF Station 547, APO 636, U.S. Army, on or about 13 March 1944, knowingly and wilfully and without proper authority, apply to his own use and benefit a Dodge, 3/4-ton Command and Reconnaissance motor vehicle, registration number 20169517, of a value of more than fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that * * * did, at USA Transportation Office, Leeds, Yorkshire, England, on or about 12 June 1944, knowingly and wilfully and without proper authority, apply to his own use and benefit a Ford V-8 black saloon motor vehicle, registration number 1823045, of a value of more than fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to Charge II and its Specification, guilty to the remaining charges and specifications. Upon the conclusion of the prosecution's testimony, he changed his plea to Charge IV and Specifications

1 and 2 thereunder from guilty to not guilty (R56). He was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that about January [1944] accused arrived at his station and was assigned as a driver to the motor pool, where a 3/4-ton Dodge command car bearing United States registration number 20169517 was assigned to him for use in performing his functions (R26,33,43,54). On the morning of 13 March 1944, this car with accused driving was dispatched for the use of First Lieutenant Charles D. Bartlett, Jr., 11th Mobile R & R Squadron, whom accused transported to Station 130 at Glaton, a distance of about five miles. With accused driving, Lieutenant Bartlett returned to his office, signed the ticket and released the vehicle. Accused then turned the car around and drove away in the direction of the motor pool. Both accused and the car were missing from that time (R27-28,30-33,55; Ex.4). His status was changed from duty to absent without leave as of 1530 hours 13 March 1944 according to the morning report. The next remark referring to accused notes alteration of status from absent without leave to confinement in station guardhouse 1800 hours 18 June 1944 (R7-8; Ex.1). According to a letter (introduced without objection on the obviously valid ground that it was hearsay, although defense counsel, disclaiming any other, did voice an objection based on irrelevancy), dated 10 April 1944, received by the Motor Transportation Office, accused's station, from First Lieutenant Paul W. Aman, Battalion Motor Officer, 129th AAA Gun Battalion, a car, identified by the assistant operations officer for the motor pool at accused's station, as the car in question, was found abandoned in Folkstone, Kent, on or about 18 March 1944. It was ultimately salvaged by the Ordnance Department (R 33-41; Ex.7).

On 25 April 1944, Sergeant Raymond J. Wierzbicki, 1145th MP Company, of accused's station, was ordered to Hull-on-Trent, England, to take accused in custody and escort him back to his station. The sergeant found accused in the custody of the military police at Hull, "signed a receipt for him" and on the following day accompanied him to Peterboro where it was necessary to change trains. While waiting at the railroad station there, accused was permitted to go unescorted to the latrine, whence he escaped (R9-13).

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On the night of 13 June 1944, Lieutenant E. Capstick-Dale, South African Air Force, stationed at Boulmer, Northumberland, visited a bar in Alnwick, about six miles distant from his station, where he was joined by an unidentified friend and the accused, who said he was a pilot. Accused drove the Lieutenant and his friend to their hut in "a black 37 Ford with a US placard in the rear. * * * he said he had been given the car for duty" (R13-14). Lieutenant Capstick-Dale and friend "put him up for the night in our hut", as well as a companion who accompanied the accused. The car was parked outside the hut when the occupants retired about midnight (R14-15). Next morning accused was gone as were his companion, the car, and the following items of personal property belonging to Lieutenant Capstick-Dale:

(a) A Cyma wrist watch, which cost ten pounds when new, and silver expansion bracelet, which cost five pounds when new, of the approximate aggregate value of fifteen pounds;

(b) A pair of brown suede shoes for which Lieutenant Capstick-Dale had paid two pounds ten shillings.

On 14 June Detective Constable Gordon McLanachan, Alnwick, Northumberland, received a complaint from Lieutenant Capstick-Dale that certain articles had been stolen from him between midnight and 6 a.m. He apprehended accused at Durham with a watch in his possession and wearing a pair of brown suede shoes corresponding to those described by Lieutenant Capstick-Dale as having been stolen from him. Lieutenant Capstick-Dale went to the police station at Alnwick where he identified "my shoes, watch and lighter" (R15-19).

Between 10 a.m., and 12:15 p.m., on 13 June 1944, Captain Leon Kasprak, 5th Traffic Regulation Group, stationed at Leeds, Yorkshire, England, found missing from in front of transportation headquarters, the four-door black Ford V-8 sedan, serial number 1823045-S, assigned to him as district transportation officer. Having given no one permission to drive it, he notified military and civilian police (R23-24). Shortly before he found accused at Durham, on 14 June 1944, it was reported to Detective Constable McLanachan that Captain Kasprak's car had just been found on the Great North Road, Gosforth. Captain Kasprak sent his driver for it, and the car was returned to Leeds 15 June 1944 (R19,24-25).

