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OPINIONS

CM ETO 1543

CM ETO 2444

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Holdings and Opinions

BOARD OF REVIEW

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 5 B.R. (ETC)

including

CM ETO 1543 - CM ETO 1920

(1944)

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

BOARD OF REVIEW

ETO 1543

- 8 MAR 1944

U N I T E D S T A T E S)	1ST INFANTRY DIVISION.
v.)	Trial by G.C.M., convened at
Private WILLIAM H. WOODY) Dorchester, Dorsetshire, England	
(14062748), Battery B, 7th) 26 January 1944. Sentence: Dis-	
Field Artillery Battalion.) honororable discharge, total for-	
) feitures and confinement at hard	
) labor for life. Eastern Branch,	
) United States Disciplinary Barracks,	
) Greenhaven, New York.	

HOLDING by the BOARD OF REVIEW
RITER, VAN BEN SCHOTEN 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: Violation of the 61st Article of War.
Specification: In that Private William H. Woody,
Battery B, 7th Field Artillery Battalion did,
without proper leave, absent himself from his
organization at Yousif, Tunisia, from about
18 April 1943 to about 23 April 1943.

ADDITIONAL CHARGE: Violation of the 58th Article of War.
Specification: In that Private William H. Woody,
Battery B, Seventh Field Artillery Battalion,
did, at Mangin, Algeria on or about May 24,
1943, desert the service of the United States
and did remain absent in desertion until he
surrendered himself at Oran, Algeria on or
about August 17, 1943.

He pleaded not guilty to and was found guilty of both charges and specifications. Evidence of two previous convictions by Special Courts-Martial was introduced: one for absence without leave for four days in

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violation of the 61st Article of War and for failure to obey an order of a superior officer in violation of the 96th Article of War, and one for petit larceny and assault with a knife in violation of the 93rd Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life at such place as the reviewing authority may direct. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, directed that the prisoner be held at Disciplinary Training Center Number 2912, Shepton Mallet, Somerset, England, pending further orders, withheld the order directing execution of the sentence and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The respective periods of unauthorized absences (five days and two months and twenty-four days, respectively) were proved by the introduction of the morning reports of accused's organization for the times in question (Pros.Exs. A and B) and by stipulations between the prosecution and defense in respect of the dates of termination of the two absences by voluntary surrender (R19,20). At the time he absented himself the first time, accused was under arrest in camp (R10). However, he was not charged with breach of arrest but only with absence without leave in violation of Article of War 61. Testimony was introduced over objection of the Defense Counsel that it was "common knowledge" in the battery that "we were going into action again" (R17). No evidence appears in the record of trial that the accused had knowledge of impending operations. Nevertheless, there is testimony that accused's battery on 18 April 1943 was outside of the town Yousif, Algeria (R15). On or about 22 May 1943, two days before he left the second time, accused was advised that desertion charges alleging violation of Article of War 58 were pending against him (R18,19). No evidence was introduced by the defense and accused elected to remain silent.

4. Absence without leave under both charges and specifications is established beyond question. The only question deserving consideration is whether accused entertained the requisite intent to remain permanently absent at the time he left his organization on 24 May 1943. It was proper for the court to infer such intent from proof of absence for two months and twenty-four days.

"Unauthorized absence is not conclusive or even prima facie evidence of the requisite intent to establish desertion. However, prolonged absence without leave, unexplained may be sufficient to establish the necessary intent to remain permanently absent from the service." (JAG 251.19, Jan 28, 1919, Dig.Ops./1912-1940, sec.416(9), pp. 268,269).

Such inference is further supported by the evidence of accused's departure upon ascertaining he was to be tried for desertion - a capital offense and the fact that his unit was in a combat area. Under such state of the evidence the court's findings should not be disturbed (CM ETO 1259, Rusniaczyk; CM ETO 1432, Good; CM ETO 1036, Harris; CM ETO 960, Fazio, Poteet and Nelson).

5. The charge sheet shows accused's age is eighteen and one half years. He enlisted at Charlotte, N.C., on 20 February 1942, for the duration of the war and six months. He had fourteen months 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. The penalty for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

B. Joseph Hite _____ Judge Advocate

Frank D. Bushman _____ Judge Advocate

(SICK IN HOSPITAL) _____ Judge Advocate

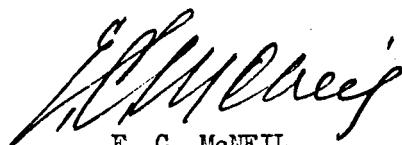
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1st Ind.

WD, Branch Office TJAG., with ETOUSA. - 8 MAR 1944 TO: Commanding General, 1st Infantry Division, APO 1, U.S. Army.

1. In the case of Private WILLIAM H. WOODY (14062748), Battery B, 7th 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 50 $\frac{1}{2}$ you now have authority to order execution of the sentence.
2. The sentence adjudged and approved appears excessive for the offenses under the circumstances shown by the record of trial. His case will be re-examined in Washington and, I believe, will result in a very considerable reduction in the sentence. In order to comply with instructions from the Commanding General, European Theater of Operations in reference to uniformity of sentences, and which direct me to take action so that this theater may not be subject to criticism for returning prisoners to the United States with indefensible sentences which require immediate clemency action by the War Department, I recommend that you reconsider the sentence with a view to reducing the term of confinement. If this is done, the signed action should be returned to this office for file with the record of trial.
3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1543. For convenience of reference please place that number in brackets at the end of the order: (ETO 1543).



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

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

BOARD OF REVIEW

ETO 1549

21 MAR 1944

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

v.

Private SAMUEL (NMI) COPPRUE
(34130220), and Private LLOYD
(NMI) ERNEST (34071173),
both of 577th Quartermaster
Railhead Company.

WESTERN BASE SECTION, SERVICES
OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS.

Trial by G.C.M., convened at Assize
Court, Minshull Street, Manchester,
England, 25 January 1944. Sentence:
COPPRUE; dishonorable discharge,
total forfeitures and confinement at
hard labor for 15 years; ERNEST;
dishonorable discharge, total for-
feitures and confinement at hard
labor for 10 years. United States
Penitentiary, Lewisburg, Pennsyl-
vania.

HOLDING by the BOARD OF REVIEW
RITTER, VAN BEN SCHOTEN and SARGENT, Judge Advocates

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

2. The accused were tried in a consolidated trial upon the following charges and specifications:

COPPRUE

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Samuel Copprue,
577th Quartermaster Railhead Company, did,
at General Depot G-18, Sudbury, Stafford-
shire, England, on or about 5 September,
1943 desert the service of the United States
and did remain absent in desertion until he
was apprehended at Manchester, Lancashire,
England on or about 1 December 1943.

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

Specification 1: (Nolle Prosequi)

Specification 2: In that * * *, did, at Manchester, Lancashire, England, on or about 1 December, 1943 feloniously take, steal and carry away thirteen (13) chickens, value about Fifteen Pounds, seven shillings, (L15. 7. Od), lawful money of the United Kingdom of the exchange value of about fifty-three dollars and ninety-five cents (\$53.95) the property of William McMorine, 3 Elizabeth Street, Greenheys, Manchester, England.

CHARGE III: Violation of the 69th Article of War.

Specification 1: In that * * *, having duly been placed in confinement in the Military Police stockade on or about 1 December, 1943, did, at Manchester, Lancashire, England, on or about 1 December, 1943 escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that * * *, having duly been placed in confinement in the Military Police stockade on or about 5 December, 1943, did, at Manchester, Lancashire, England, on or about 5 December, 1943 escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that * * *, having been duly placed in confinement in the Guardhouse, Seaforth Barracks, Liverpool, Lancashire, England, on or about 14 January 1944, did, at Seaforth Barracks, Liverpool, Lancashire, England, on or about 17 January 1944, escape from said confinement before he was set at liberty by proper authority.

ERNEST

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

Specification: In that Private Lloyd Ernest, 577th Quartermaster Railhead Company, did, at General Depot G-18, Sudbury, Staffordshire, England, on or about 5 September, 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Manchester, Lancashire, England on or about 1 December, 1943.

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CHARGE II: Violation of the 69th Article of War.
Specification: In that * * *, having duly been placed in confinement in the Military Police Stockade on or about 1 December, 1943, did, at Manchester, Lancashire, England, on or about 1 December, 1943 escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 93rd Article of War.
Specification 1: (Nolle Prosequi)
Specification 2: In that * * *, did, at Manchester Lancashire, England, on or about 1 December, 1943 feloniously take, steal and carry away thirteen chickens, value about Fifteen Pounds, seven shillings (L15. 7. Od), lawful money of the United Kingdom of the exchange value of about fifty-three dollars and ninety-five cents (\$53.95), the property of William McMorine, 3 Elizabeth St., Greenheys, Manchester, England.

CHARGE IV: Violation of the 96th Article of War.
Specification: In that * * *, did, at Manchester, Lancashire, England, on or about 1 December, 1943 wrongfully kick Police Constable Ernest Berry in the chest and in the back with his foot.

ADDITIONAL CHARGE: Violation of the 64th Article of War.
(Nolle Prosequi)
Specification: (Nolle Prosequi)

By direction of the appointing authority, the prosecution withdrew the following charges and specifications: In the case of Copprus, Specification 1 Charge II of Charge Sheet dated 20 December 1943; in the case of Ernest, Specification 1 Charge III of Charge Sheet dated 15 December 1943, and the Additional Charge and Specification thereunder of Charge Sheet dated 23 December 1943. Accused Copprus pleaded guilty to Charge III and its specifications and to the Additional Charge and its Specification, but not guilty to Charges I and II and their respective specifications. Accused Ernest pleaded guilty to Charge II and its Specification, but not guilty to Charges I, III and IV and their respective specifications. Each accused was found guilty of all charges and specifications directed against him. Evidence of two previous convictions of Copprus was introduced: one by summary court-martial for absence without leave for three days in violation of Article of War 61, and one by special court-martial for breaking restriction and absenting himself from his camp in violation of Articles of War 96 and 61 respectively. Evidence of one previous conviction of accused Ernest was introduced, for knowingly and wilfully applying to his own use a weapons carrier and for absence without proper leave from his guard.

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in violation of Articles of War 94 and 61 respectively. 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: Copprue for 30 years and Ernest for 25 years. The reviewing authority approved each of the sentences but reduced the period of confinement of Copprue to 15 years and Ernest to ten years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of each accused and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for/prosecution is substantially as follows:

Both accused were members of 577th Quartermaster Railhead Company which on 5 September 1943 was stationed at General Depot G-18, Sudbury, Staffordshire, England (R26,29). Copprue went absent without leave from his company on 5 September 1943 and was not returned thereto until 18 December 1943. Ernest went absent without leave from his company on 5 September and was not returned thereto until 8 December (R9, Pros.Exs.A and B).

On 30 November 1943, William McMorine, 3 Elizabeth Street, Greenheys, Manchester, owned a flock of thirteen chickens and kept them in the rear of 11 Lincroft Street, Moss Side. On 1 December he found that his hencote had been entered and the fowls were missing. Their heads had been severed and were lying on the ground. He followed a trail of feathers which led to 54 Carlton Street, the residence of Mrs. Annie Smith. McMorine found feathers "representing the description of my birds" in some dustbins at the rear of this address and immediately notified the police (R10).

Police Sergeant Robert Archibald, Manchester City Police, accompanied McMorine to 54 Carlton Street, saw the feathers in two dustbins in the yard and also near the cellar window of the house. He entered the house at the invitation of Copprue, who answered the door, and found a pan of chicken legs -- twenty-six in number -- on the "grate" (R13). McMorine identified them as his own by virtue of the fact that he had been treating one chicken for "scaly leg" and its legs were in the pan (R11). Copprue stated that his name was "Baby Ray". In about 15 minutes the "tenant" of the house, Mrs. Annie Smith, returned. After a conversation with her, Archibald took her to the Moss Lane East Police Station. Copprue accompanied them voluntarily but in a short time departed from the police station. Archibald and Mrs. Smith remained there and, as a result of their conversation, the two, accompanied by "Constable Burgess" and McMorine, returned to the house where, joined by Copprue, they located in the cellar the dismembered carcasses of thirteen chickens (R13). McMorine was able to identify two of the carcasses in particular because they were the only four-months-old chickens he had possessed (R12).

Copprue was returned to the Police Station by Archibald and there Ernest, the other accused, was encountered. When asked his name Ernest stated it as "Lloy". Ernest was known to Archibald as "Ernest Lloy" (R13).

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Archibald then told Copprue that he had reason to believe that he was a deserter from the American Army. Copprue replied, "That is right. I have been away about twelve weeks". Continuing, Archibald testified:

"Then the witness Annie Smith -- this was on the question of the chickens -- said 'These two men brought the chickens to my house about 11:30 last night. They brought them in a bag, took them in the cellar and plucked them.' Copprue said 'I only plucked the chickens.' Lloy said 'I say nothing'"(R14).

Mrs. Annie Smith testified that when accused brought the chickens to her home she asked them where they procured the "sack of fowl". They told her "it was their business" (R16).

McMorine, who was experienced in buying chickens, stated that their reasonable market value was £15. 7. 0., the price he had paid for them. Archibald, who testified that he knew the market value of chickens declared that at the present time i.e., time of trial, "the advertised price of chickens about to lay is running from 25/- to 30/- each; a matter of 6 to 8 dollars each is the price of pullets about to lay - at Christmas time"(R11,15).

When first apprehended, Copprue was clad in civilian clothing, consisting of navy blue trousers and a grey wool long sleeved sweater. He wore a Merchant Navy badge on his sweater. He declared he had no identity card (R13,14; Pros.Exs.C,D,E). When Ernest was seized at the police station he was dressed in his army uniform (R13). Mrs. Annie Smith, 54 Carlton Street, Manchester, testified at the trial that she had known Copprue for approximately five months and that on week-ends during September, October and November 1943, he had remained at her home occupying a room "up-stairs". On these occasions he had always been clad in civilian attire. She found his uniform in this room after Copprue was taken into custody (R16-18). Ernest had not stayed at her home, but had "occasionally" called with Copprue. "They were both going round together" and "from September, each time Copprue came he came with Lloyd"(R19).

Police Constable Ernest Berry, Manchester City Police, testified that about 11:20 p.m. on 1 December 1943 he was on duty in plain clothes. Hearing a noise from an empty house in Fairlawn Street, Moss Side, Manchester, he entered the house to investigate. He advanced up the stairs, flashed his torch and saw above him the two accused whom he had seen earlier in the day at Moss Lane East Police Station. He identified himself and informed them that he was going to take them into custody. "Lloy", the taller of the two men, "planted his foot in my chest and knocked me down the stairs". Berry seized Copprue and they struggled violently to the corner of Derby and Fairlawn Streets, when "I received a kick from behind which dropped me to the floor and I lost Copprue in the struggle". "Both men then ran away". He

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did not see either accused again. He identified accused Ernest as the person he had known as "Lloy" (R21-22).

At 10:30 a.m. on 4 December 1943 Detective Constable Albert W. Simpson, Manchester City Police, while "engaged on certain inquiries" entered the rear of 54 Carlton Street, Moss Side, looked hastily around the ground floor, then went to the cellar. With the aid of a torch he discovered Copprue, dressed in civilian clothes, hiding in the coal "chute" among old furniture, bedding, and "tins of all descriptions". He asked him where "Lloy" was and Copprue replied, "He is in Liverpool". According to Simpson, "I had a look round another room in the cellar, kicked the door to, and I there saw a man whom I know as Lloy, in uniform. I asked him if his name was Lloy. He said 'Yes'. I then conveyed them to Thurloe Street, Manchester, where I handed them over to the American Army authorities" (R20).

The prosecution introduced no evidence with respect to the charges and specifications to which the accused entered pleas of guilty.

4. The evidence for the defense summarizes as follows:

Mrs. Annie Smith, the "tenant" at 54 Carlton Street declared she met Copprue in a house across the street from her home. He was then in uniform, but she had not seen him in uniform since that time. She wore an insignia of the Quartermaster Corps which Copprue had given her (R24).

Ernest after being informed of his rights, testified:

On 5 September 1943 he was stationed at Sudbury, Staffordshire, England. He possessed seventy pounds, English currency. He and Copprue went to Derby, 18 miles away, where he purchased two return-trip tickets to Manchester and the two accused went to that city. They intended to return to their camp (R26-27). Copprue was with him on the night of 1 December 1943 when the chickens were alleged to have been stolen. Copprue was then wearing his Army uniform, which he soiled with blood from the chickens, and then changed to civilian clothes and was thus attired when the police came to Mrs. Smith's home and apprehended him (R26-27).

He denied he had kicked Constable Berry on 1 December 1943 at about 11:30 p.m. in an empty house in Fairlawn Street, Moss Side, Manchester. He stated the constable was drunk at that time.

Copprue, after his rights had been explained to him, testified, that he travelled from Derby to Manchester on 5 September 1943 on a round trip railroad ticket purchased by Ernest. His return ticket to Derby was on a shelf in Mrs. Smith's house. He had intended to "go back". On the day he was apprehended he was in civilian clothes; his explanation for wearing them was:

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"Well, that night we went out and got the chickens and I had blood on my uniform, and I was upstairs when they came, cleaning it" (R29).

He had not possessed another uniform at that time (R29). He had offered to change to his uniform, but he was told, "We will keep you in the same clothes you are in now and take you down to the station" (R27). This was the only time he had been clad in civilian clothes (R30). He asserted that he had intended returning to his camp the Saturday after he had been arrested (R30).

5. By their respective pleas of guilty as above set forth the accused admitted the following additional facts:

Copprie: (a) Unlawful escape on 1 December 1943 from confinement in a military police stockade at Manchester; (b) Unlawful escape on 5 December 1943 from confinement in a military police stockade at Manchester; (c) Unlawful escape on 17 January 1944 from confinement in the guard-house at Seaforth Barracks, Liverpool, England.

Ernest: (a) Unlawful escape on 1 December 1943 from confinement in a military police stockade at Manchester.

6. (a) Both accused were shown to be absent without leave for a period of over three months. When apprehended by civilian police, both falsified their true names. Copprie stated that his name was "Baby Ray" and Ernest declared that his name was "Ernest Lloy". The two soldiers had been together in Mrs. Smith's home frequently. Their long continued absence, their falsification of their names, their presence near military installations during this period with no attempt to surrender themselves is evidence that weighs heavily against both accused in determining their respective intents.

Copprie, when seized, was clad in civilian garments and was wearing a Merchant Navy badge. Mrs. Smith at whose home he spent the week-ends had not seen him in uniform during the whole period of three months. When apprehended and placed in confinement on 1 December 1943 for his complicity in the theft of the McMornie chickens he immediately effected his escape. When recognised by Constable Berry later in the evening of 1 December, as an escapee, he resisted arrest and remained at large until 4 December. Apprehended and confined for the second time (5 December 1943) gained his freedom. Taken into custody a third time (14 January 1944) and incarcerated in the guard-house at Seaforth Barracks, Liverpool, three days later he again escaped (17 January 1944). The next day (18 January 1944) he was apprehended for the fourth time.

Ernest, effected his escape from the military police stockade on 1 December 1943 where he had been placed awaiting charges on the chicken theft, and in the evening of said date when found by Constable Berry, who recognized

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him and Copprue as American soldiers he had seen in custody, assaulted Berry and prevented his arrest. He was captured 4 December. The proof fails to show that Ernest was out of uniform during the period of his absence.

All of the foregoing facts either proved or admitted, form a substantial basis from which may be inferred the specific intent of each accused to remain permanently away from the military service. In fact no other reasonable or logical conclusion is possible. The record is legally sufficient to sustain the findings of guilty of each accused of desertion under the 58th Article of War (Charges I and their respective specifications) (CM ETO 1017, McCutcheon; CM ETO 1412, Medeiros; CM ETO 1519, Bartel; CM ETO 1543 Woody).

(b) The larceny of thirteen chickens, the property of Mr. William McMornine possessing a value of £15. 7. 0. (or approximately of the value of \$53.95 currency of the United States) was proved by substantial circumstantial evidence and by Ernest's and Copprue's separate admissions in open court (R29) (CM ETO 1327, Urie (o); CM ETO 885, Van Horn).

(c) There is also substantial evidence that accused Ernest wrongfully kicked Police Constable Ernest Berry in the chest and in the back with his foot. He was guilty of assault and battery (CM ETO 1177, Combess).

(d) The remaining specifications and charges require no comment, inasmuch as the pleas of guilty not only admitted the facts alleged but also the ultimate guilt (CM ETO 839, Nelson; CM ETO 1266, Shipman(o)).

7. Each accused consented to a consolidated trial. No prejudice to the substantial rights of the accused resulted therefrom (CM 195294 (1931), Dig.Op.JAG/sec.395 (33), p.223).

8. The charge sheet shows accused Copprue is twenty-one years and five months of age and that he was inducted 12 June 1941; that accused Ernest is twenty-two years and one month of age and that he was inducted 2 April 1941. Neither accused had prior service.

9. 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 the record of trial is legally sufficient to support the findings of guilty and the sentence. The punishment for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58).

The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement of Copprue is authorized (AW 42; Cir.291, WD, 10 Nov. 1943 sec.V, pars.3a and b). Ernest is under the age of 31 and his sentence does not exceed ten years. The Federal Reformatory Chillicothe should be designated as his place of confinement (Cir.291, WD, 10 Nov. 1943, sec.V, par.3a).

J. F. McNeely,
Judge Advocate

D. Van Horn,
Judge Advocate

(SICK IN QUARTERS)

Judge Advocate

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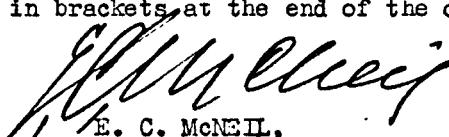
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WD, Branch Office TJAG., with ETOUSA. 21 MAR 1944 To: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S.Army.

1. In the case of Privates SAMUEL (NMI) COPPRUE (34130220) and LLOYD (NMI) ERNEST (34071173), both 577th Quartermaster Railhead Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$ you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement of Private ERNEST which should be changed to the Federal Reformatory, Chillicothe, Ohio (Cir.291, WD, 10 Nov.1943, sec.V, par.3a). This may be done in the published general court-martial order. Separate orders should be published as to each accused.

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 1549. For convenience of reference please place that number in brackets at the end of the order: (ETO 1549).



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

E TO 1553

- 6 APR 1944

UNITED STATES)

9TH INFANTRY DIVISION.

v.)

First Lieutenant JOHN W.)
SALYARDS (O-25078), 34th)
Field Artillery Battalion.)

Trial by G.C.M., convened at Cefalu,
Sicily 16 September 1943. Sentence:
To be dismissed the service.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: 1. In that First Lieutenant John W.

Salyards, 34th Field Artillery Battalion, having in his custody money of 1st Sergeant Francis W. Spangle in the amount of 2500 French Francs of the value of \$50.00 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa, from about February 15, 1943 to about May 15, 1943 wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

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Specification: 2. In that * * *, having in his custody money of Staff Sergeant Harold J. May in the amount of 1250 French Francs of the value of \$25.00 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards by 2nd Lt. Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943 to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

Specification: 3. In that * * *, having in his custody money of Technician 5th Grade Elbridge P. Webster in the amount of 450 French Francs of the value of \$9.00 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943 to about May 15, 1943, wrongfully and without cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

Specification: 4. In that * * *, having in his custody money of Technician 5th Grade John Cackowski in the amount of 350 French Francs of the value of \$7.00 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943 to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

Specification: 5. In that * * *, having in his custody money of Technician 5th Grade Marvin J. Etra in the amount of 750 French Francs of the value of \$15.00 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards by 2nd Lt. Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia North Africa from about February 15, 1943 to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

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Specification: 6. In that * * *, having in his custody money of Corporal Harry J. Haas, in the amount of 375 French Francs of the value of \$7.50 in U.S. money, which said money was entrusted to the custody of Lieutenant Salyards by 2nd Lieutenant H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943 to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

Specification: 7. In that * * *, having in his custody money of Corporal Michael Kazo, in the amount of 250 French Francs of the value of \$5.00 in U.S. money, which said money was entrusted to the custody of Lieutenant Salyards by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943 to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

Specification: 8. In that * * *, having in his custody money of Corporal George E. Jamison in the amount of 250 French Francs of the value of \$5.00 in U.S. money, which said money was entrusted to the custody of Lieutenant Salyards by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943 to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W.C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

Specification: 9. In that * * *, having in his custody money of Corporal Joseph S. Paulino in the amount of 1400 French Francs of the value of \$28.00 in U.S. money, which said money was entrusted to the custody of Lieutenant Salyards, by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943 to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

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Specification: 10. In that ***, having in his custody money of Private First Class George M. Farley in the amount of 1075 French Francs of the value of \$21.50 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards, by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943, to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

Specification 11. In that ***, having in his custody money of Private First Class George W. Radomski in the amount of 875 French Francs of the value of \$17.50 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards, by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943, to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

Specification: 12. In that ***, having in his custody money of Private First Class Charles D. Stevenson, Jr. in the amount of 2500 French Francs of the value of \$50.00 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards, by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943 to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

Specification: 13. In that ***, having in his custody money of Private First Class Frank J. Bradin, in the amount of 1375 French Francs of the value of \$27.50 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards, by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943, to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, this to the prejudice of good order and military discipline.

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Specification: 14. In that * * *, having in his custody money of Technician 5th Grade Glenn R. Readinger, in the amount of 1250 French Francs of the value of \$25.00 in U. S. money, which said money was entrusted to the custody of Lieutenant Salyards, by 2nd Lieutenant Lawrence H. Chadwick at Tlemcen, Algeria, on or about February 15, 1943, did, in Algeria and Tunisia, North Africa from about February 15, 1943, to about May 15, 1943, wrongfully and without due cause, after being ordered to do so by his Battalion Commander, Lt. Col. W. C. Westmoreland, fail to repay the same, 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 thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 9th Infantry Division, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the findings of guilty of all of the specifications of the Charge and of the Charge as involve finding the accused guilty of failing to obey an order of his superior officer to repay money in his possession which was due to the men of the Headquarters Battery, 34th Field Artillery Battalion, 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, which was undisputed, shows in substance that about 1 February 1943, at Port Lyautey, French Morocco, Second Lieutenant Lawrence H. Chadwick, Headquarters Battery, 34th Field Artillery Battalion, at the request of accused, his battery commander, collected \$797 in American "gold-seal" currency and from \$100 to \$130 in "blue-seal" currency from several men in the battery in order to purchase money orders for the men and to exchange "gold-seal" money for francs. He was not able to obtain the money orders at Port Lyautey and made a second attempt to purchase them at Tlemcen, Algeria (R9-10). The American Post Office at Tlemcen was not sufficiently established to execute money orders but he was informed that all "gold-seal" currency must be exchanged for francs but that "the blue-seal would be as it was". Accordingly, he converted \$797 of "gold-seal" currency into francs at the rate of 75 francs per dollar. He was then assigned to another battery and on 15 February transferred to accused "blue-seal" and "gold-seal" currency, and additional currency in francs, in the total amount of about \$3000 (R10,13). He gave accused a list showing the names of the men from whom money had been received, the amounts and costs of the money orders, and the amount of "blue-seal" and "gold-seal" currency. Lieutenant Chadwick testified "I think, but I am not sure, I put down the amount in francs" (R10-12). He put down the amount of "gold-seal" currency he converted namely \$797, and the number of francs he received. This was kept separately and he so informed the accused. He gave accused "more than two lists" (R14).

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After leaving Tlemcen, the battery was engaged in the Battle of Thala and then moved to a pass south of Tebessa, where on 4 March accused purchased the money orders (R11), which were issued at 50 francs per dollar (R13). All the money orders were later distributed to the men (R12-13).

About 7 April, while the troops were in a rest camp after the Battle of El Guettar, Major Otto Kerner, executive officer of the 34th Field Artillery Battalion, learned that the men who ordered money orders and paid for them in American "gold-seal" currency, did not receive any refund which accrued because such money had been converted into francs at the rate of 75 francs per dollar, whereas the money orders were purchased at the rate of 50 francs per dollar. He interrogated five or six men who had given American currency for money orders and discovered that they did not receive any payment of this profit. He directed Sergeant Francis W. Spangle, Headquarters and Headquarters Battery, 34th Field Artillery Battalion, to see accused and request the return of any profits arising from the transfer of funds. About 15 May after the organization arrived in the vicinity of Bizerte, Major Kerner asked Spangle if he had seen accused and Spangle stated that accused had told him that "all the men had to do was ask for ^{the} money". This information was given Lieutenant Colonel W. C. Westmoreland, commanding officer of the 34th Field Artillery Battalion, who summoned accused to his office (R24,27). Accused reported to Colonel Westmoreland on 15 May and was ordered by the battalion commander to refund all the money to the men in the battery within 24 hours. Accused stated that he did not know what he owed. On 5 June Colonel Westmoreland learned that the order had not been carried out, and on that day accused admitted to him/he had not complied with the order (R24-26). Asked whether accused repaid the money, Colonel Westmoreland testified:

"My investigation showed he repaid a part of the money. The night of the 16th I personally observed him talking to some men in the Battery. The following day we moved to Magenta, arrived there on or about the 22nd of May. It was not until June 5th that I made further investigation, gave him further time before I approached him again on the subject".

He did not extend the time for restitution beyond 5 June (R26).

Lieutenant Chadwick further testified that about 10 May accused asked his aid in ascertaining the names of the men who handed in the "gold-seal" currency which Chadwick had converted into francs. The two officers interrogated approximately 85 men, "at least half or more of Headquarters Battery". Chadwick was present when accused subsequently paid to several men money which was supposedly the profit on the exchange of "gold-seal" currency for francs.

"Lt. Salyards had the list and he showed me the payments which he had given out, and he also showed me which I believe was the list, how much each had told that he had taken in on francs and what the gain would be and that was the amount he paid back to those men" (R10-11).

Admitted in evidence by stipulation was a document dated 24 May 1943 containing the names of 28 men, opposite each of which was the amount of "gold-seal" currency paid in by each man, the theoretical gain over such amount because of the exchange of dollars for francs, and the amount of such gain paid to each man together with his signature thereon. The total under "amount claimed" was \$1088; under "theoretical gain", \$544; under "amount paid out", \$420.52. It was further stipulated that this document showed the amount paid to each man as profit, that no further payment was paid after 24 May 1943, and that if "these witnesses were called they would testify materially to the amount received and the amount that should have been gained from the conversion as shown by the paper." An examination of the exhibit discloses that each owner of the funds specified in the 14 specifications, as well as the additional 14 men listed in the exhibit, had received part but not all of the profit which accrued to him as a result of the conversion of his money into francs (R32; Ex.1).

Recalled as a witness by the court, Chadwick testified that the amount of "gold-seal" currency he converted into francs was \$797, and that the figure of \$1088 (Ex.1) was "way too much". *** we took the names of the men and they said how much was given them. The payment in gold seal they said was a lot more than it actually was. That total came out to be far more than \$797. He took in from \$100 - 130 "blue-seal" currency and the total amount of money which he turned in to accused, including francs and "gold-seal" currency, was about \$3000. He took no receipt from accused, and did not know what became of the paper he gave to accused, which showed the amount of money he (Chadwick) had taken in. Accused first approached him on the matter 10 May (R36-37).

4. Accused elected to remain silent, and no evidence was offered by the defense.

5. The confirming authority approved only so much of the findings of guilty of all of the specifications of the Charge and of the Charge as involved finding accused guilty of failing to obey an order of his superior officer to repay money in his possession which was due to the men of the battery.

The evidence shows that on 15 May Colonel Westmoreland ordered accused to refund within 24 hours all the money due to the men in the battery. The evidence also shows that accused had previously received money belonging to the men, part of which was to be repaid to them, and that when this order was given full restitution had not been made. It was

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further established that as of 24 May, part but not all of this money had been paid to the men and that no additional payments were made after that date. On 5 June accused admitted to Colonel Westmoreland that he had not complied with the order given on 15 May.

The terms of the order were general in character. The names of the men concerned and the amounts involved, were not specified by Colonel Westmoreland and under such circumstances the names and amounts alleged in the 14 specifications may be considered as surplusage in character. Accused in fact committed but one offense, namely, he failed to obey the order of his superior officer to refund all the money due to the members of the battery, and the evidence is legally sufficient to support the findings of guilty as approved by the confirming authority.

The defense contended in substance that accused refunded to the members of the battery \$420.52 (Ex.1) which was \$22.02 more than the profit of \$398.50 which accrued as the result of the conversion by Lieutenant Chadwick of \$797 in "gold-seal" currency at 75 francs per dollar. However, it is clear that he did not repay in full the 14 men named in the specifications.

Lieutenant Chadwick testified that he received and converted \$797 in "gold-seal" currency into francs and that the amount of \$1088 in "gold-seal" currency shown on Ex.1 as having been turned in by the men, was "way too much." Ex.1 was admitted in evidence by stipulation. Whether the men turned in \$797 or \$1088 in "gold-seal" currency for conversion into francs was a question of fact for the sole determination of the court. The testimony of Lieutenant Chadwick and Ex.1 constituted the only evidence on this question. Included in the approximate amount of \$3000 given accused by Chadwick after the latter had converted \$797 in "gold-seal" currency, was an undetermined amount of "gold-seal" currency. No evidence was offered by the defense and accused elected to remain silent. When he received the money due the men from Lieutenant Chadwick, accused gave no receipt therefor but did receive from Chadwick documents showing complete details of the transaction, including the amount of "gold-seal" currency which had been converted. These documents were not produced by the defense nor was any explanation offered as to their whereabouts. Ex.1 shows that each of the 28 men listed thereon, including each of the men alleged in the 14 specifications, had not been paid all of the profit which accrued to them as the result of the conversion into francs of their "gold-seal" currency. In view of the evidence introduced by the prosecution the burden of going forward with explanatory evidence rested upon accused. (CM ETO 527, Astrella; CM ETO 1317, Bentley). The Board of Review possesses no authority to disturb the findings of the court.

6. Several irregularities appearing in the record of trial were discussed in the review of the assistant Theater Staff Judge Advocate. As the Board of Review is of the opinion that these irregularities did not injuriously affect the substantial rights of the accused, further consideration thereof is deemed unnecessary.

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7. The charge sheet shows that accused was 25 years five months of age, that he enlisted in the Nebraska National Guard (State Detachment), and entered active duty 29 May 1940.

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 as approved by the confirming authority and the sentence. Dismissal of an officer is authorized upon conviction of a violation of Article of War 96.

B. Franklin Hite _____ Judge Advocate
Richard Sennott _____ Judge Advocate
Elwood V. Bergert _____ Judge Advocate

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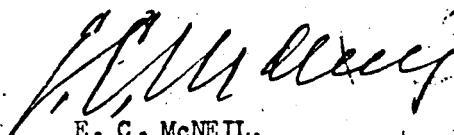
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WD, Branch Office TJAG., with ETOUSA. - 7 APR 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of First Lieutenant JOHN W. SALYARDS (O-25078), 34th 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 as approved by the confirming authority and the sentence, which holding is here approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. This is an unusual case. Although accused was tried for failure to obey an order to repay money, he was brought to account undoubtedly because of his attitude toward the money in his possession belonging to his soldiers and his failure to make any effort to repay it over a period of several months. The detailed facts of the transaction are obscure due to the loss of or failure to produce the documents containing the figures. However, it is clear that the 14 men named in the specifications have never been reimbursed in full, and they could have been paid the profit made on exchange as soon as the "gold-seal" currency was converted into francs even though the money orders could not be then obtained.

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 1553. For convenience of reference please place that number in brackets at the end of the order: (ETO 1553).


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

(Sentence ordered executed. GCMO 22, ETO, 14 Apr 1944)

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

BOARD OF REVIEW

22 APR 1944

ETO 1554

U N I T E D S T A T E S) FIRST ARMY.

v.)

First Lieutenant RALPH G.) Trial by G.C.M., convened at Lynton,
PRITCHARD (O-359868), 156th) North Devonshire, England, 24,27,28
Infantry.) December 1943. Sentence: To be
dismissed the service (suspended).

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that First Lieutenant Ralph G. Pritchard, One Hundred Fifty-sixth Infantry, being in command of a detail of troops of Company D, One Hundred Fifty-sixth Infantry for the purpose of giving a demonstration to a detachment composed of troops of Companies E and H, One Hundred Fifty-sixth Infantry, of overhead machine gun firing with ball ammunition, did at Exmoor Range near Porlock, England, on or about 25 October 1943, fail to use due caution and circumspection for the safety of said detachment of troops and did thereby negligently, carelessly, feloniously and unlawfully kill Sergeant Harold M. Olson, Company E, One Hundred Fifty-sixth Infantry, a member of said detachment.

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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, First Army, approved the sentence, designated the 2912th Disciplinary Training Center, Shepton Mallet, Somersetshire, England, as the place of confinement 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, remitted so much thereof as provided for confinement at hard labor, suspended execution of the sentence insofar as it related to dismissal from the service and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

The proceedings were published in General Court-Martial Orders No. 15, Headquarters European Theater of Operations dated 12 March 1944. Accused was restored to duty status effective 26 February 1944.

3. Accused on 25 October 1943 was Executive Officer of Company D, 156th Infantry, and had held such assignment since July 1942 (R114). He had been a student of the Infantry School at Fort Benning, Georgia, and had completed at said school a Rifle and Weapons course. After arriving in the United Kingdom he had attended three British Service Schools: Battle School, Street Fighting School and Knife Fighting School. His attendance at the Battle School was between 20 February and 19 March 1943 (R104).

At the British Battle School he witnessed several problems or demonstrations of small arms firing. Among the demonstrations thus presented to students was one known and designated as the "Crack and Thump" problem (R105). This particular problem or demonstration had a dual purpose: (a) to acclimate the soldiers and officers witnessing it to live ammunition fire over-head or in proximity of them and (b) to teach them, by means of the sound produced by small arms fire, how to identify the type and kind of weapons used and also how to locate the enemy positions when concealed or camouflaged (R5,6,107). The course of instruction witnessed by accused at the British Battle School involved the following procedure: At a selected firing terrain the class to be instructed was assembled on a hillside and was required to remain within a designated area possessing marked defined boundaries. As preliminary instruction riflemen in open view of the class discharged their weapons over the heads or to the flank of the members thereof. The attention of the students was directed to the distinction between the noise produced by bullets as they passed through the air overhead which noise is represented by the speech sound of the word "crack", and the noise caused by the actual discharge of the weapon indicated by the speech sound of the word "thump". (Hence the designation of the exercise as "crack and thump"). The "thump" is subsequent to the "crack" because of the time element involved in the transmission of sound. The point of origin of the latter (the solid projectile passing through the air), is nearer to the auditor than the point of origin of the former (the percussion arising from actual discharge of the weapon). As a result of this time

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difference it is possible to approximate the range and location of the weapon discharging the projectile. After the example and correlative explanation of the above phenomenon the actual problem was presented to the class. Placed in concealment about the firing terrain with their several separate places of location unknown to the students, were soldiers armed with British weapons: a machine gun, a Thompson sub-machine gun, a Bren gun, rifles and pistols. These concealed riflemen and gunners faced the group of students in a semi-circle, and using live ammunition, fired in their direction but at targets located on the students' flanks or on a hillside at their rear with an elevation which permitted the projectiles to pass over the students' heads. The problem was under the direction of an instructor-officer. Pre-arranged signals were given by the instructor to each rifleman when to commence firing and when to cease. Each rifleman fired a specified number of rounds separately and at the conclusion of the individual firing, at a given signal the concealed group, in unison, discharged their weapons. Each student-soldier was provided with out-line sketch map of the terrain and it was his duty to record thereon the location of each weapon, estimate its range and determine its type (R6,7,105-107). At the British School the "crack and thump" demonstration was conducted in accordance with directions contained in a British Army Manual - "Battle Drill and Fieldcraft Manual" (R105,106).

Captain Julius Sadilek was the commanding officer of Company D, 156th Infantry, from June 1942 and was in such command on 25 October 1943. He attended the British Battle School with accused (R4,9,105) and witnessed the "crack and thump" demonstration and problem above described (R4,5,106). He was presented with a copy of the above entitled manual upon which he inscribed his own name (R5). He identified the manual in court as one of the Manuals of instruction used at the British School. It was admitted in evidence as Defense Exhibit A, and the following excerpt therefrom is relevant:

" Page 15 - Section 5 - Paragraph 3.
Practice in Training Eye and Ear.

Divide a piece of ground into 20 squares marked with flags. Conceal a rifleman with some live ammunition in each square. Have these men, if possible, in German uniforms, and have them progressively better and better concealed. Let the class observe from the side of a bank. At a given signal get each man in turn to fire a live round into the bank over the heads of the observing class. They will thus get the "crack" and the "thump" of the bullet and will learn to disregard the "crack" and to locate the fire position from the "thump" and from watching for smoke and movement. At a given signal let each firer stand up, then conceal himself again and repeat the exercise. It

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is essential that men should not leave their observation training with the idea (very easy to get); 'I am very bad at this. I can never see anything'. They should be shown how to make progress in observation and the exercise just referred to is a good way of making steady progress. At the end of the exercise, the observers will be able to pick out all the fires instantly and will be able to see them almost standing out of the landscape and 'hitting them in the eye'. They will wonder how they came to miss them in the first instance, and it is this feeling of confidence which should be developed."

Upon the return of Captain Sadilek and accused to their unit after attendance at the British Battle School, the former suggested to the Regimental Commander, Colonel Lee, the Regimental S-3, Major Ralph H. Stephens, and the Battalion Commander, that every man of the regiment receive the benefit of instruction arising from the "crack and thump" demonstration (R5). Upon receiving the approval of Colonel Lee, Captain Sadilek selected accused to arrange for the demonstration and ordered that he assume charge of same. He was directed to confer with Major Stephens in preparing details (R6,9, 108). At that time Captain Sadilek delivered to accused his copy of the British Manual above described (Def.Ex.A) (R6,106) and in instructing him as to safety precautions, directed: "Fire to the flanks of the class", viz: on either side. Under such instruction the bullets would not pass over the head of the class but would strike targets on either side thereof (R6).

Resultant upon accused's designation as officer in charge of the "crack and thump" demonstrations, accused conferred with Major Stephens, Plans and Training Officer of the regiment (R7). Thereafter, while his regiment was stationed at or near Chiseldon range in the vicinity of Swindon, accused produced four or five of such demonstrations without mishap or mis-adventure (R7,93,108,131). He received no safety instructions prior to these exhibitions nor did he make precautionary inquiries. Colonel Lee, Major Stephens and Captain Sadilek were present at the second or third demonstration in the role of students. These officers, although having the opportunity, neither inspected the gun positions nor made inquiries as to safety measures in firing. No sand bags were used to "weight" the machine gun at any prior demonstration. Captain Sadilek was aware of this fact, but made no criticism or suggestion (R93,108). These four or five demonstrations produced by accused followed the same general pattern of the one at the British Battle School, except that no mortars were fired and there was no "enemy patrol" in the foreground (R106).

4. Some time prior to 25 October 1943, the 156th Infantry moved from its station in the proximity of Swindon to a station which required that it use the Exmoor Range in Devonshire for target practice and firing problems. Permission to use the Exmoor Range from 15 October to 31 October

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was obtained from V Corps (R94,95). Major Stephens as S-3, decided that accused should stage a "crack and thump" demonstration on Exmoor Range. He instructed accused to provide a sketch of the terrain, but gave no instructions as to safety measures nor as to preliminary test firing. Major Stephens was not present at the demonstration when it was finally staged (R94,126,127). On 15 October 1943 Captain Sadilek, Captain William J.B. Kuttner, assistant to Major Stephens the S-3, and accused inspected Exmoor Range. An area of the range was selected and designated for accused's demonstration. While Captain Kuttner was on the range with accused he instructed the latter only as to the direction of fire (R94,95). On 17 October accused and a sergeant (corporal) went to area of the range assigned for the demonstration. The sergeant (corporal) made a sketch of part of the terrain as directed by accused. On this occasion accused also made a personal inspection of the area, located the firing points and checked their cover and concealment (R95,109).

The entire membership of Companies E and H of the 156th Infantry were selected as students of the demonstration which was scheduled for Monday 25 October (Def.Ex.F.). The companies moved to Exmoor range on 21 October. Accused was authorized to select his own riflemen and gunners for the demonstration (R9,10,126). From Company D, 156th Infantry he chose his personnel, who described their activities in connection with the demonstration as follows:

Corporal Herman R. Turner operated an M-1 rifle. He was concealed in undergrowth between 300 and 400 feet from the class in a south-westerly direction from it (Pros.Ex.1; Def.Ex.D; R.12,14). He had participated in the "crack and thump" demonstration at Chiseldon (R14), and had qualified as a marksman with an M-1 rifle (R16). On the morning of 25 October he was shown his position by accused. The only instructions given him by accused were (a) not to fire less than three feet over the head of the class (R11,15) and (b) to obey the firing control signals given by flags and arms (R13). Accused said nothing with respect to firing to the flanks of the class (R15). In the afternoon Turner returned to his designated position and participated in the exercise (R16). He was issued 20 or 22 rounds of ball ammunition but no tracer bullets (R12). During the afternoon he fired 14 times and participated in the final mass fire (R12,13). His aiming point or target was the crest of the hill to the left of the class at an elevation higher than the position of the class. He did not fire directly over the head of the class (R12,13,17,18). There was no preliminary firing nor "dry run" that afternoon (R16). Accused was the officer in charge of the demonstration (R16). He walked through the "valley" and Turner indicated his position to him. Accused approved it (R12,16). During the demonstration accused was on the knoll where the class sat. After the problem was completed, Turner was the guard over the machine gun operated by Sergeant Galpin (R14). He was present after some of the members of the class had been hurt when tracer bullets were fired from the machine gun. The tracers went "over the hill". Neither sand bags nor depression stops had been used in the operation of the machine gun (R14).

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Private First Class James F. Allman was armed with a 1903 rifle (R20). He was stationed in a concealed position about 300 feet south by west of the class (Pros.Ex.1; Def.Ex.D; R20). Accused selected Allman's position (R23) and told him "to fire from an unknown range and be camouflaged," and "not to fire too close, and not closer than 3 feet of the class" (R20,22,25). He fired five rounds during the demonstration and engaged in the final mass firing (R21). There was no preliminary firing on the range (R24). Accused did not point out Allman's target, but directed that he fire at a hill at the rear of the class. Allman selected as his firing point a small tree opposite his position and towards the "front of the class" (R21), but fired over the heads of its members and to their left flank (R23). After the firing terminated, Allman went to the machine gun which had been operated by Staff Sergeant Galpin. There were no sand bags at the gun site (R22,24). Allman had prior to the demonstration qualified as an expert marksman with a 1903 rifle (R22).

Private First Class Jacob H. Kunzlie fired a 1903 rifle at the demonstration. Before the firing accused informed Kunzlie as to the range, the location of the class and the firing signals and instructed him to "make sure not to fire too low" and "not to fire into the class". Galpin, Turner, Campbell, Weber, Scurich, Mabry, Allen and Kunzlie were on the firing detail and heard the instructions. The ammunition was furnished by accused who showed Kunzlie his position (R26). He was concealed about 900 feet west of the location of the class and approximately 175 feet east of Galpin's machine gun position (Pros.Ex.1; Def.Ex.D; R28). Accused directed Kunzlie to fire to the left of the class but assigned no target and observed his position from a distance of 15 or 20 yards (R27,28). Kunzlie fired three rounds separately (R27,28) and two rounds in the final burst (R27) aiming and firing to the left of the class. He went to the machine gun when the firing was complete and saw Turner standing guard (R28). He had previously qualified as an expert with the 1903 rifle and had participated in two or three "crack and thump" exercises at Chiseldon (R28).

Sergeant (Corporal) Thomas J. Campbell was a member of the firing detail at Exmoor on 25 October. On the morning of that date Campbell and other members of the detail were on the terrain and received instruction from accused as to their positions and range (R30). Accused directed Campbell with respect to firing "to keep at a good safe distance over their heads". He also instructed the group as to signals and particularly as to a "cease firing" signal in event of accidents (R30). Campbell used a 1903 rifle and fired from a concealed position located approximately 975 feet south-west of the location of the class and about 180 feet south by east of Kunzlie's position (Pros.Ex.1; Def.Ex.D; R30). He selected his own position and accused "passed by it, and OK'd it." Accused thought it was a good position. Campbell directed both his separate shots and final burst of fire to the class' right flank and aimed at a target on a hill over the heads of the class members (R29,30). There was no "dry run" preliminary to the exercise and no tracer bullets were issued (R31). Campbell had previously qualified as a sharp-shooter with a 1903 rifle and had fired at one prior "crack and thump" problem at Chiseldon (R30).

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Corporal Vincent J. Scurich was on the range detail of approximately ten men on 25 October under command and direction of accused (R31). He was armed with a Browning Automatic Rifle ("BAR"). He was present at Exmoor range on the afternoon of said date immediately preceding the exercise, and with other members of the detail received verbal instruction as to signals from accused who also designated Scurich's position. Accused went to the position and directed him to fire into the hill in back of the class (R32). The position was concealed from the class and was located about 600 feet south-west of the class location (Pros.Ex.1; Def.Ex.D; R32). During the problem Scurich fired three separate bursts of six rounds each and then fired nine rounds in the final mass firing (R32,33). He fired into the hill to the right rear of the class and the projectiles passed over the heads of the class a distance of about 20 yards. His aiming point was a sandy spot on the hill over the heads of the class members. Accused did not designate the particular target (R32,33). Scurich had not previously fired for qualification with a "Bar", but had fired with such weapon at one previous demonstration at the British Battle School (R32,34).

Private First Class John F. Weber on the morning of 25 October received from accused instructions concerning signals for firing at the prospective exercise. Accused directed that the riflemen fire "high". Weber was one of the "known ranges" and did not fire in the final exercise (R34,35).

Corporal William M. Mabry fired at Exmoor range on the afternoon of 25 October as a "known range", using a 1903 rifle. Accused instructed him "to shoot plenty high" overhead of the student group. Mabry's exposed position for firing was 800 feet west of the students and approximately 200 feet in front of Galpin's machine gun (Pros.Ex.1; R36). He fired during the explanatory or informative part of the problem and did not engage in the concealed firing (R36). During the final firing he was within 5 or 6 yards of the position of the class. It was the final burst where all weapons fired simultaneously that injured the students. He saw "a row of men laying on the ground". A straight line drawn from the machine gun would extend to this "row" of 14 or 15 wounded men (R37,38). Galpin fired the machine gun on the final phase of the problem (R38). Galpin's machine gun fired two bursts separately before the final consolidated burst (R40).

Staff Sergeant Henry Galpin had been in the machine gun platoon for three years. In 1941 at Camp Blanding he was the best heavy .30 calibre machine gunner in the 156th Infantry scoring 189 out of a possible 200. He had fired a machine gun frequently and was familiar with its operation (R91). He had participated in three previous "crack and thump" demonstrations at Swindon, and had fired at objects in the field 25 times. At the time of the three previous "crack and thump" operations, Galpin did not use either depression stops or sand bags on the machine guns. He had never received instruction in the use of depression stops and never used them on problems. No gun books were kept on the machine guns (R93). There was independent evidence that Galpin received ammunition from the company supply sergeant, namely, "a belt full, four ball and one tracer, 250 rounds of ammunition" (R40).

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5. The class, consisting of E and H companies of the 156th Infantry and numbering about 210 men, assembled on a knoll in the designated area of Exmoor Range (Pros.Ex.1; Def.Ex.D; R50,51,52,58) during the early afternoon of 25 October 1943. They were seated on the ground shoulder to shoulder (R42,49,51,59). Accused was present and ordered all class members to wear helmets. Sketch maps were distributed and accused explained to the men the nature of the demonstration and the problem to be solved (R43, 48,50,55,58). The "known ranges" fired first, and this was followed by firing from the "unknown ranges" (R43). During the final burst when all "concealed range" weapons fired in unison, three or four tracer bullets were seen by members of the student group coming from the direction of Galpin's machine gun (R44,46,47,48,51,54,56,58). They struck among the students (R45,48,56). Consequential upon the firing of this final burst several student-observers were killed and wounded (R51,56,60). The killed and injured men seemed to form a straight line pattern which when projected extended to Galpin's machine gun (R51,53,59). None of the men had been killed or wounded prior to the firing of the final burst (R46,48,54). Sergeant Harold M. Olson, Company E, 156th Infantry was a member of the class. Three bullets entered his body near his heart and he died shortly thereafter (R44,48,49). Accused at this time was present with the men (R45,57). When they were struck by the bullets he immediately signalled to "cease firing" (R59).

6. After the injured had been attended, Captain Claude E. Bailey, commander Company E, 156th Infantry, the accused, Captain William J. B. Kuttner, assistant to Major Ralph H. Stephens, S-3 of the 156th Infantry, Captain Daniel P. Schofield, commander Company H, 156th Infantry, Lieutenants Nichols and Morrison made an inspection of the .30 calibre water-cooled machine gun. Staff Sergeant Galpin was also present at the inspection (R62). The gun had not been moved from the spot where it stood during the demonstration (R70,76,84), and the rear sight leaf was set at 441 (R65,67,76). It was obvious that neither sand bags nor depression or traversing stops had been used during the firing (R61,67,69,70,76). The gun stood upon ground that was fairly spongy and soft and which sloped slightly to the right. The tripod legs were nearly horizontal. The underside of the gun pintle housing was about three inches above the ground. The right front leg of the tripod was resting on the ground due to the fact that there was a small hump in the ground between the apex of the triangle formed by the leg and foot of the leg. The leg rested against this hump of ground, but the shoe of the right leg was not resting on the ground. The gun had been mounted in a grass-grown area so that the blades of grass were bent and the right front shoe rested on the grass. The grass under that shoe could be pushed down with a finger and the finger pushed under the foot. The other two legs of the tripod had a purchase in the ground but the right leg did not. The trail leg was seated firmly in the ground (R61,65,69,76,77,83). Captain Bailey "bore-sighted" the gun and also looked through the regular sights. He discovered that the line of sight in both instances passed over the knoll on which the student group had sat by an approximate distance of 12 feet and to a spot slightly to the right of the group (R62,65,66,68,79). Lieutenant Morrison pressed down with his

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hands and arms - not full arms - on the water jacket near to the muzzle of the gun. Such action depressed the whole gun but did not separate the gun from the tripod. Captain Bailey then sighted through the bore and noted that the sight was depressed approximately 10 feet to a point about 2 feet above the knoll on which the class had been grouped. The depressed point of aim cleared the crest of the knoll (R66). The gun was depressed a second time by another officer with heavy pressure and the elevating arc slipped. Galpin relayed the gun and the line of sight was 4 or 5 mills different from the original setting sighted by Captain Bailey and 4 or 5 feet to the right (R71,72,80,82). Galpin after relaying the gun fired it with a burst of 12 rounds using only tracer bullets. Later 12 rounds of ordinary bullets were fired. The tracers passed over the knoll slightly to the right of and about 12 feet above the knoll. When the 12 rounds of ordinary bullets were fired the gun and tripod as a unit bounced considerably, but there was no play of the tripod and the gun separately (R62,65, 79). The fire was not unduly dispersed or affected thereby (R65). The jamming handles of the tripod were tight, as were the clamping, elevating mechanism and muzzle glands. The gun seemed in good mechanical condition. The bore had no pits (R63).

In the presence of accused, Galpin stated to Captain Bailey that he could not understand what had happened; that at the time of firing the final burst he had been watching accused for signals; that he checked the sights before he fired and checked them again after he fired (R63).

In answer to a hypothetical question, propounded to him on cross-examination by defense counsel, which embraced the same facts with respect to the location and emplacement of a machine gun as narrated above with reference to Galpin's gun, he expressed the opinion that when fired the muzzle of the gun would be deflected to the right and downward - the line of the fire would move to the right and downward (R64). He further testified as an expert that if the slope of the legs of a heavy machine gun tripod is approximately 45 degrees, that the gun is more rigidly mounted than if the degree of slope is greater or less than that slope, and that a gun is properly mounted when the under-side of the gun pintle housing is high enough above the ground so that the angle of the legs above the ground approximates 45 degrees (R68). Captain Bailey was of the further opinion that the gun involved in this case was properly set with respect to the actual mounting, but it was not stable according to demonstrated standards of safety.

There was no bracing of the gun and there was nothing to insure that the muzzle would not fire into the class. The placement of a bar underneath the water jacket so that the muzzle could not be depressed below a certain point and the use of sand bags to hold down the gun were required in order to provide necessary safety controls. The absence of these precautionary measures, in the opinion of Captain Bailey, compelled him to conclude that the gun was improperly mounted (R69,70,71) but he did not know that if sand bags and depression stops had been used they would have avoided the accident (R71).

Captain Schofield was present at the inspection of the machine gun after the accident. His qualification as an expert was admitted (R78).

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He expressed the opinion that in this demonstration adequate precautionary measures had not been taken in placing the machine gun for over-head firing with live ammunition; that sand bags should have been used to weight the gun in place, and a depression stop should have been employed to prevent downward movement of the water jacket upon discharge of the gun (R82). He described a depression stop thus:

"A depression stop is simply a bar of wood which is supported by two stakes driven firmly into the ground, and then placed under the water jacket of the gun at such a height which will stop the water jacket on any downward action, rather angle, until it reaches such an angle to be dangerous to the troops" (R82).

7. In defense of the accused, the following evidence was presented:

Captain Dan B. Ritchie, Adjutant of the 156th Infantry, testified that he had searched the regimental records and files to discover whether safety instructions had been issued with respect to the "crack and thump" demonstration conducted by accused on 25 October 1943 but had found none (R87). He had also caused search to be made of the files of Company D, but no safety instructions covering the demonstration were discovered. The 1st Battalion was non-existent at time the above searches were conducted (R88).

Identified by Captain Ritchie were the training schedule of Company D, 156th Infantry, for Friday July 23, 1943 and Wednesday July 28, 1943 which showed that the company was to engage in the "crack and thump" exercises on said date under direction of the accused and that the text book reference for the exercise was "Battle Drill and Field Craft Manual" (British). The schedule was admitted in evidence as Def.Ex.B.

Captain Sadilek and accused both attended the British Battle School from 20 February to 20 March 1943.

Major Ralph H. Stephens, the S-3 of the 156th Infantry on 25 October and for ten months prior thereto, claimed privilege of his constitutional rights not to give evidence against himself and was not examined.

Staff Sergeant Henry Galpin, Company D, 156th Infantry testified as hereinbefore summarized. He claimed his constitutional privilege with reference to questions pertaining to his participation in the "crack and thump" exercise of 25 October 1943.

Captain William J. B. Kuttner, 156th Infantry, was on and prior to 25 October 1943 assistant to Major Stephens, S-3 of the regiment. He stated that he did not know of any safety instructions issued by the commanding officer of Company D with reference to "crack and thump" demonstrations (R94). He recited at length the history of the preparations for the "crack and thump" exercise which was produced at Exmoor Range on 25 October 1943 and of accused's connection therewith (R94-96). Such evidence conforms in

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substance with the facts hereinbefore stated. He also described the inspection and tests of the Galpin machine gun which were made immediately after the accident (R97-99). In its major aspects his testimony substantiates the facts of said investigation hereinbefore summarized. He further testified that accused was in sole charge of the "crack and thump" demonstration on 25 October 1943 and that to his knowledge accused did not request any safety instructions either from Major Stephens or himself (R99). Def.Ex.C, identified by Captain Kuttner was admitted in evidence (R101). It is an undated memorandum prepared by Major Stephens as S-3 of the regiment directing the type of firing to be conducted on Exmoor range. Included was a "crack and thump" demonstration. On the preliminary reconnaissance prior to 25 October 1943 of Exmoor range, safety precautions with respect to direction of fire only were discussed with accused (R96).

Accused elected to appear as a witness in his own behalf (R104). His testimony with respect to his training and experience both in general and in particular regard to "crack and thump" exercises; his preparations for the exercise of 25 October 1943; the events and circumstances attending the demonstration with its tragic consequences and of the post-demonstration inspection and test of Galpin's machine gun corresponds with and is corroborative of the narrative and testimony hereinbefore set forth in paragraphs 3, 4, 5 and 6 hereof (R104-114). Certain parts of his testimony, however, are directed to defensive matters and they summarize as follows:

A number of times in the United Kingdom he had observed overhead machine gun fire and on none of these occasions had sand bags or depression stops been used (R114,125). These were courses in individual assaults and regimental assaults on fortified positions (R125). As a result of these observations he believed that his problem involved the same safety factors as the assault problems (R125). Prior to firing the problems on 25 October he had indicated the point of aim to Galpin. This target was the point he observed when he sighted the gun after the accident. It was the only brown patch of grass on a hill which was approximately 1500 yards to the rear of the class position (R114,115). However, prior to the firing he did not check the sights of the gun to see if it was layed on the point of aim (R125). He had no explanation as to the reason the machine gun fired into the class (R127).

Introduced in evidence by the defense were a map of the terrain prepared under the direction of Lieutenant Colonel Lamar Tooze, assistant Inspector General (Def.Ex.D) and a diagram illustrative of vertical measurements of vital points on the terrain (Def.Ex.E). Testifying from these exhibits accused stated that the angle from the point of aim (brown patch of grass) on the distant hillside to the foot of the student standing highest on the hill in the class group was 28 mills. He had determined this figure in a test conducted by him after the accident. He stationed a man in the position of the class, layed the gun on the aiming point, depressed the muzzle until the sight covered the man and then counted the mills between the man and the aiming point (R115). Accused also computed the lateral angle between the point of aim designated by him (and which Galpin asserted he used in firing) and the point where the

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casualties occurred. He found it to be 43 mills to the right. In order to elevate 28 mills it was necessary to turn the elevation wheel on the gun slightly over one turn. The number of turns of the lateral wheel were slightly less than two turns (R115). The range of the class from the gun was approximately 330 yards or 990 feet. Reducing the 28 mills to a foot-age measurement the line of fire was 28 feet over the head of the class (R116).

Attention of accused was directed to Section IX, par.16, of Field Manual 23-55 - "Precautions for overhead fire", as follows:

"(1) * * * overhead fire will not be delivered if the troops are less than 400 or more than 1800 yards from the guns, unless the vertical interval of the troops below the line gun-target is such as to make safety obvious" (R116).

He testified that this rule applies when troops and gun are on a vertical plane because on a plane surface bullets do not rise overhead of the men. In this instance safety was obvious because the gun position was at a higher elevation than the class position (R116) and point of aim was also higher than class position (R117).

"(2) A barrel that has fired 5000 rounds or which gives evidence of excessive muzzle blast should not be used for overhead fire" (R117).

Accused instructed Galpin to pick out a good gun. Guns were available to Galpin which had not fired 5000 rounds (R117). Accused knew that new barrels had been furnished Company D and that 5000 rounds had not been fired by any of them (R126).

"(3) The tripod must be firmly mounted with jamming handles and cradle - clamping handle tight and wherever practicable on a sandbag base; badly worn tripods will not be used" (R117).

Jamming handles were tight on Galpin's gun. Sand bags were not necessary in this case because of the nature of the ground. The spade of the tripod took firm hold of the ground. Sand bags are used to add weight to the gun, stop excessive vibration and prevent the gun from bouncing. The gun was not mounted in either soft, muddy ground nor on rocky hard surface ground. The tripod legs were not worn (R117). The effectiveness of the demonstration would not have been reduced by use of sand bags. There were no sand bags available either in the company or regiment. Accused did not attempt to secure sand bags for either prior demonstrations or the instant one (R120). He did not think it necessary to use them, because he knew the ground on which the gun was set "was stable enough to hold a gun without vibrating to

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any undue extent". The ground had a thick matting of grass over it. It was not as firm as a floor, but was of such consistency that the legs could be dug into the ground. The ground was damp but accused thought the ground firm enough to hold the gun. After 16 months in a weapons company accused thought he could judge whether the ground required sand bags (R121). He knew that FM 23-55 required the use of sand bags (R125). He did not inspect the mounting of the gun after it had been set nor did he check the sighting after the gun was mounted and before it was fired (R122). If he had known that the right leg of the gun was not firmly seated he did not believe he would have permitted the gun to be fired on the demonstration (R123). He did not test fire the problem because he believed safety was obvious on that particular terrain (R123). Further, he did no test firing because the range was allotted to him only for 1½ hours and also for the reason there were other companies on the range. He took all emergency precautions himself and he did not think that higher authority would check the safety provisions of the problem (R124). Neither the regimental commander, the battalion commander nor the company commander gave him any safety instructions for the conduct of the problem (R128,129).

"(4) The water-jacket must be kept filled; guns will not be allowed to heat excessively"
(R117).

Only three bursts were fired from the gun prior to the last one. There was no evidence of excessive heating (R117).

"(5) Depression stops should be used to prevent the muzzle of the gun from being accidentally lowered below the limit of safety; the necessities of battle, however, may prevent the use of the precaution" (R118).

Depression stops were not used in this demonstration, because the mechanical function of the gun was in very good order, and the elevating mechanism was locked very tightly. The nature of the problem was such that the gun was set into position and was layed on one point and the aiming point was not changed during the demonstration. The aim was not traversed or elevated (R118,121). Further accused did not think sand bags or a depression stop were necessary because he was using a good gun which was firmly seated in a position chosen by him and he had selected a very experienced gunner (R123, 126). He understood that field manuals are only a guide. However, he did not use the manual as a guide in its entirety in the 25 October problems as his instructions were to use the "British Book" which was the text reference in the schedules (Def.Ex.B). He admitted that there was nothing in the text reference which eliminated the use of FM 23-55 (R122).

Accused's attention was also called to Appendix B of the before-mentioned "Battle Drill and Field Craft Manual" - "Safety Rules for use of Live Ammunition for Training Purposes" (Def.Ex.A - Appendix B):

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"(1) These rules which are to be used as a guide, are produced to cover the use of live ammunition for purposes of:

(a) Battle inoculation.

(b) Field firing

It must be borne in mind that these two types of training may be carried out together and that these rules will have to be adapted to meet the requirements of particular exercises" (R118).

Accused complied with the foregoing (R118).

"(2) All firing of live ammunition will be controlled by an officer, or a Warrant Officer or senior N.C.O." (R118).

Accused was in control of firing (R118).

"(3) Single rounds and short bursts only will be fired" (R118).

There was compliance with this provision (R118).

"(4) The firer will only use:- (a) a weapon he knows thoroughly, (b) A weapon that has been correctly zeroed" (R118).

Galpin was qualified as a machine gun marksman and knew his weapon thoroughly. The gun had been correctly zeroed (R118).

"(5) Before opening fire, the firer must appreciate both the ground at the selected point of impact of the bullet or bomb and the ground beyond the point of impact" (R119).

Accused took these factors into consideration (R119).

"(6) The ground selected for the point of impact should if possible be of a type unlikely to cause ricochets. In any case fire will never be put down between the firer and the student. The point of impact will be well to the flank, in line with or beyond the students. This minimizes the possibility of a ricochet. Ricochets may deviate 45° or more from point of impact" (R119).

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The point of impact designated by accused was (sighting from the gun position) to the right flank of the class and well to its rear (R119).

"(7) For the purpose of battle innoculation bullets which pass five yards over the heads of the students have the same psychological effect as if they only passed 5 feet overhead. Therefore a wide safety margin can be allowed without deterioration in the value of the training given. The overhead safety margin will never be less than five yards; it should usually be more. The greater the range the wider the safety margin should be. Overhead fire will not be attempted for training purposes at ranges over 500 yards. Overhead fire should always be given from the tripod" (R119).

The gun was fired from tripod. The range from gun to the class was 330 yards. The overhead margin between line of fire and a standing class member was 28 feet (R119).

"(8) If there is any doubt as to the safety of either students or civilians, do not fire" (R119).

Accused was in the class himself. Prior to commencement of the firing he had no doubt as to the safety of the students and civilians (R119).

"(9) No person, other than those detailed to use live ammunition will carry or use it" (R119).

In this demonstration only those detailed for such duties carried or used live ammunition (R119).

"(10) The firer must be completely in the picture as regards all possible methods of approach of the students. This is of increasing importance in view of the developments in individual camouflage. The firer will not fire if he cannot see the students" (R119).

During the entire demonstration Galpin could see the students from the machine gun position (R119).

"(11) Sentries must be posted to prevent people entering the danger area" (R120).

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It was not accused's duty to post sentries at the point of demonstration (R120).

8. Preliminary to consideration of the case upon its merits it is desirable to dispose of certain questions of evidence and procedure arising during the course of the trial:

(a) During the arraignment of accused and immediately prior to his pleading to the Charge and Specification he presented and filed his written motion

(1) to amend the specification thereof by striking out the words "one hundred fifty-sixth infantry, a member of said detachment" in the last line thereof and substituting in places thereof the words:

"Corporal Daniel E. Smith, Company H,
Private First Class Hugh S. Stone, Company
E, Private Steve J. Jondora, Company H,
and Private Robert W. Klemm, Company E,
all of One Hundred Fifty-sixth Infantry
Regiment, and members of said detachment."

and also

(2) to add a new Charge, to be designated Charge II and a new Specification as follows:

"Charge II: Violation of the 96th Article of War.
Specification: In that First Lieutenant Ralph
G. Pritchard, One Hundred Fifty-sixth In-
fantry Regiment, being in command of a de-
tail of troops of Company D, One Hundred
Fifty-sixth Infantry Regiment for the pur-
pose of giving a demonstration to a
detachment of troops of companies E & H,
One Hundred Fifty-sixth Infantry Regiment,
of overhead machine gun firing with ball
ammunition, did at Exmoor Range near Porlock,
England, on or about 25 October 1943, fail
to use due caution and circumspection for
the safety of said detachment of troops and
did thereby negligently, carelessly, felon-
iously and unlawfully injure Staff Sergeant
Delbert G. Wadley, Company H, Sergeant
Victor F. Kosoglav, Company H, Sergeant
Harold F. Murray, Company E, Private First
Class Salvatore Lotauro, Company E, Private
First Class Owen R. Van Greuningon, Company
E, Private First Class Harold E. Peterson,
Company H. Private First Class Kenneth C.
Peltier, Company H, Private D.C.Hansen,
Company H, Private Eugene F. Cross, Company
H, Private Harris C. Halvorson, Company H,

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Private Kenneth Williams, Company H,
Private Stanley R. Markon, Company H,
Private Emmett H. Gaugestad, Company E,
and Private Louis J. DiGioia, Company E,
all of One Hundred Fifty-sixth Infantry
Regiment and all members of said detach-
ment."

The court denied the motion in toto (R1) and thereupon accused entered his plea of not guilty to the Charge and Specification.

The motion in this instance was an attempt by accused to bring before the court (1) four additional offenses of involuntary manslaughter alleged to have been committed by him and (2) an offense under the 96th Article of War based on allegations of negligence of accused which resulted in the injury of fourteen other persons. The argument in support of the motion was directed primarily to the desire of accused to stand trial in the instant proceeding for his responsibility for eighteen other tortious acts in order to prevent multiplicity of actions against him.

Neither the Articles of War nor the Manual for Courts-Martial 1928, specifically authorize the amendment of the charge upon motion of the accused for the purpose of introducing therein other or additional offenses of which the accused might be brought to trial. The procedure prescribed by the Manual for Courts-Martial contemplates that the authority exercising general court-martial jurisdiction over an accused shall determine whether he shall be tried, the offenses for which he will be tried and the tribunal which shall try him (MCM, 1928, par.34, pp.22-23). There is vested in such authority a broad discretion in such matters. When he refers the charge for trial by the court appointed by him he has thus exercised this discretion and it is conclusively binding upon the trial judge advocate, the court and the accused. The controlling nature of the appointing authority's decision is well demonstrated by the fact that a nolle prosequi to a charge or specification will be entered only when directed by the appointing authority (MCM, 1928, par.72, p.56). Recognition of the exclusive power to dismiss a charge or specification requires that the appointing authority shall possess the right to determine finally and conclusively the identity of the charges and specifications upon which the accused will be tried. One power is the co-ordinate of the other power and neither can be denied without disarranging the entire system of military justice which has for its primary objective the maintenance and enforcement of discipline over military personnel (Winthrop's Military Law & Precedents - Reprint - p.49).

The wide discretionary power of the convening authority in appointing the court has been sustained in CM ETO 804, Ogletree et al and CM 231963 (1943), Bull.JAG, Vol.II, No.8, Aug 1943, sec.365(9), p.304. As a highly necessary concomitant of this power, the convening authority must possess power not only to designate who shall be tried by a general court but also for what offenses he shall be tried. The exercise of the latter power involves a plenary control of the pleadings, viz: the charge sheet.

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The conclusive and plenary nature of the appointing authority's control over the charges and specifications which he has referred to a court for trial is stated by Winthrop in the following language:

"Regularly and properly charges can be referred to a general court-martial for trial only by the commander by whom the court has been convened, (or his successor in command,) or by his authority. * * *. The reference, by the department, &c., commander, of the charges to the court is not made till the same have been approved by him, and such approval is not given till the charges have been examined by the commander, with the assistance generally of the judge advocate or other proper staff officer attached to the command, and if necessary revised and corrected. * * * * *

The officer preferring charges is not entitled to have them brought to trial, nor has an accused a vested right in having charges against him adjudicated. The convening authority, representing the United States, may always withdraw charges before trial; may cause or authorize a nolle prosequi to be entered as to a charge or specification after the charges have been placed before the court and even after arraignment, and may cause or authorize charges or specifications to be amended. But - so far as concerns the court and the parties - charges duly referred for trial are, in law, ordered to be tried as they stand. * * *, the court may strike out a charge or specification on motion of the accused if sufficient cause be exhibited; but, self-moved (or in the absence of an issue) and of its own original capacity, it has no power whatever to amend, modify, discard, or withdraw, or direct to be stricken out, any part of the charges or specifications officially committed to it for trial, except, indeed, in so far as to correct a mere obvious error of form." (Winthrop's Military Law & Precedents - Reprint - pp.154-156).

The court committed no error in denying accused's motion.

(b) There was admitted in evidence a transcript of questions propounded to accused by Lieutenant Colonel Lamar Tooze, Assistant Inspector General First Army, and accused's answers thereto in the course of an official investigation conducted by Colonel Tooze on 4 November 1943 (Pros.Ex. 3; R85-87). No objection was made on the ground that accused's answers

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were involuntary as the transcript was admitted upon stipulation (R85). The defense did object however, specifically to certain questions and answers on the ground they involved immaterial, irrelevant and hearsay evidence. The objections were overruled. The particular colloquy to which objection was made appears as follows:

- "Q. Lieutenant, prior to the time of the accident had you made any check on the safety regulations that are required when weapons are fired over head of personnel?
- A. No, sir. I have not.
- Q. Had you ever made any check on those regulations?
- A. I had read the Field Manual (sic).
- Q. How long ago was that approximately?
- A. Can't say exactly.
- Q. Was it prior to the time you put on the demonstration at Chiseldon Barracks?
- A. Yes, sir.
- Q. Were you familiar with the fact that the regulations AR 750-10, Change 2, paragraph 8^c provides that in part as follows with reference to light and heavy machine guns:
"Light and heavy machine guns with free traverse may be fired at low angles of elevation provided there is an angle of 30° or more between the line of fire and the line to the near flank of another individual or unit. The angle may be reduced to 15° if traversing stops are used. Means must be taken to enable the firing unit to know the location of the flank of the forward unit and be assured that no personnel are within the 30° or 15° sector."
- Did you know about that requirement?
- A. No, sir" (Pros.Ex.3, pp.6-7).

The court was authorized to take judicial notice of Army Regulations and the safety regulations contained in the applicable field manual (FM 23-55) (MCM, 1928, par.125, pp.134-135; CM 126974 (1919), Dig.Op.JAG, 1912-1940, sec.395(29), pp.220-221; Winthrop's Military Law & Precedents - Reprint - p.136). Accused, a member of the military service, was charged with notice of same (Winthrop's Military Law & Precedents - Reprint - p.32; United States v. Freeman, 3 How. 556, 11 L.Ed., 724). Evidence of accused's observance or non-observance of the rules and regulations pertaining to safety measures in the conduct of firing demonstrations was therefore highly relevant and material on the issue of his inculpatory conduct. His answers to questions propounded to him which pertained to his diligence and

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care in the preparation of the firing demonstration where inculpatory were admissions against interest and were clearly admissible in evidence (CM ETO 895, Davis et al.). The ruling of the court is free from criticism.

(c) Upon interrogation of Captain Schofield by a member of the court the following colloquy occurred:

"Q - Did you inspect any of the weapons before the demonstration?
A - No, sir.
Q - Whose duty was that?
A - I am not sure. I didn't consider it mine.
Q - Did the Officer who put on the demonstration?
A - I believe it would have been one of his responsibilities. I don't know if it was.
Q - If you were putting on the demonstration, would it be your responsibility?
A - Yes, sir." (R83).

The defense objected to the questions on the ground that they called for the opinion of the witness. The law member overruled the same on the ground that the defense established the witness as an expert and that the questions required his opinion in the use of a machine gun (R83). In his ruling the law member was in error. The questions did not relate to the use of a machine gun. They directly involved the issue of accused's duty to make prior inspection of the weapons used in the demonstration. This was a mixed question of law and fact to be determined by the court as a fact finding body. The questions and answers clearly invaded its province and should have been stricken from the record (22 C.J., sec.731, p.636; 32 C.J.S., sec.453, p.91; Winthrop's Military Law & Precedents - Reprint - p.338). However, this testimony was but cumulative and was wholly consistent with legally admissible and uncontradicted evidence which established accused's over-all responsibility as to safety precautions in staging the demonstration. Under such condition of record this improperly admitted evidence could have had no direct prejudicial effect upon the rights of accused (AW 37; CM ETO 571, Leach) and it may be disregarded.

9. The record of trial is replete with evidence of the events occurring at the "crack and thump" exercise at Exmoor Range on 25 October 1943. The conduct of each participant therein is revealed in detail, but the prosecution and the defense both directed their evidence primarily to the operation by Galpin of the .30 calibre heavy machine gun. There can be no doubt that the five men were killed and the 14 men were wounded coincident with the final en masse volley fired from all of the weapons. These circumstances presumptively involve each and all of the "concealed ranges". However, the prosecution's case was narrowed, by the allegations of the Specification, to the theory that the fatal shots came from the heavy machine gun and upon this hypothesis it attempted to prove accused's dere-

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lications with respect to the use and operation of that weapon. The defense met this theory of the case by its evidence and did not even suggest, moreover attempt to prove that some other "range" than Galpin fired the shots which resulted in the death of Olson. Evidence of such fact, if believed by the court would have served in a large degree to destroy the theory of the prosecution's case. Notwithstanding this status of the record, the Board of Review in its appellate review will examine the entire evidence for the purpose of ascertaining whether the accused has been convicted of an offense in support of which there is no substantial evidence of guilt, or upon evidence that discloses that Olson's death resulted from the actions of some person for whom accused is not responsible. While the situation presented is not identical with that arising in the Federal courts with respect to appellate review of the question as to whether there is substantial evidence to sustain a verdict, it is believed that such action is within the spirit of the rule:

"that in criminal cases, involving the life or liberty of the accused, the appellate courts of the United States may notice and correct, in the interest of a just enforcement of the law, serious errors in the trial of their cases, fatal to the defendant's rights, although these errors were not challenged or reserved by objections, exceptions or assignments of error" (Lamento v. United States, 4 Fed (2d), pp.901,904).

Such practice is definitely authorized and approved by a long line of decisions of which the following are noted: Wiborg v. United States, 163 U.S. 632,658, 41 L.Ed., 289,298; Clyatt V. United States, 197 U.S. 207,222, 49 L.Ed.,726,731-732; Crawford v. United States 212 U.S. 183,194, 53 L.Ed., 465,470; Gambino v. United States 275 U.S. 310,319, 72 L.Ed., 293,297, 52 A.L.R 1381; Ayres v. United States 58 Fed(2d) 607,609.

The right and duty of the Board of Review to consider the entire evidence contained in a record of trial in the determination of the question as to whether there is substantial evidence to sustain the findings of the guilt of an accused, notwithstanding the theory or hypothesis upon which the case was tried in the lower court, is in accord with Congressional policy declared in the 37th Article of War wherein it is provided that errors in the admission or rejection of evidence or in matters pertaining to pleading and practice shall not invalidate findings or sentence unless "after an examination of the entire proceedings" the error has injuriously affected the substantial rights of the accused.

While as previously stated, the defense did not assert or even suggest that five soldiers (including Olson) were killed and 14 soldiers were wounded as a result of the fire of some weapon or weapons other than the heavy machine gun, the idea deserves consideration. It was possible, of course, that all of the "concealed ranges" fired into the assembled class and that therefore some or all of them were responsible for the mass deaths and injuries. However, the evidence does not in any respect support

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such conclusion. There is absolutely no inculpatory evidence that any of the individual riflemen armed with 1903 and M-1 rifles were involved other than that they did, pursuant to orders, discharge their rifles over the heads or to the flanks of the assembled class. Such evidence not only does not affix responsibility upon them, but affirmatively denies the same. With this status of the evidence the question as to the culpability of these individual riflemen merits no further consideration.

With the elimination of the individual riflemen there remains Scurich, who discharged the Browning automatic rifle and Galpin who directed the heavy machine gun fire. Scurich fired three separate bursts of six rounds each and then fired nine rounds in the final mass firing. Scurich's testimony on this point stands undisputed and unimpeached. It must be accepted as an ultimate fact. Five men were killed and 14 were wounded at the time of the firing of the final burst. The Browning gun discharged but nine bullets during this burst. There is no testimony that tracer bullets were seen coming from the location of the Browning gun. The testimony is undisputed that the tracers came from the direction of the heavy machine gun. Galpin was issued 250 rounds of machine gun ammunition, including tracer ammunition. Tracer bullets were found at the gun and were used in the post-demonstration inspection and test of the gun. There is testimony that the dead and wounded class members were directly within the line of fire of the heavy machine gun and at least two witnesses testified that the lethal bullets came from the direction of the machine gun location.

The above evidence is substantial and supports the allegation of the Specification which relates accused's responsibility to a demonstration of overhead machine gun firing with ball ammunition. Under such circumstances the Board of Review is compelled to accept as conclusive the finding of the court as to this element of the case. It will not weigh or analyze the evidence for the purpose of determining the probability or improbability of the Browning gun inflicting the deadly fusilade (CM ETO 106, Orbon; CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer; CM ETO 422, Green; CM ETO 455, Nigg; CM ETO 804, Ogletree et al; CM ETO 895, Davis et al; CM ETO 1052, Geddes et al; CM ETO 492, Lewis).

10. Accused is charged with the crime of involuntary manslaughter. It is alleged that he was the commanding officer of a detail of troops for the purpose of giving a demonstration of overhead machine gun firing with ball ammunition, and that as a result of his failure to use due caution and circumspection for the safety of soldiers witnessing the demonstration he did "negligently, carelessly, feloniously and unlawfully kill" Olson, one of the soldier-observers.

"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 negligence in performing a lawful act, or in performing an act required by law" (MCM, 1928, par.149a, pp.165-166) (Underscoring supplied).

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"As defined at common law and under statutes substantially declaratory thereof, involuntary manslaughter consists in the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty" (29 C.J., sec.134, p.1148) (Underscoring supplied).

"As has been noted, involuntary manslaughter may consist in the doing of a lawful act in an unlawful manner, and, hence, where an unintentional homicide is occasioned by the gross or culpable negligence of defendant, although in the commission of an act lawful in itself, it is manslaughter *** (29 C.J., sec.141, p.1154) (Underscoring supplied).

"A charge of manslaughter may be predicated upon a failure to act as well as upon an act. Willful failure of a person to perform a legal duty, whereby the death of another is caused, is murder, but if the omission was not willful but was the result of gross or culpable negligence, it is involuntary manslaughter. The omission must have been due to gross or culpable negligence, and the death must have resulted from the neglect of a plain legal duty imposed by law or contract upon the defendant personally. Defendant must have had knowledge of the facts imposing the duty to act or he must have been grossly negligent in not ascertaining the facts" (29 C.J., sec.143, pp.1158-1159) (Underscoring supplied).

The evidence without contradiction or qualification establishes the fact that accused was the sole officer in charge of the "crack and thump" demonstration, that he was ordered by superior authority to stage the demonstration and that he was vested with full power and authority to secure performance of the order. No restriction was placed upon him except his company commander directed him to "fire to the flank of the class". It was his responsibility to select the firing personnel and instruct it in its duties; to arrange the terrain for the exhibition and locate the positions of fire; to secure the weapons and the ammunition; and to perfect all necessary details for the production of the demonstration. It was his further task to direct, supervise and control the actual demonstration. The record presents an abundance of evidence that within the scope of the power and authority vested in him he was free from supervision and control of higher authority.

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Weapon fire directed at or in the proximity of a body of men is dangerous under the most favorable conditions and circumstances. The value and effectiveness of this demonstration were dependent upon a fair degree of simulation of battle conditions. The students were to be placed "under fire", but the fire was to be controlled and directed in such manner as to render the same harmless. The demonstration thus involved certain serious risks which demanded the greatest of care and forethought to minimize the same. The accused acted pursuant to a lawful command of higher military authority. The duty imposed upon him included a positive mandate to exercise care and precaution to prevent accidents. Such mandate was implemented and defined by the safety precautions of FM 23-55, ^{with} knowledge of which accused was conclusively charged. The two pertinent requirements of said manual covering precautions for overhead fire of machine guns were:

- "(3) The tripod must be firmly mounted with jamming handles and cradle-clamping handle tight and wherever practicable on a sand bag base;"
- "(5) Depression stops should be used to prevent the muzzle of the gun from being accidentally lowered below the limit of safety; the necessities of battle, however, may prevent the use of this precaution" (FM 23-55, Chap.6, sec.IX, p.221) (Underscoring supplied).

Field Manual 23-55 was issued and promulgated by order of the Secretary of War and it and similar field manuals

"are law, and operative, as regulations only. As such they are law to the army and those whom they may concern, and so far are binding and conclusive." (Winthrop's Military Law & Precedents - Reprint - p.32).

(See also: AR 1-15, 12 Dec 1927, par.1; RS 161, 5 USC 22; Caha v. United States 152 U.S. 212, 38 L.Ed., 415; United States v. Smull, 236 U.S. 405, 59 L.Ed., 641; United States v. Foster, 233 U.S. 515, 58 L.Ed., 1074; Petersen v. United States, 287 Fed. 17)..

Accused therefore as the officer directing the demonstration, was specifically charged with the duty of providing the safety precautions directed by the manual.

"when a lawful duty is imposed upon a party, then an omission on his part in the discharge of such duty, which affects injuriously the party to whom the duty is owed is an indictable offense" (1 Wharton's Criminal Law - 12th Ed, sec.455, pp.690-691, sec.463, p.696).

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Neither sand bags nor a depression stop were used in mounting the machine gun. Accused excused the failure to use sand bags on the ground that they could not be procured and because he did not think it was necessary to use them on account of the nature of the ground on which the machine gun stood. His reasons for failure to use a depression stop were (1) the mechanical function of the gun was in good order and the elevating mechanism was locked very tight and (2) the gun was set into one position and the aiming point was not changed during the demonstration. In view of the direction of the field manual with respect to the use of sand bags and depression stops the reasons offered by accused for his failure to use them are not impressive. At most they constitute an explanation rather than a defense. It was not for accused to set his own judgment over the considered directions of the manual. He acted at his peril when he chose such course of action. His omission to discharge the specific duty to use sand bags and a depression stop in mounting the machine gun constituted such non-feasance as to make him amenable to the charge of involuntary manslaughter.

Notwithstanding accused's default in the performance of the specific duty to use sand bags and a depression stop in the mounting of the machine gun, it was necessary for the prosecution to establish the fact that such default was the proximate cause of Olson's death (1 Wharton's Criminal Law - 12th Ed - sec.466, p.698). Proximate cause means the cause proximate in efficiency to an injury. It does not mean the nearest in time to the injury, but the cause which is preserved until it culminates in the result, notwithstanding the fact that other causes may have arisen. If the intervening causes do not destroy or truly impair the first operative cause, it still remains the real efficient cause to which the result can be ascribed (Lanasa Fruit S.S. and I, Company v. Universal Ins. Co, 302 U.S. 556, 82 L.Ed., 422).

"a careless person is liable for all of the natural and probable consequences of his misconduct. If the misconduct is of a character, which according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man." (Atchison, Topeka and Santa Fe Railway Co. v. Calhoun, 213 U.S. 1,7, 53 L.Ed., pp.671,674).

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circum-

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stances of fact attending it.. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, * * *. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * *. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. * * *. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time." (Milwaukee and St. Paul Ry, Co. v. Kellogg, 94 U.S., 467, 24 L.Ed., pp.256,259).

It was Galpin who installed the machine gun in firing position and who actually fired the weapon at the demonstration. The evidence beyond dispute shows that the right leg of the tripod was not properly anchored. Due to this condition the gun was subject to severe vibrations upon being fired and its line of fire would have been deflected downwards and to the right. Under such circumstances, independent of the requirements of FM 23-55, ordinary care and prudence dictated the use of sand bags and a depression stop in mounting the gun. There is therefore substantial evidence upon which the court might have found that Galpin was guilty of negligence.

The question is therefore sharply presented as to whether Galpin's negligence was an independent intervening cause which insulated the effect of the accused's negligent non-feasance in failing to provide sand bags and

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a depression stop. Stated otherwise the question is: were accused's acts of negligence the proximate cause of Olson's death?

It has been demonstrated herein that the court was justified in finding that accused's failure to use sand bags and a depression stop in mounting the gun was negligence. Such negligence continued to the exact moment the shot was fired that killed Olson. Likewise Galpin's negligence was continuous in its operation. The consequence of his misplacement of the right leg of the gun tripod coupled with his failure to mount the gun with sand bags and a depression stop were in full operation at the moment the fatal bullet was discharged. An attempt to separate Galpin's negligence from accused's negligence produces the exact situation which arose in Washington & G.R.Co. v. Hickey 166 U.S. 521,525; 41 L.Ed., 1101,1102 whereof the Supreme Court said:

" The vice in all this argument, as we think, consists in the attempted separation into two distinct causes (remote and proximate) of what in reality was one continuous cause. * * *. This is an attempt to separate that which upon the facts in this case ought not to be separated. The so-called two negligent acts were, in fact, united in producing the result, and they made one cause of concurring negligence on the part of both companies. They were in point of time substantially simultaneous acts and parts of one whole transaction, and it would be improper to attempt a separation in the manner asked for by the counsel for the horse-car company." (41 L.Ed., p.1102).

The rule thus announced was confirmed and elaborated by the Supreme Court in Miller v. Union Pacific Railroad Company 290 U.S. 227,235-236; 78 L.Ed., 285-290-291 in the following language:

" The negligence sought to be established against the railroad company was not only failure to sound the whistle, but operation of the train at a rate of speed dangerous and unusual, and which necessarily would bring the train into the city at a speed far beyond the limit prescribed by the city ordinance. Assuming, upon these facts, that a finding by the jury that the train was negligently operated would be justified, such negligence continued without interruption down to the moment of the accident. The same is equally true in respect of the contributory negligence of the driver of the automobile. The result, therefore, is that the contributory negligence of the driver did not interrupt the sequence of events set in motion by

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the negligence of the railroad company or insulate them from the accident, but concurred therewith so as to constitute in point of time and in effect what was essentially one transaction. The rule is settled by innumerable authorities that if injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone. 'It is no defense for a wrong-doer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury.'"
 (78 L.Ed., pp.290-291).

Under the doctrine of the Hickey and Miller cases accused's responsibility for the defective and faulty placement of the machine gun is established beyond peradventure.

The defense contended that the demonstration was based upon a British Army Manual - "Battle Drill and Field Craft Manual" - which Captain Sadilek, accused's commander, delivered to him when he ordered him to produce the demonstration and that he complied with all of the safety regulations therein prescribed none of which required the use of sand bags or depression stops in exercises involving overhead machine gun fire with live ammunition. The contention requires but brief consideration. Captain Sadilek possessed no authority to displace the requirements of FM 23-55 - a regulation promulgated by orders of the Secretary of War - and to substitute, therefor, the British manual. A fortiori, accused was endowed with no such authority. The defense based on such grounds was without merit.

The remaining question pertains to the quality of accused's negligence in his failure to provide sand bags and a depression stop in mounting the machine gun.

"In order to sustain a conviction of involuntary manslaughter at common law the homicide must be occasioned by 'criminal', or 'gross', or 'culpable' negligence. These descriptive words are sometimes used singly. At other times all three are used conjunctively. The terminology indicates, and the courts are practically unanimous in holding, that this type of negligence is of a degree higher than that required to sustain civil liability for negligence. They have declared that criminal, gross or culpable negligence must be of such a character as to show an utter disregard for life or

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limb, or a total disregard for the consequences, or conduct indicating such willful disregard for the rights of others as to show a wanton recklessness as to the life and limb of other persons (State v. Murphy, 324 Mo. 183, 23 S.W.(2d) 136 (1929); Dunville v. State, 188 Ind. 373, 123 N.E. 689 (1919)).

* * * * *

The test is * * *: Was the accused so negligent as to show an utter indifference to the consequences and did his criminally negligent act proximately result in the death of the person alleged? The test is not what a reasonably prudent man would or would not do but whether his negligence is sufficiently gross to come within the descriptive phrases set out above. 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).

The demonstration required the firing of death dealing projectiles over the heads and in the near vicinity of the student observers. Its value was largely dependent upon the flight of the bullets in close proximity to the students. It was therefore an exceedingly dangerous operation involving obvious perils to life and limb. Accused had not only witnessed but had also staged prior demonstrations of like nature. He therefore must have known that slight deviations in the line of fire had the probability of producing disastrous and tragic results. He was under the specific duty to use the safe-guards presented in the field manual - safe-guards which experience had taught were not only desirable, but also necessary. Notwithstanding the knowledge he possessed with respect to the actual firing of the problem and the mandates of the Secretary of War with respect to safety precautions, he elected to proceed in either defiance or reckless disregard of the same. Under such circumstances the conclusion is irrefragable that his negligence was of the quality designated as "criminal", "gross" or "culpable". Beyond peradventure it was of a higher degree than that required to affix civil liability upon him for Olson's death.

The question of accused's negligence was, of course, one of fact for the ultimate determination by the court. Inasmuch as its finding is supported by competent substantial evidence it is binding on the Board of Review (see authorities cited par.9 herein at p.22).

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11. The charge sheet shows that accused is 27 years one month of age; that he was commissioned 9 October 1937 and entered Federal service on extended active duty on 14 June 1941.

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

13. An officer may be dismissed the service upon conviction of an offense under the 93rd Article of War.

B. Franklin Ritter Judge Advocate
Franklin Ritter Judge Advocate
Ellwood W. Bergend Judge Advocate

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(55)

1st Ind.

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

1. In the case of First Lieutenant RALPH G. PRITCHARD (O-359868), 156th 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 of dismissal which holding is hereby approved.
2. Copies of the published order No. 15, Headquarters, European Theater of Operations, 12 March 1944 were received at this office on 16 March 1944. The record of trial was received in this office 1 March 1944.
3. Copy of original holding and this indorsement should be returned to this office.



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

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

BOARD OF REVIEW

- 5 APR 1944

ETO 1567

U N I T E D S T A T E S)	5TH INFANTRY DIVISION.
)	
v.)	Trial by G.C.M., convened at
)	Newcastle, County Down, Northern
Private SAM (NMI) SPICOCCHI)	Ireland, 23 February 1944.
(20501225), Headquarters)	Sentence: Dishonorable discharge
Company, 1st Battalion, 11th)	(suspended), total forfeitures and
Infantry.)	confinement at hard labor for ten
)	years. The 2912th Disciplinary
)	Training Center, Shepton Mallet,
)	Somerset, England.

OPINION of the BOARD OF REVIEW
RITTER, VAN BENSHOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Sam Spicocchi,
Headquarters Company, 1st Battalion, 11th
Infantry did, at London, England on or
about 23 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 14 January 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions, one by summary court for nine days absence without leave in violation of Article of War 61, the other by special court-martial for absence without leave for nine and two days respectively and fraudulently altering a pass in violation of

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Articles of War 61 and 96.- He was sentenced to be dishonorably discharged from 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 twenty years. The reviewing authority approved the sentence but reduced the period of confinement to ten years, suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Orders No. 22, Headquarters 5th Infantry Division, APO 5, c/o Postmaster, New York, New York, dated 28 February 1944.

3. The evidence for the prosecution shows that the accused, who was stationed in Northern Ireland, failed to report to his organization on 23 December 1943 the expiration date of a nine-day furlough which authorized him to visit "some point in England, Scotland, or Wales" (R4). He remained absent without leave until 14 January 1944 when he was apprehended by a sergeant of the Criminal Investigation Division, in a room with a woman in London. The accused was then wearing his uniform and, in response to the sergeant's inquiry, correctly identified himself. When asked for his pass, he admitted that he was absent without leave, whereupon he was arrested and taken into custody. He had, at that time, both his identification card and his identification tags and showed them both to the sergeant (R6-7). The court took judicial notice of the fact that there "were numerous military camps and establishments throughout the United Kingdom" (R7).

4. The defense offered no evidence. The accused was duly advised of his rights as a witness and elected to remain silent.

5. The offense of desertion requires proof of absence without leave plus an intent to remain away permanently, or to avoid hazardous duty, or to shirk important service as alleged (MCM, 1928, par.130a, p.143). The record shows that the accused was absent without leave for a period of 22 days, terminated by apprehension at London, a place several hundred miles distant from his organization in Northern Ireland; also that his initial departure was authorized and by logical inference - that he was lawfully in London before his furlough expired and merely remained there without authority afterward. When found in London by military authorities he readily admitted and established his identity by producing his identification card and tags. He had no other clothes than his uniform.

6. While it is true, as the court judicially noticed, that there are numerous military camps and stations where accused could have returned to military control, a period of unauthorized absence as short as the one in this case, together with the circumstances of his apprehension, are insufficient to justify the inference of an intention to desert the service in the absence of some other significant factor (CM 124248 (1919); CM 213817 (1940); Dig.Op.JAG, 1912-1940, par.416(9), pp.269-270). The terms of his furlough eliminate such significance as the factor of distance might otherwise have possessed (CM 196867 (1931); Dig.Op.JAG, 1912-1940, par.416(9), p.269).

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"There must be, in addition to the fact of absence without leave for a short period, some evidence tending to show a motive for desertion or tending to show that prior to going absent without leave accused stated that he was going to desert, or some other evidence from which a court might reasonably infer that the accused intended not to return to the military service. The facts in this case are entirely consistent with innocence of desertion and there is no material evidence to sustain a finding of guilty of desertion, but only sufficient to support a finding of absence without leave. C.M.198750 (1932)".
(Dig.Op.JAG, 1912-1940, par.416(9), pp.269-270).

Although the language quoted refers to an absence of 20 days terminated by surrender at a place 40 miles from the accused's post, it is equally applicable to the offense shown by the evidence in the instant case. In the opinion of the Board of Review, the record is legally sufficient to support only so much of the findings of guilty as involve conviction of the accused of absence without leave in violation of Article of War 61.

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

8. The charge sheet shows that the accused is 29 years of age; that he was inducted 15 October 1940, to serve for the duration of the war plus six months; and that he had no prior service.

9. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of

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the findings of guilty of the Charge and Specification as involves findings that the accused did, at the place and time alleged, absent himself without leave from his organization and did remain absent without leave until he was apprehended at the time and place alleged, in violation of Article of War 61; and legally sufficient to support the sentence.

B. F. M. Kett

Judge Advocate

Richardson

Judge Advocate

Ellwood W. Ferguson

Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA.
General, ETOUSA, APO 887, U.S. Army.

- 5 APR 1944

TO: Commanding

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$ as amended by Act 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522) and as further amended by Act 1 August 1942 (56 Stat. 732; 10 U.S.C. 1522), is the record of trial in the case of Private SAM (NMI) SPICOCCHI (20501225), Headquarters Company, 1st Battalion, 11th Infantry.

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

3. The War Department removed the limit of punishment for absence without leave and thereby authorized sentences commensurate with the enhanced seriousness of the offense in war time and in overseas theaters, so that doubtful cases would not be charged as desertion. Pursuant to this policy, many cases involving much longer absences and far more aggravated than this, have been so tried in this theater. While circumstances attending unauthorized absences here, under present conditions, of necessity weigh more heavily than in normal times, the intent which converts absence without leave into desertion must still be established. This is usually done by proving conduct or statements in connection with the unauthorized absence, inconsistent with an intent to return, or to participate in hazardous duty or important service, as the case may be, such as that a soldier used a false name or false identification papers, hid out, attempted to stowaway on a ship, committed serious crimes, declared or admitted an intention to quit the service, or that his unauthorized absence was prolonged and unexplained.

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


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

(Findings vacated in part in accordance with recommendation of
The Assistant Judge Advocate General. GCMO 23, ETO, 12 Apr 1944)

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

BOARD OF REVIEW

14 MAR 1944

ETO 1577

U N I T E D S T A T E S)	CENTRAL BASE SECTION, SERVICES OF
)	SUPPLY, EUROPEAN THEATER OF OPERA-
v.)	TIONS.
Private RAY A. Le VAN JR.,)	Trial by G.C.M., convened at London,
(20341824), Company L, 2nd)	England 11 February 1944. Sentence:
Infantry Regiment.)	Dishonorable discharge, total for-
)	feitures and confinement at hard labor
)	for 20 years. The United States
)	Penitentiary, Lewisburg, Pennsylvania.

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

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 Ray A. Le Van Jr.,
Company L, 2nd Infantry Regiment, ETOUSA,
did, at Tidworth, England, on or about 10
October 1943, desert the service of the United
States and did remain absent in desertion
until he was apprehended at London, England,
on or about 18 January 1944.

CHARGE II: Violation of the 94th Article of War.
Specification: In that, * * *, did, at London,
England, on or about 20 December 1943, feloniously take, steal, and carry away one
Olive Drab Blouse of the value of about nine
dollars and seventy-five cents (\$9.75), one
pair of Olive Drab Trousers of the value of
about four dollars and fifty cents (\$4.50),
property of the United States furnished and
intended for the military service thereof.

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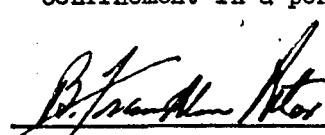
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He pleaded to the Specification, Charge I, guilty, except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave"; of the excepted words, not guilty; of the substituted words, guilty; to Charge I, not guilty, but guilty of a violation of the 61st Article of War; and guilty to Charge II and its Specification. He was found guilty of both charges and their specifications. Evidence was introduced of two previous convictions by Special Courts-Martial for violations of the 61st Article of War; one for an absence of 19 days, and one for a period not stated. He was sentenced to be dishonorable discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of twenty years at such place as the reviewing authority may direct. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. By his plea of guilty to absence without leave between the dates alleged, accused admitted an absence of 99 days from Tidworth, where he was stationed, terminated by apprehension (R22) in London, some 80 miles distant. The only question requiring consideration is whether at any time during his absence he entertained the intent to remain away permanently. It was proper for the court to infer such intent from the length of accused's absence from duty, his activities during his absence, his continued proximity to military establishments and his final apprehension. The court's findings should not be disturbed (CM ETO 1259, Rusniaczyk; CM ETO 1412, Medeiros; CM ETO 1515, Smith; CM ETO 1543, Woody).

4. The charge sheet shows accused was aged 21 years 4 months. He was inducted 1 February 1941 at Elkton, Maryland, for the duration plus six months. Prior service, if any, not shown.

5. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The penalty for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized (AW 42).


 _____ Judge Advocate


 _____ Judge Advocate

(SICK IN HOSPITAL)

_____ Judge Advocate

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1st Ind.

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WD, Branch Office TJAG., with ETOUSA. 14 MAR 1944 To: Commanding General, Central Base Section, SOS, ETOUSA, APO 887, U.S.Army.

1. In the case of Private RAY A. LE VAN JR., (20341824) Company L, 2nd Infantry Regiment, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1577. For convenience of reference please place that number in brackets at the end of the order: (ETO 1577).



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
AEO 871

BOARD OF REVIEW

ETO 1585

22 MAR 1944

U N I T E D S T A T E S)	9TH INFANTRY DIVISION.
)	
v.)	Trial by G.C.M., convened at Cefalu,
)	Sicily, 7 September 1943. Sentence:
Private JOHN R. HOUSEWORTH)	Dishonorable discharge, total for-
(34267684), 709th Ordnance)	feitures and confinement at hard
L.M. Company.)	labor for six years. United States
)	Disciplinary Barracks, Fort Leaven-
)	worth, Kansas.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification 1. In that Private John R. Houseworth,
709th Ordnance L.M. Co., did, at the 709th
Ordnance L.M. Co. bivouac area, located 8 miles
East of Cesaro, Sicily, on or about 1815 hours,
24 August 1943, with intent to do him bodily
harm, commit an assault upon T/5 Donald L.
Linabery, 709th Ordnance L.M. Co., by pressing
the barrel of a dangerous weapon into his side,
to wit, a pistol, and pulling the trigger.

Specification 2. In that * * *, did, at the 709th
Ordnance L.M. Co. bivouac area, located 8 miles
East of Cesaro, Sicily, on or about 1815 hours,
24 August 1943, with intent to do him bodily
harm, commit an assault upon T/5 Donald L.
Linabery, 709th Ordnance L.M. Co. by willfully
and feloniously biting a piece of his ear off
with his teeth.

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He pleaded not guilty to and was found guilty of both specifications and the Charge. Evidence of one previous conviction by Special Court-Martial for "drunk while on duty as driver" in violation of Article of War 85, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for six years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement, ordered the prisoner to be held at Oran, Algeria, pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

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

Technician Fifth Grade Donald L. Linabery, 709th Ordnance L.M. Company, at about 6:15 on the evening of 24 August 1943 (R11) started toward the bivouac area and saw accused and Technician Fourth Grade Deal "rassling". He walked up and asked Deal what was the matter when accused without cause, seized him by the leg and tripped him, then grabbed him by the throat and tried to choke him. Linabery was wearing a pistol in a holster (R8) under his left arm and beneath his field jacket. As he struggled to get loose, accused punched and scratched him, reached inside of his (Linabery's) field jacket and seized the pistol which was pointed at Linabery's ribs. He pulled the trigger three times. Linabery, who was lying on his right side on the ground, could hear the hammer fall. Linabery had a clip of 8 rounds in the gun but did not know if there was a bullet in the chamber. Believing accused intended to shoot him, he was "scared" and shouted for accused to "let go of that gun". Accused did not get the gun out of its holster and Private Myers and Deal ran over, grabbed accused and secured the gun. Accused and Linabery got to their feet and again started to fight (R10). Linabery tripped over a camouflage net and fell to the ground. Accused jumped on top of him, grabbed his head with both hands and bit Linabery's left ear. Myers and Deal put Linabery in a jeep and took him to Captain Waikart, Company Commander. He then went to the "aid man" and thence to the hospital. He and accused had been good friends over a period of about two years (R11). He could smell no odor of liquor on accused (R12).

Captain Anson B. Johnson, 9th Medical Battalion, treated Linabery for severe lacerations of the left ear which injury will result in permanent disfigurement. He testified that because the rim of the ear is rather tough, it would take considerable force to bite it off (R14).

Private First Class Raymond C. Myers, 709th Ordnance Company, was walking with Linabery and saw the "rassling". Linabery walked over to the fight while Myers went after a drink of water and returned. His story is similar to Linabery's except that he did not hear the snapping of the trigger of the pistol. He took the gun away from accused while Linabery was lying on the ground (R15). Linabery appeared frightened (R16). He saw Linabery fall over the net and accused lean down towards his head. When accused got up, he "spit out the blood". He did not see him bite off Linabery's ear

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"but the ear wasn't off when it first started". He got a jeep and took Linabery to the Company Commander and to a first-aid man (R17).

Technician Fifth Grade Metro J. Misko, 709th Ordnance L.M. Company, was sitting at his tent when he heard a commotion, saw accused and Linabery wrestling and went over. He saw accused bite off a part of Linabery's ear and spit it out. He assisted in taking Linabery, who was "quite frightened" to the first-aid tent (R18).

Private First Class Carl Kerecz, 709th Ordnance L.M. Company, was also sitting beside his tent in the bivouac area when he was attracted to the fight by the commotion. His statement of what occurred is similar to that of the others. He saw accused spit out the ear and assisted in taking Linabery to the "aid man" and to the "medics" (R19).

4. The only defense testimony was the following unsworn statement of accused:

"On the night the fight occurred I was drinking and I don't remember scuffling with Sgt. Diehl. I do remember scuffling with Linabery but don't remember the facts. We had always been good friends and never had any trouble before. If I had known what I was doing I would not have done what I did. I don't remember anything about the wound of his ear. I was loaded heavy." (R20).

5. Accused is charged with committing two different assaults upon Linabery, each with intent to do bodily harm; one by use of a dangerous weapon, a pistol, (Specification 1) and one by biting off a piece of the ear of the assaulted person (Specification 2).

As to Specification 1, the uncontradicted evidence shows that accused, while struggling with Linabery, seized a pistol carried by Linabery under his left arm in a holster. The pistol was pointed against Linabery's ribs. Accused pressed the trigger three times. As a soldier serving in a war combat zone, the trial court had a right to assume that he knew what would be the usual and ordinary results of such action and that he intended such results to occur.

"Weapons, etc., are dangerous when they are used in such a manner that they are likely to produce death or great bodily harm. * * * Proof.- (a) That the accused assaulted a certain person with a certain weapon, instrument, or thing; and (b) the facts and circumstances of the case indicating that such weapon * * * was used in a manner likely to produce death or great bodily harm." (MCM, 1928, par.149m, p.180).

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It is the opinion of the Board of Review that the record is legally sufficient to sustain the findings of guilty of Specification 1 of the Charge (CM ETO 422, Green).

6. Uncontradicted evidence shows that after accused and Linabery were separated following accused's first attack upon Linabery, the encounter was renewed. Linabery tripped and fell over a net. Accused thereupon "jumped on top of him, grabbed his head with both hands and bit Linabery's left ear" spitting out the blood and part of the ear. There was therefore not only an assault but a completed battery.

Accused's only defense was:

"if I had known what I was doing I would not have done what I did. I don't remember anything about the wound of his ear. I was loaded heavy".

"Assault with intent to do bodily harm. This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. * * *. Proof. - (a) That the accused assaulted a certain person, as alleged; and (b) the facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person." (MCM, 1928, par. 149m, p. 180).

There is no other testimony that accused had been drinking. Whether he was drunk enough to negative the required intent to commit the offense charged was a question of fact for the sole determination of trial court and in the opinion of the Board of Review its findings of guilty of Specification 2 of the Charge are fully supported by the evidence (CM ETO 531, McLurkin; CM ETO 804, Ogletree et al).

7. The charge sheet shows that accused is 22 years of age and was inducted 10 April 1942 at Fort McPherson, Georgia. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors 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 which is the maximum prescribed (MCM, 1928, par. 104c, p. 93). Confinement in a United States Disciplinary Barracks is

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authorized (AW 42). The place of confinement should be changed, however, to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

B.F. Cook Jr.

Judge Advocate

Rufus Brewster

Judge Advocate

Ellwood K. Langford

Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. **22 MAR 1944** TO: Commanding
General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private JOHN R. HOUSEWORTH (34267684), 709th Ordnance L.M. 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. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.
2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).
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 1585. For convenience of reference please place that number in brackets at the end of the order: (ETO 1585).


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

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

BOARD OF REVIEW

ETO 1588

31 MAR 1944

U N I T E D

S T A T E S }

9TH INFANTRY DIVISION.

v.

Private MORRIS (NMI) MOSEFF
 (31243396), Company "B",
 15th Engineer Battalion.

Trial by G.C.M., convened at
 Cefalu, Sicily 9 September
 1943. Sentence: Dishonorable
 discharge, total forfeitures
 and confinement at hard labor
 for five years. United States
 Disciplinary Barracks, Fort
 Leavenworth, Kansas.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
 Specification: 1. In that Pvt. Morris Moseff,
 Company "B" 15th Engineer Bn., did at,
 bivouac area 3 miles west of Bizerte,
 Tunisia, on or about 17 May 1943, feloniously embezzle by fraudulently converting to his own use 12,500 Francs, of the value of \$250.00, in U.S. money the property of Pvt. James E. Hinson, Company "B" 15th Engineer Bn., entrusted to him by the said Pvt. Hinson, for the purpose of purchasing money orders for said Pvt. Hinson.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from 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

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reviewing authority may direct, for five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement, directed that the prisoner be held at Oran, Algeria, pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The undisputed evidence shows that accused was intrusted on 17 May 1943 with the sum 12,500 francs of a value of \$250.00 in United States currency by Private James Hinson, Company B, 15th Engineer Battalion, for the specific purpose of purchasing a postal money order for Hinson. Accused failed to use it for such purpose and lost it through gambling. He admitted his wrongdoing and expressed the desire and intention to make restitution after the defalcation was brought to the notice of the military authorities approximately two months later (R7-12;14).

4. The effect in law of the plea of guilty is that of a confession of the offense charged (CM ETO 1266, Shipman). The trial record fails to show affirmatively that the consequences of accused's plea of guilty were fully explained to him. However, his election to appear as witness in his own behalf for the purpose of offering evidence in mitigation which was in truth a further admission of guilt shows that the plea was advisedly made. Failure to explain the plea of guilty was not fatal as it may be rightfully assumed that defense counsel performed his duty (CM ETO 394, Howe).

5. Hinson placed his property in the "care and control" of accused for a specific purpose. The latter converted the property to his own use and benefit. Intention to make restitution is no defense. The offense of embezzlement was fully proved (CM ETO 1302, Splain).

6. The charge sheet shows that accused is 21 7/12 years of age. He was inducted 3 November 1942 for the duration of the war and six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a United States disciplinary barracks is authorized (AW 42). The place of confinement should be changed, however, to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. 210, WD, 14 Sep. 1943, sec. VI, par. 2a, as amended by Cir. 331, WD, 21 Dec. 1943, sec. II, par. 2).

Frank A. Atter Judge Advocate
Richard W. Madister Judge Advocate
Elwood M. Long Judge Advocate

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1st Ind.

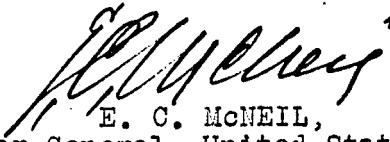
WD, Branch Office TJAG., with ETOUSA. 31 MAR 1944 To: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private MORRIS (NMI) MOSEFF (31243396), Company "B", 15th 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 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

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

In accord with present policies for conserving man power, it is recommended that you consider suspending the execution of the dishonorable discharge and designate NATOUS Disciplinary Training Center at Casablanca, French Morocco, as the place of confinement.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1588. For convenience of reference please place that number in brackets at the end of the order: (ETO 1588).



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

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

BOARD OF REVIEW

ETO 1589

22 MAR 1944

U N I T E D S T A T E S)	9TH INFANTRY DIVISION.
v.)	Trial by G.C.M., convened at Cefalu,
Private JOHN G. HEPPDING)	Sicily 4 September 1943. Sentence:
(33064729), Company "A",)	Dishonorable discharge, total for-
39th Infantry.)	feitures and confinement at hard labor
	for 20 years. United States Discipli-
	nary Barracks, Fort Leavenworth, Kansas.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.
Specification: In that Private John G. Heppding,
Company "A", 39th Infantry, did, at French
North Africa, on or about July 8, 1943, de-
sert the service of the United States by
absenting himself without proper leave from
his organization located 5 miles west of
Bizerte, French North Africa; with intent to
avoid hazardous duty, to wit: "Action against
the enemy", and did remain absent in desertion
until he surrendered himself at the bivouac
area, 39th Infantry, near Randazzo, Sicily; on
or about August 17, 1943.

He pleaded not guilty, and was found guilty of the Charge, and of the Specification guilty, except the words "bivouac area, 39th Infantry, near Randazzo, Sicily, on or about August 17, 1943", and substituting therefor the words "Setif, North Africa, on or about 16 July 1943," of the excepted words not guilty, of the substituted words guilty. Evidence of one previous conviction by summary court for

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failure to obey the lawful order of a noncommissioned officer not to buy or to bring wine aboard a train in violation of the 65th Article of War, 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 25 years. The reviewing authority approved only so much of the findings of guilty of the Specification of the Charge and the Charge as involved a finding of guilty of desertion at the time and place and under the circumstances as alleged and terminated in a manner not proven; at the time and place as alleged, approved the sentence but remitted so much thereof as involved confinement in excess of 20 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, directed that the prisoner be held at Oran, Algeria, pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. On 8 July 1943, accused was an ammunition carrier of the second machine gun squad (R11,13), 4th platoon of Company A, 39th Infantry (R9). On and for a few days prior to that date the platoon was stationed near Bizerte, Tunis (R9). Ammunition had been issued to it (R10). It had engaged in battle training, and had moved from Magenta to Bizerte (R12). At this time accused was informed on several occasions that his organization would soon engage in combat. He left his unit on 8 July 1943 taking with him his personal belongings (Pros.Ex.1; R9-11,13). His unit embarked at Bizerte 13 July (R10) but his name did not appear on the shipping roster (R6). The regiment landed at LaCarta, Sicily and thereafter engaged in the Sicilian campaign (R7,10). Accused rejoined his unit on 17 August 1943 about four miles west of Randazzo after the conclusion of the fighting (R7, 10,13).

4. Absence without leave having been established by the introduction of an extract copy of the morning report of the accused's organization for the period in question and by satisfactory testimony of those having personnel knowledge of his absence and conduct, the only question presented for determination is whether there is competent substantial evidence of his specific intent to avoid hazardous duty, to wit, action against the enemy within the meaning of the 28th Article of War. Evidence of a substantial character establishes the fact that accused on and immediately prior to 8 July 1943 was informed and knew that his platoon was about to engage in hazardous duty against the enemy and that on said date he deliberately left his command without proper authorization. The first element of prosecution's case was therefore proved (CM ETO 564, Neville). The company had engaged in battle training, had moved from Magenta to Bizerte - a forward movement towards the enemy, and had been issued ammunition. This is definite evidence which justified the court in inferring that on 8 July 1943 accused's company "was under orders or anticipated orders involving * * * hazardous duty" (MCM, 1921, par. 409, p.344). Therefore this necessary element of the offense was proved (CM ETO 455, Nigg). In the opinion of the Board of Review, such specific intent is amply established by the evidence (CM ETO 1406, Pettapiece; CM ETO 1432, Good).

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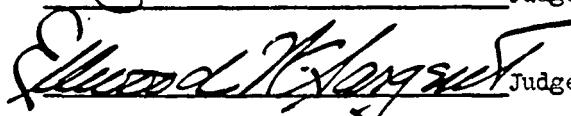
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5. The charge sheet shows that accused is 28 years and seven months of age. He was inducted at Baltimore, Maryland 18 July 1941. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of 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 desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a United States Disciplinary Barracks is authorized (AW 42). However, the place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).


John R. Kite Judge Advocate


Edward D. Scholten Judge Advocate


Ellwood W. Langseth Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 22 MAR 1944 To: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private JOHN G. HEPPDING (33064729), Company "A", 39th 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 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II,par.2). 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 1589. For convenience of reference please place that number in brackets at the end of the order: (ETO 1589).



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

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

BOARD OF REVIEW

ETO 1600

25 MAR 1944

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

v.)
Corporal JOSEPH H. ASHER)
(15089925), 357th Service)
Squadron, 317th Service)
Group.)

VIII BOMBER COMMAND.

Trial by G.C.M., convened at AAF
Station 104, APO 634, 5-6 January
1944. Sentence: Dishonorable
discharge, total forfeitures and
confinement at hard labor for seven
years. United States Disciplinary
Barracks, Greenhaven, New York.

HOLDING by the BOARD OF REVIEW
RITTER, VAN BEN SCHOTEN and SARGENT, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.
Specification: In that Corporal Joseph H. Asher,
357th Service Squadron, 317th Service Group,
did, at or near Saxlingham, Norfolk County,
England, on or about 20 November 1943,
forcibly and feloniously, against her will,
have carnal knowledge of Mary Girling Bell.

He pleaded not guilty, and was found guilty of the Specification except the words, "forcibly and feloniously, against her will, have carnal knowledge of Mary Girling Bell", substituting therefor the words, "attempt forcibly and feloniously, against her will, to have carnal knowledge of Mary Girling Bell", of the excepted words, not guilty and of the substituted words, guilty; and not guilty of the Charge but guilty of violation of the 96th 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 seven years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Greenhaven, New York as the place of

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confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. Accused in company with Corporal Howard E. Brock, 328th Bombardment Squadron, 93rd Bombardment Group, attended a public dance on the evening of 20 November 1943 at Hempnall, Norfolk, England, and there met Mary Girling Bell, Norwich Road, Saxlingham, age 17 years, the alleged victim. He was introduced to Miss Bell as "Johnny" and was thus known by her. The two soldiers left the dance hall with Miss Bell and Minnie Bates who lived with and had gone to the dance with her, for the purpose of escorting them home. Each soldier had a bicycle which he pushed as the couples walked along the road in the direction of Saxlingham (R9-12, 20-21, 32, 64, 68). Brock and Miss Bates proceeded ahead and accused and Miss Bell walked a considerable distance in their rear. At a point on the left-hand side of the road approximately mid-way between Hempnall and Saxlingham accused left the road and placed his bicycle behind a hedge. Miss Bell awaited him. On his return to her he asked he if she "were going to lay down". Receiving a negative answer, he pushed her to the ground and forced her to lie flat on her back. He knelt on the ground between her legs and pulled the girl's clothing above her waist. She endeavored to scream but he placed a hand over her mouth. She struggled and made an effort to push her assailant away from her. She also tried to kick him. He threatened to kill her if she did not keep quiet. He held the girl to the ground and she could not free herself. She could breath but could not shout. Accused pulled her knickers open. He then exposed his private parts (R22-24, 34).

The victim on direct examination testified positively as to the act of penetration (R24). On cross-examination however, she qualified her positive statement in the following colloquy:

"Q - Didn't you make a statement to one of the police officers? To the effect that he put it in a little ways, not very far?

A - Yes.

Q - You made that statement?

A - Yes.

Q - Is that your idea now or are you uncertain about it?

A - No, that is more or less my idea.

Q - You are not certain about it?

A - No, I am not certain about it.

Q - Was this your first experience with this sort of thing?

A - Yes, definitely.

Q - And you were frightened?

A - Of course I was." (R46).

The approach of a truck caused accused to desist from the attack (R37-38). He ran down the road, but a few minutes later a soldier friend, engaged in driving a truck towards Hempnall observed him searching the roadside (R24, 25, 37). He claimed to have lost his billfold and his flashlight (R78-80).

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and that he had been in a fight with a British soldier - the latter statement was subsequently admitted by him to be untrue (R81,122). His justification was that he desired to keep information of his escapade from another girl (R122).

Miss Bell when freed, hastened along the road and rejoined Brock and Miss Bates who had stopped to wait for her and the accused at a cross-road some distance beyond towards Saxlingham (R11,12,68). A cursory examination by flashlight at that time revealed scratches on Miss Bell's left leg. She complained that she had been misused and insulted by accused but did not detail her experience until later that evening when she and Minnie Bates were alone in her home (R12,25-27,41,42,68). Prosecution Exhibits 2 and 3 constitute photographic confirmation of the abrasions on her legs. Two white underwear buttons and a colored button were found at the scene of the attack as well as the accused's flashlight (R57-59,92). The knickers worn by Miss Bell that night showed two buttons missing. The top button on the back of her dress was also missing. Both knickers and dress were introduced in evidence (Pros.Exs.4, 5 and 14; R28,30,44-48,67). The colored button (being lost) was described as identical with those on the dress (Pros.Ex.5; R93).

Accused's trousers, underwear, shirt and blouse worn by him on 20 November 1943, were placed in evidence and stains which appeared to be blood were observed on the trousers, underwear and shirt. The stains on his blouse were not identified as blood (Pros.Exs. 15,17,18,19; R99-102).

The medical examination of Miss Bell conducted the following afternoon disclosed scratches or abrasions on her face, forehead, left arm, across her back and on both legs particularly on the left thigh. Although the lips of her labia were not bruised, the hymen was swollen and inflamed and there was a tear in the vicinity thereof indicating recent violent penetration. Further, she was still bleeding at the time of the examination although she was not in a menstrual period (R53-55,30,48,52).

4. Accused admitted forcing his attentions upon the girl to a certain extent at the time and place proved by the prosecution but by his sworn testimony implied that she in fact consented. He testified that before penetration could be effected he was interrupted by the approach of the truck. He asserted that prior to the intended act of intercourse he inserted his fingers in her vagina (R112-119).

5. Although charged with rape accused was convicted of the lesser included offense of attempt to commit rape under the 96th Article of War. Attempt to commit rape is a lesser included offense of the crime of rape in violation of the 92nd Article of War (MCM, 1928, par.148b, p.165).

"An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission. (Clark.)"

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An intent to commit a crime not accompanied by an overt act to carry out the intent does not constitute an attempt. For example, a purchase of matches with intent to burn a haystack is not an attempt. But it is an attempt where the haystack is actually set on fire, even though it may be immediately put out by rain, blown out by the wind, or otherwise extinguished, with only immaterial damage to the hay.

* * * * *

If an attempt is included in the offense charged it may be found as a lesser included offense in violation of A.W. 96. However, if such attempt is denounced by some specific article it should be found under that article." (MCM, 1928, par.152g, p.190).

"An attempt to rape is an offense distinct from rape or an assault with intent to rape, and comprehends elements different from those which combine to constitute either of those offenses. A specific intent to rape is an absolutely essential ingredient to an attempt to rape, and must accompany the means used to effect the crime. Accordingly, if a person is so drunk at the time of the alleged attempt as to be unable to form an intent, he cannot be convicted of the crime. It is not enough that one charged with attempt to rape intended to use the force necessary to accomplish his purpose notwithstanding the woman's resistance; he must, in addition to this, do some act which in connection with this intent constitutes the attempt. In other words, there must be an overt act tending and fairly designed to effectuate the commission of the crime. It is, however, sometimes difficult to draw a distinction between overt acts and mere acts of preparation, or acts which are not so closely connected with the substantive crime intended as to constitute an attempt.

* * * - Since an attempt to commit a crime can only be made under circumstances which, had the attempt succeeded, would have constituted the entire substantive offense, for a man to be guilty of the crime of an attempt to commit rape, he must have intended to use the force necessary to accomplish his purpose, notwithstanding the woman's resistance". (44 Am.Jur., secs.26,27, pp.917,918).

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"To be guilty of an attempt to commit an offense one must not only make preparation to commit it, but must do some act towards making use of the means provided which shows continuance of the intent to commit the offense. CM 155131 (1923)". (Dig.Op.JAG, 1912-1940, sec.454(13), p.349).

"Proof of a completed offense supports an allegation of an attempt to commit that offense; and in such a case there is no variance between the allegation and the proof. CM 158055 (1923); 179958 (1928)." (Dig.Op.JAG, 1912-1940, sec.454(14), p.349).

" On the other hand, in attempted crimes, the corpus delicti is more elusive, and the degree of its clarity depends upon the extent to which a legally protected right is infringed. As a result of a scholarly study of the present problem, the statement has been made that the corpus delicti of the criminal attempt in contrast to the corpus delicti of a completed crime is, '* * * a substantial but incomplete impairment of some interest protected by the particular prohibition against the complete crime or an impairment of some related but lesser interest protected by the prohibition against such an attempt.' (Strahorn, Jr., The Effect of Impossibility on Criminal Attempts, 78 University of Penn. Law Review, 962-998)." (Bull.JAG, Jan 1943, Vol.II, No.1, sec.454(13), p.15).

That Asher not only committed an assault but also a battery upon Miss Bell is established beyond a reasonable doubt. The court was justified in rejecting part or all of his version of the affair, particularly in view of his admitted untruthful statement on material issues, viz: the reason for blood on his person and his alleged fight with a British soldier. The maxim "Falsus in uno, falsus in omnibus" (The Sentissima Trinidad and the St. Anders, 7 Wheat, 281,339, 5 L.Ed., 454,468) is particularly applicable. In fact the court would have been legally justified in finding that the completed crime of rape as charged was committed.

There can be no reasonable doubt but that accused entertained the intent throughout the entire affair to have intercourse with his victim. The struggle between the two was terminated only by the approach of the truck. The evidence in the case indisputably supports the court's finding that there was no consent and that actual, continued and strenuous resistance was offered to accused's advances. The injured and inflamed condition

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of Miss Bell's private parts is convincing proof of the extreme violence of the efforts he exerted to accomplish his purpose. The Board of Review is of the opinion that the record is legally sufficient to sustain the court's findings of guilty of attempt to commit rape under the circumstances and at the time alleged.

6. Even though the defense did not object to testimony of the victim's narrative to Miss Bates later that night with respect to the details of the attack or to the testimony of the report by Miss Bell to her mother of the details of the crime on the afternoon of the following day, it was not entirely competent and admissible evidence. First, because the rule permitting evidence of complaints by a victim of a rape or attempted rape allows only evidence of the factum and not the details of the crime (CM ETO 709, Lakas) and, secondly, because the res gestae exception to the hearsay prohibition as here applied, requires that the complaint or report be given under spontaneous circumstances of shock or surprise and not after the expiration of time which permits opportunity for deliberation (MCM, 1928, par. 115b, p.118). The Board of Review has disregarded this inadmissible evidence. It does not consider its admission prejudicial to the substantial rights of the accused in view of the preponderating evidence of accused's guilt otherwise existing (AW 37).

7. Accused is 19 years 11 months of age. He enlisted 5 February 1942, at Fort Thomas, Kentucky for the duration of the war and six months thereafter. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty by substitutions and exceptions and the sentence. Confinement in a United States Disciplinary Barracks is authorized (AW 42).

B. Franklin Teller _____ Judge Advocate

Cal Van Sandt _____ Judge Advocate

Ellwood K. Ferguson _____ Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 25 MAR 1944
General, VIII Bomber Command, APO 634, U.S. Army.

TO: Commanding

1. In the case of Corporal JOSEPH H. ASHER (15089925), 357th Service Squadron, 317th Service Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty by exceptions and substitutions and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$ 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 1600. For convenience of reference please place that number in brackets at the end of the order: (ETO 1600).



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

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

BOARD OF REVIEW

ETO 1603

22 MAR 1944

U N I T E D S T A T E S)	29TH INFANTRY DIVISION.
)	
v.)	Trial by G.C.M., convened at APO
)	29, U.S. Army 5-21 February 1944.
Private JOSEPH F. HAGGARD)	Sentence: Dishonorable discharge,
(20365479), Headquarters)	total forfeitures and confinement
Company, 3rd Battalion,)	at hard labor for 25 years. The
116th Infantry.)	United States Penitentiary, Lewis-
)	burg, Pennsylvania.

HOLDING by the BOARD OF REVIEW
RITTER, VAN BENSCHOOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Joseph F. Haggard,
Hq. Co. 3rd Bn, 116th Infantry, did, at Tid-
worth, Hants County, England on or about 9
April 1943 desert the service of the United
States and did remain absent in desertion un-
til he was apprehended at Andover; Hampshire
County, England, on or about 11 Jan 1944.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that * * *, did, at Andover,
Hampshire County, England, on or about 4 Jan
1944, unlawfully enter the dwelling of Mrs.
Florence Hallett, 107 Weyhill Road, Andover,
England, with intent to commit a criminal
offence, to wit: larceny, therein.

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Specification 2: In that * * *, did, at Andover, Hampshire County, England, on or about 4 January 1944, feloniously take, steal, and carry away British currency, value about \$38.00, the property of Ernest Edward Effeny, and two (2) clothing coupon books, of some value less than \$1, property of Mrs. Florence Hallett.

He pleaded not guilty to and was found guilty of both charges and the specifications thereunder. 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 25 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 Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of housebreaking and of larceny (Charge II and its specifications) (R13-15, 30-31; Ex.C), (MCM, 1928, par.149e, p.169, par.g, p.171).

4. With reference to the offense of desertion (Charge I and its Specification), the only question requiring consideration is whether at any time during his absence accused entertained the intent to remain away permanently. His absence of approximately nine months was terminated by apprehension (R8-11, 16; Exs.A,B). During his absence he lived at the house of a woman for whom he did housework in payment for his food and lodgings and from whom he borrowed money for clothing. He falsely represented to her that he was discharged from the United States Army for medical reasons, that he was allowed by army authorities to remain in England and that his discharge was erroneously sent to the United States. He did not wear his uniform after the fifth month of his absence, and was partially dressed in civilian clothes when apprehended (R11-13,16; Ex.C). During his absence he committed the offenses of housebreaking and larceny. The court was fully warranted in finding that accused went absent without leave with the intent not to return (CM ETO 740, Lane; CM ETO 800, Ungard; CM ETO 823, Poteet; CM ETO 875, Fazio; CM ETO 913, Pierro; CM ETO 952, Mosser).

5. The charge sheet shows that accused was 29 years 11 months of age. On 25 January 1941 at Charlottesville, Virginia, he enlisted in the Virginia National Guard for a period of three years and was inducted into Federal service 3 February 1941.

6. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The punishment for desertion committed in time of war is death or such other punishment as a

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court-martial may direct (AW 58). The designation of the United States Penitentiary, Lewisburg, Pennsylvania as the place of confinement for desertion committed in time of war and housebreaking, is authorized (AW 42; D.C. Code, sec.22-1801 (6:55); Cir.291, WD, 10 Nov 1943, sec.V, par.3a and b).

B. Frank Miller Judge Advocate
Richard J. Marchotin Judge Advocate
Ellwood K. Vayard Judge Advocate

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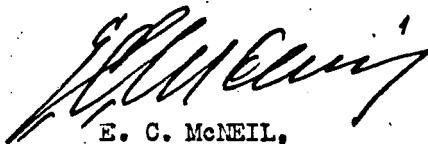
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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 22 MAR 1944 To: Commanding
General, 29th Infantry Division, APO 29, U.S.Army.

1. In the case of Private JOSEPH F. HAGGARD (20365479), Headquarters Company, 3rd Battalion, 116th 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 50 $\frac{1}{2}$, 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 1603. For convenience of reference please place that number in brackets at the end of the order: (ETO 1603).



E. C. McNEIL,

Brigadier General, United States Army,
Assistant Judge Advocate General.

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

BOARD OF REVIEW

ETO 1606

28 MAR 1944

U N I T E D S T A T E S)	EIGHTH AIR FORCE.
v.)	Trial by G.C.M., convened at AAF
Private SCOTT W. SAYRE)	Station 115, APO 634, 22 December
(14032277), 66th Bombardment)	1943. Sentence: Dishonorable
Squadron, 44th Bombardment)	discharge, total forfeitures and
Group (H).)	confinement at hard labor for
	seven years. Federal Reformatory,
	<u>Chillicothe, Ohio.</u>

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 Pvt. SCOTT W. SAYRE, 66th
Bombardment Squadron, 44th Bombardment Group
(H), APO 634, U. S. Army, did, without proper
leave, absent himself from his station at AAF
Station 115, APO 634, from about 2 May 1943
to about 30 October 1943.

CHARGE II: Violation of the 93rd Article of War.
Specification 1: In that * * *, did, at American
Red Cross Club, Bishops Palace, Norwich, Nor-
folk, England on or about the 15th June 1943
feloniously take, steal and carry away, one
(1) wallet, value about \$0.85; and £3-0-0,
value about \$12.10; of a total value of about
\$12.95, all the property of Cpl. HENRY F.
GORECKI, 67th Bombardment Squadron, 44th
Bombardment Group (H), APO 634, U. S. Army.

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Specification 2: In that * * *, did, at American Red Cross Club, Bishops Palace, Norwich, Norfolk, England on or about the 20th June 1943, feloniously take, steal, and carry away, one (1) wallet, value about \$0.85; and £2-0-0, value about \$8.07; of a total value of about \$8.92, all the property of S/Sgt. WILLIAM T. SMITH, 330th Bombardment Squadron, 93rd Bombardment Group (H), APO 634, U. S. Army.

Specification 3: In that * * *, did, at American Red Cross Club, Bishops Palace, Norwich, Norfolk, England on or about the 30th August 1943, feloniously take, steal, and carry away, one (1) wallet, value about \$0.85; and \$10.00, lawful money of the United States; and £1-0-0, value about \$4.03; of a total value of about \$14.88, all the property of S/SGT. STEPHEN J. MIHALKO, 874th Chemical Company AO, APO 633, U. S. Army.

Specification 4: In that * * *, did, at American Red Cross Club, Bishops Palace, Norwich, Norfolk, England on or about the 3rd September 1943, feloniously take, steal and carry away, one (1) wallet, value about \$0.85; and £18-0-0, value about \$72.63, of a total value of about \$73.48, all the property of S/Sgt. RAYMOND C. TRACY, 41st Service Squadron, 33rd Service Group, APO 633, U. S. Army.

Specification 5: In that * * *, did, at American Red Cross Club, Bishops Palace, Norwich, Norfolk, England on or about the 21st September 1943, feloniously take, steal, and carry away, one (1) wallet, value about \$0.85; and £3-0-0, value about \$12.10, of a total value of about \$12.95, all the property of Cpl. JAMES S. OETTINGER, 579th Bombardment Squadron, 392nd Bombardment Group (H), APO 633, U. S. Army.

Specification 6: In that * * *, did, at American Red Cross Club, Bishops Palace, Norwich, Norfolk, England on or about the 15th October 1943, feloniously take, steal, and carry away, one (1) wallet, value about \$0.85; and £2-0-0, value about \$8.07; of a total value of about \$8.92, all the property of Cpl. GEORGE E. WESTENBERG, 577th Bombardment Squadron, 392nd Bombardment Group (H), APO 633, U. S. Army.

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Specification 7: In that * * *, did, at American Red Cross Club, Bishops Palace, Norwich, Norfolk, England on or about the 29th October 1943, feloniously take, steal, and carry away, one (1) wallet, value about \$0.85; property of Pfc. DANIEL J. CUMMINGS, 351st Engineers Bn Company "E", APO 633, U. S. Army.

He pleaded guilty to Charge I and its Specification, not guilty to Charge II and all its specifications and was found guilty of both charges and all their specifications. Evidence was introduced of one previous conviction by special court-martial for three absences without leave of 15, 41 and eight days, respectively, in violation of Article of War 61, and for two breaches of arrest in quarters in violation of Article of War 69. 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 seven 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 50¹.

3. The order appointing the court, dated 16 December 1943, directed that it should meet on "December 23, 1943, or as soon thereafter as practicable". The court convened on 22 December 1943. The court's irregular procedure in departing from the order was ratified by the subsequent action of the reviewing authority, referred to above, approving the sentence (Winthrop's Military Law & Precedents, Reprint, p.159).

4. Accused pleaded guilty to Charge I and its Specification (R4). The evidence introduced with reference thereto, showing his absence without proper leave during the period alleged, fully supported the plea of guilty (R5-7,33-35; Pros.Ex.I) (CM ETO 839, Nelson; CM ETO 875, Fazio, CM ETO 885, Van Horn; CM ETO 942, Shooten and Currin; CM ETO 1543, Woody).

5. The record contains competent substantial evidence in support of the findings of guilty of Charge II and each of its seven specifications (CM ETO 885, Van Horn; CM ETO 913, Pierno, CM ETO 952, Mosser; CM ETO 1017, McCutcheon). The court resolved against accused the questions of his identity as the thief and of the voluntariness of his confession of the larcenies (Pros.Ex.VI). Its findings in these respects are supported by competent substantial evidence and will not be disturbed upon appellate review (identity: CM ETO 996; Burkhart, and authorities therein cited; voluntariness of confession: CM ETO 559, Monsalve). Evidence of the corpus delicti of the larcenies to which accused confessed was legally sufficient (CM ETO 1042, Collette, and authorities therein cited).

6. The charge sheet shows that accused is 29 years three months of age and that he enlisted 25 October 1940 at Fort McPherson, Georgia, for the duration and six months. He had no prior service.

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

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

8. The punishment for absence without leave from station is such as a court-martial may direct excluding sentence of death (AW 61; Executive Order 9267, 9 November 1942, Bull. 57, WD, sec.I, 19 November 1942; MCM, 1928, par.104c, p.97, Note). The punishment for larceny of property of a value of more than \$50 is dishonorable discharge, total forfeitures and confinement at hard labor not to exceed five years; the punishment for larceny of property of a value of less than \$20 is dishonorable discharge, total forfeitures and confinement at hard labor not to exceed six months (MCM, 1928, par.104c, 99). The finding of guilty of Specification 4, Charge II supports the designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement (AW 42; Fed. Criminal Code, sec.287, 18 U.S.C. 466, 35 Stat. 1144; Cir. 291, WD, 10 Nov 1943, sec.V, pars.2a(1) and 3a and 3d).

B.F. Franklin Jr. Judge Advocate

John R. Burdette Judge Advocate

Edward W. Hayes Judge Advocate

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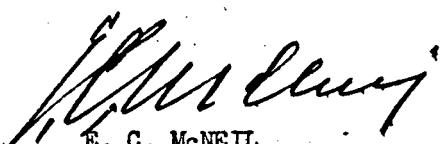
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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 28 MAR 1944 TO: Commanding General, Eighth Air Force, APO 634, U.S. Army.

1. In the case of Private SCOTT W. SAYRE (14032277), 66th Bombardment Squadron, 44th Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1606. For convenience of reference please place that number in brackets at the end of the order: (ETO 1606)



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

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

BOARD OF REVIEW

ETO 1607

24 MAR 1944

UNITED STATES)

) 5TH INFANTRY DIVISION.

v.

Private KENNETH R. NELSON
(15064176), Company I, 10th
Infantry.

Trial by G.C.M., convened at Kilkeel,
County Down, North Ireland, 21 Feb-
ruary 1944. Sentence: Dishonorable
discharge, total forfeitures and
confinement at hard labor for three
years. Eastern Branch, United States
Disciplinary Barracks, Greenhaven, New
York.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of Not Guilty)

Specification 2: In that Private Kenneth R.

Nelson, Company I, 10th Infantry, did, at Camp Ballyedmond, County Down, Northern Ireland, on or about 1 February, 1944, feloniously take, steal, and carry away one (1) Bulova wrist watch, value of about \$30.00 the property of Private Arthur DePonte, Company I, 10th Infantry.

Specification 3: In that, * * *, did, at Camp Ballyedmond, County Down, Northern Ireland, on or about 27 December, 1943, feloniously take, steal and carry away one (1) Bulova wrist watch, value of about \$30.00, the property of Private First Class Joseph Pensky, Company I, 10th Infantry.

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Specification 4: In that * * *, did, at Camp Bally-edmond, County Down, Northern Ireland, on or about 27 December, 1943, feloniously take, steal, and carry away one (1) Ingraham pocket watch, value of about \$1.00, the property of Private First Class Gilbert A. Helgemo, Company I, 10th Infantry.

Specification 5: (Finding of Not Guilty)

Specification 6: In that * * *, did, at Camp Bally-edmond, County Down, Northern Ireland, on or about 27 December, 1943, feloniously take, steal, and carry away one (1) pair of wool pants and one (1) wool shirt, value of about \$9.00, the property of Sergeant Willard Romans, Company K, 10th Infantry.

He pleaded not guilty to the Charge and all specifications thereunder and was found not guilty of Specification 1 and 5 and guilty of Specification 2, 3, 4 and 6, and of the Charge. Evidence of one previous conviction by Special Court-Martial for larceny and for being drunk in uniform in a public place in violation of Articles of War 93 and 96 respectively, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for six years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for three 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 record of trial shows no evidence was introduced in connection with Specification 1 (R25), and that the shirt alleged in Specification 5 as stolen was old and worn government issue clothing of slight value (R19).