After due warning and full explanation of his rights, accused willingly signed a statement compiled by the investigating officer from notes taken during two previous interviews (R47-51), containing the following admissions:

"I admit that I was absent without leave from 13 March 1944 until 25 April 1944, and again from 27 April 1944 until 14 June 1944. I admit that I escaped from confinement without proper authority on 27 April 1944 at Peterborough, Northamptshire, England. I admit that at Boulmer RAF Station, Northumberland, England, I stole 1 silver wrist watch with bracelet, 1 pair of suede shoes, and 5 one-pound notes, the property of Lt. E. Capstick-Dale, on or about 13 June 1944. I admit that I appropriated to my own use a Dodge 3/4 ton Command car on or about 13 March. This car was the property of the United States, and I took it from the Motor Pool at the 2nd SAD. After using it, I abandoned it at Folkstone, Kent, England. I admit that I appropriated to my own use on or about 12 June 1944 a Ford V-8 black saloon motor vehicle, property of the United States. I took the vehicle from the United States Army Transportation Office in Leeds, Yorkshire, England and, after using it, abandoned it at Gosforth, Durham, England" (R52).

4. The only evidence for the defense was the testimony of accused, who, after due explanation of his rights, elected to take the stand under oath. He testified that he was 21 years old and unmarried; and that his home was in Boston, Massachusetts. After graduating from high school, he was employed by the Atlantic and Pacific Stores. He entered the Army in February 1943, and came overseas in November of the same year. He had never been court-martialed (R56-57).

5. At the close of the evidence for the prosecution, defense moved, respectively, for findings of not guilty and dismissal of Charge II and its Specification and of Charge IV and Specifications 1 and 2 thereunder (R 56). In each instance, the motion was properly overruled.

6. Specifications 1 and 2, Charge I, allege two distinct offenses of absence without leave, one from 13 March to 25 April, the other from 27 April to 18 June. While the morning report contains no entry reflecting the termination of the first unauthorized absence and the commencement of the second, Sergeant Wierzbicki's testimony shows that accused was in the custody of the military police at Hull on 25 April and that on the following day he escaped from the witness' lawful custody. The evidence thus corroborates the pleas of guilty in establishing commission by the accused of each of the offenses as alleged.

7. The Specification, Charge II, alleges that accused escaped from confinement while in charge of Sergeant Wierzbicki for the purpose of transporting him to his station. Sergeant Wierzbicki's uncontradicted

testimony establishes every element of the offense alleged. His ill-considered leniency, of which the accused took advantage to effect his escape, was not of a type to affect the essential character of the custody imposed. "Confinement imports some physical restraint" (MCM, 1928, par.139a, p.153). Wierzbicki was under a duty, known to both him and accused, to physically restrain accused while transporting him to his station and was armed for that purpose. His temporary relaxation, under a misapprehension, of the strictness of the restraint imposed in permitting his prisoner to proceed to the toilet unescorted, was in no sense an abrogation of his status of restrainer; and the fact that accused effected his escape by stealth rather than by force rendered the offense involved no less an escape from confinement within the meaning of the term as employed in Article of War 69.

8. The Specification, Charge III, alleges theft of money and personal property. The testimony of the witnesses for the prosecution establishes the ownership, theft and initial cost of the watch, bracelet and of the shoes, although, as to the initial cost of the watch, the evidence was hearsay. Neither ownership nor theft of the money is shown. However, accused's pleas of guilty support the findings, and there is certainly nothing in the evidence to indicate that such pleas were inappropriate or improvidently made.

9. Specifications 1 and 2, Charge IV, allege unauthorized misapplication to accused's own use of two different Government vehicles on two separate occasions. The evidence, other than accused's confession, is certainly ample to show that the offenses alleged were committed, and accused's confession clearly admits that it was he who committed them. The record is legally sufficient to sustain the court's findings of guilty of Charge IV and Specifications 1 and 2 thereunder.

10. The charge sheet shows that accused is 21 years six months of age and that, with no prior service, he was inducted 5 February 1943, at Medford, Massachusetts, for the duration of the war plus six months.

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

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

Judge Advocate

Judge Advocate

Judge Advocate

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1st Ind.

War Department, Branch Office of The Judge Advocate General, with the European Theater of Operations. 23 AUG 1944 TO: Commanding General, VIII Air Force Service Command, AAF Station 506, APO 636, U. S. Army.

1. In the case of Private PAUL J. VAN BREEMEN (31295508), 5th Repair Squadron, ADG, attached 1915th Quartermaster Truck Company (Avn), 2nd Strategic Air Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the finding 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 CM ETO 3153. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 3153).

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BY AUZHORITY OF TJAG
BY REGINALD C. MILLER, COL.
JAGC, EXEC. ON 26 FEB 52

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