The evidence for the prosecution shows that accused was a member of the local security guard, left in camp while the troops were away on combat exercises (R8) about 23 December 1943, and that the articles which the accused is charged with taking were the property of some of those troops engaged in the exercises and were found missing on their return to camp (R10, 11, 16, 18, 20). Accused was wearing the trousers, Ex."G"(R22,24), and a Bulova wrist watch. The other articles named in the specifications were found among his personal belongings (R6). All of these were articles properly identified by their owners. Accused's possession of them was not explained by him. He remained silent at the trial (R25). Unexplained possession of recently stolen property is evidence of guilt (Underhill's Criminal Evidence, par.514, p.1040-1042; 1 Wharton's Criminal Evidence, par. 191, p.198-200; CM 211769, Brown; Dig.Op.JAG 1912-1940, sec.451(37), p.323; CM ETO 885, Van Horn). The court's findings of guilty are supported by substantial evidence.

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4. The charge sheet shows accused to be 22 years and nine months of age. He enlisted at Fort Thomas, Kentucky, 7 November 1940 for three years. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offenses. No errors affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The sentence is the maximum for the offense committed. Confinement in a United States Disciplinary Barracks is authorized (AW 42).

B. Nathan Hays _____ Judge Advocate
O.W. Vandervort _____ Judge Advocate
Elwood V. Bergend _____ Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 24 MAR 1944 To: Commanding
General, 5th Infantry Division, APO 5, U.S.Army.

1. In the case of Private KENNETH R. NELSON (15064176), Company I, 10th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1607. For convenience of reference please place that number in brackets at the end of the order: (ETO 1607).

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

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

BOARD OF REVIEW

ETO 1621

26 APR 1944

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

v.)

Private J. C. (I.O) LEATHERBERRY)
(34472451), Company "A", 356th)
Engineer General Service Regi-)
ment.)

EASTERN BASE SECTION, SERVICES
OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS.

Trial by G.C.M., convened at Town
Hall, Ipswich, Suffolk, England,
19-24 January 1944. Sentence: To
be hanged by the neck until dead.

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

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

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

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private J. C. Leatherberry, Company "A", 356th Engineer General Service Regiment, did, at or near Birch, Essex, England, on the main Colchester Maldon Road, on or about 7 December, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Harry Claude Hailstone, of 127 Maldon Road, Colchester, a human being by strangling the said Harry Claude Hailstone.

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

Specification: In that Private J. C. Leatherberry, Company "A", 356th Engineer General Service Regiment, did, at or near Birch, Essex, England, on the main Colchester-Maldon Road, on or about 7 December, 1943, by force and violence and by putting him in fear, feloniously take, steal

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and carry away from the person of one Harry Claude Hailstone, of 127 Maldon Road, Colchester, one cigarette lighter and a Bill-fold, value about £ 2 (American currency equivalent \$8.06), the property of Harry Claude Hailstone.

He pleaded not guilty to and was found guilty of both charges and specifications, three-fourths of the members of the court concurring. Evidence was introduced of one previous conviction by summary court-martial for absence without leave for six days in violation of Article of War 61. He was sentenced to be hanged by the neck until dead, all members of the court concurring.

The reviewing authority, the Commanding Officer, Eastern Base Section, SOS, ETOUSA, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

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

On the evening of 5 December 1943, Private George E. Fowler, 356th Engineers first met accused on a bus between Colchester and Birch aerodrome. They left the bus, went to the White Horse "pub", "had a bit of drinks" and decided to go to London. They went by train, arrived in that city the same evening and spent the night in a rooming house (R3-4). On the morning of 6 December (Monday) they visited some "pubs", but parted that evening when Fowler "went home with a lady" (R5). Private Charles Huntley, Company B, 356th Engineers spent part of the day with accused (R77), and pawned a watch for Fowler (R78). Christine Harvey, 26 Omberton Street, and Constance Jennings, 43 Walter Street, Stepney, spent the evening of 6 December with accused at the West India Club and a cafe. Both women were then lodgers at 24 Omberton Street, London, a house then occupied by a Mr. Francis M. Wettner, who was known as "Freddie". Accused spent the night of 6 December at 24 Omberton Street with Huntley, and some other American soldiers (R65,68-71,77-78). On the morning of 7 December, Huntley and accused had breakfast together, and Huntley spent the night of 7 December alone at Rawton House (R77).

About 8:45 p.m. 7 December accused and Fowler, both of whom had been at the West India Club, left London by train and arrived at Colchester about 10:45 p.m. (R5,14-15). Fowler loaned accused five shillings in London, and had one pound five shillings when he left for Colchester (R22). On the train accused told Fowler that he owed bills and needed money, and suggested that they take a cab at Colchester to camp and rob the driver. Fowler did not answer because he thought accused was joking (R13-16). When they arrived at Colchester accused was cold and Fowler removed a raincoat which he was wearing and gave it to him (R18,22). Fowler had been drinking and did not have "complete control", but did not know if accused was

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in the same condition (R22). At the Colchester station they took a cab for Birch aerodrome about eight miles away. Just before they entered the cab accused again suggested that they rob the driver but Fowler did not reply as he thought he was "kidding" (R5,16). Both entered the rear of the cab and Fowler sat at the left side rear in a corner opposite the driver (later identified as Hailstone, the deceased). Hailstone stopped the cab a short distance from the station, said he would be back in a few minutes, and entered a house (R5,21). Accused said he wondered if the driver was "going for a gun" (R22). In about ten minutes Hailstone reappeared and started for the aerodrome. After riding about four miles accused asked Hailstone to stop because he wished to urinate. Fowler left the car, walked a short distance behind it and began to urinate. He "heard a rumble and a bumping from inside the cab" and a "muzzled gag". The "bumping" sounded as if someone was stamping his feet and kicking. He heard accused say "Aren't you going to help me?" Fowler, who "wasn't in a hurry", spent "four or five minutes" in all behind the cab. After urinating he returned to the car and saw accused holding the driver by the throat with his left hand and pounding the upper part of his body and his face with his right hand. He saw accused deliver one or two blows. The driver was "gagging" and sounded "like a person strangling". He was half way to the rear seat, his head was tipped back and he was "out". He did not move (R5-8,11-12,16-18,21). Without Fowler's aid, accused then pulled Hailstone over the seat onto the rear floor of the car, searched his pockets, removed a wallet, cigarette-lighter and some papers and put them in his own pocket (R7-8,18,20). He asked Fowler to help him remove the driver from the car and said Fowler "was in it as much as he was". Fowler did not reply but took Hailstone's feet, accused seized his shoulders and both men carried him across the road. "There was two or three strands of barbed wire as a fence or a dump, like a hill, and we slid him underneath there" (R7,18,23).

Fowler told accused that he was going back to camp, returned to the cab and started for Birch aerodrome. Accused then decided to drive, passed around the gate of the camp and told Fowler he was going to Maldon to get a train. He stopped the car and both men abandoned it about a half mile from camp (R7,9). They went to Fowler's hut where they found three or four soldiers, including one Hargrove, "shooting craps". Someone said "Here's Fowler". Accused said to Fowler "It's no place for us, let's go to Company B's guardhouse". They reached the guardhouse about midnight. Fowler slept there, awoke about 7:30 a.m., went to his hut and slept until 10:45 a.m. He did not see accused when he left the guard room. He next saw him on the night of either 8 or 9 December when accused came to his barracks and said that the guards were discussing the killing of a taxi driver. Accused then possessed Hailstone's cigarette lighter and tried to light a cigarette with it (R7,10-11). About midnight 7 December, Technician Fifth Grade Brenis Hargrove, Company E, 356th Engineers, saw Fowler enter his hut with another colored soldier whom he was unable to identify. Hargrove said "Here's Sergeant Fowler" (R71-72). Sergeant Maris Gary, Company B, 356th Engineers, sergeant of the guard on the night of 7 December, found a man whom he could not identify at the time, sleeping in a bunk in the guard tent. The man was not authorized to be in the tent and Gary awakened him and ordered him to leave (R72-73). Two unsuccessful searches in camp were made for Fowler about 9:00 a.m. and 10:00 a.m. 8 December (R74). Lieutenant Dennis H. Roberts, Company C, 356th Engineers, who was assigned to Company A on 7

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December, spoke to accused about 12:30 p.m. 8 December, in an effort to discover why he had been absent without leave for two or three days (R75).

Hailstone was killed about 11:20 p.m. on the main road between Colchester and Maldon (R10). Accused was then wearing a blouse, "a pair of slacks," "O.D" shirt and the raincoat which Fowler loaned him at the Colchester station. He was wearing the coat when Hailstone was removed from the cab and did not return it to Fowler. At the trial Fowler identified the garment which was an officer's cream colored raincoat marked inside the collar "Captain J.J. Webber". It bore red smears on the front left side and also near the collar (R8-9). Fowler obtained the coat on 5 December under circumstances which indicated that he stole it from Captain John J. Webber, Royal Canadian Army Medical Corps, 18th General Hospital, who identified the coat at the trial. The raincoat was found on the morning of 8 December on the side of the road near Tolleshunt d'Arcy, shown on Pros. Ex.2 as some six miles down the road from where the taxi was found. It was admitted in evidence (R9,20,42-45; Pros.Ex.1). Fowler did not see the driver's macintosh and jacket in the rear of the car (R9-10).

The taxicab, a Vauxhall numbered CPU602, was found on the morning of 8 December near the camp in Haynes Green Lane, Layer Marney about 50 yards from the main road between Colchester and Maldon. The lights were on and the top was wet, which indicated that the car was outside during the night. There was blood on the rear seat and on the glass panel above. A netted cord luggage rack, the "trafficator arrangements", and a piece of heavy rubber used as a "draught screen" were torn down. The "switching arrangement" fastened to the steering wheel was broken, and the leatherette fabric and the windows bore evidence of "scrape marks". The condition of the car indicated that a violent struggle had occurred. A bloodstained macintosh and a blue jacket were on the rear seat and a pair of gloves and an empty wallet were on the floor. The sleeves of both the macintosh and the jacket were turned inside out and the sleeves of the coat were inside the jacket. It appeared that the clothing "had been dragged off someone". In the pocket of the macintosh were a driving license issued to Harry Claude Hailstone and a taxi driver's plate. The car, wallet, macintosh, blue jacket and gloves were identified as Hailstone's who resided at 127 Maldon Road, Colchester, with Mr. and Mrs. Sydney C. Pearce. Mrs. Pearce last saw him about 11:00 p.m. 7 December when he left the house "to take a fare". He was then wearing the macintosh which was not stained and the blue jacket (R25-26,34-38,39-42). The rear seat of the car, the macintosh, blue jacket and gloves were admitted in evidence (R31; Pros.Exs. 6,13). Eight photographs of the car taken on 9 December were also admitted in evidence (R26; Pros.Ex.3).

About 1:00 p.m. 9 December Hailstone was found dead in the grounds of Birch Rectory, Birch, "on the inside back" of a hedgerow about six feet from the main road. The body was lying on its left side and "appeared *** to have been thrown over the hedge from the road. The body was caught up in the brambles, which were not disturbed ***." On top of the bank was a double strand of barbed wire and the lower strand was bloodstained. Hailstone was lying about four feet from the top of the bank. He was fully

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clothed with the exception of a coat, jacket and hat, and his face was covered with blood. The body was identified by Pearce. A photograph showing the "outside" of the bank and the barbed wire was admitted in evidence (R27, 32-33,39; Pros.Ex.4). In the opinion of Dr. Francis E. Camps, 99 Harley Street, London who saw the body about 4:30 p.m. 9 December, Hailstone had then been dead for 36-48 hours (R50). The deceased was single, about five feet eight inches tall and weighed about 154 pounds. His hands were deformed in that he was unable to stretch his fingers. "One foot was also contracted and he dragged it." In the opinion of Pearce he did not possess the strength of a normal man (R38).

Admitted in evidence was a sketch which showed where the body, cap and raincoat were discovered (R23-24; Pros.Ex.2). The following exhibits were obtained, identified at the trial and admitted in evidence: photographs of the backs of accused's hands and of his thumbs, taken 18 and 23 December (R29; Pros.Ex.5); a pair of long underdrawers removed from accused's hut on 13 December, and his khaki blouse, shirt, necktie, vest and trousers which were also taken from the place where he kept his effects (R31,57,76; Pros.Exs.14,17); samples of the blood and hair of deceased and scrapings from his finger nails (R31,51-52,55; Pros.Exs.7-9); a pair of trousers, shoes, necktie, pair of socks, vest, underpants and shirt which were removed from Hailstone's body (R28,31,51-53; Pros.Ex.10); blood from the palm of deceased's right hand (R28,31,51-52; Pros.Ex.11); blood from the back of deceased's left thumb (R28,31,51-52; Pros.Ex.12); scrapings taken 17 December from the fingernails of accused (R49,56; Pros.Ex.16).

Dr. Camps performed a post mortem on the body. The face was extensively smeared with blood. There were very severe bruises on the outer side of the left eyebrow, in the region of the mouth and jaw, and one in the scalp which "must have been caused by something from above or behind". There were several marks on the neck, one of which was typical of a thumb mark and which clearly indicated that the attack was accomplished "with the left hand and from behind". An internal examination disclosed a fracture of the thyroid cartilage which was typical of manual strangulation, and there was evidence of congestion of the windpipe. Hemorrhages of the eyelids and whites of the eyes were typical of constriction of the neck. There were old adhesions in the lungs which were deeply congested and also hemorrhages on the surface of the heart. These conditions were "absolutely typical of an asphyxial death". Also visible were bramble scratches which occurred after death and a puncture of the left cheek which was consistent with a prick by barbed wire. There were abrasions on the front of the shins and knees "absolutely typical of a man or woman sitting in the front seat of (a) car and jerking back so that the knees came in contact with the dashboard". Dr. Camps was of the opinion that death was occasioned by manual strangulation with a left hand, that the bruises were consistent with blows delivered from the right side by a fist, that the assailant was behind deceased who was attacked while sitting in the front seat of the car and then dragged into the rear. Both accused's thumb nails and all his finger nails were rounded (Pros.Ex.5). Dr. Camps was of the further opinion that the marks on the left side of Hailstone's neck could not have been caused by a person with pointed finger nails, but were occasioned by a person with rounded nails. He believed that Hailstone was dead when he

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was placed over the embankment and that "he would have taken at least two minutes to die" (R50-53).

An examination of a sample of blood taken from accused's hand disclosed that the blood belonged to group O. A similar test of blood taken from Fowler disclosed that his blood belonged to group B (R64). Evidence was introduced to the effect that there are four groups of blood, O, A, B and AB. Group O is found in 42 per cent of the population, group A in 41 per cent, group B in 12 per cent and group AB in five per cent (R54). Mr. James Davison, director of the Metropolitan Police Laboratory, Hendon, examined several of the exhibits admitted in evidence. An examination of the blood of deceased (Pros.Exs.7,11) showed that his blood belonged to group AB (R55-56). Deceased's raincoat (Pros.Ex.13), shirt and trousers (Pros.Ex.10) were stained with blood belonging to group AB (R56). Bloodstains were found on accused's blouse on the inner surface of the left cuff, on the right thigh and fly opening of his trousers, and on the inner surface of both cuffs of his khaki shirt (Pros.Ex.14). The blood was insufficient for grouping purposes. Extensive mud stains were also discovered on his trousers. Pros.Ex.1 (the officer's raincoat worn by accused), the rear seat of the taxicab (Pros.Ex.6) and accused's long underdrawers (Pros.Ex.17), were also stained with blood belonging to group AB. The officer's raincoat was extensively bloodstained on the outer surface of the left front, down the right front and, near the shoulder. The underwear was bloodstained on both sides of the fly opening and on the top of the waistband at the front. As the bloodstains on accused's trousers and underwear were both in the region of the fly opening, Mr. Davison was of the opinion that the staining of the trousers and underwear was caused by the fact that a bloodstained hand unfastened the fly of the trousers and came in contact with the same region of the underwear. He was of the further opinion that the blood on the trousers would not have soaked through in sufficient quantities to get on the underwear (R57-59). A test of scrapings from the finger nails of accused (Pros.Ex.16) revealed the presence of human blood, insufficient for grouping purposes, on all fingers of both hands and further disclosed the presence of pink and blue fibres. The blue fibres were similar to those in Hailstone's jacket (Pros.Ex.13), and also to those found in the nails of Hailstone (Pros.Ex.8) and Fowler (R55-56).

On 13 December accused, after being warned of his rights, gave a statement to Staff Sergeant Stephen J. Graham, C.I.D. Detachment, APO 633. The statement which was read and then signed by accused on 13 December, was admitted in evidence (R46-47; Pros.Ex.15). On 16 December at an identification parade comprised of accused and six other soldiers, Fowler identified accused as the man who accompanied him in the taxicab driven from Colchester on the night of 7 December. Graham then asked accused if Fowler was the man who accompanied him from London and he replied in the affirmative. Graham thus discovered that "Huntley", to whom accused referred in his statement (Pros.Ex.15), was actually Fowler (R47).

The statement of accused was in substance as follows:

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About 4:00 p.m. 5 December he left camp on a pass which expired 11:00 p.m. the same day. At the White Horse "pub" he met a soldier named Huntley who was a member of Company E, 356th Engineers. After drinking "Scotch" whiskey the two men took a train to London and arrived about 10:00 p.m. Accused was drunk and woke up on the morning of 6 December in Rawton House, Christian Street, East London. Huntley was there but left about 10:30 a.m. and accused did not see him until about 7:00 p.m. 6 December. That evening Huntley left him to stay with a girl and accused next met him about 5:00 p.m. 7 December at Sam's Bar, Cable Street. After attending a motion picture with a girl named Eva, accused left her and went to "Freddie's" house where he spent the night of 7 December with some soldiers.

"Some of the soldiers I stayed with that night were Huntley from 'F' Company, Edward Harris from 'F' Company and another soldier whose name I do not know. There were some other soldiers there but I don't know their names. Huntley spent the night with some girl in the West Side of London." (Pros.Ex.15).

Accused met Huntley about 9:00 a.m. 8 December at Mom's Cafe on Cable Street. Huntley did not have "any kind of a coat with him then". About 10:25 a.m. Huntley, accused and four other men left London by train for Colchester, and took a bus from Colchester to camp, where accused arrived about 1:00 p.m. He was dressed in a class A uniform when he left camp and was dressed in the same uniform when he returned (Pros.Ex.15).

4. For the defense accused, after being warned of his rights, testified in substance as follows:

He had never seen Hailstone alive or dead, and had nothing to do with his murder. He left camp about 4:30 p.m. 5 December, wore a clean class A uniform and Army issue overcoat, and went to the White Horse "pub" where he met Fowler for the first time. After drinking some of Fowler's "Scotch" he began to become intoxicated. The two men then went by train to London. Accused, who was drunk, awakened the morning of 6 December at Rawton House (R81-82,89). Fowler went to the Red Cross Club during the morning and accused ate breakfast, went to Sam's Bar, then to a cafe with a girl about 5:00 p.m. and then left her to go to the West India Club. He left the club about 10:15 p.m. with two girls, one of whom was named Connie and the three had supper at "Ollees" Cafe. He then went to "Freddie's" place, the home of the two girls, where he spent the night of 6 December with Huntley, "Freddie", the two girls, Private Eddie Harrison, and two other soldiers, one of whom was called "Shortie". Accused was drinking that evening and was "pretty high" but "not exactly drunk" (R83,90-91). On the morning of 7 December accused, Huntley and "Eddie" (Harrison) went to breakfast at Mom's Cafe. Accused and Eddie then went to Kay's Cafe, then to Sam's Bar and returned to "the cafe". Accused spent the remainder of the afternoon at the West India Club, with "Miss Kay" and a girl named "Jean". About 6:00 p.m. he had supper at Ollees Cafe and returned to the West India Club about 6:30 p.m. He was with Jean at the club that evening

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from about 8:45 p.m. until about 10:45 p.m. when they went to her home on Cable Street (R84-85). He spent the night of 7 December with Jean at her home, breakfasted with her at 9:00 a.m. at Mom's Cafe and then left her to have tea at Kay's Cafe with "Kay", with whom he discussed the fact that he was absent without leave. About 10:45 a.m. he left London by train for Colchester where he took a bus for camp. He arrived as they were finishing "chow", and on his way to mess he met his company commander who told him to go to the orderly room (R85-86).

When he awakened at Jean's on the morning of 8 December he noticed blood on his underwear and mentioned it to her (R86). She was the only girl with whom he slept before he returned to camp, and while sleeping with her he wore his undershirt and underpants (R92). (It was stipulated by the prosecution and defense that Jean's blood was typed by an Army physician and found to belong to group A (R87,115). On either Monday or Tuesday evening (6 or 7 December), Huntley asked him "at the Club" "what was the blood doing on my pants". Accused noticed the blood but paid no attention to it (R87-88). He could not explain the presence of blood on his blouse and trousers unless it resulted from a fight which he had outdoors with a sergeant and another man on the night of 7 December, during which accused received a bloody nose and a scratch on his arm. The blood possibly came from accused's own person or from his antagonists. He was wearing his overcoat at the time and wore it when he returned from London. He did not notice any blood on the overcoat. At the time of trial he left the overcoat "in my company" (R93,98-100).

Accused further testified that he was confused when he stated to Sergeant Graham that he spent the night of 7 December at Freddie's house. He knew he spent three nights in London, one at Rawton House, one at Freddie's house and one at Jean's. He knew he spent the first night at Rawton House, but when he spoke to Graham he was not sure about the other two nights. He now desired to change his story as he was certain that he spent the night of 6 December at Freddie's and the night of 7 December at Jean's (R83,90-92).

He also stated to Graham that Fowler accompanied him back to camp when in fact he did not do so, and that about 9 December Fowler came to his barracks and asked him to say, should he be questioned, that Fowler returned from London with him. Accused thought Fowler "was in a clinch" and accordingly he told Graham that Fowler returned with him (R93,96,98). Graham did not tell accused until after the latter made a statement, (Pros.Ex.15), that he was being questioned with reference to a murder case. Accused first realized that he was a suspect in a murder case after three or four days of interrogation which occurred after the statement was made (R93-96).

He was drunk the night of 5 December and drank heavily during the evenings of 6 and 7 December (R96-97). He spent about 11 pounds when in London and had eight or nine pounds when he returned to camp. He won the money gambling (R99).

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Miss Kay Peters, London, E.1. manageress of the Cecilia Cafe, 11 Settles Street, saw accused at the cafe, 7 December between noon and 2:00 p.m., and also between 11-12 p.m. the same evening when he came with a girl named Jean Von Splang. Accused and Mrs. Von Splang left the cafe between midnight and 12:30 a.m. Miss Peters also saw him at the cafe between 10-11 a.m. 8 December, drank tea with him and discussed his being absent without leave. (R101-103,107). She did not notice any blood on his clothing. (R107). Huntley and Harrison were in London at the time when accused was "in town" (R106).

"Mistress" Jean Von Splang, a married woman residing at 75 Cable Street, London, E.1. saw accused at 3:0 p.m. 7 December at the West India Club. She left him at 5:00 p.m., returned to the club about 8:45 p.m. and went with him about 11:00 p.m. to eat at Kay's Cafe which was also known as Cecilia Cafe and Pasha Ali's. They left the cafe between midnight and 12:30 a.m. and went to her home where they spent the night (R109-111,117). During the night they had intercourse on the bed when accused wore his trousers. They had intercourse a second time in bed when he wore his "shorts" and "vest" and she wore a night-dress and "vest". He did not wear long underwear. The next morning she noticed blood on his underwear and was of the opinion that the blood was hers because she began menstruating during the night. She did not believe that she was menstruating during the first act of intercourse and noticed no bloodstains on his uniform (R111,113-115,118). Accused left the house the following morning about 8:45 a.m. (R111), and gave her two pounds for sleeping with her (R115). He did not mention having been in a fight nor did he bear any evidence of a fight (R116). He was wearing a long military overcoat on the afternoon of 7 December (R117-119). She knew that the date on which accused stayed the night was 7 December because she was without funds, would not receive her husband's weekly allotment until 9 December and accused gave her the two pounds (R111,115-116).

Private Huntley was in London 5-8 December (R119) and saw accused Monday and Tuesday (6-7 December) (R122). On either 6 or 7 December he saw accused in a latrine and teased him about some blood which was on his trousers (R119,121). Huntley did not notice any bloodstains on a long "G.I" overcoat which accused wore on 7 December (R121).

First Sergeant William Ellis, Company A, 356th Engineer General Service Regiment, testified that when accused left camp on 5 December he wore a "G.I" overcoat (R123-124).

5. The prosecution introduced evidence in rebuttal which was substantially as follows:

Lieutenant Roberts saw accused going to mess about noon on 8 December, and saw him again at 1:00 p.m. when accused stated that he became intoxicated in Maldon and returned to camp as soon as he realized his whereabouts. He said nothing about London. It was about a two-hour journey by train from London to Colchester, and it took about a half hour to go by bus from Colchester to camp whereas a taxi journey consumed about 20 minutes (R133-134).

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First Lieutenant James B. Regan, Company A, 356th Engineer General Service Regiment, searched all barracks of the company and the personal effects of accused but could not find any long "G.I" overcoat belonging to him (R134-136).

Sergeant Graham testified that before accused was questioned he was informed that he was to be interrogated about the murder of the taxi-driver (R136-137,140,145). After making the statement of 13 December he was again interrogated on the two succeeding days, and said that he would adhere to his statement of 13 December although he was informed that the statement differed from certain discovered facts (R136-138,141-143). He never changed the statement that he spent the night of 7 December at Freddie's, and reiterated the fact that he returned to camp with Fowler the morning of 8 December (R142).

Detective Inspector William Draper, Essex Constabulary, who was with Graham when accused made the statement of 13 December, similarly testified that Graham informed accused at the start that he would be questioned about the murder of a taxi driver (R148). Accused said nothing about spending a night in London with a girl named Jean, stated that he spent the night of 7 December, the night of the murder, at Freddie's house with girls named Constance and Christine, and that he returned to camp with Fowler and arrived after the mid-day meal (R149).

Fowler testified that he was in bed the first time that he saw accused after this happened. Accused came to his hut one evening and said that "deceased was dead". They did not discuss an alibi (R154). He went to accused's hut the same night but denied asking him to say that he (Fowler) returned with him from London. Accused had an overcoat when they went to London, did not have one on his return but wore the officer's raincoat (Pros.Ex.1) when he strangled the taxi driver (R155-156).

6. Huntley, recalled as a witness by the court, testified that no other soldiers accompanied him on his return by train from London, and that when he spent the night at Freddie's (6 December) accused, Harrison and another soldier were present (R157).

7. It was stipulated by the prosecution and defense that if Private Edward E. Hairlson, Company F, 356th Engineers, were present he would testify that he went to London by train 6 December and spent the night at Freddie's house with Huntley. Accused was also there. Hairlson and Huntley spent the night of 7 December at Rowton House but accused was not with them. Hairlson saw accused on 7 December during the day and early evening, but he did not know where he went that night (R158).

8. "Robbery is 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 (Underscoring supplied)).

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"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1928, sec.148a, p.162).

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life * * *. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark).

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

Robbery inherently involves the element of violence upon the person and it is a probable, natural and reasonable consequence of an attempt to commit robbery that a human life will be destroyed (United States v. Boyd, 45 Fed. 851, 862 - reversed on other grounds in 142 U.S. 450; Marcus v. United States, 86 Fed. (2d) 854, 861).

"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'" (1 Wharton's Criminal Law, sec.420, p. 632).

"In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defence appears, the accused must show that the act

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was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law" (Winthrop's Military Law & Precedents - Reprint - p.673).

In view of the foregoing authorities the Board of Review is of the opinion that the direct evidence in the form of Fowler's testimony, together with the circumstantial evidence clearly supported the findings of guilty of both charges and specifications.

On the train to Colchester accused told Fowler who had loaned him five shillings in London, that he needed money to pay his bills and suggested that they take a cab at Colchester and rob the driver. He made the same suggestion at Colchester when they entered the cab. On the way to camp he deliberately and cold bloodedly beat and strangled Hailstone, dragged him into the rear of the car, searched his pockets and removed his wallet, cigarette lighter and some papers. Dr. Camps' testimony clearly established the fact that Hailstone's death was caused by strangulation. It was his opinion that certain marks on deceased's neck could not have been caused by a person with pointed finger nails, but were caused by a person with rounded nails. Accused's nails were rounded. With Fowler's aid accused disposed of the body. An empty wallet was found on the floor of the car and Fowler later saw the lighter in accused's possession at the camp on 8 or 9 December. Bloodstains, insufficient for grouping purposes, were found on accused's blouse, trousers and khaki shirt. The officer's raincoat loaned by Fowler and worn by accused during the commission of the crime, and his long underwear were stained with blood belonging to group AB. Hailstone's blood belonged to group AB, a comparatively rare type of blood, and deceased's raincoat, shirt and trousers were stained with blood of the AB group. The rear seat of the car was also stained with blood of this group. Scrapings from accused's finger nails disclosed the presence of human blood, insufficient for grouping purposes, on all fingers of both hands and also the presence of blue fibres which were similar to those in Hailstone's blue jacket and also to those found in the nails of Hailstone and Fowler. The bloodstained raincoat and blue jacket belonging to deceased were found in the cab. The sleeves of both the raincoat and jacket were turned inside-out, the sleeves of the raincoat were inside the jacket, and it appeared that the clothing "had been dragged off someone".

Fowler testified that accused wore an overcoat when they went to London but did not have one when he returned on 7 December. Although accused claimed that he wore his overcoat when he returned from London on 8 December, and that it was "in my company" at the time of trial, it was not produced by the defense and an unsuccessful search for it was made prior to trial by Lieutenant Regan.

Fowler's testimony constituted the only direct evidence concerning the commission of the crime. Although Fowler was also separately charged with and found guilty of the murder of Hailstone (CM ETO 1453, Fowler), his testimony in the instant case was consistent with the other evidence. His

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credibility was a matter for the sole consideration of the court, and in view of the fact that his testimony was supported by other substantial and competent evidence, the Board of Review will not disturb the findings.

The purpose of most of the evidence introduced by the defense was to establish an alibi, namely, that accused was in London when Hailstone was killed, that he was with Mrs. Von Splang from about 8:45 p.m. 7 December until the following morning when he talked with Miss Peters, and that he did not leave London for Colchester until about 10:45 a.m. 8 December. Accused's testimony that he spent the night of 7 December with Mrs. Von Splang varied from the statement made to Graham, wherein he said that he spent that night at Freddie's. He refused to change the statement during subsequent days of interrogation. Insofar as the alibi evidence was in conflict with the prosecution's evidence, an issue of fact was created. It was the duty and function of the court to resolve the conflict, to weigh and evaluate the evidence and to judge the credibility of all witnesses. Plainly accused named Huntley, who was with him for a time in London, as his companion on the return trip to camp instead of Fowler, with the intent of both discrediting Fowler's story and strengthening his own claim of alibi. The fact that blood of a rare type but similar to that of deceased, was found on the clothing of accused and his unconvincing attempts to explain their presence, is most damaging evidence against the accused. There is substantial, competent evidence to sustain the court's finding that accused strangled and robbed Hailstone at the time and place alleged in the specifications and such finding is, therefore, binding on the Board of Review (CM ETO 492, Lewis; CM ETO 503, Richmond; CM ETO 531, McLurkin; CM ETO 559, Monsalve).

9. No evidence was introduced concerning the value of the lighter. The only evidence regarding the value of the wallet was that of the witness Pearce with whom deceased lived, who testified that its market value was "seven and sixpence" (R39). It is reasonable to infer that the articles had some value, and the value of the articles had no bearing on the limitations of punishment imposable for robbery (MCM, 1928, par.104c, p.99).

10. Attached to the record of trial is a recommendation for clemency by the defense counsel addressed to the reviewing authority.

11. The charge sheet shows that accused is 21 years 11 months of age, and was inducted at Camp Shelby, Mississippi 16 October 1942 for the duration of the war plus six months. He had no prior service.

12. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The penalty for murder is death or life imprisonment as a court-martial may direct (AW 92). The sentence that accused be hanged by the neck until dead is legal (CM ETO 255, Cobb; CM ETO

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438, Smith; CM ETO 969, Davis; CM ETO 1161, Waters; MCM, 1928, par.103a,
p.93).

B. Franklin _____ Judge Advocate
Edward Bonastre _____ Judge Advocate
Howard H. Long _____ Judge Advocate

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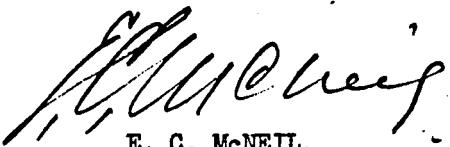
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WD, Branch Office TJAG., with ETOUSA. 26 APR 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Private J. C. (I.O.) LEATHERHERRY (34472451), Company "A", 356th Engineer General Service Regiment, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings 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 1621. For convenience of reference please place that number in brackets at the end of the order: (ETO 1621).

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 26, ETO, 1 May 1944)

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

BOARD OF REVIEW

-5 MAY 1944

ETO 1629

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

THIRD ARMORED DIVISION

v.)
Private THOMAS F. O'DONNELL)
(32729271), 143rd Armored)
Signal Company.)

Trial by G.C.M., convened at APO
253, U. S. Army, 1 March 1944.
Sentence: Dishonorable discharge
(suspended); total forfeitures
and confinement at hard labor for
15 years. The 2912th Disciplinary
Training Center, Shepton Mallet,
Somerset, England.

HOLDING by the BOARD OF REVIEW
RITTER, VAN BENSCHOOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Thomas F. O'Donnell,
143rd Armored Signal Company, did, at Cucklington,
Somerset, England, on or about 9 January
1944 desert the service of the United States
and did remain absent in desertion until he
surrendered himself at Bournemouth, England on
or about 16 February 1944.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of two previous convictions by summary court for absence without leave for 11 and three 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

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hard labor, at such place as the reviewing authority may direct, for 15 years. The reviewing authority approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

The result of the trial was promulgated in General Court-Martial Orders No.3, Headquarters Third Armored Division, APO 253, dated 3 March 1944.

3. The evidence for the prosecution shows that accused became a member of the 143rd Armored Signal Company about 5 December 1943 (R7). On 7 January 1944 he was granted a 36 hour pass expiring the following midnight (R8). Upon his departure from his organization on 7 January he took with him no equipment "other than possibly his musette bag and the gas mask which they normally carry" (R7). He failed to return to his organization upon the expiration of his pass but remained absent without leave from 0001 hours 9 January to 2230 hours 16 February 1944 when he voluntarily surrendered to military police in Bournemouth, Hampshire, where he was detained until guards from his own unit arrived to take him in custody 18 February 1944 (R7,9-10; Ex."A"). Upon his return to his organization he was wearing a Class "A" uniform (R7).

4. The only evidence for the defense was the testimony of accused, who, after being advised of his rights as a witness, elected to take the stand and be sworn (R10). He testified that he knew the penalty for desertion in time of war before he went absent without leave. He was dressed in a Class "A" uniform when he left his company on pass and was identically clad when he returned. He wore the American soldier's uniform at all times during his absence. Upon his departure from the company on 7 January, he took with him only his gas mask, no toilet articles and no personal possessions (R11). After his pass expired, he made inquiries as to bus or rail transportation back to his unit, but, "' kinda missed my train the first time and I never did get back; that is all" (R11-12).

On cross-examination, he testified that after he missed his train from Bournemouth, which was about a two hour train ride from his station, upon the occasion of his initial effort to return from his 36 hour pass, no one told him how long he would have to wait before he could travel by the next train. He believed he was gone altogether for 37 days. The remainder of his cross-examination is quoted verbatim:

*Q. Can you explain to the court or give the Court any reason why you remained absent for 37 days?

A. No sir.

Q. No explanation at all?

A. No sir.

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Q. There is not one thing, cause or reason why you stayed away for that length of time?

A. No sir.

TJA: No further questions" (R12)

5. The question presented is whether or not, under prevailing conditions in the European Theater of Operations, proof of a soldier's wholly unexplained absence without leave from his station in England, for a period of 37 days terminated by voluntary surrender is legally sufficient to support the inference, essential to the validity of his conviction of desertion, that he intended not to return.

"Intent.- 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).

"Such inference may be drawn from such circumstances as * * * that while absent he was in the neighborhood of military posts and did not surrender to the military authorities; * * *. The fact that a soldier intends to report or actually reports at another station does not, on the one hand, prevent a conviction for desertion, as such fact in connection with other circumstances may tend to establish his intention not to return to his proper place of duty. On the other hand, a soldier absent without leave from his place of service and without funds may report to another station for transportation back to his original place of duty, and such a circumstances (sic) would, of course, tend to negative the existence of such intent. No general rule can be laid down as to the effect to be given to an intention to report or an actual reporting at another station" (ibid., p.144).

"Unauthorized absence is not conclusive or even prima facie evidence of the requisite intent to establish desertion. However, prolonged absence without leave, unexplained may be sufficient to establish the necessary intent to remain permanently absent from the service. 251.19, Jan.28, 1919." (Dig.Op.JAG, 1912-1940, sec.416(9), p.269).

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"Determination of the question as to whether an absence is 'much prolonged' or satisfactorily explained, within the meaning of par.130a, M.C.M., must depend upon the circumstances of the absence. An arbitrary yardstick of time may not be applied.
* * * CM 213817(1940)" (Dig.Op.JAG, 1912-1940, sec.416(9), p.270).

The offense occurred in an active theater of operation in an allied foreign country, subject to intermittent attack from air, sea and land; and was, in its compact entirety, at that time, the base and starting point of American and allied military operations of the greatest magnitude and of supreme importance. There was then hardly a town in England that was not in the neighborhood of an American military post; certainly there were many such posts in and around Bournemouth, where accused admits he was when his leave expired and where he voluntarily, surrendered "to the patrol of the office of Assistant Provost Marshall, XVIII District," thirty-seven days later. In the absence of exceptional circumstances - and none are shown - no reasonable ground existed for an assumption that accused's unit, an armored signal company, would remain at any one station in England or in the country itself except on a day to day basis.

In deciding that:

"Mere absence for a short period * * * is not desertion in the absence of other circumstances indicating an intent to remain away permanently."

a recent holding of the Board of Review (sitting in Washington D.C.) asserts that:

"While such circumstances occur more frequently during war than peace, the mere fact that it is time of war does not make a short absence desertion. CM 226261 (1942)" (Bull. JAG, Nov 1942, Vol.1, No.6, sec.416(9), p.325).

Winthrop, on the other hand, while recognizing that:

"To infer such intent /not to return/ solely from unauthorized absence of but brief duration, especially if followed by a voluntary return, will commonly be unwarranted,"

significantly qualifies the rule by adding to his statement of it that:

"an absence, however, for a few days or even a part of a day, may, under certain circumstances, fully justify such an inference;

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and, in time of war, an absence of slight duration may be as significant as a considerably longer one in time of peace."
(Winthrop's Military Law & Precedents - Reprint - p.638). (Underscoring supplied).

To the extent that the view expressed in the foregoing quotation from the Bulletin conflicts with Winthrop's qualification of the rule, the latter appears to be sounder when applied in an active theater of operation subject to enemy attack.

In the instant case, accused's own testimony shows that when his pass expired he was at Bournemouth, which is but a two-hours' train ride from his station. He was also at Bournemouth when he surrendered. Whether he spent the intervening 37 days there or elsewhere is not disclosed by the record. In either case, his unauthorized absence for the period shown under prevailing conditions, without any explanation whatsoever, is wholly consistent with the court's inference that at some time during the period of his absence he intended not to return. The fact that he surrendered in uniform, and possibly wore it throughout his absence, is without significance as it is wellknown that a man of military age is safer from inquiry by the police if in uniform than if he wore civilian clothes. "A prompt repentance and return, while material in extenuation, is no defense" (MCM, 1928, par.130a, p.142). Under the circumstances shown, the accused's "repentance and return" are not entitled to be characterized as "prompt". The fact is not wholly without significance that, when he went absent without leave, accused had been a member of his organization for only a month, and the period of his unauthorized absence appreciably exceeded his length of service with his company. The court properly took judicial notice of prevailing conditions in the United Kingdom insofar as they affected the armed forces of the United States. The question involved was one of fact to be determined by the court which saw the accused and heard him testify.

When there was submitted competent proof of a substantial nature that accused was absent without leave for 37 days from his organization in England under existing conditions, the burden was cast upon him to go forward with the proof - the "burden of explanation" - and to show that, during the period of his unauthorized absence he intended to return to the service (CM ETO 1317, Bentley; CM ETO 527, Astrella). Although he took the stand under oath and was not only given every opportunity to explain his absence without leave, but was also repeatedly interrogated with reference thereto, he pointedly refused to offer any explanation whatsoever, save only that he missed his train on his attempted return to his station after the expiration of his pass. Such fact alone is wholly inadequate to defeat the inference of intent not to return, a reasonable and just inference to be drawn from the prosecution's evidence. The issue as to whether the accused was guilty of desertion in remaining absent without leave, under the circumstances was one of fact to be decided by the court upon all of the evidence in the case. The Board of Review therefore is of the opinion that the record of trial is

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legally sufficient to support the findings of guilty and the sentence (CM ETO 1603, Haggard and authorities therein cited).

Both the duration of accused's unauthorized absence and the complete failure of the defense to discharge the burden of explanation which the prosecution's evidence placed upon it, distinguish this case from CM ETO 1567, Spicocchi.

6. The charge sheet shows that the accused is 20 years of age and that he was inducted 22 January 1943, transferred to Enlisted Reserve Corps 22 January 1943; recalled to active duty 29 January 1943 at Camp Upton New York.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial.

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

B. Franklin Atte Judge Advocate

Stanley Burashkin Judge Advocate

Ellwood H. Haggard Judge Advocate

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

BOARD OF REVIEW

20 MAY 1944

ETO 1631

U N I T E D S T A T E S) ICELAND BASE COMMAND.

v.

First Lieutenant MARCUS L.
PEPPER (O-398414), 422nd
Quartermaster Laundry
Company.

Trial by G.C.M., convened at Camp
Curtis, Iceland, 8-9 February 1944.
Sentence: Dismissal and confine-
ment at hard labor for two years.
Eastern Branch, United States Dis-
ciplinary Barracks, Greenhaven, New
York.

HOLDING by the BOARD OF REVIEW
RITTER, VAN BEN SCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE I: Violation of the 94th Article of War.

Specification 1: In that First Lieutenant Marcus L.

Pepper, Quartermaster Corps, 422nd Quartermaster
Laundry Company, then Quartermaster Sales Officer,
United States Army Forces in Iceland, did, at
Camp Curtis, Iceland, on or about 27 January 1943,
knowingly and willfully misappropriate 2614.45
Icelandic kromur, of the value of \$403.92, prop-
erty of the United States, intended for the
military service thereof.

Specification 2: In that * * *, did, at Camp Curtis,
Iceland, on or about 20 February 1943, knowingly
and willfully misappropriate 3251.43 Icelandic
kromur, of the value of \$502.33, property of the
United States, intended for the military service
thereof.

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Specification 3: In that * * *, did, at Camp Curtis, Iceland, on or about 21 February 1943, knowingly and willfully misappropriate 1779.99 Icelandic kronur, of the value of \$275.00, property of the United States, intended for the military service thereof.

Specification 4: In that * * *, did, at Camp Curtis, Iceland, on or about 11 March 1943, knowingly and willfully misappropriate 1741.09 Icelandic kronur, of the value of \$268.99, property of the United States, intended for the military service thereof.

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

Specification 1: In that * * *, at Camp Pershing, Iceland, on or about 24 December 1943, in his testimony before Lieutenant Colonel Louis E. Marshall, I.G.D., Base Inspector General, Iceland Base Command, in his response to the following questions asked him by said Lieutenant Colonel Louis E. Marshall made under oath the following statements:

"Q. (The record of the Board says) that you were present during the open session of the Board; is that right?

"A. No, Sir.

"Q. And were afforded full opportunity to cross-examine witnesses; is that right?

"A. No, Sir.

"Q. That you were given an opportunity to present evidence in your behalf, and to testify in person; is that right?

"A. No, Sir.

"Q. Or submit a written statement, or submit a brief; is that right?

"A. No, Sir."

which statements he did not then believe to be true.

Specification 2: (As amended before arraignment). In that * * *, having received 15,186.55 Icelandic kronur of the value of \$2,346.24, public money which he was not authorized to retain as salary, pay, or emolument, did, at Camp Curtis, Iceland, on or about 11 December 1942, wrongfully fail to render his accounts for the same as provided by law, same being in violation of Sec. 176, Title 18, United States Code.

* The words "then Quartermaster Sales Officer, United States Army Forces in Iceland," omitted from this Specification.

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He pleaded not guilty to all charges and specifications and was found guilty of Charge I and its specifications, of Charge II and Specification 2 thereof, and not guilty of Specification 1 of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years at such place as the reviewing authority may direct. The reviewing authority, the Commanding General of the Iceland Base Command, approved the sentence and forwarded the record pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but remitted three years of the confinement at hard labor imposed and so much of the sentence as pertains to forfeiture of pay and allowances due or to become due, and withheld the order directing execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that accused was on duty in Iceland from September 1941 through March 1943 (R10,58) and during that time acted as Quartermaster sales officer directly under and accountable to the Base Quartermaster, and also as subsistence officer under and accountable to the Supply Officer for the Base Quartermaster. It was estimated that during this period he issued approximately ten million dollars in value of Army subsistence supplies and made possibly ten thousand dollars per week local purchases of food stuffs (R58-59). The sales commissary was located at Langholt but the office of accused was at Camp Curtis which he shared with the Supply Officer for the Base Quartermaster (R77). Accused and the Supply Officer jointly had the services of a chief clerk who also shared their office. The clerk received moneys, checks and documents for accused (R15) and receipted bills in his name and by his authority (R18). He also handled all the money which came into the office (R69). Accused and the chief clerk each kept on their desk an indorsement stamp "Marcus L. Pepper, 1st Lt., Quartermaster Sales Officer." The cash sales book of accused was kept in the chief clerk's safe to which the clerk had the only key. Accused had access to the safe but only with the clerk's key (R71). The daily receipts of the sales commissary at Langholt of three to four thousand dollars were listed on Quartermaster Forms 388, and the totals then transferred to Form 389, which with the money, was taken to the finance office at Camp Curtis. Checks were first taken to accused to indorse and then were taken to the Finance office for deposit (R61). Some cash sales were made at the Quartermaster sales office; in such cases Form 388 was prepared there (R66).

(a) I. Ingebrightsen, RNN, Norwegian Naval Liaison Office, Reykjavik, Iceland, a supply officer for the Norwegian Navy (R10), testified that as such supply officer he bought provisions for the Norwegian Navy from accused at the sales commissary. He identified original check number 57622 drawn on the Landsbanki Islands, dated 26 January 1943, payable to accused, Sales Officer, signed by the Norwegian Liaison Officer and Paymaster, in the amount of 2614.45 kronur, which check Ingebrightsen himself delivered to accused (R11). This check was in payment of merchandise described on sales slip No. 4360905, a cash purchase in the amount of 2614.45 kronur or \$403.92 (R12). A photostatic copy of the sales slip was admitted in evidence as

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Pros.Ex.A (R13). Ingebrightsen identified the photostatic copy of the sales slip by his signature appearing thereon (R12).

He also identified original check No. 57650, drawn on the Landsbanki Islands, dated 16 February 1943, payable to accused, signed by the Norwegian Liaison Officer and the Paymaster, in the amount of 3251.43 kromur, which check he also took to the sales office and received a receipt therefor. He also identified a photostatic copy of sales slip marked "Cash Purchases", No. 4360907 as the bill of goods for which check 57650 was given in payment, which photostatic copy of sales slip was admitted in evidence as Pros.Ex.B (R13).

With respect to Pros.Exs. A and B, Ingebrightsen testified that the original sales slips were not available in Iceland as they had been transmitted to the Norwegian Government at London, England (R12,13).

He also identified original check No. 70051, drawn on the Landsbanki Islands, dated 19 February 1943, payable to accused, in the amount of 1779.99 kronur. He testified he delivered the check to the sales office, receiving therefor a sales slip marked "Cash Purchases", No. 4360908 as the receipt for said check No. 70051. The original of this sales slip photostatic copy of which was admitted in evidence as Pros.Ex.C, was also at the London office of the Norwegian Government (R14). Checks were always delivered to either Sergeant McDowell or accused (R15).

(b) Private Augusta L. McDowell, 215th Quartermaster Company, testified that he was chief clerk in the subsistence office at Camp Curtis in March 1943. That office was located at the same place as the sales office. He worked under accused and Colonel Patterson (R15). He was then a Sergeant. As part of his duties he received from purchasers of goods from the sales officer, checks in payment of same and received bills upon delivery of the checks.

He identified a photostatic copy of a bill for subsistence supplies totalling an amount of \$268.99 (1741.09 Kr.) to the Norwegian Hospital, marked at the bottom "Paid 8/3/43" bearing the name of "Marcus L. Pepper" with the initials "ALM" below it, as a bill which he received by signing accused's name with his own initials under it. The Trial Judge Advocate asserted that the original bill was not available (R16). This bill was received in evidence as Pros.Ex.D (R18). When he received the bill he was given a check in payment of it (R16). He handed the check to accused for indorsement. By the similarity in the amount, he recognized a photostatic copy of check No. 72753, drawn on the Landsbanki Islands, dated 8 March 1943 for 1741.09 kronur, payable to the "Sales Officer, USAF". The date of the check corresponded with the date the bill was received and the maker of the check belonged to the Norwegian Hospital organization. The photostatic copy of the face and reverse of check No. 72753 were admitted in evidence as Pros.Ex.E. The Trial Judge Advocate asserted that the original was not available (R17). Witness testified that by authority of accused, he

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customarily signed accused's name to these bills and initialed them (R17-18).

On being recalled later in the trial, McDowell remembered receipt by the Quartermaster Sales Officer of two checks from the British Sea Transport Office about the first of December 1942. These checks were deposited with the finance office. At the time of the deposit of the checks at the finance office, the checks were substituted in the sales commissary for an equal amount of cash which was then locked in the safe. A day or two later accused asked for the money in order to return it to Commander Hart. Witness made a note of it and put it in an envelope which he placed on accused's desk (R50-51). McDowell's action in depositing the checks into the sales commissary spot deposit and withdrawing the cash was a regular matter of practice "on orders of the Finance Officer that checks be cleared in 24 hours". Cash deposits were made within 15 days to a month's time after receiving same.

Commander Hart brought these checks in to the office himself (R51). They were handed to accused for indorsement, substituted for cash in the sales commissary spot deposit and then sent to the finance office (R52).

(c) Captain Albert W. Thompson, Finance Department, was stationed at Camp Curtis from December 1942 until March 1943 during which time he was property officer in the Base Finance Office. Accused was Sales Officer for the Iceland Base Command during this period. Under authority of AR 35-6660 Thompson audited accused's accounts. He examined sales tickets in support of "Forms 389 representing cash turned into the finance office" from 1 January to 31 March 1943, that is, the deposits made with the finance officer by the Quartermaster Sales Officer (R18).

He did not find in his examination any evidence of the sales reported by sales slips 4360905, Pros.Ex.A, 4360907, Pros.Ex.B, or 4360908, Pros.Ex.C. Nor did he find any record of the transaction with the Norwegian Hospital reported by unnumbered bill marked "Paid, 8/3/43" (R19).

The total of the cash sale tickets examined in making the audit, except for \$2.95, equaled the total of deposits with the disbursing officer on the Forms 389.

He identified the first indorsement on the back of original check No. 57622, dated 26 Jan 1943, for 2614.45 kronur (R19) as accused's signature. It was received in evidence as Pros.Ex.F (R20). A photostatic copy thereof was attached to the record of trial in lieu of the original.

He identified the first indorsement on the back of original check No. 57650 dated 16 February 1943, for 3251.43 kronur as accused's signature. It was received in evidence as Pros.Ex.G (R20). A photostatic copy thereof was attached to the record of trial in lieu of the original.

He identified the first indorsement on the back of original check No. 70051, dated 19 February 1943, for 1779.99 kronur as accused's signature.

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It was received in evidence as Pros.Ex.H (R20). A photostatic copy thereof was attached to the record of trial in lieu of the original.

He identified the second indorsement on the back of photostatic copy of check (Pros.Ex.E) No. 72753, dated 8 March 1943 in the amount of 1741.09 kronur as the signature of Major E. L. Brinckmann, Base Finance Officer.

From the records of deposits in Landsbanki Islands by the Base Finance Officer, he produced a deposit slip for 28 January 1943, prepared in the accounting section of the Base Finance Office on forms furnished by the Landsbanki Islands, showing the date of each check, its number, account number at the bank on which check was drawn and the amount, which deposit slip showing 10,951.93 kronur deposited in Landsbanki Islands by Charles S. Denny, Finance Department was received in evidence as Pros.Ex.I (R21). The deposit slip lists check No. 57622, (Pros.Ex.F) dated 26 January 1943, bank No. 3586, drawn on the Landsbanki for 2614.45 kronur.

From the same source, he produced a deposit slip of 22 February 1943, representing a deposit of checks in Landsbanki Islands to the credit of account of Colonel Charles S. Denny which was admitted in evidence as Pros.Ex.J. It lists check No. 57650, (Pros.Ex.G) dated 16 February 1943 in the amount of 3251.43 kronur, and also check No. 70051, (Pros.Ex.H) dated 19 February 1943, for 1779.99 kronur (R22).

From the same source, he produced deposit slip of 12 March 1943, representing funds deposited in Landsbanki Islands to credit of the account of Major E. L. Brinckmann, account No. 4120, in the amount of 1741.09 kronur, which deposit slip was received in evidence as Pros.Ex.K. It lists check No. 72753, (Pros.Ex.E) account No. 3429 dated 8 March 1943, in the amount of 1741.09 kronur.

Witness stated that although the total of these cash sales slips examined in the audit equaled the total of the deposits by the Sales Officer to the Finance Officer, there were no records revealing the transactions represented by sales slips (Pros.Exs. A,B,C), nor the transaction represented by the receipted bill (Pros.Ex.D). "The only way you can account for them is that the check was substituted for other sales and the proceeds withheld" (R24).

The audit covered a period commencing about the first of October 1941 through March 1943 but was not completed in the sense that the irregularities and inconsistencies which were found were not cleared (R29). It was not possible to reconcile the records so as to establish the figures that are not in agreement. The audit was completed by including a list of the irregularities and discrepancies (R20).

Captain Thompson produced from the files of the Finance Officer the original deposit slip of 11 December 1942, showing the deposit of 15,186.55 kronur to credit of the account of Charles S. Denny, account No. 3516, to

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the Landsbanki Islands. This deposit slip, containing reference to checks No. 53035 (Pros.Ex.L) and No. 53036 (Pros.Ex.N) was admitted in evidence as Pros.Ex.P (R47-48). He identified the indorsement of Charles S. Denry, Base Finance Officer, on the back of check No. 53035 (Pros.Ex.L) and on the back of check No. 53036 (Pros.Ex.N). He found no record of the transactions shown by Pros.Ex.M, or of Pros.Ex.O, the received bills of subsistence stores charged to the British Navy Sea Transports SS "DEKBRIST" and SS "YAKA" respectively, in the audit of the accounts of accused. They appeared in the accounts of Lieutenant Saum in May. The audit for the month of December 1942, showed that the deposits by the Sales Officer with the Finance Officer agreed with the amounts reported on Form 389 and that there were sales tickets accounting for amounts equal to the funds actually turned in, but there was no record of these two mentioned items. This could only be accounted for by the fact that "the checks went through and were substituted for cash on other sales" (R48).

(d) Lieutenant Commander Erick Hart, RNR, Paymaster of British Sea Transport, Reykjavik, Iceland testified that since 1941 he did business with accused as Sales Officer. He purchased from accused subsistence stores for the ship YAKA and the ship DEKBRIST, being cash transactions paid by checks (R38). He identified original check No. 53035, dated 10 December 1942, in the sum of 12,230.77 kromur, drawn on the Landsbanki Islands and payable to the United States Sales Officer as a check he had counter-signed (R38) and personally given to accused in the Sea Transport office in Hekla Square, Reykjavik (R39). Accused at the time of receiving the check received the bill for the items for which Hart paid (R39). A few days later accused came to him and said the money would have to be refunded as he had no authority to take money from the Sea Transport. However, accused did not refund it and though Hart saw him frequently and mentioned the matter on several occasions, it was not refunded until the last week in April or the first week in May 1943 (R39), when it was refunded by accused at the Sea Transport Office in Reykjavik in cash. Check No. 53035 was admitted in evidence as Pros.Ex.L. A photostatic copy thereof was substituted and attached to the record by authority of the court (R40).

Hart also identified a paper marked "Shipping Ticket," on War Department QMC Form No. 434, dated 24 October 1942, containing a list of items shipped to the British Navy Sea Transport SS "DEKBRIST". The document bore the word "paid" and was receipted by accused by use of his stamp. It was delivered by accused to witness. The original copy of same had been sent to London. It was the bill for which he gave check No. 53035 (Pros.Ex.L) in payment (R40-41). It was received in evidence as Pros.Ex.M. By authority of the court a certified copy thereof was substituted and attached to the record (R41).

He also identified original check No. 53036, dated 10 December 1942, in the amount of 2955.78 kromur, drawn on the Landsbanki Islands, counter-signed by him, payable to the United States Sales Officer as a check paid at the same time and place to accused with the previous check (Pros.Ex.L). The

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original check was admitted in evidence as Pros.Ex.N, but a photostatic copy thereof was substituted and attached to the record by authority of the court (R40).

He also identified, as a copy of the original, a "shipping ticket" dated 24 October 1942 on War Department QMC Form No. 434, of items delivered to the British Navy Sea Transport SS "YAKA", given to him by accused in the Sea Transport Office, as being the bill covered by check No. 53036 (Pros.Ex.N). It was admitted in evidence as Pros.Ex.O, but by authority of the court a certified copy thereof was substituted and attached to the record (R42-43).

The conversations between Hart and accused in regard to the refund and the refund itself when made covered both checks (Pros.Exs. L and N) (R43). After receiving the refund the bills (Pros.Exs. M and O) were then paid by Hart to the Sales Commissary, Lieutenant Saum, on 23 May 1943 (R44).

(e) Lieutenant Colonel Louis E. Marshall, Base Inspector General, Headquarters Iceland Base Command, testified that in the performance of his duties he had occasion to question accused under oath about 24 December 1943 concerning proceedings before a Board of Officers which had investigated his accounts as Sales Officer. He asked accused whether or not he was present at open sessions of the board and accused answered "No". He asked accused whether or not he had had opportunity to cross-examine witnesses and accused answered that he had not. He asked accused if he had been given opportunity to present evidence in his behalf or submit a brief or make a statement to which he replied in the negative. He asked accused if he had opportunity to be represented at sessions of the board by counsel of his own choice, to which accused replied in the negative (R33).

Later in the interrogation accused was shown portions of the record of the proceedings of said board as a result of which accused admitted he was present at sessions of the board and cross-examined some of the witnesses. He also admitted he had been given opportunity to present evidence and submit a brief on his own behalf (R34).

(f) Major Alvah W. Swain, 378th Anti-Aircraft AW Battalion, Iceland, testified that he had been a member of a Board of Officers appointed to investigate the accounts of accused as Sales Officer in 1943 and attended all meetings of the Board; that accused was present at all open sessions of the Board, and was in every case, either personally or by examination of written testimony, given opportunity by the Board to cross-examine witnesses and that on at least one occasion accused did cross-examine witnesses (R35). Accused was also given the opportunity to submit evidence in his own behalf and to submit a written statement or brief (R36).

4. The evidence presented by the defense was substantially as follows:

(a) Major Thomas L. Huffstutler, 700th Quartermaster Battalion, Camp Jeffersonville, Iceland, testified that he was in the office of the

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Base Quartermaster in various capacities from September 1941 until March 1943; that the subsistence issued by accused during that time, he would "guess," would amount to approximately ten million dollars and local purchases of food^{stuff} by accused, he would "guess might run to ten thousand dollars a week." The work at time of trial was much less as there were fewer troops in Iceland, fewer camps, and better storage facilities (R59).

(b) Technical Sergeant Amos Jackson, Headquarters 700th Quartermaster Battalion, testified he was book-keeper at the sales commissary at Langholt from October 1942 to April 1943 and made deposits of cash from the sales commissary with the Finance Officer at Camp Curtis. At the end of each day the sales totals were written up on Forms 388 and the totals were carried to Form 389 which was taken to the finance office at Camp Curtis. Checks were taken to the Quartermaster Office where accused indorsed them. They were then taken to the finance office for deposit. Sales amounted to three or four thousand dollars a day (R61). Jackson testified he was familiar with accused's signature but was unable to identify the initials "MLP" on Pros.Exs. A and B as those of accused nor did he recognize accused's hand-writing on Pros.Ex.C (R62). He was positive that the endorsement of accused's name over the stamp "Marcus L. Pepper, 1st Lt. QM Corps" on Pros.Ex.E was not the signature of accused. He was not sure of the identification of the endorsement on the check Pros.Ex.F, and was sure the endorsement on the check Pros.Ex.G was not accused's signature (R63). Jackson testified he had been a clerk for eight years and manager for one year of an "A. and P." chain store and was not a handwriting expert (R64). He further testified that some cash sales were made at the "QMC" office in addition to the sales at the commissary, and that if cash sales for subsistence were made to the Royal Norwegian Navy at the Quartermaster Sales Office, they would be entered on different "388s" made there (R66). All subsistence sales should have been made at the Langholt commissary. He handled any cash or checks paid for sales and would deposit them with the finance officer after the checks were indorsed by accused (R67).

(c) Private Augusta L. McDowell recalled as a witness for the defense, explained that any person who desired to make a purchase came to the subsistence office, and an informal slip would be made of the items he wanted and which could be sold to him. If cash or check were paid, the slip would be receipted. If a check were received, it was given to accused for indorsement and then it was put into the commissary spot deposit and an equal amount of cash for the sale was taken out. This was a regular procedure and it was done "to clear checks in 24 hours" (R68-69). He testified he was familiar with accused's signature but that neither he nor anyone else was authorized to indorse checks for accused. He was not able to identify the signature of accused on Pros.Exs. E and G. He stated the indorsement on Pros.Ex.F was the signature of accused but that the indorsement on Pros.Ex.H was not accused's signature. One of the indorsement stamps "Marcus L. Pepper, 1st Lt., Quartermaster Sales Officer" was kept on McDowell's desk and one on accused's desk. The cash sales book was kept in the safe of which he had the only key. Accused had access to the safe

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with the same key (R70-71).

(d) Captain Robert O. Bishop, Quartermaster Corps, testified that he relieved accused as Base Subsistence Officer. While at time of trial there were less than half the troops to supply than were supplied when accused was subsistence officer, he had an assistant and both were busy all the time (R75-76).

(e) Lieutenant Colonel William R. Patterson, Quartermaster Corps, Iceland, testified that he was supply officer for the Quartermaster in Iceland until August 1943 during which time he shared an office with accused who was Subsistence Officer and Sales Officer. He estimated the value of rations during December 1942 until March 1943 at about \$40,000 per day which accused handled without an assistant. At time of trial he testified that based on strength, it would amount to less than half that amount although the present subsistence officer had an assistant. He made the same proportionate estimate as to the work of the Sales Officer who also has an assistant (R78). He had never seen accused substitute cash for a check nor handle any cash transaction (R79). He remembered the two British Sea Transport checks "accepted through error * * * so we reimbursed Commander Hart" (R80). He testified that he was familiar with accused's handwriting. He denied that Pros.Exs. A, B and C contained accused's handwriting and also denied that the endorsements on Pros.Exs. E,F,G and H were accused's signatures. He further testified that Commander Hart received his refund on the Sea Transport about a week or ten days after the money was received from him (R81,85). He admitted he was out of the office most of the time and would not know what accused did in his absence (R83). There would be no occasion where accused would be justified in holding an amount of \$2346.24 or 15,186.55 kromur in his office for a period of a month or more. He testified that the British Sea Transport money in the form of checks was "turned into finance" with the spot deposit of the sales commissary but he did not know whether proper accounts were rendered to finance to account for the money (R85). He testified that the refund cash to Commander Hart from accused came from the safe in the office which represented cash received in the office in payment for cash sales (R87).

5. Accused elected to remain silent.

6. In rebuttal testimony, Major Swain testified that the Commanding General of the Iceland Base Command appointed the Board of Officers on 19 May 1943 to investigate and report on the status of the commissary sales accounts of that station for the period of September 1941 to March 1943; that in execution of its duties the board audited accused's accounts and examined all the records of commissary accounts which had been submitted to the finance officer (R92-93). He personally checked the record of deposits by the Quartermaster Sales Officer with the Base Finance Officer and traced the deposits to the source of the money (R93). He found no record of the transaction indicated on Pros.Ex.A, sales slip No. 4360905, nor of the

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transaction indicated on Pros.Ex.B, sales slip No. 4360907, nor of the transaction indicated on Pros.Ex.C, sales slip No. 4360908, nor of Pros.Ex.D, being the bill of the Norwegian Hospital marked "Paid", dated 8 March 1943. He testified that he never saw the originals of Pros.Exs. A, B and C. With respect to the Norwegian Hospital bill, photostatic copies of its sales slips were obtained in response to a letter written to the Hospital. He testified that these three sales slips from the records of the Quartermaster Sales Officer were from one book (R96).

7. As to Charge I: Accused is charged with knowingly and willfully misappropriating 2614.45 Icelandic kromur (value \$403.92) on 27 January 1943 (Specification No.1); 3251.43 Icelandic kromur (value \$502.33) on 20 February 1943 (Specification No.2); 1779.99 Icelandic kromur (value \$275) on 21 February 1943 (Specification No.3); 1741.09 Icelandic kromur (value \$268.99) on 11 March 1943 (Specification No.4), all property of the United States intended for the military use thereof.

The 94th Article of War provides in part:

"Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, * * * any * * * money, * * * of the United States furnished or intended for the military service thereof; * * * shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties."

The phrase "knowingly and willfully misappropriates" has received relevant interpretation as follows:

"The knowing and wilful, (i.e. intentional,) misappropriation of public property, * * * may be defined to be the assuming to one's self, or assigning to another, of the ownership of such property, where the same is not entrusted to the party in a fiduciary capacity and the act is therefore not an embezzlement" (Winthrop's Military Law & Precedents - Reprint, p.708).

"The words 'knowingly and willfully misappropriates' as used in AW 94, were intended to include acts not covered by the previous words 'steals' and 'embezzles', * * * since misappropriating means to devote to an unauthorized purpose (par.150 1, MCM) one cannot misappropriate that over which he has no control or supervision, nor devote property to a pur-

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pose where he exercises no lawful authority respecting such property, * * *. CM 199841 (1932)*. (Dig.Op.JAG., 1912-1940, par.452(18), pp.339-340).

"Misappropriating means devoting to an unauthorized purpose. Misapplication is where such purpose is for the party's own use or benefit. The misappropriation of the property or money need not be for the benefit of the accused; the words /in the 94th Article of War/ 'to his own use or benefit' qualify the word 'applies' only." (MCM, 1928, par. 150 1, pp.184-185).

The words "misappropriate" and "misappropriation" have also received cogent interpretation by the civil courts:

"The use of the word 'misappropriate' is general in its scope. Its meaning is not limited to the appropriation of money which approaches the crime of embezzlement, but extends to a willful withholding of money due by agent to his principal." (Commonwealth v. Sharp, 155 Va. 714, 156 S.E. 570, 573). (See also: National Surety Co. v. Page (4 Cir) 58 Fed.(2nd) 145,149; 59 Fed (2nd) 371).

"* * *. We take the word 'misappropriation' to mean wrong appropriation, or the use of a fund to a different purpose from that for which it was created; but not necessarily a dishonest purpose." (Colby v. Riggs National Bank, 67 App. D.C.259; 92 Fed (2nd) 183,194; 114 A.L.R. 1065,1078):

"'Misappropriated' as used in Const. Art.5, sec.3; making the directors of corporations jointly and severally liable for moneys embezzled or misappropriated by an officer of such corporation, being used in connection with the word 'embezzle', does not mean merely applying money in a manner unauthorized by law, but rather the misapplication of funds intrusted to an officer for particular purposes by devoting them to some unauthorized purpose." (Winchester v. Howard, 136 Cal.432, 64 P. 692, 693, 89 Am.St.Rep. 153; 27 W. & P. Perm, p.288). (Cf: United States v. Omaha Tribe of Indians, 253 U.S. 275,281; 64 L.Ed., 901,905).

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It was necessary for the prosecution to prove: (a) That the accused misappropriated or applied to his own use certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged; (c) the facts and circumstances of the case indicating that the act of accused was willfully and knowingly done; and (d) the value of the property, as specified (MCM, 1928, par.150 i, p.185).

The evidence shows and accused does not deny, the four sales to the Norwegian Government (Pros.Exs.A,B,C,D) of United States subsistence stores, furnished to accused as Sales Officer of the Iceland Base Command for the military use thereof and the receipt by accused of payments therefor in the amounts alleged. The subsistence sales commissary was located at Langholt. It was also proved beyond dispute that checks evidencing said payments when received at the Camp Curtis office of accused, were substituted for an amount of cash equaling their face value. The cash was derived from the daily sales at Langholt commissary. The method of accounting required that each day QMC Form 388 be prepared itemizing thereon each sale slip by number and amount. Periodically thereafter when deposits were made with the disbursing officer, QMC Form 389 must be completed in quintuplicate. The original and three copies thereof were delivered with the deposit and one copy was retained to be forwarded to the Chief of Finance, Washington, D.C. The latter form carried the individual daily totals of Forms 388. The actual deposit was shown on Form 389 as the grand total of the daily Forms 388. This system made it possible to identify each sale and trace it from its inception to the receipt by the disbursing officer of the money received therefor. The Finance Officer, who audited accused's accounts testified that, excepting the four sales in question, there was no discrepancy between the amounts deposited and the actual sales. However, he found no record of the sales evidenced by Pros. Exs.A,B,C,D. The absence of the records of these four sales made it possible to extract from the cash representing other sales an amount equal to the face value of the checks deposited and thereby retain an apparent regularity of accounts, but which in truth was false. The Finance Officer expressed the opinion that this method was the only one which could have been practiced to achieve such result.

The unescapable conclusion is that accused, the responsible subsistence officer and Base Quartermaster Sales Officer, made direct sales at his office at Camp Curtis, issuing sales slips therefor from a sales book kept at his office and that he received payment therefor and issued and receipted sales slips covering the transactions. When the daily cash was received from the commissary at Langholt, he placed with it the checks received in payment for the sales made by him at Camp Curtis, removing at the same time from Langholt commissary cash an amount equal to the checks he placed in the deposit, thus keeping the deposit in balance with the Form 389 records accompanying it. In no other way could the circumstances shown, have been accomplished.

There is substantial evidence that checks (Pros.Exs. E,F,G,H)

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received in payment of these four sales were delivered to accused for his indorsement and that he did in fact indorse them. Evidence to the contrary served only to create an issue of fact which the court resolved against accused. Such finding is binding on the Board of Review (CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer; CM ETO 1191, Acosta).

While the procedure of temporarily substituting cash for checks in order to expedite the deposit of the checks with the disbursing officer might not be an objectionable practice provided the cash funds were later deposited as required by the regulations, in the instant case there was a total failure to deposit the cash funds for which the checks had been substituted. As a result of these operations there were removed from the regular channel of processing of Government funds the separate sums of money described in the four specifications. This fact, when synchronized with the undisputed evidence that no records of the sales evidenced by Pros. Exs. A,B,C,D were discovered upon audit of accused's accounts forms a substantial foundation of fact from which the court was fully justified in concluding that this manipulation was not accidental nor coincidental, but was the result of a deliberate and consciously executed design in which accused was an active participant. This conclusion is reinforced by two facts which are highly inculpatory and stand uncontradicted and unexplained: (1) Pros. Exs. A,B and C bear numbers, which although not consecutive are of close relativity (4360905, 4360907, 4360908), but their respective dates are 27 January 1943, 17 February 1943 and 18 February 1943. Twenty-one days elapsed between the issuance of Pros.Ex.A and Pros.Ex.B and yet there is but one number missing between the numbers of the respective slips. In view of accused's own evidence of the quantity of the business transacted it is a most peculiar circumstance that but one sale, as implied by the missing sales slip, was effected in the period of twenty-one days. The inference is therefore definite and certain that the sales book which contained these three exhibits was not in general use. It was not discovered and the mystery of its existence and use remains unsolved and unexplained. (2) Pros.Exs.A,B,C,D were not discovered in nor produced from records and files in accused's office or under his control. They came from the possession of the purchaser - the Norwegian Government.

The evidence therefore is substantial that accused was the ultimate responsible officer in the control, management and direction of the Quartermaster sales in Iceland Base Command; that as a result of the operations hereinabove described the four specific sums of money alleged in the specifications were extracted from the regular channel prescribed and in practice at Camp Curtis for the processing of proceeds of sales of commissary supplies; that said sums came under accused's control and charge; that the said sums were wholly missing and their disposition remained unexplained.

The accused elected to remain silent and offered no explanation, when obviously he was the person who most logically was informed as to the facts.

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"The accused in the face of the evidence produced against him elected to remain silent. Such was his right beyond all per-adventure, and his failure to take the stand cannot be commented upon (MCM, 1928, par.77, p.62). However, the burden of adducing evidence excusatory of his prolonged absence - the 'burden of explanation' - was on him and his right to remain silent did not relieve him of such burden of going forward with the proof (16 C.J., par.998, p.531). He offered no explanation of his conduct. The inference arising from the proof presented by the prosecution therefore stands unrebutted and unexplained." (CM ETO 527, Astrella).

"The burden of proving accused's guilt beyond a reasonable doubt never shifted from the prosecution, but the burden of producing evidence that he was overcome by sleep without premonitory warnings or symptoms - the 'burden of explanation' - passed to accused" (CM ETO 1317, Bentley).

"Ex.1 shows that each of the 28 men listed thereon, including each of the men alleged in the 14 specifications, had not been paid all of the profit which accrued to them as the result of the conversion into francs of their 'gold seal' currency. In view of the evidence introduced by the prosecution the burden of going forward with explanatory evidence was upon accused." (CM ETO 1553, Salvards).

The foregoing rule has received approval by the Supreme Court of the United States:

"But when a prima facie case has been made out, as conviction follows unless it is rebutted, the necessity of adducing evidence then devolved upon accused." (Agnew v. United States, 165 U.S. 36, 41 L.Ed., 624).

In the trial of cases involving the charge of embezzlement, misappropriation or misapplication of Government funds, the foregoing rule is of particular applicability. It is both reasonable and just to require the accused to go forward with proof of facts of which he alone may have knowledge and which may serve to exculpate him from responsibility. In

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apposition, no injustice is inflicted if he refuses or fails to accept such challenge and remains silent in the face of proof of his inculpatory conduct.

The instant case is a classical example of the necessity for such practical rule of procedure. Manifestly accused, and accused alone, possessed the knowledge which might have explained the irregular practice in his office and the disappearance of the four separate sums of money. He elected to remain silent when confronted with highly incriminating evidence. He therefore has no cause for complaint if such evidence and legitimate inferences therefrom are resolved against him. The evidence irrefragably indicates that accused misappropriated the amounts alleged, property of the United States intended for the military use thereof, and that the acts as alleged were knowingly and willfully done.

The Board of Review is of the opinion that the record is legally sufficient to sustain the findings of accused's guilt of Charge I and its specifications.

8. Specification 2 of Charge II, charges accused, as Quartermaster Sales Officer of the United States Army Forces in Iceland, with wrongfully failing, on 11 December 1942, at Camp Curtis, Iceland, to account for \$2346.24 of public moneys received by him and which he was not authorized to retain.

The evidence shows that about 10 December 1942, Lieutenant Commander Erick Hart, RNR, Paymaster of British Sea Transport at Reykjavik, Iceland, delivered to accused personally in payment for subsistence stores purchased for the ships DEKERIST and YAKA, from accused as Sales Officer, two checks, one for 12,230.77 kronur (Pros.Ex.L) numbered 53035, and one for 2955.78 kronur (Pros.Ex.N) numbered 53036. The first check was given in payment for a receipted list of items shipped to the Transport "SS Dekbriist" (Pros. Ex.M) and the second check for a similar list of items shipped to the "SS Yaka" (Pros.Ex.O). A few days later accused informed Hart of his lack of authority to receive such payments and of his intention to refund the money. Accused required that his clerk take the money from the office safe and place it on his (accused's) desk at this time. Although he saw Hart frequently and the matter was repeatedly mentioned, the money was not returned by accused to Hart until the last week in April or the first week in May 1943.

The Specification charges accused with violating Section 176, Title 18 of the United States Code which provides:

"Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be

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fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years." (Federal Criminal Code, sec.90; 18 USCA, sec.176).

(a) The statute is one of general application and violation of same by military personnel is properly chargeable under the 96th Article of War within the classification of "crimes or offenses not capital" (MCM, 1928, par.152c, p.189).

(b) The offense denounced by the above statute is not the imputed embezzlement of the money but the failure of the officer or agent of the United States to render his accounts for the same as provided by law. The offense may be complete without any actual embezzlement of the money. It is committed when it is shown that there is a willful and felonious failure to comply with specified requirements of law in the rendering his accounts of money received by him - (Dimmick v. United States, 121 Fed. 638, affirming 112 Fed. 352, certiorari denied 191 U.S. 574, 48 L.Ed., 308).

(c) The phrase as "provided by law" contained in said statute includes rules and regulations made and promulgated by heads of departments of the Federal Government under the authority of R.S.161 (5 USCA, sec.22). They become part of the law and are as binding as if incorporated in the body of the law itself. (Caha v. United States, 152 U.S. 211, 38 L.Ed., 415; Wilkins v. United States, 96 Fed. 837, certiorari denied 175 U.S. 727, 44 L.Ed., 339; Boske v. Comingore 177, U.S. 459, 462, 44 L.Ed., 846, 847; In re Aliens 231 Fed. 335; Petersen v. United States, 287 Fed. 17; International Railway Co. v. Davidson, 273 Fed. 153; In re Epstein, 300 Fed. 407, 4 Fed (2nd) 529; Dimmick v. United States, supra).

Army Regulations are rules and regulations within the purview of the foregoing rule (Winthrop's Military Law & Precedents - Reprint - p.31, 32; AR 1-15, 12 December 1927, par.1a).

(d) AR 35-6660, 29 August 1942, par.12a directs:

"Sales officers will deposit funds with a disbursing officer as follows: (1) On the 10th, 20th and last business day of each month. (2) Whenever the cash on hand exceeds \$200. (3) At any other time desired by the sales officer or directed by the commanding officer. The deposit of checks will not be unduly delayed."

"b. When funds are deposited, a report of sales on W.D., Q.M.C. Form No. 389 will be prepared in quintuplicate, the original and three copies being delivered to the disbursing officer with the funds and one copy retained. When the signed copy is received

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from the disbursing officer showing receipt of the funds (par.15a), the retained copy will be forwarded to the Chief of Finance. For procedure when funds are turned over to an agent officer, see paragraph 23."

There is conclusive proof that accused received from McDowell the sum of \$2,346.24 in currency sometime early in December 1942 - probably about 11 December - which represented the funds to be returned to Commander Hart but he did not actually reimburse the latter until some time in April or early in May 1943. He therefore held the funds approximately four months for reasons not explained by the record, although he frequently expressed his intention to Hart to make reimbursement. The attempt on the part of defense to prove that accused returned the funds to Hart within a few days after accused received same from McDowell produced an issue of fact which the court by its findings determined against accused. Such finding is conclusive on the Board of Review. (See authorities cited in par.7, supra). However, in the opinion of the Board of Review for the reasons hereafter stated, the time when accused actually returned the funds to Commander Hart is an immaterial consideration. It will be assumed that during this period of approximately four months accused did not use the funds for his own purpose nor otherwise convert the same and that during this entire period he simply held possession of this money. This assumption construes the evidence most favorably to accused. Nevertheless, such retention of the funds, under the facts proved constituted a direct violation of par.12a, b, of AR 35-6660 above quoted. It was his duty to deposit funds whenever the cash on hand exceeded \$200. It was his further duty to make deposits on the 10th, 20th and last business day of each month. In making deposits he was required to complete QMC Form 389 in quintuplicate delivering original and three copies to the disbursing officer and retaining one copy. The regulation also required him to forward the retained copy to the Chief of Finance.

The phrase "render his accounts" contained in Section 176 of Title 18 USCA demanded that accused prepare and submit to the prescribed authorities (in this instance the disbursing officer) a statement of facts which disclosed the origin of the funds deposited, viz: QMC Form 389 which in turn detailed the individual sales slips. (United States v. Van Duzee, 140 U.S. 169,171, 35 L.Ed., 399,400; Butler v. United States, 87 Fed. 655,667,668). Had accused prepared QMC Form 389 and presented it to the disbursing officer at the times required by the above quoted Army Regulation such action would have required the simultaneous production and deposit of the sum of \$2,346.24. He would have then "rendered" his account with respect to said sum of money. Manifestly under the regulation he was under the compulsion of depositing this amount with the disbursing officer as it exceeded the sum of \$200.00. His failure to perform this duty accompanying the deposit with QMC Form 389, constituted a violation of the statute.

The evidence reveals the fact that the situation which placed accused in immediate possession of these funds was provoked by a doubt as

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to whether the sales to Commander Hart (being in truth a sale to the British Government) was a "Lend-Lease" transaction (Act of Mar 11, 1941, 55 Stat. 31) or a sale which permitted the Quartermaster to accept payment therefor. Pros.Exs. L and N (the checks) had been processed as required by the regulations and deposited with the disbursing officer, when there was some kind of a determination by some person undisclosed that payment should not have been accepted and that the same should be returned to Commander Hart. The record is obscure as to the exact source of this decision. Lieutenant Colonel Patterson declared:

"Well, sometime in October--it was the latter part of October--the British Sea Transport got certain subsistence items. The method of payment had not been determined upon. Some time later--about--it was in December--about the middle of December, the British Sea Transport presented two checks for payment for these supplies. They were accepted through error, and put through and as soon as we found out that they had been accepted we tried to get them back in order to return them and found out they had already gone through finance. Well, it came up what to do then. The method determined was to reimburse them in cash. So we reimbursed Commander Hart." (R79-80).

Accused was a party to this decision. Question immediately arises as to his authority to act upon a decision in such complex matter involving international relationship. He held Government funds represented by Pros. Exs. L and N and other cash. Regular procedure required him to deposit same with the disbursing officer. This requirement was met with respect to the checks (Pros.Exs. L and N), but accused notwithstanding the specific requirements to deposit the cash became the active participant in a scheme to use a required amount thereof to reimburse Hart for the checks which had been deposited. This recital does not impute to accused up to the time he actually received the money bad faith or that he took the same animo furandi. It is not necessary, for the purpose of this case to consider whether the method by which it was proposed to reimburse Commander Hart was in violation of Art.I, sec.9, Cl.7 of the Federal Constitution prohibiting the withdrawal of money from the Federal treasury except in consequence of appropriations made by law (Reeside v. Walker, 11 How. 271, 13 L.Ed., 693), but attention is directed to the situation as an indication of the irregularities in governmental financial transactions which the regulations were intended at least partially to prevent. Had accused rendered his account in the manner required by law he would not only have relieved himself of all liability - criminal and civil - but he also would have properly placed the responsibility of deciding the important question of the application of the "Lend-Lease" statute to the sales in question upon the shoulders of higher

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authority where under the circumstances it properly belonged. He acted at his own peril in adopting the course disclosed by the evidence. It is not unreasonable or unjust to hold him answerable for his actions in this transaction notwithstanding the fact that the Government suffered no financial loss. The statute under which he was convicted does not require the actual embezzlement or loss of Government funds. The conduct denounced is the wrongful failure of an officer of the Government to render his accounts as required by law. Such conduct constitutes a form of embezzlement but the imputed embezzlement is not the gravamen of the offense.

The Board of Review is of the opinion that the record is legally sufficient to sustain the finding of accused's guilt of Specification 2, Charge II.

9. Specification 1 of Charge II charges accused with making answers to questions propounded to him by the Base Inspector General during the course of the investigation of the operations and accounts of the Quartermaster's sales office which accused did not believe to be true. The evidence is clear beyond contradiction that in response to the questions alleged in the specification accused made answers that were false and that at the time he made them he not only did not believe them to be true, but also he knew they were false. Later in the course of the same interrogation he was confronted with the minutes of the Board of Officers which conducted an investigation and audit of accused's accounts and on such confrontation he reversed his former answers and admitted all facts which he had first denied. He knew that the questions had been propounded to him in the course of an official investigation and that the Inspector General was acting in an official capacity. At the conclusion of the prosecution's case in chief the defense moved for a finding of not guilty of the Specification upon the ground that "Lieutenant Pepper's subsequent explanation and correction of the false testimony purges himself of his false testimony and cannot be convicted of perjury". The motion was granted apparently on the authority of CM 220746 (1942) (Bull.JAG, Vol.I, No.1, Jan-June 1942, sec.451(53), p.22) and CM 231119 (1943) (Bull.JAG, Vol.II, No.4, Apr 1943, sec.453(18), p.143). The foregoing holdings have been overruled and their value as authorities nullified by United States v. Norris, 300 U.S. 564, 576, 81 L.Ed., 808-814; CM NATO 154 (1943), Bull. JAG, Vol.III, No.1, Jan 1944, sec.451(53), p.13; CM ETO 1447 Scholbe; CM ETO 1538, Rhodes. The motion should have been denied. The erroneous action of the trial court in granting this motion is here noted for the reason that thereby accused escaped possible conviction for an offense with which he was charged which alone would have warranted dismissal from the service.

10. Subsequently to the preparation of the record of trial, accused submitted through channels a written brief and assignment of errors for consideration by the confirming authority, the Board of Review and the Assistant Judge Advocate General with the European Theater of Operations. The same is attached to the record of trial. The Board of Review has

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given painstaking consideration to accused's contentions and will herein-after discuss the same.

It is proper on this occasion for the Board of Review (sitting in the European Theater of Operations) to invite attention to its functions upon appellate review of the findings and sentence in this case. War Department Letter (AG 321.4 (4-26-43) OB-S, 28 April 1943: Subject: Operation of the Branch Office of The Judge Advocate General, addressed to the Commanding General, European Theater of Operations contains the following orders and directions:

"The Branch Office being an adjunct of the office of The Judge Advocate General the latter officer exercises direct and exclusive jurisdiction over all prescribed activities pertaining to it including the assignment of personnel thereto. The Assistant Judge Advocate General is one of the assistants of The Judge Advocate General and as such is not under the control or supervision of the commander of the forces with which he is serving insofar as concerns the performance of his duties under Article of War 50 $\frac{1}{2}$.

The appellate review and judicial powers incident thereto pertaining to the Assistant Judge Advocate General, the Board of Review and other elements of his Branch Office involve the judicial power generally of holding records of trial legally sufficient or legally insufficient to support findings of guilty and sentences. They include the power of passing upon the legal sufficiency of sentences approved or confirmed by the Commanding General, European Theater of Operations, or confirmed by any other confirming authority in cases in which the records of trial are properly referred to the Branch Office. These judicial powers cannot be appropriately performed in conformity with the governing statute (Article of War 50 $\frac{1}{2}$) unless all elements of the Branch Office exercising such powers occupy a position independent of and separated from the command or commands which the Branch Office serves. The Assistant Judge Advocate General will not therefore perform the duties of staff judge advocate of any reviewing or confirming authority in any case which may reach his office for appellate review, except as he may give advice to a reviewing or confirming authority in his capacity as Assistant Judge Advocate General under Article of War 46 and paragraph

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87b (page 75) of the Manual for Courts-Martial.

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

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

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

" In cases in which the President is neither reviewing nor confirming authority, it is not the province of either the Board of Review or The Judge Advocate General, and neither has the right, to weigh the evidence. In passing upon the sufficiency of the evidence in such cases, it is their province merely to determine whether or not there is in the record any substantial evidence which, if uncontradicted, would be sufficient to warrant the findings of guilty. It is exclusively the province of the court-martial, including the reviewing, and if

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there be one, the confirming authority to weigh evidence, judge of its credibility, and determine controverted questions of fact. C.M.145791 (1921).

In a case in which the President is neither the reviewing nor the confirming authority, the Board of Review may not legally weigh evidence to determine whether or not certain inferences should have been drawn therefrom. It is sufficient if the inferences drawn by the court could legally have been drawn from the evidence. C.M. 161833 (1924).

In the exercise of its judicial power of appellate review, the Board of Review treats the findings below as presumptively correct, and examines the record of trial to determine whether they are supported in all essentials by substantial evidence. To constitute itself a trier of fact on appellate review, and to determine the probative sufficiency of the testimony in a record of trial by the trial court standard of proof beyond a reasonable doubt would be a plain usurpation of power and frustrating of justice. C.M. 192609, Rehearing (1930)."
(Dig.Op.JAG, 1912-1940, sec.408(2), p.259).

The foregoing comments are pertinent and relevant in the consideration of accused's brief and assignment of errors. Much of the argument and many of the asserted errors involve issues for consideration by the confirming authority alone, and inasmuch as he has confirmed the sentence and has remitted three years of the confinement at hard labor, it must be conclusively presumed that he acted after giving proper consideration to all issues and elements involved including any errors or irregularities occurring at the trial. Upon this premise therefore accused's assignment of errors will be considered by the Board of Review (sitting in ETOUSA).

A - With respect to Charge I and its specifications accused directs his argument to the proposition that there is no evidence that the funds which it is charged he misappropriated came into his possession or that he willfully and knowingly misappropriated the same. Such contention proceeds on the hypothesis that he is charged with misappropriating the proceeds of the four checks.(Pros.Exs. E,F,G,H). While it is true that the specifications separately allege the misappropriation of four several sums of money which are identical with the denominations of the checks, there are no allegations connecting them with the checks. It is alleged that accused misappropriated four certain sums of money, the property of the United States intended for the military service thereof. The evidence is clear and beyond dispute that these checks were deposited with the disbursing officer as required by the regulations. It is neither claimed nor proved

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that he misappropriated the proceeds of these checks. It is asserted he misappropriated four sums of money which came from other cash sales of the commissary which equaled the face value of the checks. He effected this misappropriation by the expedient of issuing sales slips from a sales book which was never discovered and which was not in regular use. These sales slips (Pros.Exs. A,B,C,D) were never reported on QMC Form 388 and no record of these transactions was discovered in accused's office. They evidenced the sales for which the checks (Pros.Exs. E,F,G,H) had been delivered, but inasmuch as these sales were not recorded on Form 388 accused was at liberty to withdraw from cash on hand a sum of money equal to the total of the four checks and still keep the office records on their face in balance. McDowell testified that the substituting of checks for cash was a regular procedure in the office and that it was done in order "to clear the checks in 24 hours". This fact coupled with undisputed evidence that accused was the responsible officer in charge and that the records of his office were silent with respect to the four Norwegian sales constituted substantial evidence upon which the court was justified in finding that accused willfully and knowingly misappropriated the four sums of money alleged.

"There is a well established presumption that a steward of property of others has unlawfully converted it to his own use if he cannot or does not account for it or deliver it when accounting or delivery is required by the owners or others possessing authority to demand same. The burden is then on the steward to go forward with the proof of legitimate expenditure or loss of same. The explanatory evidence when balanced against proof of possession by the steward and failure to account or deliver the property on demand, creates an issue of fact for final resolution by the court. Failing to make an explanation, a conviction of guilt may rest upon the facts of possession, absence of accounting or delivery and the presumption arising from same." (CM ETO 1302, Splain, par.7(a) and authorities cited therein).

There being substantial evidence in the record supporting such finding the power of the Board of Review is exhausted as it cannot weigh the evidence nor judge of the verity of the evidence or credibility of the witnesses.

B - Accused's attack on the finding of his guilt of Specification 2, Charge II, is fully answered in the discussion of this finding hereinbefore set forth. His assertions "that there was no provision of law for the rendering of the accounts involved" and "that there was no way for the accused to have rendered an account for the money involved" are, of course, without basis as has been hereinbefore demonstrated. The claim that the

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money was not "public money" viz: property of the United States, merits but brief consideration. Funds arising from sale of Quartermaster supplies are property of the United States (CM ETO 1538, Rhodes). The money for which accused did not account represented proceeds of sale of Quartermaster Supplies. Obviously it belonged neither to accused nor to the British Government.

The contention of accused that he should have been permitted to introduce in evidence an extract of the minutes of the proceedings of the Board of Officers appointed to investigate the status of accused's accounts relating to the statement of Colonel Matthew S. Jones (who was not a witness and who had returned to the United States) made before said board (R90) is obviously without merit. Such statement was hearsay in its most violent form. It was properly excluded. (22 C.J., sec.168, p.207; sec.180, p.217; MCM, 1928, par.113, p.113, par.117, p.120).

C - Errors in law:

(a) Captain Thompson, a professional accountant and auditor in civil life, testified that he had made an audit and examination of accused's accounts and that he did not discover any record of the sales evidenced by Pros.Exs. A,B,C,D . His testimony also referred to and identified other exhibits in evidence in the case.. He described in detail the methods pursued in making the examination. Accused moved to strike all of his testimony on the following grounds:

"Before the defense cross examines the witness the defense wishes to object to the entire testimony of Captain Thompson on the following grounds: That a writing is the best evidence of its own contents; that it has not been shown that the writings are so numerous or bulky that they can not be examined by the court; that the facts to be proved is the general result of the whole collection; that the result is capable of being ascertained by calculation; that the witness has examined the whole collection and made such a calculation that the defense has not had access to the books and papers from which the calculation is made. It does not appear that the original has been lost, destroyed or is otherwise unavailable; it does not appear that a purported copy of the public record has been duly authenticated; and further that the information therein is compiled from other than original sources. Further object to Captain Thompson's testimony, in that it is hearsay, and the statements made by him are hearsay in that his

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reported calculations are made from books of accounts, when these books of accounts have not been established as being true, nor correct, nor compiled from original sources, and further that many of the entries in said accounts are composite entries, and there has been no intermediate memoranda produced for the study of Captain Thompson, and that all writings submitted to Captain Thompson were in themselves hearsay, not being compiled from original sources." (R26, 27).

The motion was denied and he assigns error in the court's ruling. It is manifest from a study of the record that the witness's testimony had one ultimate purpose and that was to establish the fact that no record existed in accused's accounts of Pros.Exs. A,B,C,D, and that they were issued from a sales book not in regular use. There was no attempt to secure from Captain Thompson a detailed itemization or report of the audit showing the debits and credits. His testimony was explanatory of the proper process of office accounting as required by the army regulations and of identification of exhibits, but this evidence in no sense represented a calculation of a shortage or represented the opinion of the witness that, based on the office accounts, a shortage existed. The full thrust of the testimony established the fact that an examination of accused's accounts failed to reveal the existence of Pros.Exs. A,B,C,D. Evidence of this fact was negative in character. Accused was at liberty to test its credibility, weight and probative value upon cross-examination. The records in accused's office were prescribed and required by the army regulations and said regulations had the force of law. They were therefore official public records (*Petersen v. United States*, 287 Fed. 17,23; CM ETO 1554, Pritchard). With respect to public records or records which are required by law the following is the applicable rule:

"Where the fact to be proved is not one as to the existence of which the law declares the record to be the sole and conclusive evidence, it is generally held that if the record does not contain evidence of the fact, parol evidence otherwise competent is admissible, especially when to exclude such evidence would prejudice the rights of innocent persons or enable a public officer to take advantage of his own default.

Where it is sought to prove a negative, that is, that facts or documents do not appear of record, or that as to certain acts or proceedings the record is silent, parol evidence is admissible as primary proof; the record is not higher evidence.

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That documents or facts do not appear of record may be proved by the sworn testimony of the person who is legal custodian of the record, or, it is usually considered, by that of any other competent person." (22 C.J., secs.1281-1283, pp.1005,1006. Also 32 C.J.S., sec.807c, p.726).

The rule has been given effect in Morrow v. Whitney 95 U.S. 551, 24 L.Ed., 456, where oral evidence was admitted of non-occupancy of certain land by the Government for military purposes; in German Ins. Co. v. Independent School District 80 Fed. 366 where oral evidence of a motion and vote was admitted where the minutes of a school board were silent on the subject; in Phillips v. United States 201 Fed. 259, where the court recognized the difference between public and private records by the statement that an expert accountant may give a summary of account books where they are public records or there is first sufficient evidence to allow the admission in evidence of private books of account; in Petersen v. United States 287 Fed. 17, where a postal inspector was permitted to testify that he had examined the Honolulu post office records and discovered no evidence of certain remittances; and in Shore v. United States 56 Fed.(2nd) 490, certiorari denied 285 U.S. 552, 76 L.Ed., 942 where the court allowed a custom inspector in charge of certain records and familiar with them to testify that he had examined them and that no permit in accused's favor to import liquor was recorded therein. (Cf: Wigmore's Code of Evidence Art.19, par.(d), sec.1197 (3), p.238; 22 C.J., sec.1304, p.1018, footnote 92). Accused's contention is based upon the rule established in Shreve v. United States, 77 Fed.(2nd) 2, certiorari denied 296 U.S. 654, 80 L.Ed., 466, which has received particular consideration by the Board of Review. It is however, applicable to private accounts and private records and has no proper place in the consideration of the records and accounts which under the Army Regulations must be maintained by responsible and accountable officers of the Army. There was no error in the denial of accused's motion.

(b) The testimony of Major Swain, a member of the Board of Officers appointed to investigate and examine accused's accounts, involved two pertinent facts (1) that the examination of accused's accounts failed to reveal any record of the sales evidenced by Pros.Exs. A,B,C,D and (2) that the witness personally traced all deposits appearing on QMC Form 389 to the actual sales. Accused's objection to this testimony was overruled and he asserts prejudicial error was thereby committed. As to the part of the testimony covering (1) non-discovery of records of sales, its admissibility has been demonstrated above. The witness' statement (2) that he personally traced all deposits shown on Form 389 to the individual sales was a description of the mechanics of the examination of the accounts and was proof of the means used to arrive at the ultimate fact that no records of the four sales were shown in the accounts. It was not evidence of the contents of either the audit report nor of the report of the Board of Officers. Such evidence pertained to a collateral matter only and was clearly admissible (Andrews v. Creegan, 7 Fed. 477; Scullin v. Harper 78 Fed. 460; Sharfsin v. United States 265 Fed. 916; Dickerson v. United States 65 Fed.(2nd) 824;

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I Wharton's Criminal Evidence - 12th Ed., sec.407, p.650).

(c) Photostatic copies only of Pros.Exs. A,B and C were admitted in evidence over accused's objections without the original documents. In each instance it was shown that the original sales slip had been sent to the office of the Norwegian Government in London, but the photostatic copy was identified as being a genuine facsimile of the original. The "best evidence" rule as applicable to documents is subject to the exception:

"If a writing has been lost or destroyed or
if it is otherwise satisfactorily shown that
the writing cannot be produced, then the con-
tents may be proved by a copy or by oral
testimony of witnesses who have seen the
writing." (MCM, 1928, sec.116a, pp.118,119).
(Underscoring supplied).

As applicable to the situation presented, the following rule is pertinent in determining that an original writing cannot be produced:

"Where an original document is filed among the
archives of a foreign government from which it
cannot be withdrawn, secondary evidence of its
contents is admissible * * *." (22 C.J., sec.
1331, p.1038).

The situation presented with respect to Pros.Exs. A,B,C obviously falls within the above noted rule, and there is no difficulty in concluding that the custody of the Norwegian government of the original slips is a satisfactory showing that they cannot be produced.

However, the Board of Review believes that the Pros.Exs. A,B,C were properly admitted in evidence on the basis of the following modern rule:

"But putting all this aside, the best evidence rule should not be pushed beyond the reason upon which it rests. It should be "so applied", as the Supreme Court held in an early case, "as to promote the ends of justice, and guard against fraud or imposition." Renner v. Bank of Columbia, 9 Wheat. 581,597, 6 L.Ed., 166. See, also United States v. Reyburn, 6 Pet. 352, 366, 8 L.Ed., 424; Minor v. Tillotson, 7 Pet. 99,100, 8 L.Ed., 621. The rule is not based upon the view that the so-called secondary evidence is not competent, since, if the best evidence is shown to be unobtainable, secondary evidence at once becomes admissible. And if it appear, as it does here, that what is called

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the secondary evidence is clearly equal in probative value to what is called the primary proof, and that fraud or imposition, reasonably, is not to be feared, the reason upon which the best evidence rule rests ceases, with the consequence that in that situation the rule itself must cease to be applicable, in consonance with the well established maxim--cessante ratione legis, cessat ipsa lex. An over-technical and strained application of the best evidence rule serves only to hamper the inquiry without at all advancing the cause of truth. "The fundamental basis," the Supreme Court has said, "upon which all rules of evidence must rest--if they are to rest upon reason--is their adaptation to the successful development of the truth." Funk v. United States, 290 U.S. 371, 372, 381, 54 S.Ct. 212, 215, 78 L.Ed., 369. There is not the slightest reason to suspect that this fundamental basis was affected in the present instance." (United States v. Manton 107 Fed. (2nd) 834, 845, certiorari denied 309 U.S. 664, 84 L.Ed., 1012).

These photostatic copies of the sales slips were positively identified by Ingebrightsen as being identical with the original copies. They were in truth original and not secondary evidence. The assignment of error is without merit.

(d) Accused assigns error in the admission of Pros.Ex.D - a photostatic copy of the bill of sale of goods to the Norwegian Hospital for the reason that there was no predicate laid that the original was lost, destroyed or not available. The Trial Judge Advocate asserted the fact that the original "was not available". Such statement, of course, is not evidence and will be disregarded. However, the evidence does disclose that McDowell, the accused's clerk, acknowledged he received the original bill and affixed his initials thereto. He identified the photostatic copy as correctly representing the original bill in the possession of the Norwegian Hospital. Manifestly, the admission of this exhibit is authorized by the same principles which support the admission of Pros.Exs. A,B and C. There was no error in the court's ruling.

(e) Pros.Ex.E is a photostatic copy of the face and reverse side of a check purported to be issued and negotiated in payment of the merchandise described in Pros.Ex.D. It was admitted in evidence over accused's objection that it was secondary evidence and that the prosecution had failed to account for the original. The Trial Judge Advocate again made the non-evidentiary statement that the original check was not available. Accused's purported indorsement thereon was declared by McDowell to be similar to

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accused's signature and he further identified the exhibit as being a true copy of the original check received in payment of the merchandise described in Pros.Ex.D. There is positive evidence that the original check was deposited with the disbursing officer (Pros.Ex.K) in the regular course of business. The objection was properly overruled for the reason that the exhibit is well within the rule of the Manton case supra.

(f) Accused objected to admission in evidence of Pros.Ex.F, an original check, on the ground that neither the genuineness of the check nor his indorsement thereon were proved. There is direct proof that it was signed by the Liaison Officer who was the Paymaster in the office of the Supply Officer of the Norwegian Navy; and that it was delivered to accused's office and that it was duly deposited with the disbursing officer. There was therefore proper proof of authenticity. The objection was without merit.

(g) Pros.Exs. I,J and K are receipts for deposits issued by Landsbanki Islands showing the deposit in the bank by the disbursing officer of checks (Pros.Exs. E,F,G,H) and the deposit receipts were originally admitted in evidence upon accused stating "no objection". Thereafter he moved to strike the same and all evidence referring thereto from the record because they were irrelevant and immaterial and that the evidence pertaining thereto was hearsay. After permitting the exhibits to be introduced with an affirmative indication that he had no objection he could not thereafter ask that they be excluded from the record. (Benson v. United States, 146 U.S. 325,332, 36 L.Ed., 991,995; 64 C.J., sec.221, p.211). The motion came too late, and was denied.

(h) The papers accompanying the record of trial fail to disclose when the investigating officer herein was appointed but they do disclose that the report of his investigation is dated 30 January 1944 and that the charges were referred for trial on that same day. The record also shows that the Board of Officers were appointed to investigate the accounts of accused in May 1943 and had audited and checked accused's entire records. The facts involved had already been fully investigated prior to 27 January 1944 on which date a court was appointed to try accused. A new investigation would yield the exact state of facts as did the prior investigation. It would be a futile effort which would delay the trial and not protect any rights of the accused (Dig.Op.JAG, 1912-1940, sec.428(1), p.292; CM ETO 106, Orbon). The provisions of Article of War 70 are not jurisdictional and are for the benefit of the appointing authority. (CM 229477, Floyd, (1942)). Accused's assertion of error in this respect is without merit.

(i) The claim is here made that Article of War 8 requires that, if available, an officer of The Judge Advocate General's Department shall be detailed as law member of the court and that such member was available as the trial judge advocate of the court was a member of that department. The question of whether an officer of The Judge Advocate General's Depart-

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ment was available to the Commanding General, Iceland Base Command, for designation as law member of the court was a matter for the exclusive determination of the convening authority. The provision of Article of War mentioned above is not a mandatory direction to the convening authority, but vests in him the discretion of determining the availability of a judge advocate. His designation of an officer from another branch of the service indicates his decision that a judge advocate was not available (CM ETO 804, Ogletree, et al).

11. The charge sheet shows that accused is 27 years of age. He was commissioned in the Quartermaster Corps on 23 September 1940 and ordered to active duty 15 November 1940. He had no prior service.

12. 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 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).

B. Franklin Atter Judge Advocate

Richard A. Woodburn Judge Advocate

Elwood V. Langseth Judge Advocate

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1st Ind.

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

1. In the case of First Lieutenant MARCUS L. PEPPER (O-398414), 422nd Quartermaster Laundry 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 as confirmed, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1631. For convenience of reference please place that number in brackets at the end of the order: (ETO 1631).



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

(Sentence ordered executed. GCMO 38, ETO, 2 Jun 1944)

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

BOARD OF REVIEW

ETO 1638

- 7 APR 1944

U N I T E D S T A T E S)
))
v.))
))
Private FATE (NMI) LaBORDE,))
Jr., (34250600), Company "B",))
244th Quartermaster Battalion))
(Service).))
))
))

WESTERN BASE SECTION, SERVICES
OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS.

Trial by G.C.M., convened at Chester,
Cheshire, England 14 February 1944.
Sentence: Dishonorable discharge,
total forfeitures and confinement at
hard labor for five years. The Federal
Reformatory, Chillicothe, Ohio.

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

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

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

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

Specification 1: In that Private Fate (NMI) LaBorde, Jr., Company "B", 244th Quartermaster Battalion (Service) did, at Wem, Shropshire, England, on or about 23rd January 1944, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection with a cow, the same being a beast.

Specification 2: In that * * * did, at Wem, Shropshire, England, on or about 23 January 1944, unlawfully enter the stable of William Henry Williams, Round Hill, Soulton Road, Wem, Shropshire, England, with intent to commit a criminal offense, to wit, sodomy therein.

He pleaded not guilty to the Charge and specifications. He was found not guilty of Specification 1 but guilty of a violation of the 96th Article of War, in that he did, at Wem, Shropshire, England, on or about 23 January 1944, attempt to commit the crime of sodomy by feloniously and against the order of nature, attempt (sic) to have carnal connection with a cow, the

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same being a beast. He was found guilty of the Charge and Specification 2 as alleged. Evidence was introduced of one previous conviction by summary court for being drunk and disorderly in a public place in violation of the 96th Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for eight 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 under Article of War 50 $\frac{1}{2}$.

3. Competent substantial evidence proved accused's commission of the offenses of which he was found guilty. The offender was "caught in the act." The accused's sole defense was an alibi in support of which he adduced evidence which, if believed, would have been effective to establish it. Inasmuch as the record discloses competent substantial evidence, positively identifying the accused as the offender, an issue of fact arose for the determination of the court. Its findings of guilty are conclusive on appellate review (CM ETO 531, McLurkin and authorities there cited).

(a) "Sodomy consists of sexual connection with any brute animal, * * *. To establish the offense, actual penetration must be proved. (MCM, 1928, par.149k, p.177; CM ETO 705, Malone). Attempt to commit sodomy is an offense under the 96th Article of War (CM 155131 (1923); CM 158055 (1923), 179958 (1928); CM 145266, 145155 (1921), Dig.Op.JAG 1912-1940, sec.454 (13, 14,15), p.349; MCM, 1928, par.152c, p.190).

(b) House breaking is denounced by the 93rd Article of War and is the unlawful "entering another's building with intent to commit a criminal offense therein" (MCM, 1928, par.149e, p.169; CM 230541 (1943), Bull.JAG, Vol.II, No.5, May 1943, sec.451(14), p.189).

4. The charge sheet shows that the accused is 24 years of age and was inducted at Fort Bragg, North Carolina, 17 February 1942 for the duration of the war plus six months. Prior service is not shown.

5. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved. Confinement in a Federal Reformatory is authorized (AW 42; District of Columbia Code, (House-breaking), Sec.22-1801(6:55); WD Cir. 291, 10 Nov 1943, sec.V, par.3a).

B. Franklin Kite _____ Judge Advocate
Richard W. Schlesinger _____ Judge Advocate
Ellwood T. Ferguson _____ Judge Advocate

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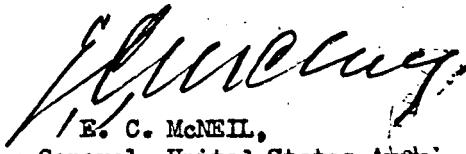
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1st Ind.

WD, Branch Office TJAG., with ETOUSA. -7 APR 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private FATE (NMI) LABORDE, JR., (34250600), Company "B", 244th Quartermaster Battalion (Service), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1638. For convenience of reference please place that number in brackets at the end of the order: (ETO 1638).



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



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

BOARD OF REVIEW

ETO 1644

26 APR 1944

UNITED STATES) XIX AIR SUPPORT COMMAND.

v.) Trial by G.C.M., convened at
Private SAM (NMI) ALLEN) Aldermaston, Berkshire, England
(39188206), Company "A",) 6 March 1944. Sentence: Dis-
448th Signal Construction) honorabile discharge, total for-
Battalion (Avn).) feitures and confinement at hard
labor for 22 years. United States
Penitentiary, Lewisburg, Pennsyl-
vania.

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

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private Sam (NMI) Allen,
Company "A", 448th Signal Construction Battalion (Avn), XIX Air Support Command, did,
at Ecchinswell, Hampshire, England, on or
about 11 February 1944, with intent to commit
a felony, viz, rape, commit an assault upon
Barbara Evelyn May Clarke, by wilfully and
feloniously holding her by the throat, taking
off her knickers and corset, and attempting
to insert his penis into her vagina.

CHARGE II: Violation of the 96th Article of War.
Specification: In that Private Sam (NMI) Allen,
* * * * did, at Kingsclere, Hampshire,
England on or about 11 February 1944, wrong-
fully and unlawfully take and use, without
proper authority, a certain motor vehicle, to
wit: $\frac{1}{4}$ ton 4x4 U.S.Gov't vehicle, No.20325550,
property of the United States of a value of
more than \$50.00.

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He pleaded not guilty to Charge I and its Specification, guilty to Charge II and its Specification, and was found guilty of both charges and their specifications. Evidence was introduced of one previous conviction by summary court for applying to his own use Government property furnished and intended for military service, 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 22 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 50 $\frac{1}{2}$.

3. Accused on 11 February 1944 was stationed at a camp about three miles from Kingsclere and was the driver of one of the trucks in a convoy of men which left camp about 7.20 p.m. that night to attend a U.S.O. show at Kingsclere (R7). Accused, as sole witness on his own behalf, testified that he parked the truck in Kingsclere and went to a nearby "pub" and had a beer. He then went to another "pub" down the street when he met Tyler, Harris and Jackson (R60), soldiers from his camp (R9,11,13) and had another beer. They played dominoes for a while when all but accused left. He drank his beer, put up the dominoes and went over where the trucks were parked. He took one of two jeeps he found there and drove out of town three or four miles. At that distance he passed a girl on a bicycle. He went on up the road about a mile, turned around and on the return trip, while trying to fix his lights, ran into the girl's bicycle. He got out and started a conversation with the girl. He took her by the arm, laid her on the ground and took off her pants. He stated on the stand that he wanted to have intercourse with her but could not. He helped her to arise. She picked up her bicycle and started down the road. He entered the jeep and returned to Kingsclere, left it and walked back to camp. She did not object to him, resist or try to leave him and he did not hold her although he had his hand on her shoulder (R60). He denied hitting her or that she was unconscious at any time while he was with her. He stated that she was riding the bicycle when the jeep hit it. He admitted that in a statement he made on 16 February, he stated, "I bumped into the girl's bicycle intentionally to stop her", but that he was not allowed to correct it (R61). He further testified that she sat down herself but that he took off the corset and knickers (R62). He had never seen the girl before and had no date with her but she did not refuse to have intercourse with him. He denied that he grabbed her by the throat or that she screamed or made any outcry. She was not thrown off but got off her bicycle when it was hit (R63). She started on and he stopped her, took the bicycle and "sat her down on the side of the road" (R64). He admitted he was on top of her and had an emission (R65).

First Lieutenant Timothy J. Sullivan, Company A, accused's unit, who was the officer in charge of the convoy that night, did not see accused at the U.S.O. show in Kingsclere though he checked four or five times. The

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truck left Kingsclere to return about 9.15 p.m. arriving in camp about 9.30 p.m. (R7).

Privates Henry D. Tyler, James Harris and Private First Class Cephas Jackson all of Company A, went with the convoy to Kingsclere, the night of 11 February. Accused drove one of the trucks. They drank beer in the Bolton Arms "pub" and when accused came in, they played dominoes until the first three named soldiers left for the show at which time accused remained in the "pub" (R10,12,14).

The proprietor of the Bolton Arms "pub" testified that 12 or 14 colored soldiers in working clothes came in the "pub" just after 7 p.m. on the night in question and stayed about a half hour when all but one man left. This man remained several minutes, put up the dominoes and then also left. None of them returned that night (R15).

Barbara E.M. Clarke, Long Ground, North Sydmonton, an 18 year old parlor maid, left her work about 8.15 p.m. this same night and started for her home, about a mile distant, on her bicycle. She was pushing her bicycle up a hill when a jeep passed her going in the opposite direction, went on a little way, turned around and came back straight for her on the left side of the road (R16) hit her bicycle (R17,21) and damaged the rear wheel. A "black American" got out and asked if he could help her. She refused and walked away. Shortly thereafter she "felt his hand on my throat" (R17). She was grabbed by her throat which was squeezed and bruised (R57). She shouted for help twice, and he threatened to cut her throat if she didn't keep quiet. She remembered nothing further till she found herself lying on the ground, her clothes off (R17) and a "sticky mess" between her legs near her privates. She called and started for help when a Mrs. Dolphin and a Mr. Stevens appeared. Stevens took her home where she informed her mother and father of the occurrence. They called a doctor and the police. Barbara had a bump over the left eye. Dr. Phillip examined her that night. Next morning she had a black eye and a sore throat. She lost ten days from her work (R18). The incident occurred between 8.45 and 9 p.m. while it was between light and dark. She could not identify accused but testified that the soldier had on "out door trousers", mackintosh little coat and "side cap". She did not know how her injuries were received and did not consent to intercourse (R19). She made a statement to the police on 15 February which was admitted in evidence as defense Ex.1 (R20). Barbara's dress, petticoat, knickers and corset, worn that night were admitted in evidence as prosecution's Exs.A,B,C and D respectively (R23).

About 8.30 p.m. on the evening of the 11th of February, Mrs. Lily I. Dolphin, Brock's Farm, Ecchinswell, Hampshire, while outside of the house on Ecchinswell Road, heard a cry and responded, "Is anyone hurt?". A voice answered, "Yes, fetch the police!.. Mrs. Dolphin asked, "Have you been knocked off your bike?" and the voice again answered, "No, an

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American here tried to strangle me". Mrs. Dolphin called Mr. John K. Stevens, a neighbor, and they found Barbara a little distance down the road walking towards them and pushing a bicycle (R25). Her face was swollen and bruised on one side and the rear wheel of the bicycle was badly damaged. Mrs. Dolphin had noticed a vehicle with bright lights about ten minutes previously, going towards the village (R26-27).

Barbara's father and mother testified that she came home about 9.15 p.m. on the night in question. She was crying and said she had been attacked by a black American. She was wearing her top clothes and was carrying her knickers and corset which were wet and dirty. She had a big bump on her left forehead and was bleeding from a scratch under one eye (R31-34).

Dr. Douglas W. Phillip, Kingsclere, Hampshire, examined Barbara about 10 o'clock that night and found her highly nervous. She had a large bump on the left forehead and she complained of a sore throat, which was slightly bruised. The external injuries appeared to be recent. That evening he also made a vaginal examination of Barbara but discovered no indication of a penetration at a time reasonably prior to the examination (R37). He saw her again the next morning and found her condition better, the lump and bruise bigger and her left eye nearly closed (R36).

Captain Edwin S. Wittbrodt, Commanding Officer of the 4183rd Quartermaster Company, went to Kingsclere the night of 11 February, in a Jeep, No. 20325550, which he left in the car park of the Swan Hotel about 8.15 p.m.; at 10 p.m. he found it parked about 125 yards away. The vehicle was United States Government owned and it was stipulated in open court to be of a value in excess of \$50 (R38).

T/4 Laython Strange, T/Sgt. Jabus Brinson and Corporal Oscar E. Lyles, all of accused's unit, went to town in the convoy and saw accused in the "pub" but not at the show and each saw accused walk into camp from the direction of Kingsclere about 10.30 p.m. (R41-46).

Detective Sergeant Richard H.B. Whitehead, Hampshire Joint Police Force, stationed at Andover, examined the place where the incident occurred, found the ground "churned up" and on the spot found a piece of metal, admitted in evidence as Ex.E, which fitted into a missing part of Barbara's corset, Ex.D. The place was about 200 yards from the home of Mrs. Dolphin (R54-55). He further testified that he was present after 11 February at the identification parade, which included accused. Barbara was very excited and distressed and failed to look at the line or to identify anyone as her assailant.

4. Accused made three different statements during the investigation. In Pros.Ex. 1, statement made 13 February, he stated he remained in the "pub" and played dominoes by himself after the other fellows left till he figured the show was over when "quite a few fellows started to come in". He found the truck gone and walked back to camp. In his statement of 16 February, Pros.Ex.2, he admitted taking the jeep and stated that he inten-

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tionally ran into a girl's bicycle to stop her; that he "asked her for a little" and "she said no". He started to lay her down and she "hollered". He then grabbed her by the neck and she stopped, whereupon he took off her pants and corset without her consent. He further stated that he tried to penetrate her but could not, had an emission and returned the jeep near the place where he got it. The trucks were gone and he walked back to camp. Statement No.3, dated 19 February 1944, Ex.3, contains substantially the same story as Ex.2 and his testimony and the last two statements agree with the evidence generally.

5. The findings of guilty of Charge I and its Specification, assault with intent to commit rape, are supported by substantial evidence. The victim's physical condition, her injuries and clothing all bore mute corroborative evidence of the offense charged. (CM ETO 78, Watts; CM ETO 489, Rhinehart and Fallucco; CM ETO 492, Lewis; CM/595, Sipes; CM/882, Biondi and White; CM ETO 996, Burkhart)

ETO ETO

6. The findings of guilty of Charge II and its Specification, unlawful taking and using a Government motor vehicle of a value in excess of \$50, are not only admitted by accused in his last two statements and his plea of guilty, but are amply supported by the record. (CM ETO 393, Caton and Fikes; CM ETO 656, Taylor; CM ETO 1366, English)

7. The charge sheet shows that accused is over 21 years of age. He was inducted at Seattle, Washington, 1 September 1942 for the duration of the war plus six months. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and 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. The sentence is less than the maximum for the offenses charged. (MCM, 1928, par.104c, p.99; CM 212091, Hopkins; CM 209295, DeArmond). Confinement in a United States penitentiary is authorized (AW 42; 35 Stat. 1143, 18 U.S.C. 455; Cir. 291, WD, 10 Nov 1943, par.V).

R. Franklin Rife Judge Advocate

Edward Burkhart Judge Advocate

Ellwood V. Sargeant Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. 26 APR 1944 To: Commanding General, XIX Air Support Command, APO 638, U. S. Army.

1. In the case of Private SAM (NMI) ALLEN (39188206), Company "A", 448th Signal Construction Battalion (Avn), attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1644. For convenience of reference please place that number in brackets at the end of the order: (ETO 1644).


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

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

BOARD OF REVIEW

ETO 1645

11 APR 1944

U N I T E D S T A T E S)
v.)
Private DONALD M. GREGORY)
(32670675), Battery C, 200th)
Field Artillery Battalion.)
)

V CORPS

Trial by G.C.M., convened at Bude,
Cornwall, England 1 March 1944.
Sentence: Dishonorable discharge,
total forfeitures and confinement
at hard labor for 10 years. The
Federal Reformatory, Chillicothe,
Ohio.

HOLDING of the BOARD OF REVIEW
RITTER, 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 Donald M. Gregory,
Battery C, 200th Field Artillery Battalion,
did, at Roseneath, Dumbartonshire, Scotland,
at about 1700 hours, on or about 4 January
1944, absent himself without leave from the
service of the United States, and did remain
absent without leave until he was apprehended
at Glasgow, Lanarkshire, Scotland, at about
1900 hours on or about 4 January 1944.

CHARGE II: Violation of the 58th Article of War.
Specification: In that * * *, did, at Roseneath,
Dumbartonshire, Scotland, on or about 12 January
1944, desert the service of the United
States, and did remain absent in desertion
until he was apprehended at Bath, Somerset,
England, on or about 19 January 1944.

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CHARGE III: Violation of the 69th Article of War.

Specification 1. In that * * *, having been duly placed in confinement in the guardhouse, on or about 28 December 1943, did, at Roseneath, Dumbartonshire, Scotland, on or about 4 January 1944, escape from said confinement before he was set at liberty by proper authority.

2. In that * * *, having been duly placed in confinement in the guardhouse, on or about 4 January 1944, did, at Roseneath, Dumbartonshire, Scotland, on or about 12 January 1944, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1. In that * * *, did, while posted as a sentinel, at Roseneath, Dumbartonshire, Scotland, on or about 28 December 1943, loiter on his post.

2. (Finding of Not Guilty)

He pleaded not guilty to all charges and specifications. He was found not guilty of Specification 2, Charge IV; guilty of all charges and all remaining specifications. Evidence was introduced of two previous convictions, one by summary court for 29 days absence without leave in violation of Article of War 61, the other by special court-martial for two absences without leave for 13 and 18 days respectively in violation of Article of War 61 and escape from confinement in violation of Article of War 69. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for ten years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that at 8 a.m. 28 December 1943, the accused was a member of the guard detachment at Roseneath, Scotland. He was regularly posted as a sentinel to stand guard for four hours at Post Number Two, comprised of a fenced warehouse area, its entrance road and sentry box. As such sentry he was charged with the duty of stopping vehicles passing in and out, and of preventing unauthorized persons entering the area or approaching the warehouses. During daylight hours, he was authorized to station himself either inside or outside the sentry box, but "normal general orders and also orders pertaining to the sentry box itself" required that its door should remain open at all times. Shortly after nine a.m. Captain Harry C. Symmonds, 190th Field Artillery Battalion, commanding officer of the guard detachment, drove past the sentry box at Post Number Two. Observing that the door was closed and that the sentry was not in

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sight, he alighted and walked to the rear of the sentry box, then up the road to see if the sentry was around the warehouses. He did not find accused until he discovered him in the sentry box with the door closed and locked. "I knocked at the door of the box for approximately a minute -- a long time considering a very small box." (R7-12).

By Captain Symmonds' order, the accused was promptly relieved and confined "in the brig * * * awaiting the Chief Master at Arms". He escaped while in the "chow line" at about 1700 hours 4 January 1944. Military police in Glasgow, approximately 27 miles distant, were promptly notified. He was "picked up" there, at about 2030 hours that same evening by a detail dispatched from his organization, which found him in the custody of the Glasgow military police (R17-18, 21-25, Ex's A,B,C).

Reconfinement at Roseneath, he again escaped on 12 January 1944. When next apprehended at Bath, England on 19 January 1944, he was dressed in a sailor's uniform, denied his identity, and claimed he had lost his "dog tags". Later he admitted both his identity and his absence without leave, declared that he did not care what happened to him and asserted that he "would not get a fair break with his own outfit and that he did not want to go back * * *." (R26-32, Ex.D).

4. The evidence for the defense consisted of the following:

(a) - The testimony of one enlisted member of the accused's guard detachment (Gorman, who had performed guard duty at Roseneath but never at Post Number 2) that there were no orders with reference to sentry boxes "as to open or closed doors";

(b) - the testimony of another soldier (Ridge, who had served as sentry on Post Number 2) that he had no recollection of any orders regarding the door on the sentry box or the box itself, that there was no lock on the sentry-box door at Post Number Two and that it had a window through which the sentry could look out (R37-40); and

(c) - the testimony elicited on cross-examination from a Staff Sergeant Orndorf, Headquarters Company, accused's regiment, a witness for the prosecution, that he - the staff sergeant - knew of no orders applying particularly to the sentry box in question nor any as to the door being open or closed (R18-19).

5. Upon being advised of his rights, accused elected to remain silent (R40).

6. The two hours absence without leave alleged in the Specification, Charge I, is established by uncontradicted evidence that three and a half hours after his escape from confinement at Roseneath, the accused was found 27 miles away at Glasgow in the custody of military police. While the evidence of his original apprehension by the Glasgow military authorities

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was hearsay and inadmissible, competent testimony showing (1) the prompt notifications of the Glasgow military police of the fact of accused's escape, (2) his delivery by the Glasgow military police to the detail of his own organization, dispatched to Glasgow for the express purpose of returning him, and (3) his subsequent escape a few days later, so strongly supports the inference of apprehension as to render patently harmless the admission of the hearsay. (MCM, 1928, par. 87b, p.74).

7. The Specification, Charge II, alleges desertion. The evidence that the accused was wearing a sailor's uniform when apprehended at Bath, England on 19 January 1944, that he denied his identity, that he excused the absence of "dog tags" by claiming they were lost, and that he expressed reluctance to return to his organization, adequately establishes the requisite element of intent to remain permanently absent from the military service (CM ETO 1603, Haggard and authorities therein cited).

8. Competent uncontroverted evidence establishes the two escapes from confinement alleged in the specifications under Charge III. (MCM, 1928, par.139b, p.154).

9. Specification 1, Charge IV, alleges loitering on post while posted as a sentinel. Webster's definition of the intransitive verb loiter is "to be slow in moving" (Webster's Collegiate Dictionary, Fifth Edition). The offense charged is recognized by the Manual for Courts-Martial as a violation of Article of War 96 (MCM, 1928, App.4, Spec.156, p.256) and is clearly established by Captain Symmonds' uncontradicted testimony, regardless of orders to keep the sentry box door open, or whether it had a lock on it or not. The dereliction, though a minor one, was the commencement of a series of events which resulted in the commission of the serious offenses of which accused was found guilty. In this sense it serves to explain the circumstances of the more serious offenses, and may be regarded as not improperly included in the charges. (MCM, 1928, par.27, p.17).

10. The charge sheet shows that the accused is 21 years of age; was inducted 30 November 1942 to serve for the duration of the war plus six months and, on the same date, transferred to the enlisted reserve, ^{recalled} to active duty 7 January 1943. Prior service is not shown.

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

12. The punishment for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). The

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designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement for desertion committed in time of war is authorized (AW 42; Cir. 291, WD, 10 Nov 1943, sec.V, pars. 3a and b).

B. Franklin Miller _____ Judge Advocate

Howard D. Anderson _____ Judge Advocate

Clifford K. Hayes _____ Judge Advocate

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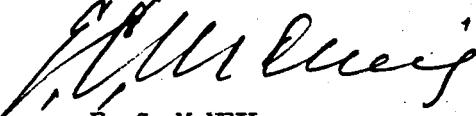
WD, Branch Office TJAG., with ETOUSA.
General, V Corps, APO 305, U.S. Army.

11 APR 1944

TO: Commanding

1. In the case of Private DONALD M. GREGORY (32670675), Battery C, 200th 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 and sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1645. For convenience of reference please place that number in brackets at the end of the order: (ETO 1645).



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

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

BOARD OF REVIEW

ETO 1659

17 MAR 1944

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

v.

Private CARL W. LEE
(37283159), Company H,
47th Infantry.

9TH INFANTRY DIVISION.

Trial by G.C.M., convened at Cefalu,
Sicily 10 September 1943. Sentence:
Dishonorable discharge, total for-
feitures and confinement at hard
labor for 20 years. Eastern Branch,
United States Disciplinary Barracks,
Beekman, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Carl W. Lee,
Company H, 47th Infantry, did at or near
Troina, Sicily, on or about 7 August 1943,
run away from his Company, which was then
engaged with the enemy, and did not re-
turn thereto until after the engagement
had been concluded.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved the sentence but remitted so much thereof as involved confinement in excess of 20 years, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement, directed that the prisoner be held at Oran, Algeria pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

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3. On 7 August 1943, accused was a member of the 3rd platoon of Company H, 47th Infantry. Company H was part of the 2nd Battalion. At 4:00 a.m. on that date it was in a rear assembly area west of Troina, Sicily. It moved forward in the direction of a front assembly area. During the advance the head of the Battalion was under heavy artillery fire. Shells landed in the front and to the right of the Battalion and in the rear thereof. It was finally stopped by enemy fire and it spread out and took cover, remaining in that position until about 8:00 p.m. when it was ordered to move out and attack further east beyond Cesaro. Accused arrived with the platoon in the forward area. About 10:00 a.m. he went to a house in the vicinity and in company with three other men remained there all day. His presence at the house was either on duty or authorized. When orders to advance were received, the four men were notified that the 3rd platoon of Company H would move out at 9:00 p.m. The other three men returned to the platoon but accused did not rejoin the same. The platoon was under artillery fire at that time (R6,7,9). On this date the company kitchen was a considerable distance in the rear of the company command post. Motor vehicles carrying water and rations were despatched twice each day from the kitchen to the troops in advanced positions (R8,10). Accused appeared at the kitchen and remained there about one and one-half days until "they came after him" (R10). He rejoined his platoon on 10 August 1943 (R8). He could have obtained transportation on any of the vehicles carrying water and rations from the kitchen to the company (R8,10).

. (a) Accused's duties required him to be with his platoon as it advanced to meet the enemy. He had no authority to absent himself from the platoon's advance lines. He ran away from his company when he failed, although duly notified of its proposed movements, to join his platoon at 9:00 p.m. on 7 August and go forward with it. The fact that he appeared at the company kitchen (where he remained for a day and one-half) does not alter this conclusion. The kitchen was a considerable distance in the rear of the company. While accused remained at the kitchen he was absent from his post of duty exactly as he would have been had he been distant from all elements of his company. He left his command and went to the rear when it was engaged with the enemy. His offense was then complete (Winthrop's Military Law & Precedents - p.623).

(b) The Specification alleges that accused ran away from the company while it was engaged with the enemy and "did not return thereto until after the engagement had been concluded". The proof fails to disclose when the "engagement" was concluded or that it had ended when accused returned to his company. However, the allegation with respect to the time of accused's return is wholly immaterial and did not require proof. It is the fact that accused departed from the place where duty required him to be when his unit was "before the enemy" that constitutes the offense (CM ETO 1404, Stack; CM ETO 1249, Marchetti).

(c) There can be no issue on the question as to whether accused and company were "before the enemy" when he ran away from it. It was actually under artillery fire and its advance was directly against the enemy. All of the elements of the offense alleged were proved beyond a reasonable doubt (CM ETO 1404, Stack; CM ETO 1249, Marchetti).

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4. The charge sheet shows that accused is 27 years three months of age and was inducted at Fort Snelling, Minnesota on 14 June 1942 for the duration of war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved. The punishment for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 75). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

B. Franklin Ritter _____ Judge Advocate

C. W. Sanderson _____ Judge Advocate

(SICK IN QUARTERS) _____ Judge Advocate

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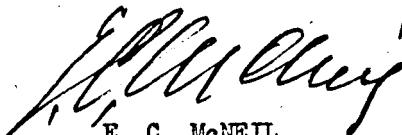
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WD, Branch Office TJAG., with ETOUSA. 17 MAR 1944 TO: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private CARL W. LEE (37283159), Company H, 47th 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. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2). 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 1659. For convenience of reference please place that number in brackets at the end of the order: (ETO 1659).



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

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

BOARD OF REVIEW

ETO 1661

25 MAR 1944

U N I T E D S T A T E S) 9TH INFANTRY DIVISION.

v.) Trial by G.C.M., convened at Cefalu,
Private LUTHER L. HASS) Sicily, 11 September 1943. Sentence:
(34147505), Anti-Tank) Dishonorable discharge (suspended),
Company, 39th Infantry.) total forfeitures and confinement at
) hard labor for ten years. Eastern
) Branch, Disciplinary Barracks, Beek-
) man, New York.

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

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

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

CHARGE I: Violation of the 65th Article of War.
Specification 1: In that Private Luther L. Hass, Anti-Tank Company, 39th Infantry, did, at Bizerte, French North Africa, on or about July 13, 1943, use the following insulting language; behave in an insubordinate and disrespectful manner toward Staff Sergeant William R. Crist, Anti-Tank Company, 39th Infantry, a non-commissioned officer who was then in the execution of his office, by saying to him "I'LL BE GOD DAMNED IF I'LL DIG A LATRINE, I'LL GO TO THE GUARD HOUSE BEFORE I DO THAT", or words to that effect.

Specification 2:(Disapproved by reviewing authority)

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CHARGE II: Violation of the 63rd Article of War.

Specification: In that * * *, did, at Bizerte, French North Africa, on or about July 13, 1943, behave with disrespect toward 2nd Lieutenant NORMAN F. MC NEIL, 39th Infantry, his superior officer, by saying to him, "I'LL BE GOD DAMNED IF I'LL DIG A LATRINE. I'LL GO TO THE GUARD HOUSE", or words to that effect.

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

Specification: In that * * *, having received a lawful command from 2nd Lieutenant NORMAN F. MC NEIL, 39th Infantry, his superior officer, "Hass, you go over there and dig that latrine," did, at Bizerte, French North Africa, on or about July 13, 1943, willfully disobey same.

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 ten years. The reviewing authority disapproved the findings of guilty of Specification 2, Charge I, approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, designated the Eastern Branch, United States Disciplinary Barracks, Breeckman, New York, as the place of confinement but directed that accused be held at Oran, Algeria pending further orders.

The proceedings were published in General Court-Martial Orders No. 31, Headquarters 9th Infantry Division, APO 9, c/o Postmaster, New York, New York, 10 February 1944.

3. The reviewing authority disapproved the findings of guilty of Specification 2, Charge I (willful disobedience of the lawful order of Staff Sergeant William R. Crist, a non-commissioned officer who was then in the execution of his office, in violation of Article of War 65). However, in view of the circumstances surrounding the commission of the offenses of which accused was found guilty, it is considered necessary to set forth in substance the evidence pertaining to all charges and specifications.

The evidence for the prosecution, which was undisputed, shows in substance that at the time and place alleged accused's company was in formation and about to go swimming. The prescribed uniform was either swimming trunks or white cotton "shorts". The entire company was in proper uniform with the exception of accused who wore fatigues. Staff Sergeant William R. Crist, Anti-Tank Company, 39th Infantry, then acting first sergeant, who "had the company fall out in formation", told accused to go to his tent and put on swimming trunks or white "shorts". He said that he would not change, whereupon Crist told him that "he would have them on before going to the beach".

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When he again refused to change Crist said "I want you to dig a latrine". Accused replied, "I'll be damned if I dig a latrine". Crist then said "You will dig a latrine," whereupon accused waived his arms "violently" and replied "I'll be God damned if I dig that latrine. I'll go to the Guard House first"(R6-7,9,11-14). He indicated that he wanted to wash his fatigues and that he would not go swimming if he could not go in coveralls(R13). The formation and swim were compulsory for members of the company with the exception of "cooks and so forth" (R12,14).

Second Lieutenant Norman F. McNeil, Anti-Tank Company, 39th Infantry, who commanded accused's platoon, was about 50 yards away at the time of the occurrence. He first heard Crist say "Hass, you go back and dig that latrine," and then heard accused's refusal. McNeil called accused over to him and said "Hass, go over there and dig that latrine", whereupon he again replied "I'll be God-damned if I dig that latrine. I'll go to the Guard House first." Captain Francis M. Brian, commander of the Anti-Tank Company, 39th Infantry, who was sitting in his tent, heard the order of McNeil and accused's refusal to obey the order. He left his tent and placed accused under arrest (R7-11,13-15). Accused did not obey the orders of either Sergeant Crist or Lieutenant McNeil(R7,10). The entire events occurred before and within the hearing of the company while in formation (R7,10-11). Captain Brian did not give accused any order (R15).

Upon cross examination Sergeant Crist testified as follows:

- "Q. When you gave this order, were you acting in the execution of your office?
- A. I was, sir.
- Q. Do you think it is within the scope of your office to give Company punishment?
- A. I think so, sir.
- Q. Have you done this before, then?
- A. Yes, sir. I have done this before.
- Q. Have you been given any authority to do this?
- A. Yes, sir. I have. The Captain has given me this authority to give out Company punishment, sir.
- Q. Are you sure of that?
- A. Yes, sir.
- Q. This order to dig the latrine was not a regular detail, was it? It wasn't his turn to dig a latrine was it?
- A. No, sir. It wasn't.
- Q. It was punishment, then?
- A. Yes, sir.
- Q. Company punishment?
- A. Yes, sir." (R8).

4. The defense offered no evidence and accused elected to remain silent (R16).

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5. A proper consideration of the alleged willful disobedience of the lawful command of Lieutenant McNeil (Charge III and Specification) necessitates a brief consideration of the alleged willful disobedience of the order of Sergeant Crist to dig a latrine (Specification 2, Charge I). The reviewing authority disapproved the findings of guilty of the latter offense. Crist testified that the order given accused to dig the latrine was not a regular detail, and that it was not accused's turn to dig a latrine. He further testified that the "Captain" had authorized him to "give out" company punishment, and that accused was ordered to dig the latrine as company punishment.

Only

* * * * the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command
* * * (AW 104) (Underscoring supplied).

"This authority of a commanding officer can not be delegated, but communications with respect thereto may be signed or transmitted by him personally or as provided for official communications in general" (MCM, 1928, par.105, p.103).
(Underscoring supplied).

In view of the foregoing, Crist was manifestly without authority to administer company punishment because of accused's refusal to change from fatigues to the prescribed swimming uniform, and his order to dig the latrine was, therefore, illegal and wholly void.

6. With reference to the alleged willful disobedience of Lieutenant McNeil's command to dig the latrine, there was no evidence to show that this command was given for any different purpose than was the order of Crist, namely, as company punishment for accused's refusal to change from fatigues to the prescribed swimming uniform. For example there was no evidence that accused was ordered by this officer to dig the latrine as a routine military duty, as a form of necessary additional physical training, or for any other purpose. In the absence of such evidence the only reasonable inference to be drawn from all the circumstances is that the officer intended, by his order to impose company punishment.

The platoon commanded by Lieutenant McNeil was present with and formed an integral part of the company commanded by Captain Brian, who was present in his tent and heard the officer's order and accused's refusal to obey. The platoon was obviously not a "detachment" within the purview of Article of War 104. In view of the facts that only the commanding officer of "any detachment, company, or higher command" may impose disciplinary punishment for minor offenses upon persons of his command, and that such authority cannot be delegated, it is evident that Lieutenant McNeil was not authorized to administer company punishment.

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Moreover, had this officer authority to administer such punishment, there is an additional reason why his order to dig a latrine was illegal and void. With respect to disciplinary punishment imposed under AW 104, the requirements of the article that the accused (a) be given the opportunity to demand trial by court-martial before imposition of punishment, and (b) be informed of his right to appeal to superior authority if he believes the punishment imposed is unjust, are mandatory, and the failure of the officer imposing the punishment to notify the accused of his rights nullifies the order of punishment and renders it illegal (CM ETO 1015, Branham). In the present case the record of trial is completely silent with reference to compliance with any of the requirements of the article and indicates rather clearly that no compliance was attempted. The instant case is readily distinguishable from cases in which there was at least a partial compliance with the foregoing provisions of AW 104 (CM ETO 1015, Branham; CM ETO 1057, Redmond).

In view of the foregoing the Board of Review is of the opinion that the evidence is legally insufficient to support the findings of guilty of Charge III and its Specification.

7. The evidence is legally sufficient to support the findings of guilty of Charge II and its Specification (behaving with disrespect toward his superior officer, Lieutenant McNeil, in violation of Article of War 63). The language addressed to the officer clearly constituted disrespectful behavior. It has been held that the fact that disrespectful language was used toward a superior officer by accused at a time when he was refusing to obey an illegal order given him by the officer is no defense (CM 146727(1921), Dig.Op.JAG, 1912-1940, sec.421(2), p.283; CM 226870(1942), Bull.JAG, Vol.I, No.7, Dec 1942, sec.422(6), p.363)).

The evidence is also legally sufficient to support the findings of guilty of Specification 1, Charge I and of Charge I (use of insulting language and behaving in an insubordinate and disrespectful manner toward a non-commissioned officer, Staff Sergeant Crist, who was in the execution of his office, in violation of Article of War 65). Accused twice openly refused to obey Crist's order to go to his tent and change from his fatigues to the prescribed swimming uniform, and then, waiving his arms violently, addressed disrespectful language to the sergeant. The scene occurred before and within the hearing of the company which was then in formation. Crist, a regular staff sergeant, was acting first sergeant of the company at the time and was performing his military duties as such. He was clearly then in the execution of his office.

8. The charge sheet shows that accused was 27 years five months of age and that he was inducted at Fort Oglethorpe, Georgia, 11 October 1941. He had no prior service.

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9. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 1, Charge I and Charge I, Charge II and its Specification, legally insufficient to support the findings of guilty of Charge III and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for eight months.

B. Franklin Kite _____ Judge Advocate
Edward W. Anderson _____ Judge Advocate
Elwood V. Hayes _____ Judge Advocate

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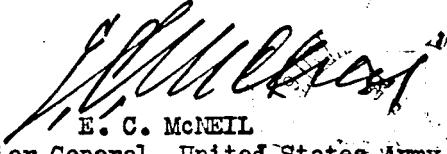
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WD, Branch Office TJAG., with ETOUSA. 25 MAR 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. Herewith transmitted for your action under Article of War 50 $\frac{1}{2}$ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), and as further amended by Public Law 693, 77th Congress, 1 August 1942 is the record of trial in the case of Private LUTHER L. HASS (34147505). Anti-Tank Company, 39th Infantry.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings of guilty of Charge III and its Specification be vacated, that so much of the sentence be vacated as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for eight months, and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated, be restored.

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


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

Incls:

Incl. 1 Record of Trial
Incl. 2 Form of Action
Incl. 3 Draft GCMO

(Sentence confirmed by order of the Theater Commander, 6 Apr 1944)

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

BOARD OF REVIEW

ETO 1663

- 1 APR 1944

U N I T E D S T A T E S)
v.)
Private GEORGE ISON JR.)
(13018478), Company L,)
47th Infantry.)
)
Trial by G.C.M., convened at Cefalu,
Sicily 7-10 September 1943. Sentence:
Dishonorable discharge, total for-
feitures and confinement at hard labor
for 20 years. United States Discipli-
nary Barracks, Fort Leavenworth, Kansas.

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private George Ison Jr.,
Company L, 47th Infantry, did, near Troina,
Sicily, on or about 7 August 1943, run away
from his Company, which was then engaged
with the enemy, and did not return thereto
until after the engagement had been concluded,
on 12 August 1943.

He pleaded not guilty, and was found guilty of the Charge, and of the Specification guilty, except the words "run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded, on August 12, 1943", substituting therefor the words, "misbehave in the presence of the enemy by failing to advance with his command which had been ordered forward by Lt. King, Platoon Commander, in compliance with orders of Company Commander", of the excepted words not guilty, and of the substituted words guilty. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved

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the sentence but remitted so much thereof as involved confinement in excess of 20 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement, directed that the prisoner be held at Oran, Algeria, pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The court met on 7 September 1943. After accused had pleaded, defense counsel moved for a continuance until 10 September for preparation of its case, charges having been received on 6 September. The court granted the motion and the trial resumed on 10 September (R5). The practice adopted was regular (MCM, 1928, par.52, pp.40,41).

4. Evidence for the prosecution showed that on 7 August 1943, accused, then a corporal, was second in command of the first squad, second platoon, Company L, 47th Infantry (R6,10,13). At about 0430 hours on that date the company left its area in the vicinity of Troina, Sicily (R10,13), at which time accused was seen moving with his platoon (R7,10). About two miles from Troina, the company headed east, was shelled several times, paused a few minutes and thereafter continued to advance. The company commander, two miles ahead, called for the second platoon to advance. The platoon moved forward, taking an hour to pass "I" Company and "K" Company. The company commander placed it in "Battalion reserve" in a gully under a bridge, where it remained for about a half hour (R7,10,13-14). For approximately three hours thereafter it was shelled heavily. Because of the intensity of the shelling the personnel of the second platoon, were required to "scatter" and take cover. About noon the entire company assembled in a culvert. About 3:30-4:30 p.m. personnel were checked and accused's absence was then noted for the first time and verified by a search. Reports were made to the commander of accused's platoon that he had "stayed behind at the beginning of the shelling" (R7,9,10,14). About 8 August in the afternoon, accused came to the company kitchen which had moved about "five miles forward" but was still in the rear of the company. At that time the mess sergeant did not notice anything unusual about his physical or mental condition. About a day later the mess sergeant reported his presence to the company commander, who told him to direct accused either to return to his company or to report to the medical personnel. The mess sergeant gave him such directions and he departed after a stay of one and a half to two days (R11-13). Between 7 and 11 August the platoon did not make actual contact with the enemy (R8). On 11 August at about 1100 hours accused reported with full equipment to his platoon headquarters. The platoon was not engaged in combat at that time, but a few shells were falling about 800 yards from its area (R7-9). Asked by his platoon commander, Second Lieutenant E.B.King, Jr., "what the trouble was and if he had been injured", he replied that "he got nervous after we got shelled and wasn't able to stand it". He stated that this was why he "stayed back" (R7). He was not warned as to his rights (R14) previous to making the statement.

5. For the defense, Private Melvin A. Krajewski of accused's platoon, testified that on the afternoon of 7 August, after his unit left Troina, shells started dropping and as it was his first time under fire he was

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hysterical. Accused went to him and tried to calm him. Accused "appeared to be shocked and had a tremble in his voice" and he told a sergeant in his platoon that he was going to stay with witness. They took cover beneath a bridge, where they remained until Sunday evening. Neither knew nor attempted to ascertain when their platoon moved out. Accused "did want to get back". Thereafter they walked down the road from their position, and found their way back to the company kitchen (R15-16).

After his rights were explained to him, accused testified that on the morning of 7 August "we were marching up the road". When the platoon was fired upon, "I just lost my head. I ran over the hill" and lay down near Krajewski, who was "hollering and carrying on." "I went all to pieces. I was nervous. I was shot. * * *. It just shocked me. I was wounded in El Guettar and I couldn't take it any more." He told the sergeant he would take care of Krajewski. Meanwhile his platoon "scattered" and "no one hollered for me to come on, so I don't know when the Platoon moved out". He did not know the position of the enemy or which way his platoon would advance. "I figured they would keep moving but nobody hollered to me and I didn't know whether or not they had moved." After the shelling ceased he "went over the next little knoll" to "see what was going on" and thus knew that the platoon had advanced down the road. He made no effort to go to the Battalion aid station that day. After the shelling decreased, he told Krajewski that they "had to get to the Company". He went down into the culvert and met five soldiers who "had gone over the hill". Shelling resumed so they spent the night there. The next morning (8 August) they "walked along", in the evening reached the company kitchen, which had passed them, and reported to the mess sergeant, who advised accused not to attempt to rejoin the company that night. The sergeant said he would take accused "with the rations". He "went for water", however, without taking accused with him. The "next day" accused "caught a ride" to his Company. He was not thereafter sent to the medical officer for examination (R18-21).

6. After the direct examination of accused, defense counsel moved for an additional continuance to determine whether or not accused was suffering from "any mental anxiety". The court denied the motion on the grounds that "the accused was apparently unstable at the time when the action in question took place, and that any examination at present is unnecessary to bear out that point" (R19). Defense counsel stated in its closing argument that accused "was not given any examination to determine whether he had any mental anxiety" (R21).

7. (a) - The first question for determination is whether the court's finding by exceptions and substitutions that accused did "misbehave in the presence of the enemy by failing to advance with his command which had been ordered forward etc" constituted a fatal variance from the allegation in the specification that he "did run from his company, which was then engaged with the enemy". The variance is not fatal if the court's action did not "change the nature or identity" of the offense charged in the specification or increase the amount of permissible punishment (MCM, 1928, par. 78c, p. 65).

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Likewise, under Article of War 37, the variance is not fatal unless

"after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused."

As stated by Winthrop.

"a party cannot be convicted of an offence of which he has not been notified that he is charged and which he has had no opportunity to defend" (Winthrop's Military Law & Precedents - Reprint - p.383).

The essential nature of the offense charged was abandonment by accused of his company when it was "engaged with the enemy", which phrase is synonymous with "before the enemy" (CM ETO 1249, Marchetti, par.8b, p.8; CM ETO 1404, Stack; CM ETO 1408, Saraceno). Such also is the essential nature of the offense of which he was found guilty. The distinction between the active abandonment involved in running away from his company as alleged, and the passive abandonment involved in failing to advance with his company as found, is one of verbiage and is technical rather than substantial. The conduct is equally reprehensible and its effect is the same in each case, - his absence from his company where it was his duty to be. The time and place of the offense alleged and that of which accused was found guilty are identical. The latter offense constituted a violation of Article of War 75 (CM ETO 1404, Stack; CM ETO 1659, Lee). The court's action did not change the nature or identity of the offense charged, and it is obvious that it did not increase the permissible punishment. The Board is also of the opinion that accused was adequately notified in the specification of the offense of which he was found guilty, that he was given fair opportunity to defend himself, and that therefore the variance did not affect his substantial rights.

(b) - The court by its findings exonerated accused of the specific charge of "running away from his company". The court would have been warranted in finding him guilty of the Specification without exceptions or substitutions because of the inclusive meaning of the phrase "ran away" (CM ETO 1404, Stack; CM ETO 1659, Lee). Its exoneration, which without qualification, would thus have been complete, was limited, however, by the substitution in the court's findings of the exact details of his misbehavior by the use of the words "misbehave * * * by failing to advance with his command, etc." Such findings are supported by competent substantial evidence. His own testimony, corroborated by that of defense witness Krajewski, shows that he made no effort either to determine whether or when his platoon had advanced, or to rejoin it when he ascertained that it had advanced. Instead of carrying out his obvious duty as second in command of his squad by assiduously checking on the movements and proposed movements of his platoon, he chose to wait in a position of comparative safety until someone "hollered for me to come on".

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The court failed to find that accused "did not return thereto (to his company) until after the engagement had been concluded", as alleged in the Specification. The allegation with respect to the time of accused's return, however, was wholly immaterial and did not require proof (CM ETO 1249, Marchetti; CM ETO 1404, Stack; CM ETO 1408, Saraceno; CM ETO 1659, Lee). His mere failure to advance with his command, under the circumstances, constituted the offense (CM ETO 1404, Stack; CM ETO 1659, Lee).

The fact that accused appeared at the company kitchen (where he remained for a day and a half to two days) does not alter the conclusion that he failed in the presence of the enemy to advance with his command, since he was absent from his post of duty, which was with his platoon as it advanced toward the enemy (CM ETO 1659, Lee). There is no evidence that he had permission to be absent from this post.

The fact that actual contact was not made with the enemy following accused's defection does not alter the conclusion that his misbehavior was before the enemy (CM ETO 1404, Stack, and authorities there cited).

(c) - The fact that accused made statements concerning his guilt of the offense charged without having been warned of his rights does not render their admission in evidence prejudicial to his substantial rights in view of the absence of evidence that the statements were not freely and voluntarily made and of the full corroboration thereof by accused's own sworn testimony.

"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).

(d) - There was some evidence that accused was suffering from so-called "combat anxiety" at the time of his failure to advance with his company. There was also evidence that at the time in question he appeared to be physically and mentally normal and that his reactions were normal. Whether he "was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior" which fact would constitute a defense to the charge (Winthrop's Military Law & Precedents -

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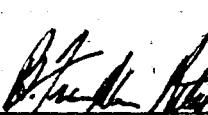
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Reprint - p.624), was essentially a question of fact for the determination of the court. It evidently declined to believe that accused's disability was genuine and extreme and as there is competent substantial evidence in support of its findings, they are conclusive on appellate review (CM ETO 1404, Stack; CM ETO 1408, Saraceno; CM ETO 1409, Mieczkowski; and authorities there cited).

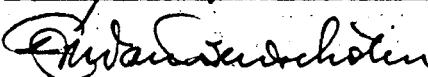
(e) - The denial by the court of the motion of defense counsel for a further continuance to allow a determination of whether accused was suffering from "mental anxiety" was proper. The defense had already been granted one continuance of three days for the preparation of its case, and the court was evidently satisfied that, although "accused was apparently unstable at the time in question", he was not suffering under such disability as would afford him a defense and that further examination would not establish such disability (see sub-par.(d), supra). The granting or denying of a motion for continuance is within the sound judicial discretion of the court and its action in denying such a motion will not be disturbed upon appellate review in the absence of a showing of abuse of discretion (CM ETO 895, Davis et al., par.7(a) p.17, and authorities there cited). There is no indication of any abuse of discretion herein, and the ruling appears to have been fully justified under the circumstances.

8. The charge sheet shows that accused is 21 years three months of age and that he enlisted at Richmond, Virginia, on 4 October 1940 to serve three years. He had no prior service.

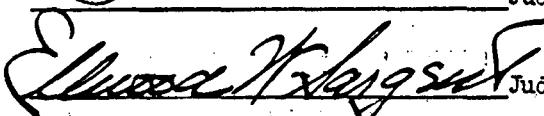
9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty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



Judge Advocate



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WD, Branch Office TJAG., with ETOUSA. - 1 APR 1944 To: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private GEORGE ISON JR. (13018478), Company L, 47th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.
2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2). 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 1663. For convenience of reference please place that number in brackets at the end of the order: (ETO 1663).



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

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

BOARD OF REVIEW

ETO 1664

29 MAR 1944

U N I T E D S T A T E S 9TH INFANTRY DIVISION.

v. Trial by G.C.M., convened at Cefalu,
Private GWYN E. WILSON Sicily 7-8 September 1943. Sentence:
(6922233), Company "L", Dishonorable discharge, total for-
39th Infantry. feitures and confinement at hard labor
 for 15 years. United States Discipli-
 nary Barracks, Fort Leavenworth, Kansas.

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

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: 1. In that Private Gwyn E. Wilson
Company "L", 39th Infantry, then Private
First Class, Company "L", 39th Infantry, did,
at Cerami, Sicily, on or about July 31, 1943,
desert the service of the United States, by
absenting himself without proper leave from
his organization, with intent to avoid haz-
ardous duty, to wit: "Action against the
enemy", and did remain absent in desertion
until he surrendered himself at Cerami, Sicily,
on or about August 2, 1943.

Specification: 2. (Finding of Not Guilty).

CHARGE II: Violation of the 75th Article of War.
(Finding of Not Guilty).

Specification: (Finding of Not Guilty).

He pleaded not guilty, and was found guilty of Charge I and Specification 1 thereof, and not guilty of Specification 2, Charge I and of 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,

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at such place as the reviewing authority may direct, for 25 years. The reviewing authority approved the sentence but remitted so much thereof as involved confinement in excess of 15 years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement, directed that the prisoner be held at Oran, Algeria pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. Evidence for the prosecution with reference to Specification 1, Charge I, of which alone accused was found guilty, showed that on 31 July 1943, he was an ammunition carrier in the mortar section, weapons platoon, Company L, 39th Infantry (R7,11,12). On that date the company was in an assembly area "just out of" Cerami, Sicily, preparing to advance to a position east of that point to engage the enemy (R6,11,13). Accused was present with his company when it was informed that it was "going into the left of the 2nd Battalion that night, with an attack at dawn the next morning" (R7,11). The company, including accused, moved out about dusk in columns of twos on both sides of the road (R14,15). About midnight, after the company had reached its new position, accused was reported absent from his platoon and a search failed to reveal his presence. He had no permission to leave his platoon (R7,11; Ex."I"). On the same day the company moved "into the attack" (R6). On the afternoon or evening of 2 August he was found in the vicinity of his Company Command Post and was sent to his platoon leader. At this time he had no equipment other than his regular uniform. He stated that his ankle was "all bandaged up" and volunteered the information that he was all right now and that he "had been taken care of and was ready to fight" (R7-9,10,13). There was no evidence that he had been treated by medical personnel. There was evidence that on 31 July accused had been given a box of machine gun ammunition to carry and that he disposed of it in some undisclosed manner (R7,12,14).

4. The defense adduced evidence that on 3 August accused was evacuated, suffering from "Anxiety State Exhaustion" (R20;Ex."II").

5. Absence without leave having been established by the introduction of an extract copy of the morning report of accused's organization for the period in question and by satisfactory testimony of those having personal knowledge of his absence and conduct, the only question presented for determination is whether there is competent substantial evidence of his specific intent to avoid hazardous duty, to wit: action against the enemy, within the meaning of Article of War 28. His company had moved to the vicinity of Cerami - a forward movement towards the enemy - and evidently had been issued ammunition. There is substantial evidence that on or immediately prior to 31 July 1943 he was informed and knew that his platoon was about to engage in hazardous duty against the enemy and that on said date he deliberately left his company without proper authorization. The necessary elements of the offense were substantially shown (CM ETO 455, Nigg; CM ETO 564, Neville), and in the opinion of the Board of Review, the necessary specific intent is supported by the evidence (CM ETO 1406, Pettapiece; CM ETO 1432, Good; CM ETO 1589, Heppling). The evidence that accused in some manner disposed of the box of ammunition which was intrusted to him, while deemed insufficient by both the prosecution (see R22) and the court to warrant a finding of guilty of

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Charge II and its Specification (unlawfully casting away ammunition, in violation of Article of War 75), is, however, some further evidence of his specific intent to avoid hazardous duty.

6. The evidence of the defense with respect to accused's physical and mental condition is directed to the period commencing on 3 August and concluding on 5 August - a period subsequent to his desertion on 31 July. It explains his acquittal of Specification 2, Charge I, but is entirely irrelevant to his first desertion on 31 July, (Specification 1, Charge I) of which he was found guilty.

7. The charge sheet shows that accused is 24 years one month of age and enlisted at Ft. McDowell, Calif. 14 October 1939 to serve three years. His prior service is thus recorded: "CA.Unasgd.8-20-37 to 10-6-39, Discharged as Pvt; Character Ex; by reason of G of G."

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

R. Franklin Ritter Judge Advocate

Howard Benedictin Judge Advocate

Elwood W. Langsdorf Judge Advocate

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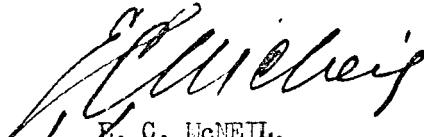
1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 MAR 1944 TO: Commanding General, 9th Infantry Division, APO 9, U.S.Army.

1. In the case of Private GWYN E. WILSON (6922233), Company "L", 39th 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 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2). This may be done in the published general court-martial order. If you should suspend execution of that portion of the sentence adjudging dishonorable discharge, then a disciplinary training center should be designated as the place of confinement.

3. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1664. For convenience of reference please place that number in brackets at the end of the order: (ETO 1664).



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
AFO 871

BOARD OF REVIEW

ETO 1670

23 APR 1944

U N I T E D S T A T E S)	FIRST ARMY
)	
v.)	Trial by G.C.M., convened at Bristol,
)	England, 29 February 1944. Sentence:
Private VIRGINO J. TORRES)	Dishonorable discharge, total for-
(32109503), Company "A",)	feitures and confinement at hard labor
86th Engineer Heavy Ponton)	for five years. The Federal Reform-
Battalion.)	atory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Virgino J. Torres,
Company "A", 86th Engineer Heavy Ponton Battalion did, at Stroud, Gloucestershire, England, on or about 1 February 1944, feloniously take, steal, and carry away Forty-eight Pounds, Ten Shillings (L48-s10), value about \$195.70, the property of Private Peter B. Frustaglio, Company "B", 86th Engineer Heavy Ponton Battalion.

He pleaded guilty to and was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions, one by Summary Court for absence without leave for 4 days and drunkenness in uniform in a public place in violation of Articles of War 61 and 96 respectively; one by Summary Court for absence without leave for 7 days and one by Special Court-Martial for absence without leave for 7 days, in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial

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for action pursuant to the provisions of Article of War 50½.

3. The specification alleges and the evidence establishes all elements of the offense of larceny (MCM, 1928, par.149g, pp.171-173). The plea of guilty admitted every essential element of the offense, including the accused's fraudulent intent to deprive the owner permanently of the money taken. All of the objective facts and circumstances of the case, as shown not only by the testimony of the prosecution's witnesses but by the testimony of the accused himself, indicate that the taking and carrying away of the money in question were with the requisite felonious intent. However, upon the cross examination of the accused by members of the court, the following testimony was elicited:

"Q The night you took the money, you intended to keep it?

A No, sir I didn't. I was going to return it back.

Q When did you decide that you were going to turn it back?

A The next morning, sir.

Questions by the president:

Q At the time you took the money, did you intend to keep it?

A No sir, I did not.

Q Then why did you take it?

A I just thought I would win some money in the crap game and then return it back" (R21).

Later, during the course of his further cross examination by members of the court, the accused testified that after he had taken the money and while he still had it in his possession, the owner

"came over and told me his money was gone and I said I didn't know anything about it. * * * I just didn't want him to find out it was me because it makes an enemy. * * * Because he would get mad at me" (R22-23).

This quoted testimony, confused and unconvincing in itself, cannot be regarded otherwise than as sufficiently inconsistent with the accused's plea of guilty as to require the president to make or direct the law member to make an explanation to the accused, pointing out such inconsistency, and, in the absence of the accused's voluntary withdrawal of his inconsistent testimony to require the court to proceed to trial and judgment as if the accused had pleaded not guilty (MCM, 1928, par.70, pp.54-55). However, as in CM 111370 (1918) and 117696(1918) (Dig.Op.JAG, 1912-1940, sec.378(3), p.189), the error was not fatal. The remainder of the accused's testimony and his statement to the investigating officer are wholly corroborative of

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abundant competent evidence of facts and circumstances adduced by the prosecution, consistent only with an inference of guilty intent.

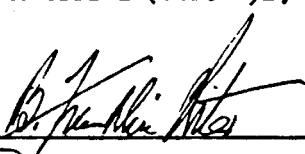
"A plea of guilty admits the facts set forth in the specification. The approved practice, in cases in which the accused entered a plea of guilty but offers evidence inconsistent with such plea, is for the court to direct that his plea be changed, and a plea of not guilty entered for him, and the record should be treated as if this action had been taken by the court. CM 121429 (1918)."^{JAC}(Dig.Op 1912-1940, sec.378(3), p.189).

On review the case has been considered as if a plea of not guilty had been entered (CM 134185 (1919), ibid., p.190). The question as to whether accused intended to deprive the owner permanently of his money was one of fact for the sole determination of the court (CM ETO 1327, Urie). Substantial competent evidence overwhelmingly supports the inference of guilty intent implicit in the court's findings. The Board of Review therefore is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence (CM ETO 875, Fazio; CM ETO 952, Mosser; CM ETO 1327, Urie; United States v. Wilson 44 Fed.593; Tractenberg v. United States 293 Fed.476).

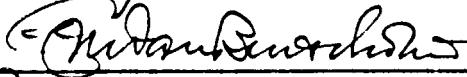
4. The charge sheet shows that the accused is 29 years of age and that he was inducted at Camp Upton, New York, 25 March 1941, to serve for one year, extended for the duration of the war and six months.

5. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial.

6. Confinement in a penitentiary is authorized for the offense of larceny of \$50.00 or more (AW 42; 18 USC 466). As accused is under 31 years of age and the sentence is under ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir. 291, WD, 10 Nov 1943, sec. V, par.3a).



 Judge Advocate



 Judge Advocate



 Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA.
General, First U.S. Army, APO 230.

23 APR 1944

TO: Commanding

1. In the case of Private VIRGINO J. TORRES (32109503), Company "A", 86th Engineer Heavy Ponton Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1670. For convenience of reference please place that number in brackets at the end of the order: (ETO 1670).



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 MAY 1944

ETO 1671

U N I T E D S T A T E S) FIRST UNITED STATES ARMY.

v.)
Private NORMAN E. MATTHEWS) Trial by G.C.M., convened at Bristol,
(37084336), 175th Signal.) England, 23 February 1944. Sentence:
Repair Company.) Dishonorable discharge, total for-
) feitures and confinement at hard labor
) for two years. Eastern Branch, United
) States Disciplinary Barracks, Green-
) haven, New York.
)

HOLDING by the BOARD OF REVIEW
RITTER, VAN BENSCHEOTEN and SARGENT, Judge Advocates

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

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

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

Specification 1. In that Private Norman E. Matthews, 175th Signal Repair Company, did, at Norton Court, Somerset, England, on or about 3 February 1944, feloniously take, steal, and carry away money, value about seventeen dollars (\$17.00), the property of Technical Sergeant Tom R. Bentley, 175th Signal Repair Company.

Specification 2. In that * * *, did, at Norton Court, Somerset, England, on or about 3 February 1944, feloniously take, steal, and carry away money, value about twenty dollars (\$20.00), the property of Technician Fourth Grade George L. George, 175th Signal Repair Company.

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

Specification: In that * * *, having been placed in arrest at Norton Court, Somerset, England, on or about 3 February 1944, did, at Norton Court, Somerset, England, on or about 3 February 1944, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that * * *, did, without proper leave, absent himself from his post and duties at Norton Court, Somerset, England, from about 1730 3 February 1944 to about 1800 3 February 1944, when he was apprehended and returned to military control at Norton Court, Somerset, England.

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 two 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 50 $\frac{1}{2}$.

3. (a) Beyond all reasonable doubt accused was in possession of five one-pound notes, English currency, the property of George, and four one-pound notes, and one American silver dollar, property of Bentley. He delivered the currency and coin from his own person to George, after George and Bentley had discovered that they were missing.

"Proof that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it" (MCM, 1928, par.112a, p.110; CM ETO 885, Van Horn).

Accused offered no explanation of his possession. The only possible inference from the circumstances is that accused stole the money.

(b) Specification 1, Charge I, alleges accused stole "money, value about seventeen dollars". Specification 2, Charge I, alleges accused stole "money, value about twenty dollars". The proof of Specification 1 showed that four one-pound English banknotes and an American silver dollar were stolen from Bentley and the proof of Specification 2 showed that five one-pound English notes were stolen from George. The defense asserted that it had no objection when the court, at the request of the prosecution, announced through the law member that it would take judicial notice of the fact that the value of one pound was, in American money, four dollars three and a half cents (\$4.035). The only question presented by the record is the sufficiency of proof to sustain a specification alleging the theft by one soldier from another, in England where both were serving as personnel of the American armed forces, of money valued at a stated sum in dollars, for example - as in Specification 1 - "money, value about seventeen dollars (\$17.00)." The following authorities appear decisive:

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"* * * in an indictment for stealing foreign money, its value in legal tender must be alleged" (36 C.J., sec.303, p.827).

"Value may be expressed by alleging the stolen property to be of the value of a stated amount of dollars, without characterizing them as 'lawful money of the United States,' or 'coin of the United States,' or using any equivalent expression; * * *." (Ibid, sec.302, p.827).

"an indictment /charging larceny of 'money' without any further description/ is supported /according to the majority rule/ by proof of the taking of anything which is used as a circulating medium by authority of the laws of the United States" (Ibid, sec.374, p.853).

"When military and civilian personnel of the American armed forces serve in a foreign country, they are paid in local currency at the official rate of exchange established for the currency with which they are paid" (WD Training Manual 14-215 (1 Jun 1943), sec.418, p.409).

The court was authorized to take judicial notice of Training Manual 14-215 and, since it is a rule or regulation of the Secretary of War, it has the force of law. (CM ETO 1538, Rhodes; CM ETO 1554, Pritchard, and authorities therein cited including R.S.161 (5 U.S.C. 22)).

While "proof that money stolen was Canadian currency will, of course, not support an allegation that defendant stole money of the United States" (36 C.J., sec.374, p.853, citing State v. Phillips 27 Wash. 364, 67 Pac. 608), the specifications in question do not allege that the money stolen was money of the United States, but merely describe it as "money, value about seventeen dollars (\$17.00)" and "money, value about twenty dollars (\$20.00)", stolen by one American soldier from two other American soldiers serving in England where the training manual prescribes payment of military personnel in local currency.

Proof of the theft of "money" was therefore fully supported by proof of theft of English currency because in England the latter "is used as a circulating medium by authority of the laws of the United States."

The record is legally sufficient to support the finding of accused's guilt of Specifications 1 and 2 of Charge I (CM ETO 875, Fazio; CM ETO 952, Mosser; CM ETO 1327, Urie; CM ETO 1415, Cochran; CM ETO 1549, Copptrue and Ernest).

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4. With respect to the breach of arrest alleged in Charge II and its Specification, the actual arrest, the limits of the arrest and accused's departure therefrom without authority were clearly proved. The finding of accused's guilt is sustained by substantial evidence (MCM, 1928, par.21, p.14; CM 229280 (1943), Bull.JAG, Feb 1943, Vol.II, No.2, sec.427, p.63).

5. Accused's absence without official leave from his post and duties was clearly established (CM ETO 364, Howe; MCM, 1928, par.132, p.145-146).

6: The charge sheet shows that the accused is 24 years of age and that he was inducted 24 October 1941 for the duration of the war plus six months.

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

B. Franklin Iles _____ Judge Advocate

Charles Burdette _____ Judge Advocate

Ellwood V. Keyser _____ Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. -5 MAY 1944 TO: Commanding General, First United States Army, APO 230.

1. In the case of Private NORMAN E. MATTHEWS (37084336), 175th Signal Repair 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 50 $\frac{1}{2}$, 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 1671. For convenience of reference please place that number in brackets at the end of the order: (ETO 1671)



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

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

BOARD OF REVIEW

ETO 1673

-3 MAY 1944

U N I T E D S T A T E S)	SOUTHERN BASE SECTION, SERVICES
)	OF SUPPLY, EUROPEAN THEATER OF
v.)	OPERATIONS.
Private RAYMOND (NMI) DENNY)	Trial by G.C.M., convened at Romsey,
(33320796), Company "B",)	Hampshire, England, 17 February 1944.
383rd Engineer Battalion)	Sentence: Dishonorable discharge,
(Separate).)	total forfeitures and confinement at
)	hard labor for 10 years. The United
)	States Penitentiary, Lewisburg,
)	Pennsylvania.

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Raymond (NMI) Denny,
Company "B", 383rd Engineer Battalion, (Separate), did, at Bishop's Waltham, Hampshire,
England, on or about 17 October 1943 with intent to commit a felony, viz., rape, commit an
assault upon Hazel M. Miller, a female person,
by wilfully and feloniously forcing her to the
ground and endeavouring to have carnal knowledge
of the said Hazel M. Miller by force and
against her will.

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 a period of 17 years. The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated the United States Penitentiary, Lewisburg,

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Pennsylvania as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. According to the convincing testimony of the prosecutrix, accused, at the time and place alleged, committed an assault and battery upon her in a manner unquestionably indicative of the intent to rape her. Competent evidence of her condition and utterances immediately subsequent to the alleged attack, strongly corroborated her direct testimony that it actually occurred. The record is legally sufficient to sustain the finding of guilty (CM ETO 78, Watts; CM ETO 489, Rhinehart and Fallucco; CM ETO 492, Lewis; CM ETO 595, Sipes; CM ETO 996, Burkhart; CM ETO 1262, Moulton).

Accused's sole defense was an alibi in support of which, without becoming a witness himself, he adduced inconclusive evidence of doubtful probative value, which was obviously weighed and found wanting by the court. Although no other witness saw accused at or near the scene of the crime charged, the prosecutrix' identification of him as her assailant was definite and convincing. Inasmuch as the record discloses competent, substantial evidence which positively identified accused as the offender, an issue of fact arose for the determination of the court. Its findings of guilty are conclusive upon appellate review (CM ETO 78, Watts; CM ETO 492, Lewis; CM ETO 503, Richmond; CM ETO 531, McLurkin; CM ETO 1360, Poe).

4. Upon a first trial accused was sentenced to dishonorable discharge, total forfeitures and confinement for twenty years which was adjudged by two-thirds vote of the members of the former court. This former sentence was disapproved by the reviewing authority, who, in the same action, ordered a rehearing before another court. Accused at the instant trial interposed the plea of former jeopardy. The plea was properly overruled.

"The rehearing provided for in A.W. 50½ is but a continuation of the original trial and an integral part of the whole process of adjudication of the case, and until the reviewing or confirming authority has finally acted upon a record the trial is not complete. * * *. C.M. 197643 (1932)." (Dig.Op.JAG., 1912-1940, par.396(3), p.241).

5. The provision of the 43rd Article of War directing that no person shall be sentenced to confinement for more than ten years except by the concurrence of three-fourths of the members present at the time the vote is taken, serves to invalidate only so much of an excessive sentence adjudged by two-thirds vote as exceeds confinement at hard labor for ten years. It is proper for the reviewing authority to reduce the period of confinement to ten years or less, thereby validating the sentence to confinement for the reduced period (CM 157144 (1923); CM 185899 (1929), Bull.JAG, Oct. 1943, Vol.II, No.10, sec.400, pp.378,379; SPJGJ 1243/10205, 7 July 1943, Bull.JAG, July 1943, Vol.II, No.7, sec.400, p.269). Dishonorable discharge, total forfeitures and ten years confinement was therefore the "original sentence."

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within the purview of the fourth paragraph of AW 50 $\frac{1}{2}$. The same could not be increased upon a rehearing (AW 50 $\frac{1}{2}$; MCM, 1928, par.87b, p.73; CM 204405 (1936), Dig.Op.JAG, 1912-1940, sec.408(6), p.261).

In this instance the court upon rehearing erroneously sentenced accused for the period of 17 years, or seven years in excess of the legal maximum. The reviewing authority properly reduced the confinement to ten years and thereby effected a legal sentence (See authorities cited above).

6. The court also properly overruled the accused's plea in bar, erroneously predicated on the lapse of time between his original trial and his trial on rehearing, which, he asserted violated his constitutional right to a speedy trial and the provision of Article of War 70 directing that

"When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him".

The case was originally tried 27 November 1943. According to the chronology sheet, the record of trial was received in the office of the reviewing authority's staff judge advocate 9 January 1944; the original sentence was disapproved and the rehearing directed 21 January 1944; charges were re-referred for trial 7 February 1944; and rehearing had, 17 February 1944.

"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." (Beavers v. Haubert 198 US 77,87, 49L.Ed.950,954).

" Speed in trying accused persons is not of itself a primal and separate consideration. Justice, both to the accused and to the public, is the prime consideration. Such speed is merely an important element or attribute of justice. If either party is forced to trial without a fair opportunity for preparation, justice is sacrificed to speed. But when both parties have had fair opportunity for preparation, then either has a legal right to demand a trial as soon as the orderly conduct of the business of the court will permit.

* * * * *

The Constitutions of most of the states have provisions similar to the Sixth Amendment

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and many of the states have statutory definitions of the time or number of court terms within which criminal accusations must be tried. Such statutes provide usually for the discharge of accused unless the trial is within the limits so defined. The United States has no such statutory provisions and we think an accused would not be entitled to a discharge even though he were denied a speedy trial within the meaning of the Constitution. His right and only remedy would be to apply to the proper appellate court for a writ of mandamus to compel trial." (Frankel v. Woodrough 7 Fed. (2nd) 796,798).

(Cf: MacKnight v. United States 263 Fed.832,835; Daniels v. United States 17 Fed.(2nd) 339,343). In the light of this showing, the defense motion appears wholly frivolous.

Moreover, Article of War 39 fixes the period of limitation which may be pleaded in bar before courts-martial. Neither the constitution nor Article of War 70 undertake to exempt persons charged with the commission of criminal offenses from liability for trial within the applicable periods of limitation prescribed (Frankel v. Woodrough, *supra*).

7. The court properly overruled the defense motion for a finding of not guilty, made at the conclusion of the prosecution's evidence-in-chief, since such evidence-in-chief was of a substantial character fairly tending to establish every element of the offense charged (MCM, 1928, par.71d, p.56; CM ETO 393, Caton and Fikes; CM ETO 1991, Pierson).

8. The charge sheet shows that the accused is 31 years of age and that he was inducted 3 July 1942 at Philadelphia, Pennsylvania, under the Service Extension Act of 1941.

9. The court was legally constituted and had jurisdiction of the person and offense. The errors and irregularities disclosed by the record are noted and discussed in the opinion of the staff judge advocate. None of them are jurisdictional and none injuriously affect the substantial rights of the accused. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

10. Confinement in a penitentiary is authorized for the offense of assault with intent to commit rape (AW 42; 18 U.S.C. 455).

B. Franklin Kite _____ Judge Advocate

Richard A. Schindler _____ Judge Advocate

Edward W. Hayes _____ Judge Advocate

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

1. In the case of Private RAYMOND (NMI) DENNY (33320796), Company "B", 383rd Engineer 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 as approved, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1673. For convenience of reference please place that number in brackets at the end of the order: (ETO 1673).


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

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

BOARD OF REVIEW

ETO 1674

- 6 MAY 1944

U N I T E D S T A T E S)
v.)
SOUTHERN BASE SECTION, SERVICES
OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS.

Private JOSEPH A. RUSSO JR.,)
(6154582), 3609th Quarter-)
master Truck Company.)
Trial by G.C.M., convened at Wilton,
Wiltshire, England, 15 February 1944.
Sentence: Dishonorable discharge,
total forfeitures and confinement at
hard labor for three years. Eastern
Branch, United States Disciplinary
Barracks, Greenhaven, New York.

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

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

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

CHARGE I: Violation of the 58th Article of War.
Specification: In that Private Joseph A. Russo Jr., 3609th Quartermaster Truck Company did, at Wilton, Wilts on or about 5 December 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Cardiff, Wales on or about 20 December 1943.

CHARGE II: Violation of the 94th Article of War.
Specification: In that * * *, did at Wilton, Wilts, on or about 5 December 1943, knowingly and willfully apply to his own use one $\frac{1}{4}$ -Ton 4x4 Truck, value of about \$700, property of the United States, furnished and intended for the military service thereof.

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CHARGE III: Violation of the 96th Article of War.
Specification: In that * * *, did, at Cardiff Docks,
Cardiff, Wales, on or about 20 December 1943,
wrongfully appear in improper uniform.

He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of three previous convictions; one by summary court for being drunk and disorderly in quarters in violation of Article of War 96, one by special court-martial for failing to repair at the fixed time to the properly appointed place for guard duty and for breaking restriction in violation of Articles of War 61 and 96, and one by special court-martial for wrongfully pushing a non-commissioned officer with his hands and for using threatening and abusive language towards him in violation of Articles of War 96 and 65. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence, although deemed inadequate, 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 50 $\frac{1}{2}$.

3. The charge sheet shows that accused is 21 years of age and that he enlisted at Providence, Rhode Island, 18 June 1940 to serve three years.

4. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a United States Disciplinary Barracks is authorized (AW 42).

B. Franklin Atay _____ Judge Advocate

Richard A. Anderson _____ Judge Advocate

Ellwood V. Langford _____ Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. -6 MAY 1944 To: Commanding General, Southern Base Section, SOS, ETOUSA, APO 519, U.S. Army.

1. In the case of Private JOSEPH A. RUSSO JR., (6154582), 3609th 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 as confirmed, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1674. For convenience of reference please place that number in brackets at the end of the order: (ETO 1674).



E. C. McNEIL,

Brigadier General, United States Army,
Assistant Judge Advocate General.

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

BOARD OF REVIEW

ETO 1685

29 MAR 1944

U N I T E D S T A T E S) 9TH INFANTRY DIVISION.

v.)
Private EARL C. DIXON,) Trial by G.C.M., convened at Cefalu,
(36124524), Company "L",) Sicily 13 September 1943. Sentence:
39th Infantry.) Dishonorable discharge, total for-
feitures and confinement at hard
labor for 20 years. United States
Disciplinary Barracks, Beekman, New
York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BEN SCHOTEN 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 75th Article of War.

Specification 1: In that Private Earl C. Dixon, Company "L", 39th Infantry, did, in the vicinity of Cerami, Sicily, on or about July 31, 1943, run away from his company which was then engaged with the enemy, and did not return until August 2, 1943.

Specification 2: In that * * *, did, in the vicinity of Cerami, Sicily, on or about August 3, 1943, misbehave himself before the enemy, by failing to advance with his command, which had been ordered forward by the Battalion Commander to engage with the enemy, which forces, the said command was then opposing, and did not return until the engagement had been concluded on August 7, 1943.

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CHARGE II: Violation of the 58th Article of War.
Specification: In that * * *, did, in the vicinity of Castelvetrano, Sicily, on or about July 23, 1943, desert the service of the United States by absenting himself without proper leave, with intent to avoid hazardous duty, to wit: "Action against the enemy", and did remain absent in desertion until he surrendered himself after the action had been concluded at Marsala, Sicily, on or about July 25, 1943.

He pleaded not guilty to and was found guilty of all charges and specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge II and Charge II as involved a finding of guilty of desertion at the time and place and under the circumstances as alleged and terminated in a manner not proven, at the time and place alleged, approved the sentence but remitted so much thereof as involved confinement in excess of 20 years, designated the United States Disciplinary Barracks, BEEKMAN, New York as the place of confinement, directed that the prisoner be held at ORAN, Algeria, pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. Prosecution's evidence which was undisputed, shows the following facts in chronological order:

Prior to 23 July 1943 accused was a member of the second squad, 3rd platoon, Company L, 39th Infantry. On that date he had been taken from the squad and was placed with Platoon Headquarters(R9,12). The company had been in combat and were resting in a bivouac area in Castelvetrano, Sicily, preparatory to moving forward for further contact with the enemy. On the night of 22 July the 3rd platoon was instructed to remain within the area, Company L was warned that it was to move out "on a minute's notice". Accused was present when his platoon received instructions (R6,9). About noon on 23 July accused's company commander met him en route to "the stream" and "told him that the Company was alerted and prepared to move out". At about three o'clock in the afternoon, the company in fact moved out, and at five o'clock began an engagement with the enemy which continued until the afternoon of 24 July (R6). Sometime on 23 July accused absented himself from his company without leave and did not return until 25 July, after the battle of Marsala, when he was found in the bivouac area near Marsala. Thereupon the company commander questioned him and placed him under arrest (R6-9, 12, Ex."1").

On or about 31 July, while accused's company was moving from Cerami in the direction of the enemy, it came under artillery fire and "scattered" to the side of the road. When it resumed movement, accused was missing from his platoon. Thereafter the company, including the 3rd platoon, engaged in combat (R6,11). Accused did not return until 2 August, at which

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time the company were still engaged in combat and were under heavy fire. His absence was unauthorized, and upon his return he was placed in arrest (R7,11).

On the night of 1-2 August the company received orders to move forward and attack the enemy in the vicinity of Cerami. The attack was executed about 3 a.m. on 3 August (R6,8,10). Accused, in the 3rd assault platoon, fell out to defecate. The company came into hand-to-hand combat with the enemy on Hill 1022 and took the hill. After the attack was completed accused was missing from his platoon (R6,7,12). He remained absent without leave until 7 August when he reported back to his organization near Cerami. During the period of his absence, his company was engaged in combat with the enemy (R6,7,10,12; Ex."1"). After his return, the company engaged in further combat with the enemy (R11).

4. The defense submitted no evidence. Accused elected to remain silent.

5. (a) Charge II and its Specification: Accused's absence without leave on 23 July 1943 was established by an extract copy of the morning report of his company for the period in question and by satisfactory testimony of those having personal knowledge of his absence and conduct. The only question deserving consideration is whether there is competent substantial evidence of his specific intent to avoid hazardous duty, to wit, action against the enemy, within the meaning of Article of War 28. There is substantial evidence that accused's company was preparing to move forward into combat on short notice and that accused was informed and knew that it was about to engage in hazardous duty against the enemy. This evidence justified the court in finding that the necessary elements of the offense were present (CM ETO 455, Nigg; CM ETO 564, Neville), and supports the finding of the necessary specific intent (CM ETO 1406, Pettapiece; CM ETO 1432, Good; CM ETO 1664, Wilson).

(b) Charge I, Specification 1: On 31 July 1943 when accused's company was advancing under enemy artillery fire, he absented himself without authority and did not return until 2 August. This is substantial evidence in support of the finding of guilty (CM ETO 1249, Marchetti; CM ETO 1408, Saraceno).

(c) Charge I, Specification 2: Some time during the attack on Hill 1022 on 3 August accused after falling out to defecate failed to rejoin his command. It had been ordered forward to engage the enemy and did engage the enemy. Accused did not rejoin his unit until 7 August. These facts are sufficient to support the finding of guilty (CM ETO 1404, Stack). The court was justified in inferring that the "orders" to move forward had been issued by the Battalion Commander or other competent authority. In the opinion of the Board of Review, evidence of the specific source of the orders was not necessary to support the finding, in view of the evidence that accused's command had in fact been "ordered forward to engage with the enemy".

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6. The charge sheet shows that accused is 26 years of age and was inducted at Detroit, Michigan 30 July 1941. He had no prior service.

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

8. The penalty for desertion committed in time of war and for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 58,75). Confinement in a United States disciplinary barracks is authorized (AW 42). However, the place of confinement should be changed to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. 210, WD, 14 Sep 1943, sec.VI, par.2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2).

B. Franklin Kite

Judge Advocate

Richard W. Hutchinson

Judge Advocate

Ellwood V. Langford

Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 29 MAR 1944 TO: Commanding General, 9th Infantry Division, APO 9, U.S. Army.

1. In the case of Private EARL C. DIXON (36124524), Company "L", 39th 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 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. Attention is invited to the designated place of confinement, which should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir. 210, WD, 14 Sep 1943, sec.VI, par. 2a, as amended by Cir. 331, WD, 21 Dec 1943, sec.II, par.2). 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 1685. For convenience of reference please place that number in brackets at the end of the order: (ETO 1685).



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

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

BOARD OF REVIEW.

ETO 1690

12 MAY 1944

UNITED STATES) 5TH INFANTRY DIVISION

Private JOSEPH M. ARMIJO
(38165792), 5th Signal
Company.

Trial by G.C.M., convened at Tollymore Park, County Down, Northern Ireland, 6 March 1944. Sentence: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for one year. 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England.

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private, then Technician

5th grade Joseph M. Armijo, 5th Signal Company, did, at Camp Tollymore Park, County Down, Northern Ireland, on or about 8 February 1944, with intent to do him bodily harm, commit an assault upon S Sgt Raymond L. Liedke, by willfully and feloniously striking the said S Sgt Raymond L. Liedke in the face with his fist.

He pleaded not guilty to and was found guilty of the Charge and of 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

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such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England, as the place of confinement.

The proceedings were published in General Court-Martial Orders No. 28, Headquarters 5th Infantry Division, APO 5, c/o Postmaster, New York, New York, 12 March 1944.

3. The evidence for the prosecution was in substance as follows:

Staff Sergeant Raymond L. Liedke, 5th Signal Company, testified that at about 7.45 p.m. on the date and at the place alleged he was working in the kitchen. " * * * we had some ratings open and I made some ratings." Accused entered, called Liedke aside and the two men entered the dining room where accused asked "why he wasn't made a T-4". Liedke replied that he had a man who was better fitted for the job, whereupon accused said "Why didn't you make me?" When Liedke "told him," accused struck him on the left side of the jaw with his fist and knocked him down. When Liedke was on the floor accused said "If you wasn't so old, I'd kick your brains out." The blow split open the lip of Liedke who went to the orderly room and placed accused under arrest (R5-6).

Technician Fourth Grade Theodore J. Jach, 5th Signal Company, testified that he was in the kitchen when he heard a noise in the mess hall "which sounded like a bench turn over." Upon entering the hall he saw a turned over bench, Sergeant Liedke on the floor, and accused standing about two feet away from the sergeant. " * * * there was harsh words being used between the two of them." Accused was saying "You have given me a dirty deal." The witness did not see "any marks of abuse" on the sergeant (R7-8).

4. For the defense accused, after receiving an explanation of his rights, testified that he entered the army 16 July 1942 and learned to read and write English at Camp Crowder. On the evening in question he saw Liedke in the kitchen and asked him to go into the dining room. There, accused said "I hear Meeks made a rating" and the sergeant answered in the affirmative. When accused asked "Why didn't you give it to me?", Liedke replied that Meeks "was an all around boy." Accused twice asked him if he(accused) was not "an all around boy" and when Liedke did not reply accused said "Be a man and tell me." Liedke said "I'm going to turn you in now," turned around, tripped over a bench and fell on his stomach and face. The bench also "went over." Liedke looked at accused and said "You dirty rat I'll get you for this." Accused remarked "If you weren't so old I'd kick your brains out. You are too old for me." He did not notice anything wrong with Liedke's face and did not observe any blood. Jach then entered the room, took accused's arm and said "Forget about him, Joe. Forget about him." Accused further testified that neither he nor Liedke struck each other or attempted to strike any blows. They had had two previous arguments (R11-14).

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Jach, recalled as a witness by the defense, testified that accused was a second cook and worked under witness's supervision for about one year. The character of his work was excellent and accused had not been in any trouble to Jach's knowledge (R9-10).

5. A rebuttal witness for the prosecution, First Lieutenant Joseph W. Kohnstamm, 5th Signal Company, testified that on the evening concerned he saw Liedke in the company orderly room about 8 p.m. There was a swelling on his chin just below his lip, the lower inside of which appeared to be cut and inflamed (R15-16).

6. The question presented for consideration is whether the evidence is legally sufficient to support the findings of guilty of an assault with intent to do bodily harm.

"This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by the means of the force employed."

Proof.--(a) That the accused assaulted a certain person as alleged; and (b) the facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person." (MCM, 1928, par.149n, p.180)
(Underscoring supplied).

Accused suddenly and without provocation struck Liedke on the face with his fist and knocked him down. The blow cut his lip. Accused struck but one blow and used no extraordinary amount of violence. Although an injury was inflicted, it was not of a particularly serious character. The evidence at most established a battery upon the person of Liedke. There were no circumstances attending the battery from which the necessary specific intent to do bodily harm may be inferred (CM ETO 1177, Combeag, and authorities cited therein). The Board of Review is of the opinion that the evidence is legally sufficient to sustain a finding of guilty of only the lesser included offense of simple assault and battery, in violation of Article of War 96.

7. The charge sheet shows that accused is 23 years of age and that he was inducted at Santa Fe, New Mexico, 16 July 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. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge.

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and Specification as involve findings of guilty of assault and battery in violation of Article of War 96, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of two-thirds of accused's pay per month for a like period.

P. Franklin Rte.

Judge Advocate

John A. Burchett

Judge Advocate

Elwood W. Ferguson

Judge Advocate

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W.
1st/Ind.

WD, Branch Office TJAG., with ETOUSA
General, ETOUSA, APO 887, U.S. Army.

12 MAY 1944

TO: Commanding

1. Herewith transmitted for your action under Article of War 50½ as amended by the Act of 20 August 1937 (50 Stat. 724; 10 U.S.C., 1522) and as further amended by the Act of 1 August 1942, (56 Stat. 732, 10 U.S.C., 1522), is the record of trial in the case of Private JOSEPH M. ARMIJO (38165792), 5th Signal Company.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings of guilty of the Charge and Specification, except so much thereof as involve findings of guilty of assault and battery in violation of Article of War 96, be vacated, that so much of the sentence as exceeds confinement at hard labor for six months and forfeiture of two-thirds of the soldier's pay per month for a like period be vacated, and that all rights, privileges and property of which he has been deprived by virtue of those portions of the findings and sentence so vacated be restored.

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


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

3 Incls:

- Incl.1 Record of Trial
- Incl.2 Form of Action
- Incl.3 Draft GCMO

(Findings vacated in part in accordance with recommendation of The Assistant Judge Advocate General. So much of sentence as exceeds confinement for six months and forfeiture of \$25.33 per month for like period vacated. GCMO 35, ETO, 20 May 1944)

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

BOARD OF REVIEW

ETO 1691

-1 MAY 1944

U N I T E D S T A T E S) 5TH INFANTRY DIVISION.

v.)
Private ROBERT (NMI) ARTWELL) Trial by G.C.M., convened at Camp
(15015593), Company L, 10th) Ballyedmond, County Down, Northern
Infantry.) Ireland, 3 March 1944. Sentence:
) Dishonorable discharge, total for-
) feitures and confinement at hard
) labor for ten years. The Federal
) Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE I: Violation of the 58th Article of War.
Specification 1: In that Private Robert Artwell, Company L, 10th Infantry did, at London, England on or about 14 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 10 December, 1943.

Specification 2: In that * * * did, at London, England on or about 15 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 February, 1944.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * *, having been duly placed in confinement in London England on or about 10 December, 1943, did, at London, England on or about 15 December, 1943 escape from said confinement before he was set at liberty by proper authority.

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CHARGE III: Violation of the 96th Article of War.
Specification: In that * * *, did, at London, England, on or about 3 February, 1944, appear in civilian clothing without authority.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 30 years. The reviewing authority approved the sentence 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 50 $\frac{1}{2}$.

3. With reference to the two offenses of desertion (Specifications 1 and 2, Charge I) the only question requiring consideration is whether at any time during his absence accused entertained the intent to remain away permanently. His organization was stationed at Camp Ballyedmond, County Down, Northern Ireland. Accused was on leave in London and overstayed his leave (R4-5; Pros.Ex.A). The period of his first unauthorized absence, about 26 days, was terminated by his apprehension in uniform in London at a considerable distance from his station. When his leave of absence expired he was living with a girl and decided not to return to his unit and to remain in London. When his money ran out he lived on money given him daily by prostitutes. He associated with three British male civilians with whom he planned a series of robberies which were not consummated. He was apprehended on 10 December by the civil authorities and taken to the Bow Street police station. He made the false statement to the arresting officer that he was on leave (R6-8; Pros.Ex.B) (Specification 1, Charge I).

On 15 December he was taken in custody at a military police station in London by a Sergeant Hackworth of his organization who was armed, and who came to London for the purpose of returning him to his unit. After accused, in the company of Hackworth, secured his belongings which were at a hotel he was taken by Hackworth to a "British guardhouse" and thence to the railroad station. On the way to the station he threw his raincoat over Hackworth's face and escaped (R9-12). He was again apprehended in London on 3 February after an absence of 49 days (R13-15). During part of this period he lived with a prostitute who gave him money and paid his rent. He acquired two civilian identity cards, one of which he used if he was stopped by the police. He intended to sell the other but could not find a purchaser. He acquired civilian clothes on 17 December and wore them until he was apprehended on 3 February (Pros.Exs.B,C,D) (Specification 2, Charge I).

The court was fully warranted in finding that on each occasion accused went absent without leave with the intent not to return (CM ETO 740, Lane; CM ETO 800, Ungard; CM ETO 823, Poteet; CM ETO 875, Fazio; CM ETO 913, Pierno; CM ETO 952, Mosser; CM ETO 1603, Haggard).

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4. The evidence was also legally sufficient to support the findings of guilty of Charge II and its Specification (escape from confinement in violation of AW 69). "Confinement imports some physical restraint" (MCM, 1928, par.139a, p.153). Accused was clearly under physical military restraint when he escaped from the armed guard, Hackworth. It has been held that an accused may escape confinement when merely under the constructive surveillance of a sentry (CM 188150, Thompson).

5. The evidence clearly supported the findings of guilty of Charge III and its Specification (appearing in civilian clothes without authority in violation of AW 96).

6. The charge sheet shows that accused was 21 years of age, that he enlisted for three years on 9 December 1940 at Fort Hayes, Columbus, Ohio, and that his service was governed by the Service Extension Act of 1941. No prior service is recorded.

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. The punishment for desertion committed in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement for desertion committed in time of war is authorized (AW 42; Cir. 291, WD, 10 Nov 1943, sec.V, pars.3a and b).

B. Franklin Miller Judge Advocate

Richard D. Thompson Judge Advocate

Ellwood K. Largay Judge Advocate

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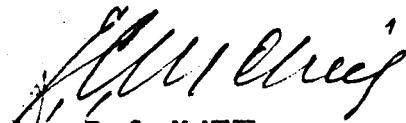
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1st Ind.

WD, Branch Office TJAG., with ETOUSA. -1 MAY 1944 TO: Commanding General, 5th Infantry Division, APO 5, U.S. Army.

1. In the case of Private ROBERT (NMI) ARTWELL (15015593), Company L, 10th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$ 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 1691. For convenience of reference please place that number in brackets at the end of the order: (ETO 1691).



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

-1 MAY 1944

ETO 1693

U N I T E D S T A T E S) 1ST INFANTRY DIVISION.

v.)
Private LEIGH A. ALLEN) Trial by G.C.M., convened at Dorchester,
(12020782), Headquarters) Dorset, England 21-22 February 1944.
Company, 2nd Battalion,) Sentence: Dishonorable discharge,
18th Infantry.) total forfeitures and confinement at
) hard labor for life. Eastern Branch,
) United States Disciplinary Barracks,
) Greenhaven, New York.

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

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

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

CHARGE: Violation of the 75th Article of War.
Specification: In that Private Leigh A. Allen,
Headquarters Company, 2nd Battalion, 18th
Infantry, being present with his company
while it was engaged with the enemy, did,
at El Guettar, Tunisia, on or about 21
March 1943, shamefully abandon the same
and seek safety in the rear, and did fail
to rejoin it until after the engagement
was concluded.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be shot to death with musketry, all members of the court concurring. The reviewing authority, the Commanding General, 1st Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term

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of accused's natural life, 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 50 $\frac{1}{2}$. The action of the confirming authority in commuting the sentence was taken under the provisions of Article of War 50.

3. Uncontroverted evidence shows that in the early morning of 21 March 1943, the Anti-Tank Platoon, 2nd Battalion, 18th Infantry was attacking Wop Hill in the El Guettar sector, Tunisia. Fascist prisoners were taken. Although the Anti-Tank Platoon was not itself under fire at the time, the battalion was actively engaged with the enemy. It was subjected all day to heavy and small arms fire. There was also some aerial activity (R20,23-24). The terrain was "pretty rough" and, although the infantry could climb over the hill, it was impossible to move the guns over it. Consequently the Anti-Tank Officer, First Lieutenant Alfred E. Koenig, dispatched accused, who was "acting as agent corporal for the Anti-Tank Platoon," as a messenger to the battalion commander requesting orders to move the guns around instead of over the hill. Lieutenant Koenig did not know just where the battalion commander was but gave accused the general location of the command post and directed him to follow the telephone wires. He then set up his own position and waited for an answer about an hour. He then went forward himself, contacted Major Peckham and received his orders from him. Accused did not have permission to be absent on 21 March 1943 (R20,22-24).

On that date Corporal Robert L. Welton of Headquarters Company, 2nd Battalion, was sent to a jeep in the rear to obtain some wire. En route he met accused who said that he was looking for the command post. When informed by Welton that he would return to the command post after obtaining the wire, accused stated that he would accompany him. After obtaining the wire they went into the El Guettar-Gabes road whereupon they "were bombed and strafed by German planes." They left the jeep and took cover in a ditch until the attack ended. During this time bombs fell in a field across the road at a distance of about 25 yards from them. Accused asked Welton "if the enemy was up that way." Upon receiving an affirmative answer, accused "said he did not want to go any further." When directed by Welton, he refused to get into the jeep and proceed. Welton argued with him without success and "I couldn't wait any more so I left him." Welton testified he did not see accused again until he was in England (R11-13).

On 25 March 1943 accused was seen in the battalion kitchen area in the El Guettar sector, about two and one-half miles behind the front lines (R13-15,15-18,18-19).

About ten days after accused was reported missing, instructions were given to kitchen personnel in the rear to apprehend him (R17,20-21). Lieutenant Koenig testified that the El Guettar engagement lasted about two weeks (R24-25). He next saw accused at Broadwayne, England (R22).

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The deposition of Major Elisha O. Peckham, 2nd Battalion, Headquarters 18th Infantry was admitted in evidence for the prosecution with the express consent of the defense and, at the direction of the law member, read into the record (R9-10; Pros.Ex."A"). The following interrogatories and answers appear in the deposition:

" First interrogatory: Are you in the military service of the United States? If so, what is your full name, grade, organization, and station? If not, what is your full name, occupation, and residence?

Answer: Yes, Elisha O. Peckham, Major 2nd Bn Hq., 18th Inf., A.P.O. #1 U.S. Army.

Second interrogatory: Do you know the accused? If so, how long have you known him?

Answer: Yes, intimately. since Nov , 1942 until his alleged disappearance.

Third interrogatory: Tell what transpired with respect to the accused and yourself.

Answer: On or about 21 March, 1943, in the vicinity of El Guettar, Tunisia, Pvt. Allen came to me with a message from Lt. Koenig requesting orders for the disposition of the Anti-tank platoon of which he was leader. I wrote the orders in field message form and dispatched Allen to return with the message to Lt. Koenig.

Fourth Interrogatory: When did you next see the accused?

Answer: I did not see Allen again until his return to us here in England."

4. For the defense Corporal Welton, recalled by the president "as a witness of the court", testified that it was after the bombing that accused said he did not want to go to the front (R25).

Testimony was adduced that previous to the landing in Africa and going into combat accused was neat, dependable and a very good soldier who had performed his duties as driver for the battalion commander in an excellent manner (R26,29), but that bombs and shells made him nervous and "shaky", that he was "shell whacky," that when bombs fell "he always started to run," that "at the hum of a plane he would go to pieces" and that when no shells were falling "he would walk around as if in a daze." Because he repeatedly became nervous while driving the battalion commander, the battalion transportation sergeant recommended that he be relieved (R26-30).

After his rights were explained to him, accused elected to remain silent (R30-31).

5. The action of the president of the court in excusing Captain Brownlee as a member of the court in order that he might serve as individual defense counsel was wholly unauthorized (MCM, 1928, par.5, p.4; par.36,

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p.27, par.45, p.34, par.57, p.44; CM ETO 804, Ogletree et al.) However, the irregularity was the result of personal solicitation of accused and hence was a self-invited error and was non-prejudicial (CM ETO 422, Green; CM ETO 438, Smith).

6. The accused is charged with a capital offense, i.e., the death penalty may be inflicted as punishment. The following excerpt from the 25th Article of War is pertinent:

"A duly authenticated deposition * * * may be read in evidence before any military court * * * in any case not capital * * * Provided, That testimony by deposition may be adduced for the defense in capital cases."

The deposition of Major Peckham was introduced in evidence and read to the court upon agreement of defense counsel only. The record fails to show the personal assent of accused to the use of the deposition against him and the deposition itself does not bear accused's written consent either to the securing of the same or to its use by the prosecution. The Board of Review will assume for the purpose of this holding that the admission of the deposition in evidence was erroneous.

7. The vital question for determination is whether the improper admission in evidence of Major Peckham's deposition "injuriously affected the substantial rights" of accused within the purview of Article of War 37. In CM ETO 1201 Pheil, the Board of Review held that the admission of illegal evidence in the form of confessions improperly obtained from accused substantially prejudiced his rights, notwithstanding the presence in the record of other evidence of the commission of the crime by accused, and that the record was therefore legally insufficient to support the findings and the sentence. The test of legal sufficiency in the case of admission of incompetent evidence was there set forth as follows:

"The question must therefore be considered as to whether the admission of these illegal confessions in evidence 'injuriously affected the substantial rights' of the accused within the purview of the 37th Article of War.

The rule governing such situation has been succinctly stated:

' It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself sub-

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stantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C.M.127490 (1919).¹ (Underscoring supplied).

The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C.M.130415 (1919).¹ (Dig.Op., JAG, 1912-30, sec.1284, p.634) (Underscor-
ing supplied).

The foregoing principles were elaborated in the dissenting opinion of Colonel Archibald King in CM 211829, Parnell. Colonel King's opinion was approved by The Judge Advocate General and formed the basis of the subsequent action of the Secretary of War.

The fate of the accused in the instant case is not to be determined by the simple expedient of separating the legal evidence from the illegal evidence and then evaluating the legal evidence as to its sufficiency to sustain the findings. Such process would be an over simplification and would wholly ignore the actualities of the trial. The court had before it both legal and illegal evidence. It is an impossibility for the Board of Review to measure the influence of the illegal evidence upon the court and should it attempt to do so it would be usurping the functions of the court (CM ETO 132, Kelly and Hyde). A reviewer in considering the record of trial to determine whether the 'legal evidence of itself substantially compelled a conviction' cannot ignore the impact upon the mind of the court of the illegal evidence. For this reason the Board of Review in CM 127490 (supra) particularly qualified its pronouncement by the statement 'nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony has been excluded enough legal evidence remains to support a conviction'. (Underscoring supplied). An accused has not received a fair and impartial trial if his conviction is based upon a body of evidence part of which is legal and which standing alone

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possesses only sufficient weight to tip the scales in favor of its sufficiency but does not contain the robust quality of moral certainty and determinativeness, and part of which is illegal composed of confessions which are some of the 'strongest forms of proof known to law'. The Board of Review undoubtedly had this situation in mind when it adopted the qualification last quoted in its holding CM 127490 (*supra*)."

The question therefore here presented is whether the legally admissible evidence, apart from the deposition, meets the foregoing test. The legal evidence, which is uncontested, establishes clearly that accused's battalion was under enemy fire in the El Guettar sector, Tunisia, on 21 March 1943, and that the Anti-Tank Platoon, with which he was then present and serving, was about to attack Wop Hill. The variance between "his company", as alleged in the specification and his platoon, as proved, is immaterial, in view of the adequacy of the proof of all other elements of the specification. Accused was adequately notified of the offense with which he was charged and was accorded fair opportunity to defend himself against the charge. The word "company", under the circumstances, was substantially equivalent to "organization." That accused and his platoon were "before the enemy", the equivalent of the allegation "engaged with the enemy," is clear. The first element of the offense was thus established (CM ETO 1249, Marchetti; CM ETO 1404, Stack; CM ETO 1408, Saraceno; CM ETO 1659, Lee).

The uncontested evidence, aliunde the deposition, establishes that the platoon leader at this time dispatched accused, who was acting as "agent corporal" as a messenger for the platoon leader, with a message directed to the battalion commander, and directed him how to find his way to the battalion command post; that accused failed to return to his platoon; that he had no permission to be absent at the time; that after bombs fell near him he refused to proceed in a jeep to the command post when directed to do so by Corporal Welton, a driver who met him; that he was seen some two and a half miles to the rear of the command post in his battalion kitchen area four days later; and that he was not seen thereafter until after his organization had returned to England. His duties clearly required him to return to and remain with his platoon after the delivery of the message. By failing to fulfil such duties he abandoned his organization, and he obviously sought safety in the rear when he went to the kitchen area. The second element of the offense was thus clearly established (CM ETO 1404, Stack; CM ETO 1659, Lee; CM ETO 1663, Ison; CM ETO 1685, Dixon). The testimony that he was not seen until after the El Guettar engagement was concluded, while unnecessary (CM ETO 1663, Ison, and authorities therein cited), makes the evidence of accused's guilt of the offense charged the more complete and compelling.

The deposition of Major Peckham furnished no element of the proof of accused's dereliction. It merely confirmed the testimony of the platoon leader that accused was dispatched by him on a specific mission, and fixed

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more definitely the precise time, but not the fact, of abandonment of his organization by accused. The statement of the trial judge advocate that "we cannot proceed without it" /Major Peckham's testimony/ was made as an argument on the prosecution's motion for continuance. Such assertion has no effect upon the actual character of the deponent's testimony.

In the opinion of the Board of Review, the legal evidence against accused in this case, unlike that against the accused in CM ETO 1201 Pheil, was not only incriminating but also excluded "any fair and rational hypothesis except that of guilt" (MCM, 1928, par.78a, p.63). The evidence, aliunde the deposition, was "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty." It did not contain that "inherent uncertainty which prevents it from attaining the weight and dignity of 'compelling' evidence"; rather it did "possess the quality of realism demanded to sustain the finding of guilty" (CM ETO 1201, Pheil).

Consequently it may be said that the repercussion of the illegal evidence in the deposition upon the other evidence would not "influence the court in its weighing and consideration of the other evidence" and hence that its admission did not substantially prejudice accused's rights (ibid.).

8. The testimony of Corporal Welton that accused stated after the bombing that "he did not want to go any further" was properly admitted in evidence as an admission against interest (CM ETO 895, Davis et al, and authorities therein cited).

9. The defense adduced evidence that accused was suffering from so-called "combat anxiety" at the time of his abandonment of his organization. Whether he "was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior," which fact would constitute a defense to the charge (Winthrop's Military Law & Precedents - Reprint - p.624), was essentially a question of fact for the determination of the court, which evidently declined to believe that accused's disability was genuine and extreme. The court's findings, in view of the inconclusive and inexpert character of the testimony as to accused's condition at the time of his defection, will not be disturbed upon appellate review (CM ETO 1663, Ison, and authorities therein cited). As nothing in Major Peckham's deposition bore upon the issue, it is clear that its erroneous admission in evidence could not have prejudiced the substantial rights of accused on this issue.

10. The charge sheet shows that accused is 24 years of age and enlisted at New York 4 November 1940 to serve three years. He had no prior service.

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

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enemy is death or such other punishment as a court-martial may direct (AW 75). Confinement in a United States Disciplinary Barracks is authorized (AW 42).

B. Frank Rife Judge Advocate

W. Van Bruchem Judge Advocate

Elwood H. Long Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. -1 MAY 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Private LEIGH A. ALLEN (12020782), Headquarters Company, 2nd Battalion, 18th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1693. For convenience of reference please place that number in brackets at the end of the order: (ETO 1693).



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

(Sentence as previously committed, ordered executed. GCMO 28, ETO, 6 May 1944)

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

BOARD OF REVIEW

26 MAY 1944

ETO 1704

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
Private JAMES P. RENFROW) Station 236, 18 February 1944.	
(15081604), Headquarters &) Sentence: Dishonorable discharge	
Headquarters Squadron, 403rd) (suspended), total forfeitures and	
Air Depot, 3rd BAD, VIII AFSC.) confinement at hard labor for three	
) years. The 2912th Disciplinary	
) Training Center, Shepton Mallet,	
) Somerset, England.	

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

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

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

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

Specification: In that Private James P. Renfrow,
Headquarters and Headquarters Squadron,
403rd Air Depot, did, without proper leave,
absent himself from his station at Army Air
Force Station 597, APO 636, United States
Army from about 0130 hours 1 December 1943
to about 1000 hours 4 January 1944.

ADDITIONAL CHARGES

CHARGE I: Violation of the 93rd Article of War.
Specification 1: (Nolle prosequi)

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Specification 2: In that * * *, did, at Portrush, Northern Ireland, on or about 2 January 1944, feloniously take, steal and carry away American and English Bank notes of the value of approximately one hundred and eighty dollars and eighteen cents (\$180.18), the property of the American Red Cross.

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

Specification 1: In that * * *, did, at Portrush, Northern Ireland, on or about 4 January 1944, wrongfully impersonate and hold himself out to be a non-commissioned officer of the United States Army by appearing in public wearing the chevrons of a Master Sergeant on his sleeves.

Specification 2: In that * * *, did, at Portrush, Northern Ireland, on or about 4 January 1944, wrongfully impersonate and hold himself out to be a pilot in the United States Army by appearing in public wearing pilot's wings on his uniform.

Specification 3: In that * * *, did, at Portrush, Northern Ireland, on or about 4 January 1944, wrongfully impersonate and hold himself out to be the recipient and lawful holder of the Purple Heart ribbon with Oak Leaf clusters.

He pleaded guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by summary court for insubordination and disrespect to a non-commissioned officer in the execution of his office in violation of Article of War 65. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for seven years at such place as the reviewing authority may direct. The reviewing authority approved the sentence, but reduced the period of confinement to three years, suspended that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement and designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, England as the place of confinement.

The result of the trial was promulgated in General Court-Martial Orders Number 11, Hq VIII AFCC, AAF Station 113, APO 639, dated 3 March 1944.

3. The only question presented for consideration arises out of the facts and circumstances manifest by inspection of the record of trial and attached papers with respect to Specification 2 of Charge I of the Additional Charges.

The original Charge Sheet discloses that there were laid under Additional Charge I (violation of the 93rd Article of War) two specifications:

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Specification 1 for larceny by accused of one £5 English bank note, property of American Red Cross and Specification 2 for larceny by accused of American and English bank notes of approximate value of \$180.18 property of American Red Cross. Upon the opening of the trial the trial judge advocate by direction of the approving authority withdrew Specification 1, Charge I of the Additional Charges (R5).

Attached to the original charge sheet is a sheet of paper upon which is copied Original Charge I and its Specification and Additional Charges I and II and their respective specifications. However, upon this separate sheet Specification 1 of Additional Charge I was omitted, and Specification 2 of Additional Charge I appears as the sole specification under said Charge with the notation, "Originally Specification 2". In reproducing Specification 2 of Additional Charge I upon this separate attached sheet the copyist omitted the vital phrase descriptive of the ownership of the money, "the property of the American Red Cross". The original charge sheet bears this notation, "See retyped copies of specifications and charges attached. Retyped for clarified reading. (Signed) James L. Cash, Captain, Air Corps, Trial Judge Advocate."

In preparing the record of trial the charges and specifications as appearing on the sheet of paper attached to the original charge sheet were reproduced and not the charges and specifications as they appear on the original charge sheet. The result is that the record of trial perpetuates the clerical error with respect to original Specification 2 of Charge I of the Additional Charges and thereby omits the phrase "the property of the American Red Cross" in original Specification 2, Charge I of the Additional Charges.

A copy of the original charge sheet was served on accused on 4 February 1944, or 14 days prior to trial.

The notation on the original charge sheet with reference to these "retyped copies" clearly negatives any suggestion that they were ever intended to supersede in any particular the original charges and specifications. The original charges and specifications therefore remained as the organic document and the sheet bearing the charges and specifications attached to the charge sheet serves only as a clarifying reference memorandum possessing no legal efficacy.

4. The legal question presented by this situation is this:

Is the Board of Review upon appellate review bound by the allegations of specifications as the same appear in the transcribed proceedings of trial where they differ from the allegations as contained in the original charge sheet, or may the Board of Review resort to the original charge sheet to determine the exact charges upon which accused was brought to trial?

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If the Board of Review is authorized to refer to the original charge sheet in the instant case the record is legally sufficient to sustain the findings of accused's guilt to Specification 2 of Additional Charge I.

The charge is the "formal written accusation" of an accused and is the original and only pleading in a general courts-martial practice, (MCM, 1928, pars.24 and 29, pp.16 and 18). It must specify the material facts necessary to constitute the alleged offense and in this requisite resembles the indictment in civil courts. A charge defective in respect to the statement of the facts constituting an offense is a nullity and may be stricken out (MCM, 1928, par.71g, p.56; Winthrop's Military Law & Precedents - Reprint, pp.132,133). It is therefore the basic instrument in the trial before a general court-martial.

The transcription of the trial proceedings should contain a verbatim copy of the charges and specifications, but the original charge sheet must accompany and be attached to the transcribed record (MCM, 1928, par.85b, p.71; Appendix 6, p.263), inasmuch as it is part of the record of trial and may be considered upon appellate review (CM 116465 (1918), Dig.Op.JAG, 1912-1940, sec.390(1), p.194)). Such relationship of the charge sheet to the transcription of the trial proceedings is the same as that of an indictment in the civil courts to the bill of exceptions. "An indictment becomes a part of the record when properly filed" (24 C.J.S., sec.1727a, p.433, note 55; Ross v. United States 102 Fed.(2nd) 113; Bratton v. United States 73 Fed.(2nd) 795; Buesel v. United States 258 Fed. 811).

A defective or erroneous copying of the charges and specifications into the transcript of proceedings may be corrected either by reassembling the court and formally correcting the record, or if such proceeding is impracticable or inconvenient a certificate of correction executed by the officers authenticating the record (transcript) of trial may be obtained. (CM 218024 (1941), Supp. I, Dig.Op.JAG, 1912-1940, (1941), sec.390(2a), p.11). However, upon appellate review by the Board of Review such corrective procedure is unnecessary if the charge sheet accompanies the record (transcript) of trial and it may be considered by the Board of Review as the original and effective pleading. The above practice is supported in principle by the 37th Article of War which contemplates an "examination of the entire proceedings" to the end that justice may be done.

Reference to Specification 2 of Additional Charge I as the same appears on the original charge sheet shows the allegation that the stolen money was the property of the American Red Cross. The finding of accused's guilt of larceny of the sum of \$180.18 was therefore supported by a proper allegation. The Board of Review is therefore of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

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5. The charge sheet shows accused's age as 18 years, that he enlisted at Fort Benjamin Harrison, Indiana, 30 August 1941 to serve for three years and that he had no prior service.

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

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

Franklin R. Atkinson Judge Advocate
Howard Boardman Judge Advocate
Elwood W. Langford Judge Advocate

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

BOARD OF REVIEW

ETO 1725

6 MAY 1944

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

v.

Private ROGER J. WARNER
(32917682), Company "H",
41st Armored Infantry
Regiment.

2D ARMORED DIVISION

Trial by G.C.M., convened at Head-
quarters, 2d Armored Division,
APO 252, U. S. Army, 14 March 1944.
Sentence: Dishonorable discharge,
total forfeitures, and confinement
at hard labor for 10 years 6 months.
Eastern Branch, United States Dis-
ciplinary Barracks, Greenhaven, New
York.

HOLDING by the BOARD OF REVIEW
RITER, VAN BENSCHOOTEN 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 Ninety-third Article of War.
Specification 1 In that Private Roger J. Warner, Company H, 41st Armored Infantry Regiment, did, at Tidworth Barracks, England, on or about 26 February 1944, with intent to commit a felony, viz murder, commit an assault upon Private Hiram D. White, Company H, 41st Armored Infantry Regiment, by willfully and feloniously cutting the said Private White on the head, face, arm and back with a dangerous weapon, to wit, a knife.

CHARGE II: Violation of the Sixty-fifth Article of War.
Specification: In that * * *, having received a lawful order from Technical Sergeant Ray A. Mifflin, Company H, 41st Armored Infantry Regiment, a non-commissioned officer who was then in the execution of his office, to surrender to him a knife, did, at Tidworth Barracks, England, on or about 26 February, 1944, willfully disobey the same.

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He pleaded not guilty to both charges and specifications and was found guilty of the Specification, Charge I except the word "murder", substituting therefor the words "voluntary manslaughter", of the excepted word not guilty, of the substituted words guilty, and guilty of Charge I and of Charge II and its Specification. Evidence was introduced of one previous conviction by summary court-martial for absence without leave for one day in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years and six months. 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 50 $\frac{1}{2}$.

3. The undisputed evidence shows that at the time and place alleged Private Hiram D. White, Company H, 41st Armored Infantry Regiment, entered a latrine where Private First Class Glenn H. Dierks of the same organization was also present. Accused, who was urinating, was asked by White to "move over so we could both take a leak". Accused replied "You can wait", whereupon White said he did not want any trouble and repeated his request. Accused again said that he could wait. The two men were arguing when Staff Sergeant John Carnduff of accused's organization entered, stepped between them and said there would be no fighting or arguing. White began to remove his jacket "because we were getting ready to fight", and had the jacket pulled over his shoulders when accused suddenly reached over Carnduff's shoulders and punched White in the face with his fist. This blow was the first in the fight. White fell down, and was assisted to his feet by a soldier. He went toward accused and the two men then circled around Carnduff, went into a "clinch" and White forced accused into a corner where they exchanged blows. Accused "kept coming down on top of White's head and parts of his body". When White started to bleed Carnduff and Dierks rushed over and attempted to separate them. White suddenly "hollered something about his eye" and Dierks saw accused with a knife in his upraised hand. He seized his arm and White ran from the room. Accused said "That will learn these people not to fool around with Warner". He further stated that White "would have been hurt if he had hit him in the heart" (R6-8, 12-17). White "had had about three or four beers" but was sober (R8, 17).

Captain James P. Parker, Medical Corps, 3rd Station Hospital, who examined White on 26 February testified that he was cut on the top of his head, back of his neck, on the left shoulder and on the right cheek. The wound which bled most profusely was situated just above the left ear and there was a bleeding artery which demanded immediate attention. The wounds on the head "were stopped by the bone of the skull". The cut on the back of the neck was two inches deep; "these wounds were of the type that they could have caused serious injury or even death, but they happened to be fortunately placed so that he wasn't injured so seriously" (R5) (Charge I and Specification).

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Technical Sergeant Ray A. Mifflin, Company H, 41st Armored Regiment, was summoned to the scene and placed accused under guard. When Mifflin demanded the pocket knife accused took it out of his pocket and then said "On second thought I think I'll keep it myself until arrested by proper authority". Mifflin began to tell him he was being arrested by proper authority and then decided he would not argue with him, but would take him to the regimental guardhouse. He went to get his "weapon" and returned. Accused "changed his mind at that time when he saw we meant to take him there and seemed more in the mood to give me the knife then". The following colloquy occurred upon Mifflin's examination by the court:

"Q: Did you order him to give you the knife?

A: Yes sir, the second time.

Q: And did he refuse the second time?

A: Yes sir, but as I said before I believe I would put that indirectly because when he saw that we meant business about having him confined I believe he would have given us the knife then."

Accused made no attempt to resist arrest and surrendered the knife at the guardhouse to the sergeant of the guard. It was evident that he "had been drinking some" and he admitted this fact. His actions and speech, however, were not affected (R9-11) (Charge II and Specification).

4. No evidence was introduced by the defense and accused elected to remain silent.

5. The court by exceptions and substitutions found accused not guilty of assault with intent to commit murder but guilty of the lesser included offense of assault with intent to commit voluntary manslaughter.

"This offense differs from assault with intent to murder in the lack of the element of malice necessary to constitute the latter crime. It is an assault in an attempt to take human life in a sudden heat of passion. The specific intent to kill is necessary, and the act must be done under such circumstances that, had death ensued, the offense would have been voluntary manslaughter. There can be no assault with intent to commit involuntary manslaughter" (MCM, 1928, par.149 1, p. 179).

It appears from the evidence that accused struck the first blow with his fist in an entirely unprovoked assault upon White, and that he stabbed him during the ensuing fistic encounter. The injuries inflicted were of such a nature that death or serious bodily injury could easily have resulted "but they happened to be fortunately placed so that he wasn't so seriously injured." The evidence clearly established the requisite specific intent to kill and had White died, accused could properly have been charged

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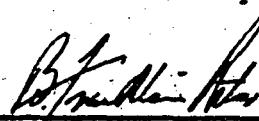
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with at least the offense of voluntary manslaughter. The evidence is legally sufficient to support the findings of guilty of Charge I and its Specification.

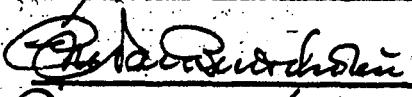
6. When Sergeant Mifflin ordered accused to give him the knife, accused started to comply with the order and then said that on second thought he would surrender it to proper authority. Although he "seemed more in the mood" to give Mifflin the knife when he finally realized he was to be taken to the guardhouse, he later surrendered the knife to the sergeant of the guard. In CM 225598 (1942) a battalion surgeon was ordered by the battalion commander to walk on foot while the organization was on a 20-mile hardening march. Being of the opinion that compliance with the order would impair his efficiency in performing medical duties accused rode in a motorcar. The Board of Review held that accused had no right to disobey the order merely because he considered it would impair his efficiency (Bul.JAG, Vol I, No.5, Oct 1942, par.422(5), pp.273-274). In the instant case accused had no right to refuse Mifflin's order and to take it upon himself to decide who was the proper authority for the purposes of surrendering the knife. To hold that a soldier would have such a power of determination would constitute a blow of the greatest magnitude to military discipline. The evidence was legally sufficient to support the findings of guilty of Charge II and its Specification.

7. The charge sheet shows that accused is 23 years of age and that he was inducted at Newark, New Jersey 24 April 1943 to serve for the duration of the war plus six months. He had no prior service.

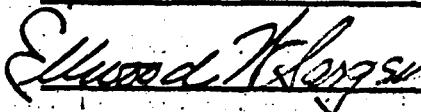
8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, which is the maximum for the offenses charged. Confinement in a United States Disciplinary Barracks is authorized (AW 42).



Judge Advocate



Judge Advocate



Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. - 6 MAY 1944 TO: Commanding General, 2d Armored Division, APO 252, U.S.Army.

1. In the case of Private ROGER J. WARNER (32917682), Company "H", 41st Armored 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 50 $\frac{1}{2}$, 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 1725. For convenience of reference please place that number in brackets at the end of the order: (ETO 1725).

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

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

BOARD OF REVIEW

ENCL 1726

- 3 MAY 1944

U N I T E D S T A T E S)	WESTERN BASE SECTION, SERVICES OF
)	SUPPLY, EUROPEAN THEATER OF OPERA-
v.)	TIONS.
Private EDDIE (NMI) GREEN)	Trial by G.C.M., convened at Manchester,
(34063080), Company "C",) Lancashire, England, 19 February 1944.	
244th Quartermaster Bat-) Sentence: Dishonorable discharge,	
talion (Service).) total forfeitures and confinement at	
) hard labor for ten years. The Federal	
) Reformatory, Chillicothe, Ohio.	

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

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Eddie (NMI) Green,
Company "C", 244th Quartermaster Battalion.
(Service) did, at Burton on Trent, Staffordshire, England on or about 13 September 1943
desert the service of the United States and
did remain absent in desertion until he was
apprehended at Manchester, Lancashire, England
on or about 20 January 1944.

He pleaded guilty to the Specification except the words "desert" and "in
desertion", substituted therefore, respectively the words "absent himself
without leave from" and "without leave" of the excepted words "not guilty",
of the substituted words "guilty" and not guilty to the Charge, but guilty
of the 61st Article of War. He was found guilty of the Charge and Specifica-
tion. Evidence was introduced of three previous convictions, two by
summary courts-martial for breaking restriction in violation of Article of

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War 96 and failing to report for bed check in violation of Article of War 61, respectively, and one by special court-martial for thirteen days absence without leave in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 30 years. The reviewing authority approved the sentence but reduced the period of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The accused's intent not to return was inferentially but most effectively established by competent, uncontradicted evidence showing that he was apprehended after an admitted unauthorized absence of more than four months in a foreign theater in war-time; that he was wearing civilian clothes and that he falsely identified himself as a merchant seaman who had left his credentials aboard ship (MCM, 1928, par.130a, pp.143-144; CM ETO 1412, Medeiros; CM ETO 1515, Smith; CM ETO 1549, Copprue and Ernest).

The only evidence adduced on behalf of the accused, whose rights were explained to him and who elected to remain silent, was the testimony of Major Charles W. Hutchings, Medical Corps, 52nd General Hospital, that he examined the accused 2 February 1944 and found him not insane but constitutionally psychopathic. His mental age was determined to be 10 years. Constitutional psychopaths knew the difference between right and wrong but in the witness' opinion, were not able to control their conduct. Before approving the sentence, the reviewing authority appropriately appointed a board of medical officers to determine the sanity of the accused (MCM, 1928, pars.35c, p.26, 78a, p.63 and 87b, p.74). Appended to the record is the Board's report that he was sane, able to distinguish between right and wrong and to adhere to the right. The report complies in every respect with the requirements of the Manual for Court-Martial, for establishing the mental responsibility of an accused suspected of insanity.

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, and the sentence as approved by the reviewing authority.

4. The charge sheet shows that the accused is 26 years of age and that he was inducted at Fort Benning, Georgia, 9 July 1941 for a service period governed by the Service Extension Act of 1941.

5. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial.

6. 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

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the sentence as approved by the reviewing authority is not over ten years,
the designation of the Federal Reformatory, Chillicothe, Ohio, is authorized
(Cir. 291, WD, 10 Nov 1943, sec.V, par.3a).

B. Franklin Nite _____
Judge Advocate

Rudolf Borchert _____
Judge Advocate

Ellwood M. Long _____
Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. -3 MAY 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private EDDIE (NMI) GREEN (34063080), Company "C", 244th Quartermaster Battalion (Service), 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 50 $\frac{1}{2}$, 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 1726. For convenience of reference please place that number in brackets at the end of the order: (ETO 1726).



E. C. McNEIL,

Brigadier General, United States Army,
Assistant Judge Advocate General.

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

BOARD OF REVIEW

ETO 1729

19 APR 1944

U N I T E D S T A T E S)	EASTERN BASE SECTION, SERVICES
)	OF SUPPLY, EUROPEAN THEATER OF
v.)	OPERATIONS.
)	
Second Lieutenant CALVIN (NMI))	Trial by G.C.M., convened at
REYNOLDS (O-1102009), 364th)	Ipswich, Suffolk, England, 22
Engineer Regiment, (General)	February 1944. Sentence: To be
Service).)	dismissed the service.

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

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

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

CHARGE: Violation of the 96th Article of War.
Specification: In that Second Lieutenant Calvin Reynolds, 364th Engineer Regiment, (General Service), having a lawful living wife, did, at St. Louis, Missouri, on or about 3 April 1943, unlawfully marry Miss Mona Elizabeth Matthew.

He pleaded not guilty to and was found guilty of the Charge and Specification thereunder. 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 a period of six months. The reviewing authority, the Commanding Officer, Eastern Base Section, Services of Supply, European Theater of Operations approved the sentence, designated Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement and forwarded the record-of trial for action pursuant to

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Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence but remitted the confinement and forfeitures and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows by stipulation that the accused married Sophia L. Reynolds at Munroe, Indiana, "in approximately August, 1938". Since then she had been, and was on the date of the trial, his lawfully wedded wife (R7).

On 3 April 1943, the recorder of deeds, St. Louis, Missouri, issued a license authorizing the marriage of the accused and Miss Mona Elizabeth Matthew of Indianapolis, Indiana. This license, bearing the certificate of "a Minister and General Officer", namely "(Rev) W.J.G.McLin M.A.", that he had united in marriage "the above named persons" at St. Louis, Missouri, on 3 April 1943, together with another separate and detached certificate to the same effect, witnessed by "Lt. Leroy Roach" and "Mr. George Smith," were thereafter duly recorded in the office of the recorder of deeds, St. Louis, Missouri (R8-9; Ex.1).

After being duly advised of his rights under Article of War 24, the accused on 25 October 1943 and 18 January 1944, made sworn statements to Lieutenant Colonel J. F. Hurley, Inspector General's Department, which were consolidated, "condensed", transcribed and introduced in evidence, the defense counsel stating that he had no objection thereto, here summarized as follows:

Sophia L. Reynolds, to whom he was married in 1938, was the accused's lawfully wedded wife; because of his marriage to her, he drew subsistence and quarters allowance; she was the recipient of an allotment of \$100 a month from his pay; and she and his mother were the beneficiaries named in his insurance policy. Sophia did not know that he participated in a marriage ceremony with Elizabeth Matthew at Saint Louis, Missouri, on 3 April 1943. The accused admitted his participation, but asserted "it was supposed to have been a joke", concocted under the following circumstances:

"I had known her Elizabeth quite a long time and we had been kidding around and she said she did not know why we could not get married, and I told her I was married, and it would be impossible and, well, she said it would never mean anything much, and I told her I never had time to get a license. She said the license was no trouble and you can always get that, and on Saturday night, April 30, I guess it was, I don't remember the date, I went in, took along a few bottles of whiskey, had a party at the house with some friends, they were all kidding, laughing and joking, betting that we could not

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get married, and I bet that I would and there was ceremony, but I never believed that it was serious or anything further would have come of it". (R9-10).

To Lieutenant Colonel Hurley's inquiry whether or not he remembered meeting Reverend McLin, the accused replied: "As far as the name is concerned, I won't say, except that there was a preacher and he wasn't supposed to have been a preacher. I honestly did not believe he was at the time. He performed what I thought was a phoney ceremony." He denied having lived with Elizabeth as man and wife, but admitted giving her money, aggregating "\$50.00 more or less", on several occasions, and sending her two checks for \$20.00 each, both of which were not paid because of insufficient funds. He also gave Elizabeth "permission to call herself Mrs. Reynolds before this so-called marriage because it might help her to get a job." Having subsequently learned that Elizabeth was asserting that she actually was his lawful wife, the accused "did not take it too seriously. I did write her a letter," he told Lieutenant Colonel Hurley, "and asked her to please straighten the thing out because it was about to cause me a lot of trouble if she did not. * * *. She always signed her letters 'Your wife' * * *. Yes, sir, there is a number of times I promised to send her money. That was quite a while back." Confronted with certified photostatic copies of the marriage license and certificate, identified on the trial as Exhibit 1, he admitted that he "probably" recognized the documents, but denied that he had procured the license. He had written letters to Mrs. Elizabeth Reynolds on 7 April, 20 May and 30 June, 1943, addressing her as his wife. He was "stalling" when he wrote the first, "kind of keeping her out of my pants until I could at least get over seas or somewhere. I knew I was in hot water by then." He was aware he was married to her "shortly after it happened. * * *. She let me know right away that I was." He knew both George Smith and Leroy Roach who had signed the marriage certificate as witnesses. He characterized his second marriage as "just one of those escapades that backfired," adding, "I rather thought something like that would happen eventually. I stalled it as long as I could"; finally admitting that, in the face of the documentary evidence which Lieutenant Colonel Hurley had shown him, "there is nothing I could say that would do any good." (R9;Ex.2).

The three letters referred to in the Hurley statement were introduced in evidence, along with the envelopes in which they were mailed. Each was addressed to Mrs. Elizabeth Reynolds. In the first, the accused referred to himself as "a newly wed bridegroom and very much in love with my bride.;" in the second, as "your husband" who "loves you very very much". The third outlined arrangements which the accused proposed to make for his bride's contemplated visit to his mother, and concluded, "With all my heart and soul I do love you my wife. Your husband from now on Calvin." (R10-11; Exs.3,4,5).

Photostatic copies of two checks for \$20.00 each, signed "Calvin Reynolds, 2nd Lt., C.E." payable to Elizabeth Reynolds, and dated respectively, 6 and 24 June 1943, were introduced in evidence. Second Lieutenant Andrew,

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J. Wann, 364th Engineers, personnel adjutant of the accused's organization, testified that he had familiarized himself with the accused's handwriting and that the signatures on the checks were the accused's. The witness had also checked the accused's 201 file and found that it showed an allotment which the accused had made to his wife. He further testified, "I am not truly familiar with the facts as to his allotment, * * * but I do know that 2nd Lieut. Reynolds had an allotment to a Mrs. Sophia Reynolds of Detroit, Missouri," and that she was described "as his wife." The defense interposed no objection to any part of Lieutenant Wann's testimony (R11-13; Exs. 6, 7).

4. Counsel for defense, in his opening statement, announced that "The accused, 2nd Lieut. Reynolds admits that he has a lawful wife living, a Mrs. Sophia Reynolds. * * *. The accused at all times denies that he has entered into a second marriage contract" (R14). The accused then elected to take the stand under oath, after his rights had been duly explained to him. He testified, in substance, as follows:

He married Sophia L. Reynolds in August, 1938. The night he participated in a marriage ceremony, which he never at any time believed to be legal, with Miss Mona Elizabeth Matthew, he and Lieutenant Roach were guests at a drinking party at George Smith's house. During the course of the evening, Smith, "kidding" the accused, asked him, with reference to Elizabeth, "Why don't you marry the girl and make an honest woman of her?" Although both agreed that it was impossible, the conversation "wound up" with a bet that the accused could not marry her. "There was a ceremony," he admitted, "I know there was some sort of ceremony. There were pictures taken and frankly we had one royal big time." Not until several days later did he learn of the existence of the marriage license and certificate. He had not procured the license because his duties at Fort Leonard Wood precluded that possibility. He considered the marriage ceremony a joke, a part of the evening's fun, and received the impression that everyone at the party similarly regarded it. McLin, who performed the ceremony, was definitely participating in the party; but the accused did not understand that he was a preacher or a minister. Asked if McLin was drinking with the rest of them, the accused replied, "Everybody there was. If there was anybody there who was not drinking I did not see him. Everybody in the place had plenty to drink." Elizabeth knew he was married because he had told her, and she had seen his wife's pictures. What "transpired that evening" was what the accused would call "in fact a mock ceremony." About four days later, however, he got a letter from Elizabeth "and she told me that she needed some money, and since we were married she thought it was my duty to take care of her, so I blew up. At that time I was just transferring to Claiborne. I stopped in St. Louis to see about it. That was when I first saw the Marriage Certificate and discovered that I was in hot water." (R17). He referred to himself as her husband in subsequent letters (Exs. 3, 4 and 5) because his purpose in writing them was "to keep the woman happy until I could get myself out of that thing. * * * she could have written to my Commanding Officer there and this would have started then." (R18). He reiterated his sworn statement to Colonel Hurley that he and Elizabeth never lived together as man and wife (R15-18).

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On cross-examination accused testified that he had made no effort to extricate himself from the situation in which his marriage to Elizabeth had placed him. He did not think the ceremony was regular "Because it did not run long enough. I have been married before and this thing did not last over five minutes." He was "pretty drunk" but remembered that he was asked the question, "Will you take this woman to be your lawful wedded wife?", and that he answered, "Okay". He thought that Elizabeth answered "I do" when asked if she would take the accused as her lawfully wedded husband. A ring was used, and the preacher pronounced them man and wife. He did not definitely know that McLin was an ordained minister and expressed himself on the trial as "still not too sure," but he admitted that he never made any efforts to ascertain whether he was or not. The two persons who signed the marriage certificate as witnesses were actually present at the ceremony. Despite his high school and junior college education, he did not appreciate "at the time" that in writing to Elizabeth the letters identified as Exhibits 3, 4 and 5, he was admitting the validity of the ceremony. He was only "trying to keep her out of my hair." He testified that in August 1943, "I first got an inkling that trouble was starting in that direction when the Colonel called me in and showed me a letter from the Board of Dependents, or something like that, that my wife had applied for support of an allotment and that I had not been giving her any money. * * * I told him that I did not feel that I was responsible. I was not married to the woman. * * *. I did not give it any more thought after that. * * *. Frankly I did not see how they could find out anything that would do me any harm. I thought that everybody in the place would know that the thing was phoney." (R18-23).

5. Captain Warren H. Sleeger, 364th Engineers, testified for the defense that he and the accused were members of the same regiment and that he had known the accused for about ten months. For about 2 months the accused was directly under the witness' command in a construction project. Captain Sleeger found him a very reliable officer in every way. Asked whether he would say that the accused "has been a conscientious officer and that he has worked well," the witness replied, "He was as far as I had anything to do with him, Sir." (R25).

6. The specification alleges that the accused, "having a lawful living wife, did, at St. Louis, Missouri, on or about 3 April 1943, unlawfully marry Miss Mona Elizabeth Matthew," in violation of Article of War 96.

"Bigamy is willfully and knowingly contracting a second marriage where the contracting party knows that the first marriage is still subsisting." (10 C.J.S., sec.I(1), p.359).

It has long been recognized as an offense under Article of War 96 (CM 238173 (1943), Bull. JAG, Oct 1943, Vol. II, No. 10, par. 454(18), p. 385; Dig. Op. JAG, 1912-1940, par. 454(17)-(18), p. 350) as well as under Article of War 95 (Winthrop's Military Law & Precedents - Reprint - fn. 54, p. 718).

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Essential elements of the offense are:

(1) A valid marriage entered into by the accused prior to and undissolved at the time of second marriage;

(2) Survival of the first spouse, to the knowledge of the accused, and:

(3) His subsequent marriage to a different spouse.

"Except as particular statutes have a different effect, cohabitation under the second marriage is not requisite, but the offense is committed when the second marriage is solemnized; and subsequent cohabitation does not constitute bigamy and is not a part or an element of the offense." (10 C.J.S., sec.5c, pp.364-365).

"Consumation by carnal knowledge is not necessary to its validity, nor is cohabitation." (2 Wharton's Criminal Law, sec.2042, p.2354).

"Except in the Philippines, where fraudulent intent and bad faith are necessary, a criminal intent is not essential to the crime of bigamy, intent not being involved in this offense, except the intent to do the thing prohibited by statute; nor is accused's good faith or honest purpose a defense." (10 C.J.S., sec.6, p.366).

"It is no defense that the party with whom the second marriage was contracted knew of the first marriage, or knew that it was undissolved, * * * or that accused at the time of the second marriage was temporarily insane from the excessive use of intoxicating liquor." (10 C.J.S., sec.7e, p.368).

"The prosecution, in a bigamy case, is under the burden of establishing the corpus delicti. Thus, the prosecution has the burden of proving a valid first marriage contracted by defendant and a second marriage and that the lawful spouse of accused was living at the time the second marriage was contracted* * *." (10 C.J.S., sec.16b(1), pp.373-374).

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"The first/marriage is at least a part of the corpus delicti, without proof of which no conviction can be had." (State v. Cooper, 103 Mo. 266, 270, 15 SW 327).

"While a few decisions hold that in prosecutions for bigamy the first marriage must be established by direct proof of the very fact of marriage, the weight of authority is that the marriage may be established by circumstantial evidence, and by evidence other than the record of the marriage. * * *. A showing beyond a reasonable doubt is required with respect to the contention that accused contracted a prior and a subsequent marriage, and that at the time of the subsequent marriage the first spouse was living. A higher degree of proof has been said to be required to show the marriages in bigamy prosecutions than in actions involving property rights or civil status." (10 C.J.S., sec.21a, p.377).

On the trial of the case under consideration, the prosecution undertook to establish the accused's subsisting first marriage by:

- (1) Stipulation as to the fact itself; and
- (2) Introduction - by stipulation - of the accused's admissions to Lieutenant Colonel Hurley;

and to corroborate this showing by Lieutenant Wann's strictly hearsay testimony that he had checked the accused's 201 file and found that it showed an allotment to the first wife. In bigamy cases, according to Wharton, "the corpus delicti is the alleged first marriage, and must be 'clearly proved' independently of the defendant's confession" (2 Wharton's, Criminal Law, 12th Ed., sec.2045, p.2359). The accused's testimony on the stand eliminated any question as to the sufficiency of the prosecution's showing of the subsisting first marriage.

"As basis for admission of extrajudicial confession, proof of corpus delicti may consist of testimony of accused himself." (People v. Hudson, 139 Cal. App. 543, 34 Pac(2nd) 741; cited in 22 C.J.S., sec.839, p.1476).

The second marriage was established by substantial competent evidence.

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"While it has been held that the subsequent marriage must be of such a character that but for the existence of a prior legal marriage it would be valid, the weight of authority is that, where the form of ceremony of marriage with another person is gone through, there is a sufficient marriage on which to predicate a charge of bigamy, the view being taken that the word 'marries', when applied to a subsequent marriage, means going through a form of marriage, and does not mean a valid marriage; * * *." (10 C.J.S., sec. 5a, p. 364).

Consideration of the accused's testimony in the light of the authorities cited leads to the conclusion that, accepted at its face value, it presents no legal defense to the charge. Those portions of it adduced under the obvious misconception that they presented plausible excuses for the accused's second marriage and his subsequent incriminating letters to his bigamous spouse, reveal a marked stultification of mind as well as of morals. Every element of the offense alleged in the Specification is fairly shown. The evidence is legally sufficient to sustain the findings of the court.

7. The charge sheet shows that the accused is 38 years of age; was inducted 24 March 1941 to serve the duration plus six months; commissioned second lieutenant, A.U.S., 22 July 1942.

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

B. J. Faulkner, Jr. _____ Judge Advocate
Edward Bernickstein _____ Judge Advocate
Edward K. Langford _____ Judge Advocate

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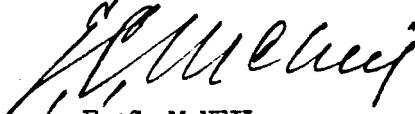
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1st Ind.

WD, Branch Office TJAG., with ETOUSA, 19 APR 1944 TO: Commanding
General, ETOUSA, APO 887, U.S. Army.

1. In the case of Second Lieutenant CALVIN (NMI) REYNOLDS (O-1102009), 364th Engineer Regiment, (General Service), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1729. For convenience of reference please place that number in brackets at the end of the order: (ETO 1729).



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

(Sentence ordered executed. GCMO 24, ETO, 24 Apr 1944)

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

BOARD OF REVIEW

ETO 1737

22 MAY 1944

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

NORTHERN IRELAND BASE SECTION,
SERVICES OF SUPPLY, EUROPEAN
THEATER OF OPERATIONS.

v.)

General Prisoner CECIL MOSSER)
(19096562), formerly Private,)
Company A, 342nd Engineer)
General Service Regiment.)

Trial by G.C.M., convened at Wilmont
House, County Antrim, Northern Ire-
land, 19 February 1944. Sentence:
To be confined at hard labor for life.
The United States Penitentiary, Lewis-
burg, Pennsylvania.

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

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

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

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

Specification: In that General Prisoner Cecil
(NMI) Mosser, Guardhouse Section, Central
Base Section Guardhouse, Central Base Sec-
tion, London, England, then Private Cecil
(NMI) Mosser, Guardhouse Section, Central
Base Section Guardhouse, Central Base Sec-
tion, London, England, did, at London,
England, on or about 24 October 1943 desert
the service of the United States and did
remain absent in desertion until he was
apprehended at Goraghwood Junction, County
Armagh, Northern Ireland on or about 28 Jan-
uary 1944.

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

Specification: In that * * *, having been duly placed in confinement in Central Base Section Guardhouse, Central Base Section, London, England, on or about 19 October 1943, did, at Central Base Section Guardhouse, Central Base Section, London, England, on or about 24 October 1943, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that General Prisoner Cecil (NMI) Mosser, Guardhouse Section, Central Base Section Guardhouse, Central Base Section, London, England did, at Goroghwood Junction, County Armagh, Northern Ireland, on or about 27 January 1944, with intent to do him bodily harm commit an assault upon Lance Corporal Wilford Morton, 173rd Provost Company, British troops, Northern Ireland, by shooting him in the abdomen with a dangerous weapon, to wit, a Caliber .45 colt automatic pistol.

Specification 2: In that * * *, did, on Canal Street, Newry, County Armagh, on or about 22 January 1944, in the nighttime feloniously and burglariously break and enter the dwelling house of Luke Curran, Esquire, with intent to commit a felony, viz larceny therein.

Specification 3: In that * * *, did, at Ballymena, County Antrim, Northern Ireland, on or about 11 December 1943, feloniously take, steal and carry away about five (5) pounds sterling, lawful currency of the United Kingdom, of the exchange value of about twenty dollars and seventeen cents (\$20.17), the property of Technician Fifth Grade Raymond J. Hallstein, 1561st Ordnance Service and Maintenance Company, APO 639, and about twelve (12) pounds sterling, lawful currency of the United Kingdom, of the exchange value of about forty-eight dollars and forty-two cents (\$48.42), the property of Technician Fifth Grade Herbert C. Freeman, 1561st Ordnance Service and Maintenance Company, APO 639.

He pleaded not guilty to Charges I and III and their respective specifications and guilty to Charge II and its Specification, and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced 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, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

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3. (a) Court-Martial record (CM ETO 952), Cecil Mosser (19096562), Private, Company A, 342 Engineer General Service Regiment (Board of Review holding 30 November 1943) discloses that accused herein was tried and sentenced on 19 October 1943 to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 20 years. This sentence was approved 3 November 1943, and on 1 December 1943 was promulgated by General Court-Martial Order No.53, Central Base Section, Services of Supply, European Theater of Operations.

(b) Desertion and escape (Charges I and II). The effect in law of the plea of guilty of the accused to the charge of escape is that of a confession of the offense alleged (CM ETO 839, Nelson; CM ETO 1266, Shipman; CM ETO 1588, Moseff). The evidence shows that on 24 October 1943 accused was confined in the guardhouse of Central Base Section, Services of Supply in London, England. Downstairs in the guardhouse was a room for drying prisoners' clothing. It had a boarded up window with a blower fan in it. At about 1500 hours on 24 October it was found that the boards had been split, the glass broken from the window and accused was gone (R12,42,45). Accused admitted his escape in his signed statement (Pros.Ex.7). From the time of his escape until his apprehension on 28 January 1944, he engaged in criminal activities in western England and in Ireland. At the time of his arrest he was in possession of a recently fired pistol and false identification papers. He was captured by an armed searching party at gun point (R32). He claimed that as he was already dishonorably discharged from the military service he could not be guilty of deserting it (R45). At the time (24 October 1943) of accused's escape from the guardhouse, which was also the act of desertion, Mosser was clearly in the military service, as the General Court-Martial Order in CM ETO 952 was not promulgated until 1 December 1943, and he remained amenable to court-martial jurisdiction for trial of these offenses (Charges I and II) beyond all peradventure (CM ETO 960, Fazio, Nelson and Poteet). The offenses alleged in Charge III were committed subsequent to the promulgation of the general court-martial order (1 December 1943) and at that time accused was in the status of a general prisoner (AR 600-375, 17 May 1943, sec.III, par.7g (2); CM ETO 1981, Fraley). He was also a person under sentence of a general court-martial and therefore amenable to military jurisdiction (AW 2(e); MCM, 1928, par.10, p.8) whether or not his dishonorable discharge had been issued (Carter v. McClaughry, 183 U.S. 365, 46 L.Ed., 236,246; Kahn v. Anderson 255 U.S. 1,7; 65 L.Ed., 469, 474; In re Craig 70 Fed.969).

The evidence amply supports the court's findings that accused was guilty of desertion (Charges I) (CM ETO 740, Lane; CM ETO 800, Ungard; CM ETO 823, Poteet; CM ETO 875, Fazio; CM ETO 913, Pierro; CM ETO 952, Mosser; CM ETO 1603, Haggard; CM ETO 1691, Artwell) and of escape from confinement (Charge II) (CM ETO 438, Smith).

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(c) Larceny (Specification 3, Charge III). On the night of 10-11 December 1943, accused accompanied by another American soldier (Nolan), occupied a room at the Marquis Hotel, Ballymena, Northern Ireland (R21). One of two American soldiers (Technician Fifth Grade Hallstein and Technician Fifth Grade Freeman) sleeping in an adjoining room was awakened at about 0355 hours by a "slight noise from the jingling in my pants over my head". The light was on and awakening he saw a man in the room who inquired for the toilet. Upon receiving an answer he stepped out of the room. The awakened soldier examined his pants and found a strange billfold in the pocket. His own was missing. He and his room-mate dressed and with the police and landlady went to the adjoining room of accused and found both men (accused and Nolan) there fully dressed. They were asked if they objected to being searched as the other men (Hallstein and Freeman) had lost their money. Both of them drew guns, backed their visitors up against the wall and escaped, threatening to shoot anyone who left the room (R21). The missing wallet, empty, was found after they left. Hallstein lost about four pounds (R15) and Freeman between 12 and 14 pounds (R18). The taking of the wallet and money is admitted by accused (R45; Pros.Ex.7). There was substantial evidence which supported the court's conclusion that accused was the thief (CM ETO 1671, Matthews; CM ETO 1670, Torres).

(d) Burglary (Specification 2, Charge III). On the evening of 22 January 1944, shortly before nine o'clock, Luke Curran, a resident of Newry, was upstairs in his home when in his home when he heard footsteps below and a door close. As Mrs. Curran had gone across the street and was expected to return soon, he paid little attention to the noise (R22). The following morning he discovered two overcoats, and a hat and coat belonging to his wife were missing (R22). They had been hanging in the back of the hall (R23). Curran identified as his/blue overcoat (Pros.Ex.4) shown to him (R23). When accused was apprehended he had no overcoat in his possession but stated he had one which was recovered and identified at the trial as Pros.Ex.4(E33). It was necessary to open a house door to reach the overcoats (R24-25) and the closing of the door was heard (R22). The record of trial is legally sufficient to sustain the finding that accused did burglariously break and enter the dwelling of Luke Curran in the night-time with the intent to commit larceny (MCM, 1928, par.149d, p.168; CM 151506, Williams).

(e) Assault with intent to do bodily harm (Specification 1, Charge III). At about 2015 hours on the evening of 27 January 1944, Lance Corporal Fred Reaveley of the Belfast Military Police was on duty with Lance Corporal Morton of the same organization, checking the identities of military personnel proceeding to and from Eire. After checking his end of the train, Reaveley came to the platform and saw Morton in the company of accused whom he had taken off the train. Accused had neither his pay book nor a permit to travel to or from Eire. Accused's only identification was two identity discs in the name of Carey Cummings. He was wearing an American uniform with a civilian overcoat similar to Pros. Ex. 4. They all proceeded into the waiting room to wait for the next train for Newry. Accused then asked to be taken to the lavatory and left with Morton. A few minutes later Reaveley heard a cry for help and found Morton lying on the platform. As

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Reaveley bent over him Morton said "The bastard shot me, Fred" (R27). Morton was seriously wounded by a shot which entered above the left hip, perforating the intestines (R30). When captured by a searching party the next day accused was in possession of a 45 calibre automatic pistol which had recently been fired (R32). Accused stated that he saw Morton was unarmed and so drew his "45 automatic" with the intent to get away. He disclaimed any intention to shoot but claimed that the gun was accidentally discharged during a struggle with Morton (R45, Pros.Ex.7). The offense was fully proved (GM ETO 422, Green; CM ETO 1585, Houseworth). The record is legally sufficient to support the findings of guilty of Charge III and its specifications.

4. The charge sheet shows that accused was inducted 16 April 1942 at Tacoma, Washington. He had no prior service. He was dishonorably discharged the service 1 December 1943 (under sentence of a general court-martial).

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

6. Confinement in a penitentiary is authorized for desertion in time of war AW 42; for assault with intent to do bodily harm with a dangerous weapon by sec.276 Federal Criminal Code (18 U.S.C. sec.455); for burglary by sec.22-1801 (6:55) District of Columbia Code, and for larceny of property of a value in excess of \$50.00 by sec.287 of the Federal Criminal Code (18 U.S.C. sec.466). The designation of the United States Penitentiary as the place of confinement is authorized (Cir.291, WD, 10 Nov. 1943, sec.V, pars. a and b).

P. Franklin Peter

Judge Advocate

Rudolf Auerbach

Judge Advocate

Edward W. Bergquist

Judge Advocate

REF ID: A64284
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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 22 MAY 1944 TO: Commanding General, Northern Ireland Base Section, SOS, ETOUSA, APO 813, U.S. Army.

1. In the case of General Prisoner CECIL MOSSER (19096562), formerly Private, Company A, 342nd Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty by exceptions and substitutions and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1737. For convenience of reference please place that number in brackets at the end of the order. (ETO 1737).



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

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

BOARD OF REVIEW

ETO 1743

6 MAY 1944

U N I T E D S T A T E S)
v.)
Private LAWRENCE J. PENSON)
(33548631), Company "B",)
447th Signal Construction)
Battalion (Avn).)

IX AIR SUPPORT COMMAND, redesignated
IX TACTICAL AIR COMMAND.

Trial by G.C.M., convened at USAAF
Station 449, APO 638, 11 February -
14 March, 1944. Sentence: Dishonor-
able discharge, total forfeitures
and confinement at hard labor for
30 years. United States Penitentiary,
Lewisburg, Pennsylvania.

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

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

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

CHARGE I: Violation of the 92nd Article of War.
Specification. In that, Private Lawrence J. Penson,
Company "B" 447th Signal Construction Battalion,
Aviation, did on or about the 27th day of Jan-
uary 1944 in the vicinity of Honiton, Devonshire,
England, forcibly and feloniously, against her
will, have carnal knowledge of Mrs. Mary Dawe.

CHARGE II: Violation of the 93rd Article of War.
Specification 1. In that, * * *, did on or about the
27th day of January 1944 in the vicinity of Honi-
ton, Devonshire, England, commit the crime of
sodomy, by feloniously and against the order of
nature having carnal connection per anum with
Mrs. Mary Dawe, a female person.

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Specification 2. In that, * * *, did on or about the 27th day of January 1944 in the vicinity of Honiton, Devonshire, England, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Mrs. Mary Dawe, a female person.

He pleaded not guilty to and was found guilty originally of both charges and their specifications. No evidence of previous convictions was introduced. He was sentenced originally to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be hanged by the neck until dead. The reviewing authority returned the record of trial to the court to reconsider its findings of guilty of the Specification of Charge I, and of Charge I and to reconsider its sentence for the purpose of imposing a sentence appropriate to its findings under all of the specifications and charges. The court reconvened and found the accused guilty of the Specification, Charge I except the words "have carnal knowledge of Mrs. Mary Dawe", substituting therefor the words "commit an assault with an intent to commit rape upon Mrs. Mary Dawe"; of the excepted words not guilty, of the substituted words guilty; of Charge I, not guilty but guilty of a violation of the 93rd Article of War. The court thereupon revoked its sentence and for all of the specifications and charges of which accused was found guilty, three-fourths of the members present at the time the vote was taken concurring, sentenced the accused to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for a period of 30 years. The reviewing authority approved the revised 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 Staff Judge Advocate in his meticulously prepared review has set forth the evidence in this case in a fair and judicial manner. It is unnecessary to repeat the narrative of the brutal, savage attack committed by accused upon a respectable British woman. The Board of Review is in entire accord with the views of the Staff Judge Advocate that the prosecution did not prove the corpus delicti of the crime of rape (Charge I and Specification) and thereby failed to establish the foundation which permitted the use in evidence of accused's confession with respect to the charge of rape. The authorities cited in the review fully support the conclusions of the Staff Judge Advocate. Further comment would be redundant.

The method adopted by the reviewing authority in directing revision proceedings and in securing a reconsideration by the court of its findings and sentence conforms to the provisions of the Manual for Courts-Martial 1928 (MCM, 1928, par.83,p.69). No matters within the prohibition of the 40th Article of War were reconsidered. The procedure adopted in this instance is approved by the Board of Review.

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The Board of Review is of the opinion that the record is legally sufficient to support the revised findings of accused's guilt of an assault with intent to commit rape on the person of Mrs. Dawe (CM ETO 78, Watts; CM ETO 595, Sipes; CM ETO 882, Biondi and White; CM ETO 996, Burkhart; CM ETO 1644, Allen; CM ETO 1873, Brown).

4. The crime of sodomy as denounced by the 93rd Article of War includes carnal knowledge per os (CM ETO 24, White; CM ETO 339, Gage; CM ETO 612, Suckow). Carnal knowledge per anum likewise is included in the offense of sodomy denounced by said Article of War (MCM, 1928, par.149k, p.177; 1 Wharton's Criminal Law - 12th Edition, sec.755, p.1035). Penetration was proved in both instances by evidence aliunde accused's confession. The Board of Review is of the opinion that the record is legally sufficient to support the findings of accused's guilt of Specifications 1 and 2, Charge II.

5. (a) The ruling of the court with respect to the seating of the accused in the court room was free from error. This was a matter peculiarly within the discretion and prerogative of the court and its ruling will not be disturbed upon appellate review in the absence of affirmative showing that accused suffered substantial prejudice (CM ETO 804, Ogletree et al; CM ETO 1284, Davis).

(b) The record of trial discloses the fact that the Commanding General of Ninth Air Force by VOCG, 5 February 1944 (confirmed by Special Orders 49, 18 February 1944) authorized the Commanding General, IX Air Support Command to appoint certain named officers of the former command as members, law members, trial judge advocates and defense counsel of a general court martial to be appointed by the last named officer. Acting pursuant to such authority the Commanding General IX Air Support Command appointed the court, which tried accused. Included in its membership and personnel were the officers made available by the Commanding General of the Ninth Air Force to act on such court. The recital of the above facts is all that is necessary to demonstrate the lack of merit of the attack by defense counsel on the legality of the court.

6. The charge sheet shows that accused is 20 years nine months of age and was inducted at Baltimore, Maryland, 6 January 1943 for the duration of the war plus six months. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and 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. The maximum penalty for assault with intent to rape is dishonorable discharge, total forfeitures and confinement at hard labor for 20 years (MCM, 1928, sec.104c, p.99) and for sodomy is dishonorable discharge, total forfeitures and

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confinement at hard labor for five years. The maximum sentence was imposed. (MCM, 1928, sec. 104c, p. 99). Confinement in a United States penitentiary is authorized (AW 42, 18 USC 455; Cir. 291, WD, 10 Nov 1943, par.V).

B. V. Muller _____ Judge Advocate

Peter Benschede _____ Judge Advocate

Howard W. Hayes _____ Judge Advocate

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1st Ind.

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WD, Branch Office TJAG., with ETOUSA. 6 MAY 1944 To: Commanding General, IX Air Support Command, redesignated IX Tactical Air Command, APO 638, U. S. Army.

1. In the case of Private LAWRENCE J. PENSON (33548631), Company "B", 447th Signal Construction Battalion (Avn), attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and sentence, which holding is hereby approved. Under the provisions of Article of War 50¹, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1743. For convenience of reference please place that number in brackets at the end of the order: (ETO 1743).



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

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

BOARD OF REVIEW

ETO 1764

10 MAY 1944

U N I T E D S T A T E S)
)
v.)
)

WESTERN BASE SECTION, SERVICES
OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS..

Private JOHNIE A. JONES)
(33047103), and Private KIRBY)
MUNDY (14073149), both of)
Detachment D, Casual Pool,)
10th Replacement Depot.)
)
)

Trial by G.C.M., convened at Bristol,
Gloucestershire, England, 4 March
1944. Sentences: Dishonorable dis-
charge, total forfeitures and con-
finement at hard labor for five years
for each accused. Federal Reform-
atory, Chillicothe, Ohio.

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

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

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

JONES

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that Private Johnie A. Jones, Detachment "D," Casual Pool, 10th Replacement Depot, did, at Bristol, Gloucestershire, England, on or about 19 January 1944, feloniously take, steal, and carry away one shoulder bag containing ten (10) shillings, lawful money of the United Kingdom and of an exchange value of about \$2.00, a purse, a compact, an identity card and a clothing coupon book of a total value of less than \$20.00, property of Mrs. Joyce Lear.

Specification 3: (Disapproved).

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Specification 4: In that * * *, did, at Bristol, Gloucestershire, England, on or about 6 January 1944, feloniously take, steal, and carry away, thirty-six (36) bath towels of a total value of about \$15.48, the property of the United States.

CHARGE II: Violation of the 94th Article of War.
Specification 1: (As amended before arraignment)

In that * * *, did, at Bristol, Gloucestershire, England, on or about 10 January 1944, feloniously take, steal, and carry away ten (10) field jackets of the value of about \$61.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: (Nolle Prosequi).

MUNDY

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

Specification 1: (Finding of Not Guilty).

Specification 2: (Disapproved).

Specification 3: In that Private Kirby Mundy, Detachment "D," Casual Pool, 10th Replacement Depot, did, at Bristol, Gloucestershire, England, on or about 6 January 1944, feloniously take, steal and carry away, thirty-six (36) bath towels of a total value of about \$15.48, the property of the United States.

Specification 4: In that * * *, did, at Bristol, Gloucestershire, England, on or about 19 January 1944, feloniously take, steal, and carry away one shoulder bag containing ten (10) shillings, lawful money of the United Kingdom of an exchange value of about \$2.00, a purse, a compact, and identity card and clothing coupon book of a total value of less than \$20.00 property of Mrs. Joyce Lear.

CHARGE II: Violation of the 94th Article of War.
Specification 1: (As amended before arraignment)

In that * * *, did, at Bristol, Gloucestershire, England, on or about 10 January 1944, feloniously take, steal and carry away ten (10) field jackets of the value of about \$61.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: (Nolle Prosequi).

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Each accused pleaded not guilty to all charges and specifications, except accused Jones pleaded guilty to Specification 4 of Charge I and to Charge II and its Specification and accused Mundy pleaded guilty to Specification 3, Charge I and to Charge II and its Specification. Accused Jones was found not guilty of Specification 1, Charge I, but guilty of Specifications 2, 3 and 4, Charge I, and of Charge I, and the Specification of Charge II and Charge II. Accused Mundy was found not guilty of Specification 1, Charge I but guilty of Specifications 2, 3 and 4, Charge I, and of Charge I, and the Specification of Charge II and Charge II. Evidence of one previous conviction by special court-martial was introduced against accused Jones for absence without leave and for impersonating a first sergeant in violation of the 61st and 96th Articles of War respectively. Evidence of four previous convictions was introduced against accused Mundy; three by summary courts for absence without leave for one, three and three days respectively in violation of the 61st Article of War and for impersonating a staff sergeant in violation of the 96th Article of War and one by summary court for wrongfully defecating on barrack's floor in violation of the 96th Article of War. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for six years. The reviewing authority with respect to accused Jones approved only so much of the findings of guilty as involve a finding of guilty of Specification 2 and Specification 4 of Charge I and Charge I and the Specification of Charge II and Charge II, reduced the period of confinement to five years, and designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement; and with respect to accused Mundy approved only so much of the findings of guilty as involve a finding of guilty of Specification 3 and Specification 4 of Charge I and Charge I and the Specification of Charge II and Charge II, reduced the period of confinement to five years and designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement. The record of trial was forwarded for action pursuant to Article of War 50½.

3. The evidence is substantial that both accused participated in the "snatching" of the purse owned by Mrs. Joyce Lear which purse and the articles contained therein were owned by her. The allegations of Specification 2, Charge I (Jones) and Specification 4, Charge I (Mundy) are fully sustained by the evidence. The record is legally sufficient to support the charge of larceny under the 93rd Article of War (CM ETO 875, Fazio; CM ETO 885, Van Horn; CM ETO 952, Mosser; CM ETO 1327, Urie; CM ETO 1415, Cochran). Although separately charged both accused were equally guilty regardless of the identity of the actual perpetrator of the theft (CM ETO 1549, Coppres and Ernest).

4. Each accused pleaded guilty to the charge of theft of the 36 bath towels of the value of \$15.48 property of the United States (Specification 4, Charge I, Jones; Specification 3, Charge I, Mundy). Larceny of government property may be charged under the 93rd Article of War (United States v. Maxon, Fed. Case No. 15,748):

Mundy in his confession stated he stole the bath towels "from the PX supplies at Number Four warehouse" (Pros.Ex.1). Jones in his confession declared:

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"Private Mundy and I were on guard duty at the #4 warehouse. During the early hours of the morning we stole 37 bath towels from the PX room. I used a wire to hook the towels through the wire cage." (Pros.Ex.2).

Lieutenant Ditzler testified that the towels belonged "to the United States Government" (R22). It was for the court to consider the effect of the implications created by this evidence that the towels were post-exchange property and not Government property. The evidence is sufficient to establish the ownership of the towels in the Government. Such being the state of the record the question as to ownership of the property is foreclosed on ^{appellate} review (CM ETO 132, Kelly and Hyde; CM ETO 397, Shaffer; CM ETO 1191, Acosta). The record is legally sufficient to sustain the finding of guilty of the theft by them of the towels.

5. The Specification of Charge II, as to each accused was amended at trial before arraignment by alleging the theft of ten field jackets of the value of \$61.00 instead of fifteen field jackets of the value of \$91.50. Defense counsel in each instant affirmatively indicated that he had no objection. The amendments were approved by the court (R6,8) and the charge sheets were amended accordingly and initialed by the trial judge advocate. Both accused pleaded guilty to the Specification as amended.

The reasonable inference from Malone's testimony and the respective confessions of the accused is that the field jackets were stolen from the possession of soldiers to whom they had been issued. It is obvious that the field jackets were "furnished and intended for the military service" of the United States. The possession of the soldiers of the jackets did not vest title of same in them. They remained the property of the United States and when stolen by third persons the thieves committed the crime of larceny under the 94th Article of War (2 Wharton's Criminal Law - 12th Ed - sec.1179, p.1497).

6. The court was not cautioned that the respective confessions of accused were admissible in evidence only against the offender making same (Cf: CM ETO 804, Ogletree et al; CM ETO 1052, Geddies et al; CM ETO 1202, Ramsey and Edwards). However, the accused each pleaded guilty to two of the specifications and as to the third specification of which each was found guilty (theft of Mrs. Lear's purse) this irregularity could not have been prejudicial in view of the victim's testimony as to the manner of the commission of the theft. In this instance the error is harmless (AW 37).

7. The court was legally constituted and had jurisdiction of the persons 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 as to each accused to support the findings of guilty and the sentence.

8. The charge sheets show that accused Jones is 24 years eight months of age and was inducted into the service at Roanoke, Virginia, 19 April 1941

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to serve for the duration of the war plus six months. He had no prior service. Accused, Mundy is 22 years of age and was inducted into the service at Fort Jackson, South Carolina 5 February 1942 to serve for the duration of the war plus six months. He had no prior service.

9. Larceny of Government property furnished and intended for the military use thereof (Specification 1, Charge II, both accused) is an offense under the Federal Penal Code and authorizes penitentiary confinement (Sec. 36 Federal Penal Code, 18 U.S.C. 87, as amended by Public Law 188 - 78th Cong, Act 22 Nov 1943, WD, Bull. 23, 11 Dec 1943). Confinement of both accused in the Federal Reformatory, Chillicothe, Ohio is authorized (Cir. 291, WD, 10 Nov 1943, sec.V, par.2). CM 144217, CM 145500, CM 147987, Dig.Op.JAG, 1912-1940, sec.399(2), p.246 are rendered inoperative in view of amendment to sec. 36 Federal Penal Code, supra.

B. Franklin Rector Judge Advocate

Richard A. Bentcham Judge Advocate

Ellwood W. Longfellow Judge Advocate

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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 10 MAY 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U. S. Army.

1. In the case of Privates JOHNIE A. JONES (33047103) and KIRBY MUNDY (14073149), both of 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 sentences. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentences.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1764. For convenience of reference please place that number in brackets at the end of the order: (ETO 1764)



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

- 3 MAY 1944

ETO 1786

U N I T E D S T A T E S) 8TH INFANTRY DIVISION.

v.

Second Lieutenant JAMES (MII)
HAMBRIGHT (O-1534038), Medical
Administrative Corps, Company
C, 8th Medical Battalion.

Trial by G.C.M., convened at APO 8,
18-19 January 1944. Sentence: To
be dismissed the service.

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

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

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

CHARGE I: Violation of the 95th Article of War.
Specification 1: In that Second Lieutenant James Hambright, 8th Medical Battalion, did, at Camp Knocknamoe, North Ireland, on or about 30 December 1943 with intent to deceive wrongfully make statements under oath to Lieutenant Colonel James B. Robertson Jr., I. C., 8th Infantry Division in the course of an official investigation, to the effect that on the night of 25 December 1943 he went directly to Whaley's Bakery in Enniskillen, North Ireland, before going to a dance and picked up organization kitchen utensils, which statement was false in that he did not go to the bakery that night before going to the dance and did not pick up such utensils.

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Specification 2: In that * * *, did, at Camp Knocknamo, North Ireland, on or about 27 December 1943 with intent to deceive wrongfully make statements under oath to Lieutenant Colonel James B. Robertson Jr., I. G., 8th Infantry Division in the course of an official investigation, to the effect that on the night of 25 December 1943 he asked the driver of an ambulance in convoy at or near the town hall in Enniskillen to lay his (Lieutenant Hambright's) coat in the back of said ambulance, which statement was false in that he did not make such request to either Private Donald D. Denny or Private First Class Delbert W. Fryklund, the Drivers of said ambulance.

Specification 3: (Disapproved).

Specification 4: (Disapproved).

Specification 5: (Disapproved).

Specification 6: In that * * *, did, at Camp Knocknamo, North Ireland, on or about 30 December 1943 with intent to deceive wrongfully make a statement under oath to Lieutenant Colonel James B. Robertson Jr., I.G., 8th Infantry Division in the course of an official investigation, to the effect that he did not on the night of 25 December 1943 at or near the townhall of Enniskillen, North Ireland, indicate or order the driver of an ambulance in convoy to move the vehicle, which statement was false in that he ordered Private Donald D. Denny, Company C, 8th Medical Battalion and Private First Class Delbert W. Fryklund, Company C, 8th Medical Battalion, the drivers of said ambulance to move the same.

Specification 7: In that * * *, did at Camp Knocknamo, North Ireland, on or about 30 December 1943 with intent to deceive wrongfully make a statement under oath to Lieutenant Colonel James B. Robertson Jr., I.G., 8th Infantry Division in the course of an official investigation, to the effect that on the night of 25 December 1943 at or near the town hall of Enniskillen, North Ireland, there was no one with him in an ambulance when the Military Police accosted him therein the second time, which statement was false in that Corporal Louis L. Berger, Company D, 8th Medical Battalion and two young ladies were with him.

Specification 8: (Disapproved)

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Specification 9: In that * * *, did wrongfully make a conflicting official statements in that at Enniskillen, on or about 25 December 1943, he in effect stated to Lieutenant Halls, Military Police Platoon, 8th Infantry Division, who was then pursuant to his duties questioning him, that liquor found on his person was brought by him from the States, and in that he subsequently stated to Lieutenant Colonel James B. Robertson Jr., I.G., 8th Infantry Division, at Camp Knocknamoe, North Ireland, on or about 27 December 1943 and 30 December 1943, in the course of an official investigation, in substance that the said whiskey was given to him by a civilian friend on the said evening of 25 December 1943.

Specification 10: In that * * *, did, at Enniskillen, North Ireland, on or about 25 December 1943, with intent to deceive, wrongfully make a statement to First Lieutenant James R. Halls, Jr., Military Police Platoon, 8th Infantry Division, who was then pursuant to his duties questioning him, to the effect that he, Lieutenant Hambright, was in charge of a nearby convoy, which statement was false, in that he was not in charge of said convoy.

Specification 11: (Disapproved).

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

Specification 1: In that * * *, did, at sea, on or about 12 December 1943 wrongfully borrow the sum of twenty-five Dollars (\$25.00) from an enlisted man, to wit: First Sergeant William H. Stockton, Company C, 8th Medical Battalion.

He pleaded not guilty to and was found guilty of all charges and specifications. He was sentenced to be dismissed the service. No evidence of previous convictions was introduced. The reviewing authority, the Commanding General, 8th Infantry Division, disapproved the findings of Specifications 3, 4, 5, 8 and 11 of Charge I, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence herein leaves the story indefinite and to some extent, incomplete. In substance, it is as follows:

Accused on 25 December 1943 was stationed at a camp near Enniskillen, North Ireland. His company had furnished the pots and pans and had their turkey cooked at a bakery in town (R15). He met Corporal Louis L. Berger, Jr., Company D, 8th Medical Battalion, Lisgoole Abbey, North Ireland

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on the night of 25 December and asked him if he were available to go into town on a detail (R65). They went to town in a 2½-ton truck driven by Technician Fifth Grade Lester F. Forseth and arrived about dusk between five and six o'clock. They parked by the town hall behind another truck (R30). Accused informed the driver they were to pick up some tinware. He was in uniform (R32) but whether or not he had or wore an overcoat is not definitely shown. It was about two blocks to the bakery from where they parked and accused said he was going to get the six or eight pans, each about two feet square, each with lid (R32) but it was dark and the driver could not see where accused went (R31-32). Berger got out of the truck and after talking ten or fifteen minutes with a crowd of boys from his own company, entered a dance with a young lady he met on the street. Inside he found accused sitting with another soldier and two ladies (R66). He joined them. The other man left and Berger became "aware that Lieutenant Hambright had a bottle with him", though it was not displayed. Accused and "the blonde" danced and Berger, who did not dance, went outside. Accused, Berger and the two girls met outside and as accused "wanted to get his coat", they "went over to the ambulance" (R67). After all four entered the vehicle, First Lieutenant James R. Halls, Jr., Military Police Platoon, 8th Infantry Division, accompanied by a Military Police staff sergeant came up and directed them to turn out the lights and get out of the ambulance which they did. The ambulance was driven down the street and parked. They followed and again entered the ambulance; Lieutenant Halls again appeared (R68). Halls sent one of his military policemen for a town constable and when he arrived, all were taken to the police barracks and questioned. Two bottles of liquor were found in the ambulance (R69). Berger rode in the back of the truck each way. There were no pans in the truck when going to town and he did not notice any on his return trip (R71). Accused returned to camp in the same truck but Berger did not see him with any utensils in his possession nor did he hear any rattling of pots or pans (R72).

4. (a) By Specification 1, Charge I, accused is charged with falsely stating during an official investigation that "he went directly to Whaley's Bakery in Enniskillen, North Ireland, the night of 25 December 1943 before going to a dance and picked up organization kitchen utensils". The record does not definitely show that there were any pans, or how or when they were sent to town or returned to camp.

During the investigation conducted by Lieutenant Colonel James B. Robertson, Jr., Inspector General's Department, 8th Infantry Division, on the 27 and 30 December 1943, accused stated that he was going to Enniskillen to pick up some of their pots at a bakery where their company Christmas turkey had been cooked (R15-16). Because of discrepancies in the various stories, accused was questioned a second time on 30 December (R20,25). He stated to Colonel Robertson that after reaching town he went directly to Whaley's bakery and got the pots, pans and lids but that he did not know the name of the street where the bakery was located. He further stated that he knew dances were conducted from time to time but did not definitely know they had one that night (R21). He denied going to town primarily to go to the dance. On being told by Colonel Robertson, "This corporal said

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that he didn't even know the reason he went into town", accused answered, "I don't remember saying anything what this detail was about. We got into town and went to the dance afterwards". When asked, "Then you didn't get the pans," accused answered, "No, sir, we didn't get any pans" (R22,27). The driver of the truck testified that he parked by the town hall on arrival in town in order to pick up some tinware. This was some two blocks from Whaley's bakery. Accused got out of the truck and disappeared in the darkness (R30-31). Trucks had been in earlier in the day to pick up the turkeys but the driver did not know whether they at that time had picked up the pans (R32-33). He did not know whether the pans were on the truck when they returned to camp (R33) though he had stayed with the truck. He did not see accused bring the pans back to the truck (R34).

There is substantial evidence to support the court's finding that accused's statements were false in that he did not go to the bakery or pick up the organization's kitchen utensils on the night of 25 December.

(b) Specification 2, Charge I, charges accused with falsely stating during an official investigation "that on the night of 25 December 1943 he asked the driver of an ambulance in a convoy at or near the town hall in Enniskillen to lay his * * * coat in the back of said ambulance". Accused informed Lieutenant Colonel Robertson during the official investigation that "he took off his overcoat and folded it so that the pocket was inside and asked the driver of the ambulance to put it in the ambulance on the seat" (R16). Later at the dance that night, accused stated, mention was made of a drink and accused and his party went outside to get his overcoat (R17,19). He stated that he recalled having a bottle in his overcoat which he left in the ambulance that was parked in front of the dance hall (R22). He explained the presence of the young ladies in the ambulance by saying that they entered it when he went in to get his coat in the rear of the ambulance (R23), which was the explanation he gave the military police for their being in the ambulance. Accused stated that the bottle of Scotch whiskey was found by the military police in his overcoat pocket (R24). The driver of the truck in which accused rode both to and from town that night, in the front seat, testified he did not remember whether or not accused had an overcoat (R32-33). Lieutenant Halls testified positively that accused was not wearing an overcoat when found inside the ambulance that night and that there was no overcoat on the seat of the ambulance (R41). An overcoat was neither seen nor mentioned at that time (R42). Private Donald D. Denny, Company "C", 8th Medical Battalion, the ambulance driver that night, testified accused came to the ambulance about 7:30 with Berger. He did not remember how accused was dressed, but accused gave him nothing, did not leave any clothes with him or ask him to take care of anything (R49-50,53). Private First Class Dalbert W. Fryklund testified he was in the ambulance parked in front of the side door of the town hall on the night in question (R55). He saw accused when he came over to the ambulance but he left nothing with him and he did not recall his having an overcoat. He said he was going to the dance (R56). Miss Florence Cassidy, 2 Strand Street, Enniskillen, who was with accused at the dance on the night in question, testified she had danced with him the night before (R59) and went outside

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the dance hall with him to get a drink when he said it was in the ambulance. She did not see accused with an overcoat at any time during the evening but thought "there was one on the seat towards the driver" of the ambulance (R61-62). Miss Elizabeth Duffy, 36 Dame Street, Enniskillen, the other girl in the party, testified she went outside with the others and got in the ambulance. She saw some liquor on the accused's side of the car but did not see an overcoat on the seat of the ambulance. Accused did not wear an overcoat (R64-65). Berger testified they went with accused to the ambulance as he wanted to get his coat (R67) and that accused did not have on an overcoat (R68). Staff Sergeant Donald Gruner, 8th Infantry Division, Military Police Platoon, testified that accused was not wearing an overcoat and did not mention one when the military police found the party in the ambulance and took them to the police barracks (R75). Technician Fourth Grade Conrad J. Daubener, who was one of the military police who found the party in the ambulance and took them to the police barracks, testified he thought accused had a raincoat but did not remember. The first bottle of liquor was found inside the left rear door of the ambulance and the second bottle he found "at the constabulary" (I73-80).

No witness testified positively that accused wore or had an overcoat that night. Both the ambulance drivers denied that accused left an overcoat or anything with them. None of his companions saw him with an overcoat that evening. Berger became aware accused had a bottle with him while in the dance hall. The inference is strong that they entered the ambulance and shut the doors in order to have a drink. If accused had had an overcoat that night which he did not want to take in to the dance with him, the logical and reasonable place for him to leave it would be with the driver of his own truck, who remained with the truck and with whom accused would return to camp. The ambulance might at any time have gone elsewhere. The evidence supports the court's findings that accused's statements to the investigating officer were false. The court could observe the witnesses and judge their credibility. This was a question of fact for the court to determine and their finding will not be disturbed. (CM LTO 132, Kelly and Hyde; CM PTO 397, Shaffer; CM PTO 1191, Acosta).

(c) Specification 6, Charge I, charges accused with falsely stating during an official investigation, that "he did not on the night of 25 December 1943 at or near the townhall of Inniskillen, North Ireland indicate or order the driver of an ambulance in convoy to move the vehicle." Accused, during the investigation, stated that after they had been ordered out of the ambulance and had left it and crossed the street, they noticed it leave its place in the parked column and move to another place nearby. Accused did not indicate to Colonel Robertson that he had ordered it to be moved and further stated that next morning he questioned the ambulance driver who told him that when the military police arrived on the scene it created a commotion and that the driver was annoyed by people opening the door and getting in (R18). On further questioning by Colonel Robertson, he twice denied that he indicated in any way or ordered the driver of the ambulance to move (R24). Lieutenant Halls testified that after he had ordered the party out of the ambulance, they walked up the street. Accused had no hat or overcoat. ▲

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few seconds later the ambulance pulled out, made a right turn and parked about 50 yards down the street. Noticing this he followed accused and his party and saw them get in the ambulance again (R36). Private Denny, the ambulance driver, testified that accused told him to drive across the street and that he would not have driven there otherwise (R51). Accused "told me to move across the street and down the street to a location where we used to park our convoys" (R52). It was not a military policeman who ordered him to move, but accused (R54,57). Private First Class Fryklund testified accused said, "Denny pull up around the corner. Get out of this congestion" (R58). When he parked at the new place, accused, Berger and the two girls again entered the ambulance (R54). Both the girls testified that someone gave instructions to the driver to move on (R60,64) but they failed to see who it was. Sergeant Gruner testified that he was present when Lieutenant Halls ordered accused's party out of the ambulance. They dismounted and walked across the street and he saw accused "motion for the vehicle to follow him". Gruner was only 15 feet away at the time (R74). He heard accused tell the driver to "Follow me" (R76). The trial court's determination that accused's statements given as above recited, were knowingly false will not be disturbed. (See authorities, supra).

(d) Specification 7, Charge I, charges that at the same time and place mentioned in preceding specifications, under like circumstances, accused falsely stated that there was no one with him in the ambulance when the military police accosted him therein the second time, when in fact, Corporal Berger and two young ladies were with him.

Accused stated to the investigating officer "that he was the only one to get in" the ambulance the second time (R19), and that after they were ordered out of the ambulance the first time, he did not "know where they went"; that "when the military police officer came up the second time and asked me what I was doing in the ambulance I told him that I left my coat in there and I went in to get it". Accused was positive there was no one in the ambulance the second time (R24). Lieutenant Halls testified that he and his two sergeants followed accused, Berger and the two girls down the street after they were ordered out of the ambulance the first time and saw them all get inside the ambulance again. Halls went to the front of the ambulance, had the dome light turned on and they were all sitting inside the ambulance (R36-37). Private Denny, the driver testified that after he parked at the new place, accused, Berger and the two girls came back to the ambulance and all got in. He saw them after he turned on the lights at the order of a military policeman (R54). One of the girls, Florence Cassidy, testified that after being ordered out of the ambulance the first time, the ambulance moved up the street and "We went up the street and got into the ambulance again and sat inside and were smoking when the door opening the second time" (R60). Lilly Duffy, the other girl testified to the same effect (R64). Corporal Berger testified that after being ordered out of the ambulance the first time, they went down the street to where it had again parked and he, accused and one girl got in before Lieutenant Halls again came up (R68). Sergeant Gruner testified that after accused and his party were ordered out of the ambulance by Lieutenant Halls, accused motioned for it to follow the party as they walked down the street and when it stopped, accused,

Berger and the two girls got back in. When the driver was ordered to put on the dome light, "they were in there having a cigarette" (R74-75). Daubener testified similarly (R79). The evidence very substantially supports the trial court's findings as to Specification 7 of Charge I.

(e) By Specification 9, Charge I, accused is charged with making conflicting official statements in that on or about 25 December 1943 he stated to Lieutenant Halls that liquor found in his possession was brought by him from the States, and later when questioned by Lieutenant Colonel Robertson, he stated that the whiskey was given to him by a civilian friend on the evening of 25 December.

Accused stated to Colonel Robertson "that sometime during the day he had met a friend who offered him a drink it being Christmas Day, and he told him he could not because he was on duty so the friend gave him a bottle" of Scotch. He mentioned another bottle of liquor but did not know from whence it came (R19). When questioned later on 30 December, he stated he secured the bottle of liquor earlier in the evening, that he did not take it from camp with him and that Corporal Berger was in the vehicle when he got the liquor which was given him by a civilian whom he met upon leaving the bakery (R22). He stated that the bottle of Scotch that the military police first found was in his overcoat pocket (R24). Lieutenant Halls testified, "I asked him where he got the whiskey" (R38) found under accused's seat in the ambulance (R37) and he said "he brought it from the States" (R38). Sergeant Gruner testified that he heard accused say he brought the whiskey from the States (R77). Daubener testified similarly (R81). Constable William M. Williams, Royal Ulster Constabulary, Enniskillen, testified that they found a bottle of Scotch under the seat in the ambulance and he asked accused ("this officer") about it and he said it was his and that a friend had given it to him (R86). The conflicting statements are apparent.

(f) Specification 10, Charge I, charges accused with falsely stating to Lieutenant Halls on or about 25 December 1943 that he was in charge of a nearby convoy.

When the party arrived at the police barracks after being discovered the second time in the ambulance, Lieutenant Halls asked accused why he was in town. Accused "said he was just in town, then he said he was in charge of a convoy" in town at a dance (R38). His exact words were that "he was in charge of a convoy group the members of which were inside the dance hall" (R43). The lieutenant sent accused back to the town hall to take charge of his convoy but would not have done so if accused had not told him that he was in charge (R39, 42-43). Major John M. Thompson, Battalion Commander of the 8th Medical Battalion, Lisgoole Abbey, testified that there was a convoy from his command to Enniskillen on Christmas Day to take enlisted men there for recreational purposes, and that Captain Cornacchi, not accused, was in charge of the convoy. Accused was not in charge of any convoy (R44-45). Private Denny, the driver of the ambulance, testified that he did not remember who was in charge of the convoy but that accused was not in charge (R51). The evidence fully supports the court's findings that the statements of accused, were intentionally false. For an officer

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to make knowingly a false statement in the course of an official investigation is an offense under the 95th Article of War (CM 1928, par. 151, p. 186; CM ETO 1447, Scholten; CM ETO 1538, Hodder; CM ETO 1953, Lewis).

(g) The Specification of Charge II charges accused with wrongfully borrowing \$25 from an enlisted man. The uncontradicted testimony of First Sergeant William H. Stockton, Company "C", 8th Medical Battalion, is that he loaned accused \$25 on board ship on or about 12 December 1943 at his request, that no definite time was fixed for repayment, that it has not been repaid and that he expected to get it back. No receipt was given him (R83). Such conduct constitutes an offense under the 96th Article of War (CM D7722 (1918), CM 130243 (1919), Dig.Op.JAG, 1912-1940, sec.454(19), pp.350,351).

5. The record is silent as to the explanation to accused of his rights to remain silent, testify under oath or make an unsworn statement. Accused did not appear as a witness on his own behalf. While this is an irregularity it is not fatal. It will be presumed that defense counsel performed his duty towards accused in this respect (CM ETO 139, McDaniels; CM ETO 531, McLurkin).

6. The charge sheet shows that accused is 29 years of age. Enlisted service from 10 December 1935 to 25 September 1942. Arm or Service: Inf. and MD. Highest grade held: Master Sgt. Commissioned 2nd Lt. MAC. 26 September 1942. Assigned to 8th Medical Bn. 17 October 1942.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

B. FRANKLIN RITER

Judge Advocate

CHARLES M. VAN BENSHOTEN

Judge Advocate

ELLWOOD W. SARGENT

Judge Advocate

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1st Ind.

AB, Branch Office TJAG., with ETOUSA. -3 MAY 1944 TO: Commanding General, ETOUSA, APO 887, U.S. Army.

1. In the case of Second Lieutenant JAMES (WMI) HAMBRICK (O-1534038), Medical Administrative Corps, Company C, 8th Medical Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as confirmed, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1786. For convenience of reference please place that number in brackets at the end of the order: (ETO 1786).

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

(Sentence ordered executed. GCMO 29, ETO, 9 May 1944)

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

BOARD OF REVIEW

ETO 1790

- 6 MAY 1944

UNITED STATES)

v.

Private JOHN T. LAIN (6288951),
Battery "B", 34th Field Artillery
Battalion.

) 9TH INFANTRY DIVISION.

Trial by G.C.M., convened at Cefalu,
Sicily, 18 September 1943. Sentence:
Dishonorable discharge, total for-
feitures and confinement at hard
labor for 20 years. Eastern Branch,
United States Disciplinary Barracks,
Beekman, New York.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private John T. Lain,
Battery "B", 34th Field Artillery Battalion,
did, in the vicinity of Palermo, Sicily,
while the organization was moving forward
to engage the enemy, on or about July 25,
1943, absent himself from his organization
and duties without proper leave, with the
intent to avoid hazardous duty, towit:
"action against the enemy," and did remain
absent until he rejoined the organization
on or about July 30, 1943.

He pleaded not guilty and was found guilty of the Specification, excepting the words "in the vicinity of Palermo, Sicily, while the organization was moving forward to engage the enemy, on or about July 25, 1943, absent himself from his organization and duties without proper leave, with the intent to avoid hazardous duty, towit: 'action against the enemy', and did

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remain absent until he rejoined the organization on or about July 30, 1943", substituting therefor the words, "without proper leave, absent himself from his organization, near Palermo, Sicily, from about July 25, 1943 to about July 30, 1943"; of the excepted words, Not Guilty, of the substituted words, Guilty. Of the Charge: Not Guilty of a violation of the 58th Article of War, but guilty of a 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 20 years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Beekman, New York as the place of confinement, ordered accused to be held at Oran, Algeria, pending further orders and forwarded the record of trial for action pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. 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 place of confinement should be changed however, to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

P. V. Murphy _____ Judge Advocate

C. L. Anderson _____ Judge Advocate

E. Wood Hargrave _____ Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. - 6 MAY 1944 TO: Commanding General, 9th Infantry Division, APO 9, U.S.Army.

1. In the case of Private JOHN T. LAIN (6288951), Battery "B", 34th 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 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

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

3. The sentence adjudged and approved appears excessive for the offense under the circumstances shown by the record of trial. Accused rejoined before his organization was in combat. This case will be re-examined in Washington and, I believe, will result in a very considerable reduction in the sentence. In order to comply with instructions from the Commanding General, European Theater of Operations, in reference to uniformity of sentences, and which direct me to take action so that this theater may not be subject to criticism for returning prisoners to the United States with sentences which require immediate clemency action by the War Department, I recommend that you reconsider the sentence with a view to reducing the term of confinement. If this is done, the signed action should be returned to this office for file with the record of trial.

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 1790. For convenience of reference please place that number in brackets at the end of the order: (ETO 1790).



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

- 8 MAY 1944

ETO 1803

U N I T E D S T A T E S)
) CENTRAL BASE SECTION, SERVICES
v.) OF SUPPLY, EUROPEAN THEATER OF
) OPERATIONS.

Second Lieutenant GEORGE R.)
WRIGHT (O-449682), Second)
Bombardment Wing.)
) Trial by G.C.M., convened at London,
) England 17 February 1944. Sentence:
) Dismissal, total forfeitures and
) confinement at hard labor for one
) year. The Eastern Branch, United
) States Disciplinary Barracks, Green-
) haven, New York.

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

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

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

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

Specification 1: In that Second Lieutenant George R.

Wright, Second Bombardment Wing, ETOUSA, did, at London, England, on or about 20 April 1943, with intent to defraud wrongfully and unlawfully make and utter to Hotel Ritz London, Ltd, Piccadilly, W.l., a certain check, in words and figures drawn as follows, to wit:

No ____ To Barclay's Bank Ltd. London, W.l., -
Pay to the order of the Ritz Hotel (London)
Limited the sum of Twenty Pounds (£20:0:0) -
only -- George R. Wright, U. S. Air Force. -
London 20-4-1943.

and by means thereof did fraudulently obtain from the Ritz Hotel (London) Limited £20.0.0, of the value about \$80.40, he the said George R. Wright.

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then well knowing that he did not have and not intending that he should have sufficient funds in the Barclays Bank Ltd., for the payment of said check.

Specification 2: In that * * *, did, at London, England, on or about 21 April 1943, with intent to defraud wrongfully and unlawfully make and utter to Hotel Ritz London, Ltd. Piccadilly, W.l., a certain check, in words and figures drawn as follows, to wit:

No. To Barclay's Bank Ltd., London, W.l., -
Pay to the order of the Ritz Hotel (London) Limited, the sum of Seventeen Pounds one shilling and eight pence (L17-1-8) Geo R. Wright, A.P.O. 647, U. S. Army - London, 21 April 1943.

and by means thereof did fraudulently obtain from the Ritz Hotel (London) Limited L17.1.8., of the value of about \$68.78, he, the said George R. Wright then well knowing that he did not have and not intending that he should have sufficient funds in the Barclays Bank Ltd. for the payment of said check.

Specification 3: In that * * *, did at London, England on or about 9 June 1943 with intent to defraud wrongfully and unlawfully make and utter to Mount Royal Hotel, Limited, Marble Arch, W.l., a certain check, in words and figures drawn as follows, to wit:

No. 2WP. 028621, to Barclays Bank Limited, London W.l., Pay to Cash, the sum of Five Pounds only (L5-0-0), Geo R. Wright, A.P.O. '634, U. S. Army - London 9-6-43.

and by means thereof did fraudulently obtain from the Mount Royal Hotel, Limited, L5.0.0., of the value about \$20.10, he, the said George R. Wright then well knowing that he did not have and not intending that he should have sufficient funds in the Barclays Bank Ltd. for the payment of said check.

Specification 4: In that * * *, did at London, England on or about 25 June 1943, with intent to defraud wrongfully and unlawfully make and utter to New Claridge's Hotel, Limited, Brook Street, London, W.l., a certain check, in words and figures drawn as follows, to wit:

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Messrs. Barclays Bank Ltd., London W.l.,
(Bankers Branch) - Pay New Claridge's
Hotel Limited, or Order - Ten Pounds only
-- (L10-0-0), Geo R. Wright, Lt, U.S.

Airforce, APO 634 - June 25, 1943.

and by means thereof did fraudulently obtain from
the New Claridge's Hotel Limited L10.0.0., of the
value of about \$40.20, he, the said George R.
Wright then well knowing that he did not have and
not intending that he should have sufficient funds
in the Barclays Bank Ltd. for the payment of the
said check.

Specification 5: In that * * *, did, at London, England,
on or about 26 June 1943, with intent to defraud
wrongfully and unlawfully make and utter to New
Claridge's Hotel Limited, Brook Street, London,
W.l., a certain check, in words and figures, drawn
as follows, to wit:

Messrs. Barclays Bank Ltd, London, W.l,
(Bankers Branch) - Pay New Claridge's
Hotel Limited, or order Ten Pounds only
-- (L10-0-0), Geo R. Wright, U. S. Air

Force, APO 634 - 26 June 1943.

and by means thereof did fraudulently obtain from
the New Claridge's Hotel Limited L10.0.0, of the
value of about \$40.20, he, the said George R. Wright
then well knowing that he did not have and not in-
tending that he should have sufficient funds in the
Barclays Bank Ltd. for the payment of the said check.

Specification 6: In that * * *, did, at London, England,
on or about 27 June 1943, with intent to defraud
wrongfully and unlawfully make and utter to New
Claridge's Hotel Limited, Brook Street, London, W.l,
a certain check, in words and figures drawn as
follows, to wit:

Messrs. Barclays Bank Ltd, London W.l,
(Bankers Branch) - Pay New Claridge's Hotel
Limited, or order, Three pounds Eleven
shillings and Four pence (L3-11-4), Geo R.
Wright, U. S. Air Force, APO 634 - 27-6-43.

and by means thereof did fraudulently obtain from
the New Claridge's Hotel Limited L3.11.4, of the
value of about \$14.34, he, the said George R. Wright
then well knowing that he did not have and not in-
tending that he should have sufficient funds in the
Barclays Bank Ltd. for the payment of the said check.

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Specification 7: In that * * *, did at London, England, on or about 27 June 1943, with intent to defraud wrongfully and unlawfully make and utter to New Claridge's Hotel Limited, Brook Street, London, W.1, a certain check, in words and figures drawn as follows, to wit:

Messrs. Barclays Bank Ltd, London, W.1,
(Bankers Branch) - Pay New Claridge's
Hotel Limited, or Order - Five Pounds --
only -- (5-0-0) - Geo R. Wright, U. S.

Air Force, APO 634, 27-6-43.

and by means thereof did fraudulently obtain from the New Claridge's Hotel Limited £5.0.0., of the value of about \$20.10, he, the said George R. Wright then well knowing that he did not have and not intending that he should have sufficient funds in the Barclays Bank Ltd. for the payment of the said check.

CHARGE II: Violation of the 95th 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)

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

Specification: In that * * *, having on and before 17 November 1943, become indebted to Athenaeum Court, 116 Piccadilly, London, W.1, England, a hotel, in the sum of fifty-three pounds English money (£53), value about \$213.06, for hotel bill, and having failed without due cause to liquidate said indebtedness, and having on or about 17 November 1943 promised in writing the management of said Athenaeum Court that he would on or about 22 November 1943 pay the sum of twenty pounds (£20) and would on or about 1 December 1943 pay the sum of fifteen pounds (£15), and would on or about 1 January 1944 pay the balance of eighteen pounds (£18) did, without due cause, at London, England, on 22 November 1943 and 1 December 1943, dishonorably fail to keep said promise.

He pleaded not guilty to all charges and specifications, and was found not guilty of Charge II and of its specifications; guilty of Charge I and the specifications thereunder, guilty of the Specification of the Additional Charge and not guilty of the Additional Charge but guilty of a violation of Article of War 96. 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

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reviewing authority may direct, for one year. The reviewing authority, the Commanding General, Central Base Section, SOS, ETOUSA, 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, withheld the order directing execution thereof pursuant to the provisions of Article of War 50 $\frac{1}{2}$, and designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York as the place of confinement.

3. With reference to the offenses of which accused was found guilty the following facts were undisputed:

Accused lived at the Athenaeum Hotel, 116 Piccadilly, London from 16 July to 17 November 1943. During his occupancy he accumulated an unpaid hotel bill in the total amount of 53 pounds 14 shillings 6 pence, and was approached several times with reference to the status of his account. "In the beginning" he made several partial payments but the total amount owed accumulated with the passage of time. When he left the hotel on 17 November he made a written promise to pay 53 pounds as follows: 20 pounds on 22 November, 15 pounds on 1 December and 18 pounds on 1 January (1944). No payments whatsoever were made after 17 November by accused from whom thereafter no word was received by the hotel. Upon moving into the hotel he paid in advance 7 pounds 7 shillings which represented a week's rent. His account was ultimately credited in this amount and the balance due at the time of trial was, therefore, still 46 pounds 7 shillings 6 pence (R52-58,80; Pros. Exs.13,25-26) (Additional Charge and Specification).

On 20-21 April, 9 June, 25,26 and 27 June 1943 accused signed and negotiated the checks alleged in Specifications 1 to 7 of Charge I. These checks were drawn on Barclays Bank Ltd, London W.l., and accused received the amounts alleged either in the form of cash or credit on hotel bills. Witnesses having personal knowledge of such facts identified each check admitted in evidence as having been negotiated by accused. These witnesses further testified that the checks were not honored by the drawee bank when presented for payment because of an insufficiency of funds; in one instance (Spec.3), checks had been paid into the account but the proceeds were not received when the check was presented for payment. After a complaint was made and an investigation started, full restitution was made on 30 August of the amounts of the checks dated 20-21 April, payable to the Ritz Hotel (London) Limited (Specs.1 and 2). Mr. E.W. Sequist, head cashier of the hotel, repeatedly cashed checks for accused and the return of the check described in Specification 1 "was the first trouble we ever had with the gentleman." When this check for 20 pounds dated 20 April was cashed, Sequist gave accused 10 pounds and returned to him a previous check of his in the sum of 10 pounds which was dishonored. The check dated 9 June cashed at the Mount Royal Hotel (Spec.3) was thrice presented for payment and finally turned over to the "Provost Marshal's Office". It is marked "Refer to drawer. Effects not cleared" and "PAID". With reference to the checks payable to New Claridge's Hotel Limited (Specs.4-7 incl), dated 25, 26 and 27 June, registered letters stating that the checks were dishonored

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and demanding payment thereof were mailed to accused on 2, 13 and 29 July. Although the envelopes containing the letters were marked with the return address of the hotel, the letters were not returned. Full restitution of the amounts of these checks was made 31 August after complaints were made and an investigation was initiated (R9-29,79; Pros.Exs.1-7 incl., 14-16 incl., 27; Def.Ex.1).

Mr. Frederick E. Wigmore, manager of Barclays Bank, 451 Oxford Street, London, identified a true duplicate copy of accused's account with the bank and it was admitted in evidence. The status of the account on the dates of the checks described in Specifications 1-7, Charge I was as follows: on 20-21 April he owed the bank 33 pounds 8 shillings 6 pence; on 9 June he had a credit balance of 15 pounds 15 shillings 6 pence but there was a "contingent liability" of about 99 pounds because of two uncollected checks which had been deposited. On 25 June he had a credit balance of 15 pounds 15 shillings 6 pence but there was then an "actual liability" of about 99 pounds because of the two uncollected checks, which had then been returned. The same condition existed on 26 and 27 June (R29; Pros.Ex.19). The two unpaid checks referred to by Mr. Wigmore, each in the amount of \$200 and dated 20 February and 20 April respectively, were payable to Barclays Bank Limited and were drawn on The Riggs National Bank, Washington, D.C. About 12 June they were returned to Barclays Bank unpaid because of insufficient funds. The checks were admitted in evidence, were later withdrawn and copies substituted therefor. The two checks were still unpaid at the time of trial (R29-30,33-34,36; Pros.Exs.8-9). By letters dated 15,17,21,29 June and 10 July, Mr. Wigmore advised accused that the two checks were dishonored and demanded payment thereof. The envelopes contained the return address of the bank and the letters were not returned. The letter dated 10 July was registered (R30-33; Pros.Exs.18,20-23 incl.). On 22 February when the first \$200 check was deposited to his account (Pros.Ex.8), accused was overdrawn in the amount of 26 pounds 4 shillings 4 pence. The deposit of the check resulted in a credit balance (if the check was collected) of 8 pounds 3 shillings 8 pence. On 20 April when the second \$200 check was deposited (Pros.Ex.9), the account was overdrawn by the amount of 33 pounds 8 shillings 6 pence. However, on 20 April it was not known at the bank that the first check was dishonored. If it had been known, the true status of the account would be that it was overdrawn in the amount of 82 pounds 16 shillings 6 pence (R34-35; Pros.Ex.19). On 28 June the account was overdrawn in the amount of 84 pounds 3 shillings 7 pence. The equivalent in British currency of the two amounts of the checks drawn on The Riggs National Bank was 99 pounds 19 shillings 6 pence. Had the two checks been honored, there would have been a credit balance on 12 June of 15 pounds 15 shillings 6 pence. This amount was not sufficient to pay the checks described in Specifications 1-7, Charge I, which totalled 70 pounds 13 shillings (R36,38-39; Pros.Ex.19).

The bank honored accused's checks in "a limited amount" when his account was overdrawn. On 17 and 19 February and 2,3,15 and 29 March checks were honored when the account was overdrawn in amounts ranging from approximately 13 to 29 pounds (R35-36; Pros.Ex.19). However, despite this

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fact, if the two checks drawn on The Riggs National Bank were honored, Mr. Wigmore "definitely" would not have honored all the checks described in Specifications 1-7, Charge I (R39-40). Prior to the time the two checks were returned unpaid, the relationship between the bank and accused was "satisfactory" (R36). Identified and admitted in evidence were seven checks, each in the sum of \$100, drawn on The Riggs National Bank by accused, payable to Barclays Bank Ltd., during the period 10 August 1942 to 18 January 1943. All checks were honored when presented for payment (R37; Def.Exs.2-8 incl.). Accused opened his account with Barclays Bank 10 August 1942 (R35). An inquiry as to his credit was sent by Barclays Bank to The Riggs National Bank. Admitted in evidence was a reply dated 20 November 1942 wherein it was stated in part that accused opened an account in The Riggs National Bank in April 1942, that satisfactory balances were maintained and that accused would be responsible for "his reasonable credit requirements" (R38; Def.Ex.9).

On 28 June Mr. Joseph E. Warren, assistant manager of Barclays Bank, received a telephone call from "G.R.Wright" who stated he was sorry that he had not been able until then to do anything about the overdraft, but that he was by cable requesting his wife in Mexico to cable funds to the bank. "It was suggested over the phone that of course under no circumstances whatsoever should this overdraft be increased pending the funds arriving from his wife" (R50-51,58).

About 27 July a sergeant went to the bank on accused's behalf and stated that accused received one of the communications from the bank and "was going to take care of ^{the} matter" (R33-34,79).

Admitted in evidence was the deposition of Mr. George O. Vass, vice-president and cashier of The Riggs National Bank of Washington, D.C. (R58; Pros.Ex.17), who deposed that between 20 January - 9 October 1943 accused had a joint checking account in the bank with his wife. Attached to Pros.Ex.17 is a photostatic true copy of the ledger sheet of the account for this period which was admitted in evidence as Pros.Ex.12 (R58). Mr. Vass further deposed that the balance of the account on 20 January 1943 was \$22.83, on 20 April \$2.38, on 9 August \$6.08 and on 11 August \$7.08. Two checks drawn on the bank, each in the amount of \$200, were dishonored because of insufficient funds when presented to the bank for payment on 7 May 1943. An examination of Pros.Ex.12 discloses that on 7 May when the two checks for \$200 each were presented for payment, the balance in the account was \$2.38. Accused's wife deposited sums in the joint account, but on 1 December 1942 established a special account of her own in the bank. Although it is stated in the deposition of Mr. Vass that a true and exact copy of the special account of accused's wife is attached thereto, the document is not in fact attached. A photostatic copy of the account is included in the papers accompanying the record of trial.

Admitted in evidence was the deposition of accused's wife, Mrs. Anne S. Wright, 1616 34th Street, N.W., Washington, D.C. who deposed that she married accused 14 February 1942. Before accused left the United

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States, they opened a joint account in The Riggs National Bank and each were authorized to draw checks. From May to November 1942 she received a monthly allotment of \$125 from accused and from December 1942 to the date of the deposition she received a monthly allotment of \$175. In February or March 1943, she opened in The Riggs National Bank an account of her own entitled "Anne S. Wright, Special". She did not inform accused who was not authorized to draw checks from this special account. Through March 1943, the allotment checks were deposited in the joint account but after that month the allotment checks were deposited in her special account, which she established for her own personal and business purposes, and in which she also deposited her salary and her reimbursement for office expenses received from her employer. In January 1943 accused sent her \$600 in addition to the monthly allotment. Up to June 1943 she paid \$550 "down" on various items of household furniture, and after that month she paid \$75 monthly for the furniture on which she still owed \$300. In May 1943 she withdrew \$478 from her special account and paid for some Bolivian bonds which she still owned. Part of the \$478 came from accused's April and May allotments which were deposited in the special account. About 8 May she was notified by The Riggs National Bank that the joint account was charged \$1.00 as a service charge for each of two checks, each in the sum of \$200 and payable to Barclays Bank Ltd., which were returned because of insufficient funds in the joint account. She did not inform accused about the checks and did nothing about the matter because the checks "had already gone back". She received no word from accused about the incident and assumed that he was notified by the bank in England and that he "had made the checks good". She was in Mexico from 20 June to 20 August 1943. She instructed The Riggs National Bank to furnish a true and exact copy of her special account in order that it might be attached to her deposition. The document is not attached thereto (R68; Def.Ex.11).

4. After receiving an explanation of his rights accused testified in substance as follows:

He was graduated from the University of Southern California in 1928 (R87), and in civil life was "in motion pictures and advertising" (R75). He enlisted in the Army 27 May 1941 and was later commissioned. He came overseas in April 1942, was a combat photographer and flew in eleven combat missions (R70).

He executed the checks alleged in Specifications 1-7 incl., Charge I, and received value therefor (R79). On 6 November 1943 he first learned that his wife had a separate account when she wrote him a letter to that effect. He did not authorize The Riggs National Bank to deposit the allotment checks in her special account and understood that they were being deposited in the joint account (R71-72,77). He was on leave from 19 to 28 June, and spent the first part of his leave in Scotland. He returned to London, was there on 25 June, and wrote the checks payable to New Claridge's Hotel (Specs.4-7 incl., Charge I) while he was on leave in London. He returned to his station at Norwich on 28 June (R74,84). On 28 or 29 June he first learned that the two checks, each in the sum of \$200 and drawn on The

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Riggs National Bank (Pros.Exs.8-9), were dishonored when he found on his return to Norwich the letter from Barclays Bank dated 21 June (Pros.Ex.21) (R70,74,77,79,90). He did not know that the two checks were dishonored when he wrote the seven checks prior to 29 June, and thought he had funds in the bank (R70-71). He also received the letter from Barclays Bank dated 29 June (Pros.Ex.22) but did not receive the ones dated 15, 17 June and 10 July (Pros.Exs.18,20,23) because "In most cases there they were sent to Air Support Command, of which I used to be a member. I never got any mail from there. It was misdirected" (R77). He immediately telephoned Barclays Bank, told the assistant manager that he was "quite surprised that the check had come back" and said that he would cable his wife. Upon his return from leave he found a cable from his wife stating that she could be reached in Mexico City. He immediately cabled her "**** and asked her why the Bank account was in such a state, because my checks had never been returned before" (R74,77). He wrote his wife "any number of letters" and sent her several cables but was unable to "contact" her from 15 August to about the middle of September. He also cabled his mother in an attempt to locate his wife, because he did not receive an answer concerning his inquiries as to the reason "this money had been taken out of the Bank. I did not know at that time another account existed at all" (R77).

When he returned from leave on 28 June he also found a communication from the Provost Marshal, Central Base Section, SOS, ETOUSA, dated 21 June concerning the return of the check cashed at the Mount Royal Hotel (Spec.3, Chg.1). He replied by first indorsement dated 30 June that steps to correct "this oversight" were being taken immediately (R78-79; Pros.Ex. 28). He wrote the checks described in Specifications 4-7, Charge I before he received the communication from the Provost Marshal (R84). During the course of over a year he drew other checks on The Riggs National Bank payable to Barclays Bank (Def.Exs.2-8), which were not dishonored (R74). He never asked for or received a statement from Barclays Bank. Prior to the time he drew the seven checks alleged he was informed whenever his account was overdrawn, whereupon he would pay the overdrafts concerned (R75,81). It was his experience that a bank will honor checks although there is an overdraft (R89). He never visited Barclays Bank. If he was overdrawn he received a note to that effect and would send a check on his Washington bank to cover the overdraft.

"The checks have always been honored and if I got a notice that I was overdrawn I always made it good. It seemed to be satisfactory to the bank * * *." (R81).

If he thought his account was "low" he sent a check for \$100 - \$200 "to keep my account up" (R81). On 10 July he drew a check on The Riggs National Bank for \$50 payable to the Chase National Bank which was honored (R74,88; Def.Ex.10). On 31 December 1942 he sent \$500 through Barclays Bank for deposit to the joint account in The Riggs National Bank, and sent another \$150 in January 1943. Since being in England he sent over \$900 for deposit in that account. He had a business partner named Broussare in

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Houston, Texas, who was supposed to pay a certain amount of money to his wife every quarter. The amount of income to accused from the business was supposed to be approximately \$4000 yearly. He requested his defense counsel to obtain Broussare's deposition and wrote the latter a registered letter (R75,78,89; Def.Ex.13).

Accused admitted that on 28 June he owed Barclays Bank about 84 pounds, and that if the two checks drawn on The Riggs National Bank for \$200 each had been honored his credit balance in Barclays Bank would have been about 14 pounds, whereas the total amount of the checks alleged in the seven specifications of Charge I was about 70 pounds. Although, therefore, his account would still be overdrawn accused asserted that when he wrote the seven checks he believed he had a balance of about 60 pounds in Barclays Bank according to the records kept in his check stubs. Asked on cross-examination if he was "off nearly £60 then in keeping your check stubs", he replied "That is right" (R85). When shown a photostatic copy of the joint account in The Riggs National Bank accused further admitted that from 23 June 1942 to 7 September 1943 that account was on numerous occasions overdrawn in amounts from \$1.48 to \$151. "Whenever the bank notified me that I was overdrawn I immediately made reimbursement" (R89-90). (Accused was in England during this time).

Accused was on a per diem status from 15 July to 11 October 1943 when the government assumed the expenses of his billet. In addition, his monthly pay, including base and overseas pay, quarters and subsistence amounted to \$267 (R78,85-86). With the exception of two or three months he also received flying pay which brought his total pay to \$342 per month. He at first allotted \$125 per month to his wife and about December 1942 increased the allotment to \$175. Restitution was made of the amounts of the seven checks, with money he borrowed "from a Colonel" and "it took me sometime to pay it back". He still owed Barclays Bank and the Athenaeum Hotel at the time of trial (R71-72,86). He asked the officer who placed him under arrest if he could reimburse Barclays Bank so much per month but was informed that he must "'pay it all off at once'". He could not do so as his expenses were heavy and he could not raise 85 pounds. "Friends I have are only Second Lieutenants, First Lieutenants and Captains and they do not have that surplus over here." (R86-87).

He was placed in arrest on 20 August 1943, was hospitalized on 3 December and at the time of trial was a detachment patient at the 36th Station Hospital (R73,88). He paid for the room where he lived after leaving the Athenaeum Hotel but did not pay his bill at the hotel because he did not have enough money to make both payments (R88). In April 1943 he loaned a Captain Smith 30 pounds and repeatedly asked him to repay the money (R72). Smith promised to pay him on Friday (19 November), so accused promised to pay the Athenaeum Hotel 20 pounds on Monday, 22 November. Smith gave him only four pounds on Monday and accused did not have enough funds to pay the hotel. From that time on Smith paid him in small amounts until the amount of the indebtedness was 14 pounds (R73,84) but accused paid nothing to the Athenaeum Hotel.

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Admitted in evidence as an exhibit for the defense were the proceedings of a Board of Officers, 36th Station Hospital, APO 649, dated 19 January 1944. The defense announced that no question was raised as to the mental condition of accused but that the exhibit was offered in evidence "for what information it contains with reference to the state of accused physically." The conclusion of the Board in this respect was that accused is "very restless, highly emotional * * *. He is and apparently has been for some time emotionally unstable and this feature of his make-up has been exaggerated under the stress of possible disciplinary actions. It is quite possible that such emotional instability may be further exaggerated at the time of trial" (R68; Def.Ex.12).

5. It is alleged in each of the seven specifications of Charge I that accused, with intent to defraud, unlawfully made and uttered the check in question then knowing that he did not have and not intending that he should have sufficient funds in Barclays Bank for the payment thereof. The gist of the offenses alleged is the intent to defraud (CM 228500, Bigelow; CM 228480, Smith).

" The gist of the statutory offense of drawing, with intent to defraud, a check or draft upon a bank, with knowledge at the time of such drawing of the insufficiency of funds * * * such bank to meet it upon presentation, is such fraudulent intent and knowledge, and it is essential that the drawer should have not only knowledge of the insufficiency of his funds * * *, but an intent to defraud" (95 A.L.R., Annot., Annotation, p.489).

" By reason either of the express provision of the statute, or judicial construction thereof to that effect, the gravamen of the offense denounced by 'bad check' statutes is the intent to defraud, which is an indispensable element of the crime" (Ibid).

When he negotiated the first of the seven checks on 20 April payable to the Ritz Hotel in the sum of 20 pounds, accused received 10 pounds in cash and a prior dishonored check in the sum of 10 pounds which had been returned to the hotel because of insufficient funds. Although on 20 February he had deposited the first of the two checks drawn on The Riggs National Bank for \$200, he was definitely put on notice on 20 April that the status of his account was such that a check for 10 pounds had been dishonored. Despite this fact he made no effort to determine the status of his account, nor did he inquire as to the status of the check drawn on The Riggs National Bank two months before. Instead, he merely sent for deposit on 20 April another \$200 check drawn on The Riggs National Bank and then proceeded to make and utter during a two-months period the seven checks alleged. When he negotiated the checks alleged in Specifications 1 and 2, dated 20-21 April, his account was overdrawn about 33 pounds. When he

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negotiated on 9 June the check alleged in Specification 3, he had a small credit balance of about 15 pounds but there was a "contingent liability" of about 99 pounds because of the two checks drawn on The Riggs National Bank, which were subsequently received by Barclays Bank, viz: 12 June, dishonored. When the checks described in Specifications 4, 5, 6 and 7, dated 25, 26 and 27 June, were negotiated by accused, his account was overdrawn about 85 pounds as the payee bank had already received the two dishonored checks. It is especially significant that if the two checks totaling \$400 had been honored, the resulting actual credit balance of about 15 pounds would still not be sufficient to pay the total amount of the seven checks, namely, about 70 pounds. Although accused made restitution of the amounts of the seven checks, he was enabled to do so only by borrowing and did not make restitution until after a complaint had been made and an investigation initiated. Although he ultimately repaid the lender of this money, the indebtedness of about 85 pounds to Barclays Bank remained unpaid at the time of trial despite repeated demands for payment on the part of the bank, and notwithstanding his promises to liquidate this indebtedness.

Special consideration is deemed necessary of the circumstances surrounding the negotiation of the checks alleged in Specifications 3 and 4, and of the entries appearing in the statement of his account with respect thereto (Pros.Ex.19) during this period. Accused drew these two checks on 9 and 25 June in the amounts of 5 and 10 pounds respectively, on which dates, according to the statement, he had a credit balance of 15 pounds 15 shillings 6 pence. (As the negotiation of any one of the later dated checks alleged in Specifications 5-7, inclusive, would result in this credit balance being exceeded, it is not necessary to consider them for the purposes of the discussion). An examination of the statement discloses that on 22 February and 23 April, the two checks drawn on the Washington bank were credited to his account, which resulted on each occasion in the conversion of his account from an overdrawn status to that of a credit balance. The two checks were dishonored by The Riggs National Bank on 7 May. Although Barclays Bank had notice on 12 June that the two checks had been dishonored, an examination of the statement discloses that the credit balance of about 15 pounds appearing in the statement as of 23 April continued, in substance, until a debit entry of about 85 pounds appears as of 28 June. Mr. Wigmore, manager of Barclays Bank, testified that although the statement showed this credit balance, when accused negotiated the check described in Specification 3 on 9 June, there was a "contingent liability" of about 99 pounds because of the deposit to his account of the two uncollected checks drawn on the Washington bank, that the bank was notified on 12 June that these two checks had been dishonored, and that, therefore, when accused negotiated the check alleged in Specification 4 on 25 June accused was actually overdrawn about 85 pounds.

" Even where a check has been credited to a depositor's account, so that he could draw against it, if the check is not in fact paid, the bank can charge it back to the depositor's account . . . Or where a draft is forwarded for collection and credited as paid, but in

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fact later discovered not to have been paid, the entry may be reversed. . . . Until the transaction is finally consummated and cash or its equivalent made available, any entry in advance, made on the supposition that the transaction will be fully executed, if it later transpires that the thing upon the expectation of which the entry was based had not happened, and the transaction has not been executed, is an erroneous entry which should and could have been corrected." (Sokoloff v. National City Bank of New York, 224 N.Y.S. 102, 120, 130 Misc. 66, affirmed 227 N.Y.S. 907, 223 App. Div. 754, and affirmed 164 N.E. 745, 250 N.Y. 69).

" When paper is deposited in a bank under such conditions as to make the bank the owner of such paper, the right exists on the part of the bank to charge back to the account of the depositor items found to be uncollectible. The credit is considered conditional only, and the right to charge back has been generally, if not universally, recognized wherever it has been asserted." (Adams County v. Meadows Valley Bank, 277 P. 575, 577, 47 Idaho 646). (Under-scoring supplied).

" Where a depositor draws a check upon one bank and deposits it in another which credits it to his account, the credit is deemed provisional only, and, if the check is not paid, it may be charged back to his account." (Old Colony Life Ins. Co. v. American Savings & Trust Co., 206 N.W. 725, 726, 165 Minn. 417). (Underscoring supplied).

" Ordinarily, when a bank gives credit to a depositor on the faith of a sight draft deposited to his account and when such sight draft is dishonored, the bank may charge back to the depositor the amount of the dishonored draft; and, if his bona fide deposit account is insufficient to meet it and he refuses to reimburse the bank, the latter may recover judgment against him for the sum involved in the transaction." (Lyon County State Bank v. Schaefer, 171 P. 1159, 102 Kan. 868).

The two checks drawn on the Washington bank were in the nature of "sight drafts", and on 7 May when they were dishonored, Barclays Bank became immediately vested with the right to charge the account with the total

amount of the two checks, about 99 pounds. Considering the credit balance of about 15 pounds, this would result in his account being overdrawn in the sum of about 85 pounds as of 7 May. Such would be the condition of the account when the checks alleged in Specifications 3 and 4 were negotiated on 9 and 25 June.

The admission of Wigmore's testimony to show the true status of the account on the dates in question was proper, despite the introduction in evidence of the bank statement itself.

"* * * where the plaintiffs offered in evidence an account between themselves and a debtor, it was held that the account was not like a bill of particulars, and was not conclusive on the plaintiffs, but that testimony to show that the debtor owed them sums not mentioned in such account was admissible". (68 A.L.R. Annot., Annotations, p.1255).

"In * * * an action for the recovery for work, labor, and services and materials rendered and furnished, it was held that the entry in the plaintiff's account book was not conclusive, like a written contract signed by the parties, but, like a private memorandum, it was open to explanation." (Ibid, p.1256).

"* * * it was held that an entry of credit by a book-keeper might be explained, * * *. (Ibid, p.1256).

This rule concerning parole evidence is the same in cases involving the commission of criminal offenses.

There was evidence that during February and March 1943, on six occasions accused's checks were honored by Barclays Bank when his account was overdrawn in amounts ranging between approximately 13 and 29 pounds. Accused testified that his checks were always honored, that he made good his overdrafts, and that "It seemed to be satisfactory to the bank * * *." Wigmore testified that until the two checks drawn on The Riggs National Bank were returned unpaid, the relationship between his bank and accused had been "satisfactory". However, the total of the seven checks alleged was more than double the highest amount of overdraft ever allowed by the bank. The manager of the bank testified that although accused's checks had been honored in a "limited amount" when his accounts were overdrawn, even if the two checks on the bank in Washington had been paid, he "definitely" would not have honored all the seven checks. "A custom of a bank to permit a depositor to overdrawn may be discontinued by the bank at any time in the absence of reliance thereon by a third person." (7 C.J., sec.403, p.680).

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Accused claimed that he did not know that his wife had established her own special account or that the joint account was in such a depleted condition. Both accused and his wife were authorized to draw checks in unlimited amounts on the joint account, and they were in different countries. The very fact that a joint account was established under such circumstances was sufficient to put accused on notice as to the possibility of sudden and large withdrawals by his wife without his knowledge.

The question as to whether accused had the intent to defraud was one of fact for the sole determination of the court, and in view of the foregoing authorities, of the evidence taken as a whole, and of accused's complete indifference to the serious condition of his account when he negotiated the checks, the Board of Review is of the opinion that the finding by the court that he did have such an intent is fully warranted by the evidence.

6. It was also clearly established by the evidence that accused dishonorably failed to pay the Athenaeum Hotel an indebtedness of 53 pounds in accordance with his written promise dated 17 November, and that his bill to the hotel was unpaid at the time of trial (Additional Charge and Specification). It was proved, however, that the amount of his indebtedness was 46 pounds 7 shillings 6 pence instead of 53 pounds as alleged after crediting the week's required deposit of £7-7-0. The dishonorable failure of an officer to pay a private indebtedness may be charged under either AW 95 or AW 96, as the circumstances may warrant (MCM, 1928, par.152b, p.188).

7. At the close of the case for the prosecution, the defense moved for findings of not guilty of all charges and specifications on the ground that the prosecution had failed to prove that accused drew the checks knowing that he did not have and not intending that he should have sufficient funds in the bank to meet payment thereof, and also because the debt to the Athenaeum Hotel was not unpaid because of a dishonorable intention on his part (R59-62). The court denied the motion (R62), which was not renewed at the conclusion of the evidence. Under the rule of CM ETO 564, Neville any error in denying the motion was thereby waived.

8. Attached to the record of trial are three petitions for clemency addressed to the reviewing authority, one signed by seven of the eight members of the court who were present during the trial, another by the assistant defense counsel and the third by accused.

9. The charge sheet shows that accused is 35 years of age and enlisted in the Air Corps at Houston, Texas 27 May 1941, that he was discharged and commissioned a second lieutenant 18 April 1942.

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

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

1. In the case of Second Lieutenant GEORGE R. WRIGHT (O-449682), Second Bombardment Wing, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1803. For convenience of reference please place that number in brackets at the end of the order: (ETO 1803).



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

(Sentence ordered executed. GCOMO 30, ETO, 14 May 1944)

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

BOARD OF REVIEW

ETO 1816

11 MAY 1944

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

v.)

Private EDWARD L. TAYLOR
(14044502), 295th Replacement
Company, 4th Replacement
Battalion, 10th Replacement
Depot.

WESTERN BASE SECTION, SERVICES
OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS.

Trial by G.C.M., convened at Whittington Barracks, Lichfield, Staffordshire, England 1 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 58th Article of War.
Specification: In that Private Edward L. Taylor,
295th Replacement Company, 4th Replacement
Battalion, 10th Replacement Depot, Pheasey
Estate, Warwickshire, England, then of
Company "C", 4th Replacement Battalion, 10th
Replacement Depot, Whittington Barracks,
Lichfield, Staffordshire, England, did, at
Whittington Barracks, Lichfield, Staffordshire,
England, on or about the 16th day of February
1943, desert the service of the United States
and did remain absent in desertion until he
was apprehended at Rugeley, Staffordshire,
England, on or about the 17th day of February
1944.

He pleaded not guilty to and was found guilty of the Charge and specification. Evidence was introduced of one previous conviction by special

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court-martial for stealing a bicycle, receiving a stolen clock and absence without leave for one day, 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 the sentence, reduced the period of confinement to ten years, designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The charge sheet shows that accused is 22 years five months of age and that he enlisted at Camp Blanding, Florida 24 January 1940 (service period governed by Service Extension Act of 1941). He had no prior service.

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

5. The penalty for desertion in time of war is death or such other punishment as the court may direct (AW 58). The designation of the Federal Reformatory, Chillicothe, Ohio as the place of confinement is authorized (AW 42; Cir. 291, WD, 10 Nov 1943, sec.V).

B. Franklin Kite

Judge Advocate

Ronald B. Wacholz

Judge Advocate

Edward H. Long

Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. 11 MAY 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private EDWARD L. TAYLOR (14044502), 295th Replacement Company, 4th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1816. For convenience of reference please place that number in brackets at the end of the order: (ETO 1816).



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

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with the
European Theater of Operations
APO 871

BOARD OF REVIEW

ETO 1821

- 8 MAY 1944

UNITED STATES) . FIRST UNITED STATES ARMY.

v. } Trial by G.C.M., convened at Bristol,
Private MIKE WELMA (32569524), } England, 2 March 1944. Sentence:
503rd Quartermaster Company } Dishonorable discharge, total for-
(Car). } feitures and confinement at hard labor
for ten years. Eastern Branch, United
States Disciplinary Barracks, Green-
haven, New York.

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

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

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

CHARGE: Violation of the 64th Article of War.
Specification: In that Private Mike (NMI) Welma,
503rd QM Co (Car), having received a lawful
command from First Lieutenant, RAYMOND
GILBERT, his superior officer, to report to
the mess sergeant for work, did at Bristol,
Gloucestershire, England, on or about 15
February 1944, willfully disobey the same.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of three previous convictions, two by summary court for absence without leave for two periods of four days each, in violation of Article of War 61; one by special court-martial for absence without leave for 13 days and breach of restriction 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 ten years. The reviewing authority approved the sentence, designated the Eastern Branch, United States

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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 the order which the accused disobeyed involved his performance of extra duty in his company's kitchen, as hard labor under an approved special court-martial sentence adjudging restriction at hard labor which sentence was then in process of execution:

"Kitchen police is * * * not within the class of military duties the imposition of which is prohibited by par. 102, MCM, 1928. * * *. SPJGA 220.69 Aug 19, 1942" (Bull.JAG, Vol.I, No.3, Aug 1942, sec.462(4), p.165).

The order was legal.

4. The charge sheet shows that the accused is 26 years of age and that, with no prior service, he was inducted 11 November 1942 at Fort Dix, New Jersey, to serve for the duration of the war and six months thereafter.

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

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

B. Franklin Higley Judge Advocate

P. Richard Brewster Judge Advocate

Elwood W. Langford Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. 8 MAY 1944 TO: Commanding General, First United States Army, APO 230.

1. In the case of Private MIKE WELMA (32569524), 503rd Quartermaster Company (Car), 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 50 $\frac{1}{2}$, 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 1821. For convenience of reference please place that number in brackets at the end of the order: (ETO 1821).



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

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with the
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APO 871

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BOARD OF REVIEW

ETO 1844

- 5 MAY 1944

U N I T E D S T A T E S) 5TH INFANTRY DIVISION.

 v.)
Private LUTHER SHARP (15064082),)
Headquarters Company, 3d)
Battalion, 10th Infantry.)
)
)
)
Trial by G.C.M., convened at
Tollymore Park, County Down,
Northern Ireland, 11 March 1944.
Sentence: Dishonorable discharge,
total forfeitures and confinement
at hard labor for six years. The
Federal Reformatory, Chillicothe,
Ohio.

HOLDING by the BOARD OF REVIEW
RITER, VAN BEN SCHOTEN 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 Luther Sharp, Headquarters Company, 3d Battalion, 10th Infantry did, without proper leave, absent himself from his organization and station at Camp Bally-edmond, County Down, Northern Ireland from about 1800 hours 1 February, 1944 to about 1400 hours 13 February, 1944.

CHARGE II: Violation of the 93d Article of War.
Specification: In that * * *, did, at Belfast, County Antrim, Northern Ireland on or about 13 February 1944, feloniously take, steal and carry away eighteen pounds English money (\$18) value about seventy two dollars and sixty three cents (\$72.63) the property of Joseph McGlade, 29 Eliza Street, Belfast, County Antrim, Northern Ireland.

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He pleaded not guilty to and was found guilty of all charges and specifications. Evidence was introduced of one previous conviction by summary court for absence without leave for two days and breaking restriction 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 ten years. The reviewing authority approved the sentence but reduced the period of confinement to six 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 50 $\frac{1}{2}$.

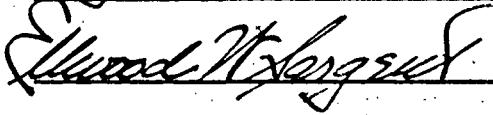
3. The charge sheet shows that the accused is 21 years of age, that he enlisted for three years at Fort Thomas, Kentucky 4 November 1940, and that the period of his enlistment was extended by the Service Extension Act of 1941. No prior service is shown.

4. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved (CM ETO 1670, Torres).

5. Confinement in a penitentiary is authorized for the offense of larceny of \$50.00 or more (AW 42; 18 U.S.C. 466). As accused is under 31 years of age and the sentence is under ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is authorized (Cir. 291, WD, 10 Nov 1943, sec.V, par.3a).



B.F. Franklin, Jr. Judge Advocate

R.L. Anderson, Jr. Judge Advocate

Ellwood M. Ferguson Judge Advocate**CONFIDENTIAL**

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

1. In the case of Private LUTHER SHARP (15064082), Headquarters Company, 3d Battalion, 10th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1844. For convenience of reference please place that number in brackets at the end of the order: (ETO 1844).



E. C. McNEIL,

Brigadier General, United States Army,
Assistant Judge Advocate General.

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BOARD OF REVIEW

ETO 1856

- 8 MAY 1944

U N I T E D S T A T E S } 29TH INFANTRY DIVISION.

v. } Trial by G.C.M., convened at APO 29,
Private HOID J. SWARTZ } 2, 17 March 1944. Sentence: Dis-
(15099496), Company C, } honorable discharge, total for-
116th Infantry. } feitures and confinement at hard
 } labor for 20 years. United States
 } Penitentiary, Lewisburg, Pennsyl-
 } vania.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following charges and specifications:
 - CHARGE I: Violation of the 58th Article of War.
Specification 1: In that Private Hoid J. Swartz, Company C, 116th Infantry, did, at Braunton, England, on or about 18 October 1943 desert the service of the United States and did remain absent in desertion until he was apprehended at Birmingham, England on or about 29 January 1944.
 - Specification 2: In that * * *, did, at Birmingham, England, on or about 4 February 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Whittington, England, on or about 19 February 1944.

CHARGE II: Violation of the 69th Article of War.
Specification: In that * * *, having been duly placed in confinement in Detention Cell, Military Police Headquarters, Birmingham, England, on or about 2 February 1944, did, at Birmingham, England, on or about 4 February 1944, escape from said confinement before he was set at liberty by proper authority.

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He pleaded not guilty to Charge I and the specifications thereof, guilty to Charge II and its Specification, 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 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 under Article of War 50¹₂.

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

4. The charge sheet shows that accused is 23 years of age, that he was inducted 19 February 1942 at Fort Benjamin Harrison, Indiana, and that his period of service is governed by the Service Extension Act of 1941. No prior service is shown.

5. Confinement in a penitentiary is authorized for the offense of desertion in time of war (AW 42). By War Department Circular #291, 10 November 1943, secV, par.3a,b,c, prisoners under 31 years of age and with sentences of not more than ten years will be confined in a Federal correctional institution or reformatory; all other prisoners subject to penitentiary confinement will be confined in United States penitentiaries. Therefore, designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized.

P. V. Miller

Judge Advocate

Edward Rundstrom

Judge Advocate

Wood K. Largent

Judge Advocate

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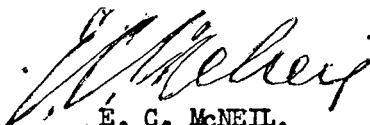
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WD, Branch Office TJAG., with ETOUSA. 8 [] 1944 TO: Commanding General, 29th Infantry Division, APO 29, U.S. Army.

1. In the case of Private HOID J. SWARTZ (15099496), Company C, 116th 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 50 $\frac{1}{2}$, 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 1856. For convenience of reference please place that number in brackets at the end of the order: (ETO 1856).


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

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with the
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APO 871

BOARD OF REVIEW

ETO 1872

22 APR 1944

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

4TH INFANTRY DIVISION.

)
v.)
)

Second Lieutenant PAUL SADLON)
(01103389), Company "A", 4th)
Engineer Combat Battalion,)
Corps of Engineers.)

Trial by G.C.M., convened at
APO 4, U. S. Army, 23 February
1944. Sentence: To be dis-
missed the service (suspended).

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2d Lieutenant Paul Sadlon,

Company A, 4th Engineer Combat Battalion, did, while en route to a theatre of operations wrongfully write to Miss Ann Yagos of New York, New York, a civilian unauthorized to receive the same, a letter containing classified military information concerning said movement between 17 January 1944 and 28 January, 1944, to-wit:

Time spent in staging area; description of movement from staging area to Port of Embarkation; time of departure and formation of convoy; direction and destination of troop movement; and other classified information.

and did wrongfully deposit said letter in the United States mails for delivery.

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Specification 2: In that * * *, did, while en route to a theatre of operations wrongfully write to Mr. and Mrs. Paul Sadlon of New York, New York, both civilians unauthorized to receive the same, a letter containing classified military information concerning said movement between 17 January 1944 and 27 January 1944, to-wit:

Time spent in staging area; description of movement from staging area to Port of Embarkation; time and place of embarkation; time of departure, formation of convoy, direction and destination of convoy; description of military activity aboard ship while enroute; and other classified information, and did wrongfully deposit said letter in the United States mails for delivery.

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 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, 4th Infantry Division, approved only so much of the sentence as involved dismissal (from) the service and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, as approved, but suspended the execution thereof. The proceedings were published in General Court-Martial Orders No. 21, Headquarters European Theater of Operations dated 31 March 1944. Accused was restored to duty status effective 27 March 1944.

3. Evidence for the prosecution showed that accused joined Company A, 4th Engineer Combat Battalion, in the second week of December 1943. While at Camp Kilmer preparatory to embarkation with his unit, he received a copy of Pamphlet 21-1, (printed by U.S. Government Printing Office, 1943) entitled "WHEN YOU ARE OVERSEAS THESE FACTS ARE VITAL", dealing with military security precautions and prohibiting correspondence concerning certain specified subjects, and he "heard extracts on censorship of mail" were issued at Camp Kilmer. On board the boat he received security instructions from his company commander and from the unit censor and at times acted as assistant censor in censoring company mail (R6-7). Accused wrote two letters while on board the boat en route to the European Theater of Operations, each of which was admitted in evidence without objection by the defense (R8; Pros. Exs.A and B). Captain John T. Maroney, his company commander, identified the handwriting on the letters as that of accused (R6,7). Pertinent portions of the letters were as follows:

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Pros. Ex.B:

ENVELOPE: "LIEUT PAUL SADLON O-1103389 (Hand-written) Free
CO "A" 4th ENGR COMBAT BN
APO #4 c/o POST MASTER (Postmark) U. S. ARMY
NEW YORK, NEW YORK. Postal Service

U. S. ARMY

1B.P.O.

JAN 31

1944

(Addressed to)

MISS ANN YAGOS
12 STATE STREET
NEW YORK 4, N.Y.

Sgd/ Paul Sadlon"

BODY OF LETTER:

*Time 1⁰⁰P.M. Thursday
Jan 20th 1944
Somewhere North Atlantic

Dearest Darling:

* * * * *

We arrived at the staging area the day I phoned you after which they cut us off all communications. We remained at the staging area only four days * * *. We moved out at 1855 from the staging area, * * *. This was 1855 Monday nite the 17th Jan. * * *. I've had two interruptions since starting this, a fire drill and an abandon ship drill. The outfit entrained in great secrecy and in 9 minutes time. We detrained boarded a ferry for the ship. Everyone carried his luggage on his back and arms and baby that was some job. Bed roll and foot locker preceeded (sic) us. * * *. It was around 2200 Monday nite. I came so close to your house I could have broken your window with a rock. * * *.

Up the old gang plank I went after getting the men on. I stopped for a few cups of coffee * * * from the Red Cross at the same time trying to bribe them into phoning you for me. I looked at my watch at (sic) it was exactly midnight when I hit the gang plank. * * *.

Our ship is the flag ship of the convoy and its name is very familiar to you. It's the biggest ship and the smoothest running I've been on. There's no vibration and only a small roll. The G.I's don't have it so good as could be expected in these times. They're very overcrowded. The officers have an ideal set up. We sleep in the

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first class cabins, eat at tables, several courses, and all we're able to hold. * * *. The men have crowded quarters and have slop thrown at them at mealtimes. * * *

Naturally Monday night we travelled in black-out, got below deck and remained there until we got out to sea. * * *. We moved out about noon Tuesday, and I was hoping you saw us move out. How about it did you see that convoy? * * *.

The weather is very surprising. It's warmer out here in the N. Atlantic than it was on the coast. * * *. * * * it's warmer now than when I made the crossing in July and September. * * *. Gun crews indulged in target practice to-day. * * *. To-day we rendezvoused another convoy from another Port. Had the men up for calesthenics at noon and now have rifle inspection at 1500.

We're headed for England as was expected and naturally headed for the big show.

Next I'd like to know how my mail is reaching you. Is it mutilated any?

Friday Jan 21ST * * *. Entire convoy indulged in Target Practice. * * *. Warm as hell today. Men taking sun-baths on deck. * * *. Last night headed in S.E. direction and to-day all day headed south. Are we headed for England? * * *.

Saturday Jan 22ND * * *. Usual watch, drills

Monday the 24TH * * *. Weather getting colder
* * * * one week on boat to-night.

Wednesday the 26TH * * *. In dangerous waters
to-day Paul.

Thursday the 27TH * * * what we did to-day
censored.

With all my love darling

Paul H

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Pros.Ex.A:

ENVELOPE: "LIEUT PAUL SADLON O-1103389 (Handwritten) Free
CO "A" 4TH ENGR COMBAT BN.
APO #4 c/o P. M. (Postmark) U. S. ARMY
NEW YORK, NEW YORK POSTAL SERVICE
U. S. ARMY 1B.P.O.
JAN 31
1944

(Addressed to)

MR. & MRS. PAUL SADLON
247 EAST 119 STREET
NEW YORK 35, N.Y.

sgd/ Paul Sadlon*

"Friday January 21, 1944
Time 7⁰⁰P.M.
Somewhere in the N. Atlantic.

Hello Mom & Dad:

Living Quarters: - The men live in crowded conditions * * * perhaps too crowded. * * *. We on the other hand have the entire first class section of the ship. * * *. We have the first three decks.

Food: - The men here also don't fare so well. They have slop thrown at them. We officers on the other hand eat all we can and have the choice of several courses of food. * * *.

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The weather: ~ Most surprising thing is that it's hot. * * *. Today the men were taking sunbaths it was so hot. * * *. There's no vibration at all like on the Leviathan. All there is, is a steady thump, thump, of the engines. The Jersey city ferry is rougher than this liner is which happens to be the flag ship of the convoy. Its the biggest ship in the convoy.

Tuesday the 18TH: - We left the pier close to noon-time. The morale is excellent.
* * *

Wednesday the 19TH. Life boat drill. * * *

Thursday the 20TH. We Rendezvoused another convoy this morning. Gave the men exercise at noon time on the deck and Rifle Inspection around 3⁰⁰ P.M. * * *. Boat drill and Fire drill.

Friday the 21ST: - * * *. Convoy engaged in Target Practice today. A very nice and reassuring sight. * * *. Really very hot today.
* * *

Saturday the 22ND: - * * *. We had the usual drills * * *.

Monday 24TH Jan * * *. Weather colder and big wind. * * * one week on boat tonight.

Wednesday 26TH January:- * * *. In dangerous

waters now. * * *.

Remaining

As ever

. Paul

Both letters after they were mailed by accused and received by the base censor, were sent through channels from the base censor to Major William S. Irby, commander of accused's battalion. Major Irby called accused to his office, advised him that he had the letters, went over the matter with him, instructed him "not to let this occur again" and informed him that he would report the matter to Colonel Ragland, Major Irby's commanding officer (R7-8).

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4. Accused, upon being advised of his rights, was sworn as a witness in his own defense and testified in substance that he joined the (4th) division in the second week in December (1943), and that two or three days after he was assigned to the company (A), he was detailed to special supply duty at battalion headquarters. "Ever since up until the time we left the staging area. Everything was supply day and night. What security instructions I did get was obtained on the fly * * * or through discussions or if something might come up by asking questions. I haven't had any security instructions previous to my joining the division. I have never been with an alerted unit. I have never been in a unit that was headed over-seas until I joined this unit. My defense is weak. I don't have much of a defense. What I lack is sufficient security indoctrination." (R9).

Upon cross-examination he testified in substance that he was commissioned 2 September 1942; that he could not say definitely whether he acted in the capacity of unit censor on board ship; that he appreciated that the statements in the letters violated security regulations; that he did not deny they were written by him; that he was a college graduate, holding degrees of Bachelor of Science from New York University and Master of Science from Columbia University, and that he was a Chemical Engineer before entering military service. Examined by the court, he testified in substance that when he was at Fort Jackson he did not have instruction in, nor did he read for himself, Army Regulations 380-5, that he doubted very much that he was given any instruction by his own unit at Fort Jackson and that when he was at Camp Kilmer he did not attend a lecture by the base censor which all officers were supposed to attend, but that he did get a copy of "WHEN YOU ARE OVERSEAS", Pamphlet 21-1 (R9-10).

5. Pertinent regulations and directives with respect to military security and censorship in effect at the time accused wrote the letters in question(Pros.Exs. A and B) were as follows:

(a) - Army Regulations 380-5, WD, 28 Sep 1942, provided in pertinent part as follows:

"64. General. - a. Movement of troops or individuals, or any group or class of such movements may be classified as secret, confidential, or restricted by, or by authority of, any officer authorized to make or authorize secret classifications under paragraph 3c. All information relating to movements thus classified will be treated as in the same category as the movements to which it relates and all movements so classified will be governed by all the provisions of this section.

b. Officers and men will avoid talk or discussion of military matters while in any public place and will view with suspicion any person asking questions about military subjects or discussing such topics where there is even remote possibility

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that the information may reach the enemy.

c. All persons connected with the military service who receive information of proposed inland or oversea movements, classified in accordance with a above, of organizations, detachments, or individuals are forbidden to make public the details of such movements.

d. (1) The names of organizations, ports of embarkation, or ships to be used in troop movements, or the date of departure, arrival, or embarkation will not be disclosed.

(2) When it is necessary to advise relatives or other civilians of approaching departure, persons connected with the military service will not convey any information in regard to rail routing, probable time and date of departure from or arrival at any station, names of ships, ports of embarkation, or the destination of organizations.

e. Commanding officers of troops or individuals affected by the provisions of this section are responsible that such troops or individuals are instructed in such provisions, advised of their applicability, and warned of the danger involved in leakage of information concerning troop movements.

68. Overseas. - a. After arrival overseas no information will be given concerning names or destinations of organizations, names of vessels, date concerning convoys, routes pursued, measures taken to avoid attack, dates of arrival, debarkation, or departure, or number of troops or kind of cargoes carried.

(b) - Training Circular No.66, WD, 12 May 1943 (which embodied pertinent portions of Training Circular No.15, WD, 16 Feb 1943), Chapter 2, provided in pertinent part:

*SECTION I TYPES OF MAIL - * * *. 11. Officers' mail.- Officers' mail will not be unit censored nor stamped with the unit censorship stamp but will be subject to censorship by the base censor. Officers will sign their name without grade in the lower left-hand corner of the envelope. This signature certifies that the officer has read, understood, and complied with military censorship regulations. Violations

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of military censorship regulations by officers will subject them to disciplinary action.

* * * * * SECTION III RESTRICTED SUBJECTS 20. * * *. Under no circumstances will open or hidden references be made in private or unofficial correspondence or private record to any of the following:

* * * * * b. The location, identity, movement, or prospective movement of any merchant ship, or commercial aircraft of the United States or its Allies, of any United States or allied naval or military aircraft.

c. Any information concerning military or naval forces of the United States or any ally.

* * * * * f. Plans and forecasts or orders for future operations whether known or merely surmised.

* * * * * 25. Private diaries. - Private diaries kept by officers, enlisted men, or civilians may contain information of value to the enemy and their dispatch through the mail is forbidden while censorship is in effect."

(c) - Pamphlet No. 21-1 (evidently issued by the War Department in 1943, and of which accused received a copy) provided in pertinent part as follows:

"WHEN YOU ARE OVERSEAS
THESE FACTS ARE VITAL
PAMPHLET NO. 21-1

WRITING HOME THINK! Where does the enemy get his information - information that can put you, and has put your comrades, adrift on an open sea; information that has lost battles and can lose more, unless you personally, vigilantly, perform your duty in SAFEGUARDING MILITARY INFORMATION?

CENSORSHIP RULES ARE SIMPLE, SENSIBLE. - They are merely concise statements drawn from actual experience briefly outlining the types of material which have proved to be disastrous

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when available to the enemy. A soldier should not hesitate to impose his own additional rules when he is considering writing of a subject not covered by present regulations. He also should be on guard against false rumors and misstatements about censorship. It is sometimes stated that censorship delays mail for long periods of time. Actually all mail (with certain nominal and very unusual exceptions) is completely through censorship within 48 hours.

THERE ARE TEN PROHIBITED SUBJECTS

1. Don't write military information of Army units - their location, strength, material, or equipment.
2. Don't write of military installations.
3. Don't write of transportation facilities.
4. Don't write of convoys, their routes, ports (including ports of embarkation and disembarkation), time en route, naval protection, or war incidents occurring en route.
5. Don't disclose movements of ships, naval or merchant, troops or aircraft.
6. Don't mention plans and forecasts or orders for future operations, whether known or just your guess.
7. Don't write about the effects of enemy operations.
8. Don't tell of any casualty until released by proper authority (The Adjutant General) and then only by using the full name of the casualty.
9. Don't attempt to formulate or use a code system, cipher, or shorthand, or any other means to conceal the true meaning of your letter. Violations of this regulation will result in severe punishment. (All the above is on page 1).
10. Don't give your location in any way except as authorized by proper authority. Be sure nothing you write about discloses a more specific location than the one authorized.

MAILING YOUR LETTER Reread your letter to be sure you have complied with all regulations. This will protect you and assure the most expeditious delivery of your letter. Five minutes now will save later delay and prevent possible suppression of the letter. It will protect you from punishment for unintentional violations.

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OFFICERS. - Seal the envelope, sign your name without comment in the lower left-hand corner to indicate your compliance with censorship regulations (your letter is subject to further censorship examination by base censorship detachments), and deposit in the organization mail box. Use only the Army Postal Service."

6. Failure to comply with general or standing orders, regulations or instructions of a department, district, post or other military establishment or with Army Regulations has long been recognized as an offense in violation of Article of War 96 (Winthrop's Military Law and Precedents - Reprint - pp.573 fn.12, 722,726, with reference to former Article of War 62; MCM, 1928, par.134b, p.149, par.152a, p.187; CM 122636 (1918), Dig.Op. JAG, 1912-1940, sec.454 (33), p.353; CM ETO 567. Radloff). Under the foregoing authorities the failure to obey, especially in the case of an officer, need not be willful and the Article is violated where such failure occurs through mere neglect.

7. (a) - The evidence shows that before embarking with his unit from the United States for the European Theater of Operations, accused received a copy of (War Department) Pamphlet 21-1, portions of which are quoted above, that he had received instruction in the subjects of military security and censorship both at the staging area and on board the transport en route to the Theater of Operations, that he had censored mail for members of his company (as he failed, under oath, to deny) and (on his own sworn testimony) that he appreciated the fact that statements in his letters violated security regulations. The evidence further shows that, as alleged in the specifications, accused while en route presumably to the European Theater of Operations, wrote the letters in question to unauthorized civilian addressees as alleged, that the letters contained military information which, under the regulations and directives above set forth, and particularly Army Regulations 380-5, WD, 28 Sep 1942, paragraphs 64 and 68, was in a classified category and that the information in each case concerned military movements which occurred during the period 17-27 January. The letter addressed to Miss Ann Yagos (spec.1; Pros.Ex.B) contained information concerning time spent in staging area, description of movement from staging area to Port of Embarkation, time of departure and formation of convoy, direction and destination of troop movement, and other classified information, as alleged. The letter addressed to Mr. and Mrs. Paul Sadlon (spec.2; Pros.Ex.A) contained information concerning time spent in staging area, description of movement from staging area to Port of Embarkation, time and place of embarkation, time of departure, formation of convoy, description of military activity aboard ship while en route, and other classified information, as alleged in part. The U.S. Army Postal Service stamps on the envelopes containing the letters, dated January 31, 1944 in each case, show that accused deposited the letters or caused them to be deposited in regular channels for delivery, as alleged (see par.8 below). The fact that the letter addressed to Mr. and Mrs. Paul Sadlon contained no direct reference to the direction and destination of the convoy with which accused was moving would have justified the court, the reviewing authority,

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or the confirming authority in excepting such words from the findings of guilty of the specification, but the failure to make such exception was not prejudicial to accused's substantial rights in view of other statements in the letter which made obvious his guilt of Specification 2 as a whole, of Specification 1 and of the Charge.

(b) - Accused in writing and mailing the letters violated Army Regulations 380-5, supra, sub-paragraph 6a (making movement of troops and all information relating thereto classified), 6d(1) (forbidding disclosure of date of departure or embarkation in connection with troop movements), and paragraph 68a (forbidding the giving of information, after arrival overseas, concerning destinations of organizations, data concerning convoys, routes pursued or dates of departure). He also violated Training Circular No.66 supra, Section III, 20 b, c and f (prohibiting disclosure of location, movement and prospective movement of any merchant ship of the United States, any information concerning military forces of the United States, and forecasts for future operations), and Section III, 25 (forbidding dispatch through the mail of private diaries kept by officers). He also violated Pamphlet 21-1, supra, items 1,2,3,4,5,6, and 10, (a copy of which he admitted, under oath, having received, prohibiting writing home military information of Army units, military installations, transportation facilities, convoys, routes, ports of embarkation, time en route, naval protection, movements of ships or troops, forecasts for future operations and location). The court was authorized to take judicial notice of Army Regulations 380-5, 28 Sep 1942, and Training Circulars No.15, WD, 16 February 1943 and No.66, WD, 12 May, 1943, Pamphlet, WD, 21-1 (CM ETO 1538, Rhodes).

(c) - The evidence of accused's educational and military status, his instruction in matters of military security and censorship and his receipt of Pamphlet 21-1, aggravates his dereliction, even apart from the consideration that he was charged with knowledge of the contents of the regulations and directives above set forth (CM ETO 1554, Pritchard, par. 8b, p. , and authorities therein cited). In the opinion of the Board of Review, it is well-nigh inconceivable, that a commissioned officer, assigned to a military unit proceeding by convoy to an active theater of operations, should lack reasonably full familiarity with such vital matters as ordinary military security and censorship regulations. Such lack of familiarity, if indeed it could be believed, could be ascribed only to willful or, at best, grossly oblivious failure to appreciate matters of fundamental and common knowledge, not only in the Army, but throughout the modern civilized world. In accused's own words, his "defense is weak". The following statements in the letters betray at least normal familiarity with security requirements:

"The outfit entrained in great secrecy;"
 "Naturally * * * we travelled in blackout,
 got below deck and remained there until
 we got out to sea;"
 "We had to stay below deck until the ship
 was out of sight;"
 "Is it (mail) mutilated any?"

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"What we did today censored;
Not many people knew of our departure."

His reference to the ship as well-known and familiar without naming her indicates his recognition of the secret character of the movement. His signature in the lower left-hand corner of each envelope was a certification that he had read, understood and complied with military censorship regulations (TC 66, supra, I,11; Pamph.21-1, supra). It is unlikely that he failed to appreciate the significance of this signature. The Board of Review concludes that each specification stated an offense in violation of Article of War 96 and that the evidence supports the findings of guilty as to each.

8. The allegations in each specification that accused "did wrongfully deposit said letters in the United States mails for delivery" may be considered as merely descriptive of his act of mailing the letters in such a manner as was normal under the circumstances. As the phrase "United States mails" or "mail" need not be given a technical construction (see CM ETO 1191, Acosta and authorities therein cited), the proof that the letters were handled by the First Base Post Office, U.S.Army Postal Service (see FM 12-105, Army Postal Service, par.41, p.33) did not constitute a variance from the specification.

9. The charge sheet shows that accused is 25 years six months of age and that he was commissioned 2 September 1942 to serve for the duration of the war plus six months. No other service data is recorded.

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

R. Franklin Kite

Judge Advocate

Budde Rauschoter

Judge Advocate

Ellwood M. Langford

Judge Advocate

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1st Ind.

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

1. In the case of Second Lieutenant PAUL SADLON (01103389), Company "A", 4th Engineer Combat Battalion, Corps of Engineers, 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.


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

15 APR 1944

ETO 1873

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

v.)

Private JOHNNY W. BROWN)
(34767249), 1053rd Engineer)
Port Construction and Repair)
Group, Corps of Engineers.)

WESTERN BASE SECTION, SERVICES
OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS.

Trial by G.C.M., convened at Porth-
cawl, Glamorganshire, South Wales,
2 March 1944. Sentence: Dishonor-
able discharge, total forfeitures
and confinement at hard labor for
five years. The Federal Reformatory,
Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 93rd Article of War.
Specification: In that Private Johnny W. Brown,
1053rd Engineer Port Construction and Repair
Group, did at Cefn Cribbwr, Glamorgan County,
Wales on or about 30 January 1944, with in-
tent to commit rape, commit an assault upon
Nora John, 3, Court Terrace, Cefn Cribbwr,
Glamorgan County, Wales, by willfully and
feloniously grabbing her and holding her
against her will.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence was introduced of three previous convictions, one by summary court-martial for 13 days absence without leave in violation of Article of War 61 and breach of restriction in violation of Article of War 96; two by special court-martial for absences without leave of 18 and 17 days respectively in violation of Article of War 61. He was sentenced to be dishonorably discharged the service, to be confined at hard labor at such place as the reviewing authority may direct for a period of ten years,

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and to forfeit all pay and allowances due and to become due for a like period. The reviewing authority approved the sentence, 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 assault and battery included in the allegations of the Specification was established by direct, substantial, competent evidence of a character to warrant the court's inference of accused's co-existing felonious intent to commit rape (CM ETO 996, Burkhart, and authorities there cited). The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority.

4. The charge sheet shows that the accused is 23 years of age, and was inducted 9 April 1943. Service period governed by the Service Extension Act of 1941. He had no prior service.

5. Confinement in a penitentiary is authorized for the offense of assault with intent to commit rape (AW 42; 18 U.S.C. 455). As accused is under 31 years of age and the sentence as approved by the reviewing authority is under ten years, the designation of the Federal Reformatory, Chillicothe, Ohio, is correct (Cir. 291, WD, 10 Nov 1943, sec.V, 3a).

B. Franklin Kite Judge Advocate

John D. Anderson Judge Advocate

Edward W. Vagard Judge Advocate

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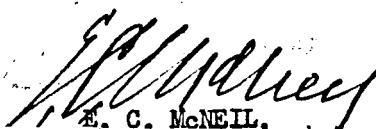
1st Ind.

WD, Branch Office TJAG., with ETOUSA. 15 APR 1944 TO: Commanding Officer, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private JOHNNY W. BROWN (34767249), 1053rd Engineer Port Construction and Repair Group, Corps of Engineers, 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 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. In this case there is evidence to support the findings of the court who are the triers of the facts. However, there is room for doubt as to his actual intent. There are many cases of forcible fondling or indecent assaults accompanied by a desire for sexual intercourse which do not amount to assault with intent to rape. " * * * the man must intend to overcome any resistance by force, * * * and penetrate the woman's person. Any less intent will not suffice." (MCM, 1928, par.149 1, p.179). In accordance with existing policies, the dishonorable discharge might well be suspended and Disciplinary Training Center #2912, Shepton Mallet, Somerset, England, designated as the place of confinement so that the soldier may not escape combat service. I so recommend.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is ETO 1873. For convenience of reference please place that number in brackets at the end of the order: (ETO 1873).



E. C. McNEIL.

Brigadier General, United States Army,
Assistant Judge Advocate General.

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

BOARD OF REVIEW

ETO 1883

25 MAY 1944

U N I T E D S T A T E S)	VIII AIR FORCE SERVICE COMMAND,
)	redesignated AIR SERVICE COMMAND,
v.)	UNITED STATES STRATEGIC AIR FORCES
)	IN EUROPE.
Private JAMES W. SHIELDS)	Trial by G.C.M., convened at AAF
(15085499), 1968th Quarter-)	Station 586, 28,29 February -
master Truck Company (Avia-)	1 March 1944. Sentence: Dishonorable
tion), Headquarters 1512th)	discharge, total forfeitures and con-
Quartermaster Truck Batta-)	finement at hard labor for five years.
lion (Aviation) (Special))	Federal Reformatory, Chillicothe, Ohio.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private, then Private First Class, James W. Shields, 1968th QM Truck Company (Avn), 1512th QM Truck Battalion (Avn) (Sp), did, at AAF Station 592, APO 635, on or about 15 January 1944, forcibly and feloniously, against her will, have carnal knowledge of 2nd Lt. Frances Jane Grayson, ANC, 305th Station Hospital, APO 508.

He pleaded not guilty to the Charge and Specification and was found guilty of the Specification except the words "forcibly and feloniously, against her will, have carnal knowledge of", substituting therefor the words "with intent to commit a felony, namely, rape, commit an assault upon", of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge but guilty of a violation of the 93rd 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

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or to become due and to be confined at hard labor for five years at such place as the reviewing authority may direct. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The prosecution's evidence in support of the charge that accused committed the crime of rape upon the person of Second Lieutenant Frances Jane Grayson, ANC, then of the 305th Station Hospital, was principally furnished by the testimony of Lieutenant Grayson. However, the surrounding circumstances of the incident were fully revealed by other evidence. The following summary of the prosecution's evidence adequately presents the material facts:

Lieutenant Grayson was one of a party of six Army nurses who attended a dancing party at the officers' club in Grovely Wood (AAF Station 592) on Saturday evening, 15 January 1944 (R7). She did not dance during the evening, but remained continuously in the lounge with First Lieutenant William Reynolds (1961st Ordnance Depot Company), except on one occasion when they both went into the kitchen about 10 p.m., and on several occasions when she went to the latrine in the same building which was reserved that evening for ladies (R9). She had about two and one-third drinks of Scotch whiskey during the evening (R16). Her last visit to the latrine (prior to the alleged assault) was after the intermission (10:30 - 11 p.m.) at about 11:30 p.m. As she came out of the latrine, accused (a kitchen orderly) whom she identified and whom she had not previously noticed that evening grabbed her by the arm. Before she had time to think or act he led her a few steps down the hall and jerked her through a door, which opened out on to the lawn. The nurse commenced to talk to accused who told her to "shut up". She screamed several times, whereupon he repeated his direction and covered her mouth with his hand (R10,13). Although she would have considered it unusual for a colored man to take her by the arm on the street, she "was not expecting anything unusual" at that time and it did not occur to her "that he was going to harm me or anything." "We do not treat the colored race any differently as patients than we do white boys" (R124). Accused pulled her across the lawn into a room in a nearby building (officers' quarters). She resisted his control over her. Realizing "that something funny was going on," she asked him what he intended to do, to which he replied to the effect that he intended to have intercourse with her. She began to plead with him and told him "he would get himself into a lot of trouble." He said: "I don't care. I want some white pussy." Accused thereupon jerked at her tight underclothes or panties, ripped the left leg and "tried to force his way in and he could not do it." She testified "He was trying to have intercourse, I suppose." He thereupon pulled and jerked off the pants despite her resistance. Lieutenant Grayson was standing up, and accused continued forcing himself upon her, bending her backwards "against a desk or some heavy table." (R10,11,21). She "tried to hold him off" and had her hand on his penis in order to keep it from penetrating her person, but he succeeded in penetrating her vaginal cavity to the extent of about one third of the length of his penis. She "kind of whimpered and was about to cry," and asked him

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to leave her alone and let her go. "Then he got fast and very shortly - it was only a few seconds - he quit" (R11-12). From her experience with colored people in her birthplace, Chattanooga, Tennessee, she was afraid of them and on this occasion she was "scared to death". According to her testimony she "was afraid to offer him very much resistance, because I was afraid he would hurt me, injure me in some way, cut my throat" (R11-12).

When accused finished, she told him to "'get me out of here'" and asked for her panties, which he handed to her. He then left the building. She went directly to the latrine, washed her face, combed her hair and "straightened up". She thereafter made immediate complaint of the attack to Chaplain (First Lieutenant) Everett E. Denlinger, telling him she thought she "had been able to fight him off" (R13,124). She repeated the complaint to the acting commanding officer of Station 592 (Captain Charley F. Pinson) and to First Lieutenant Robert C. Gehring (1969th Quartermaster Truck Company (Aviation)), before returning to her station from the dance. However, she failed to report the attack to her commanding officer because she "did not want to cause any trouble" (R15).

Although she testified that she felt "light" (R124), and Chaplain Denlinger testified that accused "had been drinking as much as anyone else" (R35), there was evidence indicating that neither accused nor his victim was intoxicated (R34,39,44,61,65,70,75,77,79,86,95).

Lieutenant Grayson's version of the affair received corroboration by the testimony by Chaplain Denlinger that she promptly complained to him of the attack and "seemed quite nervous and upset," "shaky in the hands" and "lifted her hand to her brow" (R32-33); testimony by Lieutenant Reynolds that when she returned to him about midnight "she was trembling somewhat * * * nervous" (R39); testimony by Captain Pinson and Lieutenant Gehring that she reported the incident to each of them (R81,90-91); photographs and charts representing various locations involved in the assault and accompanying events (Pros.Exs.1-21 inclusive); the victim's torn underclothes (R11,18; Pros. Ex.22) and evidence of the presence of seminal staining on the inner surface of the crotch (R53;Pros.Ex.23); and other evidence which does not require particular attention.

4. Evidence adduced by the defense did not create any material conflict with that adduced for the prosecution. After his rights were explained to him, accused elected to remain silent (R114-115).

5. In the opinion of the Board of Review the evidence in the record is legally sufficient to support findings of guilty of the charge of rape. The court, however, acquitted accused of that charge and found him guilty of the lesser included offense of assault upon Lieutenant Grayson with intent to commit rape (see MCM, 1928, par.148b, p.165; CM ETO 1743, Pinson). Her testimony as to the assault, corroborated by other evidence as to the circumstances surrounding the affair, formed a competent substantial basis for the court's inference that accused attacked his victim without her consent and with the concurrent intent on his part to engage in sexual intercourse with her without her consent and despite her resistance (44 Am. Jur. sec.110, p.973). The Board of Review is of the opinion that the

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record is legally sufficient to support the findings of accused's guilt of assault with intent to commit rape (CM ETO 996, Burkhart; CM ETO 1644, Allen; CM ETO 1673, Denny; and authorities there cited).

6. (a) - Lieutenant Grayson's testimony that accused was trying to have intercourse with her was admissible (CM ETO 996, Burkhart; State v. Collins, 294 Pac.957, 73 ALR 861,866).

(b) - The denial by the court of the motion by defense for a finding of not guilty at the close of the prosecution's case in chief (R82-84), was proper (MCM 1928, par.71d, p.56).

(c) - Evidence as to Lieutenant Grayson's prompt complaint of the assault was properly admitted (CM ETO 709, Lakas; CM ETO 1600, Asher), as was also evidence as to her physical condition and the condition of her underclothes (CM ETO 1644, Allen, and authorities there cited).

(d) - Some hearsay and opinion evidence was introduced. Most of it was either invited by the defense counsel or stipulated by him. None of it, however, in the opinion of the Board of Review, prejudiced accused's substantial rights in view of the competent evidence of his guilt.

7. The charge sheet shows that accused is 22 years 11 months of age and enlisted at Fort Benjamin Harrison, Indiana 13 January 1942 for the duration of the war plus six months. Total service to date: two years and ten days. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized for the crime of assault with intent to rape (AW 42; 18 U.S.C. 455). As accused is under 31 years of age and the sentence is not more than ten years, the designation of the Federal Reformatory, Chillicothe, Ohio is authorized (Cir.291, WD, 10 Nov 1943, sec.V, pars.3a and b).

B. Franklin Kite Judge Advocate

Richard Quisenberry Judge Advocate

Elwood W. Ferguson Judge Advocate

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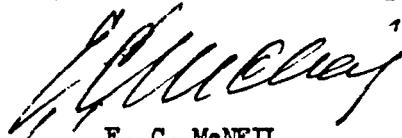
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WD, Branch Office TJAG., with ETOUSA. 25 MAY 1944 TO: Commanding General, Air Service Command, United States Strategic Air Forces in Europe, APO 633, U.S. Army.

1. In the case of Private JAMES W. SHIELDS (15085499), 1968th Quartermaster Truck Company (Aviation), Headquarters 1512th Quartermaster Truck Battalion (Aviation) (Special), attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1883. For convenience of reference please place that number in brackets at the end of the order: (ETO 1883).



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

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BOARD OF REVIEW

ETO 1886

11 MAY 1944

UNITED STATES

v.

Private RALPH J. SIMMONS
(6846609), 323rd Replacement
Company, 49th Replacement
Battalion, 10th Replacement
Depot.

WESTERN BASE SECTION, SERVICES
OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS.

Trial by G.C.M., convened at Lich-
field, Staffordshire, England, 25
March 1944. Sentence: Dishonorable
discharge, total forfeitures and
confinement at hard labor for 20
years. United States Penitentiary,
Lewisburg, Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Ralph J. Simmons,
323rd Replacement Company, 49th Replacement
Battalion, 10th Replacement Depot, Whittington
Barracks, Lichfield, Staffordshire, England,
did, at Tamworth, Staffordshire, England, on
or about 15 March 1944, forcibly and feloniously,
against her will, have carnal knowledge of Joan Ellen Passam.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and

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forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The charge sheet shows that accused is 29 years seven months of age. He had prior service: Infantry (unassigned) from 5 Aug 1933 to 6 Dec 1935; Company B, 34th Infantry, from 13 Dec 1935 to 16 Dec 1938. He enlisted at Baltimore, Maryland on 24 December 1938. Service period governed by Service Extension Act of 1941.

4. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved. (CM ETO 611, Porter; CM ETO 832, Waite; CM ETO 1202, Ramsey and Edwards). Confinement in a United States penitentiary is authorized (AW 42; 18 U.S.C. 455; Cir. 291, WD, 10 Nov 1943, sec.V).

B. Franklin Riter

Judge Advocate

John D. Randolph

Judge Advocate

Howard W. Ferguson

Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. 11 MAY 1944 TO: Commanding
Office, Western Base Section, SOS, ETOUSA, APO 515, U.S. Army.

1. In the case of Private RALPH J. SIMMONS (6846609), 323rd Replacement Company, 49th Replacement Battalion, 10th Replacement Depot, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1886. For convenience of reference please place that number in brackets at the end of the (ETO 1886).



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

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

BOARD OF REVIEW

ETO 1887

17 MAY 1944

U N I T E D S T A T E S)
v.)
Private LEONARD LEBEL)
(31099286), Company "C",)
342nd Engineer General)
Service Regiment.)

SOUTHERN BASE SECTION, SERVICES
OF SUPPLY, EUROPEAN THEATER OF
OPERATIONS.

Trial by G.C.M., convened at
Headington, Oxford, Oxfordshire,
England, 14 March 1944. Sentence:
Dishonorable discharge and total
forfeitures.

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

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 96th Article of War.
Specification: In that Private Leonard (NMI) Lebel,
Company "C", 342nd Engineer General Service
Regiment, did, at Grove, Wantage, Berkshire,
England, on or about 10 January 1944, commit
an infamous crime against the order of nature,
by wrongfully and unlawfully having carnal
copulation with a fowl.

CHARGE II: Violation of the 93rd Article of War.
Specification: In that Private Leonard (NMI) Lebel,
Company "C", 342nd Engineer General Service
Regiment, did, at Grove, Wantage, Berkshire,
England, on or about 10 January 1944, unlaw-
fully enter the poultry house of Mr. Kenneth
Boseley, with intent to commit a criminal of-
fense, to wit, carnal connection with a fowl
therein.

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He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years at such place as the reviewing authority may direct. The reviewing authority approved the sentence, but remitted the portion thereof providing for confinement at hard labor for two years, and forwarded the record of trial for action pursuant to the provisions of Article of War 50 $\frac{1}{2}$.

3. Sodomy includes carnal connection by a male human being with a fowl (58 CJ sec.1, p.787, footnote 3 (e); 1 Wharton's Criminal Law - 12th Ed - sec.756, p.1038, footnote 10). Penetration may be proved by circumstantial evidence (58 CJ sec.17, p.794). There is evidence in the record adequate to support the inference that accused effected penetration of the chicken (R11,12,13).

4. The charge sheet shows that accused is 24 years of age. He was inducted 21 April 1942 for the duration of the war and six months thereafter. 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 of guilty and the sentence.

Judge Advocate

Judge Advocate

Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. 17 MAY 1944 TO: Commanding General, Southern Base Section, Services of Supply, European Theater of Operations, APO 519, U.S. Army.

1. In the case of Private LEONARD LEBEL (31099286), Company "C", 342nd Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1887. For convenience of reference please place that number in brackets at the end of the order: (ETO 1887).



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

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

BOARD OF REVIEW

ETO 1899

4 AUG 1944

U N I T E D S T A T E S)	EIGHTH AIR FORCE.
)	
v.)	
Private DONALD HICKS)	Trial by GCM, convened at Corby
(12062455), 612th Bombard-)	Hotel, Northamptonshire, England,
ment Squadron (H), 401st)	4-5 February 1944. Sentence:
Bombardment Group (H).)	Dishonorable discharge, total
	forfeitures and confinement at
	hard labor for life. The United
	States Penitentiary, Lewisburg,
	Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Donald (NMI) Hicks,
612th Bombardment Squadron (H), 401st Bombard-
ment Group (H), AAF Station 128, APO 634, did,
at Corby, Northamptonshire, England, on or
about 2300 hours 26 December 1943, forcibly
and feloniously, against her will, have carnal
knowledge of one Mrs. Amelia May Murray of
Corby, Northamptonshire, England.

He pleaded not guilty to and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths 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 for life at such place as the reviewing authority may direct. The reviewing authority approved the sentence, designated the United States Penitentiary,

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Lewisburg, Pennsylvania as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows, in substance, that Mrs. Amelia M. Murray, who weighed 95 pounds, lived at 20 Sarrington Close, Corby, England with her husband and two small children. They lived in a four-room apartment which consisted of two bedrooms upstairs and a 12-foot square living room and a kitchen downstairs. Partitioned off in one corner of the kitchen was a lavatory. Similar apartments in the same building on either side of the Murrays were occupied by families named Smedley and Smith, and the Green family occupied the house next to the Smiths (R7-10,19,30,48).

Mr. and Mrs. Murray first saw accused 17 December 1944 at the White Horse "pub" but did not speak to him. On 25 December the Murrays were at the same "pub" and accused came over to their table, sat beside Mrs. Murray and conversed with them. When the husband went to the lavatory accused accompanied him and was never alone with Mrs. Murray. Accused went to their home for supper at Murray's invitation and remained until 2.30 a.m. 26 December. There he also accompanied Murray to the lavatory and was never alone with Mrs. Murray. During the conversation he asked the husband if he could see him the night of 26 December but was informed that Murray was "on night shift". When accused asked "What does that mean", Murray replied "I go to work 10 until 6.00 the following morning". The two men arranged to meet at the "pub" ^{on} 26 December at noon. Murray informed accused he was always welcome to visit them. He kept the appointment the following day but did not see accused, and left his home for work about 9.20 that evening (R18-19,30-33,66-67,70).

About 10.20 p.m. 26 December, Mrs. Murray heard a knock at the door, asked who was there and heard someone say "Me". Upon opening the door she saw accused and invited him into the living room. He accepted her offer of tea and after she "switched on the electric kettle" in the kitchen she returned to the living room and opened a parcel which he gave her. It contained cake which he said his wife made, and some tea. She returned to the kitchen, brought in the tea and put his cup on a small "hob" on the grate, and hers on a table in the center of the room. At first she sat on a stool, but then at his suggestion sat beside him on a settee about four feet in length and examined some photographs of his wife and some "film stars" (R19-22,34-36). He put his arm around her and she said "Stop it". Putting his hand on her breast he asked "Can I touch you here", and she replied "No". He then seized her right hand, twisted it behind her back and pulled her down beside him to a half prone position. He "looked like a wild animal that had got hold of a bit of meat and wouldn't leave go no matter whatever happened". She tried to push him away, told him to stop it, endeavoured to free her hand and hit him with her other hand on the chest and arms. He tried to kiss her and she told him to leave her alone, saying that she would never have invited

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him to the house if she thought he was that sort of person. She asked him to think about his wife and he replied that he did not know anything about his wife, that he had not seen her for a long time. By struggling she finally succeeded in getting out from beneath him (R22-23,30,37). She moved across the room but accused still held her hand behind her back. She repeatedly told him to leave her alone and was hitting him with her free hand. Near a chair in the corner of the room he put his leg underneath hers and both fell to the floor. When they fell, because of their respective sizes he "knocked the stuffing out of me. I didn't have any strength or anything left". They fell "Where the door is going to the staircase". He got both her hands behind her back and held them with one of his hands. She threatened to shout unless he left her alone, called him a "filthy beast and all sorts of names", and rolled and struggled. He pushed up her skirt, pulled off her knickers with one hand and threw them on the floor beside a chair while she was "wriggling and struggling as best I could". He never released her hands which were behind her back. He forced open her legs with his own and said "You are going to get it whether you want it or not". She shouted for Mrs. Smith and accused put his thumb under her chin and put his hand over her mouth. She did not see him unfasten his trousers because her head was turned to one side and she was crying. She felt his penis against her leg and then inside her body. She told him her husband would kill him and he replied "No, he won't". She was still crying and shouting and he put his hand over her mouth and kept it there "until it was all over". The offense occurred in an "alley-way" near the door which led to the outside (R23,25,38-39,43,45). Mrs. Murray's child was crying while she was on the floor, and "after it was all over" accused removed his hand from her mouth. She said "Let me go to my child", stood up and felt something wet on the back of her skirt and legs. As she ran around the other side of the table, he said "Come back here". She ran out through the kitchen and then to the Green's house (R26,40).

When Mrs. Murray appeared at the Green's about 10.30-11.00 p.m. she was very dishevelled and white, "her hair was all over the place" and she was wringing her hands. She said that an American had her on the floor, had taken her underpants off and "had connections with her", "had molested her". Mr. and Mrs. Green and their two sons left Mrs. Murray in their house, and went to the Murray home where accused, who was fixing his belt said "My God, what is the meaning of this?". He appeared "a bit scared" and "looked rather pale". When Mr. Green charged him with molesting Mrs. Murray, accused denied the fact. Mrs. Green went upstairs because the children were crying. After a brief conversation the whole group returned to the Green home. Accused came readily after picking up a parcel. There, accused looked at Mrs. Murray and said "What is the meaning of that?" She replied "Don't you ask me what is the matter with me!" When he said "I don't understand. I can't understand what you mean", she called him a "dirty swine" and other names and said "Look what is on my skirt * * *. You ought to know what you have done to me". When accused replied "I really don't understand" she caught him by the throat or collar and then "just sort of conked out", became exhausted and

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sat back in a chair. She was very hysterical, was crying, and shouted for her husband, saying that if he was there he "would have murdered" accused (R26-27,45,48-50,52-53,56-59). Mr. Green took accused into the kitchen where accused seemed mainly concerned as to whether Green thought he did anything to Mrs. Murray. He said that he would go to the police station, asked Green for directions and said that he would also see Mr. Murray at his place of employment. Green could hear the Murray children crying when he left his house with accused to get the latter's bicycle (R57,59). After accused departed, Mrs. Murray told Mrs. Green that she "would report him". She showed Mrs. Green a stain on the inside back of her skirt, and asked her to stay with the children while she went to the police station. Mrs. Murray testified that she then returned to her house to get her coat, found her knickers on the floor and put them on a chair. She returned to the Green's house and went to the police station. Mrs. Green then returned to the Murray home to stay with the children and remained until the police came about 2.30 a.m. On her return she noticed a cup of tea on a table in the center of the room and another cup on the "trip" of the fireplace. Both cups appeared to be full. Mrs. Murray's side comb was on the floor "by the skirting board" and a short khaki scarf was either on a chair or on the floor. Mrs. Green testified that she also noticed a pair of knickers in a chair. She acknowledged having made a prior statement to the police that she saw the knickers in the chair when she first went to the Murray home to confront accused, but testified at the trial that she was not sure whether she observed them in that position on her first entry or upon her subsequent return to the house to take care of the children. She did not move any of the articles in the room. She further testified that Mrs. Murray told her that she did not believe any fluid "had gone into her" that night (R27,43,50-54).

About midnight Mrs. Murray appeared at the Corby police station in a "very distressed", excited and nervous condition and made a complaint. She appeared to have been crying quite recently. She readily agreed to see a doctor (R60). Mr. Murray was summoned by telephone and accompanied his wife to the office of Dr. John Irving, 51 Rockingham Road, Corby about 1.30 a.m. 27 December (R14,67). Dr. Irving observed that her face was flushed, that she was trembling, that her voice was shaky and her pulse was rapid (R15). He found scratches and abrasions on her body, and in particular on the inner sides of both arms and on the inner side of the left thigh. The scratches were fresh and vertical, and on the arms were about two or three inches in length. They were not deep or bleeding. He found no bruises "at the time", nor did Mrs. Murray complain of any injuries other than those found. He took two swabs from the vagina which he gave to a constable named Jones. Dr. Irving testified that if a hard blow was struck, a discolored bruise would appear in about 15 minutes where soft tissue was involved, but that bruising of deeper tissues would take a maximum time of 24 hours to appear (R14-17).

After the visit to the doctor, Police Constable Jones, stationed

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at Corby (R7), went with Mr. and Mrs. Murray to their home, and arrived about 2.15 a.m. Jones observed two full cups of cold tea in the living room and a pair of knickers on a chair near a door leading to the stairs. He found a khaki scarf about two feet away, and a lady's hair comb "On the floor near the wall near the sideboard between the sideboard and the door leading to the stairs" (R28,60-61,67). Jones identified the scarf and comb at the trial and they were admitted in evidence. An objection by the defense to the admission of the scarf was overruled (R61,71;Pros. Exs.4-5). Mrs. Murray showed her husband bruises on her arm, a slight bruise on her hip and one on her left wrist. She "was crying a terrible lot" and after going to bed she kept shouting "My God, My God" (R68).

Mrs. Murray testified that during the incident with the accused she "was shouting all the time" but that she did not know how loudly or whether she shouted for Mrs. Smith before or after accused inserted his penis (R40,42,44,46). He did not hit her and used no threatening language except when he told her "to shut up and I was going to get it" (R41). It was not possible to hear sounds or voices in the adjoining apartment, "only the wireless if it is loud" (R40-41). The elastic in her knickers was not very strong and they had no binding around the legs. She was very thin around the waist and could wriggle out of the knickers when she had on no other clothing (R24-25,43). She identified the skirt, stockings and knickers which she was wearing that evening (Pros. Exs.1,2,3) and they were admitted in evidence (R24,71). In addition to scratches on her arms she had bruises on her chin, hip and chest, and a bruise on her wrist which appeared on the following day, on which day she visited "the doctor again because every step I took my ribs seemed to be crushed in" (R28-29). She further testified that she had never seen accused except on 17 and 26 December and that she did not see him at a dance hall in Corby (R43). She did not often visit the Raven dance hall and was last at this hall with Mrs. Green's daughter, Stella Broxton, between 10-11 p.m. on 18 November. She went home to visit her mother on 19 November (R46-47).

Constable Jones visited accused's hut at Deenethorpe Airdrome about 4 a.m. 27 December but was unable to find him. About 2.30 p.m. 27 December accused, after being warned of his rights by Jones, made an oral statement at the police station in Corby before Jones, a Corporal Strayel of the United States Army, and others. The statement is not set forth at this point because accused's testimony at the trial in his own defense substantially conformed thereto with the exception that on 27 December he stated that he arrived at his station about midnight 26 December, changed his clothes and slept in another billet (R62-65). On 27 December he stated that he went to the police station at Corby after the occurrence on 26 December but "got no reply". Jones testified that although the police station was the first building "past the bridge", it was "Definitely recessed and fairly well hidden from the road. The first easily visible building beyond the bridge was the post office which was 30 yards from the police station (R64).

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4. For the defense Mr. Benjamin Smith who lived in the house on the immediate right of the Murrays, testified that a thin brick wall separated the two homes, that a person in his house could not hear conversation in the Murray home but

"the way that woman bawls anybody can hear her any ordinary time. The walls are thin, and if they have the wireless on I needn't put my wireless on".

When Mrs. Murray shouted one could hear "Almost every word" and could also hear the babies crying. Mr. Smith left for work at 9.20 p.m. 26 December. He never visited the Murrays socially (R72-73). Mrs. Smith testified that a person in the Smith house could on occasion hear voices and the wireless in the Murray home.

"Sometimes you can make out the words, and the children crying and wireless sometimes. The noise penetrates through and it is quite plain".

The Murray and Smith downstairs living rooms and upstairs bedrooms adjoined. When in her upstairs bedroom Mrs. Smith had on previous occasions heard "a buzz of voices" in the Murray living room but she could not hear loud talking. She heard nothing of this nature that night, went to bed at 9.30 and read until about 10.30 p.m. when she checked her clock and went to sleep. She heard the Murray children crying but did not know at what time, except that it was after 10.30 p.m. She heard nothing else until 2.06 a.m. when she heard footsteps and an automobile. She did not hear anyone come to the rear door about 10.20 p.m. "Frankly, footsteps going around there may be anybody and I didn't take any notice". The Smiths and Murrays lived in the houses for six years and their friendship ceased about 18 months prior to trial (R75-79).

Mr. Norman Smedley who lived on the south side of the Murray home, testified that in his house a person could on occasion hear the Murrays talking and their radio. One could hear the children crying when one was upstairs or downstairs. Mr. Smedley was home all evening on 26 December and heard nothing unusual. He was downstairs at 11 p.m. and went to bed about 11.30 p.m. Mrs. Smedley went upstairs earlier. He did not hear the Murray radio and had his own radio turned on. He did not know "when we were listening but definitely not after 2300 hours". The Smedleys, who lived there since November 1939, did not exchange social visits with the Murrays and were not friendly with them beyond "'Good morning, good afternoon and good evening'" (R80-82). Mrs. Smedley testified that in her house a person was able to hear from the Murray home "voices or any bumps. Anything that makes a noise", including the opening and closing of doors. One would hear Mrs. Murray shouting at the children whether one was upstairs or downstairs. The Murray radio could

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be heard "if the doors were open from the other side". As near as she could remember Mrs. Smedley went to bed between 11 p.m. - 12 m. that night. She was at home all evening and heard no unusual noises. She did not hear any doors being opened or closed and "shouldn't have taken any notice" (R83-85).

Neither Mrs. Smith nor Mr. and Mrs. Smedley knew Mrs. Murray's reputation in the neighborhood for chastity (R77,81,83-84).

Mr. Thomas Murray, 4 Upper Field Grove, Corby, who was a "bouncer" at the Raven dance hall where there were four dances a week, testified that he had seen accused at the White Horse "pub" but had never seen him at the dance hall. He knew Mrs. Murray by sight and last saw her at the hall in December. "I think it was shortly before Christmas". He estimated that he saw her there more than once in December but could not testify that he saw her at the hall in November. He did not know her reputation for chastity in the community (R86-88).

Accused, having been advised as to his rights, testified in substance that he went 3½ years to high school and in civilian life was a salesman. He first met Mrs. Murray about 11 or 12 November at the Raven dance hall when he asked her to dance. Later in the evening they left the hall and he took along a mixture of ale and port wine which he previously bought at the White Horse "pub". They went to the porch of the Welfare Club in Corby and had a few drinks from the bottle. She told him that her husband "was in the service, was in the forces, and not with her" and that she did not want to be seen in public alone with accused at any future date. They indulged in sexual intercourse on the porch and returned to the dance hall about an hour later, about 10.30-11 p.m. Accused went to the lavatory and when he came out she was not there. He asked her for her address but she did not give it to him. She was dressed in a black dress, had a black coat to match and wore a hat (R89-90,104-106). He met her again at the Raven dance hall on the Friday or Saturday before Christmas (17 or 18 December) and she said she had been away visiting. They left the dance hall about 9 p.m., went to the White Horse "pub", but she would not go into the smoke room as she did not wish to be seen with him. They went into the companion-way and he bought two drinks of port for each of them "and two pints of ale to go with them". They left the "pub" and went to an air-raid shelter where he again had intercourse with her. He left her near the Odeon Theater. On neither of the two occasions did he pay her any money (R90-91,106-107,118).

He next saw Mrs. Murray on the evening of 25 December at the White Horse "pub" when she introduced him to her husband. They engaged in conversation. He went to the lavatory with Murray on one occasion, but on another accused remained at the table and told her he was "quite surprised about her husband". She said "he was there and that was the reason for not seeing me". He went with them to the Murray home and remained until about 2.30 a.m. Accused again accompanied Murray to the

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lavatory but on one occasion remained with Mrs. Murray and asked when he could see her again. She told him the following night, that her husband would not be home after 10 p.m., "but just to make sure" accused asked Murray when he returned from the lavatory if he could come to the house the following evening. Murray replied that accused would be welcome at any time but that he (Murray) would be working. Accused told him that he could not meet him the following noon (R92,107-108,120-121). About 10.30 p.m. 26 December accused knocked on the rear door of the Murray home and when she asked who was there he replied "Don". After giving her a parcel she accepted his invitation to sit beside him on the leather settee, which was about four feet in length between the leather arm rests and a little over two feet wide. After showing her some photographs he began to caress her, and removed her knickers with his left hand. She raised the rear part of her body, he slipped the knickers from one of her legs and they remained hanging on her other leg "down by the instep of the foot". She was afraid that someone would come into the house. She told him that "they were a little short because of Christmas," that that was the reason why she did not offer him much for supper the previous night and that she needed money. She asked him for two pounds and he said he would pay her when he "finished with the act". They then indulged in intercourse on the settee with no objection on her part. He withdrew before he had an emission and used his handkerchief. He used no force and she made no outcries. They were not in an entirely prone position but were lying diagonally. Her shoulders were against the arm of the settee, one foot was on the floor and the other on the settee. His trousers were open but not down. They did not have intercourse elsewhere in the house (R93-95,98,108-111). Accused denied that he struck Mrs. Murray that night and that there was a scuffle between them. He did not see any comb that evening but did testify that he owned a scarf similar to that which was found in the house. He could not account for the scratches on the victim except that those on the inner side of her leg might have been caused by his belt buckle. The Murray radio was not turned on (R98,114-115,117).

When the woman stood up her knickers fell to the floor and she threw them across the room to the opposite chair. She went to the bathroom and then made tea while accused went to the lavatory. The children started to cry but nothing was done about it. When he returned to the settee she brought in two cups of tea. His tea was hot and he put the cup in the fireplace, and she put hers on the table. She then sat next to him on the settee where he put his arm around her and caressed her. She asked him about the two pounds and he replied that he was going on a 48 hour pass, that as it was shortly before pay day he could not pay her then but would do so after pay day. She said that he promised to pay it to her, that she did not see why he did not give her the money. She appeared "quite perturbed" but did "not exactly" flare up or get excited. She said she was going to the bathroom and left the room. She appeared normal and was not nervous or disturbed, but her hair "was not fixed too much" (R95-96,112,117-120). In about five or ten minutes the Greens

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entered and Mr. Green asked what accused was doing. After a short conversation they all went to the Green home where accused asked Mrs. Murray "what was the meaning of it". She was crying, was highly nervous and upset and replied "You should know", raised her skirt and showed a stain on the rear. She said that when her husband saw accused he would take care of him. She ran up to accused but did not touch him. He saw "it was not doing any good" and asked Mr. Green to step out in the kitchen where accused asked him what he thought. Accused could think of no explanation for the outburst except for the monetary bargain and wanted to find out whether an allegation had been made "because of monetary return or just what the reason for it all was". On the previous evening Mr. Murray said something about "being in a bad financial way" and accused offered to lend them money but Murray did not accept the offer (R96-97,112,117,119-120). Accused asked Green the way to the police station and was told that it was the first building on the left hand side, just over the railroad track. He asked Green to accompany him to his bicycle "to be sure nothing else happened". He went to the building to which he was directed, knocked on the door but got no response. He then went to the home of friends in Corby, Mr. and Mrs. Franks, where he spent the night. He left their home at 7.15 a.m. 27 December and arrived at his station about 8.15 a.m., went to the mess hall, and then to his barracks where he arrived about 9 a.m. He did not sleep in his barracks the night of 26 December (R97-98,100-102,111,120). He subsequently pointed out to Inspector Jones the building he thought was the police station and was told it was the post office. The post office was the first visible building beyond the railroad bridge (R115).

Accused further testified that he made oral statements on 27 December to a Corporal Strayel at the police station at Corby, and to the officer investigating the charges (Captain Davidson). The statements substantially conformed with his testimony at the trial with the exception that he did not tell about spending the night at the Franks. He told Strayel that he arrived at his barracks about midnight 26 December, changed into working clothes and slept in another billet. He did not mention spending the night at the Franks because he did not want to bring Mrs. Franks into the case. He made the statements under an "apprehension" because at first he did not want to give any information. Strayel told him he must answer because, "it was just the same as if it was the commanding officer", that anything accused said would be regarded as hearsay and could not be brought up at the trial, and that "it would only be regarded for investigation purposes" (R100,102-103,116). He also gave the investigating officer the names of three other soldiers who would testify that they had seen him with Mrs. Murray under questionable circumstances, and requested that these men be given the opportunity to identify her. He told the investigating officer that he knew of three additional soldiers who had intercourse with her but did not furnish their names. Accused was later informed that two of the named men were given an opportunity to

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see Mrs. Murray and that "they were unable to identify her, although if I remember correctly, it was not positive identification" (R112-113). The handkerchief he used upon emission was still in his barracks and although he was later asked to produce it, he refused to turn it in because he did not "know the value of it" (R110-111).

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

* * * * *

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

Proof. - (a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent" (MCM, 1928, par.114b, p.165).

The undisputed evidence shows that at the time and place alleged accused had sexual intercourse with Mrs. Murray and that penetration occurred. The only question presented for consideration was purely one of fact, namely, whether or not she consented to the act of intercourse. The testimony of the two principals is in sharp conflict on this point. She, a woman weighing 95 pounds, testified that she remonstrated with accused immediately when he put his arm around her and touched her breast. When he seized her right hand, twisted it behind her back and pulled her to half a prone position, she tried to free her hand and to push him away, struck him with her other hand on the chest and arms and made further verbal protestations. By struggling she finally succeeded in getting out from beneath him and moved across the room, but he still held her one hand behind her back. She kept striking him with her free hand. He tripped her up, both fell to the floor, and because of their sizes he "knocked the stuffing" out of her when they fell and this sapped her strength. He then got both her hands behind her back and pulled off her knickers with his free hand. She was "wriggling and struggling", and resisted to the best of her ability. Forcing open her legs with his own he said "You are going to get it whether you want it or not". She shouted for Mrs. Smith and he put his thumb under her chin and his hand over her mouth to stifle her outcries. She felt his penis against her leg and then inside her body. As she was still crying and shouting, he put his hand over her mouth and kept it there until he fully accomplished his purpose. She testified that she first saw him at the White Horse "pub" on 17 December but did not speak to him. Her only other meeting with accused before the commission of the offense was during the previous evening, 25 December. She denied that she never saw him at the Raven dance hall. Accused testified that he first met her at the dance hall on 11 or 12 November and that she voluntarily had intercourse with him the same

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evening. He saw her again 17 or 18 December at the dance hall and they again indulged in intercourse that evening. No money was involved on either occasion. His testimony clearly supports the conclusion that he came to her home on the date alleged for the express purpose of having intercourse after he assured himself on the previous evening that her husband would be away. Accused further testified that they did have intercourse, that the act was entirely voluntary on her part, that she offered no resistance and made no outcries, and that there was no scuffle between them. After the act she was entirely normal and he could account for her sudden departure to the Green's and subsequent events, only by the fact that she was possibly upset because he did not pay her the two pounds which he promised to give her that night after he "finished with the act". The court was, therefore, presented with questions of fact and of the credibility of witnesses which were questions for its sole determination (CM ETO 1402, Willison; CM ETO 2472, Blevins; CM ETO 3141, Whitfield).

The victim's version of the incident is corroborated by competent and substantial evidence. When she appeared at the Green home she was very dishevelled and white, "her hair was all over the place" and she was wringing her hands. She complained that an American "had connections with her" and "had molested her". When accused appeared at the Green house she reproached him angrily, showed her skirt and seized his throat or collar. She then became exhausted, collapsed on a chair and became hysterical. Shortly thereafter on her own accord she went to the police station where she appeared in a "very distressed", excited and nervous condition. She made a complaint and readily agreed to see a doctor. The physician testified that her face was flushed, that she was trembling and had a rapid pulse and that her voice was shaking. Fresh scratches and abrasions were found on her body, particularly on the inner parts of both arms and of the thighs. The victim testified that there were also bruises on her chin and chest. Although Dr. Irving did not testify as to any subsequent examinations, Mrs. Murray testified that on the following day she visited "the doctor again because every step I took my ribs seemed to be crushed in". On the following day a bruise on her wrist appeared. After she and her husband retired that evening she repeatedly shouted "My God, My God". Accused testified that the act of intercourse occurred on the settee and that he saw no comb that evening. Mrs. Murray testified that it occurred across the room on the floor in an "alley-way" near a door which led to the outside, that they fell "where the door is going to the staircase". Jones found a lady's haircomb on the floor "between the sideboard and the door leading to the stairs" which fact tends to corroborate the victim's version. Accused testified that when the woman arose after the act she threw her knickers across the room to the opposite chair and later left for the Green's. Mrs. Murray stated that she picked up the knickers from the floor and threw them on the chair when she returned to her home from the Green's before she went to the police station. Mrs. Green testified that she saw the knickers on the chair but could not tell whether it was when she first went to the

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Murray home (before Mrs. Murray returned to prepare to go to the police station) or on her second entry (after Mrs. Murray left for the station). At 2.15 a.m. Jones found the knickers on the chair near the door leading to the stairs and a khaki scarf about two feet away. Although Mrs. Murray testified positively as to the fact of penetration she told Mrs. Green that she did not believe any fluid "had gone into her" that night. Accused testified that he withdrew before emission.

The Smedleys and Smiths testified in substance for the defense, that voices, the radio and other noises emanating from the Murray home could frequently be heard in their homes on other occasions. Mrs. Murray could be heard shouting at the children. However, Mr. Smith left for work that evening at 9.20 p.m. which was before accused's arrival about 10.20 p.m.. Mrs. Smith retired to her upstairs bedroom at 9.30 that night and read till about 10.30 when she checked her clock and fell asleep. She heard the Murray children crying at an undetermined hour and heard no other noises until an early morning hour when the group was apparently returning from the police station. She did not hear anyone come to the Murray's door at the time of accused's arrival. "Frankly * * * I didn't take any notice". Although Mr. Smedley was downstairs at 11 p.m., did not retire until about 11.30 p.m. and heard nothing unusual, he admittedly had his own radio turned on. He did not know how long his radio was on and knew only that it was not playing after 11 p.m.. Mrs. Smedley was also at home all evening, went upstairs earlier, went to bed between 11 p.m. - 12 m. and heard no unusual noises. She did not hear any doors being opened or closed and "shouldn't have taken any notice". In view of the foregoing activities of these three witnesses who were in their houses throughout the evening in question, there is an entirely reasonable basis for the conclusion that although Mrs. Murray did shout and struggle the noises were not actually heard.

"All other things being equal, the testimony of a witness who testifies positively that a certain fact occurred is generally speaking entitled to more weight than the evidence of another witness who swears that the fact did not occur, for it is far more probable that the latter has forgotten the occurrence than that it should be distinctly impressed on the mind of the former if it never took place.

* * * * *

The marked superiority of positive testimony is most commonly affirmed in those cases where the opposing testimony is what has been hereinbefore denominated strictly negative" (23 CJ sec.1787, pp.42-43).

It may be noted that the testimony of the four witnesses disclosed a rather strained relationship with the Murray family.

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The Board of Review is of the opinion that the finding of non-consent by Mrs. Murray was supported by competent, substantial evidence. Accordingly it will not disturb the findings of the court on appellate review (CM ETO 1402, Willison and cases cited therein; CM ETO 2472 Blevins).

6. (a) Attached to the record of trial is a petition for clemency addressed to the reviewing authority dated 15 January 1944. In paragraph f thereof it is stated that the prosecution in its closing argument particularly stressed the fact that accused made no sworn statement before trial. Argument of counsel was not recorded but the review of the Assistant Staff Judge Advocate discloses the true statement made by the prosecution during its argument and a comment thereon is included therein. Further comment is considered unnecessary.

(b) Prosecution Exhibits 1-5 were admitted in evidence and were, because of their nature, later withdrawn (R71). However, no certificates of their description are appended to the record.

(c) Also attached to the record of trial is a petition for clemency addressed to the reviewing authority dated 10 February 1944, signed by the president of the court in behalf of all members thereof. The request for clemency is based upon the fact that although it was believed accused had intercourse with the victim against her will,

"there is doubt in the minds of the Court
that Mrs. Murray did take all normal pre-
cautions necessary to avoid the act, viz:
she did not scream loud enough to be heard
in the adjoining apartment".

7. The charge sheet shows that accused is 23 years six months of age and that he enlisted 8 April 1942 at New York City, New York, 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 rape is death or life imprisonment, as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for the crime of rape (AW 42; secs. 278 and 330, Federal Criminal Code (18 USCA, 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is authorized (AW 42; Cir. 229, WD, 8 Jun 1944, sec. II, pars. 1b(4), 3b).

Franklin R. Jr. Judge Advocate

Howard F. Langford Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

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War Department, Branch Office of The Judge Advocate General with the European Theater of Operations - 4 AUG 1944 To: Commanding General, Eighth Air Force, APO 634, U. S. Army.

1. In the case of Private DONALD HICKS (12062455), 612th Bombardment Squadron (H), 401st Bombardment Group (H), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1899. For convenience of reference please place that number in brackets at the end of the order: (ETO 1899).

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

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

BOARD OF REVIEW

ETO 1901

18 MAY 1944

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

)
4TH INFANTRY DIVISION.
v.)
)
Private ALEX F. MIRANDA)
(39297382), Battery C, 42nd)
Field Artillery Battalion)
Trial by G.C.M., convened at APO 4,
U.S. Army, 20 March 1944. Sentence:
To be shot to death with musketry.

HOLDING by the BOARD OF REVIEW
RITTER, VAN BEN SCHOTEN and SARGENT, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.
Specification: In that Private Alex F. Miranda,
Battery C, 42nd Field Artillery Battalion,
did, at Broomhill Camp, Honiton, Devon,
England, on or about 5 March 1944, with
malice aforethought, willfully, deliberate-
ly, feloniously, unlawfully, and with pre-
meditation kill one First Sergeant Thomas
Evison, Battery C, 42nd Field Artillery
Battalion, a human being by shooting him
with a carbine.

He pleaded not guilty to and was found guilty of the Charge and Specification, all members of the court concurring. No evidence of previous convictions was introduced. He was sentenced to be shot to death with musketry, all members of the court concurring. The reviewing authority, the Commanding General, 4th Infantry Division, approved the sentence and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½. The Board of Review has treated the record of trial as though forwarded for action

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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 shows in substance that at about 12.15 a.m. 5 March 1944, Special Sergeant William J. Durbin of the Devonshire Division police, together with a Constable North brought accused to the Honiton police station because of a certain incident (urinating on the street). Accused's speech was thick, his breath smelled of alcohol and he was "nasty, abusive in general." In Durbin's opinion he was drunk but not so drunk that he did not know what he was doing. He did not stumble. He said to Durbin "You are a fine fat sergeant. * * * I would make you top sergeant. * * * Come on guard tomorrow night and I will give you a royal welcome". When a group of men left the station to get some sergeants who were in an accident, accused remarked "I hope they rip their guts out", and then said to Durbin "I was not pissing in the street. You are lying. I will rip your guts out." Durbin testified that accused "seemed to have sergeants in mind." (R35-36). Accused remained at the police station about 15 minutes and was driven to camp by Technician 5th Grade James W. Wesley and Corporal Joel R. Wehking, Battery C and Headquarters Battery respectively, 42nd Field Artillery Battalion. He was taken to the guardhouse and released about 12.30 a.m. Wesley testified that accused could walk, did not stumble and did not appear to be drunk. He did not smell his breath. Wehking testified that accused did not stagger, but that he stumbled when entering the vehicle. In the opinion of this witness he was not drunk nor did he smell of alcohol (R37-38,40).

Admitted in evidence were four photographs of the interior of a certain hut in the 42nd Field Artillery Battalion area taken by Corporal Frederick Kimbrough, 4th Infantry Division photographer (R5-6; Pros.Exs.A,B,C,D). In the left rear of Pros.Exs. A and B, next to a door with a black-out curtain is the end top bunk of deceased (First Sergeant Thomas Evison, Battery C, 42nd Field Artillery Battalion), upon which a soldier is reclining. The adjoining top bunk was occupied at the time of the commission of the alleged offense by Staff Sergeant James A. Merklein of the same organization. Marked with a blue cross on Pros.Exs. A & B is the top bunk which was then occupied by Corporal Walter E. Cooney of that organization, and adjoining Cooney's bunk in the foreground of the two exhibits, marked with a red cross, is the top bunk of accused (R5-6,12-13,18).

Shortly after midnight on 5 March, accused entered the hut in a noisy, boisterous manner and "said a few curse words against the first sergeant" (deceased) who was asleep. He said he had been picked up in town by the military police for urinating in the street and appeared to be "quite disturbed" about the incident. Merklein believed accused was worried about the incident and that he thought "the 1st sergeant would ride him for it." Merklein told him not to worry and to go to bed. During this time deceased was snoring "quite loudly". Accused undressed and "kept muttering" about the occurrence in town. Cooney saw him go over to the left side of deceased's bunk and bend over him. "It looked like he (accused) had his

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hands raised and was looking straight into his face." Merklein, who was dozing, awakened and saw accused between his bed and that of deceased, leaning over the first sergeant. He reached out and seized him saying, "Miranda, what are you doing?" Deceased suddenly awakened and asked in a surprised manner "What's the matter - What's going on?". Accused said "You are snoring too loud, making too much noise". Deceased said "go back to bed and do your own snoring", turned over on his left side and began to snore again (R13-14,15,20-21). Accused returned to his bunk and stood smoking a cigarette for some length of time. Cooney leaned over and asked "Miranda, what's the matter?" He replied that the military police said he urinated in the street, that he did not do so and that he "was worrying about the 1st Sergeant punishing him." Cooney told him that everything would be all right in the morning, not to worry and to go to bed. Accused laid his blanket on top of his bunk, left the hut and returned to his bunk where he appeared to be fumbling with his musette bag (R14). He then went toward the door near deceased's bunk. There was an "explosion or a shot" and accused, who was laughing hysterically, said "Your worries are over now, boys.. I have shot the 1st Sergeant and I will turn on the lights so I can show you". He turned on the lights and was seen standing beyond the stove about two feet from deceased's bed, between the bed and the door. He was armed with a carbine which he carried at "port arms". Cooney jumped out of bed, started toward accused and told him to put down the gun. At first he "seemed to refuse". He lifted the gun over his head as though he "was going to slam it to the ground", but then "gently put it down". Cooney stepped between accused and the gun which Merklein seized and placed on a table (R14,17,19-20,25,28,30,33-34). There was a magazine in the gun but no ammunition (R19-20). Accused placed his hands on Cooney's shoulders and said "Don't look at the 1st Sergeant, he is dead". He again laughed hysterically (R14-15,34). Cooney left the hut and informed a sentry of the incident, directed the corporal of the guard to secure medical aid and then aroused some officers (R14). When a guard entered the hut accused was ordered under arrest by Merklein and taken to the guardhouse. He was stubborn, appeared to be dazed and giggled hysterically all the way to the guardhouse. Merklein called out the number of the carbine; namely 1469037, and Private Bernard G. Paulhus, who slept in the bunk below accused, said that it belonged to him. Both Merklein, who put a tag on the gun, and Paulhus identified the gun at the trial. Paulhus testified that after cleaning it on the morning of 4 March by removing the barrel and clip and passing a rod through the chamber, he placed the gun in the gun rack in back of the stove, and that it did not then contain any ammunition. He had not been issued any ammunition for a "long, long time" (R19,23-25,39,41; Pros.Ex.B). The gun was admitted in evidence (R44;Pros.Ex.F). The gun rack was on the left as one entered the hut. There were no facilities for locking the guns. Ammunition was not ordinarily issued to members of the organization but was kept in the orderly room and in an ammunition dump which was guarded day and night (R16; Pros.Ex.B).

Shortly after 1 a.m. 5 March, deceased was examined in the hut by Technician Fourth Grade Frank P. Wadnek, Medical Detachment, 42nd Field Artillery Battalion. His pulse was weak and unsteady and his heart stopped

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beating in about two minutes. About 1.25 a.m. he was pronounced dead by Captain Harry P. Singley, battalion medical officer (R7-9,11,14,19). The position of the soldier in the left rear of Pros.Ex.B, and Pros.Ex.C portrayed the position of deceased when first examined in his bunk. The mark on the forehead of the soldier in Pros.Ex.D showed the point of entry of the bullet, the point of exit being in the upper rear of the head. It then entered a wooden prop which supported a straw pillow, passed through a carton of Merklein's cigarettes and entered the wall. Marked with a blue cross on Pros.Ex.C is the place where the bullet entered the wall. When deceased was examined in the hut, brain matter exuded from the place where the bullet entered his head and spinal fluid exuded from its point of exit. The rear of the head was a mass of blood. An empty cartridge case was discovered the following morning (R7,9,19,21-22). Admitted in evidence by stipulation was the report of an autopsy on the body of deceased (R10; Pros.Ex.E), and a certificate of his death (R50; Pros.Ex.G).

Accused was seen in town at about 11:00 p.m. on the evening in question by Technician Fifth Grade David C. Carroll of his organization who also lived in the same hut. Accused "seemed normal" at that time and did not appear to be drunk. Carroll was dozing in the hut when the shot was fired. He saw accused, who did not then appear to be drunk (R33-34). When undressing, accused was about an arm's length from Cooney who testified that his breath did not smell of alcohol and that there was nothing in his manner, walk or speech which indicated that he was drunk (R15). When accused was standing between the bunks of Merklein and deceased, he was about eight or ten inches away from the face of the former who testified that he did not smell any liquor on accused's breath and that in his opinion he was not drunk (R19). Staff Sergeant Daniel Rajniak who was in bed in the hut at the time of the shooting, testified that he later came within two or three feet of accused, that there was no evidence of his being drunk, that he appeared to know what he was doing and that he did not appear to be abnormal in any way (R29). Sergeant Solomon R. Richardson who was also in bed in the hut when the shooting occurred, testified that "I was lead to believe he was under the influence of whiskey when this happened." This witness based his opinion upon the shooting and the fact that accused laughed hysterically. He had previously heard him laugh in the same manner when he was under the influence of intoxicating liquor (R30-31).

Deceased enjoyed a "normal relationship" of a first sergeant with his men. He was highly regarded as a first sergeant, was fair and "commanded respect" (R12). If a soldier was given extra duty by the commanding officer, deceased "made sure that the man got his full measure of duty" (R22). Three witnesses testified that deceased had not mistreated accused in any way and that their relations appeared to be normal (R15,29, 42). A fourth witness testified that there "may have been a very little ill feeling toward the 1st Sergeant by Private Miranda, but I don't believe it would lead him to do this." Witness believed from his actions that accused thought deceased "was trying to put more extra duty on him than anybody else in the battery." However, this witness further testified that deceased did not mistreat accused in any manner nor did accused ever complain (R32-33).

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One member of accused's organization testified that accused acted no differently than any other man in the battery (R41). Merklein described him as a "quiet boy" who "told a few jokes now and then" (R20). His section leader testifies that accused always performed his assigned duties and did what he was told "without a great deal of haranguing" (R27). Captain George A. McKeon, accused's battery commander, had known him since November 1943, and had noticed nothing to indicate any abnormality, or physical or mental disability. He was not "an extremely good soldier" and "was the opposite of highly excitable. He was phlegmatic and stoical" (R11-12). Captain Singley treated accused for minor ailments about six times and believed him to be a very phlegmatic type of individual, "a rather stoical and unemotional type" (R8).

About 11:00 a.m. 5 March, Captain Charles Watkins, Medical Corps, 8th Infantry, a medical school graduate with two years experience in psychiatry, made a preliminary examination of accused and was of the opinion that he was normal "so far as being in a dazed condition or being under the influence of drugs or alcohol was concerned." On 10 March he made a more thorough mental examination and concluded that he was not insane, that he was normally intelligent but had a "low border-line intelligence". Accused stated that he was Indian (R42-44).

4. For the defense, Police Sergeant W. A. Stanning, of the Devonshire Division constabulary, testified that he saw accused for one or two minutes when he was brought into the Honiton police station after midnight 5 March, for urinating in the street. He denied committing the offense and witness was of the opinion that he had been drinking fairly heavily. * * * the man was definitely under the influence of drink, although in Stanning's opinion he was not so drunk that he did not know what he was doing (R45-46).

Special Constable Henry North of the Devonshire constabulary was on duty in Honiton after midnight 5 March, when he noticed urine coming from the entrance at 186 High Street. He flashed his torch and saw accused crouching in the doorway. He asked accused what he was doing and he replied that he was waiting for someone. When asked by North if he urinated, accused denied having done so. North replied "You must have done it," and he and Durbin took him to the police station. Accused was "very arrogant" to Durbin and said to him "What a nice fat sergeant * * * We will make you a top sergeant. I will be on guard tomorrow night. If you come out I shall give you a royal welcome". North further testified that accused smelled very strongly of liquor, and that he was intoxicated but not incapable. "In fact, he kept step with me on the way to the station" (R47-48).

After receiving an explanation of his rights accused elected to remain silent (R48).

5. Recalled as a witness by the court, Captain McKeon testified that accused fired the carbine at the qualification course at Camp Gordon Johnston (United States), that he was not particularly alert, but that the witness

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knew of nothing that would lead him to believe that accused did not understand what he was told (R45).

Also recalled as a witness by the court, Corporal Cooney testified that he knew of no ill feeling or arguments between accused and deceased. Accused "at times he complained he wasn't getting a fair break or remarked he didn't like the 1st Sergeant, but some of the other boys did too. * * * I never did hear any threat" (R49).

6. Murder is legally defined as follows:

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1928, sec. 148a, p.162).

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

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his 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 intent to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark).

Malice aforethought may exist when the act is unpre-meditated. 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, * * *, knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, * * *, although such knowledge is accompanied by indifference whether death

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or grievous bodily harm is caused or
not or by a wish that it may not be
caused" (MCM, 1928, par.148a, pp.163-164)
(Underscoring supplied).

The evidence shows that when accused was arrested in Honiton he was particularly abusive to Sergeant Durbin of the Devonshire Division police. He addressed him with slurring language, said he was a "fine fat sergeant" and that he would give him a "royal welcome" if he came to camp the following evening when accused was on guard. He denied urinating in the street, said the sergeant was lying and that he would "rip his guts out". When a group of men left the station to "get" some sergeants who were in an accident, accused declared he hoped they would "rip their guts out". Durbin testified that he "seemed to have sergeants in mind" (Underscoring supplied). When he noisily entered the hut he immediately cursed deceased who was his first sergeant, and then informed Merklein about the incident in town. Merklein was of the opinion that accused was worried about the occurrence and feared the 1st sergeant (deceased) would "ride him for it". Accused "kept muttering" about the incident, approached the bunk of deceased who was snoring loudly, and when he awakened, provokingly said that he was "snoring too loud, making too much noise". Deceased curtly ordered him to go to bed and do his own snoring, turned over on his side and began to snore again. Accused returned to his bunk and stood for some length of time smoking a cigarette. When Cooney asked him what the trouble was he replied that he had been picked up in town for urinating in the street, that he had not done so, and that he "was worrying about the 1st sergeant punishing him." He prepared for bed, left the hut, returned and appeared to fumble with his musette bag. He then went to the bunk of deceased who was asleep, deliberately shot him and said "Your worries are over now, boys. I have shot the 1st Sergeant and I will turn on the lights so I can show you." He told Cooney not to look at deceased, that he was dead.

There was evidence that deceased was highly regarded as a first sergeant, that he commanded respect and was a type of non-commissioned officer who made sure that any soldier who was given extra duty by the commanding officer "got his full measure of duty." Although there was evidence that he had not mistreated accused in any way, one witness testified that there "may have been a very little ill feeling" toward deceased by accused. This witness believed from observing accused's actions that he thought deceased "was trying to put more extra duty on him than anybody else in the battery." Cooney testified that accused "at times complained he wasn't getting a fair break or remarked he didn't like the 1st Sergeant * * *." There was evidence that accused was sane, normally intelligent but of a low border-line intelligence. In searching for a motive for accused's conduct, the evidence presents a reasonable basis for the conclusion that accused entertained a belief that he had been the object of mistreatment by deceased, that as a result he harbored a strong dislike for the first sergeant which was more or less concealed, and that he was admittedly apprehensive of being punished by deceased because of the occurrence in town.

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earlier in the evening.

The court was fully warranted in finding that the killing was premeditated by the highly significant evidence that after he was told to go to bed by deceased, accused returned to his bunk and stood smoking a cigarette for a considerable period of time, went to the latrine and returning to the hut fumbled with his musette bag, and that immediately after the shooting he announced to his hut mates that their worries were over, that he had shot deceased and that he was dead. The evidence fully justifies the conclusion that while smoking his cigarette accused determined to kill deceased and that he obtained the lethal bullet from his musette bag. His actions therefore revealed a cold, deliberate purpose in the absence of any adequate provocation whatsoever, either to kill deceased or to inflict upon him grievous bodily harm, "some excessive bodily injury which may naturally result in death" (Winthrop's Military Law & Precedents, 2nd Ed., Reprint, p.673).

The principal defense was that accused was intoxicated to such an extent that he did not have the requisite intent to kill. The gist of the testimony of the members of the British constabulary was that while in Honiton accused was drunk, but not so drunk that he did not know what he was doing. The testimony of the two soldiers who returned accused to camp, and of the several occupants of the hut was to the effect that there was nothing to indicate that he was drunk. The question of intoxication was a question of fact for the sole determination of the court, and in view of all the evidence its findings will not be disturbed by the Board of Review (CM ETO 1065, Stratton).

The evidence is legally sufficient to support the findings of guilty of the Charge and Specification (CM ETO 438, Smith; CM ETO 1161, Waters).

7. Attached to the action of the reviewing authority at his direction, are the "dictated remarks" of the reviewing authority which set forth his reasons for approving the sentence as adjudged.

8. The charge sheet shows that accused is 20 years of age and that he was inducted at Los Angeles, California, 15 May 1943 to serve for the duration of the war plus six months. He had no prior service.

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). The sentence that accused be shot to death with musketry is legal (MCM, 1928, par.103a, p.93).

Judge Advocate

Judge Advocate

Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. 18 MAY 1944 TO: Commanding General, ETOUSA, U. S. Army, APO 887, U. S. Army.

1. In the case of Private ALEX F. MIRANDA (39297382), Battery C, 42nd Field Artillery Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support the findings 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 1901. For convenience of reference please place that number in brackets at the end of the order: (ETO 1901).

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


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

(Sentence ordered executed. GCMO 33, ETO, 23 May 1944)

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

BOARD OF REVIEW

ETO 1904

13 MAY 1944

U N I T E D S T A T E S)	AIR SERVICE COMMAND, UNITED STATES
)	STRATEGIC AIR FORCES IN EUROPE.
V.)	Trial by G.C.M., convened at AAF
Private JOHN C. MAYES) Station 586, England 20, 21 March	
(35428710), 89th Station) 1944. Sentence: Dishonorable dis-	
Complement Squadron (Sp)) charge, total forfeitures and con-	
VIII Air Force Service) finement at hard labor for four	
Command.) years. Eastern Branch, United	
) States Disciplinary Barracks,	
) Greenhaven, New York.	

HOLDING by the BOARD OF REVIEW
RITTER, VAN BENSCHEOTEN and SARGENT, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.
2. Accused was tried upon the following charges and specifications:

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

Specification 1: (Finding of Not Guilty)

Specification 2: (Finding of Not Guilty)

Specification 3: (As amended by stipulation)

In that Private John C. Mayes, 89th Station Complement Squadron (Special) VIII Air Force Service Command, did, at Orchard House, Stanley Road, Twickenham, Middlesex, England, on or about 5 February 1944 feloniously take, steal and carry away a pen and pencil, of some value, the property of Dora Victoria Reardon.

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Specification 4: In that * * *, did, at 55 Fifth Cross Road, Twickenham, Middlesex, England, on or about 9 February 1944, feloniously take, steal and carry away eight pounds (L8), value about \$32.00, the property of Mrs. Rose Everall.

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

Specification: In that * * * having been restricted to the limits of his post did at AAF Station 586 on 25 January 1944 break said restriction by going beyond said limits.

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

Specification: In that * * * did, without proper leave, absent himself from his station at AAF Station 586 from about 25 January 1944 to about 14 February 1944.

He pleaded not guilty to Charge I and its specifications but guilty to Charges II and III and their respective specifications. He was found not guilty of Specifications 1 and 2 Charge I, but guilty of all other charges and specifications. Evidence was introduced of four previous convictions: three by summary court for absence without leave for two, five and seven days respectively in violation of the 61st Article of War for leaving the "BFLA" without proper authority in violation of the 96th Article of War and one by special court-martial for absence without leave for 27 days in violation of the 61st Article of War and for forgery. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for four years. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50%.

3. The charge sheet shows that accused is 39 years of age, and was inducted into the service at Fort Thomas, Kentucky, 27 April 1942 to serve for the duration of the war plus six months. He had no prior service.

4. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of 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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5. Confinement of accused in Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir. 210, WD, 14 Sep 1943, sec.VI, par.2g, as amended by Cir.331, WD, 21 Dec 1943, sec.II, par.2).

B. Franklin Attey

Judge Advocate

Richard Brundage

Judge Advocate

Howard H. Ferguson

Judge Advocate

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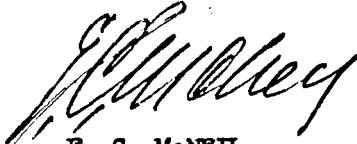
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1st Ind.

WD, Branch Office TJAG., with ETOUSA. 13 MAY 1944 TO: Commanding General, Air Service Command, United States Strategic Air Forces in Europe, APO 633, U. S. Army.

1. In the case of Private JOHN C. MAYES (35428710), 89th Station Complement Squadron (Sp) VIII Air Force Service Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 $\frac{1}{2}$, 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 1904. For convenience of reference please place that number in brackets at the end of the order: (ETO 1904).



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

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BOARD OF REVIEW

ETO 1920

1.3 MAY 1944

U N I T E D S T A T E S) FIRST UNITED STATES ARMY.

v.

Private CLYDE L. HORTON
(34318431), 3913th Quartermaster Gasoline Supply Company.

Trial by G.C.M., convened at Sudbury, Staffordshire, England, 7 March 1944. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for five years. The 2912th Disciplinary Training Center, Shepton Mallet, Somerset.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Disapproved by Reviewing Authority)

Specification 2: (Finding of Not Guilty)

Specification 3: (Finding of Not Guilty)

Specification 4: In that Private Clyde L. Horton, 3913th Quartermaster Gasoline Supply Company, did, at Loxley Hall, Staffordshire, England, on or about 3 February 1944, behave in an insubordinate manner toward his Company Commander, First Lieutenant Dean H. Johnson, who was then in the execution of his office, by saying to him, "I do not intend to do any work until I receive some consideration on passes", or words to that effect.

He pleaded guilty to the Charge and to Specification 4 thereunder and not guilty to the remaining specifications. He was found not guilty of Specifications 2 and 3, guilty of the Charge, of Specification 4, and of Specification 1 thereof with the exception of the word "command", substituting therefor the words: "Properly appointed place of assembly," of the excepted words: Not guilty, of the substituted words: Guilty. No evidence of previous

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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 disapproved the finding of guilty of Specification 1, approved the sentence, designated the 2912th Disciplinary Training Center, Shepton Mallet, Somerset, as the place of confinement and forwarded the record of trial for action under Article of War 50 $\frac{1}{2}$.

3. The evidence for the prosecution shows that on 8 consecutive days of duty, commencing 23 January 1944, the accused and several other enlisted men absented themselves from work by surreptitiously leaving the detail to which they were assigned and hiding in an upstairs room of a brick building on or near their station. This practice the malingerers dubbed "camouflage". Having discovered the accused in the "camouflage" hide-out on 3 February 1944, the corporal of accused's squad in compliance with instructions from the staff sergeant in charge of his platoon, told the accused to go to his barracks, adding that he wanted him "to go on detail with the rest of the Company." Ten minutes later the corporal met the accused at the door of his barracks where, according to the corporal's testimony

"He said: 'What the hell are you looking for me for. I am not going to work.'
 I said: 'If you are not going to work you go up and see the First Sergeant.'
 He said: 'Take me up and see the First Sergeant. I am not going to work.' So * * * I took him to the First Sergeant." (R15).

In connection with his refusal to work, the accused complained to the corporal "that he was not given the right consideration on his passes"; however he had never applied for a pass nor been refused one, and, on two occasions, when offered passes, had himself refused to accept them. Having accompanied the corporal to the orderly room, accused informed the first sergeant he was not going to work. The first sergeant then sent for First Lieutenant Dean H. Johnson, the company commander, who testified

"I was called up to the orderly room by Sergt Dillon and he told me a man had refused to work and indicated Pvt Horton. * * * I asked Pvt Horton what was the trouble and he said that he did not intend to do any work until he received consideration on pass. * * * Passes were inaugurated by the squad leaders recommending to the section leaders and the platoon sergeants. The platoon sergeants made out these pass roasters(sic) * * * and if any man thought he was not being given a fair deal the First Sergeant had instructions from me to report to me as Company Commander with the man and we would talk it over. * * * He had instructions that if any man asked to see me on a personal matter to let the man see me." (R19).

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However, until he was confined after commission of the offense, the accused never requested permission to see nor did he see his company commander (R18-19). When the accused stated to Lieutenant Johnson, "I Don't intend to do any work until I receive consideration on passes", Lieutenant Johnson instructed the first sergeant to take the accused to the battalion guard room, and promptly thereafter preferred charges against him (R20).

4. No evidence was offered by the defense with reference to Specification 4 of the Charge; and the accused, after his rights as a witness in his own behalf were explained to him, elected to remain silent.

5. Specification 4 of the Charge alleges that the accused behaved in an insubordinate manner toward his company commander by saying to him, "I do not intend to do any work until I receive some consideration on passes." Not only his plea of guilty but competent uncontradicted evidence established the accused's guilt of the insubordination charged. Furthermore, the evidence, properly showed - without contradiction - aggravating circumstances not clearly shown by the specification, and plea (MCM, 1928, par.70, p.54), namely, the baselessness of the accused's purported reason for refusing to work. He had never applied for nor been refused a pass or permission to see his company commander, and had indeed, himself, refused to accept two passes when offered to him unsolicited. His insubordination, immediately following the detection of his practice of shirking duty, may therefore be regarded as a rank and deliberate undertaking - no matter how predestinedly futile and ill advised - to flout and subvert duly constituted authority and to substitute his own, as the determining factor as to whether or not and, if so, under what conditions he should work.

The offense was appropriately charged as a violation of Article of War 96, for it clearly involves a disorder highly prejudicial to good order and military discipline. The specific offense charged is not included in the Table of Maximum Punishments set forth in the Manual for Courts-Martial. It is of a more serious quality than mere disrespect to a commissioned officer in violation of the 63rd Article of War or failure to obey a lawful order in violation of the 96th Article of War. Rather it appears to the Board of Review that the offense of which accused was found guilty was mutinous conduct and is more closely related to the offense of mutiny in violation of Article of War 66 for which no maximum punishment is prescribed (MCM, 1928, par.104c, pp.96-101, and par.136, p.150; Winthrop's Military Law & Precedents, 1920 Reprint, pp.582,585,728; CM ETO 895, Davis et al, and CM ETO 1052, Geddes et al.). The Board of Review is therefore of the opinion that the record of trial is legally sufficient to support both the findings of guilty and the sentence."

6. The charge sheet shows that the accused is 24 years of age, that he was inducted 26 August 1942 for the duration plus six months and that he had no prior service.

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

8. Confinement in a Disciplinary Barracks is authorized (AW 42).

B. Franklin Miller

Judge Advocate

Edward Benselton

Judge Advocate

Ellwood Klargast

Judge Advocate

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

8. Confinement in a Disciplinary Barracks is authorized (AW 42).

B. Franklin Miller

Judge Advocate

Edward B. Woodward

Judge Advocate

Ellwood K. Long

Judge Advocate

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WD, Branch Office TJAG., with ETOUSA. 13 MAY 1944 TO: Commanding General, First United States Army, APO 230, U.S.Army.

1. In the case of Private CLYDE L. HORTON (34318431), 3913th Quarter-master Gasoline Supply Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

2. Since the sentence adjudges confinement at hard labor for five years and since that portion thereof adjudging dishonorable discharge has not been suspended, the place of confinement should be changed from Disciplinary Training Center #2912, Shepton Mallet, Somerset, England, to Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. This can be done in the published general court-martial order. I recommend that the dishonorable discharge be not suspended.

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 1920. For convenience of reference please place that number in brackets at the end of the order:
(ETO 1920).



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

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BY AUTHORITY OF TJAG

BY REGINALD C. MILLER, Col.

JAGC, EXEC. ON 26 FEB 1952

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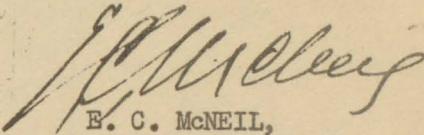
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WD, Branch Office TJAG., with ETOUSA. 13 MAY 1944 TO: Commanding General, First United States Army, APO 230, U.S.Army.

1. In the case of Private CLYDE L. HORTON (34318431), 3913th Quartermaster Gasoline Supply Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 $\frac{1}{2}$, you now have authority to order execution of the sentence.

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